

**The Americanization of contract law: the merger clause in the European perspective**Francesco Castronovo<sup>1</sup>**Introduction**

It is a fact that the American contractual models and the American drafting style dominate the business environment. Professional operators use such models not only in international business relationships, but also when they enter into a purely domestic agreement. This means that professional operators circulate US contractual models for which the law of a civil law country is applicable.

This paper explores the reasons underpinning such practice and how US contractual models react when they are subject to the law of a civil law country. In particular, considering the peculiarities of the US contract law, it is worth focusing on integration and interpretation that are based on two rules (parol evidence rule and plain meaning rule) that are quite the opposite of the principles applicable under the civil law.

The analysis will specifically focus on the merger clause, which is unknown to the civil law tradition and instead is iconic of the US contract law sentiment, investigating if and how this clause can work under the law of a civil law country.

**Common Law and Civil Law Contract: Poles Apart?**

We know about the classic divide between the idea traditionally underpinning the common law and the civil law contract, respectively. The first is a contract that aims at completeness, calling for a textual approach from the court, which is just supposed to enforce the contract as written, in its literal meaning. Because of this, American contracts are long, complex and detailed. On the contrary, a civil law contract is a contract that is basically incomplete. This is because in Europe parties can rely on codes and statutes that have specific provisions dealing with integration and interpretation: the parties do not need to consider everything in their agreement, since the law provides for the tools to face such incompleteness, guiding (and binding) the judge in the interpretation and the integration of it.

From this point of view, we can say that the common law contract – especially the US contract – and the civil law contract are poles apart: the latter is a contract that exploits and hinges on the provisions of its legal system; on the other hand, the common law contract aims at minimizing the risk of external interference by the court with the agreed terms.

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However, international practice blurred the border between the common law and the civil law approach to contract. Indeed, the international contract is basically an American-style contract, an American model that is used to carry out international business even among non-American parties. Thus, we can say that the international contract and the American-style contract are the same.

Moreover, in the last years, this style of drafting contracts has influenced the European domestic practice as well. This is a consequence of the fact that professional parties are now accustomed to this drafting style of international contracts, and they want to preserve it even when they enter into a purely domestic agreement, which would be subject to the law of a European country.

In fact, in Europe, almost all the contracts between professional parties are drafted according to the American-style, using legal tools such as representations and warranties, definitions, merger clauses, interpretation clauses, even if those elements are not part of the European practice and tradition.

It is therefore clear that the enforcement under the law of a European country of a contract drafted according to the American-style, containing clauses alien to the European practice, can be tricky. This use of the American contractual models in Europe gives rise to a number of issues; this is because, as we said, common and civil law contracts belong to different juridical cultures, and the concept of contract itself differs from one to the other.

As we cannot ignore the issues stemming from this practice, it is firstly worth lingering on the reasons for this difference, in order to analyze how the European practice should deal with such contractual models and legal tools alien to its juridical culture.

### **The Reasons behind the Drafting of an American-style Contract**

As inconceivable it may seem to a European practitioner, there is great disagreement on the meaning, interpretation and enforcement of the two most important rules in US contract law: parol evidence rule<sup>2</sup> and plain meaning rule.

Meaningfully, in the US legal system, we talk about “different versions” of these two rules<sup>3</sup>, because their interpretation and application greatly vary according to the jurisdiction where the court sits. Almost each court in the US has its own version of them, and this brings a huge inconsistency among court decisions, so that “*in virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion and cries of despair*”<sup>4</sup>.

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<sup>2</sup> “The core of the ‘parol evidence rule’ is stated in section 213 ... these statements, however, merely point to the obvious conclusion; the difficulties arise in determining whether there is an integrated agreement” (R. BRAUCHER, *Interpretation and legal effect in the Second Restatement of Contracts*, in *Columbia Law Review*, 1981; 81 Colum.L.Rev. 13, 17 (1981)).

<sup>3</sup> About parol evidence rule, it has been said that “instead of a parol evidence ‘rule’, there is a continuum of many different approaches, all using the same name and often using the same words” (P. LINZER, *The comfort of certainty: plain meaning and the parol evidence rule*, in *Fordham Law Review*, 2003, at 799).

<sup>4</sup> E. POSNER, *The parol evidence rule, the plain meaning rule and the principles of contractual interpretation*, in *University of Pennsylvania Law Review*, 1998, at 533.

In other words, the issues entangling contract integration and interpretation in the US legal system stem “*from the fact that there is basic disagreement as to the meaning and effect of the parol evidence rule and as to the appropriate goals to be achieved by the process of contractual interpretation*”<sup>5</sup>.

This is basically due, to the unfinished evolution from classical to modern contract law, i.e. from textual to contextual approach. The first envisages a formalistic, textual approach to contract: textualist theories look principally to the written agreement as only element to be taken into consideration in determining contract terms and the meaning of those terms. Therefore, elements not encompassed in the text are non-relevant and are supposed to be ignored by the judge. On the contrary, the contextual approach requires that a judge looks beyond the writing: pre- and post-contractual oral and written evidence is to be taken into account in contract interpretation and enforcement.

It is self-evident that the two theories are poles apart and are hardly compatible. Therefore, it is understandable that the lack of a clear choice for either of the two gives rise to huge uncertainty that is reflected in the US law system: each court, according to its sentiment, can choose its approach to contract, applying the more formal, textual theory, or the contextual approach, closer to the European one.

The implementation of the Uniform Commercial Code (U.C.C.) and the Restatement (Second) of Contracts (1981), that at least in point of contract interpretation tries to enforce a more modern, contextual approach, did not bring to any crucial evolution, to a real detachment from classical contract law. This because the Restatement and the U.C.C. are a kind of legislation that is totally different from the way laws are promulgated and implemented in Europe. They are not comparable to any civil code, law or statute in force in any civil law country.

The Restatement is a collection of the principles of contract law drafted by the American Law Institute. Even if it is of paramount importance for the US contractual practice, the Restatement is just a persuasive<sup>6</sup>, not a binding authority; thus, a court is not legally bound to apply it and can freely disregard it. This allows courts to keep on applying the textual, classical approach to the interpretation and integration of contract, following their own sentiment more than the modern rule provided by the Restatement, Second. The huge difference between the Restatement and a European civil code, that, on the contrary, is binding for the judge, is self-evident.

To a certain extent, the U.C.C. is closer to the European codification, but relevant differences remain. Firstly, the U.C.C. has a narrow scope: it does not deal with all contracts, but with the law applicable to sales and other commercial transactions. Secondly, as the Restatement, the U.C.C. is the product of private organizations (the National Conference of Commissioner on Uniform State Laws and the American Law Institute), not of a

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<sup>5</sup> J. CALAMARI, J. PERILLO, *A plea for a uniform parol evidence rule and principles of contract interpretation*, in *Indiana Law Journal*, 1967, at 333.

