„Admissibility and application of the merger clause under Spanish law“

Dissertation

zur Erlangung des Doktorgrades

des Fachbereichs Rechtswissenschaften

der Universität Osnabrück

Vorgelegt von

Pedro Garcia Merino

aus Madrid

Osnabrück, 2023

Berichterstatter*in:

Prof. Dr. Fryderyk Zoll

Mitberichterstatter*in:

Prof. Dr. Hans Schulte-Nölke

Tag der mündlichen Prüfung: 29.09.2022

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Contents

Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch
AC	Aranzadi Civil
ADC	Anuario de derecho civil
APMCC	Anteproyecto de Modernización del Código de Comercio
Arbitration Act	Ley 60/2003, de 23 de diciembre de Arbitraje
Art.	Article
Arts	Articles
B2B	Business-to-Business
B2C	Business-to-Consumer
BGB	Bürgerliches Gesetzbuch
BOE	Boletín Oficial del Estado
CC	Código Civil
CCAPDC	Propuesta del Código Civil de la Asociación de Profesores de Derecho Civil
CCom	Código de Comercio
CESL	Common European Sales Law
C.F.C.E.	Centre français du commerce extérieur
CISG	United Nations Convention on Contracts for the International Sale of Goods
Consumer Credit Directive	Directive 2008/48/EU of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers
Consumer Rights Directive	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights
Consumer Sales Directive	Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

DCFR	Draft Common Frame of Reference
Dir.	Director
EC	European Community
ECJ	European Court of Justice
ed.	Editor
edn	Edition
eds	Editors
ERPL	European Review of Private Law
et al.	et alia
et seq.	et sequentia
etc.	et cetera
EU	European Union
Hague Principles	The Hague Principles on Choice of Law in International Commercial Contracts
ICEX	Instituto Español de Comercio Exterior
i.e.	id est
ICC	International Chamber of Commerce
INCOTERMS	International Commercial Terms
JUR	Jurisprudence
LCGC	Ley 7/1998 de 13 de abril sobre Condiciones Generales de la Contratación
LEC	Ley de Enjuiciamiento Civil
LGDCU	Ley General para la Defensa de los Consumidores y Usuarios
MJECL	Maastricht Journal of European and Comparative Law
mn.	margin number
Mo. L. Rev.	Missouri Law Review
No.	Number

OHADAC	Organization for the Harmonization of Business Law in the Caribbean
p.	Page
Package Travel Directive	Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements
para.	Paragraph
paras	Paragraphs
Pavia Group	Academy of European Private Lawyers, European Contract Code – Preliminary Draft
PCM	Propuesta del Código Mercantil
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles on International Commercial Contracts (2016)
pp.	Pages
RADP	Revista Aranzadi de Derecho Patrimonial
RCDI	Revista Crítica de Derecho Inmobiliario
RDM	Revista de Derecho Mercantil
RDN	Revista de Derecho Notarial
RDP	Revista de Derecho Privado
RJ/ROJ	Repertorio de Jurisprudencia
RJC	Revista Jurídica de Catalunya
RUPUJ	Revista Universitas Pontífica Universidad Javerian
Rome Convention	Convention 80/934/ECC on the law applicable to contractual obligations
Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
SAP	Sentencia de Audiencia Provincial
SME	Small-Medium-Sized Enterprise
STC	Sentencia del Tribunal Constitucional

STS	Sentencia del Tribunal Supremo
Tol	Tirant online jurisprudencia
UCC	Uniform Commercial Code
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
Unfair Terms Directive	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
UNIDROIT	International Institute for the Unification of Private Law in Rome
US	United States
v.	versus
Vol.	Volume
ZEuP	Zeitschrift für europäisches Privatrecht

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14 December 2012 (RJ 2013\376)

18 January 2013 (RJ 2013\1604)

25 February 2013 (RJ 2013\7413)

9 May 2013 (RJ 2013\3088)

25 June 2014 (RJ 2014\4929)

30 June 2014 (RJ 2014\3526)

29 January 2015 (RJ 2015\633)

2 February 2016 (RJ 2016\214)

11 February 2016 (Tol 5645234)

30 March 2016 (RJ 2016\1152)

5 May 2016 (Tol 5718316)

1 July 2016 (RJ 2016\3385)

10 October 2016 (RJ 2016\4976)

21 March 2018 (RJ 2018\86865)

6 March 2020 (RJ 2020\879)

14 July 2020 (RJ 2020\2347)

Sentencias de la Audiencia Provincial

SAP Madrid 20 April 2001(JUR 2001\263590)

SAP Málaga 15 April 2002 (JUR 2002\235758)

SAP Salamanca 31 January 2005 (AC 2005\181)

SAP Madrid 23 March 2006 (JUR 2006\153492)

SAP Lleida 13 September 2007 (RJ 2007\335298)

SAP Cáceres 14 July 2010 (JUR 2010\296322)

SAP Sevilla 16 September 2011 (AC 2011\2175)

SAP Guipúzcoa 20 June 2017 (RJ 2017\232132)

SAP Madrid 13 April 2018 (JUR 2018\166161)

SAP Barcelona 29 June 2018 (ROJ 3896\2018)

SAP Madrid 4 December 2019 (RJ 2020\95517)

SAP Gerona 7 February 2019 (ROJ 106\2019)

SAP Valencia, 10 February 2021 (JUR 2021\2019)

Other jurisdictions

Austria

Arbitration Tribunal-Vienna, 15 June 1994

European Union

Case 26/62 *Van Gend & Loos* 5 February 1963

C-240/97 *Kingdom of Spain v Commission* 5 October 1999

C-132/19 *Groupe Canal+* 9 December 2020

United Kingdom

Countess of Rutland's Case (1572) 77 ER 89

Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1997] UKHL 28

United States

American Bank and Trust Company v. Trinity Universal Insurance Company et al. 205 So. 2d 35

Citizens State Bank-Midwest v. Symington 780 N.W.2d 676, 686 (N.D. 2010)

1. Introduction

"A verbal contract isn't worth the paper it's written on."

Samuel Goldwyn

1.1. Problem outline

The rights and obligations in a contract can be agreed based upon oral exchanges between the parties in the process of negotiations. In order to achieve legal certainty, however, the parties may subsequently express their agreement in writing before contracting. In modern contract practice, particularly in contracts governed by US-American or English law, it is not uncommon for the written agreement to feature a so-called "merger clause" (or "integration clause") which serves to provide greater certainty by stating that the written contract represents the final and complete agreement between the parties, thereby excluding any oral agreements the parties may have made. However, in practice there might be undertakings and other oral terms that the parties may have agreed that intend to outlast the final execution of the contract.

Whereas merger clauses are rooted in Anglo-American legal systems and a familiar "boilerplate" term in contract practice, supported by the parol evidence rule, so-called "*cláusula de integración*" are alien to the Spanish legal system. A contract governed by Spanish law is based on the actual and common intention of the parties,[1] fairness considerations envisaged by the law and customs, such as good faith and public policy,[2] and the *Sentencia del Tribunal Supremo* (Spanish Supreme Court) case law and principles that support a homogenous practice. Due to the wide interpretation surrounding the common intention of the parties, the Spanish legal system has not regulated the merger clause. Unlike the parol evidence rule in common law jurisdictions, Spanish law allows the intention of the parties to be ascertained by whatever means of extrinsic evidence that the parties may deem applicable to prove relevant facts to the contract, based on the principle of *libertad de prueba*: "freedom of evidence".[3] As the Spanish legal system lacks both the regulation

[1] Pursuant to Art. 1282 CC, based on the external interpretation of the contract *"conducta histórica interpretativa"*.

[2] See subchapter 4.1.5.

[3] See subchapter 10.2

and a suitable instrument that prevents the terms integrated in the contract from being sabotaged by prior statements not incorporated therein, the judicial interpretation of the same contract may thus differ substantially between Spain and a common law jurisdiction.

A further contributing factor is that the freedom of form[4] (Arts 1278–1280 CC), as recognized in case law,[5] does not subject contracts to formal requirements. In order to determine the *contractual value* of prior agreements, it is therefore necessary to refer to the principles and rules of interpretation of contracts contained in Arts 1281–1289 CC together with the rules of evidence which are regulated in procedural law (*Ley de Enjuiciamiento Civil*). Based on these features, the merger clause ascribes a greater weight to written agreements. Their regulation and application have been considered and analyzed in order to provide with the rationale to the court in order to apply the merger clause anchored in the written contract. This poses a series of questions: What are the legal effects of incorporating a merger clause into a contract governed by Spanish law? Is the merger clause admissible? What position does the Spanish law enforce? Should a Spanish judge presume on the basis of the merger clause that the agreement is complete and fully integrated, or should she also consider extrinsic evidence to interpret the contract?

As the Spanish jurisdiction frequently relies on oral representations and external evidence brought by the parties to interpret contracts, legal disputes and increased litigation costs may result. Accordingly, there is an actual need in the Spanish legal system for an instrument that empowers the parties to prevent extrinsic evidence, oral representations and agreements that were not integrated in the written contract in order to ensure legal certainty. Despite the series of questions above, a merger clause may be suitable for this purpose as a contractual instrument, which as an instrument fully admissible in Spanish

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[4] See subchapter 4.2.

[5] STS 3 March 1995 (RJ 1995\1775): *"el principio espiritualista o de libertad de forma que, como regla general, inspira el sistema de contratación civil en nuestro ordenamiento jurídico (artículos 1258 y 1278 CC), tiene algunas, aunque escasas, excepciones, integradas por los llamados contratos solemnes, en los que la ley exige una forma determinada, no para su simple acreditamiento (ad probationem), sino para su existencia y perfección (ad solemnitatem, ad sustantiam, ad constitutionem). Una de las expresadas excepciones es, precisamente, la relativa a la donación de inmuebles*". This ruling of the STS advocates for the freedom of form as the ruling principle in Spanish law based on Arts 1258 and 1278 CC referring to the solemn contracts (e.g., donation of real estate) as an exception to this principle.

law,[6] may be used by the parties to provide greater legal certainty to the written contract, to limit extrinsic evidence when the clause is drafted precisely and clearly expresses the intended effects, and where the inclusion of a merger clause intends the writing to be completely integrated and to discharge prior negotiations and agreements, thus limiting the interpretation to the terms included in the written contract.

1.2. Objectives

This dissertation represents the first formal analysis of the merger clause into the Spanish legal system genuinely conducted from the Spanish legal perspective. By analyzing the application of the merger clause and its legal effects in a system in which it currently lacks regulation and legal practice, a current gap in research will be closed, but in doing so pursues a series of different yet intertwined objectives.

In light of the aforementioned questions, the following serves to clarify the status of the admissibility and application of the merger clause in Spanish law as a valuable instrument to protect the integrity and legal certainty of written contracts. This requires clarification of the interpretative task carried out by the Spanish judiciary or courts of arbitration in order to ensure that the effectiveness of the clause intended by the parties is preserved and undisputed.

The presentation of a sound argumentation for the legal admissibility and application underpins the main objective to convince practitioners that the application of merger clauses is not only advised and valuable in contract practice but necessary to support the legal certainty of commercial contracts under Spanish law. The focus on contract practice thus seeks to raise the parties' awareness regarding the application of the merger clause and its legal effects when admitted by the judge, for which it is essential that they are correctly worded and individually negotiated by the parties, and to educate jurists when drafting this clause, so the parties are fully aware of their legal effects and the clause can be (freely) used without undermining their effectiveness, hence avoiding future disputes. Accordingly, the following aims to provide

[6] In accordance with the principle of freedom of contract enshrined in Art. 1255 CC provided that the requirements of Art. 1261 CC are fulfilled (full consent of the parties, subject matter and cause) and the rules of Art. 1255 CC are observed: subject to mandatory laws, ethical or morality and public order.

parties with a clear roadmap and understanding of the incorporation of the merger clause into their contracts when Spanish law is the governing law.

Finally, this dissertation intends to present what actionable further steps need to be taken in order to regulate the merger clause as an instrument envisaged in the *Código Civil* – the Spanish Civil Code – to ensure its application in future contract practice.

1.3. Methodology

The following concerns the analysis of a type of contract term that is rooted in Anglo-American law, yet is – in relation to Spanish law – applied in a civil law system with different underlying rules and principles. The legal challenges to adapt and to integrate a purely Anglo-American instrument into Spanish law are thus significant due to the difference in interpretation of the contract and the status of such clauses in Spanish law as a seldom used instrument in Spanish contract practice. In this respect, it is to be noted from the outset that this dissertation neither strives to analyze the merger clause from the perspective of Anglo-American law nor to change the Spanish legal system but rather provide with the legal rationale to support a greater legal certainty to Spanish written agreements by the incorporation of the merger clause.[7] Accordingly, all applicable legal principles pertaining to Spanish contract law affected by the application of the merger clause from the perspective of legislation, legal doctrine and case law, are examined.

The examination of the merger clause will be provided from the perspective of Spanish contract law, case law and most prominent Spanish scholars in order to prove how the merger clause can be used as a legal instrument to increase the legal certainty of the written agreement in the Spanish legal order. However, as a general statement, in comparison to other continental European jurisdictions, the regulation of contracts in the Spanish Civil Code, is incomplete and has not been modernized in recent decades. Furthermore, it is outdated because of the lack of practice of the main legal institutions, which under Spanish law are based on consent, subject matter and cause

[7] In this respect, it is key to consider that, in following *Legrand* states that legal orders are formed by a long process of historical and ideology factors where significant cultural differences arise. *Legrand* underlines that the import of foreign rules between different legal systems is an impossible task as a result of transposing legal norms without validity. P. Legrand, "The impossibility of Legal transplants", MJECL 1997, pp. 114–116.

("*consentimiento", "objeto"* and *"causa"*) that affect the validity and effectiveness of the contract. In this regard, good faith is a general principle of law that is vital to understand Spanish contract law. References to principles used by the Spanish *"doctrina de los actos propios"* (*venire contra factum propium*), *"negocios de fijación"*[8] (common agreement to determine the contract terms) and proffer of means of proof[9] are made to support the application of the clause as a legal instrument.

This *status quo* has a fundamental impact on the methodology of this dissertation because the Spanish Civil Code cannot serve as a reliable reflection of current law and practice. The predominant method used here is therefore empirical due to the extensive use of court decisions to support the reasoning presented and the (evident) lack of regulation regarding merger clauses. The analysis of case law – especially of the *Sentencia del Tribunal Supremo* – is fundamental to determining the general compatibility with Spanish law as well as any requirements necessary for the validity of such clause. Moreover, as case law reflects law in action, the analysis thereof provides a basis for determining the legal position of the Spanish judge in each applicable matter.

Due to the flaws in the Spanish Civil Code, international and European sets of rules will be examined to shed light on regulatory gaps and disputed legal precepts; other legal systems have not been addressed directly in order to concentrate the focus on Spanish law. The sets of rules comprise the UN Convention on the International Sale of Goods (CISG), the UNIDROIT Principles on International Commercial Contracts (PICC), as well as the European (soft law) rules in the proposed Common European Sales Law[10] (CESL), the Draft Common Frame of Reference[11] (DCFR), and the Principles of European Contract Law[12] (PECL). Special emphasis will be placed on the PECL and DCFR due to the numerous references by Spanish case law which serve

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[8] STS 20 April 1989 (RJ 1989\3244).

[9] Produces the novation effect over the previous agreements that extend or contradict the terms of the final written contract, these being agreements as the only means of proof by means of the written contract.

[10] Proposal for a regulation on the European Parliament and of the Council on the Common Sales Law, COM (2011) 635 final.

[11] Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (Acquis Group)*, Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR),* Munich 2009.

[12] O. Lando, H. Beale (eds), *The Principles of European Contract Law,* Parts I and II, The Hague 2000.

to interpret the gaps where the Spanish Civil Code remains silent. A comparison with international instruments has not been addressed comprehensively as Spanish case law is rather opaque in its rulings, though several awards referring to these instruments are presented to prove the admissibility of the merger clause.

The prominent role of Spanish case law in this dissertation impacts on the fields to be examined. The results of the admissibility and application of the merger clause concern private commercial (regulated by civil and commercial law) contracts, i.e., business-to-business contracts. Business-to-consumer contracts are excluded from the scope of this study as it is probable that a merger clause constitutes an unfair contract term and is therefore invalid.[13]

Furthermore, the study only refers to private parties who choose Spanish law as the governing law, either by common choice or because the courts of Spain, *lex fori,* are deemed to rule on the contract as the default governing law applied to the contract. Thus, business-to-consumer contracts, contracts between a public and a private party, as well as contracts with partners abroad with international parties are excluded since they are regulated by consumer laws or specific provisions that may not prevent the admissibility and application of the legal effects of the merger clause.

1.4. Structure

This introductory chapter presents the underlying problem and thesis as well as explanations of the methodology, scope and structure. The focal points of this dissertation are divided into three main parts comprising a total of 14 separate chapters. Part I (Chapters 2–5) begins with an overview of merger clauses, focusing in particular on their functions, and outlining their general treatment in Spanish law as well as in international and European sets of rules, before examining in more detail fundamental principles underpinning the conclusion and contents of contracts under Spanish law. The fundamental elements of the contract provide a framework to the parties as well as delimiting the non- and mandatory legal notions as to the terms of the contract. Part II (Chapters 6–12) is the backbone of the study in which the application, validity and interpretation by Spanish courts is examined. Each chapter is divided into subchapters in which the nexus concerning the admissibility and conclusion

[13] Such consequence was proposed in Art. 72(3) CESL.

of the merger clause is presented. Part III (Chapters 13 and 14) presents the conclusions from the analysis. It presents guidance for practitioners where different scenarios are outlined in order to understand the legal effects and correctly draft the merger clause for a contract governed by Spanish law.

Part I

2. The merger clause

This first chapter of Part I provides key insights into the instrument of the merger clause in order to establish a solid foundation before proceeding with the legal examination thereof. Following a general overview of the terminology and functions surrounding the merger clause, this chapter addresses the treatment of merger clauses under Spanish law and their recognition in international and European sets of rules.

2.1. Terminology: *"cláusulas de integración"*

> *"This contract is intended by the parties to be the full and final expression of their agreement and shall not be contradicted by any prior written or oral agreement."*[14]

This is an example of a "merger clause".[15] Although nowadays their use is a common practice in the United States, where they have been widely applied in a variety of commercial contracts, their first use was in England. In the words of *Cordero-Moss*, "the entire agreement clause is intended to operate as an express incorporation of the parol evidence rule and, in that sense, it is a clause which aims at detaching the contract from the need to have English law as the governing law"[16]. As is apparent from its content, such clause serves to "merge" the negotiations and prior agreements into the final written agreement of the parties, hence the designation as a "merger clause". Many different expressions are used to describe such clauses with the same such purpose, for example an "entire agreement clause", a "whole agreement clause", or an "integration clause". Outside of English, the clauses are referred to in French as *"intégralité des conventions or accord complet",* in German as *"Vollständigkeitsklauseln"*[17], and in Spanish as *"acuerdos*

[14] Sample clause available under https://contractbook.com/dictionary/merger-clause.
[15] For further examples in Spanish, see subchapter 2.3.3.
[16] E. Peel, "Boilerplate clauses under English law", in: G. Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge 2011, p. 138.
[17] The meaning and effects of an entire agreement clause differs less between German and English law, than German law and the law of most US states. If the parties agreed on product specifications but these are not included in the contract, German law does not

previos" or *"cláusula de integración"*.[18] Since the term "merger clauses" best reflects the function, precise definition and legal effects of such clause, it will be used hereinafter, with *"clásulas de integración"* favored for references to Spanish law.

2.2. Functions

In Anglo-American legal systems, the accuracy and completeness of the writing is presumed, which is reinforced by the application of the parol evidence rule – a rule of the substantive law of contract interpretation rather than a rule of evidence, which excludes earlier agreements that have been merged into the written document.[19] The incorporation of a merger clause in a contract enhances and shields the effects of the parol evidence rule to exclude liability for pre-contractual statements by declaring that the agreement is final and complete: *"A merger clause is a private parol evidence rule."*[20] In countries of a civil-law tradition (such as Spain), which may not feature a parol evidence rule or the presumption of accuracy and completeness,[21] the parties

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prevent a party from proving that such specifications were part of the agreement where the burden of proof lies on the plaintiff to clarify and prove why the modification was not included in the contract: U. Magnus, "Boilerplate clauses under German law", in: G. Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge 2011, p. 195.

[18] The Panhispanic dictionary of Spanish legal terminology defines the merger clause as "*Cláusula que determina que el contrato internacional contiene el acuerdo íntegro entre las partes, que no podrán invocar otros documentos o declaraciones para hacer valer obligaciones no contempladas en el contrato"* It is interesting that, through *"contrato internacional*", this definition presumes that a merger clause is only found in international contracts. Such nuance shows the current alien nature and lack of legal practice of the merger clause in the Spanish legal system.

[19] The parol evidence rule can be traced back to the 16th century: "Also it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted." *Countess of Rutland's Case* (1572) 77 ER 89, 91. Note that the parol evidence rule is not applied uniformly in common law jurisdictions. It is also not accepted in codes based on Roman law due to the admission of extrinsic evidence to ascertain the common intention of the parties.

[20] Wallach, "The Declining 'Sanctity' of Written Contracts – The Impact of the Uniform Commercial Code on the Parol Evidence Rule", Mo. L. Rev. 44/1979, 651, p. 677.

[21] A. Müller, *Protecting the integrity of a written agreement, a comparative analysis of the parol evidence rule, merger clauses and no oral modification clauses in U.S., English, German and Swiss law international instruments (CISG, PICC, PECL and CESL)*, The Hague 2013, p. 179.

need to resort to other contractual instruments to seek similar legal effects. Due to the lack of consolidated practice in the use of merger clauses and the parol evidence rule, it is challenging to measure and establish their scope of application since the legal effects are rooted in common law jurisdictions and doctrine. Nonetheless, it is possible to demonstrate that a merger clause will produce its full legal effects when it is subject to individual negotiation and is compliant with Spanish mandatory rules. In application of Art. 3 Rome I Regulation, the parties may choose the law applicable to the contract. Delimitation of the effects and scope of application of merger clauses will be within the framework of national laws.

In essence, including a merger clause in the written agreement fulfils two main purposes. First, it provides legal certainty. Merger clauses are typically used in international contracts where the parties may have negotiated – possibly over a considerable period of time – different proposals and drafts until they have reached a final agreement. The extensive communication documented between the parties can take various forms, such as emails, memoranda of understanding, exchanges of information, calls, letters, drafts, letters of intent, etc. It is therefore understandable that merger clauses are widely common in contracts of long duration or performance, such as construction, supply, or utilities. Second, the incorporation of a merger clause into the written agreement excludes recourse to extrinsic evidence together with circumstances and representations not integrated in the written contract.

Merger clauses thus have an important contractual function by restricting subjective contextual circumstances to be considered, especially in those jurisdictions where negotiations play a significant role between the parties. Their main legal effect is to prevent statements arising from negotiations to be included or to modify the terms of the written contract. However, the question arises as to how these terms are affected in cases where one of the parties claims that, apart from the terms of the final agreement, there are other terms that may alter or modify the signed contract. To what extent is the argument valid that, for the purpose of reconstructing the contract, it is permitted to refer to previous statements to determine the common intention of the parties? Answering this question requires consideration of the different functions of the merger clause.

2.2.1. Interpretation

The different functions of the merger clause arise from its application and legal effects to the particular contract to which they are incorporated. The first issue arises when the terms of the contract are ambiguous and there is discrepancy between the parties' intention and the written terms. This is the interpretative or hermeneutic function of the merger clause, which aims to provide clarity and certainty as means of interpretation to the contract terms. They thus do not affect the process of interpretation, but instead provide the judge with an objective interpretation of the parties' common intention regarding preceding agreements and circumstances. In other words, it aims to provide the interpreter with clarity.

From a contextualist, actual intent-based approach, the merger clause will guide the judge or arbitrator to presume that prior understandings are not to be considered as part of the written contract since the parties have mutually intended so. Any reasonable person dealing with a clause stating that the contract is an entire contract and understanding between the parties, should follow such meaning.[22] Therefore, it can be understood that merger clauses are used to provide an additional contextual element when interpreting the contract in order to align the meaning of the obligations incorporated to the contract with the principles and rules of interpretation.[23]

2.2.2. Integration

The written contract aims to provide proof of the parties' statements, agreements and omissions of what they have agreed upon during the negotiations. The written terms aim to express the final and complete agreement in order to avoid uncertainty regarding what has been or was not agreed. The question therefore arises of the existence of contractual rights and obligations that are not incorporated into the written contract, oral undertakings or agreements,

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[22] Polish contract law presents the same similarities as Spanish law, i.e., it does not provide a rule analogous to Art. 2:105 PECL nor to Art. II.-4:104 DCFR: R. Strugała, "Merger Clauses governed by Polish Law", Wroclaw Review of Law 2013, 14 at p. 20.

[23] As recognized in section 217 of the *Restatement Second of Contracts*, in § 2-202 UCC, Art. 2.1.17 PICC, in Art. 72 CESL, and maintained in connection with Art. 8 CISG. Similarly, Art. 4.2.3 OHADAC Principles states: "The content of the contract cannot be modified or completed by previous statements or agreements if the parties have included a clause stating that the contract contains all terms agreed upon by the parties. However, such statements or agreements may be used to interpret the content of the contract".

which one of the parties may claim that it should be incorporated, and which may modify, integrate or contradict the final contract.

By including a merger clause in a written agreement, the parties declare that the contract constitutes their final agreement, that it contains a complete agreement on all the terms negotiated and that no representations or promises other than those provided for in the contract have been made. To this end, other extrinsic means of proof that may supplement or contradict the terms of the contract are excluded, barring the interpretation from prior or provisional negotiations or agreements prior to the conclusion of the contract. The clause would have the effect of preventing any documentation prior to the terms signed by the parties, to be adduced as proof against the writing. This is the integrative function which aims to *merge* previous undertakings into the final and written agreement.[24] Compared to contracts where no merger clause is incorporated, the merger clause thus makes it easier to prove the complete integration of the contract.

Such integrative function needs to be aligned with the subject matter of previous oral agreements and the final and embodied written agreement which represents the parties' common intention. Once the scope of application of merger clauses has been determined, there are two main scenarios in which the merger clauses may apply: (i) the need for the final terms of the contract to be shielded from possible interpretative manipulations and, (ii) the need to provide with legal certainty on the embodied terms of the writing thus avoiding misunderstandings when interpreting the agreed terms, i.e., that the contract terms do not allow further interpretation or extrinsic evidence.[25]

2.2.3. Exclusion of gap-filling and application of implied terms

In the case of contractual gaps arise during the interpretation of the contract, the merger clause prevents such gap from being filled by declarations and documents external to the final contract, since this would imply the recognition of obligations not contained within the terms of the agreement. Preventing the judge from filling such gaps in the terms of the contract requires the

[24] How the integrative function is applied under Spanish law will be further analyzed in Chapter 10.

[25] C. von Bar and E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) – Full Edition*, Munich 2010, p. 286.

wording of the merger clauses to clearly state that the intention of the parties is to bar the parties to proffer extrinsic evidence to contradict the discharging effect suggested by the wording of the merger clause. Should the gap concern the essential elements of the contract, it would be more practical for the arbitrator or judge to declare the contract ineffective than to resort to the methods of integration from the English or the Romano-Germanic system that may entail uncertainty. Further, the legal effects of the merger clause will exclude implied terms that may resorted as obligations not considered by the parties from being introduced into the formal contract.[26]

2.2.4. Exclusion of certain aspects

The Working Group for the Preparation of the UNIDROIT Principles of International Commercial Contracts (1994) endorsed that merger clauses may perform exclusionary functions on the following aspects: (i) simulation (*contre-lettres*),[27] although rare in practice, they could exclude the simulated contract where the intention of the parties is different from the final contract; (ii) prior contracts coexisting with subsequent contracts, in order to accurately identify the applicable contract; (iii) general conditions. The exclusion of precontractual documents is the most disputed function from a civil law perspective and corresponds to the non-admission of any element coming from prior negotiation of the parties outside the terms of the written contract.

2.2.5. Cost reduction

The use of merger clause to increase the legal certainty of contracts that have been subject to negotiations over a long period of time (thus precluding oral warranties and representations not included in the final agreement) may lower the costs of litigation resulting from ambiguous contract terms. A merger clause drafted with clarity will prevent the judge from asserting extrinsic evidence to the final agreement and the parties from incurring additional expenses for appealing against the decision, i.e., the costs of legal fees for drafting the contract and for entering into litigation.

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[26] This particular function is further analyzed in more detail in Chapter 11.

[27] See also: H. Dubout, "Les clauses d'entire agreement (accord complet) dans les contrats internationaux: intérêt et précautions d'utilisation", Centre français du commerce extérieur 1/1989, pp. 193–209.

2.3. Merger clauses in the Spanish legal system and practice

2.3.1. Overview

As stated above, in Anglo-American laws, accuracy and completeness of the written contract are presumed and reinforced by the application of the parol evidence rule. In Spanish law, which features neither the parol evidence rule nor the presumption of accuracy and completeness, the legal effects of the merger clause need to be stated on a case-to-case basis as Spanish jurists are neither familiar nor trained with the practice of these clauses. Hence, their wording should be observed with caution and clarity as to the intended effects.[28]

A merger clause strengthens the presumption that the contract document is the correct and complete agreement of the parties' intention. For this reason, these clauses are rare in the Spanish legal system: the presumption of accuracy and completeness of the contract may be rebutted by any type of proof,[29] including oral agreements and representations.

In practice, merger clauses are often included as a standardized clause or boilerplate in complex commercial contracts, frequently incorporated at the end of the contract to regulate contract general matters. It is unusual for Spanish contracting parties to individually negotiate a merger clause, which limits even more its legal effects to exclude extrinsic evidence and implied terms derived from good faith, as a governing principle of Spanish contract law. How the parties respond to such merger clauses is, however, sometimes contradictory to the clause. Despite being incorporated into the contract, the parties therefore resort to prior oral understandings that may alter the content of the final contract, i.e., ignoring the intended legal effects of the merger clause. Incorporation of merger clauses into Spanish contracts will not limit the recourse to extrinsic evidence unless the parties' clear common intention is to prevent the use of extrinsic evidence for the purpose of interpretation.

Furthermore, the lack of regulation of merger clauses under Spanish law creates uncertainties around the legal treatment of such clauses, with Spanish

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[28] A. Müller, *Protecting the integrity of a written agreement, a comparative analysis of the parol evidence rule, merger clauses and no oral modification clauses in U.S., English, German and Swiss law international instruments (CISG, PICC, PECL and CESL)*, The Hague 2013, p. 179.

[29] Based on the principle of freedom of evidence, see Chapter 10.

courts often resorting to international sets of rules to understand and deal with the legal effects of a possible merger clause incorporated into a contract governed by Spanish law. In this regard, it is to be stressed that that the clarity of the wording of the merger clause is vital to bar the judge from considering extrinsic evidence.

2.3.2. Scope of application

The validity of a contract is established according to domestic law. Pursuant to Art. 1252 CC, the contract is valid[30] from the moment the parties consent to enter into a legally binding agreement. Merger clauses, as contractual legal clauses, are subject to the freedom of contract and the mandatory rules applied to the formation and interpretation of contracts regulated in the Spanish Civil Code. However, the scope of valid application of a merger clause requires a distinction to be drawn between the type of contracting parties. For consumer contracts (B2C), *Ley 7/1998, de 13 de abril sobre Condiciones Generales de la Contratación* ("law on general conditions of contracts"; LCGC) regulates the requirements of standard terms and the requirements that these clauses shall meet pursuant to Art. 80 LGDCU as well as to the consideration of unfairness of the clauses that have not been individually negotiated (Art. 82.1 LGDCU). When incorporated into non-negotiated general terms and conditions, the merger clause will probably be considered an unfair term. It is undisputed that the merger clause will be likely declared invalid when incorporated into a B2C-contract as it will be to the detriment of the consumer.[31]

Although the Spanish Civil Code contains rules of interpretation of contracts, there are neither any rules nor legal provisions that concern how the contractual clause shall be negotiated in B2B contracts. The question arises as to the presumption of validity in such contracts. This depends on two main criteria. First, whether they are incorporated as individually-negotiated standard terms. Second, whether the common intention of the parties leave no doubts as to the presumption of integration of the contract, i.e., whether external evidence to the contract will be prevented to interpret the contract.

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[30] In specific cases where the consent of the contract is challenged, merger clauses do not prevent the use of prior negotiations to interpret the actual intention of the contracting parties, since their common intention is considered an essential element for the conclusion of the contract. See subchapter 4.4.

[31] See subchapter 5.1.

Merger clauses included in individually-negotiated contracts are admissible in Spanish law based on principle of freedom of contract. However, their enforceability can be challenged as any other term that form part of the contract. When incorporated in standard terms, they only serve as a refutable presumption that the parties intend their prior declarations of intent to be deemed not to form part of the contract[32].

2.3.3. Examples

If the parties have agreed to include a merger clause, several aspects are to be taken into consideration. First, drafting a merger clause should always be done considering the law applicable to the contract.[33] Second, the background of potential interpreters, i.e., judges and arbitrators shall be taken into account.[34] Considering Spanish law as the applicable law to the contract, where legislative provisions on merger clauses are absent and the background of Spanish judges and arbitrators, one may presume that considerable weight will be attached to the wording of the clause itself, thus the interpretation of the merger clause may be dependent on the language of the clause. Hence, the intended effects of the merger clause shall be described in detail and reference to provisions of domestic law are to be avoided.

The merger clause can be drafted as a boilerplate or standard clause, known as *"cláusula de integridad"*. When the merger clause is incorporated in standard contracts it is usually included under *"General" or "Otras consideraciones"* or *"cláusulas de interpretación del contrato"* sections of the contract.[35] An example of a boilerplate merger clause in Spanish reads as follows:

"Este contrato contiene el acuerdo íntegro entre las partes en relación con su objeto. Ninguna de las partes se obliga por acuerdos expresos o implícitos,

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[32] Arts II.-1:109 and II.-4:104 DCFR, respectively define a standard term and the presumption that prior statements are not part of the contract.

[33] A. Müller, *Protecting the integrity of a written agreement, a comparative analysis of the parol evidence rule, merger clauses and no oral modification clauses in U.S., English, German and Swiss law international instruments (CISG, PICC, PECL and CESL)*, The Hague 2013, p. 258.

[34] A common law trained judge will interpret the merger clause different that a common-law judge given the same legal circumstances.

[35] S. Sánchez Lorenzo, *Cláusulas en los contratos internacionales, redacción y análisis*, Barcelona 2012, p. 230.

representación, garantía, promesa o similar que no estén recogidos en el presente documento, con excepción de los que deriven de la ley aplicable. En caso de contradicción entre este contrato y cualquier otro documento emitido con anterioridad, prevalecerá este contrato".[36]

As an individually negotiated clause, clear wording is necessary:

"Para la interpretación de este contrato no se considerarán declaraciones ni documentos emitidos por las partes al margen de la formalización del contrato formal".[37]

2.4. International and European sets of rules

By incorporating a merger clause in a contract, the parties understand that the agreement is to be interpreted based on the written terms incorporated therein, thus preventing any recourse to prior negotiations or extrinsic evidence that may modify or supplement the written agreement.[38] Merger clauses may therefore be useful where there are prior agreements and negotiations that are later superseded by new negotiations included in the written contract, but only if these prior negotiations have a logical and natural bond with the subject matter and are not independent thereof. If this were the case, they risk to be declared ineffective. From a European legal perspective, merger clauses have full validity during the stage of contract formation, assuming an integrative function (hermeneutic scope) to assess the history of the contract. In the Romano-Germanic legal systems (French, Italian, Spanish, and German) the application of the principle of subjective interpretation aims to determine the intention of the parties and whether pre-contractual statements are considered to modify or supplement the contract.[39] It is therefore common practice for the parties to invoke obligations external to the written contract derived from

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[36] "This contract contains the entire agreement between the parties in relation to its subject matter. None of the parties is bound by express or implicit agreements, representation, guarantee, promise or similar that are not included in this document, with the exception of those that derive from the applicable law. In case of contradiction between this contract and any other document issued previously, this contract will prevail."

[37] Clause drafted by the author.

[38] E. Farnsworth, "Article 8 CISG", in: Bianca C. and Bonell M. (eds), Commentary on the International Sales Law: the 1980 Vienna Sales Convention, Milan 1987, p. 102.

[39] Spanish law follows the subjective interpretation of the contract which aims to ascertain the historical background and circumstances surrounding the conclusion of the contract, L. Díez-Picazo and L. Morales, *Los Principios del Derecho europeo de contratos,* No. 5., Madrid 2001, p. 184.

the intention of the parties, both from the written documents and from other extrinsic evidence. However, since the common intention of the parties is considered an essential element for the conclusion of the contract, in particular cases merger clauses do not prevent the use of prior negotiations to interpret the parties' actual intention (e.g., fundamental mistake[40]).

Due to the nature of the merger clauses used in Anglo-American jurisdictions and their influence in international trade, and their legal effects characteristic of the common law practice, these effects will not be fully transposed or honored in civil law jurisdictions, such as Spain. Hence, it is paramount to define the intention of the parties both from the pre-negotiation phase and from the time the contract has been concluded. This will ease the incorporation and further interpretation of a merger clause into Spanish law in order to prove complete integration of the contract. Due to the lack of regulation on the merger clause under Spanish law, other sets of rules will be analyzed in order to bring clarity and further understanding to its possible incorporation into contracts governed by Spanish law.

2.4.1. CISG

The UN Convention on Contracts for the International Sale of Goods (CISG[41]) does not explicitly address merger clauses and their effects. In its Opinion No. 3, the CISG Advisory Council has aimed to provide a test to determine the scope of merger clauses. Pursuant to Art. 8(3) CISG, recourse to prior negotiations to determine the intention of the parties is permitted. The validity of the merger clause has been widely discussed[42] and in light of

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[40] The fundamental mistake is cause to invalidate the contract according to Art. 1266 CC.

[41] Spain is a member state of the CISG after its ratification on 24 July 1990.

[42] *Farnsworth* upholds the validity of the application of the merger clauses since it is not the same to exclude from the CISG the application of the parol evidence rule criterion as to deny the operability of the clauses of the contract. E. Farnsworth, "Article 8 CISG", in: Bianca C. and Bonell M. (eds), Commentary on the International Sales Law: the 1980 Vienna Sales Convention, Milan 1987, p. 102. According to *Sánchez Lorenzo*, it is not appropriate to understand Art. 8 CISG as excluding merger clauses, since they have the essential effect of excluding from the contract, as "obligations", any declarations or documents not contained in the final agreement: "La interpretación del contrato internacional: una aproximación desde el derecho comparado -instituto de investigaciones jurídicas de la UNAM", https://archivos.juridicas.unam.mx/www/bjv/libros/6/2776/9.pdf. A. López y López argues that the wording of Art. 8(3) CISG seems to be designed to exclude merger clauses, which, in his opinion, does not seem unusual, given the confluence of the two legal traditions on this point, that of civil law, which does not

Art. 8(3) CISG the courts shall consider only the domestic law perspective determined by the law applicable to the contract, since what is at issue is a question of the validity of a contractual determination, which is not regulated by the CISG. It should therefore be understood that there is a difference between domestic law and international law in determining the intention of the parties. Such distinction should not be overlooked when drafting the merger clause in order to achieve higher level of legal certainty. The CISG thus brings the interpretation of the contract under the influences of civil law (preferential subjective criteria) and common law (reasonable person principle, as the objective criteria), excluding the parol evidence rule, but leaving open the possibility that the parties may include merger clauses. The formula suggested by the CISG suggests that parties are in full control of determining the scope and the effect of merger clauses, since the common intention rules the interpretation of the contract.

2.4.2. PICC

Merger clauses are expressly regulated in Art. 2.1.17 PICC, whereby evidence of prior statements or agreements cannot contradict or supplement the contract when the contract contains a merger clause. By default, Art. 2.1.17 PICC states that in the absence of a merger clause, extrinsic evidence supplementing or contradicting a written contract is admissible. In this respect, Art. 1.2. PICC establishes freedom of form and freedom of evidence, which includes, inter alia, oral evidence in judicial proceedings. However, under the PICC, the effect of merger clauses is not to deprive previous declarations or agreements of all meaning,[43] since they may be used as a means of interpretation to resolve doubts or ambiguities in the written document (see the second sentence of Art. 2.1.17 PICC). The scope of merger clause in the interpretation of the PICC does not extend to negotiations or agreements made *after* the conclusion of the contract, which may be treated as letters of

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recognize the parol evidence, and that of common law, which is in the process of suppressing it or at least mitigating it, in: L. Díez-Picazo (ed), *La compraventa internacional de mercaderías*, Madrid 1997, p. 119.

