please form a few groups and note some thoughts down which we can then discuss

**Worksheet1**

1) **Classify each of the legal instruments listed below: What do they have in common, what distinguishes them?**

1. 1964 Hague Uniform Law on International Sales Contracts (ULIS)
2. 1970 Brussels Convention on Travel Contracts
3. 1983 Geneva Convention on Agency (Sale of Movables)
4. 1988 Ottawa International Leasing Convention
5. 1988 Ottawa Factoring Convention
6. 1980 UN Sales Convention (Vienna Convention, CISG)
8. Uniform Commercial Code (UCC), United States (1952-2007)
9. Restatement (Second) of Contracts, US
12. Regulation (ec) No 593/2008 ('Rome I Regulation')
13. Draft Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), PE-CONS 3691/07,
17. CFR (Common Frame of Reference), published by Sellier
18. PECL (Principles of European Contract Law)

2) Then, please pick some or all of the following questions, discuss them in small groups and jot some thoughts down on paper.

• What is the difference between laws drafted in political gremiums (ministries, conferences) and law drafted by scholars? What other model laws and conventions are there?

• Can rules designed to apply to international sales contracts or generally to international commercial contracts which are drafted and published but not formally adopted by state organs be law?

• Do they lack legitimacy?

• Do such rules help international trade or are they a folly of specialists in the area of international contract law?

• Can such rules provide uniformity in international trade law?

• What is the role of CISG in relation to other 'model laws' and international conventions?

• What institutions are there drafting international rules of law?

Article 38 _(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. _(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. _(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispacht, examination may be deferred until after the goods have arrived at the new destination.

Article 39 _(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. _(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

- Read Articles 38 and 39 of CISG. Read C Baasch Andersen's article on the subject.
- Do you find the description of the timeframes in Art 38 and Art 39 adequate?
- Is the examination correctly described as a 'duty! in your view?
- Is notification a 'duty!?
ProForce Recruit Ltd v Rugby Group Ltd

COURT OF APPEAL (CIVIL DIVISION)

[2006] EWCA Civ 69, (Transcript: Smith Bernal Wordwave)

HEARING-DATES: 17 FEBRUARY 2006
17 FEBRUARY 2006

MUMMERY LJ:

The appeal

[1] This is an appeal by ProForce Recruit Ltd (ProForce), for whom Mr Derek Sweeting QC appears. The appeal is from an order made by Field J on 2 March 2005. He struck out and dismissed a breach of contract claim by ProForce against the Rugby Group Ltd (Rugby Cement), for whom Mr Romie Tager QC appears. ProForce also appeals against the order to pay the costs of the action, of the hearing before the Master below and of the appeal. The costs were summarily assessed at £35,500.

[2] Field J made the striking out order, the dismissal order and the costs order on allowing an appeal by Rugby Cement against the decision given by the Senior Master (Master Turner) on 12 November 2004. The Master had dismissed Rugby Cement's application for a striking out order under CPR 3.4 or dismissal of the action by way of summary judgment under CPR Pt 24. On reviewing the Master's dismissal of the applications Field J held that he was wrong to take account of extrinsic evidence for the purpose of construing a written agreement between ProForce and Rugby Cement. According to Field J the evidence adduced by Rugby Cement of pre-contract negotiations between the parties was not admissible in aid of the construction of a 'preferred supplier status' term in the agreement.

[3] ProForce contended that the evidence in question, which was contained in a witness statement dated 26 October 2004 (plus exhibits) by Mr Allen Bloor, the Chairman and Managing Director of ProForce, is admissible. It was submitted that Mr Bloor's evidence relates to the circumstances in which the written agreement was made. It is part of the applicable matrix of fact, in that it evidences the meaning that the individuals responsible for negotiating on behalf of the parties ascribed to the expression 'preferred supplier status' in the course of negotiations and/or the representation made as to its meaning by Rugby Cement in its original offer, which was accepted and acted upon by ProForce. There was, ProForce contended, a reasonable prospect of succeeding at trial on the issue whether the parties had negotiated on an agreed basis or understanding as to the received meaning of the expression used by them in the terms of their written agreement.

