Merger clauses in business contracts

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1. Introduction[1]

Legal certainty and fairness are two concepts which represent various ends on the scale in contract law. They may at the same time be seen as contrary to each other and as being complementary to each other. They both then also play a role in the interpretation of contracts.[2]

Also a judicial system should be based on among other things certainty as well as fairness. Courts (or arbitrators) will have to perform their respective roles keeping these two principles in mind when dealing with a dispute concerning the interpretation of a contract. As is well known, materially excellent principles are of little value failing an independent and reliable court system. The two principles mix differently in different legal systems.

Lars Heuman has devoted much of his "legal life" to the law of procedure where he has delved into different topics covering among other things the use of various procedural methods.

I have personally been working mainly in the field of private law in general and contract law in particular, and thus a discussion on the topic of

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1 It could of course be asked why I have chosen to write this article in English. The basic consideration for this is that it will be the only way to get some input from those who know the English and American legal systems and who may therefore correct my misunderstandings of these legal systems in the relevant parts.

2 "Fairness" is of course controversial in connection with the interpretation of contracts where English common law would apply. English common law does not recognize "fairness" or "good faith as general principles to be applied in contract law although in case law there are several examples where considerations have been used leading to similar results as if a "good faith" principle would have been applied. English common law will basically leave it to the contracting parties to protect their own interests and does not favour a general application of good faith. Also in many other legal systems one should be cautious in applying the concept of "fairness" in commercial contracts. It is, of course not a very precise concept, but on the other hand "justice" would neither give a more precise nuance in this particular respect. It also needs to be underlined that in many legal systems there is a difference between consumer transactions and business transactions in this respect.

"merger clauses" as contractual elements but with implications in respect of the law of procedure may have some interest as a contribution in a Festskrift to Lars Heuman.

The use of a "merger clause" in a contract is often deemed by the parties to create more certainty in their contractual relation. This is the main reason for the growing use of this type of clauses in business to business contracts.[3]

Let me start off by quoting Goff LJ in the case of *Scandinavian Trading Tanker Co. AB v. Flota Petrola Ecuatoriana*[4] where he states:

> "It is of the utmost importance in commercial transactions that, if any particular event occurs, which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party in ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrevocable and which may have far-reaching consequences. It is for this reason of course that the English courts have time and again asserted the need for certainty in commercial transactions – for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly."

A different but equally significant observation has been made by Hart: "/A/ll rules have a penumbra of uncertainty where the judge must choose between alternatives."[5] These two statements may serve as a point of departure when discussing the use of "merger clauses". They are also in various ways both tied to questions related to legal risk. "Judges are not mere fact-finders, applying immutable legal rules to the facts that present themselves. They make law on occasions as well."[6]

This leads to the question what will be required by contracting parties when making a contract. Can they rely on the law of contract and obligatory law, or do they have to protect their respective interests themselves? Do they have to be very precise in their contracts setting out in detail all terms and conditions that should be relevant?[7] Also, what happens then,

[3] Below I shall use B2B contracts for short in respect of contracts between businesses. I already indicated that in consumer contracts several legislative restrictions have been introduced whereby also merger clauses would not be applied by the courts.

[4] /1983/ Q.B. 529 at p. 540.

[5] Hart, The concept of law, 2d. ed. p. 12.

[6] McCormick, Legal risk in the financial markets, Oxford/New York etc. 2006 p. 19. He is dealing with various questions of legal risk on p. 5 ff.

[7] This is an area where legal systems seem to have adopted different approaches with common law requiring detailed contracts and continental law providing more legislation to "help" the parties and the courts. Presently there has been a trend towards the use of more detailed contracts as a consequence of the dominant position of common law inspired contractual solutions in B2B transactions.

if one of the parties has protected his interests "too well" in relation to the other party.[8]

There seems to be different overriding ideas in respect of these questions over time and in different legal systems. Freedom of contract, the binding nature of contract, certainty, reasonableness and good faith are concepts that will appear in several cases of interpretation of contracts. Such split vision also appears in for example Unidroit Principles of Commercial Contracts (below UniP) and also although slightly differently in the European Principles of Contract Law (below PECL).[9]

Where, within the framework of freedom of contract, contracting parties wish to achieve some contractual certainty with respect to the interpretation of a contract they may regard the insertion into the contract of a so-called "merger clause" as one measure to achieve such certainty, the idea being to bind the court (arbitrators) to consider certain facts only which are in the contract.

English common law is one of the legal systems which by tradition is regarded as one where legal certainty in contract is prevailing, provided that the parties have been careful in drafting the contract. In their study "Understanding contract law" Adams & Brownsword demonstrate that English contract law may be less certain than sometimes believed, and although the "black letter" approach still prevails, several cases show that English courts are sometimes prepared to adopt various arguments, leading to a deviation from this principle.[10]

2. General background

2.1 Merger clause – an example

"Merger clauses" or as they are also called, "entire agreement clauses" or "integration clauses"[11], are a type of contract clauses commonly appearing in business contracts, in standard contracts as well as in individually nego-

[8] In consumer law, several rules have been introduced to protect the consumer, being regarded as a weaker party in the need of protection. In those contracts merger clauses may therefore to a larger extent be regarded as unreasonable. I here leave out consumer relations.

[9] They are both among other things based on all these principles, but the good faith principle may not be contracted out of.

[10] Adams & Brownsword, Understanding contract law, 5th ed. London etc. 2007 inter alia p. 3 and 188 ff. make a distinction between formalism, realism, market-individualism and consumer-welfarism. On p. 97 they are discussing ambiguity, vagueness and incompleteness often appearing in connection with the interpretation of contracts.

[11] I shall below mainly use "merger clause".

tiated contracts.[12] Very often there is a combination of the two, because many contracts are individually negotiated on the basis of a standard contract.

As an example I shall here use for illustration purposes the new standard form "Newbuildcon", a shipbuilding contract designed by BIMCO, not because shipbuilding is the world's most important industry, but because the Newbuildcon is a new document which was prepared over a long time, also having certain features which are often found in modern standard form documents.[13]

In this contract the relevant clause appears as art. 47 under "sundry"[14]:

> "This Contract constitutes the entire agreement between the Parties, and no promise, undertaking, representation, warranty or statement by either Party prior to the date of this Contract stated in Box 1 shall affect this Contract. Any modification of this Contract shall not be of any effect unless in writing signed by or on behalf of the Parties."

[12] In UniP 2.1.17 and in PECL 2:105 the expression "merger clause" is used. Other elements are found in UniP 2.1.12 and 2.1.18 and PECL 2:106. See also CISG art. 29.

In Swedish legal literature they are also known as "integration clauses", see e.g. Adlercreutz, Om den rättsliga betydelsen av skriftlig avtalsform och om integrationsklausuler. Festskrift till Jan Ramberg, Stockholm 1996 p. 17 ff. and Sjöman, Integrationsklausuler och dispositiv rätt. JT 2003–04 p. 935 ff. and also Hellner, The parol evidence rule och tolkningen av skriftliga avtal. Festskrift till Bertil Bengtsson, Stockholm 1993 p.185 ff.

