



IMPLEMENTATION OF THE MERGER CLAUSE BASED ON UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UNIDROIT Principles)

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ABSTRACT

In the current era of globalization, there are a significant number of international transactions which require international commercial contracts. The increasing number of international commercial contracts has led to the development of international legal instruments that regulate these contracts and accommodate the needs of the parties involved in international business transactions. One of these instruments is known as the UNIDROIT Principles. A merger provision is typically written into a large number of contracts. This clause is governed by the UNIDROIT Principles, which can be found in one of its provisions. This research paper will analyse the implementation of the merger clause in the UNIDROIT Principles by courts and arbitration. Taking into account the fact that only a few cases have been decided relating to merger clause under UNIDROIT Principles, this research paper will discuss this topic. This paper aims to examine the implementation of merger clauses under UNIDROIT Principles by court and arbitration through the review of related cases. The method used in this study is normative juridical with a descriptive-analytical nature. To date, the judicial and arbitral decisions that are accessible shed light on the meaning of the merger clause and its relation to the interpretation of the contract.

Keywords: implementation; merger clause; unidroit principles.

I. INTRODUCTION

The world's nations became increasingly interdependent in the late twentieth century. The interaction between sovereign states, businesses, and citizens has been transformed by the rapid development of new information technologies and unprecedented trade liberalisation at the multilateral, regional, and bilateral levels.¹ The significant liberalisation of trade has established a basis for the rise of transnational business operations. Increased international trade provided substantial economic growth potential, but it also brought increased risks to the countries, primarily due to new legal problems that are unique to international transactions. Creating a legal and regulatory framework that ensures secure private transnational transactions has become crucial.²

When entering into international contracts, the parties need to consider which law would govern in the event of a dispute.³ As a result of the expansion of global trade, there has emerged a previously unmet need for a legal framework that is able to operate independently of national boundaries and

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¹ Salvatore Mancuso, "Trends on the Harmonization of Contract Law in Africa", *Annual Survey of International & Comparative Law*, Vol. 13, Iss. 1, 2007, p. 157-158, <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1115&context=annlsurvey>; Whited, Christine M, "The Unidroit Principles of International Commercial Contracts: An Overview of Their Utility and The Role They Have Played in Reforming Domestic Contract Law Around the World," *ILSA Journal of International & Comparative Law*, Vol. 18, Iss. 1, 2011, p. 167, <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1857&context=ilsajournal>.

² Salvatore Mancuso, *Loc. Cit.*; Whited, Christine M, *Loc. Cit.*

³ Whited, Christine M, *Ibid.*, p. 167-168.

ensure the safety of global actors regardless of the countries in which they are based.⁴ The establishment of such an independent body of international law might encourage commercial activity in all areas of the world, each of which has its own distinct legal, economic, and political structures.⁵ Due to the reality that it is inherently impartial, uniform commercial law that is tailored to international commercial transactions has emerged as one of the best alternatives available.⁶

Demand for a uniform system of international commercial law has been encouraged by the benefits provided by such a system, which in turn has resulted in the development of a number of substantive law conventions.⁷ These conventions include the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG), the Uniform Commercial Code (UCC), and the United Nations Commission on International Trade Law (UNCITRAL). UNIDROIT, or the International Institution for the Unification of Private Law, is one organisation that is at the heart of this movement and whose work is specialised in the area of harmonising international private law.⁸ In 1926, UNIDROIT was founded as an auxiliary organ of the League of Nations. In 1940, due to the dismantlement of the League of Nations by a multilateral agreement (the UNIDROIT statute), UNIDROIT was re-established. The purpose of UNIDROIT is "to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives".⁹ The concept of harmonisation of law pertains to a legal integration process that attempts to promote legal collaboration among nations and minimise differences between domestic legal systems, or establish supranational legal mechanisms that can regulate specific areas of law.¹⁰ The establishment of the UNIDROIT Principles of International Commercial Contracts is one of UNIDROIT's most famous and generally recognised works.¹¹ The UNIDROIT Principles of International Commercial Contracts (hereinafter: the UNIDROIT Principles) provide a non-legislative codification of the general aspects of the law governing international commercial contracts.¹² The UNIDROIT Principles were first published in 1994, and the most recent edition of the UNIDROIT Principles is the fourth edition in 2016.

The application of the UNIDROIT Principles has been employed in a number of ways, despite the fact that they do not have binding force. They have become a significant source of non-binding soft law.¹³ An increasing number of arbitrators and domestic courts are referring to the UNIDROIT Principles in their decisions.¹⁴ The UNIDROIT Principles have been utilised as the rules of law governing the substance of the dispute in several decisions, many of which were arbitral awards.¹⁵ Arbitrators may apply the UNIDROIT Principles as a representation of similar supranational or transnational principles and rules of law, either at the express request of the parties or when the contract makes reference to "general principles of law," "lex mercatoria," or similar terms.¹⁶ The UNIDROIT

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*, p. 167-169.; UNIDROIT, "Purpose", <https://www.unidroit.org/about-unidroit/>, accessed on 8th of June 2023.