[4] On the basis of those submissions permission for a second appeal was granted by this court (Waller and Clarke LJJ) on 24 May 2005. The court's suggestion of mediation did not, unfortunately, achieve a settlement.

[5] The arguments before the Master and the Judge focused on ProForce's prospects of succeeding on the construction of the written agreement and on the admissibility of the extrinsic evidence adduced by it. The critical question is whether this action should be decided summarily or whether it should be allowed to proceed to trial on the disputed issues of construction and admissibility of evidence.

The facts

[6] ProForce runs an employment and recruitment agency in Rugby. Rugby Cement manufactures and supplies cement for use by the construction industry. Since 1997 ProForce has supplied temporary workers to Rugby Cement for work at a site located in the Rugby area.
The parties entered into a written service cleaning agreement on 31 July 2001 (the agreement). It was signed by Mr Allen Bloor on behalf of ProForce, and by Mr Derek Bell, the Works Manager at the Rugby site, on behalf of Rugby Cement. The agreement was for a fixed term. It provided for a fixed payment and fixed rate for specific cleaning and operator services with machinery which ProForce had purchased for the job.

The introduction to the agreement stated that ProForce had 'pleasure in submitting the following proposals for a service cleaning contract' between them.

Under the heading 'Terms and Conditions' it was agreed that:

'In addition to the normal terms and conditions that exist between Rugby Cement and ProForce, it is also agreed that, subject to contract, the following conditions will apply'

The conditions included an agreement by ProForce to buy cleaning equipment from Rugby Cement and an agreement by ProForce to supply personnel for agreed weekly hours and at agreed hourly rates. There were also agreed equipment charges.

The following provisions were also included:

'This contract will be of a minimum two-year period and will be re-negotiable at the end of that period. During that period ProForce will hold preferred supplier status.

9.2. This Agreement together with any other document expressed to being operated herein constitutes the entire contract between the parties and supersedes all prior representations, agreements, negotiations or understandings whether oral or in writing.

9.3 These terms and conditions are to prevail over any terms and conditions sought to be included herein by the Client.'

It is common ground that the agreement was subject to ProForce's Standard Terms and Conditions for the provision of contract labour. Agreed sums were duly paid. The personnel identified in the agreement were supplied and paid for throughout the stipulated two year period. ProForce supplied increasing numbers of non-cleaning personnel to the Rugby site and invoiced increasing amounts.

In November 2001 Rugby Cement began to use other employment agencies to satisfy requirements over and above those provided for in the agreement, though not to do cleaning work.

ProForce immediately and persistently complained that Rugby Cement was not observing the agreement. ProForce claimed that Rugby Cement was in breach of the term in the agreement that it would have 'preferred supplier status,' in that it failed after November 2001 to look to ProForce to provide its additional personnel requirements before looking elsewhere. Its claim is based principally on a construction of the agreement, in the light of the evidence of pre-agreement negotiations, that would give ProForce a legally enforceable right of first refusal to supply labour to Rugby Cement. It is also pleaded that a term to the like effect should be implied into the agreement in order to give it business efficacy.

Field J rejected Rugby Cement's submission that the agreement was not an enforceable contract because it contained the expression 'subject to contract' (para 16). He also rejected ProForce's implied term argument as 'hopeless' (para 17).

He disagreed with the Master about the admissibility of extrinsic evidence. He accepted Rugby Cement's submission that ProForce was not entitled to adduce the extrinsic evidence in Mr Bloor's witness statement and exhibits. After his review (in paras 18 to 20) of the legal principles laid down in the leading authorities on the admissibility of extrinsic evidence to construe a written contract, on admissible evidence of the factual matrix and on the inadmissible pre-contract negotiations of the parties and their subjective declarations of intent (ICS Ltd v West Bromwich BS [1998] 1 All ER 98, [1998] 1 WLR 896, [1998] 1 BCLC 493, in which Lord Hoffmann discussed the earlier decisions of the House of Lords in Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 3 All ER 570, [1976] 1 WLR 989, [1976] 2 Lloyd's Rep 621) the judge concluded:

'21. In my judgment, the statement alleged to have been made by Mr Bell that ProForce might be given a Preferential Agreement if ProForce were prepared to take the machinery, the discussions that continued in that vein and the alleged statement made by Ms Gough that 'Preferred Supplier Status' meant that ProForce would have the opportunity to supply all labour and additional plant at the site all constitute negotiations and form no part of the factual matrix to be used in construing the agreement.'