<sup>6</sup> “*Authority that carries some weight but is not binding on a court*” (*Black’s Law Dictionary*, St. Paul, 2009, edited by B. GARNER).

governmental lawmaker, like the European civil codes. The U.C.C. is not itself a law, but only a recommendation of the laws that would need to be passed in each US State: the enactment of the U.C.C. as a law goes through its adoption by each State, which may embrace it with specific amendments. The outcome is that there is no fully uniform implementation of it; from this point of view, the Uniform Commercial Code is very far from the European idea of civil code.

In this scenario, the lack of a consistent and solid body of law implies that almost each jurisdiction has its own approach to the interpretation and integration of a contract: it can vary from a purely, classical, textual approach, to a modern contextual approach, closer to the European one. There are many different positions between those two poles, depending on the standpoint, the tradition, and the culture of each court. Moreover, throughout the years, many courts changed their way of thinking, shifting from a textual to a contextual approach, or viceversa.

As a result, the US legal system has not been able to find consistency in the application of parol evidence rule and plain meaning rule and, in general, there is not a sharp and solid core of principles that supports the practice of contractual interpretation and integration, neither for the judges, nor for the parties. Therefore, the subjects entering into a contract do not really know how the court, in case of litigation, will interpret, integrate and enforce their contract.

We can say that this lack of a solid body of contract law for practitioners to rely upon, is the key root for the differences between an American-style contract and a European contract.

It is easy to recognize why an American-style contract stems from this uncertainty: the vagueness of laws and principles and the inconsistency in their application urge parties to draft contracts as much detailed as possible, because they do not know, in case of litigation, which version of the parol evidence rule and plain meaning rule the court will apply. Consequently, they also do not know if the judge will respect and enforce the sharp letter of the contract or if the judge will also consider elements that are not encompassed in the “four corners of the writing”.

The only certainty parties can rely upon, is the text of their agreement: a detailed, complex and long text is more likely to avoid the risk of interference by the judge. Therefore, professional parties prefer to invest money in drafting a contract as meticulous and exhaustive as possible in order to seek a textual approach by the court, rather than facing the cost of an unforeseeable enforcement of their agreement by the court<sup>7</sup>. In other words, they prefer to bear higher *ex ante* costs, that are foreseeable, rather than risking the uncertainty

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<sup>7</sup> “For these parties context is endogenous; the parties can embed as much or as little context into an agreement as they wish. In this way, sophisticated parties can economize on contracting costs by shifting costs between the front end (or drafting stage) and the back end (or enforcement stage) of the contracting process” (R. SCOTT, *Text versus context – The failure of the unitary law of contract interpretation*, in *The American Illness*, New Haven, 2013, at 316).

of the *ex post* costs<sup>8</sup>. This represents the only way to have a sort of control on the interpretation and enforcement of the contract, the only way to try to guide the court in the enforcement of it and, consequently, to foresee the costs stemming from it.

The outcome of this way of drafting contracts is a “*rush to formalism*” and the rise of what is called “*new formalism*”<sup>9</sup>: professional parties try to encompass everything (sometimes stating even the most obvious things<sup>10</sup> in their contracts) and choose, as jurisdiction and applicable law, States where courts have a formalistic (classical) approach to interpretation and enforcement, such as New York<sup>11</sup>.

We can briefly say that the peculiarity of the American contract law pushes the contracting parties to draft long, complex contracts, in order to obtain a literal and formalistic interpretation and enforcement by the court, because this ideally is the only way to prevent any unforeseeable interference with the agreed terms by the judge.

This peculiarity not only urges parties towards the use of such drafting style, but also urges them to implement a specific contractual tool, i.e. the merger (or entire agreement) clause.

Essentially, the purpose of the merger clause is to isolate the agreement from any element external to the document<sup>12</sup>, stating that the contract is complete and represents the parties’ entire agreement<sup>13</sup>. In this case, the judge is not supposed to look outside the contract, because the merger clause limits the source of obligations to the text. Therefore, the merger clause prevents a party (and the judge) from relying on evidence of statements or agreements which are not contained in the writing.

The merger clause, the contract is the complete and final agreement between the parties, invokes the parol evidence rule and seals the contract, protecting it from any external interference. Consequently, its

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<sup>8</sup> “*Transaction costs are the economic equivalent of friction in physical system ... Transaction costs of ex ante and ex post types are usefully distinguished. The first are the costs of drafting, negotiating, and safeguarding an agreement. This can be done with a great deal of care, in which case a complex document is drafted in which numerous contingencies are recognized, and appropriate adaptations by the parties are stipulated and agreed in advance*”. On the other hand, “*ex post costs of contracting take several forms. These include (1) the maladaptation costs incurred when transactions drift out of alignment ... (2) the haggling costs incurred if bilateral efforts are made to correct ex post misalignments, (3) the setup and running costs associated with the governance structures (often not the courts) to which disputes are referred, and (4) the bonding costs of effecting secure commitments*” (O. E. WILLIAMSON, *The Economic Institution of Capitalism*, London-New York, 1985, at 19).

<sup>9</sup> Cf. A. SCHWARTZ, R. SCOTT, *Contract theory and the limits of contract law*, in *Yale Law Journal*, 2003, at 541 and G. MILLER, *Bargaining on the red-eye: new light on contract theory*, in *New York University Law and Economics Working Papers*, Paper 131, 2008, at 493. Available also at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1135&context=nyu\\_lewp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1135&context=nyu_lewp).

<sup>10</sup> Writing clauses such as “*Warsaw Convention’ means the convention for the unification of certain rules relating to international carriage by air signed at Warsaw, 12th of October, 1929*”.

<sup>11</sup> Cf. T. EISENBERG, G. MILLER, *The flight to New York: an empirical study of choice of law and choice of forum clauses in publicly-held companies’ contracts*, in *Cardozo Law Review*, 2008, at 1475.

<sup>12</sup> “*If there is a crisis in contract law as unable to meet the basic needs of the business community, then that community may consider drafting its own rules (i.e. self-regulation). The most evident means of self-regulation is, in that perspective, the terms of the contract*” (F. DE LY, *Commercial law as a refuge from contract law: a comparative and uniform law perspective*, in *The Wayne Law Review*, 1999, at 1857).

<sup>13</sup> A possible wording: “*This writing contains the entire agreement of the parties and there are no promises, understandings, or agreements of any kind pertaining to this contract other than stated herein*”.

enforcement is affected by the same uncertainty and inconsistency that affect the parol evidence rule<sup>14</sup>. However it is how the parties try to protect their contract from external intrusion, that forces professional practitioners to include this clause in the contract.

In sum, we can say that in the US practice, parties try to fight the uncertainty of the US contract law by drafting a detailed text of the contract, including the merger clause and seeking for a purely textual approach by the court.

The insertion of the merger clause further confirms that the idea underlying American parties' approach to contract is the opposite of the idea dominating in Europe. US parties want to isolate their contract from the context, making it self-referential; they try to exclude the context. Conversely, in Europe the judge uses the context to interpret and integrate the agreement under the guidance of the law.

### **The Use of an American-style Contract as a Business Contract**

Anyone familiar with international contractual practice is aware of the fact that an international contract essentially is an American-style contract: long, detailed, seeking for completeness and avoiding external interference. Clauses that were born in the US practice, such as the merger clause, are now common in the international practice as well.