⁹ *Ibid.*

¹⁰ Whited, Christine M, *Loc. Cit.*

¹¹ *Ibid.*; UNIDROIT, "Purpose", *Loc. Cit.*

¹² Michael Joachim Bonell, "Towards a Legislative Codification of the UNIDROIT Principles?", *Uniform Law Review*, Vol. 12, Iss. 2, 2007, p. 233, <https://www.unidroit.org/english/publications/review/articles/2007-2-bonell-e.pdf>.

¹³ Whited, Christine M, *Loc. Cit.*, p. 176.

¹⁴ Michael Joachim Bonell, *Loc. Cit.*, p. 235.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Principles have also been employed in various decisions rendered by national courts and arbitral tribunals to interpret international uniform law instruments.¹⁷

The UNIDROIT Principles hold significance in practical application as they serve as rules of law governing international contracts. The UNIDROIT Principles are not of a legislative nature, thus requiring the parties to incorporate them in their contract, either by name or generally, in order to ensure their applicability.¹⁸ As per the Preamble, they are to be applied “when the parties have agreed that their contract be governed by them”, or “when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like”, or “when the parties have not chosen any law to govern their contract”.¹⁹ They can be applied either as a means for interpreting and supplementing international uniform law or as a means of interpreting or supplementing domestic law.²⁰

It is common practise for commercial contracts to incorporate clauses that assert that the document, as executed by the parties, constitutes their 'entire agreement'.²¹ The merger clauses are an example of provisions that are considered boilerplate provisions in common law contract types.²² The employment of boilerplate clauses that are inspired by common law has become widespread around the world as a result of commercial contracting.²³ This phenomenon occurs in both common law and civil law countries. According to the findings of the investigation, merger clauses are present in the vast majority of international contracts, despite the fact that different laws govern each of them, and they are also sometimes included in domestic contracts.²⁴

When entering into a contract governed by common law, it is common to include an "Entire Agreement" clause. This clause "merges" all previous comments made in relation to the contract into the contract.²⁵ This approach seems uncommon when viewed through the perspective of civil law because the history of the negotiations that led up to the creation of a contract is considered to be an important instrument for its interpretation.²⁶ In addition, there may be other things that were clearly agreed upon but simply were not sufficiently documented in the contract.²⁷

The inclusion of a merger clause serves the purpose of clearly indicating that the contractual provisions and terms are exclusively contained within the written contract and not elsewhere. This clause typically has the effect of excluding any claim that is founded on extrinsic evidence, such as pre-contractual conversations or agreements. This is the typical impact of this clause.²⁸ The incorporation of merger clauses into an agreement is an essential step in mitigating the possibility of legal conflict and ensuring that all parties have a comprehensive understanding of the terms of the

¹⁷*Ibid.*

¹⁸E. Allan Farnsworth, “An International Restatement: The Unidroit Principles of International Commercial Contracts”, *Symposium: Developments in International Commercial Law*, Vol. 26, Iss. 3, 1996, p. 3, <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1670&context=ublr&httpsredir=1&referer=>.

¹⁹*Ibid.*

²⁰Michael Joachim Bonell, “The law governing international commercial contracts and the actual role of the UNIDROIT Principles”, *Uniform Law Review*, Vol. 23, Iss. 1, 2018, p. 16.

²¹Elisabeth Peden, J W Carter, "Entire Agreement - and Similar - Clauses", *Journal of Contract Law*, Vol. 22, No. 1, 2006, p. 1.

²²Katerina Mitkidis, Thomas Neumann, “Entire Agreement Clauses: Convergence between US and Danish Contract Law?”, *Nordic Journal of Commercial Law*, No. 2, 2017, p. 183-184.

²³*Ibid.*

²⁴*Ibid.*

²⁵Eckart Brödermann, “Bridge over Troubled Waters for International Commercial Contracts—The UNIDROIT Principles 2016, An Overview from a Long Time User”, *Tulane Journal of International & Comparative Law*, Vol. 28, 2019, p. 82.

²⁶*Ibid.*

²⁷*Ibid.*

²⁸Catherine Pédamon, “Judicial Interpretation of Commercial Contracts in English and French Law: A Comparative Perspective”, *European Business Law Review*, Vol. 32, Iss. 6, 2021, p. 1112.

agreement.²⁹ Freedom of contract serves as the foundation for the existence and functioning of such clauses, in which the parties involved have the freedom to engage in negotiations and mutually agree to the terms of their agreement.³⁰

The UNIDROIT Principle addresses a variety of matters, including the merger clause as one of them. Merger clause is regulated under Article 2.1.17 UNIDROIT Principles. The implementation of Article 2.1.17 UNIDROIT Principles has done by some courts and arbitration. Despite the frequent use of merger clause in commercial contract, cases in which the court and arbitration invoked the merger clause in UNIDROIT Principles are limited, as insofar as there are only 6 cases shown in UNILEX.³¹ UNILEX is an online database that publishes all known decisions and arbitral awards pertaining to the UNIDROIT Principles and the United Nations Convention on Contracts for the International Sale of Goods (CISG).³² The present study attempts to contribute to the existing literature on the implementation of merger clauses in the UNIDROIT Principles, given the limited number of resolved cases pertaining to this subject matter. The purpose of this study is to examine the perspectives that are held by courts and arbitrations on the merger clauses that are set forth in the UNIDROIT Principles. Additionally, the study intends to serve as a useful guide for parties who wish to include merger clauses in their contracts.

