The missing stone in the Cathedral

*Of unfair terms in employment contracts and coexisting rationalities in European contract law*

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Publication date
2020

Document Version
Final published version

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The missing stone in the Cathedral

of unfair terms in employment contracts and coexisting rationalities in European contract law

Candida Leone

sabot
[noun]
clog, a shoe made entirely of wood

In its notorious "arrêt sabots" from 1866, the French Cour de Cassation quashed a decision by the Prud'hommes of Saint Etienne which had reduced a penalty of 10 Francs imposed on a factory worker for having worn their wooden sandals inside the plant. The fine, we know from the Prud'hommes' decision, corresponded to almost half the worker's monthly salary. It was set in the factory's règlement d'atelier, which was hung somewhere within the factory and was binding between the parties on a contractual basis. The Cassation considered the Prud'hommes, who had decided in equity, to be in breach of article 1134 of the Code civil — in other words, they had failed to properly honour the binding force of contract. This was one of many cases through which, towards the end of the 19th century, contract law rules came to be seen as an instrument of workers' oppression.
The missing stone in the Cathedral
of unfair terms in employment contracts and coexisting rationalities in European contract law

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor aan de
Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. ir. K.I.J. Maex

ten overstaan van een door het College voor
Promoties ingestelde commissie,
in het openbaar te verdedigen
op 12 juni 2020, te 11 uur

door

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geboren te Rome
Promotiecommissie:

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Chapter 1 Introduction: correcting the narrative on unfair terms control

1.1. Introduction

The book’s title is an intentional reference – and tribute – to Daniela Caruso’s seminal 1997 piece The missing view of the cathedral: the private law paradigm of European legal integration.1 In closing that piece, Caruso wrote:

“So far, Old World legislators have managed to preserve the apparent coherence of private law primarily through the technical device of shifting the burden of social choices onto the realm of public, regulatory law. As a consequence, while it is customarily accepted that a given interpretation of constitutional principles, or given regulatory statutes, have an immediate social impact and define specific schemes for wealth distribution, private law doctrines maintain the appearance of ideological neutrality and the presumption of equality of powers ("horizontality") as between any two citizens.”2

Against this backdrop, Caruso claimed, Europeanisation of private law faced resistance not so much because of the doctrinal concerns raised in the debate but because it confronted national private laws with their hidden political dimensions.

What to make of these considerations more than 20 years later?

During this period, two of the main continental legal systems – Germany and France – have undertaken rather comprehensive reforms of their contract laws; the idea that “civil codes… can survive radical changes in the social and political fabric of their respective nations” needs to be, to some extent, reconsidered: the Code Napoleon and the BGB may well have survived two world wars, still apparently the turn of the millennium was too much to bear? Did the codes carry a millennium bug?

The thesis claims that a change in contract law has been in the making for a long time. While both the reforms mentioned above have been pushed by centre-left governments, the reorientation – or relative instability, compared to the previous century or so – of contract law is not as contingent on welfare state agendas as one may be tempted to think. In 2004, the authors of the Manifesto on Social Justice in European Contract Law drew one such connection when they observed:

2 Caruso, 29.
“the private law of contract is currently becoming more significant owing to its crucial role in neo-liberal political thought. If governments seek to reduce the role of the State, to encourage market solutions to problems of securing social welfare, [...] contracts become both an instrument of trade and an instrument of politics. The rules governing these transactions, which are based in private law, therefore, become a key regulatory instrument of modern governments.”

Drawing on a reconstruction of developments taking place in the overlooked (at least: overlooked by contract lawyers) area of employment contracts, I try to partially decouple the need for reorienting contract law, and some specific “reorientation” episodes, from the welfare state and its decline and to instead link them to contract law’s success.

1.2. A Prequel: background and terminology

The book combines two seemingly separate studies on judicial control of contract terms. The aim of the book is to provide a credible account of such judicial control as a – if partial and to an extent necessarily contingent – response to contractualisation. The main actors in this account are not legislators but courts and parties bringing disputes, with, one must say, academics likely playing a role too. Legislators enter the stage only once the story is well underway. This mixed origin of judicial control should be a reason to mistrust accounts that attribute a more or less exclusive regulatory function to unfair terms control – and by extension to contemporary contract laws. Control of unfair clauses before a court is introduced to students of comparative contract law as the paradigmatic example of the rebalancing of contract law’s emphasis of freedom of contract towards “contractual justice.” However, such straightforward accounts tell us little about why and how such rebalancing came about. The connection between contractualisation and unfair control should help fill this gap without doing away with the kind of internal perspective that we apparently still find some value in teaching students about.

By judicial control I mean constellations in which courts intervene on individual terms in a contract that is being litigated before them. For part I, the scope of this intervention has been considered as confined by the definitions of Directive 93/13. For part II, I have looked broadly at court’s interventions on the validity of singular

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4 See Hugh Beale et al., Cases, Materials and Text on Contract Law (Bloomsbury Publishing, 2019), 811. The authors further refer to Zweigert and Kötz’s famous Introduction to comparative law, the latest edition of which was published in 1998.
stipulations in employment contracts. I have not looked into interventions on the *exercise* of rights created under such terms. In the text I use almost interchangeably a number of expressions: judicial control, unfair terms control, standard terms control. They are the same from the perspective of the scope of my inquiry, even though they have different associations and meanings.

By *contractualisation* I mean *a process by which the salience of contracts and contract law in a given domain is increased*. This is, we will see, a result of its expansion as well as of increasing complexity. This is an empirical phenomenon and a conceptual one – as we will see already in the next section.

### 1.2.1. The advent of *adhesion contracts*: a very bourgeois story

In order to introduce my notion of contractualisation, I will start with a brief account of the emergence of *adhesion* contracts. Nothing in the definition of contractualisation just given requires limiting the inquiry to standardised or non-negotiated contracts. As we will see, however, lack of negotiation was, a feature of what one could also call *mass* contracts that particularly impressed contemporary lawyers. The aim of this reconstruction is to highlight how – contrary to what authors of the time seemed to believe - the advent of such adhesion contracts was less of a set-back for contract law rather than the consequence of its success.

In Europe, the modern discussion on non-negotiated contracts can be considered to have started at the very outset of the 20th century, with Saleilles’ 1901 study of juridical acts in the then newly enacted *Bürgerliches Gesetzbuch*. Saleilles, truth be told, does not really believe non-negotiated contracts to be contracts at all: those *pretentu contrats*, in his view, should just not be subject to regular rules of contract law since they are, in reality, unilateral acts with some normative character.

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5 Raymond Saleilles, *De La Déclaration de Volonté: Contribution à l'étude de l'acte Juridique Dans Le Code Civil Allemand (Art. 116 à 144)* (F. Pichon, 1901). The overview here focusses on a number of leading contributions – Saleilles, Raiser and Kessler later on – and on other sources representative of the way in which the development is reconstructed in further literature. Of course, other authors have dealt with the subject already in the first part of the 20th century, but the view I reconstruct was not really controversial at the time.

Saleilles and his immediate followers explain how the emergence of standardised contracts, pre-formed textworks not subject to negotiations, deprived the “adhering” parties of the ability to negotiate. The way this phenomenon is recounted is very revealing of why the narrative needs to be somewhat corrected, one century later. Take the 1912 version told by Pichon:

“La petite boutique de Rome et du Moyen-Age a fait place au grands magasins à rayons innombrables et à succursales multiples; la diligence d’antan aux puissantes compagnies de Chemins de fer; le petit voilier aux sociétés internationales de navigation; l’atelier du maître, père de ses apprentis, aux usines formidable où les ouvriers sont moins que les machines; les corporations, aux syndicats [...]”

The story, one can immediately see, concentrates entirely on the side of offer, which was indeed undergoing momentous changes\(^7\) – but it ignores completely the contemporary changes in the field of demand. Are the people buying these goods and services the same who would be the regular customers of roman atelier and modern times carriage services? This paradox may appear even more clearly looking at a much later contribution from the other side of the ocean:

“The received theory of contract […] postulated as the typical transaction two individuals of approximately equal bargaining power working out between themselves the term of an agreement. More and more, however, in the complex economic order [of the starting 20\(^{th}\) century] bargains were made not between single individuals on each side but by single individuals on one side and great organizations of individuals on the other side. Concentration of economic power, leading to great disproportion of bargaining power in organizations with which the individual was compelled to deal in order to obtain much needed protection, as in insurance, or to have the advantage of necessary facilities, as in the case of chain stores of nationwide extent crowding out the old-time individual local dealer, has

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7 My translation: “The small high street shops of Rome and the Middle Ages have made room for department stores with countless shelves and numerous outlets; coaches of yesterday have been replaced by railway companies; small ships to international sailing companies; workshops run by craftsmen, acting as fathers to their apprentices, by imposing factories where workmen are less than the machines; corporations, to trade unions […]”. Victor Pichon, Université de Lyon. Faculté de Droit. Des Contrats d’adhésion; Leur Interprétation et Leur Nature, Thèse... Par Victor Pichon... (la” Revue judiciaire, 1912), 9. Unless otherwise indicated, all translations are mine.

8 Hobsbawm observes: “From 1880 on the pattern of distribution was revolutionized. “Grocer” and “butcher” now meant not simply a small shopkeeper but increasingly a nationwide or international firm with hundreds of branches. In banking, a handful of giant joint-stock banks with national networks replaced the smaller banks at great speed.” See Eric Hobsbawm, The Age of Empire: 1875-1914 (London: Abacus, 1994), 44..
brought everywhere attempts by law to restore equality or provide a substitute at the expense of abstract freedom of contract.”

And further on, even more revealing of the rather specific lenses with which contemporary lawyers looked at the phenomena influencing contract law:

“[...] In a society in which a householder cannot afford to bear himself the risk of losing his home which it has taken him years of saving to acquire, and can get no adequate protection against the danger of fire [...] except at such rates and on such terms as organized underwriters chose to prescribe, coerced policies of fire insurance secure expectations of much more moment than freedom of the individual will.”

If we follow Pound’s story, with its emphasis on home-owners inability to bear significant risks and need to save up for years in order to buy, we may be led to believe that householders have all of a sudden impoverished or seen their position worsen. Is that plausible? If one reads this story carefully against what we know about the historical context in which these examples must be situated, a different and more likely picture emerges: towards the end of the 19th century, through economic upheavals, home ownership, also in the cities, had gradually become available to a broader usership. So did, to go back to Pichon’s story, other products and services which, for long, had been only of interest for bourgeois and possibly aristocratic audiences.

Where these lawyers see their own (as customers) ensued impotence vis à vis their service providers, or the plights of home owners unable to meet their obligations, they fail to acknowledge that masses of people were newly enabled to access property, goods and services. Over one century later, it seems necessary to thus correct these images by highlighting that the subjects concluding these contracts where different than in the previous centuries and decades: people who had previously mostly relied on less formalised economic exchanges were, with the development of mass production and mass distribution, attracted within the reach of contract law.

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10 Again, Hobsbawm notes that towards the turn of the century industrialised or industrialising countries “formed an increasingly massive body of purchasers for the world’s goods and services: a body increasingly living on purchases, i.e. decreasingly dependent on traditional rural economies.” In this very period “instalment selling [...] was designed to enable people of small income to buy large products.” See Hobsbawm, *The Age of Empire: 1875-1914*, 49.
11 See for a similar account Patrick Selim Atiyah, *The Rise and Fall of Freedom of Contract*, vol. 1 (Oxford University Press, USA, 1979), 573–74. “For the first time in English history the working classes were themselves becoming a substantial market for manufactured goods. A great variety of new goods was becoming available to meet this demand, and so were new methods of retailing them.
These early authors’ perspective, also, does not entirely capture the way in which at the same time certain things changed on the offer side. Saying that the maître d’atelier used to be a father to his apprentices rather than an employer may be true, but hides the fact that the relationship between the former and the latter used to be one of master and servant rather than a contractual one. Similarly, when examples are presented about dry cleaners hiding exemption clauses on the back on their receipts, this picture should not make us forget how cleaning services would, only a few years earlier, have been unnecessary for most citizens – or performed by housemaids for those of larger means. It seems unlikely that apprentices and housemaids had much bargaining power suddenly taken away from them in late 19th century.

The example of hidden exemption clauses points to one other feature of the phenomenon: standardisation brought about widespread contractual complexity, pushed by companies’ desire to efficiently manage – i.e. restrict – the risks associated with their business. Early French authors, indeed, discussed whether complexity was or not a defining feature of adhesion contracts. The association with consumption, on the other hand, was not a necessary character: early scholarship discussed employment contracts as an instance of adhesion contracts.

Towards the end of the nineteenth century new shops, new advertising, much of it in the new penny newspapers, and prepared consumer goods such as ready-made clothes, shoes, patent medicines, and some pre-cooked or pre-packaged foodstuffs were becoming widely available. Where such goods had previously been supplied, if at all, from the village craftsman, they were now pouring out of the factories. ‘From machine to shop there flowed the branded, packaged, standardized, advertised products newly characteristic of this urbanized, industrialized society that was setting itself new patterns and standards of social life.’

12 See, later in the book (Chapter 5, section 1), the somewhat more extensive remarks concerning the several waves of contractualisation of labour relationships. In general, the literature on labour law, with its extensive accounts of the industrial-age transition “from status to contract” and the subsequent dynamics of “statutory” and “contractual” trends, is more sophisticated on this account and provides interesting ground for reflection.

13 Thus, while “a revolutionary technology and imperialism helped to create a range of novel goods and services for the mass market”, going back to the offer side this transformation brought about a considerable growth in the tertiary sector – in other words, ever more people (males and, increasingly, females) were employed in “offices, shops and other services”. See again Hobsbawm, The Age of Empire: 1875-1914, 53–54.

So contractualisation as defined above has two components: first, increased saliency or inclusion within contract law of relationships that were not (seriously) considered when the subject’s doctrinal core was established,\(^\text{15}\) mirrored by the increased participation in contractual transactions of subjects that were not relevant to the anthropological reference of contract law during its 19\(^{\text{th}}\) century liberal apex; second, the increased relevance of contract terms next to the basic feature of a given exchange.\(^\text{16}\) The colourful images captured by, among others, Pichon and Pound are, I submit, as much a result of capitalism’s tendency to concentration\(^\text{17}\) (as suggested by Pound in the fragment above)\(^\text{18}\) as they are of this expansion of contracts and contract law.\(^\text{19}\)

In tight relation to the concentration issue, Kessler, who first framed the problem of adhesion contracts as one of weaker party protection, focussed more directly on issues of power imbalance:

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\(^{15}\) This account resonates with legal-historical research showing that standard terms have emerged well before the end of the 19\(^{\text{th}}\) century in at least one crucial sector – transportation, and in particular transportation by sea. See Phillip Hellwege, Allgemeine Geschäftsbedingungen, Einseitig Gestellte Vertragsbedingungen Und Die Allgemeine Rechtsgeschäftslehre, vol. 148 (Mohr Siebeck, 2010). Hellwege’s careful reconstruction shows how Allgemeine Geschäftsbedingungen can be found in use already in the 16\(^{\text{th}}\) century. Interestingly, at that time municipalities had adopted special rules restricting the carrier’s ability to waive liability. Later, at the end of the 20\(^{\text{th}}\) century, the question became one of Allgemeine contractenlehre. Only after the advent of National Socialism did the question of standardized contracts emerge as one deserving separate, special regulation.

\(^{16}\) A corollary of this, which will come back with more prominence in the second part of the book, is the increased relevance of contract terms: in mass contracting, risk- and expectation-management through contract terms becomes particularly relevant. This, coupled with the development of an ever-increasing number of differentiated services, makes for increasingly complex contracts.


\(^{18}\) Text to fn 9.

\(^{19}\) To restate the argument in simple terms: both Kessler and the French authors at the turn of the century seem to imply that fewer “unequal” relationships existed before. I submit that it is more enlightening to see that before the (late) 19\(^{\text{th}}\) century unequal relationships were often non-contractual ones. Thus, the transition “from status to contract” often recalled in the domain of labour law, together with the expansion of trade at the expense of closed economies, brought within contract law many relationships that were previously excluded from it. Rather than saying that contractual relationships have grown more unequal at a given point in time, it seems appropriate to say that contract law expanded its reach to include (more) unequal relationships.
“Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.”

This representation is plausible and important, but it does not really say much on the specific significance of standardised contracts: wouldn’t entities with such strong bargaining power be just as well capable of imposing one-sided terms in negotiated agreements? Also, what would one have to make of the appearance of standard terms in relatively competitive markets, where in principle no player enjoys a particularly privileged position? Unlike the more contract-centred accounts above, Kessler is more interested in the material components of power imbalances, of which standard contracts are a manifestation, than on the transition that contract law must be undergoing to cope with change. Not the standardised nature of the contract, but the conditions under which it is concluded, are the problem in Kessler’s account.

Just before Kessler’s article appeared, Raiser’s book Das Recht Der Allgemeinen Geschäftsbedingungen had been published in Germany. While others had intervened in the German debate in the previous years, Raiser’s intervention was ground-breaking in finding a persuasive argument for the need to regulate general terms and conditions. If possible abuse in individual contracts was problematic, he argued, the problem was of entirely different nature when general terms and conditions were involved: not only private interests would be harmed in such cases, but also the common good. By drafting terms applicable to a large set of transaction and possibly setting aside several non-mandatory rules, the drafter was exercising a quasi-legislative power, subtracting their transactions from state laws. This displacement of legislative powers had to be kept under control.

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21 And this may explain why he, unlike (most of) the other authors that have engaged in earlier debates on standard contracts, still features in footnotes to contemporary debates as the champion of the “weaker party” approach.


convincingly shown by Hellwege,24 Raiser’s intervention added to a debate with no dearth of similar calls. When, well after the end of the Second World War, debates on unfair terms control reignited, it was Raiser’s contribution that market those debates, but also the later legislation which limited judicial control to standard terms which were intended for multiple use (i.e. at least in three transactions).

This concern vis à vis ongoing privatisation of law-making, despite its influence over post-war German law, is not particularly visible in the contemporary discussion on unfair terms control in Europe.25 The late fame enjoyed by Raiser’s book, which was completed in the 1930s but only read much later, probably accounts for the paradox of his contribution being at the same time crucial and somewhat forgotten. By the time of the book’s late success, many things had changed; even more so by the time that the notion of Allgemeine Geschäftsbedingungen became enshrined in the homonymous act of 1976. In this sense, Raiser’s book can be considered as a bridge between the early discussions recalled above and the later debates – and, crucially, judicial and legislative interventions.

1.2.2. Contractualisation since the second half of the twentieth century

Unfair terms control stands at the forefront of contract law’s engagement with societal developments. Leone Niglia’s book The transformation of contract in Europe26 has reconstructed, in a comparative perspective, how different approaches to unfair terms developed in several European member states characterised by different political economies. His book traces the developments of unfair terms case-law and legislation in four European countries – Germany, France, the UK and Italy – (roughly) in the second half of the 20th century and critically assesses the impact on national legal systems of the 1993 Unfair Terms Directive (henceforth Directive). The starting point is that all of the relevant countries except Italy had adopted some regulation of unfair terms in consumer contracts,27 but the apparent similarity actually hid very different approaches. In

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24 Hellwege, Allgemeine Geschäftsbedingungen, Einseitig Gestellte Vertragsbedingungen Und Die Allgemeine Rechtsgeschäftslehre.
his analysis, German law’s efforts to prevent abuse of standard contracting were in line with the German state’s social market economy programme, while the French and Italian relative inertia in the same field supported those states’ discretionary administration of state-run companies, avoiding the imposition of legal constraints on their management of consumer relations.

Niglia identifies the different national reactions (and non-reactions) to the problems posed by standard contract terms as a conscious, if not explicit, alignment of politics, legal doctrine and adjudication. Such aggregate effort, however, was characterised – according to Niglia – by an emphasis on the establishment and upkeeping of rules. The establishment of black lists or administrative procedures tasked with identifying “unfair” terms and making them unlawful is the main index of this “rule-bound” approach. In contrast, Niglia strongly decries the Directive’s market-regulatory (in his words: “market orientated”) strategy, which he sees as unconcerned with establishing which terms should be allowed by European legal systems and more than anything else keen on pursuing de-regulation.28

Niglia’s book highlights how various formats were at work in giving shape to unfair terms control. The reconstruction therein, albeit focussed on a specific period, has the merit of expressly reconnecting the discourse on unfair terms in mass contracts to the boundaries of “marketised” (i.e. private law) contracts within a state’s market economy. It is usually the case, in particular, that the introduction of market mechanisms comes hand in hand with “contractualisation” in the sense discussed above. The significant vicinity between my “contractualisation” framework, as exemplified through the re-reading of fin de siècle developments just presented, and his analysis of post-war developments in (consumer) contract law makes it possible for this book to leave aside that part of the story and concentrate on its main substantive contribution, which is to include labour contracts in the picture.

However, the present account differs from Niglia’s in two important ways: first, it does not subscribe to the idea that the emergence of more or less protective rules of private law in the field of standard terms was the outcome of legislators, courts and doctrine coordinating to reach a specific result, as he suggests was the case in

28 With the idea that ex ante prohibitions would be inefficient as they may stifle reasonable practices and therefore a focus on ex-post judicial control is more in line with a market-enhancing approach.
the four systems he studied. While it seems entirely plausible that in all systems the political attitude to markets influences the outcomes of the law’s reflection on non-negotiated contracts, Niglia’s reading requires a somewhat crude characterisation of the different responses. Furthermore, his emphasis on the concerted pursuit of certain policy objectives does not match particularly well with the Transformation’s parallel insistence on the salience of the shared “rule-based” nature of the different national responses to the problem, in contrast to the Unfair Terms Directive’s approach. It is, in other words, unclear to me what should characterise a “rule-based approach” vis à vis a regulatory one (such as the one that Niglia attributes to the Directive), if both are essentially policy-driven.

Scepticism as to the analytical value of this last distinction is the other way in which the present contribution seeks to differ from Niglia’s reconstruction: while distinguishing between instrumental/regulatory and “private law” rationalities is a core effort of this book, I do not regard the difference between “a contract law made of rules” and the supposedly more open system introduced by the Directive as particularly determinative – i.e. not more than several other possible elements – of the distinction between “private law” and “regulatory” approaches.

While Niglia pointed to an ongoing transformation, we have seen that Caruso – writing only a few years earlier – still spoke of a self-image of neutrality as being a much-cherished mask worn by private lawyers. Both realities likely coexisted, to a large extent by pretending that the areas where “transformation” was happening were not really private law.

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29 This while acknowledging, as said just above, that the political economy did matter to giving shape to the law also before statutory intervention.

30 By which, by and large, Niglia identifies the tendency of national law-makers to identify ex ante sets of terms that should be disallowed, relegating open norms to a more marginal position and reducing the role of discretionary assessments.

31 In this, mutatis mutandis, the book reflects Kennedy’s conclusions on the limited saliency of the distinction between rules and standards in signalling more individualist or “altruist” positions – Duncan Kennedy, “Form and Substance in Private Law Adjudication,” Harv. l. Rev. 89 (1975): 1685.
1.3. Private (or contract) law and regulation

Caruso, indeed, depicts a division of labour between private law and “realm of public, regulatory law”. Niglia’s distinction between “rule-based” and “market-orientated” contract law points in a less traditional direction which is interesting but relies on several assumptions that are not shared in this book. To the ends of this research, a distinction between “private law” and “regulation”. Chapter 2, for instance, will discuss the “regulatory turn” of discussions surrounding European private law and rule-making on the matter of unfair terms in mass contracts. While saying that private law becomes more “regulatory” certainly implies the existence of a difference – or many differences – between private law and regulation, it is not in itself obvious in what exactly the two differ. The book locates such difference at the level of rationalities.

1.3.1. Rationalities and features

“Rationalities concern questions asked and frameworks of discussion, not answers given and ideologies leading to such answers. This means that multiple ideologies, and multiple legal rules, are compatible with one and the same rationality.”

The concept of “rationalities”, employed by Micheals in a piece dealing precisely with the question of private law and regulation in European Private Law, helps us to locate the differences not so much at the level of individual rules, regulatory techniques or even the “ideologies” connected to them, but at the level of “questions asked and frameworks for discussion”. This definition is embraced here, but it may appear rather empty without delving into what these questions and frameworks would be in the specific context of private law and regulation. Michaels operates a distinction between “juridical” and “instrumental” rationality which is very similar to the distinction followed in this book. I prefer to distinguish between private law and “regulatory” rationality for two reasons: first, because “regulatory” is the currently dominant labelled attached to supposedly instrumental private law in the European private law debate; second, because “instrumental” is occasionally used as synonymous with “materialised” private

law, in opposition to formalistic private law.\textsuperscript{34} I specifically do not consider all cases of materialisation – in other words, all deviations from formal equality – as a form of instrumentalisation.\textsuperscript{35} In this sense, referring to regulatory rationality rather than “instrumentalist” rationality seems to help prevent misunderstandings.

Although the main differences between the rationalities attached to private law and “regulation” are arguably captured by characterising the former as more deontological and the latter as more consequentialist, it seems that most of the scholars who have engaged with the question of private law and regulation would agree that the distinction can be articulated (at least) into the following sub-components:\textsuperscript{36}

<table>
<thead>
<tr>
<th>Private Law</th>
<th>Regulation</th>
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<tbody>
<tr>
<td>Focus on individual rights;</td>
<td>Focus on desired effects;</td>
</tr>
<tr>
<td>Regulating relations;</td>
<td>Regulating behaviours;</td>
</tr>
<tr>
<td>Quest for generality</td>
<td>Specialisation;</td>
</tr>
<tr>
<td>Predominantly ex post</td>
<td>Ex ante behavioural spin;</td>
</tr>
<tr>
<td>Application as remedies</td>
<td>Application as enforcement</td>
</tr>
<tr>
<td>□ Party-led</td>
<td>□ Court or others</td>
</tr>
<tr>
<td>□ Limited set</td>
<td>□ Several possible strategies</td>
</tr>
</tbody>
</table>


\textsuperscript{35} An overview on, implicitly, shifting focus from materialization to regulation can be found in Hannes Rösler, “The Transformation of Contractual Justice: A Historical and Comparative Account of the Impact of Consumption,” \textit{The Many Concepts of Social Justice in European Private Law} 327 (2011). In particular, see there for references to earlier contributions and in particular Wieacker’s work.

\textsuperscript{36} Michaels proposes a much more elaborate table to distinguish between “instrumentalist” and “juridical” private law. Not all the elements in that table are equally important to the argument being made here, and on some I beg to disagree. While I accept that different rationalities may be more prominent in different domains, the book aims in particular to draw attention to the coexistence of different rationalities within the domains analysed. Thus, to the extent that Michaels’ story turns from reconstruction (of how instrumentalist and “juridical” rationalities have played a role in national and supra-national European private laws) to the normative claim that some private law can do away with “social” or other non-juridical concerns because those will be taken care of elsewhere, our accounts need to part ways. See Michaels, “Of Islands and the Ocean,” 2011, 146.
In this reconstruction, a “private law” rationality would focus on whether, in a dispute, the outcome would do justice to the parties’ competing rights. A regulatory framework, on the other hand, would imply wondering whether the results of the dispute were in line with certain goals pursued by the legislator, and possibly even more on the further question of whether the dispute in itself, with its outcome, is going to meaningfully contribute to the achievement of these results on a super-individual scale.

I share Michaels’ characterisation of “juridical”, or “private law” rationality as being less prone to swift change and less centralised than instrumentalist interventions, but our affinities more or less end here. Contrary to his suggestion, I consider that identifying juridical rationality as one that sees “the core of private law in non-mandatory rules that express the hypothetical will of the parties”\(^37\) goes very far – too far – towards making such rationality a matter of answers rather than one of questions, contrary to Michaels’ initial statement. The effect of this move is, in fact, to push all materialised private law away from the “core” towards the fringes, doing exactly what Caruso observed continental private lawyers excel in.

A less over-determined notion of private law rationality is the idea of commutative justice central to Christoph Schmid’s critique of EU private law instrumentalism.\(^38\) In Schmid’s account, the “justice” component within contract law has to do with subjecting private law relationships to “criteria originating in the relationship between the parties themselves – and not by reference to external political, social or economic goals (Grundsatz relative Rechtfertigung)”\(^39\). In the rest of the book, I will refer to Schmid’s definition as a blueprint for distinguishing “regulatory” and non-regulatory features in the two case-studies.

However, what is significantly different between my account and Schmid’s is that I consider the elegant distinction that Schmid draws between “a relatively timeless ethical concept” of commutative justice and “a heavily time-dependant societal

\(^{37}\) Michaels, 145.

\(^{38}\) The theory-alert reader will here of course object that there are more notions of corrective justice one may and should engage with – from Ernest J. Weinrib, Corrective Justice (Oxford University Press, 2012) to; James Gordley, “Equality in Exchange,” Calif. L. Rev. 69 (1981): 1587. However, while my understanding of the notion is certainly closer to some of those accounts than to others, engaging directly with normative theories is not the purpose of this book.

shaping” as artificial and, albeit analytically useful, not particularly helpful to the kind of critique of overreaching regulatory rationality that this book seeks to engage in.  

Borrowing the same terminology, one may say that this book, through the case of unfair terms control, seeks to claim just that a “time-dependant societal shaping” does not stand next to corrective justice but rather gives shape to what contract law justice means in different contexts. Therefore, while contract law justice may well be mainly an ethical concept, the book certainly does not subscribe to the idea that this concept would be (if “relatively”) timeless. In this sense, the book aims to be perhaps less “conservative” or nostalgic, in its critique, than Schmid’s account, although embracing – from a critical perspective – the idea that a certain degree of separation between law and politics is essential to upholding the former’s claim to legitimacy.

Throughout the book, in essence, my aim is to reinvigorate the idea that unfair terms control is a means of – sometimes more, sometimes less – deformed corrective justice.

40 See ibidem p 19.

41 Implicitly, this also entails a difference between the present account, with its belief that contractualisation as a social phenomenon influences the “core” of contract law by giving justice different meanings, is at odds with Michaels’ contention that non-instrumental private law could be severable from the political process and a need for democratic legitimacy. I also believe this contention to be partially inconsistent with Michaels’ own observation, in the same piece, that the distinction between juridical and instrumental private law is content-independent, with both possibly taking all sort of different positions on various political spectrums, juridical private law being always political “at large”.

42 A question which the book takes no position on, albeit those interested in the difference between moral and ethical arguments may claim that limiting the scope and nature of the claim in the way that I did above does suggest that the reference to ethical arguments is inevitable. This is not a direction in which I intend or am able to expand for the time being.


44 Everson, “From Effet Utile to Effet Neoliberal.”

45 In this sense, the account makes unfair terms at most a very mild version of welfarist contract law only partially seeing it as explained by “the intrusion of the values of the welfare state into the market-oriented structure of traditional contract law”. See Thomas Wilhelmsson, “Varieties of Welfarism in European Contract Law,” European Law Journal 10, no. 6 (2004): 713. (also discussed infra, Chapter 2).
1.3.2. ... of unfair terms control

Over the last two decades, in Europe at least, two dimensions have featured most prominently in discussions on unfair terms in non-negotiated contracts. First, the discussion has been characterised by an overwhelming focus on consumer transactions. Second, an increasing emphasis has been placed on the policy of unfair terms control – i.e. on the theoretical arguments justifying such control, in particular the concrete goals to be pursued by means thereof. A main reason for both trends is the European harmonisation that has taken place by means of Directive 93/13 on Unfair Terms in Consumer Contracts, widely acknowledged as the most debated instalment in the European consumer law acquis. Next to catalysing national debates by raising endless questions on its scope and impact – and to adding a European forum for idea exchanges – the Directive is likely the main propeller for the second trend as well. Indeed, unlike traditional contract law, European private law rules tend to be largely justified, measured and criticised in light of their (actual or expected) effects. Unsurprisingly, this brings


47 Inter alia, thanks to new journals devoted to discussing issues of private law at European level, which created new platforms for Europe-wide exchanges: the European Review of Private Law started its publications in the same year the directive was adopted; in 2005, the European Review of Contract Law came to enrich the picture. Both initiatives were clearly connected to the Parliament’s and Commission’s plans towards a European private law but they had each its distinctive approach and agenda.


49 This was either taken at face value or scrutinised for its ability to balance legal certainty and fairness in the individual case.

50 Something which fits neatly with one of the main dichotomies traced by Michaels, i.e. that between technical and technocratic expertise: while national lawyers have often criticized European consumer law for its poor technical quality, it is mostly a different kind of
the discussion at the level of the goals to be pursued, which is something people can reasonably disagree on. In the European legal debate, the two main competing goals of unfair terms control are consumer protection and correction of market failures, or, in other terms, (distributive) market correction or market enhancement.

“Does it protect consumers?”, “does it help clear the market from excessively one-sided terms?” are thus competing questions through which the merits of unfair terms control are currently assessed in the European debate. Dissatisfied criticisms have been voiced by proponents of both approaches, highlighting the current rules’ shortcomings in achieving either of these goals to an empirically meaningful extent.51 “Unfair” terms are still widespread,52 which likely means consumers are not getting as good deals as the law would want them to and/or the market for terms in consumer contracts is still not working as desired. And yet the Directive is alive and well, and books some rather spectacular performances every now and then.53 In other words, perhaps judging the Directive on the basis of its effectiveness does not exhaust what there is to say about it.


53 The reader will be reminded of the Spanish mortgage saga which started with Aziz and may still not have exhausted its reach – see the far-reaching obligations on courts and parties under C-419/18 and C-483/18, Profi Credit Polska, ECLI:EU:C:2019:930. This case-law has sparked a whole different strand in literature that seems to take place in a different universe than the discussion reconstructed here – see Oliver Gerstenberg, “Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts,” European Law Journal 21, no. 5 (2015): 599–621; Chantal Mak, “On Beauty and Being Fair—The Interaction of National and Supranational Judicatures in the Development of a European Law on Remedies,” in Varieties of European Economic Law and Regulation (Springer, 2014), 823–834.
Accepting that “results”, understood as effectiveness on some measurable (i.e., aggregate) scale, are not necessarily the key to understanding or justifying unfair terms control, may help onlookers to make sense of the gradual emergence of an unfair terms discussion and, sometimes, unfair terms regulation in labour law. While unfair terms control could either be considered as redundant in the tightly regulated field of employment relations, and it is criticised as being ineffective elsewhere, both Germany and, more recently, France have used civil code reforms to open the doors of employment contracts to judicial scrutiny. The models deployed are close to identical to the mechanisms employed in consumer contracts. One could try to analyse these developments as pursuing some specific policy; however, in line with what has been said above, this book takes a different approach. Namely, it suggests that in light of the context, i.e. that this has happened at a time when labour law in Western Europe is deemed to be increasingly contractualised and ever more conceptualised as “the law of the labour market”, characterising these legislative innovations as a response to such contractualisation does more justice to reality. However, I also submit, looking at these developments as turning points, i.e. concentrating on the visible activities of legislators at specific moments in time, still presents the whole phenomenon as more deliberate, and possibly deliberately regulatory, than it actually was.

Instead, this book argues that, although the development and expansion of markets is an essential factor in the emergence of unfair terms control in many European legal systems,54 top-down, goal-oriented regulation of these markets is not as essential a factor – in spite of the prominence it has acquired with the rise of the regulatory state. The argument is corroborated by showing how unfair terms control has made its way – by means of case-law – in the somewhat unchartered territory of employment contracts, in the two Member States that have most influenced the 1993 Directive. In both France and Germany, indeed, (labour) courts had been striking down or reshaping “unfair” terms in employment contracts for years by the time the legislator intervened providing them with a convincing legal basis to do so.

Thus, the book aims to present a different kind of contribution to the academic discussion by distancing itself from both the focus on consumer law and the discipline’s policy-oriented turn, with the aim of letting the analysis of unfair

54 See infra the sharp recollection by Niglia as to the correlation between market-openness and relevance of unfair terms control in four countries in Niglia, The Transformation of Contract in Europe.
At the end of the analysis, I submit that a proper explanation of unfair terms control should not neglect the “internal” perspective of contract law, represented by (academics and) courts faced with contract law conflicts concerning dubious terms as a result of the expanding contractualisation of economic relations. These courts strive, and have striven over time, to give a “just” answer to the problem they are confronted with rather than to achieve certain “regulatory” results. Legislators’ interventions of course matter and have an impact on the way unfair terms control is put in place – as shown both in the first and in the second part of the book. However, “rewriting” the stories of unfair terms control to make them fit squarely into some regulatory agenda provides for a limited understanding of unfair terms control and contributes to up-keeping a static and one-faceted idea of contract law. This impoverished view, besides being rather unappealing, is far from innocent or harmless. The idea of private law as market-enhancing tool – the most successful of all regulatory paradigms – is happily embraced by conservative positivist scholars as it allows for discarding competing claims as to private law’s building blocks and normative underpinnings. To the extent that, in particular, addressing market failures is used as a justification for regulatory intervention, such explanation does not seem to challenge – even though it partially refocuses - the traditional (i.e. 19th century), mainly formalistic-technical account of contract law.

1.4. Methodology

The factors articulated in the previous sections, taken together, give shape to the hypothesis that the body of the book seeks to corroborate: namely, that the emergence of unfair terms control is – where it happens – a form of (deformalized) corrective justice developed within private laws subjected to the pressure of contractualisation. While many current accounts, albeit differing in many ways, imply that unfair terms control is an “interference” with contract law coming from outside, in particular in view of pursuing certain externally determined policy aims, thus, the book aims to undermine the distinction between a stable neutral inside and a moving, political “outside” by underlining the dynamic nature of what is “inside”.

The book is divided in two parts, with two different foci. Each part plays a specific role in corroborating my hypothesis.

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55 This connection, if truth be told, has been investigated by many authors through the study of consumer contracts, largely by claiming that consumer law exerts a certain “socialising” influence on contract law.
In the first part, I make what could be considered a negative case for my approach, by showing the limitations of the current standard accounts. In order to do so, in Chapter 2 I reconstruct the present state of the academic debate surrounding the topic of unfair terms in non-negotiated contracts and judicial control thereof in Europe by focussing on the 1993 European Directive on Unfair Terms on Consumer Contracts. This choice is justified not only by the great influence that this debate exerts on national developments due to the harmonization process instigated by the Directive’s adoption, but also by the specific nature of the contributions to the European debate, given their departure from traditional legal arguments into more substantive and non-positivistic discussion.\textsuperscript{56} These characteristics make an analysis of EU-level developments both relevant to achieving an understanding of present trends in the field and particularly useful for revealing the advent, legacy and limitations of explicitly “regulatory” justifications. Such limitations are, in particular, highlighted in Chapter 3 by showing how the core – regulatory – arguments in the debate fail to fully make sense of the Court of Justice’s adjudication in the field of unfair terms. CJEU adjudication is a particularly suitable place for identifying cluster of resistance to regulatory rationality since the Court is not a private law court. Its adjudication in preliminary ruling procedures concerns the interpretation of EU law – in this case, of a Directive addressed to Member States rather than to private parties.\textsuperscript{57}

In the second part of the book, I make a more positive case for my hypothesis. In particular, I seek to link the recent “contractualisation” of individual labour relationships to the development of unfair terms control in the area of labour contracts. This appears to be a relatively recent development in the field of unfair terms control: namely, its apparent extension to the field of labour law in two prominent European legal systems since the start of the 21\textsuperscript{st} century. In Germany, which was the country inspiring this study, judicial control of non-negotiated contracts has been extended to employment contracts with the civil code reform of 2001. In France, a provision allowing judicial control of “adhesion contracts” has been introduced in the Code Civil in the context of another momentous reform, finalised by presidential decree in 2016. The two reforms are introduced in Chapter 3. My analysis of both countries, however, does not start with the reforms. Much rather, it seeks to show the more recent developments as being rooted into - or at least as having been anticipated by – a longer-term process of

\textsuperscript{56} For an early reconstruction, see Martijn W. Hesselink, “The New European Legal Culture,” 2001, 33, 57ff.

judicial intervention making use of a number of contract law techniques in order to address contentious terms that the concerned courts were invested with. Hence, Chapter 4 presents salient clusters of pre-reform judicial intervention in both countries, trying to identify both the legal basis and the core arguments employed to justify such intervention.

The two next chapters in this part are informed by the analytical lenses of contractualisation: first, in Chapter 5 I propose an understanding of contractualisation that tries to connect broad phenomena and contractual practices in the field of personal work; second, in Chapter 6, I analyse how relevant classes of contractual arrangements (i.e. “terms”), identified on the basis of the framework proposed in chapter 5, have been dealt with in judicial practice in the two countries. The argument hopefully emerging from combining the two chapters is that terms have emerged in practice in line with what the contractualisation framework would suggest, and this has triggered a reaction in the form of litigation leading to the emergence - and later “institutionalisation” of unfair terms control.

Both the first and the second part of the book can be described as “case studies”. They definitely carry all the limitations usually associated with the case-study strategy: even when internally valid (which is difficult to say of hermeneutic exercises of the kind the book engages with), their external validity, or suitability for generalisation, is limited. I have explained above why I think the first case-study is particularly representative; much more severe limitations need to be acknowledged as to the second. The two countries chosen as object of the study have been selected for several concurring reasons: first, they were the countries where the discussion on non-negotiated contracts had been most vibrant, generating two “models” (see also infra, chapter 2) that are regularly assumed to

58 See Alan Bryman, Social Research Methods (Oxford University Press, 2016). The countries considered in the book could be taken to represent exemplifying cases, to the extent that their traditional influence in the discussion on unfair terms control makes them “representative” of broader clusters. Considered the traditional reluctance of legal systems against the incorporation of employment contracts within the reach of unfair terms control, however, these two cases can also be seen as “revelatory” cases in the sense indicated by Bryman: they allow us to study something which would not be visible elsewhere.

59 Bryman aptly observes that researchers should not think that a case-study is “a sample of one”. One cannot think that, by identifying “good” cases, the results of a case study can then be generalized to a class of objects. It is, simply, a different exercise. Furthermore, replicability is hard to guarantee when the methodology is the analytical work of one researcher – but this is a caveat that, in one way or another, applies to case-studies in law as well as to any other research effort in the field. Bryman, 55.
have been paradigmatic for most other European legal systems; second, their diverging approaches to labour law and to the relation between law (and legal scholarship) and politics made them an interesting starting point to look into whether these differences would affect the legal system’s attitude to the less-chartered territory of unfair terms in labour law; third, and related to the second, at the moment of starting the present research the assumption was that indeed no unfair terms control was taking place vis à vis employment contracts in France. My early – i.e. pre-reform – conclusions in this respect were that unfair terms control was already present in the system, as a cryptotype which has probably emerged with the new rules on adhesion contracts.

Finally, some limitations. However plausible the selection criteria, it is obvious that the thesis cannot prove – nor does it endeavour to prove – that unfair terms control emerges necessarily (i.e. everywhere), as a result of contractualisation. As to employment law, contractualisation likely occurs in the several legal systems which at the moment do not allow judicial review of non-negotiated terms in employment contracts, but the current diversity definitely testifies to the possible contingency of the developments I trace and correlation I draw. The thesis does not endeavour to define or outline the (socio-economical) conditions of possibility for such developments. Another limitation concerns other possibly relevant fields of inquiry – i.e. other areas arguably subject to contractualisation, from family law to personal data – which are also completely left out.

60 In the context of unfair terms control, it is common to contrast the “German” and “French” approaches. See compendium. More in general, the shortcut is common in comparative law: our own LLM programme in European Private Law, when dealing with national law, routinely falls back on French and German (and English) law as paradigmatic examples. See also Kötz’s classic Hein Kötz, European Contract Law, Second Edition (Oxford, New York: Oxford University Press, 2017).

61 Alain Supiot, Le Droit Du Travail: « Que Sais-Je? » N° 1268 (Presses Universitaires de France, 2019). Supiot distinguishes the French approach are more “political”, grounded in labour conflict and emphasising the role of the law; in contrast, German labour law appears as less conflictual, more based on (compromise found within) collective autonomy.


This limits my argument to an ex-post conclusion on instances in which we do choose to opt for unfair terms control. The argument, in a way, can be summarised with a simile from a different area of life. It is sometimes claimed that drinking moderate amounts of red wine may have benefits for our cardio-vascular activity – but telling ourselves that this is why we do it would be a slightly dangerous lie. What the book seeks to suggest is that unfair terms control may have some impact on weaker party welfare or market efficiency and it can make sense to give it shape in a way that contributes to these goals – but we would be on a rather self-defeating path to think this is the only reason why we, (contract) lawyers, do it.

1.5. Final remarks

The thesis uses a study in labour law, or at least on employment contracts, to make a point about unfair terms control and, ultimately, contract law in general. This strategy, which echoes a certain strand of works done – with different claims – in the field of contract law & consumer law,64 may appear controversial to contract lawyers and labour lawyers alike. Certain clarifications, thus, seem to be in order. First, the thesis assumes the relevance of contract law to the regulation of individual employment relations. It does not assume, imply or claim that the individual employment contract is the main source providing the rules applicable to those relations, but it does understand the contract as more than a mere point of accession to the employment relation. More strongly, it is a claim needed to sustain the argument defended in the thesis that the relevance of individual contracts (vis à vis other relevant sources) has increased over the past decades.65 In the second part of the thesis, I seek to illustrate and support this claim in the way and to the extent that seemed to best suit the nature of the book (see above); however, the claim is ultimately empirical in nature, thus my work and methodology cannot prove it. Additionally, claiming that “contractualisation” is taking place is not tantamount to endorsing it: I take here no stance as to the desirability of this development, which presupposes the diminished importance of collective labour laws, from a political or legal-political perspective66 – or from the perspective of labour law as a discipline with a claim to autonomy.

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64 Nathalie Rzepecki, Droit de La Consommation et Théorie Générale Du Contrat (PU Aix-Marseille, 2015).
65 See on this infra chapter 5, in particular 5.2. and 5.3.
Second, the thesis may (with some reason) be seen as attempting to undermine precisely this claim to autonomy. Besides my conviction that the main threat in this respect does not come from the corner of private law and private lawyers, but rather from the “regulatory” trend which is also discussed in the thesis, I do embrace the point just expressed on the relevance of contract law rules in the analysis. I do so implicitly by means of my research design and research aims; but also, explicitly, in my historical analysis and in the way I reconnect the French developments to the recent civil code reform, by highlighting a possible larger picture emerging from scattered instances instead of opting for a different reading of the same patterns. Thus, while I share most of the normative commitments traditionally and usually associated with labour law’s autonomous ethos, I can’t say the book commits in any meaningful manner to upholding or enforcing a disciplinary distinction between contract law and the law of employment contracts.

This reluctance is based on two main points: on the one hand, the conviction – which effectively lies very close to the book – that the separation between “social” labour law and “liberal” – i.e. laissez-faire – private law rests on a reified understanding of the latter. Next to being factually inaccurate in view of the way private law has developed in the past century, from the point of view of contract law debate, the distinction tends to reinforce the argumentative advantage of those who do advocate for such a “liberal” contract law over a more materialised, or at least contestable, image. In light of this, emphasising the distance between general contract law and the law of individual employment contracts may still be desirable if one believed such strategy to be an effective way of sheltering labour law in difficult times; however, I believe that in light of the mentioned “regulatory”

67 Simon Deakin’s The Law of the Labour Market was published already in 2005; the idea that workers should be protected not “from” the market but “in” it has been a keystone of the flexicurity agenda. For a pointed critique, see Ruth Dukes, The Labour Constitution: The Enduring Idea of Labour Law (Oxford Monographs on Labour La, 2014).


trends, the distinction may not have much to offer in terms of resistance to regressive distributional claims. At a time when labour law is increasingly conceptualised as “law of the labour market”, downplaying the interpersonal aspects connected with a contractual approach only seems to feed into a paradigm that displaces all concerns with justice to a narrow set of state interventions – an option which I don’t see as particularly appealing.
Part I

The “policy”\textsuperscript{71} discussion in European contract law and its limitations

Introduction

This part aims to unveil tensions between regulatory and non-regulatory or “private law” rationalities in a specific context: the EU (private law) developments concerning the Unfair Contract Terms directive. By the end of the two chapters, it should have become clear to the reader that, even though “EU” unfair terms control undoubtedly has – and especially \textit{has acquired} – a stark regulatory component, regulatory reasoning cannot easily stand alone. A private law dimension tends to resurface in the face of attempts to full-blown instrumentalisation.

In Chapter 1, the “regulatory turn” in the debate surrounding unfair terms control at in European private law is illustrated by juxtaposing the original explanations for the adoption of Directive 93/13 and the more recent academic debate. In Chapter 2, the tensions between regulatory and private law rationales are laid out by looking at salient aspects of the CJEU’s interpretation of the Directive.

In order to identify regulatory and private law elements in unfair terms discussions and adjudication, it must be made clear what the analytical framework for the inquiry will be. In the analysis, I take Schmid’s definition of corrective justice as a blueprint: thus, for the purposes of the present work, arguments that (mainly) justify an outcome with reference to the concerned contractual parties are taken to reflect a private law rationality, whereas arguments that mainly “make sense” with a view to concerns \textit{beyond} the parties to a specific relation and what justice requires between them are regulatory.\textsuperscript{72}

\textsuperscript{71} The 2008 Consumer law compendium realised on behalf of the commission devotes a section to “policy reasons” for introducing unfair terms control. None of the other chapters, covering all the main consumer law instruments in the \textit{acquis communautaire} of the time, include a comparable meta-positivistic section.

\textsuperscript{72} Schmidt defines commutative justice as meaning “that private law relationships are to be governed only by criteria originating in the relationship between the parties themselves” (see Schmid, “The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell,” 2011.. Obviously the blueprint above is less normatively pure and more pragmatic.
As discussed above, the distinction between regulatory and private law rationalities is one of questions asked, not of answers given. To the extent that they pursue external goals – market efficiency or consumer welfare – through the regulation of contractual relations, rules of contract law are seen here as regulatory irrespective of their specific content. This approach follows an established strand in regulation theory, that sees regulation as “the use of numerous institutions, tools and techniques to ensure the achievement of desired social goals”. The notion thus adopted is, notably, different from that embraced by approaches seeing regulation more or less exclusively as a means of addressing market failures. Such broad definition appears best suited to help drawing a workable distinction between “regulatory” and “private law” rationalities, by avoiding the creation of in-between categories; it also seems to be in line with the ideas implied by the existing literature referred to in the introduction. In a similar fashion, such a broad understanding of regulation seems to be embraced in the leading works expressly discussing the “regulatory function” of EU private law, and, crucially, in a conspicuously prolific project on “European Regulatory Private Law”, which, as we will see, has significantly contributed to making the “visible hand” of regulatory private law actually visible in the private law debate.

