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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 4 The road to unfair terms control

4.1. Similar stories, different paths

Since the start of the century, major reforms of their respective civil codes have taken place both in Germany and, more recently, in France. In both cases, with the reforms came legislative changes allowing judicial control of non-negotiated terms in employment contracts. While, as we will see, the result was achieved in Germany by expanding the scope of the “consumer” rules and in France by introducing a new provision in the Civil code, the relevant provisions look very similar to each other and also present a high degree of similarity to the main provision in the Unfair Terms Directive.

Both France and Germany have adopted legislation concerning – as a minimum shared denominator – non-negotiated consumer contracts at the end of the 1970s. These rules had different scopes and very different application mechanisms.³¹² While in Germany courts were since the very beginning entrusted with the task of applying the relevant rules, in France the essence of the task was to be carried out by administrative channels. French courts, in fact, started exercising unfair terms control *extra ordinem*, eventually with the approval of the *Cassation*, until the legislator officially allowed them to do so when implementing the Unfair terms directive.³¹³

Both sets of rules were not applicable to employment contracts. The German *Allgemeine Geschäftsbedingungen Gesetz* (Standard Terms Act, often referred to as AGB-Gesetz) had a broad scope, applying to all standardised contracts covered by the *Bürgerliches Gesetzbuch* (German civil code or BGB). Only a few subjects were excluded – among which employment contracts. In France, the Loi Scrivener of 1978 restricted unfair terms rules to consumer contracts. The definition was formulated in sufficiently broad terms to make debates on its effective reach flourish,³¹⁴ but its non-applicability to labour law was quite beyond question. The two original pieces of legislation, Loi Scrivener and Standard Terms Act, have later been both “codified”. The former, however, has been incorporated in the Code de

³¹² See in critical perspective 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.

³¹³ Jean Calais-Auloy and Henri Temple, *Droit de La Consommation* (Dalloz, 2015), 225.

³¹⁴ In particular, at some point it appeared possible that the protection would also apply to non-consumers when acting outside their professional competences: Cass. Civ. 28 april 1987, n. 85-13674.

la consommation, putting together several sets of (legislative as well as governmental) regulations concerning consumer protection, whereas the latter has been incorporated in the BGB as a result of the 2001 reform.

While in both cases the inclusion of employment contracts in the scope of unfair terms control was clearly not the main goal of the large-scale contract law reforms of this century, the relation is more direct in the German case. Doing away with the exclusion of employment contracts under the AGB-Gesetz was an explicit choice, made in the awareness of the case-law developments discussed here – see *infra*. In France, there is no reason to believe that something similar took place. The report presenting the 2016 reform to the then-president Hollande does not mention employment contracts at all.³¹⁵ The relationship between the new rules and the case-law outlined in the second part of the chapter is, then, more difficult to establish.

This Chapter provides an overview of avenues through which, prior to the reforms officially expanding unfair terms control to employment contracts, judicial intervention on individual terms was already taking place. It will show how, in piece-meal fashion, courts had already developed a relatively extensive network of rules aimed at limiting possible abuse on the side of the employers, which were later codified in the reform processes. In reconstructing the developments which have over time taken place in the two countries, one difficulty arises from the different *chronology* in the one and the other system. In this respect, one thing should be clarified in order to prevent misunderstandings: there is no temporal coincidence to be observed. This is not only true of the most recent developments, whereby we can observe that 15 years have passed between the two reforms; very different timelines also need to be considered when discussing the progressive diffusion of judicial control thanks to more or less audacious judge-made solutions. A chronological account would therefore provide a deceitful sense of linearity.

At the same time, we will see that in both countries, prior to the reform, a number of different solutions were adopted in order to invalidate “unfair” terms: different provisions were invoked, and sometimes the result was reached without clearly articulating a specific legal basis. This variety of solutions did not follow a linear evolution. Sometimes parameters were introduced and later replaced by others, but often different strategies coexisted. The following sections will, for each

³¹⁵ See Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, JORF n°0035 du 11 février 2016 texte n° 25.

country, trace these movements and then provide an account of the contours of unfair terms control rules as they are in place after the reform to identify the transitions and assess the contiguity or distance between the two stages.

4.2. Germany

4.2.1. Inhaltskontrolle of employment contracts

The 2001 reform of the German law of obligations, also referred to as *Modernisierung*³¹⁶, led to the incorporation of unfair terms rules in the German Civil Code (Bürgerliches Gesetzbuch, henceforth BGB). Until that moment, the subject was regulated by the 1976 Standard Terms Act.³¹⁷

In 1975 – that is, roughly one year before the adoption of the Standard Terms Act, Westhoff wrote at the very inception of his dissertation:

*“[...] it is part of everyday legal practice that employment contracts, the content of which is based on the economic weight of the employer, are subjected by Courts to fairness control.”*³¹⁸

One year later, the Standard Terms Act excluded employment law from its scope of application; this notwithstanding, the parliamentary reports confirmed that the exclusion was not meant to preclude the control that was already taking place by means of, in particular, § 242 BGB.³¹⁹ More needs to be said about this phenomenon in order to be able to assess its relationship to the more recent developments that are reported in more detail later in the chapter.

The following account aims to show that the *Inhaltskontrolle* (content control) practiced by Labour courts before the reform of 2002, later largely absorbed by unfair terms control, was indeed already very similar to the AGB-Gesetz-dictated control which took place in consumer contracts. Furthermore, I submit, it reflected a set of concerns which is not different than the combination of justifications

³¹⁶ Gesetz zur Modernisierung des Schuldrechts adopted on 26 November 2001, BGBl. I page 3138, which entered into force on 1 January 2002.

³¹⁷ Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz), adopted on 9 December 1976, BGBl. I I page 3317.

³¹⁸ The full first sentence in the book's introduction reads: *“Eine Untersuchung über die Inhaltskontrolle von Arbeitsverträgen bedarf der Rechtfertigung: begegnet sie doch dem – zunächst berechtigten – Misstrauen, hier werde nur längst Bekanntes wiederholt: Es zählt heute zum juristischen Alltag, dass Arbeitsverträge, deren Inhalt auf dem wirtschaftlichen Übergewicht des Arbeitsgebers beruht, von den Gerichten einer Billigkeitskontrolle unterzogen werden.”* Stefan Westhoff, *Die Inhaltskontrolle von Arbeitsverträgen*, 1975, 9.

³¹⁹ BT-DS 7/5422 p.13.

usually associated with unfair terms control. Indeed, if the control was already established at an early stage, it was nonetheless controversial- not so much as far as its *results* were concerned, but certainly as to its *justifications*³²⁰. The situation, which had been identified as somewhat problematic almost since its outset, had not fundamentally changed by 2002. Putting an end to legal uncertainty was, we will see, one of the main reasons put forward by the German government when justifying its proposal to lift the exclusionary provision of § 23 AGB-Gesetz. But what were labour courts actually doing in order to generate such uncertainty?

4.2.1.1. Labour law's protective aims, Gesetzesumgehung and prohibited contracts

Control of contractual content³²¹ had entered court practice at least as early as 1960, when the *Bundesarbeitsgericht* stated³²² that a term setting an end date for the duration an employment contract could not be invoked³²³ by the employer when its effect was to circumvent the provisions concerning the termination of (open-ended) employment contracts. This notion of circumvention of the law, or *Gesetzesumgehung*, was applied not only to the stipulation of fixed-term contracts, but, in time, also to other terms allowing the employer to unilaterally modify the content of their own and their counterpart's obligations, for instance by the

³²⁰ Westhoff, *Die Inhaltskontrolle von Arbeitsverträgen*. Of course, criticising the latter could easily be seen as a way of refusing the former as well. This is in particular the case of Westhoff himself, who concludes his analysis of the legal basis for the *Inhaltskontrolle* already practiced by labour court at that time by saying that, since much of that control could not be justified on the basis of existing law or acceptable analogies, its results were illegitimate as well.

³²¹ As mentioned in Chapter 1, the work is only concerned with one aspect of judicial control: the control of contractual content, that is what unfair terms control is about. This means that control over the way the contract is implemented, or the use that the parties make of the contractual terms, goes beyond the scope of the present investigation. This is to a large extent the case of the so-called *Billigkeitskontrolle*, which applies for instance to cases where ancillary performances on the side of the employer were spontaneously granted and then withdrawn. This was a much-discussed form of intervention, but it excluded from the present inquiry since it concerns more the exercise of a (contractual) prerogative than its existence and shaping. Exercise of the prerogative granted by a certain term relies on the existence – that is, validity – of the term. This is a different criterion than has sometimes been followed in previous recognitions – see Dorothea König, “Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England Und Frankreich” (Universitätsbibliothek Freiburg, 2010), <http://www.freidok.uni-freiburg.de/volltexte/2010/7667/>. In her dissertation, König considers as *Inhaltskontrolle* all judicial interventions “taking into account the idea of worker protection”, see p.41 in her book.

³²² AP BGB § 620 Befristeter Arbeitsvertrag Nr. 16, Decision of 12.10.1960 - 3 AZR 65/59

³²³ Thus, the decision doesn't say that the clause should be considered as invalid – but neither does harmonised “consumer law” unfair terms legislation (i.e. the Directive) to-date.

incorporation of so-called *Widerrufsvorbehalt*. Such terms were held to circumvent the provisions on “partial termination” of the employment contract (*Änderungskündigung*)³²⁴, which is also regulated under German employment law. At its origins, the reasoning could be summarised as follows: the development of rules concerning the (partial) termination of employment relationships suggested that their aim was to preserve the worker’s job; therefore, contractual arrangements that deprived employees of the protection granted to this interest by the legislator go against such aim and should not be upheld by courts.³²⁵ The stipulations were to be considered illegal under the general rule on illegal contracts of § 134 BGB, according to which contracts infringing a statutory prohibition are invalid.³²⁶

In later case-law,³²⁷ the measure of *Gesetzesumgehung* was more directly anchored in the contractual balance: when a term made “essential elements of the contract” subject to unilateral modification, such a term would be liable to affect the balance of performance and counter-performance.³²⁸ In particular, according to case-law, such balance would be unacceptably affected when the modification concerned more than 25-30 percent of the overall remuneration. The notion that unilateral modifications were liable to alter the balance between the performances, thus, first emerged as an argument for expanding the *Gesetzesumgehung* doctrine.³²⁹

4.2.1.2. Constitutional principles

Further intervention took shape through the application of Art. 12 of the German *Grundgesetz* (GG)³³⁰, again – at least in the beginning – through the clause of § 134 BGB.³³¹ A term restricting the employee’s occupational freedom as protected by art. 12 GG, was to be considered as compatible with that provision (only) if, under

³²⁴ König, “Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England Und Frankreich,” 47; Westhoff, *Die Inhaltskontrolle von Arbeitsverträgen*.

³²⁵ See König, “Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England Und Frankreich,” 43.

³²⁶ According to König, this route was seen as Fixierung von Leitbildern (“crystallization of the statutory models”). See König, 93 fn 282 with further references.

³²⁷ BAG v. 7. 10. 1982, AP § 620 BGB Teilkündigung Nr. 5.

³²⁸ BAG v. 21. 4. 1993, AP § 2 KSchG 1969 Nr. 34 [II 1 b)] referring to BAG v. 13.5.1987, AP § 305 BGB Billigkeitskontrolle Nr. 4 [II 3].

³²⁹ Again see König, “Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England Und Frankreich,” 44ff.

³³⁰ The first part of the article declares that “All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training”.

³³¹ Urteil vom 29.06.1962 - 1 AZR 343/61 | BGB § 611 | GG Art. 12 | GG Art. 2 AP GG Art. 12 Nr. 25 (m. Anm. Hueck).

consideration of all the circumstances of the case at stake and in accordance with the principle of good faith it was tolerable for the employee and, seen from the point of view of a reasonable observer, it expressed a grounded and valuable interest of the employer.³³² This approach, which was tantamount to a direct application of article 12 GG to private legal relationships, was later “corrected”, using the principle of good faith as embodied in § 242 BGB as a medium for the indirect application of the provision.³³³ Various types of terms common in employment practice may have an impact on occupational freedom: one may think of not only non-compete clauses, but also the restitution of education costs, the duty to return an already perceived bonus or just particularly long conventional notice periods.

4.2.1.3. Contractual equality

The doctrines described above do not seem to attach much importance to the question whether a term has or not been freely negotiated or unilaterally drafted. This circumstance seems to gain meaning in decisions where the control is explicitly based on the need to ensure the establishment of a fair contractual content, given the existence of a situation of “impaired contract equality” (*gestörte Vertragsparität*).³³⁴ In this context, unilateral contract drafting could either

³³² BAG 29.06.1962 : “II.3.b) In den Rechtsbeziehungen der Parteien des Arbeitsvertrages handelt es sich nicht um die Abwehr (unzulässiger) staatl. Eingriffe, sondern um die Abwehr von Eingriffen, die sich aus der sozialen Machtstellung des Arbeitgebers im Einzelfall ergeben können. Sofern sich die Vertragsparteien eines auf unbestimmte Zeit eingegangenen und deshalb kündbaren Arbeitsverhältnisses in dem durch Art. 12 GG erfaßten und geschützten Raum bewegen und zu Lasten des Arbeitnehmers eine Regelung treffen, die die in einem solchen Arbeitsverhältniss bestehende Freiheit der Arbeitsplatzwahl berührt, müssen sie diesem Grundrecht die größtmögliche Geltung verschaffen. Unter diesen Voraussetzungen hält der Senat auch in einem auf unbestimmte Zeit eingegangenen Arbeitsverhältnisses eine solche freiwillig eingegangene vertragl. Beschränkung des Arbeitnehmers in der freien Wahl des Arbeitsplatzes mit Art. 12 GG für vereinbar, die unter Berücksichtigung aller Umstände des Einzelfalles nach Treu und Glauben dem Arbeitnehmer zuzumuten ist und vom Standpunkt eines verständigen Betrachters aus einem begründeten und zu billigenden Interesse des Arbeitgebers entspricht. Sind diese Voraussetzungen nicht gegeben, dann ist die Vereinbarung wegen Verletzung des in Art. 12 GG enthaltenen Verbots nach § 134 BGB nichtig.”

³³³ König, “Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England Und Frankreich,” 49.

³³⁴ BAG 31.10.1969 - 3 AZR 119/69 AP BGB § 242 Ruhegehalt-Unterstützungskassen Nr. 1 (Ls.) (m. Anm. Lukowsky) “Ein Vertragswerk, das nicht zwischen den Beteiligten im Wege eines gegenseitigen Interessenausgleichs ausgehandelt, sondern praktisch vom Arbeitgeber allein festgelegt wird, muß sich eine Korrektur nach Billigkeitsgründen gefallen lassen. Eine solche gerichtliche Billigkeitskontrolle ist bei allen Vertragswerken geboten, bei deren Zustandekommen die Vertragsparität gestört ist. Darüber besteht heute in Rechtslehre und Rechtsprechung weitgehend Einigkeit. Man streitet lediglich über die - theoretische, das praktische Ergebnis nicht beeinflussende -

represent a result of such impairment,³³⁵ or a fact in itself capable of justifying judicial intervention. Thus, the BAG observed that

*“the existing law of obligations relies on the thought that contractual fairness is guaranteed by the fact that through negotiation equally strong parties reach a reasonable agreement each in consideration of their own interests. This is what justifies freedom of contract. [...] It is different when no balance between the parties guarantees a reasonable contractual content, due either to impaired contractual equality or to the fact that, due to other reasons, one of the parties alone can determine the contractual content”.*³³⁶

With regard to such “other reasons”, the Court mentions standard terms of employment, in cases where the employer can determine the contractual performance and in the case of the non-binding concession of voluntary benefits. On this path, by the last decade of the 20th century the BAG asserted its role in guaranteeing the establishment of a balance of interests between the parties.³³⁷ The

Frage, ob sich die Rechtfertigung dieser Billigkeitskontrolle aus §§ 315 ff. BGB oder aus § 242 BGB oder aus der Verletzung vorvertraglicher Pflichten ergibt (vgl. dazu BGHZ 38, BGHZ Band 38 Seite 183 ff. = NJW 63, NJW Jahr 1963 Seite 99; Flume, Allg. Teil des Bürgerlichen Rechts, Bd. II, Das Rechtsgeschäft, 1965, S. 670 ff.; Larenz, Lehrbuch des Schuldrechts, Bd. I, Allg. Teil, 8. Aufl., S. 96 ff.; Esser, Schuldrecht, Bd. I, Allg. Teil, 3. Aufl., S. 93 ff.; Fikentscher, Schuldrecht, 2. Aufl., S. 110 ff.; Diederichsen, ZHR 132, 232 ff. [247 ff.]; ders., JZ 69, JZ Jahr 1969 Seite 73; Grunsky, Juristische Analysen, Zivilrecht I, 1969, S. 87 ff. [93 ff.]; jeweils m.w. Nachw.)”.

