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

A critical analysis of Art. 72 DCESL, its interaction with other provisions and its effect on the protection of consumers and SME

Universität Bremen

pinkel@zerp.uni-bremen.de

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Structure

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pinkel@zerp.uni-bremen.de

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I. Background

- Often contracts are embodied in a document
- Some effects of statements made prior to the conclusion of contract remain
- Differences between common and civil law
- Differences in interpreting written contracts
- Partly functional equivalent to contractual terms or rules on interpretation: Misrepresentation

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I. Need for Merger Clauses

- In complex contract negotiations early assumption can become abandoned
- Fraudulent reliance on only alleged terms
- Legal uncertainty if prior oral statements have legal effect
- Costs due to more and/or longer litigation

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I. Possible Problems of a Merger Clause

- Important agreements have been forgotten when drafting the document
- Contract cannot be operated without additional terms und would therefore be void
- Unawareness of merger clauses in standard terms
- Fraudulent use of merger clauses to avoid being held liable for promises made earlier
- Justified reliance on promises

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I. Limitation of the effect of merger clauses

- Limitations of the effect of merger clauses in all legal orders in the EU
- Common law jurisdiction
  - Trend to have only few restrictions on merger clause
  - Particularity: Non-reliance clauses necessary and application restricted
- Civil law jurisdiction
  - Individually negotiated terms often take priority
  - Good faith limits application of merger clauses
  - Focus of real intent of the parties leads to an application of prior statements in the interpretation of a contract

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II. The development of Art. 72 DCESL in the “text steps” of European Private Law

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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. 2:105 PECL almost identical

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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

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II. Development of Art. 72 DCESL

- Important principles in PECL/DCFR
  - *venire contra factum proprium*
  - limited effect of merger clauses in standard terms
- Art. 72 DCESL has been introduced only by the FS
- Both principles are not expressly codified anymore in DCESL
- Newly introduced: Difference between B2B- and B2C-contracts
- Full edition of the DCFR not very helpful in interpreting Art. 72 DCESL; but it can provide reasons for alternative solutions
- No comments or changes made in ELI-Statement S-2-2012

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III. Scope of application and interaction with other norms

- Merger clauses seems to have far-reaching effect according to Art. 72 DCESL
- This will, however, not be the case in practice
- To understand the practical effect, it is important to analyze
  - The scope of application
  - Other norms, reducing the effect

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III. Scope of application

- Merger clause relates only to prior agreements which are related to the contract embodied in the document in such a way that it would be natural to included them
- Other agreements concluded during the negotiation can still have effect
- Concepts as collateral contracts (exception to parole evidence rule) can apply

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III. Relation to Other Norms

- Although a merger clause has been inserted in a document, other norms will still give effect to prior statements
- Since the relationship between the norms is not always clear or other concepts are very general this will lead to legal uncertainty

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III. Article 49: Fraud

- 1. A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any precontractual information duty, required that party to disclose.
  2. Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake. […]
- Art. 49 DCESL might be bit broader than in many European jurisdictions

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III. Article 2: Good faith and fair dealing

- 1. Each party has a duty to act in accordance with good faith and fair dealing.
  2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
  3. The parties may not exclude the application of this Article or derogate from or vary its effects.
- => *venire contra factum proprium* still applies

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III. Article 68: Implied terms

- 1. Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:
  (a) the nature and purpose of the contract;
  (b) the circumstances in which the contract was concluded; and
  (c) good faith and fair dealing.
  2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.
  3. Paragraph 1 does not apply if the parties have deliberately left a matter unregulated, accepting that one or other party would bear the risk.
- Notwithstanding Art. 68 (3) DCESL, through implied terms prior statements can be used to supplement the contract, although altering it is impossible

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III. Merger clauses in Standard Terms

- *Article 62 (**Preference for individually negotiated contract terms)***
  To the extent that there is an inconsistency, contract terms which have been individually negotiated prevail over those which have not been individually negotiated within the meaning of Article 7.
- Art. 72 DCESL is not *lex specialis* to Art. 62 DCESL since they deal with different topics
- Art. 72 DCESL will only have an effect if the merger clause applies *in casu*
- (Oral) individual negotiated terms will, therefore, prevail over a merger clause in standard terms