Related questions are also dealt with in e.g. Adlercreutz, Avtalsrätt II, 5th ed. Lund 2001 pp. 30 and 92, Ramberg & Ramberg, Allmän avtalsrätt, 7th ed. Stockholm 2007, p. 166, Bryde-Andersen, Praktisk aftaleret, 2d. rev. ed. København 2003, in 2.3.c, 3.2.c, 4.1.c., Lando m.fl., Udenrigshandelens kontrakter, 5th ed. København 2006 in 2.305, Haaskjøld, Kontraktsforpliktelser, 2002 p. 109 ff. and Høgberg, Kontraktstolkning, Oslo 2006 p. 30.

[13] BIMCO is an international organization where different shipping interests are represented, and the "Newbuildcon" is a brand new standard form shipbuilding contract. It may not be regarded as a truly "agreed document", but the various interests represented during the drafting work has ensured "an appropriate contractual balance and that the interests of the builders and the buyers are properly reflected."

With respect to the "entire agreement clause" this is not per se a controversial clause but it may lead to problems once in a while. With respect to the drafting technique used it could be mentioned that several BIMCO forms have a so-called box layout. This means that in a part 1 relevant details in respect of the contract will have to be filled in, such as the names of the parties, the characteristics of the ship, delivery times etc. Part 2 contains the printed clauses which may be amended or deleted either by filling in the boxes or by amendments in the text or through particular clauses.

[14] The "merger clause" is a type of clause often referred to as a boiler plate clause, a clause found in a large amount of contracts. The merger clause will sometimes be found under the heading "sundry provisions" or "miscellaneous" together with certain other clauses which have no immediate connection with each other under the common heading but rather as a kind of "rest" clauses. On "boiler plate clauses" see e.g. Anderson, Drafting and negotiating commercial contracts. London etc. 2007 p. 85 ff. In Swedish law see inter alia Edlund, Boilerplate på svenska. SvJT 2001 p. 172 ff.

As it is drafted the clause contains some different elements, both an "entire agreement" element, and an "amendment" element.[15] In some contracts these two elements are addressed in different clauses. They aim at solving different contractual problems, but they often appear in the same clause. The two elements thus address different questions although they could possibly be seen as representing similar considerations.

Another contractual element which belongs to a similar category is a clause stating that a contract shall be binding only when in writing and when it has been signed, and connected to this there are, of course, various "subject clauses".[16] Also sometimes such "written" element is made part of the integration clause, and it could therefore be seen as a separate element in an integration clause. I shall below mainly deal with the first element and only to some extent with the second and the third elements.

There is a basic contract law principle in relation to B2B contracts to the effect that what the parties have agreed shall prevail between them. Generally there are formal requirements with respect to contracts (such as requirement of written form) only in certain cases. Different approaches in various legal systems with respect to rules of material and of procedural law nature may lead to different considerations and solutions in court practice. Different legal systems recognize various rules in the law of procedure regarding evidence admissible to prove what has been agreed in a contract.[17] In Scandinavian law for instance there is a procedural principle of freedom of evidence, meaning that a court or arbitrators will be free to judge all evidence presented by the parties.[18] In English common law the parol evidence rule has been seen as a principle with some procedural implications, but the Law Commission has been hesitant to recognize this.[19]

2.2 The need of order in the contract procedure

The various contractual elements mentioned as well as the use of standard documents seem to be a consequence of modern business organization, where (often) large corporations are divided into several departments

[15] Cf art. 29 in CISG.

[16] See inter alia Gorton, Shipping and contracting, Lund 1983, Hellner, Kommersiell avtalsrätt, 4th ed. Stockholm 1993 p. 36 and Grönfors, Avtalsgrundande rättsfakta, Stockholm 1993 p. 74 ff.

[17] See in Swedish law Rättegångsbalken (the Law of procedure) 35:1.

[18] This principle may also conflict with the parties' freedom of contract in connection with the use of merger clauses.

[19] See inter alia Beale, Bishop & Furmston, Contract. Cases and materials. 5th ed. Oxford 2007 p. 350 f.

with certain freedom to act as a consequence of organizational needs but also based on some considerations developed in law. The running of a company thus necessitates that different persons with various functions in the organization hierarchy may represent and bind the company without a general authority having been given to them from a certain body. This development has also had an impact on authority questions and not least the "power of position" and related matters in the law of agency but also in company law. "Subject clauses" of various types are often used to make sure that decisions are taken on the right level, for example through a clause "subject to board's approval".[20]

Presumably all these lines of development have been important in an evolution where established legal rules have been considered insufficient to cover the needs of business but also needs in society. Business has therefore adopted, by the use of contracting and organization, a number of methods to achieve certain freedom in an organization and still retaining the main decision power centrally. The other side of the coin is then when (and how) to protect the other contracting party acting in good faith. So, in a general sense we are back at risk distribution considerations.

Thus, particularly in large projects or in many everyday transactions for that matter, different departments are often involved in the contract negotiations. Several legislative measures have been taken during the last 20 year period to protect consumers partly at least as a consequence of asymmetric information. In B2B relations much fewer such general measures have been taken, but in stead courts may here have been involved in such a way that interpretation of contracts, gapfilling etc. could sometimes appear as some kind of protecting steps.[21]

3. Merger clauses

3.1 Generally

The various aspects of merger clauses could thus be seen as methods to achieve an organizational control of the contract and of the contents of the contract. As already mentioned above in 2.1. merger clauses will normally

[20] The idea is that there shall be no binding contract until the board of directors has taken such decision.

[21] There are, of course a number of measures which are prohibited by law, such as usury, misrepresentation etc, but also interpretation of contracts may appear as some kind of concealed control of contracts. "Dold avtalskontroll" has been used in the Swedish legal doctrine, see inter alia Adlercreutz, Avtal II. pp. 14 and 94, Ramberg & Ramberg p. 168. See also Hagstrøm, Urimelige avtalevilkår, Lov og Rett 1994 p. 131.

cover certain elements. I shall very briefly touch upon some of them but I shall mainly deal with one.

The first is the "four corner provision" which is usual in many B2B contracts, although it may be differently designed with presumably different consequences. All merger clauses have at least as some common idea that the parties recognize that certain elements in the negotiations shall be disregarded when interpreting the contract. Only what remains in the text shall be decisive in the interpretation of the contract. The merger clause thus serves at providing some order in the contract. The other side of the coin is that the parties agreeing on the merger clause may have had different considerations with respect to the omission of certain contractual elements, something which will become apparent only at a later stage, if there is a dispute.

A merger clause may also specifically spell out that relevant background law (non-mandatory legislation, particular rules etc.) shall be disregarded when interpreting the contract, which may cause some problems particularly in case a court is used to fall back on non-mandatory law or general principles as a basis in the interpretation of gapfilling.[22]

The basic idea of the merger clause is thus that only what is appearing in the final contract shall have relevance as contractual elements when the contents and the meaning of the contract shall be determined. The clause may also set out that any rules, principles and court practice shall be disregarded in the interpretation of the contract, but it is my impression that this is less frequent. One question will then be if a clause that does not specifically address particular legislation, case law etc. will nevertheless have the effect that these elements shall be disregarded. We shall below see some clauses which could be interpreted as shutting out the use of legislation and background law.

Another feature of merger clauses is that they may entail provisions regarding liability in the sense that the merger clause may have as effect that there will be no liability on one (or both) parties for representations and warranties having been given before the conclusion of the contract.

