



## UvA-DARE (Digital Academic Repository)

### The missing stone in the Cathedral

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

Leone, C.

**Publication date**

2020

**Document Version**

Other version

**License**

Other

[Link to publication](#)

**Citation for published version (APA):**

Leone, C. (2020). *The missing stone in the Cathedral: Of unfair terms in employment contracts and coexisting rationalities in European contract law*.

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

## **Chapter 5 Contractualisation and employment relations**

### **5.1 Introduction**

Chapter 4 has illustrated the judicial paths preceding the reforms of this century and has looked into the relationships between the two developments. Chapter 5 reconnects these findings to the book's broader claim: namely, that such judicial developments represent a response to, or in some sense a consequence of, ongoing contractualisation. It further investigates whether such response can be properly attributed to contract law's internal rationality or must be seen as mainly coming "from without".

The chapter is structured as follows: first (5.2.), it discusses "contractualisation" as a phenomenon concerning labour law and labour relationships in general. A succinct overview of the dynamics between contract and institutional accounts in historical perspective shows how contract has gained prominence in the past decades as a matter of how the employment relation is conceptualised.

Next (5.3.), this chapter analyses contractualisation through the more microscopic lenses of contract law and contractual governance: if contract and contract terms would matter to the parties, and in particular to the drafters (i.e. employers and their lawyers), what kind of "work" would such terms be likely taking care of? At the end of the section, I distinguish three functions that (possibly: standardised) contract terms can play in employment relationships: customisation, flexibilization and governance.

The chapter finally (5.4.) focuses on three concrete examples of contractualisation, representing the different functions distilled in section 5.3. It presents court litigation in Germany and France involving the validity of terms concerning the restitution of education costs ("customisation"), functional and financial flexibility ("flexibilisation"), and penalty clauses ("governance"). While section 5.3 shows that employers and their lawyers have good reasons to make use of the possibility to craft relevant aspects of an employment relationship by means of (standard) contract terms, section 4 investigates the space employers have to use such contract terms and what happens when the use of such terms leads to a court dispute.

### **5.2. The contractualisation of employment relationships in historical perspective**

At the inception of this book, contractualisation has been introduced as the increased relevance of contracts and contract law to domains which were not

traditionally salient to the discipline, on the one hand, and on the other hand as the emergence of different *subjects* – what has over time become known as “weaker parties”, which were not structurally considered by 19<sup>th</sup> century contract law. Can we, in a similar sense, also meaningfully speak of contractualisation for labour law?

Within labour law, contractualisation may first be associated with the emergence of the contract of employment, part of the movement “from status to contract” famously captured by Maine.<sup>511</sup> However, more recent literature uses the term contractualisation – together with other keywords such as individualisation – to refer to a move away from “*the Aristotelian rule of labour law*” of industrial societies, based on “*the unities of place and work [...], of time and work [...] and of action and work*”.<sup>512</sup> In France, the term is referred to every time that the regulation of an aspect of the employment relationship is left to *either* collective or individual agreement – in contrast to being dealt with by the law. We could label this more recent development as a re-contractualisation; however, in the following chapters the simpler name “contractualisation” will be maintained.

The broader phenomenon is difficult to capture from either a conceptual or a legal perspective. Gardner<sup>513</sup> made it almost entirely a philosophical problem – the flattening of autonomy and self-realisation alike by means of the impoverished language of contracts, which would represent a blanket justification of the employer’s authority on a content-independent basis. In empirical terms, the various forms of disarticulation<sup>514</sup> of regulatory mechanisms giving shape to

---

<sup>511</sup> The famous move identified by Maine is based on the English common law. See Simon Deakin and Wanjiru Njoya, “The Legal Framework of Employment Relations,” *The Sage Handbook of Industrial Relations*, 2008, 284–304; Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Routledge, 2016). The story is obviously somewhat different for Germany and, especially, France, where the 1789 revolution was the main driver for legal change in this area, but broadly speaking the characterisation is not inappropriate.

<sup>512</sup> Veneziani, in Bruno Veneziani and B. A. Hepple, *Transformation of Labour Law in Europe: A Comparative Study of 15 Countries, 1945-2004* (Hart Publishing Limited, 2009), 114.

<sup>513</sup> John Gardner, “The Contractualisation of Labour Law,” in *Philosophical Foundations of Labour Law*, ed. Hugh Collins, Gillian Lester, and Virginia Mantouvalou (Oxford, 2018).

<sup>514</sup> The term used here again seeks to capture different phenomena: for France, Jeammaud aptly characterized contractualisation as mainly “*extension de la place ménagée au contrat ou à la convention*”, putting together individual and collective autonomy in contrast to statutory rule making. In Germany, however, the role of legal regulation was never as preponderant as in France. Dynamics there concern rather the relationship between different types of collective rule-setting, such as sectoral versus company agreements. Antoine Jeammaud, *Les Polyvalences Du Contrat de Travail*, 1989.

employment relations seems to leave a larger space to – or at least places increased attention on – the individual contract.<sup>515</sup> On the other hand, the relevance of contractual terms in management has increased as a result of the growing complexity of employment relations in advanced economies<sup>516</sup> This may be what Micklitz refers to as he describes employees' moves from status to contract to status to contract "via the new forms of contractualisation in the working relation".<sup>517</sup>

The ongoing processes, thus, enhancing the contractual features and contents of employment relationships, makes for an interesting parallel to the "contractualisation" of consumption which took place with the advent of mass distribution.<sup>518</sup> On the one hand, contract law potentially "expands" to a domain – and to cover subjects – that had previously been largely outside its scope; on the other hand, the use of contractual tools in managing the relation enhances the role – or responsibility – of contract law in defining the balance of the parties' rights and duties.

### 5.2.1. The emergence of employment contracts and contractualisation of employment relationships

Employment law, whether one focuses on its "public" of "private" components, is a historically recent product.<sup>519</sup> Although with local variations, it is usual to identify a first moment in which relations that used to be subsumed under different "statuses" became contractualised around the end of the 18<sup>th</sup> century or beginning of the 19<sup>th</sup>.<sup>520</sup> Industrialisation entailed the gradual demise of traditional trades, characterised by relatively small workshops with a master and a few apprentices; the appearance of the capitalist model, thus, increased the relevance of salaried work. The then emerging principles of liberal contract law, such as

---

<sup>515</sup> Jeammaud.

<sup>516</sup> See the various layers discussed in Christian Bessy and Daniel Szpiro, "The Provisions in a Labour Contract: Technology and the Market," *Cambridge Journal of Economics* 35, no. 3 (2011): 459–81..

<sup>517</sup>Hans-W. Micklitz, *The Politics of Justice in European Private Law: Social Justice, Access Justice, Societal Justice*, Cambridge Studies in European Law and Policy (Cambridge: Cambridge University Press., 2018), 137–38.

<sup>518</sup> See Chapter 1.

<sup>519</sup> See Bruno Veneziani and Bob Hepple, "The Making of Labour Law in Europe," 1986, 6.

<sup>520</sup> See Bruno Veneziani, "The Evolution of the Contract of Employment," *The Making of Labour Law in Europe*, 1986, 34–35. Until those days, work used to be of various servile nature, or was organized within guilds or provided by individual artisans. As Veneziani points out, for instance, while the wording of "right to work" had already emerged in the 16<sup>th</sup> century, at that time it mainly entailed that the poor could be put into compulsory work by virtue of public force.

freedom of contract, applied to contractual relationships between employees and employers in the first half of the 19<sup>th</sup> century.<sup>521</sup> In the second part of that century, the suitability of such laissez-faire approaches to labour relations for preventing widespread prevarications – and ultimately guaranteeing social peace – was subject to increasing social, political and academic criticism.<sup>522</sup>

In France, a judgment from this period remains a symbol of the iniquities deriving from the strict application of contractual principles to (non-negotiated) employment contract: the so-called “arrêt sabots”. In this 1866 decision,<sup>523</sup> the *Cassation* quashed a decision by the Prud’hommes of Saint Etienne which had reduced a penalty of 10 Francs imposed on a factory worker for having worn their wooden sandals inside the plant. The fine, we know from the *Prud-hommes’* decision, corresponded to almost half the worker’s monthly salary. It was set in the factory’s *règlement d’atelier*, which was hung somewhere within the factory and was binding between the parties on a contractual basis. The *Cassation* considered the Prud’hommes, who decided in equity, to be in breach of article 1134 of the Code civil – in other words, they were failing to properly acknowledge the binding force of contract. This was one of many cases through which contract law rules came to be seen as an instrument of oppression.<sup>524</sup>

In most Western European countries, the first laws establishing minimal social security provisions and regulating certain contents of employment relations were adopted by the end of the 19<sup>th</sup> century as a response to the emerging “social question”.<sup>525</sup> In one way or another, around the same time *collective* labour relations also developed and trade unions and strikes were, under different conditions and restraints, made legal.<sup>526</sup> The various protective statutes mainly

---

<sup>521</sup> This time delimitation, is subject to non-menial controversy. Deakin introduces a slightly different timeline and, thanks to this broader view, partially challenges the idea that there was any such rapid shift under English law. See Simon Deakin and Frank Wilkinson, *The Origins of the Contract of Employment* (Oxford University Press, 2005).

<sup>522</sup> See Veneziani and Hepple, “The Making of Labour Law in Europe,” 7.

<sup>523</sup> Cass. 14.2.1866, D 1866-1-84. See Domergue, *Etude d’Ensemble Sur Le Contrat d’Adhésion*, 116.

<sup>524</sup> See Domergue, 117–18.

<sup>525</sup> Veneziani and Hepple, “The Making of Labour Law in Europe.”

<sup>526</sup> For a recollection, see Antoine Jacobs, “Collective Self-Regulation,” *The Making of Labour Law in Europe*, London, Mansell, 1986, 193ff. Hinting to « different conditions and restraints » as I do above does obviously no justice to the very different ways in which strikes are regulated across different countries, nor to the difference between not criminalising abstention from work and consecrating strike as a *right*. All these very important issues,

applied to workers hired under a *contract of employment*, even though very often even codified systems lacked a definition of such contract.<sup>527</sup>

In the first part of the 20<sup>th</sup> century, the normative relevance of the employment contract started to be questioned. “Institutional” theories of law and society were mainly developed before the Second World War,<sup>528</sup> and their relative success had much to do with the political climate of the intra-war periods. While communitarian theories were crucial to the narrative of Italian fascism<sup>529</sup> and, later, to German Nazism,<sup>530</sup> they also resonated elsewhere on the continent. However, their long haul and influence on labour law lasted longer, thanks in part to their resonance with theories attempting to explain the internal workings of companies.<sup>531</sup> The intensification of regulations, the growing importance of corporate structures and the mentioned favourable intellectual and political climate led authors in several countries to endorse non-contractual – or: institutional – theories of labour relationships.

---

however, have little bearing on the focus of the reconstruction pursued here and are hence omitted.

<sup>527</sup> In Germany, article 611 BGB defines the “Service contract”, which applies to all sort of services. Only in 2017 has a definition of the employment contract been introduced in the Code by the Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze vom 21.02.2017 (BGBl. I S. 258), as a means of codifying the long-standing definition established in case-law (see Gesetzentwurf des Bundesregierung, Drucks. 294/16, 2.6.16). In France, the Code du Travail does not define the employment contract. This notwithstanding, many statutes have historically relied on the notion in order to circumscribe their scope of application - see Pélissier, Auzero, and Dockès, “Droit Du Travail, Précis Dalloz, 27e Édition 2013”, para 197.

<sup>528</sup> Romano and Hauriou both had made their theories widespread by 1930: *L’ordinamento giuridico* was published in 1918, *La théorie de l’institution et de la fondation* in 1925.

<sup>529</sup> An echo of this can still be found in the Italian civil code, which devotes one whole book (*Codice civile, libro Quinto: Del Lavoro*) to “work” but does not define the employment contract.

<sup>530</sup> As reported by Monateri and Somma, National Socialist doctrine endorsed the idea that “cases regarding the individual position in respect of the social formations, in particular in family law and in labour law, [did] not constitute contracts. In particular, they quote Larenz writing that “*Das Verlöbnis, die Eheschliessung, der Eintritt in ein Arbeitsverhältnis sind in unserem Sinne keine Verträge, weil sie nicht den Austausch einzelner Leistungen oder Güter zum Gegenstande haben, sondern die Eingliederung der ganzen Persönlichkeit in einer Gemeinschaft*”. See P. G. Monateri and Alessandro Somma, “The Fascist Theory of Contract: A Comparative and Historical Inquiry into the Darker Side of Contract Law,” *Cardoza Electronic Law Bulletin*, 2009, 9.

<sup>531</sup> The idea of the firm as institution was common in German labour law in the same period: RG, Urteil vom 6. Februar 1923, RGZ 106, 272, 275, Erwin Jacobi, *Betrieb Und Unternehmen Als Rechtsbegriffe* (Weicher, 1926), p.1 and 9.

For labour laws in Europe, indeed, not only authors with authoritarian sympathies entertained such theories. Alain Supiot authoritatively identifies the inception of the institutional approach with the work of Otto von Gierke, “challenging at the same time the abstract individualism coming from France and the legal statalism inherited from Hegel”.<sup>532</sup> The institutional approach, in this sense, was first of all a rejection of over-encompassing voluntarism in private as well as public law. Hugo Sinzheimer, inspired by von Gierke, similarly viewed the workplace as a community in analogy with the political community. In his case, such analogy implied that similar principles of democracy had to apply in the workplace and to the broader labour relations: an economic constitution that needed to mirror and complement the political constitution.<sup>533</sup> Notions such as the worker’s “incorporation” in the community of the firm and the idea of employment as a personal relationship rather than a contract,<sup>534</sup> stem from this period and this conceptual world.