Chapter 2 will show how the arguments which dominate this discussion fall short of accounting for some significant features of the way the Unfair Terms Directive has been interpreted by the Court of Justice of the European Union. While most of the Court’s case-law has taken the Directive in a decidedly regulatory direction – in line with one or the other of the policy goals discussed in Chapter 1 – the

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73 F. Snyder, Better Regulation in EU law: variations on a theme, Peking University School of Transnational Law Research Paper No. 17-5, (2017) p 5 with further references.
75 Which would be necessary, it appears, if policy goals other than addressing market failures would be taken out of the realm of regulation.
76 See supra 1.3., in particular 1.3.1.
78 The theme is not discussed extensively in the setup of the project and it is left to pre-comprehension in most of the contributions which have been emerged from the project, but Micklitz defines regulatory law as “the law which is adopted in order to pursue particular political purposes” in a clarification note - see Micklitz, The Visible Hand of European Regulatory Private Law, “Yearbook of European Law.” (2009): 28.
complex set of rules and principles in which unfair terms control is embedded seems to resist overreaching instrumentalisation.
Chapter 2 Directive 93/13, justification and aims

2.1. Justification and aims of the Unfair Terms Directive

Until very recently, the Unfair Terms Directive was a “sleeping beauty”\(^79\) - if one that everyone was talking about.\(^80\) With very little litigation having reached the Court of Justice, it was close to impossible to have a comprehensive idea of its real harmonisation capacity and concrete effects on national legal practices. Even in this period, however, the Directive was a fascinating object of study for private lawyers - especially, but not only, those involved in the European Private Law debate. Next to its more straightforward symbolic value as the first “horizontal” instrument of EU contract law, the scholars’ fascination with the Directive has been plausibly explained by Thomas Wilhelmsson,\(^81\) who pointed out how one’s answers to the core questions concerning the proper approach to unfair terms are influenced by deeply entrenched and overlapping-but-distinguished background ideas. Thus, according to Wilhelmsson, how we view this question has to do as much with one’s disciplinary background as with their conception of the role of justice in contract law and, quite possibly, one’s general understanding of the functioning of humans and society. Frequently, these convictions will align: for instance, it seems plausible that people holding some strong assumptions as to human rationality will also believe in a restricted role for justice in contract law and will not easily see any problems with one-sided contract terms. Sometimes, they will not – somebody may believe that humans are, or ought to be, relatively rational, and still be in favour of unfair terms regulation on grounds of efficiency (see Section 1.1.2.2. below). The various layers which are at stake in the discussion, however, make it fertile ground for academic inquiry. In particular, marking or undermining the boundaries between the Directive and national “general” contract laws and their respective attitudes to freedom of contract has provided impulse for national commentators to delve into the question of the Directive’s justification and aims – to an extent that is unimaginable for more “sectoral” instruments.


\(^80\) On Google Scholar, the search “Directive 93/13” retrieves over two thousand entries for the period 1993-2013.

The national commentaries however are not the focus of the coming sections, which, after presenting an “internal” perspective on the reasons for adopting the Directive in 1993, will concentrate on theoretical arguments concerning unfair terms control (with an emphasis on consumer contracts) and connect such arguments to the basic features of the UTD as passed in 1993. The starting point for the discussion are the main arguments that have been presented in the (English language) debate on the Unfair terms directive itself or on other possible rules expressly addressing unfair terms control within harmonised European contract law (even though such arguments are further contextualised). The chapter furthermore only considers contributions which have expressly addressed the justification/aims question – the much vaster literature taking such justifications for granted and discussing individual rules or court decisions is not considered here but rather, where appropriate, in Chapter 3.

2.1.1. The Directive’s Aims in the view of the EU legislator

Directive 93/13 harmonised judicial control of “unfair” terms in non-negotiated consumer contracts. The recitals present it as being justified by a series of arguments mainly relating to the promotion of the internal market and consumer protection “across borders”:

“In order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of member states other than his own, it is essential to remove unfair terms from those contracts.”

From the first perspective (internal market), harmonisation was required since laws of Member States relating to unfair terms in consumer contracts “show marked divergences”. This could lead to unfair competition between sellers and suppliers subject to unfair terms control and their non-regulated competitors. By reducing such divergences, the Directive was expected to help stimulate fairer competition. The second aim, consumer protection when acquiring goods or services across borders, in practice catered to the sub-section of consumers who would not be able to rely on the application of their home-base mandatory

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82 Thus, for instance, the very important discussion of the quasi-legislative nature of standard terms as hypothesised by Raiser, or the “double collectivisation” issue as Micklitz has labelled it later on (both hinted to in Chapter 1 supra), is not discussed in Chapter 2 since it has not had significant resonance in the European debate.

83 Which – under then article 100 A EEC Treaty – was also the legal basis for the adoption of the Directive.

84 Directive 93/13 EEC, recitals.
consumer protection under the Rome Convention 1980– namely, those contracting with a provider who did not in any way direct their activities towards’ the consumer’s country of residence. While both reasons were mentioned also by the Explanatory Memorandum accompanying the first proposal put forward by the Commission in 1990, they seem to have appeared only at that stage – i.e. when a legal basis had to be established – and are absent from previous documents. In particular, the argument that the Directive should eliminate distortions of competition and foster consumer confidence was necessary to establish the EU’s competence to enact legislation under the internal market clause, but was not subject to– and would probably not pass – strict scrutiny.

The recitals further recall that successive consumer programmes had suggested that ‘acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts’, and that this protection “ought to be provided by laws and regulations which are either harmonized at Community level or adopted directly at that level”. The recitals, thus, do not directly delve into the substantive reasons for regulating unfair terms in consumer contracts, but rather concentrate on justifying the need for harmonised rules. To use Joerges’ words, harmonisation reasoning “remains indeterminate as to the substantive content of harmonisation measures”.

For more substantive justifications, readers of the recitals are directed to the Community’s own programmes on consumer protection and consumer information of 1975 and 1981. Indeed the programme of 1975 mentioned unfair

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86 See the Commission communication presented to the Council on 14 February 1984 (based on COM (84) SS final), Bulletin of the European Communities Supplement 1 /84.
89 Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy OJ No C 92, 25. 4.
terms, under the heading “protection of the economic interests of consumers“, as the first of a number of “principles” which would guide the Commission’s actions:

“Purchasers of goods or services should be protected against the abuse of power by the seller, in particular against one-sided standard contracts, the unfair exclusion of essential rights in contracts, harsh conditions of credit, demands for payment for unsolicited goods and against high-pressure selling methods.”

Already within the short text included in the consumer programme, different possible rationales seem to transpire: insofar as the “economic interests of consumers” are concerned, it was already clear at that time that such interest may not be immediately or univocally threatened every time “one-sided” standard terms are used, since such terms may allow the trader to demand a lower price in return for its services. Lamenting the imposition of one-sided standard terms by means of “abuse of power” by the trader seems to imply a different concern – namely, that the consumer’s ability to self-determine, or contractual autonomy, has been harmed.

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90 Council resolution 1975, para 19 (i).

91 As Beale had already pointed out, the rationale matters to determining whether in this case terms should be invalidated: “Is the aim to prevent exploitation, so that a transaction under which the consumer gets ‘value for money’ is not improper even if it is harsh, or will other forms of harshness justify intervention? If the term reduces the protection that the consumer would have received under the facultative rules, but there is evidence that the term has led to the consumer being charged less, is the ‘balance’ restored?” Hugh Beale, “Inequality of Bargaining Power,” Oxford Journal of Legal Studies 6, no. 1 (March 1, 1986): 123–36, https://doi.org/10.1093/ojls/6.1.123. The price argument is however contentious see Leone Niglia, “The Rules Dilemma-The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe,” Colum. J. Eur. L. 13 (2006): 125.

92 Ebers, in the Consumer law compendium, writes that abuse implies that “in view of the economic, social, psychological and intellectual superiority of the business the customer has no choice other than to submit to the clauses in question.” See Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers, EC Consumer Law Compendium: The Consumer Acquis and Its Transposition in the Member States (Walter de Gruyter, 2009), 338.
When reconstructing “the problem” with unfair terms in contracts concluded with consumers, the Commission’s communication of 1984\textsuperscript{93} concluded with a quite principled observation:

“The widespread use of standard contract terms can thus be seen as calling into question the consensual basis of contract law. It was long believed that the provisions of the general law ensured an equitable balance between the parties to a contract, while parliament and the courts saw to it that this balance was maintained. Since the parties to a contract may in so many cases derogate from the law’s provisions, however, the equitable balance which such laws might have guaranteed is almost never achieved, because suppliers use standard terms designed primarily to protect their own interests.”\textsuperscript{94}

The text does not necessarily express concern with the weak position of consumers \textit{vis à vis} traders, even though it suggests that drafting terms in advance grants the latter a stronger bargaining position.\textsuperscript{95} The concern is mainly with the lack of negotiation \textit{per se},\textsuperscript{96} coupled with fact that the standard terms used by traders routinely upset the balance stricken by the law by means of default rules.\textsuperscript{97}

Next to harmonising the control of standard terms in consumer contracts in the (many) member states which had already introduced relevant legislation, the Directive led to the introduction of unfair terms in consumer contracts rules in three countries – Italy, Greece and Belgium – where no specific rules had been adopted before. Filling a gap in these three countries may have been an additional reason for the Commission to push forward the harmonisation proposal. A climate generally favourable to the expansion of European intervention in “social” fields may also have played a role.\textsuperscript{98} The Directive marked the first European inroad into

\textsuperscript{93} Unfair terms in contracts concluded with consumers, Commission communication presented to the Council on 14 February 1984 (based on COM (84) SS final), Bulletin of the European Communities, Supplement 1/84.

\textsuperscript{94} Commission Communication, p. 6.

\textsuperscript{95} Point 14: “Since the terms were designed, drawn up and applied unilaterally by the supplier, they improve their bargaining position.”

\textsuperscript{96} Point 12: “The standard terms are drawn up without the consumer’s participation, so he is unable to assert his interest and ensure that they are reflected in the terms.”

\textsuperscript{97} Again Point 14: “Whereas the law generally ensures a certain equilibrium between the various interests involved, it is not the purpose or effect of standard term to establish a fair balance.”

\textsuperscript{98} Consider, for instance, the adoption of the Community Charter of the Fundamental Social Rights of Workers in 1989, and, in the field of consumer protection, the Doorstep Sales Directive of 1987. Weatherhill presents it as an example of directives adopted “pursuant to the Treaty-conferred competence to harmonise with no serious explanation or expectation
the general contract laws of the Member States, playing a fundamental role in stimulating private lawyers’ interest in European law and policy and even attracting the attention of prominent non-specialists\textsuperscript{99} to issues of contract law.

\textbf{2.1.2. The academic debate}

For the first few years after the Directive’s adoption, commentators were mainly busy analysing its specific contents and trying to predict its impact on the private laws of the different Member States, also with a look to the various implementation strategies put in place by national legislators. Around the turn of the Century, the European private law debate received unprecedented impulse thanks to the Commission’s announced intention to investigate possibilities for further, and much more comprehensive, harmonisation or even unification. The prospect of extensive law-making exercises to come opened up the question of what rules would have to be adopted, and with that the quest for justifications supporting the one or the other rule.\textsuperscript{100} Unfair terms rules, and in particular questions concerning their scope, have been intensely discussed in the past two decades in the main European private law fora.

The next two sections will reconstruct the main arguments put forward in the debate concerning unfair terms control on EU-level platforms, setting aside national developments. This limitation indirectly also bears on the time-frame considered – I will not discuss here the discussions which, in the second half of the twentieth century, surrounded the adoption of unfair or “standard terms” legislation in various member states. As already done in the introduction, I defer on this point to the many existing studies on the issue.

\textbf{2.1.2.1. The weaker party argument}

Weaker party protection is a familiar formula in contemporary private law. It can cover certain trends in general civil law\textsuperscript{101} as well as rules of “special” contract


\textsuperscript{100} “The CFR can restore the full picture of social justice issues in private law question of which the Community legislator has lost sight as a result of the limits posed by the functional competences attributed to the Union.” Martijn W. Hesselink, \textit{CFR & Social Justice} (Walter de Gruyter, 2009), 16.

law involving consumers or tenants. The notion has been known to private lawyers and private international lawyers for a comparatively long time. Depending on the preferred nuance, it can refer to a concern with possible discrepancies between one party’s formal expression of private autonomy and the requirements of a substantial exercise of such autonomy. In a stronger version, weaker party protection can be expressly paternalistic, i.e. exclude certain options from those available to (certain) parties in pursuit of the party’s “real” best interest – based on the assumption that they are not in a position to judge for themselves what preserving such interest requires.

Categorical protection such as that afforded to consumers, is not necessarily the same as the protection of individual parties – it will be at times over-comprehensive and at times under-comprehensive, generating possible disparities of treatment between similar cases. This categorical protection possibly – but not necessarily – engages with (and raises) questions of distribution. “Consumers” or “workers” could be seen as a proxy for individuals actually needing protection. They may also, however, be seen as groups whose interests are advanced or protected vis à vis the interests of a different group – typically, providers or employers. When consumer protection emerged, it emerged in a


104 The latter version is quite close to an approach based on public morals rather than the protection of “weak” individuals as such. Consider classical examples such as the sale of parts of the human body, surrogacy or the case for and against “dwarf tossing”: is it easy to see that paternalistic and other perfectionist arguments can lead to partially overlapping results, as discussed by Marella, “The Old and the New Limits to Freedom of Contract in Europe.”
number of national legal systems as part of the welfare state, most prominently in the central part of the past century. The debate on weaker party protection in contract law was partially separated, partially influenced by this development – it was not necessary to be at all time clear on whether one meant weaker party as a proxy or as a matter of distribution. Starting in the nineteen eighties, however, the EU has taken up a large part of the rule-setting activities.105

The protective intent of EU consumer law was acknowledged in early commentaries:

“[The European legislator] has become increasingly inclined to differentiate between types of contracting parties, such as employees, consumers, tenants, and companies. It has also revealed a willingness to recognise norms of solidarity, such as requirements of trustworthy conduct, carefulness in dealings and performance of obligations, and protection against inequality of bargaining power. These strands all appear in the Directive on Unfair Contract Terms, which mirrors the developments in private law in many legal systems. The rejection of abstraction and universalism, and a disposition to respond to the expectations of participants in the market, brings private law closer to the cultural roots of the communities which it regulates.” 106

In the context of non-negotiated (consumer) contracts, inequality between the parties exists already because the trader’s standard terms are usually offered on a take-it-or-leave it basis. The consumer does not have the chance to negotiate such terms, which are typically drafted in advance to be applied to a countless number of transactions. Noticeably, when a reference is sought for the weaker party argument in the context of European unfair terms rules, the choice often falls on an old North-American piece, namely “Contract of adhesion: some thoughts on freedom of contract” by Friedrich Kessler.107 The article, dating from 1943, does indeed argue that

105 Rösler has aptly pointed out, in this respect, that – within private law – a division of labour seemed to exist after the EU’s intervention in consumer law: “standardised inferiority” was to be taken care by European legislation, while individual inferiority was left to decide upon at Member State level. See Hannes Rösler, “Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law,” European Review of Private Law 18, no. 4 (2010): 729–756.


107 The piece has become such a classic in the discipline that it by now makes part of the “law commons” series made available by Yale Law School, see http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3728&context=fss_papers.
“[s]tandard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.”

The “weakness” considered in this analysis was not necessarily of a socio-economical nature; all it all, it seems plausible that even a very rich customer would most likely just have to accept the standard terms drafted by e.g. their laundry service providers. The weakness was relational – i.e. the consumer was in this sense “weak” vis à vis the provider, but not necessarily in absolute terms. Even though, indeed, one need not be destitute in order to be faced with a “take-it-or-leave-it” contractual offer, this way of contracting is quite far from the exercise of contractual autonomy on which continental private law codifications were based. A very limited understanding of contractual autonomy needs to be brought forward in order to “normalise” this image– namely that the non-drafter could always decide to refuse the offer and “shop around” for better terms. Not for nothing had earlier scholars like Saleilles rejected the qualification of standard terms as contracts: most contract lawyers would probably agree that the thin consent exercised by a party accepting standard terms does not provide the same legitimating force of an actual negotiation.

The idea that when consumers are faced with a “take it or leave it” offer, even on otherwise competitive markets, they will usually have to accept has intuitive appeal and has been often used by lawyers in the course of the 20th century.  

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109 See e.g. Patrick Selim Atiyah, Essays on Contract, 2nd revised (Oxford University Press, 2012). In his essay “Freedom of contract and the new right” Atiyah struggles to explain how, as a supporter of the so-called new right, he can still not do away with the feeling that freedom of contract should not be left unrestricted. If the hypothesis in the book is correct, Atiyah had (in his scholarship already) more or less all the elements that he needed in order to answer this question.

110 See Rösler, “Protection of the Weaker Party in European Contract Law,” 742. See also footnote 65- quoting Reiser.

111 The Commission’s proposal called the application of normal rules on consent to consumer contracts “something of a fiction”. COM(90) 322 final I 2- SYN 285 p.2.

112 Again, the Commission’s 1984 Communication (fn. 14 above) reasons at point 9: “(…) very few consumers will be sufficiently well informed to do so; and those who try, for example,
The Directive’s recitals\textsuperscript{113} and, more recently, the language used by the Court of Justice to describe the Directive’s aims, both emphasise how unfair terms control aims to redress consumers’ weakness. Starting with Oceano [para 26], the Court has reproduced the same language in a large number of decisions concerning the Directive:

“the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.”

The consumer is thus seen as being unable to influence the contract’s content (lack of bargaining power) and lacking important information on the content of the contract or of, possibly, the negotiation itself (level of knowledge).\textsuperscript{114} The last weakness may be addressed by procedural measures: this involves, we will see, the timely provision of pre- and contractual information and by a way of drafting that does not make the contract’s conditions untransparent.\textsuperscript{115} However, substantive balance also matters. If this balance is lacking, the Directive’s remedial provision

“is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.”\textsuperscript{116}

\textsuperscript{113} As mentioned above, one of the recitals says that “acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.”

\textsuperscript{114} It stands out that in this context the parties’ different level of knowledge is seen as a form of weakness rather than as a market problem - or as a market problem originating from a weakness, as phrased by Josse G. Klijnsma, “Oneerlijke Bedingen Onder Het Voorstel Voor Een Gemeenschappelijk Europees Kooprecht: De Positie van KMO’s,” \textit{Tijdschrift Voor Consumentenrecht & Handelspraktijken (TvC)}, no. 3 (2013): 109..

\textsuperscript{115} See C-92/11, \textit{RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.}, ECLI:EU:C:2013:180. In this way, information is not so much something the consumer really bases their decision on (though this point is also put forward in RWE) as a tool to manage the contract afterwards, especially when something goes contrary to the party’s expectations.

\textsuperscript{116} “As regards that weaker position, Article 6(1) of Directive 93/13 provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the
In the more recent academic debate, however, not many\textsuperscript{117} seem willing to defend weaker protection as a proper goal of Directive 93/13.\textsuperscript{118} When weaker party protection is discussed, the Unfair Terms Directive is usually mentioned with some caveats,\textsuperscript{119} although its inclusion may be mainly due to its symbolic relevance within European private law.\textsuperscript{120} The intuitively appealing reasons offered in previous discussions seem to have lost ground; when a particular decision on the Directive is discussed more in depth, its specific relevance is related to external factors – e.g. “hidden constitutionalisation”.\textsuperscript{121} Only occasionally the Directive’s protective mission is taken sufficiently seriously to mount more articulated critique of its failures.\textsuperscript{122}

This development can be explained, I think, by the following three reasons: first, the contents of the directive; second, the difficult position of weaker party position in post-national debates (expressly non-positivistic) debates; third, the specific context in which discussions on the Directive have been taking place. As concerns the contents of the Directive, several authors\textsuperscript{123} have noticed that some of the fundamental features of unfair terms control under the Directive, such as the exclusion of core terms and the focus on non-negotiated contracts, are not consistent with a weaker party protection approach. If the consumer is in a weak

\textit{parties with an effective balance which re-establishes equality between them} (see Mostaza Claro, paragraph 36; Asturcom Telecomunicaciones, paragraph 30; Case C-137/08 VB Pénzügyi Lizing [2010] ECR I-10847, paragraph 47; and C-453/10 Pereničová and Perenič [2012] ECR, paragraph 28)."

\textsuperscript{117} Except for Hondius, “The Protection of the Weak Party in a Harmonised European Contract Law.”

\textsuperscript{118} Except for Hondius.

\textsuperscript{119} Rösler, “Protection of the Weaker Party in European Contract Law.”

\textsuperscript{120} Geraint Howells, Thomas Wilhelmsson, and Roger Brownsword, \textit{Welfarism in Contract Law} (Dartmouth, 1994).


position vis-à-vis the supplier, the criticism goes, they will not be better positioned to secure a fair price than to discuss liability terms, and when trying to negotiate they may land in an ever worse position than other consumers subject to the supplier’s standard terms. The Directive’s approach, concentrating harmonisation efforts on unfair terms control as a private law mechanism brought about primarily by way of individual litigation, can also be criticised as a device tailored more to sophisticated actors (those who are likely to bring their case in court) than to really “weak” ones. Next to saying very little on collective and administrative enforcement, the Directive is silent on alternative institutional arrangements, such as the negotiation of “fair” standard terms between professional and consumer organizations, which are arguably more effective in securing the interests of the weakest consumers.

Weaker party protection through contract law is in turn a fairly fraught terrain – in general and certainly with reference to unfair terms control. As said above, weaker party protection is seen as part of “welfarist” contract law – i.e. contract law based in the ethos of the welfare state. “Welfarist” here is thus not meant as “welfare-maximising”: not all welfarist contract law, or the reasons behind it, are regulatory in the sense intended in this book. Under this broad notion, Wilhelmsson placed very different measures and agendas – ranging from mandated disclosures to the Nordic law idea of social force majeure and (accordingly) from market enhancement to “public values “welfarism”. He also, however, usefully highlighted how those several different perspectives intertwine when discussing weaker party protection. Not all these perspectives apply to unfair terms control, which Wilhelmsson finds to have no redistributive ambition but to be based in a version of corrective justice and aim to “rectify outcomes of the market mechanism in order to promote acceptable contractual behaviour”.

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124 Hesselink, “Unfair Terms in Contracts between Businesses.”
125 The directive, as such, draws the contours of the substantive mechanism but leaves all procedural matters to the member states, subject to the requirement – at article 7 – that “adequate and effective means exist to prevent the continued use of unfair terms”. This requirement includes, according to art 7(2), allowing private or public organisations to bring actions, but establishes no further rules concerning the concrete set-up of such collective or public enforcement mechanisms.
127 Wilhelmsson, “Varieties of Welfarism in European Contract Law.”
Wilhelmsson, however, provides no elaboration on how the measure of acceptable contractual behaviour should be identified.

A decade later, Hesselink\textsuperscript{128} observed that some of the most plausible justifications for imposing limits to contractual autonomy – market ethics or some versions of paternalism – are rather illiberal. Within individual legal systems, manifestations of such motives may be taken for granted, i.e. as having been enshrined (to different degrees) in the system. In the openly normative academic discussions sparked by the Commission’s start-of-the-century law-making agenda, such perfectionist – but also contingent – motives have gained less traction.\textsuperscript{129} The European intervention created a starker division between individual and collective protection: the relatively porous boundaries between the two at MS level became harder and individual protection fell out of fashion. What remains, due especially to the abundance of German scholars in the debate on unfair terms legislation, is rather some acknowledgement of the impossibility to rely on the “legitimising effect” of consent in the case of contracts accepted without knowing their terms, which in general justifies a restriction of formal private autonomy in view of fostering the substantive exercise of that same autonomy.\textsuperscript{130}

When the discussion falls onto distributives ambitions as a justification in the field of unfair terms control – as with all consumer protection – the challenge of backfiring or adverse redistribution cannot be averted: if unfair terms control is effective in clearing consumer markets of bad terms, will this not likely mean that consumers on average will have to pay more for the same products, because providers will transfer to them the costs associated with the better terms? Is unfair terms control, thus, going to generate upward redistribution – from less to more privileged consumers?\textsuperscript{131} The question raised is of empirical nature and sometimes its purchase and bona fide nature have been questioned,\textsuperscript{132} but it is particularly

\textsuperscript{128} Hesselink, “Unfair Terms in Contracts between Businesses.”

\textsuperscript{129} Rösler, “Protection of the Weaker Party in European Contract Law,” 742. Rösler has aptly pointed out, in this respect, that – within private law – a division of labour seemed to exist after the EU’s intervention in consumer law: “standardised inferiority” was to be taken care by European legislation, while individual inferiority was left to decide upon at Member State level.

\textsuperscript{130} See Rösler, 742. See also footnote 65- quoting Raiser.


troublesome for anyone who is in favour of pursuing some form of social justice via private law.

With reference to the Directive, the different purchase of established arguments, however, is also owed, as Micklitz has claimed, to the specific characteristics of the directive vis-à-vis national legislative instruments and the different contexts in which these were respectively adopted. The effectiveness of unfair terms control as an instrument for improving consumer welfare has been questioned. This seemed particularly problematic in the context of harmonisation efforts after the year 2000, when the EU law framework that was quite shattered by the Tobacco judgment. Besides the more general questions concerning the relationship between minimum harmonisation and internal market, the case set in motion important changes in the ways in which successive harmonisation instruments were presented and framed, prompting the Commission to place much more emphasis on the internal market arguments justifying legislative intervention.

This further contributed to framing discussions on consumer protection in regulatory terms – if not to pursue some overall measurable goal, why was the EU involved in the first place? An efficiency analysis seemed, at this point, to provide for more consistent answers – at least on a theoretical level.

2.1.2.2. Market failure argument
An alternative argument ‘justifying’ unfair terms legislation, indeed, is based on an economic analysis of law. From that perspective, the mere facts that a party’s autonomy may not be respected or that specific terms may not be fair are not of


136 The relationship was a complex one from inception – for a critical analysis completed just before the Tobacco judgment, see Michael Dougan, “Minimum Harmonization and the Internal Market,” Common Market Law Review 37, no. 4 (2000): 853–885. Given such tensions, the judgment could be seen as providing impulse for the Commission to move on to a maximum harmonization agenda – see Marija Bartl, “Legitimacy and European Private Law (EUI Thesis),” Available at SSRN 2142798, 2012, 137.

particular relevance. Instead, the focus is on the fact that consumer contracts are typically mass contracts, and the question that needs to be asked is whether mass contracts generate market failures. Do non-negotiated mass contracts generate inefficient results? A finding in this direction would, in turn, constitute an economic justification for targeted interference with market mechanisms. The economic analysis of standard contracts is undoubtedly a well-developed, though also ever-evolving, field.

Several lines of reasoning based on market failures have been identified in the field of non-negotiated terms. They will be recalled here with the aim of correctly identifying the most salient issues relevant to a market approach to unfair terms control. This, in turn, will be useful to identify the characteristics of Directive 93/13 which seem to square with such an approach and those which do not.

Does lack of negotiation, then, lead to market failures? It is a relatively intuitive idea, fitting well with contract law thinking,\(^\text{138}\) that when terms are not negotiated, this likely leads to sub-optimal contractual content. Negotiation is, indeed, supposed to be the mechanism through which each party asserts their interests, leading to an efficient exchange which effectively reflects the parties’ preferences. However, negotiation is expensive too, thus there are good reasons- from an individual and societal point of view- to adopt standardised contracts. Standardisation lowers transaction costs.\(^\text{139}\)

In the context of mass contracting, however, whereby one party only makes use of standard terms, the parties have very different information and incentives when approaching the contract. The drafter knows the contract’s content much better, and has an interest in using it as a means of optimising their business over several transactions. They have, thus, good reasons to invest in careful drafting, and to use that drafting to tilt the contract’s content to their advantage. The other party, if they are not a repeat player and the stakes are not particularly high, have few incentives to acquire information concerning the contract’s content. As a consequence, they are not aware of the potentially disadvantageous terms and therefore may enter a contract on conditions they wouldn’t consciously accept. This is typically, but not exclusively, the case with consumers.

This approach can be roughly labelled a “transaction cost” approach. It leads to the conclusion that non-negotiated terms must be regulated and has (as such)

\(^{138}\) And in particular with the idea of procedural justice.

prominently been introduced to the European debate by the much-read 2008 “Consumer Law Compendium”.\textsuperscript{140} In that context, the “transaction cost” argument is presented as describing the historical reasons for regulation adopted by individual member states, and Germany in particular.\textsuperscript{141} This is rather bold considering that the very notion of “transaction cost” became popular\textsuperscript{142} only after the German rules on standard terms were adopted, which in turn happened at the end of an extremely lengthy legislative process. However, the argument does not capture relevant developments in the legal-economic debate concerning the regulation of mass contracts: as will be discussed below, not many of those engaging in economic analysis of standard form contracts would subscribe to the idea that the consumer’s non-reading attitude is a problem in itself.\textsuperscript{143}

The economic case for regulation, is not satisfied by pointing at non-negotiation, transaction costs or information asymmetries: the question is whether these phenomena lead to (net) efficiency losses, that is if they lead to different terms than the ones we would observe under a regime of perfect competition. While negotiation and “informed” consent are central to classical contract law, their role can be reduced to none in economic terms – to the extent that efficiency is secured by other elements in the market mechanism. This forms the background for a second strand of “economic” arguments, more sceptical about the need to allow (judicial or otherwise) control of non-negotiated contracts. When a party fails to negotiate/read the contract, the reasoning goes, their attitude is to be read as rational apathy:\textsuperscript{144} for that party, it is most beneficial (and thus, rational) to save the time and effort that it would take to engage in reading/negotiations.

Market competition, according to an important strand of US-based scholars, will make sure that the contract’s drafter does not take undue advantage of the circumstances. Assuming that consumers dislike one-sided terms, too many such terms would lead customers who do read the contract (the so-called “informed

\textsuperscript{140} Schulte-Nölke, Twigg-Flesner, and Ebers, EC Consumer Law Compendium, 2009.

\textsuperscript{141} Schulte-Nölke, Twigg-Flesner, and Ebers, 337 ff.


\textsuperscript{143} See e.g. Ian Ayres and Alan Schwartz, “Remedies for the No Read Problem in Consumer Contracting,” in Stanford Law Rev, 2013. According to Ayres and Schwartz, consumers often predict how bad the terms are. Only “unpredictably bad” terms should be subject to restriction in their view.

to abandon the greedy provider, damaging their business. In principle, thus, an intervention will be required only when there are specific reasons to believe that in a certain market these corrective mechanisms are not taking place. This analysis, which still holds considerable ground across the Atlantic, is not equally successful in Europe. As we will see, the reconstruction is challenged by other approaches. A further challenge comes from empirical studies that question the existence of a sufficiently numerous group of reading consumers.

Other strands of North-American legal-economic analysis, which focus on behavioural and decision-making processes, concentrate their suspicions not on the parties’ access to relevant information, but rather on their (our) failure to process that information. Recent contributions insist on the fact that humans tend to a) take their decisions on the basis of a limited set of possibly ill-chosen parameters and b) systematically err in appreciating how those factors will actually work out as the contract is executed—especially when a time dimension is added.

First, psychological research shows that humans presented with complex choices tend to focus their decision-making on only a few issues which are “salient” to them and to factor other elements out. In the context of contractual decision-making, this means in the first place that we tend to concentrate on the basic features of the good that we seek to achieve and most notably on its price, while


146 One interesting feature of the unfair terms control system set by the Directive, or more in general of a system relying on open norms applied ex post, is that it can be modelled differently according to the guiding ides, so for instance A. Hatzis has suggested that the Directive poses no problem as long as it is only applied to cases where certain market problems are ascertained, instead of where terms are “unfair” in light of the moral or normative assessment by the concerned judges. See Aristides N. Hatzis, “An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts,” in *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, ed. H. Collins, vol. 15, 2008, 43–56.

other elements, most prominently those concerning the contract itself, tend to play a (much) lesser role.148

In the second place, even within the few parameters that are taken into account, several biases affect decision-making negatively.149 Often mentioned in consumer law studies are the “optimism bias” and so-called “hyperbolic discounting”. According to the first, we tend to overestimate ourselves in comparison to our peers and thus our ability to keep our promises, also in the face of others’ failure to deliver on the same terms. The second bias suggests that we overly “discount” the value of events which seem temporally remote, irrationally sacrificing our actual long-term preferences to present satisfaction.

This “behavioural” approach has recently attracted much interest in Europe and in certain member states. We will use a decision from the United Kingdom to illustrate with an example how behavioural insights have been and can be incorporated in the discussion over unfair terms control.150 The decision concerns a gym chain’s standard contracts, which were offered in a number of variations all requiring the consumer to commit to the gym for a certain amount of time. The court ruled the minimum duration terms invalid, validating the Office of Fair Trade’s submission that complaints it had received

“demonstrate that consumers tend to overestimate the use they will make of their gym club memberships, that unforeseen circumstances often make it impractical for members to use the gym facilities, and that often a monthly payment that may have been affordable at the beginning of the agreement ceases to be affordable before the end of the minimum membership period. Mr. Jason Freeman has exhibited to his witness statements many such complaints. They also reveal that consumers often do not appreciate that they have entered into an agreement which requires them to remain a member for a minimum period until they seek to bring it to an end. Indeed statements have sometimes been made to them which have positively misled them into believing that they have a right to terminate under their agreements when in truth they do not.”151

151 OFT v Ashbourne, para 133.
In a similar vein, it has been argued that the reasoning on (unfair) contract terms should incorporate insights that suggest that in long terms contracts consumers are often “seduced” by short-term advantages and tend to ignore higher costs which will only arise at a later stage.\(^{152}\) This means that even some “main” (or “core”, or salient) contractual issues might escape the (effective) operation of market forces.

While these perspectives all offer valuable insight, the most established approach to Directive 93/13 and market failures builds on the notion of “market for lemons”.\(^{153}\) The theory is based on information economics. The premise of this argument is similar to the ones we have just examined: the market for contract terms does not work as it should. Consumers, due to transaction costs or biases, do “not reward high quality contract terms”,\(^{154}\) i.e. they do not pay more for better terms.\(^{155}\) As a consequence, producers offering better terms- which are costly for them- are put at a disadvantage against competitors using worse terms. Market forces tend to draw the quality of terms down. Eventually, the argument goes, downward competition might lead consumers to leave a market which no longer offers terms of acceptable quality. Some regulation can just be justified in order to prevent such perverse operation of the market.

The market for lemons justification claims\(^{156}\) to give a good account of several relevant aspects of the directive, including the exclusions of “core” terms from control and the Court of Justice’s refusal to give a too concrete specification of what “unfairness” entails as a standard. From this perspective, the language used by the Court of Justice to invoke the need for consumer protection appears spurious. The fact that such language has not only been repeated, but also appears to have been reinforced since the time that the theory has been exposed may be seen to undermine the theory’s explanatory value, but the next chapter will

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\(^{153}\) Korobkin, “Bounded Rationality, Standard Form Contracts, and Unconscionability.”


\(^{155}\) In more nuanced terms, the contention is that consumers do not base their choice of a certain product or service on the provider’s standard terms, or only on a small part of these. Given similar products, they will choose cheaper products over more expensive products coming with “better” terms. This assumption is of course reinforced by the insights on consumer behaviour discussed above, but does not rely on them.

attempt at providing a somewhat more sophisticated argument in a similar direction.

2.2. European private law and the rise of “aims” discussions

A broader look suggests that the regulatory turn in the unfair terms debate should not come as a surprise. European Private Law has emerged in radically different ways than its national counterparts. The EU’s institutional mission of creating and upholding the so-called internal market has deeply characterized its efforts in the domain of private here, contract- law from the beginning on. As has been argued by several authors, this stems as much from the Union’s limited competences in the field of private law and institutional designs as, especially since the first Barroso commission, from the interaction between the factors just mentioned and a specific pro-market ideology.

Harmonisation of certain fields of private law has sometimes been presented as a market-creating mechanism, securing the establishment of a “level playing field” among actors in different Member States and, more recently, removing obstacles to cross-border trade. In the last part of the 20th century, this connection has

157 Although national private law systems are arguably also subject to transformation in a similar direction. See Guido Comparato, “Public Policy through Private Law: Introduction to a Debate on European Regulatory Private Law,” Eur. LJ 22 (2016): 5.


160 Note the difference between the Unfair Terms Directive, which, at its second recital, only mentions “distortions of competition” arising from the existence of different national rules, and the 2011 Consumer Rights Directive, which, while emphasising the need to strike a balance between consumer protection and business competitiveness (at recital 4), expressly refers to legislative differences as “internal market barriers affecting traders and consumers”. Existing disparities, according to recital 6, “increase compliance costs to traders wishing to engage in the cross-border sale of goods or provision of services. Disproportionate fragmentation also undermines consumer confidence in the internal market.” The 1985 Product Liability Directive mentions distortions of competition in a way similar to the UTD and adds disparities in consumer protection level as a problem in itself (first recital, which also mentions that differences may affect the free movement of goods, but does not say how this would happen). Within the Doorstep sales Directive, the language was even more unsophisticated,
allowed the Commission and the Member States to formally establish the Union’s competence to enact harmonising measures, under the banner of then article 100 TEC (now, with modifications, art 114 TFEU). While the choice of legal basis might have been a mere matter of expediency at the time, it has markedly influenced the following developments of EU legislation in the field of consumer protection. In this respect, it may suffice to recall that article 169, the TFEU provision establishing a specific competence for consumer protection, details two “routes to consumer policymaking”: the most prominent, still, refers to the internal market (article 114 TFEU); the second, which enables the Parliament and Council to enact legislative measures “which support, supplement and monitor the policy pursued by the Member States” has seldom been used.

On other occasions, harmonisation has been the consequence of market creation; such is the case of the liberalisation of formerly public services, which has engendered the need for some special regulation of, inter alia, energy supply contracts. The EU, indeed, “has taken over the competence of most of those specific areas of the economic system that are considered as in a particular need of regulation” – which is an additional explanation of the distinctively regulatory outlook of its interventions in private law. The tight connection between private law and market making within the Union has been emphasised-or decried- by many authors. The only divergence, indeed, seems to concern the authors’ normative stance vis à vis such connection. What they all seem to agree on is that it is impossible to look at European private law merely stating that rules on contracts concluded away from business premises had to be harmonized because “any disparity between such legislation may directly affect the functioning of the common market” (second recital). This is in striking contrast to, e.g., the elaborate justifications of the need of new consumer sales rules to be found at recitals 3-5 of the recent proposal of 31 October 2017, COM(2017) 637 final.

161 See, with reference to the UTD, Weatherill, EU Consumer Law and Policy, 147.
162 For a compelling critique, see Bartl, “Internal Market Rationality.”
163 Weatherill, EU Consumer Law and Policy, 17. More recently, Stephanie Law, “The CJEU’s Interpretation of the Consumer: What Significance of Judicial Cooperation?,” in Judicial Cooperation in European Private Law (Edward Elgar Publishing, 2017), 167–68. Law still observes that art 169 (rectius, its pre-predecessor art 129.a(2) of the Maastricht treaty) has been used as legal basis only once since the possibility was established in 1993, for Directive 98/6 on consumer protection in the indication of the prices of products offered to consumers. According to article 169(4) TFEU, the legal basis as provided by article 169.2(b) and 169(3) can only be used for minimum harmonization measures.
164 See, again, Weatherill, EU Consumer Law and Policy, 18.
166 See Chapter 1, 1.3. and Chapter 2.
and see the seemingly technical, non-instrumental body of rules that national private laws have long been considered to represent. The “instrumentalisation” of private law, of course, is no invention of the European Commission(s): along the twentieth century, private law rules have been used to various ends. Within the context of European private law, however, this trend is particularly strong and is tilted towards one particular end - again, the internal market.

In this respect, consumer (protection) law is a terrain for ideological contention. While there is a certain consensus that the market - whether its creation, opening, expansion- is a central concern to European consumer legislation, very different ideas are represented concerning the degree to which non-market aims are and should be pursued as well. In recent years, the notion of EU-originated private law as “regulatory” private law has gained ground as a descriptive-explanatory tool thanks to the work of the research team led by Hans Micklitz at the European University Institute.

The notion of European Regulatory Private Law postulates that private law rules stemming from the EU are essentially concerned with the regulation (sometimes self-regulation) of different, partially segregated markets, which while pursuing loosely coherent objectives cannot be seen to be establishing or to follow any general principles such as the ones characterising national (private) legal orders. Not all the tenets and implications of the ERPL theory are necessarily equally shared among scholars in the field, but at its core the project helps to make sense of an emerging “system” of private law which differs in very remarkable ways from the private laws which have been adopted and developed in the Member States. The traditional defining function of private law, with some simplification, is non-regulatory. The law of contracts, torts and property has for centuries secured existing rights, helped create new ones and, crucially, reacted when protected rights were violated. In stark contrast to the steering attitude of

167 Of course one should not here suggest that this account had not been challenged by several attempts at deconstruction in earlier times – from the critical legal studies movement to American and Scandinavian realists. In particular, in the European private law debate it is common to refer to Duncan Kennedy, “The Political Stakes in’ Merely Technical” Issues of Contract Law,” *European Review of Private Law* 10, no. 1 (2002): 7.


171 Hesselink.
private law was first of all an ex-post mechanism. The European Regulatory Private Law paradigm does not come without a concern for justice – it comes with an “original” concept of justice, that is access justice. Other than the classical private law notion of corrective justice, access justice is not mainly concerned with the relationship between the two parties to the contract but focuses mainly on providing the (here) consumer with meaningful opportunities on the internal market, crucial to functioning fully in the European market society. In contrast to social justice, which has followed national patterns of solidarity, self-help and redistribution, access justice is a loose notion (it can take different shapes in different markets) but, at its core, it is homogeneous throughout the EU and is less dependent on the typical institutional structures of the Westphalian state.

The unfair terms directive does not, within the ERPL account, belong to the generation of EU interventions properly characterised by access justice; much rather, it belongs to a previous phase in EU private law making in which national patterns of social justice were mimicked – and left essentially in place, inter alia by the use of minimum harmonisation. However, the account is not exclusively descriptive but also normative; it contains an important critique on the feasibility of social justice through private law, tied not only in the classical arguments by law & economics – and, to an extent, social science – scholars, but also in a broader reflection on the changing role of the State. We have seen above that it is not easy to decide to what extent unfair terms control was ever meant to pursue social justice in a strong sense. ERPL forefronts the struggle in defending why we would then want to keep it in place.

2.3. Conclusion: unfair terms control for whom?

The idea of private law as regulation is a powerful explanatory instrument because it does not postulate any specific goals but only a certain – goal-oriented, rather than principle-based; more “macro” than “micro” – rationality. With reference to the Unfair Terms Directive, we have seen how two main “goals” have been identified: on the one hand, the protection of consumers as a class, i.e. the “regulatory” version of the principle of weaker party protection, and the eradication of unfair terms to be found in consumer markets. The effective pursuit

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172 In a relatively classical definition, regulation can be identified as the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification- see Julia Black, “Critical Reflections on Regulation,” Austl. J. Leg. Phil. 27 (2002): 1.

173 Although it affords certain goals a strong advantage over certain other goals – see Hugh Collins, Regulating Contracts (Oxford University Press, 2002).
of these goals, then, would be the primary function of adjudication under the Directive. Saying that these goals are regulatory in nature entails that they do not primarily concern the relation between two specific parties.

The original intentions were not as clear. We have seen that contemporaneous documents did not extensively elaborate on the reasons for intervening against unfair terms, rather starting from the need to harmonise existing provisions enacted at MS level.

Over the years, the protection of individual consumers as “weak” parties has been losing ground in the discussion. The protection of consumers as a group by means of unfair terms control can be made to fit within a regulatory rationale but is a questionable enterprise for reasons that have also been mentioned above – from the dangers of backfiring to questions of effectiveness. Thanks to the emerging consensus on some form of information-related market failure (combined with the growing popularity of behavioural economics), the Directive’s orientation has increasingly come to be associated with a market-cleansing rationale. The more “welfarist” arguments, as predictable, tend to lose ground. So, a regulatory rationale tends to be mostly about market-enhancing interventions. But how regulatory is the directive in practice? Is it really the case that the regulatory rationale has displaced the – admittedly, murky – more plural origins of unfair terms control? These questions will be investigated in Chapter 3.
Chapter 3 The Directive “in action”, a three-pronged analysis

This Chapter will propose an analysis of salient aspects in the CJEU’s interpretation of the Unfair Terms Directive. The aim of the analysis is to identify the reach and limitations of regulatory reasoning in this area. As said above, the leading criterion to identify “regulatory” features is whether the rule emerging from a decision is best justified with reference to the parties concerned or having in mind goals going beyond the rights and interests of those specific parties. In particular, rules which are adopted with a view to providing a certain type of incentives – i.e. steering party behaviour in a desired direction – even though the application of a different rule to the contract under consideration would entail a more balanced or “fairer” outcome and would suggest a regulatory rationale.

Although most readers will be familiar with the structure and content of the Directive, it seems appropriate to very briefly introduce them here. Within its scope, which is limited to non-negotiated terms in consumer contracts, the Directive contains, at article 3 one main substantive provision declaring that a term has to be regarded as unfair if “contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” The control does not “relate to” the determination of the main subject matter of the contract, nor to the relationship between the goods or services provided and the price paid by the consumer- as long as the terms containing these determinations are drafted in plain intelligible language. A requirement of “plain and intelligible” drafting further applies to all (non-negotiated) contract terms contained in written contracts. In case of doubt, the interpretation most favourable to the consumer shall prevail. Member States must make sure that terms which are found unfair are not binding on the affected consumers.

174 The chapter is to a large extent an elaboration and update of a paper I presented in Leiden at the end of 2016. Even though the argument has changed considerably in the meantime, I am still grateful to the organizers of the conference “Private law and market regulation” of 2 December 2016 for the chance they gave me to reconsider my topic. The conference paper is available online: Candida Leone, “Of Private Law, Market Regulation and Telling Them Apart in the EU,” Amsterdam Law School Research Paper, no. 2017–28 (2017): 017–04.
175 Art 3(1) Directive 93/13/EEC.
176 Art 4(2) Directive 93/13/EEC.
177 Art 5(2).
178 Except in collective actions, see art 5(2).
179 Art 6(1).
The analysis will concentrate on three salient aspects of the CJEU’s adjudication concerning Directive 93/13: substantive standards, consequences of unfairness and the main procedural issues come to prominence in the Court’s case-law. These three aspects have been selected for different reasons. The unfairness test includes several open-ended concepts, some of which appear to be somewhat morally laden; a regulatory approach may be expected to find difficulties in making sense of such open-ended and “charged” notions as those used in the Directive’s substantive provisions. Evidence of a “regulatory” focus in these areas would testify to the pervasiveness of instrumental rationalities in unfair terms adjudication before the CJEU. The consequences of unfairness are one point on which the Directive has expressly deferred to national law: unfair terms shall not be binding on the consumers “as provided by national law”. This makes the area a likely place for collisions between national private laws and EU harmonization, and quite possibly for clashes of rationalities. Civil procedure, finally, with its reliance on private action, is typically stressed as one of the main shortcomings of private law in terms of regulatory effectiveness; thus, the treatment of sanctions and remedies under the Directive has much to say about the reach and limitations of regulatory strategies in the matter.

In the context of unfair terms control, regulatory rationales may mean different things. In line with what has been said above, “regulatory” in this context does not mean exclusively market-oriented. As recalled above and submitted by prominent scholars, what goals regulation pursues is not intrinsic in the notion. Therefore, going back to the two main arguments identified in Chapter 2, both weaker party protection as a matter of policy and addressing market failures are regulatory goals. In other words, consumer protection that is granted in the same way irrespective of whether individual consumers “deserve” or need it follows a regulatory rationality. However, one should not neglect two important side observations: first, that the boundaries between weaker party protection as a matter of policy and weaker party protection as a matter of “principle” are often blurred: in other words, a certain intervention may to an extent align with both ideas; second, that (again, with a number of scholars) adopting a regulatory rationality indirectly tends to reinforce economic, market-related (or market enhancing) goals over

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181 Bronwen Morgan, “The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality,” Social & Legal Studies 12, no. 4 (December 1, 2003): 489–523,
goals that rather aim to correct market results. As a result of both these factors, it is to be expected that the clearest examples of “regulatory” features in CJEU adjudication will be in line with a market failure approach.

Starting with the “market for lemons” approach, such a rationale would require trying to secure that all terms for which no plausible market will arise are scrutinised.\textsuperscript{182} The specific standard according to which scrutiny would take place is a less straightforward issue – one could argue that courts should strike out inefficient terms, but it is far from clear that they would be well-placed to (efficiently!) perform the necessary assessment. Control of “non-salient” terms could be then performed on the basis of some proxy or general rule that courts can apply without too much need to non-legal input. A weaker party protection – qua advancement of collective interests – rationale would require, for instance, that unfair terms control turns into a way of imposing demanding standards of behaviour on the professional, irrespective of specific contractual interactions; that as many consumers as possible can rely on a declaration of unfairness – which is in general an aim better served by collective than by individual proceedings – and that terms intervening in sensitive areas of economic and contracting activity be scrutinised with particular attention. Both rationales would place emphasis on deterrence when it comes to the consequences of unfairness.

By contrast, a more “private law” rationale would focus on the rights, responsibilities and behaviours of the parties directly involved in the dispute. It would require some – formal or substantive – criteria to identify which terms should be controlled \textit{in a certain case}, likely on the basis of the quality of consent. If concerned with weaker party protection, it would require standards as much as possible capable of tailoring to the specific needs of the concerned consumer and the context in which a certain contract was concluded. It would aim at making sure that the individual consumer concerned does not have to bear the effects of particularly imbalanced contractual conditions. Setting incentives for the professional to behave better in the future, or “punishing” them, is not central to a protective private law rationale: the individual consumer has no stakes in this discussion. Protective concerns taken aside, a private law rationale would actually require giving adequate consideration to the interests of the trader, likely

\textsuperscript{182} Schillig, “Directive 93/3 and the ‘Price Term’ Exemption”; Korobkin, “Bounded Rationality, Standard Form Contracts, and Unconscionability.”
moderating the negative effects of a declaration of unfairness when the trader has not been particularly reckless.

All in all, the chapter shows that a regulatory rationale does much to justify the developments in unfair terms control which have taken place in the hands of the CJEU since the start of the century. This seems, among other things, an unsurprising product of the institutional positioning of the CJEU, whose jurisdiction is limited to the interpretation of rules – to make things worse, rules originally addressed at legislators rather than at private parties. However, “private law” elements resurface all the time. The private law that emerges is sometimes of a technical nature; sometimes, though, what surfaces is the genuine concern with not entirely losing sight of the individual parties’ interests and rights in the pursuit of effective, behaviour-steering regulation. In other words, the private law that emerges as a counterbalancing force to sheer regulation is one that already incorporates weaker party protection among its concerns – a private law which is no longer the 19th century model whose departure was already underway as it was being celebrated.

As recalled above, the Directive has generated notoriously little case-law for over a decade, until the adverse economic cycles triggered by the 2007-2008 financial crisis have finally “kissed it awake”. It is therefore thanks to the many cases which have been decided over a relatively short period of time that the Court has had the chance to quite momentously develop a number of doctrines well beyond-or besides- what one would have been able to expect only a few years ago. We will now look into a number or particularly salient aspects among those which have featured prominently in the case law of the last two decades.

183 This is only to speak of the EU level – a different discussion altogether concerns the worries and motives of national courts bringing preliminary reference applications. In particular, judges concerned with the impossibility of giving justice within the legal framework established by their national legislation have been the object of much writing – see, with very different styles, Fernando Gómez Pomar and Karolina Lyczkowska, “Spanish Courts, the Court of Justice of the European Union, and Consumer Law,” InDret, no. 4 (2014); Fernanda Nicola and Evelyne Tichadou, “Océano Grupo: Missed Opportunities and a Second Life for EU Consumer Law,” in EU Law Stories, ed. Fernanda Nicola and Bill Davies (Cambridge University Press, 2017), 369. Also in this case, justice in individual cases and broader concerns seem tightly intertwined.

3.1. The unfairness test: substantive unfairness and transparency

3.1.1. Unfairness: significant imbalance, good faith and the possible role of proportionality

When the Directive was adopted, the general clause of article 3 attracted much attention (and criticism), especially due to its reference to good faith. However, enthusiasm and fears alike went considerably down after the Court’s decision in Freiburger Kommunalbauten, which seemed to announce a future of judicial restraint. In this case, the Court declared that it did not fall within its remit to assess whether a given term was unfair:

“as to the question whether a particular term in a contract is, or is not, unfair, Article 4 of the Directive provides that the answer should be reached taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract. It should be pointed out in that respect that the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.”