3.2 The "four corner clause" and the "parol evidence rule"

The first part of the Newbuildcon clause refers to various items connected with the period before the contract was concluded, and the idea is that in case of a dispute the court or the arbitrators shall only deal with the contract itself and not consider undertakings or statements made before the

[22] This is the case in for instance some international grain contracts, and in a number of construction contracts.

conclusion of the contract. The second part deals with the measures to be taken in connection with amendments, and the contract also contain specific provisions on amendments being made.

As mentioned the merger clause entails a contract law as well as a procedural aspect.[23] In English law the parol evidence rule is of basic importance in this respect (see further below in 4.2). I shall mainly deal with the contract law side but the other perspective has to be kept in mind particularly in legal systems based on free evidence, where the courts are entitled to and supposed to consider all evidence presented before the court.

Depending on the design of the clause it will have different contractual effects. It may be more or less inclusive and more or less precise. Sometimes such clauses go further and may be quite wide. In other instances only statements or various points in the negotiations shall be omitted. Depending on their design the merger clause may have to be dealt with differently by courts or arbitrators. Further, there may be a difference in opinion depending on whether the clause is printed in a standard form or if it has been negotiated and drafted individually. On the other hand, one may ask why there would be a difference if the parties negotiated on the basis of a reasonably well known printed standard form, where the merger clause is already a well known item and has existed for some time.

It is not unlikely that different approaches will be applied in respect of merger clauses depending on whether English law or Swedish law shall apply to the contract. This, I believe, could be the case in particular where the merger clause is tied to an exclusion of liability.

3.3 The change/amendment clause

The change element appears particularly in certain types of contracts where changes will presumably happen during the performance period, such as construction contracts, shipbuilding contracts etc. Frequently there are in this type of contracts provisions setting out certain formalities in connection with amendments agreed during the performance period.[24]

These formalities aim at specifying how such changes should be made, who will sign and account for the amendments and so forth. Construction contracts often have sophisticated and detailed contractual solutions with respect to the handling of amendments to the contract, because in this type of contracts such changes are expected to take place, and there is therefore a need to apply certain formulas in order to create an orderly manner in which changes should be carried out.

[23] See for instance Hellner, The parol evidence rule evidence p. 185 ff.
[24] Cf. inter alia CISG art. 29.

The idea behind such clauses is again to achieve some order in the management of the contract with respect to amendments so as to avoid that amendments are decided and carried out by persons who lack authority, and where the consequences of the amendment (such as time and costs) are not clearly agreed.

3.4 The written agreement clause

This is a type of clause often found in contracts, either in conjunction with a "true" integration clause or as a separate clause. The idea of this clause is, again, to create contractual order, to enable certain persons in the business hierarchy to be able to give a "go ahead".[25] Legal problems in relation to this type of clauses are often attributed to questions such as: when is there a binding contract?[26] In most legal systems there are no formal requirements regarding the formation of a contract generally. This means that when the parties are in agreement they will be bound by what has been agreed between them irrespective of the form of the agreement. If there is a clause in the contract stating that there will be a binding contract only upon the signing of the contract by both parties, the problem may arise to determine at what point this occurred.

Various conditions precedent may be inserted into the agreement[27], and there will often also be an express clause in the contract requiring that it shall be signed before it shall be binding.[28] Practically there may then be a situation where the parties disagree on whether they had reached a binding agreement or whether the agreement needed signing before there was a binding contract. This is often a question of proof. When was the "written clause" introduced in the negotiations? Is the clause only to be seen as a question of good order or should the clause be regarded as a requirement, meaning that before the requirement has been fulfilled there is no binding agreement? If the clause was introduced already in the beginning of the negotiations or during the negotiations, before the parties reach an agreement, then such "written clause" should probably be decisive. In my view the clause should also normally have effect if the "written" provision was in the standard form, based on which the negotiations were carried

[25] As mentioned there are of various types of "subject clauses" introduced in contracts whereby certain conditions precedent shall have to be met before there is a binding contract. The "written agreement" clause should possibly be regarded as a particular type of clause rather than as a merger clause.

[26] See inter alia, Gorton, Shipping and contracting, Lund 1983, Grönfors, Avtalsgrundande rättsfakta, p. 74 ff. and Hellner, Kommersiell avtalsrätt p. 24 ff.

[27] Cf. inter alia, Anderson, Drafting commercial contracts, p. 33 f.

[28] See i.a. Ramberg & Ramberg p. 66 with references.

out, when both parties should have been aware of the clause. Again it has to be reiterated that if the requirement is only to be regarded as a question of "good order" then it will not have the effect of being a necessary requirement for a binding agreement to have been concluded. If, however, the particular provision was introduced only in connection with the signing of the contract, then the written contract is only a confirmation of the agreement already made. It will then only have evidentiary implications. The problem will, of course, in practice arise only in those instances where the parties in connection with the signing realise that they are not in agreement on all points.

Let me here just mention some cases which could serve as illustrations to the difficulties that may arise when the parties dispute whether an agreement has been reached and the terms included in the agreement.

> Thus in *Pagnan v. Feed Products* /1987/ 2 Lloyd's Rep 605 (CA) the parties disagreed on when a binding agreement had been entered into between them and what terms and conditions were part of the agreement. In this case most of the negotiations were made by telex and several messages were exchanged between them through the brokers involved. The negotiations went on, and the telexes exchanged contained the main terms as well as details, but in the end one of the parties was of the opinion that they had not agreed on all points, whereas the other party was of the opinion that there was already a binding contract between them. The court found that the evidence showed that a binding agreement had been entered into between the parties.
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> Similarly in *Granit S.A. v. Benship International* /1994/ 1 Lloyd's Rep. 525 the parties were in disagreement whether there was a binding contract between them. Also in this case much of the negotiations had been carried out by telex, and when the dispute arose, one of the parties alleged that a "subject details" provision had not been met since the parties were not in agreement on all details. The court found, however, that there was no evidence that there was such "subject provision" in the contract and therefore that a binding contract had been entered into between the parties.

Similar problems also appear in Swedish case law, and they have been discussed to some extent in the legal doctrine.[29]

4. English and Swedish law

4.1 Some basic remarks

Art. 42 in Newbuildcon contains rules with various methods concerning dispute resolution with respect to different types of disputes under the contract. This is a solution found in a number of modern contracts intended for use world wide.

[29] See e.g. in Ramberg & Ramberg p. 101.

The Newbuildcon is a contract form intended for use under whatever legal system the parties choose.[30] Thus art. 41 concerning governing law spells out that the contract is subject to English law unless another law has been agreed between the parties. This means that the standard form is believed to have been drafted in such a way that it could be subject to any legal system, without substantial legal problems occurring. Undoubtedly, differences between legal concepts and terminology could cause problems when applying a particular legal system to the standard contract, and this is also something which seems to have become gradually more appreciated in the legal doctrine.[31]

The chosen solution has been adopted in several international standard forms[32], indicating the idea that there are commonly accepted rules and principles, where international business contracts exist in a common international context.

English and Swedish law does not apply the same legal principles and doctrines for example when it comes to the interpretation and understanding of contracts. Not even English and American law has adopted the same methods in this respect. Actually, one may probably say that common law related to contract is split by its common framework.[33]

Also the Swedish procedural law is rather different from the English law of procedure, something which has also to be taken into consideration.

