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### The missing stone in the Cathedral

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

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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*.<sup>1</sup> 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.”<sup>2</sup>*

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:

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<sup>1</sup> Daniela Caruso, “The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration,” *European Law Journal* 3, no. 1 (1997): 3–32.

<sup>2</sup> 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.”<sup>3</sup>*

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.”<sup>4</sup> 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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<sup>3</sup> Study Group on Social Justice in European Private Law, “Social Justice in European Contract Law: A Manifesto,” *European Law Journal* 10, no. 6 (2004): 653–74.

<sup>4</sup> 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*.<sup>5</sup> Saleilles, truth be told, does not really believe non-negotiated contracts to be contracts at all: those *pretendu 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.<sup>6</sup>

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<sup>5</sup> 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.

<sup>6</sup> François Chénéde, "Raymond Saleilles, Le Contrat d'adhésion (2e Partie)," 2012, 1017. The thesis was particularly popular among public law scholars (most notably, L. Duguit and M. Hauriou), but also the first doctoral thesis on the subject of adhesion contracts followed this "institutional" theory: see Jacques Dollat, "Les Contrats d'adhésion: Thèse Pour Le Doctorat" (PhD Thesis, Librairie de la Société du recueil J.-B. Sirey & du Journal du Palais, 1905).

Sailleilles 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 formidables où les ouvriers sont moins que les machines; les corporations, aux syndicats [...]”*<sup>7</sup>

The story, one can immediately see, concentrates entirely on the side of *offer*, which was indeed undergoing momentous changes<sup>8</sup> – 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<sup>th</sup> 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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<sup>7</sup> 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...* (1a” *Revue judiciaire*, 1912), 9. Unless otherwise indicated, all translations are mine.

<sup>8</sup> 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.”<sup>9</sup>*

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:<sup>10</sup> towards the end of the 19<sup>th</sup> 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 were 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.<sup>11</sup>

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<sup>9</sup> Roscoe Pound, “The Role of the Will in Law,” *Harvard Law Review* 68, no. 1 (1954): 19.

<sup>10</sup> 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.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> It seems unlikely that apprentices and housemaids had much bargaining power suddenly taken away from them in late 19<sup>th</sup> 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<sup>14</sup> discussed employment contracts as an instance of adhesion contracts.

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*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.'*

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> See eg Pichon, *Université de Lyon. Faculté de Droit. Des Contrats d'adhésion; Leur Interprétation et Leur Nature, Thèse... Par Victor Pichon...; Max Domergue, Etude d'Ensemble Sur Le Contrat d'Adhésion* (Toulouse: Imprimerie Parisienne, 1935). Domergue writes considerably later but

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,<sup>15</sup> mirrored by the increased participation in contractual transactions of subjects that were not relevant to the anthropological reference of contract law during its 19<sup>th</sup> century liberal apex; second, the increased relevance of contract *terms* next to the basic feature of a given exchange.<sup>16</sup> The colourful images captured by, among others, Pichon and Pound are, I submit, as much a result of capitalism's tendency to concentration<sup>17</sup> (as suggested by Pound in the fragment above)<sup>18</sup> as they are of this *expansion* of contracts and contract law.<sup>19</sup>

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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reconstructs the earlier developments of adhesion contracts case-law and doctrine including examples from employment contracts. See the famous *arrêt sabots* recounted at Chapter 5.1.

<sup>15</sup> This account resonates with legal-historical research showing that standard terms have emerged well before the end of the 19<sup>th</sup> 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<sup>th</sup> 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<sup>th</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> Karl Marx, "Capital, Volume III," Penguin Classics, 1993. See Chapter 27.

<sup>18</sup> Text to fn 9.

<sup>19</sup> 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<sup>th</sup> 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.”*<sup>20</sup>

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.<sup>21</sup>

Just before Kessler's article appeared, Raiser's book *Das Recht Der Allgemeinen Geschäftsbedingungen* had been published in Germany.<sup>22</sup> 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,<sup>23</sup> subtracting their transactions from state laws. This displacement of legislative powers had to be kept under control. As

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<sup>20</sup> Friedrich Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract," *Colum. L. Rev.* 43 (1943): 629.

<sup>21</sup> 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.

<sup>22</sup> Ludwig Raiser, *Das Recht Der Allgemeinen Geschäftsbedingungen* (Hanseat. Verlag-Anst., 1935).

<sup>23</sup> Micklitz speaks of "double collectivization" with reference to, on the one hand, the practice of using standard terms, and, on the other hand, the *negotiation* of standard terms within certain market sectors. See Hans-W. Micklitz, "Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts," in *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International, 2008), 19–41.

convincingly shown by Hellwege,<sup>24</sup> 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.<sup>25</sup> 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 Europe*<sup>26</sup> 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 20<sup>th</sup> 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,<sup>27</sup> but the apparent similarity actually hid very different approaches. In

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<sup>24</sup> Hellwege, *Allgemeine Geschäftsbedingungen, Einseitig Gestellte Vertragsbedingungen Und Die Allgemeine Rechtsgeschäftslehre*.