As a consequence of the Directive’s formulation and of the Court’s institutional mandate – interpreting EU law –, the decision affirms, it is for national courts to determine whether individual terms are to be considered unfair under the Directive. As pointed out by Hesselink, the Court’s laid-back approach in this context was not difficult to understand; however, to the extent that the justification relied on the need to consider “national legislation” in order to assess a term’s fairness, the ECJ was creating a requirement that had been nowhere in the Directive itself. By distinguishing its previous decision in Océano, which had declared a jurisdiction clause unfair, the ECJ appeared to take a step back and avoid encouraging national courts to seek far-reaching guidance on applying the Directive. For a couple of years, they did not do so. It was only after 2009 that

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185 Famously, Teubner, “Legal Irritants.”
187 Freiburger Kommunalbauten, para 21.
preliminary reference requests started gaining more traction, with the Court having decided several cases on unfair terms rules every year at least since 2014.\footnote{Considering judgments and orders quoting the Directive in their operative part, 68 cases on Directive 93/13 appear to have been settled by the Court between 1 January 2014 and October 2019.}

While the stream of cases which has reached Luxembourg in the last few years has not really revived the excitement that had surrounded the “unfairness” clause in the early days of the Directive, it has shown that the Court is ready to adopt a more decisive role. In particular, with its landmark \textit{Aziz} decision, the Court has actually taken up the task of providing further indications on the meaning of the Directive’s article 3. In this context, the ECJ seems to have separated two prongs within the unfairness test—“significant imbalance” on the one hand, and “contrary to good faith” on the other.\footnote{Case C-415/11 \textit{Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)}, ECLI:EU:C:2013:164.}

As to the significant imbalance, the Court has held in \textit{Aziz} that

\textit{“it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.”}\footnote{This may seem obvious now but it was not at the time when the Directive was adopted and immediately afterwards. To the contrary, a former Commission officer who was privy to the negotiations leading to the Directive’s adoption wrote in 1995: “Let us be clear: there is no way that a contractual term which causes ‘a significant imbalance in parties’ rights and duties arising under the contract to the detriment of the consumer’ can conform with the requirement of ‘good faith’ Indeed, the opposite is true: a term is always regarded as contrary to the requirement of ‘good faith’ when it causes such an imbalance. What the principle of good faith adds is something that the criterion of significant imbalance alone could not provide us with: namely, decades of national case-law and doctrine.” See Mario Tenreiro, “The Community Directive on Unfair Terms and National Legal Systems: The Principle of Good Faith and Remedies for Unfair Terms’(1995),” \textit{European Review of Private Law} 3 (n.d.): 273, 279.}

\textit{Aziz, para 68.}
position has been significantly impaired by the contentious term: the more a term deviates from the otherwise applicable rules, to the consumer’s disadvantage, the more likely it is that that term should be considered unfair. This stance has been repeated and reinforced in the later Constructora Principado\(^\text{193}\) decision, where the Court specified that

“the question whether that significant imbalance exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause.

On the contrary, a significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.”\(^\text{194}\)

At the same time, the Court pointed that this analysis should not entirely exhaust the significant imbalance test:

“in assessing whether there is a significant imbalance, it is for the referring court to take into account the nature of the goods or services for which the contract was concluded by referring to all the circumstances attending the conclusion of that contract, as well as all the other terms of contract.”\(^\text{195}\)

In Aziz, after the general argument concerning the significant imbalance test, the CJEU has then proceeded with very specific guidance to the national court, instructing them to examine three suspicious terms. In these instructions, the guiding criteria enumerated above- in particular, the comparison with the otherwise applicable default national legal rules and the remedies available to the consumer in case a term is unduly triggered- are implemented consistently. In the case of one of the terms, establishing custom default interest rates, the court additionally included a proportionality test which seems particularly interesting – the national court should check whether the interest rate established in the contract “compared with the statutory interest rate […] is appropriate for securing the

\(^{193}\) Case C-226/12 Constructora Principado SA v José Ignacio Menéndez Álvarez, ECLI:EU:C:2014:10.

\(^{194}\) Constructora Principado para 22-23.

\(^{195}\) Constructora Principado para 30. The language mirrors article 4(1) of the Directive as well as its recitals. See infra section 3.1.3.
attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them”. 196

With reference to the requirement that the significant imbalance has arisen “contrary to good faith”, the Court in Aziz instructed national courts to ascertain whether

“the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations”. 197

Deriving guidance from such instructions does not seem too easy. To the extent that the focus would be on what the seller or supplier could expect when “dealing fairly and equitably”, 198 the Court’s specification did not seem to add much clarity to the “good faith” requirement as such. The result of not focussing on fair and equitable dealing on the side of the trader, on the other hand, appears likely conducive to a rather consumer-unfriendly standard: since, in most cases, the consumer’s volition concentrates on the contract itself rather than on its terms, 199 the abstract possibility of negotiating individual contract terms would be unlikely to improve the consumer’s substantive position. In other words, consumers who have agreed to unfair terms such as the very harsh acceleration clauses contained in the contract considered in Aziz would likely have agreed to them even if they were not pre-printed but “agreed” between the individual consumer and the bank’s agent, if they were presented as necessary conditions for accessing the credit. This test seems to differ from the most common understanding of “objective” good faith, entailing the consideration of the other party’s interests, 200 and has been seen as wavering towards a more subjective view – mediated by a notion of the consumer’s will which, as said above, seems potentially

197 Case C-415/11 Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), ECLI:EU:C:2013:164, para 69.
198 Could reasonably expect: but there is no way of projecting whether the Court meant this as an additional factor or just used the language to be inclusive towards common lawyers not appeased by the notion of “dealing fairly and equitably”.
199 Something which we choose to acquiesce to when understanding consent to standard terms – see Andrea Azzaro, I Contratti Non Negoziati (Esi, 2000).
problematic.\textsuperscript{201} If the court, thus, sees any normative content in the concept of good faith, that content is not easy to distil from existing case-law.\textsuperscript{202}

More recently, the good faith standard outlined in \textit{Aziz} came back to the fore in a rather indirect manner. In its 2018 \textit{Banco de Sabadell}\textsuperscript{203} decision, the ECJ validated a blanket prohibition, by the Spanish Supreme Court, of default interest rates\textsuperscript{204} going above a certain threshold (set by the Court itself), on the reason that:

\begin{quote}
\textit{“It is apparent [that] the Tribunal Supremo (Supreme Court) examined the national rules applicable in various branches of law and sought to determine the default rate of interest which could reasonably be agreed to, at the end of an individual negotiation, by a consumer who has been treated fairly and equitably, whilst ensuring in particular that the function of that interest is maintained, which is specifically to deter delays in payment and compensate the creditor in a proportionate manner in the event of such delay.”}\textsuperscript{205}
\end{quote}

In doing so, according to the ECJ, the Tribunal Supremo “\textit{complied with the requirements set out in Aziz}”. In validating the Spanish court’s irrebuttable presumption of unfairness, however, the ECJ seems to have discarded part of those requirements. After articulating (at para 68-70) the implications of significant imbalance and good faith as discussed above, the decision in \textit{Aziz}, that the court refers to in \textit{Banco de Sabadell} – much like that \textit{Constructora Principado} – added a reference to the specific circumstances at the time of the contract’s conclusion:

\begin{quote}
\textit{“Furthermore, pursuant to Article 4(1) of the directive, the unfairness of a contractual term is to be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of it.”}\textsuperscript{206}
\end{quote}


\textsuperscript{203} Joined Cases C-96/16 and C-94/17, \textit{Banco Santander SA v Mahamadou Demba, Mercedes Godoy Bonet} (C-96/16), and \textit{Rafael Ramón Escobedo Cortés v Banco de Sabadell SA} (C-94/17), ECLI:EU:C:2018:643.

\textsuperscript{204} That is, interests payable in case the consumer fails to timely meet their obligations under the contract.

\textsuperscript{205} \textit{Banco de Sabadell}, para 63.

\textsuperscript{206} \textit{Aziz} para 71.
Such emphasis on the specific circumstances surrounding the conclusion of the contract could have been problematic in Banco de Sabadell, as an irrebuttable presumption such as that established by the CJEU in this case by definition does not allow taking the specific circumstances into account if this would lead to “exonerating” the term.\textsuperscript{207} The “expulsion” of the circumstances assessment from the good faith standard seems to counter the subjective turn that could be read in Aziz – a generalized assessment such as that at stake in Banco de Sabadell clearly had nothing to do with the state of mind of the individual traders involved.

Allowing forms of covert judicial-black listing of terms is a move with an obvious enhancing effect on the regulatory potential of unfair terms control: it gives a strong signal. Similarly, the reference to background default rules and the remedies available under national rules, as well as the embryonic proportionality test suggested in Aziz, make the outcome in a specific case highly dependent on the national legal environment, and therefore (national) market-specific, but rather easy to generalise within the relevant market/legal system. Thus, national judicial decisions dealing with a certain term within a specific group of contracts should be relatively apt for being considered by drafters in the same legal system and market sector concluding contracts of comparable content- which, even absent direct ultra partes effectiveness of the judgments, should contribute to their regulatory impact.

The court’s discomfort in (not) dealing with the non-regulatory aspects built in the text seems to emerge with reference to the general approach to the good faith test and the wavering attention paid to circumstances. As to the former, the hint to “subjective” good faith seems straight out of line with the broad spirit of the directive, whether in terms of (individual or collective) weaker party protection or in terms of market failures. As to the latter, one must not forget that their relevance is in principle first and foremost guaranteed by the division of labour between CJEU and national courts. However, the Court has – so far – not volunteered any elaboration on how the reference should be interpreted or in which way the national judges should go about it. This is particularly alarming in light of the fact that circumstances do seem to play a large role in the case-law on transparency.

3.1.2. Transparency

Depending on how one regards these outcomes as to the “substantive” unfairness standard, they may be more or less surprised by the parallel developments concerning the other main control mechanism foreseen by the Directive: \textsuperscript{207} We will go back to this in section 2.1.3, dealing with the relevance of the circumstances surrounding the conclusion of the contract.
transparency. In first instance, the last statement may sound in itself controversial—one may doubt whether transparency, expressed in the directive mainly through the requirement of “plain and intelligible” drafting articulated by art. 5, was ever supposed to be treated as a control mechanism on more or less equal footing with the clause of art. 3. Even relatively recent commentaries\(^\text{208}\) remind us that this was at least not the way in which the obligation of clear and comprehensible drafting was expected to work when the Directive was adopted. However, a combination of factors has contributed to making transparent drafting one of the key elements in the CJEU’s adjudication concerning Directive 1993/13. In particular, the transparency clause has become central in the adjudication of price-related terms, for which the Court was sometimes not able to tell ex ante whether they would be open for scrutiny under the unfairness clause (since they may be exempted under the “core terms” exception). The transparency obligation has been developed in a string of cases all concerning long-term contracts, and by now we know that the CJEU considers similar requirements to apply when it is used as a material standard of evaluation\(^\text{209}\) and when it works as a gateway for the possibility to control “core” terms.\(^\text{210}\) Even more recently, the Court has clarified that in certain cases a lack of transparency can be in itself conducive to unfairness when it misleads the consumer as to the extent of the rights they enjoy.\(^\text{211}\)

\(^{208}\) See Johanna Waelkens, “Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts,” 2015, 47. See also, much more recently, AG Hogan’s discomfort with the developments undergone by transparency under CJEU case-law: AG opinion, case C-34/18 Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt, ECLI:EU:C:2019:245.

\(^{209}\) Such is the case, in a strong way – possibly entailing unfairness – for certain terms under the non-binding, but increasingly relevant, Annex, and under certain national legal systems. In a less dramatic way, transparency scrutiny applies to all terms under article 5, possibly requiring courts to undertake pro-consumer interpretation of terms which are found to be unclear.

\(^{210}\) See CJEU case C-26/13, Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, ECLI:EU:C:2014:282 para 69 and case C-143/13, Bogdan Matei, Ioana Ofelia Matei v SC Volksbank România SA,, ECLI:EU:C:2015:127 where the Court of Justice is explicit that the scope of art 4(2) and 5 has to be considered as overlapping.

\(^{211}\) C- 191/15, Verein für Konsumenteninformation (VKI) v Amazon, ECLI:EU:C:2016:612. In a similar vein, the Spanish Tribunal Supremo (TS) has understood certain core terms to be unfair because in the given circumstances the consumers were left in the dark as to their significance and consequences. While the case – of so-called floor clauses – has eventually come before the CJEU, the latter did not engage substantively with the question of whether the TS’ application of the test was in line with the Directive.
The ECJ is clear that the requirement of transparency “cannot be reduced to [the terms] being formally and grammatically intelligible”\textsuperscript{212}: the “system of protection” put in place by the Directive is such that “the requirement of transparency must be understood in a broad sense”.\textsuperscript{213} In particular, whether establishing price modifications, interest rates variation or conversion in a foreign currency, the terms must set out “transparently the reasons for and the particularities of the mechanism”\textsuperscript{214} which may not be of immediate evidence for the consumer, in a way that allows them to “foresee, on the basis of clear, intelligible criteria, the economic consequences” which the term has in the context of the contract they are concluding. The Court holds that the acquisition of information “before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer”,\textsuperscript{215} who can on that basis decide whether they want at all to be bound by the contract; additionally, with specific emphasis on long-term contracts, it seems that contract terms can play a further role in providing the consumer a point of reference to later check the legitimacy of the other party’s behaviour during the time of contractual performance.\textsuperscript{216}

Up to here, the Court’s understanding of transparency, which is in all likelihood also more substantive and more constraining than an obligation of drafting in layman language,\textsuperscript{217} aligns in two important ways with a regulatory agenda: on the one hand, it tries to secure that the consumer has an operational (as opposed to literal) understanding of the workings of a contract, before and after concluding

\textsuperscript{212} This is confirmed in Amazon, which, however, does not elaborate on the standard to be tested. It seems that the provider would be required to include a mention of the provisions which provide the relevant context for a sufficient comprehension of the term’s meaning.

\textsuperscript{213} Kásler, 71 and 72.

\textsuperscript{214} Matei, Kásler, but also case C-92/11, RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V., ECLI:EU:C:2013:180.

\textsuperscript{215} This language has become a staple in consumer decisions – see recently in C-43/17 Wallbusch Walter Busch, ECLI:EU:C:2019:47, para 36, referring to Wind Tre and Vodafone Italia, C-54/17 and C-55/17, EU:C:2018:710, paragraph 46.

\textsuperscript{216} See Candida Leone, “Transparency Revisited–on the Role of Information in the Recent Case-Law of the CJEU,” European Review of Contract Law 10, no. 2 (2014): 312–325. The connections between transparency requirements, pre-contractual information obligations and the obligation to provide information on a durable medium foreseen by some consumer protection Directives is a further question that is beyond the scope of the present research.

it, so that they can operate as agents of competition;\textsuperscript{218} on the other hand, again it gives drafters quite clear directions as to how complex terms should be formulated, while seeking to undermine the attractiveness of trading strategies which in part rely on a combination of unclear drafting\textsuperscript{219} and discretionary powers or savvy use of market mechanisms. The adoption of the “average consumer”\textsuperscript{220} notion as the imaginary consumer against whose understanding the term’s transparency should be assessed, in this light, would again appear to be consistent with an approach that concentrates on the (market) regulatory impact of unfair terms control rather than with the specific relationship at stage. Such average consumer, whom we would imagine to be normatively informed,\textsuperscript{221} attentive and circumspect,\textsuperscript{222} is in turn expected to discipline other market actors by their proactive market behaviour.

### 3.1.3. Circumstances: between ex ante and ex post

As discussed with reference to the substantive fairness test, the Directive expressly mentions that non-negotiated terms have to be assessed by referring to all circumstances attending the conclusion of the contract.\textsuperscript{223} This is one of the reasons why the Court, since Freiburger, has claimed that it is not in a position to assess whether specific terms are unfair. There have been no express occasions, however, for the CJEU to clarify which circumstances should be considered and how they should matter. However, the transparency assessment seems to be turning into an access point through which circumstances play a concrete role.


\textsuperscript{219} Or unclear explanation of the contract’s operation- see above and below.

\textsuperscript{220} In this respect, the issue just highlighted at fn. 18 is crucial; the Court in Kásler (para 74) suggested that the transparency of the terms under review should be examined, inter alia, in light of whether the average consumer, having available the information that was (likely) available in the case considered, would have understood. The “average consumer” notion was again used in case C-96/14, Jean-Claude Van Hove v CNP Assurances SA, ECLI:EU:C:2015:262.

\textsuperscript{221} But see infra 3.1.4.


\textsuperscript{223} Directive 93/13, article 4(1).
The relevance of the “circumstances” assessment, as said above (2.1.1), is difficult to establish. In *Banco de Sabadell*, the CJEU considered that an irrebuttable presumption of unfairness, established by means of supreme court case-law, for terms setting default interests at a rate more than two percent higher than the statutory interest rule, is not incompatible with the Directive. A Spanish court had raised doubts in this respect, considered that “the criterion applies objectively and automatically, without allowing the national court hearing the matter to take into account all of the circumstances of the case”. In a previous case, *Unicaja*, the CJEU had otherwise maintained that a national provision requiring a competent court to reduce default interest rates more than three times the statutory rate to an amount not exceeding that threshold could not take away the possibility, for that national court, to separately assess whether a default interest term – either above or below that threshold – must be considered unfair. The main reason for this was found in the requirement that unfairness be assessed by referring to all the circumstances attending the conclusion of the contract.

In *Banco de Sabadell*, however, the Court maintains that

“the development of a criterion derived from case-law, such as that identified in the present case by the Tribunal Supremo (Supreme Court), is wholly consistent with the objective of consumer protection pursued by that directive. It follows from Article 3(1) of Directive 93/13 and from the general scheme of the directive that the

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224 Joined Cases C-96/16 and C-94/17, Banco Santander SA v Mahamadou Demba, Mercedes Godoy Bonet (C-96/16), and Rafael Ramón Escobedo Cortés v Banco de Sabadell SA (C-94/17), ECLI:EU:C:2018:643.

225 *Banco Sabadell*, para 52.


227 *Unicaja*, also recalled in Banco de Sabadell at para 67: “The Court in essence inferred from those provisions as well as from Article 6(1) and Article 7(1) of Directive 93/13 that the latter precludes national legislation defining a criterion in the light of which the unfairness of a contractual term must be assessed, when such legislation prevents the national court dealing with a term that does not meet that criterion from examining whether that term is unfair and, if it is, declaring it unfair and setting it aside (see, to that effect, judgment of 21 January 2015, *Unicaja Banco and Caixabank*, C-482/13, C-484/13, C-485/13 and C-487/13, EU:C:2015:21, paragraphs 28 to 42).”

228 As well as the consequences of the term in a specific contract, having in mind its effect under the applicable national rules. See *Unicaja* para 37: “the unfairness of a contractual term must be assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, on the date of conclusion of the contract, to all the circumstances attending its conclusion. It therefore follows that the consequences of the term under the law applicable to the contract must also be taken into account. This requires consideration to be given to national law (see order in Sebestyén, C-342/13, EU:C:2014:1857, paragraph 29 and the case-law cited).”

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latter does not so much aim to guarantee an overall contractual balance between the rights and obligations of the parties to the agreement as to prevent an imbalance between those rights and obligations from arising to the detriment of consumers."

It seems, here, that the attainable level of consumer protection is the defining factor in this case: while a blanket prohibition of default interests above a certain rate (at stake in Banco de Sabadell) does not prevent national courts from finding that a certain term is unfair and deriving all necessary consequences from such finding, the impossibility to form an independent assessment in Unicaja would have possibly undermined the effectiveness of article 6. In affirming this, however, the Court makes a rather far-reaching statement when it considers that the directive “does not aim to guarantee an overall contractual balance”, but only to prevent imbalances from arising to the detriment of the consumer. The danger ventilated by Niglia in reaction to Freiburger – namely, that circumstances would be turned by the CJEU into an inlet for watering down consumer protection – seems not to have come true so far. To the extent that circumstances do play a role, they have not led to any de- or deregulation – in other words, when the Court has brought up the circumstances prong, it was if anything instructing national courts to adopt a more stringent approach rather than a more permissive one. The consideration of circumstances as an exonerating factor does not seem to play as much weight as their possible relevance to the consumer’s advantage. In practice, a similar – if more nuanced – conclusion emerges from an analysis of the connection between transparency and the circumstances prong.

Already in RWE, the Court had linked transparency to the broad issue of pre-contractual information, observing that information, prior to concluding the contract, on the terms of the agreement and their significance was of crucial importance to the consumer. Transparency, then, may include the information provided to the consumer at the moment of concluding the contract, with a view to allowing them to understand possibly complex terms. How salient this would be in practice depended, at that point, on what national courts would do with this indication when applying the test.

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229 Banco de Sabadell, para 69.
230 See Niglia, “The Rules Dilemma-The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe.”
231 C-92/11, RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V., ECLI:EU:C:2013:180.
232 RWE para 44.
233 Ibidem, para 50.
In Kásler, shortly afterwards, the CJEU observed that whether the average consumer would be able to assess what impact the terms would have on their rights and obligation must be assessed “having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement.” This seemed to confirm the expansion of the scope of the transparency assessment, but was not per se expanded upon in the decision.

More recently, though, the relevance of pre-contractual information (and its understanding by the consumer) to the transparency assessment has come prominently to the fore thanks to the Andriciuc decision. In this case, again concerning foreign-currency loans, the question centered rather straightforwardly on the extent of the lender’s information obligation as implied by the duty of transparent drafting. The Court of Justice answered the question by declaring that

> “the requirement that a contractual term must be drafted in plain intelligible language requires that, in the case of loan agreements, financial institutions must provide borrowers with sufficient information to enable them to take prudent and well-informed decisions. In that connection, that requirement means that a term under which the loan must be repaid in the same foreign currency as that in which

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235 For the contested terms to meet the transparency requirement, the average consumer should, as a result of the information and drafting, “not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.” See Kásler para 74.

236 Case C-186/16, Ruxandra Paula Andriciuc and Others v Banca Românească SA, ECLI:EU:C:2017:703

237 The referring’s court question was formulated as follows: “Must the plainness and intelligibility of a contractual term, within the meaning of Article 4(2) of Directive 93/13, be understood to mean that that term must provide not only for the grounds of its incorporation in the contract and the term’s method of operation, or must it also provide for all the possible consequences of the term as a result of which the price paid by the consumer may vary, for example, foreign exchange risk, and in the light of Directive 93/13 may it be considered that the bank’s obligation to inform the customer at the time of granting the credit relates solely to the conditions of credit, namely, the interest, commissions, and guarantees required of the borrower, since such an obligation may not include the possible overvaluation or undervaluation of a foreign currency?”
it was contracted must be understood by the consumer both at the formal and grammatical level, and also in terms of its actual effects, so that the average consumer, who is reasonably well informed and reasonably observant and circumspect, would be aware both of the possibility of a rise or fall in the value of the foreign currency in which the loan was taken out, and would also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations.”

In the reasoning, the national court’s task to consider “all the circumstances surrounding the conclusion of the contract” functions as a bridge towards the relevance of pre-contractual information. This express connection of the “circumstances” prong with transparency and information duties seems to have some potential to inject life into an otherwise somewhat neglected clause of the Directive. But Andriciuc goes one step further in giving prominence to the “circumstances” prong by expressly linking the drafter’s specific knowledge and attitude to the significant imbalance test:

“[…] the assessment of the unfairness of a contractual term must be made with reference to the time of conclusion of the contract at issue, taking [into] account all of the circumstances which could have been known to the seller or supplier at that time, and which were such as to affect the future performance of the contract.”

In particular, in the case of terms resting all risks of currency depreciation on the consumer

“It is for the referring court to assess, having regard to all of the circumstances of the case in the main proceedings, and taking account, in particular of the expertise and knowledge of the seller or supplier, in the present case the bank, with regards to the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, of the existence of a possible imbalance within the meaning of [the Directive’s article 3(1)].”

By implication, the formulation requires ignoring imbalances that have emerged after the conclusion of the contract unless they could be anticipated (in particular: by the seller or supplier) already at that stage. Corrective interventions in exceptional cases characterised by supervening circumstances are thus left to the

238 See para 46.
239 Ibidem para 54.
240 Andriciuc, para 58.
Member States, which often – but not always – will mean falling back on rules of general contract law. A final and connected consideration on the ways in which judicial control under the Directive is taking shape concerns the observation that, in general, there seems to be no place for an appreciation of whether the consequences triggered by a certain clause, or in other words the effects of the clause, would or would not be justified in the case at stake. The only element that matters is whether, ex ante, the clause was to be seen as acceptable in the context of the contract’s overall balance. This is an element almost implicit in the option for unfair terms control- if it is the term and not its “actioning” which is subject to control, it follows almost logically that the question whether in the case under review the consequences determined by the term were actually justified is not relevant. For instance, in Aziz the question whether the acceleration clause included in the contract should be voided did not depend on whether, in the case at stake, a demand for repayment would be justified by the importance of the debtor’s non-performance, but exclusively on the term’s formulation. This apparently small rule may be seen as indicative of an intrinsically “regulatory” inclination of unfair terms control: in the individual case, it may well be that a too broadly drafted term has only been invoked in a situation where its consequences would be fully justified – or it could be that invoking a fair term in a certain situation would disproportionately affect the individual consumer – but these considerations do not matter if the point is, for one reason or another, to get rid of unfair terms used in mass contracts.

To sum up, we can see that the Court has a conflicted relationship with the circumstances prong: on the one hand, it seems to play down its relevance or to deliberately use it in a selective manner. The passage in Banco de Sabadell that discards contractual balance as a possible goal of the directive is particularly

241 Some remedy for imprévision being available in many national systems, see Hugh Beale et al., Cases, Materials and Text on Contract Law (Bloomsbury Publishing, 2019). The possibility to invoke such remedies will usually be subject to very strict requirements. In some legal systems, however, more consumer-friendly devices may exist- see e.g. Thomas Wilhelmsen, “‘Social Force Majeure’— A New Concept in Nordic Consumer Law,” Journal of Consumer Policy 13, no. 1 (1990): 1–14.

242 See also a discussion of the Spanish follow-up decisions in Sánchez, “Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis,” 966–67. Also, in the order rendered in case C-602/13, Banco Bilbao Vizcaya Argentaria SA v Fernando Quintano Ujeta, Maria-Isabel Sánchez García, ECLI:EU:C:2015:397, the Court confirmed that this approach should be considered as established interpretation of the Directive.

243 Except for certain constellations in which the potential effects were clearly foreseeable at the time of concluding the contract, see the discussion above (Andriciuc).
striking in this respect. Consumer protection is here, for once, presented as quite absolute from the need of balancing with other concerns. On the other hand, the reference to circumstances in order to expand the scope of transparency requirements well beyond the textual formulation of terms inserts an element of uncertainty that really seems to open up to a discussion on the merits of a specific interaction. While referring to a regulatory standard, the test articulated in Andriciuc\textsuperscript{244} for national courts to ascertain whether the seller should have informed the consumer about risks connected to monetary depreciation is reminiscent of national doctrines on duties to disclose in general contract law.

3.1.4. The average consumer

In the years since Kásler, the CJEU has repeatedly referred to the “average consumer” as the ideal recipient of contract terms and pre-contractual information. As we have just recalled, in Andriciuc the Court even repeated that such consumer is postulated to be “reasonably well informed and reasonably observant and circumspect”. However, this consumer is also quite needy when they have to understand a contract: they need to be informed about certain legal provisions,\textsuperscript{245} and should not be too quickly assumed to understand legal jargon\textsuperscript{246} or be able to translate legalese into a concrete scheme of hypotheses and consequences.\textsuperscript{247} Such consequences may, on occasion, have to be clearly spelled

\textsuperscript{244} See supra excerpt referred to in fn. 205.
\textsuperscript{245} With limits – see C-34/18, Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt, ECLI:EU:C:2019:764, according to which article 5 of Directive 93/13 “does not require the seller or supplier to provide additional information relating to a term which is drafted clearly, but the legal effects of which may be determined only by interpreting provisions of national law in respect of which there is no consistent case-law.” While the Court relies on quite formalistic arguments – essentially just saying that the facts of the case are not the same as in Amazon – I think the case should not be read as turning Amazon into an exception but rather as seeking to avoid the imposition of unreasonable burden onto the sellers. The Court expressly voices this concern at para 69 of the decision: imposing an obligation on the seller or supplier to inform the consumer of the existence of general procedural provisions and of the relevant case-law would go beyond what could reasonably be expected of the seller or supplier in the context of the requirement for transparency.
\textsuperscript{246} See van Hove para 47: it is for the referring court to determine whether, […] an average consumer, […] would not only be aware of the existence of the difference between the concept of ‘total incapacity for work’, within the meaning of the contract at issue in the main proceedings, and that of ‘partial permanent incapacity’, within the meaning of the national social security law, but would also be able to assess the potentially significant economic consequences, for him, resulting from the limitation of the cover included in the insurance policy in accordance with the requirements of the case-law referred to in paragraph 41 above.
\textsuperscript{247} Ibidem, second part of the sentence.
out for them in the contract or explained at the moment of concluding it. Furthermore, a consumer concluding several related contracts cannot be expected to be as alert, with regard to terms in each contract, as they could be if they were concluding one simple transaction.

The signals that the CJEU issues to national referring courts in its guidance on unfair terms seem, thus, to depart from the more exacting average consumer image that the same Court has painted elsewhere.

The average consumer as a normative idea that expressly rejects more realistic paradigms is a quite apt regulatory notion: an informed, circumspect consumer is a consumer who shops around, identifies the better available options and is able to follow up on their research in their shopping behaviour, promoting healthy competition. A weaker consumer may reveal a more protective agenda and as such could still be compatible with a regulatory rationale: it sets very demanding standards of behaviour on professionals, who know that they are otherwise exposed to unfavourable consequences, and hence hopefully enhances the position of consumers as a class. This still requires, however, that the standard is set in a relatively homogeneous manner – only in that way will it work to stir behaviours on a significant scale.

The “possibly weak” average consumer that emerges from the Court’s case-law – an average consumer whose actual strengths are left for national courts to assess on a seemingly very case-by-case basis – tends to defy both possible regulatory aims. It keeps in place a relatively underdefined standard which will make the transparency assessment heavily contingent on individual circumstances. Quite

248 See RWE, where this necessity is supported by the contents of the Energy directives.
249 See Andriciu.
250 Again Van Hove, section 48.
surprisingly, thus, the adoption of the average consumer standard seems not only not to have made the unfairness test harsher to consumers, but also it appears to have if anything decreased the Directive’s regulatory outlook in favour of a more private law rationality.

3.2. Consequences of unfairness

3.2.1. “Not binding is not binding”

The remedy for unfairness is provided by article 6(1). Though in principle leaving room for technical variations, the Directive requires MS to make sure that unfair terms are not “binding” on consumers. The choice to formulate the provision in a way which did not espouse any existing national terminology provided for diverging interpretations in the first years following the directive’s adoption. In the last decade, however, the CJEU has clarified that, in order to achieve the directive’s aims, when materially able to do so, courts should be ready to scrutinise terms ex officio\(^\text{253}\) and that terms found to be unfair have to be entirely removed from the contract,\(^\text{254}\) with no chance of adaptation. Once the term is removed from the contract, the concerned court has to evaluate whether the agreement is “capable of continuing in existence” without the unfair term.\(^\text{255}\)

The total eradication of terms found unfair, rather than their “reduction” or adaptation by the concerned courts, is justified in plainly regulatory terms:

“[I]f it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms (see, to that effect,

\(^{253}\) Case C 168/05, Mostaza Claro, ECLI:EU:C:2006:675, paragraph 38; case C 40/08, Asturcom Telecomunicaciones, ECLI:EU:C:2009:615, paragraph 31; Case C 137/08 VB Pénzügyi Lizing, ECLI:EU:C:2010:659, paragraph 48; see infra, 3.3.

\(^{254}\) Case C-618/10, Banco Español de Crédito SA v Joaquín Calderón Camino, ECLI:EU:C:2012:349.

\(^{255}\) Also on this point the CJEU has been able to make clear that the evaluation has to be made objectively, and should be unaffected by the consideration that voiding the contract altogether might be more convenient for the consumer than upholding it without the invalid term: see Case C-453/10, Jana Pereničová, Vladislav Perenič v SOS financ spol. s r. o., para 32-33. However (paragraph 35), since the Directive only carried out “partial and minimum harmonization”, MS are free to enact “in compliance with European Union law, national legislation under which a contract concluded between a trader and a consumer which contains one or more unfair terms may be declared void as a whole where that will ensure better protection of the consumer.”
The order in Pohotovost’, paragraph 41 and the case-law cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.”

The contrast between these considerations and national rules and practices in general contract law, which (think of penalty clauses) frequently give judges the task to reshape unacceptable terms into acceptable ones, is quite remarkable. The task in that case is either to maintain an agreement as close as possible to the original deal, or to reach a solution that secures a reasonable balance between the interests of the parties to the contract. Neither of these concerns are particularly relevant to the establishment of the appropriate consequences of unfairness before the CJEU. In particular, this was recently reinforced in a decision concerning the compatibility with the Directive of judge-made criteria for unfairness assessment in Spain:

“The development of a criterion derived from case-law, such as that identified in the present case by the Tribunal Supremo (Supreme Court), is wholly consistent with the objective of consumer protection pursued by that directive. It follows from Article 3(1) of Directive 93/13 and from the general scheme of the directive that the latter does not so much aim to guarantee an overall contractual balance between the rights and obligations of the parties to the agreement as to prevent an imbalance between those rights and obligations from arising to the detriment of consumers”.

Thus, the fact that case-law of the Spanish supreme court blacklisted default interest clauses that exceeded the regular interest rate by more than 2 percentile points, even though liable to disallow possibly not unreasonable terms, did not go against the Directive.

3.2.2. Unless the consumer opines otherwise

The fact that the imbalance should not emerge to the detriment of the consumer is established in general – but how does that reflect in individual cases? In other words, who assesses what is detrimental to the consumer? In Pannon, the court affirmed that the directive does not require national courts to set aside an unfair term

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256 See Banco Español de Crédito SA v Joaquín Calderón Camino, C-618/10, para 69.
257 Joined Cases C-96/16 and C-94/17.
258 Joined Cases C-96/16 and C-94/17, para 69.
259 Joint cases C-96/16 and C-94/17, para 69.
The court does not elaborate on this outcome. The solution is, indeed, easily in line with the text of the Directive: *non-binding on the consumer* does not seem to suggest that the term must be invalidated even if the consumer has no interest in it being set aside. From a regulatory perspective, the result is less straightforward: the possibility that a term assessed as unfair may be legitimised in specific proceedings by the consumer’s assent takes away from the guidance potential of the assessment. Furthermore, consumers as a group do not gain much from the court’s finding if that finding can in fact be countered by a consumer’s possible last-minute preference in favour of the term’s application. From the perspective of the individual procedure, however, as well as in terms of protecting the individual consumer concerned, the rule makes perfect sense and represents a counterbalance to the Court’s determination to enhance the effectiveness of a declaration of unfairness, which is rather difficult to carry out consistently in the practice of national adjudication.

3.2.3. “As provided for under national law” (I): What about supplementary rules?

Establishing that an unfair term cannot be “fixed” by a court does not exhaust the discussion on unfairness from the perspective of contract law. In Kásler, the Court has affirmed that the terms found unfair can be replaced by national default (“supplementary”) rules if this is necessary for the contract to “continue in existence after an unfair term has been deleted”. 261 This approach has been developed having in mind the review of core terms, which by definition should be such that the contract should be unable to survive their removal. The justification for this exception to the rule is the concern that “the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to disadvantageous consequences”. 262

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260 Pannon, para 33. Again in Banif, Case C-472/11, para 27.
261 Kásler, para 85, relying on precedents (Case C-453/10 Pereničová and Perenič EU:C:2012:144, paragraph 31, and Banco Español de Crédito EU:C:2012:349, paragraph 40 and case-law cited). It is not clear to what extent the same reasoning could be applicable to the replacement of supplementary rule for unfair terms whose invalidation would not have consequences for the contract’s existence.
262 Joined cases C-482/13, C-484/13, C-485/13 and C-487/13, Unicaja Banco, SA v José Hidalgo Rueda and others & Caixabank v Manuel María Rueda Ledesma and others, henceforth Unicaja, para 33.
On the basis of this reasoning, in *Unicaja* the Court has clearly excluded that the decision it gave in Kásler could be relied upon to allow national courts to moderate unfair default interest clauses:

“subject to the checks to be made in this regard by the referring court, the annulment of the contractual clauses at issue could not have adverse consequences for the consumer, inasmuch as the amounts for which the mortgage enforcement proceedings have been brought will necessarily be lower in the absence of an increase by applying default interest laid down by those clauses.”

This state of things gave interpreters considerable headaches. In the cases referred to above, the Court had neither made a clear distinction between giving a judge moderating powers and replacing the term with a default rule which is applicable under national law, nor really decided on the second scenario: the case at stake concerned the admissibility of judicial moderation of default interest rates rather than their replacement by a default statutory interest. This made it tempting to think that replacement of the unfair terms by means of national default rules may be generally allowed.

From a national perspective, establishing then when a term falls the otherwise applicable rule of contract law takes its place is tantamount to establishing that the term has never become part of the contract. Especially if one espouses the idea that supplementary provisions express what the legal system concerned considers as a “fair” solution, without involving the possibly contentious evaluations of one specific court, replacing unfair terms by the content of default rules is an option which undoubtedly carries great appeal. This also seems in line with the Court’s own contention that unfair terms control should restore the consumer in the

263 *Unicaja*, para 34.
264 Especially vivid in Dutch law: see for extensive discussion and further references Marco B.M. Loos, *Algemene Voorwaarden* (Den Haag: Boom Juridisch Uitgever, 2018), 360.
265 See AG opinion in ECLI:EU:C:2014:2299, Joined cases C-482/13, C-484/13, C-485/13 and C-487/13, *Unicaja Banco, SA v José Hidalgo Rueda and others & Caixabank v Manuel Maria Rueda Ledesma and others*. AG Wahl has expressly stated that “the fact that moderating powers might be conferred by a provision of national law rather than being an expression of judicial discretion is irrelevant”. According to the AG, “Member States may only adopt or retain rules providing for greater consumer protection than that already granted under the directive”.
266 This proved not to be the case, even though the nature of national default rules turned out to be relevant to the application of the Kásler rule: see *infra* in this section.
position they would have been in had the unfair term never been included in the contract.  

In a string of 2019 decisions, the CJEU has considerably advanced its case-law on the subject. With its Grand Chamber decision in Abanca, it has quite definitely clarified that also replacement by means of national default rules is subject to the Kásler test. This means that replacement is only possible when the contract would otherwise have to be invalidated and invalidation would be to the consumer’s detriment. In a crucial following case, Dziubak, the Court has further decided that it is for the consumer to assess whether invalidity would be against their interest. In the same case, the Court has had the chance to explain that the Kásler exception must be interpreted strictly as applying only to national default rules; a standard or open norm such as “the principle of equity or […] established customs” does not qualify for application under Kásler. The reasons for this are explained by the Court by reference to the fact that only “supplementary provisions of national law or those which are applicable where the parties so agree” are “presumed not to contain unfair terms”.

“They provisions are meant to reflect the balance that the legislature intended to establish between all the rights and obligations of the parties to certain contracts in cases where the parties have not departed from a standard rule provided for by the

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267 Pavillon comments on the tension between this idea and the Court’s insistence on not allowing any form of replacement of terms declared unfair. See Pavillon, “Private Enforcement as a Deterrence Tool.”

268 See the discussion in CJEU C-70/17 and C-179/17, Abanca Corporación Bancaria SA v Alberto García Salamanca Santos and Bankia SA v Alfonso Antonio Lau Mendoza and Verónica Yuliana Rodríguez Ramírez, ECLI:EU:C:2019:250, as well as the order in C-486/16, Bankia SA v Alfredo Sánchez Martínez, Sandra Sánchez Triviño, ECLI:EU:C:2019:572.

269 Some have observed that the joint cases arose from a particularly complicated fact-pattern and hence the answers given by the court do not lend themselves easily to generalisation. See Francisco de Elizalde, “Partial Invalidity for Unfair Terms? CJEU in Abanca - C-70 & 179/17,” Journal of European Consumer and Market Law 8, no. 4 (September 1, 2019): 147–49. I tend to disagree: the reasons should emerge from the text.

270 Case C-260/18, Kamil Dziubak, Justyna Dziubak v Raiffeisen Bank International AG, ECLI:EU:C:2016:612.

271 Dziubak para 55, based on the precedents discussed supra under section 2.2.2.: “since the system of protection against unfair terms does not apply if the consumer objects to it, that consumer must a fortiori be entitled to object to being protected, under that same system, against the unfavourable consequences caused by the contract being annulled in its entirety where he does not wish to rely on that protection.”

272 Dziubak, para 59.
national legislature in relation to the contracts concerned, or indeed have expressly opted for a rule introduced by the national legislature to that end to be applicable.

However, in the present case, even assuming that provisions such as those to which the national court refers, given their general nature and the need to make them effective, can in practice replace the unfair terms concerned by the mere act of substitution by the national court, they do not appear, in any event, to have been subject to a specific assessment by the legislature with a view to establishing that balance, such that those provisions are not covered by the presumption set out in paragraph 59 of this judgment that they are not unfair."  

The Court, thus, seems to fall back to the Directive’s favor for national rules and to the exemplary function of national default rules as expression of a “just” apportionment of rights and interests also relevant to the unfairness test. The CJEU’s recent case-law further shows deference to national law on a crucial point: it is national law that determines when a contract is to be considered as not viable, and thus invalid, without the unfair term. Article 6, according to the Court, provides no criteria to decide on this issue – besides what has been several times repeated by the Court itself, namely, that the assessment must be objective, i.e. not related to the interests of the parties (in particular: the professional). This criterion is to be seen as binding if the national criteria are to be defined “in a manner consistent with EU law”.

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273 Dziubak, para 60-61.
274 Both the Directive’s 13th recital and article 1(2), excluding terms reflecting mandatory statutory or regulatory provisions from control are reproduced in the “Legal context” section of the decision. However, the juxtaposition of the two is actually in contrast with the Court’s own interpretation of article 1(2), which has strictly limited the exemption to mandatory rules – and thus to “supplementary rules”.
275 See supra, 3.1.1.
276 Both Abanca & Bankia and Dziubak.
277 Dziubak para 40.
278 Dziubak para 39.
279 Dziubak para 40.
280 Effective compliance with this parameter was arguably in doubt in both Dziubak, where the referring court thought “freedom of contract” may stand in the way of upholding the contract, and in Abanca-Bankia, where the Spanish government claimed that the essence of the contract type would be violated, but the infringement would really only alter the creditor’s advantages arising from the contract type. See more extensively my analysis in Candida Leone, “Case Note Abanca Corporación Bancaria, S.A. v Alberto García Salamanca Santos (Grand Chamber),” Revue Européenne de Droit de La Consommation, no. forthcoming (2020).
In cases where the contract can continue without the unfair term, the question remains to what extent the Directive precludes replacement of the terms by means of supplementary legal provisions. In 2018, the Court has approved of Spanish case law instructing lower courts confronted with unfair default interest rates to find that no default interest was due by the debtor,

“without being able to substitute supplementary national provisions for that contractual term or revise the term in question, whilst maintaining the validity of the other terms in the agreement, and in particular the term concerning ordinary interest”.

While in this case the answer may seem pretty straightforward, from the perspective of national law the question is where the line must be drawn: for instance, should a national court invalidate an unfair conventional limitation period, it would be entirely counterintuitive to conclude that no statutory limitation applies to any claims that would have been covered by the unfair term. More dubious would be the possibility to apply general rules on damages for non-performance when a penalty clause is declared unfair. The Court has clarified in Kanyeba\(^{282}\) that the Directive does not preclude allowing the trader to present claims based on extra-contractual liability as it does not, in fact, in any way seek to harmonise tort law. Whether one could extend the same reasoning to a claim in contract-based liability is not obvious.

A possible reading would be that only rules whose scope or function overlaps with the unfair term would need to be left out. Nothing in the Court’s jurisprudence so far, however, provides a solid anchoring for this argument.\(^{283}\) In line with Kásler, one could argue that also beyond cases of possibly invalidity, the consumer’s interest may be the appropriate parameter to decide whether supplementary

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\(^{281}\) Cases C-96/16 and C-94/17, para 78.

\(^{282}\) Joined cases 349-351/18, Kanyeba, ECLI:EU:C:2019:936.

\(^{283}\) The Court did operate a similar distinction in order to justify that the invalidation of (the part of) a term establishing default interests did not require setting aside the “regular” contractual interest even as the former was calculated on the basis of the latter. The specific formulation, the Court argued, did not take away the different functions performed by the terms – ordinary interests being intended to remunerate the creditor for making a certain sum available, while default interests can perform deterrent, punitive and damage compensation functions – see para 76. However, transplanting this reasoning to the area of the consequences of unfairness is no obvious operation.
provisions should or should not apply. This solution would only apply to a limited palette of terms and possibly conflict with other considerations.\textsuperscript{284}

The Court’s uncompromising attitude on the issue of total eradication shows its paradoxical implications in \textit{Dziubak}: when no default statutory provision can replace an invalid term, consumers are confronted with a rather unattractive choice – between the contract’s invalidity and upholding a term that has been declared unfair. The solution is, with all evidence, far from concerned with ensuring contractual balance. At the same time, the solution seems both at odds with the protective rationale of the \textit{Kàsler} exception to the eradication rule and even, in the long run, likely to upend the very effectiveness that the eradication doctrine seeks to guarantee. The prospect of going through court proceedings and ultimately ending up with the original unfair term may represent a further element discouraging consumers from invoking unfairness and thus act as enforcers. Overreaching regulatory zeal does not sit well within a complex legal panorama.

\textbf{3.2.4. “As provided for under national law” (II): but with all the effects that must derive from it}

Once a term is declared invalid, any effects that it may have produced lack a legal basis and must be redressed. In particular, this means that consumers who have undergone extra costs as a result of the unfair provision may have a compensatory claim against their contractual counterpart. Such was, for instance, the case as a result of the German litigation surrounding price increases in contracts for the supply of energy, which gave rise to the Court’s RWE decision\textsuperscript{285}. In that case, the CJEU had considered whether it should limit in time the effects of its own findings concerning the transparency and fairness of relevant price variation clauses on the basis of the possible impact that its decision may have on the finances of the companies concerned. The Court had concluded that the circumstances of the case did not warrant such a limitation.

\textsuperscript{284} For instance, it may only partially overlap with Pavillon’s suggestion that replacement should be possible every time the unfair term was one that restricted the rights of the affected consumer – think of a short term: for the consumer no term is better than the default rule, hence replacement is not in their interest. See Charlotte MDS Pavillon, “Case Note: ECLI:EU:C:2019:250 (Abanca Corporación Bancaria),” \textit{Nederlandse Jurisprudentie}, 2020, 101.

\textsuperscript{285} See supra note 233.
In *Gutierrez Naranjo*, the CJEU had to decide on the compatibility with EU law of a Spanish Supreme Court orientation which limited the recoverability of excess payments due under terms that were at some point declared unfair. The Court concluded that such a limitation was incompatible with the Directive.

In several cases concerning the unfair terms directive, the Court of Justice had indeed declared that legal certainty and other relevant interests can justify limitations to consumer protection under the Directive - thus declaring rules of civil procedure concerning res iudicata and limitation periods compatible with EU law. However, these cases cannot be used as a justification for national courts limiting the effects of a declaration of unfairness. As the Court explains elsewhere, "the application of a limitation period does not altogether deprive a person, [...], of the right that EU law entitles them to. Conversely, the temporal limitation of the legal effects stemming from a declaration of nullity in application of Directive 93/13 is tantamount to depriving, in general, any consumer having concluded, before [the relevant] date, a mortgage loan contract containing such a clause of the right to obtain repayment in full of the amounts overpaid".

Hence, it is not open to national law to adversely affect the substance of the rights conferred by EU law to individual consumers – in this case, the right not to be bound by a term which has been declared unfair. In the RWE, the German government had asked the CJEU to limit the effects of its decision because of the impact it may have on German energy providers. The Court rejected the request

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286 See joined cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo v. Cajasur Banco, Palacios Martínez v. BBVA and Banco Popular Español v. Irles López*, ECLI:EU:C:2016:980. After having found frequently used “floor clauses” unfair under the Spanish rules implementing the unfair terms directive, the Spanish Supreme Court had decided that consumers would only be entitled to restitution for having paid too high interest rates as of the date of the Supreme Court’s own finding. In his opinion, AG Mengozzi argued in favour of a similar limitation, but the CJEU found it incompatible with the Directive. See for an early commentary http://recent-ecl.blogspot.nl/2016/12/spanish-floor-clauses-clausulas-suelo.html.

I am indebted to the author, my colleague Joanna ML van Duin, for pretty much all the insight I have on unfair terms before Spanish courts.

287 See *Gutiérrez Naranjo* para 69-69 with reference to C-40/08, Asturcom Telecomunicaciones, EU:C:2009:615

288 See Case C-542/08 *Friedrich G. Barth v Bundesministerium für Wissenschaft und Forschung, para 35*, as referred to in *Gutierrez Naranjo* para 70.

289 *Gutierrez Naranjo* Para 72.

290 *Gutierrez Naranjo* Para 71.
on relatively formalistic ground (the possible financial impact would not be exclusively a result of the CJEU’s interpretation); however, more interesting is that on that occasion the CJEU repeated that such a limitation of individuals’ ability to rely on the correct interpretation of EU law can only be put in place in “altogether exceptional cases”.  

It stands out how non-regulatory reasoning plays a powerful role in the justification of the outcome in Gutierrez Naranjo: the reason why the Spanish court cannot limit the effects of a declaration of unfairness is simply in the fact that a limitation would deprive affected consumers of the rights they hold under the Directive (article 6.1). The fact that such a restriction, next to providing “incomplete and insufficient” protection, would also not constitute “an adequate or effective means of preventing the continued use of that type of term” in line with the Directive’s article 7 is mentioned in passing but does not appear necessary in order to justify the decision – and is not repeated in the final lines.

3.3. Ex officio control and the relationship between individual and collective proceedings

3.3.1. Development and expansion of ex officio control

As widely known, Member States retain a large degree of autonomy as concerns the implementation of directives within their legal systems, and in particular as to the procedural arrangements surrounding the actioning of the substantive rules put in place by virtue of EU rules. In the case of the Unfair Terms Directive, this means that the Directive does not directly establish any procedural rules concerning the way in which unfair terms should be challenged or resisted in court. Over the last few years, however, the Court of Justice has been busy establishing an articulated and demanding set of requirements that national procedural laws have to respect in order to comply with the principles of equivalence of effectiveness.

291 RWE, para 59.
292 At para 73.
293 Except establishing that, as concerns the non-negotiated nature of the relevant terms, the burden of proof is on the professional who wants to claim a certain term has been negotiated (art 3).
First of all, it is by now clear that national courts should be ready to scrutinise non-negotiated terms *ex officio*. It is instructive to take a closer look at the way in which the Court justifies the power of revision in *Mostaza Claro*:

“The system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms […]

Such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract.

It is on the basis of those principles that the Court has ruled that the national court’s power to determine of its own motion whether a term is unfair constitutes a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers […]”

This power, however, is turned into a duty by the end of the decision:

“The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.”

In this case, a local court had been asked by a consumer to annul an arbitration award, on the grounds that the arbitration agreement under which the award had been pronounced had to be considered void. The consumer had not raised the issue in the arbitration proceedings. The other party, but also the German government, had argued that allowing - or requiring - courts to invalidate an arbitral award in cases like the one at stake would “seriously undermine the effectiveness” of arbitration awards. The Court explains that, as with other elements of public policy deriving from EU law, setting aside arbitration awards is required every time it would be possible for courts to pronounce their nullity.

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295 *Mostaza Claro* paras 25-27.

296 *Mostaza Claro* para 33.
for violation of national public policy rules. A violation of this obligation, the Court has recently confirmed,\textsuperscript{297} can (under relatively strict conditions) qualify as a violation of EU law giving rise to a claim in damages against the non-compliant MS for the aggrieved consumers.