Similar contractual disputes arising under Swedish law may be treated somewhat differently under English law, but at the same time the problems of interpretation and or gap filling are in many respects similar although the Swedish approach may differ from the English.[34] Depending on the circumstances the end result may often turn out to be more or less

[30] This is also a contractual technique used more and more commonly. It is based on an assumption that there is a common understanding of commercial practice in many legal systems or at least that the contract form itself sufficiently covers all items and forseeable events that the room for misinterpretation or misunderstanding should be minimal. There may also be an idea that business contracts in general will be interpreted in the same way by different courts. If this is the assumptions it could be questioned whether it is rather a qualified wishful thinking in case a dispute arises that has to be resolved by arbitration or by a court. Of course, very few disputes ever reach this stage.

[31] See for instance Gorton, Syndicated loans – some thoughts on the reception of Anglo-American contract practice into Swedish law. European Business Law vol. 18, 2007, p. 313 ff. with references.

[32] See for instance in several charter party forms and in financial documentation, such as documents being drafted by London Markets Association (LMA) and the ISDA forms.

[33] Thus English common law coupled with equity and procedural rules may in many respect be regarded as rather different from US law (whatever that may be), Australian law, Indian, law, Canadian law etc. There is a common basis but the evolution has then worked in various directions.

[34] With respect to Swedish law see e.g. Adlercreutz, Avtal II pp. 22, 27 etc.

the same and even based on similar consideration, but there are situations where the result may turn out differently both with respect to considerations and end result.[35]

I think that the statement by Lord Bingham in *Bank of Credit and Commerce International SA v. Ali*[36] could serve as an illustration of the present stage of English common law interpretation of contracts:

> "…the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."[37]

In spite of the differences between English law and Swedish law when it comes to the interpretation of contracts, I believe that this statement does not significantly differ from what is to-day expressed in Swedish legal doctrine in respect of the interpretation method used by Swedish courts.[38]

4.2 The parol evidence rule – some basic points

Scandinavian law is in some respects rather different from English common law, inter alia with regard to the interpretation of contracts and the various methods developed. English courts thus seem to be more inclined to determine the contractual implications based on the words of the contract. Scandinavian lawyers tend to see English law as more formalistic than Scandinavian law. In Scandinavian law courts are free to judge any evidence produced by the parties in a trial related to a non-mandatory dispute (provided, of course, that requirements set out in procedural law are met). Swedish courts and arbitrators are thus free and more inclined to consider all material, preceding statements etc. when interpreting the contract, and base their judgments on an overall picture of the contractual and negotiating material. Swedish courts may, however, come to the conclusion that certain written and oral material used in the negotiations has

[35] Such difference has been demonstrated in the Swedish Supreme Court case NJA 1995 p. 586 as compared to *Kleinwort Benson v. Malaysia Mining* mentioned below in 4.5.

[36] /2002/ AC 251.

[37] Cf. the discussion in Burrows (ed.), Contract terms, Oxford 2007 where a comparison is made between interpretation in English, French and German law.

[38] See for instance Adlercreutz, Avtalsrätt II, chapter 8 and Ramberg & Ramberg, chapter 10.

been consummated by the final contract.[39] Also, there is in Scandinavian law no strong precedent principle like the one applicable in e.g. English law. McCormick has expressed his view in this respect thus:

> "English law generally looks to the form of the transaction rather than their substance and in construing the meaning of provisions in transaction documents will adopt an objective method of interpretation (based on what the parties might reasonably have been thought to mean) rather than a subjective method (based on the court deciding what the parties true intention really was)."[40]

In English law the law of precedent is well established and so is the parol evidence rule, which is also applied together with the so-called "four corner rule".[41] The rule is recognized in English common law[42] (as well as in other common law jurisdictions) since long, and the idea is that "evidence

[39] See for instance Adlercreutz, Avtalsrätt II, chapter 8 and Ramberg & Ramberg, chapter 10.

[40] P. 127, where he also refers to the dicta made by Lord Hoffmann in the case of *Investor Compensation Scheme Ltd. v. West Bromwich Building Society* /1998/ 1 WLR 896. This case has come to be much discussed since Lord Hoffmann then restated the principles to be applied by the courts in the interpretation of contract. It was here acknowledged that the 'background' could not include evidence of pre-contractual negotiations and the parties' declarations of subjective intent, which can only be put before the court in actions for rectifications. See i.a. McKendrick, The interpretation of contracts: Lord Hoffmann's Re-Statement in W. Worthington (ed.) Commercial law and practice:

[41] See e.g. Treitel, The law of contract, 10th ed. London 2007 p. 175 ff. with references to inter alia *Jacobs v. Batavia & GeneralPlantations Trust Ltd*. /1924/ 1 Ch. 287, p. 295 and *Rabin v. Gerson Berger Association Ltd* /1986/ 1 W.L.R. 526.

With respect to the importance of the parol evidence rule se inter alia the statement by Lord Morris i *Bank of Australasia v. Palmer* /1897/ AC 540 p. 545: "…parol evidence cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of the contract."

Jan Hellner has discussed at some length the background of the parol evidence rule and its consequences and limitations in the the article mentioned above in footnote 12.

[42] See however Beale, Bishop & Furmston, Contract. Cases and materials 5th ed. Oxford 2008 p. 350 f. where the authors in respect of the parol evidence rule refer to the Law Commission: "We have now concluded that although a proposition of law can be stated which can be described as 'the parol evidence rule' it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather, it is a proposition of law which is no more than a circular statement when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of a contract. We have considerable doubts, whether such a proposition should properly be characterized as a 'rule' at all, but several leading textbook writers and judges have referred to it as a 'rule' and we are content to adopt their terminology for the purpose of this report…."

cannot be admitted (or, even if admitted, cannot be used) to add to, vary, or contradict a written instrument."[43]

In a recent case one of the law Lords explained:

> "The rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document is fundamental to the mercantile law of this country; the bargain is the document; the certainty of the contract depends on it…This rule is one of the great strengths of English commercial law and is one the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty."[44]

As times have gone by a number of amendments and restrictions have developed with respect to the parol evidence rule, and today the rule seems to be rather complex and its application much less certain than originally. "Evidence extrinsic to the document is therefore admitted in a number of situations … which fall outside the scope of the rule."[45] This means that courts have gradually admitted extrinsic evidence of various nature which would not have been acceptable in the earlier days.[46] The certainty inherent in the rule therefore came to be reduced gradually. Referring to court practice Treitel mentions a number of cases, which illustrate how the rule has been gradually narrowed down: Written agreement not being the whole agreement, validity, implied terms, oral warranties[47], operation of the contract, evidence as to parties, defence to specific performance, custom, identification of the subject matter, rectification, collateral agreements and consideration.[48] This erosion of the rule as it stood originally forced contracting parties to try to reestablish by contract the certainty of the old rule and its application. Various contractual pro-

[43] Treitel. p. 175. The use of the parol evidence rule in American law is also illustrated in the case *MCC – Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino S.p.A*. 144 F. 3rd p. 1384 (11 CCA).