[43] The purpose of these clauses is not to establish the parol evidence rule by convention, M. Serrano Fernández, *Estudio de Derecho Comparado sobre la interpretación de los contratos ¿Hacia una unificación de la hermenéutica contractual?,* Valencia 2005, pp. 392–394.

confirmation.[44]

Furthermore, Art. 4.3. PICC contains the "relevant circumstances" for interpretation, pursuant to Art. 4.1 PICC. Parties to international transactions often include a provision under the heading of "merger or integration clauses" stating that the written contract fully and exclusively incorporates all the terms of the agreement. This raises the question of how the scope of extrinsic evidence is defined within the relevant circumstances of Art. 4.3 PICC and, in particular, from the preliminary negotiations. Since the conduct of the parties is subsequent to the conclusion of the contract may agree to modify preliminary negotiations, the intention of the parties needs to be re-valuated to ascertain their true intention.

2.4.3. PECL

Art. 2:105 PECL concerns merger clauses.[45] According to Art. 2:105(1) PECL, a merger clause must be individually negotiated in order to exclude any prior statements, undertakings or agreements not embodied in the written contract. Accordingly, when the clause is individually-negotiated, the principle of party autonomy prevents each of the contracting parties from invoking declarations, undertakings or agreements not incorporated into the written contract. No prior agreement, promise or statement may therefore form part of the written contract or modify or supplement it, whether they have been made in the course of negotiations or whether they been anchored in writing (in the latter case, they will be understood to be novated by the terms of the final contract). In the event that a merger clause is a standard term (i.e., not individually negotiated), it only establishes a presumption that the parties intended that the prior statements and undertakings should not be included in the final contract (Art. 2:105(2) PECL). However, the parties may rebut this presumption with proof to the contrary. The parties cannot exclude or restrict the use of prior statements to interpret the contract, unless such clause is individually negotiated (Art. 2:105(3) PECL). Furthermore, Art. 2:105(4)

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[44] See P. Viscasillas, "Tratamiento jurídico de las cartas de confirmación en la Convención de Viena de 1980 sobre Compraventa Internacional de Mercaderías, Revista Jurídica del Perú 1997, pp. 241–261.

[45] As Art. II.-4:104 DCFR corresponds in substance to Art. 2:105 PECL, the DCFR will not be examined separately. The provisions of Art. 72 CESL contain specific rules for B2C contracts, though Art. 72(1) corresponds to Art. 2015(1) PECL.

PECL refers to one of the grounds for limiting the effects of merger clauses: the principle *of venire contra factum propium.*[46] In the same line of interpretation, the *Lando Commission* has stated that merger clauses do not apply to agreements and declarations which, although they refer to the time of negotiations, are autonomous and independent of the contract terms.[47] However, they will be fully applicable in cases where external precedents are connected to the subject matter of the contract, hence it presumes the rule that the merger clause will form part of the future contract terms. Similarly, according to the *Lando Commission*, the parties should be allowed to prove that merger clauses were not agreed to substitute a specific oral promise or promise made in another document, since it is assumed that a rule preventing a party from enforcing an earlier statement or promise would be excessively rigid and would often lead to results contrary to the good faith.[48]

[46] This principle has been recognized as a general principle applicable within the PECL, e.g., to resolve the question of the possible loss of the legal defense due to late notice. Arbitration Tribunal-Vienna, Austria, 15 June 1994, which expressly states, citing §§ 7, 16(2) b and 29(2) ABGB, that the principle of estoppel or *venire contra factum propium* is a special application of the principle of good faith. It is fully applicable in Spain, France, Italy, Greece and Germany. Specific rules are provided in countries such as Austria, Estonia and Bulgaria.

[47] O. Lando, H. Beale (eds), *Principles of European Contract Law, Parts I and II,* The Hague 2000, pp. 114 et seq.

[48] Ibid., p. 153.

3. Admissibility of the merger clause under Spanish law

Although merger clauses are used in practice as a boilerplate clause in commercial contracts, such clauses are an instrument alien to the Spanish legal system. As merger clauses are rarely individually negotiated by Spanish contracting parties, this may also have a limitation on its legal effects to exclude extrinsic evidence and implied terms derived from good faith.[49] Accordingly, the inner characteristics of the Spanish legal system may pose some legal challenges to be regarded as certain limitations to its admissibility, especially as such clauses lack regulation in the Civil Code, which is the main rule of law for contracts and its interpretation, and in the *Código de Comercio,* Spanish Commercial Code, of 1885 or in its latest Proposal of Amendment of 2014 (*el Anteproyecto de Ley del Código Mercantil)*.

This Chapter therefore addresses aspects surrounding its admissibility and subsequent application under Spanish law from a broad spectrum of perspectives in order to provide a comprehensive picture of the underlying admissibility of a merger clause from the Spanish legal perspective.

3.1. *Principio de justicia rogada*

The *principio de justicia rogada* ("adversarial principle") is a principle of Spanish procedural law which states that any proof resorted to in the oral hearings needs to be brought by the interested party only.[50] Thus, it is for the parties, not the judges, to bring the evidence to the proceedings for their subsequent assessment. Such rule is mandatory and not subject to interpretation by the parties. Furthermore, the different sort of evidence that the parties may allege before the judge are ruled by the principle of freedom of evidence, which virtually allows the parties to resort to any proof they consider, according to Art. 299.3 LEC.

Once the judge has acknowledged the evidence, she will rule exclusively on what has been alleged and proven by the parties (*iudex iudicet secundum allegata et probata partium*). This procedural principle is fundamental to understand and analyze the admissibility of the merger clause as it establishes

[49] Good faith is an essential principle for the interpretation of contracts under Spanish law, see subchapter 4.1.6.
[50] Based on Art. 216 LEC.

the mandatory rules of legal procedure under which the parties may agree upon the incorporation of a merger clause, thereby impacting upon the effectiveness of the legal effects of such clause.

3.2. Contract interpretation

The process of interpretation of contracts is enshrined in Arts 1281–1289 CC. The subjective interpretation is followed in the Spanish legal system based on the common intention of the parties where the interpretation aims to ascertain the historical background and circumstances surrounding the conclusion of the contract (*formación del contrato*).[51] The question arises as to how predictable the outcome of litigation will be, namely how the Spanish judge will interpret the subsequent conduct of the parties that may dispute prior understandings and agreement which might not be included in the contract. What is degree of integration of the contract? In practice, this question – usually -concerns the *teoría de los actos propios*: the doctrine of *actos proprios*.[52]

Prima facie, the prior conduct of the parties after the conclusion of the contract, will still be considered as part of the historical interpretation in accordance with the *actos propios* doctrine.[53] Such subsequent interpretation conducted by the judge may declare the merger clause invalid when the subsequent acts of the parties are contrary to the integrity and content of the agreed terms, such as agreements or oral representations not included in the final written contract. Accordingly, statements asserted by one of the parties that may had invoked the confidence of the other party and therefore meet the requirements set out in the *actos propios* doctrine, could disrupt the legal effects of the merger clause, even declared it invalid.

However, according to the Spanish interpretation of contracts the common intention of the parties shall be determined by ascertaining contemporaneous or subsequent actions of the parties after the conclusion of the contract.[54] According to Art. 1282 CC, oral agreements or understandings are not subject

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[51] Unless previous declarations had been expressly excluded by the parties. L. Díez-Picazo, E. Roca Trias and A. Morales Moreno, *Los principios del derecho europeo de contratos,* Madrid 2002, p. 184.

[52] As per STS 9 December 2010 (RJ 2011\1408) and STS 25 February 2013 (RJ 2013\7413).

[53] Subchapter 6.3.

[54] Art. 1282 CC: "*para juzgar de la intención de los contratantes, deberá atenderse principalmente a los actos de éstos, coetáneos y posteriores al contrato*".

to the rule of interpretation of provisions envisaged in Arts 1282 and 1289 CC, since these are prior agreements or acts to the conclusion of the contract. Such statement is voiced by judgements of the Spanish Supreme Court.[55] Further, by virtue of the parties' freedom of contract,[56] they may voluntarily exclude statements that can be used for interpretation, as long as they do not violate mandatory rules and provided that: (i) they do not result in a lack of defense (*indefensión*) nor prejudice for one of the parties, (ii) nor limit the evidentiary function. Therefore, by including a merger clause to the written contract, the parties may limit the scope of interpretation to their legal relationship by expressly excluding external evidence and undertakings against their desired interpretation of their contract. Art. 1282 CC proves the argument that should the parties incorporate a merger clause to the contract, the judge will have to respect the common intention of the parties and consider the writing in which the merger clause has been included as an integrated document that includes all the agreements reached by the parties. The aforementioned argumentation demonstrates that a merger clause is fully admissible to the extent that it is covered by the parties' intention and its effects are clearly stated in its wording.

3.2. Type of contract

As it will be further analyzed in subchapter 4.2., the principle of freedom of form principle governs Spanish law where no form is required for the validity of a contract, unless explicitly expressed otherwise (e.g., solemn contracts). The admissibility of the merger clause in a contract governed by Spanish law will therefore depend on the type of the contract, whether Spanish law provides specific rules governing such contracts and whether the admissibility of the merger clause depends on compliance with such rules.

3.2.1. Oral agreements

A merger clause will not be validly included as part of an oral agreement since its mere existence and content cannot be proven; unless it had been authorized in public deed and subsequently proven by the declarant party. Further, oral

[55] STS 2 December 1994 (RJ 1994\9393) and STS 12 July 2004 (RJ 2004\4342).
[56] Subchapter 4.1.

agreements or undertakings are not subject to the rules of interpretation envisaged in Arts 1282 and 1288 CC.[57]

3.2.2. Solemn contracts or contracts entered in public document

The parties may agree on a solemn form, e.g., a public deed for the sale of real estate (*ab substantiam*) for their agreed terms (pursuant to Art. 1280 CC), where a merger clause is incorporated therein. If the form required is not fulfilled by any of the parties, the contract will be invalid together with the merger clause. If the form required by statute to which the parties decided to voluntarily abide by is not clearly met (*"carácter constitutivo"*), the rules of interpretation of the contract will apply as default rules.

3.2.3. Private contracts

Under Spanish law a private document only produces effects *inter partes* (*res inter alios acta alteri non nocet*). A merger clause incorporated to a private document where no mandatory rules are violated will be valid thus producing its legal effects to the signatory parties.

3.2.4. Adhesion contracts

With regard to merger clauses incorporated as boilerplate terms in B2B contracts two distinctions need to be made.

3.2.4.1. Standard terms

Where the requirements of incorporation, duly informed and transparency set out by Art. 7 LCGC are met, a standard term may be valid. Hence, a merger clause incorporated under such provision only makes a presumption that the parties wished not to include previous understandings to be integrated in their final contract. Thus, the validity of such presumption may be easily challenged by the judge interpreting the contract, even risking an unfavorable award against the buyer.

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[57] STS 2 December 1994 (RJ 1994\9393) and STS 12 July 2004 (RJ 2004\4342) prescribe the interpretation of the Código Civil to only written agreements.

3.2.4.2. Individually negotiated terms

Should the parties commonly agree in writing that oral declarations are of a suppletory nature (i.e., to be excluded from the contractual terms; *"regla de la prevalencia"*) the judge will respect the common intention of the parties and the merger clause will produce full legal effects. This is type of contract where the merger clause would produce its full legal effects thus providing with legal certainty to the terms agreed within the contract.

3.3. Comparison to similar legal instruments in Spanish law

The Spanish legal system regulates other legal instruments whose legal effects and obligations could shed some light on the possible admissibility and application of a merger clause incorporated into a contract governed by Spanish law, namely (i) the rule *venire contra factum propium* (also called the doctrine of *actos propios*) and (ii) *el negocio de fijación* ("determination of the contract terms").

3.3.1. *Actos propios*

The doctrine of *actos propios*[58] reflects the civil law principle *venire contra factum propium.* This principle is founded upon good faith and prevents a party under special circumstances from deviating from his prior acts, omissions or representations. In practice, courts apply such principle cautiously as its application is limited by the principle of reasonableness, where the parties are expected to act pursuant to what is reasonable in view of the business transactions, interests and the particular circumstances involved.[59] Its application concerns the position of a reasonable person understood as a neutral person who had the available knowledge as the parties would have had at the time of the conclusion of the contract in the same circumstances.[60] *A priori*, the validity of the merger clause could be disputed by a party claiming that he did not have all the background knowledge to reasonably conclude the

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[58] For details see A. Vaquer Aloy, E. Bosch Capdevila and M. Sánchez González, *Derecho europeo de contratos, Libros II y IV del Marco Común de Referencia*, Barcelona 2012, pp. 279 et seq.

[59] e.g., Art. 1: 302 PECL on reasonableness.

[60] L. Díez-Picazo, *La doctrina de los actos propios*, Barcelona 1963. H. Díez García, *Interpretación e integración del contrato*, in: R. Bercovitz Rodríguez-Cano (dir.), Tratado de Contratos I, 2nd edn, Valencia 2020, pp. 1088–1089.

contract and that the parties' prior behavior contradicts or is inconsistent with the result of the concluded agreement.

In practice, however, the mere inclusion of a merger clause to the parties' common intention overrides any (possible) misunderstanding of what prior unreasonable or inconsistent behavior of the parties could have been. Following the principle of reasonableness, a reasonable person that encounters the wording of the merger clause as the entire agreement of the parties should, to a great extent, seek such a meaning of the contract as can be inferred from its mere reading rather than an understanding or interpretation according to external circumstances.[61]

3.3.2. *Negocio de fijación*

The *negocio de fijación* ("determination of the contract terms") is a principle which serves to give similar legal effects as to the merger clause. This principle, followed by the doctrine and jurisprudence,[62] is based on the subject matter of the agreement, the so-called "*negocio jurídico*" of the contracting parties. The determination of contract terms aims to avoid disputes derived from a new contract and *unexpected* obligations[63] (*vínculos*) that have a novatory legal effect[64].

Such prior determination of the terms of agreements in order to avoid potential litigation is paramount and constitutes an important alternative to formal dispute resolution in civil proceedings. The incorporation of a merger clause to a contract would imply to support and materialize the theory of the *negocio de fijación* while providing the legal certainty of a legal figure customary and rooted in international contract law and to some extent not unfamiliar to the Spanish judiciary.[65] In this respect, the PICC, PECL, DCFR and CESL may provide a Spanish judge with a framework to support the

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[61] The reasonableness principle applied to Polish law contracts can be applied to Spanish law contract by analogy. R. Strugała, "Merger Clauses governed by Polish Law", Wroclaw Review of Law 2014, pp. 19–20.

[62] F. de Castro y Bravo, *El negocio jurídico*, Madrid 1985, p. 75.

[63] STS 20 April 1989 (RJ 1989\3244) and STS 6 November 1993 (RJ 1993\8618).

[64] STS 29 July 1998 (RJ 1998\6452). This judgement proves the novatory function of the legal relationship.

[65] In this regard, the lack of regulation of merger clauses in the Spanish Civil Code would make it necessary for Spanish courts to resort to international legal texts in order to find additional support to the legal effects of the merger clause incorporated to a Spanish-ruled contract.

understanding and validity of the merger clause: (i) Art. 2.1.17 PICC supports the interpretation given in Art. 1282 CC[66] which addresses the common intention of the parties based on the current acts and behavior of the parties. (ii) Art. II.-4:104 DCFR and Art. 2:105 PECL state the subjective criteria of interpretation of the contract, based on the common intention of the parties, and reasonable expectations. (iii) Art. 58 CESL gives preference to the common intention of the parties complemented by the auxiliary rules included in Art. 59 CESL, which mirrors the Spanish contract interpretation contained in Arts 1281–1289 CC where preliminary negotiations are included. Thus Art. 59 CESL, together with Art. 72(2) CESL do not bar circumstances prior to the conclusion of the contract from being regarded.

3.4. Case law

Despite the lack of formal regulation in the Spanish Civil Code, the Commercial Code, or any applicable contract law rules, Spanish courts have deemed the merger clause admissible. In certain awards, where merger clauses were fully enforced, the merger clause succeeded to exclude preliminary negotiations and agreements. These judgements highlight the current need in the Spanish legal system for a legal instrument that shields the parties' agreement from external circumstances. Moreover, certain awards by the Spanish Supreme Court support the notion that the merger clause is a fully valid instrument to be incorporated into Spanish law. To this aim, three different awards have been carefully chosen in which the legal effects of the merger clause are both admitted and disputed thus analyzing both sides of the spectrum to further understand the rationale of Spanish judges.[67]

3.4.1. Effectiveness

3.4.1.1. Spanish Supreme Court

The judgement of 8 May 2012[68] serves as a model to be followed for the possible inclusion and incorporation of the merger clause to the Spanish legal

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[66] *"Para juzgar de la intención de los contratantes, deberá atenderse principalmente a los actos de éstos, coetáneos y posteriores al contrato"*.
[67] The Spanish original text is used to maintain the original text and accuracy.
[68] (RJ 2012\6117).

system since it fulfills the legal effects of the merger clause preventing external alleged interpretations outside the contract.

The case itself concerned a dispute of a purchase and sale of shares in a company in which there was an initial declaration of purchase intentions that was subsequently modified by a contract in a private document. It was subsequently shown that the accounting and financial information provided did not correspond to the reality presented to the buyer. In order to decide upon the validity of the *"cláusula de integridad"*, the Supreme Court first analyzed the question of the literal interpretation of the contract, which does not prevent *"el recurso a factores ajenos a lo expresado"* ("recourse to factors other than what is expressed"), in order to ascertain the intention of the parties and the interpretative effectiveness of the prior conduct of the parties, which includes, in this case, the inclusion of a *"cláusula de integridad"*.

The Court agreed with the seller, concluding that that the parties had intended the *"cláusula de integridad"* to cover any misunderstandings to the purchase and sale of shares. The position adopted by the Court can be interpreted as it is aligned with the current doctrine expressed in Art. 5:102 PECL, pointing out that *"no es dudoso que los contratantes, a fin de evitar malentendidos, puedan prever de forma expresa la ineficacia de los actos anteriores o formular precisiones sobre su alcance"*[69].To this end, the Court invoked Art. 2:105(3) PECL which states that "prior declarations of the parties may be used to interpret the contract […] except by an individually negotiated clause". Since the parties had individually agreed that that all previous acts – particularly the "memorandum" and the "due diligence" – were ineffective in changing the correct meaning of what had been expressly stated, the Court admitted the validity of the merger clause thus ignoring previous negotiations alleged by the opposing party.

3.4.1.2. SAP Guipúzcoa

In its judgement of 20 June 2017[70], the *SAP Guipúzcoa* ruled on a case of purchase and sale of shares in a private document subsequently authorized

[69] Ibid., § 42 ("it is not doubtful that the contracting parties, in order to avoid misunderstandings, may expressly provide for the ineffectiveness of prior acts or formulate clarifications on their scope").
[70] RJ 2017/232132.

into a public deed (by a *notarius publicus*), which included the following clause:

"El documento de acompañamiento y este contrato de novación deberán interpretarse como una única obligación a todos los efectos. A excepción de las modificaciones expresamente acordadas en el presente contrato de novación, del documento de acompañamiento deberá entenderse plenamente vigente y eficaz en todos los términos."[71]

The Court argued that the public deed played an evidentiary function to the contract thus including the sale of shares incorporated to the contract.

3.4.2. Ineffectiveness

The *SAP Madrid* judgement of 4 December 2019[72] concerned a dispute between a company and an employee in relation to a senior management contract. This ruling is an example of the merger clause used as a boilerplate i.e., not individually negotiated by the parties and relying in its effects as mere presumption to the contract.

In this particular case, the defendant claimed a novation of the contract since the following statement contained in the agreement (*stipulatio novatoria*) was a merger clause:

"ambas partes han alcanzado un completo acuerdo para regular su relación, a partir de este momento, sustituyendo cualquier otra relación" (Capítulo V del contrato de Alta Dirección)[73].

The Court agreed and remarked that merger clauses are often standardized clauses that are generally integrated by drafting lawyers into all contracts even when clients did not specifically negotiate such clause, noting further that such clauses do not apply to prior agreements or representations which, although made when the contract was negotiated, are separate and distinct from the contract. [74]

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[71] Ibid., § 3.7 ("the accompanying document and this novation contract shall be interpreted as a single obligation for all purposes. With the exception of the amendments expressly agreed in this novation contract, the accompanying document shall be deemed to be in full force and effect in all its terms").
[72] RJ 2020/95517.
[73] Ibid., § 30 ("both parties have reached a complete agreement to regulate their relationship, from this moment onwards, replacing any other relationship").
[74] Ibid., § 30.

The Court considered that the senior management contract did not novate the initial agreement, as the novation of the agreements is not presumed (pursuant to Art. 1204 CC[75]), thus declaring the agreement to be upheld, since Annex V of the contract was signed in addition to the agreement, thus as a separate contract on the basis of the previous interpretative conduct (Art. 1282 CC[76]). Furthermore, the Court referred that the defendant forwarded such annex to a third party via email which it was interpreted as the defendant's subsequent conduct, i.e., that the conclusion of the agreement was understood to be fully valid and applicable when he sent an email to a third party attaching the agreement. The Court held that a different contract was applicable since the common intention of the parties had been declared when one the parties had already accepted its content by forwarding to a third party external to the contract.

3.5. Doctrine

Although Spanish scholars are well acquainted with the practice of merger clauses in international contract law and the principles and rules used in soft law and European private law model rules, the opinions in Spanish legal literature regarding the validity, admissibility and effects differ widely, strengthening the assertion that such clauses are alien to the Spanish legal system. In particular, opinions are divided about whether the merger clause can fulfill its intended function. Despite these disputes in doctrine surrounding the admissibility of the merger clause, this should not impede a favorable interpretation of the merger clause in Spanish law to provisions of the Civil Code that may welcome its application.

3.5.1. Limitation on extrinsic evidence

To begin, *Garrote Fernández-Díez* argues against the function envisaged by the merger clause when excluding external circumstances to the contract. In his opinion, the effects of the merger clause to preclude extrinsic evidence cannot limit the interpretative function of the judge who needs to ascertain

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[75] *"Para que una obligación quede extinguida por otra que la sustituya, es preciso que así se declare terminantemente, o que la antigua y la nueva sean de todo punto incompatibles"*.

[76] *"Para juzgar de la intención de los contratantes, deberá atenderse principalmente a los actos de éstos, coetáneos y posteriores al contrato"*.

the common intention of the parties and therefore he is entitled to resort to any external evidence that that may justify a particular meaning of the contract which can deviate from previous agreements by the parties.[77]

In a similar vein, *López y López*[78] understands that the merger clause implies a limitation to the interpretative task to the terms agreed by the parties and to ascertaining the real intention of the parties.[79] He stresses the incompatibility arisen from the interpretative task of the judge and the legal effects of the merger clause which limit the scope of the interpretation of the common intention of the parties that, in his opinion, should comprehend both the acts during the negotiations and after the conclusion of the contract.

Lastly, *Gómez-Salvago Sánchez*[80] and *Serrano Fernández*[81] do not admit the presumption that the contractual parties are in the position to admit, limit or exclude extrinsic evidence, since the understand that is a mandatory function that corresponds to the judge as prescribed in the mandatory rules envisaged Arts 1281–1289 CC.

3.5.2. Supporting interpretation

In contrast, some scholars assert that the merger clause is admissible in Spanish law. Unlike the scholarly opinions above, *Ferrer Riba* advocates that merger clauses only aim to determine the subject matter of the interpretation of the contract, while the process of interpretation, remains *untouched*, since the merger clause does not interfere with the mandatory rules of interpretation.[82]

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[77] I. Garrote Fernández-Díez in: R. Bercovitz. Rodríguez-Cano, N. Moralejo, Imbernón, S. Quicios Molina (eds), *Tratado de contratos,* Tomo I*,* 2nd edn, Valencia 2013, pp. 877–893. Serrano Fernández does not admit the legal effects of merger clauses to Spanish law.

[78] A. López y López, in: R. Bercovitz Rodríguez-Cano (coord.), *Comentarios al código civil, artículos 1281-1289 CC*, 3rd edn, Valencia 2011, p. 127.

[79] *"una circunscripción de la tarea interpretativa a los solos materiales indicados de las partes, reduciendo cuando no eliminando, las posibilidades de establecimiento de la real intención de aquellas".*

[80] S. Gómez-Salvago Sánchez, *La forma voluntaria del contrato*, Valencia 1999, pp. 40 et seq.

[81] M. Serrano Fernández, *Estudio de Derecho Comparado sobre la interpretación de los contratos ¿Hacia una unificación de la hermenéutica contractual?*, Valencia 2005, pp. 76–86 et seq.

[82] V. Ferrer Riba, "Comentario al Art. 6 LCGC", in: A. Menéndez Menéndez and L. Díez-Picazo (dirs.) and A. Águila-Real (coord.), *Comentarios a la Ley de Condiciones Generales de la contratación*, Madrid 2002, pp. 373–374.

As such, *Ferrer Riba* concurs with the statement that the incorporation of a merger is fully compatible with the Spanish legal system.

Vaquer Aloy advocates the validity of merger clauses under Spanish law on the basis of their compatibility with Art. II.-4:104 DCFR, where a contract containing an individually negotiated clause do preclude the parties of asserting prior statements due to the common intention of the parties and the terms must be interpreted according to the terms contained in the final written agreement.[83]

In also referring to soft law, *Díez-Picazo* (jurist, scholar, and Constitutional Court Magistrate) points out that although Spanish law does not expressly contain any similar rule to Art. 2.1.17 PICC, which regulates the merger clause directly, the clause is fully admissible under Spanish law.[84] In his opinion, the absence of specific regulation in Spanish law brings the opportunity to understand that its admissibility is fully plausible and can be considered indirectly regulated in Art. 1282 CC. This provision of the Spanish Civil Code refers to the interpretative task (*"juzgar"*) of the intention of the parties based on their current and subsequent actions.[85] In this regard, the parties' previous acts and behavior are omitted in such legal precept, which proves that the interpretation of the merger clause is fully valid and aligned to such provision.[86]

Notwithstanding, the majority of Spanish legal scholars understands that the documentation of a contract always implies a new contract (*renovatio contractus*);[87] due to absence of formal requirements regarding the form in which the contract has been documented or *externalized*, the contract is

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[83] Vaquer Aloy, E. Bosch Capdevila and M. Sánchez González, *Derecho europeo de contratos, Libros II y IV del Marco Común de Referencia*, Barcelona 2012, pp. 291–295.
[84] L. Díez-Picazo, Los Principios del Derecho Europeo de los Contratos, Madrid 2002, p. 259.
[85] *"Para juzgar de la intención de los contratantes, deberá atenderse principalmente a los actos de éstos, coetáneos y posteriores al contrato"*.
[86] Chapter 3.
[87] According to L. Díez-Picazo*: "el documento nova el acuerdo"* ("the document novates the verbal agreement"), *Fundamentos del Derecho Civil Patrimonial I. Introducción teoría del contrato,* 6th edn*,* Madrid 2007, pp. 298–299. Contradictory opinions are held by M. Cámara Álvarez, "El Notario latino y su función", RDN 1972, p. 300. I. Garrote. Fernández-Díez, in: R. Bercovitz Rodríguez-Cano (dir.), *Tratado de Contratos*, Valencia 2020, pp. 879–880.

concluded (*perfeccionado*) by the agreement of intention (*acuerdo de voluntades*) pursuant to Art. 1258 CC.[88]

To conclude with the different arguments presented by the Spanish doctrine, the opinion presented by *Sixto Sánchez Lorenzo*[89] remarks the fact that the absence of regulation and customary use of the merger clauses in Spanish law shall not preclude the role of this clause used in international trade as *mandatory* clauses. He shares the opinion that the regulation of the legal effects of the merger clause and its limits contained in Art. 2:105 PECL, Art. II.-4:104 DCFR and Art. 2.1.7 PICC would shed light on the Spanish legal system, referring to the interpretative doubts that arose when interpreting the CISG.

3.6. International contracts

3.6.1. *Lex fori*

The admissibility of the merger clause is subject to the law of the jurisdiction to which the parties have either chosen or which is determined by the relevant rules of private international law. Depending on the choice of law, the merger clause will produce different legal effects which the parties need to be aware of before deciding upon the applicable law to their legal relationship or *"negocio jurídico"*. Should the parties seek to choose Spanish law as the *lex fori*, the terms of the contract need to clearly address their choice to avoid further unwanted interpretations and understandings that may deviate from their common intention to limit the scope of their obligations to what stated in the terms of the contract. As an example of a clause concerning the governing law and jurisdiction, one may consider the following:

"This Agreement shall be governed by and construed in accordance with the substantive laws of Spain, without regard to its provisions concerning choice of laws. Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall

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[88] Note that the APMCC does not regulate the merger clause, and thus Art. 1270.2 CC merely reproduces Art. 1224 CC. This omission contrasts with the inclusion of the modification clauses in the particular form. Similarly, Art. 1241 APMCC is aligned with Art. 29(2) CISG, Art. 2:206 PECL, Art. II.-4:105 DCFR, and Art. 2.1.18 PICC.

[89] S. Sánchez Lorenzo, *La Europeización de las reglas de interpretación de los contratos en la propuesta de modernización del código civil español en materia de obligaciones y contratos*, in: A. Dhormann, M. Palazón (dir.), Barcelona 2011, pp. 155–160.

preferably be resolved through negotiations of the parties or failing this, by the Courts of Spain".[90]

When drafting commercial contracts, Spanish attorneys[91] frequently tend to standardize contractual clauses when dealing with international parties[92] in order to comply with international standards and trade usages that fulfill the commercial (common) needs of the parties. In this regard, the Rome I Regulation determines the law governing contracts and applies in all EU Member States (except Denmark). Thus, this set of uniform rules may replace their domestic law when there is a conflict of law or when the parties have not selected a governing law. As default rules, according to Art. 4 Rome I when there is absence of choice, the law of the country of the party's habitual residence where the contract is to be concluded will apply.[93] In cases where it is not possible to apply the Rome I Regulation, Art. 10.5 CC applies subsidiarily, which grants freedom to choose the applicable law when expressly stated and provided it has a *nexus* with the business subject matter in question. In the absence of a choice of *lex fori* by the parties, the domestic law of the parties applies, the applicable law corresponding to the common habitual residence, and in the last case, by default, it will apply the law of the place of conclusion of the contract.[94]

Generally speaking, it can be stated that the Spanish commercial legal practice is, to certain extent, influenced and dependent both on international soft law principles and on common legal practice from Anglo-American liberal models of international trade. This statement is supported by the *España Exportación e Inversiones* ("ICEX"; Spanish Chamber for International Trade)

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[90] Clause drafted by the author of the book.

[91] According to ICEX international practice.

[92] Thus the parties are in many cases not aware of the legal effects of the clause nor they are cautious in their wording, which may result in undesired disputes and unforeseen risks.

[93] Special rules are laid down for eight types of contracts generally applicable to sale of goods and three other types, and two special rules for real estate and sale goods.

[94] Art. 10.5 CC: *"Se aplicará a las obligaciones contractuales la ley a que las partes se hayan sometido expresamente, siempre que tenga alguna conexión con el negocio de que se trate; en su defecto, la ley nacional común a las partes; a falta de ella, la de la residencia habitual común, y, en último término, la ley del lugar de celebración del contrato No obstante lo dispuesto en el párrafo anterior, a falta de sometimiento expreso, se aplicará a los contratos relativos a bienes inmuebles la ley del lugar donde estén sitos, y a las compraventas de muebles corporales realizadas en establecimientos mercantiles, la ley del lugar en que éstos radiquen"*.

which provides a model contract for international commercial contracts where the CISG is chosen as the applicable law together with references to the PICC.[95] The fact that a governmental body fosters the application of the CISG and the PICC as applicable criteria for international commercial contracts illustrates the legal standpoint and tradition followed by Spanish legal practitioners when doing business with international parties. Hence, provided that no mandatory rules preclude its application, the parties, by virtue of their autonomy (*autonomía de la voluntad*), may choose the law most favorable to their interests in order to fill in the gaps or interpretations of national law; and even to derogate from the applicable mandatory rules. However, the choice of the *lex fori* by the parties needs to be cautiously examined on a case-to-case basis in the light of the applicable law. In most international contracts, merger clauses follow certain uniformity, although not to the extent to be considered as standardized. Further, there are cases where their content as "*on-off contracts*" is individually negotiated, including the general conditions whose terms are specifically addressing the commercial transaction subject of the contract.

3.6.2. CISG as applicable law

The CISG will apply if the parties are from different countries (states) and both are contracting states to the Convention or if the rules of private international law establish the application of the law of a state that is a party to the Convention (Art. 1 CISG). Should the question regarding the validity of the terms of the contract arise, Art. 6 CISG[96] allows the parties, to derogate from the application of Art. 8(3) CISG, in favor of the domestic law. In this regard, the parties may prevent the use of interpretative material,[97] negotiations, any

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[95] ICEX Model contract for the international sale of goods: "15.1 All questions relating to this contract which are not expressly settled by the provisions of this contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods […]. Questions not covered by the CISG shall be governed by the [PICC], and to the extent that such questions are not covered by the [PICC], by reference to [specify the relevant national law by choosing one of the following options: The applicable national law in the country where the Seller has its place of business, or the applicable national law in the country where the Buyer has its place of business, or the applicable national law of a third country (specify the country)".

[96] Applicable to the international contract when at least one of the contracting parties is non-national. Art. 1 CISG.

[97] As mentioned above, it is notable whether the term has been individually negotiated (the prior agreements are not included in the final contract and are therefore excluded

practices which the parties may have established between themselves, usages and subsequent conduct by inclusion of a merger clause, thus barring the possibility to resort to other documents external to the contract. If the parties had included a merger clause in the contract, and no choice of law had been provided, an explicit opt out of Art. 8(3) CISG shall be stated. Otherwise, on the basis that prior negotiations serve to modify or terminate the written contract, the merger clause would come to alter or modify the means of proof regulated in Art. 11 CISG.[98]

3.7. Arbitration

As a common dispute resolution method, the parties may include an arbitration clause in their contract, whereby they agree to submit any future disputes to arbitral courts as the dispute resolution method thus choosing the governing law (specific arbitration rules), the country and venue where the arbitration will take place.[99] The mere inclusion of the word "arbitration" in a contract can be considered sufficient to demonstrate the intention of the parties.[100] As a general requirement, national laws governing the arbitration process and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[101], obliges the parties to fully abide by the chosen arbitration rules and prevents national courts from hearing disputes submitted to arbitration. Art. 11.1º of *Ley 60/2003, de 23 de diciembre de Arbitraje*[102] (Arbitration Act) regulates the arbitration procedure in Spain.[103] Should the parties

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from the interpretation) or not by the parties, in which it is presumed that the parties did not want the prior agreements to form part of the contract.

[98] Conversely, based on the argument that the merger clause does not affect the procedural rules, the mere fact that CISG considers previous negotiations reveals that the CISG neither recognizes nor admits the parol evidence rule. P. Huber and A. Mullis, *The CISG: A new textbook for students and practitioners,* Munich 2007, pp. 13–14.

[99] The SAP Madrid also broadly interprets the willingness of the parties to submit to arbitration, SAP Madrid 13 April 2018 (JUR 2018\166161).

[100] G. Born, *International Commercial Arbitration*, 2nd edn, Alphen aan den Rijn 2014, p. 764.

[101] Most commonly known as the New York Convention, adopted by the United Nations diplomatic conference on 10 June 1958.

[102] Law 60/2003 of 23 December 2003 on Arbitration is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985.Other applicable instruments include: Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the European Convention on International Commercial Arbitration 1961 (Geneva Convention).

[103] For more information about this act, see F. Ruiz Risueño and J. Fernández Rozas, *El arbitraje y la buena administración de la Justicia*, Valencia 2019.

have clearly stated that the arbitration will take place in Spain, the arbitration procedure will be governed firstly by what has been expressly agreed by the parties; secondly, by the rules of procedure to which they have referred to in the arbitration clause; and, thirdly, by the arbitration governing law which specifies the seat or place where the arbitration shall take place (*lex arbitri*). According to Art. 2 Arbitration Act, this law applies to arbitration within Spanish territory, both of a national or international nature,[104] for all matters freely decided by the parties. Furthermore, the parties may alternatively submit any disputes to an arbitrator in judicial or extrajudicial proceedings, subject to the rule to which they have submitted (in this case, the awards ruled by the Court of Arbitration of Madrid).

Where the interpretation of the *disputed* contract is concerned, the scope of arbitration shall extend to all matters arising out of the contract, including the nullity and validity of all clauses of the contract.[105] Since the arbitration agreement or clause is independent from other clauses of the contract pursuant to Art. 22 Arbitration Act, should the arbitrator's award declare the nullity of the contract would this effect not imply the nullity of the arbitration agreement or clause *per se*. In this regard, a merger clause incorporated to an agreement submitted to arbitration (arbitration clause), the merger clause would be considered as an additional term of the contract (even if it is an adhesion contract in which the incorporation and information requirements are met) subject to the interpretation of the arbitrator. Should the contract be declared null and void, the merger clause would follow the same nature, except in the case of partial nullity of independent terms that do not concern the effects of the merger clause. The rules of evidence of the prior declarations of the parties will be those determined by Art. 25.2[106] of the Rules of the Arbitration Court of Madrid, with the *Ley de Enjuiciamiento Civil* (LEC; Civil Procedure Act) having a supplementary character, though in practice it is followed to a certain extent by Spanish arbitrators.

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[104] "Arbitration shall have an international character when: the parties have domiciles in different States; the place of arbitration or of performance of the main obligations is outside the domicile of the State of the parties; and the dispute is one of international trade", pursuant to Art. 3 Arbitration Act.

[105] Order of the SAP Barcelona 29 June 2018 (ROJ 3896/2018).

[106] "The defense shall be accompanied by all the documents, witness statements and expert reports available to the defendant and shall propose any other evidence that is intended to be adduced in support of the claims made".

With regard to the recourse to evidence, the parties are free to propose the means of evidence they deem appropriate, provided is admitted in the law. Even when an arbitration clause is incorporated, the *Juzgado de Primera Instancia*, i.e., the first ruling Court of the District Court where the place of arbitration takes place, will provide legal assistance in the collection of evidence according to Art. 8 Arbitration Act. Accordingly, the principle of freedom of evidence applies to arbitration proceedings.[107] Arbitral decisions or awards shall be enforced by the court of first instance of the place where the award was made (Art. 545.2 LEC[108]).

In short, where a contract contains a merger clause and an arbitration agreement or clause subject to Spanish arbitration law, it is for the arbitrator to determine the scope and application of the merger clause with respect to the exclusion of additional and/or contradictory agreements to the final contract. The parties may, however, expressly exclude that the arbitration as a dispute retention method is refrained from conducting such interpretation of the merger clause.

3.8. Void contracts

In cases where a Spanish judge may declare the contract null and void, unless a *force majeure* clause had been agreed by the parties, the validity of a merger clause may be subject to the nullity of the overall contract in which it is included. Thus, the validity of the merger clause is subject to (i) the validity of the contract in which it is incorporated, as well as any modification of the external circumstances (*rebus sic stantibus*) and (ii) the application of the causes of nullity envisaged by mandatory Spanish laws.[109] Should one of the clauses of the contract be declared null and void, Art. 1261 CC declares that such event does not taint the nullity of the remaining clauses, since these are independent from each other, provided that the essential elements of the contract remain valid. Nevertheless, it is probable that a merger clause included in a void contract would also be void, given the integrative effect of the

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[107] See Chapter 10.

[108] *"2. Cuando el título sea un laudo arbitral o un acuerdo de mediación, será competente para denegar o autorizar la ejecución y el correspondiente despacho el Juzgado de Primera Instancia del lugar en que se haya dictado el laudo o se hubiera firmado el acuerdo de mediación".*

[109] Together with the effects derived from the limitations of the agreements, subchapter 4.1.4.

contract terms meaning that the remaining clauses are unapplicable from the initial contract, unless the content of the void clauses is irrelevant to the content of the contract.

3.9. Interim conclusion

The above examination of the admissibility of the merger clause from various perspectives of Spanish law and doctrine give rise to three main reasons for supporting the assertion that the merger clause is admissible in Spanish law as an instrument of contract interpretation. Firstly, no specific mandatory rules pertaining to the Spanish legal system are violated, i.e., the process of interpretation is not affected by a merger clause incorporated to the contract since the merger clause is to be understood as means of interpretation. Secondly, the Spanish Civil Code interprets the contract based on the common intention of the parties and does provide legal principles similar to the effects of a merger clause (e.g., Art. 1252 and 1258 CC), which brings the opportunity to include the merger clause in Spanish contract law, as underscored by *Díez-Picazo*. Thirdly, the use of a merger clause would preclude a meaning to the contract that is inconsistent with the parties' current acts and behavior, as stated in Art. 1252 CC.

4. Formation of contract under Spanish law

This chapter analyzes the formation of contracts under Spanish law. As the examination in Chapter 3 allows for the conclusion that a merger clause is, in principle, admissible under contracts governed by Spanish law, it is prudent to understand how a merger clause can be drafted, incorporated and enforced i.e., produces its full legal effects (the parties' intended legal effects) under Spanish law. Accordingly, it is necessary to understand the particular principles and rules that apply to the process of forming and concluding a valid contract.