The Court’s reasoning in this case is intriguingly ambiguous. It refers to the “deterrent” effect of ex officio control to explain why powers in this direction are to be seen as invested in national courts and then turns to public policy and the Union’s task to raise the standard of living and the quality of life in its territory\textsuperscript{298} in order to convert these powers into obligations which cannot be compressed for the sake of arbitration. When explaining the mandatory nature of article 6, the court explains that the aim of the provision is

\begin{quote}
“to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.”\textsuperscript{299}
\end{quote}

While effectiveness (here: effectiveness of the protection offered by article 6) is in itself an ambiguous notion,\textsuperscript{300} the Court’s concern for the protection offered to the individual consumer involved in the dispute seems here relatively genuine. The ex officio obligations are not limited to arbitration procedures that, from the Directive’s perspective, are after all likely illegal.\textsuperscript{301,302} Within the outer limits posed by the principle of \textit{res iudicata},\textsuperscript{303} and with the help of an unusually high number

\textsuperscript{297} Case C-168/15, Milena Tomášová v Slovenská republika – Ministerstvo spravodlivosti SR, Pohotovost s.r.o., ECLI:EU:C:2016:602.

\textsuperscript{298} Mostaza Claro para 37: as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory”.

\textsuperscript{299} See Case C-488/11 Asbeek Brusse and the Man Garabito v Jahani BV, ECLI:EU:C:2013:341 para 38, with further references.

\textsuperscript{300} Where EU law offers no comparable “protection”, the court seems less concerned with the consumer’s (fundamental) rights: see Case C-109/17, Bankía SA.

\textsuperscript{301} See now article 18 Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

\textsuperscript{302} For a different take, emphasising the specifically problematic nature of arbitration clauses and seeking to thus distinguish, in particular, VKI, AG opinion, case C-34/18 Ottília Lovasné Tóth v ERSTE Bank Hungary Zrt, ECLI:EU:C:2019:245.

\textsuperscript{303} see to that effect case C-40/08, Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira, ECLI:EU:C:2009:615 – also in these cases, the national rules will have to comply with the principle of effectiveness.
or preliminary reference requests,\textsuperscript{304} the Court of Justice has been “upgrading”-i.e. the rules of civil procedure (concerning in particular but not exclusively mortgage enforcement) in the Kingdom of Spain throughout the last decade.\textsuperscript{305}

3.3.2. Collective actions and individual rights

The Directive shows its market-cleansing orientation in a more traditional fashion at article 7, which imposes that MS go beyond the establishment of private law rules, allowing “persons or organizations” (art 7(2)) with a legitimate interest to act in protecting consumers, which includes obtaining injunctions to prevent the (continued) use of terms which are found unfair. Consumer organisations as well as business associations are considered as potential carriers of the required legitimate interest. Indeed, it is easy to see that while unfair terms control in individual proceedings can give relief to certain specific consumers, it is hardly an instrument capable of eliminating unfair terms from entire markets, or- as the Directive undertook to do- from the internal market as a whole. To this end, collective enforcement presents advantages at least under two points of view: first, overcoming individuals’ possible lack of appropriate incentives to act; second, delivering a result which is not only relevant in one dispute, but capable of impeding the use of certain terms at large. The legality of such effect of injunctions brought by consumer associations has been, again, established by the CJEU at the beginning of this decade.\textsuperscript{306} In addition to these points, allowing collective enforcement, in the hands of consumer associations or possibly of public agencies in charge of consumer protection, can help the establishment of practices whereby the standard terms in use in a market can become the object of negotiations “in the shadow of the law”, enhancing the bargaining power of consumer advocates.

In contrast, the Court’s decisions concerning the delimitations between collective and individual proceedings under the Directive testify to a concern with private

\textsuperscript{304} See Pomar and Lyczkowska, “Spanish Courts, the Court of Justice of the European Union, and Consumer Law.”

\textsuperscript{305} See Barral-Viñals, “Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements.”

\textsuperscript{306} Case C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, ECLI:EU:C:2012:242: the Directive “does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings.”
law as a mechanism for securing rights rather than an instrument of public policy enforcement. Collective proceedings differ from individual disputes, since in the former context a term’s evaluation takes place in abstracto and not with reference to a specific transaction.\textsuperscript{307} Consistent with this difference, the Court of Justice has affirmed\textsuperscript{308} that national civil procedure rules cannot let collective actions automatically pre-empt individual ones. Making consumers dependent on a procedure from which they cannot dissociate themselves and depriving them of the possibility to ex post accept the application of an invalid term would be contrary to the requirement of effective protection. From a market regulation perspective, this decision is arguably quite problematic as it undermines the predictive –and thus, guidance - value of decisions taken in collective proceedings.

In a similar vein, the CJEU has\textsuperscript{309} decided that national civil procedure rules requiring consumer associations to bring actions for injunctions before the courts of the place where the defendant is established, instead of allowing them to sue where the association is established, do not jeopardise the achievement of the purposes of directive 93/13 and do not violate EU law. According to the Court, “it is clear that, as regards the procedural remedies available to consumer protection associations in order to prevent the continued use of unfair terms, they are not in an inferior position vis-à-vis the seller or supplier.” Therefore, consumer associations cannot be equated to consumers for the purpose of establishing jurisdiction in the case of injunctions against the use of allegedly unfair terms. In this case, the idea that increasing the effectiveness of actions by consumer associations by making sure that they could easily bring an injunction against the continued use of unfair terms was not enough for the CJEU to equate them to individual consumers, whose protection can justify the Court’s interference with national civil procedures. While the reasons for not expanding to associations the procedural protection granted to consumers are mainly in the sphere of the relationship between EU and national law, the decision reinforces the idea that the procedural protection of consumers is not merely an instrument for effective

\textsuperscript{307} As we have seen, this means that certain rules -i.e. the consideration of circumstances attending the contract’s conclusion and the interpretation most favourable to the consumer- are only applicable in individual proceedings.

\textsuperscript{308} C-381/14, C-385/14, Jorge Sales Simiés v Caixabank SA, and Youssouf Drame Ba v Catalunya Caixa SA (Catalunya Banc SA), ECLI:EU:C:2016:909.

\textsuperscript{309} Case C-413/12, Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL, ECLI:EU:C:2013:800.
enforcement, but is just as importantly meant to secure the protection of individual consumers.\textsuperscript{310}

3.4. Conclusions

A close look into the CJEU’s extensive case-law concerning selected aspects of the Unfair Terms directive shows – as expected – a strong regulatory undertone; more interesting is the question of where non-regulatory motives arise. The overview reveals that the “nuisance” of justice-related motives emerges more or less at every turn.

Such was the case for the unfairness test discussed in section 2.1.: within the substantive unfairness test, the significant imbalance element has gained preponderance and seems to be designed in order for traders to manage their legal risks within each national legal systems effectively; meanwhile, the Court has been showing its discomfort with the “good faith” element in the test – essentially leaving it up to national courts to fill it in with their favourite standards. However, the circumstances surrounding the conclusion of the contract – seemingly downgraded in a number of decisions to a mere style trait – seem to make their way back via the transparency clause, destabilising the attempts to crystallise its meaning in objective, regulatory-friendly ways. The transparency test, indeed, seems to concern more and more a comprehensive assessment of the informational basis on which the (individual) consumer has concluded a contract. In stark contrast to a “simple” obligation to draft the terms in a transparent manner, such comprehensive assessment will evidently depend on the circumstances of the cases. This is troublesome for the Court itself, which by definition interprets the law rather than applying it to specific sets of circumstances. The development diminishes the regulatory potential of the test, as does - quite surprisingly - the “possibly weak average consumer” that the Court seems to have adopted in UCTD cases. This relatively realistic consumer image, towards which the CJEU seems to steer national judges, is possibly the most significant concession to consumer-protection-qua-interpersonal justice in the overview.

\textsuperscript{310} The topic is, in one way or another, at the centre of a vast array of contributions and at least three PhD dissertations in English, two of which have been published as books: Allison Östlund, Effectiveness versus Procedural Protection (Nomos Verlagsgesellschaft mbH & Co. KG, 2019); Anthi Beka, The Active Role of Courts in Consumer Litigation (Intersentia, 2018). The third one is currently being completed: preliminary results have been published in Anna van Duin, “Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC,” Journal of European Consumer and Market Law 6, no. 5 (2017): 190–198.
If the relationship between different rationales seemed ambiguous in respect of the unfairness test, it appeared as more openly problematic in the section devoted to the consequences of unfairness. The Court in this area pursues an openly regulatory agenda by concentrating on the preventive function of the term’s invalidity. To make sure that this preventive function is not undermined, it excludes all adaptation of the term – irrespective of whether adaptation would possibly be in the consumer’s interest or whether the invalidity could generate problems under national law. Only a market-cleansing objective justifies this approach. The limits to this overarching dissuasive function are to be found in some minimal consideration for the consumer who – at least! – must be given the final word on whether a term should be held invalid or applied and as to whether they prefer invalidity or (sic!) the application of the unfair term. It is quite obvious that the parties to the individual contract, and the individual dispute, are not the main focus. The parties’ interests, then, can be perhaps conceptualised as the external limits on the regulatory focus – determining when exceptions to the main rule need to be accepted. In this sense, however, the focus seems to be on the individual consumer as a weaker party. Additionally, one must consider how practical problems seem to arise in fitting the court’s incentive-based approach in the national private law systems, where for instance layers of remedies may be available – see e.g. the problem of different procedures for claims arising from the same contract, or the concurrence of contractual and tortious damages. The court’s decision in Gutierrez points to a non-instrumental consumer protection very much grounded in corrective justice: the consumer must be returned what they unjustly paid. The court in this case did (for once) not rely on incentives in order to assert the protection of consumers who had suffered a prejudice against the asserted systemic effect of removing the unfair terms.

As concerns the last section on ex officio and the relationship between collective and individual actions, market-cleansing, collective consumer protection and the protection of individual consumers may seem to go hand in hand most of the time: ex officio application of the Directive seems one example of such harmony. Disentangling different rationales is, hence, difficult. The Court has made significant inroads into the Member States’ procedural autonomy under the banner of effective protection. These inroads have not been justified with language similar to the one found in the section on the Consequences of unfairness, but out

311 The “deterrent nature” and “dissuasive purpose” of measures adopted in order to establish collective enforcement measures under article 7 of the Directive is mentioned in Invitel, not considered in this review, but in order to justify something that Member states
of an apparently genuine concern for the protection of the individual consumer-claimant – or more often consumer-defendant. It has not been willing to cross boundaries in the same way when, as in Asociacion de Consumidores de Castilla y Leon, collective procedures were at stake. Is has further made clear that access to justice for individual consumer must, as a rule, trump the stabilising effects of a decision taken in a collective procedure. In this context, the court seems to think that consumer protection as a matter of individual protection justifies further interference with national law than the Directive’s market-cleansing or collective protection aims.

One further red thread emerges – that is, the difficult position of the Court of Justice in typically private law cases, when its function is intrinsically regulatory: it interprets part of the legal framework relevant to a dispute but does not apply the rules. Seen how a growing number of cases remind us how doing “justice” between the parties will ultimately be a task for the national courts, the emergence of justice remainders within the CJEU’s adjudication should be seen as all the more remarkable.

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could do, not something that they are actually required to so – even though some passages in the text may suggest otherwise. See C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, ECLI:EU:C:2012:242.
Part II

The appearance of unfair terms control in labour law and the contractualisation of employment relations

Introduction

After having showed how, even in the heavily “instrumentalised” field of European consumer contract law, unfair terms control cannot be understood without bearing in mind its “contract law” corrective justice dimension, i.e. without also looking at it as a phenomenon within contract law rather than one entering the subject from without, the book will now attempt a similar operation for certain recent developments in individual employment law.

In essence, the coming chapters will claim that the (development and) introduction of unfair terms control of non-negotiated terms in employment contracts in two European jurisdictions is not just the result of – deliberate or possibly hapazardous – intervention on the side of the national legislators, but much rather the reflection of a phenomenon that was already in place in court practice. The book goes on to suggest that, much as with standard terms in (general and) consumer contract law, this phenomenon represents a bottom-up reaction to the ongoing contractualisation of labour relations, in particular at the individual level. In other words, as contract law gains increased relevance in individual employment relationships, the significance and content of traditional contract law notions must also evolve in the context of employment law in order to adapt to a context in which formal equality between contracting parties has little to say on the justice content of the agreements they will reach.

In narrative order, part II will thus first, at Chapter 4, introduce the legislative interventions which have led to the introduction of unfair terms control of employment contract in Germany and, most recently, in France. It will present the developments, especially in case-law, which have preceded (and possibly led to) the later legislative interventions, with emphasis on the different legal provisions and concepts mobilized by courts in order to intervene without express legislative authorisation to do so. In the second part of the chapter, a reasoned introduction to the main features of the “new” rules will allow to establish affinities and divergences between the judicial interventions traced in the chapter and the form of control envisaged by the codified rules.

Chapter 5 seeks to reconnect the analysis to the contractualisation discourse sketched in the introduction: it provides a macro-perspective (contractualisation
as a broad historical phenomenon), as well as a micro-analysis of how and why contractualisation – qua incentives and contractual technique – takes hold in the field of employment contracts. The chapter further presents the judicial reaction to a number of clauses appearing, in various forms, in both legal systems. Highlighting the emergence of similar clauses in both systems, and their ubiquitously problematic nature (as suggested by the fact that their legitimacy was object of litigation), serves the purpose of establishing “by proxy” the plausibility of the suggested contractualisation framework. Analysing the ways in which courts have shaped their reactions to such terms allows to investigate the role played by contract law discourse, rules and principles in the process.

While in general court reasonings will be less outspoken than in the case of the CJEU judgments analysed in Chapter 3, also in this part reasonings that are explicitly regulatory are highlighted; furthermore, throughout the chapters I pay attention to the possibility that a certain development could be directly connected to the dynamics of labour law rather than illustrate broader developments in contract law.
Chapter 4 The road to unfair terms control

4.1. Similar stories, different paths

Since the start of the century, major reforms of their respective civil codes have taken place both in Germany and, more recently, in France. In both cases, with the reforms came legislative changes allowing judicial control of non-negotiated terms in employment contracts. While, as we will see, the result was achieved in Germany by expanding the scope of the “consumer” rules and in France by introducing a new provision in the Civil code, the relevant provisions look very similar to each other and also present a high degree of similarity to the main provision in the Unfair Terms Directive.

Both France and Germany have adopted legislation concerning – as a minimum shared denominator – non-negotiated consumer contracts at the end of the 1970s. These rules had different scopes and very different application mechanisms. While in Germany courts were since the very beginning entrusted with the task of applying the relevant rules, in France the essence of the task was to be carried out by administrative channels. French courts, in fact, started exercising unfair terms control extra ordinem, eventually with the approval of the Cassation, until the legislator officially allowed them to do so when implementing the Unfair terms directive.

Both sets of rules were not applicable to employment contracts. The German Allgemeine Geschäftsbedingungen Gesetz (Standard Terms Act, often referred to as AGB-Gesetz) had a broad scope, applying to all standardised contracts covered by the Bürgerliches Gesetzbuch (German civil code or BGB). Only a few subjects were excluded – among which employment contracts. In France, the Loi Scrivener of 1978 restricted unfair terms rules to consumer contracts. The definition was formulated in sufficiently broad terms to make debates on its effective reach flourish, but its non-applicability to labour law was quite beyond question. The two original pieces of legislation, Loi Scrivener and Standard Terms Act, have later been both “codified”. The former, however, has been incorporated in the Code de

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313 Jean Calais-Auloy and Henri Temple, Droit de La Consommation (Daloz, 2015), 225.
314 In particular, at some point it appeared possible that the protection would also apply to non-consumers when acting outside their professional competences: Cass. Civ. 28 april 1987, n. 85-13674.
la consommation, putting together several sets of (legislative as well as governmental) regulations concerning consumer protection, whereas the latter has been incorporated in the BGB as a result of the 2001 reform.

While in both cases the inclusion of employment contracts in the scope of unfair terms control was clearly not the main goal of the large-scale contract law reforms of this century, the relation is more direct in the German case. Doing away with the exclusion of employment contracts under the AGB-Gesetz was an explicit choice, made in the awareness of the case-law developments discussed here – see infra. In France, there is no reason to believe that something similar took place. The report presenting the 2016 reform to the then-president Hollande does not mention employment contracts at all. The relationship between the new rules and the case-law outlined in the second part of the chapter is, then, more difficult to establish.

This Chapter provides an overview of avenues through which, prior to the reforms officially expanding unfair terms control to employment contracts, judicial intervention on individual terms was already taking place. It will show how, in piece-meal fashion, courts had already developed a relatively extensive network of rules aimed at limiting possible abuse on the side of the employers, which were later codified in the reform processes. In reconstructing the developments which have over time taken place in the two countries, one difficulty arises from the different chronology in the one and the other system. In this respect, one thing should be clarified in order to prevent misunderstandings: there is no temporal coincidence to be observed. This is not only true of the most recent developments, whereby we can observe that 15 years have passed between the two reforms; very different timelines also need to be considered when discussing the progressive diffusion of judicial control thanks to more or less audacious judge-made solutions. A chronological account would therefore provide a deceitful sense of linearity.

At the same time, we will see that in both countries, prior to the reform, a number of different solutions were adopted in order to invalidate “unfair” terms: different provisions were invoked, and sometimes the result was reached without clearly articulating a specific legal basis. This variety of solutions did not follow a linear evolution. Sometimes parameters were introduced and later replaced by others, but often different strategies coexisted. The following sections will, for each

country, trace these movements and then provide an account of the contours of unfair terms control rules as they are in place after the reform to identify the transitions and assess the contiguity or distance between the two stages.

4.2. Germany

4.2.1. Inhaltskontrolle of employment contracts

The 2001 reform of the German law of obligations, also referred to as Modernisierung, led to the incorporation of unfair terms rules in the German Civil Code (Bürgerliches Gesetzbuch, henceforth BGB). Until that moment, the subject was regulated by the 1976 Standard Terms Act.

In 1975 – that is, roughly one year before the adoption of the Standard Terms Act, Westhoff wrote at the very inception of his dissertation:

“[…] it is part of everyday legal practice that employment contracts, the content of which is based on the economic weight of the employer, are subjected by Courts to fairness control.”

One year later, the Standard Terms Act excluded employment law from its scope of application; this notwithstanding, the parliamentary reports confirmed that the exclusion was not meant to preclude the control that was already taking place by means of, in particular, § 242 BGB. More needs to be said about this phenomenon in order to be able to assess its relationship to the more recent developments that are reported in more detail later in the chapter.

The following account aims to show that the Inhaltskontrolle (content control) practiced by Labour courts before the reform of 2002, later largely absorbed by unfair terms control, was indeed already very similar to the AGB-Gesetz-dictated control which took place in consumer contracts. Furthermore, I submit, it reflected a set of concerns which is not different than the combination of justifications

usually associated with unfair terms control. Indeed, if the control was already established at an early stage, it was nonetheless controversial - not so much as far as its results were concerned, but certainly as to its justifications. The situation, which had been identified as somewhat problematic almost since its outset, had not fundamentally changed by 2002. Putting an end to legal uncertainty was, we will see, one of the main reasons put forward by the German government when justifying its proposal to lift the exclusionary provision of § 23 AGB-Gesetz. But what were labour courts actually doing in order to generate such uncertainty?

4.2.1.1. Labour law’s protective aims, Gesetzesumgehung and prohibited contracts

Control of contractual content entered court practice at least as early as 1960, when the Bundesarbeitsgericht stated that a term setting an end date for the duration an employment contract could not be invoked by the employer when its effect was to circumvent the provisions concerning the termination of (open-ended) employment contracts. This notion of circumvention of the law, or Gesetzesumgehung, was applied not only to the stipulation of fixed-term contracts, but, in time, also to other terms allowing the employer to unilaterally modify the content of their own and their counterpart’s obligations, for instance by the

320 Westhoff, Die Inhaltskontrolle von Arbeitsverträgen. Of course, criticising the latter could easily be seen as a way of refusing the former as well. This is in particular the case of Westhoff himself, who concludes his analysis of the legal basis for the Inhaltskontrolle already practiced by labour court at that time by saying that, since much of that control could not be justified on the basis of existing law or acceptable analogies, its results were illegitimate as well.

321 As mentioned in Chapter 1, the work is only concerned with one aspect of judicial control: the control of contractual content, that is what unfair terms control is about. This means that control over the way the contract is implemented, or the use that the parties make of the contractual terms, goes beyond the scope of the present investigation. This is to a large extent the case of the so-called Billigkeitskontrolle, which applies for instance to cases where ancillary performances on the side of the employer were spontaneously granted and then withdrawn. This was a much-discussed form of intervention, but it excluded from the present inquiry since it concerns more the exercise of a (contractual) prerogative than its existence and shaping. Exercise of the prerogative granted by a certain term relies on the existence – that is, validity – of the term. This is a different criterion than has sometimes been followed in previous recognitions – see Dorothea König, “Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England Und Frankreich” (Universitätsbibliothek Freiburg, 2010), http://www.freidok.uni-freiburg.de/volltexte/2010/7667/. In her dissertation, König considers as Inhaltskontrolle all judicial interventions “taking into account the idea of worker protection”, see p.41 in her book.

322 AP BGB § 620 Befristeter Arbeitsvertrag Nr. 16, Decision of 12.10.1960 - 3 AZR 65/59

323 Thus, the decision doesn’t say that the clause should be considered as invalid – but neither does harmonised “consumer law” unfair terms legislation (i.e. the Directive) to-date.
incorporation of so-called *Widerrufsvorbehalt*. Such terms were held to circumvent the provisions on “partial termination” of the employment contract (Änderungskundigung), which is also regulated under German employment law. At its origins, the reasoning could be summarised as follows: the development of rules concerning the (partial) termination of employment relationships suggested that their aim was to preserve the worker’s job; therefore, contractual arrangements that deprived employees of the protection granted to this interest by the legislator go against such aim and should not be upheld by courts. The stipulations were to be considered illegal under the general rule on illegal contracts of § 134 BGB, according to which contracts infringing a statutory prohibition are invalid.

In later case-law, the measure of Gesetzesumgehung was more directly anchored in the contractual balance: when a term made “essential elements of the contract” subject to unilateral modification, such a term would be liable to affect the balance of performance and counter-performance. In particular, according to case-law, such balance would be unacceptably affected when the modification concerned more than 25-30 percent of the overall remuneration. The notion that unilateral modifications were liable to alter the balance between the performances, thus, first emerged as an argument for expanding the Gesetzesumgehung doctrine.

4.2.1.2. Constitutional principles

Further intervention took shape through the application of Art. 12 of the German Grundgesetz (GG), again – at least in the beginning – through the clause of § 134 BGB. A term restricting the employee’s occupational freedom as protected by art. 12 GG, was to be considered as compatible with that provision (only) if, under

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325 See König, “Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England Und Frankreich,” 43.

326 According to König, this route was seen as Fixierung von Leitbildern (“crystallization of the statutory models”). See König, 93 fn 282 with further references.

327 BAG v. 7. 10. 1982, AP § 620 BGB Teilkündigung Nr. 5.

328 BAG v. 21. 4. 1993, AP § 2 KSchG 1969 Nr. 34 [II 1 b)] referring to BAG v. 13.5.1987, AP § 305 BGB Billigkeitskontrolle Nr. 4 [II 3].


330 The first part of the article declares that “All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training”.

331 Urteil vom 29.06.1962 - 1 AZR 343/61 | BGB § 611 | GG Art. 12 | GG Art. 2 AP GG Art. 12 Nr. 25 (m. Anm. Hueck).
consideration of all the circumstances of the case at stake and in accordance with the principle of good faith it was tolerable for the employee and, seen from the point of view of a reasonable observer, it expressed a grounded and valuable interest of the employer.\textsuperscript{332} This approach, which was tantamount to a direct application of article 12 GG to private legal relationships, was later “corrected”, using the principle of good faith as embodied in § 242 BGB as a medium for the indirect application of the provision.\textsuperscript{333} Various types of terms common in employment practice may have an impact on occupational freedom: one may think of not only non-compete clauses, but also the restitution of education costs, the duty to return an already perceived bonus or just particularly long conventional notice periods.

4.2.1.3. Contractual equality
The doctrines described above do not seem to attach much importance to the question whether a term has or not been freely negotiated or unilaterally drafted. This circumstance seems to gain meaning in decisions where the control is explicitly based on the need to ensure the establishment of a fair contractual content, given the existence of a situation of “impaired contract equality” (\textit{gestörte Vertragsparität}).\textsuperscript{334} In this context, unilateral contract drafting could either


\textsuperscript{334} König, “Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England Und Frankreich,” 49.

\textsuperscript{334} BAG 31.10.1969 - 3 AZR 119/69 AP BGB § 242 Ruhegehalt-Unterstützungskassen Nr. 1 (Ls.) (m. Anm. Lukowsky) “Ein Vertragswerk, das nicht zwischen den Beteiligten im Wege eines gegenseitigen Interessenausgleichs ausgearbeitet, sondern praktisch vom Arbeitgeber allein festgelegt wird, muß sich eine Korrektur nach Billigkeitsgründen gefallen lassen. Eine solche gerichtliche Billigkeitskontrolle ist bei allen Vertragswerken geboten, bei deren Zustandekommen die Vertragsparität gestört ist. Darüber besteht heute in Rechtslehre und Rechtsprechung weitgehend Einigkeit. Man streitet lediglich über die - theoretische, das praktische Ergebnis nicht beeinflußende -
represent a result of such impairment, or a fact in itself capable of justifying judicial intervention. Thus, the BAG observed that

“the existing law of obligations relies on the thought that contractual fairness is guaranteed by the fact that through negotiation equally strong parties reach a reasonable agreement each in consideration of their own interests. This is what justifies freedom of contract. […] It is different when no balance between the parties guarantees a reasonable contractual content, due either to impaired contractual equality or to the fact that, due to other reasons, one of the parties alone can determine the contractual content”.

With regard to such “other reasons”, the Court mentions standard terms of employment, in cases where the employer can determine the contractual performance and in the case of the non-binding concession of voluntary benefits. On this path, by the last decade of the 20th century the BAG asserted its role in guaranteeing the establishment of a balance of interests between the parties. The

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335 Ibidem.


337 Adomeit harshly criticised the German Constitutional Court’s Bürgschaft judgement of 19.10.1993 for, in his opinion, turning this BAG doctrine into a “general principle”. Such direct connection, however, was quite controversial at the time. See Klaus Adomeit, “Die Gestörte Vertragsparität - Ein Trugbild,” NJW, 1994, 2467; Fritz Rittner, “Die Gestörte Vertragsparität Und Das Bundesverfassungsgericht,” NJW, 1994, 3330.
need for courts to fulfill this function was imposed by the “structural inferiority” of the employee vis-à-vis their employer.\textsuperscript{338}

Thus, unilateral drafting and unilateral action within the contract stand in the way of the possibility to rely on contractual autonomy as guaranteeing an acceptable content. The fact that the BAG seems to assimilate instances of structural imbalance (the gestörte Vertragsparität stricto sensu) to non-negotiated terms and to cases where the employer has or exercises unilateral prerogatives points to one essential characteristic of Inhaltskontrolle,\textsuperscript{339} namely the fact that it constantly fluctuates between a genuine weaker party protection concern and the ambition of taming the employer’s unilateral powers as “master of the contract” and of the relationship.\textsuperscript{340}

This duplicity is well reflected in the notion of Fürsorgepflicht, that was also occasionally invoked, and in the attempts by the BAG to make extensive use of § 315 BGB (Specification of performance by one party) - which both relate to the contract’s performance- to justify Inhaltskontrolle. The Fürsorgepflicht can be defined as the duty, for the employer, to consider the interests of their employees when exercising their rights under the employment relationship. It is at the same time a remnant of the institutional approach and a response to the personal subordination of the employee.\textsuperscript{341} In more modern terms, it can be described as the specification of the good faith clause of § 242 BGB in the field of employment relationships. Similarly, the idea to assimilate certain contract terms to unilateral employer prerogative as to the determination of the performance and submit it to the Billigkeitskontrolle made possible by § 315 BGB when the employee has

\textsuperscript{338} BAG 16.3.1994: “Treffen die Arbeitsvertragsparteien eine eigenständige Regelung, so unterliegt eine solche Klausel einer Inhaltskontrolle nach § 138 BGB. Es ist zu prüfen, ob sie gleichermaßen auf beide Parteien des Arbeitsverhältnisses Anwendung findet, ob sie inhaltl. ausgewogen ist und nicht Rechte des Arbeitnehmers einseitig beschneidet.”

\textsuperscript{339} This line of arguing by the BAG had been indeed more or less continuously criticized for its lack of doctrinal clarity besides its far-reaching interventions – see Dagmar Coester-Waltjen, “Die Inhaltskontrolle von Verträgen Außerhalb Des AGBG,” Archiv Für Die Civilistische Praxis, 1990, 1.


accepted a term drafted unilaterally by the employer\textsuperscript{342} shows the tendency to conflate Inhaltskontrolle and control of unilateral powers de facto or de iure exercised by the employer.

4.2.1.4. In search of unity?
In 2000, not long before the approval of the Modernisierung, the BAG reviewed its case law on Inhaltskontrolle. In a case\textsuperscript{343} concerning a conventional limitation period, the court excluded the necessity of an application by analogy\textsuperscript{344} of the Standard Terms Act because the existing control under the principles developed “by means of §§ 134, 138, 242, 315 BGB”, together with the legal regulation of employment carried sufficient consideration of the need to protect employees. Although applying the AGB-Gesetz is unnecessary and (and at that point in time also) inadmissible, the Court argues, this does not mean that “general ideas that have found their expression in other statutes, as for instance in the Standard Terms Act”, should not be applied.\textsuperscript{345} Principles developed through labour law adjudication, the BAG continues, should not lose their applicability because in a certain case the contract has not been negotiated but formulated by the employer in the form of standard terms. One instance of such principles is considered immediately afterwards, when considering whether the clause has to be considered as “surprising”. The dogmatic foundation of the exclusion of “surprising clauses”, the BAG explains, is not univocally identified. Some decisions speak of a principle that surprising clauses do not become part of the contract, without anchoring this statement to any legislative provision. This, the BAG observes, is however not different than what the Bundesgerichtshof did before the entry into force of the AGB-Gesetz.\textsuperscript{346}

A substantive appreciation of a contentious clause, according to the BAG, requires the concerned court to check whether it is not contrary to good practice, to good faith, to mandatory provisions or to basic principles of labour law. The control, in this case, ascertains whether the clause establishes equal limitation periods for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{342} See Westhoff, Die Inhaltskontrolle von Arbeitsverträgen, 62. with further references.
\item \textsuperscript{343} BAG 13.12.2000, 10 AZR 168/00
\item \textsuperscript{344} “Es ergibt sich auch keine praktische Notwendigkeit für eine analoge Anwendung des AGB-Gesetzes, weil die in der Regel anhand der §§ 134, 138, 242, 315 BGB durch die Rechtsprechung entwickelten arbeitsrechtlichen Grundsätze und die übrigen vorhandenen gesetzlichen Regelungen dem Arbeitnehmerschutzgedanken des Arbeitsrechts hinreichend Rechnung tragen”.
\item \textsuperscript{345} Ibidem, under b).
\item \textsuperscript{346} In the end, though, the decision proceeds to anchor the prohibition of surprising terms in the principle of Treu und Glauben as enshrined in § 242 BGB.
\end{itemize}
\end{footnotesize}
both parties, whether it is justified, not exceedingly short\textsuperscript{347} and whether it does not unreasonably disadvantage the employee. The latter is, incidentally, the same wording used in the Standard Terms Act.

The reasoning adopted by the BAG in this circumstance is instructive as to the complex relationship between judicial control and the legal regulation of non-negotiated contracts: although neither the principles developed by the Bundesarbeitsgericht nor the case-law of the Bundesgerichtshof were developed exclusively in relation to non-negotiated contracts, the vicinity between the control regulated by the ABGB and the “judicial principles” developed under various provisions is obvious. However, the Court is not ready to consider the Bereichsausnahme of § 23 as pre-empting the continued control of potentially unfair terms.

This variety of interventions,\textsuperscript{348} which had been condemned as “\textit{dogmatisch unbefriedigend}”,\textsuperscript{349} has been brought to unity by the inclusion of employment contracts within the reach of §§ 305-310 BGB.

4.2.2. The \textit{Schuldrechtsmodernisierungsgesetz} and judicial control of non-negotiated employment contracts

The 2001 reform of the German law of obligations, also referred to as \textit{Modernisierung},\textsuperscript{350} led to the incorporation of unfair terms rules in the German Civil Code (Bürgerliches Gesetzbuch, henceforth BGB). Until that moment, as mentioned, the subject was regulated by the 1976 Standard Terms Act. Under its provisions, terms contained in standardised contracts or Allgemeine Geschäftsbedingungen, which were used or were meant to be used for multiple transactions, could be subject to judicial control. After the 1993 Directive was

\textsuperscript{347} Interestingly, the parameters for this particular prong will change shortly after this decision. In this case, considering existing collective agreements and the legal limitation periods, the BAG considered the term as acceptable; however, after the \textit{Schuldrechtsmodernisierungsgesetz}, which will make the default limitation period longer, the changed statutory Leitbild will lead the BAG to require longer conventional periods.

\textsuperscript{348} For instance, the good morals provision of § 138 BGB was invoked against exceedingly high restitution-of-bonus terms, or exceedingly broad non-competition clauses; but terms of the same kind could also be declared to go against Article 12 of the Grundgesetz, which protects the individual’s freedom to choose their occupation, and be seen as falling under the remit of § 242.

\textsuperscript{349} Gregor Thüising, \textit{AGB-Kontrolle Im Arbeitsrecht} (Beck, 2007), 11. See \textit{ivi} for further account of the previous evolution.

\textsuperscript{350} Gesetz zur Modernisierung des Schuldrechts adopted on 26 November 2001 (BGBl. I page 3138), which entered into force on 1 January 2002.
implemented, in the case of contracts concluded with consumers, not only such standardised contracts\textsuperscript{351} but all non-negotiated terms could be tested for unfairness. Insofar as § 23 of the 1976 Act made direct application of the act to employment contract impossible, the exclusion was removed thanks to the 2001 reform.

During the process leading to the Modernisierung, the issue of judicial control of employment contracts was not the object of much debate. Short before the reform text was approved, though, the German Senate (Bundesrat)\textsuperscript{352} suggested that the “branch exclusion” should be lifted for employment contracts. In its response, the Government concurred with the Senate’s suggestion. It observed that “the case-law of the Bundesarbeitsgericht relative to contractual rules shows that contractual freedom ‘left to itself’ is not on the whole suited to ensure workers a sufficient protection against unfair contract terms”.\textsuperscript{353} The proposal to lift the exclusionary provision of § 23 AGB-Gesetz was, still according to the Government, in particular meant to secure that the protection of employees concerning the control of contractual content would not lag behind the level of protection achieved in civil law\textsuperscript{354}. At the same time, the measure would put an end to the legal uncertainty generated by the absence of clear indications as to the kind of control to be exercised by Labour courts.\textsuperscript{355}

The implicit acknowledgement that some control was already being exercised by labour courts was not made for the first time. We have seen above that already the drafters of the 1976 Standard Terms Act were aware that some form of judicial control was likely already taking place in this and other excluded fields. Awareness of this activity was clearly mirrored in the parliamentary report accompanying the Act: the exclusionary provision of § 23 should not mean that

\textsuperscript{351} That is, contracts intended for multiple use; as a rule of thumb, multiple use meant that they were intended to be used at least three times.


\textsuperscript{353} BT-Dr 14/6857 p, 54: “Das Fall-Material der Rechtsprechung des BAG zu den Arbeitsvertragsmodalitätenzeigt, dass eine “sich selbst überlassene” Vertragsfreiheit nicht in der Lage war, insgesamt einen ausreichenden Schutz der Arbeitnehmer vor unangemessenen Vertragsbedingungen zu gewährleisten.”

\textsuperscript{354} Ibidem: “Dadurch wird auch dafür gesorgt, dass das Schutzniveau der Vertragsinhaltskontrolle im Arbeitsrecht nicht hinter demjenigen des Zivilrechts zurückbleibt”.

\textsuperscript{355} Ibidem: “Die aus dieser unheinheitlichen Rechtsprechung entstehende Rechtsunsicherheit sollte durch die Streichung der Bereichsausnahme beseitigt werden.”
“content control” (Inhaltskontrolle) of pre-formulated contracts, such as had been taking place in the excluded domains, would need to stop. For employment contracts, such control\textsuperscript{356} went on, in not-so-disguised form, throughout the decades leading to the reform of 2001.\textsuperscript{357} However, the reform was presented as a turning point and the case-law concerning unfair terms in employment contract has seen a steep acceleration since the new rules have come into force.\textsuperscript{358}

Since the Modernisierung, the same provisions applicable to consumer contracts give shape, with a few exceptions and adaptations (see infra, esp. 4.2.1..), to the judicial control of non-negotiated terms in employment contracts. This is due to the concurrent workings of the end of the branch exclusion and the incorporation of a fairly wide definition of consumer at § 13 BGB. The definition, in fact, considers as consumer “any natural person who concludes a juridical act for a purpose which can be chiefly attributed neither to their trade or business nor to their independent professional activity”\textsuperscript{359}

The Modernisierung incorporated the definition of consumer in the BGB, granting it enhanced status and significance within the code’s system. German doctrine, among other things, started to wonder what this meant for employment contracts: were employees to be treated as consumers all the time, i.e. also when concluding employment contracts? For the purposes of unfair terms control, now that the


\textsuperscript{357} Traces of this control are still to be found after the entry into force of the “new” Civil Code: In 2003, faced with a case to which the new rules were not yet applicable, the Court stated that “Ungeachtet der Bereichsausnahme des § 23 AGB-Gesetzes unterliegen arbeitsverträge der allgemeinen richterlichen Inhaltskontrolle” BAG 9.9.2003, NJW 2004, 1754. “Notwithstanding the exclusionary clause”, according to the Bundesarbeitsgericht, a “general content-control” was to be exercised by judges also under old law.


\textsuperscript{359} The new § 13 BGB, which follows the approach of former § 23a AGB-Gesetz, defines a consumer as follows: "Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu Zwecken abschließt, die überwiegend weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden können". The article has been lastly been amended to reflect the current EU-level definition of consumer, which covers persons acting predominantly outside of the exercise of a trade, business or profession.
domain exclusion had been lifted, did this mean that all the special consumer provisions (or “luxe AGB-kontrolle”) of the former AGB-Gesetz had to be applied?360

The answer to the question was not of huge momentum in practical terms – most of the doctrine considered it reasonable to equate the treatment of consumers and workers with regard to certain provisions of consumer law but not to others.361 Nonetheless, a debate was sparked between two different concepts of “consumer”: the so-called “relative Verbraucherbegriff” (relative consumer notion) and the “absolute Verbraucherbegriff” (absolute consumer notion). The former emphasizes the contextual character of consumer protection, which originates from the fact that the consumer is protected when securing for herself goods or services which serve to satisfy their personal needs. In this light, it is the contract’s objective which determines the application of protective legislation, not the “protection-worthiness” of the individual.362 An employment contract has a very different objective that has nothing to do with consumption; it engages the employee to fulfil an obligation through their own services. Contrary to classical consumer contracts, in a standard form contract for labour it is from the protected party that the main or “characteristic” performance is expected. Seen through these lenses, the employee could not be considered as a consumer.363

The competing “absolute” concept of consumer relied on the literal contents of § 13 BGB, together with the legislative history, to claim that an employee has to be considered as a consumer even when entering an employment contract or related

360 Other possible domains where the definition could have a bearing are: the amount of interests to be paid in case of delayed payment according to §§ 288 and 247I BGB; the right of withdrawal for doorstep sales would also be applied to contracts for terminating the employment relationship (Aufhebungsverträge) and settlement agreements (Abwicklungsverträge); finally, a credit contract between employer and employee with market-like interests could represent a consumer credit contract under §§ 491ff. BGB. Regarding the first issue, the Bundesarbeitsgericht has not considered the answer to the question of the “consumer-worker” as necessary in order to avoid application to employment disputes of the higher interest rate imposed in business relations. See BAG decision of 23.2.2005, NZA 2005, 694.

361 This observation is to be found in Ulrich Preis, “Ausgewählte Fragen Der AGB-Kontrolle Im Arbeitsrecht,” in Inhaltskontrolle Im Arbeitsrecht, Zwischen Zivilrecht Und Arbeitsrechtlichen Besonderheiten, ed. Barbara Dauner-Lieb, Henssler, Martin, and Ulrich Preis, Nomos (Munich, 2006), 65.


363 There seems to be, in the literature, a certain emphasis on the “structural difference” between employment contracts and “classical” consumer contracts, based on the fact that the employee offers their services rather than requiring services for themself.
agreements. As we have seen, when proposing to subject employment contracts to judicial control, the government explicitly stated that the innovation was meant to ensure that the level of Inhaltskontrolle for the protection of employees would not lag behind the level afforded by general private law”. Of course the formulation of the provision was inelegant, since it introduced in the consumer-professional dichotomy a third element, the non-independent worker, which traditionally belonged to a different couple, that of Arbeitnehmer and Arbeitgeber. The doctrine could, thus, not find a clear agreement on the interpretation of § 13 BGB.

Some clarity, though, has been achieved after BAG 25.05.2005, which explicitly declared an employment contract as one “between a professional and a consumer” under § 310(3) BGB. The court explains this outcome by stating that the term “Consumer” represents only a juridical technical umbrella-concept ("rechtstechnischen Oberbegriff"). A consumption objective, as is typical for sale and credit contracts, is not required. With the definition of consumer the legislator detached itself from the common use of language ("allgemeiner Sprachgebrauch") opting for an independent comprehensive determination of the concept. Its meaning descends in each case from the connection of provisions based on the qualification of someone as a consumer.

As shown in the passage above, the BAG opted for staying true to the literal sense of the definition. In particular, this is not too surprising with reference to unfair terms control – which is the area to which the consumer definition originally

364 Supra, at fn. 50. This argument was also mentioned by the court in its decision of 25.05.2005 to ground its own interpretation of the provision, which is accounted below.
365 The latter’s role in the entire discussion is far from clarified. Manfred Lieb quotes this as one qualifying argument of the relative consumer doctrine: “Damit entfällt die starre Zweiteilung Unternehmer/Verbraucher, die keine andere rechtliche Qualifizierung zulässt, und schafft Raum für die Beibehaltung der Sonderbeziehungen zwischen Arbeitgeber und Arbeitnehmer als eines jedenfalls grundsätzlich eigenständigen Schutzbereichs.” See Manfred Lieb, “AGB-Recht Und Arbeitsrecht Nach Der Schuldrechtsmodernisierung,” in Festschrift Für Peter Ulmer Zum 70. Geburtstag Am 2. Januar 2003, ed. Mathias Habersack et al. (Walter de Gruyter, 2003).
366 BAG 25.05.2005, NZA 2005, 1111.
367 Ibid., p. 1115, part 5 point 1: “Bei dem Arbeitsvertrag der Parteien handelt es sich um einen Vertrag zwischen einem Unternehmer und einem Verbraucher”.
applied. It is, indeed, not obvious that the “characteristic performance” criterion mentioned above would have much to say in terms of determining the scope of the protective rules.

While it is unclear whether including the “consumer-employee” in the general part of the BGB really entailed a “paradigm shift”, such a broad definition has a bearing on the image of the consumer carried by legal practice. Even the fact – undisputed in the German debate – that the protection should also apply to contracts for the provision of goods or services concluded by the employee for purposes linked to their professional activity (a car to go to work, a personal computer and the like) is enough to break the distinction between private (protected) and (unprotected) “professional” economic activities which lies at the basis of a strict “relative” definition of consumer.

369 The adoption of the Arbeitnehmer-Verbraucher theory has been called a “paradigm shift”: see Thomas Schmidt, “„Der Arbeitnehmer-Verbraucher“- Zwischenbilanz Eines Paradigmenwechsels,” in Tradition Und Moderne - Schuldrecht Und Arbeitsrecht Nach Der Schuldrechtsreform, Festschrift Für Horst Ehmann Zum 70. Geburtstag, vol. 318, Schriften Zum Bürgerlichen Recht (Berlin: Duncker & Humblot, 2005). According to the author, this shift concerns labour law as a discipline based on the idea of a „kollektivrechtlich abgesicherten privatautonomen Rechtverhältnisses eigener Art“ (a sui generis private legal relationship secured through the law of collective autonomy, p. 154) as well as general private law, which turns from a “freiheitliche Zivilrechtssystem privatautonomer Prägung” (a liberal system of civil law imprinted by private autonomy) to „einer alles überlagernden staatlichen Verbraucherschutzrechtsordnung“ (a comprehensive consumer protection system shaped by the State).

370 Ibidem p. 84.

371 This hypothesis was explicitly targeted by the government at the time of the reform: in the motivations to the proposal one can read that “Es sollten aber nicht die Personen aus dem Verbraucherbegriff ausgenommen werden, die als abhängig Beschäftigte eine Sache zu einem Zweck kaufen, der (auch) ihrer beruflichen Tätigkeit dient, z.B. der Lehrer, der sich einen Computer anschafft, um damit Klassenarbeiten zu entwerfen, oder der Angestellte, der eine Kaffeemaschine für sein Büro kauft. Dies gilt auch für die Rechtsbeziehungen des Arbeitnehmers zu seinem Arbeitgeber. Solche Fälle sind nicht mit denjenigen vergleichbar, in denen selbständig am Wirtschaftsleben beteiligten Verträge abschließen. Sie sollen deshalb den besonderen Vorschriften über Verbrauchergeschäfte unterstellt werden.” (BT Drucks. 14/6040, s. 243).

372 The boundaries of which appear to be somewhat porous also at the EU level: see C-590/17, Henri Pouwin, Marie Dijoux, v Électricité de France (EDF), ECLI:EU:C:2019:232, in which the Court of Justice decided that a mortgage contract concluded between and employee and his employer was a contract between a consumer and a professional.
With that, the separation between different “special private laws” is also put under pressure, reinforcing the harmonisation effect of the choice to move the consumer definition to the BGB.\(^{373}\)

4.2.2.1. Scope

In the post-reform BGB, the control of general terms and conditions (Allgemeine Geschäftsbedingungen) is outlined in a section including §§ 305-310 BGB. The core provision in the section is § 307, outlining the unfairness standard; § 308 and 309 contain two lists of forbidden or presumptively forbidden terms. Article 305 defines general terms and conditions (Allgemeine Geschäftsbedingungen, AGB) and disciplines the relationship between those and individual contracts.\(^{374}\) Article 306 establishes the consequences of unfairness. We will discuss all these provisions in more detail in the coming sections.

In employment contracts, all non-negotiated terms are subject to control. This includes general terms and conditions – defined by as § 305(1) as pre-formulated terms intended for use in a multiplicity of future contracts – as well as non-negotiated terms meant for single use. The scope is broader than what is envisaged by the general rule of § 307(1),\(^{375}\) as a consequence of the inclusion of employees within the definition of “consumer”.\(^{376}\) While in practice the difference is small – most non-negotiated terms are indeed meant for repeated use, and anyway the distinction makes little sense from the perspective of the consumer-employee – the expansion arguably reflects different rationales for adopting judicial control.\(^{377}\)

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\(^{373}\) Not everyone has interpreted the move as an upgrade for consumer protection: see Micklitz, “The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law,” 2012.

\(^{374}\) Together with the additional rules of §§ 305a, 305b and 305c.

\(^{375}\) Which subjects “terms in general terms and conditions” to the unfairness test.

\(^{376}\) According to § 310(3), § 305c par. 2 and §§ 306-309 are applicable to all terms in consumer contracts that are provided by the professional. The provisions not applicable when no AGB are concerned are those on incorporation of terms and conditions in the individual contract, part of that on surprising and ambiguous terms (but the contra proferentem rule applied) and finally the precedence of individual agreements over standard terms. In the latter case it is quite easy to see that a similar rule is based on the existence of a generalised use of the terms and conditions capable of making sense of the distinction between individual and standard clauses. Furthermore, still under § 310(3) when standard terms are used, they are considered as provided by the employer unless the employee has inserted them in the contract.

While the scope of control is thus in a way expanded, § 310 also partially restricts it by excluding the application of the procedural requirements of § 305 (2) BGB to the inclusion of standard terms in an employment contract. The section, where applicable, submits the valid incorporation of standard terms to the provision of preliminary information concerning their existence and to the possibility for the counterpart to gain knowledge of their content. When such conditions are not met with regard to a given individual contract, standard terms are considered as not included in the contract. Such incorporation control is not applicable to employment contracts. Since the excluded requirements aim at ensuring the counterpart’s awareness of the inclusion of standard terms, it is possible that the legislator relied in this matter upon the provisions of the so-called Nachweisgesetz\(^\text{379}\) implementing Directive 1991/533 EC.\(^\text{380}\) According to that law, the employer must provide the employee a statement of the latter’s working conditions within one month of commencement of the employment. It has been observed, however, that this requirement may not suffice for the purposes of AGB regulation since, on the one hand, this communication (or the lack thereof)\(^\text{381}\) has no effect on the validity of the terms and conditions about which it informs; on the other hand, seen that it explicitly provides that the information has to be given at most one month later than the beginning of the relationship, it is clear that the provision is not directed to building free and informed consent at the moment of entering the contract.\(^\text{382}\) Furthermore, the exclusion commanded by § 310 (4)
applies both to the requirement that the incorporation of standard terms should be made known/knowable to the counterpart and the necessary approval of this incorporation by the latter party. The *Nachweisgesetz* contains no provision to this respect.\(^{383}\)

4.2.2.2. Interpretation

According to § 305b, individual agreements, including oral ones, take precedence over AGBs even when a written form requirement has been stipulated in the contract. The BAG has stated that the provision does not apply to company practices, the relevance of which can be excluded by the standard terms since they are not individual agreements. This distinction has been criticised\(^{384}\) on the basis of many arguments. Prima facie, it can seem questionable whether such delimitation is compatible with the provision’s aims, which combine the promotion of individual negotiation and protection against avoidance of other provisions. Furthermore, from the very perspective of unfair terms control, a stipulation excluding the contractual relevance of company practices could amount to a “surprising” term in contrast with the employee’s justified reliance aroused by the company’s practices. According to § 305c, indeed, surprising and ambiguous terms included in AGBs do not become part of the contract. This is the case, according to the first section of § 305c, for terms which, considering the circumstances of the case\(^{385}\) (and especially the contract’s appearance), are so unusual that the proponent’s counterpart does not need to take their existence into account.

The second section of § 305(c) commands interpretation *contra proferentem* in case of doubt as to the meaning of a term.

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\(^{385}\) The issue, which does not seem to present particular hurdles in the context of labour contracts and BAG adjudication, will not be treated in a separate paragraph. The German approach- which can has been brought down by Stoffels to the motto “*Clausolae insolitae inducunt suspicione*”, “unusual terms attract suspicion”- seems to have had enough time to stabilise during the 20\(^{th}\) century. As a consequence, the application of AGB-control to employment contracts has basically not brought any change to the status quo. For an elaborate account, see Markus Stoffels, “Der Schutz Vor Überraschenden Vertragsbestimmungen,” *Gedächtnisschrift Für Manfred Wolf, Hrsg. von Jens Dammann, Wolfgang Grunsky, Thomas Pfeiffer, München*, 2011, 157–67.
4.2.2.3. Inhaltskontrolle
The core of the regulation is to be found at § 307. This provision is made of three paragraphs. The first one introduces a general rule according to which a term can be struck as invalid; the second and third paragraphs specify the general rule. The provision is further supplied by two lists of presumptively unfair terms in §§ 308 and 309. It is § 307, however, that represents the core of the Inhaltskontrolle (“content control”) as established in the BGB. Given its importance, the text of the article will be reproduced here and analysed in detail.