[44] *Shogun Finance Ltd v. Hudson* /2004/1 A.C. 919. The two other law Lords agreed with this statement.

[45] Treitel p. 176 ff. See also Lewison, The interpretation of contracts, 4th ed. London 2007 chapter 3.10 on the parol evidence rule.

[46] Ibid.

[47] An exclusion clause contained in a written contract can be overridden by an express oral warranty given at the time of the sale, and also an oral statement of fact may operate as a misrepresentation in spite of its purported incorporation into the contract as a warranty; and where this is the case, the oral statement can be used as evidence, not of the contents of the contract but of an invalidating cause.

[48] So for instance *Yani Haryanto v, E.D. & F Man (Sugar) Ltd*. /1986/ 2 Lloyd's Rep. 44. (written agreement not the whole agreement), *Gillespie Bros. & Co. v. Cheney, Eggars & Co.* /1896/ 2 Q.B. 59 (implied term), *Bank of New Zealand v. Simpson* /1900/ AC at p. 189 (aid to construction), *Palgrave, Brown & Son Ltd v. S.S. Turid (Owners)* /1922/ A.C. 397 (custom) and *Mann v. Nunn* (1874) 30 L.T. 526 (collateral agreements).

visions thus came to be developed for this purpose, among them and in particular *merger clauses*.

Let me just mention some few cases which could be used as an illustration of the situation as it could appear without a merger clause existing. In *International Press Centre Ltd v. Norwich Union*[49] underwriters had subscribed to a contract of reinsurance. In accordance with normal practice the reinsurance was initially agreed in the form of a slip. Subsequently a formal policy was issued. It was held that the slip was inadmissible in construing the policy. On the other hand in an earlier case, *Henderson v. Arthur*[50] the parties entered into a written agreement for the assignment of a lease of a farm. The purchaser was permitted to prove an oral agreement that the written agreement should be void if the landlord refused consent to the assignment.

The *Paula Lee*-case does not concern the question of the parol evidence rule, nor the use of a merger clause, but it illustrates a situation where certain facts were deemed to be implied.[51] The case concerned damages due to repudiation, and in order to determine the damages the court had to establish the obligations undertaken.

> The case concerned a contract whereby the plaintiffs (dress manufacturers) had appointed the defendants as their sole distributors for the sale of their dresses in certain Middle East countries. The defendants undertook as per clause 4 in the contract to purchase not less than 16,000 garments each season, and the distributor had a wide discretion in the marketing and sale of the dresses.
>
> When two seasons remained the distributor repudiated the contract and the manufacturer sued for breach of contract. Mustill J. (as he then was) held that the distributors had wrongfully repudiated the contract, and thus the question of amount of damages had to be decided.
>
> The Contract only stated 16,000 dresses without setting out style, sizes or price levels etc. and the question arose how the damages should be calculated. Should the distributor be allowed to order 16,000 pieces of the cheapest dresses or should another calculation be used? Could the defendant here be liable in damages for anything more than the minimum undertaken, which lacking some specific requirements amounted to16,000 of the cheapest dresses.
>
> After much consideration the Judge found that the agreement in the instant case should be construed as subject to an *implied term* that the garments would be selected in a reasonable manner. The reason for this was in his view to make commercial sense of the agreement. Hence the obligation under the contract was not just to purchase at least 16,000 garments, but to choose a range of garments which was reasonable.
>
> The Judge also explained how various methods could be used and left it with the parties to agree on the amount to be paid after considering the guiding principles of the court.

[49] (1986) Build. L.R. 130.
[50] /1907/ 1 K.B. 10.
[51] /1983/ All E.R. 390.

As far as I know the parties then agreed, and the case was thus closed.

From our perspective here a conclusion seems to be that a merger clause in the contract would hardly have given the court a different basis for determining the number of dresses to be sold.

This also means that "merger clauses" may have to be interpreted and applied against the background of the parol evidence rule as it developed whereby extrinsic evidence of different types came to be allowed by the courts.

4.3 Different types of merger clauses – some examples

The Newbuildcon merger clause referred to above in 2.1. thus contains both one part which sets out that it is "the entire contract and understanding" and one part which declares that "all prior negotiations, representations ….on any subject matter of the Contract" shall be superseded by the final contract entered into. The clause does not, however, explicitly deal with legislation, and this is probably not very common.

Another example appears in Beale, Bishop & Furmston[52]:

> "The parties have negotiated this Agreement and shall enter into any Contract made subject hereto on the basis that the provisions of this agreement and such Contract represent their entire agreement relating to the matters contained in this Agreement and such Contract."

In one of the cases which Sjöman refers to in his article on "Integration clauses and non-mandatory law"[53] he quotes a clause appearing in an "acquisition contract" (purchase of all shares). Here the particular merger clause read:

> "This agreement is the complete regulation of the questions covered by the agreement. All oral or written undertakings or covenants which have preceded the agreement will be replaced by this."[54]

I shall below in 5.3. revert to and discuss the judgment of the arbitrators.

Different merger clauses thus have as their main idea to create control and certainty, trying to cut out the risk that evidence is used which the parties agreed would be superseded by the four corners of the contract.

[52] Contract p. 349.

[53] Sjöman, Integrationsklausuler och dispositiv rätt. JT 2003–2004 p. 935 ff.

[54] The contract is in Swedish and the Swedish text is as follows: "Detta avtal utgör parternas fullständiga reglering av de frågor som avtalet berör. Alla muntliga eller skriftliga åtaganden eller utfästelser som föregått avtalet ersätts härav."

They also serve to reduce evidence costs. In some cases such clauses are rather short and cover only certain items, in other cases they are longer, more precise and detailed, and specifically setting out a number of items to be disregarded in the interpretation of the contract. Merger clauses, although they may be designed differently, have a common goal namely to reduce the evidence material to be used, and thereby the parties shall be bound only by the contract terms appearing in the final contract so as to avoid at a later stage to meet arguments related to statements or promises made or material presented and made available during the negotiations, unless it is explicitly made part of the contract.

To my understanding this is basically what is intended by the parties, and a subsequent dispute will often arise because one of them finds out that he had not before understood the full consequence of the clause, which becomes more fully understandable only in later light.

Anderson mentions different elements appearing in merger clauses:[55]

> "This agreement, including its Schedules, sets out the entire agreement between the Parties.
>
> It supersedes all prior oral or written agreements, arrangements or understandings between them.
>
> The Parties acknowledge that they are not relying on any representation, agreement, term or condition which is not set out in this Agreement.
>
> To be legally binding, any amendment to this Agreement must be in writing signed by authorized representatives of the Parties."

Another example appearing in a case is mentioned by Whincup.[56] This clause is found in the case *Government of Zanzibar v. British Aerospace (Lancaster House) Ltd*.[57] and it reads:

> "The parties have negotiated this contract on the basis that the terms and conditions set out herein represent the entire agreement between them… Accordingly they agree that all liabilities and remedies in respect of any representations made are excluded save insofar as provided in this contract. The parties further agree that neither party has placed any reliance whatsoever on any representations, agreement, statements or understandings whether oral or in writing made prior to the date of this contract other than those expressly incorporated…in this contract"

In *Deepak v. Imperial Chemical Industries Plc.*[58] the clause read:

> "This contract comprises the entire agreement between the PARTIES … and there are not any agreements, understandings, promises or conditions, oral or written, expressed

[55] Drafting commercial contracts p. 87.
[56] Whincup, Contract law and practice. The English system, with Scottish, Commonwealth, and Continental comparisons, Oxford 2006, p. 229 ff.
[57] /2000/ 1 WLR 2333.
[58] /1998/ 2 Lloyd's Rep. 139 affirmed /1999/ 1 Lloyd's Rep. 387.