4.1. Freedom of contract: *libertad contractual*

4.1.1. Scope

The freedom of contract is a fundamental pillar in private contract law and international trade enshrined in the European and international uniform legal systems.[110] It can be argued that without such fundamental principle it would be impossible to shape the rules of private law.[111]

In Spanish law, *"libertad contractual"* is conceived as the legal capability provided to the parties to conclude an agreement; to choose the contracting party; to decide upon the terms of the contract, to choose the type and form of agreement (within those provided by law) and the legal ability to enter into new agreements.[112] Spanish doctrine has drawn a distinction[113] between two

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[110] e.g., in Germany, the freedom of contract is a constitutionally protected freedom which is limited by legal precepts of the BGB, such as §138 BGB on usury. In Italy is contemplated in Art. 1322 *Codice Civile* and in Spain in Art. 1255 CC. Freedom of contract is also anchored in, e.g., Art. 1.1. PICC, Art. 1:102 PECL and Art. II.-1:102 DCFR (party autonomy). The principle of freedom of contract is included in EU law texts, such as Art. 16 of the Charter of Fundamental Rights, which refers to the freedom to conduct a business, as well as the ECJ decision in ECJ C-240/97*, Kingdom of Spain v Commission of the European Communities*, 5 October 1999: "It should be noted, as a preliminary point, that the right of the parties to modify the contracts they have concluded is based on the principle of freedom of contract and cannot therefore be limited in the absence of Community legislation laying down specific restrictions in this respect", para. 99.

[111] M. Pohl, Party Autonomy in light of the 1980 United Nations Convention on Contracts for the International Sale of Goods, Katowice Osnabrück 2018, p. 25 et seq.

[112] L. Díez-Picazo, E. Roca and A.M. Morales, *Los Principios del Derecho europeo de contratos*, Madrid 2002, p. 42. Some scholars even differentiate between the *"libertad contractual"* and the inner freedom of contract *"libertad de configuración interna".*

[113] According to C. Sieburgh, "Western law of contract", in: M. Bussani and F. Werro (eds.), *European Private Law. A. Handbook,* Durham 2009, p. 172, A. Vaquer Aloy,

aspects of contractual freedom:[114] *libertad contractual individual* ("individual freedom of contract"), and *libertad contractual collectiva* ("collective freedom of contract"). The individual freedom of contract is defined as the inherent autonomy of the parties to enter into an agreement and to freely determine the terms of the contract. This definition is aligned with the European concept of party autonomy. On the other hand, collective freedom of contract relates to a mere social or collective component in which the principle of fairness aims to rebalance a possible unfair negotiation of the contractual terms in which there has been no freedom to enter into an agreement. This latter is often carried out as a contextual interpretation by the judge when determining the common intention of the parties.

The principle of freedom of contract is applied in Spanish law by virtue of Art. 1255 CC which refers to the freedom of contract as the actual intention of reaching a binding agreement. This principle allows the parties are free to choose the type of contract they want to use for their legal relationship and the governing law that will rule upon such legal obligations.[115] Under Spanish law, the freedom of the parties therefore fairly broad, and thus the parties may break down the subject matter of the contract according to the applicable norms and determine the terms of the contract by common intention; either by drafting a completely new contract type, arising from their own agreements, or from a contract arising from a combination of different contract types.

4.1.2. Freedom of interpretation?

Under the freedom of contract, the parties may determine the content of the contract in accordance with the limits of Art. 1255 CC: mandatory rules, in addition to morality and public policy, and the rules that establish the process of interpretation of the contract: *"De los Contratos"* (Arts 1281–1289 CC).[116]

E. Bosch and M. Sánchez (eds.), E. Bosch Capdevila, M. Sánchez González, *El derecho europeo de la compraventa y la modernización del derecho de contratos, Tomo I*, Barcelona 2015, p. 85.

[114] J. Ataz López, "La libertad contractual y sus límites", in: R. Bercovitz Rodríguez-Cano (dir.), *Tratado de Contratos,* 2nd edn, Valencia 2013, pp. 148–149.

[115] However, should the parties agree that a contract will be governed by a specific contractual legal type that is not in line with the terms of the agreement, the contractual type that is in line with the agreement shall prevail and apply.

[116] In addition, custom and good faith act as dispositive rules that fill legal gaps in the Spanish legal system.

These rules of interpretation in the Civil Code are mandatory rules from which the parties cannot derogate.

The LEC contains the procedural rules on evidence civil proceedings. These are mandatory rules that cannot be altered by the parties, although the means of evidence, are subject to the parties' will to determine and proffer it before the judge. These are the rules of the burden of proof regulated in Art. 217.3 LEC. Based on this legal principle, the parties are free to resort to any means of proof, thus to agree that prior procedural evidence that modifies the written contract is excluded.[117]

The question therefore arises as to how the freedom of contract allows the parties to decide – via a merger clause – upon the interpretation of the contract and the evidence that may be used in the process. In this regard, one can refer to the views of the legal scholars who oppose the inclusion of the merger clause claiming that limits the scope of the interpretation of the contract since its legal effects go against both the interpretation rules enshrined in the Civil Code and the procedural rules of the LEC.[118] However, my opinion holds that the merger clause does not aim to influence the process of interpretation. It instead provides the judge with the means of interpretation in order to more easily determine the common intention of the parties. The judge is still entitled to resort to any external evidence justifying any terms of the contract that might not be consistent with the contract.[119] The possibility to resort to external circumstances beyond the contract does not, however, exclude merger clauses from affecting the process of interpretation *per se,* since they are indeed asserted by the common intention of the parties to limit the scope of their understandings to the terms integrated in the contract thus resorting to extrinsic evidence. Should the judge ignore the inclusion of an individually negotiated clause agreed into the contract, he would violate the parties expressed common intention to discharge these agreements and fail in interpreting the meaning that the parties intended to ascribe to their contract. In short,

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[117] Hence, the merger is fully compatible with the procedural formation of the contract.
[118] A. *López y López*, *I. Fernández-Díez*, *S. Gómez Salvago Sánchez* and *M.Serrano Sánchez*. Chapter 6.
[119] See M. Łolik, *Współczesne prawo kontraktów – wybrane zagadnienia*, Munich 2014, pp. 66–70.

merger clauses can be classified as substantive discharging agreements and not as regulating the process of interpretation.[120]

4.1.3. Freedom of content

The freedom to decide the terms of the contract is subject to the party's intention, meaning that if they have intended a type of contract that does not conform to their agreed terms, statutory terms will fill such encountered gaps and thus prevail against what the parties might have (inconclusively) interpreted.[121] However, the contractual terms are not necessarily required to be fully determined from the formation of the legal relationship in order to produce full legal effects, but only to abide by the essential elements of the contract.[122] The requirements for the conclusion of the contract are analyzed in subchapter 4.4. Subsequently, the parties may determine the outstanding legal terms either by further agreement, or by the integration of the contract.

Nevertheless, the freedom to choose the content is not an absolute rule of law since it has limitations established by both statute and other legal texts arising from circumstances applicable to the particular case. International legal texts apply this principle uniformly and its broadest wording is recognized in Art. 6 CISG, which establishes the non-mandatory nature of its provisions through the intention of the parties to "exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions"[123]. If the parties do not exclude its application, it will apply to legal precepts that are in principle excluded, such as the validity of the contract (Art. 4 CISG). Similarly, the parties may agree that the contract shall be governed by the law of the country of one of the parties. The parties may

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[120] A. Müller, *Protecting the integrity of a written agreement, a comparative analysis of the parol evidence rule, merger clauses and no oral modification clauses in U.S., English, German and Swiss law international instruments (CISG, PICC, PECL and CESL)*, The Hague 2013, p. 189.

[121] As case law points out *"los contratos son lo que son y no lo que las partes digan que son"*. Hence the determination of a contract depends on the applicable mandatory rules. According to, inter alia, STS 21 May 1997 (RJ 1997\3871) and STS 7 June 2007 (RJ 2007\5560).

[122] Only those requirements necessary for the validity of the agreement, L. Díez-Picazo, *La formación del contrato,* Madrid 2015, pp. 6–10.

[123] In other words, the parties may agree to modify and exclude, in their particular contract, some or all of its rules. A. Calvo Caravaca, "Comentarios al artículo 6", in: L. Díez-Picazo (dir.), *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, Madrid 1998, p. 92.

derogate from any of its provisions or modify its effects. Similar wording features in Art. 1.1PICC and Art. 1:102 PECL, where the parties are free to determine the obligations due to the principle of freedom of contract. However, the contractual freedom is subject to the limitations of mandatory rules, the application of good faith and fair dealing in international trade, as stated in the different sets of rules. According to Art. 1:102(2) PECL, the parties may exclude the application of any of the principles or derogate from or modify their effects, unless the principles have been provided otherwise. Similarly, Art. II.-1:102 DCFR[124] considers freedom of contract as one of the most valued applied principles, and in its application, it is supplemented by the principle of fairness.

By virtue of the freedom of contract envisaged in Art. 1255 CC, the parties may therefore, in principle, decide to incorporate a merger clause into the contract and decide the wording of the clause within the limits of the mandatory civil and procedural rules. The merger clause may be used as means of interpretation that will guide the judge towards ascertaining the common intention of the parties as being to exclude extrinsic evidence to the contract.

4.1.4. Limitations

The freedom of contract has limitations.[125] Art. 1255 CC imposes certain obligations as legal provisions to comply by the parties when entering into a fully binding agreement, namely mandatory rules to observed by the parties: *ley, moral, y orden público* ("law, morality and public order").[126] These are limitations that shall be observed at the time the parties determine the content of their legal relationship.

Spanish law prescribes as limitations to the contract, according to Art. 1255 CC, the law the "*moral"* and the public policy.[127] Firstly, Art. 1255 CC envisages the mandatory laws as the set of rules that are mandatory to contracts

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[124] Art. II.-1:102 DCFR under the heading of "party autonomy" overlapping with the Pavia Group and the PICC.

[125] Violation of the freedom of contract was awarded in STS 11 February 2002 (RJ 2002\3107), and in SAP Sevilla 16 September 2011 (AC 2011\2175).

[126] For examples from case law, see STS 11 February 2002 (RJ 2002\3107) and SAP Sevilla 16 September 2011 (AC 2011\2175).

[127] In Art. 1:201 PECL, good faith is mentioned as a limit only to mandatory law, for which it must be stated in the law itself. In addition, morality and public order are not mentioned.

submitted to the Spanish forum.[128] These are binding and fully enforceable norms that impose certain formal standards which shall be observed and known by the parties when determining the terms of the contract. These norms apply from a two-fold perspective: (i) by preventing the execution of certain agreements prohibited by the law (negative effect);[129] and (ii) by imposing certain terms or provisions that affect the formation of the contract, i.e., agreements that violate such provisions shall be declared void.[130] Most European legal systems envisage rules for the nullity of contracts that are against the "good morals" (also known as *bonos mores, bonnes moeurs, gute Sitten,* etc).[131] As to the definition of morality, this concept can be understood as the set of values and norms that guide the parties to act with honesty and integrity according to a certain society or group. Broadly speaking, morality relates to the distinction between right and wrong human conduct that has become a "stable social compact"[132]. Spanish law understands the good customs together with the concept of *orden público* ("public policy") as an overall principle governing *social conducts and beliefs*. In this regard, Spanish case law does not provide any clarification for determining that a particular matter is immoral and contrary to public policy, despite it may impact on the parties' contractual autonomy.[133] Instead, the Spanish judge has ample capacity to reject those agreements that from a collective perspective or social standpoint are against the inner principles of the law, i.e., enshrined in Art. 1255 CC[134].

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[128] Understood as those that contain prohibitions and those that establish the nullity for their observance. Although this is an open issue, subject to interpretation.

[129] e.g., nullity of a waiver of liability due to fraud, Art. 1102 CC, nullity of a lifetime service lease, Art. 1583 CC.

[130] This procedure is often used when one of the parties needs special protection by the state, e.g., in the field of urban leases, consumer protection, etc.

[131] Art. 1255 CC differs from the DCFR in the consideration of morality as a limit to the autonomy of the will, and from the PECL, in the non-inclusion of morality and public order. J. Ataz López, "La libertad contractual y sus límites", in: R. Bercovitz Rodríguez-Cano (dir.), *Tratado de Contratos*, Tomo I, 2nd edn, Valencia 2013, p. 189.

[132] T. Beauchamp and J.F. Childress, *Principles of biomedical ethics*, 7th edn, New York 2013, pp. 2–3.

[133] Defined in STS 5 February 2002 (RJ 2002\1600) as *"el conjunto de reglas obligatorias en las relaciones contractuales concernientes a la organización económica que deben limitar la autonomía privada"*.

[134] *"Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral, ni al orden público".* Although Art. 1255 CC is usually cited as the rule that protects the existence

The Spanish regulation regarding the sanction of contracts against morality[135] is particularly broad for two main reasons. First, the lack of clarity toward the definition of *"moral"*[136]. Since no formal definition is encountered in the Spanish legal system, the attention will be directed towards to those agreements which are not immoral.[137] Second, there are hardly any judicial awards in which an agreement or contract had been declared void based solely on the fact that it is expressly contrary to public order.[138] Spanish case law merely states that where a certain matter is immoral and against the public policy it is therefore excluded from private autonomy,[139] yet without providing any further clarification.[140]

These limitations to the freedom of contract are drafted in such a way that everything that is not expressly prohibited can validly be the subject matter of a contract, which brings a great amplitude and broadness to the private autonomy. Further, the parties may voluntarily exclude the provisions of law, agreeing on different contractual terms in accordance with Art. 6.2 CC. Such provisions may be deemed valid provided that they are not contrary to public policy and do not prejudice the rights of third parties. There is not a clear distinction to ascertain when mandatory rules and those of a dispositive nature are considered. In some cases, it is expressly stated: e.g., Arts 1102 and 1935 CC prescribe that civil liability caused by bad faith cannot be excluded by the parties. If the contracting parties agree on the exclusion of the dispositive provisions of the law and these are excluded from the contractual terms, they will abide by their own contractual regulation (self-regulation), which shall

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of limitations to private autonomy, in the practice, it is a limitation on the content of the contractual terms. Ibid. pp. 148–149.

[135] However, an immoral clause cannot be compared with a clause that leads to an unfair result, since the balance of the parties' obligations to the contract is not a requirement under Spanish contract law.

[136] In addition to Art. 1255 CC, it is mentioned in Art. 6.2. CC as a limit to private autonomy.

[137] Such as the agreement of *quota litis*, addressed in STS 13 May 2004 (RJ 2004\2739), which, despite being prohibited by the *Estatuto General de la Abogacía* as of 22 June 2001, is admitted by the Supreme Court when it is proved that this prohibition is not found in any mandatory rule.

[138] As stated in STS 20 July 1993 (RJ 1993\6166); STS 26 October 1998 (RJ 1998\8237) on a perpetual lease agreement.

[139] According to STS 23 October 1992 (RJ 1992\8280), which declares the observance to public policy as the principle concerning payments before inheriting, according to Art. 818 CC.

[140] Art. 1255 CC is not applicable, according to STS 12 November 1987 (RJ 1987\8374).

be fully binding. This exclusion may only occur when the parties determine the rules or guidelines by which the legal relationship shall be governed; unless such determination is understood to have been made when the parties had limited themselves to excluding the application of a specific rule. Nevertheless, there are cases in which it is not straightforward to establish the opposite criterion as set out in Art. 1465 CC. Hence, this criterion must be applied.

The mandatory rules enshrined in the Civil Code are therefore to be observed by the inclusion of a merger clause to a Spanish-contract, with special emphasis to the rules of interpretation applying to contracts in the Civil Code. The observance of morality and public policy are subsidiary rules that are to be taken into account, but will rarely impede the validity and application of the merger clause.

4.1.5. Statutory sources under Spanish law

Statutory sources have several purposes. First, they inform the parties of a certain hierarchical order to follow within the particular legal system of application. Second, statutory sources establish the standards that the parties shall comply with in drafting an agreement, i.e., what stipulations shall the parties fulfill in order to enforce the written agreement. Third, they aim to serve as a reference for the parties when the law is absent thus providing case law and principles on how the parties shall abide by when entering into an agreement. These are the rules that the parties will resort to when writing down the terms they will agree upon. Statutory sources of law are enshrined in Art. 1.1. CC[141] which follows the following hierarchical order of application: (i) the Spanish law and EU Directives, (ii) the *costumbre* ("custom"), and (iii) the general principles of law.

[141] On the other hand, Spanish legal doctrine follows a similar set of rules: (i) Mandatory rules: which establish the legal relationship and are not subject to the parties' autonomy. They are considered fully binding rules. (ii) Dispositive rules: these are rules derived from the party autonomy: agreed rules, accepted standard terms and *"cláusulas de estilo"*. They are binding rules between the parties provided that they do not infringe mandatory rules. (iii) Ancillary rules (legal norms): intended to fill the gaps in the contract: these are dispositive norms, rules of conduct "*costumbre*" and rules of good faith. Most of these rules are default rules, i.e., they can be modified by the parties.

4.1.5.1. Spanish law and EU Directives

The *Constitución Española* (Constitution of Spain) enacted on 31 October 1978 rules over the Spanish legal system, serving as guidance for all Spanish legal principles, codifications, and legal texts. All laws and rules under Spanish jurisdiction are subject to the Constitution considered as the supreme source of law within the hierarchy of norms. In descending hierarchy, the Constitution is followed by statutory laws, decrees and ministerial orders. The validity of any written contract shall be subject to the mandatory rules governed in this supreme law. This is followed by all laws enacted under the Spanish legal system which have mandatory application[142]: these are binding and fully enforceable norms which cause a specific imposition or limitation to the provisions of the contract, which shall be observed and known by the parties when determining the terms of the contract. Such norms are applied in a two-fold perspective: by prohibiting certain agreements (negative effect);[143] and by imposing certain terms on the contract, so that agreements that seek to modify it would be considered null and void.[144] Furthermore, Art. 1.5 CC[145] recognizes international treaties ratified between Spain and other countries signed by the Spanish Government as mandatory laws once they have been enacted and published in the *Boletín Oficial del Estado* (BOE), the official journal of legislation passed by the Spanish Government. EU directives have the consideration of mandatory rules as supranational laws thus shall these regulations prevail over those enacted at a national level. In cases where Spanish law contradicts the EU directives, the latter takes priority.[146]

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[142] Understood as those that contain prohibitions and those that establish the nullity for their observance. Although this is an open question subject to further interpretation.

[143] e.g., nullity of a waiver of liability due to fraud, Art. 1102 CC, nullity of a lifetime service lease, Art. 1583 CC.

[144] This procedure is often used when one of the parties needs special protection by the state, e.g., in the field of urban leases, consumer protection, etc.

[145] Instrument of Accession of Spain to the United Nations Convention on Contracts for the International Sale of Goods, signed at Vienna on 11 April 1980. Published in the *Boletín Oficial del Estado* on 30 January 1991.

[146] After the award of the ECJ in Case 26/62 *Van Gend & Loos* 5 February 1963, no Member State may deviate from the European enacted laws as part of the European legal jurisdiction.

4.1.5.2. Custom

In successive order of application, the *costumbre* ("custom") applies as default rule after mandatory laws. Under Spanish law, the custom can be defined as a uniform and repetitive social conduct, which it can be considered as a mandatory rule to abide by the members of a specific social group or community.[147] In the absence of applicable law, the custom applies if it is not contrary to morality, public policy and that it is proven by any means as stated in Art. 1.3. CC. The legal effects of the custom are rather limited to civil law contracts. However, it has a broader application as soft law in commercial or mercantile law where the uses "*usos normativos*" are a common practice to the specific industry or business. Usages can be defined as practices the parties have established between themselves of which they knew or ought to have known and which are widely applied in the particular trade or transaction concerned. Art. 9(2) CISG recognizes the application to the parties' contract of trade usages. Similarly, Art. 5:102 PECL on relevant circumstances addresses usages for the interpretation of the contract. Art. II.-9:101 DCFR affirms the usages as terms of a contract; and finally, Art. 5.1.2 PICC determines practices established between the parties and usages as implied obligations to be followed by the parties. For example, trade usages in a certain sector can provide an implied term to a contract that the counterparty may expect to be executed when concluding the contract[148] although it has not been incorporated to the contract. These are also called "*uso del tráfico*" or "*usos negociales*".

In order for the trade usage to be considered as a source of law, two main requirements are needed: first, the usage in question needs to be widely observed in the practice in a specific business meaning that the repetitive nature of a particular business transaction has become customary and hence a common practice[149]. Second, the usage needs to be widely recognized as *opinion iuris* thus having the status of *"uso normativo"* or mandatory use. In this regard, a merger clause can be declared unenforceable by the judge if the

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[147] Definition provided in STS 18 April 1995 (RJ 1995\3136): "*la norma jurídica elaborada por la conciencia social mediante la repetición de actos realizados con intención jurídica"*.

[148] e.g., Art. 5.1.2 PICC on implied obligations.

[149] According to P. Perales Viscasillas, "El contrato de Compraventa Internacional de Mercancías (Convención de Viena de 1980)", Sección 158.

declarant party proves that a particular trade use is both (i) a common practice in the business industry and (ii) the existence of *opinion iuris* as to the particular trade usage. The fact that the particular trade use has not been included by the wording of the merger clause proves that an implied obligation would be recognized within as part of the legal relationship of the parties[150].

4.1.5.3. General principles of law

The general principles of law are considered the third source of law in descending hierarchy which constitutes non-statutory norms that shall apply in the absence of the law or custom according to Art. 1.4 CC. These are legal recommendations with three main purposes: (i) to serve as a framework for the lawmaker in the process of creating new laws, (ii) as a supportive function for the interpretation of soft law and, (iii) to fill gaps encountered within the Spanish legal system. The application of general principles of law is rather limited, since its use strictly depends on the application followed by Spanish judges and courts pursuant to Art. 1.7 CC[151] which creates "case law". However, the case law is, according to Art. 1.6 CC not to be considered a source of law, since it only allows to complement the legal system by means of the interpretation of the judicial sources established by the Supreme Court. Similarly, the legal doctrine set by Spanish scholars only considered as a supplementary function within the interpretation of the law.

4.1.5.4. Implication for merger clause

The parties' freedom of contract is subject to the contractual legal requirements established by the law, custom and principles of law. Those agreements that may not comply with these norms will be declared null and void by the ruling judge. Accordingly, the validity and application of the merger clause[152] shall be subject to these sources of law in order to be fully applicable.[153]

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[150] Trade usages are further examined in subchapter 11.4.

[151] *"7. Los Jueces y Tribunales tienen el deber inexcusable de resolver en todo caso los asuntos de que conozcan, ateniéndose al sistema de fuentes establecido"*.

[152] Since the merger clause is not regulated under Spanish law, nor in the custom or general principles, its application is strictly limited to the scope of international treaties, such as the CISG and the legal doctrine attributed to Spanish scholars that aim to interpret its application from other legal jurisdictions to Spanish law.

[153] In the field of international contract law, the applicable hierarchy of sources of law differs slightly from the one followed by Spanish law although the essence remains: (i)

Hence, according to Spanish law, there are no specific mandatory, dispositive, ancillary nor commercial usage rules addressing the incorporation of merger clauses to the contract *per se*.

4.1.6. Good faith as an obligation

Good faith is considered a principle rooted in continental-European civil law that represents a vital role in the process of contract interpretation and negotiation.[154] It constitutes a due conduct to be observed by the parties subject to honesty, moral and good customs (*buenas costumbres*).[155] Under Spanish law, good faith constitutes an obligation (limit) to the freedom of contract according to Art. 7.1 CC[156]: As mentioned, the terms of the contract are

free determination of the contract by the parties: subject to the limits of mandatory law, public order, morality and good faith. As to those terms agreed by the parties, these may be regulated by commercial usage, such as the PICC, Incoterms and the Uniform Rules of the ICC. Further, it includes expressly incorporated General Terms and Conditions applicable to the business industry or a binding usage not excluded by the parties (Art. 1.8 PICC and Art. 9 CISG). (ii) International conventions: shall apply, ratified by the country where the contract is to be performed, provided they have not been excluded by the parties. (iii) Mandatory provisions: of the country of performance or execution of the contract shall apply and their exclusion cannot be agreed upon by the parties.

[154] The PICC introduced the so-called "reasonable commercial standards of fair dealing" stated in Art. 3.2.2(1)(a) and 3.2.5, which implies that the principles shall be interpreted within the context of international trade. This is one of the greatest and most successful innovations of the PICC with respect to other texts of uniform law, in particular with respect to the CISG, see J. Oviedo Albán, L. Urbina Galiano and L. Posada Núñez*, La formación del contrato en los Principios de Unidroit para los contratos comerciales internacionales*. RUPUJ no. 96, 1999, p. 11.

[155] S. Cámara Lapuente (Coord.), *Derecho Privado Europeo*, Madrid 2003, p. 482.

[156] *"Los derechos deberán ejercitarse conforme a las exigencias de la buena fe".*

limited by Art. 1255 CC,[157] hence good faith constitutes a limit[158] to the freedom to contract and therefore to the determination of the contract terms. This principle obliges parties to behave in an honest and diligent way when negotiating the terms of a contract. According to Art. 1258 CC, good faith is a rule for determining the content of the contractual obligations and in practice it must be present throughout the entire life of the contract, even from its inception when preliminary negotiations take place. However, the task to determine whether the parties acted in good faith to the judge or arbitrator. In cases where general terms and conditions are incorporated to the contract, good faith shall be observed in first place, in order to prevent these terms from being considered as unfair terms thus a position of imbalance one of the parties. Such interpretation is regulated by Art. 82 LGDCU.[159]

The question therefore arises as to what extent shall the parties be subject to the good faith when determining the contact of the contract. What guidelines should they follow? How to determine the degree of compliance with this principle is rather general and vague and it differs substantially from what it may be understood in common law systems. Under Spanish law, when the parties include a merger clause under a contract governed by Spanish law, they shall observe the principle of good faith from the very beginning of their negotiations until the conclusion and determination of the contract terms. Should general terms and conditions be negotiated in the contract, special attention to the provisions outlined by the *Ley General para la Defensa de los*

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[157] The principle of good faith, has different applications to contract law: it may be applied as (i) a guiding principle for prior negotiations (leading to *culpa in contrahendo* when it is not applied), as (ii) an integrative effect of the terms of the contract, as (iii) a criterion of interpretation and as (iv) a limit to the free determination of the contract terms. The *Proyecto de Reforma del Código Civil* (PRCC) (project to reform the Civil Code) restates the principle of good faith in Art. 1237 regarding morality as a principle to follow, similar to Art. 1255 CC, except for the use of the term "*libremente*" ("freely"). Nevertheless, Art. 2 PRCC, regarding the autonomy of the will and its limits, substitutes the concept of "morality" with the principle "good faith". This definition provides more flexibility in the application of the law, avoiding specific cases where ethically reproachable conduct may arise. In the light of above, the merger clause would be admissible under Spanish law provided that it respects the freedom of contract, enshrined in Art. 1255 CC (freedom to determine the terms of the contract) and the limits outlined in this provision: morality and public order; as well as subject to good faith.

[158] STS 22 May 1993 (RJ 1993\3724) associates the good faith with the good behavior of citizens.

[159] The reference from the consumer law guides further the interpretation and legislation of good faith and the consideration of unfair terms under Spanish law.

Consumidores y Usuarios should be observed in order to prevent the nullity of the contract (unfair terms[160]).

4.1.7. Infringement of the mandatory rules to the freedom of contract

Although Art. 1255 CC prescribes the mandatory rules or limitations to the freedom of contract, the question arises of the legal sanctions for violation of these legal provisions.

As a general rule, any contract that directly or indirectly violates the fundamental principles of law and mandatory rules established by the applicable law (chosen law applicable to the contract) will be typically be declared invalid by default. Under Spanish law, Art. 6.3 CC establishes full nullity for acts contrary to mandatory and prohibitive rules, unless a different effect is established therein (by applicable norm) for the breach of contract. In this regard, the formula used by the Spanish Civil Code is vague and open to interpretation: it declares the nullity of the contract only when the law infringed does not provide otherwise.[161] In cases where the limit to morality or public order has any effect on a clause or contractual terms that is not essential for the validity of the contract, such clause will be considered null and void. However, where the parties may demonstrate the validity of the contract, partial nullity[162] can be assumed. Similarly, Art. 1296.1 APMCC, states the nullity of a contract when the disputed clauses are contrary to a mandatory or prohibitive rule established by Spanish law. Here there is the question of the extent previous agreements not incorporated into the contract can serve the judge to interpret the contract provided that there are indications of violation of the law, morality or public order. Any of these violations will render the contract void pursuant to Art. 1255 CC. This rationale must be observed by the parties when they agree to include a merger clause in their contract provided that it does not violate: (i) moral and public policy, (ii) specific laws that requires as specific provisions to be incorporated to the contractual

[160] Subchapter 5.3.

[161] In this regard, Art. II-7:302 DCFR, and Art. 15.102(1) PECL, which apply nullity if it is not provided for by law.

[162] According to STS 15 February 1991 (RJ 1991\1271), STS 23 June 1992 (RJ 1992\5467), and STS 16 May 2000 (RJ 2000\5082).

clauses and (iii) are not considered "*contratos solemnes*" or "*contratos de adhesión*"[163].

4.2. The freedom of form

Freedom of form is the legal principle that allows the parties to choose any form to their agreement that they deem convenient without any concerns as to its validity. Contracts generally do not need to be concluded in writing and are not subject to other formal requirements.[164] As a general principle, Spanish law does not require any form for the validity of the contract. However, there are specific contract types such as *contratos solemnes* (solemn contracts) regulated in Art. 1280 CC that establish the formal requirement that the agreement is notarized in a public deed to be valid and effective. Furthermore, contracts subject to consumer protection, succession, property[165] and real estate laws, create exceptions to the rule, thus they need to be concluded in the required form. As these contracts are exceptions to the principle of freedom of form, the formal requirements under Spanish law will be analyzed briefly below.

The freedom of form is considered a fundamental principle that governs Spanish contract law. The principle of freedom is governed by Art. 1278 CC[166]. Generally speaking, Spanish contract law includes numerous gaps (compared to other European legal jurisdictions) what makes necessary to resort to international texts and soft law. In contrast to soft law, which may require the terms of the contract to be drafted in writing, Spanish law omits the reference to a legally bound intention (Art. 2:101 PECL), a binding legal relationship (Art. II.–4:101 DCFR), or intention to have legal effects (Art. 30

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[163] The STS has defined on numerous occasions the adhesion contract as the type in which its clauses have been predisposed by one party and imposed on the other, without the latter having the possibility of negotiating or modifying them or to make counter offers, but can simply accept or reject them, according to STS 13 November 1998 (RJ 1998\8742). The STS further clarifies that a contract should not be classified adhesion by the mere fact that the regulations contained therein had been drawn up by one of the parties, as this circumstance alone does not make the contractual nature of the freely agreed business disappear, if there is the concurrence of mutual consents, according to the STS 30 May 1998 (RJ 1998\4076).

[164] H. Schulte-Nölke, "Art. 6 CESL", in: R. Schulze (ed.), Common European Sales Law – Commentary, Baden-Baden 2012, mn. 1 and 5.

[165] Arts 633,1857,1875, 1279 CC.

[166] *"Los contratos serán obligatorios, cualquiera que sea la forma en que se hayan celebrado, siempre que en ellos concurran las condiciones esenciales para su validez"*.

CESL) in favor of the essential conditions of the contract for its validity.[167] Under Spanish law a contract therefore does not require any particular form to be legally binding, as the emphasis is placed on the fulfillment of the essential elements of the contract, namely consent, subject matter and cause (*objeto, cosa y causa*), are fulfilled (Art. 1261 CC). The outcome of this interpretation is that integrity of the consent provided by the parties prevails over the concurrence of wills.[168] This scenario causes a dichotomy between civil and commercial law legal texts.

In contrast to soft law, where the intention to be legally bound is *condition sine qua non* for the conclusion of the contract, Spanish law opts to set the essential elements of the contract as the main obligation of the contract. This rationale is due to an outdated Civil Code enacted in 1889 which has not been updated to meet current contract law demands. Simultaneously, the approach followed in Art. 51 Ccom[169] refers back to the legal precept stipulated in the Civil Code which reflects to a strong dependence to the latter for any contract law matters. In this vein, the Spanish Civil Code combines contractual autonomy with the binding nature of what has been agreed under *pacta sunt servanda* stipulated in Art. 1091 CC[170]. Furthermore, Arts 1255, 1256 and 1258 CC establish the presumption that agreements shall remain in force and any amendments to the contract shall be mutually agreed by the parties.[171]

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[167] Subchapter 4.4.

[168] R. Bercovitz Rodríguez-Cano, *Tratado de contratos*, Valencia 2015, p. 116.

[169] *"Serán válidos y producirán obligación y acción en juicio los contratos mercantiles, cualesquiera que sean la forma y el idioma en que se celebren, la clase a que correspondan y la cantidad que tengan por objeto, con tal que conste su existencia por alguno de los medios que el Derecho civil tenga establecidos […]"*.

[170] *"Las obligaciones que nacen de los contratos tienen fuerza de ley entre las partes contratantes, y deben cumplirse a tenor de los mismos"*.

[171] However, there are several statutory formal requirements for a type of contract (to produce legal effects against third parties). For example, *contratos solemnes,* where a notarized contract deed serves as reliable documentary evidence of the parties' agreement. The wording of a merger clause under Spanish law is not subject to any specific form for most of the agreements. For example, in succession, property, and real estate contracts, the lack of required form of the form will declare the contract and the merger clause incorporated therein null and void.

4.2.1. Adhesion contracts

Special consideration shall be paid to the contracts of adhesion. An adhesion contract fulfills a primary economic function to foster commercial and legal traffic contract through mass contracting. The main characteristic of these contracts is the lack of negotiation between the parties, since the adherent party simply adheres to the content already drawn up of the contract, which constitutes an authentic standard contract model aimed at a mass of contractors whereby the "offeror" imposes[172] a standard contract to a multitude of "adherents".[173] It is evident that in this type of contract the parties do not agree on equal conditions, thus the freedom of contract is limited to a mere "take-it-or-leave-it" scenario forcing the party to decide whether to accept or not the proposed business transaction where general terms and conditions regulate the parties' legal relationship. In the adhesion contract, the written form is required, but not to be conveyed in public deed. Therefore, compared to the form freely agreed in ordinary contracts, the adhesion contract is a pre-drafted contract.

4.2.2. Solemn contracts

Spanish case law refers to solemn or adhesion contracts as a clear exception to the principle of freedom of form where the *ad solemnitatem* is a requirement for the validity of the entire contract in order to produce legal effects.

The following *numerus clausus* are to be understood and observed by the parties that intend to enter into a contract subject to the *ad solemnitatem* requirement:

(i) donation of real estate (*bienes inmuebles*) pursuant to Art. 633 CC,
(ii) prenuptial agreements (*capitulaciones matrimoniales*) and subsequent modifications,
(iii) mercantile bonds (*fianza mercantil*) regulated in Art. 440 Ccom,
(iv) donation of real estate without delivery *(donación de bienes inmuebles sin entrega simultánea de la cosa)*, Art. 632.2 CC,

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[172] However, in certain cases (e.g., provision of public services), the trader himself can be forced to enter into an agreement, regardless of the adherent party.
[173] Generally, the contract is aimed at all the adherents who intend to contract, but occasionally it can be imposed on all possible and eventual contractors, e.g., when there is a *de facto* or *de jure* monopoly situation in a certain sector.

(v) in consumer contracts, the written form[174] as a requirement for the validity of the contract is regulated by Arts 6–7 LGC, and Arts 111–112 LGDCU,

(vi) other cases,[175] e.g., transfer of rights for the use of intellectual property which require the written form,[176] payment default on debt and construction work.

As a mandatory rule, Art. 1280 CC establish a *numerus clausus* of contracts to be outlined in public document. Spanish doctrine acknowledges that this provision of the Civil Code must be interpreted together with Arts 1254 and 1255 CC, regarding the consent,[177] and Arts 1278 and 1261 CC that exclude the form[178] as a requirement.[179]

Solemn contracts impose the public deed written form as a requirement *conditio sine qua non* to the entire contract and to all the clauses that form part of the agreement, without exceptions. Accordingly, a merger clause included into a solemn contract, where the written form is required for its validity, needs to comply with the *ad solemnitatem* form to produce full legal effects. Further, the drafted merger clause shall not be contrary to mandatory rules pursuant to Art. 6.3 CC, Art. 1296.1 APMCC (otherwise the contract will be declared void). At the time the parties are transposing their understandings into the written contract, the effects of the merger may not contradict these mandatory limitations as well as subject to specific regulations of special contracts (as noted) to avoid further examination by the judge. It is therefore prudent for the parties to familiarize themselves with the nature of solemn contracts and the mandatory rules that govern these legal contract types to avoid undesired disputes and litigation costs.

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[174] The requirement of form does not exclude the fulfillment of the consent and the other essential elements of the contract by Art. 1261 CC.

[175] Business transactions of a fiscal nature that require the notarized nature of the document for its conclusion but not for its validity, STS 22 December 1990 (RJ 1990\10364).

[176] R. Valpuesta Fernández, *Código Civil comentado,* Tomo III, Cizur Menor Navarra 2011, p. 667.

[177] Ibid. P. 684; L. Díez-Picazo, *Sistema de Derecho Civil,* Tomo II, 6th edn, Madrid 1989, p. 40.

[178] STS 12 April 1993 (RJ 1993\2996) regarding the lack of consent of several co-owners of a plot of land: *"acuerdo verbal del contrato de permuta solar por locales comerciales, alcanzado con dos de los propietarios del solar, faltando el consentimiento de los demás"*.

[179] According to STS 30 April 1995 (RJ 1995\1558), STS 9 December 1977 (RJ 1977\4707), STS 23 November 1989 (RJ 1989\7905).

4.2.3. The form of the contract as a requirement

By the incorporation of a merger clause to the contract, the parties intended to waive their freedom to proffer any means of evidence to the contract that may contradict the written intention of the parties. The merger clause does not regulate the mandatory rules of evidence provided by the LEC, instead, it provides clarity and certainty as means of interpretation to the contract terms by providing the judge with an objective interpretation of what the common intention of the parties are in respect to precedent agreements and circumstances. In other words, it aims to provide the necessary clarity to ensure the enforceability of the contract. The main question is whether the merger clause fully compatible with the procedural rules enshrined in the *Ley de Enjuiciamiento Civil.*

The form is used as the legal instrument whereby the parties express their intention to enter into an agreement. The parties are free to determine the means of their declarations, either written or by oral means subject to mandatory rules. The so-called *pactum de forma* will be further analyzed in subchapter 11.4.3. Under Spanish law, no specific form is prescribed in the law. However, the form, meaning any form agreed by the parties, is *per se* considered as a necessary requirement for the acknowledgment of the agreed terms between the parties. Hence, the law will only admit the will of the parties when it is materialized in a *valid* form.[180] In consequence, there is a traditional distinction between the form *ad solenitatem* (*ad substantiam, ad essentiam, ad validate)* and the form *ad utilitatem (ad probabtionem)* based on the function or role that the form has in regards to the validity of the contract.[181] The form is a formal requirement in contracts where a particular formal requirement is set. For example, the donation of real estate (*bienes inmuebles*) is to be formalized in public deed[182] (ex. Art. 633 CC). The nature of the document may be public or a private document, depending on whether or not a notary public is involved.

Under Spanish law, form is not, in principle, an essential requirement for the contract. In order to respect party autonomy, the focus is placed on what

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[180] M. Albadalejo, *Derecho Civil I*, *Introducción y parte general*, 17th edn, Madrid 2013, p. 743.
[181] STS 18 March 2008 (Tol 1311951) and STS 10 September 2007 (Tol 1146774).
[182] F. De Castro y Bravo, *El negocio jurídico*, Madrid 2002, p. 127.

the parties intended, regardless of the form in which it has been expressed, thus following the principle *pacta sunt servanda* (Art. 1255 CC).[183] The Spanish Civil Code require for the conclusion of real estate contracts the registration as public deeds (included in Art. 1280 CC). However, Art. 1279 CC allows the conclusion of the contract not made by a public deed if the requirements of Art. 1261 CC (consent, subject matter and cause) are met. Thus, Art. 1280 CC requires a public deed only in certain contracts, i.e., when the parties aim to enforce the contract against third parties. Otherwise, the contract will be valid between the parties even if it is agreed in another form, provided the requirements of Art. 1261 CC are met. Hence, the contract form will be only enforceable when one of the parties demands such requirement within the terms for the performance of the contract. The outcome is that the contract form might become a requirement at the full disposal of the autonomy of the parties. This approach is followed in Arts 1239 and 1240 CC.