Under § 307, a clause which determines “an unreasonable disadvantage” (Unangemessene Benachteiligung), contrary to good faith, for the user’s contractual partner is ineffective. The second paragraph of § 307 provides a first specification of the test: in case of doubt, an unreasonable disadvantage exists

1. when the clause is incompatible with the fundamental principles underlying the rules from which it deviates or

2. when it envisages results, which endanger the contract’s function (Zweck).

Furthermore, according to the third paragraph, the unfair disadvantage can arise also from a “formal” circumstance, namely the fact that a term is not “clear and comprehensible”. This latter requirement is not further specified in the provisions, but was well-known in Germany at the time of the reform.386

Furthermore, §310(3) n.3 establishes that, in “consumer” contracts, the circumstances surrounding the contract’s conclusion need to be considered. In its case-law, the BAG lists in particular “personal characteristics of the individual contract parties having an impact on their bargaining power, specificities of the concrete situation and a-typical specific interests of the party.”387 The list has been drafted by the BAG as an “operationalization” of recital 16 of the Unfair Terms

386 Already at that point, the transparency requirement was considered to encompass three elements, namely a comprehensibility requirement; a demand for determinacy in the clauses’ wording; finally, a prohibition of deception – see Heinrichs, FS Trinkner, 1995, p. 157, 166 ff. We will see infra that these requirements are reflected in the BAG case-law concerning unfair terms control.

387 see BAG 31.8.2005, NZA 2006, 324, which lists “[…] insbesondere (1) persönliche Eigenschaften des individuellen Vertragspartners, die sich auf die Verhandlungsstärke auswirken, (2) Besonderheiten der konkreten Vertragsabschlusssituation, wie z.B. Überrumpelung, Belehrung sowie (3) Untypische Sonderinteressen des Vertragspartners.”
Directive, following leading German scholars – which the Court explicitly mentions as the source of its position, with the idea of providing a “richtlinienkonforme Auslegung” of § 310III Nr. 3 BGB.

The third section of §307 introduces a significant limitation to the operation of Inhaltskontrolle, stating that the latter only applies to conditions derogating from or supplementing default rules; other terms may only be declared invalid under the transparency requirement, read in conjunction with the general rule on unfairness. This limitation is read as aiming at exempting from control both terms reproducing legal rules and agreements regarding price. The latter are, in principle, by definition left to party autonomy within a market system and hence are usually not the subject of default rules. In this context, one must keep in mind that a number of general principles – such as pacta sunt servanda – are also considered to be provisions that contract terms may be derogating from, hence expanding the scope of control. Furthermore, in the field of employment contracts, collective agreements at various level are equalled to law to the ends of the section and are therefore exempted from control under the general clause of § 307 – but in some cases they may also work as “default rules” that terms are derogating from under § 307(3).

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388 Which reads: “Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account”.

389 In the main decision on the point, BAG 31.8.2005, NZA 2006, 324 the Court recalls Stoffels, AGB-Recht Rdnr. 478; Palandt Heinrichs, BGB, 64. Aufl., § 310 Rdnr. 21; Brandner , in Ulmer/Brandner/Hensen, AGB-Gesetz, 9. Aul., § 9 Rdnr. 179).

390 The Unfair Terms Directive contains two different provisions to this purpose: article 1 paragraph 2 excludes laws and international agreements from the act’s scope; article 4 paragraph 2 excludes the contract’s main object and the adequacy of the price and remuneration. It is considered “not for the least part” (“nicht zuletzt”) an effect of German influence that this exclusion appeared in the last phase of the Directive’s drafting. See Gerick von Hoyningen-Huene, “Unwirksamkeit von AGB Bei Bloßer Intransparenz,” In: Lebendiges Recht–Von Den Sumerern Bis Zur Gegenwart Festschrift Für Reinhold Trinkner, Heidelberg, 1995, 189.
When it comes to operationalising the notion of “reasonable impairment”, reference is often made to the parties’ rights and interests:

“Unreasonable is any impairment of a legally recognised interest of the employee which is not justified by a well-founded and protection-worthy interest of the employer or counter-balanced by a corresponding advantage.”

In other cases, the BAG opts for a slightly different formulation, declaring that an unreasonable disadvantage exists “when the proponent, by means of unilateral drafting, tries to abusively pursue their own interest at the expenses of their counterpart, without sufficiently considering their interest and without offering them an appropriate compensation.”

The parties’ competing interests, according to standing case-law, have to be balanced in a general way, independent of the specific circumstances of the case, having in mind the “typical” parties to the kind of contract concerned. Some decisions specify that where similar terms are employed for different classes of contracts, the control has to be structured along “groups” of cases or contracts typically expressing the factual interests at stake.

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392 BAG 14.09.2011, NZA 2012, 81 n. [33]: “[…] wenn der Verwender durch einseitige Vertragsgestaltung missbräuchlich eigene Interessen auf Kosten seines Vertragspartners durchzusetzen versucht, ohne von vornherein auch dessen Belange hinreichend zu berücksichtigen und ihm einen angemessenen Ausgleich zu gewähren.” The same wording can also be found in BAG 21.06.2011, NZA 2011, 1338, ;BAG 18.03.2008, 9 AZR 186/07, NZA 2008, 1004; BAG 10.01.2007, AP BGB § 611 n.7.


generalisation is therefore only partial, and has to depart from a subset of the reality which appropriately approximates the circumstances of the case: both the employer’s interests to be considered and the competing ones may be very different for different sectors and segments of the labour market. In contrast to its case-law under the general good faith clause of §242 BGB, the BAG has clarified that the assessment concentrates on the terms: whether or not the employee is worthy of protection in a specific case is immaterial, if the term is unfair.

According to second part of § 307 (1), a term may also be invalid because it is not clear and comprehensible. That lack of transparency could affect the validity of a contractual term, indeed, was not a novelty to German law at the time of the reform. Already in 1987 one contribution stated that “The duty of transparency has to be considered as a principle informing the entire Standard Terms Act.”

After the Modernisierung, this principle finds concrete expression in two provisions: § 305(2) and § 307 BGB, the latter’s formulation having been adapted during the reform process to codify the requirement introduced by the case-law on § 9 AGB-Gesetz. Since, as mentioned above, the rules concerning standard terms incorporation do not apply to employment contracts, reflections concerning the relation between the requirements set from this latter provision and § 307 are

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395 BAG 24. 6. 2004 – 6 AZR 383/03.
396 BAG, Urteil vom 11.04.2006 - 9 AZR 610/05.
398 According to Heinrichs, the principle was already embodied in the Standard Terms Act by the two lists of forbidden terms at §§10-11 AGB-Gesetz, “in denen fehlende Klarheit oder Durchschaubarheit der entscheidende oder zumindest ein mitentscheidender Grund für die Unwirksamkeit der Regelung ist”. Among the terms for which intransparency is ground of unfairness, the Author lists, inter alia, periods the duration of which is not sufficiently determined, conditions for termination, open-ended clauses allowing a third party to enter the contract. See Helmut Heinrichs, “Das Transparenzgebot Und Die EG-Richtlinie Über Mißbräuchliche Klauseln in Verbraucherverträgen,” Lebendiges Recht–Von Den Sumerern Bis Zur Gegenwart, Festschrift Für Reinhold Trinkner Zum 65 (1995): 161–62.
399 The principle was notably affirmed by the Bundesgerichtshof in its seminal decisions BGH 24.11.1988, NJW 1989, 222 and BGH, NJW 1989, 530 an BGH 17.1.1989, NJW 1989, 224.
of little interest here. It certainly is interesting to notice, though, that this circumstance tends to increase the role of the transparency requirement of § 307. The latter, in truth, seems to represent the only check on the bridge between substantive and formal correctness of AGBs in our subject.

What is the role of transparency in the unfairness test, then? The majority opinion, among German scholars, seems to be that lack of clarity/comprehensibility of a term can only lead to a declaration of nullity when it is coupled by substantive disadvantage for the proponent’s counterpart. The disadvantage, however, does not have to derive directly from the clause itself, rather from the fact that - due to lack of transparency - the counterpart cannot properly know or assess their own rights and duties and, as a consequence, the benefits and shortcomings arising from the contract.

Transparency encompasses some comprehensibility in the literal sense of the word, a degree of (pre-) determination of the contract’s contents and a prohibition of deception. Formal transparency must be understood in light of the aim of the requirement – which is not pre-contractual information but making sure that the employee is not prevented from exercising their rights. This explains the BAG’s apparently harsh statement that “the fact that the worker has no possibility, or only an aggravated possibility, to understand the relevant regulation, does not in itself constitute a breach of the transparency requirement.” We have seen above that article 310(4) excludes the application of the incorporation requirements of §305II BGB to contracts in the field of labour law. This means that standard terms can legitimately become part of an employment contract even if they have not been brought to the attention of the employee or they have otherwise not been aware

400 For a reflection based on the then-in-force corresponding AGB-G Gesetz provisions, §§ 2 (incidentally, 3, 5) and 9 AGB- Gesetz, see Heinrichs, “Das Transparenzgebot Und Die EG-Richtlinie Über Mißbräuchliche Klauseln in Verbraucherverträgen.”
401 M. Wolf in Wolf/Horn/Lindacher (fn. 14), § 9 AGB-Gesetz, par. 146; Brandner, in Ulmer/Brandner/Hensen (fn. 14 ), § 9 AGB-Gesetz, par. 19; Palandt/Heinrichs (fn. 18 ) , § 9 AGB-Gesetz, par. 15; Ermann/Hefermehl, § 9 AGB-Gesetz, par. 19. Contra F. Graf von Westphalen, Vertragsrecht und Klauselwerke, 1993, “Transparenzgebot” (fn 26), par 12. A yet different position is put forward by Köndgen, who refused the distinction between formal and substantive unfairness on the basis that, at the very least, every form of intransparency damages the counterpart in depriving them of the chance to seek for a better deal on the market. See his contribution in NJW 1989, 943 (at 950).
402 With an eye to the long-term dimension of labour contracts, which incorporates some structural leeway for employer’s discretionary action.
403 Heinrichs, FS Trinkner, 1995, p. 157, 166 ff.
404 BAG 14.03.2007, NZA 2008, 45
of them. A strict transparency requirement, demanding that the employee be able to “make sense” of the standard terms before entering the contract, would be liable to turn into a backdoor through which the excluded incorporation control could sneak in. In the same line of reasoning, contradictory contents will generally be considered as a source of intransparency in the sense of § 307 I 2 BGB since they make the other party’s legal stand, so to say, objectively unclear and not only hardly recognisable to the party herself.

Next to such formal clarity, transparency entails a so-called “Bestimmtheitsgebot” (determinacy requirement): “the factual prerequisites and legal consequences must be so precisely described that no unjustified margins for discretion should be left to the drafter.” The requirement is not absolute: the term has to describe the rights and obligations of the contractual partner as clearly as possible to the extent that it is legally and factually reasonable.

When the impossibility of recognising the rights and duties emerging from the contract – and the subsequent impediment in the exercise of legal rights – are due to misleading or erroneous description of the juridical reality, the clause can finally be seen as violating the prohibition of deception. This category may appear to be less relevant for the domain of work relations, where for instance the designation of a contractual type other than the one fitting the relation’s concrete operation can be simply set aside by the judge ascertaining the discrepancy. In fact, it has on occasion been used to set aside terms which sought to exclude the possibility of modifying a contract by means of an oral agreement. The exclusion being incompatible with the prevalence of individual agreements over standard terms stipulated by art § 305b BGB, the term was liable to mislead the employee as to the

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406 Brandner called this a “demand of maximum possible determinacy” in the drafting of contractual rules, Anforderung grösstmöglicher Regelungsbestimmtheit. A term’s content does not have to be clear and plain in absolute terms where such absoluteness is not achievable, but it has to be as clear as the circumstances allow. See H. E. Brandner, “Transparenz Als Maßstab Der Inhaltskontrolle? Ein Problemskizze,” in Festschrift Für Horst Locher Zum 65. Geburtstag P. Löffelmann Und H. Korbion, ed. P Löeffelmann and H Korbion (Werner-Verlag, 1990), 317–24.H..

extent of their rights and obligations. Terms having this effect are considered as intransparent and thus unfair.

The BAG has been conservative in applying the “circumstances” prong to the transparency assessment: “In assessing whether a term complies with the transparency requirement, one must not take the view of a fleeting observer but that of an attentive and cautious market participant.” Courts may have to reach a different conclusion when additional circumstances are present – such as express pressure by the employer for the employee to sign the contract before requesting a translation, or an assurance that the contract does not include any terms that were not already discussed between the parties. Giving more general weight to the employee’s – in one case, linguistic – incompetence would make the validity of standard terms – irrespective of their content – be made ultimately contingent on the condition that their content could be understood by their concrete addressee. This, according to the BAG, would create legal uncertainty and run contrary to the idea that content control happens according to a generalising standard, which is only complemented, but not displaced, by the consideration of individual circumstances.

If § 307 is without much doubt to be considered the most important pillar of Inhaltskontrolle, a few more words will have to be spent here to give an account of the two following provisions, §§ 308 and 309. Lists of forbidden terms were already present in the AGB-Gesetz when it was introduced. As a consequence, when Directive 93/13 had to be implemented, there was no large controversy about the fate of its Annex, which the Member States were free to consider or ignore. The two provisions in their current shape provide one list of Klauselverbote mit Wertungsmöglichkeit (prohibition with the possibility of evaluation, § 308) and

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409 Ibidem para 68.

Unlike in business-to-business contracts, the application of the black and gray list to labour relations has not been excluded; their relevance, however, is limited by the requirement – under § 310(4) – that the specific features of labour law ("arbeitsrechtliche Besonderheiten") should be taken into account when applying §§ 305-310 BGB to work contracts. This is, on its face, a very open norm. Reading the Government’s report accompanying the Modernisierung proposal, it seems that the main aim of the clause was precisely to avoid unconditional application of the “black list” of § 309 to employment relations. In this sense, the clause should be considered an entrance door for more freedom of contract and not, as one may instinctively have thought, for less. Indeed, one notable result of this doctrine has been the validation, against § 309 n. 6, of the use of penalty clauses for the failure to take service and for termination of the contract due to reasons pertaining to the worker. In the first years of its application, commentators have also discussed whether only legal features should be taken into account or also factual peculiarities of labour relations. This debate has also virtually ceased after 2005.

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412 See BT Drucks. 14/6857, p. 54

413 See Hanau, “Die Rechtsprechung Zu Den Arbeitsrechtlichen Besonderheiten,” in Festschrift Für Horst Konzen Zum Siebzigsten Geburtstag, ed. Barbara Dauner-Lieb (Mohr Siebeck, 2006), 250. See also BT Drucks. 14/6857, p. 54. Both from the context in which it was placed (providing restrictions to the operation of unfair terms control in labour contracts) and the consequences it brought about, it appears that this adequate consideration of labour law’s “specificities” was required by the legislator out of the impression that to some extent the new Inhaltskontrolle might be more pervasive than the existing labour law rules.

414 Which, for consumer contracts, rules out all penalties for a number of cases including termination or withdrawal from the contract (eine Bestimmung, durch die dem Verwender für den Fall der Nichtabnahme oder verspäteten Abnahme der Leistung, des Zahlungsverzugs oder für den Fall, dass der andere Vertragsteil sich vom Vertrag löst, Zahlung einer Vertragsstrafe versprochen wird.)


416 An interesting side question on this point is whether these “specificities” only matter with regard to the premises of AGB control, or also to its effects: in the case of invalidity, for instance, should courts consider the fact that in labour law invalid clauses used to be reduced...
when the BAG opted for the second option; 417 open, all the same, stays the question of what features will from time to time be considered as arbeitsrechtliche Besonderheiten in the application of standard terms control and, as a consequence, towards which directions the clause will stir this control.

4.2.2.4. Consequences of unfairness

As we have seen, under § 307 unfair terms are ineffective. The consequences of such ineffectiveness, as well as of the non-incorporation of AGBs or parts thereof is regulated in § 306. According to this provision, the non-incorporation or (partial) invalidity of ABGs does not affect the validity of the remaining parts of the contract. When a clause falls or is not incorporated, the relevant default provisions apply.418 The contract is only invalid when upholding it, also taking into account the rule of the preceding paragraph, would generate unbearable difficulties for one of the parties. The provision does not foresee the so called “geltungserhaltende Reduktion”, i.e. the possibility to “reduce” the unfair term to a fair one419 maintaining its validity. The reason for this, is that those who make use of the

to a valid content (so-called Geltungserhaltende Reduktion) instead of being thrown away?

Hanau, “Die Rechtsprechung Zu Den Arbeitsrechtlichen Besonderheiten,” 253.. Later (p. 255), the author criticises BAG 21.04.2005 (NZA 2005, 1053)- which inter alia allows for some form of conservative reduction by means of a “blue pencil-test”. Following Hanau, according to the decision the clause is unbalanced because it is unilateral, punishing only violations on the side of the employee. In truth, the decision (see NZA 2005, p. 1055) only states that since the clause is unilateral, the operation of the penalty clause has to take both sides’ interests into account in conformity with good faith. Where this does not happen, and the clause seems meant to foster further interests of the user which are not in connection with the facts, it should be considered invalid for the underlying interest is not worth of protection. Therefore the Court does not misrecognise the “peculiar” position of employer and worker with regard to the effects of non-performance of the specific obligation (to employ/work) but actually goes further in this reasoning, considering that the employer’s interest that the contract is not (grossly) violated is already specifically taken into account by the possibility of termination without notice. In such cases, the stipulation of a penalty clause can only be justified by other protection-worthy interests of the employer.


418 This is derived from § 306 (2): Soweit die Bestimmungen nicht Vertragsbestandteil geworden oder unwirksam sind, richtet sich der Inhalt des Vertrags nach den gesetzlichen Vorschriften. As far as proper consumer contracts are concerned, this needs to be read in conjunction with the CJEU’s case-law on the consequences of unfairness as discussed in Chapter 3.2.

419 This is easily comprehensible by taking the example of a penalty clause: if the court finds that a penalty of two months the worker’s salary is too high seen the circumstances of the specific contract, which would only have allowed for a penalty equal to one month of pay, the geltungserhaltende Reduktion would consist of substituting the valid penalty (one month) for the invalid one.
advantages linked to standardised contracting by drafting their own terms and conditions should also bear the risk of those terms and conditions being invalid.\footnote{See, for a critical analysis of the problem, Ludwig Häsemeyer, “Geltungserhaltende Oder Geltungszerstörende Reduktion,” Festschrift Für Peter Ulmer Zum 70 (n.d.): 1097.} Allowing \textit{geltungserhaltende Reduktion} would entail leaving abuse of contractual freedom unsanctioned, since the drafting party would be not worse off than what they would have been had they not violated the law in the first place. At the same time, in a similar case the drafter’s counterpart would only discover what their obligations are under the concerned contract at the end of the adjudication procedure, being exposed to additional inconvenience.

4.3. France

4.3.1. The discreet appeal of unfair terms control

While the wide personal scope of unfair terms control under the Code de la Consommation rules had given rise to speculations as to its applicability beyond typical consumer relations,\footnote{In the current version, articles L 212-1 and L 212-2 separately make unfair terms control applicable to contracts between “professionals and consumers” and between “professionals and non-professionals”.} the applicability of the consumer unfair terms provision to employment and other work contracts has never really entered the picture. However, the inapplicability of “consumer law” unfair terms control did not leave courts entirely unequipped to perform a \textit{function} similar to that of unfair terms control albeit in different forms. We will see how several provisions have been mobilized and courts have used a degree of creativity in order to deal with one-sided terms.

What characterizes the French story is the mix of civil law reasoning, labour law rules and seemingly unfettered judicial creativity. One remarkable thread is the argument that contract terms should not too easily deprive workers of their legally acquired rights,\footnote{In this sense, the employment contract has been defined an instrument of \textit{resistance} vis à vis the employer’s demands for flexibilisation, external strains etc. See Marion Del Sol, “Le Contrat de Travail: Instrument de Flexibilité et / Ou de Résistance?,” Bulletin Social Francis Lefebvre, 2002, 269–80.} including the right to have the other party bound by the contracts both parties have entered.\footnote{See infra 4.3.1.2.}

Only in more recent years, however, observers of French law had started to notice how the \textit{language} of the courts intervening on contract terms had grown similar to that which we are all acquainted with in the context of consumer law: thus, in 2013...
it was possible for an author to expressly ask whether the concept of *clause abusive*, which had for a long term been common in French contract law – at that point, way beyond the mere domain of consumer contracts – was on the brink of finding its way into labour law.\textsuperscript{424} To what extent the reform has brought this penetration to its final destiny is going to be discussed at the end of the chapter.

4.3.1.1. The general provision of Article L. 1121-1 Code du Travail
First, it is appropriate to take a look at judicial control based on the protection of fundamental rights. First introduced in the Code du Travail in 1992 as (then) Article L 120-2, the wording of Article L 1121-1 is particularly general:

“No one can impose restrictions on the rights of individuals and on individual and collective freedoms which are not justified by the nature of the task to be performed or proportionate to the aim that is pursued.”\textsuperscript{425}

The provision extends a limitation originally imposed on company regulations (*règlements d’atelier*)\textsuperscript{426} to all sorts of actions undertaken in the operation of a business. It applies, thus, to employment and other work contracts. What characterizes the provision is, on the one hand, its reference to rights and liberties; on the other hand, the standard based on which the employer’s actions are scrutinized, namely whether they are justified by the nature of the employee’s task and proportionate to the objective pursued. While the second requirement is arguably close to the rationality of unfair terms control, this is hardly the case for the first. Talking of workers’ “rights and liberties” is evidently not the same as referring to the balance between the rights and duties of both parties to the contract, as unfair terms provisions typically do. While the consumer provisions look at the rights established by the contract and their balance, article 1121-1 Code du Travail relates to rights existing independent of the contract and protects them


\textsuperscript{425} “Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché.”

\textsuperscript{426} This was the scope of then 122-35 Code du Travail, introduced in 1982. The provision was first extended beyond the *règlement interieur* in 1992 – see Jean Pélissier, Gilles Auzero, and Emmanuel Dockès, “Droit Du Travail, Précis Dalloz, 27e Édition 2013,” Droit Social, no. 10 (2012): 965 para 629.
against different sorts of violations- including those which might take place by means of contract terms.427

Terms that were liable to affect, for instance, the employee’s occupational freedom (e.g. non-competition clauses) or their right to freely determine their residence have been scrutinized under article 1121-1 Code du Travail. Thus, in the case of a term requiring a lawyer to establish their residence nearby their law firm, the employee’s integration in the “local environment” of the firm’s place of establishment was not considered a sufficient reason to interfere with their freedom to choose their place of residence.428 Also the practice of requiring employees to return a bonus that they have received from the employer at the end of a year if they resign early during the following year is problematic under this provision, since it restricts the employee’s occupational freedom.

The rule of Article 1121-1 Code du travail, then, bears significant differences and important similarities to unfair terms control. On the one hand it resembles the latter mechanism in its protective intent and, possibly, in the way it focuses on the employer’s unilateral (contractual) activity. On the other hand, the requirement that rights other than the ones created by the contract are infringed upon both signifies a different rationale – with much simplification, the protection of certain rights rather than control of unilateral drafting – rights, which however are not necessarily too difficult to find in employment contracts.429

4.3.1.2. Article 1134 cc and the regime of clauses de variation

If article 1121-1 Code du travail can hardly be seen as a rule of contract law, something very different needs to be said about article 1134 Code civil (since 2016 largely article 1103 and 1193), which was also seen as the ground for court intervention in this field. The principle of pacta sunt servanda enshrined in the provision – possibly the most iconic contract law provision in the French context – has been mobilised by courts to set strict limits on clauses allowing the employer to change the contract’s terms unilaterally (clauses de variation, hence: modification clauses). These clauses can take very different forms and affect different elements in the exchange, but usually they are all aimed at allowing adjustments in case the employer’s situation should change over time. Classical examples are terms

427 In the French headscarf case recently decided by the Court of Justice, art 1121-1 was one of the standards for testing the employer’s position vis à vis the wearing of a headscarf. But in this case no contract terms were at stake. See C-188/15, Asma Bougnaoui, Association de défense des droits de l’homme (ADDH) v Micropole SA, ECLI:EU:C:2017:204.


429 See Alain Supiot, Critique du droit du travail (Presses Universitaires de France, 2011). The employment contract, after all, always employs the person of the employee.
allowing a change in the employee’s place of work, in the working time or in the
tasks assigned to the employee. Terms establishing a variable remuneration could
also fall under this group. Modification terms touching both the employee’s and
the employer’s characteristic obligations will be discussed more in detail in
Chapter 5430 with an eye to their functioning and legal regimes. What is most
interesting here is to identify the legal basis and main arguments on which the
need for limiting their validity have been based.

In a recent decision,431 the Chambre Sociale of the Court of Cassation (henceforth
Cassation) seemed to exclude any relevance of modification clauses, as it declared
that

“a term in an employment contract cannot enable the employer to unilaterally
modify the employment contract”.432

The apparently sweeping statement was based on 1121-1 Code du Travail, just
discussed here, and article 1134 of the Civil Code (pre-2016 reform). While
apparently stark, the 2018 judgment fits within a line of case-law that has been
developing at least since the beginning of the century. The validity of modification
clauses in general was, in fact, questioned in a rather radical way by the Cassation
in 2001, with a decision according to which

“a term by which the employer reserves the right to modify the employment contract,
in part or in its entirety, is void as contrary to the requirements of article 1143
second paragraph of the civil code as the employee cannot validly renounce the rights
which he has under the law.”433

As said, article 1134 of the Code civil sanctions the binding force of contract. The
provision’s second paragraph, recalled in the decision, establishes the
irrevocability of contracts, except for the case of mutual consent. This principle
includes a prohibition for one party to impose a modification of the contract to the
other party during the contract’s execution. In this sense, the decision considers
the modification clause void insomuch as it deprives the employee of their right
to refuse a change to their contract’s terms.

430 See Infra 6.2.1. and 6.2.2.
l’employeur de modifier unilatéralement le contrat de travail.”
433 Cass. soc. 27.2.2001, n. 99-40219: “(l)a clause par laquelle l’employeur se réserve le droit de
modifier, en tout ou partie, le contrat de travail est nulle comme contraire aux dispositions de l’article
1134, alinéa 2, du Code civil, le salarié ne pouvant valablement renoncer aux droits qu’il tient de la
loi”.

122
Notwithstanding this general statement, however, we will see that the Cassation allows a number of modification clauses to deploy their effects – subject to conditions that depend on the object of the term considered. In particular, clauses establishing a variable remuneration are admitted when the variation is based on objective criteria which are independent of the employer’s will, the variation is not such to shift the entrepreneurial risk onto the employee and the statutory and collective minima are preserved. Terms called “of geographical mobility” (clauses de mobilité géographique) are also deemed legitimate when they determine the size of the area to which they apply. It is not allowed to include a term that reserves the employer the possibility to modify the geographical domain to which the employee’s mobility obligation applies. However, clauses affecting the contractually established working time are not allowed when they impact the remuneration – think of someone who is employed to perform night work and would see their salary reduced if they were unilaterally assigned to daytime shifts. An important consideration in this respect seems to be that contract terms should not as the same time be used to write down one particular arrangement – be it a certain mobility zone or daytime vs. night-time work – while at the same time depriving the stipulation of concrete significance by incorporating a modification clause.

Modification clauses are arguably a sensible instrument for increasing the contract’s resilience in the context of all long-term relationships. However, they undoubtedly introduce an element of uncertainty into the contract and usually their effects are mostly enjoyed by the drafter. They are also not unknown to consumer contracts, and indeed also in that context they are often the object of specific regulation. In the French system of unfair terms control in consumer contracts, terms of this kind are considered both in the “black” list of terms which are always unfair and in the presumptive “grey” list. The relatively wide wording in the black list, prohibiting all terms that “authorise the professional to unilaterally modify the contract’s terms concerning its duration, the character of

434 “Une clause du contrat de travail peut prévoir une variation de la rémunération du salarié dès lors qu’elle est fondée sur des éléments objectifs indépendants de la volonté de l’employeur, ne fait pas porter le risque d’entreprise sur le salarié et n’a pas pour effet de réduire la rémunération en dessous des minima légaux et conventionnels” Cass. soc. 2.7. 2002, n° 00-13111; Cass. Soc. 4.3.2003, n° 01-41864 et 20.4.2005, n° 03-43696.

435 And effective. The Court of Cassation, indeed, has sometimes also refused to identify terms that were not sufficiently explicit. See Paul-Henri Antonmattei, Les Clauses Du Contrat de Travail (Wolters Kluwer France, 2009), 49–50.

436 Both requirements are articulated in Cass. soc. 7.6.2006, n° 04-45846.

437 This was indeed the case in Cass. soc. 14.11.2018, n° 17-11.757.
the goods or services to be delivered or their price” does not mean that all variation clauses are inhibited. The lists, indeed, are followed by exemptions concerning certain long-term contracts. For certain services, an explicit exception is carved out in the legislative part of the Code de la consommation. Thus, for instance, not too long ago the Cassation granted a way to terms concerning the possible variation of overdraft interests in contracts for banking accounts. The usual requirement for these terms to be valid, in consumer law, is that they must be connected to other mechanisms protecting the consumer’s free determination – such as the possibility to terminate the contract without penalty – and, often, that they indicate under which conditions a variation will take place.

The criteria used to identify acceptable variation clauses, then, seem rather similar in consumer and employment contracts. In both contexts it is necessary to strike a balance between the need for flexibility typical of long-term relationships and the preservation of a reasonable contractual equilibrium, preventing the consumer/employee from being abandoned to the other party’s arbitrary will. In this respect, the indication of the parameters according to which the prerogative will be exercised should both an instrument of transparency, hopefully allowing the accepting party to know what they can expect, and a substantive guarantee against capricious requests.

The differences which can be identified as to the regime to which certain terms are subject in the two domains do not seem to imply different approaches – in other words, the judicial control of variation clauses seems quite comparable to “consumer law” unfair terms control. In particular, it is interesting to observe that as far as the remuneration is concerned an additional guarantee is added, namely that salary variations have to be based on objective criteria. This requirement is absent in consumer contracts. Arguably, in that context more faith is put in competition: in case the consumer finds the modifications unreasonable, they are

438 Article R 132-1 Code de la consommation considers a term that “autorise le professionnel à modifier unilatéralement les clauses du contrat relative à sa durée, aux caractéristiques ou au prix du bien à livrer ou du service à rendre” always invalid. Furthermore, article R 132-2 of the same code establishes a presumption of unfairness when a term “réserve au professionnel le droit de modifier unilatéralement les clauses du contrat relatives aux droits et obligations des parties (autres que celles interdites)”.
439 See article R132-2-1 Code de la Consommation.
441 See article L 128-84 Code de la consommation and, in the same direction, the Court of Justice’s interpretation of the transparency requirement laid down in Directive 93/13. In this respect, I will be forgiven for referring to my own comment: Leone, Transparency revisited – on the role of information in the recent case-law of the CJEU, ERCL 2014, p. 312.
entrusted with disciplining the provider by terminating the contract; if a sufficient number of consumers react in the same way, it will be the market response that punishes the provider’s arbitrary behaviour.\footnote{125} Relying on a similar mechanism in the domain of employment relations would be much more controversial.

\section*{4.3.1.3. The eclectic regime of certain clauses}

Finally, it is important to mention that French courts have also developed specific regimes for certain terms, not necessarily based on general principles but as a more express form of judge-made law. While courts have intervened on a larger pool of terms, here we will consider in particular the case of non-competition clauses and so-called “\emph{clauses de dédit-formation}”, requiring employees to reimburse their employers educational expenses in case of termination of the relationship.\footnote{442} The interesting observation in these cases is that both types of terms can be considered sensitive vis à vis the employee’s occupational freedom, and thus judicial intervention in this respect can be justified with reference to article L. 1121-1 Code du Travail.\footnote{444} However, courts started “regulating” the validity of these terms without expressly referring to the provision (until 2008, L. 120-2 Code du Travail).

The case of non-competition clauses is exemplary because of the strict principles developed and the fragmentary evolution that has led to the current legal framework. The regime of such clauses is modelled around the case of post-contractual non-compete clauses, i.e. non-compete obligations arising after the termination of the employment contract.\footnote{445} In a landmark 1992 decision,\footnote{446} the \emph{Cassation} articulated broad requirements: non-compete clauses are licit if they protect a legitimate interest of the employer and do not post a grave threat to occupational freedom, taking into account the nature of the employee’s activity.\footnote{447} More specific requirements, such as the inclusion of a geographical and temporal

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\begin{itemize}
\item[442] This observation is confirmed by the fact that, where competition can more obviously not be relied on – as in the case of natural monopolies such as energy supply – the issue of prices becomes more salient and is sometimes subject to specific regulation.
\item[443] These will be further discussed in chapter 6.
\item[444] See section 4.3.1.
\item[445] Case-law also testifies to the use of non-compete clauses applying already during the time-span of the contract. In this case, the clauses mainly reinforce the duty of loyalty that is normally read into the employment relationship, by e.g. specifying it with reference to certain types of conduct.
\item[447] Ivi: “\textit{la clause de non-concurrence destinée à protéger des intérêts légitimes de l’employeur est licite, si elle ne porte pas gravement atteinte à la liberté du travail en raison de son étendue dans le temps et dans l’espace, compte tenu de la nature de l’activité du salarié.}”
\end{itemize}
delimitation, appeared afterwards. Only in 2002,\footnote{Cass. soc. 10.7.2002, 00-45.135.} finally, did the Court add that a non-competition obligation must be accompanied by the payment of an indemnity compensating the employee for the loss of chances that such obligation entails. \footnote{This solution differs from the one retained for commercial agency contracts, where no compensation is required. See article L. 134-14 Code du Commerce. The Cassation affirms that the provision’s failure to require such compensation must be seen as an explicit choice of the legislator. See Cass. com., 4.12. 2007, n° 06-15.137.} At this point, the Cassation expressly referred to then article L. 120-1 Code du Travail. While there is no reference, among the validity requirements as commonly summarised in the literature, to the relationship between the obligation and the nature of the employee’s duties, which would be part of the test under that provision, it may well be that this aspect is considered already in the appreciation of the employer’s legitimate interest in using the clause.

As concerns the clauses de dédit-formation, courts not only have restricted their applicability (only to expenses voluntarily incurred by the employer), but also subject their validity to a number of cumulative conditions (see Chapter 5). The basis for control is assumed to be found in the employee’s occupational freedom, of which the freedom to resign is an instantiation.\footnote{See section 341 in Pascal Lokiec, Droit Du Traval Tome I Les Relations Individuelles de Travail, PUF (Paris, 2011).} However, the legal basis is not directly anchored to article 1121-1 and the factors to be considered under that provision are not expressly addressed.

Whereas non-competition covenants and terms of dédit-formation are subject to different standards, they share characteristics which may explain the particularly specific regime to which they are subjected. They both concern elements which are not part and parcel of the relationship, but get agreed between the parties due to some specific interest of one or both of them. Therefore, they cannot- or can only partially- be legitimised by reference to some other element in the relationship; they rather have to be internally balanced. Thus, the non-competition obligation needs to be granted separate compensation, and the restitution obligation has to relate to specific expenses freely incurred and must be structured in a fair way. While in both cases a background concern seems to exist with reference to the employee’s fundamental rights; the specific validity regimes applied to these terms, however, seems to be quite loosely anchored in the standard articulated by Article L 1121-1 Code du Travail\footnote{With reference to non-compete clauses, Lokiec observes how the obligation to provide compensation tends to obscure, in more recent practice, the other requirements – that is, the one more directly associated with the standard of L.1121-1 Code du Travail.} - they look rather as attempts to concretise a
fairness or balance requirement which is as closely associated with the relationship between the parties as it is with external (fundamental rights) concerns.

4.3.1.4. “Clauses abusives” as unifying notion?
In 2009, for the first time the Chambre sociale of the Cour de Cassation used the term “abusive” in respect of a term requiring an employee, employed on a part-time contract, to seek their employer’s approval before engaging in other gainful activities. The decision, striking out the said term, was preceded by a number of cases before lower courts in which either the notion of “clause abusive” had been brought up by the employee or the courts had employed it of their own initiative. Use of the terminology may, of course, fulfil a mostly rhetorical function: it does not appear that courts are expressly adopting – or referring to – the “significant imbalance” test employed in the Code de la consommation.

Use of the terminology does not seem to be directly linked to the one or the other among the legal bases or specific terms discussed in the previous sections. For some terms qualified as “abusive”, the implicit point of reference seems to be Article L. 1121-1 Code du Travail; the provision is indeed explicitly mentioned by the Cassation in a 2016 case concerning a non-compete clause whose “abusive” nature was subject to contention. In other cases, the notion has appeared with reference to terms establishing unilateral prerogatives – similar to the ones we have seen under section 4.3.2. For terms of this kind, the idea has further been ventilated in legal scholarship that their contentious nature has to do with their ability to affect the balance between the rights and obligations of the parties to the contract, in line with the significant imbalance requirement relevant to consumer

452 Zabel, “Clauses Abusives et Droit Du Travail : Le Concept Issu Du Droit de La Consommation Pénètre-t-Il Le Droit Du Travail ?”
453 On Legifrance, the only mention of “déséquilibre significatif” in available case-law of the Chambre Sociale comes from a decision of 1998, where the claimant had invoked the notion in relation to a statute from 1791. See Cour de Cassation, Chambre sociale, du 25 mars 1998, 94-20.780, Publié au bulletin.
454 See the overview in Zabel, supra.
455 Cour de cassation, civile, Chambre sociale, 4 novembre 2016, 15-18.956, Inédit Quashes CA decision because it did not properly justify its finding that a non-compete clause (accompanied by a penalty clause) was not abusive. The legal basis is mixed: “Vu les articles 1134 du code civil dans sa rédaction antérieure à l’ordonnance n° 2016-131 du 10 février 2016, L. 1121-1 du code du travail et 17 de l’accord national interprofessionnel des voyageurs, représentants et placières du 3 octobre 1975”.
456 CA Pau, 14 June 2010, 08/04305 and 08/04306 and CA Versailles 3 June 2008, 07/03825.
law. Much attention was still being devoted to individual terms and their validity regime. Part of the scholarship, however, had started to identify these developments as a broader movement, of which the language occasionally employed by courts – in other words, the designation of the unfair term as “clause abusive” – could be seen as a signal.

4.3.2. The 2016 reform and employment contracts as contrat d’adhésion

The reform of the law of obligations recently approved by the French government introduces a general remedy against “significantly imbalanced” terms in non-negotiated contracts. According to the new Article 1171 CC “in a contract of adhesion, any term which creates a significant imbalance between the parties’ rights and obligations is considered as never written”. By virtue of its position, among the general rules on contractual content, the provision applies to all non-negotiated contracts, including those which are not specifically regulated within the civil code.

It is, at present, still unclear what kind of role the new provision will play: the new rules are introduced next to a number or provisions placed outside the civil code, such as, crucially, the rules on unfair terms control in the Code de la consommation. There is little doubt that the new article 1171 is closely inspired by the consumer law unfair terms control rules, but its positioning as well as its contents also show differences viz such rules. The reform introduced several norms which can help shed light on the scope, content and effects of the new rules on unfair terms. An

461 Thus, its potential scope of application extends to commercial contracts as well as to contracts between private parties and all sorts of personal work contracts, insofar as not superseded by more specific rules.
462 See Rapport au Président de la République... supra fn 317. The report to the President mentions the unfair terms along the new rules on economic duress, “afin de préserver les intérêts de la partie la plus faible”. The rules are also justified on grounds of systematic
in-context analysis is necessary in order to identify the likely division of labour among the different provisions. This section addresses all these changes and, where appropriate, compares them to existing “twin” rules in special laws. The overall aim of this analysis will be to get an understanding of the nature of the still fairly new “significant imbalance” control.

4.3.2.1. Scope
The scope of the provision is determined by the notion of contrat d’adhésion, as defined in Article 1110 CC. According to that provision, a contract is de gré à gré when its terms can be freely negotiated between the parties; it is d’adhésion when it “encompasses a set of non-negotiable terms established in advance by one of the parties”. Contrary to the text originally included in the Civil code by the 2016 Ordonnance, the current text does not refer to the notion of “general conditions”, which is well-known but formally undefined to French law, while being quite central in other European legal systems. According to Mekki, the modification coherence, since several provisions on unfair terms were “scattered” in special legislation. When the 1978 Loi Scrivener introduced the first rules on unfair terms, it did so in a chapter devoted to “La protection des consommateurs contre les clauses abusives”. The original prohibition applied to imbalanced terms which appeared to have been “imposed to the consumer though an abuse of economic power by the other party” (art 35 Loi n°78-23 du 10 janvier 1978 sur la protection et l’information des consommateurs de produits et de services). In the book, unfair terms and clauses abusives are used interchangeably as shortcut for “terms creating a significant imbalance”, although the terminology betrays some confusion between the national and the European legal models.

This prognostic effort is required by the lack of reliable analyses. The first comments seemed to pose questions without trying to answer them – see e.g. Christophe Radé, “L’impact de La Réforme Du Droit Des Contrats En Droit Du Travail,” Lexbase Hebdo Ed. Sociale, no. 645 (February 25, 2016).

This according to the new article 1110, as modified by the law transposing the original Ordonnance, Loi n°2018-287 du 20 avril 2018 - art. 2 : Le contrat de gré à gré est celui dont les stipulations sont négociables entre les parties. The previous text said “librement négociées” instead of négociables.

Again, as modified by the same 2018 law: « Le contrat d’adhésion est celui qui comporte un ensemble de clauses non négociables, déterminées à l’avance par l’une des parties. » The text included in the Civil Code by the 2016 Ordonnance was: “Le contrat d’adhésion est celui dont les conditions générales, soustraites à la négociation, sont déterminées à l’avance par l’une des parties”, i.e. an adhesion contract is one whose general conditions have been determined by one of the parties, without prior negotiation.

See Calais-Auloy and Temple, Droit de La Consommation, 195. Here they define them as “pre-drafted terms in contracts concluded by one person with a series of other persons”.

Think of the German allgemeine Geschäftsbedingungen, the Dutch algemene voorwaarden, the Italian condizioni generali di contratto.
should avoid the risk that contracts which only contain a limited number or non-negotiated (or non-negotiable) clauses are subject to control. The question remains, however, who should prove that the terms were “non-negotiable” and how high the threshold should be for establishing the “negotiability”. These questions are not addressed by the text of the law. None of the provisions, furthermore, expressly address the case in which the contract terms have actually been drafted by a third party, but it seems reasonable to infer that this case would also be covered by the definition of contrat d’adhésion if the adoption of the set of terms had been the result of a decision by the employer. Notwithstanding the relatively restrictive definition of adhesion contracts, it seems likely that many employment contracts concluded via standard terms or incorporating standard terms will fall under the scope of the provision.

The provisions of Articles 1110 appear to have reignited a discussion which had been open for a very long time. While the notion of contrat d’adhésion is over a century old, it had so far not made its way into a legal provision. The rules on unfair terms in consumer contracts introduced in 1978 by the Loi Scrivener apply to negotiated and non-negotiated terms alike. On this point, indeed, the French approach departs not only from the German model but also from the EU (minimum harmonisation) Unfair Terms directive. When unfair terms control was first introduced in France, ignoring the much-debated notion of contrat d’adhésion, the choice was lamented by prominent scholars and mostly justified by the difficulty of defining a contract of adhesion. Should non-negotiation be the only benchmark, or should the parties’ qualities play a role? And, was the legislator to make a difference between single- and multiple-use textwork? The wording was often used, throughout the years, in academic texts and has been

469 Mekki.
472 Famously introduced into the French legal debate by Raymond Saleilles, the issue was already the topic of a PhD dissertation in 1912: see Pichon, Université de Lyon. Faculté de Droit. Des Contrats d’adhésion; Leur Interprétation et Leur Nature, Thèse... Par Victor Pichon...
incorporated in the civil code of Quebec, but the questions stayed unanswered. The text of the code civil provides some partial answers – for instance, it seems clear that non-negotiable terms intended for use in a single transaction should be subject to control. However, it is likely that disputes on the application of the distinctions included in the provisions will arise in the coming years.

4.3.2.2. Incorporation and interpretation
The concept of general conditions, expelled from the definition of adhesion contracts, is still employed by the new Article 1119 CC, according to which general conditions can only be invoked when they have been brought to the attention of the non-drafting party and have been accepted by that party. The provision codifies pre-existing case law. It also includes an interpretation rule according to which, much like what we have seen for German law, terms individually negotiated between the parties always prevail over non-negotiated terms included in general conditions.

According to the new article 1190 CC, in case of doubt, contracts of adhesion are interpreted against the drafter. This is explained as a direct implication of the lack of negotiability: those who have the possibility of drafting contract terms to their advantage also need to bear the risks connected to imperfect drafting.

4.3.2.3. Unfairness: terms creating “a significant imbalance”
The core novelty, from the point of view adopted here, is the introduction of an “unfair terms” rule at article 1171 CC:

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474 Thus under article 1379 of the Civil Code of Quebec: “Le contrat est d’adhésion lorsque les stipulations essentielles qu’il comporte ont été imposées par l’une des parties ou rédigées par elle, pour son compte ou suivant ses instructions, et qu’elles ne pouvaient être librement discutées. Tout contrat qui n’est pas d’adhésion est de gré à gré”. Both the reference to “stipulations essentielles” and the notion of free discussion, which featured in the Taubira draft, might have been inspired by this provision.


476 Article 1119 CC: « (1) Les conditions générales invoquées par une partie n’ont effet à l’égard de l’autre que si elles ont été portées à la connaissance de celle-ci et si elle les a acceptées. (2) En cas de discordance entre des conditions générales invoquées par l’une et l’autre des parties, les clauses incompatibles sont sans effet. (3) En cas de discordance entre des conditions générales et des conditions particulières, les secondes l’emportent sur les premières ».

477 For more references, see Revet, “Les Critères Du Contrat d’adhésion.”

478 See Revet.
“In a contract of adhesion, a non-negotiable term, established in advance by one of the parties, that creates a significant imbalance in the rights and obligations of the parties to the contract may is considered as never written.

The assessment of significant imbalance must not concern either the definition of the subject-matter of the contract nor the adequacy of the price in relation to the act of performance.\textsuperscript{479}

The rule further seeks to restrict its scope of application by only applying to “non-negotiable” terms within adhesion contracts – in turn defined as contracts which include a set of non-negotiable terms. This provision reflects the aim, already mentioned above, of preventing an expansive application of the new judicial control. The problems that it may generate have already been discussed in the previous paragraph.

As to the substance of the rule, article 1171 CC resembles closely the language of two other provisions located outside the civil code, namely article L. 132-1\textsuperscript{480} Code de la consommation and article L. 442-6, I, 2\textsuperscript{481} Code de commerce. Both articles deal with terms creating “a significant imbalance in the rights and obligation of the parties”. The consumer law provision, however, has been in place for a longer time and is usually considered to have been a source of inspiration for the similar rule of the Code du commerce.

The prohibition of unfair terms in the Code de la Consommation applies exclusively to contracts between a professional and a “non-professional or a consumer”. This

\textsuperscript{479} Art 1171 in the version resulting from the Law 2018-287 of 20 April 2018, article 7: “(1)Dans un contrat d’adhésion, toute clause non négociable, déterminée à l’avance par l’une des parties, qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite. (2) L’appréciation du déséquilibre significatif ne porte ni sur l’objet principal du contrat ni sur l’adéquation du prix à la prestation”. The words “non négociable, déterminée à l’avance par l’une des parties” have been added to the pre-existing 2016 text by the law of 2018.

\textsuperscript{480} Under article L 212-1 Code de la consommation: “Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat. […] L’appréciation du caractère abusif des clauses au sens du premier alinéa ne porte ni sur la définition de l’objet principal du contrat ni sur l’adéquation du prix ou de la rémunération au bien vendu ou au service offert pour autant que les clauses soient rédigées de façon claire et compréhensible”.

\textsuperscript{481} According to article L 442-6 Code du Commerce: “Engage la responsabilité de son auteur et l’oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers : […] De soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties”.

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latter definition covers consumers in the strict sense as well as legal persons which are not conducting business, such as non-profit organisations. This restricted scope traditionally characterises the French approach to unfair terms control vis-à-vis, for instance, the German choice to allow review of all non-negotiated contracts- including, thus, business-to-business transactions. The provision forbidding “unfair” terms was already in place before the Directive’s adoption, but it is only after the latter’s implementation that it explicitly allows the judge to hold the imbalanced term for never written. In deciding on a term’s potential unfairness, the judge has to take into account the circumstances surrounding the contract’s conclusion as well as all the other terms included in the contract.

The new provision, as we have seen, will apply to non-negotiated contracts only, but irrespective of the parties’ qualities. The substantive test, thanks to the reference to a “significant imbalance”, seems very similar to the consumer law rule. Another striking similarity concerns the fact that the new provision, like both Article L 212-1 Code de la consommation, exempts core and price terms from scrutiny. This is in line with the choices of other countries which have introduced specific rules for non-negotiated contracts and the Unfair Terms Directive.


483 For a brief account, see Chazal, Clauses abusives, in Répertoire du droit commercial, Dalloz 2013, in particular par 5-6.

484 Article L 241-1 Code de la consommation “Les clauses abusives sont réputées non écrites.” However, “le contrat restera applicable dans toutes ses dispositions autres que celles jugées abusives s’il peut subsister sans lesdites clauses”.

485 Article L 212-1 Code de la consommation second paragraph: “Sans préjudice des règles d’interprétation prévues aux articles 1156 à 1161, 1163 et 1164 du code civil, le caractère abusif d’une clause s’apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu’à toutes les autres clauses du contrat. Il s’apprécie également au regard de celles contenues dans un autre contrat lorsque la conclusion ou l’exécution de ces deux contrats dépendent juridiquement l’une de l’autre”.

486 Article L 212-1 Code de la consommation, third paragraph: “L’appréciation du caractère abusif des clauses au sens du premier alinéa ne porte ni sur la définition de l’objet principal du contrat ni sur l’adéquation du prix ou de la rémunération au bien vendu ou au service offert pour autant que les clauses soient rédigées de façon claire et compréhensible.”

487 See for instance article 6:231(a) of the Dutch Burgerlijk Wetboek.
Analysing the commercial law unfair terms provision seems to confirm what has been observed so far. Article L-442-6 Code de commerce has been adopted more recently, signalling the expansion of the notion of clause abusive (unfair term) beyond the domain of consumer law. Unlike both Article L 212-1 Code de la consommation and Article 1171 CC, the commercial law provision does not exclude terms defining the contract’s object and the balance between price and performance from its scope. This difference is not surprising since price agreements are actually a typical subject of competition law. In the context of commercial relationships, however, the insertion of an unfair term had no consequence on the contract: it was merely sanctioned by means of damages—where damage could be proved. This brief analysis reinforces, a contrario, the impression that the rule of Article 1171 CC bears a strong resemblance to the one of Article L 212-1 of the Code de la consommation— in other words, it seems that the new mechanism is likely to work in a way which is similar to what has been experienced so far in consumer law.

Unlike the consumer law rules and the German 307 BGB, the general clause of article 1171 is not accompanied by lists of terms considered or presumed unfair. The neighbouring Article 1170 CC, however, provides that “all terms depriving the debtor’s essential obligation of its substance are considered as not written”. The provision, in essence, reproduces the well-known Chronopost decision, in which the Cassation had voided a term by which a transporter’s responsibility for failing to deliver in the promised time was severely limited, basically leaving the transporter’s promise deprived of any meaningful sanction. This provision is one of the marks left by the abolition of the notion of cause, which the Cassation had then controversially employed to invalidate the limitation of liability. At that time, the Court’s intervention was arguably required by the absence of a rule allowing the invalidation of unfair terms outside the domain of consumer contracts. In this sense, the question may be raised whether a rule of this sort would still be necessary in view of the new Article 1171 CC. While the doubt may seem warranted at first glance, “blacklisting” this kind of terms might not be

488 See again Zabel, “Clauses Abusives et Droit Du Travail : Le Concept Issu Du Droit de La Consommation Pénètre-t-Il Le Droit Du Travail ?”
489 With reference to commercial contracts, then, the main effect of the new provision will be in the remedies available to the non-drafting party, which in certain cases will be able to demand the unfair term to be declared void. But this is something which goes beyond the scope of this contribution.
superabundant once the text of proposed Article 1171 CC is subjected to closer inspection.