On the construction of the 'preferred supplier status' provision he found against ProForce. He concluded:

'24. In my opinion, construed against the relevant background, the words 'ProForce will hold preferred supplier status' mean that if Rugby choose to operate a system of contracting only with preferred suppliers in respect of the Rugby
ProForce are to be treated as being one of those preferred suppliers for all categories of personnel, not just cleaners. The words do not mean that Rugby are obliged during the term of the agreement to contract only with preferred suppliers and that throughout the term of the agreement Rugby must operate a preferred supplier system.

26. As it happened, Rugby did not adopt a preferred supplier system for the site during the contractual term. Instead they looked to a number of suppliers of labour who did not have the status of preferred supplier to satisfy their non-cleaning requirements. In my judgment, in acting in this way Rugby were not in breach of the agreement.'

Submissions of ProForce

[18] ProForce submitted that the case should be allowed to go to trial in order to establish the factual matrix of the agreement in the light of the extrinsic evidence on which it relies.

[19] As indicated earlier, ProForce contended that the 'preferred supplier status' term should be construed by reference to the meaning ascribed to the phrase by the parties through the individuals who conducted the negotiations and/or the representation made as to its meaning by Rugby Cement. Those matters were part of the basis on which the parties concluded the agreement. The only relevant evidence on the point of contractual formation before the court was the statement from Mr Bloor. The evidence was that the 'preferred supplier status' term was shorthand for a status that was well understood by those individuals responsible for negotiating the agreement. It did not mean simply that ProForce was to be the preferred supplier for the specific cleaning and other services set out in the agreement. During the two year period Rugby Cement was obliged to offer ProForce the opportunity to supply contract labour and hire equipment at the Rugby site in preference to other suppliers and would not engage other suppliers of contract labour and hire equipment without first having offered ProForce a reasonable opportunity of meeting Rugby Cement's requirements in such respects. Alternatively, a term to that effect should be implied as a matter of commercial efficacy.

[20] The facts were that Rugby Cement had no other preferred supplier agreement; that after the inception of the agreement ProForce supplied increasing numbers of non-cleaning personnel; and that the departure of the individuals responsible for negotiating the contract on the part of Rugby Cement led to an immediate reversal in this position.

Discussion and main conclusions

[21] I am satisfied that Master Turner was right to dismiss Rugby Cement's applications to have the case determined summarily. It follows that Field J was wrong to allow Rugby Cement's appeal and to decide the action summarily by dismissing ProForce's claim. He ought to have allowed the disputed issue of the 'preferred supplier status' term and the associated point on the effect of cl 9.2 to proceed to trial.

[22] If there is to be a trial it is undesirable to express at this stage and at this level concluded views on the construction and admissibility issues. The whole purpose of having a trial is to enable the court of first instance to reach a conclusion on the construction issues after having established the relevant facts in the light of the admissible documentary and oral evidence.

[23] I would allow ProForce's appeal for the short reasons that follow.

[24] The expression 'preferred supplier status' is not defined by the parties anywhere in the agreement. Apart from the case of Dunblane Property Ltd v MotorCare Holdings [2003] EWCA Civ 1033, in which the agreement in question contained an express definition of that expression, its meaning has not been judicially considered in any reported case cited to the court.

[25] The expression does not, in my view, have an obvious natural and ordinary meaning. Its meaning can only be properly determined in the context of the agreement read as a whole and of all the surrounding circumstances.

[26] A range of meanings has been pleaded by the parties. The crucial point is whether, as ProForce contended, the 'preferred supplier status' provision created a binding obligation that Rugby Cement should, during the term of the agreement, give ProForce a right of first refusal to supply Rugby with labour; or whether, as Rugby Cement contended, it only conferred on ProForce the commercial advantage of being a supplier of labour approved by Rugby and with whom Rugby can choose to place business, though without any obligation to do so.