The freedom of form governs the validity of contracts under Spanish law. The case law considers the requirement of form as an exception,[184] thus the *ad solemnintatem* form lacks legal practice in favor of a wide regulation for the means of evidence.[185] Again, this emphasizes that the validity of the contract does not depend on the form in which the contract has been concluded.[186]

4.2.4. The validity of the form

In soft law, the so-called standard form contract or *"forma convencional"* suggests a specific form for the conclusion of the agreement although it is only a presumption that admits proof to the contrary.[187] The lack of the agreed form cannot be invoked by the party who by its own conduct has created the belief and trust in the other party regarding the validity or modification of the contract.[188] This constitutes an infringement of the doctrine *venire contra factum proprium non valet*, which, *a priori*, may limit the effects of a merger clause contained in the contract. However, when the standard form has been

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[183] R. Bercovitz Rodríguez Cano, *Tratado de contratos*, Valencia 2015, p. 847.
[184] STS 27 January 1995 (RJ 1995\177); STS 18 April 2008 (RJ 2008\3522) argues on the restrictive interpretation of the form.
[185] I. Garrote Fernández-Díez in: R. Bercovitz Rodríguez-Cano, *Tratado de contratos*, Tomo 1, 2nd edn, Valencia 2020, p. 933.
[186] M. Santos Morón, *La forma de los contratos en el Código Civil*, Madrid 1996, p. 69.
[187] Art. 2.106(1) PECL.
[188] Art. 29(2) CISG, Art. 2.106(2) PECL, Art. 2.18 PICC.

agreed by the parties, it needs to be expressed in two ways: in a broad sense, understood as declarations of consent and in a narrow sense, in which it is a requirement for the validity of the contract.[189] Although Spanish law leaves to the parties the freedom to choose the form of the agreements, the legal effects are governed by the applicable law. According to the Spanish doctrine, these are valid agreements where the contract form fulfills a merely instrumental function. The form is only relevant for the evidence used by the parties and will not affect the conclusion of the agreement itself. It is therefore a requirement of *probationis causa*, which, if not fulfilled, allows the parties to fulfil it in accordance with Art. 1279 CC.[190] Under Spanish law, the application of the principle of freedom of evidence prevents to award sole evidentiary value to the standard form (Arts 216[191] and 218 LEC). In this regard, it is disputed whether the parties may assign constitutive character to a specific contract form. This issue will be discussed further in the so-called *pactos de forma* in subchapter 10.4.3. The fulfillment derived from the agreed form cannot be invoked by the party who by his own conduct has made to believe the other party to rely on the validity of the contract or its modification.[192] Under Spanish law, the validity of the form is provided as far as it is clearly stated. In addition, nullity of the agreement claiming the lack of contract form is supported by *actos propios*.[193] The parties may agree to enter into an agreement by a specific contract form by incorporating a clause where the written form shall be observed for the validity of the agreement.

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[189] In international trade the parties can agree to submit to a certain form in their commercial relations by agreeing on a clause that the written form must be observed for the validity of the agreement.

[190] A. Uría Menéndez, *Curso de Derecho Mercantil II*, Madrid, 2001, p. 40; A. Vaquer Aloy, E. Bosch Capdevila, M. Sánchez González, *Derecho europeo de contratos, Libros II y IV del Marco Común de Referencia*, Barcelona 2012, pp. 105 et seq.

[191] "*Los tribunales civiles decidirán los asuntos en virtud de las aportaciones de hechos, pruebas y pretensiones de las partes, excepto cuando la ley disponga otra cosa en casos especiales"*.

[192] Art. 29(2) CISG, Art. 2.106(2) PECL, Art. 2.18 PICC.

[193] As occurs, for example, with the non-compliance with the written form required for the validity of the lease or sublease contract (Art. 8 Ley de Arrendamientos Urbanos), A. Vaquer Aloy, E. Bosch Capdevila, M. Sánchez González, *Derecho europeo de contratos, Libros II y IV del Marco Común de Referencia*, Barcelona 2012, p. 279.

4.2.5. Legal effects of the written agreement as proof of the contract

Although Spanish law does not, in principle, impose any requirements as to the form of the agreement for the conclusion of a valid contract, the form has an inner function as an evidentiary function which aims to provide legal certainty i.e., to prove the existence of agreed terms and whether these have been included in the final contract. The contract form aims to provide certainty on how the agreement has been concluded during the negotiation phase which shall include all the essential elements of the contract, while enabling to prove the facts agreed by the parties. The main effect of the form is to serve as the proof of the declarations of intent between the contracting parties. In this regard, the form is considered *ab probationem* when the existence of a specific contract can only be proved by written means.[194]

In this respect, the written form is a mean of proof to demonstrate the existence of the contract, according to Arts 318 and 316 LEC, but not a requirement of validity for the contract itself. In Spanish procedural law, only the parties are allowed to proffer evidence to prove the veracity of facts or arguments according to the *principio de justicia rogada*,[195] whereby any evidence resorted to in the oral hearings needs to be brought by the interested party only. Once the judge has acknowledged the proof, she will rule exclusively on what has been alleged and proven by the parties (*iudex iudicet secundum allegata et probata partium*). However, the different sort of evidence that the parties may allege before the judge are ruled by the principle of *libertad de prueba* ("freedom of evidence"), which virtually allows the parties to resort to any proof they consider, according to Art. 299.3 LEC.[196] Accordingly, the form *ab probationem* has no application in Spanish law,[197] i.e., contracts can be proved by any of the means admitted in law. The purpose of the evidence are the facts that are proffered by the parties that are subject to the legal matter of the contract, according to Arts 281 and 283 LEC. By virtue of Art. 283 LEC, the evidence that is to be considered as new facts, external to the

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[194] M. Albadalejo, *Derecho Civil*, *Introducción y parte general*, 17th edn, Madrid 2006, p. 747.
[195] See subchapter 3.1.
[196] Note that the possibility of proving the contract by any means, including witness evidence is expressly contained in Art. 2.101(2) PECL, Art. 1.2 PICC and Art. 11 CISG.
[197] M. Albadalejo, *Derecho Civil*, *Introducción y parte general*, 17th edn, Madrid 2006, p. 748.

procedure, will not be admitted. This evidence will therefore be considered as futile evidence since it does clarify the controversial facts and matters that are beyond the scope of the evidence.

In this respect, since such freedom of evidence shall be taken into consideration when a merger clause is incorporated into a Spanish contract, the legal effects of the merger will remain valid to the extent that the merger does not limit the array of different means of proof that the judge has available to prove the contract.

4.2.6. Written v. oral agreements

Two types of agreements are envisaged under Spanish law: (i) agreements *ad solemnitatem*, in which the written form is the prerequisite for the validity of the contract, and (ii) agreements *ad probationem*, in which the form serves to enforce the agreement against the parties. The consent is given by the declarations of consent of the parties. Under Spanish law the declarations of consent (*declaraciones de consentimiento*) of the parties are considered the essence of the contract, to be embodied in the written document. Written agreements can be either of public nature when a *notarius publicus* documents in public document the nature of the agreement or any equivalent civil servant, or of private nature when the parties' consent to enter into a binding agreement in writing suffice. In Spanish contract law, the written agreement serves as key function for evidentiary purposes since agreements concluded verbally might entail a greater difficulty to be proved before a judge, although included as evidence to proceedings. In this regard, there are cases where there may be prior statements independent from the written agreement that, when evidenced by the parties, they could amend the final agreement. For example, once the parties have reached an oral agreement, they wish to document it. This discrepancy may arise either because the agreement does not incorporate terms that were initially agreed, or because the contract terms do not mirror the parties' common understandings. To interpret whether the contract is integrated there are different interpretations to ascertain the validity of the written agreement. The most widespread interpretation understands that the written agreement entails a new consent different from the one that was concluded orally.[198] Thus, if the written agreement matched the terms agreed on

[198] STS 20 April 1989 (RJ 1989\3244).

verbally, the result is *pacta concludentia* or *fijación de negocio* (*Festellungs-vertrag*, *negozio di accertamento*). In the event of discrepancies between what was agreed orally by the parties and what is incorporated into the written agreement, the oral terms may be transferred to the written contract provided that their existence is proven by the means of evidence admitted in Spanish law.[199] At all events, the written agreement always implies a new agreement that replaces the previous one, thus novating (*novando*) the oral agreement (*renovatio contractus*)[200]. In this regard, what is the position followed by Spanish law?

Prima facie, the prevalence of a written contract over an oral contract can be disputed in certain cases. However, the lack of integrative effect of an oral agreement may make it difficult to prove the existence of consent thus is the general rule that the written agreement shall prevail over non-written undertakings. Further, the evidentiary function of formal documents aims to provide legal certainty over oral communications or side-agreements. Hence if a dispute arises, the existence of a written agreement will be proof for the common agreement between the parties. However, it can be cases where the parties may resort to other means of evidence approved by the judge, such as the opinion of an expert, or witnesses which might not be included in the contract. In those cases, the oral agreement would be awarded full effectiveness provided misrepresentation or substantial error in the written contract.[201] There is no *renovatio contractus* in this case since the legal obligation is not considered to have been novated.

4.3. Precontractual duties

4.3.1. Overview

Precontractual duties have been subject to extensive regulation at EU level, especially as information duties in B2C contracts.[202] Information is needed for the decision-making process as well as to ensure the performance of the contract. However, the extent to which precontractual duties are subject to

[199] Chapter 10.
[200] L. Díez-Picazo, *La formación del contrato,* Madrid 2015, p. 29.
[201] I. Garrote Fernández-Díez, in: B. Rodríguez Cano (dir.), *Tratado de Contratos*, Tomo I, 2nd edn, Valencia 2013 pp. 87–893.
[202] R. Schulze and F. Zoll, *European Contract Law*, 2nd edn, Baden-Baden 2016, p. 138.

sanctions by breach of the agreement is subject to debate.[203] In this respect, the Spanish Civil Code and the APMCC are silent regarding the contractual liability of the precontractual duties. In legal practice, however, the violation of these duties will not bar the conclusion of the contract, since such infringement only has effects on the duty to inform and not on the integrated terms of the contract.

The intention of the parties is expressed through declarations of will that define the future legal obligations of the contract. Different legal traditions in Europe have adopted different positions regarding the question of pre-contractual duties.[204] The leading Spanish legal doctrine understands that the contract formation it is outlined in two different phases: the preparatory and the execution phase.[205] The contractual process is focused on the conclusion of the contract itself through the concurrence of the offer and the acceptance, in which the parties' declarations of will aim to create a legal binding agreement. In this respect, the Spanish Civil Code follows a static approach regarding the requirements of the contract, where the integrity of the contract prevails over the agreement of wills. During the interpretation carried by the judge, she will attempt to ascertain whether the consent was defective at the time it was declared by the parties[206].

The doctrinal standpoint advocated by *García Rubio,* understands that the Spanish legal standpoint should mirror the position envisaged in Art. 4:119 PECL and Art. 3.7 PICC, which favor of remedies derived from the breach of the contract over remedies for mistake.[207] Similarly, *Morales Moreno* advocates the contractual liability of the precontractual duties that include the breach of the contract (*"lesion del interés de cumplimient como del de integridad"*)[208]. For example, the avoidance of the contract by excessive

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[203] Art. 5 Consumer Rights Directive stipulates information requirements for consumer contracts; see also Art. 14(1)(b) Consumer Credit Directive.
[204] R. Schulze and F. Zoll, *European Contract Law*, 2nd ed, Baden-Baden 2016, p. 144.
[205] L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial I. Introducción teoría del contrato*, 6th edn, Madrid 2007, p. 309.
[206] Hence, in practice, the CC provisions on the formation and conclusion of the contract insufficient and vague.
[207] P. García Rubio, "Responsabilidad por ruptura injustificada de negociaciones: A propósito de la STS (Sala 1ª) de 16 de mayo de 1998", La Ley 4/1989.
[208] M. Morales Moreno, *Incumplimiento del contrato y lucro cesante*, Pamplona 2010, p. 90.

advantage (*ventaja excesiva*) is envisaged in Art. 4:109 PECL and included in Art. 1301 APMCC.

In Spanish law, the avoidance of the contract due to violation of the good faith has been voiced by the case law.[209] According to the main doctrine,[210] Art. 1262.1 CC insufficiently regulates the elements of the contract since it does not regulate the legal figures of the offer and acceptance, nor does it resolve the problems arisen.[211] Furthermore, the incomplete regulation of Art. 1262 has been complemented by the case law to establish the requirements that a declaration of intention shall meet in order to be considered fully valid or accepted. These gaps have been highlighted by the Supreme Court.[212] Thus, the only rules contained in the Civil Code regarding the formation of the contract are those that refer to the contractual consent, pursuant to Arts 1254, 1258 CC and Arts 54 and 55 Ccom. However, only Art. 1262 CC refers to the formation process of the consent and, therefore, of the contract. None of the legal provisions refers to the previous negotiations, which are fundamental in the formation and interpretation of the contract. In short, the Spanish Civil Code adopts the so-called "prototype" model.[213] In view of the regulatory insufficiency under Spanish law, doctrine and jurisprudence[214] are undertaking continuous efforts to complement this legal framework, taking as a reference the harmonizing proposals of contract law, on which the

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[209] STS 5 May 009 (RJ/2009/2907) recognizes the negative interest of contract of credit and includes the indemnization caused by the damage *"daño emergente"* by the loss of profit *"lucro cesante"*. In this ruling, the losses were caused by the lack of launching the work project until a later period of time.

[210] L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial I. Introducción teoría del contrato*, 6th edn, Madrid 2007, p. 328., and V. Chuliá, Introducción al Derecho Mercantil, 17th edn, Valencia 1997, p. 764. These authors propose the convenience of applying the CISG rules extensively to all domestic contracts concluded in Spain and, therefore, deprived of the internationality character required by Art. 1 CISG as a necessary requirement for the activation of its scope of application.

[211] M. Siems, "Unevenly Formed Contracts: Ignoring the 'Mirror of Offer and Acceptance', ERPL 2004, pp. 771–788.

[212] STS 10 October 1980 (RJ 1980\3623).

[213] C. von Bar and E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) – Full Edition*, Munich 2010, p. 294, note 1: O. Lando and H. Beale (eds), *The Principles of European Contract Law, Parts I and II*, The Hague 2000, pp. 139, 161.

[214] In the absence of rules contained in the Civil Code, applicable case law has established the requirements that a declaration of intent must meet given in order to be considered as an offer and acceptance, according to STS 10 October 1980 (RJ 1980\3623), among others.

proposed regulation contained in Arts 1246 et seq. PMCC and Arts 413.1 et seq. PCM has been based.

In principle, by including a merger clause to the contract, the parties waive their ability to assert that any precontractual duties are claimed to be violated nor were indispensable for the party to enter into the agreement. In light of the gaps in statutory regulation regarding all aspects of contract formation, a merger clause under Spanish law might bring some guidance to provide higher certainty to the agreement of the parties, provided that its wording is in accordance with the essential elements of the contract enshrined in Arts 1254 and subsequent. The merger clause thus proves to be a legal instrument that provides legal certainty and will exclude any contractual liability or contractual breach derived to the lack of relevant information or violation of precontractual duties.

4.3.2. Preliminary dealings and negotiations: *tratos preliminares*

Under Spanish law, the preliminary phase of the contract is distinguished by the freedom of the parties to enter in any negotiations or understandings they deem applicable. However, these preliminary agreements or *tratos preliminares* are not binding, since there is no contractual relationship derived from the consent of the parties. As a rule of interpretation of the contract, one-sided declarations and commitments that a party assumes on a pre-contract basis, unless they are expressly stated, will not be integrated into the legal terms of the contract. The parties are therefore free to withdraw from the contract negotiations without any obligation to compensate the other party for not having signed an agreement.

The preliminary dealings[215] (*Vorverhandlungen, trattative*), regulated in most European jurisdictions can be defined as discussions, negotiations, and written statements conducted by the parties that aim to reach a subsequent agreement [216] (such as drafts, minutes, etc.). Spanish law lacks a relevant definition of the preliminary dealing *per se*, hence these negotiations are

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[215] They are defined by the STS as those *"actos que los interesados llevan a cabo con el fin de discutir y concretar un futuro contrato"* according to STS 25 June 2014 (RJ 2014\4929).

[216] B. Moreno Quesada, "La oferta del contrato", RDN 4/1956. This author distinguishes two pre-contractual moments: a first stage of strict preliminary dealings aimed at the formulation of an offer, and a second pre-contractual stage, which commences with the formulation of the offer, which leads to the conclusion of the contract.

considered as preliminary acts prior to the conclusion of the contract that must be specifically included as a means of interpretation in light of Art. 1282 CC on the interpretation of the intention of the parties.

In order to complement the lack of specific regulation, Spanish legal doctrine is responsible to determine the rules of application and validity of this phase of the (subsequent) formation of the contract. These acts fulfil an essential evidentiary function, both for determining the value of the contract and the existence of pre-contractual binding nature understandings or *"responsabilidad precontractual"*. These understandings will not produce any legal effects between the parties. In the absence of specific regulation by the Civil Code,[217] Art. 1282 CC may shed light on the basis that parties acts are interpreted following their contemporaneous and subsequent acts to enter into an agreement, which it can be referred as hermeneutic or interpretive criterion, as pointed out by the Supreme Court.[218] Accordingly, negotiations are a source of interpretation of the contract.[219] The very existence of preliminary discussions is only bound when the consent is jointly provided, which constitutes their subjective element and without which preliminary discussions have no legal existence. Unilateral and spontaneous acts of one of the parties therefore cannot entail any legal consequences for the other party.

Under Spanish law, the *"tratos prelimares o contractuales"* is a relevant legal figure to be considered during the formation and interpretation of the contract. Within these preliminary understandings, the parties could already outline the incorporation a merger clause to their agreement and no regulation, under Spanish law, is preventing the inclusion thereof. The question thus arises as to whether the parties may agree in the final contract to exclude as

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[217] According to STS 16 December 1999 (Tol 2586), the figure of the so-called preliminary negotiations (*Vorverhandlungen Trattative)*, a theory constructed by Germanic doctrine has been adopted by Spanish doctrine concerning preliminary negotiations understood as: "*el conjunto de actos y operaciones que los intervinientes […] realizan con el fin de discutir y preparar un contrato. Las deliberaciones, conversaciones y negociaciones que los interesados llevan a cabo antes de celebrar el contrato, con la finalidad de fijar sus condiciones, anteriores a cualquier oferta en firme*". These negotiations shall be approached from a broad point of view, namely to include undertakings and related exchange of information speculations which do not involve any legal act, as no measurable legal effects are immediately derived from these operations. The most relevant judgement under Spanish law on preliminary negotiations is STS 9 March 1998 (RJ 1998/2372).

[218] STS 19 May 2003 (RJ 2003\4857) and STS 30 May 2003 (RJ 2003\4803).

[219] See Art. II.-8:102 DCFR.

an interpretative criterion the agreements expressed during the preliminary negotiation phase. The Supreme Court has answered this question favorably,[220] based on the provisions of Art. 2:105 PECL regarding the individually negotiated merger clause. This aspect is further analyzed within the effectiveness and limitations of the merger clauses in Chapter 6.

4.3.3. Good faith as a pre-contractual duty

The duty to negotiate in good faith, understood in an objective sense, includes several other duties considered as conducts to followed by the parties during their negotiations: the obligation to provide information to each other, to maintain the confidentiality on the information negotiated by the parties or the duty to be diligent during the dealing[221]. Further, the duty not to leave the negotiations without due cause, in order to protect the interests of the other party.

Whereas some sets of rules determine that good faith governs preliminary dealings as part of the contracting phase,[222] this approach is not universal.[223] For Spain, however, it is undisputed, that the pre-contractual good faith is a legal requirement stipulated in Art. 1258 CC that governs the formation process of the contract; that shall be applied as a guideline both during the preliminary stages, Arts 1471 or 1902 CC, and during the rest of the contract-phase conclusion, as stated in Art. 7.1 CC (objective good faith). In this regard, Art. 1245 PMCC follows the path laid down in Art. 2.1.15 PICC regarding the negotiations conducted in bath faith. According to its content, those who participate in the negotiations shall act or behave themselves in accordance with the requirements of good faith. These provisions do not to include an exhaustive list of specific examples of good faith in the negotiation phase, which allows it to be *adapted* to the relevant economic and social circumstances.[224]

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[220] STS 8 May 2012 (RJ 285/2012).
[221] Spanish doctrine considers these duties to be implicitly regulated in Art. 1902 CC.
[222] In this respect Art. 1.7 PICC.
[223] R. Schulze and F. Zoll, *European Contract Law*, 2nd edn, Baden-Baden 2016, p. 138.
[224] M. Pereña Vicente, P. Delgado Martín and M. Heras Hernández, *Nuevas orientaciones del Derecho Civil en Europa,* Pamplona 2015, pp. 273–280.

4.3.4. Reasonable confidence of the parties

The origin of the reasonable confidence derives from Roman law, particularly from principle *"venire contra factum proprium"*. The reasonable interpretation of the intention of the parties materialized in the contract it features in various sets of rules (Art. 4.1 PICC, Art. 1:302 PECL and Art. I.-1:104 DCFR). Under Spanish law, the reasonable confidence can be understood as the confidence and due manner that any average person in a similar situation and circumstances would have done. These conclusive facts made by one of the parties, entails acts that are considered binding to the other party as well as all the legal effects produced by such legal acts.[225]

The doctrine considers three main elements for the existence of reasonable confidence: (i) it shall be based on external declarations of the parties; (ii) the expectations created by the parties must be legitimate; and (iii) the conduct shown by a party is not contradictory to previous acts, surprising and inconsistent.[226] The reasonable confidence of the contract shall be preserved in order to avoid the creation of false expectations regarding the conclusion of a contract.[227] In order to interpret the intention of the parties, in addition to the particular circumstances of the specific case, the status of the negotiations shall be also taken into account: If they are at an early stage, the trust of the parties is usually lacking, unlike when they are at an advanced stage.[228]

The Supreme Court considers the principle of reasonable confidence as the duty to observe the parties' conduct foreseen by previous acts and to preserve the binding consequences arising from the parties' common intention.[229] In this regard, contradictory behavior constitutes an infringement of the legitimate expectations of the parties. A merger clause incorporated into a Spanish law contract shall always bear in mind the common intention of the parties and that such purpose is clearly stated in the clause as the intended will of the

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[225] A. Secades, "La responsabilidad precontractual en la hipótesis de ruptura injustificada de las negociaciones preliminares", ADC 37/1984, p. 705.
[226] STS 17 June 2008 (RJ 2008\4698).
[227] STS 5 April 1999 (RJ 1999\1873) refers to the bad faith as a *conditio sine qua non* to appreciate *culpa in contrahendo*, in STS 31 January 2005 (RJ 2005\1745).
[228] SAP Salamanca of 31 January 2005 (AC 2005\181) considers as unjustified the breach of negotiations: *"fundamental la ruptura injustificada de negociaciones en el quebranto de la confianza generada en la etapa preparatoria del contrato, generadora de expectativas, cuyo fracaso resulta perjudicial para los intereses del reclamante"*.
[229] STS 22 October 2010 (RJ 2010\7596).

parties. No doubt that the contradictory behavior will be prevented in case the judge proceeds to further interpretate the contractual terms of the agreement.

4.3.5. The duty to inform during the negotiation

Information is one of the most valuable commodities a party may have in order to enter into an agreement, decide wisely as well as to ensure the due performance of the contract. However, as noted above, debate surrounds the extent to which precontractual duties are subject to sanctions by breach of the agreement.[230]

The duty to inform originates from the principle of good faith recognized by European doctrine and it stands out as the most enforceable and most protected duty in commercial contracts, especially within B2C contracts. Such duty is based on the possible imbalance of knowledge between the contracting parties, and thus, in those cases in which there is no imbalance, when the violation of the duty to inform cannot be alleged, as it is not possible to invoke ignorance caused by not acting negligently. In Spanish law, the duty to inform is based on provisions of European contract law, derived from an application of the EU directives. This duty entails that the information provided by the parties shall be sufficient to enter into an agreement and it shall be provided in a timely manner and in a way that is understandable and accessible to the addressee.[231] In this regard, one could interpret the meaning of "reasonably expect" in Art. II.-3:101 DCFR as referring to the information that deviates from subject matter of the contract, the good or service description, from normality and which is or is likely to be unknown to the addressee (which, due to his ignorance, is what determines the legal terms of the contract). Thus, *prima facie*, Art. II.-3:101 DCFR can be applied by analogy to Spanish law in order to provide relevant information for the buyer, provided that it differs from the standards of quality and performance.

The Spanish Civil Code recognizes the validity of the information *in contrahendo,* which does not imply any contractual liability, since the aggrieved party is not granted the legal actions for non-performance (Arts 1096, 1101 and 1124 CC), but other Spanish legal actions (*redhibitoria* and *quanti*

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[230] For example, Art. 14(1)(b) Consumer Credit Directive.

[231] M. Valpuesta Fernández, *Derecho Civil, Obligaciones y contratos,* Valencia 1998, p. 394.

minoris).[232] Similarly, the *Propuesta del Código Mercantil* does not expressly include the duty to inform the contract information except when the buyer is a consumer, in which case Art. 511.1 PCM refers to consumer protection legislation. However, Art. 412.2 PCM does provide the liability for damages caused during the preliminary or pre-contractual stage excluding the failure to reach a final agreement.

A fully valid merger clause will waive any misrepresentation of facts or duty of confidentiality (Art. 2.1.16 PICC) that the parties may invoke against the contract due to there is no regulation that obliges the parties to comply with a duty of information unless there is a consumer contract, which shall be governed by consumer laws.

4.3.6. Distinction with other legal figures regarding the binding nature of the contract

Preliminary dealings or *tratos preliminares* should aim to distinguish when the parties' dealings are intended to enter into an agreement or not. In the latter case, it would be necessary to determine whether the parties are dealing with terms that should be included in the negotiations or whether these form part of the contractual offer, an instrumental contract (such as a promise of sale, a pre-contract or a purchase option), or the contract itself. In practice, a literal interpretation of the contract, i.e., the wording of the legal terms and from a contextual interpretation, i.e., the circumstances that might shed light upon the true intention of the parties, are used to to determine the binding nature of the parties' intention. To this end, the case law of the Spanish Supreme Court understands that the agreements reached by the parties will form part of the preliminary agreements if the essential elements of the contract are not determined, i.e., a new agreement is necessary to determine such elements.[233] If the essential elements of the contract are determined and only ancillary aspects might need to be supplemented (*"por el uso, la práctica, los acuerdos o tratos previos o la buena fe contractual"*) (Art. 1259 CC), the contract can be considered concluded (*perfeccionado*).[234] These ancillary aspects will be complemented by the judge when rendering the legal claim

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[232] F. Elizalde Ibarbia, "*El contenido del contrato"*, ADC (2016), fasc. IV, Pamplona 2015, p. 312.
[233] STS 21 March 2012 (RJ 2012\5128).
[234] STS 1 July 2010 (RJ 2010\5696).

accordance with Art. 708.1 LEC[235]. In other cases, the judge has taken into consideration the acts conducted by the parties to conclude the contract.[236]

During this phase of interpretation, when there is no intention to enter into the agreement, previous negotiations will be merely considered as part of the preliminary phase or preliminary dealings (*tratos preliminares*). However, when determining the existence of a legally binding offer, the intention expressed by the declaring party is lacking *animus contrahendi* and therefore the intention declared will not be sufficient for the conclusion of the contract (Art. 1256 CC). The Spanish interpretation will thus be subject to following Arts 1281–1289 CC.[237] The Spanish Supreme Court has established the following requirements for the offer to be binding: (i) the offer or agreement needs to be integrated or complete, fulfilling all the essential elements of the contract (*essentialia negotii*), and (ii) if this were not the case it would have to be supplemented by subsequent declarations of the parties.[238] In the words

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[235] Art. 708.1. LEC (Ley 1/2000) on *Condena a la emisión de una declaración de voluntad: "Cuando una resolución judicial o arbitral firme condene a emitir una declaración de voluntad, transcurrido el plazo de veinte días que establece el artículo 548 sin que haya sido emitida por el ejecutado, el Tribunal competente, por medio de auto, resolverá tener por emitida la declaración de voluntad, si estuviesen predeterminados los elementos esenciales del negocio. Emitida la declaración, el ejecutante podrá pedir que el Secretario judicial responsable de la ejecución libre, con testimonio del auto, mandamiento de anotación o inscripción en el Registro o Registros que correspondan, según el contenido y objeto de la declaración de voluntad"*.

[236] This is the case ruled by the SAP Madrid 20 April 2001(JUR 2001\263590) which considered that the preliminary agreements had been disregarded due to the lack of a contract: *"resulta inconcebible dar y aceptar órdenes si entre las partes no hay un contrato que faculte para ello, porque unos simples tratos preliminares no autorizan ni a eso ni a nada que signifique mandar o disponer"*.

[237] L. Díez-Picazo, "La formación del contrato", ADC 1995, p. 7.

[238] The distinction between the preliminary negotiations and the offer, as the STS points out, is due to the essential elements of the offer are absent: *"nos hallamos ante unos tratos preliminares y no una oferta al faltar elementos esenciales de esta última (concretamente, el precio): tal fase preparatoria es bien distinta de la oferta en cuanto declaración de voluntad de naturaleza recepticia, como tal dirigida a otro sujeto y emitida con un definitivo propósito de obligarse si la aceptación se produce[...]"*. STS 13 October 2005 (RJ 2005\7235). SAP Madrid 23 March 2006 (JUR 2006\153492) refers to the differentiating characteristics of the offer, stating that *"la oferta es la declaración unilateral de voluntad emitida por una persona interesada en la perfección del contrato dirigida a otra determinada cuya aceptación es necesaria para que aquella se produzca. Debe contener todos los elementos del contrato, de modo que el destinatario sólo tenga que aceptarla, y ser emitida con la voluntad real y firme de obligarse"*. Further it states *"Estos caracteres son los que la diferencian de las conversaciones previas o tratos preliminares que suelen sostener los interesados para definir los elementos esenciales objeto y precio y las condiciones y el tiempo de cumplimiento de las recíprocas*

of the Supreme Court, the offer is "a complete draft of the contract, pending only the acceptance of the acceptor"[239].

As to those agreements that the parties have reached during the negotiations, but which either lack the essential elements of the contract or the declared intention from which it is not understood that the parties are willing to be bound, these will be considered as preliminary agreements: They will not be integrated into the contract, thus lacking any legal effects unless a final agreement is reached.[240]

In this regard and with respect to merger clauses, the difference between "*pactum de contrahendo*", as a preparatory contract for a future contract, and the preliminary dealings or *tratos preliminares* is to be noted. The former is a contract itself as the final phase of the phase of negotiations or preliminary dealings,[241] and whose purpose is to outline the legal effects of a future contract.[242] Preliminary dealings are an essential element in the determination of the legal terms of the contract and therefore in the incorporation of the merger clause. Thus, in prior agreements and pre-contractual dealings where the consent of the parties is declared, the consent (*"acuerdo suficiente"*) will be considered as binding thus these legal obligations will be incorporated into the final contract. On the other hand, when the consent of the parties is not clearly determined, it is necessary to resort to the rules of interpretation and evidence. In order to avoid an inconclusive consent, the parties may agree to include a merger clause in the written contract that will exclude the preliminary dealings or *tratos preliminares*, thus the final agreement only includes the legal obligations agreed in writing. I share the opinion that this scenario, where no regulation is mandatory, is an opportunity for the merger clause to provide legal certainty to the process of contracting.

4.3.7. Liability for breach during negotiations

Spanish law does provide legal actions for the losses and breaches during the negotiation of the contract. The infringement of the duties of good faith and

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obligaciones, las cuales carecen de fuerza vinculante, y que una vez concluyen es cuando se está en disposición de emitir la declaración de voluntad en qué consiste la oferta".

[239] STS 2 November 2010 (Tol 1996317). S. Durany Pich, "Sobre la necesidad de que la aceptación coincide en todo con la oferta: el espejo roto", ADC 1992, pp. 1011–1096.

[240] STS 9 March 1998 (RJ 1998\2372).

[241] STS 30 January 1998 (RJ 1998\353).

[242] STS 16 December 2008 (RJ 2009\290).

fair dealing is manifested in different ways: On the one hand, by entering into negotiations without real intention of entering into the agreement, i.e., breaking negotiations unilaterally and without due cause; or on the other hand by referring to the information provided to the other party, either by lack of disclosure, falsification or applying or using the information for one's own benefit. All these forms of breach of duties of fair dealing are addressed as a breach of good faith under the Spanish Civil Code. In those cases where the parties have acted in good faith during the negotiation phase, if a party has created the reasonable expectation[243] to enter into an agreement, if subsequently without due reason that party abandons the negotiations, the obligation to compensate the damage caused to the other party arises (Art. 2.1.15 PICC, among others) provided the following requirements. These requirements are prescribed by the Spanish case law regarding a non-contractual liability of the negotiations:[244] (i) the creation of a relationship of reliance, for which it is necessary to assess the conduct of the parties, and to ascertain how far the negotiations have been conducted; (ii) the unjustified nature of the breach, by violating the duties of loyalty and good faith[245]; (iii) there must have been damage, to be proved, to the aggrieved party derived from the relationship of trust.

Under Spanish law, non-contractual liability is based on the principle of good faith in Art. 7 CC, which allows for compensation with negative interest or *reliance damages* for the unjustified breach of preliminary agreements. Unjustified reasons can be the lack of real intention to enter into the agreement or the breach of duty of information in preliminary dealings (non-contractual nature) (Art. 1902 CC).[246] According to case law, preliminary dealings which do not lead to the conclusion of the contract do not give rise either

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[243] Trust is embodied in actions or "*actos concluyentes"* of one of the parties, caused by acts or attitudes that are considered binding on the person who execute these. A. Quesada Sánchez, "Las negociaciones" in: A. Dohrmann (coord.)*, Derecho privado europea y modernización del derecho contractual en España,* Barcelona 2011*,* p. 67.

[244] STS 16 December 1999 (RJ 1999\8978); STS 14 June 1999 (RJ 1999\4105).

[245] Generally speaking, abandoning the negotiations because of a better offer and communicating it to the other party can be considered as just cause; however, it will be unjustified if it occurs after the other party accepts its own terms.

[246] According to R. De Ángel Yagüez, "La responsabilidad civil. Cuestiones previas de delimitación", in: S. de la Cuesta, (coord.), *Tratado de responsabilidad civil I*, Barcelona 2008, p. 83. The case law based on STS 5 May 2009 (RJ 2009\2007) and STS 18 January 2007 (RJ 2007\529) in which the injured party can terminate the contract, claim compensation, or exercise both actions jointly.

to a pre-contract or to any legal obligations for the parties, unless it can be demonstrated that the parties acted *"in contrahendo*" in bad faith, giving rise to a right for compensation.[247] Thus, Spanish law indeed admits the liability for breach of preliminary negotiations, as non-contractual liability[248] and, if there is bad faith – *dolo* or *culpa* – the compensation is governed by Art. 1902 CC[249]. In other cases, the (arbitrary) breach of negotiations is considered as the sanction of abuse of power (*abuso del derecho*; Art. 7.1 CC).[250] Regarding the duty of confidentiality, breach is governed in specific legislation, not in the Civil Code.[251] The parties may agree on this regard as part of the subject matter.[252] Furthermore, the Civil Code grants the aggrieved party an action for damages for breach of contract (Arts 1096, 1101 and 1124 CC) in cases where one party provides false, erroneous or insufficient information to another party during the negotiation phase.[253]

Since liability for breach of preliminary negotiations is regulated under Spanish law by the mandatory rules provided in the Civil Code (as tort law), a merger clause incorporated to a contract cannot prevent that the aggrieved may invoke any loss, damages or legal liability derived from the breach of contract. These are mandatory rules that do not affect the content of the contract but the contractual liability of the parties. Should the merger clause regulate any contractual liability, it will be declared void by the judge, based on the argument that the merger clause cannot derogate from mandatory laws.

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[247] STS 14 December 2012 (RJ 2012\376), refers to "bad faith" as the only case in which liability for culpa *in contrahendo* could be considered possible.

[248] STS 11 April 2000 (RJ 2000\2434), STS 16 December 1999 (RJ 1999\8978) and STS 14 June 1999 (RJ 1999\8978).

[249] Case law admits non-contractual liability for breach of contract according to STS 11 April 2000 (RJ 2000\2434). STS 16 December 1999 (RJ 1999\8978) and STS 16 May 1998 (RJ 1998\4308) admit non-contractual liability on the basis of the violation of the *neminem laedere* principle. M. García Rubio, "Responsabilidad por ruptura injustificada de negociaciones", La Ley, 4/1989; S. Cámara Lapuente (coord.), *Derecho Privado Europeo,* Madrid 2003, p. 112.

[250] STS 14 June 1999 (RJ 1999\4105) and STS 15 June 1999 (RJ 2009\3394).

[251] Special laws shall apply when contracts of confidentiality, also called "Non-Disclosure Agreements" are signed by the parties, e.g., Ley 1/2019, de 20 de febrero, de Secretos Empresariales.

[252] Such as Royal Decree 2458/98, which implements Art. 62 of Law 7/1996 of 15 January, on the regulation of retail trade, which in its Art. 3 establishes the franchisee's duty of confidentiality of all pre-contractual information received from the franchisor.

[253] According to the doctrine in STS 31 October 2001 (RJ 2001\9639) and STS 24 April 2009 (RJ 2009\3167).

4.3.8. Pre-contractual agreements: *documentación precontractual*

Current global trade has transformed the traditional contract formation phase by introducing new contractual concepts foreign to Spanish law regulation, such as letters of intent, memoranda of understanding and confidentiality agreements.

A letter of intent may be considered a pre-contractual agreement that is part of the preliminary negotiations in which the contracting parties include the rules on the negotiation and its subsequent incorporation to the legal terms, without any obligation to conclude the contract based on such terms. These preliminary agreements represent the beginning of negotiations and the contracting process itself. The pre-contractual agreement (intent) therefore has two purposes: Evidentiary and normative, since it serves to establish the rules that will govern the negotiations between the parties.[254] Although a letters of intent does not bind the parties, since it is considered a preliminary agreement, under Spanish law it may have the character of legal obligations if it can be understood that it provides a complete agreement and the intention to produce fully legal effects, provided observance to good faith and the applicable provisions of the Civil Code.[255]

As to the Memorandum of Understanding (MOU), this is an agreement accepted by Spanish legal doctrine and case law as a possibility to draft in writing the agreements reached during the negotiations.[256] Thus, avoiding to renegotiate preliminary agreements already reached in the negotiation phase. In any case, if the contract is not concluded, the parties are not bound by what has been agreed upon by the MOU.

Where merger clauses are concerned, such preliminary dealings have a decisive effect on the formation of a merger clause, since such clause aims to exclude such dealings that have not been included in the final contract. An individually negotiated merger clause included in the written contract will prevent any documentation, whatever nature or content it presents, to be

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[254] Its purpose is to demonstrate the existence of an agreement between them until the content of the contract is specified: *"un acuerdo entre ellas sobre determinados extremos, que les impediría retractarse, pero han de seguir negociando los restantes."* STS 11 April 2000 (RJ 2000/2434), STS 7 June 2011 (RJ 2011\4391), and STS 24 June 2011 (RJ 2011\7370).

[255] Art. 1258 CC.

[256] H. Marín Narros, "Concepción y eficacia de las letters of intent, los memoranda of understanding y los acuerdos de intenciones", Noticia Jurídicas 2009, p. 16.

asserted as means of interpretation to the parties' intention materialized in the contract due to the parties have expressly intended to exclude any external documentation to the writing.

4.4. Requirements for the conclusion of the contract

Formal requirements have different purposes: first, they aim to provide the minimum standards that a contract shall meet in order to be valid. Second, formal requirements aim to provide legal certainty to the contract, since its fulfillment by the parties is required before the execution of the agreement. Thirdly, these are requirements that aim to serve as a basis to distinguish binding agreements from non-binding negotiations and undertakings.

The focus of this dissertation relies primarily on the third issue, the requirements for the formation of the contract, since these elements constitute the fundamentals to prove the admissibility and application of the merger clause to Spanish law, particularly to ascertain what legal requirements shall the parties fulfill in order to enforce the clause.

Three main topics will be analyzed within the requirements for the formation of the contract: (i) the determination of a subject matter of an agreement, (ii) the interpretation of the subject matter, and (iii) the understanding of the cause under Spanish law which poses the risk of an incomplete contract where the judge may resort to external evidence to fill the gaps of the contract.

From the outset, however, it is to be noted that the Spanish Civil Code features various discrepancies between other European academic and uniform law texts, such as the requirement of the *objeto* ("subject matter") and the *causa* ("cause") as essential elements of the contract. Other legal figures such as the preliminary agreement (*precontrato*[257]) and property contracts (*contratos reales*[258]) are completely unknown in such texts. In addition to the essential elements of the contract, certain types of contracts have specific formal

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[257] The "preliminary agreement" (*precontrato*) is not expressly regulated in the Civil Code, but is admitted in accordance with the general principles of law and the principle of free will in Art. 1255 CC. Specific cases of preliminary agreements include the promise of sale, Art. 1451 CC and the promise of pledge or mortgage, Art. 862 CC.