In the context of consumer contracts, terms such as those addressed by Article 1170 CC are taken care of by the Directive’s (non-binding) annex and, in French law, by the 2009 regulations establishing the “black” and “grey” lists. In the context of general contract law, however, courts might have been tempted to give greater significance to the second part of Article 1171 CC, which excludes from control the contract’s object and the relationship between price and performance. Considered that this relationship is precisely what is affected by exemption clauses, it is probably wise to have included a special provision to secure that they would not be exempted from control. This might, in turn, also provide a source of inspiration for courts dealing with similar, albeit less far-reaching provisions. Again, however, this contributes to shaping the contours of Article 1171 CC: it is not there to address those “extreme” cases of contractual imbalance, which will be taken care of by Article 1170 CC, or, in even more extreme cases, by Article 1169 CC. The latter provision, which also is reminiscent of the functions of cause, holds as invalid an onerous contract in which the counter-performance promised to the party undertaking an obligation is “illusory or derisory”.491

The new control should be easy to distinguish from the general provision of Article 1102 CC, according to which freedom of contract “does not allow the parties to derogate from rules which are an expression of public policy.”492 This provision basically codifies the direct effect on contractual autonomy of Article 6 CC, which provides that private agreements cannot derogate from good morals and public order. The existence of such direct effect, in any case, had been established already some years ago by the Cassation493 - thus the reform does not innovate on this point.

In a previous draft, the public policy provision included a second part establishing a certain influence of fundamental rights and freedom on contractual validity.494

491 This is an exception to the principle, stated in article 1168 CC, that lack of equivalence between the promised performances does not affect the contract’s validity.

492 The new Article 1162 CC further explains that neither the contract’s terms nor its objective can be against public order: Le contrat ne peut déroger à l’ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties.

493 Cass. civ. 7 december 2004 n°01-11823.

494 Ses Article 1102 CC Taubira draft according to which freedom of contract additionally did not allow parties “to infringe fundamental rights and freedoms recognised by a provision which applies to relationships between private parties except where such infringement is indispensable to the protection of legitimate interests and proportionate to the intended purpose.”
Fundamental rights would then be considered not as an absolute limit to contractual freedom, but as norms that tolerate to be curtailed, as long as the infringement is justified as being indispensable to the pursuit of a legitimate interest. The disappeared provision echoed limitations that were already existing in the case-law of the Cassation. Moreover, it closely resembled the (fundamental) rights control provision already in force in labour law, Article L 1121-1 Code du Travail. While it seems possible to envisage that the protection of fundamental rights will just be taken up into the notion of “public order” consecrated by Article 1102 CC, the interaction between the control established by article 1171 and the Code du travail provision will need time to be clarified.

4.3.2.4. Consequences of unfairness
In contrast to the earlier version of the provision contained in the draft ordonnance published in 2015, Article 1171 CC dictates that terms causing a significant imbalance as considered as non-written (non-écrit). While the previous formulation required the aggrieved party to expressly demand that the term be invalidated, the current formulation reproduces the language adopted in consumer law. The latter sanction has to be considered as more similar to a special form of nullity than to voidability- in other words, it should not be conditional on the aggrieved party’s request. The judge is thus allowed (or even expected) to

497 See infra para chapter 4.
498 See Chantepie, above fn 37.
499 According to the Taubira proposal’s article 1169 CC “Une clause qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat peut être supprimée par le juge à la demande du contractant au détriment duquel elle est stipulée.” The proposal is still available online at the address http://www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf (last accessed 8 march 2020).
500 With even more far-reaching consequences than nullity itself: see most recently Civ. 1re, 13 mars 2019, F-P+B, n° 17-23.169, according to which the five-year limitation period applying to actions in nullity does not apply to consumers’ claims that a term is non-binding due to unfairness. In commenting the decision, Pellier assumes that this also applies to other cases where the sanction of “non-écrit” appears. See Jean-Denis Pellier, “De la distinction entre la nullité et le réputé non écrit - Banque - Crédit | Dalloz Actualité,” accessed October 23, 2019, https://www.dalloz-actualite.fr/flash/de-distinction-entre-nullite-et-repute-non-ecrit#.XbB0J5MzbUp. For an earlier in-depth study distinguishing “non-écrit” from partial nullity, see Sophie Gaudemet, La clause réputée non écrite (Economica, 2004).
carry out unfair terms control of their own motion. This change seems in line with the decision to restrict judicial control to non-negotiated contracts: while requiring some self-reliance seems appropriate in the context of “traditional” (i.e. negotiated) contracts, the threshold for protection can reasonably be set lower for parties to contracts of adhesion. In the latter context, the ex officio mechanism is supposed to compensate for the party’s presumed weakness and guarantee the extirpation of unfair terms. The language employed seems to also exclude the possibility that an unfair term could be adapted by the judge rather than entirely removed from the contract.

4.4. Conclusions

We have seen that, in both countries, courts were using different legal instruments – and sometimes went beyond the legal instruments that were available to them – in order to react to contentious terms in employment contracts. Some of these instruments were taken from the toolkit of labour law; almost inevitably, however, principles of contract law were also invoked. The creative use of these tools made by labour courts was often criticized. However, a broad look suggests that similar strategies were also not foreign to “regular” private law adjudication.501

In this context, it stands out that developments in the two countries happened along different timelines: in Germany, the first interventions belong to the nineteen-sixties and were almost in tune with the parallel developments in other fields; in France, the first cases appear to have emerged roughly two decades later and courts’ intervention on contract terms seems to have gained more momentum after the turn of the century. Several factors need to be considered. In particular, the greater bearing of the notion of labour law’s autonomy in French law; the tradition of restraint characterizing French courts vis à vis the relative activism of German (in particular, post-war) courts; and possibly, much in line with the thesis itself, as a consequence of the systems’ emphasis on legislative intervention and of the greater discursive influx of institutional theories, just a lesser degree of “contractualisation” in French practice until a later point in time.

The application of labour law rules or mobilisation of principles is a rather unsurprising reaction to clauses that, without expressly violating existing rules, appear to unsettle the default balance created by existing (protective) labour regulation. They can represent, thus, a form of protection of labour law itself, faced

501 That § 242 BGB could have an impact on contractual drafting next to its direct applicability to performance was a popular solution also outside of labour law; similarly, in French law, the rejection of unilateralism enshrined in the case-law on modification terms extends to non-labour contracts.
with the increasing fragmentation of contractual models and work practices. While this process would also arguably represent a response to contractualisation, one may doubt whether such response would say anything about unfair terms control or contract law in general. This would be arguably best exemplified by the example of the German “Gesetzesumgehung” doctrine. A look at the two national experiences shows, however, that contract law reasoning played a growing role in giving shape to that doctrine, by connecting it to the balance of performance and counter-performance; furthermore, the French developments show how a similar concern with the core elements in the employment relation was deployed entirely on the basis of contractual rules – be it the binding force of contract or the prohibition of merely potestative conditions.

Both experiences further show a concern with (fundamental) rights and liberties, and in particular the freedom to pursue gainful occupation. The relevance of fundamental rights to contract law was a post-war discovery that exerted a growing influence on contract law in the late twentieth century; employment contracts are a particularly fertile terrain for such growth. Rights and liberties that employees enjoy as humans cannot be entirely absorbed by questions of contractual balance; we have seen, however, how in both experiences the “fundamental rights” basis is not entirely loose from contractual reasoning: explicitly in Germany, through the use of section 242 BGB as entry point for the indirect horizontal effect of article 12 GG; implicitly in France, via the syncretistic regime of non-compete covenants and clauses of dedit-formation.

Finally, the chapter has shown that in both countries, the various forms of intervention were (beginning to be) conceptualised in unitary terms before the reforms. In Germany, the symbolical value of the move does not take away the fact that the BAG saw considerable proximity between the Inhaltskontrolle that it had been performing and the rules on standard terms. Once the applicability of those rules has been extended to employment contracts through the Modernisierung, the BAG has not hesitated to consider them as the new legal basis on which to base interventions – effectively replacing the previous standards.\(^{502}\) This has entailed, importantly, an enhanced relevance of transparency rules and the establishment of term eradication as the only consequence of unfairness.

In France, no such explicit stock-taking can be found in the case-law; the documents accompanying the reform also make no reference to employment contracts. However, in the past decade or so, references to the notion of “clause

\(^{502}\) Even though we will see in Chapter 5 that many of the substantive parameters employed “live through” in the new era.
abusive” had started to appear in judicial decisions concerning different terms and based on traditionally different tests. This was accompanied by a number of voices starting to address the various judicial interventions on individual terms as a unitary trend.

Skepticism has been expressed about the potential impact of the new unfair terms provision on employment contract exactly because the control exerted by courts already has filled in the void left by long-term legislative inaction. Thus, recently Radé has pointed to the Cassation’s creative combination of ‘fundamental principles’ lacking any textual reference, with art L-1121-1 Code du Travail (formerly L 120-2) and old 1134 Code civil as providing answers to the need for protective intervention, “la nature ayant horreur du vide”.503 At the same time, Loiseau has suggested that the broad formulation of article 1171 may actually lead to scrutiny of clauses which had hitherto not been affected.504 From the perspective of the thesis, it is interesting to observe that Radé’s observation offers implicit support to my hypothesis: the void filled by courts was due to the legislator’s failure to take care of contractual justice outside the domain of consumer contracts.

A remarkable thing is that in both cases the legislative intervention restricts the focus of judicial control by focussing on non-negotiated terms. The judicial development of unfair terms control does not stand, in either country, in an unambiguous relation to pre-formulation or non-negotiation. We have seen the issue surface on occasion in German case-law (especially in the notion of Gestörte Vertragsparität). In France, employment contracts are often designated as “d’adhésion”,505 but this is not seen as a requirement for court intervention. It is unclear how much difference the focus on non-negotiated contracts has brought about in Germany and whether it will have consequences in France. For the latter, one may observe that the potentially very restrictive scope of the provisions given the emphasis on impossibility to negotiate has raised little doubts among labour lawyers. The notion of contrat d’adhésion “seems to match well the employment contract”.506 It seems clear that not all employment contracts will fall under the definition, and

505 See e.g. Olivier Litty, Inégalité des parties et durée du contrat: Étude de quatre contrats d’adhésion usuels (Paris: LGDJ, 1999). The study considers employment contracts next to tenancy, credit and insurance contracts.
perhaps even not all non-negotiated employment contracts\textsuperscript{507} – but a large set of such contracts will likely contain clusters of terms subject to scrutiny.\textsuperscript{508}

The exclusion of “core” terms is another persistent feature. If we think about the discussion in Chapter 2, this exclusion makes one question to what extent weaker party protection was actually what the drafters had in mind when adopting these rules. The distinction, again, did not feature prominently in the case-law. A closer look at the terms actually involved in the litigation will be necessary in order to investigate whether the limitation is likely to have an impact in France – or to what extent it has had one in Germany.

The scope of the German rules appears broader, as ultimately all non-negotiated terms seem liable to being subject to control; how the quandaries of the French reform around the definition of contrat d’adhésion will influence the application of the provisions is difficult to predict. It seems clear that not all employment contracts will fall under the definition, and perhaps even not all non-negotiated employment contracts\textsuperscript{509} – but a large set of such contracts will likely contain clusters of terms subject to scrutiny.\textsuperscript{510} Contrary to the German legislator, on the other hand, the French reform has not carved out employment contracts from the rules on incorporation of standard terms.

The central unfairness standard is similar between the two countries, which is only partially a result of the European harmonisation effected by Directive 93/13. In the case of France, it stands out that the new standard expressly excludes “core” terms and does not mention appreciation of the circumstances of the case within the unfairness test. This is weird for a novelty officially justified by the aim of making the system of contract law more just: what is more unfair than unjust core terms? Assessing the circumstances surrounding the conclusion of the contract also seems important to doing justice between the parties to that contract.

As to the consequences of unfairness, there seems to be no significant difference – except for the fact that the French provision does not say anything as to the relation between the invalidity of a certain term and the fate of the contract. The radical


\textsuperscript{509} See the doubts expressed by Lokiec and Rochfeld, “L’accord et Le Juge Du Travail: Le Temps Des Réformes Paradoxales.”

\textsuperscript{510} Auzero and Canut, “Le Juge et La Modification Du Contrat de Travail/The Judge and the Modification of the Employment Contract.”
consequences associated with the “non-écrit” doctrine seem to exclude that uncertainty may arise as to the possibility to rewrite unfair terms.
Chapter 5 Contractualisation and employment relations

5.1 Introduction

Chapter 4 has illustrated the judicial paths preceding the reforms of this century and has looked into the relationships between the two developments. Chapter 5 reconnects these findings to the book’s broader claim: namely, that such judicial developments represent a response to, or in some sense a consequence of, ongoing contractualisation. It further investigates whether such response can be properly attributed to contract law’s internal rationality or must be seen as mainly coming “from without”.

The chapter is structured as follows: first (5.2.), it discusses “contractualisation” as a phenomenon concerning labour law and labour relationships in general. A succinct overview of the dynamics between contract and institutional accounts in historical perspective shows how contract has gained prominence in the past decades as a matter of how the employment relation is conceptualised.

Next (5.3.), this chapter analyses contractualisation through the more microscopic lenses of contract law and contractual governance: if contract and contract terms would matter to the parties, and in particular to the drafters (i.e. employers and their lawyers), what kind of “work” would such terms be likely taking care of? At the end of the section, I distinguish three functions that (possibly: standardised) contract terms can play in employment relationships: customisation, flexibilization and governance.

The chapter finally (5.4.) focuses on three concrete examples of contractualisation, representing the different functions distilled in section 5.3. It presents court litigation in Germany and France involving the validity of terms concerning the restitution of education costs (“customisation”), functional and financial flexibility (“flexibilisation”), and penalty clauses (“governance”). While section 5.3 shows that employers and their lawyers have good reasons to make use of the possibility to craft relevant aspects of an employment relationship by means of (standard) contract terms, section 4 investigates the space employers have to use such contract terms and what happens when the use of such terms leads to a court dispute.

5.2. The contractualisation of employment relationships in historical perspective

At the inception of this book, contractualisation has been introduced as the increased relevance of contracts and contract law to domains which were not
traditionally salient to the discipline, on the one hand, and on the other hand the emergence of different subjects – what has over time become known as “weaker parties”, which were not structurally considered by 19th century contract law. Can we, in a similar sense, also meaningfully speak of contractualisation for labour law?

Within labour law, contractualisation may first be associated with the emergence of the contract of employment, part of the movement “from status to contract” famously captured by Maine.\(^511\) However, more recent literature uses the term contractualisation – together with other keywords such as individualisation – to refer to a move away from “the Aristotelian rule of labour law” of industrial societies, based on “the unities of place and work […], of time and work […] and of action and work”\(^512\). In France, the term is referred to every time that the regulation of an aspect of the employment relationship is left to either collective or individual agreement – in contrast to being dealt with by the law. We could label this more recent development as a re-contractualisation; however, in the following chapters the simpler name “contractualisation” will be maintained.

The broader phenomenon is difficult to capture from either a conceptual or a legal perspective. Gardner\(^513\) made it almost entirely a philosophical problem – the flattening of autonomy and self-realisation alike by means of the impoverished language of contracts, which would represent a blanket justification of the employer’s authority on a content-independent basis. In empirical terms, the various forms of disarticulation\(^514\) of regulatory mechanisms giving shape to

\(^{511}\) The famous move identified by Maine is based on the English common law. See Simon Deakin and Wanjiru Njoya, “The Legal Framework of Employment Relations,” *The Sage Handbook of Industrial Relations*, 2008, 284–304; Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Routledge, 2016). The story is obviously somewhat different for Germany and, especially, France, where the 1789 revolution was the main driver for legal change in this area, but broadly speaking the characterisation is not inappropriate.


\(^{514}\) The term used here again seeks to capture different phenomena: for France, Jeammaud aptly characterized contractualisation as mainly “extension de la place ménagée au contrat ou à la convention”, putting together individual and collective autonomy in contrast to statutory rule making. In Germany, however, the role of legal regulation was never as preponderant as in France. Dynamics there concern rather the relationship between different types of collective rule-setting, such as sectoral versus company agreements. Antoine Jeammaud, *Les Polyvalences Du Contrat de Travail*, 1989.
employment relations seems to leave a larger space to – or at least places increased attention on – the individual contract. On the other hand, the relevance of contractual terms in management has increased as a result of the growing complexity of employment relations in advanced economies. This may be what Micklitz refers to as he describes employees’ moves from status to contract to status to contract “via the new forms of contractualisation in the working relation”.

The ongoing processes, thus, enhancing the contractual features and contents of employment relationships, makes for an interesting parallel to the “contractualisation” of consumption which took place with the advent of mass distribution. On the one hand, contract law potentially “expands” to a domain – and to cover subjects – that had previously been largely outside its scope; on the other hand, the use of contractual tools in managing the relation enhances the role – or responsibility – of contract law in defining the balance of the parties’ rights and duties.

5.2.1. The emergence of employment contracts and contractualisation of employment relationships

Employment law, whether one focuses on its “public” of “private” components, is a historically recent product. Although with local variations, it is usual to identify a first moment in which relations that used to be subsumed under different “statuses” became contractualised around the end of the 18th century or beginning of the 19th. Industrialisation entailed the gradual demise of traditional trades, characterised by relatively small workshops with a master and a few apprentices; the appearance of the capitalist model, thus, increased the relevance of salaried work. The then emerging principles of liberal contract law, such as

515 Jeammaud.
518 See Chapter 1.
520 See Bruno Veneziani, “The Evolution of the Contract of Employment,” The Making of Labour Law in Europe, 1986, 34–35. Until those days, work used to be of various servile nature, or was organized within guilds of provided by individual artisans. As Veneziani points out, for instance, while the wording of “right to work” had already emerged in the 16th century, at that time it mainly entailed that the poor could be put into compulsory work by virtue of public force.
freedom of contract, applied to contractual relationships between employees and employers in the first half of the 19th century.\textsuperscript{521} In the second part of that century, the suitability of such laissez-faire approaches to labour relations for preventing widespread prevarications – and ultimately guaranteeing social peace – was subject to increasing social, political and academic criticism.\textsuperscript{522}

In France, a judgment from this period remains a symbol of the iniquities deriving from the strict application of contractual principles to (non-negotiated) employment contract: the so-called “arrêt sabots”. In this 1866 decision,\textsuperscript{523} the Cassation quashed a decision by the Prud’hommes of Saint Etienne which had reduced a penalty of 10 Francs imposed on a factory worker for having worn their wooden sandals inside the plant. The fine, we know from the Prud-hommes’ decision, corresponded to almost half the worker’s monthly salary. It was set in the factory’s règlement d’atelier, which was hung somewhere within the factory and was binding between the parties on a contractual basis. The Cassation considered the Prud’hommes, who decided in equity, to be in breach of article 1134 of the Code civil – in other words, they were failing to properly acknowledge the binding force of contract. This was one of many cases through which contract law rules came to be seen as an instrument of oppression.\textsuperscript{524}

In most Western European countries, the first laws establishing minimal social security provisions and regulating certain contents of employment relations were adopted by the end of the 19th century as a response to the emerging “social question”.\textsuperscript{525} In one way or another, around the same time collective labour relations also developed and trade unions and strikes were, under different conditions and restraints, made legal.\textsuperscript{526} The various protective statutes mainly

\textsuperscript{521} This time delimitation, is subject to non-menial controversy. Deakin introduces a slightly different timeline and, thanks to this broader view, partially challenges the idea that there was any such rapid shift under English law. See Simon Deakin and Frank Wilkinson, \textit{The Origins of the Contract of Employment} (Oxford University Press, 2005).


\textsuperscript{524} See Domergue, 117–18.

\textsuperscript{525} Veneziani and Hepple, “The Making of Labour Law in Europe.”

\textsuperscript{526} For a recollection, see Antoine Jacobs, “Collective Self-Regulation,” \textit{The Making of Labour Law in Europe}, London, Mansell, 1986, 193ff. Hinting to « different conditions and restraints » as I do above does obviously no justice to the very different ways in which strikes are regulated across different countries, nor to the difference between not criminalising abstention from work and consecrating strike as a \textit{right}. All these very important issues,
applied to workers hired under a *contract of employment*, even though very often even codified systems lacked a definition of such contract.527

In the first part of the 20th century, the normative relevance of the employment contract started to be questioned. “Institutional” theories of law and society were mainly developed before the Second World War,528 and their relative success had much to do with the political climate of the intra-war periods. While communautarian theories were crucial to the narrative of Italian fascism529 and, later, to German Nazism,530 they also resonated elsewhere on the continent. However, their long haul and influence on labour law lasted longer, thanks in part to their resonance with theories attempting to explain the internal workings of companies.531 The intensification of regulations, the growing importance of corporate structures and the mentioned favourable intellectual and political climate led authors in several countries to endorse non-contractual – or: institutional – theories of labour relationships.

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527 In Germany, article 611 BGB defines the “Service contract”, which applies to all sort of services. Only in 2017 has a definition of the employment contract been introduced in the Code by the Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze vom 21.02.2017 (BGBl. I S. 258), as a means of codifying the long-standing definition established in case-law (see Gesetzentwurf des Bundesregierung, Drucks. 294/16, 2.6.16). In France, the Code du Travail does not define the employment contract. This notwithstanding, many statutes have historically relied on the notion in order to circumscribe their scope of application - see Pélissier, Auzero, and Dockès, “Droit Du Travail, Précis Dalloz, 27e Édition 2013”, para 197.

528 Romano and Hauriou both had made their theories widespread by 1930: *L’ordinamento giuridico* was published in 1918, *La théorie de l’institution et de la fondation* in 1925.

529 An echo of this can still be found in the Italian civil code, which devotes one whole book (*Codice civile, libro Quinto: Del Lavoro*) to “work” but does not define the employment contract.


531 The idea of the firm as institution was common in German labour law in the same period: RG, Urteil vom 6. Februar 1923, RGZ 106, 272, 275, Erwin Jacobi, *Betrieb Und Unternehmen Als Rechtsbegriffe* (Weicher, 1926), p.1 and 9.
For labour laws in Europe, indeed, not only authors with authoritarian sympathies entertained such theories. Alain Supiot authoritatively identifies the inception of the institutional approach with the work of Otto von Gierke, "challenging at the same time the abstract individualism coming from France and the legal statalism inherited from Hegel". The institutional approach, in this sense, was first of all a rejection of over-encompassing voluntarism in private as well as public law. Hugo Sinzheimer, inspired by von Gierke, similarly viewed the workplace as a community in analogy with the political community. In his case, such analogy implied that similar principles of democracy had to apply in the workplace and to the broader labour relations: an economic constitution that needed to mirror and complement the political constitution. Notions such as the worker’s "incorporation" in the community of the firm and the idea of employment as a personal relationship rather than a contract stem from this period and this conceptual world.

This will remind the reader of a similar trend identified for non-negotiated contracts, whose actual contractual nature was questioned by early commenters in favour of an analogy with normative acts. Within an institutional view of the employment relations, the employer’s prerogative and, ultimately, rule-setting through contract, can also be seen as a normative power. As mentioned above, this view can in turn be a point of departure for asserting primacy of the employer’s (sovereign) will or for requiring such will to be constrained much like the state’s powers in a democratic system. The parallel between the two discussions should not come as particularly surprising: employment contracts were mentioned as prime examples of contrats d’adhésion by that early literature. This broad resonance may explain why, in spite of their connections to authoritarian regimes and authoritarian impulses, institutional approaches remained influential way into the central part of the century – even as labour law assumed a decidedly emancipatory function.

532 "En combattant à la fois l’individualisme abstrait venu de France et l’étatisme juridique hérité de Hegel" : see Supiot, Critique du droit du travail, 17.
534 As Supiot aptly observes, this also connects with the limitations that the contractual analysis, based on exchange, seem to meet when confronted with the multiple ramifications of employment contracts. An alternative focus on the “personal relationship” ensuing from such contracts appeared as more suited to account for such complexity. See Supiot, Critique du droit du travail, 26.
5.2.2. After World War II: the changing interplay between contract and “institutions”

In post-war France, as a matter of fact, there was hardly consensus as to the existence of the institute “labour contract”, let alone its function. The network of rules encapsulating party autonomy in the context of employment relationships was certainly not getting any looser. The so-called institutional theory, whose most eminent proponent was Paul Durand, went at one point so far as to put forward that labour law could dispense of “any contractual support”. The idea, in short, was that employees were integrated in a certain community, the enterprise, and that the employer’s power of direction descended from their property rights over the business or, more often, their leading position within the community. In this view, the contract was considered at most as the act through which the worker came to be integrated within the enterprise community (acte-condition).

This approach was criticised in France both by “traditional” scholars and, from a Marxist perspective, by Camerlynck and Gerard Lyon-Caen. Especially the latter came to acknowledge, in relatively early times, a double function for the employment contract: not only an “original” or “genetic” function (rôle génétique) but also a power to create obligations, or normative function (rôle normatif). The influence of Lyon-Caen and other prominent labour lawyers, such as the Italian scholars Gino Giugni and Luigi Mengoni, contributed to the long-term prevalence of the “contractual” approach, which however has had different consequences in different countries. In France and Germany, in any event, it has long been acknowledged that contract has to be, first, the necessary condition for the formation of an employment relationship, but also at least one of the sources regulating that relationship. With time, a certain shift from administrative to judicial control of labour relationships, as well as the courts’ (and especially the Cassation’s Social Chamber’s) orientation towards a contractual reconstruction...

536 Durand, for instance, saw the employer’s power of direction in analogy with the state’s legislative, executive and judiciary power. See Robert-Edouard Jaussaud, Paul Durand, and R. Jaussaud, *Traité de Droit Du Travail* (Dalloz, 1947), no. 348.
539 See again Gaudu and Vatinet, 1.
have entailed a retreat of institutional approaches (at least in their traditional versions). 541

The “creative” function of labour contracts was of course very limited around the middle of the last century, due to a large extent to the extensive control exercised by public actors, and in particular public administration, on labour relationships, and to the wide coverage of collective agreements. In this context, acknowledging that employment relations had a contractual basis did not necessarily mean that these relations should be seen as pertaining to the domain of contract law more in general. In other words, in what relationship labour law should stand to “droit civil”, was again not an obvious question.

In the French debate, opinions diverged on whether the application of civil law principles to employment disputes was intrinsically biased in favour of employers or could also turn to the worker’s advantage. 542 In the years, however, two ideas seem to have gained a certain degree of stability: on the one hand, the autonomy of labour law as a discipline with its own principles; on the other, that labour contracts can, this last circumstance notwithstanding, be still be seen against the “common stem” of private law (“tronc commun du droit privé”). 543

In the German debate, the cohabitation of communitarian/institutional views and the workings of contract law principles survives to an extent to this date. 544 Institutional approaches retained relevance in case-law well into the post-war period as a way of explaining, for instance, the worker’s subjection to company practices. At the same time, there was little doubt that the rules of contract law, including some specific rules pertaining to employment contracts, 545 were applicable to these contracts – the general principles of the discipline being no exception. Only recently the employment contract has expressly been defined in the BGB as separate from other service contracts. 546 Thus, it should not come too much as a surprise that good faith and good morals, as we have seen, have played an important role in the development of judicial control of employment contracts as of the 1960s.

541 Again, Gaudu and Vatinet, Les Contrats Du Travail, 3.
543 Such “stem” is part of the broad “droit commun” to which article L. 1221-1 of the Code du Travail submits the employment contract.
545 The rules expressing the so-called Fürsorgepflicht, see above 4.2.1.3.
546 See new § 611a, added to the general rule on service contracts of § 611.
5.2.3. Contractualisation in post-industrial societies

In 1994, Lord Wedderburn\textsuperscript{547} warned continental labour lawyers against complacency in dealing with the “new individualism” permeating labour law developments in Anglo-Saxon countries. The United Kingdom was at the forefront of a movement of “individualisation” of employment relations whereby companies de-recognised unions and chose to focus on human relations management-based “personal contracts”.\textsuperscript{548} The series of phenomena that Wedderburn describes – declining unionisation rates, “advocacy of individual bargaining”, “globalised localisation” were well underway – certainly with significant local variations – well beyond the UK already at that point. It is difficult, though, to exactly depict when they took off. A main driver for developments in the different systems was the growth in unemployment following the oil (and inflation) crisis of 1973, which opened fatal cracks in the post-war Keynesian consensus.\textsuperscript{549} In Germany, if we look at legislative developments, a turning point seems to be represented by the fall of the Schmidt cabinet in 1982 and the labour market reforms undertaken by the supervening Kohl cabinet. While these reforms were initially reverted by the “red-green” coalition taking power at the end of the Kohl era in 1998, the deregulatory trend resumed by 2003 under the banner of “Agenda 2010”.\textsuperscript{550} The Part-time and fixed-term employment act of 2000,\textsuperscript{551} liberalising fixed-term contracts, has been amended several times throughout the past two decades. Its article 12, in particular, provides ample room for “work on call” arrangements (\textit{Arbeit auf Abfruf}, colloquially “zero-hour contracts”). Whether mediated by unions or otherwise achieved, internal flexibility – both in terms of functions and working time – was the main strategy of employment preservation during the last


economic crises and downturns. In France, over the last decades, many voices have credited a new relevance, or new role of employment contracts in the regulation of employer-worker relationships. Two concurring phenomena have taken place, namely on the one side “that lawyers serving employers have rediscovered the interest of contractual stipulations” and a certain retreat of legal regulation which has gone under the name of “contractualisation” (whereby both individual and collective agreements are addressed as “contracts”) on the other.

As concerns collective agreements, a complex bundle of phenomena have been taking place already for some time. On the one hand, the law had often entrusted collective agreements with the task of achieving flexibility and maintaining competitiveness (an objective which is supposed to be in the interest of employers and workers alike); on the other hand, “traditional” collective agreements, or national branch agreements, are found to lose ground vis à vis decentralised bargaining and non-union agreements. In Germany, new emphasis on lower-level agreements and flexibility undermines the so-called Günstigkeitsprinzip (principe de faveur), according to which successive levels of regulation could only derogate from the ones “above” them to workers’ advantage. The so-called


555 Indeed, Jeammaud remarks how “contractualisation” can be used to cover various trends or phenomena. This earned it a couple of specifically devoted publications, see for instance the devoted number of Droit ouvrier (1997) and Philippe Auvergnon, La Contractualisation Du Droit Social: Actes Du Séminaire International de Droit Comparé Du Travail, Des Relations Professionnelles et de La Sécurité Sociale, 2003; Patrice Adam, “L’individualisation Du Droit Du Travail: Essai Sur La Réhabilitation Du Salarié-Individu” (PhD Thesis, Nancy 2, 2001).

556 See Löwisch, “Das Verhältnis von Arbeitsrecht Und Bürgerlichem Recht in Deutschland.”

557 Covering for instance the whole metal industry, or fashion, retail.

“controlled decentralisation” phenomenon has arguably had quite different impacts across different sectors, in effect leading to a contraction of collective bargaining in, e.g., retail. Such disparate effects – workable decentralisation here, effective contraction there – may not be too surprising. The services sector is known to display very different levels of unionisation compared to the manufacture sector and the difference has only become more prominent in recent years. In presence of such low unionisation, more dispersed bargaining is likely to mean less bargaining power for unions. Meanwhile, decrease in unionisation levels and workforce disintegration mechanisms also affect the reach and legitimacy of union-bargained collective agreements.

In this context, it seems plausible that room (increasingly) exists for employers to give shape to employment relations by means of individual – often standardised – contracts. Contractualisation, however, presupposes that employers also make


561 Next ot this is the role of self-employment, which, while essentially stable as a percentage of the workforce in both countries over the past 15 years (source: OECD (2019), Self-employment rate (indicator). doi: 10.1787/fb58715e-en, Accessed on 28 December 2019), has gained very different connotations. See again for Germany Carta, “La Crisi Della Contrattazione Di Settore in Germania.”

562 According to the World Bank, services, a sector traditionally less unionized and more difficult to regulate than industry, have kept growing slowly but steadily until the recent sovereign debt crisis France: 63% in 1987, 75,3% in 2016; Germany: 55,2% in 1987, 70,5% in 2015 (latest report).

563 The two phenomena may well be connected: Pedersini observes that “if the contribution of multi-employer collective agreements to defining the terms of employment is scaled down significantly, the general legitimation of industrial relations may be eroded since it also - perhaps mainly - derives from the capacity to extend inclusive protection and realise tangible improvements in economic and working conditions on a broad front.” See Roberto Pedersini, “Conclusions and Outlook More Challenges and Some Opportunities for Industrial Relations in the European Union,” in Multi-Employer Bargaining under Pressure: Decentralisation Trends in Five European Countries (European Trade Union Institute (ETUI), 2018), 291.
use of that room. Why and how they would do so is a matter that will be discussed in the next section.

5.3. Contractualisation as a *tool*: contract terms in employment practices

5.3.1. Terms’ functions and analytical framework

In the previous section, contractualisation has been presented as a macroscopic phenomenon taking place in a widespread way across modern labour markets. Empirical research on employment contracts in France, however, concluded that the most relevant instantiations of contractualisation happened not as a result of deregulation but due to “strategic use” of contracts on the side of employers. In the following sections, I develop some basic analytics to think about why – and how – employers and their lawyers would invest in using spaces afforded to private autonomy to draft what are essentially “terms and conditions” not only for their customers but also for their employees.

When one discusses this issue, it is important to keep in mind that, as a starting point, legal systems traditionally do not require using a specific form in order to validly conclude an employment contract. Until the first specific rules appeared for temporary or part-time contracts, requiring the limitations to be established in writing, writing down the content of an employment contract was a perfectly optional exercise for the parties. The main content of the contract of employment was represented by, on the one hand, the obligation to work under the employer or its representatives, and on the other hand, the obligation to provide work and pay the worker’s salary. In a Fordist context, this original setting often did not require much further specification.

In all EU legal systems, an obligation for the employer to provide a newly hired employee a written statement of certain core terms concerning the employment has been established by the so-called “Employment information directive” of 1991. According to the Directive’s recitals, “the development, in the Member States, of new forms of work has led to an increase in the number of types of employment relationships”. Member States have hence adopted formal requirements in the field of employment relationships with the aim to provide “improved protection” against violations of their rights and to “create greater

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566 Council Directive of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship, 91/533/EC
transparency” on the labour market. Interestingly, thus, the increased salience of individual employment contracts has been indirectly acknowledged by the EU already in 1991. The Directive has been recast in 2019, including not only an expanded mandatory disclosure but also, possibly relevant to the subject of this book, the prohibition of certain forms of extreme non-compete clauses.\footnote{Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186, 11.7.2019, p. 105.}

Why would employers want to make use of such contract stipulations? Collins has classically argued that employment relationships are characterised by a “double information asymmetry”: the employee knows their job-related strengths and weaknesses, which are unknown to the employer; conversely, the employer holds much information on the day-to-day working of the workplace which is relevant but inaccessible to the employee.\footnote{See Hugh Collins, “Justifications and Techniques of Legal Regulation of the Employment Relation,” in Legal Regulation of the Employment Relation, ed. Hugh Collins, Paul L. Davies, and Roger W. Rideout, 2000, 3–28. See in particular p. 7.} While Collins uses the observation to argue that some regulation may be needed, employers have the possibility to react to the lack of information by using contract terms. They may want to align employees priorities with the interest of the company by tweaking the remuneration structure, include specific obligations that clarify what is expected of individual employees and so on. The non-compete clauses that the 2019 EU directive aims to ban seem to fit in this description.\footnote{Article 9 Directive 2019/1152, Parallel employment, esp first section: “Member States shall ensure that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.”}

Collins further identifies transaction costs, especially in the field of dispute resolution, as being relevant to employment contracts.\footnote{Collins, “Justifications and Techniques of Legal Regulation of the Employment Relation,” 9–10.} Transaction costs make the creation, adaptation and termination of employment contracts burdensome. Also in this respect, employers can improve their outlook by deploying appropriate contract terms: without considering arbitration clauses, one can think for instance of conventional limitation periods and penalty or liquidated damages clauses.

Transaction costs also typically explain the need for standardisation: while companies may sometimes want to differentiate between employees, the benefit...
of contractual tools is limited if they are to be re-discussed every time. Thus, in principle it makes sense for the “terms and conditions” to be drafted in a rather homogeneous way for homogeneous groups of workers. In this way, the employer achieves a larger degree of legal and organisational certainty and reduces agency issues – including by reducing the discretionary role of middle-management in discussing terms of employment with individual employees.

Transaction costs are also traditionally seen as one of the reasons explaining the efficiency value of employment contracts, in parallel with Coase’s theory of the firm: the employer’s power of direction is one way of cutting transaction costs related to the performance of the contract, since the employer can demand that the employee perform a possibly quite broad palette of tasks within the performance of their employment contract. Given the long-term nature of employment relationships, additional flexibility may be required.

Almost counterintuitively, contractual drafting can serve both legal certainty- by clarifying the parties’ expectations and possibly standardising the concerned work relationships- and flexibility -e.g. by allowing more room to the “management” of the contractual relationship. To the extent that the applicable labour laws allow it, they can also set aside or alter the operation of legal rules, affording the employer a legal reality that is closer to their needs.

An interesting way to think about how lawyers approach the question of contract drafting is provided by Collins, who identifies four functions:

1) Resolving ambiguities by suggesting express terms that “provide greater detail for the economic deal”;
2) Allocating risks of foreseeable and unforeseeable contingencies;
3) Constructing non-legal sanctions or self-enforcing legal sanctions;
4) Detailing how disputes should be resolved and the types of remedy available to other parties.

For the purposes of the book’s analysis, and in line with what has been observed so far in this section, these functions are here translated to employment relationships by distinguishing between

1) Customisation: by and large overlapping with no. 1 above;

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572 Hugh Collins, Regulating Contracts (Oxford University Press, 2002).
2) Flexibilisation: managing risk within the limits imposed by mandatory labour laws, which determine to what extent a risk allocation can take place;

3) Governance: terms dealing with sanctions or dispute resolution, establishing mechanisms to facilitate the management of the relationship.

Collins notices how in business relations detailed terms may prevent court disputes, but at the same time may not be relied upon “for fear of souring the business relation and creating an additional obstruction to the completion of the deal”. This may be less the case in an employment relationship, where typically disputes arise when the relationship has soured. Furthermore, when the employee is comparatively weak, much like consumers, they may feel pressured to comply with certain terms even when they have not yet been invoked. This arguably adds to the employer’s (lawyers’) interest in making use of existing chances of unilateral contract drafting.

5.3.2. Customisation

In a famous Dutch case, a hotel chain had dismissed a waitress for a violation of its “drugs-free workplace” policy – during the employee’s free time. The employee had signed an express written acceptance of the policy. Quite plainly, not all employment contracts contain an implied or express obligation, for the employee, not to use drugs in their spare time. In principle, what an employee does in their free time is irrelevant to the employment relationship in line with the employee’s right to respect for their private life. The various courts involved in the case, including the Dutch supreme court, however, confirmed the dismissal with very limited scrutiny.

When employers wish to introduce obligations not automatically deriving from the employment contract, or to give particular weight to certain specific obligations, it is expedient to make sure that employees have specifically consented to undertaking these obligations. In the example case, all employees were required to individually accept the employer’s policy. This made it easier to justify the employee’s dismissal as due to a violation of the employment contract. While it is not impossible to introduce specific rules of conduct for individuals

574 See Evert Verhulp, “Identity-Bound Employers and Limitations of Employees’ Fundamental Rights,” European Labour Law Journal 2, no. 2 (2011): 166–172. The author suggests that the fact that the lower level courts were placed in Aruba and not in the Netherlands has had an impact on the final outcome.
through instruments other than the individual contract.\textsuperscript{575} Direct incorporation in the contract seems in many circumstances a safer option.\textsuperscript{576} Typical examples of such clauses would be terms requiring employees covering specific functions to live on or next to their work premises, but also “objective” clauses, giving the employer the right to terminate the contract in case the employee does not reach certain agreed targets, are examples of such terms.\textsuperscript{577} Other examples may be clauses concerning social media use, use of company devices and similar detailed regulations.\textsuperscript{578} Often non-compliance with these terms will have consequences for the employee, disciplinary or otherwise.

\section*{5.3.3. Contract Terms as instruments of flexibility}

While the most visible discussions in labour law on flexibility arguably concern \textit{external} flexibility, namely companies’ ability to up- and down-size or externalise work and workforce, flexibilisation efforts also have an important \textit{internal} component. Internal flexibility can take place in two important directions – adapting wages to the company’s or worker’s performance (financial flexibility) or adapting the workforce’s tasks, functions and distribution (functional

\textsuperscript{575} Through, for instance, collective agreements or employee handbooks. A prominent example would be that of security company GS4’s “neutrality” policy, which was used as a reason to dismiss a Muslim employee who decided to wear a headscarf while at work. This policy had been, at some point during the controversy, expressly endorsed by G4s’s works council. The policy, in so far as it genuinely prohibited all display of any signs of religious, political or philosophical affiliation, was upheld by the Court of Justice of the European Union. See Achibta v G4S, Case C-157/15.


\textsuperscript{577} See French case-law in Aubrée, “Contrat de Travail–Existence–Formation.”

\textsuperscript{578} See the examples in the law firm websites referred to above, note 573.
From the perspective of contract law, functional flexibility concerns adaptations in the contract’s characteristic performance (the provision of work, in other words the employee’s performance); financial flexibility, on the other hand, affects the monetary obligation due in return for the characteristic performance.

5.3.3.1. Functional flexibility

Within employment relationships, the main instrument of functional flexibility is traditionally the subordination lien, or employer’s power of direction. This entails that while the contract only specifies the main characteristics of the employee’s position – e.g., teaching and doing research at an educational institution – the employer or its representatives can specify the contents of the employee’s tasks and adapt them over time as necessary: for instance, they can assign certain people to teach certain courses, and reassign them to different ones should the original courses be discontinued.

The employment contract, through its description of the employee’s position, usually sets the outer limits of this “functional” flexibility. Contractual terms may, however, seek to expand these limits – for instance providing that the employer can demand the employee to teach in an area different than the one that was originally presupposed by the contract, should that be necessary for the university’s well-functioning. Such terms allow companies “to adapt to the growing number of security regulations, to technological developments, to evolving demands by clients and to changing strategies of competitors.” They also play an important relational function in setting mutual expectations in tune with possible future adaptations. There are thus, legal and practical advantages to including functional flexibility in the original contract – when, one should also consider, the employee will both be inclined to make certain concessions in order

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580 With M. Rönmmar, who later concentrates of the exercise of managerial prerogative rather than contract drafting, “The aim of functional flexibility is to vary the content of work in relation to the changing demands of production. In order to achieve functional flexibility, the employer will broaden job descriptions and the obligation to work in general and invest in training and education”. Rönmmar, 57.

to get the desired position and will not (yet) have developed any attachment to their current functions and workplace.\textsuperscript{582}

5.3.3.2. Financial flexibility

Next to the functional flexibility just discussed, companies also strive for financial flexibility, that is the possibility to adapt their wage expenditure to market circumstances, their own performance and other relevant factors.\textsuperscript{583} Since the main starting point in a traditional employment contract is that wages are to be set in a manner which allows the employee to rely on stable income and keeps them immune from entrepreneurial risk, wage flexibility is something that does not come automatically with the stipulation of an employment contract.

Wage arrangements can also function as instruments of human resources management, providing workers economic incentives going beyond the basic time-money exchange.\textsuperscript{584} While such arrangements will normally complement the regular salary, for some workers they may represent a significant component of their total remuneration.\textsuperscript{585} Once a complementary pay system is put in place, it may be difficult to change it. The interest for employers of carefully drafting wage flexibility terms seems beyond doubt.\textsuperscript{586}

In the context of salary-related stipulations, different dimensions can come into play.\textsuperscript{587} On the one hand, it is possible to connect the salary to the firm’s or the

\textsuperscript{582} In other words, there is no endowment effect on the employee’s side at the moment of concluding the contract.

\textsuperscript{583} Again, this description mirrors that proposed by Rönnmar, who translates, for a legal audience, categories found in human resources management studies.

\textsuperscript{584} BAG 19. 3. 2014 – 10 AZR 622/13.

\textsuperscript{585} A recent Eurofound report shows that “variable pay systems” are very (and increasingly) widespread, especially in the private sector. Often unions or worker representatives are involved – especially company level representation. However, variable pay seems to be particularly preponderant in countries with relatively low levels of unionisation, suggesting that companies enjoy considerable room for manoeuvre to use unilateral policies and individual agreements instead of collective instruments. “Changes in Remuneration and Reward Systems,” Eurofound, January 6, 2020, https://www.eurofound.europa.eu/publications/report/2016/industrial-relations/changes-in-remuneration-and-reward-systems.


\textsuperscript{587} “The European Company Survey (ECS) 2013 asked human resource managers in European establishments with more than 10 employees whether at least some of their employees received variable pay. The survey distinguished five forms of variable pay:
employee’s performance; on the other hand, the employer might wish to be able to compensate their employees in a more generous way at certain times, while maintaining the possibility to go back to more conservative expenditures later on. From the point of view of the present study, one may see the first as a “customisation” attempt and the second as flexibilisation stricto sensu.

5.3.4. Governance

Next to a need for flexibility, the typically long-term nature of employment contracts entails – this is hardly a surprise – a need for governance structures addressing potential conflicts.588 This need emerges both with reference to the prevention of controversies and to their management.589 In the first sense, contract terms may help set incentives that realign the employee’s interests with those of the company – for instance, by establishing fines for disloyal conduct. Contractual penalties may, additionally, reinforce the effectiveness of specific obligations included for “customisation” purposes. This contributes to moderating the problem of information asymmetries at the moment of concluding the contract. In the second sense, contractual terms may for instance set conventional limitation periods, increasing legal certainty, or contain an undertaking to exhaust internal dispute resolution mechanisms before bringing certain claims before a court of law.

While, again, the main governance structure characterising employment relationships is evidently the subordination lien, or the employer’s managerial prerogative, this structure is purposefully open (we have already said that subordination is also a traditional instrument of flexibility). The coordination problems that this openness entails are arguably enhanced by the complexity of

payment by results (for example, piece rates, provisions, brokerages or commissions pay linked to individual performance following management appraisal; pay linked to group performance (of the team, working group or department); profit-sharing schemes (pay linked to the results of the company or establishment); share-ownership schemes offered by the company.

“Except share-ownership schemes, all the mentioned practices were found to be common (25% of employers) to very common (43%). “Changes in Remuneration and Reward Systems,” 17.

588 Although in the context of labour law it is common – and in many ways significant – to distinguish between open-ended and fixed-term contracts, this distinction is less crucial when discussing contracts and contracting. From the point of view of drafting parties, the question of managing the risks associated with the time dimension arises irrespective of how the contract can be terminated – even though termination costs will likely play a role in assessing the said risks.

589 M. Mekki, Le Nouvel Essor Du Concept de Clause Contractuelle (1ère Partie) (RDC, 2006).
employment relations in service or, even more, “knowledge” economies. Governance by specific contract terms, then, such as penalties or conventional limitation periods, allow employers to gain legal certainty without turning to substantive rules limiting the parties’ room for manoeuvre.

5.4. Contractualisation in practice and judicial responses: analysing certain contentious terms

The above analysis shows why employers and their lawyers may want to make use of the possibility to craft relevant aspects of an employment relationship by means of (standard) contract terms; we have further seen that multiple developments seem to be making more “space” for such drafting exercise: contractualisation of employment relationships – including in France and Germany – in the sense established in Chapter 1 of this book is a plausible hypothesis. This section looks for concrete examples of contractualisation: do employers have the space to use contract terms to customise obligations, increase flexibility and establish governance mechanisms? And what happens when the use of such terms leads to a court dispute? In particular, what is the role of contract law and competing rationalities in this reaction?

To answer these questions, this section presents a selection of terms which have been the object of court litigation in the two jurisdictions considered and an analysis of the ways in which courts have intervened on their validity. First, I present “customisation” terms, which essentially introduce elements to the employment contract that would not automatically be implied by the contract itself. Customisation terms are presented on the example of clause concerning the restitution of educational expenses. Two separate sub-sections are devoted to functional and financial flexibility. Both are looked at through modification or variation terms. One may, however, expect some differences in the treatment of the two areas of concern since functional flexibility directly affects the employee’s performance, whereas financial flexibility relates to the employer’s counter-performance. The determination and specification of employee’s duties come close to the general question of managerial powers. Remuneration, on the other hand,


591 Contractualisation is defined there as “a process by which the salience of contracts and contract law in a given domain is increased”. See p. 2- on for further elaboration.

592 Or in other words, ultimately, of the subordination nexus.
is usually considered as a purely contractual (as opposed to relational or institutional) aspect. Finally, I look at “governance” mechanisms within the contract on the example of penalty clauses.

Only clauses that, in somewhat similar fashion, appear in both systems have been included in the chapter. This choice obscures the fact that a larger palette of terms has actually gained salience in each country. Limiting the analysis to “common ground” mechanisms further hinders the study’s ability to look inside each system in a systematic way. However, the choice has two considerable advantages: first, it enhances oversight; second, it provides some insight into how the background framework, control mechanisms and other factors contribute to shaping the response to contractualisation in individual cases.

As discussed in Chapter 4, at the moment of writing, both Germany and France have included provisions on unfair terms control applicable to employment contracts in their civil codes. However, for French law, the analysis here is made on the basis of case-law published before the reform: while the possible impact of the new Civil Code rules on employment contract has been discussed in the literature, it is still too early to expect to find meaningful developments in the specific areas discussed in this chapter. As far as Germany is concerned, in contrast, the analysis is mainly based on case-law from the post-Modernisierung era. Where relevant, however, a reference is made to the state of the art before 2001: to what extent has the new legal framework affected the balance between rationalities?

5.4.1. Customisation: the restitution of educational expenses

The reimbursement of education costs is an example of the directions in which contemporary labour relationships are expanding. Although collective agreements continue to be a relevant framework within which these issues are addressed, there might be many different reasons why they also tend to appear in individual contracts- in both systems. Over the duration of an employment relationship, it can serve the interests of both parties to ensure that the worker’s skills are updated or upgraded. When this is the case, the employee can be allowed

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593 In which case, in Germany the terms would be exempted from the stricter control exercised over terms in (non-negotiated) individual contracts. This is not, in principle, the case under art L. 1121-1 Code du Travail.

594 We know that this happens from the case-law itself: for France, we will see that only trainings which are offered in the context of individual contracts can include a restitution obligation; in Germany, all BAG cases had to concern non-collective agreements, otherwise no scrutiny would take place.
to pursue the training at least in part during their working time. Furthermore, the employer can incentivise the effort by covering the related educational expenses, which can be considerable. In these cases, the employer has an interest in keeping the employee with him after the end of training, so to profit from his “investment” in the employee’s skills. For this reason, it is common to stipulate that the employee will have to reimburse (part of) the expenses incurred by their employer in view of their education, in case they quit (or the contract is otherwise terminated) before a certain time has passed since the training has been completed.  

From the point of view of the worker, these terms restrict their occupational freedom, i.e. they represent a limitation on their ability to resign whenever they desire to, possibly with a view of getting a better job.  

It is thus perhaps not very surprising that both legal systems have been confronted with litigation concerning terms of this kind.

5.4.1.1. Germany

However presented in different forms and with different labels, also in Germany the fundamental function of these agreements is understood as being that of “securing the employer the benefits deriving from the employee’s newly acquired skills” for the longest time possible, while also guaranteeing recovery of the expenses actually undertaken in the event of early termination. The employee, at the same time, has an interest in improving their market chances through the education and not to be bound to the same employer more than is appropriate considering the latter’s expenses.