The first explanation of this phenomenon is quite simple: American companies, when they enter into an international contract with foreign counterparties, usually have bargaining power to impose their contractual models, basically leveraging on their economic strength. Over the years, the American multinational companies involved in transnational business gradually managed to impose their contractual style in the international environment, so that it later became the drafting standard for contracts, even when there are no American parties involved<sup>15</sup>. The international contractual practice is now the *"globalization of the long, extremely complex and detailed 'American' form of business contracting"*<sup>16</sup>.

More in general, since the end of World War II, American practitioners have been exporting to Europe new contractual forms, necessary to the new forms of business that they were carrying out, such as leasing, factoring, and franchising: each of those contractual practices represents a form of doing business that was unknown in Europe. Essentially, *"step by step, after World War II, these procedures have established themselves outside the U.S. as an integral part of the process of Americanization and, today, they are in use*

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<sup>14</sup> *"The law on what effect should be given to merger clause is messy. In some cases they have been given a great deal of weight; in some they have been given little weight; and in some the courts have said that the weight to be given such provisions depends on the circumstances"* (L. FULLER, M. EISENBERG, M. GERGEN, *Basic contract law, Concise edition*, St. Paul, 2013, at 517).

<sup>15</sup> *"A certain American style of contracting arose and then spread to Europe and the rest of the world as American companies doing business abroad insisted on contracting that business in the style to which they had become accustomed"* (M. SHAPIRO, *Globalization of the freedom of contract*, in *The state and freedom of contract*, by H. SCHEIBER, STANFORD, 1998, at 284-285).

<sup>16</sup> *Id.* at 290.

*virtually worldwide*<sup>17</sup>; in other words, the American practitioners exported both new ways of doing business and the relevant contractual models that they needed for this purpose.

This first explanation for the spread of the American contracting style is for sure correct. However, there is a further, and more relevant, reason that supports the success of this way of contracting in the international business among non-American practitioners.

As we said, the American contract is a contract that seeks completeness: because of the lack of a solid body of laws and principles, it is detached from any theoretical concept. In the text, parties can retrieve all the aspects of their contractual relationship, so that the contract, in their intentions, is a self-sufficient system.

This very pragmatic attitude comes in handy when parties from different countries have to find a common ground for their bargain: in fact, they come from different juridical cultures and, in transnational business, they cannot use their own national principles, laws, and juridical concepts.

In this perspective, the American-style contract, since it does not rely on a particular core of concepts and laws, is the perfect common ground; a mutual, neutral language that parties from different countries can use to create their agreement, regardless of the applicable law.

The American contract, as we said, is a contract that ideally does not leave anything to interpretation or integration: it rules and explicates all the aspects of the underlying business. Consequently, it is the best choice for parties that are conducting a transnational business and cannot rely on the mutual knowledge of principles, rules and juridical concepts. Since their cultural background is not the same, on the one hand, they cannot give anything for granted, and, on the other hand, they can't use the juridical tools that belong to their respective legal systems.

This is the reason that pushes companies from all over the world to use the American-style contract, even when they are not bargaining with an Anglo-Saxon counterparty, and it is a fact that nowadays international business is conducted using the American contractual models<sup>18</sup>.

This big influence is not limited to international transactions, but deeply involves the purely domestic practice in each European State as well: from the transnational practice, the American-style contract spread to the national practice and is used even when the contracting parties are from the very same country. Professional operators use the American contractual models even when they are entering into a purely domestic contract subject to the law of a European country, by translating such models in their language or using them in their original English version. Worldwide, we can say that regardless of the nationality of the parties, and the law applicable to the agreement, when professional parties enter into a contract, they draft an American-style contract.

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<sup>17</sup> W. WIEGAND, *The reception of American law in Europe*, in *The American Journal of Comparative Law*, 1991, at 229.

<sup>18</sup> "Globalization of contract practices is, to a very great degree, the spread of the American style of long, detailed contracts, concocted by large American law firms for a very high fee, to the rest of the world" (M. SHAPIRO, *supra* note 14, at 273).

The reason for the success of American models even in the purely national, European business practice is easy to see: European professional operators are accustomed to such models, because they use them in the international environment, and they want to keep on using them even when they do business in their own country. This is basically due to cost and consistency: professional practitioners want their contractual models to be always the same, also when they are doing business with a foreign or national counterparty. Moreover, the lawyers who assist such companies usually work for international law firms and normally have an American university background of studies : it is much more natural and obvious for them to refer to US contract models than to the European ones<sup>19</sup>.

We can therefore say that it is natural that the American-style contract has become the language of business, both international and domestic: European professional operators have adopted this style of drafting contracts and they use it in all of their business transactions, even when the applicable law is the law of their own civil law country. In Europe, any business contract includes the typical American clauses, arising the question on how this way of contracting can work in a civil law environment.

In particular, it is worth analyzing what sort of effects the merger clause may have in such an environment: as we said, the merger clause states a principle that is quite the opposite of the idea underpinning the civil law contract. By including the merger clause, the parties aim at preventing any interference with their agreement, which they deem complete, while, in the European tradition, a contract is meant to be integrated by the judge.

### **The CISG and the US Contract: a First Clash with the Civil Law Tradition**

The application of the United Nations Convention on Contracts for the International Sale of Goods ("CISG") represents a good example of how the essential difference between the US and the European mentality brings to harmonization issues. The United States joined the CISG which is, in point of integration and interpretation, basically close to the civil law sentiment<sup>20</sup>. It is easy to see how the application of the CISG to a transnational contract, that involves a US party, is a good example of the practical issues stemming from the implementation of the civil law approach to an American-style contract and to the merger clause. To a certain extent, the problem of the compatibility between CISG and US contract law, reflects the compatibility issue between the American-style contract and civil law, due to the fact that both the CISG and the European contract law lack of some paramount common law concepts.

Therefore, it is worth analysing in detail the application of the CISG in this perspective, making a step forward in the analysis of the implementation of the American-style contract in a civil law environment.

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<sup>19</sup> W. WIEGAND, *supra* note 16, at 229.

<sup>20</sup> Even if the CISG must be interpreted and applied having regard to its international character (Article 7), it is clear that the Convention is very close to the European mentality, at least in point of parol evidence rule and plain meaning rule, that do not apply under the CISG.



Upon specific request from the Association of the Bar of the City of New York Committee on Foreign and Comparative Law, the CISG Advisory Council addressed the issue of the application of the parol evidence rule, plain meaning rule and merger clause under the CISG<sup>21</sup>, which some US court decisions had to face as well.

Tackling the first matter in a very sharp way, the CISG Advisory Council stated that *“the parol evidence rule has not been incorporated into the CISG”*<sup>22</sup>. Indeed, Article 11 of the Convention sets forth that a contract may be proved by any means, including witnesses; this means that a party can prove that a statement is an actual part and has become a term of the contract by any means. It is clear that this rule is the opposite of the parol evidence rule, because it does not reduce the contract only to its text, and it is close to the civil law mentality. In point of plain meaning rule, the finding of the CISG Advisory Council is consistent with this first answer. Article 8 of the CISG specifies the Convention’s principles on contract interpretation, the purpose of which, under the CISG, is determining the intent of the parties. In other words, the CISG allows a substantial inquiry into the parties’ subjective intent.

