The missing stone in the Cathedral

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

Leone, C.

Publication date
2020

Document Version
Other version

License
Other

Citation for published version (APA):
Leone, C. (2020). The missing stone in the Cathedral: Of unfair terms in employment contracts and coexisting rationalities in European contract law.

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
The missing stone in the Cathedral

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

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

Candida Leone
geboren te Rome
Promotiecommissie:

Promotor(es):
Prof. dr. A.A.H. van Hoek Universiteit van Amsterdam
Prof. dr. M.B.M. Loos Universiteit van Amsterdam

Copromotor(es):
Prof. dr. M. Bartl Universiteit van Amsterdam

Overige leden:
Dr. K.J. Cseres Universiteit van Amsterdam
Dr. N. Maggi-Germain Université Panthéon-Sorbonne – Paris 1
Prof dr. C. Mak Universiteit van Amsterdam
Prof. dr. H-W. Micklitz University of Helsinki
Prof. dr. C. U. Schmid Universität Bremen
Prof. dr. E. Verhulp Universiteit van Amsterdam

Faculteit der Rechtsgeleerdheid
Table of Contents

**CHAPTER 1** INTRODUCTION: CORRECTING THE NARRATIVE ON UNFAIR TERMS CONTROL  
1.1. Introduction  
1.2. A Prequel: background and terminology  
1.3. Private (or contract) law and regulation  
1.4. Methodology  
1.5. Final remarks  

**PART I** THE “POLICY” DISCUSSION IN EUROPEAN CONTRACT LAW AND ITS LIMITATIONS  

*Introduction*  

**CHAPTER 2** DIRECTIVE 93/13, JUSTIFICATION AND AIMS  
2.1. Justification and aims of the Unfair Terms Directive  
2.2. European private law and the rise of “aims” discussions  
2.3. Conclusion: unfair terms control for whom?  

**CHAPTER 3** THE DIRECTIVE “IN ACTION”, A THREE-PRONGED ANALYSIS  
3.1. The unfairness test: substantive unfairness and transparency  
3.2. Consequences of unfairness  
3.3. Ex officio control and the relationship between individual and collective proceedings  
3.4. Conclusions  

**PART II** THE APPEARANCE OF UNFAIR TERMS CONTROL IN LABOUR LAW AND THE CONTRACTUALISATION OF EMPLOYMENT RELATIONS  

*Introduction*  

**CHAPTER 4** THE ROAD TO UNFAIR TERMS CONTROL  
4.1. Similar stories, different paths  
4.2. Germany  
4.3. France  
4.4. Conclusions  

**CHAPTER 5** CONTRACTUALISATION AND EMPLOYMENT RELATIONS  
5.1 Introduction  
5.2. The contractualisation of employment relationships in historical perspective  
5.3. Contractualisation as a tool: contract terms in employment practices  
5.4. Contractualisation in practice and judicial responses: analysing certain contentious terms  
5.5. Conclusions  

6. CONCLUSIONS AND OUTLOOK  

BIBLIOGRAPHY  
CASE LAW  
LEGISLATION  
SUMMARY  
SAMENVATTING  
ACKNOWLEDGEMENTS