This will remind the reader of a similar trend identified for non-negotiated contracts, whose actual contractual nature was questioned by early commenters in favour of an analogy with normative acts. Within an institutional view of the employment relations, the employer’s prerogative and, ultimately, rule-setting through contract, can also be seen as a normative power. As mentioned above, this view can in turn be a point of departure for asserting primacy of the employer’s (sovereign) will or for requiring such will to be constrained much like the state’s powers in a democratic system. The parallel between the two discussions should not come as particularly surprising: employment contracts were mentioned as prime examples of *contrats d’adhésion* by that early literature. This broad resonance may explain why, in spite of their connections to authoritarian regimes and authoritarian impulses, institutional approaches remained influential way into the central part of the century – even as labour law assumed a decidedly emancipatory function.

---

<sup>532</sup> “En combattant à la fois l’individualisme abstrait venu de France et l’étatisme juridique hérité de Hegel » : see Supiot, *Critique du droit du travail*, 17.

<sup>533</sup> See Ruth Dukes, “Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law,” *Journal of Law and Society* 35, no. 3 (2008): 341–363; Ruth Dukes, “Hugo Sinzheimer and the Constitutional Function of Labour Law,” *The Idea of Labour Law*, 2011, 57–68.

<sup>534</sup> As Supiot aptly observes, this also connects with the limitations that the contractual analysis, based on exchange, seem to meet when confronted with the multiple ramifications of employment contracts. An alternative focus on the “personal relationship” ensuing from such contracts appeared as more suited to account for such complexity. See Supiot, *Critique du droit du travail*, 26.

## 5.2.2. After World War II: the changing interplay between contract and “institutions”

In post-war France, as a matter of fact, there was hardly consensus as to the existence of the institute “labour contract”, let alone its function. The network of rules encapsulating party autonomy in the context of employment relationships was certainly not getting any looser. The so-called institutional theory, whose most eminent proponent was Paul Durand, went at one point so far as to put forward that labour law could dispense of “any contractual support”.<sup>535</sup> The idea, in short, was that employees were integrated in a certain community, the enterprise, and that the employer’s power of direction descended from their property rights over the business or, more often, their leading position within the community.<sup>536</sup> In this view, the contract was considered at most as the act through which the worker came to be integrated within the enterprise community (act-condition).<sup>537</sup>

This approach was criticised in France both by “traditional” scholars<sup>538</sup> and, from a Marxist perspective, by Camerlynck and Gerard Lyon-Caen.<sup>539</sup> Especially the latter came to acknowledge, in relatively early times, a double function for the employment contract: not only an “original” or “genetic” function (*rôle génétique*) but also a power to create obligations, or normative function (*rôle normatif*).<sup>540</sup> The influence of Lyon-Caen and other prominent labour lawyers, such as the Italian scholars Gino Giugni and Luigi Mengoni, contributed to the long-term prevalence of the “contractual” approach, which however has had different consequences in different countries. In France and Germany, in any event, it has long been acknowledged that contract has to be, first, the necessary *condition* for the formation of an employment relationship, but also at least *one of the sources* regulating that relationship. With time, a certain shift from administrative to judicial control of labour relationships, as well as the courts’ (and especially the *Cassation*’s Social Chamber’s) orientation towards a contractual reconstruction

---

<sup>535</sup> André Rouast and Paul Durand, *Précis de Droit Du Travail* (Daloz, 1963), n. 440.

<sup>536</sup> Durand, for instance, saw the employer’s power of direction in analogy with the state’s legislative, executive and judiciary power. See Robert-Edouard Jaussaud, Paul Durand, and R. Jaussaud, *Traité de Droit Du Travail* (Daloz, 1947), no. 348.

<sup>537</sup> See Antoine Jeammaud, Martine Le Friant, and Antoine Lyon-Caen, “L’ordonnement Des Relations de Travail,” *Recueil Daloz*, 1998, 359–368.

<sup>538</sup> Namely, François Gaudu and Raymonde Vatinet, *Les Contrats Du Travail*, *Traité Des Contrats Dir J. Ghestin* (Paris: LGDJ, 2001), 1.

<sup>539</sup> See again Gaudu and Vatinet, 1..

<sup>540</sup> Jeammaud, Le Friant, and Lyon-Caen, “L’ordonnement Des Relations de Travail.”

have entailed a retreat of institutional approaches (at least in their traditional versions).<sup>541</sup>

The “creative” function of labour contracts was of course very limited around the middle of the last century, due to a large extent to the extensive control exercised by public actors, and in particular public administration, on labour relationships, and to the wide coverage of collective agreements. In this context, acknowledging that employment relations had a contractual basis did not necessarily mean that these relations should be seen as pertaining to the domain of contract law more in general. In other words, in what relationship labour law should stand to “*droit civil*”, was again not an obvious question.

In the French debate, opinions diverged on whether the application of civil law principles to employment disputes was intrinsically biased in favour of employers or could also turn to the worker’s advantage.<sup>542</sup> In the years, however, two ideas seem to have gained a certain degree of stability: on the one hand, the autonomy of labour law as a discipline with its own principles; on the other, that labour contracts can, this last circumstance notwithstanding, be still be seen against the “common stem” of private law (“*tronc commun du droit privé*”).<sup>543</sup>

In the German debate, the cohabitation of communitarian/institutional views and the workings of contract law principles survives to an extent to this date.<sup>544</sup> Institutional approaches retained relevance in case-law well into the post-war period as a way of explaining, for instance, the worker’s subjection to company practices. At the same time, there was little doubt that the rules of contract law, including some specific rules pertaining to employment contracts,<sup>545</sup> were applicable to these contracts – the general principles of the discipline being no exception. Only recently the employment contract has expressly been defined in the BGB as separate from other service contracts.<sup>546</sup> Thus, it should not come too much as a surprise that good faith and good morals, as we have seen, have played an important role in the development of judicial control of employment contracts as of the 1960s.

---

<sup>541</sup> Again, Gaudu and Vatinet, *Les Contrats Du Travail*, 3.

<sup>542</sup> Couturier, “Les Techniques Civilistes et Le Droit Du Travail”; Lyon-Caen, “Du Rôle Des Principes Généraux Du Droit Civil En Droit Du Travail.”

<sup>543</sup> Such “stem” is part of the broad “*droit commun*” to which article L. 1221-1 of the Code du Travail submits the employment contract.

<sup>544</sup> See Michel Coutu, Martine Le Friant, and Gregor Murray, “Broken Paradigms: Labor Law in the Wake of Globalization and the Economic Crisis,” *Comp. Lab. L. & Pol’y J.* 34 (2012): 565.

<sup>545</sup> The rules expressing the so-called *Fürsorgepflicht*, see above 4.2.1.3.

<sup>546</sup> See new § 611a, added to the general rule on service contracts of § 611.

### 5.2.3. Contractualisation in post-industrial societies

In 1994, Lord Wedderburn<sup>547</sup> warned continental labour lawyers against complacency in dealing with the “new individualism” permeating labour law developments in Anglo-Saxon countries. The United Kingdom was at the forefront of a movement of “individualisation” of employment relations whereby companies de-recognised unions and chose to focus on human relations management-based “personal contracts”.<sup>548</sup> The series of phenomena that Wedderburn describes – declining unionisation rates, “advocacy of individual bargaining”, “globalised localisation” were well underway – certainly with significant local variations – well beyond the UK already at that point. It is difficult, though, to exactly depict when they took off. A main driver for developments in the different systems was the growth in unemployment following the oil (and inflation) crisis of 1973, which opened fatal cracks in the post-war Keynesian consensus.<sup>549</sup> In Germany, if we look at legislative developments, a turning point seems to be represented by the fall of the Schmidt cabinet in 1982 and the labour market reforms undertaken by the supervening Kohl cabinet. While these reforms were initially reverted by the “red-green” coalition taking power at the end of the Kohl era in 1998, the deregulatory trend resumed by 2003 under the banner of “Agenda 2010”.<sup>550</sup> The Part-time and fixed-term employment act of 2000,<sup>551</sup> liberalising fixed-term contracts, has been amended several times throughout the past two decades. Its article 12, in particular, provides ample room for “work on call” arrangements (*Arbeit auf Abfruf*, colloquially “zero-hour contracts”). Whether mediated by unions or otherwise achieved, internal flexibility – both in terms of functions and working time – was the main strategy of employment preservation during the last

---

<sup>547</sup> Lord Wedderburn, “Labour Law and the Individual in Post-Industrial Societies,” in *Labour Law in the Postindustrial Era: Essays in Honour of Hugo Sinzheimer*. (Dartmouth: Aldershot, 1994), 13.

<sup>548</sup> Roger Welch and Patricia Leighton, “Individualizing Employee Relations: The Myth of the Personal Contract,” *Personnel Review* 25, no. 5 (1996): 37–50.

<sup>549</sup> See Eric Hobsbawm, *The Age of Extremes: 1914-1991* (London: Abacus, 1995), 404ff (“the crisis decades”).

<sup>550</sup> Manfred Löwisch, “Das Verhältnis von Arbeitsrecht Und Bürgerlichem Recht in Deutschland,” in *Das Verhältnis von Arbeitsrecht Und Zivilrecht in Japan Und Deutschland*, ed. Franz Josef Düwell et al. (Peter Lang International Academic Publishers, 2013), 21.

<sup>551</sup> Gesetz über Teilzeitarbeit und befristete Arbeitsverträge 21. Dezember 2000 (BGBl. I S. 1966).

economic crises and downturns.<sup>552</sup> In France, over the last decades, many voices have credited a new relevance, or new role<sup>553</sup> of employment contracts in the regulation of employer-worker relationships. Two concurring phenomena have taken place, namely on the one side “that lawyers serving employers have re-discovered the interest of contractual stipulations”<sup>554</sup> and a certain retreat of legal regulation which has gone under the name of “contractualisation” (whereby both individual and collective agreements are addressed as “contracts”) on the other.<sup>555</sup>

As concerns collective agreements, a complex bundle of phenomena have been taking place already for some time. On the one hand, the law had often entrusted collective agreements with the task of achieving flexibility and maintaining competitiveness (an objective which is supposed to be in the interest of employers and workers alike);<sup>556</sup> on the other hand, “traditional” collective agreements, or national branch agreements,<sup>557</sup> are found to lose ground vis à vis decentralised bargaining and non-union agreements.<sup>558</sup> In Germany, new emphasis on lower-level agreements and flexibility undermines the so-called *Günstigkeitsprinzip* (principe de faveur), according to which successive levels of regulation could only derogate from the ones “above” them to workers’ advantage. The so-called

---

<sup>552</sup> Günther Schmid, “Labour Market Policy and Labour Law Reforms in Germany: Towards Inclusive Growth,” *International Journal of Comparative Labour Law and Industrial Relations* 35, no. 3 (2019): 305–330; Günther Schmid, “Sharing Risks of Labour Market Transitions: Towards a System of Employment Insurance,” *British Journal of Industrial Relations* 53, no. 1 (2015): 70–93.

<sup>553</sup> Philippe Waquet, “Le Renouveau Du Contrat de Travail,” *Revue de Jurisprudence Sociale* 5, no. 99 (1999): 383; but already one decade earlier by Antoine Lyon-Caen, “Actualité Du Contrat de Travail, Bref Propos,” *Droit Social*, no. 7–8 (1988): 540; Jeammaud, *Les Polyvalences Du Contrat de Travail*, 299..

<sup>554</sup> Antoine Jeammaud, “Le Contrat de Travail, Une Puissance Moyenne,” in *Analyse Juridique et Valeurs En Droit Social: Mélanges En l’honneur de Jean Pélissier* (Paris: Dalloz-Sirey, 2004), 299–300.

<sup>555</sup> Indeed, Jeammaud remarks how “contractualisation” can be used to cover various trends or phenomena. This earned it a couple of specifically devoted publications, see for instance the devoted number of *Droit ouvrier* (1997) and Philippe Auvergnon, *La Contractualisation Du Droit Social: Actes Du Séminaire International de Droit Comparé Du Travail, Des Relations Professionnelles et de La Sécurité Sociale*, 2003; Patrice Adam, “L’individualisation Du Droit Du Travail: Essai Sur La Réhabilitation Du Salarié-Individu” (PhD Thesis, Nancy 2, 2001).

<sup>556</sup> See Löwisch, “Das Verhältnis von Arbeitsrecht Und Bürgerlichem Recht in Deutschland.”

<sup>557</sup> Covering for instance the whole metal industry, or fashion, retail.

<sup>558</sup> See for a recent overview Cinzia Carta, “La Crisi Della Contrattazione Di Settore in Germania,” *Lavoro e Diritto*, no. 4/2019 (2019), <https://doi.org/10.1441/95369>., detailing both the decline in sectoral bargaining and the general developments re collective agreements coverage and unionisation.

“controlled decentralisation”<sup>559</sup> phenomenon has arguably had quite different impacts across different sectors,<sup>560</sup> in effect leading to a contraction of collective bargaining in, e.g., retail.<sup>561</sup> Such disparate effects – workable decentralisation here, effective contraction there – may not be too surprising. The services sector is known to display very different levels of unionisation compared to the manufacture sector and the difference has only become more prominent in recent years. In presence of such low unionisation, more dispersed bargaining is likely to mean less bargaining power for unions<sup>562</sup> Meanwhile, decrease in unionisation levels and workforce disintegration mechanisms<sup>563</sup> also affect the reach and legitimacy of union-bargained collective agreements.<sup>564</sup>

In this context, it seems plausible that room (increasingly) exists for employers to give shape to employment relations by means of individual – often- standardised – contracts. Contractualisation, however, presupposes that employers also *make*

---

<sup>559</sup> Christian Dustmann et al., “From Sick Man of Europe to Economic Superstar: Germany’s Resurgent Economy,” *Journal of Economic Perspectives* 28, no. 1 (February 2014): 167–88, <https://doi.org/10.1257/jep.28.1.167>; Jelle Visser, “What Happened to Collective Bargaining during the Great Recession?,” *IZA Journal of Labor Policy* 5, no. 1 (May 13, 2016): 9, <https://doi.org/10.1186/s40173-016-0061-1>.