[258] This is characterized by the fact that the contract is concluded with the delivery of the good (*cosa*) including: loan, mutual, bailment, gratuitous bailment, deposit, pledge. This is a category of Spanish law already abandoned by most of the legal systems around us. See R. Zimmermann, *The law of obligations, Roman Foundations of the Civilian Tradition*, Oxford 1992, p. 1002.

requirements. For example, *contratos solemnes* where the agreement needs to be in writing and notarized in order to produce legal effects. This chapter analyzes the essential elements of the contract envisaged in Spanish law in order to prove the validity of a merger clause to a contract where these essential elements are met. For the purpose of better understanding, the three essential elements of the contract[259] will be analyzed: (i) the "consent" (*consent*) and defects thereof, (ii) the "subject matter" (*objeto*), and (iii) the "cause" (*causa).*

4.4.1. Consent

A valid consent is strictly dependent on the declaration of will[260] that the parties intend to be legally bound by the terms they include into the contract. The definition of a contract under Spanish law understands the consent of the parties as the essential element for the conclusion of the contract,[261] according to Art. 1254 CC: "The contract exists from the time where one or several persons consent to bind themselves vis-à-vis another or others to give something or to provide a service"[262]. Hence, a contract arises when the consent[263] is conveyed in the statement of will of the parties[264] with the intention to enter into a fully binding agreement[265] (*ad constituendum obligationem*).[266] Furthermore, Art. 1261 CC requires the consent of the contracting parties and Art. 1091 CC establishes that the obligations arising from contracts have the force of law between the contracting parties and must be fulfilled in accordance with them. However, the intention of the parties is not always binding. A distinction is to be drawn between a legally binding intent, where binding

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[259] Art. 1261 CC.

[260] Subchapter 4.4.3.

[261] Art. 1254 CC states "a contract exists when one or more persons consent to be bound".

[262] *"El contrato existe desde que una o varias personas consienten en obligarse, respecto las unas de las otras, a dar alguna cosa o prestar algún servicio"*.

[263] Art. 1089 CC refers to the legal obligations derived from the law, contracts, and legal conducts: *"Las obligaciones nacen de la ley, de los contratos y cuasi contratos, y de los actos y omisiones ilícitos o en que intervenga cualquier género de culpa o negligencia"*.

[264] L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial. Introducción. Teoría del Contrato. Las relaciones obligatorias*, Madrid 1979, p. 92.

[265] However, legal doctrine understands that it is possible to follow the "*teoría del negocio jurídico*", as there is a nexus between the different contractual figures. M. Albadalejo, *Derecho Civil I, Introducción y parte general*, 16th edn, Madrid 2004, p. 567.

[266] L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial, Introducción, Teoría del Contrato, Las relaciones obligatorias*, Madrid 1979, p. 86.

agreements arise, and non-binding agreements, such preliminary agreements.[267] The consent given during preliminary agreements will be analyzed in subchapter 4.4.1.

In this respect, questions arise as to when does the consent need to be expressed in order to be effective: Should the consent always be presumed as the intention to be legally bound or are there certain cases where it can be disputed? For example, when the consent is defective. Are there any requirements as to the form of the consent?

Generally speaking, contracts are concluded by mere consent (as a general rule) according to Art. 1258 CC:[268] It is not required that the content is expressly stated, since it can be presumed by the party's acts themselves.[269] Exceptions to this provision are *actos unilaterales* ("unilateral statements") preliminary agreements[270] where the consent is absent because an agreement has not yet been not formed or reached.

The existence of the contract is determined by the parties' intention, statements of will, to be legally bound in order to exclude from the contract those agreements where there is no actual intent to be bound such as moral commitments or declarations *iocandi causa*.[271] As a general criterion of interpretation, the intention of the parties may be determined on the basis of the express or tacit declarations of the parties, derived from the parties conclusive or unambiguous acts (*facta conclusudentia*[272]). The statements of will from the parties thus constitute their actual intention to enter into an agreement. The task of determining whether the intention of the parties is legally binding or not corresponds to the judge. In this regard, *Díez-Picazo* indicates unless the parties state otherwise, a tacit statement of intention can be understood to

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[267] L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial I, Introducción teoría del Contrato*, 6th edn, Madrid 2007, p. 172.

[268] "*Los contratos se perfeccionan por el mero consentimiento, y desde entonces obligan, no sólo al cumplimiento de lo expresamente pactado, sino también a todas las consecuencias que, según su naturaleza, sean conformes a la buena fe, al uso y a la ley"*.

[269] See Art. II.-4:102 DCFR. However, the presumed agreement does not seem to be identified with Spanish law, since the category of *de facto* in contractual relations is arbitrary, L. Díez-Picazo, E. Roca Trias, A. *Morales Moreno*, *Los Principios del Derecho europeo de contratos*, Madrid 2002, p. 173.

[270] Subchapter 4.4.1.

[271] Art. 14 CISG, Art. 2:101 PECL and Art. 2.1.2. PICC.

[272] M. Marín López, "Requisitos esenciales del contrato. Elementos accidentales del contrato*"* in *Tratado de contratos*, in: R. Bercovitz Rodríguez-Cano (ed.), *Tratado de contratos*, *Tomo I*, 2nd edn, Valencia 2020, p. 618.

have been made by means of acts carried out in accordance with the social uses and the legal communications, which unequivocally reveal the internal consent.[273] In order for a merger clause to be fully valid when incorporated into a contract, the essential elements of the contract need to be observed. Should any of the essential elements is missing at the conclusion of the contract (formation phase) the entire contract and the clauses incorporated therein risk being declared null and void.

4.4.2. Mistake as a defect of consent

Rules on defects of consent seek to protect the freedom of contract of the parties – in Spanish law, the rules focus on the process of formation of the will of the parties rather than the legal consequences on the legal relationship.[274] Under Spanish law, there are specific cases where the so-called defects of consent or defects of the declaration of consent (*vicios del consentimiento*) may be derived from the lack of alignment between the intention expressed in the declaration of will and the actual will of the parties. The Spanish Civil Code lists the possible defects of consent (*vicios del consentimiento*) in Art. 1265 CC which are further contemplated in Arts 1266–1270 CC. Alongside mistake (*error*), Art. 1265 CC also lists fraud (*dolo*), duress (*violencia*), and intimidation (*intimidación*) as giving rise to defects of consent. These are not analyzed in this chapter as these are defects that will render the contract null and void and no interpretation by the judge will be ascertained in this regard (Art. 1265 CC).

The regulation of mistake provided in the Civil Code aims to: (i) protect the trust of the party that was unaware of the mistake and how it has affected the parties' interests, (ii) to ascertain whether the contracting party that shared the mistake could have duly avoided it, (iii) to foster legal certainty by establishing requirement of fundamental mistake. As a defect of consent, mistake is commonly referred as an erroneous perception or a belief that is not in

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[273] L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial, Introducción, Teoría del Contrato, Las relaciones obligatorias*, Madrid 1979, p. 190. See also STS 22 December 1992 (RJ 1992\10635) and STS 10 June 2005 (RJ 2005/4364).

[274] R. García Vicente, "Comentarios al Art. 1265 CC", in: R. Bercovitz Rodríguez-Cano (dir.), *Comentarios al Código Civil*, 5th edn, Madrid 2021.

accordance with specific facts.[275] The mistake is associated with the declaration of the will of the parties that commonly refers to lack of awareness of specific acts or facts.[276] Mistakes may be unilateral or common: if the mistake is communicated or shared by the other party, the mistake is common; otherwise it is unilateral. In this respect, where the declaration of will differs from what the party actually intended, the consent will not be given, as an essential element of the contract, and the contract is not concluded.[277]

Whereas Art. 1265 CC declares the contract null when the consent had been expressed by mistake, duress, intimidation or fraud, Spanish case law only allows for nullity of the contract for mistake in exceptional cases, according to Art. 1266 CC. In the case that mistakes are ascertained within the conclusion of the contract (*error esencial;* fundamental mistake regarding elements of the contract that motivated the conclusion of the contract), the parties will have to remedy such mistake in order for the judge to consider the contract valid.

4.4.3. The declaration of will

Under Spanish law, the contract is a legal act formed by the declaration of will of the parties that aims to enter into a legal relationship.[278] As a general rule, the declaration of will suffices to prove the intention of the parties to bind themselves. In this respect, a merger clause intended to exclude the declarations of the parties that are not incorporated to the writing will exclude any expectation or reliance to external declarations of the will of the parties due to the parties have previously and jointly agreed to bar recourse to extrinsic declarations.

Art. 1281 CC governs the interpretation of the declaration of the parties: (i) should the terms are clear, their literal meaning prevails; (ii) should the

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[275] In Spanish law, it should be noted the distinction between conscious and unconscious discrepancy of a mistake. In the practice the difference is irrelevant as to the application of the merger clause.

[276] The mistake was defined as the ignorance of a legal precept as to its content, existence or validity to a specific case *"la ignorancia de una norma jurídica en cuanto a su contenido, existencia o permanencia en vigor para el caso concreto"*, STS 28 September 1992 (RJ 1992\8022), STS 23 December 1991 (RJ 1991\9760).

[277] STS 2 February 2016 (RJ 2016\214) ascertained that the declaration of the parties was absent thus declared the contract void due to lack of consent.

[278] The Spanish Civil Code does not provide a definition of the contract. Art. 1254 CC refers to the consent needed to enter into a legally binding agreement.

wording contradict the parties' intention, this latter shall prevail.[279] The Spanish Civil Code gives preference to the literal meaning of the clauses, except when the intention of the parties in contrary to the wording; in such case the intention shall prevail. However, it is disputed within Spanish doctrine whether the preference between the subjective declaration of will and the objective declarations of will can be challenged by the judge in the event of discrepancy.

The interpretation applied by Spanish doctrine follows the doctrine of the declaration, based on the external element of the expressed will that aims to bind the legal transaction "*negocio jurídico"* and the reliance created in the other party.[280] This interpretation concurs with the provisions of Art. II.-4:101 DCFR regarding the nullity of the contract when the recipient party has diligently noticed the lack of binding nature of the declaration where the intention prevails over the will expressed by the parties. The theory of declaration places all the weight on the declaration of will and leaves the *value* of the subjective will. This theory pursues to give certainty to the legal relationships, protect the expectations of the recipient and lessen the risk of the divergence between the will and the declaration of agreement bases on reasonable criteria.[281]

Where a merger clause is concerned, the expressions of the parties in the form of external declarations with the intention to enter into a binding agreement that created the expectation on whose conduct another party has reasonably acted in reliance and is not included in the contract cannot be invoked by one of the parties: The merger clause reflects the agreement that such declarations were meant to be excluded. However, if there is simulation of the declarations of will by the two parties, the essential terms of the contract and the merger clauses will be declared void by the judge due to lack of consent and an invalid contract.

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[279] *"Si los términos de un contrato son claros y no dejan duda sobre la intención de los contratantes, se estará al sentido literal de sus cláusulas. Si las palabras parecieren contrarias a la intención evidente de los contratantes, prevalecerá ésta sobre aquéllas"*.

[280] It is based on the assumption that the addressee of a declaration must be able to rely on its effectiveness and validity without carrying out an investigative task as to whether or not it corresponds to the real will of its issuer.

[281] R. García Vicente, "Comentarios al Art. 1266 CC", in: R. Bercovitz Rodríguez-Cano (dir.), *Comentarios al Código Civil*, 5th edn, Madrid 2021.

In other cases, an intermediate solution may be adopted, in which the discrepancy between what the parties actually intended and what is declared may involve a conflict of interests that cannot be resolved by means of the interpretation of the contract. To resolve such discrepancy, different criteria have been applied. Firstly, case law presumes that the declaration mirrors the internal intention of the declaring party.[282] Accordingly, the party invoking such discrepancy shall therefore prove this circumstance. This rule shall rely on the principle of good faith since the addressee party acted in good faith when he trusted such declaration.[283]

Secondly, in cases of conscious and intended discrepancy between what the parties have declared and what is really intended in their mutual negotiations, the contract is considered "simulated" (*simulado*), i.e., there is a clear intention to deceive third parties.[284] Spanish law associates the simulation of the contract with the falsity or veracity of the cause (*causa falsa*) covered in Art. 1276 CC, which requires three main presumptions: (i) discrepancy between the subjective and the declared intention, (ii) intention to deceive, and (iii) the existence of a simulated agreement (which will be valid if it fulfils the requirements of Art. 1261 CC).

As the parties are bound by their own agreements and undertakings and the principle of good faith, by virtue of Art. 1258 CC that concerns behavior due by the parties ("*una conducta contractual significative"*), when a discrepancy between the subjective and the declared intention arises, the declared intention of the parties (*"lo manifestado o exteriorizado"*),[285] according to Art. 1288 CC, prevails.

4.4.4. Subject matter

The subject matter is an essential element that needs to be determined in order for the contract to produce legal obligations and to fulfill its purpose.[286]

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[282] STS 21 October 1951 (RJ 1951\2354), STS 3 May 1935 (RJ 1935\1124). According to the STS, the *"doctrina de la declaración"* is used to ascertain between the declaration and will of the parties as voiced in STS 1 December 1959 (RJ 1959\4476) and STS 24 June 1969 (RJ 1969\3633).

[283] STS 21 November 2012 (RJ 2012\11052) and STS 14 July 2020 (RJ 2020\2347) remarked the good faith as governing principle for the intention of the parties

[284] STS 5 December 2005 (RJ 2005\10185).

[285] A. Carrasco Perera, *Derecho de Contratos,* 2nd edn, Pamplona 2017, pp. 138 et seq.

[286] Art. 1261 CC requires consent, object and cause as essential requirements for the conclusion of a contract.

Where a merger clause is concerned, it must be incorporated into a Spanish contract in which the subject matter is already certain and determined to achieve the purpose pursued by the parties.[287] Art. 1261 CC stipulates for the conclusion of the contract the existence of a certain subject matter as the core of the contract. Thus, Spanish law imposes a contractual control for the determination of the subject matter based on three main requirements:

(i) *Imposibilidad* ("impossibility"): a valid subject matter shall be possible, meaning that it has a realistic purpose,

(ii) *determinación* ("certainty"): meaning that the purpose of the business is previously defined, and it does not create ambiguities regarding the expected outcome of the agreement,

(iii) *licitud* ("lawfulness"): it shall be in accordance with the applicable and mandatory laws.

4.4.4.1. Impossibility of the subject matter

The Civil Code regulates the impossibility of the subject matter based on physical goods (*cosas*) and services. Art. 1272 CC states that impossible things or services may not be the subject matter of a contract.[288] However, there is a theory of goods and services under Spanish law that proves to be insufficient to cover all the contractual possibilities regulated in positive law.[289] The fact that the Civil Code regulates impossibility as a requirement of validity does not solve these issues (either), thus highlighting the lack of applicability of these rules. In contrast, uniform law texts interpret those cases of impossibility to be resolved on the basis of breach of contract, i.e., simplifying and avoiding inconsistency to the applicable rules and favoring the legal preservation of the contract.[290] It is therefore not decisive when a contract has an "impossible" subject matter to be determined by the parties. Instead, a rationale based on a breach of contract may trigger the understanding that the subject matter cannot, since its inception, be concluded. For example, a party that may enter into a contract to do business in a country that subsequently has been sanctioned on a no-trade list by the United States. Such party would

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[287] V. San Julián-Puig, *El objeto del contrato*, Pamplona 1996, p. 62.

[288] *"No podrán ser objeto de contrato las cosas o servicios imposibles."*

[289] L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial I. Introducción teoría del contrato*, 6th edn, Madrid 2007, p. 229.

[290] S. Cámara Lapuente, (coord.), *Derecho Privado Europeo*, Madrid 2003, p. 229.

be excused from performing its obligation under the contract because performance would violate the US law.

Regarding the certainty of the subject matter, the parties may reach an agreement that is not sufficiently certain, provided that a minimum degree of certainty is further determined at a later stage during the contract negotiations. The question arises as to when should the agreement be entirely determined or certain and how the minimum degree may be ascertained? Under Spanish law, the determination of the subject matter is a prerequisite for the validity of the contract meaning that the commercial "good" or subject matter is dependent on the contract to be "certain": *"objeto cierto que sea materia del contrato",* according to Art. 1261.2. CC. Hence, the subject matter shall be determined at the time of the conclusion of the contract, or failing that, to be further "determinable" according to criteria that the parties have foreseen or that the law establishes, without the need for agreement of the parties. In this regard, Art. 1273 CC specifies the kind of good or service subject matter of the contract: "as to its kind" (*en cuanto a su especie*).[291] Furthermore, Art. 1447 CC allows a third party to establish the price of the goods, or in partnership contracts to even determine the exact outstanding share in the profit and losses of the business outlined in the contract (Art. 1690 CC). However, in cases where the third party is unwilling or unable to make the determination, the contract is deemed ineffective.[292]

4.4.4.2. Lawfulness of the subject matter

The Spanish Civil Code provides for a control for the abusive determination of the subject matter by any of the parties. Such control is contemplated in Art. 1256 CC, and based on the interpretation of Art. 1254 CC, which prohibits that the parties' actions may affect the validity and performance of the contract to be left to the discretion of one of the contracting parties. Under the Spanish Civil Code,[293] the subject matter of an agreement shall be always of a lawful nature following two main distinctions: if the subject matter is a good

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[291] This means that the determination of the subject matter of the good or service must not lead to confusion with other different goods (*cosas*), according to STS 9 January 1995 (RJ 1995\01613).

[292] STS 27 February 1997 (RJ 1997\1333) and STS 4 December 1998 (RJ 1998\8788). Nevertheless, this is not an absolute rule, since the possibility of unilaterally terminating from the contract cannot be excluded.

[293] See also Art. 30 Pavia Group.

("*cosa"*), it must be commerciable (*"fuera del comercio de los hombres"*), and if it is a service, it must not be contrary to the laws and good customs according to Art. 1271 CC. The lawfulness principle applied to goods (*cosas*) is in accordance with moral rules and principles. According to *Cámara*, this legal control is a characteristic of a legal system that needs further development since the lawfulness can be achieved by other more *subtle* means, such as those used when regulating the agreements or the cause[294] (Arts 1255 and 1275 CC). The lawfulness of the subject matter is rarely disputed in practice, provided that parties shall always be observant to which applicable laws affect their agreement.

4.4.5. Cause

The third essential element for the validity of the contract is the *causa* ("cause") of the contract (Art. 1261.3 CC[295]). The role of the cause and its legal effects is commonly perceived as an ambiguous legal notion in civil law.[296] Under Spanish law, cause should be understood two-fold: (i) subjectively, as the rationale pursued by the parties regarding the conclusion of the contract; and (ii) objectively, fulfilling an economic-social function of the contract. However, the cause *per se* does not play an essential role in the legal practice, being the consent and the subject matter complementary elements that can replace such function, if absent.[297]

The Spanish Civil Code lacks a clear definition of the cause, though Art. 1274 CC outlines its legal effects for certain types of contracts. The cause shall always be present in the contract following Art. 1275 CC, which establishes that those contracts without cause (at the time of concluding the contract) will not produce any legal effects. Furthermore, the Spanish Supreme Court, has stressed the need for the parties to take into the consideration the economic-social function when wording the contract to be fully valid (the

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[294] S. Cámara Lapuente (Coord.), *Derecho Privado Europeo,* Madrid 2003, pp. 404–408.
[295] In addition, consent is manifested by the concurrence of the offer and the acceptance of the *good* and the cause according to Art. 1262 CC.
[296] A. Vaquer Aloy, E. Bosch Capdevila, M. Sánchez González, *El derecho europeo a de la compraventa y la modernización del derecho de contratos,* Barcelona 2015, p. 276.
[297] In this way, it would be aligned with the DCFR and the equivalent rules of the proposals for harmonizing European law, Vaquer Aloy, E. Bosch Capdevila, M. Sánchez González, *El derecho europeo de la compraventa y la modernización del derecho de contratos,* Barcelona 2015, p. 276.

objective interpretation).[298] Similarly, in those cases where the contract is fully simulated, the courts have considered the cause to be non-existent:[299] in such cases, its non-existence shall be proved by the party who has invoked the simulation.[300]

The nullity of the cause in Spanish law is prescribed for the following: (i) when a false cause is presumed, i.e., the contract has been simulated (Art. 1276 CC),[301] (ii) unlawful, i.e., violating law or morality (Art. 1275 CC),[302] and (iii) when the cause refers to an mistake statement of intention.[303] In the practice, the nullity[304] of a contract due to the lack of cause is a common reason in numerous cases.[305]

4.4.6. Interim conclusion

The validity of a merger clause in a written contract is subject to the existence of a binding agreement (consent) that rests on the terms agreed by the parties being the subject matter, i.e., purpose pursued by the parties, being true (not simulated) and lawful (in accordance with applicable laws). In this context, nullity of the contract due to lack of consent entails the nullity of both the contract and the merger clause therein. Since the purpose pursued by the parties is the exclusion of the agreements prior to the final contract, the merger clause must be considered to meet the requirements of validity demanded by

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[298] STS 21 July 2010 (Tol 1921825), STS 17 December 2004 (Tol 590984), STS 27 June 1996 (Tol 1659495).

[299] STS 11 February 2016 (Tol 5645234) points out that the non-existence of the price must be proven and not the mere non-payment of the same, since, as in STS 5 May 2016 (Tol 5718316) states, the non-payment of the price cannot be equated to the non-existence of the same.

[300] It shall be aligned with the business or legal transaction pursued by the parties.

[301] STS 23 May 1980 (Tol 1740526), STS 16 December 1986 (Tol 1734648) and STS 26 November 1987 (Tol 1737125).

[302] STS 30 November 2000 (Tol 10994), STS 6 June 2002 (Tol 202863). The STS award of 10 June 2015 (Tol 5199607), declared the nullity of the contract on the understanding that the unlawful purpose sought by both parties has been raised by case law to the category of unlawful cause determining the nullity of the contract in accordance with Art. 1275 CC.

[303] Art. 1301 CC prescribes a four-year period, from the time of the conclusion of the contract, to contest the contract due to a false or simulated cause and to prove the veracity of the business *"negocio jurídico"*.

[304] S. Cámara Lapuente (Coord.), *Derecho Privado Europeo*, Madrid 2003, p. 410. However, the cause it is not a requirement for the validity of the contract nor to deem the contract as invalid

[305] For example, STS 24 October 2006 (Tol 1006919) in which a contract was rendered null and void due to the "superiority" of one of the contracting parties.

Spanish contract law provided the aforementioned requirements for the conclusion of a valid contract are satisfied.

5. Nature of the terms of the contract

By virtue of the *libertad contractual* ("freedom of contract") enshrined in Art. 1255 CC, the parties are in principle free to determine the terms will govern their contract. However, the freedom of contract is not absolute as it is subject to mandatory rules that may impose a specific form or content to be envisaged by the parties for the validation of the contract and from which the parties may not derogate.[306] For example, the *Ley de Arrendamientos urbanos* ("Urban Tenancy Act") and the *Ley de Consumidores y Usuarios* establish formal requirements such as the form and negotiation of the clause in order for the contract to produce legal effects. The inclusion of a merger clause into a contract governed by mandatory rules shall fulfill the same requirements as the rest of the clauses of the contract in question. Accordingly, the parties need to understand the consequences of incorporating a merger clause as a standard term or as an individually negotiated term, which it will be subject to a fairness test.

5.1. Standard terms

The standardization of contracts and the use of general terms and conditions in B2C-contracts may lead to one of the parties to impose the consumer party a fixed contractual term required for its performance (e.g., to buy or sell the good in question). The consequence is that the freedom of contract is only at disposal of one of the contracting parties, with the other party lacking any chance to dispute the (imposed) terms.

Whereas the EU Unfair Terms Directive contains a control mechanism for terms of consumer contracts which have not been individually negotiated, it does not contain a control mechanism for the inclusion or incorporation of individually negotiated terms.[307] Similarly, this Directive does not regulate the general terms and conditions of contracts as such. These terms may be drafted as general terms and conditions. Consequently, Spanish law regulates this matter in Arts 1–10 LCGC and in Arts 80–91 LGDCU, relating to general conditions and unfair terms in consumer contracts. While the LCGC applies to any standard adhesion contract, regardless of the status of the contractual

[306] For "*libertad contractual*" see subchapter 4.1.
[307] Art. 3 Unfair Terms Directive.

parties, the LGDCU applies only to B2C contracts. Thus, the LCGC indirectly refers to the requirement of "non-individual negotiation" as one of the characteristics of the general condition of the contract. However, the requirements that these clauses shall meet are regulated in Art. 80 LGDCU, as well as to the consideration of unfairness of the clauses that have not been individually negotiated (Art. 82.1 LGDCU). Under Spanish law, it is not a *conditio sine qua non* for a non-negotiated clause to be a general condition; since the concept of a non-individually negotiated clause is broadly defined, there is thus no rule or general provision that states that a party needs to prove whether its predisposed clause had been individually negotiated. Only the LGDCU regulates this matter. It is important that it is a previously formulated clause (in any case it will be part of general term and conditions), established by one of the parties that was included in the contract without the possibility of negotiation nor agreement by the other party. Accordingly, the only available option for the consumer is to adhere to the fixed terms without any chance of being able to influence its content or challenge it *(negative effect* of limiting party autonomy).

An indirect control on non-individually negotiated clauses is carried out: (i) through the control of inclusion or incorporation (it does not take into account whether or not the adherent is a consumer), which allows the contractual terms to be determined through those clauses which, by fulfilling the formal requirements, are considered part of the contract; and (ii) through the control of content, through the standard terms (applied only to consumers), by means of unfair terms. In order for the non-individually negotiated clauses to be validly incorporated into the contract by the predisposing party, the adherent party must (i) accept the clauses, (ii) be duly informed of the clauses, and (iii) be provided with copy of the clauses. Pursuant to Art. 5.3 LCGC these clauses must be drafted with clarity, transparency, concreteness, and simplicity. However, unfair terms, will be declared ineffective in any case.

Spanish law includes a number of gaps due to the failure to transpose the provision contained in Art. 4(2) Unfair Terms Directive, which establishes the differentiation between the two types of pre-drafted clauses: those subject to a control of the legal terms of the contract; and others, referring to the main

subject matter of the contract, which, in order to be declared unfair, the wording needs to be unclear and unintelligible (control of transparency).[308]

In light of the above, Spanish law does not require a merger clause to be individually negotiated in order to be valid. It may be included in general terms and conditions. Mandatory rules regarding standard terms have the same legal effect on the merger clause incorporated to the contract, with no possible maneuver to avoid compliance with the mandatory rule.[309]

5.2. Standard terms v. individual agreements

Standard terms are defined as provision drafted in advance for repeated use by one part and without any possibility to be negotiated. The term "adhesion" has been used to express the unfair bargaining power against consumers. General prerequisites for the admission of standard terms are: (i) incorporation of the standard term into the contract by the common intention of the parties; (ii) it needs to be interpreted, and (iii) it is subject to further review. Merger clauses incorporated as standard terms do raise two main questions as to its validity (a merger clause negotiated in a B2B transaction is understood as a presumption of the parties) and merger clauses drafted as standard terms and included in general terms and conditions are likely to be considered as unfair terms subject to the judicial control of the contents of standard terms.

The questions as to its validity as a standard term derives from its own nature, used as boilerplate clauses. However, the question arises as to the presumption of validity that the merger clause may have when it is incorporated as standard terms or as an individually negotiated clause. It is commonly stated that individually negotiated agreements override any previous or conflicting agreements. As noted above, non-individually negotiated clauses do not necessarily need to be formulated or incorporated as general terms and conditions to be fully valid under Spanish law. Although standard terms are useful instruments used in mass commercial transactions, they entail a *negative effect* of limiting the autonomy of the parties, giving rise to a negotiating

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[308] F. Pertíñez Vilchez, "Los elementos esenciales del contrato y el control de las condiciones generales", Rev. Doctrinal Aranzadi Civil-Mercantil 17/2003, p. 2171.

[309] "*El control referido al criterio de transparencia tiene por objeto que el adherente conozca o pueda conocer con sencillez tanto la carga económica como la carga jurídica del contrato*" according to the judgement of the Supreme Court of 18 June 2012 (RJ 2012\8857).

inequality[310] between the seller and the buyer. This inequality is mainly due to two factors: (i) the information imbalance, derived from the different contracting positions i.e., the party who enters into a plurality of identical contracts; and (ii) the superior bargaining power, based on the seller's power to unilaterally govern the terms and conditions. Under the DCFR, standard terms are defined by the following elements:[311] (i) the contract shall be concluded prior to the start of the negotiations, without any possibility of having been individually negotiated;[312] and (ii) the wording is used on a large or standard scale, i.e., in multiple contracts with different parties.

The Spanish Civil Code lacks normative definition of standard terms. Instead, Arts 1261–1264 APMCC refer to general contracting conditions, including the assessment of contractual balance between the parties and the assessment of unfair terms incorporated to the contract. It can be presumed that the APMCC, being only a draft to update the current Civil Code, lacks direct applicability and therefore it can only be referred as legal reference or guidance for the parties. Art. 1261.1 APMCC contains the definition of general terms and conditions, which includes the main prerequisites for entering into an agreement, namely: (i) incorporation of the terms to a written contract; (ii) prior drafting of the clause, which restricts the autonomy of the drafting party without any possibility to negotiate, and (iii) the standard nature of the agreement, i.e., its wide use as standardized contracts.

The *Ley sobre Condiciones Generales de la Contratación* (LCGC) is the current Spanish legislation regulating standard terms. It differentiates between unfair terms, only applicable to consumers, and standard terms, as provisions to contract, without any distinction between consumers and non-consumers (Art. 2 LCGC).

A merger clause incorporated to an agreement concluded between a trader and a consumer, where the clause has already been included in the prior agreement and is part of a standardized contract will be considered as general

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[310] However, it is true that the adherent party is in an unequal position with respect to the business party. They greatly limit the power of disposition of the parties, conditioning the principle of freedom of negotiation, placing one party in a situation of notable imbalance. J. Concepción Rodríguez, *Derecho de Contratos*, Barcelona 2003, p. 42.

[311] Designation used by the DCFR, Art. II-1:109 applicable to all types of contracts.

[312] As the other party has no influence on its content, which is imposed on Art. II.-1:110 DCFR. Derived from the Unfair Terms Directive, there are no appreciable differences between the Spanish standard and the DCFR.

terms. Hence, the interpretation of the clause will be subject to the provisions included in the LCGC. In this regard, the rule is that individually negotiated agreements are more prone to express the common intention of the parties than standard terms governing B2C-contracts. Further, the theory of *venire contra factum proprium* supports this rule.

5.3. Unfair terms "*cláusulas abusivas*"

A merger clause included in the general terms of the contract is considered as a standard term. If included in a B2C contract, it can be considered as an unfair term if the legal effects of the merger clause aim to exclude extrinsic evidence which might be against the consumer, i.e., previous agreements that may harm the consumer's interest. Under Spanish law, unfair terms are defined as: "all those stipulations not negotiated individually and those practices not expressly consented to that are contrary to the requirements of good faith and cause, to the detriment of the consumer and user, a significant imbalance of the rights and obligations of the parties arising from the contract"[313]. Art. 82. LGDCU clearly states the good faith as a ruling principle for the legal practice of the parties together with the imbalance caused to the rights and obligations of the parties in detriment of the consumer. It is therefore undisputed that the merger clause will be likely declared invalid when its effects may go against the consumer.

In this regard, the Package Travel Directive, envisages in its Art. 6(1), the binding character of pre-contractual information and conclusion to the traveler. *Domínguez Luelmo* understands that Art. 6(1) Package Travel Directive envisages the principle of precontractual information that applies to both the trader and the traveler (organizer and retailer) prior to the conclusion of the contract.[314] Furthermore, the duty contemplated in Art. 5 of the Directive regarding precontractual information has been used in the Spanish legal system

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[313] Non-official translation: "*todas aquellas estipulaciones no negociadas individualmente y todas aquéllas prácticas no consentidas expresamente que, en contra de las exigencias de la buena fe causen, en perjuicio del consumidor y usuario, un desequilibrio importante de los derechos y obligaciones de las partes que se deriven del contrato*": Art. 82.1 Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias.

[314] A. Domínguez Luelmo, *Contratación electrónica y protección de consumidores: régimen jurídico*, RCDI, 660/2000, p. 29.

as a consolidated practice. Similarly, Art. 1267.6 APMCC regulates the obligation of the trader to provide with information to the consumer with enough information to the conclusion of the contract as a contractual balance in favor of the consumer in order to consent to enter into the contract.

The Unfair Terms Directive provides a wide interpretation to determine the unfairness of a term: it includes a control on the legal or regulatory balance, while excluding the economic control (price and remuneration) of the benefits of the contract (Art. 4(2)[315]). This legal provision is incorporated into Art. 82 LGDCU.

The Spanish Civil Code does not contain any mandatory rules regarding unfair terms.[316] Instead, the general rule followed in practice and by doctrine declare the *mandatorinnes* of other rules incorporated into consumer laws in order to protect the weaker party. As for the mandatory nature of general terms and conditions, Art. 8 LCGC, considers null and void any general contracting conditions that contradicts "to the detriment of the adherent party" the provisions of this Law "or any other mandatory or prohibitive rule" (Art. 8.1 LCGC). Furthermore, "special consideration is taken to those unfair terms when the contract has been concluded with a consumer", in accordance with the TRLGDCU (Art. 8.2 LCGC). It is once again prudent to emphasise that the Spanish legislation on unfair terms only applies to protect consumers in B2C-contracts, thus all other contractual relationships are excluded from this protection scheme.[317] As such, there is no legal principle under Spanish law that allows for the application of the concept of "unfair terms" attributable to any non-negotiated term in B2B-contracts, nor is the assessment of transparency of the terms relating to the essential elements of the contract

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[315] Art. 4(2) Unfair Terms Directive: "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language".

[316] Assumption or principles is found in specific legal principles or references.

[317] However, in those cases in which the contract has been concluded by means of adherence to general contracting conditions, between a business party and any consumer (*persona física o jurídica adherente*) (Art. 1 LCGC), the assessment of the terms may be carried out through the incorporation of the conditions in the individual contract (Arts 5 and 7 LGDCU), as well as the different interpretative rules contained in the LCGC. Therefore, the assessment provided in Art. 8 LCGC cannot be configured as a true assessment of the content of the general terms and conditions, but rather as a repetition of the general rule Arts 6.3 and 1255 CC.

applicable to businessmen (derived from Art. 4(2) Unfair Terms Directive).[318] This represents a gap in the protection in B2B-contracts as one party may nonetheless be in a position of weakness and helplessness in the face of terms that cause an unjustified imbalance.

When a clause is considered unfair, the immediate legal effect is the nullity of the clause: "abusive clauses shall be null and void and shall be deemed not to have been incorporated" (Art. 83 TRLGC). The rest of the contractual terms not affected by the clause will remain in force, versus the void term or clause. Regarding this lack of protection in commercial contracts, most of the Spanish doctrine (based on the regulation contained in the DCFR[319]) understands that an analogical interpretation of the DCFR should be advocated and, therefore, unfair terms should not be a category reserved only for consumers, but applicable to all subjects and contracts concluded under general terms and conditions.[320] The PECL addresses unfair terms in Art. 4:110, called "unfair terms not individually negotiated"[321] referring to general terms and conditions in a subtle way when addressing the "battle of terms".

A merger clause incorporated into a B2C-contract will have to be drafted with observance to the TRLGCU and LGDCU as to the general terms and conditions. Hence, a merger clause fulfilling the mandatory requirements of these laws may survive a full void contract insofar such clause can be fulfilled independently from the already void contract. Should the merger clause be incorporated to a B2B-contract, a gap arises. Hence, interpretation of the agreed terms is highly uncertain (though there is possible interpretation according to international principles such as DCFR and PECL).

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318 STS 9 May 2013 (RJ 2013\3088).

319 The DCFR regulates different cases of *unfair* terms in business-to-business relations. In order to assess the unfairness of terms, various factors are to be taken into account in the "unfairness test" according to Art. II.-9:407 DCFR; terms based on provisions of applicable law, international conventions to which the Member States or the European Union are party ("declaratory clauses") and terms relating to the definition of the subject matter and the adequacy of the contract price (Art. II.-9:406) are excluded.

320 E. Valpuesta Gastaminza, *Unificacion del Derecho Patrimonial Europeo*, Barcelona 2011, p. 74.

321 (1) there has been individual negotiation if the clause has been the explicit subject of negotiations between the parties, (2) it is presumed (*iuris tantum)* that there has been no individual negotiation if a clause is contained in general conditions, and has been used in a certain number of contracts. O. Lando and H. Beale (eds), *Principles of European Contract Law, Parts I and II,* The Hague 2000, p. 269.

Part II

6. Effectiveness and limitations of the merger clause

Various factors determine the effectiveness of the legal effects of the merger clause: The jurisdiction, the applicable law, the rules of interpretation, the wording of the clause and how the clause has been drafted (i.e., whether is contained in individually negotiated contracts or in standard terms). For the purpose of this analysis, the wording of a merger clause itself will not be examined. However, in certain cases, depending on how the merger clause has been agreed by the parties, the clause may be limited in its effectiveness, and is thus not enforceable between both the parties and against third parties. This Chapter therefore highlights the legal effects that the merger clause produces when it is individually negotiated by the parties.

6.1. Incorporated as individually negotiated term

As a general principle, merger clauses included as individually negotiated terms are admissible in most jurisdictions: "Their validity and enforceability may be challenged, but on grounds not different from those that can be used to contest any other contractual term"[322].

Several sets of rules contain provisions on merger clauses can be found in different legal texts, which require the merger clause to be individually negotiated in order to have the effect of determining the final agreement as a fully integrated agreement[323] (although this does not invalidate other minor effects): Art. 2.1.17 PICC, Art. 2:105 PECL, Art. II.-4:104 DCFR, and Art. 59 (in relation to Art. 72 CESL). Accordingly, prior declarations are used for the interpretation of the agreement, although this effect can be excluded by party agreement.[324]

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[322] A. Müller, *Protecting the integrity of a written agreement, a comparative analysis of the parol evidence rule, merger clauses and no oral modification clauses in U.S., English, German and Swiss law international instruments (CISG, PICC, PECL and CESL)*, The Hague 2013, p. 191.

[323] Its application is observed in the PICC and CESL.

[324] Except in the CESL, which does not require individual negotiation.

6.2. Incorporated as standard terms

As to its incorporation, two main scenarios arise: (i) if the merger clause is included as standard terms or in general terms and conditions and therefore has not been agreed by both parties, it only implies a presumption *iuris tantum* of the desire of the parties not to include the previous negotiations in the final contract, without prejudging its binding scope.[325] In international trade, practically all existing merger clauses are incorporated as a pre-drafted or boilerplate clauses, which has not been subject to prior negotiation. (ii) When the merger clause had been individually negotiated (including orally) agreements outside the contract prevail over a merger clause contained in the general terms and conditions. However, if the merger clause is a written, individually negotiated term, it prevails over previous agreements and other written terms, unless they are more beneficial to the customer. This overriding rule is enshrined in Art. 6.1 LCGC.[326]

Under Spanish law, where the merger clause is incorporated into standard terms in B2C contracts (commonly called "*contratos de ahesión*") it will be likely declared void.[327] As discussed in Chapter 5, in contracts where the final party is a consumer, unfair terms are regulated in both Arts 1–10 LCGC (which transpose the Unfair Terms Directive) and Arts 82 et seq. LGDCU. Should the merger clause be incorporated as a standard term in a B2C contract, the clause or whole contract may be considered unfair and therefore ineffective. In this respect, Art. 72 CESL differentiates between merger clauses contained in B2B contracts and B2C contracts, providing that a consumer is not bound by a merger clause (Art. 72(3) CESL). Other sets of rules do not feature such distinctions. Hence, in B2B contracts, there is a regulatory gap in this regard.

When merger clauses are included or take the form of a general condition, and there is a contradiction or discrepancy between the general terms and conditions and a negotiated agreement between the parties, the individual

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[325] S. Sánchez Lorenzo, *Cláusulas en los contratos internacionales, redacción y análisis*, Barcelona 2012, p. 230.

[326] *"Cuando exista contradicción entre las condiciones generales y las condiciones particulares específicamente previstas para ese contrato, prevalecerán éstas sobre aquéllas, salvo que las condiciones generales resulten más beneficiosas para el adherente que las condiciones particulares"*.

[327] Subchapter 4.2.1.

agreement prevails. The rule of prevalence implies a rule of delimitation or discrepancy between an individual agreement and a merger clause applicable to the same contract, determining that the individual agreement shall prevail. If the adhering party proves that a particular agreement was reached outside the document signed, the predisposing party cannot ignore it by hiding behind the general terms and conditions or a boilerplate condition as this is prevented by the rule of prevalence of Art. 6 LCGC, regardless of the time at which the agreement was reached. Only the predisposing party, in order to avoid the application of the special condition, shall prove that by other means, the parties had refused to include it in the contract. These general terms and conditions may in any case be null and void in the context of content control, since they must be considered unfair insofar as they attempt to displace the rule of prevalence or introduce presumptions that lead to an inadmissible alteration of the burden of proof (Arts 88.2 and 89.1 LGDC).

6.3. Application of the merger clause in Civil law

The inclusion of a merger clause makes it possible to exclude from the written contract the vast range of undertakings, understandings and documentation generated during the phase of prior negotiations while giving legal certainty to the contractual terms. Furthermore, compared to contracts without a merger clause, merger clauses make it easier to prove complete integration. As the prior declarations are considered non-existent, its limited effectiveness will not entail further litigation for the parties. Should the parties disagree that prior negotiations are not included in the final written contract, litigation will result. However, they may have the negative effect of preventing important evidence being determined as to whether the parties have agreed on a specific term and may therefore limit the scope of justice in this case.