II. RESEARCH METHODS

This research article was written using normative juridical research methods, namely a method that primarily employs library materials or other secondary data relating to primary to tertiary legal materials. This research is descriptive-analytical, which means that it aims to provide clear, sequential, and universal explanations regarding all matters, whether they pertain to legislation or legal theories. Data was collected by searching library materials, followed by reading, studying, and researching various legal sources. The object of this normative legal research is in the form of qualitative legal materials, namely primary legal materials (UNIDROIT Principles, national law, international conventions or treaties, jurisprudence, and arbitral awards) and secondary legal materials (library materials, previous studies, doctrine, books, and publications by international organisations that are relevant to this research). A literature review was also conducted in the form of case studies and analyses related to the current research. The UNIDROIT Principles and arbitral awards are the most often used legal sources in this research to review the implementation of UNIDROIT Principles merger clauses in related cases.

III. DISCUSSION AND RESULT

A. Merger Clause in International Commercial Contract

In spite of the fact that they were developed within the common law system, merger clauses are frequently utilised inside the context of international contracts.³³ In addition, it appears that their incorporation into exclusively domestic transactions that are governed by civil law is growing in

²⁹Milosevic & Associates, "Enforceability of Entire Agreement Clauses in Ontario", <https://www.mlflitigation.com/media/enforceability-of-entire-agreement-clauses-in-ontario/>, accessed on 26th of May 2023.

³⁰*Ibid.*

³¹UNILEX, "UNIDROIT Principles Selected Cases by Article & Issues", https://www.unilex.info/principles/cases/article/129#article_129, accessed on 30th of May 2023.

³²Lauro Gama, Jr., "Prospects for the UNIDROIT Principles in Brazil", *Uniform Law Review*, Vol. 16, Iss. 3, 2011, p. 620, <https://www.unidroit.org/english/publications/review/articles/2011-3/613-656-gama.pdf>.

³³Radosław Strugała, "Merger Clauses in Contracts Governed by Polish Law", *Wroclaw Review of Law, Administration & Economics*, Vol. 3, Iss. 1, 2013, p. 14-15.

popularity.³⁴ As a consequence of this, merger clauses are present in both international and domestic contracts; this is the case regardless of whether the relevant contracts are governed by civil law or common law.³⁵ This phenomenon applies not only to merger clauses but also to other contractual terms that come from jurisdictions that are considered to be Anglo-American.³⁶ The existence of so-called boilerplate clauses, such as the merger clause, is one of the distinguishing features of the Anglo-American model for the drafting of contracts.³⁷ Boilerplate clauses are standardised contractual terms that appear at the beginning or towards the conclusion of contracts, typically under the heading "miscellaneous provisions."³⁸ The term "boilerplate" is defined in Black's Law Dictionary as:

"Language which is used commonly in documents having a definite meaning in the same context without variation; used to describe standard language in a legal document that is identical in instruments of a like nature."³⁹

The term "entire agreement clauses" appears to be more commonly to be used in England than it has in the United States, where it is more commonly known as "integration clauses" or "merger clauses."⁴⁰ The aforementioned clauses are commonly known as *entire agreement clauses*, which may also be referred to as *integralite des conventions*, *accord complet*, or *Vollstiindigkeitsklauseln*. The terminology mentioned above is frequently used in the titles of these clauses. However, alternative titles such as "prior agreements," "former agreements," "entire contract," "whole agreement," and "complete agreement" are occasionally used.⁴¹ According to the definition provided by Black's Law Dictionary, a "entire agreement clause" is "a contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." Other names for this type of clause include "integration clause," "entire contract clause," "merger clause," and "whole agreement clause."⁴²

The inclusion of a merger clause, also referred to as an "integration" or "entire agreement" clause, serves to incorporate all pre-contractual negotiations into the written contract.⁴³ The merger clause fully incorporates all previous and current agreements, thereby seeking to preclude the admission of extrinsic evidence pertaining to supplemental or conflicting terms.⁴⁴ A merger clause's normal legal effect is "to exclude any [contextual] claims based on pre-contractual negotiations or understandings between the parties."⁴⁵ Therefore, through the use of a merger clause, the parties indicate to the adjudicator that they seek a textualist approach to the interpretation of the contract.⁴⁶ This approach eliminates the possibility of any contextual claim that is based on pre-contractual negotiations or understandings between the parties.⁴⁷ A merger clause is likely to be included in a

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Gervas W. Wall, Nicholas Whalen, "The Boilerplate: What does it Accomplish?", <https://www.dww.com/articles/boilerplate-what-does-it-accomplish#Endnotes>, accessed in 25th of May 2023.