Thus, in order to be compatible with a balanced appreciation of the parties’ interests, the stipulation must concern a programme which actually has some economic value for the employee, and does not only fulfil purposes related to the employing company’s well-functioning or productivity. Provided that, the...

595 Paul-Henri Antonmattei, Les Clauses Du Contrat de Travail (Wolters Kluwer France, 2009), 79. He observes that “the current development in the domain of professional training creates greater incentives towards the insertion of this term in employment contracts.”

596 Although it can be argued that they are also valuable for employees, in that the possibility of making use of them encourages employers to undertake costly training investments. See Aubrée, “Contrat de Travail–Existence–Formation”, para 100.

597 The BAG has independently interpreted as a Rückzahlungsklausel agreements terms which nominally concerned a “loan” granted by the employer to the employee but in practice resulted in payments to the interested educational institution and not to the worker. A loan, according to the Court, postulates that the agreed sum is put at the beneficiary’s disposal.

598 In other words, the training must typically either allow the employee to gain access to a better position within the same company, or improve her their chances on the labour market: see 11.04.2006 - 9 AZR 610/05.
employer is entitled to pursue the establishment of a bond, but the duration of the latter, absent exceptional circumstances, has to be scaled according to the advantage for the employee, the costs incurred by the employer, the duration of the programme pursued and taking into account above all the days in which the worker was dispensed from habitual activities to attend the concerned programme.

Already before the reform took place, the BAG had articulated – on the basis of a cumulative reading of § 242, § 138 and § 315 BGB\(^{599}\) – rather detailed guidelines as to the admissible duration of the permanence obligation: six months in case of a programme lasting up to one month- under continued payment of the regular salary; one year if the programme lasts between one and two months, two for a commitment between three and four months; no more than three years for programmes lasting between six months and twelve months and up to five years when the courses last over two years.\(^ {600}\)

If the amount of the restitution and its amortization have to be considered when determining the term’s fairness, it follows that the amount due has to decrease over time.\(^ {601}\) This development also has to be expressly contemplated in the contract. The BAG has not set detailed guidelines on this point. The practice seems to be to stipulate that the outstanding amount decreases every month by a fraction of that amount which is proportional to the total duration of the fidelity obligation. As early as 1986,\(^ {602}\) the BAG had denied that a deviation from this model, providing for yearly- rather than monthly- decrease (e.g. minus 25% after one year, minus 50% after two years, and so on) could be considered as unfair. This position might have become harder to sustain\(^ {603}\) under the current legal

\(^{599}\) Concerning, respectively, good faith in (the performance of) contractual relationships, immoral contract and the unilateral determination of contractual performance.

\(^{600}\) See BAG 14.01.2009, 3 AZR 900/07.

\(^{601}\) Preis, ErfK Arbeitsrecht 2015, § 611, para 442.

\(^{602}\) BAG, 23.04.1986, 5 AZR 159/85.

\(^{603}\) Pleyer, AP BGB § 611 Ausbildungsbeihilfe Nr. 10, in his annotation to the decision above, observes that the fact that other authors claimed it to be the “usual” arrangement already at that time, this was not a problem from the point of view of the term’s validity. However, this evaluation might have to be slightly corrected in light of the different standard imposed by the post-reform model of control. Whereas in 1986 the BAG observed that “Es geht aber nicht darum, den Vertrag abweichend von den Vereinbarungen entsprechend dem Vorteil des einen oder anderen Vertragspartners umzuändern, sondern es sind im Rahmen der Vertragsfreiheit Rückzahlungsvereinbarungen der Parteien anzuerkennen, sofern im Rahmen einer Gesamtabwägung nicht unsachgerechte Kündigungsbeschränkungen erfolgen” (feely translating, “the question is not to change the contract in accordance with one or the other party’s advantage, but to
framework. However, looking at more recent last-instance cases, it seems that most contracts tend to indeed follow the “standard” approach.

An additional validity requirement is that the restitution obligation must be expressly limited to cases in which the termination lies within the employee’s sphere of influence (resignation or dismissal for fault). This limitation, in other words, has to be incorporated in the wording of the clause. A term which generally engages the employee to pay “when the relationship is terminated early” is therefore unfair. This position marks a difference with respect to the earlier case-law “under § 242 BGB” to the extent that, before the reform, courts would check whether in a given case calling in the reimbursement obligation was justified in light of the circumstances. For instance, this would be the case when an employee has been dismissed for good cause. In the current legal framework, the control is “anticipated” to the term’s formulation. In this respect, the application of the standard terms provisions also entails an increased transparency standard, which for instance requires, when the worker undertakes to accept a new position upon completion of a certain program, that this position is clearly described in the agreement.

While, under the pre-reform Inhaltskontrolle, an exceedingly long permanence obligation could be reduced to an acceptable one, even adapting the scaling of the debt’s extinction under the new rules an unfair length or scaling automatically entails the term’s invalidity. The BAG has stated that adaptation in place of eradication may, exceptionally, be necessary when, in case of extraordinarily expensive or exceptionally valuable trainings, the exact boundaries of what can be required of employees are unclear. In this case, the employer may have drafted the terms under enhanced uncertainty and thus “considering the specificities of labour law”, supplementary interpretation may be applied. More in general, the BAG has said that the determining factor for deciding whether supplementary interpretation is justified should be “whether the removal without replacement of

recognise the restitution agreements entered by the parties making use of their contractual freedom, insofar as, under a general evaluation, the possibility to resign is not unjustifiably impaired”). The standard endorsed by the general rule of article 307 is different.

604 See BAG 23.01.2007, 9 AZR 482/06. In this case, the face that the term further specified that the obligation would ensue “in particular when the employee resigns or when the company terminates the contract for a reason pertaining to the employee” did not suffice to make the clause sufficiently limited.

605 BAG, 11.04.2006 - 9 AZR 610/05.


607 Preis, ErfK Arbeitsrecht 2015, BGB § 310, para 94.

608 BAG, 11.04.2006 - 9 AZR 610/05.
the unfair term offers a reasonable solution taking into account the typical interests of the drafter and of their counterpart".609 When the removal of the term can entail an “unbearable hardship” (unzumutbare Härte) for the drafter, it can be said that the gap ensuing from the invalidity needs to be filled.610

5.4.1.2. France
The so-called “clause de dédit-formation” (forfeit clause linked to education), through which the employee engages to pay a certain sum if they quit before a certain date, is conceptualised as a “termination fee”. In other words, it does not entail an obligation for the employee to remain with their employer, but attaches monetary consequences to the exercise of their right to terminate the contract.611 Such arrangement represents both a form of investment insurance for firms which offer to cover the costs for their employees’ further education and a way of incentivising those employees not to immediately quit the post they have been trained to fill. It should not, however, turn into a systematic instrument of employee retention.612 Furthermore, the validity of such clauses, which is in principle not questioned,613 is subjected by French courts to several cumulative conditions, of substantive as well as formal nature.

From the substantive point of view, the Cassation has specified already before the turn of the century a series of requirements: a) that the offered programme has

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612 Antonmattei, 80. uses as example the case of a logistics company specialised in the transportation of hydrocarbons which regularly hired drivers lacking the necessary licence and then asked them to undertake the indispensable training and a correlated obligation to remain with the company for 18 months. In this case, the objective was reducing personnel turnover in a sector whose working conditions were particularly challenging. This strategy represents an abuse of the clause de dédit-formation. The case is taken from Cass. soc. 4 juin 1987, n 84-43639.
613 But see Aubrée, “Contrat de Travail–Existence–Formation”, para 112. Here Aubrée highlights that this attitude seems incompatible with the idea that, within the employment relation, it is the employer which has a duty to secure that his workers maintain and improve their skills and adaptability, while the employees are under no obligation of seeking continued education.
imposed on the employer additional costs compared to those which were in any
case due by law or collective agreements;\(^{614}\) b) that the amount to be refunded is
proportionate to the expenses incurred and the duration of the training;\(^{615}\) c) that
the term does not result in depriving the employee of their ability to resign.\(^{616}\) This
last requirement means that the “fidelity” obligation imposed on the employee
should not be exceedingly long, while the proportionality prong suggests that the
amount to be returned should decrease with time.\(^{617}\) However, neither of the two
prongs seem to have been further specified by the highest court.

As far as form is concerned, the Cassation has more recently specified that the
obligation “has to be the object of a specific agreement entered into before the
beginning of the training and which specifies the date, the nature, duration and
actual cost to the employer of the training as well as the amount and mode of the
reimbursement due by the employee”.\(^{618}\) The “specific agreement” requirement is
intended as imposing that the term should concern one particular training, so that
the employee’s consent is not given without actual knowledge of the deal’s
conditions.\(^{619}\) In a case decided in 2007, the Court made clear that the costs actually
incurred by the employer have to be clearly mentioned in the clause itself. The
absence of such mention was considered to make the clause invalid.\(^{620}\)

Finally, it is interesting to observe that stress is placed on the term’s mise-en-
eouvre- in other words, on the question of under what circumstances the
reimbursement obligation can be imposed on the employee. In general, it seems
that the claim should be actionable every time the termination of the contract is to
be attributed to the employee’s behaviour.\(^{621}\) The most obvious case would be that
of their resignation, although not when the latter is justified by a severe breach on
the side of the employer.\(^{622}\) It seems that the obligation should also become
actionable when the employee is dismissed for disciplinary reasons, and not when
an economic dismissal takes place. The Cassation’s choice to grant the claim when

\(^{614}\) Thus the costs have to be “real”, i.e. they must not have already been refunded to the
company by the state), Cass. soc. 19 nov. 1997, RJS 1/98, n° 79.

\(^{615}\) Cass. soc. 17 juill. 1991, RJS 10/91 n°1072.

\(^{616}\) ibidem.

\(^{617}\) Antonmattei, Les Clauses Du Contrat de Travail, 2009, 82.


\(^{619}\) Antonmattei, Les Clauses Du Contrat de Travail, 2009, 81.

\(^{620}\) Soc. 16 mai 2007, JCP S 2012, 1175, note F Dumont.


\(^{622}\) Cass. soc. 11 janv. 2012, 10-15481.
an employee resigns in the course of their probation period, on the other hand, has been the object of criticism.\textsuperscript{623}

As to the consequences of incorrect drafting, in most cases a failure to meet all the mentioned requirements will entail the term’s nullity. However, when the fidelity obligation stretches exceedingly far in time or the amount to be reimbursed is exceedingly high, it is possible for the judge to reduce the term instead of eradicating it. This is done under application of article 1152 of the Civil Code, concerning penalty clauses.\textsuperscript{624}

\textbf{5.4.1.3. Comparison}

As concerns the restitution of educational expenses, the two systems show a similar concern with the employee’s ability to resign. This concern is coloured by constitutional provisions and in itself not necessarily concerned with contractual balance – even an extraordinary investment by the employer would not, for instance, justify an unlimited permanence obligation.

Within these external limits, proportionality plays a significant role: the requirement must serve a legitimate interest and not go beyond what is reasonably required to pursue it.\textsuperscript{625} As to the legitimate interest, both systems insist on the fact that the employer must have voluntarily incurred the expenses that are being claimed back. In both systems, this requirement is connected to the idea that expenses incurred for mere purposes of “normal” updating of skills and knowledge are not recoverable. German law further specifies that the training must promise a professional advantage for the employee. Furthermore, the restitution obligation must be proportionate in itself.

Furthermore, both systems place emphasis on transparency. This may not be particularly surprising for (post-reform) German law, however it is remarkable that a similar trend is also noticeable in French case-law: see, for instance, the requirement that the exact costs incurred by the employer be mentioned in the clause.

Two important differences can be observed: on the one hand, the different emphasis on the \textit{drafting} of the term establishing the conditions for a restitution obligation and its \textit{exercise}. Where we have seen that in Germany the term must


\textsuperscript{625} Indavertedly echoing Micklitz’s idea of the role of proportionality in unfair terms control and beyond: see Micklitz, “Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts,” 2008.
restrict itself to cases in which the termination is due to the employee, in France courts will scrutinise whether the employer is justified in invoking the term in a certain situation – so a term may not be actionable when termination was not due to the employee’s choices or behaviour. This is an interesting divergence to the extent that it also mirrors the difference between judicial control in Germany pre- and post-reform. Emphasis on drafting could be seen as a regulatory feature: other than control over exercise of a right or prerogative, it is not directly tied into the facts of a specific dispute and has potential to directly affect a number of other contracts. This development, however, is also relatively easy to explain as a direct implication of any version of open unfair terms control: if the term must be balanced, it can’t be the case that the assessment depends on how the rights that it establishes are exercised. Fair implementation of an unfairly formulated prerogative cannot re-establish contractual equality.

The other main difference has a more explicit regulatory connotation: whereas French courts leave some space for the correction of an unfair restitution term, in German law since the reform the prohibition of *geltungserhaltende Reduktion*, justified in plainly regulatory terms (ie mainly incentive setting) prevails. One may notice how ambiguity transpires here: on the one hand incentives are the main justification, but the German courts also feel the need to justify this by referring to a concern with the counterparty’s position. Furthermore, the BAG has set limits to the operation of the prohibition, ie it makes room for cases in which the rule of full eradication should be set aside on the basis of the individual parties’ interests.

5.4.2. Functional flexibility: worker’s performance and place of work

Case-law discussed in the following sub-sections concerns terms operating in the area of the right of direction: terms by which the employer reserves the right to change the employee’s place of employment or their function. The starting point is that when the place of employment or the function are determined in the contract, this specification takes away from the employer the possibility of changing it later on by making use of managerial prerogative. As we will see, while the function is normally mentioned in the contract with such binding effects, mentioning the place of employment, in both systems, may not immediately entail that such indication has become part of the contract. From the employee’s perspective, the impact of terms of this kind will often be very limited, when the different tasks or, on occasion, different locations where the work is to be carried out – are relatively close to each other. Sometimes, however, a different set of tasks may entail different working hours, different compensation schemes or (the impossibility of) making use of certain sets of skills.
5.4.2.1. Germany

In German law, the standard scope of managerial discretion in determining the due performance is § 106 of the German Trade Regulations (Gewerbeordnung or GewO), according to which “[t]he employer can specify the content, place and time of the work performance according to reasonable discretion, as long as these conditions are not set by the employment contract, provisions of a company agreement, an applicable collective agreement or legal norms.”

This means that in principle the employer enjoys comparatively large discretion, but the margins can be reduced by a variety of sources including the individual contract. Whereas under the employment contract the discretionary Verweisungsrecht descends directly from the law, when the contract has provided further specifications, an employer that wishes to maintain some flexibility will want to include a contractual modification reservation. It is logical to observe, then, that in this context two questions will play a central role—namely, what has been specified in the contract and what, on the other hand, can be considered encompassed in the reservation in case one has been made.

As an external limit to what can be validly reserved, the BAG has considered that while through a similar device the employer can “in the frame of the contractually agreed occupation, carry out a specification of the worker’s duties through assignment to different tasks (Aufgabengebied)”, they cannot reserve the right to change the worker’s function (Tätigkeit) completely. In particular, the designation to a lower-grade function (that is, a demotion) outside the mechanism of partial termination is generally not allowed.

The BAG does not expressly refer to the Gesetzesumgehung doctrine, but explains that a term which in principle would also allow the employer to assign the employee to a lesser function represents “a considerable deviation from the labour law principle of the protection of the content of the relationship” and is hence

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627 These two questions are put at the roots of judicial control of a transfer “regulated by standard terms” by BAG 25.08.2010, NZA 2010, 1355.

628 BAG 09.05.2006, NZA 2007, 145, at 146.

629 BAG 25.08.2010, cit.,1358.
unfair.\textsuperscript{630} In view of the specific interpretative exercise which seems immanent to the evaluation of this sort of terms, the court does not seem to be willing to use transparency requirements as a further restriction: the employer does not have to mention on what grounds a new designation may occur, even though it is clear that it should not be just on the basis of their own sheer convenience.\textsuperscript{631}

The assessment seems to be stricter with reference to the function then in respect of place determination: in one case, for instance, a contract term stating that “Ms. D is employed as editor in the main editorial office, area Special Editions” has been interpreted as only establishing a functional, and not geographical, destination area.\textsuperscript{632}

In recent decisions, the court has gone so far as to establish that, when a place designation is accompanied by a related modification reservation, the former is radically inapt to ground a contractual determination.\textsuperscript{633} A reason for this approach seems to lie in the consideration that flexibility is a disadvantage partially counterbalanced by increased job security, since the range of positions which have to be considered in case of firm-related dismissals is wider in the case of a flexible arrangement.\textsuperscript{634}

In this field, the reform has nominally brought about a paradigm shift in the approach of the BAG: whereas previously clauses introducing elements of flexibility in the regulation of the work relationship were evaluated against the prohibition to elude norms on “partial termination”\textsuperscript{635} of employment contracts, with the introduction of standard terms control §§ 305-310 have become the uniform.\textsuperscript{636} From the perspective of the standard used to assess the terms, in

\textsuperscript{630} BAG 09.05.2006, NZA 2007: “erhebliche Abweichung von dem Grundgedanken des arbeitsrechtlichen Inhaltschutzes”.

\textsuperscript{631} BAG, Urteil vom 09.05.2006 - 9 AZR 424/05, para 28.

\textsuperscript{632} See BAG 11.04.2006, BeckRS 2006, 43810

\textsuperscript{633} BAG 25.08.2010, NZA 2010, 1355 and BAG 19.01.2011, NZA 2011, 631.

\textsuperscript{634} Ibid., par 37.

\textsuperscript{635} In particular §2 KSchG: “Kündigt der Arbeitgeber das Arbeitsverhältnis und bietet er dem Arbeitnehmer im Zusammenhang mit der Kündigung die Fortsetzung des Arbeitsverhältnisses zu geänderten Arbeitsbedingungen an, so kann der Arbeitnehmer dieses Angebot unter dem Vorbehalt annehmen, daß die Änderung der Arbeitsbedingungen nicht sozial ungerechtfertigt ist (§ 1 Abs. 2 Satz 1 bis 3, Abs. 3 Satz 1 und 2). Diesen Vorbehalt muß der Arbeitnehmer dem Arbeitgeber innerhalb der Kündigungsfrist, spätestens jedoch innerhalb von drei Wochen nach Zugang der Kündigung erklären.”

\textsuperscript{636} The same approach as to the relationship between control of unilateral prerogatives and unfair terms control has been adopted by the Bundesgerichtshof, see Preis, Erf. Komm. BGB § 310 Rn.
particular as regards the employee’s function not much has changed in practice: the rules on partial termination seem to be used as point of reference for the interpretation of the general clause of § 307. However, we have seen how the reform has brought about a determinacy requirement requiring terms to be drafted in a way that reduces discretion: after the reform, the drafting of a given clause is more clearly separated from the question of how the right establish under it is established.

5.4.2.2. France
At the start of this century, the Cassation has established that

“a term by which the employer reserves the right to modify the employment contract, in part or in its entirety, is void as contrary to the requirements of article 1143 second paragraph of the civil code as the employee cannot validly renounce the rights which he has under the law.”

If taken literally, this enunciation would make all modification terms invalid. The orientation inaugurated by the Cassation with this decision has led scholars to wonder whether the employment contract was an instrument of flexibilisation or of “resistance” against it. The right the employee cannot renounce is the right to, in essence, reject any modifications to the contract that they do not agree with, as enshrined in the principle of the binding force of contract.

Such broad prohibition, however, does not correctly reflect the case-law of the Cassation itself, which allows – under conditions – several types of similar terms. According to one author, rather than of the pacta sunt servanda principle, this limitation should be seen as a consequence of the application, in the employment

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638 Soc. 27 fevr 2001, Dr. soc. 2005, 634, according to which the clause is “nulle comme contraire aux dispositions de l’article 1134, alinéa 2, du Code civil, le salarié ne pouvant renoncer aux droits qu’il tient de la loi”. In practice, this would mirror the German stream of thought according to which this kind of stipulation amounts to a deviation from the principle pacta sunt servanda. See already supra para 4.3.1.2.

639 Former article 1134 CC: «Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.»

context, of the rules of general civil law concerning (merely) potestative\textsuperscript{641} conditions and the requirement that the object of an obligation be determined or determinable. In this sense, not every modification reservation would have to be considered as inadmissible, but only those which would make room for the exercise of arbitrary, unfettered unilateral power.

As concerns functional flexibility, the \textit{Cassation} has not seriously engaged with the conditions that would make such terms acceptable. The starting point is that the employee’s \textit{qualification} – ie, in essence, their function – cannot be changed without their consent.\textsuperscript{642} When modification clauses are discussed, the \textit{Cassation} mainly concentrates on whether lower courts have made sure that the employer, in \textit{enforcing} the clause, has not gone against this principle.\textsuperscript{643} In one case, a term has been declared incapable of allowing the employer to change the worker’s qualification.\textsuperscript{644} In practice, this means that the validity of contract terms in this area is confined within the limits of the managerial prerogative, which makes all terms of this sort theoretically vulnerable. In practice, parties may still be using them.\textsuperscript{645}

So-called \textit{clauses de mobilité géographique}, terms allowing the employer to change the employee’s place of work, are deemed acceptable as long as they do not interfere directly with the worker’s ability to choose their own domicile\textsuperscript{646} and, according to more recent case law, inasmuch as they clearly indicate the physical domain to which they extend.\textsuperscript{647} While lack of any delimitation makes the clause invalid, when the delimitation merely lacks clarity, courts do not hesitate to “correct” a term by way of restrictive interpretation, for instance by saying that only plants already existing at the moment when the term was agreed upon can be considered encompassed by it.\textsuperscript{648} This, however, seems to indicate that transparency cannot be considered a requirement for the \textit{validity} of such terms.


\textsuperscript{642} Soc. 10 mai 1999, Bull. civ. V, v. 381, Dr. soc 1999, 736.

\textsuperscript{643} See Gratton, \textit{Les Clauses de Variation Du Contrat de Travail}, 178.

\textsuperscript{644} Soc. 18 Juillet 2001, inédit, pourvoi n. 99-44.038. Discussed in Gratton, 181 with further references.

\textsuperscript{645} Gratton seems to assume that this is the case, see Gratton, 176 with further references.

\textsuperscript{646} Soc. 12 janv 1999, Spileers, \textit{RJS} 2/99.


The *Cassation* is stricter when it comes to attempts at cumulating reservations: while setting a wide domain is allowed, however, it is not allowed to include a term that reserves the employer the possibility to modify the territorial domain to which the employee’s mobility obligation applies.649

5.4.2.3. Comparison

Courts across the border seem to agree that employers cannot give themselves a right to change the contractually agreed function. The contract, thus, determines the external limits of the managerial prerogative. Within these limits, courts are not imposing particularly demanding requirements in terms of formulation – we will see that this stands in contrast to the regime of terms concerning the remuneration. German law falls back onto labour law principles in order to fill in the significant imbalance test under unfair terms control rules. In French law, the case-law has reinvigorated debates on the relationship between contract and “power” – the *pouvoir de direction*, or managerial prerogative.650 In practice, a similar dynamic is at play in both systems: what is “contractualised” cannot easily be changed – so that, apparently, desire to afford employers some room for manoeuvre in the field of geographical mobility leads to denying stipulations concerning the place of work the qualification of contract terms.651

5.4.3. Financial flexibility: variable remuneration

While the previous paragraphs have addressed the ways in which employment contracts can be used to achieve functional flexibility,652 companies also strive for financial flexibility, that is the possibility to adapt their wage expenditure to market circumstances, their own performance and other relevant factors. At the same time, wage arrangements can also function as instruments of human resources management, providing workers economic incentives going beyond the basic time-money exchange. From the point of view of the present study, the former count as attempts at flexibilisation in the strict sense; the latter participate in the

649 See again Cass 7 Juin 2006, n. 04-45846


651 See critically Jean Pélissier, “La détermination des éléments du contrat de travail,” 2005, 6. The debate on the distinction between “terms” of the employment contract and “working conditions”, the latter being covered by the managerial prerogative, can be left in the background here but testifies to this tension between contract and “power”.

652 As an alternative, or complement, to managerial discretion. See Rönnmar, “The Managerial Prerogative and the Employee’s Obligation to Work.”.
customisation function discussed above and will be discussed in a separate subsection.

In this domain, the practice and discussion in the two countries are well alive but show little alignment. While in France the focus is on target clauses and other customisation mechanisms, in Germany the BAG case-law has been concentrating on several types of reservations allowing employers to modify their obligations or prevent the emergence of an obligation altogether. Although this German practice does not seem to find a parallel in France, it seems worth considering in more detail as an example of the degree of sophistication that can be reached by individual employment contracts—not necessarily between particularly sophisticated parties.

5.4.3.1. Germany
Variable remuneration can be put in place in several ways. First, unilaterally by the employer, by means of a company policy or by providing voluntary pay complements under reservation that they will not be necessarily paid again the next year. In such cases, the mechanisms will be outside of the scope of unfair terms control. In the interest of legal certainty and with an aim to attracting employees, companies may however choose to “contractualise” the mechanisms, to a more or less far-reaching extent. If the variation is shaped in a form of a “performance agreement” (Zielvereinbarung), linking the remuneration to results achieved by the company or by the individual employee, it is exempted from substantive control, with only transparency rules being applicable.

If the variation is otherwise regulated in the contract, the term will be subject to § 308 n. 4, which in principle forbids any “agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or

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653 In which case, such policy is subject to approval by the company’s works councils where these exist. See, with further reference to the relevant rules in the BertVG, Wolfgang Däubler, Arbeitsrecht: Ratgeber Für Beruf, Praxis Und Studium, 10th ed. (Bund Verlag, 2014), section 750.

654 See BAG 12.12.2007, 10 AZR 97/07, according to which as Zielvereinbarung entered in order to specify the targets which a certain employee is supposed to achieve is exempted from control as. According to Moll, Erf. Komm. 2012, para 55 lower instance courts have so far not adopted too strong standards. Westphalen refers to literature suggesting how this requirement should be interpreted, suggesting, inter alia, that transparency would be against a determination leaving both the evaluation concerning the achievement of the promised results and the translation of this evaluation into a monetary reward to the employer.
deviation is reasonable for the other party to the contract when the interests of the user are taken into account”.

In practice, it has long been common to include some contractualisation of the variable pay in the contract, coupled with mechanisms aiming to relativise or exclude the binding force of the contractual statement. These mechanisms are a typical feature of individual pay-related agreements, since their introduction presupposes that the salary component at stake is not part of the wages that the employer is obliged to pay by collective agreements or other super-individual instruments.

The chapter will consider two main instruments of “wage flexibilisation” which are widespread in contractual practice and case-law:

- **Widerrufsvorbehalte**, which make the granting of certain advantages subject to withdrawal, while not excluding the employer’s obligation to keep them in place until the moment of withdrawal;

- **Freiwilligkeitsvorbehalte**, which aim at preserving the “voluntary” nature of payments effected by the employer excluding the emergence of a binding praxis or company practice (betriebliche Übung)

**Widerrufsvorbehalte** (withdrawal reservations) have a very general scope of application. They can concern certain elements of the salary that are paid in addition to the amounts agreed through collective bargaining, performance-related or other recurring bonuses or even other forms of remuneration – think of a company car or other utilities. Since the reform of 2001, such stipulations can

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655 The German version goes as follows: “die Vereinbarung eines Rechts des Verwenders, die versprochene Leistung zu ändern oder von ihr abzuweichen, wenn nicht die Vereinbarung der Änderung oder Abweichung unter Berücksichtigung der Interessen des Verwenders für den anderen Vertragsteil zumutbar ist”.


657 Anrechnungsvorbehalte, which are mostly linked to the application of collective agreements and foresee the possibility, for the employer, to deduct sums paid as “extra-collective” remuneration from (certain or all) pay increases agreed by workers’ and employers’ associations. Since they leave the netto sum paid to the employee intact and are considered to be an essential instrument of risk management, the BAG subjects them to very limited scrutiny. See BAG 01.03.2006, BeckRS 2006, 41981, BAG 27.08.2008, NZA 2009, 49.

658 As a rule of thumb, when the payment of a sum takes place without reservation for three times at least the concerned employees acquire a legal right to successive payments.
also be submitted, with priority over the general rule of § 307, to the “special” regulation of § 308 n. 4, which in principle forbids any “agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation is acceptable (zumutbar) for the other party to the contract when the interests of the user are taken into account”.

The “acceptability” of a modification agreement has been articulated around a substantive and a “formal” requirement, according to which the acceptable content must be reflected in the term’s formulation—that means, the clause must not make “unacceptable” modifications abstractly possible. In practice “reasonable drafting” requires the indication of the conditions under which a withdrawal may take place and what it would entail, both of which must “be as much as possible specified (möglichst konkretisiert)” in the term. This entails that at least the “direction” from which the grounds for withdrawal may originate—e.g. from economic reasons, productivity or employee’s behaviour—is indicated in the clause, together with the intensity of the perturbation that will trigger the withdrawal.

The concretisation requirement is a result of the application of unfair terms control provisions. The Bundesgerichtshof had previously established that given the suspicious nature of modification clauses, they needed to be termed in a way that clearly did not allow unacceptable modifications and that allowed the other party to anticipate their consequences. The measure of acceptability was found in the fact that “the interest of the user is preponderant or at least of equal weight as the typical interests of the other party”.

The formulation, also taken up by the BAG after the reform, thus focuses on a rather abstract assessment; more concrete consideration of the circumstances at stake is delegated to the control on the exercise of unilateral determination rights under § 315 BGB.

From a substantive point of view, thus, in employment contracts the starting point is that withdrawal rights are reasonable as long as they allow the agreement’s

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659 The German version goes as follows: “die Vereinbarung eines Rechts des Verwenders, die versprochene Leistung zu ändern oder von ihr abzuweichen, wenn nicht die Vereinbarung der Änderung oder Abweichung unter Berücksichtigung der Interessen des Verwenders für den anderen Vertrags teil zumutbar ist”.


661 Ibid., p. 468: “Die Bestimmung muss die Angemessenheit und Zumutbarkeit erkennen lassen”.

662 Ibidem. The Court specifies that a general reference to “economic reasons” or “employee’s behaviour” does not suffice.

663 BGH 17.02.2004 - XI ZR 140/03:
adaptation in view of the uncertain development of the relationship;\textsuperscript{664} however, they should not allow the employer to transfer the entrepreneurial risk onto the worker.\textsuperscript{665} Furthermore, the flexibilization should not affect the core of the employment contract, let it jeopardize the aim of that contract contrary to the requirements of § 307 BGB.\textsuperscript{666} The relevant threshold to assess whether the core of the contract is affected is drawn from the Court’s pre-2002 case-law,\textsuperscript{667} which allowed withdrawal reservations inasmuch as they did not exceed 25-30% of the global remuneration and did not go below the minima established by relevant collective agreements.\textsuperscript{668}

Given that the drafting requirements were a result of the Modernisierung, the BAG has been willing to make exceptions to the application of the invalidity rule of § 306 BGB with reference to the so-called “old cases” – those concerning relationships started before the adoption of the Modernisierung. In these cases, the BAG has instead opted for supplementary interpretation (ergänzende Auslegung), consisting of an attempt to establish what the parties would have agreed if they had been aware of the term’s invalidity. For instance, in the case\textsuperscript{669} of an invalid reservation allowing the employer to withdraw extra-collective payments without indicating any reasons which could justify a withdrawal, the Court established that, had they known of the clause’s ineffectiveness, the parties would have at least stipulated that a withdrawal would be permitted in case of economic


\textsuperscript{665} Ibidem “Im Grundsatz hat der Arbeitgeber wegen der Ungewissheit der wirtschaftlichen Entwicklung des Unternehmens und der allgemeinen Entwicklung des Arbeitsverhältnisses ein anerkennenswertes Interesse daran, bestimmte Leistungen, insbesondere ”Zusatzleistungen” flexibel auszugestalten. Dadurch darf aber das Wirtschaftsrisiko des Unternehmers nicht auf den Arbeitnehmer verlagert werden.”  

\textsuperscript{666} “Eingriffe in den Kernbereich des Arbeitsvertrags sind nach der Wertung des § 307 Abs. 2 BGB nicht zulässig;”  

\textsuperscript{667} Based on the notion of Gesetzesumgehung, see 4.2.2.1.  


\textsuperscript{669} BAG 12.01.2005, 5 AZR 364/04  

\textsuperscript{670} Which was, for once, a consequence of the application to employment contracts of the « grey » list of § 308. In particular, § 308(4) (Reservation of the right to modify) prohibits stipulating “a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation can reasonably be expected of the other party to the contract when the interests of the user are taken into account”.

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difficulties for the company. Since the concrete exercise of withdrawal had indeed happened, in the case at stake, due to financial difficulties, the Court has in this way managed to both warn the employer that the terms had to be adapted and to avoid imposing an additional burden on an already non-flourishing company. Leaving the clause without replacement would represent a disproportionate interference with the user’s private autonomy, in particular considering that the consequences of the “erroneous” formulations could not be known at the moment of entering the contract.

Next on the list, a *Freiwilligkeitsvorbehalte* aims at preserving the voluntary (i.e. non-obligatory) character of a certain payment. The BAG considers that in principle such a reservation can be valid as long as it is drafted in a transparent, non-ambiguous way. In the presence of a clearly drafted term warning that the employer is not committing to repeating the payment in the future, no justified expectation of the employee can be grounded. A *de facto* emergence of a similar

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672 The Court also mentions the difficulty which would be associated with any attempts to modify the clause once its invalidity is known, since the modification should at any rate be accepted by the worker.

expectation, according to the Court, does not have legal impact notwithstanding the recognisable psychological effect, and the economic function, that certain “voluntary” payments may acquire after recurring for several years. The formula of “voluntariness”, anyway, has to be very clear in order to display the desired effects: a simple mention of the “voluntary” nature of a certain payment has a merely declaratory value and reminds the receiver that the employer is not under a statutory or collective obligation to grant it but does so of its own motion. Only an explicit announcement that “repeated payment does not give rise to any claim”- or an equivalent caveat – will preempt the emergence of a claim.

The transparency requirement is interpreted strictly in this area: the mere accumulation of provisos will not result in a reinforcement of their respective effects, but in reciprocal undermining – in other words, invalidity. A gratification, for instance, cannot be both “voluntary” in the strong sense explained above and “subject to withdrawal”: the first condition aims at excluding the emergence of a legal right, while the second postulates its existence.

The main limitation to the use of Freiwilligkeitsvorbehalte, however, lies in the fact that such reservations are only applicable to occasional gratifications but not to the parts of the remuneration that stand in a direct relationship to the worker’s regular performance. Next to this, it is assumed that the “Kernbereich” limitation as to the extent of the remuneration that is made subject to reservation applies to these clauses as it does to Widerrufsverbehalte. “Regular” remuneration enjoys a much more pervasive protection than occasional remuneration, as alterations to

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674 In BAG 30.07.2008, NZA 2008, 1173, the Court acknowledges that in case of repeated payment the employee may start to rely on the concerned sums; it also considers “not to neglect” that bonus payments are often not used for “luxury” expenditures (Luxusgaben). This “factual” reliance (tatsächliches Vertrauen) does not enjoy, as said, legal protection. The court follows here the considerations developed by Singer, Vertrauensschutz und Verhältnismässigkeit als Grundelemente der Arbeitgeberhaftung bei Freiwilligen Zuwendungen, in FS Canaris p. 1467 ff (1481), according to which renunciation to gratifications is easier than it would be for regular income since the former’s destination to “usual cost of living” (gewöhnliches Lebensunterhalt) is more tenuous.

675 In BAG 14.09.2011, NZA 2012, 81, when confronted with a particularly broad reservation, the 10th Senate expressed, in an obiter dictum, some doubts as to the position held up to this moment by the BAG as to the time-unlimited preventive effect of a contractual reservation with regard to repeated payments- at least when, as in the case considered, the repetition had occurred for over twenty years.

676 Willemsen and Grau, “Alternative Instrumente Zur Entgeltflexibilisierung Im Standardarbeitsvertrag.”

677 Willemsen and Grau.
it represent a serious interference in the contractual equilibrium of performance and counter-performance.

Furthermore, when a term is formulated in such a way as to potentially submit to “voluntariness” all forms of payment which are not explicitly agreed in the contract, it infringes on the basic rule according to which individual agreements always prevail over standard conditions. The invalidity of a similar, widely drafted term does not rest on specific quantitative tests but rather on the logic of standard terms and a basic protection of employee’s expectations.  

In a decision from 2014, the BAG has affirmed that a Freiwilligkeitsvorbehalt allowing the employer to decide freely whether to pay a bonus, even after having expressly set the targets to be achieved in a certain year, is to be considered invalid under §307 BGB. Such reservation, the BAG argued, is incompatible with the nature of performance agreements, which incite the employee to put extra effort in to their job and determine what “optimal” performance would entail in a certain period. In such cases, the bonus if effectively a counter-performance in direct relation to the employee’s efforts and its effective payment cannot be left to the free determination of the employer. The employer is, in contrast required to take such decision based on reasonable discretion (nach billigem Ermessen). In the decision under discussion, for instance, it was established that the reservation was invalid but that the bank, which had suffered considerable liquidity issues in 2008, had acted within their rights when setting the bonus to be effectively paid for that year at zero. When the parties fail to reach an agreement or the employer does not set the relevant objectives for a certain year the concerned employee should be able to claim damages.

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678 BAG 14.09.2011, NZA 2012, 81. In this case, the court opted for a contra proferentem interpretation: the employer claimed that the clause only was only meant “the establishment of a company practice with regard to certain occasional payments”, but the term’s wording allowed fur much larger discretion. Since it was impossible to reach a final result by means of ordinary interpretation, the Senate applied § 305 cII choosing the interpretation that, leading to invalidity, was most disadvantageous for the proponent.

679 The Court (p. 84) observes that, if “voluntariness” was allowed with reference to laufender Entgelt “the employer would be given the chance to expect the whole performance from the employee and to dispose of his own counter-performance”. This would fundamentally (grundlegend) impair the worker’s interest and obviously endanger the contract’s Zweck.

680 See BAG 19.3.2014,

681 See BAG 19.3.2014, para 52.

682 Ibidem para 53.

683 Moll, 2012, para 64.
Given their nature, bonuses that actually represent a direct remuneration of the employee’s effort cannot be made subject to a restitution obligation when the employment is terminated shortly after their maturity. However, for performance-related bonuses this maturity may come after the end of the year to which the bonus refers since it may be dependent on final assessment of the company’s and employee’s performance, e.g., the achievement of yearly targets.

5.4.3.2. France
Under French law, there is – as a starting point – a somewhat simpler differentiation between bonuses and flexible remuneration systems which make the variation mechanism part of the basic remuneration model. For bonuses, judicial control is essentially limited to the respect of the employee’s occupational freedom, which stands in the way of requiring such bonuses to be returned in case of termination or resignation before a certain time. From this point of view, a condition (accepted by the employee by receiving the payment) which imposed the restitution of a bonus paid at the end of a certain year in case the employee would terminate the contract before 30 June of the following year was considered by the Cassation as incapable of grounding a restitution claim. Additionally,
employers are not allowed to use the threat of having to return a bonus as a disciplinary mechanism.\textsuperscript{688}

A clause introducing a \textit{variable remuneration} must fulfil a different series of conditions in order to be valid: the variation must depend on \textit{objective elements} which are independent of the employer’s will, it must not shift the entrepreneurial risk onto the employee and in any case respect minimum salary requirements.\textsuperscript{689} The first requirement helps to understand a broadly worded decision, according to which a contract term cannot validly allow the employer to unilaterally modify the employee’s contractual remuneration:\textsuperscript{690} the key aim in this context is to avoid an unfettered unilateral prerogative, again in line with the general contract law principle on the prohibition of potestative conditions.\textsuperscript{691}

The factors determining the variable quota have to be such that the employee’s remuneration is not influenced by the employer’s mismanagement of the firm’s income- thus, while the firm’s \textit{revenues} (ie gross income) are to be considered as acceptable parameters, the same does not go for \textit{profits} (what is left of the income when all expenses are paid).\textsuperscript{692} In any event, it must be possible for the employee to verify that their remuneration has been duly quantified according to the criteria specified in their employment contract.\textsuperscript{693} This seems to implicitly require a certain degree of specificity in the contractual determination.

When the variation is made dependent on the employee’s performance (s.c “\textit{clause d’objectif}”), the individual covenant may limit itself to indicating the existence of the mechanism\textsuperscript{694} while the variable quota and the objective to be achieved can be established from year to year- both conventionally or unilaterally, through the employer’s direction power.\textsuperscript{695} When the determination is left to the employer,

\textsuperscript{688} Antonmattei, \textit{Les Clauses Du Contrat de Travail}, 2009, 24. See infra with respect to penalty clauses.

\textsuperscript{689} Cass. soc. 2 july 2002, n. 00-13111, Bull.civ. V n° 373 ; Soc, 4 mars 2003, RJS 5/03 n° 568.

\textsuperscript{690} Cass. soc. 3 july 2001, n. 99-42-761.

\textsuperscript{691} See Alexandre Barège, JC Travail, Clauses particulières, para 65.


\textsuperscript{693} Cass. soc. 18 june 2008, n. 07-41910.

\textsuperscript{694} It is not clear to what extent the way in which the flexible quota is calculated, when its entity is not mentioned in the contract, will have to be contractualised.

\textsuperscript{695} Cass. soc. 22 mai 2001: TPS 2001, com. 284: “\textit{les objectifs peuvent etre définis unilateralement par l’employeur dans le cadre de son pouvoir de direction}”. In this case the objectives were not linked to a variable remuneration clause. However, contrary to the conclusion of Antonmattei, established case-law allows the employer to unilaterally identify the relevant objectives also when such a clause is included in the contract (see Antonmattei, \textit{Les Clauses Du Contrat de Travail}, 2009, 26.) See Barège, para 65 and Cass. soc. 2 march 2011, n. 08-44977
however, this prerogative is not unfettered: the objectives have to be realistic and have to be communicated to the employee at the beginning of the relevant period. Furthermore, the courts attach heavy consequences to the employer’s failure to do its part in specifying the contract’s content.

If the variable remuneration for a certain year is not established by the employer, it is the judge’s task to determine it, taking as reference the criteria mentioned in the contract and the agreements reached for other years. A similar, or even stricter, mechanism is in place for the event that the variable quota is set, but the employer fails to fix the objectives to be attained. The Cassation has further clarified that, when the employer fails to specify the objectives that an employee has to fulfil in order to receive their target-related remuneration (as well as the relevant calculation methods) and the time frame for the achievement of such objectives, the bonus has to be paid in its entirety irrespective of the employee’s (in)ability to prove the quality of their performance. This is the case even when the bonus is promised in the form of a yearly amount and the employee has been employed for a few months only. The implied basis for such findings is always (then) article 1134 of the civil code, ie the binding force of contract.

696 It should also be mentioned, albeit in passing, that this unilateral determination is liable to take place also in a different context, namely that of objectives which are not set in view of a variable compensation, but rather to contractualise a certain performance level expected of the employee. In that case, much emphasis is placed on the opposability of the objectives to the employee and the room left to the judge’s evaluation concerning the existence of a justified ground for termination on the basis of insufficient results. See Barège para 66.

697 See e.g. Cass soc, 2 march 2011, n. 08-44977 and Cass. soc. 18 march 2015, n. 13-24205: “lorsque les objectifs sont définis unilatéralement par l’employeur dans le cadre de son pouvoir de direction, il peut les modifier dès lors qu’ils sont réalisables et qu’ils ont été portés à la connaissance du salarié en début d’exercice”.

698 Cass. soc. 4 june 2009, 07-43198: “lorsque le droit à une rémunération variable résulte du contrat de travail et à défaut d’un accord entre l’employeur et le salarié sur le montant de cette rémunération, il incombe au juge de la déterminer en fonction des critères visés au contrat et des accords conclus les années précédentes, de sorte que, si l’objectif de résultats dont le contrat de travail fait dépendre la rémunération variable n’a pas été déterminé, il appartient au juge de le fixer par référence aux années antérieures”.

699 Cass. soc. 10 juillet 2013, n. 12-17921, non publié au bulletin.

700 In the case considered by the decision, the contract had been terminated at the end of a three-month probation period.
5.4.3.3. Comparison

Under French law, there seems to be no little space for the nuances – or ambiguities – surrounding for instance the *Freiwilligkeitsvorbehalt* under German law. When the contract refers to the remuneration, that reference has a binding effect.\(^{701}\) Whereas thus the legal framework and even, most likely, HR practices differ in this area between the two countries (see the clearer distinction between variable remuneration and bonuses under French law), the overview reveals a similar concern – in turn similar but not identical to what we have seen in the sphere of “functional” modifications.

The German case-law on *Widerrufsvorbehalte* adopts parameters which appear very close to the ones followed by French courts: there should be no room for an arbitrary definition and the terms should not transfer to the employee the entrepreneurial risk that the employer is supposed to bear. Whereas the latter concern seems to reflect more the ideal apportionment of risk within employment relationships (at least from a protective perspective), the concern with unfettered unilateral prerogatives goes to the heart of contractual equality. In Germany, the BGH first has contentiously referred to the principle of *pacta sunt servanda*; it seems that the same principle, together with the French Civil code’s express rejection of potestative conditions, is at the basis of the French cases. Protection for the “core” of the employment relationship, justified under German law by the preservation of the essence of the labour-wage exchange with the *Kernbereich* doctrine, seems to be pursued in a seemingly more radical way in France as a matter of principle. On the other hand, whereas German case-law puts hard limits to the reach of wage flexibilization clauses, French law only requires respect for minimum wage requirements. In practice, thus, the difference may lie less in the attitudes of courts than in the surrounding legal rules and contractual practices.

This becomes particularly visible when it comes to variations made dependent on the employee’s performance. In both systems, what seems to be guiding the courts is securing some correspondence between the rights and obligations that the two parties derive from the term: if the conditions are set for the employee, who needs to fulfil them in order to have a valid claim, the employer’s corresponding obligations cannot be subject to their capricious choices. What the BAG establishes by declaring that a performance-related bonus may not be made subject to a *Freiwilligkeitsvorbehalt* is not too far, thus, from what the Cassation does when “filling in” for an employer’s failure to set the yearly targets in order to grant the employee’s claim to a performance bonus. In both cases, courts acknowledge the large space to be left to managerial prerogative in operationalising the

\(^{701}\) PéliSSier, “La détermination des éléments du contrat de travail.”
performance-payment agreements; the need to preserve the contractual balance apparently envisaged by the parties, however, acts as a limit to the reasonable exercise of such prerogative.

While the *Modernisierung* has brought about more restrictive drafting rules carrying a somewhat regulatory mode – as suggested by the reference to the “typical interests” in early case law on *Widerrufsbehalte* and unfair terms control – it seems that in both the German and the French case the aim of determinacy requirements is to make sure that the employee can later check – or ask a court to check – whether the prerogative has been fairly exercised. This protective intervention, as suggested above, appears well in tune with a concern for guaranteeing a degree of equality between the parties.

### 5.4.4. Governance: Penalty clauses

Rules of contract law expressly aim to establish the consequences of a breach of contractual obligations. In general contract law, the default response to the violation of a contractual obligation – in particular when specific performance is not appropriate – is a claim for damages. Different rules apply to employment contracts. On the one hand, in this context liability of the employee for damages is usually limited to gross negligence, making a claim for compensation less likely to arise and succeed; on the other hand, employers have disciplinary powers through which they can react to contractual breaches. In case of particularly severe breaches, the typical remedy will be the termination of the contract.

Parties entering contracts may decide to complement the remedies offered by general and specific legal rules by introducing contractual penalties. In simple terms, a contractual penalty is a term that pre-determines the amount of money that a breaching party has to pay upon violation of a certain obligation. Although most legal systems place some limitations on contractual freedom in case of extremely low or extremely high penalties, it is generally not strictly required that the penalty constitute a genuine estimate of expected damage. From a functional perspective, these stipulations can have multiple effects. First, they spare the non-breaching party the need to prove how much damage they have suffered as a result of breach – even stronger, they in principle allow them to do away with any need to prove having suffered damage; second, they encourage the other party to perform, by making clear that there will be consequences in case of non-performance and by making these consequences potentially more costly than performance.

In employment contracts, penalties can be of particular interest since often the damage suffered by an employer in case of breach of the employee’s obligations
will be difficult to prove. They are also particularly suspicious due to the hierarchical relationship in place, arguable structural imbalances and the fact that they partially subvert the indeterminate nature of the employee’s duty to work. This is true in two ways. On the one hand, the usual construction of the obligations arising from the contract for the employee refers to compliance with the employer’s managerial prerogative, and not with the achievement of specific results—unless these are specifically mentioned in the contract. Thus, performance or non-performance within the employment relationship do not have the same objective standards that characterise other service contracts. Connected to this understanding of the employee’s contractual liability is the establishment of specific rules concerning tortious liability for damages caused during the performance. These rules tend to limit the relevance of non-gross negligence and improve employees’ procedural position in terms of burdens of proof. Contractual penalties can be connected to the main performance due under the contract or to ancillary terms. The further these terms are from the contract’s “core”, the less intense their interference with the liability rules recalled above.

5.4.4.1. Germany

German doctrine distinguishes between two forms of penalty clause, which can be either “independent” or “dependent”. A dependent penalty clause is meant to sanction the violation of contractual duties and is therefore “accessory” to the preliminary existence of an obligation. The “independent” penalty, on the other hand, is a form of guarantee which can be undertaken by one party when no “main” obligation exists. Thus, for instance, an independent penalty clause can be agreed for the case in which, after negotiations, an employment contract does not come into existence—or, on the other hand, when an existing open-ended contract is terminated before a certain amount of time has passed. In principle, however, the same “promise” to pay a fine could be given for any kind of behaviour and to

702 Or present specific challenges in respect of the employer’s trade secrets.
703 For French law, Lokiec defines the employment contract as “la convention par laquelle une personne physique met son activité au service d’une autre personne, physique ou morale, sous l’autorité de laquelle elle se place, moyennant le versement d’une rémunération”. See p 109 Lokiec, Droit Du Travail Tome I Les Relations Individuelles de Travail. The definition is borrowed from Jeammaud (reference in text); for a similar definition see the new art. 611a BGB.
704 See for German law the additional burdens posed on employers seeking compensation by 619 BGB, next to the various modifications to the liability regime introduced by means of case law— for an overview, para 532 ff in Däubler, 9783766362681. For French law, para 379 in Lokiec, Droit Du Travail Tome I Les Relations Individuelles de Travail.
any bystander: a “classical” example is that of someone promising to stop smoking and to give someone else a certain amount of money in case of violation. Encompassed in the broad notion of penalty clause, thus, can be several kinds of stipulations. On the other hand, “sanctions” for employee’s violating common obligations such as those linked to health and safety regulations (think for instance of a ban on smoking within the company or plant area, or of a duty to wear security garments, or other behaviours whose enactment of omission can be submitted to a fine) will typically be found in company regulations separate from the employment contract. These cases probably fall out of the reach of standard terms control because those penalties will find their source not in the individual (though standard) contract but in other forms of workplace regulations which are not incorporated in the contract. In principle, however, all sorts of accessory duties (Nebenpflichten) could be guaranteed with a penalty clause, and in practice penalty clauses were reported almost a decade ago to concern almost a fourth of all employment contracts. Hence, the domain covered by AGB control seems to remain potentially very wide. Common stipulations challenged in BAG decisions are:

- Sanctions for not taking the job;
- Fees for violation of confidentiality or non-competition duties;
- Penalties for terminating the relationship without respecting the agreed notice period.