In view of Art. 2.1.17 PICC and Art. 2:105 PECL,[328] most legal systems may admit the application of merger clause, as substantive law agreements or as evidentiary agreements, provided that the clause only aims at the exclusion of additional and/or contradictory terms. Whenever merger clauses are not used for the purpose of excluding additional and contradictory terms, since these clauses are rooted in the common law, their purpose may be mistaken,

[328] See subchapters 8.2.1 and 8.2.3.

leading to an inappropriate use of them. The risk posed is that they are used in the civil law sphere to solve problems that are proper to their historical configuration within the common law: to solve ambiguities and to fill gaps. The fundamental question of the application of merger clause is that, for their use in the civil law sphere, they cannot be directly transferred from the original common law configuration. Rather, they need to be reformulated and adapted to the specific conditions of the legal system governing the law of contract. Merger clauses should therefore be drafted with sufficient clarity so that it is not necessary to rely on elements outside the contract for the interpretation of the clause itself, and thus not to challenge the parties' agreements contained in the final contract.

7. Interpretation of the merger clause in Spanish law

In principle, merger clauses cannot influence the interpretation process itself, but are an instrument to interpret the contract. Accordingly, this Chapter analyzes rules and principles in Spanish law that impact upon how the terms agreed in the contract are interpreted or indeed modified due to external events.

7.1. Binding nature of the contractual terms

When the parties conclude the contract, they shall abide by the contract rules that establish the binding effectiveness of the contract, following the principle *pacta sunt servanda*. Consequently, the contract produces a number of legal effects: (i) formation, modification and determination of the contractual terms; and (ii) "declaratory effects" *(efectos declaratorios)* aimed at establishing the existence of a legal relationship and its content, through the so-called *negocio de fijación*[329].

According to Art. 1258 CC the parties are free to determine the contract terms, within the limits of Art. 1255 CC[330] and the subsequent legal effects that the parties have mutually agreed. The binding effect of the agreement arises from the moment the parties express their consent, pursuant to Art. 1089 CC (the existence of the contract lies on the consent of the parties to enter into an agreement, Art. 1254 CC). With such consent, the binding effect of the contract arises, as specified, which considers the obligations of the contract as laws between the parties (Art. 1091 CC). The rules of interpretation under Spanish law aim to ascertain the intention of the contracting parties and it is based on the parties' obligation of performance which extends to all the consequences which, according to their nature, are in accordance with good faith, usage and the law pursuant to Art. 1258 CC. Two types of legal effects thus arise: (i) non-statutory, derived from what has been negotiated by the parties, and (ii) statutory, i.e., derived from what is established by law. This fulfilment of what has been agreed will depend on whether the

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[329] L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial*, Tomo I, 5th edn, Madrid 1996, pp. 364–365.

[330] *"Los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, siempre que no sean contrarios a las leyes, a la moral ni al orden público"*.

contractual terms reflect the declared intention. Otherwise, the intention of the parties at the time of the conclusion of the contract will prevail.

To ascertain such intention, Art. 1282 CC states that all acts prior, contemporaneous and "subsequent to the contract" shall be considered. A consequence of the binding effectiveness of the contract, based on Art. 1091 CC, is the rule contained in Art. 1256 CC, whereby the validity and performance of the contract cannot depend on one of the parties[331]. The Spanish Civil Code limits the validity and fulfillment controls to the judge or arbitrator. However, under Spanish law, there is one legal institution, the *declaración unilateral de voluntad* ("unilateral statement"), which can be defined as a party's unilateral intention. The predominant Spanish doctrine understands that this institution does not have any binding effect, as it is not a source of obligations (Art. 1262 CC) since two declarations are necessary for the contract to exist (Art. 1262 CC).[332] Therefore, it only has an evidentiary value of its existence.[333] However, Spanish case law admits these unilateral promises as a reflection of the intention of assuming the obligations deriving from them. [334] The *Proyecto de Modificación del Código Civil* states in its Art. 1092.2 that the unilateral promise or statement of a performance is only binding in the cases provided for by law.

In this regard, a merger clause under a contract governed by Spanish law needs to be expressly consented and mutually agreed by the parties at the time of the conclusion of the contract. At the time of drafting the clause, the parties shall bear in mind Art. 1282 CC as to the interpretation of contemporaneous and subsequent acts to the contract and unilateral statements that may mismatch their common intention materialized in such clause. Provided that the parties aimed to be legally bound by the incorporation of the merger clause,

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[331] This principle embodies one of the basic principles of contracting, *neccesitas,* STS 27 February 1997 (RJ 1997/1333).

[332] In uniform law, unilateral legal acts include unilateral undertakings or promises, which are intended to have a binding character without the need for acceptance and for which the DCFR (similar to Art. 2:107 PECL), grants a binding character if the issuer intends to be legally bound (Art. I.-I:103 (2) DFCR, similar to Art. 2.107 PECL). Likewise, Art. 1.3. PICC establishes the binding nature of any contract validly concluded between the parties.

[333] It admits two exceptions: the *"oferta pública de recompensa"* (Art. 1093 CC) and *"concurso con premio"* (Art. 1094 CC).

[334] STS 30 September 1975 (RJ 1975\3408) and STS 28 September 1995 (RJ 1995\6454).

subsequent and/or unilateral statements will need to be interpreted in light of the common consent and intention at the time of the conclusion of the contract.

7.2. Modification of the contract terms: extraordinary external causes

There are unforeseeable risks and scenarios beyond the control of the parties that can benefit one of the parties or affect the agreement and its performance. Several legal instruments used in commercial practices such as the *rebus sic stantibus* clause, or hardship, aim to honor the contract obligations and to fulfill the nature of the agreed contract. These figures represent an exception to the *pacta sunt servanda* principle.

7.2.1. *Vis maior* and *force majeure*

In Spanish law, the regulation of unforeseeable circumstances and *force majeure* derive from the particular action that causes damage and liability.[335] Hence, such liability does not arise when *force majeure* or the fault of the victim himself concur (Art. 1905 CC.) The Spanish Civil Code envisages together *vis maior* and *force majeure or* fortuitous events, distinguishing between events beyond the debtor's control that occur within his internal sphere (and being unforeseeable, if foreseen they would be avoidable) and those that occur in his external sphere (being unavoidable[336]). The difference is established by the seriousness of the event. Spanish legal doctrine associates unforeseeability as a cause of exoneration from liability with the "inevitability" of foreseeable events (the event must be unforeseeable and unavoidable), according to Art. 1.105 CC.[337] In order to assess unforeseeability, terms of

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[335] Arts 1105, 1.625, 1.777 and 1.784 CC. See also principle VI.3 on force majeure and Art. 8:108 PECL; Art. II-7:201 and Art. III.-3:104 DCFR; Art. 79 CISG; Art. 7.1.7 PICC; Art. 88 CESL. Art. 7.1.7 PICC exonerates the debtor from non-performance under due to *force majeure*-related impediments. With regard to Art. 88 CESL, it should be pointed out that the injured party, in addition to exemption from performance, has other remedies, as pointed out by F. Zoll, "Art. 88 CESL" in R. Schulze, Common European Sales Law – Commentary, Baden-Baden 2012, p. 715. Furthermore, if the parties do not reach an agreement, the judge or arbitrator intervenes, and if he cannot adapt the contract, it will be totally or partially terminated, as he determines, see Zoll, ibid.

[336] According to Art. 1905 CC.

[337] In German law, unforeseeability does not even appear in § 275 BGB. The essence of the *Unmöglichkeit* ("impossibility") does not lie in the unforeseeability, but in the impossibility of execution based on change of circumstances in relation to *rebus sic stantibus rule* according to §313 BGB.

reasonable improbability are used.[338] In terms of liability, fault is presumed and it is for the debtor to prove his lack of fault, since exoneration from liability is considered an exception to the fulfilment of the obligation based on Art. 1.124 CC.

Under Spanish law, the effects[339] of *vis maior* or *force majeure* on the contract are (i) partial impossibility of performance, without affecting the existence of the contract, as it can be partially performed; (ii) total and definitive impossibility of performance of the obligation on the part of the debtor, terminating the contract.[340] Where a merger clause is concerned, if the corresponding contract is impossible to perform due to *vis maior* or *force majeure* and thus terminated, a merger clause incorporated therein will lack validity and it will not be effective.

7.2.2. *Rebus sic stantibus*

The *rebus sic stantibus* rule can be defined as "things thus standing". It implies that stipulations of the contract can be subsequently modified in the event of substantial alterations to the conditions and circumstances under which they were first agreed upon. The aim of this principle is to re-establish the balance of performance when substantial modifications to the elements of the contract occurred. It occurs when, due to unforeseeable circumstances beyond the parties' sphere of influence, it becomes impossible or burdensome for one of them to fulfil the obligation.

The application of the *rebus sic stantibus* doctrine is based on the classic principle that the parties are bound to what was agreed in the contract as long as the conditions under which it was entered into are maintained.[341] Since

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[338] As the STS 5 November 1993 (RJ 1993\8970), the STS 18 December 2006 (RJ 2006\9171, followed by many other judgements, indicates reasonable probability must be measured with a relative criterion, according to the diligence required of the obligor. L. Díez Picazo*, Sistema de Derecho Civil*, Tomo II, 9th edn, Madrid 2002, p. 201.

[339] X. O'Callaghan, *Compendio de Derecho Civil. Tomo II*, *Obligaciones y Contratos,* Vol. I, 3rd edn, Madrid 2001, p. 177.

[340] Except in the case of generic obligations, in which the case of unforeseeable circumstances or force majeure does not apply, since equivalent *things* or goods can be delivered.

[341] Case law considers the *rebus sic stantibus* clause to be of an exceptional nature, establishing very strict requirements for its admission. The judgements of the Supreme Court stresses that it is a dangerous clause which, if applicable, must be admitted with caution. STS 23 April 1991 (RJ 1991 \3023), and STS 17 November 2000 (Tol 10976). In Spain, the first ruling on the application of *rebus sic stantibus* for the economic

unforeseeable circumstances may arise that substantially vary the terms of the contract and cause an extraordinary alteration of the balance of benefits assumed by the parties, the intention of the parties may be also altered.[342] Spanish law does not regulate the *rebus sic stantibus* rule, being only a jurisprudential reference, commonly understood as *"alteración de la base del negocio",* which the court admits for reasons of equity, but in a very strict way,[343] especially in contracts of long duration or of single performance deferred in time,[344] requiring for its consideration the occurrence of the following requirements:

(i) excessively burdensome or costly for one of the parties which alters the economic basis of the contract;[345]

(ii) unforeseeability, when the event causing the imbalance was not taken into account or should not have been taken into account at the time the contract was concluded;[346]

(iii) lack of liability attributable to the parties: the event must be beyond the parties' intention and outside their sphere of control;[347]

(iv) the non-assumption of the risk by the aggrieved party is required, based on the contractual or legal distribution of risk. These will be cases where the contract already contains a clause reviewing such scenario or event, while a revision or update of the initial agreed price. In such cases it is understood that the risk was already foreseen at the time of conclusion of the contract.[348]

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situation caused by COVID-19 has been ruled by the SAP Valencia 10 February 2021 (JUR 2021\97607).

[342] The principle is based on the parties acting in ignorance of events that unforeseeably occur, but such ignorance does not fall into the category of mistake, and therefore does not allow the contract to be rendered null and void due to this defect of consent, STS 12 November 2004 (Tol 513427).

[343] Despite the fact that in some STS judgements, such as that of 30 June 2014 (RJ 2014\3526), it applies the concept of hardship provided in the PICC, and in the judgement of 21 March 2018 (RJ 2018\86865). Thus, it is required that that the event must go be beyond the will of the parties and beyond their control.

[344] In single-tract contracts, *rebus sic stantibus* is of even more exceptional application than in successive contracts. STS 22 April 2004 (RJ 2004\2673). Regarding the exceptional nature of the principle, see judgement of 20 February 2001 (RJ 2001\1490).

[345] STS 30 June 2014 (RJ 2014\3526).

[346] STS 18 January 2013 (RJ 2013\1604).

[347] Similar configuration to that adopted by the PICC, STS 21 March 18 (RJ 2018\86865).

[348] STS 27 April 2012 (RJ 2012\4714).

If an event occurs which, even by unbalancing the benefits of the parties, forms part of the foreseen risk, the clause will not be applied.[349] The Supreme Court opened the door to the possible consideration of the global macroeconomic crisis as an unforeseeable event, which could fall within the scope of *rebus sic stantibus*.[350] This judgement added, as specific causes of impossibility due to the general crisis, the conditions imposed by credit institutions to grant financing and the possibilities of negotiating payment conditions with the seller. Such case serves to objectify the circumstances that may give rise to a contractual modification. Furthermore, in a different judgement, the Supreme Court voiced to review the requirements traditionally demanded by this principle, in favor of decreasing the default exceptional nature of its applicability.[351]

Art. 1105 CC[352] establishes that, as a general rule, no one party have to take responsibility for unforeseen or unavoidable events in an obligation. It thus provides an alternative mechanism to the *rebus sic stantibus* rule, when it is impossible to prove that the alteration was substantial and unforeseeable. As the Spanish case law points out,[353] the *rebus sic stantibus* principle does not have the effect of terminating the contract, but only the effect of modifying it, aimed at compensating for the imbalance of performance of the contract. Hence, since the *rebus sic stantibus* principle only applies when avoidable and extraordinary circumstances occur, which were not foreseeable by the parties, it will not affect a merger clause, since this latter takes into consideration only the obligations agreed by the parties, and these extraordinary obligations were beyond the parties' legal relationship (*"indisponibles a las partes"*).

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[349] M. Quicios Molina, "La ineficacia contractual", in: R. Bercovitz Rodríguez-Cano and N. Moralejo Imbernón (coords), *Tratado de contratos*, Tomo I, Madrid 2009, pp. 1560–1564.

[350] STS 8 November 2012 (RJ 2013\2402).

[351] STS 30 June 2014 (RJ 2014\3526).

[352] *"Fuera de los casos expresamente mencionados en la ley, y de los en que así lo declare la obligación, nadie responderá de aquellos sucesos que no hubieran podido preverse, o que, previstos, fueran inevitables."*

[353] In STS 6 March 2020 (RJ 2020\879), STS 12 November 2001 (Tol 513427) and STS 22 April 2004 (RJ 2004\2673).

8. Rules of interpretation

Rules of interpretation are traditionally divided into two main groups: on the one hand the legal precepts containing hermeneutic canons for ascertaining the common intention of the contracting parties, the so-called textualist interpretation; and on the other hand, the contextualist, which deals with resolving problems arising from external circumstances beyond the contract terms and deals with the ambiguity about certain clauses or wording. Accordingly, the interpretative task of searching for the common intention of the contracting parties involves:

(i) interpretation of facts: the aim is to ascertain and establish the relevant facts to be interpreted, basically derived from the contracting parties' declarations of intent. In this case, the evidence will be assessed. The "hermeneutic material" is the subject of the interpretative activity *strictu sensu*, based on the legal rules of interpretation;

(ii) determination of the applicable law: aimed at determining that the terms agreed by the parties lies within a specific contractual type (which will give rise to a different legal regulation); and

(iii) lack of intention: in the event that the true scope of the parties' intention has not been determined, it will be necessary to resort to the reconstruction of the contractual relationship, by integrating the contract.[354] This is the integrative interpretation of the contract, which aims to fill the gap left by a clear but incomplete declaration of intention *"declaración de voluntad"* by reconstructing the hypothetical intention of the parties.

8.1. Objective v. subjective interpretation

There are two main comparative models of interpretating the contract: the continental or Roman-Germanic model and the Anglo-American model. The interpretation in civil law jurisdictions seeks the meaning of the contractual terms on the basis of a subjective interpretation that aims to determine the true common intention of the parties, which prevails over the literal meaning of the terms of the contract. This approach is also followed by international instruments, with particular focus on the actual intent of the parties and on

[354] L. Díez-Picazo, *Fundamentos del Derecho civil patrimonial, T.I.: Introducción. Teoría del contrato*, 6th edn, Madrid 2007, pp. 495 et seq.

fairness considerations which rejects the application of the parol evidence rule and allows unrestricted admissibility of extrinsic evidence to interpret the parties' intent.

The objective or textualist interpretation of the common law, characteristic of the Anglo-American model, is based on legal certainty and the application of the parol evidence rule, so that the sanctity of the contract means only the "sanctity of the written words"[355], or the rule of the four corners of the document in which the obligations of the parties are constrained.

On the one hand, the interpretation followed by English courts, seeks to discover the meaning of the parties' statements under the standard of a reasonable man, i.e., in the same circumstances as would have been assigned to what reasonable persons would have agreed. Therefore, following this line of reasoning, subjective circumstances, in particular the weight of negotiations and pre-contractual dealings, are generally rejected.[356] On a comparative basis, the rules of evidence in English law, *stricter* than in civil law, shall be considered in the interpretation of disputed facts. Such rules do not allow evidence of statements of the parties or their conduct subsequent to the conclusion of the contract to alter the interpretation of the writing.[357] During the task to ascertain the terms of the contract, the common lawyer, as in civil law, relies on different general rules or principles, the principle of good faith,[358] the principle of preservation of the contract (*"favor negotii"*), and the principle of systematic interpretation of the terms of the contract as an overall. On the other hand, American law, has, during the last decades, become progressively more flexible towards a model of interpretation that is more open to subjective elements.[359] On the other hand, civil law jurisdictions praise the freedom of contract and the subjective intention of the parties. Contracts are formed by the parties' intention *"acuerdo de voluntades"* and contractual interpretation is aimed at discovering what the parties intended to express when concluding the contract, without being limited by the written text, and allowing them to resort to extrinsic evidence. Hence, the subjective rules of

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[355] K. Lewison, *The interpretation of Contracts*, 3rd edn, London 2004, p. 28.

[356] Criterion reaffirmed in the leading case *Investors Compensation Scheme Ltd. v. West Brownnwich Building Society* [1997] UKHL 28.

[357] G. Treitel*, The Law of Contract*, 11th edn, London 2003, pp. 195–196.

[358] The good faith doctrine is applied in STS 12 December 2011 (RJ 2012\328971).

[359] According to section 201(2) of the *Second Restatement of Contracts*, as well as the application by the courts of Art. 8 CISG.

interpretation in civil law, codified, play an essential role to ascertain the parties' intention. When the intention of the parties cannot be ascertained, there seems to be a certain tendency towards a rule of objectifying the intention according to a principle of reasonableness, which is the approach taken in most international texts of uniform law.[360] Since international texts advocate for a subjective interpretation, these will be compared in order to understand what the actual intention of the parties is.

8.2. The interpretation of the contract in international sets of rules

8.2.1. CISG

The formula envisaged for the interpretation of contracts in Art. 8 CISG is based on "relevant circumstances" as the criteria that will guide the interpreter in establishing the intention of the parties or the standard of reasonableness. The interpretation of the contract under Spanish law is aligned with the one provided in the CISG, as demonstrated by the application of Art. 25 CISG to a national contract to solve a fundamental breach of the contract.[361]

The CISG rules of interpretation had a great influence on the drafting of other European texts, such as the PECL. Art. 8 CISG adopts a hermeneutic criterion that leans towards subjectivism – the interpretation must inquire into the actual intent of each contracting party – although qualified by a requirement that the other party must have known or could not have been unaware of the intention of the other contracting party.[362] This requires that such intention is externalized, either in another document, orally, or as a matter of common practice.[363] This interpretation based on the "common intention", constitutes the "hermeneutical material", which shall be ascertained from the meaning that each of the contracting parties gives to the intention of the other, according to the canons of correctness, responsibility and protection of trust that

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[360] Art. 8 CISG; Art. 4.1. (1) PICC, Art. 5:101 PECL and Art. II. 8:101 DCFR.

[361] According to STS 20 July 2012 (RJ 2012\9006).

[362] M. Yzquierdo Tolsada, *Contratos. Civiles, mercantiles, públicos, laborales e internacionales, con sus implicaciones tributaras, Los Contratos Internacionales I, Tomo XVI,* 1st edn, Pamplona 2014, pp. 469–470.

[363] SAP Cáceres 14 July 2010, (JUR 2010\296322): in order to interpret the intention of the parties as regard to the amount and the price established in the international sales contract, the Court considered that prior knowledge of the buyer's intentions should prevail, in application of Art. 8 CISG.

must inspire their relations, in accordance with good faith.[364] In determining the intention of a party, due regard shall be had to all the relevant circumstances of the case, in particular the negotiations, any practices which the parties have established between themselves, usages and subsequent conduct (Art. 8(3) CISG). However, the CISG has not expressly included the principle of good faith as a criterion of interpretation, but refers to it as a criterion for interpreting its norms and rules.[365] Where it is not possible to ascertain the real intention, the objective criterion, derived from the perspective of the reasonable man,[366] included in Art. 8(2) CISG,[367] is used as a subsidiary approach. In the context of interpretation of the contract, several principles apply, distinguishing on the one hand, the rules of interpretation applicable to bilateral agreements (i.e., the subjective criteria apply in any case, and subsidiarily the objective criterion based on reasonable man) and, on the other hand, unilateral "declarations and other conduct" and unilateral acts performed by the parties, where the subjective criteria are subordinate to whether the addressee knew (or could not have known) the intention of the issuer.[368] Art. 8(3) CISG establishes as "relevant circumstances" the criteria which shall guide the interpreter in establishing the intention of the parties or the standard of reasonableness.[369] The approach followed by CISG is contextualist by default but with the nuance that it may bring a more objective criteria if needed: the reasonable man. Such interpretation takes precedence to guide the judge in her task to ascertain the common intention of the parties.

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[364] López y López, "La interpretación del contrato en la Convención de Viena sobre la Compraventa Internacional de mercaderías", RDM 225/1997, pp. 114–115.

[365] Both in Art. 7 CISG and C. Scope of the application of the Convention.

[366] This is a very objective measure, which Spanish law assimilates to standard diligence in Art. 1104 CC, regulated within the concept of *bonus pater familias*.

[367] Despite the preference of the subjective interpretation over the objective, the CISG thus combines the subjective an objective element; the standard of the reasonable man, which is closely referred to the theory of implied terms.

[368] However, when referring to the interpretation of the contract, while Art. 4.1 PICC states that "the contract shall be interpreted in accordance with the common intention of the parties", Art. 8.1 CISG also includes "*when the other party knew or could not have been unaware of what that intention was*". Spanish case law relies on Art. 4.3. PICC to interpret Art. 1286 CC in matters of interpretation of contracts as ruled in STS 21 December 2007 (RJ 2008\531).

[369] (a) prior negotiations between the parties; (b) practices which they have established between themselves; (c) acts performed by the parties after the conclusion of the contract; (d) the nature and purpose of the contract; (e) the meaning commonly given to terms and expressions in the trade concerned; and (f) usages.

8.2.2. PICC

The PICC follow the interpretation criteria used in the Romano-Germanic legal systems, based on the common intention of the parties.[370] The application of the PICC by Spanish courts has served as legal basis to the Spanish Supreme Court. In a 2006 decision, the Court ruled that Art. 1258 CC is a norm of such generic meaning that it does not allow to allege infringement as grounds for cassation, without there being any resemblance to the § 242 BGB. Hence, the court applied Art. 1201 PECL and Art. 1.7 PICC, concerning international trade contracts, thus rejecting the allegation of appeal.[371] In a 2007 case related to a commercial sales contract in which the payment of the goods is discussed due to the unjustified breaches of the other party, which are classified as essential by Spanish law and by Art. 7.3.1(2)(b) PICC, the Court awarded that in order for the contract to be ruled, the requesting party first had to fulfill its legal obligations.[372]

Art. 4.1 PICC contains the general rule that the contract shall be interpreted in accordance with the common intention of the parties. Thus, the common intention constitutes the hermeneutical material, meaning that the preference of the actual intention of the parties prevails over the literal wording of the contract. If the common interpretation cannot be established, Art. 4.2 PICC follows presents a similar approach followed by Art. 8 CISG which incorporates the objective criteria of reasonableness ("reasonable person") to overcome ambiguous assumptions. The PICC incorporates in its Art. 4.6 the *contra proferentem* rule based on the principles of self-responsibility and the recipient's trust, derived from the principle of good faith. According to which, in the interpretation of obscure clauses, preference will be given to terms which are contrary to the interests of the proposer. However, in the event of language discrepancy, the language in which the contract was drafted prevails, according to Art. 4.7 PICC. The principle of good faith is enshrined in Art. 1.7 PICC which refers to the general duty of the contracting parties to act in good faith and fair dealing in international trade. The PICC provide additional criteria to interpret the contract: the protection of the third party in good

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[370] Art. 4.1 PICC.

[371] STS 4 July 2006 (RJ 2006\6080).

[372] STS 23 July 2007 (RJ 2007\849); B. Gregoraci Fernández, "El moderno derecho de obligaciones y contratos en la jurisprudencia del Tribunal Supremo español", RJC 2009, pp. 479–498.

faith, which was absent from all previous texts, and which would be affected only by "the apparent meaning" and not by the true intention of the parties, insofar as such interpretation is alien to it.

8.2.3. PECL

Spanish doctrine[373] remarks the increasing use of the PECL (and European soft law in general) by Spanish courts to complement the judicial interpretation of gaps in the Civil Code and the Commercial Code. However, *Vaquer Aloy* states that the PECL has influence to very specific provisions of contract law, such as breach of contract and tort liability.[374] As an example, the *SAP Lleida* in its ruling applied Art. 3.3. PICC and Art. 4:102 PECL to argue that the initial impossibility of the provision should not always determine the nullity of the contract.[375]

The PECL are clearly influenced by the rules already contained in the CISG and the PICC. Art. 5:101 PECL contains the general rules of interpretation, stating that the subjective interpretation, seeking the intention of the parties prevails "even when such interpretation does not coincide with the literal wording of the words used". Where the quest for this common intention is not possible, the PECL opt for a solution practically identical to the PICC, both as regards to the objective meaning attributable by a rational person in identical circumstances to those of the parties (Art. 5:101(3) PECL), and as regards to the criteria to be used to interpret the contract (Art. 5:102 PECL). The PECL contribute to the international texts with an additional interpretative rule contained in Art. 5:101(2), where if one party intended to give a particular meaning to the contract and this intention could not be ignored by the other party, this will be the prevailing intention and the one that has to be given to the contract. As a subsidiary criterion to this provision above,

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[373] M. Perales Viscasillas, "Aplicación jurisprudencial de los Principios de Derecho Contractual Europeo", in: M. Díaz Romero et al. (eds.), *Derecho privado europeo. Estado actual y perspectivas de futuro*, Pamplona 2009, pp. 472 et seq.

[374] A. Vaquer Aloy, "El Soft Law europeo en la jurisprudencia española: doce casos", Ars Iuris Salmanticensis Estudios, 1/2013, pp. 93–115. Application of the good faith doctrine in STS 12 December 2011 (RJ 2012\328971). See also C. Vendrell Cervantes, "The Application of the Principles of European Contract Law by Spanish Courts", ZEuP 2008, pp. 534–548.

[375] 13 September 2007 (RJ 2007\335298).

Art. 5:101(3) PECL establishes the criteria for interpreting rationality through the rule of a reasonable person.

The principle of "good faith and fair dealing" has been expressly incorporated into the Art. 1:201 PECL. In addition, references to good faith can be found in several provisions (e.g., Arts 2:301 and 4:111 PECL). Furthermore, an objective interpretation is included in Art. 5:101 PECL, and in Art. 5:102 PECL, in which good faith is included as one of the relevant circumstances specific to the auxiliary instruments of interpretation. Finally, Art. 5:103 PECL refers to the *contra proferentem* principle, derived from the principle of good faith as a criterion to be observed for the interpretation of contracts.

In short, the PECL follow a common general rule of interpretation based on the subjective interpretation of the parties' intention to the contract with a subsidiary interpretation following the reasonable person approach. As the Spanish interpretation of contracts is, in turn, heavily influenced by these principles (as shown in the case law), the Spanish judge will have these provisions as precedent to follow and award upon, when ascertaining the common intention of the parties.

8.2.4. Other international legal instruments: DCFR and CESL

The DCFR follows the same line of argumentation provide by Arts 5:101–5:107 PECL.[376] The only variation is found in Art. II.-8:102 (2) DCFR, which limits the interpretation based on subjective circumstances relating to preliminary negotiations, previous particular usages or subsequent conduct of the parties[377]. Art. II.-8:101 favors the interpretation according to the intention of the parties, even if this is contrary to the literal meaning of the expressed terms. Further, Art. II.-8:102 DCFR sets outs the terms when they are known to the third party, or could have been known to the third party.[378] Art. II.-

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[376] The DCFR shows that the Member States were able to agree on many common concepts and rules, although in specific, sometimes incidental contexts, F. Zoll, "The Remedies for Non-Performance in the System of the Acquis Group", in: R. Schulze (ed.) *Common Frame of Reference and Existing EC Contract Law,* 2nd edn, Munich 2009, p. 209.

[377] H. Simón Moreno, "Disposiciones generales", in: A. Vaquer Aloy, E. Bosch Capdevila, M. Sánchez González, *Derecho europeo de contratos. Libros II y IV del Marco Común de Referencia*, Tomo I, Barcelona 2012, p. 112.

[378] In this way, the interpretation is *objectified* so that the third party is not affected by interpretations or agreements of which he is unaware. M. Cervilla Garzón, "La interpretación del contrato", in: A. Vaquer Aloy, E. Bosch Capdevila, M. Sánchez González, *El*

8:102(1)(g) DCFR, on the other hand, includes, as external elements of contract interpretation, good faith and honest dealing. Art. II.-8:103(2) DCFR, refers to the *contra proferentem rule*, derived from the application of the principle of good faith. The DCFR provides some modern aspects within the interpretation of contracts, for example the rule of *"interpretatio contra stipulatorem"* or *contra proferentem* to cases in which the doubtful clause has been introduced by the influence of one of the parties, so that it will be interpreted against him (Art. II.-8:103(2); the rule of systematic interpretation or unity of contract (Art. II.-8:104); the prevalence of individually negotiated terms over pre-agreed terms (Art. II.-9:103); the application of the principle of conservation (*"favor contractus"* or *"favor negotii"*) (Art. II.-8:106 DCFR),[379] also referred to in Art. 5:106 PECL.

The CESL, following its preceding instruments, includes in Art. 59(g), within the circumstances relevant to interpretation, good faith and the *contra proferentem* rule in Art. 65 CESL. Art. 58 CESL advocates for the common intention of the parties, even if it is different from the literal[380] interpretation, thus in detriment of the bad faith of the other party who, knowing the meaning given to a clause or term by the other party, do not act accordingly, thus bound by its effects. Subsidiarily, as in the aforementioned international texts, an objective interpretation criterion operates according to the reasonable person standard. Unlike the DCFR, which addresses parties' intentions as "unilateral juridical acts", the CESL refers to these as "unilateral statement indicating intention"[381] which demonstrates a more accurate wording for unilateral statements[382].

Derecho común europeo de la compraventa y la modernización del Derecho de contratos, Atelier, Barcelona 2012, pp. 231–232.

[379] Also included in Art. 5:106 PECL.

[380] As included in the DFCR and the PECL.

[381] This shows the influence of Art. 1:107 PECL: "unilateral promises and other statements and conduct indicating intention", and Art. 3.2.17 PICC: "any communication of intention addressed by one party to the other" and Art. 4.2 PECL. The use of the term "unilateral act intended to have legal effect" is considered more appropriate. H. Schulte-Nölke, "Art. 12 CESL", in: R. Schulze, *Common European Sales Law – Commentary*, Baden-Baden 2012, pp. 121–122.

[382] In the same line, the Pavia Group follows the line of the other texts of uniform law with regard to interpretation and its rules, where priority is given to the intention of the contracting parties. It is regulated in Arts 39–41, where Art. 39(4) contemplates good faith and good sense as limits to the interpretation of the content of the contract.

9. Rules of interpretation under Spanish law

In order to ascertain how, in principle, merger clauses cannot influence the interpretation process itself, but are viewed as a means of interpretation, this Chapter analyzes the fundamental rules enshrined in the Spanish Civil Code and the application of such rules by the Spanish Supreme Court on the interpretation of contracts.

9.1. Subjective interpretation of the contract

As a jurisdiction following the civil law tradition, Spanish law follows the subjective interpretation of the contract, (historical interpretation) where the intention of the parties can be ascertained by whatever means of extrinsic evidence that the parties may deem applicable to prove relevant facts to the contract, based on the principle of *libertad de prueba* ("freedom of evidence"). Furthermore, no form is required under Spanish law contracts, pursuant to the freedom of form (Arts 1278–1280 CC).[383] Hence, in order to determine the *admissibility* of prior agreements, it is necessary to refer to the principles and rules of interpretation of contracts contained in Arts 1281–1289 CC and to the rules of evidence which are regulated in the procedural code *Ley de Enjuiciamiento Civil.*

The interpretation of the contract has a function akin to the function of interpretation of rules: it aims as ascertaining the concrete "intention" of the contracting parties (Art. 1281 CC and the literal meaning of the wording), together with Art. 57 CCom, as well as a task of attributing "meaning" to the parties' "declarations" (*declaraciones*) (Arts 1284 and 1285 CC). Both precepts constitute a single rule indicating the absolute prevalence of a subjective interpretation, although it shall be observed (objectively) in the light of the principles of self-responsibility and protection of confidence[384].In this regard, the Spanish doctrine differentiates between, one the one hand, a subjective interpretation, following Arts 1282–1283 CC, seeking the common intention of the contracting parties (*voluntas spectanda*), i.e., from a historical interpretation of the contract, aimed at a reconstruction of the thinking, intention and

[383] STS 3 March 1995 (RJ 1995\1775) on solemn contracts. See subchapter 4.2.
[384] A. López y López, in: M. Albadalejo et al. (eds), *Comentarios al Código Civil y Compilaciones Forales, XVII*, 2nd edn, Madrid 1993, p. 127.

purpose of the contracting parties at the time of the conclusion of the contract. On the other hand, the objective interpretation, pursuant to Arts 1284–1289, which is conducted independently from what was intended by the parties.[385] Art. 1281 CC favors the main rules of contractual hermeneutics, which doctrinally can be summarized as (i) the principle of the search for the actual intention (*voluntad spectanda*) of the contracting parties "common intention of the parties" or common historical will of both parties at the time of the formation and conclusion of the contract;[386] (ii) the principle of self-responsibility of the parties; (iii) the principle of trust, good faith observed by in the parties; and (iv) the principle of preservation of the contract in its entirety against partial nullity that may affect the parties' performance of their contractual obligations (*favor contractus or favor negotii*).

The Spanish Supreme Court has established its own doctrine on the interpretation of contracts, which is materialized in the well-known judgement of the Supreme Court of 29 January 2015.[387] Such judgement stated, as the guiding principle when interpreting the content of the contract, the *voluntad de las partes* ("actual intention of the parties"), as the prevailing rule to consider. The Supreme Court alleged that the rest of the interpretative rules shall support the intention of the parties, either complementing or supporting it, but never limiting or altering it. The Supreme Court's doctrine on interpretation can therefore be summarized as a combination of principles accepted by the case-law in order to ascertain the intention of the parties, whereby account must be taken of the entire conduct of the contracting parties, consisting of acts prior to, contemporaneous and subsequent to the contract.[388] The interpretation of contracts is a function attributed to the court of first instance.[389]

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[385] L. Díez-Picazo, *Fundamentos del Derecho civil patrimonial, T.I.: Introducción. Teoría del contrato,* 6th edn, Madrid 2007*,* pp. 496 et seq. A. López y López, "Comentarios a los Arts 1281-1289", in: B. Rodríguez-Cano (coord.), *Comentarios al código civil*, 3rd edn, Valencia 2011, p. 24.

[386] STS 30 March 2016 (RJ 2016\1152).

[387] (RJ 2015\633). According to this ruling, the interpretation of the intention of the parties is projected onto the integrity of the contract, which must be considered as a logical unity, and not as a mere sum of clauses, so that the interpretation of the contractual terms must inevitably start from the systematic interpretation of the contract – or interpretative canon of the contract – as a whole.

[388] STS 6 February 1998 (RJ 1998\703) and STS 3 July 2002 (RJ 2002\5837).

[389] For example, STS 24 September 2007 (RJ 2007\5367).

Regarding the use of international legal instruments, the judgement of the Supreme Court of 8 May 2012 based its ruling on Art. 4 PICC.[390] In this award, the Spanish Supreme Court applied the PICC as a reference for interpreting national law. This award remarked that the contract shall be interpreted in accordance with the common intention of the parties, even if it differs from the literal meaning of the words.

There is thus no doubt that Spanish judges will look at the common intention of the parties when interpreting the disputed contract with regular reference and even will resort to international legal and academic texts to support their decision. Merger clauses incorporated to Spanish contracts will not limit the recourse to extrinsic evidence unless the parties' common intention expressly excludes the use of extrinsic evidence for the purpose of interpretation. In order to ensure such correct interpretation by the applicable judge, due consideration of Arts 1281–1289 CC as well as good faith shall be taken.

9.2. Other rules of interpretation of the contract

The legal rules of interpretation contain hierarchically-ordered criteria, with preference given to those aimed at ascertaining the intention of the parties over the rules of objective interpretation, which subsidiarily, can only be resorted to when the common intention has not been ascertained. According to Spanish case law, the interpretation of contracts is a declarative hermeneutic process of intention of the parties. Pursuant to Art. 1286 CC, the purpose of interpretation is to analyze the terms or clauses "words" of the contract in order to find the common intention of the contracting parties. The terms agreed by the parties that form the written contract, are break down into clauses that mirror the parties' understandings, statements, omissions and clauses. The Spanish Civil Code does not define what is meant by a clause incorporated into the terms of a contract. Spanish doctrine and case law understands this clause as a provision, term or stipulation of a legal act.[391] The Civil Code uses the meanings of "terms", "clauses" and "stipulations" interchangeably to refer to a single concept of "clause" or structural element of a contract. In a broad sense, a contract is made up of a set of clauses with a specific content (e.g., a disclaimer), which is substantially different from the

[390] (RJ 2012\617).

[391] See subchapters 3.4. and 3.5.

meaning of clause when incorporated to the general terms and conditions (*Condiciones Generales de la Contratación*) where the meaning of clause is broader. A contract is therefore not a simple sum of clauses, but a unitary and harmonious entity, made up of a set of clauses that respond to the common intention of the parties to the contract, creating a bond or subordination between them, forming a logical unity, to be interpreted systematically. This is the understanding of clauses under Spanish law.

9.3. The mandatory nature of the rules of interpretation

Arts 1281–1289 CC and Arts 57–59 CCom regulate the subject matter (*objeto)* and the applicable means of interpretation of contracts. The interpretative rules contained in Arts 1281–1289 CC constitute a subordinate and complementary set of rules.[392] Therefore, they contain applicable legal rules, to be used as legal tools by the interpreting judge to determine the contractual intention.[393] The rules of contract interpretation are, however, not rules of evidence.[394] The rules on contract interpretation rules are mandatory within the interpretative process, without any possibility of contradicting or circumventing them.[395] The parties may challenge its infringement in appealing (*casación*),[396] through a review of the legality on the contract interpretation. If disputed, the court of first instance has the function of interpreting contracts and their clauses, and its interpretation must prevail, except when (review in cassation) it is contrary to any of the legal rules governing the interpretation pursuant to the Civil Code or it is demonstrated that the interpretation is illogical, irrational or arbitrary.[397]

However, the contracting parties may voluntarily exclude elements that can be used for interpretation, e.g., usages that are not derived from mandatory rules. In contrast to the doctrinal positions that claim the prevalence and even the exclusion, where appropriate, of the objective rules over the subjective ones, doctrine understands that it is more effective that during the

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[392] SAP Málaga of 15 April 2002 (JUR 2002\235758).
[393] STS 22 June 2009 (RJ 2009\3412), STS 25 November 2009 (RJ 2009\7298).
[394] STS 28 September 2006 (Tol 1014549) and STS 10 May 2007 (Tol 1075949).
[395] However, in practice, Spanish courts may deviate from these rules with the support of other judicial rules that may provide the Spanish judge with enough maneuver to rule on the interpretative process.
[396] Art. 477.1 LEC.
[397] STS 1 July 2016 (RJ 2016\3885), STS 10 October 2016 (RJ 2016\4976).

interpretative process, all the rules, or those that are appropriate in each case, are to be applied jointly.[398]

9.4. Other rules of interpretation

Arts 1283–1289 CC provide a set of interpretative rules aimed at clarifying ambiguities of the contractual terms that have not been solved during the subjective interpretation. This interpretation is conducted in a successively fashion, i.e., following the following a systematic approach:

(i) literal interpretation: Such "*in claris*" rule, contained in Arts 1281 and 1282 CC and Art. 57 CCom, entails the first step taken within the contract interpretation process by reviewing the literal wording of the terms (grammatical) and the meaning of the clauses: if the terms of a contract are clear, the literal wording of its words will prevail (Art. 1281.1. CC) – the so called "*in claris non fit interpretatio*".