⁴⁰ Marcel Fontaine, Filip De Ly, *DRAFTING INTERNATIONAL CONTRACTS: An Analysis of Contract Clauses*, New York: Transnational Publishers, Inc., 2006, p. 118.

⁴¹ *Ibid.*, p. 129-130.

⁴² Hu Ke, "Consolidation of Arbitration under "Entire Agreement" Clauses", <https://arbitrationblog.kluwerarbitration.com/2018/08/05/consolidation-of-arbitration-under-entire-agreement-clauses/>, accessed on 27th May of 2023.

⁴³ Uri Benoliel, "The Interpretation of Commercial Contracts: An Empirical Study", *Alabama Law Review*, Vol. 69, Iss. 2, 2017, p. 481, <https://www.law.ua.edu/lawreview/files/2017/12/The-Interpretation-of-Commercial-Contracts.pdf>.

⁴⁴ Marcel Fontaine, *Op. Cit.*, p. 118.

⁴⁵ Uri Benoliel, *Loc. Cit.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p. 482.

contract if the parties involved are concerned about the application of a contextual approach of interpretation, in which the courts take into account evidence of pre-contractual negotiations.⁴⁸ The absence of a merger clause in a written contract makes the written contract at risk of being disputed by the parties that the document does not embody the entire agreement between them and that oral terms are also admissible.⁴⁹ The phrase "This Agreement represents the Parties' entire understanding regarding the subject matter herein" or "The contract contains the entire contract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings, and agreements on any subject matter that is related to the contract" are the typical wording that is used for it.⁵⁰

The reason why merger clause is so commonly used, as stated by Lightman J., is:

"The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search."⁵¹

One of the primary benefits of merger clauses is their ability to offer a level of assurance regarding the scope of the agreement. By explicitly stating that the document represents the entirety of the contract, the parties eliminate the need to search for any implied or inferred intention to integrate the bargain, which is the foundation of the parol evidence rule.⁵²

The merger clause serves multiple purposes, including the following:

a. Exclusion of Previous Contracts

The parties' previous contracts that are still in effect may be excluded from the scope of the parties' current contractual obligation by using the merger clause. These clauses are meant to prevent the existence of different contracts at the same time.

b. Exclusion of Pre-Contractual Documents

When a merger clause is included in a contract, it can be used to prohibit the use of pre-contractual documents as evidence to supplement or contradict the terms of the contract. It could imply letters of intent, memoranda of understanding (MoU), heads of agreement, exchanges of correspondence and information, minutes of meetings and different drafts and pre-contractual arrangements. In addition, there may have been certain oral agreements made prior to the stage of the formation of the contract. All of this can occur before the contract is signed; alternatively, oral agreements may be made when the contract is signed.⁵³

c. Exclusion of Written or Oral Representations

The inclusion of merger clauses may serve the purpose of protecting against potential actions by one of the parties seeking to have the contract declared null and void due to misrepresentation or mistake. In practice, the inclusion of such clauses may hold significant importance in

⁴⁸ *Ibid.*

⁴⁹ Robert Edel, "Boilerplate Clauses: Waiver, Variation and Entire Agreement", *Australian Mining and Petroleum Law Association Yearbook*, 2007, p. 198, <http://www.austlii.edu.au/au/journals/AUMPLawAYbk/2007/13.pdf>.

⁵⁰ Radosław Strugała, *Op. Cit.*, p. 14.

⁵¹ Jonathan Morgan, "Contracting for Self-Denial: On Enforcing 'No Oral Modification' Clauses", *The Cambridge Law Journal*, Vol. 76, Iss. 3, 2017, p. 596, <https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/contracting-for-selfdenial-on-enforcing-no-oral-modification-clauses/7E953F085688CEF12E9219F4CF699FDD#>.

⁵² *Ibid.*, p. 597.

⁵³ Marcel Fontaine, *Op. Cit.*, p. 134.

circumventing complex transactions that may be challenged by a party with intentions of breaking their contractual obligations, thereby subjecting the other party to considerable costs and uncertainty.⁵⁴

d. Exclusion of General Conditions: Blocking Clauses

The merger clause might also serve the purpose of acting as a blocking clause against general conditions. It is generally known that the issue of conflicting general conditions and the many different responses that can be found in comparative law both contribute to uncertainty in international trade.⁵⁵

e. Exclusion of Future Contracts and Documents

In addition to the contract that has the general conditions, the implementation of ancillary or alternative contracts and other documents may also serve as means of adhering to contractual obligations and may introduce variations to the original agreement. The merger clause aims to ensure that the contract remains unaffected by the implementation of subsequent contracts or ancillary documents.⁵⁶

The parties involved are to precisely decide the various objectives they may have in mind regarding the usage of the merger clause. Further, when entering international contracts, one needs to be aware of the various meanings and approaches these terms may have in different jurisdictions. This is especially important when entering into contracts between parties originating from civil law and common law countries.⁵⁷

It is crucial that the parties involved in the contractual agreement refrain from placing their trust in verbal statements or any other form of communication, including electronic mail, text messages, phone conversations, or informal agreements, that occur during the negotiation phase of the contract and are not explicitly mentioned in the written contract or are in conflict with the written contractual provisions. In the absence of a merger clause within a contract, any legal disputes arising from the contractual terms would need the consideration of extrinsic evidence, such as verbal promises, written communications, and other statements that were not expressly incorporated into the written contract. This means that the legal proceedings may become complex and costly.