[27] For ProForce it was argued that by virtue of the provision it clearly had that status, whatever it meant, and that 'preferred' meant that it had some positive advantage relative to other suppliers. It was contended with considerable commercial force that, if the preferred supplier status term did not confer on it a right of first refusal for the supply of labour to Rugby, it added nothing to what ProForce was already entitled to under the agreement. If the expression was to have any effect, it must, it was argued, be construed as conferring on ProForce a benefit additional to the benefits enjoyed by it under the agreement.

[28] Apart from that consideration, the remainder of the agreement and ProForce's standard terms and conditions did not throw any light on the meaning of the expression. It would be necessary to explore the factual hinterland of the agreement in order to see whether illumination of the meaning of the expression could be found: for example, in evidence showing that the parties had agreed upon the meaning of the terms or had a mutual understanding of the term and were using it in the agreement as a shorthand expression of their agreement or understanding.
As for the authorities Mr Sweeting cited a pertinent passage from the judgment of Kerr J in The Karen Oltmann [1976] 2 Lloyds Rep 708 at 712:

'Take Prenn v Simmonds [1971] 1 WLR 1381 as an example. The issue in that case was whether the reference to profits in the contract meant the profits of the holding company only or the consolidated profits of the whole group. If in the course of the negotiations one party had made anything in the nature of a representation to the other to the effect that references to profits were to be taken in one of the senses and not in the other, and the other party had thereupon negotiated on this basis, then extrinsic evidence to establish this representation would in my view be clearly admissible. Similarly, if it had been contended that the parties had conducted their negotiations on an agreed basis that the word 'profits' was used in one sense only, although in the contract it was capable of having two senses, and the contract had been executed on that basis, I do not think that the court would be precluded by authority from admitting extrinsic evidence to see whether or not this agreed basis could be established. Both these situations would be a long way from the attempts made in Prenn v Simmonds and Arrale v Costain [1976] Lloyds Rep 98, to adduce extrinsic evidence to try to persuade the court that one interpretation of the contract was in all the circumstances to be preferred to the other. I think that in such cases the principle can be stated as follows. If the contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract would not result from any mistake. The words used in the contract would ex hypothesi reflect the meaning which both parties intended.'

'... there will be occasions where the pre-contract negotiations do shed light on the meaning the parties intended to convey by the words they used. There will be occasions, for instance, when the parties in their pre-contract exchanges made clear the meaning they intended by language they subsequently incorporated into their contract. When pre-contract negotiations assist in some such way, the notional reasonable person should be able to take that evidence into account in deciding how the contract is to be interpreted.'

This would not be a departure from the objective approach. Rather, this would enable the notional reasonable person to be more fully informed of the background context. This would recognise that pre-contract negotiations are themselves part of the background of a contract and that, like other background material, they may be relevant when interpreting a contract. They differ from other background material in that, unlike other background material, they may afford direct evidence of the parties' actual intentions. That is not a reason for banning their use. That would be perverse. That would mean that in deciding the meaning intended to be conveyed by the language chosen by the parties the notional reasonable person would always be barred from having regard to what may be the best evidence of all. He must always conjecture, he must never know. The preferable approach is to recognise that pre-contract negotiations are relevant and admissible if they would have influenced the notional reasonable person in his understanding of the meaning the parties intended to convey by the words used.

Whether the notional reasonable person would have been so influenced in a particular case depends upon the facts of that case.'

In my view, a trial is necessary in this case in order to hear all the pre-contract evidence from both sides in order to establish the facts of the case, including any evidence of pre-contract negotiations that is relevant and admissible for the purpose of ascertaining the meaning of the Preferred Supplier Status provision in the agreement.
In his detailed skeleton argument and in his forceful oral submissions Mr Tager QC cited further authorities and advanced arguments for upholding the judgment of Field J and his decision that there was no point in having a trial: that the preferred supplier status term should be given its natural and ordinary meaning that during the two years of the agreement ProForce would have the status of a supplier with whom Rugby Cement would prefer to do business; that it meant no more than that ProForce would be included on any list of suppliers holding that status as a pre-condition to Rugby Cement offering future business opportunities to ProForce; that it did not confer on ProForce any legally binding right of first refusal in relation to supplies to Rugby Cement: that the oral conversations and discussions forming pre-contractual negotiations were irrelevant to the meaning of the agreement and were inadmissible by virtue of the parol evidence rule and formed no part of the factual matrix to be used in construing the agreement; and that cl 9.2 prevented ProForce from relying on the pre-contract materials in the evidence of Mr Bloor.