> or implied, concerning the subject matter which are not merged into this contract and superseded thereby…"

Merger clauses now seem to have been introduced into a variety of commercial contracts also when another legal system than English (or American law[59]) is applicable. This is a consequence of the gradual spread of English and American law inspired documents and also of a wider use of English and American law as governing law with respect to international commercial contracts.

The development has spread further in some international B2B contracts than in others, but largely English and American law have come to play an important role generally. The use of "merger clauses" has therefore also come to be included in several business contracts in use in various trades and, also where American or English law is not the governing law.

Merger clauses therefore have as a raison d'être the situation within the common law frame, but they have of course a similar and possibly even wider application in a legal system where the courts are free to use any evidence in the interpretation of contracts. One question that may then arise is if a court in another jurisdiction will be more reluctant to recognize and apply a merger clause. This also means, however, that a Swedish or another Scandinavian court, when deciding a contract dispute, where the issue is related to the interpretation of the contract with a merger clause will also have to decide whether this is for procedural reasons or reasons following material law. One may of course raise the question why courts which basically recognize the principles "freedom of contract" and the binding nature of a contract would be reluctant to apply a merger clause.

4.4 Some few remarks on precontractual statements in Swedish law

As stated above Scandinavian courts would basically be allowed to use any evidence produced by the parties to determine the contents of the contract. Difficulties may arise to determine the nature of certain statements made. Are they given as promises intended to have contractual effect? Are they mere puffs? Have they been superseded by the final contract?

In his study on the parol evidence rule Hellner covers various aspects of contracts starting with contracts on real estate but also questions related to consumer contracts. The law related to real estate is in Swedish law

[59] The use of the concept of "American law" in connection with contract law is of course questionable. Contract law is basically governed by state law and it would for that matter be more relevant to address the matter as related to New York law, Californian law etc. "American law" may, however, be used since the Uniform Commercial Code is basically American although it has to be and has been adopted more or less in all American states.

rather formalistic and there is an inherent tendency towards something like the parol evidence rule.[60] He also treats consumer law aspects, where information duties more clearly will have to be taken into consideration due to the consumer protective aspects.

4.5 Some few examples of contract interpretation in Swedish law

Swedish rules on interpretation of contracts are not identical with those applied in common law. Like in English common law there is in Swedish law no particular legislation on interpretation of contracts.[61] So the law on interpretation of contracts has been developed by the courts and in the legal doctrine. Broadly there is an idea that the interpretation principles applied in the various Scandinavian countries are rather similar but by no means identical. Similarly the interpretation rules developed in the UniP and in PECL seem to be reasonably close to those developed in Scandinavian law, and largely, if comparing them to court decisions in English law, the immediate and overall impression is that in many cases the differences are not substantial, although they may be in detail (where the devil is).

Let me here, as haphazardly as with respect to the English cases, just mention a couple of cases from Swedish case law in relation to interpretation. Swedish case law is limited because most disputes of B2B character are referred to arbitration.

In NJA 1990 p. 24 there was a dispute concerning the meaning of the expression "all works" (samtliga arbeten) in an agreement regulated by the general conditions on construction (AB 72). The construction company was of the opinion that the requirements of the clause were fulfilled when the construction had been approved in connection with the final survey whereas the employer was of the opinion that the expression meant that the construction works had not been performed until discrepancies had been fixed after the final survey. The Supreme Court stated that that a natural point of departure for the interpretation of a construction contract is the understanding of the particular term in general language, and it has then to be found out if otherwise the contents of the contract or the trade practice leads to a particular interpretation. Since it was obvious that the parties had intended to deviate from the solution of the AB 72 the expression used should not be allowed any particular importance.

NJA 1993 p. 436 illustrates the relation between the preamble and the contract, and the Supreme Court here found that the preamble is not to

[60] See Hellner, Parol evidence p. 185 ff.

[61] The act on insurance contract, however, contains such provision. The contract act contains certain rules whereby certain acts may render a contract unenforceable etc.

be regarded as a contract term per se, but what is stated in there may have the function to be a starting point for the understanding of the contract. In the preamble of this particular contract some information had been given in respect of numbers. The number thus mentioned was used as a basis for determining the liability of the seller when it appeared that the information was wrong. Thus a clause exempting the seller from liability was not regarded to prevail but the Court used the information in the preamble.

The case NJA 1995 p. 586 has particular interest in this connection, since it involves the interpretation of contractual wording which in almost identical form had shortly before been interpreted by an English court.

> In the Swedish case a parent company had given to a bank lending money to one of its subsidiaries a letter of comfort stating i.a. "it is our intention to see that the borrower complies with all of the terms and conditions and to honour all of their respective obligations under the loan agreement." The lender had initially asked for a guarantee or a letter of comfort amounting to a guarantee. The final wording had been agreed on the suggestion of the parent company (and actually based on the English case Kleinwort Benson v. Malaysia Mining Corp.) The Swedish Supreme Court made, as they claimed, a linguistic interpretation of the relevant wording and found that it amounted to an undertaking to fulfill the obligations of the subsidiary in accordance with the loan agreement, an interpretation which was regarded to be apparent from the document.

In *Kleinwort Benson v. Malaysia Mining Corporation*[62] a similar clause had been inserted in the relevant document. The wording here was as follows in the relevant part:

> "It is our policy to ensure that the business of MMC Metals is at all times in a position to meet its liabilities under the above arrangements."
>
> The lower court came to the conclusion that the parent company, Malaysia Mining, was liable to the bank for the repayment of the loan granted to the subsidiary, MMC Metals. The court of first instance found the wording to amount to an undertaking. The Court of Appeal, however, found that upon the true construction of the wording there may have been an undertaking during some period after the signing but if so, this period had lapsed. The court also took into consideration the construction of the other parts of the document in relation to the above quoted part. Reading the various parts of the document together the Court of Appeal found that there was in the document one statement, one undertaking and then the point which was in dispute. So the Court of Appeal on linguistic basis had come to another conclusion than the Swedish Supreme Court in the interpretation of the document.
>
> The Swedish Court of Appeal deciding the case before it came before the Supreme Court, reached the same result as later the Supreme Court but on other grounds, and in its judgment it explicitly stated that it applied Swedish interpretation rules and that it was not bound by the view expressed in the English decision.

[62] /1989/ 1 Lloyd's Rep. 556 (CA).

It is interesting to see how the Swedish Supreme Court and the English Court of Appeal both employ what they see as a linguistic method, that is they construe the wording of the document only, and they come to the opposite solutions. This illustrates the difficulties always arising in connection with the interpretation of a contract.

4.6 Postcontractual conduct

It seems to be more difficult to apply the parol evidence rule in respect of statements made and measures taken after the conclusions of the contract, and it is much more doubtful whether it is at all applicable in this respect and if so to what extent.