Should Art. 1281 CC leave doubt as to the intention of the contracting parties, the judge will have to resort to the following interpretative rules, which are of a subordinate or subsidiary character.[399] Spanish case law applies as a matter of preference and priority.[400]

Similarly, the judge will consider the limitations to this interpretation, which are the application of the principle of mutual trust and the observance of application of the principle of self-responsibility of the contracting party, derived from the good faith (*principio de confianza en los actos propios*).[401]

(ii) historical interpretation: provided that the judge lacks clarity when interpreting the terms of the contract and it is not possible to ascertain the true intention of the parties, covered in Arts 1281 and 1282 CC, the historical rule of interpretation examines the conduct of the parties carried out during the phase of performance of the contract [402] or what is called the "interpretative conduct". The aim of this interpretation is to examine the acts that have been proven and have a relation with the whole of the contract as an expression of

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[398] M. Albaladejo, *Derecho Civil I. Introducción y parte general*, 16th edn, Madrid 2006, p. 769-770. Further, L. Díez-Picazo, *Fundamentos del Derecho civil patrimonial, T.I.: Introducción. Teoría del contrato,* 6th edn, Madrid 2007*,* p. 501.
[399] STS 1 February 2011 (RJ 2011\45943).
[400] STS 7 June 2011 (Tol 2155334), STS 14 April 2011 (Tol 2092450).
[401] STS 19 July 1995 (RJ 1995\5714).
[402] STS 16 March 2011 (RJ 2011\2874).

the concrete intention,[403] unequivocally revealing the intention[404]; being significant and relevant and useful to ascertain the real intention of the parties.[405] This interpretation not only includes the scope of contemporaneous and subsequent acts, but also prior acts and other circumstances which may contribute to determining the contractual intent (not excluded by Art. 1282 CC)[406]. Doctrinally, they are referred to as the "precedents of the contract"[407], constituted by the legal, social and economic situation that existed when the parties concluded the contract. This rule complements the rule contained in Art. 1281.2 CC.[408]

(iii) Authentic interpretation; the authentic interpretation is conducted by the parties. This interpretation includes a new understanding and scope of the parties' understandings, (*"a través de una nueva declaración de voluntad posterior que fije el negocio declarativo o de fijación"*) to provide clarity on the intention that the parties had given to specific terms and clauses and its binding effect.[409]

(iv) *Favor debitoris* interpretation: Art. 1283 CC will be applied, when for lack of clarity of the terms of the contract it is not possible to know the true intention of the contracting parties, thus the judge resorts to the previous, next and subsequent conduct of the parties to interpret what was actually intended by the parties. However, the parties may voluntarily exclude usages not derived from mandatory rules as a hermeneutic canon (exclusion deduced from the rules of interpretation).

(v) Effectiveness interpretation (*regla pro eficacia*): based on Art. 1284 CC, this interpretation aims to give prevalence to the legal effects of terms over the lack of effectiveness, which may be declared as void. This rule applies only when terms contain two possible interpretations on terms producing legal effects and the other not, prevailing the former one. It implies an application

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[403] STS 30 November 2004 (RJ 2004\7903) and STS 9 October 2007 (RJ 2007\6811).
[404] STS 10 February 1986 (RJ 1986\514).
[405] STS 20 July 2004 (RJ 2004\4570).
[406] STS 19 May 2003 (RJ 2003\4857) and STS 30 May 2003 (RJ 2003\4803).
[407] De Castro y Bravo, *El negocio jurídico*, Madrid 1985, p. 75.
[408] STS 14 December 1995 (RJ 1995\9610).
[409] The fixing business requires the existence of a previous contract and of contractual declarations for clarification purposes. STS 24 June 2004 (RJ 2004\4432).

of the principle of preservation of the contract. This rule is inapplicable in cases where literal interpretation prevails[410].

(vi) Systematic interpretation: Art. 1285 CC provides a systematic interpretation which aims to interpret the contract as an overall. All clauses shall therefore be interpreted together as a result of the general contractual intention which is not divisible but applicable for the entire contract.[411]

(iv) Rule of finalist interpretation: Art. 1286 CC includes a rule of prevalence over the literal wording of the contract which favors the subject matter of the contract. This rule does not apply independently from the rest of the rules of interpretation (it is subject to the other rules).[412]

(vii) Gap-filling interpretation: Art. 1287 CC contains a rule of integration of the contract in the event of gaps or omissions in the contractual statement to be filled by usages and cultural customs of the jurisdiction whose law governs the contract.

(viii) Obscure interpretation: Art. 1288 CC only applies when the obscurity of the clause cannot be resolved by applying Art. 1285. The interpretation of obscure clauses must not favor the party who has caused the obscurity (Art. 1288 CC). In the case where Art. 1285 has been applied and the obscurity of the clause has not been resolved, *contra proferentem* or contra *stipulatorem* interpretation applies. This interpretative method is further applied in contracts concerning the general terms and conditions. To solve this interpretation, first the judge will make a joint interpretation of the whole clause and for the doubtful phrases will make an interpretation resulting from the contract as a whole.

(ix) The closing rule for the interpretation: Art. 1289 CC provides that in case that the previous rules of interpretation cannot be applied by the judge, the following considerations applies: On the one hand, if the unresolved interpretation falls under the statement "on accidental circumstances of the contract", the judge will resolve in favor of the lesser transfer of rights and interests if the contract is gratuitous (*favor debitoris*); or on the other hand in favor of

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[410] STS 19 July 2004 (RJ 2004\4387).
[411] STS 9 October 1981 (RJ 1981\3592) and STS 18 June 2009 (RJ 2009\5320).
[412] To interpret this provision, case law referred to Art. 4.3(c) PICC, STS 21 December 2007 (RJ 2008\531).

"the greater onerousness of interests" if the contract is onerous (*favor sinalagmae*); if the doubts lie on the main subject matter of the contract, "the contract will be null".

Spanish law does not contemplate any rule on the resolution of conflicts arising from linguistic discrepancies, so it will be necessary to apply the general rules of interpretation contained in Art. 1280 CC.

9.5. Rules for the interpretation of standard terms

General terms and conditions shall be interpreted as an overall. Pursuant to Art. 1258 CC, the overall interpretation of the whole clause must be considered first, and then attribute to the doubtful sentences the meaning that results from the whole.[413] In practice the *contra proferentem* or *contra stipulatorem* interpretation is applied mainly in the field of adhesion contracts and general terms and conditions. It is a concrete application of the principle of good faith in the interpretation of B2B-contracts and is contained in Art. 1288 CC[414] (it does not refer to pre-agreed contracts). In B2C-contracts, Art. 6 LCGC provides that the rule of interpretation favors an individually negotiated agreement over a general term applicable to the same contract, determining that the individual agreement must prevail whenever it is more beneficial to the buyer (i.e., consumer).[415]

The application of this interpretative rule requires three conditions: (i) the doubtful, ambiguous or obscure nature of the clause, where prior interpretation[416] is required; (ii) liability to the predisposing party, and (iii) unsolved, meaning that such obscurity, ambiguity or doubtful term has not been resolved using the subjective rules of interpretation (subsidiary nature of the *contra proferentem* rule).

9.6. Good faith as a criterion of interpretation

The substantial number of legal gaps in the Spanish Civil Code contributes to supply these gaps and to assist the judge in interpreting the contract, together

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[413] STS 8 June 1992 (RJ 1992\5170).
[414] Similar to Art. 1280.2 APMCC and Art. II.-8:103 DCFR.
[415] Its rationale is that the particular conditions better reflect the will of the parties than the general ones. STS 18 February 1966 (RJ 1966\805) and STS 22 December 1971 (RJ 1971\5397).
[416] Art. 1288 CC and Art. 6 II LCGC.

with the case law of the Supreme Court and the Spanish doctrines. In Spanish law, doctrine and case law consider good faith as an autonomous source of interpretation, although it is only mentioned in Art. 1258 CC (referring to integration) and not in the provisions that apply for the contract interpretation, i.e., Arts 1281–1289 CC. The good faith principle constitutes a limitation to the principle of party autonomy (Art. 1281 CC), based on the principles of self-responsibility of the party declaring and the trust of the recipient of the declaration (*principio de confianza*), derived from good faith in an objective approach.[417]

Regarding the use of the criterion of good faith as a hermeneutic canon in contracts, Art. 1258 CC contains a three-fold consideration: (i) the loyalty and correctness that the interpreter must assume as a contracting party entering into a contract; (ii) the loyal conduct that shall be observed by the party through the interpretation of contractual relations; and (iii) the protection of the recipient's trust in the objective meaning of the declaration and the imposition of the corresponding responsibility on the declarant[418].

The principle of the declarant's self-responsibility means that is bound by the declarations giving rise to legal transactions and obligations subject to their consequences according to their objective meaning. This rule has been repeatedly applied by the courts and has been the subject of extensive case law, mainly in the case of contracts of adhesion and general terms and conditions, and is based on the protection of trust (*confianza)* and, therefore, on the principle of acting in good faith.[419] In conclusion the principle of good faith, serves as a guiding principle to the interpreter to ascertain the conduct of the parties to the contract, in accordance with the principle of *actos propios* or the prohibition of *venire contra factum propium*.

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[417] J. Jordano Barea, "La interpretación de los contratos", in: J. Vallet de Goytisolo, *Homenaje a Juan Berchmans Vallet de Goytisolo*, Madrid 1998, p. 316.

[418] L. Díez-Picazo, *Fundamentos del Derecho civil patrimonial,* Tomo I*,* 6th edn, Madrid 2007*,* p. 65.

[419] STS 16 November 1979 (RJ 1979\3850) and STS 30 January 2003 (RJ 2003\2024).

10. The rules of evidence in Spanish law

Since no definition is provided in the Spanish civil codification, the Spanish Constitutional Court has defined the evidence as the activity aimed at convincing the judge of the veracity of the facts that are claimed to exist in reality. The different means of proof must be proposed by the parties.[420]

The rules on evidence are regulated by *Ley de Enjuiciamiento Civil* (LEC), which lays down various rules on the taking of evidence, aiming to specify the scope of procedural principles as well as their limitations. This Chapter defines the process of taking evidence under Spanish law by illustrating its interaction with said principles: The evidence (*prueba*) under Spanish law plays an essential role when interpreting the common intention of the parties to the contract. In this regard, questions can be posed concerning the specific means of proof than can be alleged by the parties, and the probative value of these means in the eye of the Spanish judge or arbitrator.

As a mere reference to compare and gain further understanding, texts of uniform international contract law lay down the different rules of evidence as follows: Art. 11 CISG states that unless a state reservation has been established, the existence and content of the contract of sale and its terms may be proved by any means, including witnesses. Hence no requirement as to the form. Art. 1.2. PICC establishes the general rule of freedom of form to prove the existence of a contract. Art. 2.1.17 PICC and Art. 2:105 PECL allow extrinsic evidence to interpret the contract.

10.1. Extra-procedural evidence

The LEC, distinguishes two types of evidence: the evidence that applies in procedural cases, which only takes place in civil proceedings (commercial contracts);[421] and the extra-procedural evidence, which produces effects outside the process or proceedings, i.e., against third parties. The evidence in civil proceedings deserves a separate chapter for its analysis. Regarding extra-procedural evidence, in addition to public or private nature documents, either

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[420] 14 February 2000 (RJ 2000\824): *"actividad encaminada a convencer el juez de la veracidad de los hechos que se afirman existentes en la realidad. Los diferentes medios de prueba deberán ser propuestos por las partes"*.

[421] See subchapter 10.2.

in paper or electronic format, there are other means of proving contracts by means of other written document means. In this regard, the Spanish Civil Code recognizes the probative value of other documents as a means of proving an obligation (e.g., the "invoice", regulated Art. 1172 CC)[422]. Amongst all the different means of documentation, the invoice stands out, although it lacks legal regulation, due to its wide usage in contracts and its evidential function with respect to the content of from an analogical application of Art. 1172 CC (regarding the repayment of debts). Other means of evidence include, for example, the accounting bookkeeping documentation of businesses, according to Art. 327 LEC[423]. in accordance with commercial law, and the Supreme Court has also accepted a bill of exchange (*letra de cambio*) as sufficient proof to demonstrate the existence of the contract.[424] Arts 319 and 326 LEC, presumes the evidentiary value of public and private documents established by the Civil Code when they are not disputed by the parties or a presiding judge.

10.2. Evidence in civil proceedings

Arts 550–666 LEC establish the procedural principles of evidence. The subject matter or "*object"* of the evidence, in the majority of cases, refers only to the facts, which after the allegations of the parties may be disputed.[425] In other words, facts that have been alleged by one party and not admitted by the other (disputed facts, not legal assessments).[426] In civil proceedings, regarding the adduce of evidence, the *principio de justicia rogada* applies, meaning that the facts shall be provided exclusively by the parties (purposefully).[427] Thus, only the parties can make statements or allegations, which will therefore be the subject matter of the evidence. The parties have the right to prove, but they

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[422] *"El que tuviere varias deudas de una misma especie en favor de un solo acreedor, podrá declarar, al tiempo de hacer el pago, a cuál de ellas debe aplicarse. Si aceptare del acreedor un recibo en que se hiciese la aplicación del pago, no podrá reclamar contra ésta, a menos que hubiera mediado causa que invalide el contrato".*

[423] *"Cuando hayan de utilizarse como medio de prueba los libros de los comerciantes se estará a lo dispuesto en las leyes mercantiles. De manera motivada, y con carácter excepcional, el tribunal podrá reclamar que se presenten ante él los libros o su soporte informático, siempre que se especifiquen los asientos que deben ser examinados".*

[424] STS 2 September 1998 (Tol 7210).

[425] The purpose of the evidence is to prove relevant and disputed facts, STS 16 February 2016 (RJ 2016\ 533).

[426] J. Montero Aroca, *La prueba en el proceso civil*, Pamplona 2007, p. 35

[427] See subchapter 3.1.

also bear the burden of proof of the facts in dispute and of the consequences of the alleged facts that are not proven (Art. 217 LEC). The rule of the burden of proof (*onus probandi*) determines that the plaintiff is the one who has to prove the certainty of the alleged facts, although in the case of excluding facts (*impeditivos excluyentes*) it is up to the defendant to prove them. For example, when the plaintiff claims the existence of a contract ("constitutive fact") and the defendant claims the abusive clause. These rules have three main limitations: (i) "impossible" (*diabólica*) proof that causes defenselessness cannot be claimed;[428] (ii) the rules of distribution of evidence cannot imply privileges for one of the parties; (iii) the "principle of relieving proof" (*principio de facilidad probatoria*) can be applied, which reverses the burden of proof in favor of the party who has easier access to resort to such proof.[429]

The principle *libertad de prueba* ("freedom of evidence") is a general principle which applies in any statutory procedural law in Spain. It is the main applicable principle regarding the provisions on evidence within the *Ley de Enjuiciamiento Civil* and although it is not expressly regulated, it is a principle strictly applicable by Spanish courts. This principle states that the judge at the end of the oral hearing needs to ascertain the results obtained by the taken evidence and decide, if he considers the facts put forward by the parties to be true. The provision intentionally relies on the subjective criteria of free assessment of evidence rather than any objective criteria. In Spanish law, the principle of free evidence, (freedom to use any means of proof), allows the parties to prove contracts, terms, or facts by any of the means admitted in law (Arts 1216–1225 and 1127–1230 CC). There is no single required form of proof, not even when it is documentary.[430] Thus, the principle of freedom of evidence applies, admitting the evidence of witnesses,[431] which grants the judge the free assessment of the evidence in accordance with the circumstances contained in Art. 376 LEC. To provide some clarity to the parties, Art. 299.3 LEC lists out the means of proof (categories) admitted during a litigation civil procedure: (i) the interrogation of the parties, (ii) public and

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[428] STC 14/1992, 10 February 1992 (BOE No. 54, 3 March 1992).
[429] STC 227/1991, 28 November 1991 (BOE No. 3, 3 January 1992).
[430] Arts 217.6, 218.2 and 299.3 LEC, make it sufficiently clear that there is no limitation of means of proof that the parties may use in during the proceeding.
[431] It is settled case law that witness evidence is insufficient to accredit the existence of ordinarily documented businesses according to STS 11 April 1992 (RJ 1992\3093) and STS 12 June 1998 (RJ 1998\4683).

(iii) private documents, (iv) expert opinions, judicial recognition, and (v) the interrogation of witnesses,[432] as well as the proof of presumptions. [433]

Other admitted that can reproduce words, sounds or images, as well as data, digits or mathematical operations with accounting purposes are admissible. Should none of the previous means be relevant to shed light on applicable facts, additional means could be admitted, if presented voluntarily by the interested party (Art. 299.3 LEC). Other presumptions resorted by the parties lie outside the means of Art. 299 LEC. These may allow resort to a relevant fact that does not have a direct proof to be considered proven,[434] through another fully demonstrated fact (basic fact) which serves to prove the new fact by a logical consequence. Presumptions can be: (i) legal, distinguishing between "*iuris tantum*", which admit proof to the contrary, and "*iure et de iure*", no proof against; and (ii) judicial,[435] which admit proof to the contrary.

The judicial assessment of evidence conducted by the judge is therefore decided by virtue of the principle *iura novit curia*, without deviation from what has been invoked by the parties, in accordance with the rules applicable to the case, even if they have not been correctly alleged or cited by the litigants (Art. 218.1.2 LEC).

10.3. Assessment of evidence

Established case law provides that the assessment of evidence made by the lower court can only be reviewed in appealing (*casación*) in exceptional cases.[436] The evidence should only be used when the common intention of the parties, cannot bet ascertained by the judge. Hence, the importance of clear

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[432] Art. 299 LEC.

[433] According to the majority doctrine, inter alia, R. Bercovitz Rodríguez-Cano, *Comentarios al código civil*, 5th edn, Pamplona 2021, p. 1503, S. Gómez-Salvago Sánchez, *La forma voluntaria del contrato*, Valencia 1999, pp. 69–70, A. López y López, "Comentarios a los arts. 1291-1289 CC, in: R. Bercovitz Rodríguez-Cano (coord.), *Comentarios al código civil,* Valencia 2011, pp. 37–39. J. Jordano Barea, "La interpretación de los contratos", in: J. Vallet de Goytisolo, *Homenaje a Juan Berchmans Vallet de Goytisolo*, Madrid 1998, p. 511.

[434] STS 9 October 1998 (RJ 1998\7561), STS 3 July 1992 1992, STS 11 May 1993 (RJ 1993\3537 and STS 11 October 1999 (RJ 1999\7322), STS 23 November 2000 (RJ 2000\9239), STS 30 April 2003 (RJ 2003\3742).

[435] Provided in Art. 386 LEC.

[436] Such as the violation of some precept regulating the assessed value of certain means of evidence, or that the assessment made is arbitrary, unreasonable or leads to implausible results, according to STS 13 October 11 (RJ 2012\1237).

meaning and wording of the terms of the written contract in order to prevail over external evidence.[437] The question arises as to what extent any evidence may be admitted by the Spanish judge to interpret a written contract incorporating a merger clause. The judge could admit future evidence thus reviewing the content of the merger clause provided that the invoked evidence by one of the parties claims to infringe: (i) the essential elements of the contract (Art. 1261 CC[438]), (iii) the mandatory rules covered in Art. 1256 CC (validity and fulfillment of the contract), the good faith and the equity and balance of the contract (*desequilibrio contractual*) supported by case law, in special laws of Spain (*normativa foral*) and, preliminary agreements in matrimonial law. Outside of this *numerus clausus*, a merger clause will prevent the Spanish judge to resort to any evidence to interpret the written contract to determine the common intention of the parties.

[437] STS 7 June 2011 (Tol 2155334) and STS 14 April 2011 (Tol 2092450).

[438] Art. 1261 CC: "*No hay contrato sino cuando concurren los requisitos siguientes: 1.º Consentimiento de los contratantes. 2.º Objeto cierto que sea materia del contrato. 3.º Causa de la obligación que se establezca".*

11. Integration of a written agreement

Following the analysis of the fundamental principle on contract interpretation and the assessment of evidence, it is necessary to provide clear understanding on how the parties' common intention to not integrate previous understandings in their final contract can be reinforced by the incorporation of a merger clause and how it may be considered as integrated terms of the contract pursuant to Spanish law and its further interpretation by the judge.

11.1. Overall perspective in Spanish law

Spanish law does not feature either the parol evidence rule or a presumption of completeness of a written contract. Conversely, under Spanish law the interpretation of the contract is based on the parties' actual and only when the intention of the parties is not clearly determined by Arts 1281–1289 CC, the intention of the parties the integration of the contract will be sought.[439] The merger clause will confer the parties with the legal instrument to clarify their intention.

A written agreement is presumed to cover the complete agreement of the parties. The terms in writing are presumed to cover the whole agreement of the parties where the parties have set out in writing all the terms agreed upon during the negotiations: Statements, undertakings, omissions, letter of intent, etc. which will give rise to contractual obligations to be fulfilled by the conclusion of the contract. The nature of the written contract has an integrative effect since it discharges prior and contemporaneous statements and understandings that have not been incorporated into the final agreement, to the extent covered by the parties' integrative intent. During the process of interpretation, i.e., determining the common intention of the parties, it will be necessary to resort to the historical reconstruction of the contract by integrating the agreed terms. As noted above, the binding legal effects of a written contract are not only limited to what has been expressly agreed by the parties, but extends to all those obligations that have arisen outside the intention of the parties – the "implied terms". These very latter obligations constitute the

[439] The so-called "*Reconstrucción de la voluntad contractual de las partes*", L. Díez-Picazo, *Fundamentos del Derecho civil patrimonial, T.I.: Introducción. Teoría del contrato*, 6th edn, Madrid 2007, p. 498.

integration of the contract, through the objective reconstruction of the contractual relationship.[440] Accordingly, under Spanish law, there is a close relationship between interpretation and integration of contracts, thus the integrative function of the writing needs is only sought once the interpretation of the intention of the parties has been ascertained first.[441] In this regard, the Spanish legal system does not contain a general provision considering pre-contractual statements as an integral part of the content of the contract.[442] Therefore, the declarations issued by the declarant are not binding, notwithstanding these can be accepted. The general rule (leaving aside B2C rules) is therefore that unilateral declarations (intent) and commitments that a party makes before the conclusion of the contract do not form part of the content of the contract, unless expressly stated.

11.2. Integration of implied terms

Implied terms arise when the parties have not agreed on the legal effects, rights and duties, of a specific term of their written contract and the judge is unable to find a *solution* to the specific legal issue based on her interpretation of the written agreement. The judge therefore needs to assert or provide her own terms for the contract. The regulation of "implied terms" binds the intention of the parties through the integration of such term to the agreed contract.

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[440] L. Díez-Picazo, E. Rocas Trias, A. Morales Moreno, *Los principios del derecho europeo de contratos,* Madrid 2002, pp. 272–273.

[441] Ibid., p. 508.

Art. 9.2 CISG regulates the integration by any agreed usage and established practice between the parties. However, it does not distinguish between express or implied obligations, unlike Art. 5.1 PICC. Art. 4.8 PICC and Art. 6:102 PECL, together with the implied terms, Art. 5.1 PICC and Art. 6:102 PECL, regulate particular rules of integration or filling of gaps (Arts 5.6 or 5.7 PICC and Arts 6:102 or 6:106 PECL). Integration is also regulated in Art. 68 CESL and Art. II.-9:101 DCFR. In any case, the exceptional nature to fill the gaps in the contractual regulations it is covered by the rules derived from the legal norms, uses or practices. In addition, the parties may agree to supplement or modify the clauses of the contract.

[442] Unlike international legal instruments: Art. II.-9:102 DCFR states that these pre-contractual statements (made only by a trader or entrepreneur, in his advertising and marketing efforts) are incorporated into the contract as contract terms if the other party reasonably understood them to be part of the content of the contract, except that the other party knew or expected that they were inaccurate. DCFR refers to the incorporation into the contents of the statement as "*term*", whereas the PECL uses "contractual obligation". However, Art. 5.1.2 PICC admits the binding nature of the parties by good faith, derived from an "implied term" to the contract but does not expressly extend its scope to the assertions *in contrahendo*, for which only the binding effects based on intentional is mentioned as a matter of interpretation.

International instruments, such as the PECL and the PICC, feature provisions concerning implied terms.[443] The approached followed in PECL, similar to English law[444] (but different as to the source from which the implied terms derive: the intention of the parties, the nature and object of the contract and good faith) has been adopted with slight variations in Art. II.-9:101 DCFR and Art. 68 CESL. In particular, Art. 4.8 PICC concerning the supply of an omitted term, opts for a specific rule of gap filling consisting of providing a term appropriate to the circumstances of the contract, for which, in addition to the intention of the parties and the nature and purpose of the contract, general criteria such as good faith and fair dealing, and even the purest "common sense" are considered.

Spanish law regulates implied terms in Arts 1258.2 CC and 57 CCom and extends the content of the contract beyond what has been expressly agreed by the parties, to include contractual regulations other than those arising from the parties' agreements (function of common joint integration). Spanish law and case law do not accept the so-called "integrative interpretation"[445] which seeks to reconstruct the content and effects of the contractual terms (Arts 1283–1285 CC). The process of integration is conducted in accordance with Art. 1258 CC, where it is not necessary to have pre-existing contractual gaps that need to be filled by means of a presumed or hypothetical intention.[446] As has already been seen, the binding nature of the terms intended by the parties – by virtue of Art. 1258.2 CC, and to Art. 1243 APMCC – once the contract has been concluded (*perfeccionado*) applies to both the terms expressly agreed and to those terms derived from the natural consequences of the obligations, in accordance with good faith, usage and the law.[447] Any legal gaps that may arise during the interpretation, will have to be filled in by

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[443] Reference to the implied terms "in fact", which refers to the good faith and the subject matter object of the contract.

[444] The common law is based on legal certainty as the predominant value, as opposed to the balance of the contract and the good faith of civil law systems, allowing the introduction of implied terms for the integration of gaps if they are foreseeable terms and necessary for the contract to "work" (commercial effectiveness).

[445] The integrative integration has its origin in a social conception of law and economics, taken over by German law (*"ergänzende Vertragsauslegung"*), and is used by German courts to fill contractual gaps. Taking into account the hypothetical intention (*"voluntad")* of the parties.

[446] C. Lasarte Álvarez, "Sobre la integración del contrato: la buena fe en la contratación", RDP 64/1980, pp. 50–78.

[447] STS 15 November 2010 (RJ 2010\8869).

including extrinsic evidence to the contract, hierarchically ordered for the purpose of integration: (i) the law, as mandatory rules; (ii) the "usages of the trade" or "business usages" in function of integrating the contract (normative usages); (iii) the good faith[448], as a standard of conduct of the parties. Regarding the extension or modification of the content of the contract by means of good faith, the echoes the applicable doctrine with a restrictive character in this respect.

The integrating function provided in international contract law as a reference to be adopted to domestic law is made clear in the judgement of the Supreme Court of 3 December 2008, using for the first time in Spanish case law, the regulation of good faith provided in Art. 1.7 PICC and Art. 1:201 PECL to fill in the gaps encountered in domestic law.[449] Furthermore, the judgement of 4 July 2006 resorted to the principle of good faith.[450] In cases where legal gaps arise in the contract, a merger clause included in the contract prevents such gap from being filled by extrinsic declarations and documents external to the written contract, since this would imply recognizing obligations not contained in the contract. Therefore, if the term (gap) *per se* was essential to the determination of rights and duties, it would be simpler for the Spanish judge to hold the contract ineffective rather than resorting to the methods of integration of the English or the Romano-Germanic system. The function of a merger clause under Spanish law will not be closing gaps and will exclude implied terms when individually agreed and incorporated into a contract governed by Spanish law.

11.3. Integration of standard terms

The regulation of standard terms under Spanish law is established by the *Ley de Condiciones Generales de la Contratación* which applies to B2C-contracts. The general terms and conditions that meet the legal requirements are considered sources of integration of the contract.[451] These are the "incorporation requirements" pursuant to Art. 5 LCGC, which require: (i) the predisposing party to provide the adhering party with express information on the

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[448] STS 23 March 2007 (RJ 2007\2349).
[449] (RJ 2009\670).
[450] (RJ 2006\6080).
[451] L. Díez-Picazo, *Fundamentos del Derecho civil patrimonial, T.I.: Introducción. Teoría del contrato*, 6th edn, Madrid 2007, pp. 452–454.

general terms and conditions, and also provides a copy thereof; (ii) the adherent party accepts the incorporation; (iii) the contractual document is signed by all the contracting parties; and (iv) the contract refers to the incorporated general terms and conditions.

Further, Art. 7 LCGC provides the "non-incorporation requirements" which refer to the non-incorporation and nullity of specific general conditions into the contract. The predisposing party must prove that the adherent party knew about these terms and expressly accepted them; therefore, they bind the predisposing party and adherent party if it is demonstrated that the latter was aware and accepted such terms; this cannot be presumed. In addition, in order for the general terms and conditions to be incorporated into the contract, their wording must be transparent, clear, specific and simple, and general terms and conditions which the adherent has not had a real opportunity to become fully aware of at the time of the conclusion of the contract, as well as those that are illegible or ambiguous, will not be incorporated into the contract.[452] A merger clause incorporated into an agreement as part of general terms and conditions shall be particularly observant with the legal requirements listed above in Arts 5 and 7 LCGC in order to prove its validity by the Spanish judge when integrating the contract signed by the parties.

11.4. Integration of uses and practices

11.4.1. International legal instruments

Usages and commercial practices are considered a common practice in international commercial contracts. In addition to their function of serving as a guide to interpretation (e.g., Art. 8 CISG) and fulfilling a function of determining the tacit agreements of the parties, these uses and practices are considered to determine the terms of the contract, by integrating the content of the contract during its formation process (Art. 9 CISG). Usages and practices are regulated in Art. 9 CISG and Art. 1.9 PICC. Following *Perales Viscasillas*, two main scenarios can be outlined from Art. 9(1) CISG:[453] (i) business

[452] According to the legal precepts envisaged in Art. 5.5. LCGC.

[453] P. Perales Viscasillas, *"*El contrato de compraventa internacional de mercancías (Convención de Viena de 1980)*",* Sección 158, pp. 22–23.

practices,[454] which are characterized by the conduct established between the parties to the performance of their obligations, bound to these practices,[455] thus being incorporated to the content of the contract;[456] and (ii) conventional usages, which consist of a particular and determined agreement (express or tacit) for the use of a specific usage in a specific transaction.[457]

Furthermore, Art. 9(2)CISG refers to the normative usages objectively applicable through the *lex mercatoria*[458], as an applicable legal rule.[459] This refers to usages (known or expected to be known by the parties) which implicitly constitute widely known usages in international trade and regularly observed by the parties within their legal relationship. These uniform customs and practices are subordinate to the national law which admits their validity (Art. 4(a) CISG).[460] Hence, in the event of incompatibility between an agreed

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[454] They refer to those usages which the parties have regularly followed in their conduct and which serve to determine both their intention and the obligations existing between them; they prevail, like any clause agreed by the parties, over the provisions of the CISG, given their dispositive character, according to Art. 6 CISG). M. Yzquierdo Tolsada, *Contratos. Civiles, mercantiles, públicos, laborales e internacionales, con sus implicaciones tributaries*, *Tomo XVI, Los Contratos Internacionales I*, Pamplona 2014, p. 472.

[455] This results from the fact that "the practices" create an expectation on which a reasonable person could assume that the previous conduct will continue, or the fact that the prohibition of *venire contra factum propium* underlies it. A. Calvo Caravaca in: L. Díez-Picazo, (dir.), *La compraventa internacional de mercaderías. Commentary on the Vienna Convention*, Madrid 1988, pp. 137–138.

[456] e.g., delivery and payment deadlines, the quality of the goods to be delivered, the use of a particular means of communication for placing orders.

[457] Included in international trade: INCOTERMS 2000, the Uniform Customs and Practice for Documentary Credits (UCP 500), the Uniform Rules for Contractual Guarantees, 1990, and the "Uniform rules of the collection of commercial paper" 1967.Worth mentioning the role of the International Chamber of Commerce in the compilation and dissemination of trade customs and practices.

[458] Understood as a set of customs and practices that are common in international trade and that individuals assume in their relations with the *opinio iuris* of their legal relationship. The *lex mercatoria* is an important instrument for regulating questions of international private law and, in particular, matters of a commercial nature. It constitutes a legal solution mechanism for traders and for the applicators of the law, arbitrators and national judges. Despite its importance as an ordering function of international commercial relations, it only has legal effects and validity *inter-partes*. M. Yzquierdo Tolsada, *Contratos. Civiles, mercantiles, públicos, laborales e internacionales, con sus implicaciones tributaras, Los Contratos Internacionales I, Tomo XVI,* 1st edn, Pamplona 2014, p. 474.

[459] For example, the uniform rules for documentary credit, the provisions of which are applied by the parties concerned unless otherwise agreed.

[460] They can be considered valid under Spanish law, by virtue of Art. 1255 CC, if they are not contrary to mandatory rules. Recognized by Spanish case law in STS 15 June 2011 (RJ 2011\4635), STS 12 July 2006 (RJ 2006\4509).

usage and the practice followed by the parties, the former shall prevail.[461] Similarly, Art. 1.9 PICC recognizes usages and customs of international trade.[462] Likewise, Arts II.-9:101(1) and II.-9:104 DCFR, as well as Art. 66 CESL and Art. 1:105 PECL contain the reference to usages and practices as direct sources of contractual regulation, with a similar application between the DCFR and the PECL. By contrast, the CESL discards any reference to reasonableness[463]. In short, in order for these normative usages to be enforceable they shall meet three requirements: the usage must be applicable in international trade transactions, it must be known by the parties, and it must be effectively abided by them in their conduct.

11.4.2. Spanish law: "*la costumbre*" as interpretation

Art. 1.1 CC and Art. 2 CCom regulate the custom as a source of Spanish law. In the absence of definition and specific regulation, the doctrine considers that both (i) an external[464] and an (ii) internal element is necessary for its existence, stressing the social nature that such use is obligatory and legally binding in those relations where it is considered to have legal effects (*opinio iuris*).[465] Spanish law allows the parties to freely agree on the application of usages and customs on the basis of Art. 1255 CC (business usages) as long as they do not contradict mandatory rules. The Spanish doctrine distinguishes, together with the normative usages, the negotiating usages, which fulfil a function of integration of the contractual intention of the parties by express reference to the applicable law. Normative usages, are regulated under Spanish law within the custom and they are a source of law and apply subsidiary or directly when stated by law (Art. 1.3 CC). These usages are applicable irrespective of the intention of the parties (validly admitted by case law[466]),

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[461] "*Primacía de la voluntad de las partes que lo sitúa al principio de la jerarquía de normas*", M. Perales Viscasillas, *El contrato de Compraventa Internacional de Mercancías (Convención de Viena de 1980),* 2001.

[462] They are binding if the parties refer to their regulation. They shall also apply if the parties agree that their contract shall be governed by: "general principles of law", "*lex mercatoria*" or similar expressions.

[463] The DCFR and the CESL distinguish between usages and practices accepted by the parties and those generally applicable.

[464] Custom constitutes an act or usage that must be generalized, repeated or constant, uniform and public. M. Albadalejo, *Derecho Civil I*, Madrid 2009, p. 98,

[465] This internal element is not required in the DCFR.

[466] STS 8 April 1994 (RJ 1994\2733) and STS 21 June 1985 (RJ 1985\3305).

since they can be resorted to as the provisions[467] established in Art. 1258, which covers the normative function of usages *extra legem*. The validity of these usages depends on two requirements: (i) continuous practice, and (ii) legal necessity (*opinio iuris*). The reasonableness of its application[468] will depend on the social context to the applied contract i.e., taking into account the spirit and purpose of the particular usage or custom disputed. Whereas the parties' previous customary business practices (Art. 9 CISG) have a binding scope on the basis of the expectations and trust generated for the other party, the parties themselves may include a merger clause excluding these practices and usages as an element of the contract where international usages or practices or specific usages from a trade or business industry will not be considered to fulfill the obligations of the agreement. By agreeing so, the parties could prevent further interpretation of their own practice than might not be aligned with international standards or usages.

11.4.3. The covenants of form: *pactos de forma*

Under Spanish law, when the common intention of the parties cannot be ascertained due to discrepancy in the agreed terms (what agreed by the parties in prior, contemporaneous and subsequent understandings), regard shall be taken into account whether the consent was validly to be interpreted as to be bound (*si revelan un consentimiento válido para obligarse*), even if the consent was expressed in a manner different from that originally agreed.[469]. The *form ab probationem* or legal requirement of a specific form as the only way of proving by documentary means the existence of a contract is not admitted, meaning there is no rule that establishes a specific form to be observed when entering into an agreement (no absolute binding value to the form agreed by the parties conventional form). As mentioned, the principle of freedom of form applies in Spanish law, with form as a condition for the validity of the contract being rather exceptional in practice.[470] Hence, the application of Arts 1278 and 1279 CC must be understood on the basis of this general principle "contracts are bound whatever the form". The function of Art. 1279 CC

[467] With the practices set out in the DCFR.
[468] Not required in the CESL.
[469] S. Gómez Salvago Sánchez, *La forma voluntaria del contrato,* Valencia 1999, pp. 24 et seq.
[470] See subchapter 4.1.

is to achieve the effectiveness of the contract by means of its documentary form in order to facilitate proof and to be enforceable against third parties (when a public document). The requirement of written form contained in Art. 1280 CC[471] does not have the scope of *solemn form*, without having any influence on the binding effectiveness of the contract, as repeatedly declared by case law.[472] The parties are free to conclude the business in the agreed form or in a different one, and no penalty can be invoked by any party to the contract. The only possible pre-contractual liability would be that arising from the unjustified breakdown of negotiations where these lack any written evidence to be proven before the judge. In short, a merger clause under Spanish law could be manifested in any possible form agreed the parties in their contract.

On the basis of party autonomy, enshrined in Art. 1255 CC, the parties may not only determine the content of the contract but also to choose the most appropriate form (within the limits of legality) by which their legal relationship will be bound to. This principle is established in Arts 1258 and 1278 CC. By means of covenants on a specific form, the parties provide legal certainty to their commercial relationships, avoiding discrepancies that may arise from preliminary negotiations which may not follow the agreed and contractually agreed form in question. It can be presumed that the agreed form provides legal certainty to the conclusion of the contract. Two chronological aspects can be distinguished: First, the signing of the agreement by the conclusion of the contract, in which the preliminary agreements, without a binding nature, take place; and the second, which begins when the agreed form is signed, which determines the conclusion of the contract, leaving outside of the contract terms the preliminary agreements that do not conform with the agreed form. Accordingly, the function of the form in agreements is intrinsically related to the material fact of the conclusion of the contract. Following the application of the principle *libertad de prueba* ("freedom of evidence"), even solemn contracts[473] can be proved by any means of evidence in addition to the document. However, their full probative value is not provided but their

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[471] Art. 1280 CC: "other contracts in which the amount of the performance of one or both of the contracting parties exceeds 1500 pesetas must also be recorded in writing, even if it is a private contract".

[472] STS 27 February 1999 (RJ 1999\1894).

[473] See subchapter 3.2.2.

content can be challenged (especially in cases of simulation) by other means of evidence. In general terms, in order to ascertain the common intention of the contracting parties, the means of proof external to the contract should be limited. However, based on the *libertad de prueba* principle, the use of the means of evidence is optional (based on the principle of party contribution) for the parties, who are free to propose any means of evidence they deem appropriate. The parties may therefore limit or modify the means of proof by means of formal agreements, excluding the proof of elements extrinsic to the contract[474].

According to *Díez-Picazo*, there are two cases of covenants on forms:[475] Firstly, contracts in which the chosen form has a constitutive nature, i.e., it is as an essential element of the contract by virtue of the law (solemn form). Hence, the non-conformity with the agreed form would be cause of nullity (constitutive form agreement).[476] Secondly, contracts, where the document is not required as a constitutive or essential form either by law or by the parties (oral form), thus it has an evidentiary function. In such case, the form plays a presumption of effectiveness.[477] By means of formal agreements, the parties may therefore either establish an essential requirement to be fulfilled by the future agreement (solemn form), or have the purpose of accreditation or certainty of what has been agreed (e.g., by finalizing preliminary agreements) preserving its binding effect.

Irrespective of solemn contracts, the parties may therefore agree on a specific form to their agreement in which they conventionally include the chosen form of their relationship to provide their legal relationship with a higher level of legal certainty (evidentiary function of the prior agreements) to the

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[474] French case law has in some cases admitted that the parties may conclude agreements on proof, capable of restricting the flexible provisions of the law. Dutch law applies a similar approach. In Italy, the parties may conclude limited evidentiary agreements: they must be in writing (Art. 2725 *Codice civile*) and conform to the content of substantive rules, without preventing the judge from seeking the true intention of the parties (Art. 162 *Codice civile*).

[475] L. Díez Picazo, *Fundamentos del Derecho Civil Patrimonial I. Introducción teoría del contrato,* 6th edn*,* Madrid 2007, pp. 256–263.

[476] § 125 BGB prescribes the nullity of the contract due to lack of form.