For the reasons already given the right time and place for a final decision by the court on Mr Tager's arguments on both construction and admissibility is at trial, not on an application to strike out or for summary judgment.

Clause 9.2

Although I have already referred in general terms to cl 9.2, I should make some more specific observations on it. The judge's construction of the clause came in for substantial criticism by ProForce. Field J said:

'22. Even if I were wrong about this [see paragraph 21 of his judgment cited in paragraph above], in my view these statements are 'prior representations, negotiations or understandings' within clause 9.2 of the standard terms and by virtue of that clause cannot be relied on by ProForce in seeking to establish their claim for breach of the agreement. Mr Sweeting argues that the effect of clause 9.2 was limited to barring reliance on pre-contract statements that are later said to be terms of the agreement. Whilst the clause may not exclude liability for misrepresentation (cf Thomas Witter Ltd v TBP Industries Ltd [1996] 2 All ER 573) in my opinion the effect of the words 'This agreement supersedes all prior representations, agreements, negotiations or understandings' is that the things superseded are to have no bearing on the meaning of the agreement.'

Mr Sweeting submitted cl 9.2 was an 'entire agreement clause' aimed at excluding attempts to use extrinsic evidence in order to incorporate further terms or representations into the contract, which the parties had not themselves included and thereby change the contents of the agreement. It was not apt to govern the construction of the written terms that the parties had included or to exclude evidence relevant to the ascertainment of their meaning. ProForce argued that it was not attempting to use what was agreed, understood or said before the making of the written contract in order to introduce a new term or a collateral contract, but to arrive at the proper meaning of the expression 'preferred supplier status,' which had no plain natural and ordinary meaning and which was not defined in the written agreement.

In my judgment, ProForce has a real prospect of succeeding at trial in its construction of cl 9.2. There is a reasonably arguable distinction between, on the one hand, ascertaining the contents of a written contract or setting up a collateral or side contract by reference to prior representations, agreements, negotiations and understandings and, on the other hand, ascertaining the meaning of a term contained in a written contract by reference to pre-contract materials. It is reasonably arguable that in cl 9.2 the parties intended to exclude the former, but not to inhibit the latter.

Result

I would accordingly allow the appeal and restore the order made by the Master. It is unnecessary to express any separate view on the costs order made by the judge and appealed by ProForce on other grounds. It was made on the basis that Rugby Cement succeeded in their appeal to him and that ProForce's action would be dismissed. That is no longer the case.

In the light of our judgments the parties should attempt to reach an agreement on the terms of the order on allowing ProForce's appeal, including the question of costs before the Master, Field J and on this appeal. If the parties cannot reach agreement they should make written submissions to the court on the disputed aspects of the order to be made consequent on allowing the appeal.

I agree that this appeal should be allowed but on a narrower basis than that set out in the judgment of Mummery LJ. I gratefully adopt his statement of the facts and submissions.

This appeal concerns the question whether the appellants (‘ProForce’) has a real prospect of success as regards its claim for damages for the failure by the Respondent (‘Rugby’) to give it the opportunity to tender for the supply of personnel before engaging contractors through other agencies. As this appeal arises at an interim stage in these proceedings, this court must proceed on the basis that the ProForce's allegations can be proved at trial.
[46] ProForce's case is that the obligation to give that preferential opportunity arises from a service cleaning contract made on 31 July 2001 between ProForce and Rugby. The critical provision in that agreement is as follows:

'This contract will be a minimum two-year period and will be re-negotiable at the end of that period. During that period ProForce will hold preferred supplier status.'

