ABSTRACT

The Effect of Merger and Non-Reliance Clauses in the Common European Sales Law (CESL)

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Even if parties to a contract embody the terms of their final agreement in one document, prior statements and agreements continue to influence their legal relationships in western jurisdictions. While the exact rules vary concerning the question in which cases agreements in the process of negotiation can be considered as terms of the contract, all civil law jurisdictions use prior statements at least as a tool to interpret the written contract and all common law jurisdictions give effect to prior *representations* through the rules of (innocent) misrepresentation.

In complex contract negations, however, assumptions on which some pre-contractual statements might be founded can become abandoned later on. Reliance on pre-contractual statements, moreover, reduces the legal certainty concerning potential contractual claims, which, as an effect, could increase the likelihood and costs of court proceedings. Finally, the possibility exists of fraudulent reliance on a pre-contractual statement, which is only alleged by one party or which has clearly been based on changed circumstances or abandoned assumptions.

Therefore, parties may decide to introduce a merger clause (also known as entire agreement clause or integration clause), stating that all agreements of the parties have been embodied in the final document. In common law jurisdictions this is often combined with a so called no-reliance clause, excluding liability for misrepresentation. Even though civil law jurisdictions give more weight to pre-contractual statements and are more likely to accept agreements in the process of contract negotiations as terms of the final contract, traditionally merger clauses were almost only known in common law jurisdictions and here in particular common in the US. In international sales, however, that has changed over the last decades. By now, a rule on the validity and effect of a merger clause is, therefore, an essential part of any B2B sales law codification. Also that question has led to very different results in the different legal systems in Europe. Overall, common law jurisdictions seem more willing to apply a merger clause. However, it is much more difficult to restrict liability for misrepresentation, a concept known neither in the civil law countries nor in the Commission's draft of a Common European Sales Law (DCESL).

Against that background, Art. 72 DCESL on merger clauses will be critically examined. To do so, the paper starts by examining the "text steps" which finally led to the DCESL (I.), before addressing the article's scope of application and its interaction with other rules of the DCESL (II.). That will provide the basis for a separate evaluation of Art. 72 DCESL for B2C (III.) and B2B contracts (IV.). Finally, some concluding remarks and suggestions on how the article could be changed will be given (V.).

(I.) As to the development of the rules on merger clauses in the "text steps" in the evolution of a European Contract Law, it will be shown that Art. 72 DCELS strongly derogates from Art. II.-4:104 DCFR and Art. 2:105 PECL, which are nearly identical. The PECL and the DCFR had widely restricted the effect of merger clauses by reducing them to a rebuttable presumption if they had been introduced through standard terms and introducing the principle of *venire contra factum proprium*. Neither restriction can be found in Art. 72 DCESL. According to Art. 72 (2) DCESL *e contrario*, it is even allowed to exclude prior statements as a tool of interpreting the written contract through standard terms if that has been expressly stated. In turn, Art. 72 (3) DCESL introduces a rule stating that consumers are not bound by a merger clause, a rule that is unknown to the DCFR and the PECL. The concepts of Art. 72 DCEL had been introduced with Art. 68 Feasibility Study (FS) and converted in Art. 72 DCELS. Only Art. 72 (4) DCESL had been added, which states that it is not allowed to derogate from the article to the detriment of the consumer. That rule is, however, redundant. Also the alternative draft for a CESL contained in the Statement on the Proposal for a Regulation on a Common European Sales Law of the European Law Institute (S-2-2012) has simply transferred Art. 72 DCESL to Art. 71 S-2-2012 without any modifications. It seems, however, that the working party which prepared S-2-2012 had not discussed the issue. Therefore, it can be concluded that the preparatory work before the FS, in particular the full edition of the DCFR, cannot be used to interpret Art. 72 DCESL. Nevertheless it can be helpful to discuss possible alternatives.

(II.) In order to discuss the effect of statements and agreements made prior to a written contract if a merger clause had been inserted in the final written document, it is essential to clarify the scope of application of Art. 72 DCESL and its interaction with other rules of the DCESL. As to the scope of Art. 72 DCESL, it is submitted that a merger clause relates only to prior agreements which are related to the contract in such a manner that it would be absolutely natural to include them in the written document. Other agreements reached in the course of contract negotiations can, therefore, still have effect. *Inter alia*, a doctrine similar to the concept of collateral contract as an exception to the parole evidence rule in common law countries will apply as an exception to the merger clause.

Moreover, several rules in DCEL still give effect to pre-contractual statements. First of all, it is quite evident that Art. 49 DCEL on fraud still applies. In addition, Art. 2 DCEL highlights the strong position of good faith and fair dealing in the Common European Sales Law. It is therefore submitted that the principle of *venire contra factum proprium* as expressly contained Art. 2:105 (4) PECL and Art. II.-4:104 DCFR will also apply under DCESL. Since the notion of good faith and fair dealing has very different meanings within the Member States, the removal of the expressed rule in the article on merger clauses is, however, still very unfortunate since it will increase legal uncertainty and lead to differences in interpreting DCESL throughout the European Union until the CJEU will have had the chance to develop the doctrine. Furthermore, even if a merger clause has been inserted, statements made and agreements reached in the process of negotiations can still be used to fill gaps not explicitly regulated in the written contract in accordance with the implied term doctrine contained in Art. 68 DECL (cf. in particular Art. 68(2), (1)(b), DCEL).

