The missing stone in the Cathedral

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

Leone, C.

Creative Commons License (see https://creativecommons.org/use-remix/cc-licenses):

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.
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 his 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 AIDS  
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-PRAONGED 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**