<sup>560</sup> Thorsten Schulten and Reinhard Bispinck, “Varieties of Decentralisation in German Collective Bargaining – Experiences from Metal Industry and Retail Trade. WP CSDLE ‘Massimo D’Antona’.INT – 137/2017,” Working Paper, 2017, <http://aei.pitt.edu/100468/>.

<sup>561</sup> Schulten and Bispinck.

<sup>562</sup> Next of this is the role of self-employment, which, while essentially stable as a percentage of the workforce in both countries over the past 15 years (source: OECD (2019), Self-employment rate (indicator). doi: 10.1787/fb58715e-en, Accessed on 28 December 2019), has gained very different connotations. See again for Germany Carta, “La Crisi Della Contrattazione Di Settore in Germania.”

<sup>563</sup> According to the World Bank, services, a sector traditionally less unionized and more difficult to regulate than industry, have kept growing slowly but steadily until the recent sovereign debt crisis France: 63% in 1987, 75,3% in 2016; Germany: 55,2% in 1987, 70,5% in 2015 (latest report).

<sup>564</sup> The two phenomena may well be connected: Pedersini observes that “if the contribution of multi-employer collective agreements to defining the terms of employment is scaled down significantly, the general legitimization of industrial relations may be eroded since it also - perhaps mainly - derives from the capacity to extend inclusive protection and realise tangible improvements in economic and working conditions on a broad front.” See Roberto Pedersini, “Conclusions and Outlook More Challenges and Some Opportunities for Industrial Relations in the European Union,” in *Multi-Employer Bargaining under Pressure: Decentralisation Trends in Five European Countries* (European Trade Union Institute (ETUI), 2018), 291.

use of that room. Why and how they would do so is a matter that will be discussed in the next section.

### **5.3. Contractualisation as a *tool*: contract terms in employment practices**

#### **5.3.1. Terms' functions and analytical framework**

In the previous section, contractualisation has been presented as a macroscopic phenomenon taking place in a widespread way across modern labour markets. Empirical research on employment contracts in France, however, concluded that the most relevant instantiations of contractualisation happened not as a result of deregulation but due to “strategic use” of contracts on the side of employers.<sup>565</sup> In the following sections, I develop some basic analytics to think about why – and how – employers and their lawyers would invest in using spaces afforded to private autonomy to draft what are essentially “terms and conditions” not only for their customers but also for their employees.

When one discusses this issue, it is important to keep in mind that, as a starting point, legal systems traditionally do not require using a specific form in order to validly conclude an employment contract. Until the first specific rules appeared for temporary or part-time contracts, requiring the limitations to be established in writing, writing down the content of an employment contract was a perfectly optional exercise for the parties. The main content of the contract of employment was represented by, on the one hand, the obligation to work under the employer or its representatives, and on the other hand, the obligation to provide work and pay the worker’s salary. In a Fordist context, this original setting often did not require much further specification.

In all EU legal systems, an obligation for the employer to provide a newly hired employee a written statement of certain core terms concerning the employment has been established by the so-called “Employment information directive” of 1991.<sup>566</sup> According to the Directive’s recitals, “the development, in the Member States, of new forms of work has led to an increase in the number of types of employment relationships”. Member States have hence adopted formal requirements in the field of employment relationships with the aim to provide “improved protection” against violations of their rights and to “create greater

---

<sup>565</sup> C. Bessy, “La Contractualisation de La Relation de Travail, Paris, LGDJ, Coll.«,» *Droit et Société*», *Série Économie*, 2007.

<sup>566</sup> Council Directive of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship, 91/533/EC

transparency” on the labour market. Interestingly, thus, the increased salience of individual employment contracts has been indirectly acknowledged by the EU already in 1991. The Directive has been recast in 2019, including not only an expanded mandatory disclosure but also, possibly relevant to the subject of this book, the prohibition of certain forms of extreme non-compete clauses.<sup>567</sup>

Why would employers want to make use of such contract stipulations? Collins has classically argued that employment relationships are characterised by a “double information asymmetry”: the employee knows their job-related strengths and weaknesses, which are unknown to the employer; conversely, the employer holds much information on the day-to-day working of the workplace which is relevant but inaccessible to the employee.<sup>568</sup> While Collins uses the observation to argue that some regulation may be needed, employers have the possibility to react to the lack of information by using contract terms. They may want to align employees priorities with the interest of the company by tweaking the remuneration structure, include specific obligations that clarify what is expected of individual employees and so on. The non-compete clauses that the 2019 EU directive aims to ban seem to fit in this description.<sup>569</sup>

Collins further identifies transaction costs, especially in the field of dispute resolution, as being relevant to employment contracts.<sup>570</sup> Transaction costs make the creation, adaptation and termination of employment contracts burdensome. Also in this respect, employers can improve their outlook by deploying appropriate contract terms: without considering arbitration clauses, one can think for instance of conventional limitation periods and penalty or liquidated damages clauses.

Transaction costs also typically explain the need for *standardisation*: while companies may sometimes want to differentiate between employees, the benefit

---

<sup>567</sup> Directive 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186, 11.7.2019, p. 105.

<sup>568</sup> See Hugh Collins, “Justifications and Techniques of Legal Regulation of the Employment Relation,” in *Legal Regulation of the Employment Relation*, ed. Hugh Collins, Paul L. Davies, and Roger W. Rideout, 2000, 3–28. See in particular p. 7.

<sup>569</sup> Article 9 Directive 2019/1152, Parallel employment, esp first section: “Member States shall ensure that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.”

<sup>570</sup> Collins, “Justifications and Techniques of Legal Regulation of the Employment Relation,” 9–10.

of contractual tools is limited if they are to be re-discussed every time. Thus, in principle it makes sense for the “terms and conditions” to be drafted in a rather homogeneous way for homogeneous groups of workers. In this way, the employer achieves a larger degree of legal and organisational certainty and reduces agency issues – including by reducing the discretionary role of middle-management in discussing terms of employment with individual employees.

Transaction costs are also traditionally seen as one of the reasons explaining the efficiency value of employment contracts, in parallel with Coase’s theory of the firm:<sup>571</sup> the employer’s power of direction is one way of cutting transaction costs related to the performance of the contract, since the employer can demand that the employee perform a possibly quite broad palette of tasks within the performance of their employment contract. Given the long-term nature of employment relationships, additional flexibility may be required.

Almost counterintuitively, contractual drafting can serve both legal certainty- by clarifying the parties’ expectations and possibly standardising the concerned work relationships- and flexibility -e.g. by allowing more room to the “management” of the contractual relationship. To the extent that the applicable labour laws allow it, they can also set aside or alter the operation of legal rules, affording the employer a legal reality that is closer to their needs.

An interesting way to think about how lawyers approach the question of contract drafting is provided by Collins,<sup>572</sup> who identifies four functions:

- 1) Resolving ambiguities by suggesting express terms that “provide greater detail for the economic deal”;
- 2) Allocating risks of foreseeable and unforeseeable contingencies;
- 3) Constructing non-legal sanctions or self-enforcing legal sanctions;
- 4) Detailing how disputes should be resolved and the types of remedy available to other parties.

For the purposes of the book’s analysis, and in line with what has been observed so far in this section, these functions are here translated to employment relationships by distinguishing between

- 1) Customisation: by and large overlapping with no. 1 above;

---

<sup>571</sup> Ronald Harry Coase, “The Nature of the Firm,” in *Essential Readings in Economics* (Springer, 1995), 37–54.

<sup>572</sup> Hugh Collins, *Regulating Contracts* (Oxford University Press, 2002).

- 2) Flexibilisation: *managing* risk within the limits imposed by mandatory labour laws, which determine to what extent a risk allocation can take place;
- 3) Governance: terms dealing with sanctions or dispute resolution, establishing mechanisms to facilitate the management of the relationship.

Collins notices how in business relations detailed terms may prevent court disputes, but at the same time may not be relied upon “for fear of souring the business relation and creating an additional obstruction to the completion of the deal”. This may be less the case in an employment relationship, where typically disputes arise *when* the relationship has soured. Furthermore, when the employee is comparatively weak, much like consumers, they may feel pressured to comply with certain terms even when they have not yet been invoked. This arguably adds to the employer’s (lawyers’) interest in making use of existing chances of unilateral contract drafting.

### 5.3.2. Customisation

In a famous Dutch case,<sup>573</sup> a hotel chain had dismissed a waitress for a violation of its “drugs-free workplace” policy – during the employee’s free time. The employee had signed an express written acceptance of the policy. Quite plainly, not all employment contracts contain an implied or express obligation, for the employee, not to use drugs in their spare time. In principle, what an employee does in their free time is irrelevant to the employment relationship in line with the employee’s right to respect for their private life. The various courts involved in the case, including the Dutch supreme court, however, confirmed the dismissal with very limited scrutiny.<sup>574</sup>

When employers wish to introduce obligations not automatically deriving from the employment contract, or to give particular weight to certain specific obligations, it is expedient to make sure that employees have specifically consented to undertaking these obligations. In the example case, all employees were required to individually accept the employer’s policy. This made it easier to justify the employee’s dismissal as due to a violation of the employment contract. While it is not impossible to introduce specific rules of conduct for individuals

---

<sup>573</sup> Hoge Raad 14-09-2007 ECLI:NL:HR:2007:BA5802.

<sup>574</sup> See Evert Verhulp, “Identity-Bound Employers and Limitations of Employees’ Fundamental Rights,” *European Labour Law Journal* 2, no. 2 (2011): 166–172. The author suggests that the fact that the lower level courts were placed in Aruba and not in the Netherlands has had an impact on the final outcome.

through instruments other than the individual contract,<sup>575</sup> direct incorporation in the contract seems in many circumstances a safer option.<sup>576</sup> Typical examples of such clauses would be terms requiring employees covering specific functions to live on or next to their work premises, but also “objective” clauses, giving the employer the right to terminate the contract in case the employee does not reach certain agreed targets, are examples of such terms.<sup>577</sup> Other examples may be clauses concerning social media use, use of company devices and similar detailed regulations.<sup>578</sup> Often non-compliance with these terms will have consequences for the employee, disciplinary or otherwise.

### 5.3.3. Contract Terms as instruments of flexibility

While the most visible discussions in labour law on flexibility arguably concern *external* flexibility, namely companies’ ability to up- and down-size or externalise work and workforce, flexibilisation efforts also have an important *internal* component. Internal flexibility can take place in two important directions – adapting wages to the company’s or worker’s performance (financial flexibility) or adapting the workforce’s tasks, functions and distribution (functional

---

<sup>575</sup> Through, for instance, collective agreements or employee handbooks. A prominent example would be that of security company GS4’s “neutrality” policy, which was used as a reason to dismiss a Muslim employee who decided to wear a headscarf while at work. This policy had been, at some point during the controversy, expressly endorsed by G4s’s works council. The policy, in so far as it genuinely prohibited all display of any signs of religious, political or philosophical affiliation, was upheld by the Court of Justice of the European Union. See *Achibta v G4S*, Case C-157/15.

<sup>576</sup> Yves Aubrée, “Contrat de Travail–Existence–Formation,” *Encyclopédie Dalloz, Répertoire de Droit Du Travail*, no. 75 (2014): 3. See eg A. van Hoek, “Collective Agreements and Individual Contracts of Employment in Labour Law–Netherlands Report,” *Collective Agreements and Individual Contracts of Employment, The Hague: Kluwer Law International*, 2003, 167–90.: while (what’s left of) the *principe de faveur* may render certain obligations suspicious in collective agreements, once they are incorporated in the individual contract (among others through “menu” choices) the evaluation of the benefits and disadvantages becomes more complicated. A quick overview of law firms’ websites discussing employee handbooks in the Netherlands – a choice based on the easy availability of sources in English – show that it is considered as (good) practice for employers to incorporate the handbooks in the individual employment contracts (<https://www.russell.nl/publication/employee-handbook>, last accessed 8 March 2020), together with “a so-called unilateral amendment clause” ([https://www.bakermckenzie.com/-/media/files/insight/publications/2018/08/guide\\_globalemployernetherlands\\_aug2018.pdf](https://www.bakermckenzie.com/-/media/files/insight/publications/2018/08/guide_globalemployernetherlands_aug2018.pdf), last accessed 8 March 2020).

<sup>577</sup> See French case-law in Aubrée, “Contrat de Travail–Existence–Formation.”

<sup>578</sup> See the examples in the law firm websites referred to above, note 573.

flexibility).<sup>579</sup> From the perspective of contract law, functional flexibility concerns adaptations in the contract's characteristic performance (the provision of work, in other words the employee's performance); financial flexibility, on the other hand, affects the monetary obligation due in return for the characteristic performance.

#### 5.3.3.1. Functional flexibility

Within employment relationships, the main instrument of functional flexibility is traditionally the subordination lien, or employer's power of direction. This entails that while the contract only specifies the main characteristics of the employee's position – e.g., teaching and doing research at an educational institution – the employer or its representatives can specify the contents of the employee's tasks and adapt them over time as necessary: for instance, they can assign certain people to teach certain courses, and reassign them to different ones should the original courses be discontinued.

The employment contract, through its description of the employee's position, usually sets the outer limits of this "functional" flexibility.<sup>580</sup> Contractual terms may, however, seek to expand these limits – for instance providing that the employer can demand the employee to teach in an area different than the one that was originally presupposed by the contract, should that be necessary for the university's well-functioning. Such terms allow companies "to adapt to the growing number of security regulations, to technological developments, to evolving demands by clients and to changing strategies of competitors."<sup>581</sup> They also play an important relational function in setting mutual expectations in tune with possible future adaptations. There are thus, legal and practical advantages to including functional flexibility in the original contract – when, one should also consider, the employee will both be inclined to make certain concessions in order

---

<sup>579</sup> See for background Mia Rönnmar, "The Managerial Prerogative and the Employee's Obligation to Work: Comparative Perspectives on Functional Flexibility," *Industrial Law Journal* 35, no. 1 (2006): 56–74. The idea of "external" flexibility referred to here is very similar to what the author calls "numerical" flexibility.