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III. Merger clauses in Standard Terms

- => A merger clause in standard terms will only have the effect of a rebuttable presumption
- Any other interpretation of the relationship between Art. 72 und Art. 62 DCESL would lead to strange results
- Such a strong effect of merger clauses would also be unique
- In national jurisdiction similar norms are interpreted in that way (cf. e.g. § 305b BGB)

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III. Interaction of Art. 72 DCESL with other norms

- The effect of Art. 72 DCESL is much more limited than the wording suggests
- It has largely the same effect as Art. II.-4:104 DCFR
- However, the complex relationships between the norms and the application of general principles will increase legal uncertainty and is likely to endanger the uniform application of DCESL in all jurisdiction in Europe before the CJEU can decide those issues

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III. Art. 72 DCESL and National Procedural Law

- Special rules on evidence give priority to written documents containing the agreement
- Substantive law rules – as Art. 72 DCESL – can serve as a functional equivalent
- If a merger clause is inserted, special procedural law rules should be inapplicable
- If no merger clause is inserted, national procedural laws will lead to differences concerning the effect of the written document

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III. Art. 72 (2) DCESL *e contrario* and the principle of real intent

- Art. 72(2) DCESL: Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.
- => *e contrario*: it is allowed to exclude prior statements as a tool to interpret a document containing a contract

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III. Art. 72 (2) DCESL *e contrario* and the principle of real intent

- Art. 58 et seq. DCESL states that the (common) real intent of the parties is decisive
- To find out the real intent, it can be used inter alia:
  - "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)
- That principle should not be subject to party autonomy

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III. Art. 72 (2) DCESL *e contrario* and the principle of real intent

- Therefore, it seems to be odd to exclude prior statements as a tool for finding the real intent of the parties
- A rule as contained in the UNIDROIT Principles is preferable
- **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.

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IV. Evaluationen Art. 72 DCESL for B2C-Contracts

- Rule that only consumer is not bound is positive
  - Consumers tend to trust in oral agreements
  - Void contractual clauses can still have factual effect before court proceedings start
  - Consumer should be allowed to rely on a merger clause if included in a contract
- Consumers are better protected than in many national jurisdictions, where merger clauses in B2C contracts are often inapplicable or void

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IV. Evaluationen Art. 72 DCESL for B2C-Contracts

- Problems, however, exist in exceptional circumstances
  - Contract negotiation takes a long time
  - The exact subject of the sales is not clear from the beginning
  - => expectations and underlying assumptions can change during negotiations
- => If the consumer has expressly agreed on an individually negotiated merger clause it should have the effect of a rebuttable presumption in those cases

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V. Evaluation of Art. 72 DCESL for B2B Contracts

- If Art. 72 will be interpreted in conjunction with Art. 62, Art. 2 DCESL as laid out
  - Private autonomy is given enough room
  - Legal certainty can be increased by merger clause
  - Reliance on promises is sufficiently protected
- Problem only exists if prior statements are excluded for interpretation of contract

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V. Evaluation of Art. 72 DCESL for B2B Contracts

- If, however, Art. 72 will be regarded as *lex specialis* to Art. 62 DCESL problems will occur
- Those will be increased by Art. 39 DCESL (knock-out-rule)
- Misuse of merger clause easily possible
- DCESL is supposed to protect weaker parties, including SME, but that would not be the case here

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VI. Final remarks/suggestions

- Art. 72 DCESL seems to function in practice quite well if DCESL will be interpreted as lined out; therefore, discussions on how to make the rules on merger clauses even more perfect should not jeopardize the enactment of the draft regulation
- But the norm is still too unclear which will lead to
  - Additional legal uncertainty which, in turn, increases costs an endangers the goal to reduce costs and uncertainty through merger clauses
  - Different interpretations of the norm within the EU at an early stage
- In the rare case that an individually negotiated merger clause had been inserted in a B2C contract after complex contract negotiations, it should have the effect of a rebuttable presumption
- Excluding prior statements for the interpretation of a contract should not be allowed, since it is not in line with the general principles of interpretation as contained in Art. 68 et seq. DCESL

pinkel@zerp.uni-bremen.de