In doing so, pursuant to Article 8(3), *“due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties”*.

It is clear that this approach rejects the plain meaning rule, because Article 8 mandates that all circumstances and facts of the case are to be considered during the course of contract interpretation. The text of the contract, the writing, is just one element among others to be taken into account: it is the most important, but not the only one to be considered, because *“words are almost never unambiguous”*<sup>23</sup>. The conclusion is that under the CISG *“the fact that the meaning of the writing seems unambiguous does not bar recourse to extrinsic evidence to assist in ascertaining the parties’ intent”*<sup>24</sup>, and therefore the plain meaning rule does not apply under the CISG.

Consequently, we can say that the concept of interpretation itself expressed in the CISG is closer to the civil law mentality.

In a nutshell, the Vienna Convention *“indicates that the writing is one, but only one, of many circumstances to be considered when establishing and interpreting the term of a contract”*<sup>25</sup>, showing an approach to contract that is similar to the European sentiment.

Among the few US courts’ decisions that confronted the CISG, the leading case is *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino*, 144 F.3d 1384 (11th Cir. 1998). Even if this decision anticipates by about

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<sup>21</sup> CISG Advisory Council Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, Oct. 23, 2004, (Rapporteur: Richard Hyland), available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html> (hereinafter CISG Advisory Council).

<sup>22</sup> See paragraph 2 of the Opinion.

<sup>23</sup> See paragraph 3.2 of the Opinion.

<sup>24</sup> See paragraph 3.3 of the Opinion.

<sup>25</sup> See paragraph 2.2 of the Opinion.

six years the CISG Advisory Council, it is consistent with it, recognizing that the approach of the CISG to contract integration and interpretation is very far from the US contract law approach. The US Court of Appeals acknowledges that the CISG requires a court to consider evidence of a party's subjective intent while interpreting the contract and concludes that the Convention rejects parol evidence rule. The Court, reversing the US District Court decision that had applied the parol evidence rule in derogation of the CISG, clearly highlights the difference between civil and common contract law, stating that *"courts applying the CISG cannot ... upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result"*. As we said, the two systems (common and civil law) provide two different sets of concepts that rule contract interpretation and integration: the implementation of one or the other brings to very different outcomes.

The CISG has no provision dedicated to the merger clause. However, the CISG Advisory Council analyzed this issue too<sup>26</sup>.

Considering that the aim of the merger clause is to bar extrinsic evidence that would otherwise supplement or contradict the term of the contract, the issue regarding such clause falls under Article 11 of the CISG. Basically, the merger clause is a derogation of Article 11, which allows the party to prove a sale contract by any means, including witnesses. Since Article 6 allows parties to exclude the application of the CISG, permitting them to *"derogate from or vary the effect of any of its provisions"*, a merger clause under the CISG is therefore legit, but it is necessary to assess its effects.

The merger clause is subject to interpretation as all the other terms of the contract: its effects depend on the interpretation of it. Therefore, any question related to the application of such a clause must be resolved by referring to the criteria enunciated in Article 8. Consequently, the merger clause can bar extrinsic evidence of a side statement or agreement only if that was the intent of the parties when including the clause in their contract: *"extrinsic evidence should not be excluded, unless the parties actually intended the Merger Clause to have this effect"*<sup>27</sup>. In order to ascertain whether this is the intent that underpins the merger clause, Article 8 requires an examination and an assessment of all the circumstances and facts surrounding the contract, that must confirm this intent, together with a specific wording of the clause.

To summarize, we can say that the Vienna Convention has an approach close to civil law in point of interpretation and integration of the contract, because it rejects both parol evidence rule and plain meaning rule. As a result, under the CISG, a merger clause, although legit, has the effect of barring extrinsic evidence depending on the fact that the parties really meant that effect, this intent having to be ascertained by means of interpretation, as we do with all the other terms of the contract.

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<sup>26</sup> See paragraph 4 of the Opinion.

<sup>27</sup> See paragraph 4.5 of the Opinion.

**Legal Transposition Across the Ocean: Completeness and Incompleteness in the European Perspective**

As we said at the beginning, the civil law contract is a contract that is basically incomplete, because it can rely on a set of rules and concepts that guide the judge in its interpretation, integration, and enforcement. It is thus clear that an American-style contract, which aims at being self-sufficient, excluding any interference by the judge, and discharging all the elements that are not encompassed in its text, is alien to the civil law system. However, we have to acknowledge the fact that US contractual models are used in Europe and thus becoming subject to the national law of a civil law country. This depends on what we have already explained: even between parties from the very same country, the American way of drafting contracts has become the language of business. In fact, European practitioners use such models to rule their national business relationships. This means that we are facing contracts drafted according to the American standard, providing clauses alien to the European juridical culture, to which the law of a civil law country is applicable: could we say that the American legal contractual tools have been transplanted in civil law practice?

Usually the term “legal transplant”<sup>28</sup> refers to the reception of a foreign law in a legal system: it describes a phenomenon common since the earliest recorded history, of a legal system borrowing and assimilating legal materials from other legal systems<sup>29</sup>.

Whereas legal transplant is “*the moving of a rule or a system of law from one country to another*”<sup>30</sup>, the phenomenon we are examining here is different from it, even if the underlying principle is similar<sup>31</sup>.

Both phenomena are pushed by the idea of borrowing a foreign legal model that has proven to work well in a foreign country<sup>32</sup>, but while in Watson’s theory the object of the transplant is a rule or a system of law, in our case the objects of such transplant are legal contractual models and clauses that are not native to the civil law jurisdiction and that have been brought there from the US law system.

The source of the transplant we are analyzing is the legal practice of professional operators: practitioners of a country find in the practice of a foreign country a legal tool – such as a clause or an entire contractual model –, that is unknown to their own legal system, but that they deem useful for their needs. Therefore, they decide

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<sup>28</sup> This term was firstly coined by A. WATSON, *Legal transplants: an approach to comparative law*, Edinburgh, 1974. See also M. SIEMS, *Comparative law*, Cambridge, 2014, at 191.

For a history of the theory of legal transplant, see J. W. CAIRN, *Watson, Walton, and the history of legal transplant*, in *Georgia Journal of International & Comparative Law*, 2013, at 637, and J. W. CAIRN, *Development of comparative law in Great Britain*, in *The Oxford Handbook of Comparative Law*, edited by M. REIMANN, R. ZIMMERMANN, Oxford, 2007, at 170.

<sup>29</sup> “History of a system of law is largely a history of borrowings of legal materials from other legal system and of assimilation of materials from outside of the law” (R. POUND, *The formative era of American law*, Boston, 1938, at 94).

<sup>30</sup> A. WATSON, *supra* note 27, at 21.