A merger clause that is well-drafted generally includes several essential characteristics: The agreement typically includes four key elements. Firstly, the entire agreement statement asserts that the agreement embodies the complete understanding between the parties and supersedes any prior agreements, whether written or oral. Secondly, the non-reliance statement establishes that the parties have not relied on any representations, including pre-contractual representations, that are not explicitly set out in the agreement. Thirdly, the statement regarding remedies specifies that the parties' only recourse is limited to those remedies outlined in the agreement, or alternatively, that the sole remedy available is for breach of contract. Finally, the clause explicitly states that it does not preclude liability for fraudulent conduct.⁵⁸

Even though a merger provision is included in a contract, this does not necessarily mean that a claim cannot be brought against the other party or that specific statements cannot be used. For instance, the the existence of merger clause would not give effect to the following:

⁵⁴ *Ibid.*, p. 145-148.

⁵⁵ *Ibid.*, p. 148-149.

⁵⁶ *Ibid.*, p. 149-150.

⁵⁷ *Ibid.*, p. 150.

⁵⁸ Michael Thompson, Bart Kanya, "Entire agreement clauses – are you adequately protected?", <https://www.lexology.com/library/detail.aspx?g=959baabb-d601-440f-bf50-a39ed5053df9>, accessed on 26th of May 2023.

- a. A claim asserted by a contracting party as a result of events that occur after the contract is signed may nevertheless be successful. Merger clause preclude claims based on representations and statements made prior to signing;
- b. The utilisation of notes, negotiating correspondence, and other such materials that might be of assistance in understanding the provisions of the contract in the event that a claim is filed;
- c. A request for correction on the grounds that the contract does not set out the terms in the manner in which they were agreed upon by the parties;
- d. Implying provisions into the contract as long as allowed by the contract. Implied terms refer to contractual provisions that are not explicitly stated in the contract, but are inferred into it for a variety of reasons;
- e. Implying broad obligation into the contract.⁵⁹

B. Regulation of Merger Clause in UNIDROIT Principles

Merger clause is recognized in UNIDROIT Principles. The adoption of the concept of excluding extrinsic evidence in the determination of contract terms by the UNIDROIT is significant, particularly in light of the evident influence of civil law on its document. This approach applies in cases where agreements contain "entire agreement" or merger clauses.⁶⁰

The merger clause is regulated in Article 2.1.17 UNIDROIT Principles, which stipulates:

"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."⁶¹

Based on the UNIDROIT Principles' comment for Article 2.1.17, in situations where negotiations of varying lengths precede a contract's conclusion, the parties may opt to put their agreement in writing and declare that said document represents their final agreement. Incorporating a properly formulated "merger" or "integration" clause into the contract may help achieve this objective. Notwithstanding the inclusion of such a clause, prior statements or agreements retain their significance and may be applied as a tool for interpreting the written document. This conforms with the provision in Article 4.3(a) UNIDROIT Principles, which stated:

"In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including (a) preliminary negotiations between the parties; [...]"⁶²

The "merger clause" pertains solely to prior statements or agreements made between the involved parties and does not preclude subsequent informal agreements between them. However, the parties are able to extend a form that has been agreed upon even to any subsequent amendment. This conforms with the provision in Article 2.1.18 UNIDROIT Principles, which stated:

"A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a

⁵⁹Edward Kuliner, "Contracts: entire agreement clauses", <https://harperjames.co.uk/article/contracts-entire-agreement-clauses/#section-1>, accessed on 24th of May 2023.

⁶⁰Michael W. Galligan, "Choosing New York Law as Governing Law for International Commercial Transactions", *NYSBA International Law Practicum*, Vol. 26, No. 2, 2013, p. 95, <https://www.phillipsnizer.com/sitefiles/24299/article-nysba-intllawpracicum-autumn2013-galligan.pdf>.

⁶¹UNIDROIT, "UNIDROIT PRINCIPLES 2016", <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/>, accessed on 27th of May 2023.