[47] The principal issue is as to the meaning of the words 'preferred supplier status'. A major plank in ProForce's case is that the meaning of those words for which it contends was in fact the meaning which the parties placed on those words when they were negotiating the agreement. That evidence is disputed. In addition, the effect of cl 9.2 has to be considered. Clause 9.2 provides:

'This Agreement together with any other document expressed to be incorporated herein constitutes the entire [Contract] between the parties and supersedes all prior representations, agreements, negotiations or understandings whether oral or in writing.'

[48] The evidence as to the meaning of the term 'preferred supplier status' is set out in the witness statement of Mr Allen Bloor at para 13 of his witness statement, Mr Bloor states:

'Discussions continued in that vein until about May [2001] when Emma Gough offered ProForce 'preferred supplier status' explaining that we would have the opportunity to supply all labour and additional plant at the Rugby site.'

[49] The judge held that Mr Bloor's evidence as to what Miss Gough said in the course of discussions leading to the agreement constituted negotiations and was therefore inadmissible on the interpretation of the agreement (judgment para 21). He further held that, if he was wrong about this, Mr Bloor's evidence was excluded by cl 9.2 of the agreement (judgment, para 22).

[50] Mr Derek Sweeting QC, for ProForce, submits that Miss Gough's representation was that preferred supplier status would give ProForce an advantage relative to other suppliers. Accordingly 'preferred supplier status' means the opportunity to supply personnel in preference to other suppliers and that ProForce would be given a reasonable opportunity to supply personnel before other suppliers were approached. Mr Sweeting submits that both parties approached the contract on the basis that this is what the phrase 'preferred supplier status' meant and that this meaning was not only shared by both parties to the agreement but also communicated between them in the course of the pre-contractual negotiations. Mr Sweeting further submits that the admission of the evidence of Mr Bloor would illuminate and not add to the agreement. He contends that his evidence is relevant to interpretation and he reserves the question whether statements of subjective intention are admissible. Mr Sweeting relies on the decision of Kerr J in the Partenreedesei Karen Oltmann v Scarsdale Shipping Co Ltd ('the Karen Oltmann case') [1976] Lloyd's Law Reports 708 at 712 (set out in para 30 of the judgment of Mummery LJ):

'[51] Mr Romie Tager QC for the Respondents submits that evidence of negotiations cannot be admitted on questions of interpretation of a written document. He submits that if the parties had a common assumption as to the meaning of 'preferred supplier status' and the agreement does not on its true construction reflect that meaning, the only remedy which ProForce could have would be to establish an estoppel by convention or to apply for rectification. Neither remedy is open to it in the present case. He submits that the passage on which Mr Sweeting relies from the Karen Oltmann case does not represent the current law. He further submits that cl 9.2 excludes evidence as to any representation or agreement.

[52] In Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 898 at 912-3, Lord Hoffmann, with whom the remainder of the House agreed, set out the principles for the interpretation of written documents. In the course of doing so, he specifically dealt with the admissibility, for the purpose of interpreting an agreement, of what parties said in the course of negotiating that agreement:

'(1) Interpretation is the ascertaining 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.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.'

[53] It is clear, however, that the courts do, for different purposes, admit evidence as to communications between the parties prior to the making of a written contract. This occurs, for example, where the parties made their agreement partly in writing and partly orally. It occurs where there are proceedings for rectification. Likewise the court may hear
In the alternative, in this case, there is a sufficient prospect of success on the further ground that the evidence in the case of 'one-off' contracts between two persons, as in this case.

Contract is one to which different persons adhere at different points in time, such as a company's constitution, than in the question whether some matters outside the text of a contract should be given less weight where (for example) the (1980) provides that a party's intention is in certain circumstances relevant, and in determining that intention regard is to be had to the contractual negotiations of the parties (art 4.3). The UN Convention on Contracts for the International Sale of Goods requires regard to be had to all the circumstances, including the pre-contractual communications (see The Pacific Colocotronis [1981] 2 Lloyd's Rep 40). Similarly, evidence as to pre-contractual communications may be admitted to identify property referred to in a contract or a term of art which is used in the contract. Indeed, there is no reason in principle why a contract should not expressly state that a particular term used in the contract should bear the meaning which the parties gave to it in the course of their negotiations. Evidence as to the parties' negotiations would in those circumstances unquestionably be admissible to show what that meaning was.