³³⁵ *Ibidem*.

³³⁶ BAG 21.12.1970 - 3 AZR 510/69 AP BGB § 305 Billigkeitskontrolle Nr. 1: *“Das geltende Schuldrecht beruht auf dem Gedanken, die Vertragsgerechtigkeit sei in aller Regel dadurch gewährleistet, daß gleichstarke Vertragspartner jeweils in Wahrnehmung der eigenen Interessen im Wege des Aushandelns einen billigen Ausgleich schaffen. Daher rechtfertigt sich die Vertragsfreiheit. Sieht man von den gesetzl. Mindestbedingungen zugunsten schwächerer Vertragspartner ab, wird die Entscheidung über den Vertragsinhalt den Beteiligten überlassen; die Vertragsgestaltung bedarf im allgemeinen nicht der gerichtl. Überprüfung. Anders ist es dann, wenn kein Gleichgewicht der Vertragspartner einen angemessenen Vertragsinhalt gewährleistet, weil entweder die Vertragsparität gestört ist oder eine Vertragspartei aus anderen Gründen allein den Inhalt des Vertragsverhältnisses gestalten kann.”*

³³⁷ Adomeit harshly criticised the German Constitutional Court’s *Bürgschaft* judgement of 19.10.1993 for, in his opinion, turning this BAG doctrine into a “general principle”. Such direct connection, however, was quite controversial at the time. See Klaus Adomeit, “Die Gestörte Vertragsparität - Ein Trugbild,” NJW, 1994, 2467; Fritz Rittner, “Die Gestörte Vertragsparität Und Das Bundesverfassungsgericht,” NJW, 1994, 3330.

need for courts to fulfill this function was imposed by the “structural inferiority” of the employee vis à vis their employer.³³⁸

Thus, unilateral drafting and unilateral action within the contract stand in the way of the possibility to rely on contractual autonomy as guaranteeing an acceptable content. The fact that the BAG seems to assimilate instances of structural imbalance (the *gestörte Vertragsparität* stricto sensu) to non-negotiated terms and to cases where the employer has or exercises unilateral prerogatives points to one essential characteristic of *Inhaltskontrolle*,³³⁹ namely the fact that it constantly fluctuates between a genuine weaker party protection concern and the ambition of taming the employer’s unilateral powers as “master of the contract” and of the relationship.³⁴⁰

This duplicity is well reflected in the notion of *Fürsorgepflicht*, that was also occasionally invoked, and in the attempts by the BAG to make extensive use of § 315 BGB (Specification of performance by one party)- which both relate to the contract’s *performance*- to justify *Inhaltskontrolle*. The *Fürsorgepflicht* can be defined as the duty, for the employer, to consider the interests of their employees when exercising their rights under the employment relationship. It is at the same time a remnant of the institutional approach and a response to the personal subordination of the employee.³⁴¹ In more modern terms, it can be described as the specification of the good faith clause of § 242 BGB in the field of employment relationships. Similarly, the idea to assimilate certain contract terms to unilateral employer prerogative as to the determination of the performance and submit it to the *Billigkeitskontrolle* made possible by § 315 BGB when the employee has

³³⁸ BAG 16.3.1994: “Treffen die Arbeitsvertragsparteien eine eigenständige Regelung, so unterliegt eine solche Klausel einer Inhaltskontrolle nach § 138 BGB. Es ist zu prüfen, ob sie gleichermaßen auf beide Parteien des Arbeitsverhältnisses Anwendung findet, ob sie inhaltl. ausgewogen ist und nicht Rechte des Arbeitnehmers einseitig beschneidet.”

³³⁹ This line of arguing by the BAG had been indeed more or less continuously criticized for its lack of doctrinal clarity besides its far-reaching interventions – see Dagmar Coester-Waltjen, “Die Inhaltskontrolle von Verträgen Außerhalb Des AGBG,” *Archiv Für Die Civilistische Praxis*, 1990, 1.

³⁴⁰ See already Lieb’s critical remarks as to the shifting justifications for *Inhaltskontrolle* and control of standard terms at the time of the Standard Terms Act: Manfred Lieb, “Sonderprivatrecht Für Ungleichgewichtslagen? Überlegungen Zum Anwendungsbereich Der Sogenannten Inhaltskontrolle Privatrechtlicher Verträge,” *Archiv Für Die Civilistische Praxis*, 1978, 196.

³⁴¹ See Rudi Müller-Glöge, “BGB § 345 Beweislast,” in *Erfurter Kommentar Zum Arbeitsrecht*, 12th ed., 2012 para 881-891.

accepted a term drafted unilaterally by the employer³⁴² shows the tendency to conflate *Inhaltskontrolle* and control of unilateral powers de facto or de iure exercised by the employer.

4.2.1.4. In search of unity?

In 2000, not long before the approval of the *Modernisierung*, the BAG reviewed its case law on *Inhaltskontrolle*. In a case³⁴³ concerning a conventional limitation period, the court excluded the necessity of an application by analogy³⁴⁴ of the Standard Terms Act because the existing control under the principles developed “by means of §§ 134, 138, 242, 315 BGB”, together with the legal regulation of employment carried sufficient consideration of the need to protect employees. Although applying the AGB-Gesetz is unnecessary and (and at that point in time also) inadmissible, the Court argues, this does not mean that “general ideas that have found their expression in other statutes, as for instance in the Standard Terms Act”, should not be applied.³⁴⁵ Principles developed through labour law adjudication, the BAG continues, should not lose their applicability because in a certain case the contract has not been negotiated but formulated by the employer in the form of standard terms. One instance of such principles is considered immediately afterwards, when considering whether the clause has to be considered as “surprising”. The dogmatic foundation of the exclusion of “surprising clauses”, the BAG explains, is not univocally identified. Some decisions speak of a principle that surprising clauses do not become part of the contract, without anchoring this statement to any legislative provision. This, the BAG observes, is however not different than what the *Bundesgerichtshof* did before the entry into force of the AGB-Gesetz.³⁴⁶

A substantive appreciation of a contentious clause, according to the BAG, requires the concerned court to check whether it is not contrary to good practice, to good faith, to mandatory provisions or to basic principles of labour law. The control, in this case, ascertains whether the clause establishes equal limitation periods for

³⁴² See Westhoff, *Die Inhaltskontrolle von Arbeitsverträgen*, 62. with further references.

³⁴³ BAG 13.12.2000, 10 AZR 168/00

³⁴⁴ “Es ergibt sich auch keine praktische Notwendigkeit für eine analoge Anwendung des AGB-Gesetzes, weil die in der Regel anhand der §§ 134, 138, 242, 315 BGB durch die Rechtsprechung entwickelten arbeitsrechtlichen Grundsätze und die übrigen vorhandenen gesetzlichen Regelungen dem Arbeitnehmerschutzgedanken des Arbeitsrechts hinreichend Rechnung tragen”.

³⁴⁵ *Ibidem*, under b).

³⁴⁶ In the end, though, the decision proceeds to anchor the prohibition of surprising terms in the principle of *Treu und Glauben* as enshrined in § 242 BGB.

both parties, whether it is justified, not exceedingly short³⁴⁷ and whether *it does not unreasonably disadvantage the employee*. The latter is, incidentally, the same wording used in the Standard Terms Act.

The reasoning adopted by the BAG in this circumstance is instructive as to the complex relationship between judicial control and the legal regulation of non-negotiated contracts: although neither the principles developed by the *Bundesarbeitsgericht* nor the case-law of the *Bundesgerichtshof* were developed exclusively in relation to non-negotiated contracts, the vicinity between the control regulated by the ABGB and the “judicial principles” developed under various provisions is obvious. However, the Court is not ready to consider the *Bereichsausnahme* of § 23 as pre-empting the continued control of potentially unfair terms.

This variety of interventions,³⁴⁸ which had been condemned as “*dogmatisch unbefriedigend*”,³⁴⁹ has been brought to unity by the inclusion of employment contracts within the reach of §§ 305-310 BGB.

4.2.2. The *Schuldrechtsmodernisierungsgesetz* and judicial control of non-negotiated employment contracts

The 2001 reform of the German law of obligations, also referred to as *Modernisierung*,³⁵⁰ led to the incorporation of unfair terms rules in the German Civil Code (Bürgerliches Gesetzbuch, henceforth BGB). Until that moment, as mentioned, the subject was regulated by the 1976 Standard Terms Act. Under its provisions, terms contained in standardised contracts or *Allgemeine Geschäftsbedingungen*, which were used or were meant to be used for multiple transactions, could be subject to judicial control. After the 1993 Directive was

³⁴⁷ Interestingly, the parameters for this particular prong will change shortly after this decision. In this case, considering existing collective agreements and the legal limitation periods, the BAG considered the term as acceptable; however, after the *Schuldrechtsmodernisierungsgesetz*, which will make the default limitation period longer, the changed statutory Leitbild will lead the BAG to require longer conventional periods.

³⁴⁸ For instance, the good morals provision of § 138 BGB was invoked against exceedingly high restitution-of-bonus terms, or exceedingly broad non-competition clauses; but terms of the same kind could also be declared to go against Article 12 of the *Grundgesetz*, which protects the individual’s freedom to choose their occupation, and be seen as falling under the remit of § 242.

³⁴⁹ Gregor Thüsing, *AGB-Kontrolle Im Arbeitsrecht* (Beck, 2007), 11. See *ivi* for further account of the previous evolution.

³⁵⁰ Gesetz zur Modernisierung des Schuldrechts adopted on 26 November 2001 (BGBl. I page 3138), which entered into force on 1 January 2002.

implemented, in the case of contracts concluded with consumers, not only such standardised contracts³⁵¹ but all *non-negotiated* terms could be tested for unfairness. Insofar as § 23 of the 1976 Act made direct application of the act to employment contract impossible, the exclusion was removed thanks to the 2001 reform.

During the process leading to the *Modernisierung*, the issue of judicial control of employment contracts was not the object of much debate. Short before the reform text was approved, though, the German Senate (*Bundesrat*)³⁵² suggested that the “branch exclusion” should be lifted for employment contracts. In its response, the Government concurred with the Senate’s suggestion. It observed that “*the case-law of the Bundesarbeitsgericht relative to contractual rules shows that contractual freedom ‘left to itself’ is not on the whole suited to ensure workers a sufficient protection against unfair contract terms*”.³⁵³ The proposal to lift the exclusionary provision of § 23 AGB-Gesetz was, still according to the Government, in particular meant to secure that the protection of employees concerning the control of contractual content would not lag behind the level of protection achieved in civil law³⁵⁴. At the same time, the measure would put an end to the legal uncertainty generated by the absence of clear indications as to the kind of control to be exercised by Labour courts.³⁵⁵

The implicit acknowledgement that *some* control was already being exercised by labour courts was not made for the first time. We have seen above that already the drafters of the 1976 Standard Terms Act were aware that some form of judicial control was likely already taking place in this and other excluded fields. Awareness of this activity was clearly mirrored in the parliamentary report accompanying the Act: the exclusionary provision of § 23 should not mean that

³⁵¹ That is, contracts intended for multiple use; as a rule of thumb, multiple use meant that they were intended to be used at least three times.

³⁵² On the suggestion of one *Land*: see Hans-D Hensen, “Zu Entstehung des AGB-Gesetzes,” in *Recht im Spannungsfeld von Theorie und Praxis: Festschrift für Helmut Heinrichs zum 70. Geburtstag*, ed. Andreas Heldrich, Peter Schlechtriem, and Eike Schmidt, 1st ed. (München: C.H.Beck, 1998), 335–54.

³⁵³ BT-Dr 14/6857 p, 54: “*Das Fall-Material der Rechtsprechung des BAG zu den Arbeitsvertragsmodalitäten zeigt, dass eine “sich selbst überlassene” Vertragsfreiheit nicht in der Lage war, insgesamt einen ausreichenden Schutz der Arbeitnehmer vor unangemessenen Vertragsbedingungen zu gewährleisten.*”

³⁵⁴ *Ibidem*: “*Dadurch wird auch dafür gesorgt, dass das Schutzniveau der Vertragsinhaltskontrolle im Arbeitsrecht nicht hinter demjenigen des Zivilrechts zurückbleibt*”.

³⁵⁵ *Ibidem*: “*Die aus dieser unheimlichen Rechtsprechung entstehende Rechtsunsicherheit sollte durch die Streichung der Bereichsausnahme beseitigt werden.*”

“content control” (*Inhaltskontrolle*) of pre-formulated contracts, such as had been taking place in the excluded domains, would need to stop. For employment contracts, such control³⁵⁶ went on, in not-so-disguised form, throughout the decades leading to the reform of 2001.³⁵⁷ However, the reform was presented as a turning point and the case-law concerning unfair terms in employment contract has seen a steep acceleration since the new rules have come into force.³⁵⁸

Since the *Modernisierung*, the same provisions applicable to consumer contracts give shape, with a few exceptions and adaptations (see *infra*, esp. 4.2.1.), to the judicial control of non-negotiated terms in employment contracts. This is due to the concurrent workings of the end of the branch exclusion and the incorporation of a fairly wide definition of consumer at § 13 BGB. The definition, in fact, considers as consumer “any natural person who concludes a juridical act for a purpose which can be chiefly attributed neither to their trade or business nor to their *independent* professional activity”.³⁵⁹

The *Modernisierung* incorporated the definition of consumer in the BGB, granting it enhanced status and significance within the code’s system. German doctrine, among other things, started to wonder what this meant for employment contracts: were employees to be treated as consumers all the time, i.e. also when concluding employment contracts? For the purposes of unfair terms control, now that the

³⁵⁶ That Karsten Schimdt summarised as “filling the hole” left open by the choice to exclude labour law from the AGB-G Gesetz: “*Die hierdurch gerissene rechtspolitische Lücke wurde durch eine Inhaltskontrolle nach § 242 BGB geschlossen.*” See Karsten Schmidt, “Arbeitsrecht Als Verbraucherrecht? Methodenprobleme Des § 13 BGB Im Lichte Des BAG-Urteils Vom 25.5.2005,” in *Festschrift Für Horst Konzen Zum Siebzigsten Geburtstag*, ed. B. Dauner-Lieb et al. (Munich: Mohr Siebeck, 2006), 867.

³⁵⁷ Traces of this control are still to be found after the entry into force of the “new” Civil Code: In 2003, faced with a case to which the new rules were not yet applicable, the Court stated that “*Ungeachtet der Bereichsausnahme des § 23 AGB-Gesetzes unterliegen arbeitsverträge der allgemeinen richterlichen Inhaltskontrolle*” BAG 9.9.2003, NJW 2004, 1754. “Notwithstanding the exclusionary clause”, according to the *Bundesarbeitsgericht*, a “general content-control” was to be exercised by judges also under old law.

³⁵⁸ See Rüdiger Krause, “Germany: Part I: The Individual Employment Relationship,” in *International Encyclopedia for Labour Law and Industrial Relations*, ed. Roger Blanpain, 2008, paras. 181–185.