<sup>580</sup> With M. Rönnmar, who later concentrates of the exercise of managerial prerogative rather than contract drafting, "*The aim of functional flexibility is to vary the content of work in relation to the changing demands of production. In order to achieve functional flexibility, the employer will broaden job descriptions and the obligation to work in general and invest in training and education*". Rönnmar, 57..

<sup>581</sup> Aline Van Bever, "Goede Trouw En Belangenafweging in Het Arbeidsrecht. Toepassing Op de Eenzijdige Wijziging van Arbeidsvoorwaarden," *Tijdschrift Voor Sociaal Recht/Revue de Droit Social*, no. 4 (2010): 469–535.(My own translation from the Dutch original)

to get the desired position *and* will not (yet) have developed any attachment to their current functions and workplace.<sup>582</sup>

### 5.3.3.2. Financial flexibility

Next to the functional flexibility just discussed, companies also strive for *financial* flexibility, that is the possibility to adapt their wage expenditure to market circumstances, their own performance and other relevant factors.<sup>583</sup> Since the main starting point in a traditional employment contract is that wages are to be set in a manner which allows the employee to rely on stable income and keeps them immune from entrepreneurial risk, wage flexibility is something that does not come automatically with the stipulation of an employment contract.

Wage arrangements can also function as instruments of human resources management, providing workers economic incentives going beyond the basic time-money exchange.<sup>584</sup> While such arrangements will normally *complement* the regular salary, for some workers they may represent a significant component of their total remuneration.<sup>585</sup> Once a complementary pay system is put in place, it may be difficult to change it. The interest for employers of carefully drafting wage flexibility terms seems beyond doubt.<sup>586</sup>

In the context of salary-related stipulations, different dimensions can come into play.<sup>587</sup> On the one hand, it is possible to connect the salary to the firm's or the

---

<sup>582</sup> In other words, there is no endowment effect on the employee's side at the moment of concluding the contract.

<sup>583</sup> Again, this description mirrors that proposed by Rönömar, who translates, for a legal audience, categories found in human resources management studies.

<sup>584</sup> BAG 19. 3. 2014 – 10 AZR 622/13.

<sup>585</sup> A recent Eurofound report shows that "variable pay systems" are very (and increasingly) widespread, especially in the private sector. Often unions or worker representatives are involved – especially company level representation. However, variable pay seems to be particularly preponderant in countries with relatively low levels of unionisation, suggesting that companies enjoy considerable room for manoeuvre to use unilateral policies and individual agreements instead of collective instruments. "Changes in Remuneration and Reward Systems," Eurofound, January 6, 2020, <https://www.eurofound.europa.eu/publications/report/2016/industrial-relations/changes-in-remuneration-and-reward-systems>.

<sup>586</sup> See esp. chapter 9 in Richard Thorpe and Gill Homan, *Strategic Reward Systems* (Pearson Education, 2000).

<sup>587</sup> "The European Company Survey (ECS) 2013 asked human resource managers in European establishments with more than 10 employees whether at least some of their employees received variable pay. The survey distinguished five forms of variable pay:

employee's performance; on the other hand, the employer might wish to be able to compensate their employees in a more generous way at certain times, while maintaining the possibility to go back to more conservative expenditures later on. From the point of view of the present study, one may see the first as a "customisation" attempt and the second as flexibilisation *stricto sensu*.

#### 5.3.4. Governance

Next to a need for flexibility, the typically long-term nature of employment contracts entails – this is hardly a surprise – a need for governance structures addressing potential conflicts.<sup>588</sup> This need emerges both with reference to the prevention of controversies and to their management.<sup>589</sup> In the first sense, contract terms may help set incentives that realign the employee's interests with those of the company – for instance, by establishing fines for disloyal conduct. Contractual penalties may, additionally, reinforce the effectiveness of specific obligations included for "customisation" purposes. This contributes to moderating the problem of information asymmetries at the moment of concluding the contract. In the second sense, contractual terms may for instance set conventional limitation periods, increasing legal certainty, or contain an undertaking to exhaust internal dispute resolution mechanisms before bringing certain claims before a court of law.

While, again, the main governance structure characterising employment relationships is evidently the subordination lien, or the employer's managerial prerogative, this structure is purposefully open (we have already said that subordination is also a traditional instrument of flexibility). The coordination problems that this openness entails are arguably enhanced by the complexity of

---

payment by results (for example, piece rates, provisions, brokerages or commissions  
pay linked to individual performance following management appraisal;  
pay linked to group performance (of the team, working group or department);  
profit-sharing schemes (pay linked to the results of the company or establishment);  
share-ownership schemes offered by the company.

"Except share-ownership schemes, all the mentioned practices were found to be common (25% of employers) to very common (43%). "Changes in Remuneration and Reward Systems," 17.

<sup>588</sup> Although in the context of labour law it is common – and in many ways significant – to distinguish between open-ended and fixed-term contracts, this distinction is less crucial when discussing contracts and contracting. From the point of view of drafting parties, the question of managing the risks associated with the time dimension arises irrespective of how the contract can be terminated – even though termination costs will likely play a role in assessing the said risks.

<sup>589</sup> M. Mekki, *Le Nouvel Essor Du Concept de Clause Contractuelle (1ère Partie)* (RDC, 2006).

employment relations in service or, even more, “knowledge” economies.<sup>590</sup> Governance by specific contract terms, then, such as penalties or conventional limitation periods, allow employers to gain legal certainty without turning to substantive rules limiting the parties’ room for manoeuvre.

#### **5.4. Contractualisation in practice and judicial responses: analysing certain contentious terms**

The above analysis shows why employers and their lawyers may want to make use of the possibility to craft relevant aspects of an employment relationship by means of (standard) contract terms; we have further seen that multiple developments seem to be making more “space” for such drafting exercise: contractualisation of employment relationships – including in France and Germany – in the sense established in Chapter 1 of this book is a plausible hypothesis.<sup>591</sup> This section looks for concrete examples of contractualisation: do employers have the space to use contract terms to customise obligations, increase flexibility and establish governance mechanisms? And what happens when the use of such terms leads to a court dispute? In particular, what is the role of contract law and competing rationalities in this reaction?

To answer these questions, this section presents a selection of terms which have been the object of court litigation in the two jurisdictions considered and an analysis of the ways in which courts have intervened on their validity. First, I present “customisation” terms, which essentially introduce elements to the employment contract that would not automatically be implied by the contract itself. Customisation terms are presented on the example of clauses concerning the restitution of educational expenses. Two separate sub-sections are devoted to functional and financial flexibility. Both are looked at through modification or variation terms. One may, however, expect some differences in the treatment of the two areas of concern since functional flexibility directly affects the employee’s performance, whereas financial flexibility relates to the employer’s counter-performance. The determination and specification of employee’s duties come close to the general question of managerial powers.<sup>592</sup> Remuneration, on the other hand,

---

<sup>590</sup> Walter W. Powell and Kaisa Snellman, “The Knowledge Economy,” *Annual Review of Sociology* 30, no. 1 (2004): 199–220, <https://doi.org/10.1146/annurev.soc.29.010202.100037>; Alan Burton-Jones, “Knowledge Capitalism: Business, Work, and Learning in the New Economy,” *Oup Catalogue*, 2001.

<sup>591</sup> Contractualisation is defined there as “a process by which the salience of contracts and contract law in a given domain is increased”. See p. 2- on for further elaboration.

<sup>592</sup> Or in other words, ultimately, of the subordination nexus.

is usually considered as a purely contractual (as opposed to relational or institutional) aspect. Finally, I look at “governance” mechanisms within the contract on the example of penalty clauses.

Only clauses that, in somewhat similar fashion, appear in both systems have been included in the chapter. This choice obscures the fact that a larger palette of terms has actually gained salience in each country. Limiting the analysis to “common ground” mechanisms further hinders the study’s ability to look inside each system in a systematic way. However, the choice has two considerable advantages: first, it enhances oversight; second, it provides some insight into how the background framework, control mechanisms and other factors contribute to shaping the response to contractualisation in individual cases.

As discussed in Chapter 4, at the moment of writing, both Germany and France have included provisions on unfair terms control applicable to employment contracts in their civil codes. However, for French law, the analysis here is made on the basis of case-law published before the reform: while the possible impact of the new Civil Code rules on employment contract has been discussed in the literature, it is still too early to expect to find meaningful developments in the specific areas discussed in this chapter. As far as Germany is concerned, in contrast, the analysis is mainly based on case-law from the post-*Modernisierung* era. Where relevant, however, a reference is made to the state of the art before 2001: to what extent has the new legal framework affected the balance between rationalities?

#### **5.4.1. Customisation: the restitution of educational expenses**

The reimbursement of education costs is an example of the directions in which contemporary labour relationships are expanding. Although collective agreements continue to be a relevant framework within which these issues are addressed,<sup>593</sup> there might be many different reasons why they also tend to appear in individual contracts- in both systems.<sup>594</sup> Over the duration of an employment relationship, it can serve the interests of both parties to ensure that the worker’s skills are updated or upgraded. When this is the case, the employee can be allowed

---

<sup>593</sup> In which case, in Germany the terms would be exempted from the stricter control exercised over terms in (non-negotiated) individual contracts. This is not, in principle, the case under art L. 1121-1 Code du Travail.

<sup>594</sup> We know that this happens from the case-law itself: for France, we will see that only trainings which are offered in the context of individual contracts can include a restitution obligation; in Germany, all BAG cases had to concern non-collective agreements, otherwise no scrutiny would take place.

to pursue the training at least in part during their working time. Furthermore, the employer can incentivise the effort by covering the related educational expenses, which can be considerable. In these cases, the employer has an interest in keeping the employee with him after the end of training, so to profit from his “investment” in the employee’s skills. For this reason, it is common to stipulate that the employee will have to reimburse (part of) the expenses incurred by their employer in view of their education, in case they quit (or the contract is otherwise terminated) before a certain time has passed since the training has been completed.<sup>595</sup> From the point of view of the worker, these terms restrict their occupational freedom, i.e. they represent a limitation on their ability to resign whenever they desire to, possibly with a view of getting a better job.<sup>596</sup> It is thus perhaps not very surprising that both legal systems have been confronted with litigation concerning terms of this kind.

#### 5.4.1.1. Germany

However presented in different forms and with different labels,<sup>597</sup> also in Germany the fundamental function of these agreements is understood as being that of “securing the employer the benefits deriving from the employee’s newly acquired skills” for the longest time possible, while also guaranteeing recovery of the expenses actually undertaken in the event of early termination. The employee, at the same time, has an interest in improving their market chances through the education and not to be bound to the same employer more than is appropriate considering the latter’s expenses.

Thus, in order to be compatible with a balanced appreciation of the parties’ interests, the stipulation must concern a programme which actually has some economic value for the employee, and does not only fulfil purposes related to the employing company’s well-functioning or productivity.<sup>598</sup> Provided that, the

---

<sup>595</sup> Paul-Henri Antonmattei, *Les Clauses Du Contrat de Travail* (Wolters Kluwer France, 2009), 79. He observes that “the current development in the domain of professional training creates greater incentives towards the insertion of this term in employment contracts.”

<sup>596</sup> Although it can be argued that they are also valuable for employees, in that the possibility of making use of them encourages employers to undertake costly training investments. See Aubrée, “Contrat de Travail–Existence–Formation”, para 100.

<sup>597</sup> The BAG has independently interpreted as a *Rückzahlungsklausel* agreements terms which nominally concerned a “loan” granted by the employer to the employee but in practice resulted in payments to the interested educational institution and not to the worker. A loan, according to the Court, postulates that the agreed sum is put at the beneficiary’s disposal.

<sup>598</sup> In other words, the training must typically either allow the employee to gain access to a better position within the same company, or improve her their chances on the labour market: see 11.04.2006 - 9 AZR 610/05.

employer is entitled to pursue the establishment of a bond, but the duration of the latter, absent exceptional circumstances, has to be scaled according to the advantage for the employee, the costs incurred by the employer, the duration of the programme pursued and taking into account above all the days in which the worker was dispensed from habitual activities to attend the concerned programme.

Already before the reform took place, the BAG had articulated – on the basis of a cumulative reading of § 242, § 138 and § 315 BGB<sup>599</sup> – rather detailed guidelines as to the admissible duration of the permanence obligation: six months in case of a programme lasting up to one month- under continued payment of the regular salary; one year if the programme lasts between one and two months, two for a commitment between three and four months; no more than three years for programmes lasting between six months and twelve months and up to five years when the courses last over two years.<sup>600</sup>

If the amount of the restitution and its amortization have to be considered when determining the term's fairness, it follows that the amount due has to decrease over time.<sup>601</sup> This development also has to be expressly contemplated in the contract. The BAG has not set detailed guidelines on this point. The practice seems to be to stipulate that the outstanding amount decreases every month by a fraction of that amount which is proportional to the total duration of the fidelity obligation. As early as 1986,<sup>602</sup> the BAG had denied that a deviation from this model, providing for yearly- rather than monthly- decrease (e.g. minus 25% after one year, minus 50% after two years, and so on) could be considered as unfair. This position might have become harder to sustain<sup>603</sup> under the current legal

---

<sup>599</sup> Concerning, respectively, good faith in (the performance of) contractual relationships, immoral contract and the unilateral determination of contractual performance.

<sup>600</sup> See BAG 14.01.2009, 3 AZR 900/07.

<sup>601</sup> Preis, *ErfK Arbeitsrecht* 2015, § 611, para 442.

<sup>602</sup> BAG, 23.04.1986, 5 AZR 159/85.