In this case, the parties have used a very unusual combination of words ('preferred supplier status'). These words are undefined and they are not introduced or accompanied by any words of explanation. In those circumstances it is in my judgment reasonably arguable that on their true interpretation those words bear the meaning that the parties in common gave them in their communications leading up to the signing of the agreement. In admitting evidence as to those communications, the court would be hearing that evidence not with a view to taking the parties' subjective intent into account for the purposes of interpretation (a purpose precluded by the principles laid down by Lord Hoffmann in the ICS case) but for the purpose of identifying the meaning that the parties in effect incorporated into their agreement in circumstances where the court was satisfied that on their true interpretation the terms of the agreement were to have this effect.

In my judgment, there is a sufficient prospect of success in distinguishing this situation from the usual situation in which, in the course of negotiations, the parties agree a matter which is to become binding on them (only) when a written agreement has been drawn up and signed. In that situation, evidence of the parties' negotiations would in principle not be admissible: see per Lord Hoffmann in the ICS case and per Lord Wilberforce in Prenn v Simmonds [1971] 1 WLR 1382 at 1314 to 1315. This court cannot, however, at this stage determine the points which I have identified as reasonably arguable because they depend upon the true interpretation of the agreement, and the court cannot determine the true interpretation of the agreement without making findings of fact as to the circumstances surrounding its execution. That cannot be done on a summary application.

Evidence as to negotiations between the parties to a contract leading up to the making of that contract may be admissible for the purposes of interpretation in wider circumstances than I have indicated above, but it is unnecessary for me to go further than those circumstances for the purpose of this appeal. Lord Hoffmann recognises in the ICS case that the boundaries of the rule excluding evidence of pre-contractual communications on questions of interpretation is unclear. Moreover, Lord Nicholls has argued in the passage cited by Mummery LJ in para 34 of his judgment and elsewhere, that the rule should be relaxed. The exclusion of pre-contractual negotiations is not on the face of it consistent with the general principle that a contract should be interpreted in the light of its context. Nor, on the face of it, is the application of a meaning which is not that which the parties themselves gave to a term consistent with the general approach of contract law, which is to respect party autonomy. The results may be anomalous. If the judge's ruling in this case expresses the general position in law, the result would be that the parties' meaning would be adopted if they defined the term in their written contract but not if they only did so only in the course of pre-contractual negotiations. Moreover, in that latter event, the meaning given to the term by the court would prevail, and (if the court's meaning is one which is different from that on which both parties in fact proceeded) a party would be able to avoid its contractual obligations deriving from the parties' meaning. That may be the law but, if it is, it is not, on the face of it, an attractive result. There are considerations that may go the other way. Lord Hoffmann's holding is that the exclusionary rule is based on reasons of practical policy (see para (3) of the passage cited above from the ICS case). That policy would have to be carefully considered if evidence of pre-contractual negotiations is to be admitted in evidence in interpretation questions in the future on any wider basis than the law presently permits. In that sense there may be parallels to be drawn with the use of legislative history in the interpretation of statutes. In addition, careful consideration may have to be given to the aims to be achieved by contractual interpretation and the precise extent to which the law requires an objective interpretation, as set out in para (1) of the passage cited above from the ICS case. It may be appropriate to consider a number of international instruments applying to contracts. It is sufficient to take two examples. The UNIDROIT Principles of International Commercial Contracts give primacy to the common intention of the parties and on questions of interpretation requires regard to be had to all the circumstances, including the pre-contractual negotiations of the parties (art 4.3). The UN Convention on Contracts for the International Sale of Goods (1980) provides that a party's intention is in certain circumstances relevant, and in determining that intention regard is to be had to all relevant circumstances, including preliminary negotiations. Consideration may also have to be given to the question whether some matters outside the text of a contract should be given less weight where (for example) the contract is one to which different persons adhere at different points in time, such as a company's constitution, than in the case of 'one-off' contracts between two persons, as in this case.

In the alternative, in this case, there is a sufficient prospect of success on the further ground that the evidence
will show that Miss Gough made a binding representation as to the effect that the subsequent agreement would have in regard to ProForce's preferred supplier status: see the De Tichihatchef case cited above. Accordingly, for that reason also the interpretation of the agreement cannot be determined on a summary application.

