# The missing stone in the Cathedral

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

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# 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.