<sup>25</sup> In contrast, Radin expresses, from a more remedial perspective, very similar concerns with reference to US law. Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press, 2012).

<sup>26</sup> Leone Niglia, *The Transformation of Contract in Europe* (The Hague; New York: Kluwer Law International, 2003).

<sup>27</sup> UK: Unfair Contract Terms Act, 1977 c 50; France: Loi n°78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services (s.c. "Loi

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 upkeep 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.<sup>28</sup>

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

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Scrivener”); Germany: Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz). vom 09. Dezember 1976 (BGBl. I S. 3317).

<sup>28</sup> 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.<sup>29</sup> 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"<sup>30</sup> 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.<sup>31</sup>

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

<sup>30</sup> 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.

<sup>31</sup> 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”.<sup>32</sup> 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.”<sup>33</sup>*

The concept of “rationalities”, employed by Michaels 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 label attached to supposedly instrumental private law in the European private law debate; second, because “instrumental” is occasionally used as synonymous with “materialised” private

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<sup>32</sup> See quotation above fn 1. On the ever-changing fortunes of the distinction between public and private law within European private law, see lastly Olha O. Cherednychenko, “Rediscovering the Public/Private Divide in EU Private Law,” *European Law Journal*, 2019.

<sup>33</sup> Ralf Michaels, “Of Islands and the Ocean: The Two Rationalities of European Private Law,” *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW*, Roger Brownsword, Hans-W Micklitz, Leone Niglia, Steve Weatherill, Eds., Hart Publishing, 2011, 139.

law, in opposition to formalistic private law.<sup>34</sup> I specifically do not consider all cases of materialisation – in other words, all deviations from formal equality – as a form of instrumentalisation.<sup>35</sup> 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:<sup>36</sup>

### Private Law

- Focus on individual rights;
- Regulating relations;
- Quest for generality
- Predominantly ex post
- Application as remedies
  - Party-led
  - Limited set

### Regulation

- Focus on desired effects;
- Regulating behaviours;
- Specialisation;
- Ex ante behavioural spin;
- Application as enforcement
  - Court or others
  - Several possible strategies

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<sup>34</sup> See eg Laurence B. Solum, “Legal Theory Lexicon 043: Formalism and Instrumentalism,” *Legal Theory Lexicon* (blog), accessed March 4, 2020, [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2005/05/legal\\_theory\\_le\\_1.html](https://lsolum.typepad.com/legal_theory_lexicon/2005/05/legal_theory_le_1.html).

<sup>35</sup> 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,” *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.

<sup>36</sup> 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”<sup>37</sup> 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.<sup>38</sup> 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)*”.<sup>39</sup> 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

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<sup>37</sup> Michaels, 145.

<sup>38</sup> 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.

<sup>39</sup> Christoph Schmid, “The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell,” *European Constitutionalism Without Private Law: Private Law Without Democracy, Recon Report*, no. 14 (2011): 18–19.

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.<sup>40</sup>

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.<sup>41</sup> Therefore, while contract law justice may well be mainly an ethical concept,<sup>42</sup> 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,<sup>43</sup> 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.<sup>44</sup>

Throughout the book, in essence, my aim is to reinvigorate the idea that unfair terms control is a means of – sometimes more, sometimes less – deformalized corrective justice.<sup>45</sup>

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<sup>40</sup> See *ibidem* p 19.

<sup>41</sup> 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”.

<sup>42</sup> 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.

<sup>43</sup> See Michelle Everson, “From Effet Utile to Effet Neoliberal: Why Is the ECJ Hazarding the Integrity of European Law?,” *European Constitutionalism without Private Law-Private Law without Democracy*, RECON Report, no. 14 (2011): 39–41.

<sup>44</sup> Everson, “From Effet Utile to Effet Neoliberal.”

<sup>45</sup> 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*<sup>46</sup> 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<sup>47</sup> for idea exchanges – the Directive is likely the main propeller for the second trend as well.<sup>48</sup> Indeed, unlike traditional contract law,<sup>49</sup> European private law rules tend to be largely justified, measured and criticised in light of their (actual or expected) effects.<sup>50</sup> Unsurprisingly, this brings

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<sup>46</sup> The 2008 Consumer Law Compendium devotes a specific section to the background of unfair terms control, which expressly focusses on “*policy reasons* [my emphasis] for monitoring pre-formulated terms”. See Christian Twigg-Flesner, Martin Ebers, and Hans Schulte-Nölke, *EC Consumer Law Compendium-Comparative Analysis* (Online version, 2008), 347,

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.183.3328&rep=rep1&type=pdf>.

<sup>47</sup> 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.

<sup>48</sup> As studied by a number of people before me: Christian Joerges, “The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines—an Analysis of the Directive on Unfair Terms in Consumer Contracts,” *European Review of Private Law* 3, no. 2 (1995): 175–191.; Christoph Schmid, “The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell,” *European Constitutionalism Without Private Law: Private Law Without Democracy, Recon Report*, no. 14 (2011): 17–36. It has been observed that directives entail a functional orientation due to their very nature of instruments setting specific *goals* for their addressees, the Member States, rather than establishing rules that individuals are supposed to follow.