³⁵⁹ The new § 13 BGB, which follows the approach of former § 23a AGB-Gesetz, defines a consumer as follows: “*Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu Zwecken abschließt, die überwiegend weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden können*”. The article has been lastly amended to reflect the current EU-level definition of consumer, which covers persons acting *predominantly* outside of the exercise of a trade, business or profession.

domain exclusion had been lifted, did this mean that all the special consumer provisions (or “*luxu AGB-kontrolle*”) of the former AGB-Gesetz had to be applied?³⁶⁰

The answer to the question was not of huge momentum in practical terms – most of the doctrine considered it reasonable to equate the treatment of consumers and workers with regard to certain provisions of consumer law but not to others.³⁶¹ Nonetheless, a debate was sparked between two different concepts of “consumer”: the so-called “*relative Verbraucherbegriff*” (relative consumer notion) and the “*absolute Verbraucherbegriff*” (absolute consumer notion). The former emphasizes the contextual character of consumer protection, which originates from the fact that the consumer is protected when securing for herself goods or services which serve to satisfy their personal needs. In this light, it is the contract’s *objective* which determines the application of protective legislation, not the “protection-worthiness” of the individual.³⁶² An employment contract has a very different objective that has nothing to do with consumption; it engages the employee to fulfil an obligation through their own services. Contrary to classical consumer contracts, in a standard form contract for labour it is from the protected party that the main or “characteristic” performance is expected. Seen through these lenses, the employee could not be considered as a consumer.³⁶³

The competing “absolute” concept of consumer relied on the literal contents of § 13 BGB, together with the legislative history, to claim that an employee has to be considered as a consumer even when entering an employment contract or related

³⁶⁰ Other possible domains where the definition could have a bearing are: the amount of interests to be paid in case of delayed payment according to §§ 288 and 247I BGB; the right of withdrawal for doorstep sales would also be applied to contracts for terminating the employment relationship (*Aufhebungsverträge*) and settlement agreements (*Abwicklungsverträge*); finally, a credit contract between employer and employee with market-like interests could represent a consumer credit contract under §§ 491ff. BGB. Regarding the first issue, the *Bundesarbeitsgericht* has not considered the answer to the question of the “consumer-worker” as necessary in order to avoid application to employment disputes of the higher interest rate imposed in business relations. See BAG decision of 23.2.2005, NZA 2005, 694.

³⁶¹ This observation is to be found in Ulrich Preis, “Ausgewählte Fragen Der AGB-Kontrolle Im Arbeitsrecht,” in *Inhaltskontrolle Im Arbeitsrecht, Zwischen Zivilrecht Und Arbeitsrechtlichen Besonderheiten*, ed. Barbara Dauner-Lieb, Henssler, Martin, and Ulrich Preis, Nomos (Munich, 2006), 65.

³⁶² See G. Ring, *Nomos Kommentar zur BGB*, art. 13, 14, 2 Auflage, 2012, p.80.

³⁶³ There seems to be, in the literature, a certain emphasis on the “structural difference” between employment contracts and “classical” consumer contracts, based on the fact that the employee offers their services rather than requiring services for themselves.

agreements. As we have seen, when proposing to subject employment contracts to judicial control, the government explicitly stated that the innovation was meant to ensure that the level of *Inhaltskontrolle* for the protection of employees would not lag behind the level afforded by general private law³⁶⁴. Of course the formulation of the provision was inelegant, since it introduced in the consumer-professional dichotomy a third element, the non-independent worker, which traditionally belonged to a different couple, that of *Arbeitnehmer* and *Arbeitgeber*.³⁶⁵ The doctrine could, thus, not find a clear agreement on the interpretation of § 13 BGB.

Some clarity, though, has been achieved after BAG 25.05.2005³⁶⁶, which explicitly declared an employment contract as one “between a professional and a consumer” under § 310(3) BGB.³⁶⁷ The court explains this outcome by stating that the term

“Consumer” represents only a juridical technical umbrella-concept (“rechtstechnischen Oberbegriff”). A consumption objective, as is typical for sale and credit contracts, is not required. With the definition of consumer the legislator detached itself from the common use of language (“allgemeiner Sprachgebrauch”) opting for an independent comprehensive determination of the concept. Its meaning descends in each case from the connection of provisions based on the qualification of someone as a consumer”³⁶⁸.

As shown in the passage above, the BAG opted for staying true to the literal sense of the definition. In particular, this is not too surprising with reference to unfair terms control – which is the area to which the consumer definition originally

³⁶⁴ *Supra*, at fn. 50. This argument was also mentioned by the court in its decision of 25.05.2005 to ground its own interpretation of the provision, which is accounted below.

³⁶⁵ The latter’s role in the entire discussion is far from clarified. Manfred Lieb quotes this as one qualifying argument of the relative consumer doctrine: “Damit entfällt die starre Zweiteilung Unternehmer/Verbraucher, die keine andere rechtliche Qualifizierung zulässt, und schafft Raum für die Beibehaltung der Sonderbeziehungen zwischen Arbeitgeber und Arbeitnehmer als eines jedenfalls grundsätzlich eigenständigen Schutzbereichs.” See Manfred Lieb, “AGB-Recht Und Arbeitsrecht Nach Der Schuldrechtsmodernisierung,” in *Festschrift Für Peter Ulmer Zum 70. Geburtstag Am 2. Januar 2003*, ed. Mathias Habersack et al. (Walter de Gruyter, 2003).

³⁶⁶ BAG 25.05.2005, NZA 2005, 1111.

³⁶⁷ *Ibid.*, p. 1115, part 5 point 1: “Bei dem Arbeitsvertrag der Parteien handelt es sich um einen Vertrag zwischen einem Unternehmer und einem Verbraucher”.

³⁶⁸ *Ibidem*, a few lines below: “Verbraucher” bezeichnet nur einen rechtstechnischen Oberbegriff. Ein konsumtiver Zweck, wie er für Kauf- oder darlehensverträge typisch ist, wird nicht verlangt. Mit der Definition des Verbrauchers hat sich der Gesetzgeber von dem allgemeinen Sprachgebrauch gelöst und eine eigenständige umfassende Begriffsbestimmung gewählt. Deren Sinn ergibt sich jeweils aus dem Zusammenhang der Normen, die auf die Eigenschaft als Verbraucher abstellen.”

applied. It is, indeed, not obvious that the “characteristic performance” criterion mentioned above would have much to say in terms of determining the scope of the protective rules.

While it is unclear whether including the “consumer-employee” in the general part of the BGB really entailed a “paradigm shift”,³⁶⁹ such a broad definition has a bearing on the *image* of the consumer carried by legal practice. Even the fact – undisputed in the German debate – that the protection should also apply to contracts for the provision of goods or services concluded by the employee for purposes linked to their professional activity³⁷⁰ (a car to go to work, a personal computer and the like)³⁷¹ is enough to break the distinction between private (protected) and (unprotected) “professional” economic activities which lies at the basis of a strict “relative” definition of consumer.³⁷²

³⁶⁹ The adoption of the Arbeitnehmer-Verbraucher theory has been called a “paradigm shift”: see Thomas Schmidt, “„Der Arbeitnehmer-Verbraucher“- Zwischenbilanz Eines Paradigmenwechsels,” in *Tradition Und Moderne - Schuldrecht Und Arbeitsrecht Nach Der Schuldrechtsreform, Festschrift Für Horst Ehmann Zum 70. Geburtstag*, vol. 318, Schriften Zum Bürgerlichen Recht (Berlin: Duncker & Humblot, 2005). According to the author, this shift concerns labour law as a discipline based on the idea of a „kollektivrechtlich abgesicherten privatautonen Rechtsverhältnisses eigener Art“(a *sui generis* private legal relationship secured through the law of collective autonomy, p. 154) as well as general private law, which turns from a “*freiheitliche Zivilrechtssystem privatautonomer Prägung*“ (a liberal system of civil law imprinted by private autonomy) to „*einer alles überlagernden staatlichen Verbraucherschutzrechtsordnung*“ (a comprehensive consumer protection system shaped by the State).

³⁷⁰ *Ibidem* p. 84.

³⁷¹ This hypothesis was explicitly targeted by the government at the time of the reform: in the motivations to the proposal one can read that “*Es sollten aber nicht die Personen aus dem Verbraucherbegriff ausgenommen werden, die als abhängig Beschäftigte eine Sache zu einem Zweck kaufen, der (auch) ihrer beruflichen Tätigkeit dient, z.B. der Lehrer, der sich einen Computer anschafft, um damit Klassenarbeiten zu entwerfen, oder der Angestellte, der eine Kaffeemaschine für sein Büro kauft. Dies gilt auch für die Rechtsbeziehungen des Arbeitnehmers zu seinem Arbeitgeber. Solche Fälle sind nicht mit denjenigen vergleichbar, in denen selbständig am Wirtschaftsleben beteiligten Verträge abschließen. Sie sollen deshalb den besonderen Vorschriften über Verbrauchergeschäfte unterstellt werden.*” (BT Drucks. 14/6040, s. 243).

³⁷² The boundaries of which appear to be somewhat porous also at the EU level: see C-590/17, *Henri Pouwin, Marie Dijoux, v Électricité de France (EDF)*, ECLI:EU:C:2019:232, in which the Court of Justice decided that a mortgage contract concluded between an employee and his employer was a contract between a consumer and a professional.

With that, the separation between different “special private laws” is also put under pressure, reinforcing the harmonisation effect of the choice to move the consumer definition to the BGB.³⁷³

4.2.2.1. Scope

In the post-reform BGB, the control of general terms and conditions (*Allgemeine Geschäftsbedingungen*) is outlined in a section including §§ 305-310 BGB. The core provision in the section is § 307, outlining the unfairness standard; § 308 and 309 contain two lists of forbidden or presumptively forbidden terms. Article 305 defines general terms and conditions (*Allgemeine Geschäftsbedingungen*, AGB) and disciplines the relationship between those and individual contracts.³⁷⁴ Article 306 establishes the consequences of unfairness. We will discuss all these provisions in more detail in the coming sections.

In employment contracts, all non-negotiated terms are subject to control. This includes general terms and conditions – defined by as § 305(1) as pre-formulated terms intended for use in a multiplicity of future contracts – as well as non-negotiated terms meant for single use. The scope is broader than what is envisaged by the general rule of § 307(1),³⁷⁵ as a consequence of the inclusion of employees within the definition of “consumer”.³⁷⁶ While in practice the difference is small – most non-negotiated terms are indeed meant for repeated use, and anyway the distinction makes little sense from the perspective of the consumer-employee – the expansion arguably reflects different rationales for adopting judicial control.³⁷⁷

³⁷³ Not everyone has interpreted the move as an upgrade for consumer protection: see Micklitz, “The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law,” 2012.

³⁷⁴ Together with the additional rules of §§ 305a, 305b and 305c.

³⁷⁵ Which subjects “terms in general terms and conditions” to the unfairness test.

³⁷⁶ According to § 310(3), § 305c par. 2 and §§ 306-309 are applicable to all terms in consumer contracts that are provided by the professional. The provisions not applicable when no AGB are concerned are those on incorporation of terms and conditions in the individual contract, part of that on surprising and ambiguous terms (but the *contra proferentem* rule applied) and finally the precedence of individual agreements over standard terms. In the latter case it is quite easy to see that a similar rule is based on the existence of a generalised use of the terms and conditions capable of making sense of the distinction between individual and standard clauses. Furthermore, still under § 310(3) when standard terms are used, they are considered as provided by the employer unless the employee has inserted them in the contract.

³⁷⁷ See Phillip Hellwege, “It Is Necessary to Strictly Distinguish Two Forms of Fairness Control,” *Journal of European Consumer and Market Law* 4, no. 4 (2015): 129–134.

While the scope of control is thus in a way expanded, § 310 also partially restricts it by excluding the application of the procedural requirements of § 305 (2)³⁷⁸ BGB to the inclusion of standard terms in an employment contract. The section, where applicable, submits the valid incorporation of standard terms to the provision of preliminary information concerning their existence and to the possibility for the counterpart to gain knowledge of their content. When such conditions are not met with regard to a given individual contract, standard terms are considered as not included in the contract. Such incorporation control is not applicable to employment contracts. Since the excluded requirements aim at ensuring the counterpart's awareness of the inclusion of standard terms, it is possible that the legislator relied in this matter upon the provisions of the so-called *Nachweisgesetz*,³⁷⁹ implementing Directive 1991/533 EC.³⁸⁰ According to that law, the employer must provide the employee a statement of the latter's working conditions within one month of commencement of the employment. It has been observed, however, that this requirement may not suffice for the purposes of AGB regulation since, on the one hand, this communication (or the lack thereof)³⁸¹ has no effect on the validity of the terms and conditions about which it informs; on the other hand, seen that it explicitly provides that the information has to be given *at most one month later* than the beginning of the relationship, it is clear that the provision is not directed to building free and informed consent at the moment of entering the contract.³⁸² Furthermore, the exclusion commanded by § 310 (4)

³⁷⁸ Section (3) concerns the possibility for the parties to agree, beforehand, on the incorporation of general terms and conditions in a given type of contracts. In other words, the provision allows the parties to establish the use of a specific set of terms in the context of a framework contract. This exclusion does not require much explanation and does not appear to impact the analysis to be carried out here and will thus not be further discussed.

³⁷⁹ Gesetz über den Nachweis der für ein Arbeitsverhältnis geltenden wesentlichen Bedingungen, 20.7.1995 (BGBl. I p 946).

³⁸⁰ Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18.10.1991, p. 32–35

³⁸¹ Unlike respect or violation of § 305 (2). As a matter of fact, the Directive itself set no sanction for its violation at the hands of private parties.

³⁸² § 310 para 4 Michael Coester et al., "J. von Staudingers Kommentar Zum Bürgerlichen Gesetzbuch Mit Einführungsgesetz Und Nebengesetzen," 2007, 757. Indeed the Directive's recitals do not directly refer to informed consent. Harmonization is justified on the basis of the need to avoid disparities among member states, given that some - but not all- MS "have considered it necessary to subject employment relationships to formal requirements [...]". The aims of the national legislations are "to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market". The latter may or may not refer to *pre-contractual* transparency.

applies both to the requirement that the incorporation of standard terms should be made known/knowable to the counterpart *and* the necessary approval of this incorporation by the latter party. The *Nachweisgesetz* contains no provision to this respect.³⁸³

4.2.2.2. Interpretation

According to § 305b, individual agreements, including oral ones, take precedence over AGBs even when a written form requirement has been stipulated in the contract. The BAG has stated that the provision does not apply to company practices, the relevance of which can be excluded by the standard terms since they are not individual agreements. This distinction has been criticised³⁸⁴ on the basis of many arguments. *Prima facie*, it can seem questionable whether such delimitation is compatible with the provision's aims, which combine the promotion of individual negotiation and protection against avoidance of other provisions. Furthermore, from the very perspective of unfair terms control, a stipulation excluding the contractual relevance of company practices could amount to a "surprising" term in contrast with the employee's justified reliance aroused by the company's practices. According to § 305c, indeed, surprising and ambiguous terms included in AGBs do not become part of the contract. This is the case, according to the first section of § 305(c), for terms which, considering the circumstances of the case³⁸⁵ (and especially the contract's appearance), are so unusual that the proponent's counterpart does not need to take their existence into account.

The second section of § 305(c) commands interpretation *contra proferentem* in case of doubt as to the meaning of a term.

³⁸³ See to this point and for further elaboration Detlev Joost, "Allgemeine Geschäftsbedingungen Und Arbeitsvertrag—Ein Beispiel Für Eine Missglückte Gesetzgebung," *Festschrift Für Peter Ulmer Zum 70* (n.d.): 1200–1202.

³⁸⁴ § 310 para 4 Coester et al., "J. von Staudingers Kommentar Zum Bürgerlichen Gesetzbuch Mit Einführungsgesetz Und Nebengesetzen," 758..