⁶²*Ibid.*

party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.”⁶³

This article implicitly affirms the rule established in Article 1.2 UNIDROIT Principles, in which if a merger clause is absent, extrinsic evidence that supplements or contradicts a written contract may be considered admissible. This conforms with the provision in Article 1.2 UNIDROIT Principles, which stated:

“Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses”.⁶⁴

Article 2.1.17 UNIDROIT Principle provides a response to the question of whether or not earlier versions of the contract can be utilised in any way to interpret the final text. Article 2.1.17 UNIDROIT Principles specifies in this regard with a compromise solution: (1) it states that any previous statements or agreements made prior to the finalisation of a contract cannot override or add to the terms of the contract, provided that the contract contains a merger clause. (2) However, these statements can be referred to for the purpose of interpreting written communication. This is especially useful in the context of international contracting, where misunderstandings often arise due to language barriers.⁶⁵

As per the principle of freedom of contract outlined in Article 1.5 UNIDROIT Principles, the parties possess the liberty to explicitly prohibit any modification to the contract through prior external statements or agreements, thereby invoking the parol evidence rule.⁶⁶ Article 1.5 UNIDROIT Principles stated:

“The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.”⁶⁷

The UNIDROIT Principles 2016 gave an example of the language of merger clause, stating: “This contract contains the entire agreement between the parties”.⁶⁸

C. Implementation of Merger Clause in UNIDROIT Principles

The application of the merger clause can be observed in the decisions related to this provision, which demonstrate the tribunal's implementation and interpretation of such clause. These cases were sourced from the UNILEX directory.

In the Russian-Canadian sales contract case (1998), the Tribunal came to the conclusion that the merger clauses "may be characterised as typical clauses," and that "there can be no doubt for any party engaged in international trade that the clauses mean, and must mean, what they say." In light of this judgement, a reference has been provided for the definition of merger clauses. The merger clauses are being understood according to their ordinary meaning.⁶⁹ The Tribunal made the observation that the effects and the relevance of a merger clause are reflected in Article 2.1.7 of the UNIDROIT Principle. In that award, notwithstanding the Tribunal did not rule that the Unidroit Principles should be directly applied, the Tribunal made reference to them as they "reflect a world-wide consensus in

⁶³ *Ibid.*

⁶⁴ UNIDROIT, “UNIDROIT PRINCIPLES 2016”, <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>, accessed on 27th of May; Alberto Luis Zuppi, “The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria”, *Georgia Journal Of International And Comparative Law*, Vol. 35, No. 2, 2007, p. 272.

⁶⁵ Eckart Brödermann, *Loc. Cit.*, p. 82-83.

⁶⁶ *Ibid.*, p. 83.

⁶⁷ UNIDROIT, “UNIDROIT PRINCIPLES 2016”, *Loc. Cit.*

⁶⁸ *Ibid.*

⁶⁹ Russian-Canadian sales contract case, ICC International Court of Arbitration Case No. 9117, Final Award, March 1998, <https://www.unilex.info/principles/case/661>, accessed on 4th of June 2023.

most of the basic matters of contract law".⁷⁰ The Tribunal further stated Article 2.1.17 UNIDROIT Principles and the comment on this article. The express "integration clause" serves as a barrier to the idea that a particular action or practice could become significant enough to bind the Parties.⁷¹

In an ICC case, the Tribunal noted that the law of Country X adheres to the basic principle outlined in Article 2.1.17 UNIDROIT Principles. When the Arbitral Tribunal applied that rule of interpretation to a merger clause that was included in the contract, it came to the conclusion that the contract could not be contradicted or supplemented by evidence of prior statements or agreements unless the plain wording of the contract could not determine the common intention of the parties. This was the conclusion that the Arbitral Tribunal came to when it applied that rule of interpretation to a merger clause that was included in the contract.⁷²

In a Camera Arbitrale Nazionale e Internazionale di Milano case (2002), a parties argued that the price adjustment clause contained in their contract was to be interpreted in accordance with Article 1362 (2) of the Italian Civil Code, which states "in accordance with the common intent of the parties to be determined in the light of their conduct or any agreement prior or subsequent to the conclusion of the contract". The parties agreed that Italian law would apply to the contract. The other party countered that the clause in question was to be interpreted in accordance with Article 1362 (2) of the Italian Civil Code. This party invoked a clause in their contract to the effect that "this agreement encompasses the entire understanding between the parties with respect to the subject matter of this agreement, and supersedes all prior agreements or statements regarding the subject matter, and there are no representations, warranties, covenants, agreements, or collateral understandings oral or otherwise, express or implied, affecting this agreement if they are not expressly set forth or provided." It argued that the contract was the only place where the parties' intention could be found and that, as a result, any other agreement that occurred prior to or after the contract's conclusion was to be disregarded. The court has affirmed that the aforementioned provision is to be regarded as a merger clause. The court held, however, that such a clause merely indicates that there are no binding agreements between the parties other than those contained in the contract and has no effect on the rules of interpretation established by the applicable law (in this case, Article 1362 of the Italian Civil Code). In coming to this decision, the court made explicit reference, in addition to citing legal writings, to Article 2.17 [Article 2.1.17 of the 2004 edition] of the UNIDROIT Principles. The court also made reference to the Comments, which state that "the effect of such a clause is not to deprive prior statements or agreements of any relevance: they may still be used as a means of interpreting the writing document."⁷³

In *Joseph Charles Lemire v Ukraine* (2010), concerning the substance of the matter at hand, the Arbitral Tribunal has to decide, as a preliminary matter, the question of how the agreement was to be interpreted. The claimant contended that there could be additional obligations beyond those explicitly stated in the agreement, which the parties agreed upon during the negotiation process leading up to the agreement. The claimant supported this argument by referencing clauses in the agreement that aligns with Articles 4.1 and 4.3 of the UNIDROIT Principles. These clauses stipulate that the agreement must be interpreted based on the parties' common intention and that this intention should take into account, among other things, the preliminary negotiations. The respondent raised an

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² ICC International Court of Arbitration No. 16314, <https://www.unilex.info/principles/case/2116>, accessed on 5th of June 2023.