<sup>31</sup> We can also say that, to a certain extent, some of Watson’s general reflections on “his” legal transplant are valid also in our case: the transplant to Europe of US legal tools is “*extremely common*” and is, for sure a “*fertile source of development*”, because pushes civil law professional operators towards new ways of drafting contracts. Finally, we can say that both legal transplants are “*socially easy ... and are accepted into the system without too great difficulty*”, because professional operators are eager to implement new legal tools that can serve their purposes (cf. A. WATSON, *supra* note 27, at 95).

<sup>32</sup> Cf. M. SIEMS, *supra*, note 27, at 191.

to borrow such legal tool and they start using it under their own legal system, for their own purposes. For the purpose of differentiating legal transplants, this phenomenon could be defined as “legal transposition”.

Legal transposition first developed when non-American professional operators came in contact with an American-style contract and American clauses: if at first they were forced to use them as a result of the economic strength of their American counterparties, in the long run they assimilated such tools, as they considered them useful and started using them in their business, regardless of the applicable law.

The importation from the United States to Europe of such tools, as we said, was not straightforward, because it passed through the use of them in international practice, but the outcome is the same: European professional operators transposed across the Ocean US legal tools into their practice, because they considered them handy. Now such common law tools circulate in the European business environment, disregarding the fact that such environment is a civil law one.

After having analysed the wide-ranging reasons that supported the spread of the US contract in Europe, it is time now to delve into this phenomenon from the perspective of the parties, in order to understand why it was necessary to borrow these foreign legal tools from the American practice and transpose them into the European one.

As we said, we are talking about professional parties that enter into a so-called business-to-business domestic contract. From their perspective, the use of an American-style contract provides them with the most desirable thing in business: certainty. We can say that civil law practitioners choose the American models as a tool to pursue predictableness<sup>33</sup>. The fact that in practice this is often an illusion does not make any difference in their choice.

The bottom idea supporting this choice is that even in a civil law system, where there is a set of rules and principles that guide interpretation, integration and enforcement of contracts, you can still retrieve physiological uncertainty, due to the unpredictability of how the judge and the counterparty will interpret and apply them. Professional operators in civil law countries are convinced that by adopting the American-style contract that is a contract that describes and encompasses all the aspects of their business relationship, and calls for a literal, strict interpretation and corresponding enforcement, they can avoid this uncertainty. This kind of contract, in the intention of the parties, leaves no room for a different interpretation or enforcement by the judge or for any claim by the counterparty. Contracting parties seek the enforcement of their contract

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<sup>33</sup> To a survey at European level, professional operators “when asked which characteristic of contract law influenced their choice [of the law applicable to their contract], most answered that a suitable contract law had to enable trade, and be predictable and fair”. In sum, professional operators “want their contract law, in decreasing order of importance, to enable trade and to be fair, predictable, short and concise, flexible and prescriptive” (S. VOGENAUER, S. WEATHERILL, *The harmonisation of European Contract Law*, Oxford, 2006, at 121 and 136).

See also A. SCHWARTZ, R. SCOTT, *supra* note 8, at 541: “of first-order importance, firms want the state to enforce the contracts that they write, not the contracts that a decisionmaker with a concern for fairness would prefer them to have written”.

as a mere straightforward application of what they wrote in it, in its literal meaning, which in turn manifests their rejection of any interference by the applicable national law. In fact, even if often these contracts provide a clause that states that the law governing the agreement is the law of the parties' country, this is a last-resort clause.

Paradoxically, they try to detach from the set of rules civil law systems provide them with, investing in *ex ante* costs seeking a tailor-made contract, a self-regulation of their business, with the aim of preventing *ex post* costs, the amount of which is not predictable<sup>34</sup>.

This creates an environment that is, in an ideal world, isolated from the laws applicable to the contract and from the intervention of the state judiciary system. The drafting of a meticulous and detailed contract and the implementation of legal tools such representations and warranties, definitions, recitals, preambles, merger clause, interpretation clauses, is not anymore just a passive adoption of models imposed by American counterparties, but, at least in part, a deliberate and conscious choice.

By means of such legal transposition of US legal tools, parties aim at self-regulation, because *"these clauses are expressions of the contracting parties' intention to settle legal problems by self-determined contractual provisions, and not by otherwise applicable law"*<sup>35</sup>.

It is a fact that European practitioners, taking advantage of the experience with American counterparties, imported a (costly) contractual engineering from the other side of the Ocean with the objective, on the one hand, of preventing any interference with the agreed terms by the State courts; on the other hand, of deterring the counterparty from bringing any claim or trying to enforce the contract in a different way from the one planned.

The most evident proof of this phenomenon is that almost all business-to-business contracts, even when they are just domestic contracts, have a merger clause and an arbitration clause. These two clauses mean that the parties, on one side, do not want any interference with the structure of their relationship and, on the other side, that if the contract fails to prevent misunderstandings and a dispute arises, they prefer it to be solved by subjects – arbitrators – that are more familiar with their mentality, not by a State court.

However, as we said, this is often an illusion, because, *"everyone is, of course, familiar with the paradox that the more carefully and fully contracts seek to anticipate every potential nuance that may rise in a complex, ongoing business relationship, the more massive the litigation is likely to become if the anticipation fails"*<sup>36</sup>.

True, logically, the paradox can be described as follows: the more a discourse is articulated, the more it is likely to present lacunae, according to a number of specifications. It is then worth analyzing how the civil law system affects this (alien) contractual engineering that has been transposed from the other side of the Ocean.

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<sup>34</sup> "A complicating factor in all of this is that the *ex ante* and *ex post* costs of contract are interdependent. Put differently, they must be addressed simultaneously rather than sequentially" (O. E. WILLIAMSON, *supra* note 7, at 21).

<sup>35</sup> F. DE LY, *supra* note 11, at 1861.

<sup>36</sup> M. SHAPIRO, *supra* note 14, at 292.

The main issue arising is that those US contractual models do not have, outside the common law countries, the support of the parol evidence rule<sup>37</sup> and of the plain meaning rule<sup>38</sup>. On one side, even if the application of such rules is uncertain, we cannot ignore that they are the cornerstones of the US contract law, but are totally unknown in civil law countries. On the other side, the uncertainty affecting those two rules, as we said, is the main reason that pushed US practitioners to use such drafting style and clauses.

Moreover, as we know, generally speaking, in the civil law systems, the opposite principle is applied because the judge is expected to look outside the contract to seek elements to use both for the interpretation and for the integration of it.

It is therefore necessary to analyze how the general principles of contract civil law interact with this way of drafting contracts, and in particular with the merger clause, that is the symbol, as far as possible, of the rejection of the judge and of the national law system.

### The Harmonization of the Merger Clause with the Civil Law Principles

In the light of the considerations above, we must try to seek a solution harmonizing the peculiarity of the American-style contract and its most iconic clause, the merger clause, with the principles of civil law.

The first issue is to understand if and how such style and such clause can operate in a juridical environment where there are no parol evidence rule and no plain meaning rule, which are the keystones in the US contract law even if, as we said, these are affected by uncertainty and ambiguity.