³⁸⁵ The issue, which does not seem to present particular hurdles in the context of labour contracts and BAG adjudication, will not be treated in a separate paragraph. The German approach- which can has been brought down by Stoffels to the motto "*Clausolae insolitae inducunt suspicionem*", "unusual terms attract suspicion"- seems to have had enough time to stabilise during the 20th century. As a consequence, the application of AGB-control to employment contracts has basically not brought any change to the status quo. For an elaborate account, see Markus Stoffels, "Der Schutz Vor Überraschenden Vertragsbestimmungen," *Gedächtnisschrift Für Manfred Wolf, Hrsg. von Jens Dammann, Wolfgang Grunsky, Thomas Pfeiffer, München, 2011, 157–67.*

4.2.2.3. Inhaltskontrolle

The core of the regulation is to be found at § 307. This provision is made of three paragraphs. The first one introduces a general rule according to which a term can be struck as invalid; the second and third paragraphs specify the general rule. The provision is further supplied by two lists of presumptively unfair terms in §§ 308 and 309. It is § 307, however, that represents the core of the *Inhaltskontrolle* (“content control”) as established in the BGB. Given its importance, the text of the article will be reproduced here and analysed in detail.

Under § 307, a clause which determines “an unreasonable disadvantage” (*Unangemessene Benachteiligung*), contrary to good faith, for the user’s contractual partner is ineffective. The second paragraph of § 307 provides a first specification of the test: in case of doubt, an unreasonable disadvantage exists

1. when the clause is incompatible with the fundamental principles underlying the rules from which it deviates or
2. when it envisages results, which endanger the contract’s function (*Zweck*).

Furthermore, according to the third paragraph, the unfair disadvantage can arise also from a “formal” circumstance, namely the fact that a term is not “clear and comprehensible”. This latter requirement is not further specified in the provisions, but was well-known in Germany at the time of the reform.³⁸⁶

Furthermore, §310(3) n.3 establishes that, in “consumer” contracts, the circumstances surrounding the contract’s conclusion need to be considered. In its case-law, the BAG lists in particular “personal characteristics of the individual contract parties having an impact on their bargaining power, specificities of the concrete situation and a-typical specific interests of the party.”³⁸⁷ The list has been drafted by the BAG as an “operationalization” of recital 16 of the Unfair Terms

³⁸⁶ Already at that point, the transparency requirement was considered to encompass three elements, namely a comprehensibility requirement; a demand for determinacy in the clauses’ wording; finally, a prohibition of deception – see Heinrichs, FS Trinkner, 1995, p. 157, 166 ff. We will see *infra* that these requirements are reflected in the BAG case-law concerning unfair terms control.

³⁸⁷ see BAG 31.8.2005, NZA 2006, 324, which lists “[...] insbesondere (1) persönliche Eigenschaften des individuellen Vertragspartners, die sich auf die Verhandlungsstärke auswirken, (2) Besonderheiten der konkreten Vertragsabschlussituation, wie z.B. Überrumpelung, Belehrung sowie (3) Untypische Sonderinteressen des Vertragspartners.”

Directive,³⁸⁸ following leading German scholars – which the Court explicitly mentions as the source of its position,³⁸⁹ with the idea of providing a “*richtlinienkonforme Auslegung*” of § 310III Nr. 3 BGB.

The third section of §307 introduces a significant limitation to the operation of *Inhaltskontrolle*, stating that the latter only applies to conditions derogating from or supplementing default rules; other terms may only be declared invalid under the transparency requirement, read in conjunction with the general rule on unfairness. This limitation is read as aiming at exempting from control both terms reproducing legal rules and agreements regarding price. The latter are, in principle, by definition left to party autonomy within a market system and hence are usually not the subject of default rules.³⁹⁰ In this context, one must keep in mind that a number of general principles – such as *pacta sunt servanda* – are also considered to be provisions that contract terms may be derogating from, hence expanding the scope of control. Furthermore, in the field of employment contracts, collective agreements at various level are equalled to law to the ends of the section and are therefore exempted from control under the general clause of § 307 – but in some cases they may also work as “default rules” that terms are derogating from under § 307(3).

³⁸⁸ Which reads: “*Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account*”.

³⁸⁹ In the main decision on the point, BAG 31.8.2005, NZA 2006, 324 the Court recalls Stoffels, AGB-Recht Rdnr. 478; Palandt Heinrichs, BGB, 64. Aufl., § 310 Rdnr. 21; Brandner , in Ulmer/Brandner/Hensen, AGB-Gesetz, 9. Aufl., § 9 Rdnr. 179).

³⁹⁰ The Unfair Terms Directive contains two different provisions to this purpose: article 1 paragraph 2 excludes laws and international agreements from the act’s scope; article 4 paragraph 2 excludes the contract’s main object and the adequacy of the price and remuneration. It is considered “not for the least part” (“*nicht zuletzt*”) an effect of German influence that this exclusion appeared in the last phase of the Directive’s drafting. See Gerick von Hoyningen-Huene, “Unwirksamkeit von AGB Bei Bloßer Intransparenz,” *In: Lebendiges Recht–Von Den Sumerern Bis Zur Gegenwart Festschrift Für Reinhold Trinkner, Heidelberg, 1995*, 189.

When it comes to operationalising the notion of “reasonable impairment”, reference is often made to the parties’ rights and interests:

“Unreasonable is any impairment of a legally recognised interest of the employee which is not justified by a well-founded and protection-worthy interest of the employer or counter-balanced by a corresponding advantage.”³⁹¹

In other cases, the BAG opts for a slightly different formulation, declaring that an unreasonable disadvantage exists *“when the proponent, by means of unilateral drafting, tries to abusively pursue their own interest at the expenses of their counterpart, without sufficiently considering their interest and without offering them an appropriate compensation.”*³⁹² The parties’ competing interests, according to standing case-law, have to be balanced in a general way, independent of the specific circumstances of the case, having in mind the “typical” parties to the kind of contract concerned.³⁹³ Some decisions specify that where similar terms are employed for different classes of contracts, the control has to be structured along “groups” of cases or contracts typically expressing the factual interests at stake.³⁹⁴ The

³⁹¹ *“Unangemessen ist jede Beeinträchtigung eines rechtlich anerkannten Interesses des Arbeitnehmers, die nicht durch begründete und billigenwerte Interessen des Arbeitgebers gerechtfertigt oder durch gleichwertige Vorteile ausgeglichen wird”.* See e.g. BAG 13.12.2011, BeckRS 2012, 67608 n. [22] - # AZR 791/09. See also BAG 19.1.2011, NZA 2012, 85, with reference to 8.8.2007, 7 AZR 855/06. BAG 8.8.2007, indeed, links the enunciation to precedents of the Bundesgerichtshof, namely BGH 14.1.1987, NJW 1987, 2431 and more recent cases like BGH 4.7.2011, NJW 1997, 3022.

³⁹² BAG 14.09.2011, NZA 2012, 81 n. [33]: *“[...] wenn der Verwender durch einseitige Vertragsgestaltung missbräuchlich eigene Interessen auf Kosten seines Vertragspartners durchzusetzen versucht, ohne von vornherein auch dessen Belange hinreichend zu berücksichtigen und ihm einen angemessenen Ausgleich zu gewähren.”* The same wording can also be found in BAG 21.06.2011, NZA 2011, 1338, ;BAG 18.03.2008, 9 AZR 186/07, NZA 2008, 1004; BAG 10.01.2007, AP BGB § 611 n.7.

³⁹³ See BAG 13.12.2011, BeckRS 2012, 67608 n. [22] *“Dabei ist ein genereller, typisierender, vom Einzelfall losgelöster Maßstab anzulegen (vgl. BAG 28. Mai 2009 – 8 AZR 896/07 – Rn. 30, AP BGB § 306 Nr. 6 = EZA BGB 2002 § 307 Nr. 45). Es kommt nicht auf die besonderen Umstände des Einzelfalls, sondern auf die typische Sachlage an (vgl. BGH 29. Mai 1991 – IV ZR 187/90 – zu II 3 a der Gründe, NJW 1991, 2763). Abzuwägen sind die Interessen des Verwenders gegenüber den Interessen der typischerweise beteiligten Vertragspartner unter Berücksichtigung der Art, des Gegenstandes, des Zwecks und der besonderen Eigenart des jeweiligen Geschäfts (vgl. BAG 2. September 2009 – 7 AZR 233/08 – Rn. 28, aaO; 19. Januar 2011 – 3 AZR 621/08 – Rn. 27, EZA BGB 2002 § 611 Ausbildungsbeihilfe Nr. 15).”*

³⁹⁴ See BAG 18.01.2006, BeckRS 2006, 42082: *“Werden Allgemeine Geschäftsbedingungen für verschiedene Arten von Geschäften oder gegenüber verschiedene Verkehrskreisen verwendet, deren Interessen, Verhältnisse und Schutzbedürfnisse unterschiedlich gelagert sind, kann die Abwägung zu gruppentypisch unterschiedlichen Ergebnissen führen. Sie ist innerhalb der Vertrags- oder*

generalisation is therefore only partial, and has to depart from a subset of the reality which appropriately approximates the circumstances of the case: both the employer's interests to be considered and the competing ones may be very different for different sectors and segments of the labour market. In contrast to its case-law under the general good faith clause of §242 BGB,³⁹⁵ the BAG has clarified that the assessment concentrates on the terms: whether or not the employee is worthy of protection in a specific case is immaterial, if the term is unfair.³⁹⁶

According to second part of § 307 (1), a term may also be invalid because it is not clear and comprehensible. That lack of transparency could affect the validity of a contractual term, indeed, was not a novelty to German law at the time of the reform. Already in 1987 one contribution stated that "The duty of transparency has to be considered as a principle informing the entire Standard Terms Act".³⁹⁷ After the *Modernisierung*, this principle finds concrete expression in two provisions: § 305(2) and § 307 BGB,³⁹⁸ the latter's formulation having been adapted during the reform process to codify the requirement introduced by the case-law on § 9 AGB-Gesetz.³⁹⁹ Since, as mentioned above, the rules concerning standard terms incorporation do not apply to employment contracts, reflections concerning the relation between the requirements set from this latter provision and § 307 are

Fallgruppen vorzunehmen, die nach der and dem Sachgegenstand orientierten typischen Interessenlage gebildet werden."

³⁹⁵ BAG 24. 6. 2004 – 6 AZR 383/03.

³⁹⁶ BAG, Urteil vom 11.04.2006 - 9 AZR 610/05.

³⁹⁷ Trinkner/Wolfer, BB 1987, p. 425 ff at 428 (quoted by von Hoyningen-Huene, "Unwirksamkeit von AGB Bei Bloßer Intransparenz."), my translation. The original sentence reads "Das Transparenzgebot muss als ein das gesamte AGB-Gesetz beherrschendes Prinzip angesehen werden". Köndgen defined the requirement a "tragendes Prinzip" (guiding principle) of standard terms legislation. See Johannes Köndgen, "Grund Und Grenzen Des Transparenzgebots Im AGB-Recht-Bemerkungen Zum 'Hypothekenzins-' Und Zum 'Wertstellungs-Urteil' Des BGH," NJW, no. s 943 (1989).

³⁹⁸ According to Heinrichs, the principle was already embodied in the Standard Terms Act by the two lists of forbidden terms at §§10-11 AGB-Gesetz, "in denen fehlende Klarheit oder Durchschaubarkeit der entscheidende oder zumindest ein mitentscheidender Grund für die Unwirksamkeit der Regelung ist". Among the terms for which intransparency is ground of unfairness, the Author lists, *inter alia*, periods the duration of which is not sufficiently determined, conditions for termination, open-ended clauses allowing a third party to enter the contract. See Helmut Heinrichs, "Das Transparenzgebot Und Die EG-Richtlinie Über Mißbräuchliche Klauseln in Verbraucherverträgen," *Lebendiges Recht–Von Den Sumerern Bis Zur Gegenwart, Festschrift Für Reinhold Trinkner Zum 65 (1995):* 161–62.

³⁹⁹ The principle was notably affirmed by the *Bundesgerichtshof* in its seminal decisions BGH 24.11.1988, NJW 1989, 222 and BGH, NJW 1989, 530 an BGH 17.1.1989, NJW 1989, 224.

of little interest here.⁴⁰⁰ It certainly is interesting to notice, though, that this circumstance tends to increase the role of the transparency requirement of § 307. The latter, in truth, seems to represent the only check on the bridge between substantive and formal correctness of AGBs in our subject.

What is the role of transparency in the unfairness test, then? The majority opinion, among German scholars, seems to be that lack of clarity/comprehensibility of a term can only lead to a declaration of nullity when it is coupled by substantive disadvantage for the proponent's counterpart.⁴⁰¹ The disadvantage, however, does not have to derive directly from the clause itself, rather from the fact that - due to lack of transparency - the counterpart cannot properly know or assess their own rights and duties and, as a consequence, the benefits and shortcomings arising from the contract.

Transparency encompasses some comprehensibility in the literal sense of the word, a degree of (pre-) determination of the contract's contents⁴⁰² and a prohibition of deception.⁴⁰³ Formal transparency must be understood in light of the aim of the requirement - which is not pre-contractual information but making sure that the employee is not prevented from exercising their rights. This explains the BAG's apparently harsh statement that *"the fact that the worker has no possibility, or only an aggravated possibility, to understand the relevant regulation, does not in itself constitute a breach of the transparency requirement"*.⁴⁰⁴ We have seen above that article 310(4) excludes the application of the incorporation requirements of §305II BGB to contracts in the field of labour law. This means that standard terms can legitimately become part of an employment contract even if they have not been brought to the attention of the employee or they have otherwise not been aware

⁴⁰⁰ For a reflection based on the then-in-force corresponding AGB-Gesetz provisions, §§ 2 (incidentally, 3, 5) and 9 AGB-Gesetz, see Heinrichs, "Das Transparenzgebot Und Die EG-Richtlinie Über Mißbräuchliche Klauseln In Verbraucherverträgen."

⁴⁰¹ M. Wolf in Wolf/Horn/Lindacher (fn. 14), § 9 AGB-Gesetz, par. 146; Brandner, in Ulmer/Brandner/Hensen (fn. 14), § 9 AGB-Gesetz, par. 19; Palandt/Heinrichs (fn. 18), § 9 AGB-Gesetz, par. 15; Ermann/Hefermehl, § 9 AGB-Gesetz, par. 19. *Contra* F. Graf von Westphalen, Vertragsrecht und Klauselwerke, 1993, "Transparenzgebot" (fn 26), par 12. A yet different position is put forward by Köndgen, who refused the distinction between formal and substantive unfairness on the basis that, at the very least, every form of intransparency damages the counterpart in depriving them of the chance to seek for a better deal on the market. See his contribution in NJW 1989, 943 (at 950).

⁴⁰² With an eye to the long-term dimension of labour contracts, which incorporates some structural leeway for employer's discretionary action.

⁴⁰³ Heinrichs, FS Trinkner, 1995, p. 157, 166 ff.

⁴⁰⁴ BAG 14.03.2007, NZA 2008, 45

of them. A strict transparency requirement, demanding that the employee be able to “make sense” of the standard terms before entering the contract, would be liable to turn into a backdoor through which the excluded incorporation control could sneak in. In the same line of reasoning, contradictory contents will generally be considered as a source of intransparency in the sense of § 307 I 2 BGB since they make the other party’s legal stand, so to say, *objectively* unclear and not only hardly recognisable to the party herself.

Next to such formal clarity, transparency entails a so-called “*Bestimmtheitsgebot*” (determinacy requirement): “the factual prerequisites and legal consequences must be so precisely described that no unjustified margins for discretion should be left to the drafter.”⁴⁰⁵ The requirement is not absolute: the term has to describe the rights and obligations of the contractual partner as clearly as possible to the extent that it is legally and factually reasonable.⁴⁰⁶

When the impossibility of recognising the rights and duties emerging from the contract – and the subsequent impediment in the exercise of legal rights – are due to misleading or erroneous description of the juridical reality, the clause can finally be seen as violating the prohibition of deception. This category may appear to be less relevant for the domain of work relations, where for instance the designation of a contractual type other than the one fitting the relation’s concrete operation⁴⁰⁷ can be simply set aside by the judge ascertaining the discrepancy. In fact, it has on occasion been used to set aside terms which sought to exclude the possibility of modifying a contract by means of an oral agreement. The exclusion being incompatible with the prevalence of individual agreements over standard terms stipulated by art § 305b BGB, the term was liable to mislead the employee as to the

⁴⁰⁵ BAG 14.03.2007, NZA 2008, 45: “*Das] Transparenzgebot schliesst das Bestimmtheitsgebot ein. Danach müssen die tatbestandlichen Voraussetzungen und Rechtsfolgen so genau beschrieben werden, dass für den Verwender keine ungerechtfertigten Beurteilungsspielräume entstehen*”.