⁷³ Camera Arbitrale Nazionale e Internazionale di Milano, 28 November 2002, <https://www.unilex.info/principles/case/995>, accessed on 27th of May 2023.

objection regarding a clause in the agreement which conforms to Article 2.1.17 of the UNIDROIT Principles. This clause stated that the agreement “constitutes the entire agreement between the Parties on the subject matter hereof and supersedes all prior correspondence, negotiations and understandings between them with respect to the matters covered herein”. The only source of obligations is the written document itself, which is the agreement. Claimant's expectations that are not supported by the text do not give rise to respondent's contractual obligations.⁷⁴

In *Proforce Recruit Limited v. The Rugby Group Limited* (2006), The contract contained a clause stipulating, "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." According to Lord Justice Mummery, the term "preferred supplier status" lacks an apparent natural and ordinary meaning, and therefore "its meaning could only be properly determined in the context of the agreement read as a whole and of all the surrounding circumstances". Regarding the "entire agreement clause" present in the contract, the author notes the importance of distinguishing between two distinct scenarios: (1) determining the contents of a written contract by referring to prior representations, agreements, negotiations, and understandings, and (2) determining the meaning of a term within a written contract by referring to pre-contract materials. Lord Justice Mummery concludes that in the present case, it is reasonable to argue that the parties intended to exclude the former scenario but not to restrict the latter. In support of these conclusions in substance, Lady Justice Arden went even further and openly stated that consideration should be made of the possibility of admitting "evidence in interpretation questions in the future on any wider basis than the law presently permits." She suggests that considering several international instruments applicable to contracts would be suitable in the present context. For instance, the UNIDROIT Principles, which "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 (Article 4.3)". Similarly, the CISG stipulates "provides that a parties' intention is in certain circumstances relevant, and in determining that intention regard is to be had to all relevant circumstances, including preliminary negotiations".⁷⁵

In *Scotia Homes (South) Ltd. v Mr James Maurice McLean and Mrs Linda Isabella McLean* (2012), the contract contained a clause stipulating, "It is expressly declared and agreed that the Contract forms the agreement entered into between the Company and the Purchaser and no reliance has been or will be placed by either the Company or the Purchaser in any manner or way whatsoever upon any representation, warranty or undertaking given by or on behalf of either the Company or the Purchaser whether written or verbal which is not specified in or does not form part of the Contract." The appellant argued that consideration of the plan was excluded by the entire agreement clause since the entire agreement clause does not preclude the implication of terms based on business efficacy, nor does it bar the court from utilising evidence of the contextual circumstances to aid in the interpretation of the contract. However, it does prohibit a party from attempting to imply a term based on representations made during prior negotiations. The respondent contended that the "entire agreement" clause did not supersede the general contract interpretation principles. The Tribunal agreed with the

⁷⁴Joseph Charles Lemire v. Ukraine (Decision on Jurisdiction and Liability) [2010] ICSID Case No. ARB/06/18, para. 113-115, <https://www.unilex.info/principles/case/1533>, accessed on 27th of May 2023; Case Summaries, *Uniform Law Review*, Vol. 18, Iss. 1, 2013, p. 177, <https://academic.oup.com/ulr/article-abstract/18/1/171/1693601?redirectedFrom=fulltext>.

⁷⁵*Proforce Recruit Limited v. The Rugby Group Limited*, Court of Appeal (Civil Division) No. EWCA Civ 69, 2006, 17 February 2006, <https://www.unilex.info/principles/case/1119>, accessed on 27th of May 2023; Alexander Komarov, "Contract interpretation and gap filling from the prospect of the UNIDROIT Principles", *Uniform Law Review*, Vol. 22, Iss. 1, 2017, p. 37.

counsel for the respondents that it is uncontroversial to conclude that such a phrase does not exclude a consideration of what the express words of the contract indicate. If, consequently, such a clause does not exclude a consideration of what the express words of the contract imply, then such a clause does not exclude a consideration of what the express words mean.⁷⁶

It is to be noted that the UNIDROIT Principles do not provide a definition of the merger clause but merely enunciate the matter that the clause governs. The "Russian-Canadian sales contract" confirmed the meaning of the merger clause as stipulated under Article 2.1.17 UNIDROIT Principles. The merger clause under Article 2.1.17 UNIDROIT Principles refers to a typical clause that is frequently incorporated into commercial contracts and shall be construed in accordance with the provision set forth in Article 2.1.17 UNIDROIT Principles.