First, we have to start by making a clarification that may appear obvious, but is paramount: even if the merger clause is a clause that affects the way the contract is integrated, since it calls for the application of the parol evidence rule, it is still a term of the contract as the other clauses. This means that the merger clause is subject to the principles of interpretation applicable to the contract. Therefore, when the clause is under a legal system different from the American one, the plain meaning rule does not apply, whereas the civil law principles in point of interpretation are applicable to the clause. Consequently, under the civil law, we cannot apply the merger clause in its literal meaning as in most US jurisdictions, where the general sentiment among courts is that *“an integration clause which states that a writing is meant to represent the parties’ entire agreement is also a clear sign that the writing is meant to be just that and thereby expresses all of the parties’ negotiations, conversations, and agreements made prior to its execution”*<sup>39</sup>.

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<sup>37</sup> Parol evidence rule is *“a rule with little counterpart in civil-law systems ... Though French law, in Art. 1341 Code civil, provides that parol may not vary or contradict certain writings. This provision has been relaxed judicially”* (E. A. FARNSWORTH, *Comparative Contract Law*, in *The Oxford Handbook of Comparative Law*, edited by M. REIMANN, R. ZIMMERMANN, Oxford, 2007, at 920).

<sup>38</sup> For a comparison with the civil law approach in point of plain meaning rule, see E. A. FARNSWORTH, *supra* note 36, at 921.

<sup>39</sup> *Yocca v. Pittsburgh Steelers Sports, Inc.*, Supreme Court of Pennsylvania, 2004 (578 Pa. 479). This decision directly refers to the principles expressed in *Gianni v. R. Russel & Co.* (126 A. 791, 792 (Pa. 1924)), applying the classical, formal, textual theory. Cf. also *Telecom Intern. America, Ltd. v. AT & T Corp*, United States Court of Appeals, Second Circuit, 2001 (280

This is because the core of contract interpretation in civil law is the inspection and scrutiny on the parties' intent, in order to determine the real meaning of the contract. Thus, in interpreting the merger clause, the judge or arbitrator is supposed to ascertain if there is a real and precise intent of the contracting parties underpinning such clause beyond its literal meaning: the clause has the effect of discharging all the elements not encompassed in the text only if the parties meant this very effect. Unlike the US contract law, where a contract is generally considered complete because of the sole presence in it of a merger clause, which is usually interpreted according to its literal meaning, under the civil law the judge is required to seek if there is a specific intent of the parties supporting the clause.

In other words, the inquiry into the common intention of the parties allows the judge or the arbitrator to give the clause the effects the parties actually intended it to have. At the same time, the civil law rules in point of contract interpretation allow the detachment from its literal meaning, consenting a more flexible enforcement of the clause, closer to the intent and the scopes of the contracting parties.

In this respect, the drafting style of the contract shall be taken into consideration. As we said, business contracts in Europe are now complete and detailed as the American ones. This because European professional operators, even if the applicable law provides them with default or supplementary rules, prefer to write a contract as much complete as possible, in order to avoid any external interference by the court with the agreed terms and prevent any claim from the counterparty.

From this perspective, the inclusion of a merger clause is consistent with this style of contracting: by inserting it, the parties try to seal their contract, to protect its completeness. Therefore, in interpreting the merger clause in order to ascertain if the parties actually intended to discharge all the elements external to the contract, the judge should give due consideration to the style of the contract.

If, as it is common among professional operators in Europe, the contract is very detailed, this is a strong indication that the parties were seeking the completeness of their agreement; therefore, the merger clause inserted in such contract should be interpreted so that its aim, supported by parties' intent, discharges all the elements external to the contract.

Indeed, as we said, professional practitioners in Europe use such detailed style of contracting in order to describe all the aspects of their business relationship; this means that what is not encompassed in the writing, such as a previous or side agreement or statement, is not relevant to them. From this perspective, the merger clause is just an explicit declaration of the intent of completeness that is the reason underpinning this detailed drafting style. In brief, we can say that a merger clause in a civil law system, has effect according to the parties'

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F.3d 175); *Crown Pontiac, Inc. v. McCarrell*, Supreme Court of Alabama, 1997 (695 So.2d 615); *Colafrancesco v. Crown Pontiac-GMC, Inc.*, Supreme Court of Alabama, 1986 (485 So.2d 1131); *Benvenuti Oil Co., Inc. v. Foss Consultants, Inc.*, Appellate Court of Connecticut, 2001 (64 Conn.App. 723); *ISG State Operations, Inc. v. National Heritage Ins. Co., Inc.*, Court of Appeals of Texas, 2007 (234 S.W.3d 711).

intent undergirding it, and such intent has to be ascertained by interpreting the contract, also in the light of its drafting style.

Considering the fact that interpretation is deeply intertwined with parol evidence rule, the proposed solution for the implementation of the merger clause in a civil law system obviously affects the solution of the issue of the lack, in such system, of the parol evidence rule itself, which under the common law regulates the integration. In the end, one of the few certainties in point of parol evidence rule is that the rule is deeply intertwined with the interpretation<sup>40</sup>.

Indeed, in line with the foregoing, the integration depends on the meaning we give to the clause, and the relevance we give to the contracting style, as paramount elements to be taken into account in determining the parties' intent. If, in interpreting the contract, it is clear that the parties did not want any sort of integration, that they wanted the contract to be sealed and protected from any external interference by the court with the agreed terms, the judge or the arbitrator should respect this common intent. Using the terminology of the US contract law, we can say that deeming the contract as a completely integrated agreement depends on the parties' intent behind the merger clause, and such intent has to be ascertained interpreting the clause and the contract. In this way, the merger clause can be a useful tool for European professional operators that carry out their business under civil law. As we said, among European professional operators and also among US practitioners, the common intent goes towards isolating the contract from any external interference.

We have to acknowledge the fact that the intent of professional operators in Europe is to self-regulate their business. In order to achieve such self-regulation, they transposed the merger clause in the civil law contractual practice, together with the American way of engineering and drafting contracts. Therefore, the European business-to-business contract is the result of mutual discussion and negotiation between the parties that design their contract in order to exclude any interference with their business. It is a costly tailor-made contract, engineered to face all the aspects of the ongoing business relationship, in order to avoid any supplementation by the court and any claim by the counterparty. Given that the parties' intent is clear, the interpretation, integration and enforcement of their contract should be carried out in the perspective of respecting such intent.

Therefore, the merger clause can be an effective and useful tool in a civil law system where there is no parol evidence rule and no plain meaning rule, as well as in the American experience: it allows the parties to circumscribe the source of their obligations, having a control on the extent of the obligations stemming from their agreement.

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<sup>40</sup> "The parol evidence rule and the plain meaning rule are conjoined like Siamese twins. Even though many academics and more than a few judges have tried to separate them, the bulk of the legal profession views them as permanently intertwined" (P. LINZER, *The comfort of certainty: plain meaning and the parol evidence rule*, in *Fordham Law Review*, 2002, at 823).



We could even say that this clause could work better in the civil law than in the common law system, because in the first it is not affected by the uncertainty that entangles the latter. From this perspective, the transposition of the clause into the civil law systems entails the detachment from the parol evidence rule and plain meaning rule and, consequently, leaves behind the uncertainty affecting those two rules, since in Europe such clause has the support of a core of well-defined principles and rules in point of interpretation and integration.