⁴⁰⁶ Brandner called this a “demand of maximum possible determinacy” in the drafting of contractual rules, *Anforderung größtmöglicher Regelungsbestimmtheit*. A term’s content does not have to be clear and plain in absolute terms where such absoluteness is not achievable, but it has to be as clear as the circumstances allow. See H. E. Brandner, “Transparenz Als Maßstab Der Inhaltskontrolle? Ein Problemskizze,” in *Festschrift Für Horst Locher Zum 65. Geburtstag P. Löffelmann Und H. Korbion*, ed. P Löffelmann and H Korbion (Werner-Verlag, 1990), 317–24.H..

⁴⁰⁷ Graf von Westfalen and Thüsing, in Graf Von Westfalen, *Vertragsrecht und AGB-Klauselwerke...* par. 26 mention the case “*wenn der AGB-verwender den zu Grunde liegenden Individualvertrag vertragstypologisch falsch einordnet, in dem er einem Vermittlungsvertrag statt eines Reisvertrages vorsieht*”, decided by BGH NJW 1992, 3158, 3161.

extent of their rights and obligations. Terms having this effect are considered as intransparent and thus unfair.

The BAG has been conservative in applying the “circumstances” prong to the transparency assessment: *“In assessing whether a term complies with the transparency requirement, one must not take the view of a fleeting observer but that of an attentive and cautious market participant.”*⁴⁰⁸ Courts may have to reach a different conclusion when *additional* circumstances are present – such as express pressure by the employer for the employee to sign the contract before requesting a translation, or an assurance that the contract does not include any terms that were not already discussed between the parties.⁴⁰⁹ Giving more general weight to the employee’s – in one case, linguistic – incompetence would make the validity of standard terms – irrespective of their content – be made ultimately contingent on the condition that their content could be understood by their concrete addressee. This, according to the BAG, would create legal uncertainty and run contrary to the idea that content control happens according to a generalising standard, which is only *complemented*, but not displaced, by the consideration of individual circumstances.⁴¹⁰

If § 307 is without much doubt to be considered the most important pillar of *Inhaltskontrolle*, a few more words will have to be spent here to give an account of the two following provisions, §§ 308 and 309. Lists of forbidden terms were already present in the AGB-Gesetz when it was introduced. As a consequence, when Directive 93/13 had to be implemented, there was no large controversy about the fate of its Annex, which the Member States were free to consider or ignore. The two provisions in their current shape provide one list of *Klauselverbote mit Wertungsmöglichkeit* (prohibition with the possibility of evaluation, § 308) and

⁴⁰⁸ BAG 25. 9. 2008 – 8 AZR 717/07 para 50: *“Bei der Beurteilung, ob eine Regelung dem Transparenzgebot genügt, ist nicht auf den, sondern auf den aufmerksamen und sorgfältigen Teilnehmer am Wirtschaftsverkehr abzustellen (Palandt/Grüneberg 67. Aufl. 2008 § 307 BGB Rn. 19).”*

⁴⁰⁹ *Ibidem* para 68.

⁴¹⁰ *Ibidem* « Die Sprachunkundigkeit des Arbeitnehmers zählt als persönliche Eigenschaft zwar grundsätzlich zu derartigen Begleitumständen [...], kann allerdings allein nicht zu einer Unwirksamkeit von Vertragsbestimmungen führen, die einer Inhaltskontrolle nach abstrakt-generellen Kriterien standhalten. Sonst stünde die Wirksamkeit jeder Allgemeinen Geschäftsbedingung - unabhängig von ihrem Inhalt - letztlich unter dem Vorbehalt, dass der Klauselinhalt von dem konkreten Vertragspartner intellektuell verstanden werden konnte. Dies widerspräche dem abstrakt-generellen Prüfungsmaßstab des § 307 Abs. 1 BGB, der durch § 310 Abs. 3 Nr. 3 BGB lediglich ergänzt, aber nicht vollständig verdrängt wird und führte überdies zu erheblicher Rechtsunsicherheit. »

one containing *Klauselverbote ohne Wertungsmöglichkeit* (absolute prohibition, § 309).

Unlike in business-to-business contracts, the application of the black and gray list to labour relations has not been excluded; their relevance, however, is limited by the requirement – under § 310(4) – that the specific features of labour law (“*arbeitsrechtliche Besonderheiten*”) should be taken into account when applying §§ 305-310 BGB to work contracts. This is, on its face, a very open norm.⁴¹¹ Reading the Government’s report accompanying the *Modernisierung* proposal,⁴¹² it seems that the main aim of the clause was precisely to avoid unconditional application of the “black list” of § 309 to employment relations. In this sense, the clause should be considered an entrance door for more freedom of contract and not, as one may instinctively have thought, for less.⁴¹³ Indeed, one notable result of this doctrine has been the validation, against § 309 n. 6,⁴¹⁴ of the use of penalty clauses for the failure to take service and for termination of the contract due to reasons pertaining to the worker.⁴¹⁵ In the first years of its application, commentators have also discussed whether only *legal* features should be taken into account or also factual peculiarities of labour relations.⁴¹⁶ This debate has also virtually ceased after 2005,

⁴¹¹ See BAG 04.03, 2004, NZA 2004, 727, quoting Joost, “Allgemeine Geschäftsbedingungen Und Arbeitsvertrag—Ein Beispiel Für Eine Missglückte Gesetzgebung,” 1199. He defined it as “*in hohem Masse*” (to a large extent) undetermined general clause.

⁴¹² See BT Drucks. 14/6857, p. 54

⁴¹³ See Hanau, “Die Rechtsprechung Zu Den Arbeitsrechtlichen Besonderheiten,” in *Festschrift Für Horst Konzen Zum Siebzigsten Geburtstag*, ed. Barbara Dauner-Lieb (Mohr Siebeck, 2006), 250. See also BT Drucks. 14/6857, p. 54. Both from the context in which it was placed (providing restrictions to the operation of unfair terms control in labour contracts) and the consequences it brought about, it appears that this adequate consideration of labour law’s “specificities” was required by the legislator out of the impression that to some extent the new *Inhaltskontrolle* might be more pervasive than the existing labour law rules.

⁴¹⁴ Which, for consumer contracts, rules out all penalties for a number of cases including termination or withdrawal from the contract (*eine Bestimmung, durch die dem Verwender für den Fall der Nichtabnahme oder verspäteten Abnahme der Leistung, des Zahlungsverzugs oder für den Fall, dass der andere Vertragsteil sich vom Vertrag löst, Zahlung einer Vertragsstrafe versprochen wird.*)

⁴¹⁵ See BAG 04.03, 2004, NZA 2004, 727, *supra* fn. 84. Against this solution was clearly, but in splendid isolation, M. Wolf, “Entwicklungen Im AGB-Recht Und Ihr Einfluss Auf Das Arbeitsrecht,” in *Inhaltskontrolle Im Arbeitsrecht, Zwischen Zivilrecht Und Arbeitsrechtlichen Besonderheiten*, ed. Barbara Dauner-Lieb, Henssler, Martin, and Ulrich Preis (Nomos, 2006), 29.

⁴¹⁶ An interesting side question on this point is whether these “specificities” only matter with regard to the premises of AGB control, or also to its effects: in the case of invalidity, for instance, should courts consider the fact that in labour law invalid clauses used to be reduced

when the BAG opted for the second option; ⁴¹⁷ open, all the same, stays the question of what features will from time to time be considered as *arbeitsrechtliche Besonderheiten* in the application of standard terms control and, as a consequence, towards which directions the clause will stir this control.

4.2.2.4. Consequences of unfairness

As we have seen, under § 307 unfair terms are ineffective. The consequences of such ineffectiveness, as well as of the non-incorporation of AGBs or parts thereof is regulated in § 306. According to this provision, the non-incorporation or (partial) invalidity of AGBs does not affect the validity of the remaining parts of the contract. When a clause falls or is not incorporated, the relevant default provisions apply.⁴¹⁸ The contract is only invalid when upholding it, also taking into account the rule of the preceding paragraph, would generate unbearable difficulties for one of the parties. The provision does not foresee the so called “*geltungserhaltende Reduktion*”, i.e. the possibility to “reduce” the unfair term to a fair one⁴¹⁹ maintaining its validity. The reason for this, is that those who make use of the

to a valid content (so-called *Geltungserhaltende Reduktion*) instead of being thrown away? Hanau, “Die Rechtsprechung Zu Den Arbeitsrechtlichen Besonderheiten,” 253.. Later (p. 255), the author criticises BAG 21.04.2005 (NZA 2005, 1053)- which *inter alia* allows for some form of conservative reduction by means of a “blue pencil-test”. Following Hanau, according to the decision the clause is unbalanced because it is unilateral, punishing only violations on the side of the employee. In truth, the decision (see NZA 2005, p. 1055) only states that *since* the clause is unilateral, the operation of the penalty clause has to take both sides’ interests into account in conformity with good faith. Where this does not happen, and the clause seems meant to foster further interests of the user which are not in connection with the facts, it should be considered invalid for the underlying interest is not worth of protection. Therefore the Court does not misrecognise the “peculiar” position of employer and worker with regard to the effects of non-performance of the specific obligation (to employ/work) but actually goes further in this reasoning, considering that the employer’s interest that the contract is not (grossly) violated is already *specifically* taken into account by the possibility of termination without notice. In such cases, the stipulation of a penalty clause can only be justified by other protection-worthy interests of the employer.

⁴¹⁷ BAG 25.05.2005, NZA 2005, 1111.

⁴¹⁸ This is derived from § 306 (2): *Soweit die Bestimmungen nicht Vertragsbestandteil geworden oder unwirksam sind, richtet sich der Inhalt des Vertrags nach den gesetzlichen Vorschriften*. As far as proper consumer contracts are concerned, this needs to be read in conjunction with the CJEU’s case-law on the consequences of unfairness as discussed in Chapter 3.2.

⁴¹⁹ This is easily comprehensible by taking the example of a penalty clause: if the court finds that a penalty of two months the worker’s salary is too high seen the circumstances of the specific contract, which would only have allowed for a penalty equal to one month of pay, the *geltungserhaltende Reduktion* would consist of substituting the valid penalty (one month) for the invalid one.

advantages linked to standardised contracting by drafting their own terms and conditions should also bear the risk of those terms and conditions being invalid.⁴²⁰ Allowing *geltungserhaltende Reduktion* would entail leaving abuse of contractual freedom unsanctioned, since the drafting party would be not worse off than what they would have been had they not violated the law in the first place. At the same time, in a similar case the drafter's counterpart would only discover what their obligations are under the concerned contract at the end of the adjudication procedure, being exposed to additional inconvenience.

4.3. France

4.3.1. The discreet appeal of unfair terms control

While the wide personal scope of unfair terms control under the Code de la Consommation rules had given rise to speculations as to its applicability beyond typical consumer relations,⁴²¹ the applicability of the consumer unfair terms provision to employment and other work contracts has never really entered the picture. However, the inapplicability of "consumer law" unfair terms control did not leave courts entirely unequipped to perform a *function* similar to that of unfair terms control- albeit in different forms. We will see how several provisions have been mobilized and courts have used a degree of creativity in order to deal with one-sided terms.

What characterizes the French story is the mix of civil law reasoning, labour law rules and seemingly unfettered judicial creativity. One remarkable thread is the argument that contract terms should not too easily deprive workers of their legally acquired rights,⁴²² including the right to have the other party bound by the contracts both parties have entered.⁴²³

Only in more recent years, however, observers of French law had started to notice how the *language* of the courts intervening on contract terms had grown similar to that which we are all acquainted with in the context of consumer law: thus, in 2013

⁴²⁰ See, for a critical analysis of the problem, Ludwig Häsemeyer, "Geltungserhaltende Oder Geltungszerstörende Reduktion," *Festschrift Für Peter Ulmer Zum 70 (n.d.):* 1097.

⁴²¹ In the current version, articles L 212-1 and L 212-2 separately make unfair terms control applicable to contracts between "professionals and consumers" and between "professionals and non-professionals".

⁴²² In this sense, the employment contract has been defined an instrument of *resistance* vis à vis the employer's demands for flexibilisation, external strains etc. See Marion Del Sol, "Le Contrat de Travail: Instrument de Flexibilité et / Ou de Résistance?," *Bulletin Social Francis Lefebvre*, 2002, 269–80.

⁴²³ See infra 4.3.1.2.

it was possible for an author to expressly ask whether the concept of *clause abusive*, which had for a long term been common in French contract law – at that point, way beyond the mere domain of consumer contracts – was on the brink of finding its way into labour law.⁴²⁴ To what extent the reform has brought this penetration to its final destiny is going to be discussed at the end of the chapter.

4.3.1.1. The general provision of Article L. 1121-1 Code du Travail

First, it is appropriate to take a look at judicial control based on the protection of fundamental rights. First introduced in the Code du Travail in 1992 as (then) Article L 120-2, the wording of Article L 1121-1 is particularly general:

“No one can impose restrictions on the rights of individuals and on individual and collective freedoms which are not justified by the nature of the task to be performed or proportionate to the aim that is pursued.”⁴²⁵

The provision extends a limitation originally imposed on company regulations (*règlements d’atelier*)⁴²⁶ to all sorts of actions undertaken in the operation of a business. It applies, thus, to employment and other work contracts. What characterizes the provision is, on the one hand, its reference to rights and liberties; on the other hand, the standard based on which the employer’s actions are scrutinized, namely whether they are justified by the nature of the employee’s task and proportionate to the objective pursued. While the second requirement is arguably close to the rationality of unfair terms control, this is hardly the case for the first. Talking of workers’ “rights and liberties” is evidently not the same as referring to the balance between the rights and duties of both parties to the contract, as unfair terms provisions typically do. While the consumer provisions look at the rights established by the contract and their balance, article 1121-1 Code du Travail relates to rights existing independent of the contract and protects them

⁴²⁴ Anne-Lise Zabel, “Clauses Abusives et Droit Du Travail : Le Concept Issu Du Droit de La Consommation Pénètre-t-Il Le Droit Du Travail ?,” *Petites Affiches*, no. 13 september 2013 n.184 (2013): 6.

⁴²⁵ “Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché.”

⁴²⁶ This was the scope of then 122-35 Code du Travail, introduced in 1982. The provision was first extended beyond the *règlement interieur* in 1992 – see Jean Pélissier, Gilles Auzero, and Emmanuel Dockès, “Droit Du Travail, Précis Dalloz, 27e Édition 2013,” *Droit Social*, no. 10 (2012): 965 para 629.

against different sorts of violations- including those which might take place by means of contract terms.⁴²⁷

Terms that were liable to affect, for instance, the employee's occupational freedom (e.g. non-competition clauses) or their right to freely determine their residence have been scrutinized under article 1121-1 Code du Travail. Thus, in the case of a term requiring a lawyer to establish their residence nearby their law firm, the employee's integration in the "local environment" of the firm's place of establishment was not considered a sufficient reason to interfere with their freedom to choose their place of residence.⁴²⁸ Also the practice of requiring employees to return a bonus that they have received from the employer at the end of a year if they resign early during the following year is problematic under this provision, since it restricts the employee's occupational freedom.