A merger clause would probably only rarely be used to limit postcontractual conduct from its contractual effect. It will, however, depend on the type of merger clause which is relevant (four corner clause or amendment clause). The four corner element would not normally cover circumstances after the conclusion of the contract, but of course items covered in a contract amendment clause would be relevant in the interpretation of the changes. So, if there is in the contract a clause which specifically sets out the operation of the contract after its conclusion these parameters will have to be considered by the court in case of a dispute referred to a court or to arbitration.

4.7 Unidroit Principles and PECL

Some words merit to be mentioned in this connection regarding the solutions employed with respect to merger clauses in UniP and PECL.

Art. 2.1.17 (merger clause) in the UniP prescribes:

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

The corresponding article in PECL (2.105) uses almost the same wording as the UniP. Both articles thus set out that courts and arbitrators are bound by the agreement of the parties, but the article also adds the important words that statements and agreements made before the final agreement may be used in the interpretation of the contract. The article, as I read it, is therefore to be seen as an effort at the same time not to interfere with the right of the court to use all evidence but nevertheless not trespassing the contractual freedom of the parties.

It is very likely that this would be similar to the reasoning of Swedish courts when dealing with merger clauses. English courts, at least in B2B relations, will probably accept the contractual freedom of the parties to a greater degree, but as we shall see there are limits also in English law particularly in relation to the Misrepresentations act.

Also one has to admit that the UniP solution does not really provide much guidance.

5. Merger clauses in case law

5.1 Generally

I shall below try to identify certain problems which have arisen in English and Swedish law. In Swedish case law there is little case law, and I have not been able to go through those arbitration awards that may be available.

As stated already English interpretation of contracts differs from Swedish. Even if the traditional parol evidence rule has meant that courts apply a rather restrictive attitude with regard to evidence being presented the restrictions have been gradually softened. A question will of course be whether English and Swedish courts respectively adopt different views when applying and interpreting merger clauses.

5.2 English law

5.2.1 In general

Above the question of the parol evidence rule and interpretation principles have been discussed. The situation with respect to the use of merger clauses may thus vary, and the situation could arise how English courts will interpret merger clauses. Will it be treated as conclusive, or will the court interpret it against the background in each case individually weighing in various elements important for the understanding of the contract in the light of the merger clause? There are in English case law some cases where related questions have been raised and dealt with, and all courts seem not to have adopted the same method of interpretation in different cases. So some courts have adopted a more restrictive attitude allowing the merger clause to cut off all precontractual statements and information, whereas other courts have adopted a view that the merger clause is not the whole truth per se.

In one case *Inntrepreneur Pub Co. Ltd. v. East Crown Ltd.*[63] the function of a merger clause was set out as follows: "/T/o preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty."[64]

In consumer relations, however the situation may be quite different, and such clauses in consumer contracts are often regarded as objectionable according to the Unfair Terms in Consumer Contracts Regulation.

5.2.2 Which is the likely approach of English courts with respect to merger clauses?

Presumably English courts will, particularly in B2B contracts, often accept merger clauses without a test based on reasonableness. In the case *Government of Zanzibar v. British Aerospace*[65] the court allowed the use of clause but also reasoned that there was a requirement of reasonableness ('the nature and circumstances of the negotiations which led to the agreement'). The judge quoted with approval the observations made by another court in the case *Grimstead v. Mc Garrigan*[66].

> Here the merger clause had been agreed between professionally advised parties of the same bargaining power: "It is reasonable to assume the parties desire commercial certainty. They want to order their affairs on the basis that the bargain between them can be found within the document they have signed. They want to avoid uncertainty of litigation base on allegations as to the content of oral discussions at pre-contractual meetings…It is legitimate, and commercially desirable, that both parties should be able to measure the risk, and agree the price, on the basis of warranties."

Likewise the court in *Exxonmobil v. Texaco*[67] found that the merger clause should be upheld. See also the statement by the judge in the case mentioned above *Inntrepreneur v. East Crown*[68], where following another

[63] /2000/ 2 Lloyd's Rep. 611. Lightman J. here stated on p. 614: "The operation of the /merger/ clause is not to render evidence of the collateral warranty inadmissible as it is suggested in Chitty…; it is to denude what would otherwise constitute a collateral warranty of legal effect."

[64] For a general discussion see also *Deepak v. Imperial Chemical Industries Plc.* /1999/ 1 Lloyd's Rep. 387.

[65] /2000/ 1 WLR 2333.

[66] 1999. The case is unreported but referred to in Whincup p. 229.

[67] [2003] 2 Lloyd's Rep. 686.

[68] /2000/ 2 Lloyd's Rep. 611.

case[69] it was held that the merger clause as such was not subject to a test of reasonableness in relation to the Misrepresentations Act.

All courts do not seem to be in agreement with respect to whether a test of reasonableness could be applied following the Misrepresentations Act, but there seems to be an understanding that in B2B contracts such reasonableness test should not be applied, at least not generally.[70]

As far as I am aware there is no case clearly showing whether a merger clause will be regarded as conclusive. There seems, however, to be an indication that in B2B contracts the parties (with equal bargaining power) may create something like a contractual estoppel between them. There are, however also cases where courts have adopted a test of reasonableness particularly taking the Misrepresentation act into consideration.

5.3 Swedish law

Swedish court practice is very limited in this area. The situation in the other Scandinavian countries is similar.[71]

Let me below refer to one of the few Norwegian court cases, Rt 1992 p. 796 which may provide some illustration. Although Swedish and Norwegian contract law is based on the same legislation case law may not always be identical. Norwegian courts seem to have adopted a "freer" approach in their interpretation, they more easily use "good faith" arguments in their reasonings, and also, I think, the so-called "doctrine of presupposed conditions" (förutsättningsläran) has been used more frequently in Norwegian case law than in Swedish, although it has been applied more often by Swedish courts during the last decades than previously.[72]

As shown above Danish and Norwegian contract law doctrine like the Swedish legal doctrine often refers to the use of merger clauses but the writers generally do it in rather general terms. Some writers suggest that the merger clause will have a limited effect, but for example Haaskjøld has stated that there must be "good cause to use extrinsic data where these

[69] *McGrath v. Shaw* [1989] 57 PCR 452.

[70] Particularly in consumer contracts the professional may not rely on a merger clause unless it would be regarded fair under the circumstances.

[71] In Norwegian law Bjørnstad has written a student thesis on Entire agreement, Oslo 2007 within a project comparing common law and Norwegian law. His study is a valuable contribution to the use and understanding of merger clauses.