<sup>603</sup> Pleyer, AP BGB § 611 Ausbildungsbeihilfe Nr. 10, in his annotation to the decision above, observes that the fact that other authors claimed it to be the “usual” arrangement already at that time, this was not a problem from the point of view of the term's validity. However, this evaluation might have to be slightly corrected in light of the different standard imposed by the post-reform model of control. Whereas in 1986 the BAG observed that *“Es geht aber nicht darum, den Vertrag abweichend von den Vereinbarungen entsprechend dem Vorteil des einen oder anderen Vertragspartners umzuändern, sondern es sind im Rahmen der Vertragsfreiheit Rückzahlungsvereinbarungen der Parteien anzuerkennen, sofern im Rahmen einer Gesamtabwägung nicht unsachgerechte Kündigungsbeschränkungen erfolgen”* (freely translating, “the question is not to change the contract in accordance with one or the other party's advantage, but to

framework. However, looking at more recent last-instance cases, it seems that most contracts tend to indeed follow the “standard” approach.

An additional *validity* requirement is that the restitution obligation must be expressly limited to cases in which the termination lies within the employee’s sphere of influence (resignation or dismissal for fault). This limitation, in other words, has to be incorporated in the wording of the clause. A term which generally engages the employee to pay “when the relationship is terminated early” is therefore unfair.<sup>604</sup> This position marks a difference with respect to the earlier case-law “under § 242 BGB” to the extent that, before the reform, courts would check whether *in a given case* calling in the reimbursement obligation was justified in light of the circumstances.<sup>605</sup> For instance, this would be the case when an employee has been dismissed for good cause. In the current legal framework, the control is “anticipated” to the term’s formulation. In this respect, the application of the standard terms provisions also entails an increased transparency standard, which for instance requires, when the worker undertakes to accept a new position upon completion of a certain program, that this position is clearly described in the agreement.<sup>606</sup>

While, under the pre-reform *Inhaltskontrolle*, an exceedingly long permanence obligation could be reduced to an acceptable one, even adapting the scaling of the debt’s extinction,<sup>607</sup> under the new rules an unfair length or scaling automatically entails the term’s invalidity.<sup>608</sup> The BAG has stated that adaptation in place of eradication may, exceptionally, be necessary when, in case of extraordinarily expensive or exceptionally valuable trainings, the exact boundaries of what can be required of employees are unclear. In this case, the employer may have drafted the terms under enhanced uncertainty and thus “considering the specificities of labour law”, supplementary interpretation may be applied. More in general, the BAG has said that the determining factor for deciding whether supplementary interpretation is justified should be “whether the removal without replacement of

---

recognise the restitution agreements entered by the parties making use of their contractual freedom, insofar as, under a general evaluation, the possibility to resign is not unjustifiably impaired”). The standard endorsed by the general rule of article 307 is different.

<sup>604</sup> See BAG23.01.2007, 9 AZR 482/06. In this case, the fact that the term further specified that the obligation would ensue “*in particular* when the employee resigns or when the company terminates the contract for a reason pertaining to the employee” did not suffice to make the clause sufficiently limited.

<sup>605</sup> BAG, 11.04.2006 - 9 AZR 610/05.

<sup>606</sup> BAG 18.3.2008, NZA 2008. 1004.

<sup>607</sup> Preis, *ErfK Arbeitsrecht* 2015, BGB § 310, para 94.

<sup>608</sup> BAG, 11.04.2006 - 9 AZR 610/05.

the unfair term offers a reasonable solution taking into account the typical interests of the drafter and of their counterpart".<sup>609</sup> When the removal of the term can entail an "unbearable hardship" (*unzumutbare Härte*) for the drafter, it can be said that the gap ensuing from the invalidity needs to be filled.<sup>610</sup>

#### 5.4.1.2. France

The so-called "*clause de dédit-formation*" (forfeit clause linked to education), through which the employee engages to pay a certain sum if they quit before a certain date, is conceptualised as a "termination fee". In other words, it does not entail an obligation for the employee to remain with their employer, but attaches monetary consequences to the exercise of their right to terminate the contract.<sup>611</sup> Such arrangement represents both a form of investment insurance for firms which offer to cover the costs for their employees' further education and a way of incentivising those employees not to immediately quit the post they have been trained to fill. It should not, however, turn into a systematic instrument of employee retention.<sup>612</sup> Furthermore, the validity of such clauses, which is in principle not questioned,<sup>613</sup> is subjected by French courts to several cumulative conditions, of substantive as well as formal nature.

From the substantive point of view, the *Cassation* has specified already before the turn of the century a series of requirements: a) that the offered programme has

---

<sup>609</sup> BAG, 14. 1. 2009 – 3 AZR 900/07, para 30, with reference to BAG 25.5.2005 – 5 AZR 572/04.

<sup>610</sup> BAG 21.06.2011, BeckRS 2011, 77583 "Eine ergänzende Vertragsauslegung setzt voraus, dass der Regelungsplan der Parteien infolge der durch die Unwirksamkeit einer Vertragsklausel entstandenen Lücke einer Vervollständigung bedarf (BAG 11. April 2006 – 9 AZR 610/05 – Rn. 35, aaO). Dies ist dann anzunehmen, wenn die ersatzlose Streichung der unwirksamen Klausel für den Verwender eine unzumutbare Härte darstellen würde (vgl. BAG 15. September 2009 – 3 AZR 173/08 – Rn. 49, AP BGB § 611 Ausbildungsbeihilfe Nr. 42 = EzA BGB 2002 § 611 Ausbildungsbeihilfe Nr. 13)."

<sup>611</sup> Antonmattei, *Les Clauses Du Contrat de Travail*, 2009, 83.

<sup>612</sup> Antonmattei, 80.uses as example the case of a logistics company specialised in the transportation of hydrocarbons which regularly hired drivers lacking the necessary licence and then asked them to undertake the indispensable training and a correlated obligation to remain with the company for 18 months. In this case, the objective was reducing personnel turnover in a sector whose working conditions were particularly challenging. This strategy represents an abuse of the *clause de dédit-formation*. The case is taken from Cass. soc. 4 juin 1987, n 84-43639.

<sup>613</sup> But see Aubrée, "*Contrat de Travail-Existence-Formation*", para 112. Here Aubrée highlights that this attitude seems incompatible with the idea that, within the employment relation, it is the employer which has a duty to secure that his workers maintain and improve their skills and adaptability, while the employees are under no obligation of seeking continued education.

imposed on the employer additional costs compared to those which were in any case due by law or collective agreements;<sup>614</sup> b) that the amount to be refunded is proportionate to the expenses incurred and the duration of the training;<sup>615</sup> c) that the term does not result in depriving the employee of their ability to resign.<sup>616</sup> This last requirement means that the “fidelity” obligation imposed on the employee should not be exceedingly long, while the proportionality prong suggests that the amount to be returned should decrease with time.<sup>617</sup> However, neither of the two prongs seem to have been further specified by the highest court.

As far as form is concerned, the *Cassation* has more recently specified that the obligation “has to be the object of a specific agreement entered into before the beginning of the training and which specifies the date, the nature, duration and actual cost to the employer of the training as well as the amount and mode of the reimbursement due by the employee”.<sup>618</sup> The “specific agreement” requirement is intended as imposing that the term should concern one particular training, so that the employee’s consent is not given without actual knowledge of the deal’s conditions.<sup>619</sup> In a case decided in 2007, the Court made clear that the costs actually incurred by the employer have to be clearly mentioned in the clause itself. The absence of such mention was considered to make the clause invalid.<sup>620</sup>

Finally, it is interesting to observe that stress is placed on the term’s *mise-en-oeuvre*— in other words, on the question of under what circumstances the reimbursement obligation can be imposed on the employee. In general, it seems that the claim should be actionable every time the termination of the contract is to be attributed to the employee’s behaviour.<sup>621</sup> The most obvious case would be that of their resignation, although not when the latter is justified by a severe breach on the side of the employer.<sup>622</sup> It seems that the obligation should also become actionable when the employee is dismissed for disciplinary reasons, and not when an economic dismissal takes place. The *Cassation*’s choice to grant the claim when

---

<sup>614</sup> Thus the costs have to be “real”, i.e. they must not have already been refunded to the company by the state), *Cass. soc.* 19 nov. 1997, *RJS* 1/98, n° 79.

<sup>615</sup> *Cass. soc.* 17 juill. 1991, *RJS*10/91 n°1072.

<sup>616</sup> *ibidem*.

<sup>617</sup> Antonmattei, *Les Clauses Du Contrat de Travail*, 2009, 82.

<sup>618</sup> *Cass. soc.* 4 february. 2004, *RJS* 4/04, n° 438 and *Cass. Soc.* 16 March 2005, n 02-47007.

<sup>619</sup> Antonmattei, *Les Clauses Du Contrat de Travail*, 2009, 81.

<sup>620</sup> *Soc.* 16 mai 2007, *JCP S* 2012, 1175, note F Dumont.

<sup>621</sup> Aubrée, “*Contrat de Travail–Existence–Formation*”, para 107.

<sup>622</sup> *Cass. soc.* 11 janv. 2012, 10-15481.

an employee resigns in the course of their probation period, on the other hand, has been the object of criticism.<sup>623</sup>

As to the consequences of incorrect drafting, in most cases a failure to meet all the mentioned requirements will entail the term's nullity. However, when the fidelity obligation stretches exceedingly far in time or the amount to be reimbursed is exceedingly high, it is possible for the judge to *reduce* the term instead of eradicating it. This is done under application of article 1152 of the Civil Code, concerning penalty clauses.<sup>624</sup>

#### 5.4.1.3. Comparison

As concerns the restitution of educational expenses, the two systems show a similar concern with the employee's ability to resign. This concern is coloured by constitutional provisions and in itself not necessarily concerned with contractual balance – even an extraordinary investment by the employer would not, for instance, justify an unlimited permanence obligation.

Within these external limits, proportionality plays a significant role: the requirement must serve a legitimate interest and not go beyond what is reasonably required to pursue it.<sup>625</sup> As to the legitimate interest, both systems insist on the fact that the employer must have voluntarily incurred the expenses that are being claimed back. In both systems, this requirement is connected to the idea that expenses incurred for mere purposes of “normal” updating of skills and knowledge are not recoverable. German law further specifies that the training must promise a professional advantage for the employee. Furthermore, the restitution obligation must be proportionate in itself.

Furthermore, both systems place emphasis on transparency. This may not be particularly surprising for (post-reform) German law, however it is remarkable that a similar trend is also noticeable in French case-law: see, for instance, the requirement that the exact costs incurred by the employer be mentioned in the clause.

Two important differences can be observed: on the one hand, the different emphasis on the *drafting* of the term establishing the conditions for a restitution obligation and its *exercise*. Where we have seen that in Germany the term must

---

<sup>623</sup> See Aubrée, “Contrat de Travail–Existence–Formation”, para 108. Barège para 94.

<sup>624</sup> Cass. soc. 18 juin 1981, n 78-40939, Bull. Civ. 1981, V, 587; Cass. soc. 23 janv. 1985, 82-42992, Bull. civ. 1985, V, 58.

<sup>625</sup> Indavertedly echoing Micklitz's idea of the role of proportionality in unfair terms control and beyond: see Micklitz, “Some Reflections on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts,” 2008.

restrict itself to cases in which the termination is due to the employee, in France courts will scrutinise whether the employer is justified in invoking the term in a certain situation – so a term may not be *actionable* when termination was not due to the employee's choices or behaviour. This is an interesting divergence to the extent that it also mirrors the difference between judicial control in Germany pre- and post-reform. Emphasis on drafting could be seen as a regulatory feature: other than control over exercise of a right or prerogative, it is not directly tied into the facts of a specific dispute and has potential to directly affect a number of other contracts. This development, however, is also relatively easy to explain as a direct implication of any version of open unfair terms control: if the *term* must be balanced, it can't be the case that the assessment depends on how the rights that it establishes are exercised. Fair implementation of an unfairly formulated prerogative cannot re-establish contractual equality.

The other main difference has a more explicit regulatory connotation: whereas French courts leave some space for the correction of an unfair restitution term, in German law since the reform the prohibition of *geltungserhaltende Reduktion*, justified in plainly regulatory terms (ie mainly incentive setting) prevails. One may notice how ambiguity transpires here: on the one hand incentives are the main justification, but the German courts also feel the need to justify this by referring to a concern with the counterparty's position. Furthermore, the BAG has set limits to the operation of the prohibition, ie it makes room for cases in which the rule of full eradication should be set aside on the basis of the individual parties' interests.

#### **5.4.2. Functional flexibility: worker's performance and place of work**

Case-law discussed in the following sub-sections concerns terms operating in the area of the right of direction: terms by which the employer reserves the right to change the employee's place of employment or their function. The starting point is that when the place of employment or the function are determined in the contract, this specification takes away from the employer the possibility of changing it later on by making use of managerial prerogative. As we will see, while the function is normally mentioned in the contract with such binding effects, mentioning the place of employment, in both systems, may not immediately entail that such indication has become part of the contract. From the employee's perspective, the impact of terms of this kind will often be very limited, when the different tasks or, on occasion, different locations where the work is to be carried out – are relatively close to each other. Sometimes, however, a different set of tasks may entail different working hours, different compensation schemes or (the impossibility of) making use of certain sets of skills.