The rule of Article 1121-1 Code du travail, then, bears significant differences and important similarities to unfair terms control. On the one hand it resembles the latter mechanism in its protective intent and, possibly, in the way it focuses on the employer's unilateral (contractual) activity. On the other hand, the requirement that rights *other than the ones created by the contract* are infringed upon both signifies a different rationale – with much simplification, the protection of *certain rights* rather than control of unilateral drafting – rights, which however are not necessarily too difficult to find in employment contracts.⁴²⁹

4.3.1.2. Article 1134 cc and the regime of *clauses de variation*

If article 1121-1 Code du travail can hardly be seen as a rule of contract law, something very different needs to be said about article 1134 Code civil (since 2016 largely article 1103 and 1193), which was also seen as the ground for court intervention in this field. The principle of *pacta sunt servanda* enshrined in the provision – possibly the most iconic contract law provision in the French context – has been mobilised by courts to set strict limits on clauses allowing the employer to change the contract's terms unilaterally (*clauses de variation*, hence: modification clauses). These clauses can take very different forms and affect different elements in the exchange, but usually they are all aimed at allowing adjustments in case the employer's situation should change over time. Classical examples are terms

⁴²⁷ In the French headscarf case recently decided by the Court of Justice, art 1121-1 was one of the standards for testing the employer's position vis à vis the wearing of a headscarf. But in this case no contract terms were at stake. See C-188/15, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole SA*, ECLI:EU:C:2017:204.

⁴²⁸ Cass. soc.12.7.2005 n. 04-13342.

⁴²⁹ See Alain Supiot, *Critique du droit du travail* (Presses Universitaires de France, 2011). The employment contract, after all, always employes the *person* of the employee.

allowing a change in the employee's place of work, in the working time or in the tasks assigned to the employee. Terms establishing a variable remuneration could also fall under this group. Modification terms touching both the employee's and the employer's characteristic obligations will be discussed more in detail in Chapter 5⁴³⁰ with an eye to their functioning and legal regimes. What is most interesting here is to identify the legal basis and main arguments on which the need for limiting their validity have been based.

In a recent decision,⁴³¹ the *Chambre Sociale* of the Court of Cassation (henceforth *Cassation*) seemed to exclude any relevance of modification clauses, as it declared that

*"a term in an employment contract cannot enable the employer to unilaterally modify the employment contract"*⁴³²

The apparently sweeping statement was based on 1121-1 Code du Travail, just discussed here, and article 1134 of the Civil Code (pre-2016 reform). While apparently stark, the 2018 judgment fits within a line of case-law that has been developing at least since the beginning of the century. The validity of modification clauses in general was, in fact, questioned in a rather radical way by the *Cassation* in 2001, with a decision according to which

*"a term by which the employer reserves the right to modify the employment contract, in part or in its entirety, is void as contrary to the requirements of article 1143 second paragraph of the civil code as the employee cannot validly renounce the rights which he has under the law."*⁴³³

As said, article 1134 of the Code civil sanctions the binding force of contract. The provision's second paragraph, recalled in the decision, establishes the irrevocability of contracts, except for the case of mutual consent. This principle includes a prohibition for one party to impose a modification of the contract to the other party during the contract's execution. In this sense, the decision considers the modification clause void inasmuch as it deprives the employee of their right to refuse a change to their contract's terms.

⁴³⁰ See *Infra* 6.2.1. and 6.2.2.

⁴³¹ Cass. soc. 14.11.2018, n. 17-11.757: *"une clause du contrat de travail ne peut permettre à l'employeur de modifier unilatéralement le contrat de travail."*

⁴³² Cass.soc., 14.11. 2018, n. 17-11.757.

⁴³³ Cass. soc. 27.2.2001, n. 99-40219: *"(l)a clause par laquelle l'employeur se réserve le droit de modifier, en tout ou partie, le contrat de travail est nulle comme contraire aux dispositions de l'article 1134, alinéa 2, du Code civil, le salarié ne pouvant valablement renoncer aux droits qu'il tient de la loi"*.

Notwithstanding this general statement, however, we will see that the *Cassation* allows a number of modification clauses to deploy their effects – subject to conditions that depend on the object of the term considered. In particular, clauses establishing a variable remuneration are admitted when the variation is based on objective criteria which are independent of the employer’s will, the variation is not such to shift the entrepreneurial risk onto the employee and the statutory and collective minima are preserved.⁴³⁴ Terms called “of geographical mobility” (*clauses de mobilité géographique*) are also deemed legitimate⁴³⁵ when they determine the size of the area to which they apply. It is not allowed to include a term that reserves the employer the possibility to modify the geographical domain to which the employee’s mobility obligation applies.⁴³⁶ However, clauses affecting the contractually established working time are not allowed when they impact the remuneration – think of someone who is employed to perform night work and would see their salary reduced if they were unilaterally assigned to daytime shifts.⁴³⁷ An important consideration in this respect seems to be that contract terms should not at the same time be used to write down one particular arrangement – be it a certain mobility zone or daytime vs. night-time work – *while at the same time* depriving the stipulation of concrete significance by incorporating a modification clause.

Modification clauses are arguably a sensible instrument for increasing the contract’s resilience in the context of all long-term relationships. However, they undoubtedly introduce an element of uncertainty into the contract and usually their effects are mostly enjoyed by the drafter. They are also not unknown to consumer contracts, and indeed also in that context they are often the object of specific regulation. In the French system of unfair terms control in consumer contracts, terms of this kind are considered both in the “black” list of terms which are always unfair and in the presumptive “grey” list. The relatively wide wording in the black list, prohibiting all terms that “authorise the professional to unilaterally modify the contract’s terms concerning its duration, the character of

⁴³⁴ “Une clause du contrat de travail peut prévoir une variation de la rémunération du salarié dès lors qu’elle est fondée sur des éléments objectifs indépendants de la volonté de l’employeur, ne fait pas porter le risque d’entreprise sur le salarié et n’a pas pour effet de réduire la rémunération en dessous des minima légaux et conventionnels” Cass. soc. 2.7. 2002, n° 00-13111; Cass. Soc. 4.3.2003, n° 01-41864 et 20.4.2005, n° 03-43696.

⁴³⁵ And effective. The Court of Cassation, indeed, has sometimes also refused to identify terms that were not sufficiently explicit. See Paul-Henri Antonmattei, *Les Clauses Du Contrat de Travail* (Wolters Kluwer France, 2009), 49–50.

⁴³⁶ Both requirements are articulated in Cass. soc. 7.6.2006, n. 04-45846.

⁴³⁷ This was indeed the case in Cass. soc. 14.11.2018, n. 17-11.757.

the goods or services to be delivered or their price⁴³⁸ does not mean that all variation clauses are inhibited. The lists, indeed, are followed by exemptions concerning certain long-term contracts.⁴³⁹ For certain services, an explicit exception is carved out in the legislative part of the Code de la consommation. Thus, for instance, not too long ago the Cassation granted avail to terms concerning the possible variation of overdraft interests in contracts for banking accounts.⁴⁴⁰ The usual requirement for these terms to be valid, in consumer law, is that they must be connected to other mechanisms protecting the consumer's free determination – such as the possibility to terminate the contract without penalty – and, often, that they indicate under which conditions a variation will take place.⁴⁴¹

The criteria used to identify acceptable variation clauses, then, seem rather similar in consumer and employment contracts. In both contexts it is necessary to strike a balance between the need for flexibility typical of long-term relationships and the preservation of a reasonable contractual equilibrium, preventing the consumer/employee from being abandoned to the other party's arbitrary will. In this respect, the indication of the parameters according to – or within which – the prerogative will be exercised represent both an instrument of transparency, hopefully allowing the accepting party to know what they can expect, and a substantive guarantee against capricious requests.

The differences which can be identified as to the regime to which certain terms are subject in the two domains do not seem to imply different approaches – in other words, the judicial control of variation clauses seems quite comparable to “consumer law” unfair terms control. In particular, it is interesting to observe that as far as the remuneration is concerned an additional guarantee is added, namely that salary variations have to be based on objective criteria. This requirement is absent in consumer contracts. Arguably, in that context more faith is put in competition: in case the consumer finds the modifications unreasonable, they are

⁴³⁸ Article R 132-1 Code de la consommation considers a term that “*autorise le professionnel à modifier unilatéralement les clauses du contrat relative à sa durée, aux caractéristiques ou au prix du bien à livrer ou du service à rendre*” always invalid. Furthermore, article R 132-2 of the same code establishes a presumption of unfairness when a term “*réserve au professionnel le droit de modifier unilatéralement les clauses du contrat relatives aux droits et obligations des parties (autres que celles interdites)*”.

⁴³⁹ See article R132-2-1 Code de la Consommation.

⁴⁴⁰ See Cass. soc. 23.1.2013, n° 10-21177.

⁴⁴¹ See article L 128-84 *Code de la consommation* and, in the same direction, the Court of Justice's interpretation of the transparency requirement laid down in Directive 93/13. In this respect, I will be forgiven for referring to my own comment: Leone, Transparency revisited – on the role of information in the recent case-law of the CJEU, *ERCL* 2014, p. 312.

entrusted with disciplining the provider by terminating the contract; if a sufficient number of consumers react in the same way, it will be the market response that punishes the provider's arbitrary behaviour.⁴⁴² Relying on a similar mechanism in the domain of employment relations would be much more controversial.

4.3.1.3. The eclectic regime of certain clauses

Finally, it is important to mention that French courts have also developed specific regimes for certain terms, not necessarily based on general principles but as a more express form of judge-made law. While courts have intervened on a larger pool of terms, here we will consider in particular the case of non-competition clauses and so-called "*clauses de dédit-formation*", requiring employees to reimburse their employers educational expenses in case of termination of the relationship.⁴⁴³ The interesting observation in these cases is that both types of terms can be considered sensitive vis à vis the employee's occupational freedom, and thus judicial intervention in this respect can be justified with reference to article L. 1121-1 Code du Travail.⁴⁴⁴ However, courts started "regulating" the validity of these terms without expressly referring to the provision (until 2008, L. 120-2 Code du Travail).

The case of non-competition clauses is exemplary because of the strict principles developed and the fragmentary evolution that has led to the current legal framework. The regime of such clauses is modelled around the case of post-contractual non-compete clauses, i.e. non-compete obligations arising after the termination of the employment contract.⁴⁴⁵ In a landmark 1992 decision,⁴⁴⁶ the *Cassation* articulated broad requirements: non-compete clauses are licit if they protect a legitimate interest of the employer and do not post a grave threat to occupational freedom, taking into account the nature of the employee's activity.⁴⁴⁷ More specific requirements, such as the inclusion of a geographical and temporal

⁴⁴² This observation is confirmed by the fact that, where competition can more obviously not be relied on – as in the case of natural monopolies such as energy supply – the issue of prices becomes more salient and is sometimes subject to specific regulation.

⁴⁴³ These will be further discussed in chapter 6.

⁴⁴⁴ See section 4.3.1.

⁴⁴⁵ Case-law also testifies to the use of non-compete clauses applying already during the time-span of the contract. In this case, the clauses mainly reinforce the duty of loyalty that is normally read into the employment relationship, by e.g. specifying it with reference to certain types of conduct.

⁴⁴⁶ Cass.soc. 14.5.1992, 89-45.300.

⁴⁴⁷ Ivi: "*la clause de non-concurrence destinée à protéger des intérêts légitimes de l'employeur est licite, si elle ne porte pas gravement atteinte à la liberté du travail en raison de son étendue dans le temps et dans l'espace, compte tenu de la nature de l'activité du salarié.*"

delimitation, appeared afterwards. Only in 2002,⁴⁴⁸ finally, did the Court add that a non-competition obligation must be accompanied by the payment of an indemnity compensating the employee for the loss of chances that such obligation entails.⁴⁴⁹ At this point, the *Cassation* expressly referred to then article L. 120-1 Code du Travail. While there is no reference, among the validity requirements as commonly summarised in the literature, to the relationship between the obligation and the nature of the employee's duties, which would be part of the test under that provision, it may well be that this aspect is considered already in the appreciation of the employer's legitimate interest in using the clause.

As concerns the *clauses de dédit-formation*, courts not only have restricted their applicability (only to expenses voluntarily incurred by the employer), but also subject their validity to a number of cumulative conditions (see Chapter 5). The basis for control is assumed to be found in the employee's occupational freedom, of which the freedom to resign is an instantiation.⁴⁵⁰ However, the legal basis is not directly anchored to article 1121-1 and the factors to be considered under that provision are not expressly addressed.

Whereas non-competition covenants and terms of *dédit-formation* are subject to different standards, they share characteristics which may explain the particularly specific regime to which they are subjected. They both concern elements which are not part and parcel of the relationship, but get agreed between the parties due to some specific interest of one or both of them. Therefore, they cannot- or can only partially- be legitimised by reference to some other element in the relationship; they rather have to be *internally* balanced. Thus, the non-competition obligation needs to be granted separate compensation, and the restitution obligation has to relate to specific expenses freely incurred and must be structured in a fair way. While in both cases a background concern seems to exist with reference to the employee's fundamental rights; the specific validity regimes applied to these terms, however, seems to be quite loosely anchored in the standard articulated by Article L 1121-1 Code du Travail⁴⁵¹ - they look rather as attempts to concretise a

⁴⁴⁸ Cass. soc. 10.7.2002, 00-45.135.

⁴⁴⁹ This solution differs from the one retained for commercial agency contracts, where no compensation is required. See article L. 134-14 Code du Commerce. The *Cassation* affirms that the provision's failure to require such compensation must be seen as an explicit choice of the legislator. See Cass. com., 4.12. 2007, n° 06-15.137.

⁴⁵⁰ See section 341 in Pascal Lokiec, *Droit Du Travail Tome I Les Relations Individuelles de Travail*, PUF (Paris, 2011).

⁴⁵¹ With reference to non-compete clauses, Lokiec observes how the obligation to provide compensation tends to obscure, in more recent practice, the other requirements – that is, the one more directly associated with the standard of L.1121-1 Code du Travail.

fairness or balance requirement which is as closely associated with the relationship between the parties as it is with external (fundamental rights) concerns.

4.3.1.4. “Clauses abusives” as unifying notion?

In 2009, for the first time the *Chambre sociale* of the *Cour de Cassation* used the term “abusive” in respect of a term requiring an employee, employed on a part-time contract, to seek their employer’s approval before engaging in other gainful activities. The decision, striking out the said term, was preceded by a number of cases before lower courts in which either the notion of “clause abusive” had been brought up by the employee or the courts had employed it of their own initiative.⁴⁵² Use of the terminology may, of course, fulfil a mostly rhetorical function: it does not appear that courts are expressly adopting – or referring to – the “significant imbalance” test⁴⁵³ employed in the Code de la consommation.

Use of the terminology does not seem to be directly linked to the one or the other among the legal bases or specific terms discussed in the previous sections.⁴⁵⁴ For some terms qualified as “abusive”, the implicit point of reference seems to be Article L. 1121-1 Code du Travail; the provision is indeed explicitly mentioned by the *Cassation* in a 2016 case concerning a non-compete clause whose “abusive” nature was subject to contention.⁴⁵⁵ In other cases, the notion has appeared with reference to terms establishing unilateral prerogatives – similar to the ones we have seen under section 4.3.2.⁴⁵⁶ For terms of this kind, the idea has further been ventilated in legal scholarship that their contentious nature has to do with their ability to affect the balance between the rights and obligations of the parties to the contract, in line with the significant imbalance requirement relevant to consumer

⁴⁵² Zabel, “Clauses Abusives et Droit Du Travail : Le Concept Issu Du Droit de La Consommation Pénètre-t-Il Le Droit Du Travail ?”

⁴⁵³ On Legifrance, the only mention of “déséquilibre significatif” in available case-law of the *Chambre Sociale* comes from a decision of 1998, where the claimant had invoked the notion in relation to a statute from 1791. See *Cour de Cassation, Chambre sociale, du 25 mars 1998, 94-20.780, Publié au bulletin.*

⁴⁵⁴ See the overview in Zabel, *supra*.

⁴⁵⁵ *Cour de cassation, civile, Chambre sociale, 4 novembre 2016, 15-18.956, Inédit* Quashes CA decision because it did not properly justify its finding that a non-compete clause (accompanied by a penalty clause) was not abusive. The legal basis is mixed: “*Vu les articles 1134 du code civil dans sa rédaction antérieure à l’ordonnance n° 2016-131 du 10 février 2016, L. 1121-1 du code du travail et 17 de l’accord national interprofessionnel des voyageurs, représentants et placiers du 3 octobre 1975*”.