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

<sup>50</sup> 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.<sup>51</sup> “Unfair” terms are still widespread,<sup>52</sup> 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.<sup>53</sup> In other words, perhaps judging the Directive on the basis of its *effectiveness* does not exhaust what there is to say about it.

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evaluation that is at the centre of the EU law-making process, namely impact assessments attempting to predict a measure’s effects (mostly in economic terms) and debates concerning the instrument’s suitability to achieve its stated goals.

<sup>51</sup> See for recent versions Marco Loos and Joasia Luzak, “Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers,” *Journal of Consumer Policy* 39, no. 1 (2016): 63–90; Charlotte Pavillon, “Private Enforcement as a Deterrence Tool: A Blind Spot in the Omnibus-Directive,” *European Review of Private Law with the Proceeds of the Conference ‘A New Deal for Civil Justice*, 2019. In a different mode, critical of the CJEU for its confusing insistence on weaker party protection as a concern in unfair terms control M. Schillig, “Inequality of Bargaining Power versus Market for Lemons: Legal Paradigm Change and the Court of Justice’s Jurisprudence on Directive 93/13 on Unfair Contract Terms,” *European Law Review* 33 (2008): 336–358.

<sup>52</sup> Marco Loos and Joasia Luzak, “Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers,” *Journal of Consumer Policy* 39, no. 1 (2016): 63–90.

<sup>53</sup> 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 Judiciaries 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,<sup>54</sup> 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 uncharted 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

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<sup>54</sup> 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*.

terms control shed some light on some deep dynamics of contract law.<sup>55</sup> 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. 19<sup>th</sup> 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 (de)formalized 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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<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

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<sup>st</sup> 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

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<sup>56</sup> For an early reconstruction, see Martijn W. Hesseling, "The New European Legal Culture," 2001, 33, 57ff.

<sup>57</sup> Hannes Rösler, "Europeanisation of Private Law through Directives-Determining Factors and Modalities of Implementation," *Eur. J.L Reform* 11 (2009): 305.

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”.<sup>58</sup> 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.<sup>59</sup> 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

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<sup>58</sup> 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.

<sup>59</sup> 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;<sup>60</sup> second, their diverging approaches to labour law and to the relation between law (and legal scholarship) and politics<sup>61</sup> 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,<sup>62</sup> 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 – ie other areas arguably subject to contractualisation, from family law to personal data<sup>63</sup> – which are also completely left out.

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<sup>60</sup> 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).

<sup>61</sup> 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.

<sup>62</sup> Although a discussion can be occasionally traced elsewhere: see eg Hugh Collins, “Legal Responses to the Standard Form Contract of Employment,” *Industrial Law Journal* 36, no. 1 (2007): 2–18; Douglas Brodie, “The Employment Contract and Unfair Contracts Legislation’(2007),” *Legal Studies* 27 (n.d.): 95–107.

<sup>63</sup> See among many relevant publications: Carmen Langhanke and Martin Schmidt-Kessel, “Consumer Data as Consideration,” *Journal of European Consumer and Market Law* 4, no. 6 (2015): 218–223; Frederik Swennen, *Contractualisation of Family Law-Global Perspectives*, vol. 4 (Springer, 2015).

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,<sup>64</sup> 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.<sup>65</sup> 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 perspective<sup>66</sup> – or from the perspective of labour law as a discipline with a claim to autonomy.

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<sup>64</sup> Nathalie Rzepecki, *Droit de La Consommation et Théorie Générale Du Contrat* (PU Aix-Marseille, 2015).

<sup>65</sup> See on this *infra* chapter 5, in particular 5.2. and 5.3.

<sup>66</sup> For a different critique of contractualisation, see John Gardner, “The Contractualisation of Labour Law,” in *Philosophical Foundations of Labour Law*, ed. Hugh Collins, Gillian Lester, and Virginia Mantouvalou (Oxford, 2018).



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<sup>67</sup> 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<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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”

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<sup>67</sup> 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).

<sup>68</sup> See, only among relatively recent works, Guy Davidov and Brian Langille, *The Idea of Labour Law* (Oxford University Press, 2011).

<sup>69</sup> See the classic debate in French labour law: Gerard Lyon-Caen, “Du Rôle Des Principes Généraux Du Droit Civil En Droit Du Travail,” *Rev. Trim. Dr. Civ.*, 1974, 229; Gerard Couturier, “Les Techniques Civilistes et Le Droit Du Travail,” *Recueil Dalloz*, 1975, 151;222.

<sup>70</sup> Again, this point has been made earlier by a prominent labour lawyer, Mark Freedland, a decade ago: see Mark Freedland, *Private law, regulation and governance design and the personal work contract*, in *Making European Private Law: Governance Design* 227 (2010). See also Luca Nogler, “The Historical Contribution of Employment Law to General Contract Law: A Lost Dimension?,” in *Life Time Contracts: Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (The Hague: Eleven International Publishing, 2014), 279–319.

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.