### **The rules of evidence in civil law systems and the parol evidence rule**

Generally speaking, we can say that the rules in point of integration and interpretation in civil law systems are more flexible and sensitive to the parties' intent. This means that in interpreting, integrating and enforcing the contract a civil law judge does not limit his observation to the text: civil law rules allow for the inquiry into the parties' subjective intent, taking into consideration also elements external to the text of the contract. As we said, this approach to contract is quite the opposite of the common law one, because the underlying idea in civil law systems is that the intention of the parties prevails over the literal meaning of the contract.

However, the main civil law systems, such as Italy, France and Spain, include rules that apparently are similar to the parol evidence rule, limiting the proof of the contract itself, of side agreements and side elements that integrate or contradict the contract.

Basically, those rules dictate that proof by witnesses is not admissible if the object of the contract exceeds a certain sum of money and, moreover, the same proof is not permitted in order to demonstrate the existence of side agreements.

Under Article 51 of the Spanish Commercial Code, no proof by witnesses will be admitted as to the existence of a contract worth more than a certain amount.

Similarly, pursuant to the older version of Article 1341 of the French Civil Code, no proof by witnesses was allowed against or beyond the contents of a contract exceeding a value that is fixed by decree, or in relation to what was alleged to have been said before, at the time of, or after the contract.

The new version of this rule (Article 1359, enforced in 2016) reads that an agreement exceeding a sum or value fixed by law needs to be proved only by written evidence. Moreover, pursuant to the second paragraph of the same article a written contract, regardless of its value, can be integrated or contradicted only by another written document.

We therefore infer that the French Civil Code, both with the old and the new rule, gives prominence to documentary evidence, thus excluding the relevance of proof by witnesses; moreover, pursuant to Article 1359, documentary evidence is the only admissible rebuttal evidence in written contracts.

In Italy, the situation is similar. The Italian Civil Code (Article 2721) does not allow proof by witnesses of a contract, whose value exceeds a certain amount of money. However, the provision is not as rigid as it might

seem, because the second paragraph of Article 2721 allows the court to admit proof by witnesses even beyond that pre-established threshold amount when the character of the parties, the nature of the contract or any other circumstances suggest to do so. As to side elements, Article 2722 of the Italian Civil Code rejects proof by witnesses of prior or contemporary agreements of a written document.

Even if these rules may sound in some way close to the parol evidence rule, a closer look reveals instead that they share just a little with the common law rules.

Firstly, the reason underpinning those civil law rules is different from the one underpinning the parol evidence rule. As we said, the latter aims at protecting the sanctity of contract from any external interference, whereas the aforementioned civil law provisions are driven by the idea that proof by witnesses is not as reliable as hard evidence.

This paramount difference directly stems from the nature of the rules: the parol evidence rule is a rule of substantive law<sup>41</sup>, whereas the provisions in the Italian, French and Spanish Codes are purely rules of evidence, meant to only limit the use of the proof by witnesses.

It is therefore self-explanatory, that the parol evidence rule exercises its effects before the rules of evidence and acts on a different level: it discharges all elements that are not encompassed in the contract, excluding their relevance, whereas the rules of evidence just prevent parties from evidencing (by witnesses) such elements. Moreover, the parol evidence rule is not limited just to testimony: it prevents the use of any element external to the contract. Conversely, civil law rules aim at only limiting the use of proof by witnesses.

In brief, the parol evidence rule has a broader and more complex purpose than the civil law provisions analyzed, and this difference is reflected on the effects of the merger clause. In this perspective, the effect of such clause is not to prevent the counterparty from proving the existence of a side agreement, but to discharge it; by including the merger clause in the contract, the parties agree that no side agreements are present and relevant to them and therefore this adsorbs and supersedes the issue of the proof of a side agreement.

It is therefore clear that the merger clause has a scope and effects that are much broader and deeper than the civil law rules dedicated to evidence. As we said, civil law practitioners, by inserting such a clause, (try to) seal the contract protecting it from external interferences. In fact, they would not obtain the same result if they relied on the rules in point of evidence provided by their own law systems.

This conclusion further confirms that the merger clause is a useful tool even in a civil law system: since it defines the sources of obligation, it has a scope and effects that are much broader and deeper than the civil law rules dedicated to evidence. From the parties' perspective, the end result is that it does not matter if a party is able to prove the existence of a side agreement, as the same has already been discharged by the merger clause.

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<sup>41</sup> *"It is not a rule of evidence but a rule of substantive law. Nor it is a rule of interpretation; it defines the subject matter of interpretation"* (Restatement, Second, Contracts, § 213, comment (a)).

### The Transposition of the Merger Clause and the Principles of European Contract Law

As we said in the previous paragraph, it is possible to imagine the use of the merger clause, even without the support of the parol evidence rule and of the plain meaning rule: such clause can have the effect of protecting parties' interests embedded in the contract even without the support of the two key rules of contract common law.

The issues of the effect of the merger clause in a civil law system have been tackled by the Principles of European Contract Law. Like the CISG, the Principles appear to have an approach that is very close to the civil law sentiment on this point, and therefore they reject both parol evidence rule and plain meaning rule that are paramount in the functioning of the merger clause.

However, unlike the CISG, the Principles directly deal with this clause, but, because of such rejection, they tackle the matter from a perspective that is very different from the one of the US law system. Indeed, one of the aims of the Principles is the "*construction of a Bridge between the Civil Law and the Common law*", because "*one of the most intractable problems of European legal integration is the reconciliation of the civil law and the common law families*"<sup>42</sup>. The Principles try to create a common language that can be useful to both civil and common law practitioners. In that they adopt a typical common law legal tool, subjecting it to a rule that is closer to the civil law system sentiment, and, obviously, is not based on the plain meaning rule and parol evidence rule, considering that the Principles are "*designed primarily for use in the Member States of the European Union*" and that "*they have regard to the economic and social conditions prevailing in the Member States*"<sup>43</sup>. In the light of this, the Principles try to point out a solution (i.e. a rule) for the use of the merger clause, even in a juridical environment to which this clause is, basically, alien and unknown.

As we said, the parol evidence rule has not been incorporated into the Principles of European Contract Law. On the contrary, we can easily observe that the rule set forth in Article 6:102 is quite the opposite: "*a contract may contain implied terms which stem from (a) the intention of the parties, (b) the nature and purpose of the contract, and (c) good faith and fair dealing*". It is therefore clear that, under the Principles, elements external to the text of the contract can be used to supplement the agreement. Moreover, the Principles adopt other supplementary articles that deal with specific issues, such as the price (Articles 6:104-6:107) and the quality of the performance (Article 6:108). Thus, if, on one side, the Principles embrace the concept that a contract may contain implied terms and pinpoint the sources of such terms, on the other, they make available to the court or the arbitrator specific tools to fill the lacunae affecting the agreement.

Likewise, the plain meaning rule does not apply under the Principles. Actually, the Principles, Article 5:101(1), state the opposite concept in point of interpretation: "*a contract is to be interpreted according to the common*

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<sup>42</sup> *Principles of European Contract Law, Parts I and II*, edited by O. LANDO and H. BEALE, The Hague, 2000, at xxii.