⁴⁵⁶ CA Pau, 14 June 2010, 08/04305 and 08/04306 and CA Versailles 3 June 2008, 07/03825.

law.⁴⁵⁷ Much attention was still being devoted to individual terms and their validity regime.⁴⁵⁸ Part of the scholarship, however, had started to identify these developments as a broader movement, of which the language occasionally employed by courts – in other words, the designation of the unfair term as “clause abusive” – could be seen as a signal.⁴⁵⁹

4.3.2. The 2016 reform and employment contracts as *contrat d’adhésion*

The reform of the law of obligations recently approved by the French government⁴⁶⁰ introduces a *general* remedy against “significantly imbalanced” terms in non-negotiated contracts. According to the new Article 1171 CC “in a contract of adhesion, any term which creates a significant imbalance between the parties’ rights and obligations is considered as never written”. By virtue of its position, among the general rules on contractual content, the provision applies to all non-negotiated contracts, including those which are not specifically regulated within the civil code.⁴⁶¹

It is, at present, still unclear what kind of role the new provision will play: the new rules are introduced *next to* a number of provisions placed outside the civil code, such as, crucially, the rules on unfair terms control in the *Code de la consommation*. There is little doubt that the new article 1171 is closely inspired by the consumer law unfair terms control rules, but its positioning as well as its contents also show differences *viz* such rules. The reform introduced several norms which can help shed light on the scope, content and effects of the new rules on unfair terms.⁴⁶² An

⁴⁵⁷ Grégoire Loiseau, “Les Clauses Abusives Dans Le Contrat de Travail,” *Cahiers Sociaux Du Barreau de Paris*, no. n°265 (July 2014): 452.

⁴⁵⁸ See e.g. Camille Defer, “Les Droits Potestatifs Dans Le Contrat de Travail” (PhD thesis Paris II, 2016), <https://docassas.u-paris2.fr/nuxeo/site/esupversions/c78d8cf5-5358-4a33-8c13-9e8120f4dfe0?inline>.

⁴⁵⁹ Zabel, “Clauses Abusives et Droit Du Travail: Le Concept Issu Du Droit de La Consommation Pénètre-t-Il Le Droit Du Travail ?”; Loiseau, “Les Clauses Abusives Dans Le Contrat de Travail.”

⁴⁶⁰ Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, available online at <https://www.legifrance.gouv.fr/eli/ordonnance/2016/2/10/2016-131/jo/texte> (last accessed 8 March 2020).

⁴⁶¹ Thus, its potential scope of application extends to commercial contracts as well as to contracts between private parties and all sorts of personal work contracts, insofar as not superseded by more specific rules.

⁴⁶² See Rapport au Président de la République... *supra* fn 317. The report to the President mentions the unfair terms along the new rules on economic duress, “afin de préserver les intérêts de la partie la plus faible”. The rules are also justified on grounds of systematic

in-context analysis is necessary in order to identify the likely division of labour among the different provisions.⁴⁶³ This section addresses all these changes and, where appropriate, compares them to existing “twin” rules in special laws. The overall aim of this analysis will be to get an understanding of the nature of the still fairly new “significant imbalance” control.

4.3.2.1. Scope

The scope of the provision is determined by the notion of *contrat d’adhésion*, as defined in Article 1110 CC. According to that provision, a contract is *de gré à gré* when its terms can be freely negotiated between the parties;⁴⁶⁴ it is *d’adhésion* when it “encompasses a set of non-negotiable terms established in advance by one of the parties”.⁴⁶⁵ Contrary to the text originally included in the Civil code by the 2016 Ordonnance, the current text does not refer to the notion of “general conditions”, which is well-known but formally undefined to French law,⁴⁶⁶ while being quite central in other European legal systems.⁴⁶⁷ According to Mekki, the modification

coherence, since several provisions on unfair terms were “scattered” in special legislation. When the 1978 *Loi Scrivener* introduced the first rules on unfair terms, it did so in a chapter devoted to “La protection des consommateurs contre les clauses abusives”. The original prohibition applied to imbalanced terms which appeared to have been “imposed to the consumer though an abuse of economic power by the other party” (art 35 Loi n°78-23 du 10 janvier 1978 sur la protection et l’information des consommateurs de produits et de services). In the book, unfair terms and clauses abusives are used interchangeably as shortcut for “terms creating a significant imbalance”, although the terminology betrays some confusion between the national and the European legal models.

⁴⁶³ This prognostic effort is required by the lack of reliable analyses. The first comments seemed to pose questions without trying to answer them – see e.g. Christophe Radé, “L’impact de La Réforme Du Droit Des Contrats En Droit Du Travail,” *Lexbase Hebdo Ed. Sociale*, no. 645 (February 25, 2016).

⁴⁶⁴ This according to the new article 1110, as modified by the law transposing the original Ordonnance, Loi n°2018-287 du 20 avril 2018 - art. 2 : *Le contrat de gré à gré est celui dont les stipulations sont négociables entre les parties*. The previous text said “librement négociées” instead of *négociables*.

⁴⁶⁵ Again, as modified by the same 2018 law: « Le contrat d’adhésion est celui qui comporte un ensemble de clauses non négociables, déterminées à l’avance par l’une des parties. » The text included in the Civil Code by the 2016 Ordonnance was: “Le contrat d’adhésion est celui dont les conditions générales, soustraites à la négociation, sont déterminées à l’avance par l’une des parties”, i.e. an adhesion contract is one whose general conditions have been determined by one of the parties, without prior negotiation.

⁴⁶⁶ See Calais-Auloy and Temple, *Droit de La Consommation*, 195. Here they define them as “pre-drafted terms in contracts concluded by one person with a series of other persons”.

⁴⁶⁷ Think of the German *allgemeine Geschäftsbedingungen*, the Dutch *algemene voorwaarden*, the Italian *condizioni generali di contratto*.

should avoid the risk that contracts which only contain a limited number or non-negotiated (or non-negotiable) clauses are subject to control.⁴⁶⁸ The question remains, however, who should prove that the terms were “non-negotiable” and how high the threshold should be for establishing the “negotiability”.⁴⁶⁹ These questions are not addressed by the text of the law. None of the provisions, furthermore, expressly address the case in which the contract terms have actually been drafted by a third party, but it seems reasonable to infer that this case would also be covered by the definition of *contrat d’adhésion* if the adoption of the set of terms had been the result of a decision by the employer.⁴⁷⁰ Notwithstanding the relatively restrictive definition of adhesion contracts, it seems likely that many employment contracts concluded via standard terms or incorporating standard terms will fall under the scope of the provision.⁴⁷¹

The provisions of Articles 1110 appear to have reignited a discussion which had been open for a very long time. While the notion of *contrat d’adhésion* is over a century old,⁴⁷² it had so far not made its way into a legal provision. The rules on unfair terms in consumer contracts introduced in 1978 by the Loi Scrivener apply to negotiated and non-negotiated terms alike. On this point, indeed, the French approach departs not only from the German model but also from the EU (minimum harmonisation) Unfair Terms directive.⁴⁷³ When unfair terms control was first introduced in France, ignoring the much-debated notion of *contrat d’adhésion*, the choice was lamented by prominent scholars and mostly justified by the difficulty of defining a *contract of adhesion*. Should non-negotiation be the only benchmark, or should the parties’ qualities play a role? And, was the legislator to make a difference between single- and multiple-use textwork? The wording was often used, throughout the years, in academic texts and has been

⁴⁶⁸ See Mustapha Mekki, “La Loi de Ratification de l’ordonnance Du 10 Février 2016. Une Réforme de La Réforme?,” *Recueil Dalloz*, no. 17 (2018): 900–911.

⁴⁶⁹ Mekki.

⁴⁷⁰ In favour if a similar answer Thierry Revet, “Les Critères Du Contrat d’adhésion,” *Recueil Dalloz*, no. 30 (2016): 1771–1778.

⁴⁷¹ Grégoire Loiseau, “Droit Civil et Droit Du Travail: Une Relation Instable,” *Droit Social*, no. 6 (2019): 477–79; Christophe Radé, “Entre Espoir et Desespoir,” *Droit Social*, no. 6 (2019): 475–76.

⁴⁷² Famously introduced into the French legal debate by Raymond Saleilles, the issue was already the topic of a PhD dissertation in 1912: see Pichon, *Université de Lyon. Faculté de Droit. Des Contrats d’adhésion; Leur Interprétation et Leur Nature, Thèse... Par Victor Pichon...*

⁴⁷³ See again Hans Schulte-Nölke, Christian Twigg-Flesner, and Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and Its Transposition in the Member States* (Walter de Gruyter, 2009).

incorporated in the civil code of Quebec,⁴⁷⁴ but the questions stayed unanswered. The text of the code civil provides some partial answers – for instance, it seems clear that non-negotiable terms intended for use in a single transaction should be subject to control.⁴⁷⁵ However, it is likely that disputes on the application of the distinctions included in the provisions will arise in the coming years.

4.3.2.2. Incorporation and interpretation

The concept of general conditions, expelled from the definition of adhesion contracts, is still employed by the new Article 1119 CC, according to which general conditions can only be invoked when they have been brought to the attention of the non-drafting party and have been accepted by that party.⁴⁷⁶ The provision codifies pre-existing case law.⁴⁷⁷ It also includes an interpretation rule according to which, much like what we have seen for German law, terms individually negotiated between the parties always prevail over non-negotiated terms included in general conditions.

According to the new article 1190 CC, in case of doubt, contracts of adhesion are interpreted against the drafter. This is explained as a direct implication of the lack of negotiability: those who have the possibility of drafting contract terms to their advantage also need to bear the risks connected to imperfect drafting.⁴⁷⁸

4.3.2.3. Unfairness: terms creating “a significant imbalance”

The core novelty, from the point of view adopted here, is the introduction of an “unfair terms” rule at article 1171 CC :

⁴⁷⁴ Thus under article 1379 of the Civil Code of Quebec: “*Le contrat est d’adhésion lorsque les stipulations essentielles qu’il comporte ont été imposées par l’une des parties ou rédigées par elle, pour son compte ou suivant ses instructions, et qu’elles ne pouvaient être librement discutées. Tout contrat qui n’est pas d’adhésion est de gré à gré*”. Both the reference to “stipulations essentielles” and the notion of free discussion, which featured in the Taubira draft, might have been inspired by this provision.

⁴⁷⁵ See again Mekki, “La Loi de Ratification de l’ordonnance Du 10 Février 2016. Une Réforme de La Réforme?”.

⁴⁷⁶ Article 1119 CC : « (1) Les conditions générales invoquées par une partie n’ont effet à l’égard de l’autre que si elles ont été portées à la connaissance de celle-ci et si elle les a acceptées. (2) En cas de discordance entre des conditions générales invoquées par l’une et l’autre des parties, les clauses incompatibles sont sans effet. (3) En cas de discordance entre des conditions générales et des conditions particulières, les secondes l’emportent sur les premières ».

⁴⁷⁷ For more references, see Revet, “Les Critères Du Contrat d’adhésion.”

⁴⁷⁸ See Revet.

“In a contract of adhesion, a non-negotiable term, established in advance by one of the parties, that creates a significant imbalance in the rights and obligations of the parties to the contract may be considered as never written.

*The assessment of significant imbalance must not concern either the definition of the subject-matter of the contract nor the adequacy of the price in relation to the act of performance.*⁴⁷⁹

The rule further seeks to restrict its scope of application by only applying to “non-negotiable” terms within adhesion contracts – in turn defined as contracts which include a set of non-negotiable terms. This provision reflects the aim, already mentioned above, of preventing an expansive application of the new judicial control. The problems that it may generate have already been discussed in the previous paragraph.

As to the substance of the rule, article 1171 CC resembles closely the language of two other provisions located outside the civil code, namely article L. 132-1⁴⁸⁰ Code de la consommation and article L. 442-6, I, 2⁹⁴⁸¹ Code de commerce. Both articles deal with terms creating “a significant imbalance in the rights and obligation of the parties”. The consumer law provision, however, has been in place for a longer time and is usually considered to have been a source of inspiration for the similar rule of the Code du commerce.

The prohibition of unfair terms in the *Code de la Consommation* applies exclusively to contracts between a professional and a “non-professional or a consumer”. This

⁴⁷⁹ Art 1171 in the version resulting from the Law 2018-287 of 20 April 2018, article 7: “(1) Dans un contrat d’adhésion, toute clause non négociable, déterminée à l’avance par l’une des parties, qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite. (2) L’appréciation du déséquilibre significatif ne porte ni sur l’objet principal du contrat ni sur l’adéquation du prix à la prestation”. The words “non négociable, déterminée à l’avance par l’une des parties” have been added to the pre-existing 2016 text by the law of 2018.

⁴⁸⁰ Under article L 212-1 Code de la consommation: “Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat. [...] L’appréciation du caractère abusif des clauses au sens du premier alinéa ne porte ni sur la définition de l’objet principal du contrat ni sur l’adéquation du prix ou de la rémunération au bien vendu ou au service offert pour autant que les clauses soient rédigées de façon claire et compréhensible”.

⁴⁸¹ According to article L 442-6 Code du Commerce: “Engage la responsabilité de son auteur et l’oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers : [...] De soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties”.

latter definition covers consumers in the strict sense as well as legal persons which are not conducting business, such as non-profit organisations. This restricted scope traditionally⁴⁸² characterises the French approach to unfair terms control vis à vis, for instance, the German choice to allow review of all non-negotiated contracts- including, thus, business-to-business transactions. The provision forbidding “unfair” terms was already in place before the Directive’s adoption, but it is only after the latter’s implementation that it explicitly allows the judge to hold the imbalanced term for never written.^{483 484} In deciding on a term’s potential unfairness, the judge has to take into account the circumstances surrounding the contract’s conclusion as well as all the other terms included in the contract.⁴⁸⁵

The new provision, as we have seen, will apply to non-negotiated contracts only, but irrespective of the parties’ qualities. The substantive test, thanks to the reference to a “significant imbalance”, seems very similar to the consumer law rule. Another striking similarity concerns the fact that the new provision, like both Article L 212-1 Code de la consommation, exempts core and price terms from scrutiny.⁴⁸⁶ This is in line with the choices of other countries which have introduced specific rules for non-negotiated contracts and the Unfair Terms Directive.⁴⁸⁷

⁴⁸² See the standard reference contained in the EU consumer law compendium: Twigg-Flesner, Ebers, and Schulte-Nölke, *EC Consumer Law Compendium-Comparative Analysis*, 337. Available at: http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf (last accessed 8 march 2020)

⁴⁸³ For a brief account, see Chazal, *Clauses abusives*, in *Répertoire du droit commercial*, Dalloz 2013, in particular par 5-6.

⁴⁸⁴ Article L 241-1 Code de la consommation “*Les clauses abusives sont réputées non écrites.*” However, “*le contrat restera applicable dans toutes ses dispositions autres que celles jugées abusives s’il peut subsister sans lesdites clauses.*”

⁴⁸⁵ Article L 212-1 Code de la consommation second paragraph: “*Sans préjudice des règles d’interprétation prévues aux articles 1156 à 1161, 1163 et 1164 du code civil, le caractère abusif d’une clause s’apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu’à toutes les autres clauses du contrat. Il s’apprécie également au regard de celles contenues dans un autre contrat lorsque la conclusion ou l’exécution de ces deux contrats dépendent juridiquement l’une de l’autre.*”

⁴⁸⁶ Article L 212-1 Code de la consommation, third paragraph: “*L’appréciation du caractère abusif des clauses au sens du premier alinéa ne porte ni sur la définition de l’objet principal du contrat ni sur l’adéquation du prix ou de la rémunération au bien vendu ou au service offert pour autant que les clauses soient rédigées de façon claire et compréhensible.*”

⁴⁸⁷ See for instance article 6:231(a) of the Dutch Burgerlijk Wetboek.