#### 5.4.2.1. Germany

In German law, the standard scope of managerial discretion in determining the due performance is § 106 of the German Trade Regulations (*Gewerbeordnung* or *GewO*), according to which “[t]he employer can specify the content, place and time of the work performance according to reasonable discretion, as long as these conditions are not set by the employment contract, provisions of a company agreement, an applicable collective agreement or legal norms.”<sup>626</sup>

This means that in principle the employer enjoys comparatively large discretion, but the margins can be reduced by a variety of sources including the individual contract. Whereas under the employment contract the discretionary *Verweisungsrecht* descends directly from the law, when the contract has provided further specifications, an employer that wishes to maintain some flexibility will want to include a contractual modification reservation. It is logical to observe, then, that in this context two questions will play a central role - namely, what has been specified in the contract and what, on the other hand, can be considered encompassed in the reservation in case one has been made.<sup>627</sup> As an external limit to what can be validly reserved, the BAG has considered that while through a similar device the employer can “in the frame of the contractually agreed occupation, carry out a specification of the worker’s duties through assignment to different tasks (*Aufgabengebiet*)”, they cannot reserve the right to change the worker’s function (*Tätigkeit*) completely.<sup>628</sup> In particular, the designation to a lower-grade function (that is, a demotion) outside the mechanism of partial termination is generally not allowed.<sup>629</sup>

The BAG does not expressly refer to the *Gesetzesumgehung* doctrine, but explains that a term which in principle would also allow the employer to assign the employee to a lesser function represents “a considerable deviation from the labour law principle of the protection of the content of the relationship” and is hence

---

<sup>626</sup> § 106 GewO, Weisungsrecht des Arbeitgebers: “Der Arbeitgeber kann Inhalt, Ort und Zeit der Arbeitsleistung nach billigem Ermessen näher bestimmen, soweit diese Arbeitsbedingungen nicht durch den Arbeitsvertrag, Bestimmungen einer Betriebsvereinbarung, eines anwendbaren Tarifvertrages oder gesetzliche Vorschriften festgelegt sind.” The provision further specifies: “Dies gilt auch hinsichtlich der Ordnung und des Verhaltens der Arbeitnehmer im Betrieb. Bei der Ausübung des Ermessens hat der Arbeitgeber auch auf Behinderungen des Arbeitnehmers Rücksicht zu nehmen.”

<sup>627</sup> These two questions are put at the roots of judicial control of a transfer “regulated by standard terms” by BAG 25.08.2010, NZA 2010, 1355.

<sup>628</sup> BAG 09.05.2006, NZA 2007, 145, at 146.

<sup>629</sup> BAG 25.08.2010, *cit.*, 1358.

unfair.<sup>630</sup> In view of the specific interpretative exercise which seems immanent to the evaluation of this sort of terms, the court does not seem to be willing to use transparency requirements as a further restriction: the employer does not have to mention on what grounds a new designation may occur, even though it is clear that it should not be just on the basis of their own sheer convenience.<sup>631</sup>

The assessment seems to be stricter with reference to the function than in respect of place determination: in one case, for instance, a contract term stating that “Ms. D is employed as editor in the main editorial office, area Special Editions” has been interpreted as only establishing a functional, and not geographical, destination area.<sup>632</sup>

In recent decisions, the court has gone so far as to establish that, when a place designation is accompanied by a related modification reservation, the former is radically inapt to ground a contractual determination.<sup>633</sup> A reason for this approach seems to lie in the consideration that flexibility is a disadvantage partially counterbalanced by increased job security, since the range of positions which have to be considered in case of firm-related dismissals is wider in the case of a flexible arrangement.<sup>634</sup>

In this field, the reform has nominally brought about a paradigm shift in the approach of the BAG: whereas previously clauses introducing elements of flexibility in the regulation of the work relationship were evaluated against the prohibition to elude norms on “partial termination”<sup>635</sup> of employment contracts, with the introduction of standard terms control §§ 305-310 have become the uniform.<sup>636</sup> From the perspective of the standard used to assess the terms, in

---

<sup>630</sup> BAG 09.05.2006, NZA 2007: “erhebliche Abweichung von dem Grundgedanken des arbeitsrechtlichen Inhaltsschutzes”.

<sup>631</sup> BAG, Urteil vom 09.05.2006 - 9 AZR 424/05, para 28.

<sup>632</sup> See BAG 11.04.2006, BeckRS 2006, 43810

<sup>633</sup> BAG 25.08.2010, NZA 2010, 1355 and BAG 19.01.2011, NZA 2011, 631.

<sup>634</sup> *Ibid.*, par 37.

<sup>635</sup> In particular §2 KSchG: “Kündigt der Arbeitgeber das Arbeitsverhältnis und bietet er dem Arbeitnehmer im Zusammenhang mit der Kündigung die Fortsetzung des Arbeitsverhältnisses zu geänderten Arbeitsbedingungen an, so kann der Arbeitnehmer dieses Angebot unter dem Vorbehalt annehmen, daß die Änderung der Arbeitsbedingungen nicht sozial ungerechtfertigt ist (§ 1 Abs. 2 Satz 1 bis 3, Abs. 3 Satz 1 und 2). Diesen Vorbehalt muß der Arbeitnehmer dem Arbeitgeber innerhalb der Kündigungsfrist, spätestens jedoch innerhalb von drei Wochen nach Zugang der Kündigung erklären.”

<sup>636</sup> The same approach as to the relationship between control of unilateral prerogatives and unfair terms control has been adopted by the *Bundesgerichtshof*, see Preis, Erf. Komm. BGB § 310 Rn.

particular as regards the employee's function not much has changed in practice: the rules on partial termination seem to be used as point of reference for the interpretation of the general clause of § 307.<sup>637</sup> However, we have seen how the reform has brought about a determinacy requirement requiring terms to be drafted in a way that reduces discretion: after the reform, the *drafting* of a given clause is more clearly separated from the question of how the *right* establish under it is established.

#### 5.4.2.2. France

At the start of this century, the *Cassation* has established that

*“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.”*<sup>638</sup>

If taken literally, this enunciation would make all modification terms invalid. The orientation inaugurated by the *Cassation* with this decision has led scholars to wonder whether the employment contract was an instrument of flexibilisation or of “resistance” against it. The right the employee cannot renounce is the right to, in essence, reject any modifications to the contract that they do not agree with, as enshrined in the principle of the binding force of contract.<sup>639</sup>

Such broad prohibition, however, does not correctly reflect the case-law of the *Cassation* itself, which allows – under conditions – several types of similar terms. According to one author,<sup>640</sup> rather than of the *pacta sunt servanda* principle, this limitation should be seen as a consequence of the application, in the employment

---

<sup>637</sup> See BAG, Urteil vom 09.05.2006 - 9 AZR 424/05 para 27. Very critical of the case law on this subject: Jörg Benedict, “Der Maßstab Der AGB-Kontrolle – Oder Die Suche Nach Dem »indispositiven Leitbild« im Arbeitsvertragsrecht,” *JuristenZeitung (JZ)* 67, no. 4 (2012): 172–82.

<sup>638</sup> Soc. 27 fevr 2001, Dr. soc. 2005, 634, according to which the clause is “*nulle comme contraire aux dispositions de l'article 1134, alinéa 2, du Code civil, le salarié ne pouvant renoncer aux droits qu'il tient de la loi*”. In practice, this would mirror the German stream of thought according to which this kind of stipulation amounts to a deviation from the principle *pacta sunt servanda*. See already supra para 4.3.1.2.

<sup>639</sup> Former article 1134 CC: «*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.*»

<sup>640</sup> Laurène-Kirstie Gratton, *Les Clauses de Variation Du Contrat de Travail*, Thèses (Dalloz, 2011).

context, of the rules of general civil law concerning (merely) potestative<sup>641</sup> conditions and the requirement that the object of an obligation be determined or determinable. In this sense, not every modification reservation would have to be considered as inadmissible, but only those which would make room for the exercise of arbitrary, unfettered unilateral power.

As concerns functional flexibility, the *Cassation* has not seriously engaged with the conditions that would make such terms acceptable. The starting point is that the employee's *qualification* – ie, in essence, their function – cannot be changed without their consent.<sup>642</sup> When modification clauses are discussed, the *Cassation* mainly concentrates on whether lower courts have made sure that the employer, in *enforcing* the clause, has not gone against this principle.<sup>643</sup> In one case, a term has been declared incapable of allowing the employer to change the worker's qualification.<sup>644</sup> In practice, this means that the validity of contract terms in this area is confined within the limits of the managerial prerogative, which makes all terms of this sort theoretically vulnerable. In practice, parties may still be using them.<sup>645</sup>

So-called *clauses de mobilité géographique*, terms allowing the employer to change the employee's place of work, are deemed acceptable as long as they do not interfere directly with the worker's ability to choose their own domicile<sup>646</sup> and, according to more recent case law, inasmuch as they clearly indicate the physical domain to which they extend.<sup>647</sup> While lack of any delimitation makes the clause invalid, when the delimitation merely lacks clarity, courts do not hesitate to "correct" a term by way of restrictive interpretation, for instance by saying that only plants already existing at the moment when the term was agreed upon can be considered encompassed by it.<sup>648</sup> This, however, seems to indicate that transparency cannot be considered a requirement for the *validity* of such terms.

---

<sup>641</sup> A condition, included in a contract, the fulfilment of which is entirely dependent on the will of the obligor. See for a brief explanation Bénédicte Fauvarque-Cosson, "The New Provisions on Conditions in the UNIDROIT Principles 2010," *Unif. L. Rev.* 16 (2011): 542.

<sup>642</sup> Soc. 10 mai 1999, Bull. civ. V, v. 381, Dr. soc 1999, 736.

<sup>643</sup> See Gratton, *Les Clauses de Variation Du Contrat de Travail*, 178.

<sup>644</sup> Soc. 18 Juillet 2001, inédit, pourvoi n. 99-44.038. Discussed in Gratton, 181 with further references.

<sup>645</sup> Gratton seems to assume that this is the case, see Gratton, 176 with further references.

<sup>646</sup> Soc. 12 janv 1999, *Spileers*, RJS 2/99.

<sup>647</sup> Soc. 19 mai 2004, Sem. Soc. Lamy 2004, n°1171, p. 12; Cass 7 Juin 2006, n. 04-45846.

<sup>648</sup> Soc. 12 mai 2004, sem. Soc. Lamy 2004, n° 1171, p. 12.

The *Cassation* is stricter when it comes to attempts at cumulating reservations: while setting a wide domain is allowed, however, it is not allowed to include a term that reserves the employer the possibility to modify the territorial domain to which the employee's mobility obligation applies.<sup>649</sup>

#### 5.4.2.3. Comparison

Courts across the border seem to agree that employers cannot give themselves a right to change the contractually agreed function. The contract, thus, determines the external limits of the managerial prerogative. Within these limits, courts are not imposing particularly demanding requirements in terms of formulation – we will see that this stands in contrast to the regime of terms concerning the remuneration. German law falls back onto labour law principles in order to fill in the significant imbalance test under unfair terms control rules. In French law, the case-law has reinvigorated debates on the relationship between contract and “power” – the *pouvoir de direction*, or managerial prerogative.<sup>650</sup> In practice, a similar dynamic is at play in both systems: what is “contractualised” cannot easily be changed – so that, apparently, desire to afford employers some room for manoeuvre in the field of geographical mobility leads to denying stipulations concerning the place of work the qualification of contract terms.<sup>651</sup>

#### 5.4.3. Financial flexibility: variable remuneration

While the previous paragraphs have addressed the ways in which employment contracts can be used to achieve *functional* flexibility,<sup>652</sup> companies also strive for *financial* flexibility, that is the possibility to adapt their wage expenditure to market circumstances, their own performance and other relevant factors. At the same time, wage arrangements can also function as instruments of human resources management, providing workers economic incentives going beyond the basic time-money exchange. From the point of view of the present study, the former count as attempts at flexibilisation in the strict sense; the latter participate in the

---

<sup>649</sup> See again Cass 7 Juin 2006, n. 04-45846

<sup>650</sup> Discussed in a string of impressive books: Pascal Lokiec, *Contrat et Pouvoir : Essai Sur Les Transformations Du Droit Privé Des Rapports Contractuels* (Paris: LGDJ, 2004); Alexandre Fabre, *Le Régime Du Pouvoir de l'employeur* (Paris: LGDJ, 2010); Gratton, *Les Clauses de Variation Du Contrat de Travail*.

<sup>651</sup> See critically Jean Pélissier, “La détermination des éléments du contrat de travail,” 2005, 6. The debate on the distinction between “terms” of the employment contract and “working conditions”, the latter being covered by the managerial prerogative, can be left in the background here but testifies to this tension between contract and “power”.

<sup>652</sup> As an alternative, or complement, to managerial discretion. See Rönmar, “The Managerial Prerogative and the Employee's Obligation to Work.”.

customisation function discussed above and will be discussed in a separate subsection.

In this domain, the practice and discussion in the two countries are well alive but show little alignment. While in France the focus is on target clauses and other customisation mechanisms, in Germany the BAG case-law has been concentrating on several types of reservations allowing employers to modify their obligations or prevent the emergence of an obligation altogether. Although this German practice does not seem to find a parallel in France, it seems worth considering in more detail as an example of the degree of sophistication that can be reached by individual employment contracts- not necessarily between particularly sophisticated *parties*.

#### 5.4.3.1. Germany

Variable remuneration can be put in place in several ways. First, unilaterally by the employer, by means of a company policy<sup>653</sup> or by providing voluntary pay complements under reservation that they will not be necessarily paid again the next year. In such cases, the mechanisms will be outside of the scope of unfair terms control. In the interest of legal certainty and with an aim to attracting employees, companies may however choose to “contractualise” the mechanisms, to a more or less far-reaching extent. If the variation is shaped in a form of a “performance agreement” (*Zielvereinbarung*), linking the remuneration to results achieved by the company or by the individual employee, it is exempted from substantive control, with only transparency rules being applicable.<sup>654</sup>

If the variation is otherwise regulated in the contract, the term will be subject to § 308 n. 4, which in principle forbids any “*agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or*

---

<sup>653</sup> In which case, such policy is subject to approval by the company’s works councils where these exist. See, with further reference to the relevant rules in the BertVG, Wolfgang Däubler, *Arbeitsrecht: Ratgeber Für Beruf, Praxis Und Studium*, 10th ed. (Bund Verlag, 2014), section 750.

