The missing stone in the Cathedral

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

Leone, C.

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.
The missing stone in the Cathedral

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

Candida Leone

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
1.1. Introduction 1
1.2. A Prequel: background and terminology 2
1.3. Private (or contract) law and regulation 12
1.4. Methodology 19
1.5. Final remarks 23

PART I THE “POLICY” DISCUSSION IN EUROPEAN CONTRACT LAW AND ITS LIMITATIONS 26

Introduction 26

CHAPTER 2 DIRECTIVE 93/13, JUSTIFICATION AND AIMS 29
2.1. Justification and aims of the Unfair Terms Directive 29
2.2. European private law and the rise of “aims” discussions 48
2.3. Conclusion: unfair terms control for whom? 51

CHAPTER 3 THE DIRECTIVE “IN ACTION”, A THREE-PRONGED ANALYSIS 53
3.1. The unfairness test: substantive unfairness and transparency 57
3.2. Consequences of unfairness 73
3.3. Ex officio control and the relationship between individual and collective proceedings 82
3.4. Conclusions 87

PART II THE APPEARANCE OF UNFAIR TERMS CONTROL IN LABOUR LAW AND THE CONTRACTUALISATION OF EMPLOYMENT RELATIONS 90

Introduction 90

CHAPTER 4 THE ROAD TO UNFAIR TERMS CONTROL 92
4.1. Similar stories, different paths 92
4.2. Germany 94
4.3. France 119
4.4. Conclusions 137

CHAPTER 5 CONTRACTUALISATION AND EMPLOYMENT RELATIONS 142
5.1 Introduction 142
5.2. The contractualisation of employment relationships in historical perspective 142
5.3. Contractualisation as a tool: contract terms in employment practices 153
5.4. Contractualisation in practice and judicial responses: analysing certain contentious terms 161
5.5. Conclusions 195

6. CONCLUSIONS AND OUTLOOK 200

BIBLIOGRAPHY 208
CASE LAW 227
LEGISLATION 232
SUMMARY 237
SAMENVATTING 239
ACKNOWLEDGEMENTS 243