<sup>43</sup> *Id.* at xxv.

*intention of the parties even if this differs from the literal meaning of the words*". Furthermore, Article 5:102 of the Principles make specific reference to external elements that must be taken into account when interpreting the contract, explicitly listing<sup>44</sup> the relevant circumstances surrounding the contract, such as the preliminary negotiations, the conduct of the parties and the nature of the contract. Therefore, the general rule in point of interpretation gives pre-eminence to the common intention of the parties and the judge or the arbitrator is supposed to detach from the literal meaning of the writing in order to determine such intention. It is therefore clear that in interpreting the contract under the Principles, the judge or the arbitrator is not limited to the "four corners of the writing", but is supposed to consider external elements in order to ascertain the common intention of the contracting parties.

It is according to those principles that Article 2:105 of the Principles deals with the merger clause. It is immediately clear that the Principles tackle the merger clause from the perspective of its compliance with the real intent of the parties. Indeed, Article 2:105 makes a difference between an "*individually negotiated*" (Article 2:105(1)) and a "*not individually negotiated*" (Article 2:105(2)) merger clause.

Moving from the idea that interpreting the contract is ascertaining the intention of the parties, the Principles ask to determine whether there is a real and precise intent of the contracting parties that underpins the merger clause beyond its literal meaning: the clause has the effect of discharging all the elements not encompassed in the text only if individually negotiated, because the specific negotiation points to the parties wanting this very effect. On this point, we can see the big difference between the Principles and the common law, and in particular with the US contract law. Indeed, under the US contract law, the judge usually will consider a contract complete because of the sole presence of the merger clause<sup>45</sup>. On the contrary, under the Principles, this clause must be interpreted according to the true intention of the parties, and in this scope the distinction between individually, and not individually negotiated clauses becomes relevant.

The not individually negotiated clause "*will only establish a rebuttable presumption that the parties intended that their prior statements should not form part of the contract*"<sup>46</sup>. This means that a party is allowed to prove that the merger clause was not meant to exclude a prior statement or an agreement not encompassed in the text of the contract.

The scope of this provision is to avoid giving effect to a merger clause that is just a boilerplate clause<sup>47</sup>, that has been included in the contract without a real awareness of its effects, just because it is inserted in a model

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<sup>44</sup> It is worth noting that the list provided by Article 5:102 is non-exhaustive (see *id.* at 291). This means that in determining the parties' intention the judge or the arbitrator is allowed to take into account any relevant circumstance external to the contract. This further confirms that the Principles totally reject the plain meaning rule.

<sup>45</sup> Cf. E. A. FARNSWORTH, *Contracts*, New York, 2004, at § 7.6a.

<sup>46</sup> *Principles of European Contract Law, Parts I and II*, *supra* note 41, at 153.

<sup>47</sup> A boilerplate clause is a "*standardized provisions that are routinely inserted by the drafting lawyers into every contract the lawyer writes – even when the principals have not specifically negotiated such a provision – and usually appear at the end of the contract with other standardized provisions*" (L. FULLER, M. EISENBERG, M. GERGEN, *supra*, note 13, at 517).

circulating in the business environment: *“it often happens that parties use standard form contracts containing a merger clause to which they pay no attention”*<sup>48</sup>.

The rule set forth in Article 2:105 is a specific application of the general principle in point of interpretation dictated by Article 5:101(1), that states that the common intention of the parties is the paramount criterion guiding the interpretation of the contract.

We can say that even if there is a specific provision dedicated to the merger clause, the Principles treat such clause as all the other terms of the contract: it is to be interpreted according to the rules of interpretation provided by the Principles.

With regard to the completeness of the contract, Article 2:105 is a specific application of the principle of freedom of contract embodied in Article 1:102. Under such article, parties are free to determine the contents of their contract; consequently, they are allowed to exclude the relevance of previous agreements, documents, and statements that are not embodied in the final version of their writing. However, if they fail to do so, those external elements can be used to supplement the contract. In this way, the Principles state a rule that is quite the opposite of the parol evidence rule: external elements can be used to supplement the contract, unless the parties had excluded them, including a merger clause specifically negotiated (i.e. supported by a specific, common intent) in their contract.

The rule set forth by Article 2:105 of the Principles is the demonstration that the merger clause can have effect, and be useful to the parties, even in a civil law environment that hinges on the common intention of the parties, as clarified by the comment to Article 5:101: *“the search for common intention is compatible with rules which forbid the proof of matters in addition or contrary to a writing, for example if the parties have negotiated a merger clause to the effect that writing contains all the terms of the contract (see Article 2:105: Merger Clause), as it refers to external elements only to clarify the meaning of a clause, not to contradict it”*<sup>49</sup>.

The application of the paramount criterion of the interpretation according to the common intention of the parties, that is a cornerstone of the civil law and is set forth in Article 5:101, allows the Principles to state a specific rule for the merger clause, even without the support of parol evidence rule and plain meaning rule. We can say that the Principles acknowledged the borrowing of the merger clause from the common law practice, and provided a rule that harmonizes such transposition and allows the use of such tool in European practice, in the application of principles in point of integration and interpretation that are close to the civil law sentiment.

## Conclusion

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<sup>48</sup> *Principles of European Contract Law, Parts I and II*, supra note 41, at 153.

<sup>49</sup> *Id.* at 288.

Globalization of business practices results in globalization in contracting. Worldwide, professional operators rely on legal transpositions in their business practice, i.e. the borrowing of legal tools from a different legal system that in their opinion can better serve their purposes and needs.

In this transposition, the traditional divide between the civil law and the common law contract is not as sharp as it used to be. It is easy to retrieve contracts that are clearly drafted according to the American style, that includes specific clauses that are typical of the common law tradition, while the contracting parties, the applicable law, and the courts having jurisdiction on them are from a civil law country. The outcome of this transposition is the use of a contracting style in a juridical environment that has not the theoretical concept supporting it in its country of origin.

In particular, the merger clause states a concept that is the opposite of the principles applicable under the civil law. This clause aims at excluding any external interference by elements outside of the written contract, whereas, under civil law, the judge is supposed to use such elements to integrate the agreement.

We can try to retrieve the solutions for the harmonization of this transposition, keeping as a criterion the intent of the parties. Given the absence of plain meaning rule (that, in this perspective, seems like a hurdle), we can investigate the intent of the parties and enforce the transposed common law clauses according to such intent. Likewise, the absence of parol evidence rule allows to consider the contract a complete agreement only if the parties' intent was in this sense. In this way, the merger clause even in a civil law environment is a useful juridical tool that allows professional operators to have a control on the extent of the obligations stemming from their agreement.

This perspective allows civil law practitioners to transpose, use and enforce common law clauses, and, in particular, the merger clause, in a more flexible way, avoiding the excessively rigid approach that in the US contract law creates the uncertainty that affects that law system. At the same time, the outcome is to preserve the core of the civil law principles that cannot be neglected when a contract is under the law of a European country.

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