[72] In the legal doctrine Lehrberg has been a spokesman for an increased use of this doctrine, see his study Förutsättningsläran. Allmänna betingelser för möjligheten att frånträda rättshandlingar på grund av okända eller oförutsedda omständigheter, Uppsala 1989.

can contribute to shedding light over an otherwise unclear or incomplete wording".[73]

> In the Norwegian case Rt 1992 p. 796 (Pepsico) there was a merger clause in the contract. The contract concerned the right for a Norwegian brewery to make certain drinks. The contract was for 10 years. There were some complications in that according to the contract New York law would apply. The difference between Norwegian law and New York law was considered not to be so great, and it seems as if the Norwegian Supreme Court used Norwegian law in its judgment.
>
> There was a breach of the contract on the part of the brewery, but when determining damages the contract did not give clear guidance. The different courts came to different conclusions, where the first instance was of the opinion that the interpretation suggested by the brewery was clearly in line with the wording of the contract. The Court of Appeal stated i.a. that: "In a situation where a presupposition cannot be clearly read out of the contract provisions, a clear wording has to be the basis. This follows from general principles of interpretation and under all circumstances from the integration clause in art. 33".[74] The Supreme Court found no solution in the contract, rather that the contract on this point was silent. Therefore the Supreme Court applied gapfilling to achieve a solution in line with the contract.[75]

In Swedish law some arbitration awards have been discussed in various contexts i. a. by Sjöman.[76] These cases involved the acquisition of shares.[77] In his discussion on the disputes Sjöman also refers to articles by Lindskog[78] concerning the use of clauses limiting the liability of the seller in acquisitions contracts. As indicated above, depending on their drafting, merger clauses might lead to exemption of liability, in which case at least if gross negligence or intent is involved a Swedish court will most probably not allow the application of a clause having the effect of exemption of liability.

The two disputes referred to by Sjöman were referred to arbitration. In the latter case the question was raised whether a merger clause also meant that non-mandatory legislation should be disregarded in the interpretation of the contract.

The clause stated:

[73] Kontraktsforpliktelser, 2002 p. 109 ("full anledning til å se hen til uteforliggende tolkningsdata hvor disse kan bidra til å kaste lys over en ellers uklar eller ufullstendig ordlyd").

[74] The Norwegian text says: "I en slik situasjon hvor en forutsetning ikke entydig kan utledes av kontraktets bestemmelser, må en klar ordlyd legges til grunn. Det folger av alminnelige tolkningsprinsipper, og under enhver omstendighet av integrasjonsklausulen i pkt. 33".

[75] The solution here could be compared to the soultion rendered in the Paula Lee case, see above in 4.2 where the judge implied certain.

[76] See Sjöman, Juridisk Tidskrift 2003–2004 p. 935.

[77] One of the cases is from 1986 and the second one to 2002 (the arbitration award being rendered 2002-06-11).

[78] Juridisk Tidskrift 1992–93 p. 709 and Juridisk Tidskrift 1994–95 p. 539.

> "Complete regulation.
> This agreement is the complete agreement by the parties of all questions concerned by the Agreement. All written or oral covenants and representations preceding the agreement shall be substituted for by the contents of this agreement."

The dispute in the case concerned how the contract should be interpreted and applied lacking a clause on the right of termination.

There was in the contract a catalogue of representations and covenants the breach of which would lead to price reduction. That particular deficiency which the buyer referred to was not part of the catalogue but only in an information memorandum. The buyer based its claim on the use of the Swedish purchase act and its rules. The seller referred to the merger clause alleging that the purchase act should be disregarded. If the view of the seller would have been followed that would have had as an effect that the buyer would have been cut off from a contractual remedy.

Without discussing the applicability of the merger clause the arbitrators found that price reduction would be allowed.

If compared to the Norwegian case we may thus ask if the arbitrators were not prepared to apply the merger clause in the situation or whether they based themselves on a fairness reasoning to conclude that the purchase act applied.

Following the statements found in the Scandinavian legal doctrine and the few cases mentioned a number of questions could be raised in respect of the application in Swedish law of merger clauses in B2B contracts.

Would a Swedish court allow a clause stating that only what is in the contract, no statements, no acts, no legislation, no court practice, no general principles shall be allowed for use in the understanding of the contract but the interpretation shall be exclusively based on the contract itself?

It seems as if Swedish courts will be reluctant or at least cautious to restrict itself from using the contractual material which is available. It may accept restrictions but if it comes into a deadlock in the contract itself it will probably seek assistance in some of the traditional sources.

5.3.2 Will a merger clause narrow down general interpretation principles? Could the effect of a merger clause be limited?

If the principle of contractual freedom and the binding nature of the contract is upheld (which Swedish courts often reiterate that they do in B2B transactions) then Swedish courts should be able to accept merger clauses to a great degree. In my view courts should be careful not unnecessarily to trespass into the contractual freedom, and a merger clause should therefore not be set aside lightly. Even if parties have resorted to Swedish

courts they should be able to rely on a court not interfering with their contractual freedom without very good cause.

It is not unlikely that a merger clause could add to the clarification of the contractual circumstances and if the contract provisions are clear I do not think that one party once having agreed to the merger clause should be in a position easily to have the clause set aside by reference to circumstances outside the contents of the contract. Basically the merger clause should, in my view, be allowed to prevail.

A different situation occurs if in the particular case the contract is silent or unclear. It will then be the duty of the court or the arbitrators to find in the contract the solutions. How this is done in the individual situation may depend on the particular circumstances. Will the court imply terms? Will it in stead fall back on non-mandatory legislation? Or will it use other relevant circumstances? There is as far as I can understand no general reply to these questions.

5.3.3 The merger clause and mandatory rules

A merger clause even between parties of equal bargaining power would hardly take precedence before mandatory rules in Swedish law.

6. Concluding remarks

When the parties in a B2B-contract have agreed on a merger clause in a contract there is, in my view, at least an implication that they were at the time of conclusion of the contract in agreement on the contractual elements to be covered by the contract. There are suggestions in the legal doctrine that this type of clause is only inserted by tradition without much consideration being given to the contractual circumstances or the effects. I am not in agreement. It may very well be that the clause was not individually negotiated. It may be that the clause is often a standard clause. The clause has, however, been inserted into the contract for some calculated reason, and in B2B relations both parties should be aware of it and also its positive effects in cutting out a lot of material, statements which the parties in the conclusion of the contract agreed should be disregarded. They should therefore be bound by it. If at a later stage, during the performance of their contractual obligations, any of them would come to another insight there has to be very strong evidence for a court or arbitrators to disregard from the clause agreed. There may of course be situations where the contract is not as clear and precise as the parties believed when

the contract was concluded. Also, there may be situations where a merger clause is used in a way that the legal system should not accept.

The court will then of course have to deal with the matter as it comes up.

Will Scandinavian courts or arbitrators rather fall back on procedural freedom? Will a merger clause contribute to cheaper costs (for evidence)? Should this then be a persuasive argument to add to an argument for allowing the use of the merger clause? Who is better to determine that than the parties in connection with the conclusion of the contract?

There are also more specific questions that may be raised in connection with merger clauses. One question is if there is a difference between clauses that have been individually negotiated and clauses which just appear in a standard form contract? Particularly when it is a standard form contract which is used frequently and which is reasonably well known among parties in the trade, there is in my view little reason to make such distinction.

I do not suggest that merger clauses should always shut out other material than what appears in the contract. I think, however, that there is often good reasons for parties to have included such a clause in a contract also where it excludes the use of particular legislation. But then again it may be a question of construing the particular clause. There should maybe be need of clear words in order to cut out legislation as complement in the interpretation.

Supposedly there is a certain difference between the approach in English common law and in the Scandinavian law system in these respects but when it comes to the individual situations I believe that the differences may not be all that great. If the merger clause is largely accepted then there will nevertheless be situations where there will be need of complimentary interpretation tools. It is my hope that courts and arbitrators could be entrusted to handle such situations, but they should be open with what they are doing.