[477] *Gómez Salvago Sánchez*, understands that the parties may an agreement that has as its subject matter the choice of the formal means by which the parties understand themselves to be legally bound, but they cannot agree on a specific form as the only one to determine the content of a future contract: *La forma voluntaria del contrato*, Valencia 1999, p. 30.

obligations included in the final contract. As to the incorporation of a merger clause into a contract governed by Spanish law, the parties may agree that such clause will be drafted in a specific form. Provided that such clause is not affecting solemn contracts, the form agreed upon and determined by the common intention of the parties will not affect to the effectiveness of such clause since it will be against the freedom of form enshrined in Spanish practice. The interested party may therefore not expect to declare void such term(s) if not followed the form agreed accordingly.

12. Agreements in private and public documents: solemn and verbal form

The nature of the document in which the agreement had been agreed upon will affect both the effectiveness and enforceability of the merger clause incorporated to the contract. To allow for clearer understanding and insights into the formal frameworks available to the parties and their effects on the merger clause, it is prudent to detail the different forms in which agreements may be concluded and the corresponding legal rules in Spanish law.

12.1. Agreements made in a private document

Agreements conveyed in private documents produce effects between the parties and not against third parties (public document). Hence, the merger clause only produces effects between the signatory parties. In the event that one of the parties agrees that their common agreement will be executed in public deed,[478] i.e., the parties aim to consider the public deed as a non-solemn requirement, if one of the parties refuses to formalize the agreement in such form and the opposing party claims such lack as invalidity to the contract, the judge will oblige the non-compliant party to execute the contract in the agreed form. Such reasoning is established in Art. 1279 CC outlined by the expression the contracting parties may compel each other to fill in a specific form in Art. 1279 CC[479], which applies, therefore, not only to cases in which the law requires a specific form, but also when the parties have agreed upon a specific form to the contract. The purpose of this intention is to reinforce the effectiveness of the contract against third parties.[480] Under Spanish law, agreements conveyed in a private document only produces effects between the signatory parties (and between their heirs) without effects on third parties.[481] The private written contract itself, has no legal evidentiary value and

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[478] e.g., the parties can agree that the form of the contract is required to be made in public deed subject to the payment of the price by the purchaser, hence, the purchaser cannot register the property in the Property Register until the price had been paid.

[479] *"Si la ley exigiere el otorgamiento de escritura u otra forma especial para hacer efectivas las obligaciones propias de un contrato, los contratantes podrán compelerse recíprocamente a llenar aquella forma desde que hubiese intervenido el consentimiento y demás requisitos necesarios para su validez".*

[480] STS 16 September 2014 (RJ 2014\5552).

[481] See Art. 1227 CC. "The date of a private document shall not be counted in relation to third parties except from the day on which it was incorporated or registered in a public

no binding effect, outside the scope of the contract,[482] unless its authenticity is judicially proven. However, Art. 1225 CC recognizes the same evidentiary value to both private and documents as to the effect produced between the parties.[483] However, the signature is not a requirement that conditions the validity of the document, as there is no mandatory rule or law that requires it, and its validity may also be proven by any of the means admitted in law,[484] or recognized by the person to whom it affects (Arts 341 and 342 LEC).

12.2. Agreements made in a public document: notarial deed

What has been agreed in a public document by the parties has full probative value: It is presumed to be true, is full proof of its content and could be directly enforceable; it also produces legal effects against third parties.[485] The public deed does not conclude the contract but merely restates what it has been agreed by the parties in the private document (pursuant to Art. 1224 CC), except in the exceptional cases determined by law as a requirement *ab solemnitatem* (e.g., donation of real estate, Art. 633 CC). Regarding standard form contracts, the written form is generally required, as a requirement *ad utilitatem* or *ad luciditatem*, which is not a condition for the validity of the contract, hence there is no requirement for a public deed.

12.3. Agreements made in an agreed solemn contract

In the case of a solemn contract, in which it has been agreed that the form is *ad substanciam*, the intention of the parties prevails over the formal requirements, and the contractual terms that do not conform to the agreed form requirement will be null and void without effect between the parties. Furthermore, since it is an essential condition, it shall be unequivocally drafted in the

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register, from the death of any of those who signed it, or from the day on which it was delivered to a public official by reason of his office".

[482] In context with STS 3 March 1990 (RJ 1990\1663) and STS 26 September 1991 (RJ 1991\6069).

[483] STS 8 July 1988 (RJ 1988\5586) and STS 17 February 1992 (RJ 1992\1264).

[484] Even the LEC does not include the signature as a requirement in Art. 326 LEC. Evidentiary force of private documents.

[485] Art. 319 LEC states: "Public documents are proof, even against a third party, of the fact that motivates their execution and of the date of their execution" (Art. 1218 CC). In the same sense, "public documents […] shall be full proof of the fact, act or state of affairs that they document, of the date on which this documentation is produced and of the identity of the notaries and other persons who, where appropriate, intervene in it".

written contract.[486] As a result, merger clauses incorporated into a Spanish-ruled contract are subject to the intention of the parties to require the form as public document for the conclusion of the contract. Should the parties agree on such form, this element will be enforceable between the parties and enforced by the judge in case is not duly fulfilled. Provided that the parties have not agreed on a specific form, and the subject matter of their agreement lies as a solemn contract (e.g., a sale of real estate), no Spanish provision requires a specific form for the validity of the contract.

12.4. Oral agreements: *pactos verbales*

Oral agreements, are considered as fully valid expressions of the consent of the contracting parties that produce legal effects between the contracting parties once proved.[487] To be valid they need to be formalized by the parties in a private or public document (in this case they will have effects against third parties), or their existence and content is proven by the judicial proof pursuant to Art. 217 LEC (burden of proof), or by any means of proof accepted in law; and proved by application of the doctrine of *actos propios*, based on the protection of trust and the principle of good faith, the LEC,[488] or by any means of proof accepted in law.[489] This imposes a duty of coherence and limits the freedom to act when reasonable expectations have been created.[490]

When the parties intend to document in a private contract a previous oral agreement, and the private document aims to include the same terms agreed in the oral agreement, it is presumed that it only updates the form to what already has been agreed by the parties; the so-called *"specificatio"*.[491] In case of a discrepancy between the oral agreement and the terms of the written document, the content of the latter, which novates or renews what was agreed verbally (*renovatio contractus*), shall prevail.[492] Thus, from a theoretical perspective, the document was evidentiary and in practice it has a dispositive

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[486] STS 16 September 2014 (RJ 2014\5552).
[487] In application of the spiritualist principle of contract law where no form is required for the validity of contracts.
[488] An oral contract cannot be considered in application of Art. 217 LEC, when its existence has been denied by the plaintiff and there is no evidence to that effect, according to SAP Gerona 7 February 2019 (ROJ 106/2019).
[489] For example, an invoice, STS 23 November 1989 (RJ 1989\7905).
[490] STS 9 December 2010 (RJ 2011\1408) and 25 February 2013 (RJ 2013\7413).
[491] STS 5 February 1981 (RJ 1981\350).
[492] STS 8 June 20 (RJ 2020\1643).

nature.[493] Likewise, in the case of subsequent agreements, whether such amendments refer to relevant aspects of the contract not foreseen in the oral agreement or these aim to restate what already agreed in the oral agreement, the common intention of the parties to amend the writing prevails. However, when agreed oral terms which are not included in the final writing, such intention was not clear. Should the document be vested as public deed, to prove its validity and recognition (Art. 1224 CC[494]), the initial oral agreement (proven by the interested party before the judge) would take precedence in the event of divergence.[495] Should this function of recognition not be provided, the written agreement prevails, as a result of the last renewing intention of the parties.

As to the incorporation of a merger clause regarding oral agreements, two main scenarios arise:

(i) In the case of a merger clause in a contract governed by Spanish law, where prior oral understandings have been recognized by a public notary (proven by the burden of proof pursuant to Art. 217 LEC and 1224 CC) the oral agreement will prevail over the terms incorporated into the written contract. Otherwise, if the recognizing function given by the public servant to the oral understanding is lacking, prior terms will be superseded in the written agreement as the final and complete agreement of the parties.

(ii) If by means of a merger clause included in written general terms and conditions (which meets the requirements of Art. 7 LCGC[496]) it is agreed to exclude negotiations prior to the general terms and conditions, this agreement including the merger clause shall be drafted as a particular condition in order to prevail over the other contradictory general conditions. Otherwise, the oral agreements (which have been proven) prevail over what has been agreed in

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[493] M. Núñez Lagos, *Contenido sustantivo de la escritura pública*, Tomo II, Estudios de Derecho Notarial, Madrid 1986, p. 294.

[494] *"Las escrituras de reconocimiento de un acto o contrato nada prueban contra el documento en que éstos hubiesen sido consignados, si por exceso u omisión se apartaren de él, a menos que conste expresamente la novación del primero"*.

[495] STS 8 June 2020 (RJ 2020\1643).

[496] "a) Those that the adherent has not had a real opportunity to know in a complete way at the time of the conclusion of the contract or when they have not been signed, when necessary, in the terms resulting from Art. 5. b) Those that are illegible, ambiguous, obscure and incomprehensible, except, regarding the latter, which have been expressly accepted in writing by the adherent and comply with the specific regulations that discipline in their field the necessary transparency of the clauses contained in the contract ".

the general conditions, provided that they comply with the limitations previously indicated.

12.5. Agreements on specific form incorporated to general terms and conditions

Pursuant to Art. 6.1 LCGC[497] particular conditions or legal obligations incorporated to the general terms of conditions of a (B2C) contract will prevail over the general unless the general conditions benefit the seller. In the case of commitments made by oral agreements that are not honored or respected by the predisposing party on the grounds of the existence of written form clauses in the general conditions, two main scenarios are to be envisioned: to consider that written form clauses as an essential requirement for the validity of the parties' agreements, or to consider that the oral (proven in terms of the Art. 217 LEC) individual agreement should prevail over the written form clause in the general conditions.

According to *Gómez-Salvago* it is not admissible that an individual oral agreement can be considered ineffective against a clause in a written form included in a general condition, as it violates the client's trust in what was agreed verbally and will be against the wording of Art. 6.1. LCGC.[498] Furthermore, in case that such individual oral agreement in B2C-contracts is overlooked, this would render the entire general condition as "*abusive*" or unfair, and therefore null and void.[499] In B2B-contracts, Art. 8 LCGC will not be applicable. Here it is important to stress that the disputed oral agreement shall be in any case prove in order to determine its existence and validity against the disputed general condition. When the burden to prove the oral agreement lies on the trader, not to prove that such agreement had never existed, the so-called *diabolica probatio* "*prueba diabólica"* applies. A written merger clause incorporated to written general and conditions can be declared ineffective (i.e., not preventing extrinsic evidence), if the oral agreement

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[497] "1. When there is a contradiction between the general conditions and the particular conditions specifically provided for that contract, the latter shall prevail over the former, unless the general conditions are more beneficial for the adherent than the particular conditions".

[498] S. Gómez Salvago Sánchez, "Las cláusulas de forma en las condiciones generales de contratación", RADP 21/2008, pp. 140–141.

[499] Art. 85.9 LGDCU. "Clauses which exclude or limit the employer's obligation to respect agreements or commitments entered into by his agents or representatives or make his commitments subject to compliance with certain formalities".

stated by the buyer is considered to be infringed by such written terms of the contract. The merger clause would be declared unfair and therefore invalid.

12.6. Formal requirements of form agreed by the parties

Pursuant to Art. 1255 CC, agreements in which a specific form is agreed are valid,[500] provided that they respect the mandatory rules that impose a special form for a specific contract (i.e., solemn contracts). A party may therefore demand that new amendments to their agreement are to be made in accordance with the agreed form;[501] if this is not respected, the new modifying agreement will be valid if they prove that there was an intention to be bound. When the parties have agreed upon the form of modification (or termination) of the already existing contract, the non-adoption of the agreed form thus does not necessarily result in the nullity of what has been agreed. This approach invalidates the initial presumption that such amendment is not binding, as stated by Art. II.-4:105 DCFR, which refers to clauses stating that "the modification of the contract in question must be made in a certain form". However, a modification that is made without observing such form has a relative effectiveness by providing that it is presumed not to be considered binding. Thus, the DCFR only establishes a rebuttable presumption that new agreements to modify or terminate the contract do not seek to legally bind the parties.

Under Spanish law, when there is an oral agreement, it is necessary that what has been agreed in this form be "authenticated" (*autentificada*), before the judge (Art. 217 LEC). However, this "authentication" will not be necessary if it is proven that a party has acted reasonably in accordance with what was agreed in the oral agreement. This solution provided by the DCFR applies given the difficulty of proving the amendment (agreement), made in oral form.

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[500] L. Díez-Picazo, E. Rocas Trias, A. Morales Moreno, *Los Principios del Derecho europeo de contratos,* Madrid 2001, pp. 184–185, in relation to Art. 2.106 PECL.

[501] Art. 1279 CC establishes the general rule that the requirement of a special form only causes the parties to be bound to comply with such form, but without affecting the validity of the contract.

12.7. Legal certainty under Spanish law: *equilibrio contractual*

The party autonomy to determine the content of agreements (*pactos*) is not an absolute principle since mandatory rules apply to the parties' legal relationship. The fundamental principle *pacta sunt servanda* (Art. 1091 CC) determines that agreements are to be fulfilled, binding the parties that have entered into these agreements. Art. 14 of the Spanish Constitution envisages that legal certainty is bound by the performance of the contract. Under Spanish law, the existence of a legal imbalance of performance between the contracting parties (*desequilibrio jurídico de las prestaciones entre las partes contratantes)*, is a fundamental principle affecting the legal certainty of the agreements which may determine the nullity of the contract. The contract may contain a possible negotiating inequality that may result in an unbalanced bargaining power caused by the party causing a position of superiority (therefore weakness for the opposing party) who is obtaining unfair or disproportionate advantages (undue advantage[502]). This legal principle features in principle 10 of the DCFR under "Correcting inequality of bargaining power" as alleged lack of bargaining power by one of the parties (as well as in Art. II.-7:707 DCFR on unfair exploitation). In addition to the weak position of one party being exploited by the other party to cause the imbalance, it is necessary for the *advantaged party* to have prior knowledge of such advantage of the vulnerable position of the other party and to act unfairly by abusing the weak position of the other party, resulting in a situation of injustice.[503] Accordingly, under Spanish law, the autonomy of each party must be adopted not only from a legal point of view, but also from a social, cultural and economic standpoint, in order not to cause negative results.[504] Such lack of knowledge by the disadvantaged party could be understood in a similar approach as to the defects of consent envisaged in Art. 1265 CC and stated in Arts 4:103 and 4:109 PECL.[505] Alongside the subjective imbalance, caused by the abuse of the weakness of one party,[506] there are other imbalances determined by objective

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[502] Undue advantage exists where a contract has been entered as a result of pressure to the other party.

[503] E. Gómez Calle, *Desequilibrio Contractual y Tutela del Contratante Débil*, Madrid 2019, Cap. I, Ap. 2, e-book.

[504] For example, the gender inequality in wages.

[505] See subchapter 4.4.1.

[506] By analogy Arts 621-45, 621-47.1 and 621-48 Código Civil Catalán incorporates a regulation of unfair advantage to avoid cases of abuse by one party over another.

causes that the Spanish judge would consider at the time of interpretation of the contract: (i) economic imbalance of the parties' performances, which determine the ineffectiveness of the contract (exceptionally admitted in few legal systems), (ii) legal imbalance in B2C-contracts between the rights and obligations of the parties which results from the control of the content of the general terms and conditions through unfair terms.[507]

Under Spanish law, what it has been agreed between the parties, without any fault of the essential elements of the contract (Art. 1265 CC), shall be fulfilled in its own terms (Art. 1091 CC). This rule is based on the freedom of contract; hence, the weak position of one of the contracting parties affects his freedom of contract, and consent, since it is understood that such party consents to enter into an unfair contract. Several circumstances arise that may affect the lack of freedom to contract, such as a state of need (severe economic problems), dependence or situation of subordination to the other party (which is serious and urgent), in which the party has lost his or her autonomy of decision by being subordinated to another person, and who is obliged to contract for fear of being harmed by his or her situation of inferiority (such as economic dependence, and labor dependence), where the person is not sufficiently aware of the harm that may result if he contracts, where in a relationship of trust, it constitutes a typical cause of contractual weakness included in the current rules on unfair advantage or undue exploitation, which affects making a conscious decision, and extreme fear *"temor reverencial"* derived from a situation of subordination or dependence that may give rise to abusive situations.

12.8. Effects caused to the aggrieved party

The existence of situations of vulnerability caused to one of the contracting parties may significantly affect the effectiveness of what has been agreed upon by the parties. Other European legal systems, which envisage these scenarios as defects of consent, propose the relative nullity of the contract or

[507] Rules are contained in Art. 1262 PMCC and Art. 525-7 CCAPDC, which declare null and void unfair terms not individually negotiated that contain the requirements of Art. 4:110 PECL. It also indicates that the unfairness does not extend to the services that are the main object of the contract (Art. 1262 PMCC). § 138 BGB classifies it as usury (*Wucher*) and regards it as a special rule within the regime of legal transactions contrary to morality.

voidability (of all or some of the clauses, which can be remedied or confirmed[508]) which can be requested by the vulnerable party, without the need for a court decision to that effect.[509] The Spanish Civil Code does not consider the existence of an economic imbalance of the benefits as a requirement of validity.[510] It does not contain a specific rule on the declarations issued in a situation of vulnerability or cases of taking advantage of this situation by the other contracting party. It admits termination for breach of contract on an exceptional basis,[511] pursuant to Art. 1291 CC. The control of contractual terms of predefined clauses is only admitted in consumer contracts without affecting the economic equilibrium of the contract. Under Spanish law, *Gómez Calle* and *Morales Moreno* state that in the case of defects affecting the validity of the contract (as well as its effectiveness), the correct treatment *should be* voidability.[512]

In contrast to the lack of regulation in the Civil Code, the proposals for reform of Spanish law do address this question. Art. 1301 PMCC requires (at the time of the conclusion of the contract) that a contracting party is in a position of weakness defined by the following reasons: (i) dependence, (ii) extraordinary economic difficulties, (iii) ignorance of the disadvantaged position, inexperience or lack of foresight. In addition, it is necessary that the other contracting party takes unfair advantage of the position of weakness by obtaining an excessive advantage (including economic and other imbalances)

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[508] The confirmation of the voidable contract is regulated in Art. 1182 CC, Art. 3.2.9 PICC, Art. 4:114 PECL, Art. 4:407 PCC, Art. II.-7:211 DCFR, Art. 53 CESL, Art. 1307 PMCC, Art. 527-15 CCAPDC.

[509] As opposed to voidability, due to a defect in the formation of the contract, Art. 1300 CC, rescission is possible, in which it is applied to valid contracts that produce an unfair prejudice to one of the parties, according to Art. 1290 CC.

[510] However, there are specific regulations regarding the economic imbalance of certain contracts. For example, the Law of 23 July 1908, on the nullity of usurious loans and the International Convention on Maritime Salvage, made in London on 28 April 1989 and ratified by Spain on 14 January 2005.

[511] Some authors such as L. Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial I. Introducción teoría del contrato*, 6th edn, Madrid 2007, pp. 204–205. M. Palazón Garrido, "El abuso de debilidad, confianza o dependencia", in: S. Sánchez Lorenzo (ed.): *Derecho contractual comparado*. *Una perspectiva europea y transnacional*, Tomo I, 3rd edn, Madrid 2016, pp. 1303–1335 understands that a broad conception of fraud could serve as a remedy for some typical cases of unfair advantage, however it would not serve to resolve other cases of unfair exploitation in which the injured party is aware of the contract he/she is entering into.

[512] E. Gómez Calle, *Desequilibrio Contractual y Tutela del Contratante Débil*, Madrid 2019, Cap. III, ap. 5; A. Morales Moreno, *El error en los contratos,* Madrid 1988, p. 68.

without expressly requiring that it knew or ought to have known of the situation.[513] Art. 1302 PMCC refers to the case where the damage in Art. 1301 PMCC is caused by a third party[514] and the contract can be rendered null and void if the other contracting party is liable for the acts of the third party and has knowledge of them. The *Asociación de Profesores de Derecho Civil* has made a proposal for a regulation under the title "*Ventajismo*" that aims to avoid scenarios of contractual imbalance.[515]

Those agreements that limit or exclude situations of vulnerability of a party must be considered ineffective as they violate the imperative rules against good faith. The legal system should not protect unfair conduct of a party that causes an unfair content of the contract, affecting the legal certainty of the contract. The imbalance of the contract that may cause a party to be vulnerable may be a reason to void the contract. In order to avoid such scenario, the incorporation of a merger clause in a contract governed by Spanish law should consider the possible lack of freedom of contract and the good faith that the aggrieved party may suffer by consequence of a disadvantageous legal relationship or unfair advantage by the other party. Provided that the contracting parties are aware of such vulnerabilities, they may agree to include a merger clause which shall respect the formal requirements imposed by the parties, the limitations derived from Art. 1255 CC, the legal certainty of the parties, the equality of the contracting parties and good faith in business.

[513] Stated in PICC and differently from the PECL, DCFR and CESL.
[514] Following Art. 3.2.8 PICC, Art. 4:111 PECL and Art. II.-7:208 DCFR.
[515] Art. 527-9 CCAPDC.

Part III

13. Conclusions

The analysis of current Spanish law, case law and doctrine clearly demonstrates that the "merger clause" is not only an instrument admissible within the Spanish legal system but is also proven to be an enforceable instrument of interpretation due to its indirect application enshrined in Art. 1282 CC. Accordingly, the legal certainty that the merger clause aims to provide to B2B contracts by integrating the parties' understandings into the written version and discharging prior statements can still be achieved if Spanish law is chosen to govern the contract, despite the absence of formal regulation of merger clauses in current legislation, particularly the Civil Code.

In detail, however, the assessment of the legal principles pertaining to civil and commercial Spanish contract law that may be affected by the application of the merger clause provides three core justifications for the above assertion concerning the admissibility and enforceability of such contractual clauses.

Firstly, the application of the merger clause does not violate any specific mandatory rules in Spanish law. This concerns the rules in Arts 1255[516], 1261[517], 1276 and 1280[518] CC, the Supreme Court case law regarding *desigualdad de las partes, buena fe contractual, teoría de los actos propios*, the process of interpretation – whereby the merger clause is understood as a means of interpretation –, the freedom of evidence contained in Art. 299.3 LEC as well as the procedural rules regarding evidence.

Secondly, the Spanish Civil Code, which determines the process of interpretation of the contract, ascertains the common intention of the parties based on their current and subsequent acts,[519] pursuant to Art. 1282 CC[520]. The process of interpretation is not affected by a merger clause incorporated into the

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[516] See subchapter 5.1.
[517] Subchapter 4.4.
[518] Chapter 12.
[519] The process of interpretation is not affected by a merger clause incorporated to the contract since the merger clause is to be understood as means of interpretation. Furthermore, oral agreements are not considered in the process of interpretation
[520] A meaning to the contract that is inconsistent with the parties' current actions and behavior: *"Para juzgar de la intención de los contratantes, deberá atenderse principalmente a los actos de éstos, coetáneos y posteriores al contrato"*. According to Arts 1252 and 1258 CC.

contract since the merger clause is to be understood as means of interpreting the contract. The parties are therefore precluded from invoking prior statements and understandings. Furthermore, oral agreements and undertakings not subject to the rules of interpretation envisaged in Arts 1282 and 1288 CC[521].

Thirdly, application of the merger clause is not only supported in doctrine but, more fundamentally, in sound judicial rulings[522] from the Spanish Supreme Court[523].

Nonetheless, the analysis does show that the effect of the merger clause is not unlimited as limitations exist in particular circumstances concerning mandatory rules. As a merger clause cannot contradict or circumvent mandatory rules, a judge will rule any such clause void. This is particularly relevant with regard to a merger clause regulating any contractual liability: A merger clause incorporated into a contract cannot prevent the aggrieved party from invoking any loss, damages or legal liability derived from the breach of contract as liability for breach of preliminary negotiations is regulated by the mandatory rules provide in the Spanish Civil Code (as tort law).

Such limitations are particularly relevant in light of how the merger clause has been incorporated into the contract and the status of the parties. The analysis of Spanish law shows that a distinction is to be drawn between whether the clause is incorporated in standard terms (i.e., non-negotiated, adhesion contracts) or individually negotiated. For the former, there is, in principle, only a presumption that the parties intended to not include previous understandings to be integrated in their final contract. Thus, the validity of such presumption may be easily challenged by the judge interpreting the contract, even risking an unfavorable award against the buyer. However, for an individually-negotiated merger clause, the judge will respect the common intention of the parties and the merger clause will produce full legal effects if the parties jointly agreed that oral declarations are to be excluded from the contractual terms (*"regla de la prevalencia"*).

An advantage of a valid and effective merger clause lies in the ability to

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[521] STS 2 December 1994 (RJ 1994\9393), STS 12 July 2004 (RJ 2004\4342) prescribes the interpretation of the Civil Code to only written agreements.
[522] STS 8 May 2012 (RJ 2012\6117) served as a model for the interpretation of the merger clause based on the PICC for the purpose of interpreting national law.
[523] See subchapter 3.4.1.1.

create legal certainty by excluding the recourse to oral representations and extrinsic evidence, in turn avoiding lengthy legal disputes and the associated costs. Nonetheless, this conflicts with the civil-law tradition of subjective interpretation of the contract, where the intention of the parties can be ascertained by whatever means of extrinsic evidence that the parties may deem applicable to prove relevant facts to the contract, based on the principle of *libertad de prueba* ("freedom of evidence).[524] Further, no form is required under Spanish law contracts and case law,[525] pursuant to the freedom of form[526] (Arts 1278–1280 CC). Hence, in order to determine the *contractual value* of prior agreements, it is necessary to refer to the principles and rules of interpretation of contracts contained in Arts 1281–1289 CC and to the rules of evidence which are regulated in the procedural law *Ley de Enjuiciamiento Civil.* The possibility that the parties resort to external circumstances outside the contract has not been materialized in any current legal instrument.[527]

In this respect, merger clauses seek to integrate prior and contemporaneous statements into the final agreement of the parties. The intended effect to bar extrinsic evidence is clear in applying the textualist approach favored in the common law, where the merger clause is rooted. Discrepancies thus arise when applying contextualist intent-based approach to interpret merger clauses. Caution must therefore be exercised in adapting a pure Anglo-American interpretation to Spanish law. This is not without problems in practice, since it is challenging to claim that a merger clause has effects beyond those that a lawyer, judge or arbitrator educated in continental civil law principles and approaches, would ascribe to such clauses. As Spanish civil law focuses on the actual and common intent of the parties (pursuant to Art. 1282 CC, based on *conducta histórica interpretativa*) and of fairness considerations, such as the good faith, parties that aim to preclude ascribing to the contract a

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[524] Chapter 10.

[525] STS 3 March 1995 (RJ 1995\1775): *"el principio espiritualista o de libertad de forma que, como regla general, inspira el sistema de contratación civil en nuestro ordenamiento jurídico (artículos 1258 y 1278 CC), tiene algunas, aunque escasas, excepciones, integradas por los llamados contratos solemnes, en los que la ley exige una forma determinada, no para su simple acreditamiento (ad probationem), sino para su existencia y perfección (ad solemnitatem, ad sustantiam, ad constitutionem). Una de las expresadas excepciones es, precisamente, la relativa a la donación de inmuebles"*.

[526] Subchapter 4.2.

[527] Principle of "*negocio de fijación"* and *"actos propios"*. Subchapters 3.3.1 and 3.3.2.

meaning consistent with external circumstances must therefore draft the merger clause with wording that unequivocally states the desired effects.

The analysis of Spanish law and doctrine shows that merger clauses cannot influence the interpretation process itself, but are viewed as a means of interpretation. Even when the common intention of the parties is not clear, the merger clause shall preclude a meaning consistent with external circumstances to the contract. Nonetheless, this requires the merger clause to be individually negotiated and in accordance with the mandatory rules set out by the Spanish Civil Code and the judgements of the Spanish Supreme Court (*"buena fe, desigualdad de las partes* and *teoría de los actos propios"*).

From the outset, the absence of specific regulation in Spanish law brings the opportunity to understand that the admissibility and enforceability of the merger clause is fully plausible and can be considered indirectly regulated in Art. 1282 CC. Considering Spanish law as the applicable law to the contract, and the background of Spanish judges and arbitrators, it can be presumed that the language of the clause will weigh heavily on its interpretation. To preclude the judge from interpreting the contract beyond the terms incorporated therein, the merger clause needs to be drafted clearly, stressing the intended legal effects of the merger clause and sufficiently detailed where reference to provisions of domestic law is to be avoided. Furthermore, the parties need to draft in the clause that their intention to limit the interpretation of the judge is conclusive and final thus waiving the possibility to resort to extrinsic evidence. In this respect, the following provides an example of the type of language that is required in order to achieve the desired effects:

> *"Este contrato contiene el acuerdo íntegro entre las partes en relación con su objeto. Ninguna de las partes se obliga por acuerdos expresos o implícitos, representación, garantía, promesa o similar que no estén recogidos en el presente documento, con excepción de los que deriven de la ley aplicable. Se considera este contrato como expresión de su voluntad e intención común última. Por ello, las partes renuncian a solicitar ante el juez de realizar una interpretación del contrato utilizando elementos externos a su contenido, y de proponer pruebas externas no contenidas en este contrato".*

> *"This contract, including all schedules attached hereto which represent an integral part hereof and have been signed by the parties, constitutes, the entire agreement between the parties and the final intention of the parties. The parties waive the right to request the judge from interpreting the contract by re-sorting to external elements and evidence not contained in the contract".*

The application of the merger clause under Spanish law not only needs a cautious wording and understanding from both the parties and the interpreters but also consistent legal practice if such clauses are to be adopted by the Spanish legal system. Should their inclusion in commercial contracts increase and their main legal effects as legal instruments that ascribe the contract with legal certainty fulfilled, it would create a relevant bottom-up approach that lawyers in Spain follow and which can inspire the Spanish legislator. For this purpose, judges need to respect and follow the final intention of the parties and validate the effects of the merger clauses to provide with legal certainty in commercial contracts.

These considerations lead to the conclusion that there is an actual need in Spanish law for a regulation of an instrument that empowers the parties to prevent extrinsic evidence, oral representations and agreements that were not integrated in the written contract. Furthermore, the absence of specific regulation in Spanish law in addition to the absence of the parol evidence rule or similar presumption of accuracy, presents an ideal opportunity for the merger clause to be regulated in the Spanish legal system. The admissibility and enforceability of the merger clause is fully plausible and can be considered indirectly regulated in Art. 1282 CC[528]. There are thus strong arguments that the inclusion of merger clauses to Spanish law is not only justified but valuable as a legal instrument to be used to increase legal certainty both to the parties' written agreement but also to modernize Spanish contract law in light of contract practice.

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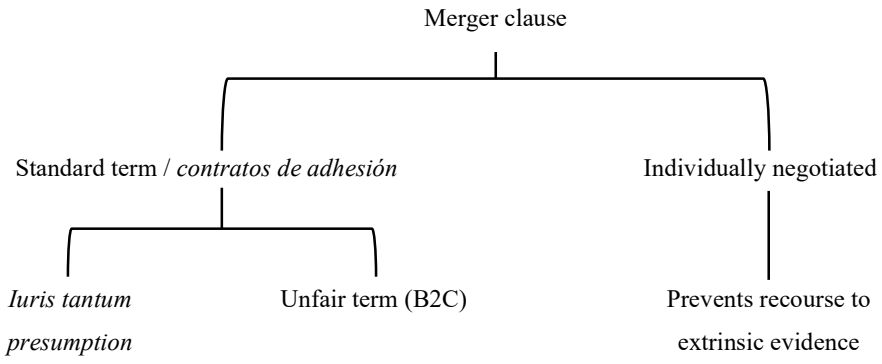
[528] *"Para juzgar de la intención de los contratantes, deberá atenderse principalmente a los actos de éstos, coetáneos y posteriores al contrato"*.

14. Advice for practitioners

The wording of merger clause should be careful and clear in its intention with special consideration to the mandatory rules of the Spanish Civil law and the case law set out by Spanish Supreme Court. The following provides key guidance and advice for practitioners with regard to the legal effects and application of the merger clause under a contract governed by Spanish law.



1. Admission of the merger in the Spanish legal system

The merger clause – *"cláusula de integridad"* – is admitted to the law of Spain subject to the limitations of (i) mandatory rules and (ii) the jurisprudence of the Spanish Supreme Court:

(i) The mandatory rules concern the rules contained in the Spanish Civil Code: Art. 1255: mandatory rules, Art. 1261: essential elements of the contract: "*consentimiento, objeto y causa*", and Arts 1278 and 1280: *contratos solemnes*.

(ii) The Supreme Court case law concerns the common *"doctrina del Tribunal Supremo"*, *"desigualdad de las partes", "buena fe contractual"*, *"teoría de los actos propios"*. Special consideration shall be given to the doctrine of *actos propios* as statements asserted by one of the parties that may had inspired the confidence of the other party could potentially render the merger clause invalid. However, according to the Spanish interpretation of contracts, the common intention of the parties shall be determined by ascertaining contemporaneous or subsequent actions of the parties after the conclusion of the contract (Art. 1282 CC). Direct interpretation of the Civil Code therefore overrides this doctrine.

2. The two main functions in incorporating of the merger clause pursuant to Spanish law

In order to produce full legal effects, it is a *condition sine qua non* that the merger clause is individually negotiated, otherwise the clause acts as an *iuris tantum presumption*. Where such condition is satisfied, the merger clause serves to:

(i) increase the legal certainty of the written contract by preventing recourse to extrinsic evidence, limited to essential mistake, breach of contract or subject to lack of any of the essential elements of the contract. The merger clause is used an evidentiary means to interpret the contract.

(ii) create an integrative effect to the contract, since it merges prior negotiations and statements (contractual obligations) that are not incorporated into the written final contract. Such integrative function needs to be aligned with the parties' common intention in order to be validly interpreted by the judge.

3. Obstacles when incorporated in standard terms, general terms and conditions, and adhesion contracts

If the merger clause is included as standard terms or in general terms and conditions, it only implies a presumption *iuris tantum* not to include previous negotiations into the final contract. Furthermore, it is likely that it can be considered as an unfair term when incorporated into a B2C-contracts. In B2B-contracts, it is a refutable presumption. However, the merger clause is individually negotiated in a B2C contract, it has full effects and it prevails over previous agreements and other written terms, unless they are more beneficial to the customer (Art. 6.1 LCGC[1]).

[1] *"Cuando exista contradicción entre las condiciones generales y las condiciones particulares específicamente previstas para ese contrato, prevalecerán éstas sobre aquéllas, salvo que las condiciones generales resulten más beneficiosas para el adherente que las condiciones particulares"*.

4. Extrinsic evidence is not admitted to prove the effectiveness of the merger clause in Spanish law, provided a clear intention of the parties.

Prima facie, the merger clause, as any written clause of the contract, may be proven by external evidence is to prove its content and reviewed by the judge, according to the Spanish subjective interpretation based on Arts 1281–1289 CC and the *libertad de prueba* principle.

However, to preclude the judge from interpreting the contract beyond the terms incorporated therein, the merger clause needs to be drafted clearly, stressing the intended legal effects of the merger clause and detailed enough where reference to provisions of domestic law are to be avoided (not to confuse the interpreter[2]). The parties must leave no doubts that their intention of including the merger clause is to limit the interpretation of the judge is conclusive and final thus waiving the possibility to resort to any extrinsic evidence.

5. Legal effects of the merger clause are subject to the interpretation of the common intention of the parties

The main legal effects of the merger clause, i.e., integrate and complete contract, depend on whether the clause is a standard or individually negotiated term which supersedes any conflicting standard terms and the wording of the clause. Only an individually negotiated clause which expressly states the intended effects will be fully effective. These effects are supported by the *principio de los actos propios* (*venire contra factum propium*). The wording must be sufficiently clear to show the parties' intention to limit any extrinsic interpretation or proffer to extrinsic evidence.

6. Complete integration of the written contract

The judge should not dispute the validity of a merger clause that:

(i) has been individually negotiated by the parties,

(ii) has a clear wording on the intended effects, and

(iii) does not infringe the limitations of mandatory rules and the Spanish case law.

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[2] The absence of specific regulation in Spanish law brings the opportunity to understand that the admissibility and enforceability of the merger clause is fully plausible and can be considered indirectly regulated in Art. 1282 CC.

If incorporated into standard terms (*"contratos de ahesión"*), it creates a refutable presumption that the parties aimed to excluded unauthorized oral representations (*iuris tantum* presumption).

7. Presumption of full integration

Due to the lack of legal regulation surrounding merger clauses in Spain, judges will look at the common intention of the parties when interpreting the disputed contract. Since Spanish law is not familiar with the merger clause, the Spanish judge may refer to international sets of rules, including soft law, to further interpret the contract. The STS judgement of 8 May 2012 (RJ 2012\6117) serves as a model for the interpretation of the merger clause based on the PICC for the purpose of interpreting national law.

8. Permitted recourse to extrinsic evidence

8.1. Lack of a binding agreement or validity of the contract

As stipulated in Art. 1261 CC, there is no contract without the consent of the contracting parties. The validity of the merger clause is therefore subject to the validity and enforceability of the consent of the parties to the contract. The judge will interpret the contract beyond the contract to fill the lack of consent that may render the entire contract null and void.

For mistake as a defect of consent, a merger clause incorporated to a contract will prevent the parties to invoke a mistake or erroneous perception to the terms of the contract since the parties have intended to prevent prior and external circumstances to be introduced as extrinsic evidence.[3] The parties need to be aware of this risk when including the merger clause in the contract. However, if an "essential mistake" (*error esencial*) is invoked by the mistaken party, Art. 1266 CC will apply. As this reflects the breach of a mandatory provision, the contract will be null and void.

8.2. Trade usages

Spanish law allows the parties to freely agree on the application of usages and customs on the basis of Art. 1255 CC (trade usages) as long as they do not

[3] Under US law, the parol evidence rule does not prevent a party from invoking that a contract is void due to a unilateral or common mistake: *Citizens State Bank-Midwest v. Symington* 780 N.W.2d 676,686 (N.D. 2010).

contradict mandatory rules. The merger clause may exclude trade usages, but this must be expressed clearly. Extrinsic evidence is not admitted to prove the existence of trade usages provided that the contract has included an individually negotiated clause, excluding these practices and usages as an element of the contract.

Extrinsic evidence to interpret the contract is admissible where there is evidence that the trade usage or customs breaches the mandatory rules contained in the Civil Code (Arts 1255, 1261, 1265, etc.).

8.3. Other agreements

If there are collateral or other agreements which are autonomous from the subject matter and content ("*objeto*" and "*contenido*") of the contract, extrinsic evidence is not admitted to prove their existence. If other agreements are related to the subject matter and content of the contract, extrinsic evidence is not admissible since the merger clause gives rise to the presumption that such collateral or other agreements are not part of the contract.

8.4. Subsequent modification to the conclusion of contracts

In general, Spanish law lacks statutory formal requirements regarding subsequent modifications. The common intention of the parties to amend the written contract is therefore key. However, where Spanish law imposes formal requirements, further modifications to such contract must also adhere to the formal requirements to be valid.

Oral terms not incorporated into the final written contract prove that such intention was not commonly materialized in the written version and are thus excluded. However, provided that such oral agreement has been ratified as public deed, in order to prove its validity and recognition (proven by the interested party before the judge) such oral deed would take precedence in the event of divergence pursuant to Art. 1224 CC[4], pursuant to STS 8 June (RJ 2020\1643). If such the recognition is not provided in a public deed, the written agreement prevails as the final expression of the parties' intentions.

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[4] *"Las escrituras de reconocimiento de un acto o contrato nada prueban contra el documento en que éstos hubiesen sido consignados, si por exceso u omisión se apartaren de él, a menos que conste expresamente la novación del primero"*.

9. Agreement to bar recourse to extrinsic evidence with the purpose of interpretating the contract

The interpretation of the contract cannot be limited by the parties' intention since the merger clause cannot derogate or affect the rules of interpretation of the contract envisaged in the Spanish Civil code. The subjective interpretation of the contract falls to the Spanish judge and is not subject to the parties' modification, as a statutory rule enshrined in Arts 1282–1283 CC.

The merger clause cannot limit the application of the intention of the parties throughout their own individual interpretation.

However, the parties can agree to include a merger clause that acts as means of interpretation, i.e., that the judge can fully ascertain the merger clause by interpreting the common intention as the parties as their final understanding thus she is prevented from resorting or interpreting the contract beyond the common intention of the parties. The content of the merger clause shall always mirror the parties' intention.

10. Standard terms barring recourse to extrinsic evidence to fill gaps in the contract

When a merger is a drafted in standard terms, their legal effect will be deprived thus being regarded as a mere presumption that the parties intended that the earlier negotiations should not be incorporated into the written contract. For example, in the event of gaps or omissions in the contract, Art. 1287 CC would allow the parties to fill legal gaps by trade usages and customs of Spain, according to the sources of law envisaged in Art. 1 CC.

However, when the merger clause is individually negotiated, in cases where legal gaps arise in the contract, a merger clause included in the contract prevents such gaps from being filled by extrinsic declarations and documents external to the written contract, since this would imply recognizing obligations and terms not contained in the contract. A clearly stated merger clause conveys that no gaps are found in the contract, thus its effects prevent the interpreter from resorting to external circumstances.