[59] As to cl 9.2 of the agreement, I agree with Mummery LJ that ProForce's argument on cl 9.2 has a real prospect of success for the reason he gives in para 41 of his judgment. In addition, the evidence may in due course show that the parties in effect agreed that their agreement or common understanding as to the meaning of 'preferred supplier status' was to displace anything in the written agreement that would otherwise override that meaning. There is in my judgment, a sufficient prospect of success on that ground also.

[60] For the reasons given above, I would allow this appeal.

JUDGMENTBY-3: RICHARDS LJ:

JUDGMENT-3: RICHARDS LJ:

[61] I, too, would allow this appeal. The reasons given by Arden LJ provide a sufficient basis for doing so. I also agree with Mummery LJ, however, that it is not appropriate at this stage to express any concluded view on the extent to which the pre-contract negotiations can properly be taken into account in this case for the purpose of ascertaining the meaning of the contract. That question is best resolved in the light of detailed findings of fact made at trial.

Appeal allowed.

SOLICITORS:
LM; Cemex (UK) Legal Department
Claimant C, an English company specialised in the run-off of insurance businesses, had entered into an agreement ("the Agreement") with A, an intermediate holding company in a group of companies active in the insurance sector, for the purchase of the shares of B, A’s direct subsidiary. The Agreement provided for the transfer, prior to its completion, of B’s “accumulated net worth” to A or elsewhere as directed by A. The day before completion of the Agreement the transfer took place in favour of Defendant D, the ultimate holding company of B, and the amount of the payment made was calculated on the basis of B’s distributable dividends.

After completion of the Agreement a dispute arose between C and D concerning the exact meaning of the expression “accumulated net worth” used in the Agreement. According to Claimant C it referred only to B’s distributable profits, while according to D it meant the whole of B’s net assets.

After a first judgment in favour of D, the appeal by C against the decision of the lower court was rejected by the Court of Appeal. In the Court’s opinion, the expression “accumulated net worth”, if interpreted in the context of other provisions of the Agreement and the rationale of the underlying commercial transaction, clearly was intended to cover all the net assets of B and not only the distributable dividends. As to C’s argument that the amount actually transferred from A to D a day before completion of the Agreement was calculated by D’s director by way of dividend and was so expressly explained to a representative of C who was present when the amount was calculated, the Court pointed out that the extent to which pre-contractual negotiations can be admitted as evidence for the interpretation of a written agreement was a controversial issue in English law. While as a rule such evidence was not admitted, there were exceptions to this rule, and in this respect she quoted the passage of her opinion in Proforce Recruit Ltd v The Rugby Group Ltd [see UNILEX: Court of Appeal (Civil Division), 17 February 2006] where she had stated that evidence as to pre-contractual negotiations may be admissible even on a wider basis than the law presently permits and that for this purpose it may be appropriate to consider international instruments such as the UNIDROIT Principles and CISG. However, in the case at hand the Court decided not to admit the evidence of the communications that the parties had exchanged between themselves before completion of the Agreement for the interpretation of the expression “accumulated net worth” used in the Agreement. While admitting that the issue was not the subject of extended argument in the Court and recalling that after all when the transfer was made prior to completion of the Agreement there was no actual agreement between the parties as to the way in which the transfer had to be made, it stated that “the admission of evidence of pre-contractual negotiations for the purpose of interpretation […] would not be permitted under the law as it stands.”
Art 35-40 CISG: Inspection rules

Cases:

‘Rainbow Trout Eggs’

- Appellate Court of Coruna (Spain), 21 June 2002
  melted Jasmine Aldehyde


certainly short enough - same day

- Landgericht (Regional Court) Aachen (Germany), 3 April 1990

too long - goods lay uninspected for two months

- Oberlandesgericht (Appellate Court) Duesseldorf (Germany), 10 Dec 1994 [6U32/193]

early delivery:

- opinions vary! even though the seller can still deliver, some think that commercial practice will require immediate inspection.

distinguish

Art. 38 (3) - knowledge of both parties of special circumstances

Art. 40 - seller’s knowledge of defect