In the context of terms which have not been individually negotiated within the meaning of Art. 7 DCESL, Art. 62 DCESL states that individually negotiated terms prevail over standard terms. It is therefore submitted that individually negotiated (oral) terms prior to the drafting of the written agreement will take precedence over a merger clause contained in standard terms, as is the case in many national jurisdictions (cf. e.g. the interpretation of § 305b BGB). As a result, this will reduce a merger clause contained in standard terms to a rebuttable presumption because it can always be proven that an individually negotiated (oral) term exists. In order to increase legal certainty, it would be preferable, however, for this to be expressly stated in Art. 72 DCSEL as is the case in the PECL and the DCFR.

After all, the effect of a merger clause under DCESL seems to be much more limited than Art. 72 DCEL first suggests. It needs to be kept in mind, however, that a merger clause – even one excluding prior statements for the interpretation of a written contract – is expressly allowed. Therefore, a merger clause will not be subject to the control of unfair contract terms of Art. 79 *et seq.* DCESL.

Finally, the possibility to exclude prior statements as a tool of interpretation of a final written contract (Art. 72 (2) DCESL *e contrario*) seems to be in conflict with the general rules on interpretation of a contract contained in Art. 58 *et sec.* DCESL. They focus on the real intent of the parties. It is questionable whether it is generally allowed to derogate from that basic principle by party agreement and follow the concept of objective interpretation of a written contract as it is known in the common law world. That would mean that “the conduct of the parties” (Art. 59 (b) DCESL), “the circumstances in which [the contract] was concluded” (Art. 59 (a) DCESL), interpretation of the same term in previous contracts (Art. 59 (c) DCESL) and

all kinds of other relevant factors can be used to identify the real intent of the parties, which can derogate from the literal interpretation of a contract while statements of the parties prior to the drafting of the written document containing the contract could be excluded. That seems to be more than odd, in particular in cases where the merger clause is contained in standard terms so that prior oral contract terms will still prevail in accordance with Art. 62 DCESL.

(III.) Even though Art. 72 DCFR has some weaknesses, it seems drafted to work almost perfectly for most consumer contracts. It is submitted that consumers tend to be more likely to trust oral assurances. Furthermore, even if a clause would have no legal effect, it may still have some practical effect since most conflicts will not reach the level of court proceedings and traders could, therefore, successfully refer consumers to a void contractual clause. Moreover, also the consumer could trust in the applicability of a merger clause, and he should be allowed to do so. Therefore it is, in general, the right choice to make a merger clause binding only for a trader. In exceptional circumstances, however, it seems unfair to completely exclude the possibility to introduce a merger clause which has also some effect on a consumer. In the rare cases in which contract negotiations in the B2C context take place over a certain period of time and the final subject of the sale is yet to be specified in the beginning (e.g. a set of paintings, where it is unclear, which painting will finally be included), it is also possible that assumptions underlying statements in the earlier phase of negotiations will be abandoned for the final contract. In such cases a merger clause should also have the effect of a rebuttable presumption against the consumer if the clause has been individually negotiated. The present draft makes it almost impossible to exclude the legal effect of early statements without expressly naming them.

(IV.) If the interpretation concerning the interdependence between Art. 72 DCESL and other articles, in particular Art. 2 and Art. 62 DCESL, as laid down under (II.) turns out to be true, the rules on merger clauses in the B2B context are also quite functional. They give enough room for private autonomy while protecting, in particular, SME from the misuse of a merger clause. If, however, prior individually negotiated agreements should not prevail over a merger clause contained in standard terms, a misuse of merger clauses would be possible. That effect is even increased due to the knock-out-rule for conflicting standard terms in its strong form as contained in Art. 39 DCESL. Hereby, it will regularly happen that in particular SME will not be aware of the merger clause in a standard term and will not have included a conflicting term in their standard terms due to the fact that they want to rely on the default solution in that context. Since the DCESL is supposed to provide a strong protection of weaker parties, including SME, that would not be acceptable.

(V.) Even though Art. 72 DCESL leaves too much room for legal uncertainty, it seems to provide a workable solution for the problem of merger clauses in almost all cases. In order to reduce legal uncertainty and increase the coherent interpretation of DCESL throughout the EU in an early stage (i.e. before the CJEU had the possibility to clarify those issues), it would be preferable if the principle of *venire contra factum proprium* and the limited effect on merger clauses contained in standard terms would be expressly discussed in Art. 72 DCESL. Moreover, in B2C contracts an individually negotiated merger clause should have the effect of a rebuttable presumption against a consumer if a merger clause is objectively justified (i.e. that underlying presumptions have changed during the negotiations). Due to the incoherence with the general principles of contract interpretation (Art. 58 *et sec.* DCESL), the exclusion of prior statements as a tool of contract interpretation should not be permitted. The present legal uncertainty will, at least in the short run, also endanger one goal of a merger clause, namely the increase of certainty between the parties and thereby a gain of efficiency. Despite all the changes suggested to improve the DCESL, the current situation is not likely to endanger its practical success. Discussions on that issue, therefore, should not jeopardize the enactment of the draft regulation.

Art. 2.1.17 UNIDROIT Principles 2010 (Merger clauses)

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

Art. II.–4:104 DCFR (Merger clause)

(1) If a contract document contains an individually negotiated term stating that the document embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract.

(2) If the merger clause is not individually negotiated it establishes only a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.

(3) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated term.

(4) A party may by statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on such statements or conduct.

Art. 68 FS/Art. 72 DCESL/Art. 71 S-2-2012 (Merger clauses)

(1) Where a contract document contains a clause stating that the document embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract.

(2) Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.

(3) In a contract between a business and a consumer, the consumer is not bound by a merger clause.

[(4) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.] *Paragraph 4 is not included in the FS*