<sup>654</sup> See BAG 12.12.2007, 10 AZR 97/07, according to which as *Zielenvereinbarung* entered in order to specify the targets which a certain employee is supposed to achieve is exempted from control as. According to Moll, *Erf. Komm.* 2012, para 55 lower instance courts have so far not adopted too strong standards. Westphalen refers to literature suggesting how this requirement should be interpreted, suggesting, inter alia, that transparency would be against a determination leaving both the evaluation concerning the achievement of the promised results and the translation of this evaluation into a monetary reward to the employer.

*deviation is reasonable for the other party to the contract when the interests of the user are taken into account”.*<sup>655</sup>

In practice, it has long been common to include some contractualisation of the variable pay in the contract, coupled with mechanisms aiming to relativise or exclude the binding force of the contractual statement. <sup>656</sup> These mechanisms are a typical feature of individual pay-related agreements, since their introduction presupposes that the salary component at stake is not part of the wages that the employer is obliged to pay by collective agreements or other super-individual instruments.

The chapter will consider two main instruments<sup>657</sup> of “wage flexibilisation” which are widespread in contractual practice and case-law:

- ✓ *Widerrufsvorbehalte*, which make the granting of certain advantages subject to withdrawal, while not excluding the employer’s obligation to keep them in place until the moment of withdrawal;
- ✓ *Freiwilligkeitsvorbehalte*, which aim at preserving the “voluntary” nature of payments effected by the employer excluding the emergence of a binding praxis or company practice (*betriebliche Übung*)<sup>658</sup>

*Widerrufsvorbehalte* (withdrawal reservations) have a very general scope of application. They can concern certain elements of the salary that are paid in addition to the amounts agreed through collective bargaining, performance-related or other recurring bonuses or even other forms of remuneration – think of a company car or other utilities. Since the reform of 2001, such stipulations can

---

<sup>655</sup> The German version goes as follows: “*die Vereinbarung eines Rechts des Verwenders, die versprochene Leistung zu ändern oder von ihr abzuweichen, wenn nicht die Vereinbarung der Änderung oder Abweichung unter Berücksichtigung der Interessen des Verwenders für den anderen Vertragsteil zumutbar ist*”.

<sup>656</sup> Heinz Josef Willemsen and Timon Grau, “Alternative Instrumente Zur Entgeltflexibilisierung Im Standardarbeitsvertrag,” *Neue Zeitschrift Für Arbeitsrecht*, 2005, 1137.

<sup>657</sup> *Anrechnungsvorbehalte*, which are mostly linked to the application of collective agreements and foresee the possibility, for the employer, to deduct sums paid as “extra-collective” remuneration from (certain or all) pay increases agreed by workers’ and employers’ associations. Since they leave the netto sum paid to the employee intact and are considered to be an essential instrument of risk management, the BAG subjects them to very limited scrutiny. See BAG 01.03.2006, BeckRS 2006, 41981, BAG 27.08.2008, NZA 2009, 49.

<sup>658</sup> As a rule of thumb, when the payment of a sum takes place without reservation for three times at least the concerned employees acquire a legal right to successive payments.

also be submitted, with priority over the general rule of § 307, to the “special” regulation of § 308 n. 4, which in principle forbids any “agreement of a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation is acceptable (*zumutbar*) for the other party to the contract when the interests of the user are taken into account”.<sup>659</sup>

The “acceptability” of a modification agreement has been articulated<sup>660</sup> around a substantive and a “formal” requirement, according to which the acceptable content must be reflected in the term’s formulation -that means, the clause must not make “unacceptable” modifications abstractly possible.<sup>661</sup> In practice “reasonable drafting” requires the indication of the conditions under which a withdrawal may take place and what it would entail, both of which must “be as much as possible specified (*möglichst konkretisiert*)” in the term. This entails that at least the “direction” from which the grounds for withdrawal may originate- e.g. from economic reasons, productivity or employee’s behaviour- is indicated in the clause, together with the intensity of the perturbation that will trigger the withdrawal.<sup>662</sup>

The concretisation requirement is a result of the application of unfair terms control provisions. The *Bundesgerichtshof* had previously established that given the suspicious nature of modification clauses, they needed to be termed in a way that clearly did not allow unacceptable modifications and that allowed the other party to anticipate their consequences. The measure of acceptability was found in the fact that “the interest of the user is preponderant or at least of equal weight as the typical interests of the other party”.<sup>663</sup> The formulation, also taken up by the BAG after the reform, thus focusses on a rather abstract assessment; more concrete consideration of the circumstances at stake is delegated to the control on the exercise of unilateral determination rights under § 315 BGB.

From a substantive point of view, thus, in employment contracts the starting point is that withdrawal rights are reasonable as long as they allow the agreement’s

---

<sup>659</sup> The German version goes as follows: “*die Vereinbarung eines Rechts des Verwenders, die versprochene Leistung zu ändern oder von ihr abzuweichen, wenn nicht die Vereinbarung der Änderung oder Abweichung unter Berücksichtigung der Interessen des Verwenders für den anderen Vertragsteil zumutbar ist*”.

<sup>660</sup> Ever since BAG 12.01.2005, NZA 2005, 465.

<sup>661</sup> *Ibid.*, p. 468: “*Die Bestimmung muss die Angemessenheit und Zumutbarkeit erkennen lassen*”.

<sup>662</sup> *Ibidem*. The Court specifies that a general reference to “economic reasons” or “employee’s behaviour” does not suffice.

<sup>663</sup> BGH 17.02.2004 - XI ZR 140/03:

adaptation in view of the uncertain development of the relationship;<sup>664</sup> however, they should not allow the employer to transfer the entrepreneurial risk onto the worker.<sup>665</sup> Furthermore, the flexibilization should not affect the core of the employment contract, lets it jeopardize the aim of that contract contrary to the requirements of § 307 BGB.<sup>666</sup> The relevant threshold to assess whether the core of the contract is affected is drawn from the Court's pre-2002 case-law,<sup>667</sup> which allowed withdrawal reservations inasmuch as they did not exceed 25-30% of the global remuneration and did not go below the minima established by relevant collective agreements?<sup>668</sup>

Given that the drafting requirements were a result of the *Modernisierung*, the BAG has been willing to make exceptions to the application of the invalidity rule of § 306 BGB with reference to the so-called "old cases" – those concerning relationships started before the adoption of the *Modernisierung*. In these cases, the BAG has instead opted for supplementary *interpretation (ergänzende Auslegung)*, consisting of an attempt to establish what the parties would have agreed if they had been aware of the term's invalidity. For instance, in the case<sup>669</sup> of an invalid reservation allowing the employer to withdraw extra-collective payments without indicating any reasons which could justify a withdrawal, the Court established that, had they known of the clause's ineffectiveness,<sup>670</sup> the parties would have at least stipulated that a withdrawal would be permitted in case of economic

---

<sup>664</sup> Ivi: "Die Vereinbarung des Widerrufsrechts ist gem. § 308 Nr. 4 BGB zumutbar, wenn der Widerruf nicht grundlos erfolgen soll, sondern wegen der unsicheren Entwicklung der Verhältnisse als Instrument der Anpassung notwendig ist (vgl. BGH 19. Oktober 1999 – XI ZR 8/99 – NJW 2000, 651)".

<sup>665</sup> Ibidem "Im Grundsatz hat der Arbeitgeber wegen der Ungewissheit der wirtschaftlichen Entwicklung des Unternehmens und der allgemeinen Entwicklung des Arbeitsverhältnisses ein anerkennenswertes Interesse daran, bestimmte Leistungen, insbesondere "Zusatzleistungen" flexibel auszugestalten. Dadurch darf aber das Wirtschaftsrisiko des Unternehmers nicht auf den Arbeitnehmer verlagert werden."

<sup>666</sup> "Eingriffe in den Kernbereich des Arbeitsvertrags sind nach der Wertung des § 307 Abs. 2 BGB nicht zulässig."

<sup>667</sup> Based on the notion of Gesetzesumgehung, see 4.2.2.1.

<sup>668</sup> Since BAG 7. 12. 2005 - 5 AZR 535/04, NZA 2006, 423, recalled by BAG 11.10.2006, 5 AZR 721/05.

<sup>669</sup> BAG 12.01.2005, 5 AZR 364/04

<sup>670</sup> Which was, for once, a consequence of the application to employment contracts of the « grey » list of § 308. In particular, § 308(4) (Reservation of the right to modify) prohibits stipulating "a right of the user to modify the performance promised or deviate from it, unless the agreement of the modification or deviation can reasonably be expected of the other party to the contract when the interests of the user are taken into account".

difficulties for the company. Since the concrete exercise of withdrawal had indeed happened, in the case at stake, due to financial difficulties, the Court has in this way managed to both warn the employer that the terms had to be adapted and to avoid imposing an additional burden on an already non-flourishing company. Leaving the clause without replacement would represent a disproportionate interference with the user's private autonomy,<sup>671</sup> in particular considering that the consequences of the "erroneous" formulations could not be known at the moment of entering the contract.<sup>672</sup>

Next on the list, a *Freiwilligkeitsvorbehalte* aims at preserving the voluntary (i.e. non-obligatory) character of a certain payment. The BAG considers that in principle such a reservation can be valid as long as it is drafted in a transparent, non-ambiguous way.<sup>673</sup> In the presence of a clearly drafted term warning that the employer is not committing to repeating the payment in the future, no justified expectation of the employee can be grounded. A *de facto* emergence of a similar

---

<sup>671</sup>BAG 12.01.2005, 5 AZR 364/04, para 42 : "Es geht dabei nicht um die im Arbeitsrecht geltenden Besonderheiten, da langfristig angelegte Formularverträge ohne die Möglichkeit der einseitigen Änderung von Allgemeinen Geschäftsbedingungen im gesamten Vertragsrecht regelmäßig vorkommen. Vielmehr resultieren die Bedenken aus der rückwirkenden Anwendung von förmlichen Anforderungen (hinreichend deutliche Formulierung der Rechtslage) auf einen abgeschlossenen Sachverhalt (Abschluss des Arbeitsvertrags). Da das Gesetz auch für Altverträge gilt und dies hinsichtlich der Anforderungen an die Vertragsformulierung auf eine echte Rückwirkung hinausläuft, bedarf es der verfassungskonformen, den Grundsatz der Verhältnismäßigkeit wahren Auslegung und Anwendung. Das führt dazu, dass die unwirksame Klausel nicht gemäß § 306 Abs. 2 BGB ersatzlos wegfällt. Eine Bindung des Arbeitgebers an die vereinbarte Leistung ohne Widerrufsmöglichkeit würde unverhältnismäßig in die Privatautonomie eingreifen. Mit einer solchen Rechtsfolge konnte, musste und durfte niemand rechnen. Sie würde keine angemessene, den typischen Interessen der Vertragspartner Rechnung tragende Lösung bieten (vgl. BGH 3. November 1999 – VIII ZR 269/98 – BGHZ 143, 104, zu II 4 der Gründe mwN; Willemsen/Grau RdA 2003, 321, 325). Da der Verwender bei Abschluss des Arbeitsvertrags die §§ 307 f. BGB nicht berücksichtigen konnte und die Klausel nur deswegen unwirksam ist, weil sie in formeller Hinsicht den neuen Anforderungen nicht genügt, bedarf es zur Schließung der entstandenen Lücke der ergänzenden Vertragsauslegung. Es ist zu fragen, was die Parteien vereinbart hätten, wenn ihnen die gesetzlich angeordnete Unwirksamkeit der Widerrufsklausel bekannt gewesen wäre. Nur so wird die unverhältnismäßige Rückwirkung des § 306 Abs. 2 BGB verfassungskonform abgemildert und dem Willen und den Interessen der Vertragsparteien angemessen Rechnung getragen."

<sup>672</sup> The Court also mentions the difficulty which would be associated with any attempts to modify the clause once its invalidity is known, since the modification should at any rate be accepted by the worker.

<sup>673</sup> See BAG 30.07.2008, NZA 2008, 1173.

expectation, according to the Court,<sup>674</sup> does not have legal impact notwithstanding the recognisable psychological effect, and the economic function, that certain “voluntary” payments may acquire after recurring for several years.<sup>675</sup> The formula of “voluntariness”, anyway, has to be very clear in order to display the desired effects: a simple mention of the “voluntary” nature of a certain payment has a merely declaratory value and reminds the receiver that the employer is not under a statutory or collective obligation to grant it but does so of its own motion. Only an explicit announcement that “repeated payment does not give rise to any claim”- or an equivalent *caveat* – will preempt the emergence of a claim.

The transparency requirement is interpreted strictly in this area: the mere accumulation of provisos will not result in a reinforcement of their respective effects, but in reciprocal undermining – in other words, invalidity. A gratification, for instance, cannot be both “voluntary” in the strong sense explained above and “subject to withdrawal”: the first condition aims at excluding the emergence of a legal right, while the second postulates its existence.

The main limitation to the use of *Freiwilligkeitsvorbehalte*, however, lies in the fact that such reservations are only applicable to occasional gratifications but not to the parts of the remuneration that stand in a direct relationship to the worker’s regular performance.<sup>676</sup> Next to this, it is assumed that the “*Kernbereich*” limitation as to the *extent* of the remuneration that is made subject to reservation applies to these clauses as it does to *Widerrufsvorbehalte*.<sup>677</sup> “Regular” remuneration enjoys a much more pervasive protection than occasional remuneration, as alterations to

---

<sup>674</sup> In BAG 30.07.2008, NZA 2008, 1173, the Court acknowledges that in case of repeated payment the employee may start to rely on the concerned sums; it also considers “not to neglect” that bonus payments are often not used for “luxury” expenditures (*Luxusasgaben*). This “factual” reliance (*tatsächliches Vertrauen*) does not enjoy, as said, legal protection. The court follows here the considerations developed by Singer, Vertrauensschutz und Verhältnismässigkeit als Grundelemente der Arbeitgeberhaftung bei Freiwilligen Zuwendungen, in FS Canaris p. 1467 ff (1481), according to which renunciation to gratifications is easier than it would be for regular income since the former’s destination to “usual cost of living” (*gewöhnliches Lebensunterhalt*) is more tenuous.