It is possible to regard the contract to be a comprehensive agreement between parties even in cases where agreement was not reached on all aspects. Such scenario often requires the interpretation of the agreement. In the absence of explicit statements by the parties, prior statements or agreements are not deprived of their significance by the merger clause. However, they can still serve as a tool for interpreting the written contract.⁷⁷

In the cases presented above, in which the UNIDROIT Principles are used to interpret the contract, it is not possible to find a solution to a problem by interpreting the written contract in its entirety. Instead, it is necessary to look at external evidence, such as prior statements or arrangements, in the negotiation of a contract. It is admissible to use pre-contractual statements in order to determine the meaning of an unconventional expression in a contract, which demonstrates the fact that the presence of a merger clause has no impact on how contract terms are interpreted.⁷⁸ This premise has been affirmed by the Camera Arbitrale Nazionale e Internazionale di Milano case, Proforce Recruit Limited v. The Rugby Group Limited case, and Scotia Homes (South) Ltd. v Mr James Maurice McLean and Mrs Linda Isabella McLean case above.

Article 2.1.17 UNIDROIT Principles does not prevent the use of evidence of prior statements or agreements to interpret written contract. This also align with Article 4.3(a) UNIDROIT Principles which taken into consideration preliminary negotiations between the parties to interpret a contract.⁷⁹ The aforementioned decisions confirmed the impact of the merger clause in interpreting contracts, which is align with both articles. It is also consistent with the comment provided by the UNIDROIT Principles with respect to Article 2.1.17. The comment stated that "the effect of such a clause is not to deprive prior statements or agreements of any relevance: they may still be used as a means of interpreting the written document".⁸⁰

The decision above also set fourth the clarity on the obligation of the parties under contract by rejecting the expectations of parties' obligation which does not included in written contract. This affirmed that the rights and obligations of each party could only found in the contract.

⁷⁶ Scotia Homes (South) Ltd. v Mr James Maurice McLean and Mrs Linda Isabella McLean, Sheriffdom of Tayside Central and Fife No. A216/10, 30 November 2012, <https://www.unilex.info/principles/case/1679>, accessed on 26th of May 2023.

⁷⁷ Michael Joachim Bonell, "The UNIDROIT Principles and CISG - Sources of Inspiration for English Courts?", *Pace International Law Review*, Vol. 19, Iss. 1, 2007, p. 18, <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1057&context=pilr>.

⁷⁸ Herbert Smith Freehills, "Court of Appeal finds entire agreement clause did not preclude terms of superseded contract being admissible to explain meaning of unconventional term", <https://hsfnotes.com/litigation/2019/08/28/court-of-appeal-finds-entire-agreement-clause-did-not-preclude-terms-of-superseded-contract-being-admissible-to-explain-meaning-of-unconventional-term/>, accessed on 27th of May 2023.

⁷⁹ UNIDROIT, "UNIDROIT PRINCIPLES 2016", <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>, *Op. Cit.*

⁸⁰ UNIDROIT, "UNIDROIT PRINCIPLES 2016", *Op. Cit.*

IV. CONCLUSIONS

The demand for international commercial agreements has grown in line with the rise of international commercial transactions. The situation calls for the creation of a legal framework that can regulate and provide guidance for the creation of international commercial contracts. The UNIDROIT Principles present an international legal instrument that may serve as a legal framework for international commercial contracts. One of the terms that is frequently used in a commercial contract is referred to as a merger clause. A merger clause is a declaration that the contract constitutes the parties' final and entire agreement, to the exclusion of all prior agreements and representations that have taken place in the past between the parties. UNIDROIT Principles governs merger clause under Article 2.1.17. Article 2.1.17 UNIDROIT Principles in essence regulates that the terms of the agreement embodied in the contract and cannot be supplemented and contradicted by external evidence. However, it does not exclude such evidence for contract interpretation purposes. To the present time, a relatively small number of cases involving merger clauses have been decided. The implementation of merger clauses that is observed in current decisions primarily serves to confirm matters pertaining to the meaning of the merger clause and the relationship between the merger clause and the interpretation of the contract. The merger clause is understood in its ordinary meaning with respect to the provision set forth in Article 2.1.17 UNIDROIT Principles. Regarding the contract interpretation, the merger clause does not prohibit parties from using statements and agreements made prior to the contract conclusion to interpret the contract, which confirms the provision contained in Article 2.1.17 UNIDROIT Principles. When drafted appropriately, merger clauses provide the parties with the ability to incorporate their whole agreement into a single document. It is recommended that the parties draft a merger clause that in a way that gives a comprehensive explanation of the extent to which such a clause has an effect on the contract. This is particularly important when it comes to the interpretation of the contract and the use of external evidence to either supplement or contradict the terms included in the written contract. It is also recommended that the parties have a common understanding on the definition of an uncommon word as well as their rights and obligations that are set forth in the contract. This is because these gaps in the contract are the kind of things that, in many cases, invoke the usage of a merger clause. Parties could also explicitly include exceptions for prior agreements that are related to the present one in the merger clause.

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