Analysing the commercial law unfair terms provision seems to confirm what has been observed so far. Article L- 442- 6 Code de commerce has been adopted more recently, signalling the expansion of the notion of *clause abusive* (unfair term) beyond the domain of consumer law.⁴⁸⁸ Unlike both Article L 212-1 Code de la consommation and Article 1171 CC, the commercial law provision does not exclude terms defining the contract's object and the balance between price and performance from its scope. This difference is not surprising since price agreements are actually a typical subject of competition law. In the context of commercial relationships, however, the insertion of an unfair term had no consequence on the contract: it was merely sanctioned by means of damages-where damage could be proved.⁴⁸⁹ This brief analysis reinforces, a contrario, the impression that the rule of Article 1171 CC bears a strong resemblance to the one of Article L 212-1 of the Code de la consommation- in other words, it seems that the new mechanism is likely to work in a way which is similar to what has been experienced so far in consumer law.

Unlike the consumer law rules and the German 307 BGB, the general clause of article 1171 is not accompanied by lists of terms considered or presumed unfair. The neighbouring Article 1170 CC, however, provides that "all terms depriving the debtor's essential obligation of its substance are considered as not written". The provision, in essence, reproduces the well-known Chronopost⁴⁹⁰ decision, in which the *Cassation* had voided a term by which a transporter's responsibility for failing to deliver in the promised time was severely limited, basically leaving the transporter's promise deprived of any meaningful sanction. This provision is one of the marks left by the abolition of the notion of *cause*, which the *Cassation* had then controversially employed to invalidate the limitation of liability. At that time, the Court's intervention was arguably required by the absence of a rule allowing the invalidation of unfair terms outside the domain of consumer contracts. In this sense, the question may be raised whether a rule of this sort would still be necessary in view of the new Article 1171 CC. While the doubt may seem warranted at first glance, "blacklisting" this kind of terms might not be

⁴⁸⁸ See again Zabel, "Clauses Abusives et Droit Du Travail : Le Concept Issu Du Droit de La Consommation Pénètre-t-Il Le Droit Du Travail ?"

⁴⁸⁹ With reference to commercial contracts, then, the main effect of the new provision will be in the remedies available to the non-drafting party, which in certain cases will be able to demand the unfair term to be declared void. But this is something which goes beyond the scope of this contribution.

⁴⁹⁰ Cass. comm. 22 Octobre 1995, n° 93-18632.

superabundant once the text of proposed Article 1171 CC is subjected to closer inspection.

In the context of consumer contracts, terms such as those addressed by Article 1170 CC are taken care of by the Directive's (non-binding) annex and, in French law, by the 2009 regulations establishing the "black" and "grey" lists. In the context of general contract law, however, courts might have been tempted to give greater significance to the second part of Article 1171 CC, which excludes from control the contract's object and the relationship between price and performance. Considered that this relationship is precisely what is affected by exemption clauses, it is probably wise to have included a special provision to secure that they would not be exempted from control. This might, in turn, also provide a source of inspiration for courts dealing with similar, albeit less far-reaching provisions. Again, however, this contributes to shaping the contours of Article 1171 CC: it is not there to address those "extreme" cases of contractual imbalance, which will be taken care of by Article 1170 CC, or, in even more extreme cases, by Article 1169 CC. The latter provision, which also is reminiscent of the functions of *cause*, holds as invalid an onerous contract in which the counter-performance promised to the party undertaking an obligation is "illusory or derisory".⁴⁹¹

The new control should be easy to distinguish from the general provision of Article 1102 CC, according to which freedom of contract "*does not allow the parties to derogate from rules which are an expression of public policy.*"⁴⁹² This provision basically codifies the direct effect on contractual autonomy of Article 6 CC, which provides that private agreements cannot derogate from good morals and public order. The existence of such direct effect, in any case, had been established already some years ago by the *Cassation*⁴⁹³ - thus the reform does not innovate on this point.

In a previous draft, the public policy provision included a second part establishing a certain influence of fundamental rights and freedom on contractual validity.⁴⁹⁴

⁴⁹¹ This is an exception to the principle, stated in article 1168 CC, that lack of equivalence between the promised performances does not affect the contract's validity.

⁴⁹² The new Article 1162 CC further explains that neither the contract's terms nor its objective can be against public order: *Le contrat ne peut déroger à l'ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties.*

⁴⁹³ Cass. civ. 7 december 2004 n°01-11823.

⁴⁹⁴ See Article 1102 CC Taubira draft according to which freedom of contract additionally did not allow parties "to infringe fundamental rights and freedoms recognised by a provision which applies to relationships between private parties except where such infringement is indispensable to the protection of legitimate interests and proportionate to the intended purpose."

Fundamental rights would then be considered not as an absolute limit to contractual freedom, but as norms that tolerate to be curtailed, as long as the infringement is justified as being indispensable to the pursuit of a legitimate interest.⁴⁹⁵ The disappeared provision echoed limitations that were already existing in the case-law of the *Cassation*.⁴⁹⁶ Moreover, it closely resembled the (fundamental) rights control provision already in force in labour law, Article L 1121-1 Code du Travail.⁴⁹⁷ While it seems possible to envisage that the protection of fundamental rights will just be taken up into the notion of “public order” consecrated by Article 1102 CC,⁴⁹⁸ the interaction between the control established by article 1171 and the Code du travail provision will need time to be clarified.

4.3.2.4. Consequences of unfairness

In contrast to the earlier version of the provision contained in the draft ordonnance published in 2015,⁴⁹⁹ Article 1171 CC dictates that terms causing a significant imbalance as considered as non-written (*non-écrit*). While the previous formulation required the aggrieved party to expressly demand that the term be invalidated, the current formulation reproduces the language adopted in consumer law. The latter sanction has to be considered as more similar to a special form of nullity than to voidability- in other words, it should not be conditional on the aggrieved party’s request.⁵⁰⁰ The judge is thus allowed (or even expected) to

⁴⁹⁵ See Chantepie’s early contribution to the Dalloz blog dedicated to the reform: <http://reforme-obligations.dalloz.fr/2016/02/16/la-liberte-contractuelle-back-to-basics/#more-200> (last accessed 8 march 2020).

⁴⁹⁶ See Lucien Maurin, *Contrat et Droits Fondamentaux* (Paris: LGDJ, 2013).

⁴⁹⁷ See *infra* para chapter 4.

⁴⁹⁸ See Chantepie, above fn 37.

⁴⁹⁹ According to the Taubira proposal’s article 1169 CC “*Une clause qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat peut être supprimée par le juge à la demande du contractant au détriment duquel elle est stipulée.*” The proposal is still available online at the address http://www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf (last accessed 8 march 2020).

⁵⁰⁰ With even more far-reaching consequences than nullity itself: see most recently Civ. 1re, 13 mars 2019, F-P+B, n° 17-23.169, according to which the five-year limitation period applying to actions in nullity does not apply to consumers’ claims that a term is non-binding due to unfairness. In commenting the decision, Pellier assumes that this also applies to other cases where the sanction of “non-écrit” appears. See Jean-Denis Pellier, “De la distinction entre la nullité et le réputé non écrit - Banque - Crédit | Dalloz Actualité,” accessed October 23, 2019, <https://www.dalloz-actualite.fr/flash/de-distinction-entre-nullite-et-repute-non-ecrit#.Xbb0J5MzbUp>. For an earlier in-depth study distinguishing “non-écrit” from partial nullity, see Sophie Gaudemet, *La clause réputée non écrite* (Economica, 2004).

carry out unfair terms control of their own motion. This change seems in line with the decision to restrict judicial control to non-negotiated contracts: while requiring some self-reliance seems appropriate in the context of “traditional” (i.e. negotiated) contracts, the threshold for protection can reasonably be set lower for parties to contracts of adhesion. In the latter context, the ex officio mechanism is supposed to compensate for the party’s presumed weakness and guarantee the extirpation of unfair terms. The language employed seems to also exclude the possibility that an unfair term could be adapted by the judge rather than entirely removed from the contract.

4.4. Conclusions

We have seen that, in both countries, courts were using different legal instruments – and sometimes went beyond the legal instruments that were available to them – in order to react to contentious terms in employment contracts. Some of these instruments were taken from the toolkit of labour law; almost inevitably, however, principles of contract law were also invoked. The creative use of these tools made by labour courts was often criticized. However, a broad look suggests that similar strategies were also not foreign to “regular” private law adjudication.⁵⁰¹

In this context, it stands out that developments in the two countries happened along different timelines: in Germany, the first interventions belong to the nineteen-sixties and were almost in tune with the parallel developments in other fields; in France, the first cases appear to have emerged roughly two decades later and courts’ intervention on contract terms seems to have gained more momentum after the turn of the century. Several factors need to be considered. In particular, the greater bearing of the notion of labour law’s *autonomy* in French law; the tradition of restraint characterizing French courts vis à vis the relative activism of German (in particular, post-war) courts; and possibly, much in line with the thesis itself, as a consequence of the systems’ emphasis on legislative intervention and of the greater discursive influx of institutional theories, just a lesser degree of “contractualisation” in French practice until a later point in time.

The application of labour law rules or mobilisation of principles is a rather unsurprising reaction to clauses that, without expressly violating existing rules, appear to unsettle the default balance created by existing (protective) labour regulation. They can represent, thus, a form of protection of labour law itself, faced

⁵⁰¹ That § 242 BGB could have an impact on contractual drafting next to its direct applicability to performance was a popular solution also outside of labour law; similarly, in French law, the rejection of unilateralism enshrined in the case-law on modification terms extends to non-labour contracts.

with the increasing fragmentation of contractual models and work practices. While this process would also arguably represent a response to contractualisation, one may doubt whether such response would say anything about unfair terms control or contract law in general. This would be arguably best exemplified by the example of the German “*Gesetzesumgehung*” doctrine. A look at the two national experiences shows, however, that contract law reasoning played a growing role in giving shape to that doctrine, by connecting it to the balance of performance and counter-performance; furthermore, the French developments show how a similar concern with the core elements in the employment relation was deployed entirely on the basis of contractual rules – be it the binding force of contract or the prohibition of merely potestative conditions.

Both experiences further show a concern with (fundamental) rights and liberties, and in particular the freedom to pursue gainful occupation. The relevance of fundamental rights to contract law was a post-war discovery that exerted a growing influence on contract law in the late twentieth century; employment contracts are a particularly fertile terrain for such growth. Rights and liberties that employees enjoy as humans cannot be entirely absorbed by questions of contractual balance; we have seen, however, how in both experiences the “fundamental rights” basis is not entirely loose from contractual reasoning: explicitly in Germany, through the use of section 242 BGB as entry point for the indirect horizontal effect of article 12 GG; implicitly in France, via the syncretistic regime of non-compete covenants and clauses of *dedit-formation*.

Finally, the chapter has shown that in both countries, the various forms of intervention were (beginning to be) conceptualised in unitary terms before the reforms. In Germany, the symbolical value of the move does not take away the fact that the BAG saw considerable proximity between the *Inhaltskontrolle* that it had been performing and the rules on standard terms. Once the applicability of those rules has been extended to employment contracts through the *Modernisierung*, the BAG has not hesitated to consider them as the new legal basis on which to base interventions – effectively replacing the previous standards.⁵⁰² This has entailed, importantly, an enhanced relevance of transparency rules and the establishment of term eradication as the only consequence of unfairness.

In France, no such explicit stock-taking can be found in the case-law; the documents accompanying the reform also make no reference to employment contracts. However, in the past decade or so, references to the notion of “clause

⁵⁰² Even though we will see in Chapter 5 that many of the substantive parameters employed “live through” in the new era.

abusive” had started to appear in judicial decisions concerning different terms and based on traditionally different tests. This was accompanied by a number of voices starting to address the various judicial interventions on individual terms as a unitary trend.

Skepticism has been expressed about the potential impact of the new unfair terms provision on employment contract exactly *because* the control exerted by courts already has filled in the void left by long-term legislative inaction. Thus, recently Radé has pointed to the *Cassation*’s creative combination of ‘*fundamental principles*’ lacking any textual reference, with art L-1121-1 Code du Travail (formerly L 120-2) and old 1134 Code civil as providing answers to the need for protective intervention, “*la nature ayant horreur du vide*”.⁵⁰³ At the same time, Loiseau has suggested that the broad formulation of article 1171 may actually lead to scrutiny of clauses which had hitherto not been affected.⁵⁰⁴ From the perspective of the thesis, it is interesting to observe that Radé’s observation offers implicit support to my hypothesis: the void filled by courts was due to the legislator’s failure to take care of contractual justice outside the domain of consumer contracts.

A remarkable thing is that in both cases the *legislative intervention* restricts the focus of judicial control by focussing on non-negotiated terms. The judicial development of unfair terms control does not stand, in either country, in an unambiguous relation to pre-formulation or non-negotiation. We have seen the issue surface on occasion in German case-law (especially in the notion of *Gestörte Vertragsparität*). In France, employment contracts are often designated as “*d’adhésion*”,⁵⁰⁵ but this is not seen as a requirement for court intervention. It is unclear how much difference the focus on non-negotiated contracts has brought about in Germany and whether it will have consequences in France. For the latter, one may observe that the potentially very restrictive scope of the provisions given the emphasis on impossibility to negotiate has raised little doubts among labour lawyers. The notion of *contrat d’adhésion* “seems to match well the employment contract”.⁵⁰⁶ It seems clear that not all employment contracts will fall under the definition, and

⁵⁰³ Radé, “Entre Espoir et Desespoir,” 476.

⁵⁰⁴ Loiseau, “Droit Civil et Droit Du Travail: Une Relation Instable,” 478.

⁵⁰⁵ See e.g. Olivier Litty, *Inégalité des parties et durée du contrat: Étude de quatre contrats d’adhésion usuels* (Paris: LGDJ, 1999). The study considers employment contracts next to tenancy, credit and insurance contracts.

⁵⁰⁶ Radé, “Entre Espoir et Desespoir,” 476.

perhaps even not all non-negotiated employment contracts⁵⁰⁷ – but a large set of such contracts will likely contain clusters of terms subject to scrutiny.⁵⁰⁸

The exclusion of “core” terms is another persistent feature. If we think about the discussion in Chapter 2, this exclusion makes one question to what extent weaker party protection was *actually* what the drafters had in mind when adopting these rules. The distinction, again, did not feature prominently in the case-law. A closer look at the terms actually involved in the litigation will be necessary in order to investigate whether the limitation is likely to have an impact in France – or to what extent it has had one in Germany.

The scope of the German rules appears broader, as ultimately all non-negotiated terms seem liable to being subject to control; how the quandaries of the French reform around the definition of *contrat d’adhésion* will influence the application of the provisions is difficult to predict. It seems clear that not all employment contracts will fall under the definition, and perhaps even not all non-negotiated employment contracts⁵⁰⁹ – but a large set of such contracts will likely contain clusters of terms subject to scrutiny.⁵¹⁰ Contrary to the German legislator, on the other hand, the French reform has not carved out employment contracts from the rules on incorporation of standard terms.

The central unfairness standard is similar between the two countries, which is only partially a result of the European harmonisation effected by Directive 93/13. In the case of France, it stands out that the new standard expressly excludes “core” terms and does not mention appreciation of the circumstances of the case within the unfairness test. This is weird for a novelty officially justified by the aim of making the system of contract law more just: what is more unfair than unjust core terms? Assessing the circumstances surrounding the conclusion of the contract also seems important to doing justice between the parties to that contract.

As to the consequences of unfairness, there seems to be no significant difference – except for the fact that the French provision does not say anything as to the relation between the invalidity of a certain term and the fate of the contract. The radical

⁵⁰⁷ See the doubts expressed by Pascal Lokiec and Judith Rochfeld, “L’accord et Le Juge Du Travail: Le Temps Des Réformes Paradoxaes,” *Droit Social*, no. 1 (2017): 5.

⁵⁰⁸ Gilles Auzero and Florence Canut, “Le Juge et La Modification Du Contrat de Travail/The Judge and the Modification of the Employment Contract,” *Droit Social*, no. 1 (2017): 11.

⁵⁰⁹ See the doubts expressed by Lokiec and Rochfeld, “L’accord et Le Juge Du Travail: Le Temps Des Réformes Paradoxaes.”

⁵¹⁰ Auzero and Canut, “Le Juge et La Modification Du Contrat de Travail/The Judge and the Modification of the Employment Contract.”

consequences associated with the “non-écrit” doctrine seem to exclude that uncertainty may arise as to the possibility to rewrite unfair terms.