The two generally recognised functions of penalty clauses in German civil law are “incentivising” the debtor to comply and “guaranteeing” the creditor with a basic form of compensation in case of non-performance which is pre-liquidated and thus not submitted to the general rules on proof. The first of these functions has been particularly underlined by the BAG when it had to decide of the admissibility of Vertragsstrafen in labour law after the removal of the branch exclusion and especially the applicability of § 309 n. 6, which prohibits the stipulation of penalty clauses in standard contracts “in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the

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705 Or as such presented by Bernd Kaiser, “Die Vertragsstrafe Im Wettbewerbsrecht,” 1999, 17.
706 Eg under the measures adopted as implementation of the Arbeitsstättenverordnung - ArbStättV (BGBl. I Nr. 44 vom 24.8.2004, S. 2179)
708 See 4. 3. 2004 - 8 AZR 196/03, NZA 2004, 727
709 See BAG 04.03.2004, 8 AZR 196/03.
contract frees himself from the contract”. While payment defaults are, as a matter of fact, irrelevant for labour contracts, the events of renunciation of an accepted job or “illicit” termination are important and often considered by the drafters. In this context, the Court made use of the “arbeitsrechtliche Besonderheiten” clause of § 310 n. 4 to establish that, “under appropriate consideration” of these specificities, penalty clauses had to be considered in principle not unfair.

This conclusion was reached mainly in light of the fact that the typical object of an employment contract, i.e. the personal performance of the agreed behaviours by the worker, is not suitable for judicial enforcement. In other words, the worker can not be forced to perform their job and therefore the employer has a justified interest in using other means of persuasion. Even starting with this consideration of fundamental admissibility of penalty clauses, though, a “stricter” (than in general contract law) standard has to be adopted in view of the objectives of workers’ protection.

The penalty clause, in particular, should not entail an unbearable limitation to the employee’s fundamental rights, and especially occupational freedom. This mainly affects the amount of the penalty, which should not exceed a standard of reasonableness. This standard is not statically determined (i.e. it is not the same for every contract and every kind of clause) but has to be adapted to the different contexts in which it was stipulated. Whereas, for instance, in the case of a “classical” penalty clause a fine amounting to one month of salary is generally regarded as fair, this does not entail that amounts exceeding this threshold will be considered excessive. On the other side of the coin, the penalty for non-entering into or early termination of the relationship should be commensurate to the notice period, which is considered as a good proxy of the employer’s interest in the performance. When the notice period, as during probation, amounts to less than one month, there will be reasons to suspect that a penalty corresponding to one-month (gross) salary is excessively high.

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710 § 888 III ZPO. Additionally, avoiding indiscriminate applicability of the black lists was one of the aims pursued by the legislator by inserting the “arbeitsrechtliche Besonderheiten” reservation (BT-Dr 14/6857 r. 54).

711 See § 343 BGB.

712 Such was the case in BAG 23.09.2010, 8 AZR 897/08, where the parties had agreed a penalty of one month salary in case of termination without due notice but also stipulated a six-month probation period during which the notice only amounted to two weeks. In this case, the term was considered invalid and the employee freed of the obligation even though the termination had occurred after the probation period had expired- in accordance with the general objective of market-policing.
The penalty clause, indeed, should not represent a form of “over-insurance” for the employer, entailing the “creation of new claims detached from the drafter’s proper interests.”\textsuperscript{713} For the same reason, when longer or more complex termination periods are agreed, the entity of the fine should be adapted to the importance of the violation and the subsequently emerging damage. For instance, in the case\textsuperscript{714} of a teacher whose contract foresaw notice period of two months to the end of the school year (thus only one moment for termination each year), the court has found that simply establishing a penalty of three times the monthly salary for an irregular termination of any kind was not appropriate to the situation and was likely to represent an “over-insurance” for the benefit of the employer. The “benefit”, moreover, does not have to immediately concern the “drafter”, personally or as the representative of an organisation. Even when, as in the case discussed, the money obtained were to be used entirely for the benefit of the school’s pupils, a “mediated” advantage is enough to trigger unfairness- also in light of the fact that the debtor’s position is indifferent to whom the concrete beneficiaries of their expense will be.

A similar “over-insurance” can also take place when the penalty clause is stipulated for contractual violations and the conducts triggering the penalty clause are already “punishable” through immediate termination (fristlose Kündigung). So has the Court argued in a 2005 decision\textsuperscript{715} concerning a penalty stipulated- inter alia- for the event that “the employer was legitimated to resort to termination without notice by a culpable contractual breach by the employee”, under reservation that the employer could still claim a higher damage. In this case, the BAG observed that the penalty was only stipulated for a breach on the side of the employee, thus requiring a close scrutiny to assess whether the interests of both parties had been taken in reasonable account. In this case, in principle only the employer has a legitimate interest in obtaining a suitable performance, whereas the employee has no justified claim to contractual breach. The employer’s interest, however, is typically protected against serious violations of the main contractual duties by the possibility to immediately terminate the employment contract. A further penalisation of the employee by means of the penalty clause can, in the words of the Court, only be justified by “the violation of other protection-worthy

\textsuperscript{713} Ibid. par [64] the clause is considered to entail an unreasonable disadvantage because it represents “eine unangemessene “Übersicherung” des Beklagtes […] und insoweit nur zur blossen Schöpfung neuer, vom Sachinteresse des Verwenders losgelöster Gerforderungen”.

\textsuperscript{714} BAG 25.09.2008, 8 AZR 717/07, NZA 2009, 370.

interests of the employer”. In the context of the same decision, other provisions foreseeing a penalty remained unaffected, concerning refusal to enter the job and termination “in breach of contract” (unter Vertragsbruch). The validity of a penalty clause for violation of contractual duties presupposed that two elements of the term are sufficiently determined: the obligations whose violation is sanctioned with a penalty – thus the behaviours that the employee should avoid in order to stay away from the penalty – and the entity of the potential fine. As to the first, in order to allow the worker to discern, it will not suffice to mention “serious violations” but a concrete – and not merely exemplary – indication of what is considered a “serious” violation is required. As to the height of the fine, which should also be reasonable in the context of the relationship, it should not be formulated in a way which leaves the employer excessive discretion. So for instance a penalty for violations of “non-competition duties, secrecy or in case of exceeding the powers of mandate” was considered sufficiently determined as to the conducts but not as to the consequences since it foresaw “one to three months” of gross salary for each violation, opening the doors of an unacceptable enrichment.

5.4.4.2. France
The subject of penalty clauses is particularly hard to apprehend under French law. Under article L. 1331-2, the Code du Travail prohibits all sorts of “fines or other pecuniary sanctions”, declaring all contrary “provisions or stipulations” invalid. This means, in essence, that disciplinary violations by employees cannot be sanctioned by means of monetary fines. Faulty execution of the employee’s obligation – for instance, failure to show up for work on a given day or similar breaches – must be dealt with through the several instruments available to the

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717 BAG 18.08.2005, NZA 2006, 34. Similarly intransparent has been considered the penalty concerned in BAG 14.08.2007, 8 AZR 973/08 which amounted to “two months is each case of penalisation and” but also foresaw that “in case of an enduring violation of secrecy or non-competition duties, very month of duration is considered as renewed violation”. The provision, in the BAG’s opinion, did not give any guarantee as to the maximum amount reachable by the penalty in a reference period of, e.g., one month.


Toute disposition ou stipulation contraire est réputée non écrite.”
employer in the exercise of its disciplinary powers. Internal sources, in particular the *reglément interieur*, have to clearly establish the nature and extent of the possible sanctions: one could think, here, of warnings, suspensions and so forth, scaling up to violations sanctioned with termination.\(^{719}\)

Next to this, it is important to keep in mind that, as a general rule, employee liability for damaging actions committed on the job can only be triggered in case of “*faute lourde*”,\(^{720}\) a form of negligence which would probably be best transposed as intent to harm.\(^{721}\) Contract terms should not seek to circumvent this restriction by “contractualising” specific duties of care: it is for instance not open to employers to stipulate that the employee is responsible for the loss of registered stock items irrespective of their (gross) negligence being demonstrated.\(^{722}\)

Penalties are however not excluded for specific violations of accessory duties and where the legislator establishes that a lesser degree of fault is sufficient to give rise to liability. For instance, in the case of a fixed-term contract, the law establishes certain reasons which allow the employee to unilaterally terminate the contract ahead of time. Outside of these hypotheses, premature termination by the employee gives rise to a claim for damages on the side of the employer.\(^{723}\) In this case, the use of a penalty clause has been validated by the *Cassation*.\(^{724}\) The case

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719 Article L 1321-1 Code du Travail limits the scope of a *reglément interieur* to health and safety rules, the conditions under which employees may be required to “cooperate in restoring” appropriate health and safety conditions and more generic “general and permanent rules concerning discipline, in particular the nature and extent (échelle) of the sanctions which the employer is allowed to adopt”. Article R 1321-1 of the same law, on the other hand, enunciates that the rules are displayed in easily accessible locations within the workplace as well as “in the rooms and at the entrance of the rooms” where hiring takes place.


721 The Social division of the Cassation, since Soc. 31 May 1990, affirms consistently that establishing *faute lourde* requires proving the employee’s intention to hurt the company’s interest or: it entails “la volonté du salarié de porter préjudice à son employeur dans la commission du fait fautif et ne résulte pas de la seule commission d’un acte préjudiciable à l’entreprise” (see recently Cass. Soc. 22 octobre 2015, n°14-11291 ; Cass. Soc. 22 octobre 2015, n°14-11801).


723 Art L. 1243-3 Code du travail : “La rupture anticipée du contrat de travail à durée déterminée qui intervient à l’initiative du salarié en dehors des cas prévus aux articles L. 1243-1 et L. 1243-2 ouvre droit pour l’employeur à des dommages et intérêts correspondant au préjudice subi. » The cases admitted by the two provisions mentioned are faute grave, force majeure ou inaptitude constatée par le médecin du travail and having found a permanent position.”

724 Cass. soc. 9 février 2011 n° 09-42485, inédit.
concerned a circus artist that had been employed on a fixed-term contract of 1 year to perform a martial arts act within the employer’s show. The contract included a penalty clause on which we have little information, except that it prescribed “a forfait equal to the salary for 10 working days for each established violation, up to a maximum of 8 times the amount payable for a single violation”, which in turn amounted to a third of the total salary to be perceived for the entire duration of the contract. In light of this relative assessment, the contractual penalty had been considered as manifestly excessive and the recoverable damages had been set at a little more than half the rate that would have derived from the contract. Nonetheless, the clause has been respected to the extent that the damages have been awarded without requiring the (former) employer to provide specific proof as to the extent of the damages that they had suffered as a consequence of the employee’s wrongful termination.

Non-competition clauses are arguably the most likely context in which penalties appear. The validity of such clauses is in itself subject to several cumulative conditions. The incorporation of a penalty clause makes the non-competition obligation considerably more prominent and has a clear interest for employers. Although the subject of non-competition clauses is much discussed, and these

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725 In line with the general rule of article 1231-5 second part of the Code Civil.

726 The Cassation decision as published on legifrance contains an excerpt from the Cour d’Appel decision: “Certes, l’article VII du contrat prévoit dans un tel cas une indemnité égale à 10 fois le montant de son honoraire journalier par violation constatée, limité à 8 fois le montant de l’amende due pour une infraction unique soit la somme de 14. 299, 72 €. Mais une telle disposition s’analyse, en droit, en une clause pénale que l’article 1152 du Code civil permet au juge de réduire si elle est manifestement excessive. Elle doit être considérée comme telle en l’espèce, dès lors qu’elle représente l’équivalent de 3 mois et demi de salaire puisqu’aux termes du contrat, 24 journées de représentation étaient garanties par mois soit un tiers de la rémunération prévue pour la durée totale du contrat.”

727 From the same excerpt: The cour d’appel had considered that the « non respect par ce salarié de ses engagements a nécessairement causé un dommage à l’employeur ». However, the court also observed that no proof of specific costs – printing the programme, finding a replacement – had been given, thus the estimate of 8000 euro must be assumed to properly cover the inconvenience occasioned to the employer by the artist’s untimely departure: “Et la SARL CIRCUS FLIC FLAC GMBH ne fournit pas le moindre élément de quelque nature, pièce ou attestation ou autre, susceptible de venir étayer les frais prétendument exposés pour l’impression des programmes ou pour pourvoir au remplacement de cet artiste, tous chefs de réclamations qui, au demeurant, se rattachent directement et étroitement à la rupture du contrat et n’en sont pas distincts. L’évaluation ci-dessus retenue couvre le préjudice réellement subi né des perturbations nécessairement subies, des tracas divers et démarches qui ont dû être effectuées pour suppléer dans la précipitation à la défection inopinée de cet artiste, alors que la saison avait débuté depuis plus d’un mois et que le show initial avait été choisi plus de six mois auparavant.”
discussions always mention the likelihood that the clause will be supported by a penalty, there is relatively little indication of what criteria determine a penalty’s “non-manifest disproportion” in this context.

5.4.4.3. Comparison
At first glance, the French approach appears much more restrictive than the one adopted by German law. The general prohibition of pecuniary sanctions may lead observers to conclude that penalty clauses are not allowed at all in French employment contract. Upon closer scrutiny, however, such terms appear to be allowed when they are used to secure specific obligations, such as non-compete clauses and the respect of a contract’s agreed duration or notice periods. These cases appear remarkably similar to the German practice, where we have also seen the same type of obligations being among the ones characteristically secured by penalties. Penalty clauses should in general not be “manifestly disproportionate” under both German and French civil law, and courts in both countries apply such scrutiny.

While assuming the general admissibility of penalty clauses, German case-law in practice strives, without the textual support offered by the French Code du travail provision, to make sure that these do not fulfil a hidden disciplinary function or pursue unjustified enrichment for the employer: see the requirement that they do not represent an additional sanction for something which could be punished with termination. So in a way while French law departs from the disciplinary perspective and allows deviations from the prohibition when the penalty fulfils a genuinely contractual function, German law departs from the general doctrines of penalty clauses but seeks to limit their application to cases where the employer can demonstrate a genuine interest. Furthermore, German case-law makes a clear attempt at regulating the terms, ie at providing guidelines on what would make for valid penalty clauses.

One could say that the German regime represents more a reaction to contractualisation whereas the French cases testify more to a discovery of contractualisation, whereby we can expect more and more cases to emerge as employers devise new suitable ancillary obligations. In both cases, civil law rules provide a background standard; we can see however how German case-law provides much further-reaching operationalisation, going further away from the general rules on contractual penalties. A final difference is of course, as observed
elsewhere, that under French (but not German) law, courts are allowed to rewrite an unfair penalty into an acceptable one.\textsuperscript{728}

### 5.5. Conclusions

This chapter has reconstructed the interplay between contract and other legal figures in the configuration – conceptual or practical – of employment relations. Contract has been part of this story from the inception – the beginning of labour law in a way is the birth of the employment contract – but its relevance has changed over time. No one would suggest today that the employment contract is merely an “acte-condition” whose conditions are entirely set outside of the agreement. A number of concurring factors – from deregulation to the emergence of increasingly sophisticated HR practices to the increased awareness that modern day labour markets are to a large extent based on the service sectors – has expanded the contractual arrangement of individual employment relations well beyond the few high-skilled employees who actually negotiate bespoke contracts. Individual employment contracts are more complex than they used to be in Fordist times, as acknowledged by the recently reformed Employment information directive.

The chapter has outlined a series of reasons that make it attractive for contract drafters, and specifically employers and their lawyers, to make use of any spaces afforded to them by the existing legal frameworks. Assuming that drafting such terms for internal use, as a standardisation exercise, is effectively an exercise in regulation, I have turned the regulatory challenges associated by Collins with employment relations into reasons for making use of contract terms and sought to identify, still within Collins’s framework and on the basis of some insights in HR and legal literature, which kinds of functions such terms would pursue. I hence distinguished between customisation, functional flexibility, financial flexibility and the establishment of governance structures – in particular with an eye to dispute resolution.

This chapter shows that the three main aims for pursuing through contractual drafting can be seen as mirrored by contractual practice in the legal systems. More accurately, the pursuit of these aims by means of contract terms seems to have generated \textit{court litigation}, and thus to have proven contentious between the parties. The courts’ reactions to the contractual arrangements considered are remarkably

\textsuperscript{728} The fact that, under unfair terms rules, unfair penalties cannot be adjusted establishes a further incentive to provide guidance – but the BAG had already established similar blueprints before the \textit{Modernisierung}. 

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similar in the two systems: rather than allowing or disallowing certain terms in their entirety, courts have often endeavoured to establish conditions for their validity. The blunter resistance against functional flexibility is telling in this respect, in particular since in both countries the employee’s qualification enjoys tighter protection than determinations concerning the place of work.

It is important to stress that in France, contrary to Germany, the cases analysed were decided outside of the “original” framework of unfair terms control – which was and still is only applicable to consumer contracts.\(^\text{729}\) This makes it all the more remarkable that, outside of transparency rules, determinacy requirements seem to be on the ascent. An echo of concerns with the incorporation of non-negotiated terms can probably be discerned where, such as in the case of clauses de dédit formation, the terms have to be expressly accepted by or presented to the employee.

An additional effect of framing the subject within unfair terms/standard terms control is that “fair” drafting gains relevance vis à vis (or possibly next to) reasonable or good faith enforcement of the term. Transparency as developed by the BAG, especially qua Bestimmtheitsgebot, has important affinities with the concern over arbitrariness which emerges from the Cassation’s treatment of salary modification terms. The most striking similarity, however, is how in both cases courts have – somewhat contentiously – made use of the notion of the binding force of contract to express the foundations and substantive standards of judicial control in this field. If the binding force of contract had been an instrument of oppression at the time of the arrêt sabots, it seems to now have been turned – at least in certain contexts – in an instrument of resistance.

Other differences - in particular the very diverging level of detail in the regulation of several terms, are difficult to attribute to one specific factor but also resonate with broader questions on unfair terms control. At face level, one may be tempted to attribute the difference, at least in part, to the different legal basis justifying control – the “black list” item of § 309 n. 6 BGB vis à vis the general provision on “manifestly disproportionate” contractual penalties of art 1152 CC (now 1231-5 CC). Other factors, such as judicial culture and legal style at large may also play a role: the different motivation styles of German and French courts are almost a commonplace in comparative law.\(^\text{730}\) However, at the same time, it seems plausible to think that the different theoretical approaches to judicial scrutiny of contract

\(^{729}\) And other similar contracts “between a professional and a non-professional”, see art L 212-2 Code de la Consommation.

terms may also be a relevant factor. For German law, the idea of objective interpretation – ie somewhat normative nature – of standard terms may play a role in the way the BAG seeks to provide guidance to parties. In French law, there is a less strict distinction between the policing of terms’ drafting and of their enforcement.

The regimes attached to a finding of unfairness are also illustrative of these patterns of convergence and divergence: while often an unfair term will be deemed as invalid or non-applicable, it is not infrequent, in French cases, to see that a term is “reduced to fairness”. This is notably the case of cases in which drafting requirements have been formally met but the limits of acceptable “subordinations” have been trespassed: see the case of *clauses de dédit formation* which extend over a too long period. The logic is similar to the one applied in the moderation of manifestly excessive penalties – the clause’s core is preserved. In Germany, this used to be the case, for penalty clauses, under pre-reform *Inhaltskontrolle*. Nowadays, the standard interpretation of the remedies provision in the standard terms chapter is to the effect that unfair terms have to be eradicated. This way of acting is deemed necessary to make sure that employers are incentivised to provide reasonable terms rather than relying on the freezing effect of draconian penalties, knowing that, even if unfair, they will still give them an advantageous position in court. The eradication rule, thus, transcends the achievement of a fair balance between the two parties concerned, concentrating on employers as repeat players. Contrary to the CJEU, however, the BAG partially justifies such rule with concerns for the position of the *individual* consumer/employee, who would otherwise only find out what their rights and duties are at the end of long court proceedings.

To sum up, the study shows that, even if acting within rather different legal framework and sometimes having to deal with slightly different terms, judicial law-making in both countries shows a similar, if not overlapping, mix of labour law-based reasoning and reliance on notions of contract law equality and justice. Admittedly, the adoption of *standard terms*-based unfair terms control in Germany has led to a higher penetration of regulatory influences. While this is quite univocally the case for the radical eradication of unfair terms. Perhaps not incidentally, this is the main change brought about – in Germany and, if 1171 Code Civil becomes the new standard, also in France – by the legislative reforms, with

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731 But one should speak more generally of drafters: the rule, which as we have seen (see supra 3.3.1.) has been adopted by the CJEU as well, applies under German law to all control-subject non-negotiated and standard terms.
no anchoring in the pre-existing case-law.\textsuperscript{732} I have sought to show that transparency requirements can be brought back to a more classical private law rationale: on the one hand, they aim to secure that parties are not prevented from exercising their rights; on the other hand, in the form of the determinacy requirement or \textit{Bestimmtheitsgebot}, they perform a substantive function of delimiting the employer’s unilateral modification powers – something which we have seen is high in the mind of the French 	extit{Cassation} with no influence from regulatory concerns.

In conclusion: contractualisation is plausible; employers make use of the spaces that the applicable legal frameworks make available for them to use contract terms strategically; the response to such practices in the two legal systems is at points surprisingly similar and relies heavily on making a protective use of traditional and less traditional notions of contract law. The book is, thus, over.

\textsuperscript{732} See also Hellwege, \textit{Allgemeine Geschäftsbedingungen, Einseitig Gestellte Vertragsbedingungen Und Die Allgemeine Rechtsgeschäftslehre}, 148:12–13.
Chapter 6 Conclusions and outlook

The first part of the book has focused on unfair terms control in European – ie EU – private law. Since the adoption of Directive 1993/13, a large space has opened for debating unfair terms control. While at the national level separate conversations have continued, the discussion centering on the Directive and its interpretation by the Court of Justice of the European Union has gathered increasing momentum since the start of the century, and particularly after the financial crisis of 2008-2009 and the following eurocrisis. This discussion has a growing influence on the way in which unfair terms control is understood and conceptualized well beyond Directive 93/13.

Beyond the Directive itself and the many CJEU cases interpreting it, the EU acquis concerning unfair terms control encompasses a large body of literature discussing the rationales and justifications implied in the various choices made by the Directive, as well as in the above-mentioned case-law. The book has reconstructed the discussion around the rationales and has placed it in the context of the larger debate on European Private Law: not only did this debate already at earlier stages take a relatively openly policy-oriented take (what in Italy is traditionally called “politica del diritto”, that is an operation which academics are cautioned against engaging in), in the last decade it has come to be dominated by one specific policy-infused paradigm. Whereas in 2010 Schmid provided the first comprehensive account – and denunciation – of private law instrumentalisation at the end of the (CJ)EU, within a few years the European Regulatory Private Law (ERPL) account developed by Hans Micklitz had essentially come to embrace such instrumentalisation as the new normal in the European market states. The plausibility of the claim from an explanatory perspective and the extensive studies which have accompanied its descriptive efforts have made Micklitz’s account a central point of reference for anyone engaging with European private law. From a normative perspective, ERPL focusses on the notion of access justice and conveys skepticism as to the attainability of social justice through private law and in particular through EU private law. For unfair terms control, such regulatory account further tilts the competition between the two main rationales that have emerged in the debate – a wobbly notion of collective weaker party protection against the correction of information-related market failures – in favour of economic arguments. Materialised corrective justice does not fare well in the regulatory arena.

Against this background, the thesis has sought to provide – within the same debate rather than outside of it – a partial counterweight to (and, to an extent, a caveat against) an unconditioned embrace of instrumentalisation in European
private law. The approach, is, in a way, opposite to that taken by Schmid: instead of looking for instances of instrumentalisation, I have sought to highlight the limits of instrumental rationalities in unfair terms adjudication. Looking at a number of core elements in the Unfair Terms Directive – as interpreted by the Court of Justice – I have sought to rebalance the description of an overall-instrumental European private law by highlighting the ambiguous dynamics between instrumental and non-instrumental rationalities in CJEU adjudication. The tension between the two is a pervasive feature characterizing, when looking close enough, all the considered aspects of the directive. The standardization fostered by the significant imbalance test is to be seen next to the productive but unstable relationship between transparency and the circumstances of the individual case.\textsuperscript{733} The mobilization – or more often setting aside – of procedural rules to enhance the directive’s effectiveness seems often guided by genuinely non-regulatory considerations.\textsuperscript{734} In the area of the consequences of unfairness, the Court’s difficulty in embracing more nuanced private law reasoning has resulted in a series of increasingly opaque decisions which undermine a crucial element in the Directive’s guidance function for national courts.\textsuperscript{735} The example of the “possibly vulnerable” average consumer that the Court seems to presuppose in its unfair terms case-law is particularly telling: while in most configurations the average consumer is a relatively straightforward regulatory concept – a more or less protective one depending on the attributes attached to the normative model – the possibly vulnerable average consumer is mainly an instrument of flexibility aimed at reaching plausible solutions in individual cases without giving in too much to an instrumental protective rationale.

Rebalancing the narrative about unfair terms control in European private law matters. The failure or projects based on more traditional understandings or private law has reinforced the image of a European private law devoid of meaningful general principles or a sense of justice not based on a more or less visible hand of the market. The centrifugal inclinations of European “regulatory” private law go hand in hand with the regulatory rationalities. The ongoing proliferation of sectoral interventions, such as most recently the Directive on Unfair Trading Practices in the agricultural supply chain, does not happen in a vacuum: suffice it to see how most of the substantive core of the latter directive is centred on the prohibition of certain contractual practices – even stronger, of certain uses of contract terms. Both this directive and the equally recent Directive on transparent

\textsuperscript{733} See supra section 3.1.  
\textsuperscript{734} See section 3.3.  
\textsuperscript{735} See section 3.2.
and predictable working conditions in the European Union (whose articles 8 and 9 in particular also have a clear focus on contract terms similar to those discussed in the second part of the book) refrain from the more comprehensive ambitions that characterized consumer legislation in the past three decades. Fragmentation is alive and well, also outside of the hyper-specialised regulatory silos. However, given the visibility of unfair terms control in the debate on European contract law, rediscovering the non-regulatory rationalities in this area has the potential of radiating similar concerns into seemingly distant areas such as agricultural supply chains – and of course European labour law.

Indeed, as the second part of the book has hopefully shown, the contrast between an old-fashioned general contract law and the ever-developing “special” laws should not be drawn in too crude terms. Over time, we have seen, unfair terms control has found its way into the employment laws of France and Germany quite separately from the direct intervention of legislators. Studying the emergence of unfair terms control in France and Germany has allowed to show a number of (almost) parallel developments. On the one hand, perhaps with some delay in comparison with other areas of contract law, – and notably, of course, consumer law – courts have been mobilizing different legal rules in order to address the emergence of certain terms. On the other hand, the whole picture painted by these individual rules seems more than the sum of its parts. In particular, what is telling is the way in which labour law and general contract law have been both deployed by courts to similar effects. In Germany, the case law pre-dating the Modernisierung’s official opening up of standard terms control to employment contracts was all along seen as tightly connected to the Inhaltskontrolle taking place in other areas. The legal basis invoked by courts was, if sometimes elusive, roughly identified in the same rules that played a role in such other areas, such as the good faith clause. At the same time, courts’ interventions against terms allegedly circumventing employment rules were also ultimately identified as belonging to the same phenomenon. In France, calls for “un droit des clauses du contrat de travail” have been gradually followed by questions being raised as to whether the general notion of unfair term (clause abusive) was slowly infiltrating labour law. As to the legal basis, control based on specific labour law provisions took place next to prominent developments under the banner of the “very contract law” idea of the binding force of contract. Why this has happened is of course not an answer that can be drawn conclusively from this work.

A hypothesis, however, has been presented. The development of unfair terms control has been connected to contractualisation of individual employment relationships. In the first place, contractualisation has been discussed as a macroscopic phenomenon; the uneasy position of contracts within employment
relations has been traced back to the earliest stages of labour laws. While contract has always been present at the basis of free labour relationships – at least for the past two hundred years and more – its role has been questioned in the past to gain more visibility in the last four decades. The precise borders of this phenomenon vary depending on the legal systems that one considers. While in Germany contractual arrangements have been popular for a longer time and are likely to have played a role in the strategy of internally flexible open-ended contracts, in France the academic discussion has more recently clearly reconsidered the interest of employment contracts.

All in all, this may be less the result of deregulation in itself than of the growing creativity of Human Resources professionals and lawyers at the service of employers. At a more micro level, we have seen, contractualisation concerns the use of contractual tools – in other words, contractual terms – in order to manage individual employment relationships. The increased relevance of services entails a different configuration of the work-salary nexus than the one prevalent in the industrial era. Employment contracts contain more terms in order to cater to specific function-related needs and greater differentiation among different employees is functional to flexibilization of the employer’s internal operations. Contract terms are apt tools for managing the risks inherent to long-term relationships. Flexibility and legal certainty are both aims that can be pursued by means of contract drafting. The second part of chapter 5 has thus identified three main functions that terms can fulfill.

First, “customization” terms can be used to specify certain duties (or sometimes rights, granted under certain conditions) of the employee that are deemed central to the relationship. Second, contract terms can be used to achieve flexibility, particularly valuable in the context of long-term relationships. This flexibilization can namely be achieved by means of terms operating in the sphere of the worker’s performance (e.g. mobility clauses) or affecting the remuneration (bonusses, variable remuneration). Third and last, terms were identified as suitable to establish mechanisms of contractual governance, especially with an eye to the governance of contractual disputes, in the form of rules on dispute resolution directed to courts or other procedural arrangements designed to reduce legal jeopardies in case of disputes. According to these functions, some broadly defined groups of terms were included in an overview of case-law in the next chapter.

The parallel analysis of contentious terms in the two countries has shown that, in many cases, similar contractual practices exist – often leading in turn to quite similar reactions in court. The comparison in the field of variable remuneration suggests the existence of very different contracting practices. The section on
contractual penalties suggests a much more cautious approach on the side of French employers in the face of a generally negative attitude expressed by the legislator – but penalties make inroads in French practice too. Considerable similarities have emerged, on the other hand, both with reference to our example of customization term (the restitution of education costs) and, interestingly, terms aiming at functional and territorial mobility. In the latter groups, courts in both countries showcase a resistance against broad functional flexibilization; such opposition to enlargements of the employer’s unilateral prerogatives, it has been said, seems to reflect a concern for the parties’ contractual equality – already affected by the very existence of the managerial prerogative. A main difference across the board was the occasional readiness of French courts to rewrite an excessively broadly defined term into a less far-reaching one – a possibility acknowledged by German case-law before the Modernisierung but excluded under current standard terms control rules.

The fact that a significant portion of the terms emerging from the case-law of various courts in the two countries lent itself to being placed within the functional framework devised and employed in the book provides some corroboration to the hypothesis that unfair terms control and contractualisation are connected. In other words, if the terms emerging are in line with the functions of contract terms that justify contractualisation at the micro-level, then we can see the appearance of those terms as a manifestation of contractualisation – and advance the hypothesis that unfair terms control is a response to such phenomenon. The hypothesis postulates a connection between court disputes not necessarily having taken place under an express legislative framework allowing unfair terms control, nor under any discernible sub-set of rules. If accepted, this idea forefronts the bottom-up judicial formant of unfair terms control. That these court decisions would all be following a regulatory agenda rather than trying to address unfairness in the contractual relationships before them seems, in turn, implausible.

The limited – if clearly discernible – impact of such regulatory drive becomes visible by closely analysing the case-law presented in the last part of the book: the responses articulated by the highest courts in France and Germany appear remarkably similar as to the underlying concerns that they reveal. This similarity appears in the face of possibly different contractualisation practices and different legal frameworks. Concern with contractual equality emerges at several points, as expressed in different forms: not only through substantive limitation of the employer’s unilateral prerogatives but also, interestingly, through formal limitation in the form of determinacy requirements. This is clearly the case in Germany, but also emerges as a trend in France. The “transparency” requirements
so expressed are better explained in terms of contractual equality than in terms of market competition.

In German law, judicial control certainly exhibits more regulatory features than in France – and, importantly, more so under the “new” rules on standard terms than it did before the Modernisierung. Prominent examples are the rejection of geltungserhaltende Reduktion, or total eradication approach, and the irrelevance of the employee’s protection-worthiness in the concrete case, in most cases determining a stricter distinction between the drafting of the contract and its enforcement. The limitation of judicial control to non-negotiated terms, and express exclusion of core terms, ensuing from the Modernisierung does not seem to have had much impact on the reach of judicial scrutiny. In France, it is still unclear whether courts will adopt the new unfair terms control as replacement of the various forms of intervention they have engaged in so far. If that would be the case, the German experience leaves some room for hoping that the legislative restrictions will not overly affect the reach of judicial control. Besides the BAG’s attempt to justify the total eradication approach in mixed terms and its willingness to make exceptions to it, what stands out is that this feature is the only one that directly reconnects to legislative intervention: total eradication, in turn still more moderate than what CJEU adjudication requires, made its first appearance with the Standard Terms Act. The judicial reaction was, perhaps unsurprisingly, more genuinely concerned with securing contractual equality and justice in the face of contractualisation than the later legislative interventions.

The overview reconnects the second part of the book to its introduction, where the early literature on adhesion contracts was also reframed as a story of, and a reaction to, contractualisation. Contract law has been expanding its scope and gaining in complexity. While some – especially commercial – transactions have arguably left the reach of state- (or EU-) based contract law, to land in the realm of transnational codes or self-regulation, other transactions and subjects have sometimes gained prominence. Working class consumers have entered the main arena of contract law with the advent of mass distribution. Employees appear to be re-entering this arena. In such contexts, it does not seem outlandish to expect contract laws to be under some pressure to acknowledge the different players and different stakes that it stretches out to. This does not entail, of course, that change

736 See the discussion of modification terms under 5.4.2. and 5.4.3.
737 See supra 5.4.1. and 5.4.3.1.
738 See supra 3.2.
will take place in all cases and under all circumstances, let alone necessarily in the guise of unfair terms control.

Where it does happen, however, seeing such change (where it takes place) as a gradual development in connection with the phenomenon of contractualisation has an impact on how we understand unfair terms control and its relationship with contract law. Quite obviously, it becomes difficult to see unfair terms control as inherently limited to consumer transactions. In both systems, at this point civil code rules on unfair terms control encompass a very wide range of standardised contracts. Furthermore, we have seen how in both cases the limitation to non-negotiated contracts has re-emerged in the legislation – case-law did not really hinge on the question of negotiation, probably in the (we assume: unchallenged) assumption that no meaningful negotiation had taken place.

There is little reason, at this point, to think of these rules as exceptions from the general contract law rules based on arm’s length negotiation. Outside a number of specific areas, most day-to-day contracts are not the subject of any meaningful negotiations. Seeing such growing lists of exceptions as the emerging rule seems in line with basic principles of parsimonious thinking. It also seems more likely to secure that the basic commitment of private law to corrective justice is not essentially hollowed out by contractual practice and interpretive formalism. The point is mainly relevant for private law theories that aim to be relevant in reconstructive terms but do not aim to be entirely in line with positive law. Purely normative theories and purely positivist approaches alike may not find much to be learned from the contribution the book seeks to make.

Commitment to (some) such idea of justice seems like something on which few contract lawyers would disagree. The book suggests that the surveyed developments showcase an adaptation of relevant practices of corrective justice by means of unfair terms control in the face of contractualisation. Recognizing the role of this development in thinking about viable private laws for the coming decades may hopefully be a little easier with the help of the tiny stone that the

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739 Principle of parsimony: The principle that the most acceptable explanation of an occurrence, phenomenon, or event is the simplest, involving the fewest entities, assumptions, or changes. In phylogenetics, for example, the preferred tree showing evolutionary relationships between species, molecules, or other entities is the one that requires the least amount of evolutionary change, that is, maximum parsimony (https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100346221, last accessed 8 March 2020).
book has sought to add to the cathedral Caruso reminded us to look at from an appropriate distance.
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Summary

Unfair terms control is a landmark of contemporary European contract laws. How we talk about it is important to our general understanding of contract law – and arguably beyond that. Over the past decades, a very prominent debate has emerged around the so-called Unfair Terms Directive of 1993, which has harmonised the control of non-negotiated terms in consumer contracts across the European Union. Much attention in this context has been devoted to the justifications of unfair terms control. This discussion has gradually turned away from the various national paths of doctrinal discussion and has focussed on the regulatory features of judicial control: the elimination of market failures and, less convincingly, the advancement of social justice or consumer interests have become staple arguments and benchmarks for criticism or normative contributions. This broad engagement with ultra-individual effects has been termed regulatory rationality: a matter of questions asked, not of answers given. The question of what basic contractual justice requires between the parties involved in the concerned exchanges has lost centrality, increasingly to the advantage of arguments apparently unconcerned with justice writ large.

This dissertation attempts to partially refocus the debate on unfair terms control, exploring the contribution that the emergence of unfair terms control in employment contracts in two legal systems can make to articulating the respective positions of judicial control, regulation and justice in contract law. By reconstructing the developments preceding the adoption of rules allowing judicial control of non-negotiated employment contracts in France and Germany, the book focusses on judicial control as a response to contractualisation of employment relations. Such contractualisation – in itself a combination of broad trends in labour law, doctrinal developments and, increasingly, HR practices – is paralleled to the movements which, at the outset of the 20th century, gave rise to the notion of contrat d’adhésion. Employers have good reasons to use the contract as a tool: to customise the contents of the employment relationship, to include elements of flexibilisation and to put in place dispute-management procedures. This increases the saliency of contracts, and contract law, in employment relations. Such success of contract law as a means of managing unequal relations calls for a reconsideration of its basic tenets, and in particular of what corrective justice means between the parties concerned.

In the book’s two parts, both case-law of the EU Court of Justice and salient adjudication on “unfair” terms in employment contracts are scrutinized with a view to assessing the extent to which regulatory and “justice” rationales are reflected in the way judicial control is shaped. While the EU case law (perhaps
unsurprisingly) displays a remarkable degree of regulatory ambition, both case studies show the crucial role of “contractual” or corrective justice concerns in making sense of judicial and interpretive practices. Interestingly, the case of Germany shows how the more recent legislative regulation of unfair terms control has increased the regulatory features of a judicial scrutiny that had been established by labour courts already decades earlier. This shift is particularly visible in the field of the consequences of unfairness – albeit with less far-reaching and less unsettling consequences than the similar rule put in place by the Court of Justice in the only apparently far apart field of consumer contracts. In both countries, furthermore, exclusive focus on non-negotiated or standardised terms is also a novelty brought about by legislative intervention: a very important distinction to the ends of certain doctrinal accounts and one that is crucial to the purchase of regulatory arguments, but perhaps not a very useful one in court disputes where lack of (meaningful) negotiation could easily be assumed. Rather than letting this distinction over-determine our analysis, thus, the story invites us to once again reconsider the idea that standardisation justifies exceptions from non-intervention and perhaps rather ask at what conditions principled non-intervention is justified. The little clog on the book’s cover reminds us of injustice lingering when the law abides by arbitrary will under the vestige of contract.
Samenvatting

De regulering van oneerlijke bedingen is een centraal en actueel thema in het Europese contractenrecht. De manier waarop dit thema wordt benaderd en besproken heeft invloed op ons begrip van het contractenrecht – en wellicht nog breder: op ons begrip van het privaatrecht in het algemeen. In de afgelopen decennia is een belangrijke discussie ontstaan over de zogeheten Richtlijn oneerlijke bedingen (1993), die de rechterlijke toetsing van niet-onderhandelde bedingen in consumentenovereenkomsten in de Europese Unie heeft geharmoniseerd. Hierbij is veel aandacht besteed aan de rechtvaardiging van de rechterlijke toetsing van oneerlijke bedingen. De focus van dit debat is geleidelijk verschoven van de verschillende, soms ambige argumenten in de oorspronkelijke nationale discussies naar de regulerende aspecten van rechterlijke toetsing. Het tegengaan van marktfalen en, controversieler, het bevorderen van sociale rechtvaardigheid of consumentenbelangen zijn tegenwoordig standaardargumenten en -uitgangspunten voor kritiek of normatieve bijdragen geworden. De nadruk die daarbij wordt gelegd op zaakoverstijgende effecten wordt de regulerende rationaliteit genoemd: “rationaliteit” in die zin dat het geen antwoorden of uitzonden voorschrijft, maar eerder bepaalt welke vragen relevant worden geacht. Juist de vraag wat contractuele rechtvaardigheid in de basis vereist tussen de betrokken partijen is buiten beeld geraakt, in toenemende mate ten gunste van argumenten die schijnbaar niets van doen hebben met rechtvaardigheid in brede zin.

In dit proefschrift wordt een aanzet gedaan voor een gedeeltelijke heroriëntatie van het debat over oneerlijke bedingen. Hierbij wordt verkend welke bijdrage de ontwikkeling van rechterlijke toetsing van oneerlijke bedingen in arbeidsovereenkomsten – zoals onderzocht in twee rechtssystemen: Duitsland en Frankrijk – kan leveren aan het verduidelijken van de rol van rechterlijke toetsing, regulering en rechtvaardigheid in het contractenrecht. Aan de hand van een reconstructie van de ontwikkelingen die voorafgingen aan de implementatie van wetgeving die rechterlijke toetsing van niet-onderhandelde arbeidsovereenkomsten in Frankrijk en Duitsland mogelijk heeft gemaakt, schetst dit boek een beeld van rechterlijke toetsing als antwoord op de contractualisering van de arbeidsverhouding. De contractualisering kan worden gezien als een combinatie van brede tendensen in het arbeidsrecht, de juridische doctrine en, in toenemende mate, hr-praktijken, die parallel loopt aan de ontwikkelingen die aan het begin van de twintigste eeuw hebben geleid tot de opkomst van het begrip ‘contrat d’adhésion’. Voor werkgevers zijn er goede redenen om het contract als instrument te gebruiken: om de inhoud van de arbeidsrelatie te specificeren, om elementen van flexibilisering op te nemen en om procedures voor
geschillenbeslechting in te voeren. Dit verhoogt de relevantie van contracten en het contractenrecht in arbeidsrelaties. Het geconstateerde succes van het contractenrecht als middel om ongelijke verhoudingen te beheersen vraagt om een herdefiniëring van de belangrijkste aspecten van het contractenrecht – met name wat de vraag betreft naar de betekenis van correctieve rechtvaardigheid voor de betrokken partijen.

In de twee delen van dit boek worden zowel de jurisprudentie van het Europese Hof van Justitie over de Richtlijn oneerlijke bedingen als relevante uitspraken over "oneerlijke" bedingen in arbeidsovereenkomsten op nationaal niveau geanalyseerd, om te onderzoeken in hoeverre grondgedachten op het gebied van regulering en "rechtvaardigheid" tot uiting komen in de wijze waarop rechterlijke toetsing is vormgegeven. Terwijl de jurisprudentie van het Hof van Justitie (wellicht niet verrassend) een aanzienlijke mate van reguleringsambitie laat zien, tonen beide casestudies aan dat "contractuele" of correctieve rechtvaardigheid van cruciale betekenis is voor een meer volledig begrip van rechterlijke interpretaties en uitspraken. In het geval van Duitsland laat de analyse zien hoe de meer recente wettelijke regulering van oneerlijke bedingen de regulerende kenmerken heeft vergroot van een rechterlijke toetsing die al tientallen jaren eerder door de arbeidsrechtbanken was geïntroduceerd. Deze verschuiving naar een meer "regulerende" aanpak is vooral zichtbaar ten aanzien van de gevolgen van oneerlijkheid – zij het met minder verstrekkelende en ingrijpende gevolgen dan de vergelijkbare regel die het Hof van Justitie heeft ingevoerd op het gebied van consumentenovereenkomsten. Verder is in beide landen de exclusieve aandacht voor niet-onderhandelde of gestandaardiseerde bedingen bovendien een vernieuwing die door wetgevend optreden tot stand is gebracht. Het onderscheid tussen gestandaardiseerde en onderhandelde bedingen is zeer belangrijk vanuit het perspectief van bepaalde doctrines en mogelijk cruciaal voor de overtuigingskracht van reguleringsargumenten, maar misschien een minder onderscheidend criterium in een concrete rechtszaak, waar het ontbreken van (zinvolle) onderhandelingen relatief snel zal kunnen worden aangenomen. In plaats van te veel waarde te hechten aan dit onderscheid, nodigt deze waarneming ons uit om het idee dat standaardisatie uitzonderingen op non-interventie rechtvaardigt nog eens te heroverwegen en ons eerder af te vragen onder welke voorwaarden principiële non-interventie gerechtvaardigd is. Het klompje op de omslag van het boek herinnert ons aan het onrecht dat dreigt wanneer de wet vasthoudt aan de willekeur van het contract.
Acknowledgements

A large project is over. Thanks to my considerable personal and professional luck at the University of Amsterdam, other projects are already underway. None of these would have been possible without the support of my supervisors, Aukje van Hoek and Marco Loos. As in other types of families, we did not know each other at the start. Patiently but firmly, you have nonetheless directed me towards overcoming the several obstacles I put on my own way. Marco, the trust you have come to put in me over the past years is a source of pride next to, more importantly, gratitude. Aukje, besides the key advice you had for me at several points, your generosity and dedication – whether expressed in the form of sharp reading or pizza-buying – have literally pulled me over the last few meters. It goes without saying that all that is wrong with the thesis is to be put down to me alone.

I am grateful to the members of the reading committee – Kati Cseres, Nicole Maggi-Germain, Chantal Mak, Hans-Wolfgang Micklitz, Christoph Schmid and Evert Verhulp, who deserve special mention not only for their willingness to assess the manuscript but also for their patience in accommodating a bunch of delays and their perseverance in reading through a pandemic, university closures and lockdowns.

Thanks, also, to a number of outstanding scholars who have lent a few hours of their time to discussing unfair terms with me: Judith Rochfeld, Philipp Hellwege, Rudiger Krause and Hugh Collins provided not only their scholarship but also words of wisdom and in some cases hospitality at their institutions. Jérôme Porta’s reading suggestions gave me valuable insights and whole weeks of intellectual enrichment.

Martijn Hesselink opened the door of CSECL to me and over time convinced me that I was simply not thinking wild enough. Whether this was true or not, I am grateful for his criticism and his friendship. My Guardian breaks would not be the same without you – nor would my scholarship, for what that matters. Chantak Mak stewarded me through my very first teaching experience: I can now perhaps say, I had no idea what I was doing. She most likely suspected as much and never held it against me, feeding me confidence and boterkoek at critical times. Hereby my heartfelt thank you.

At CSECL (now ACT), I have been blessed with many amazing encounters and a number of genuine friendships. My highly accomplished paranyphen, former roommates and occasional movie pals Bram and Mirthe have accompanied very different stages in the making of the book with very similar unassuming warmth. Bram, Hawaii tosti’s are gross to the core but quite delicious in fact, would never have known without you. Mirthe, I hope “Cass.soc.” is not the one thing you will remember about our various thesis-related discussions – but I am still hugely grateful for your help and support (“sending today?”). The rest, we’ll see. Or, thanks for all the fun, the food, the flea market trips and your resolve to bring order to my working methods – it’s only my fault that your efforts are often frustrated. Your sabich has twice been crucial to the book, and your wits much more often to my sanity (“It could be that everybody at the UvA hates you, but could it be the hormones instead?”). I miss you. Alon, you are still in time to move to Brussels before fully falling for Leeds. Anna, it’s a real blessing that we can still share joys and defeats in our respective academic and life paths, and great fun to have nerdy exchanges where I pretend to understand civil procedure. I’d
rather you’d still have haring with me every now and then – whether here, in Noordwijk or elsewhere – but I guess I can cope. Two more roommates have made my PhD days less lonely. I have learnt a great deal from each (from bears to sharks to furniture to Scandinavian legal theory and political philosophy) while also having a lot of fun. Josse, you made up pretty quickly for calling me “the shortest CSECL member” the first time we talked. While you never condoned my undecided attitude to the whole PhD-finishing issue, your saintly composure upon finding out that we had to drive back three hundred kms to retrieve my passport somewhere along the Australian coast will never be forgotten. Karoline, as long as you were around I could pretend I had an idea what cool people did, wore and ate. Although I was never great at being hip by proxy, we should still see each other more often so you could give me some bijles. Olga, we never sat in a room together but still we went through some good (and less good) times. But we are getting better by the year, so more to come. I have shared drinks, reads, trips, frustrations and parenting questions with many others at the Centre: Joasia, Sacha, Aart, Beatrijs, Irina, Laura, Mia, Rafal (of course!), I promise that at some point there will be some celebration! It goes without saying that the many lovely colleagues (in particular but not only from the Private Law department) whom I am certainly forgetting are also invited. Same goes for the many students who have so much enriched my academic life in the past years – I would have loved to share with you the day I become a more respectable lecturer.

That CSECL has by now turned into ACT and so many exciting things are going on is due to collective work, courage and determination but also to the efforts of a single human, my beloved friend and daily source of inspiration – not to mention, over the past couple of years, officially appointed co-promotor – Marija Bartl. You know how much I love you and admire your scholarship but I know you will be happy to see it repeated here.

I would not have ended up at the University of Amsterdam – and probably would have quickly fallen out of any passion for legal research – without my supervisor and mentor in Pisa, Giovanni Comandé, and my first role-model in the (we can now say it) sometimes very misogynistic environment of Sant’Anna, Caterina Sganga. My first steps in Dutch academia led to a number of encounters, some bumpier than others. Thanks to Franck Hendrickx, thus, for once reminding me that also supervisors have feelings. I hope I am able to carry his wisdom with me in all my academic interactions nowadays.

Our life in Amsterdam has been blessed with the gift of a number of extended families: Stefania and Giovanni, how bijzonder that we ended up in the business of parenting pretty much at the same time and more or less in the same place. It is wonderful to see Enrico, Emma, Elena and Matteo grow next to our own kids. Marghe, look what we are all doing! Piet, thanks for bearing with all the Italian and chaos. Ale & Francy, well you know, I think; we will resume our visits to Pizzabakkers and weekly meals soon enough. Teresa, I will get to you in a sec.

Back in Italy, some of my friends were considerably quicker on finishing their dissertations but managed their objective high ground with plenty of grace. Cinzia, thanks for the fun visits here and there, le merende chez Maria Teresa (ciao!), the updates on labour law and the fundamental literature references. Vio, thanks for being my constant reminder that form
is substance, a crucial aesthetical but also critical tool (even though one which we must also subject to critique!). We may not always be in touch as much as we’d like to, but you are always with me.                  [Elia e Andrea, baciotti]

Talking of extended families above should not detract from more conventional constellations. Teresa (zia Teresa!) has been the first in her family to get a PhD – and also in ours. Luckily (for your nephews and their parents) you are also very good at ball games, videogaming and many other things, but I directly enjoy your conversation skills the most I must say. Carlo’s parents, Lucio and Lucia, and the rest of the Veneto crowd – Alessandra, Ivana and Renzo – have been putting up with distance and worries about our meanderings with remarkable steadiness and regularly offered wonderful prosecco and culinary escapes. Next to, more recently, being a great uncle to Leo and Dario, Davide has given us a reason and excuse to travel back since short after moving away from Italy. Unbelievable how big you have got! Big hug.

Whether I was waiting for a bus under the rain, getting a piercing or wondering whether I should totally change career plans, I knew someone in Fondi had my back. Maria Nives, Raniero, Marta and Marco, if love had to be expressed in food it would have to be olive oil and artichokes travelling across Europe in a glass jar. Extra thanks, by the way, to talented Marta for designing the book’s cover and her patience in complying with my obsessive suggestions re colours, lines, text orientation and spacing. Mario e Sara, here is the book we have been talking about for years – not as fun as Murakami, but it’s done at last. Rossella, thanks for always insisting that we stay sane and grounded.

The book is for my parents, Ester and Massimo – somewhat ironically, since they disagree on almost everything but have always both insisted that my study and career choices should be for me and not for them. As a grown-up person and as an academic, I will never be grateful enough for the combination of empowerment and consciousness that this has endowed me with. I would, however, likely not have become the kind of person who actually finishes a book without my partner Carlo, who every day dares me to be a more decent, more reflexive human and my two sons, Leo and Dario, who give me endless happiness even though I can’t seem to learn how to play.