<sup>675</sup> In BAG 14.09.2011, NZA 2012, 81, when confronted with a particularly broad reservation, the 10<sup>th</sup> Senate expressed, in an *obiter dictum*, some doubts as to the position held up to this moment by the BAG as to the time-unlimited preventive effect of a contractual reservation with regard to repeated payments- at least when, as in the case considered, the repetition had occurred for over twenty years.

<sup>676</sup> Willemsen and Grau, “Alternative Instrumente Zur Entgeltflexibilisierung Im Standardarbeitsvertrag.”

<sup>677</sup> Willemsen and Grau.

it represent a serious interference in the contractual equilibrium of performance and counter-performance.

Furthermore, when a term is formulated in such a way as to potentially submit to “voluntariness” all forms of payment which are not explicitly agreed in the contract,<sup>678</sup> it infringes on the basic rule according to which individual agreements always prevail over standard conditions. The invalidity of a similar, widely drafted term does not rest on specific quantitative tests but rather on the logic of standard terms and a basic protection of employee’s expectations.<sup>679</sup>

In a decision from 2014,<sup>680</sup> the BAG has affirmed that a *Freiwilligkeitsvorbehalt* allowing the employer to decide freely whether to pay a bonus, even after having expressly set the targets to be achieved in a certain year, is to be considered invalid under §307 BGB. Such reservation, the BAG argued, is incompatible with the nature of performance agreements, which incite the employee to put extra effort in to their job and determine what “optimal” performance would entail in a certain period. In such cases, the bonus is effectively a counter-performance in direct relation to the employee’s efforts and its effective payment cannot be left to the free determination of the employer.<sup>681</sup> The employer is, in contrast required to take such decision based on reasonable discretion (*nach billigem Ermessen*). In the decision under discussion, for instance, it was established that the reservation was invalid but that the bank, which had suffered considerable liquidity issues in 2008, had acted within their rights when setting the bonus to be effectively paid for that year at zero.<sup>682</sup> When the parties fail to reach an agreement or the employer does not set the relevant objectives for a certain year the concerned employee should be able to claim damages.<sup>683</sup>

---

<sup>678</sup> BAG 14.09.2011, NZA 2012, 81. In this case, the court opted for a *contra proferentem* interpretation: the employer claimed that the clause only was only meant “the establishment of a company practice with regard to certain occasional payments”, but the term’s wording allowed for much larger discretion. Since it was impossible to reach a final result by means of ordinary interpretation, the Senate applied § 305 cII choosing the interpretation that, leading to invalidity, was most disadvantageous for the proponent.

<sup>679</sup> The Court (p. 84) observes that, if “voluntariness” was allowed with reference to *laufender Entgelt* “the employer would be given the chance to expect the whole performance from the employee and to dispose of his own counter-performance”. This would fundamentally (*grundlegend*) impair the worker’s interest and obviously endanger the contract’s *Zweck*.

<sup>680</sup> See BAG 19.3.2014,

<sup>681</sup> See BAG 19.3.2014, para 52.

<sup>682</sup> *Ibidem* para 53.

<sup>683</sup> Moll, 2012, para 64.

Given their nature, bonuses that actually represent a direct remuneration of the employee's effort cannot be made subject to a restitution obligation when the employment is terminated shortly after their maturity.<sup>684</sup> However, for performance-related bonuses this maturity may come after the end of the year to which the bonus refers since it may be dependent on final assessment of the company's and employee's performance, eg the achievement of yearly targets.<sup>685</sup>

#### 5.4.3.2. France

Under French law, there is – as a starting point – a somewhat simpler differentiation between bonuses and flexible remuneration systems which make the variation mechanism part of the basic remuneration model. For bonuses, judicial control is essentially limited to the respect of the employee's occupational freedom, which stands in the way of requiring such bonuses to be returned in case of termination or resignation before a certain time.<sup>686</sup> From this point of view, a condition (accepted by the employee by receiving the payment) which imposed the restitution of a bonus paid at the end of a certain year in case the employee would terminate the contract before 30 June of the following year was considered by the *Cassation*<sup>687</sup> as incapable of grounding a restitution claim. Additionally,

---

<sup>684</sup> BAG 13.11.2013, 10 AZR 848/12. In practice, the distinction between different sorts of bonuses may not be clear-cut. See Kerstin Reiserer and Diana Fallenstein, "Mitarbeiterbindung Und Leistungsabhängige Bonussysteme: Ein Widerspruch Oder Zulässige Praxis? (Teil I)," *Deutsches Steuerrecht*, no. 33 (2011): 1573. In the broad area of *Sonderzuwendungen*, according to the authors, it is common to identify three categories: special allowances with pure remuneration character (*Sonderzuwendungen mit reinem Entgeltcharakter*), allowances as reward of fidelity to the company (*Sonderzuwendungen zur Belohnung von Betriebstreue*) and mixed-purpose allowances (*Sonderzuwendungen mit Mischcharakter*). If the distinction between the first and the third category has to be based on the wording of the term concerned, it seems likely that allowances of the first kind will be difficult to find..

<sup>685</sup> Claudia Heins and Tobias Leder, "Heins/Leder: Stichtagsklauseln Und Bonuszusagen – Unvereinbar?," *Neue Zeitschrift Für Arbeitsrecht*, no. 10 (2014): 520. See BAG 6.6.2009, 10 AZR 390/08.

<sup>686</sup> Antonmattei, *Les Clauses Du Contrat de Travail*, 2009, 24.

<sup>687</sup> Cass. soc. 18 april 2000, n 97-44235. On the other hand, when a bonus becomes due only after the moment at which the contract is terminated, unless contract or usages dispose otherwise, the employer does not have to pay the bonus *pro rata temporis* to the resigning employee. See Cass. soc. 18 april 2000, n. 97-43717 (esp. with reference to a holiday allowance to be paid yearly to those employed by the company at the end of June) and Cass. soc. 26 January 2005, n. 02-47271 (performance bonus).

employers are not allowed to use the threat of having to return a bonus as a disciplinary mechanism.<sup>688</sup>

A clause introducing a *variable remuneration* must fulfil a different series of conditions in order to be valid: the variation must depend on *objective elements* which are independent of the employer's will, it must not shift the entrepreneurial risk onto the employee and in any case respect minimum salary requirements.<sup>689</sup> The first requirement helps to understand a broadly worded decision, according to which a contract term cannot validly allow the employer to unilaterally modify the employee's contractual remuneration:<sup>690</sup> the key aim in this context is to avoid an unfettered unilateral prerogative, again in line with the general contract law principle on the prohibition of potestative conditions.<sup>691</sup>

The factors determining the variable quota have to be such that the employee's remuneration is not influenced by the employer's mismanagement of the firm's income- thus, while the firm's *revenues* (ie gross income) are to be considered as acceptable parameters, the same does not go for *profits* (what is left of the income when all expenses are paid).<sup>692</sup> In any event, it must be possible for the employee to verify that their remuneration has been duly quantified according to the criteria specified in their employment contract.<sup>693</sup> This seems to implicitly require a certain degree of specificity in the contractual determination.

When the variation is made dependent on the employee's performance (s.c "clause d'objectif", the individual covenant may limit itself to indicating the existence of the mechanism<sup>694</sup> while the variable quota and the objective to be achieved can be established from year to year- both conventionally or unilaterally, through the employer's direction power.<sup>695</sup> When the determination is left to the employer,

---

<sup>688</sup> Antonmattei, *Les Clauses Du Contrat de Travail*, 2009, 24. See *infra* with respect to penalty clauses.

<sup>689</sup> Cass. soc. 2 july 2002, n. 00-13111, Bull.civ. V n° 373 ; Soc, 4 mars 2003, *RJS* 5/03 n° 568.

<sup>690</sup> Cass. soc. 3 july 2001, n. 99-42-761.

<sup>691</sup> See Alexandre Barège, *JC Travail*, Clauses particulières, para 65.

<sup>692</sup> See Antonmattei, *Les Clauses Du Contrat de Travail*, 2009, 25.

<sup>693</sup> Cass. soc. 18 june 2008, n. 07-41910.

<sup>694</sup> It is not clear to what extent the way in which the flexible quota is calculated, when its entity is not mentioned in the contract, will have to be contractualised.

<sup>695</sup> Cass. soc. 22 mai 2001: TPS 2001, com. 284: "*les objectifs peuvent être définis unilatéralement par l'employeur dans le cadre de son pouvoir de direction*". In this case the objectives were not linked to a variable remuneration clause. However, contrary to the conclusion of Antonmattei, established case-law allows the employer to unilaterally identify the relevant objectives also when such a clause is included in the contract (see Antonmattei, *Les Clauses Du Contrat de Travail*, 2009, 26.) See Barège, para 65 and Cass. soc. 2 march 2011, n. 08-44977

however, this prerogative is not unfettered:<sup>696</sup> the objectives have to be realistic and have to be communicated to the employee at the beginning of the relevant period.<sup>697</sup> Furthermore, the courts attach heavy consequences to the employer's failure to do its part in specifying the contract's content.

If the variable remuneration for a certain year is not established by the employer, it is the judge's task to determine it, taking as reference the criteria mentioned in the contract and the agreements reached for other years.<sup>698</sup> A similar, or even stricter, mechanism is in place for the event that the variable quota is set, but the employer fails to fix the objectives to be attained. The *Cassation* has further clarified that, when the employer fails to specify the objectives that an employee has to fulfil in order to receive their target-related remuneration (as well as the relevant calculation methods) and the time frame for the achievement of such objectives, the bonus has to be paid *in its entirety* irrespective of the employee's (in)ability to prove the quality of their performance<sup>699</sup>. This is the case even when the bonus is promised in the form of a yearly amount and the employee has been employed for a few months only.<sup>700</sup> The implied basis for such findings is always (then) article 1134 of the civil code, ie the binding force of contract.

---

according to which the finding that "*l'avenant au contrat de travail stipulait que la détermination des objectifs conditionnant la rémunération variable du salarié relevait du pouvoir de direction de l'employeur*" requires the judge to accept that modifying the objectives on which the variable component depends does not require the employee's consent.

<sup>696</sup> It should also be mentioned, albeit in passing, that this unilateral determination is liable to take place also in a different context, namely that of objectives which are not set in view of a variable compensation, but rather to contractualise a certain performance level expected of the employee. In that case, much emphasis is placed on the *opposability* of the objectives to the employee and the room left to the judge's evaluation concerning the existence of a justified ground for termination on the basis of insufficient results. See Barège para 66.

<sup>697</sup> See e.g. Cass soc, 2 march 2011, n. 08-44977 and Cass. soc. 18 march 2015, n. 13-24205: "*lorsque les objectifs sont définis unilatéralement par l'employeur dans le cadre de son pouvoir de direction, il peut les modifier dès lors qu'ils sont réalisables et qu'ils ont été portés à la connaissance du salarié en début d'exercice*".

<sup>698</sup> Cass. soc. 4 june 2009, 07-43198: "*lorsque le droit à une rémunération variable résulte du contrat de travail et à défaut d'un accord entre l'employeur et le salarié sur le montant de cette rémunération, il incombe au juge de la déterminer en fonction des critères visés au contrat et des accords conclus les années précédentes, de sorte que, si l'objectif de résultats dont le contrat de travail fait dépendre la rémunération variable n'a pas été déterminé, il appartient au juge de le fixer par référence aux années antérieures*".

<sup>699</sup> Cass. soc. 10 juillet 2013, n. 12-17921, non publié au bulletin.

<sup>700</sup> In the case considered by the decision, the contract had been terminated at the end of a three-month probation period.

### 5.4.3.3. Comparison

Under French law, there seems to be no little space for the nuances – or ambiguities – surrounding for instance the *Freiwilligkeitsvorbehalt* under German law. When the contract refers to the remuneration, that reference has a binding effect.<sup>701</sup> Whereas thus the legal framework and even, most likely, HR practices differ in this area between the two countries (see the clearer distinction between variable remuneration and bonuses under French law), the overview reveals a similar concern – in turn similar but not identical to what we have seen in the sphere of “functional” modifications.

The German case-law on *Widerrufsvorbehalte* adopts parameters which appear very close to the ones followed by French courts: there should be no room for an arbitrary definition and the terms should not transfer to the employee the entrepreneurial risk that the employer is supposed to bear. Whereas the latter concern seems to reflect more the ideal apportionment of risk within employment relationships (at least from a protective perspective), the concern with unfettered unilateral prerogatives goes to the heart of contractual equality. In Germany, the BGH first has contentiously referred to the principle of *pacta sunt servanda*; it seems that the same principle, together with the French Civil code’s express rejection of potestative conditions, is at the basis of the French cases. Protection for the “core” of the employment relationship, justified under German law by the preservation of the essence of the labour-wage exchange with the *Kernbereich* doctrine, seems to be pursued in a seemingly more radical way in France as a matter of principle. On the other hand, whereas German case-law puts hard limits to the reach of wage flexibilization clauses, French law only requires respect for minimum wage requirements. In practice, thus, the difference may lie less in the attitudes of courts than in the surrounding legal rules and contractual practices.

This becomes particularly visible when it comes to variations made dependent on the employee’s performance. In both systems, what seems to be guiding the courts is securing some correspondence between the rights and obligations that the two parties derive from the term: if the conditions are set for the employee, who needs to fulfil them in order to have a valid claim, the employer’s corresponding obligations cannot be subject to their capricious choices. What the BAG establishes by declaring that a performance-related bonus may not be made subject to a *Freiwilligkeitsvorbehalt* is not too far, thus, from what the *Cassation* does when “filling in” for an employer’s failure to set the yearly targets in order to grant the employee’s claim to a performance bonus. In both cases, courts acknowledge the large space to be left to managerial prerogative in operationalising the

---

<sup>701</sup> Pélissier, “La détermination des éléments du contrat de travail.”

performance-payment agreements; the need to preserve the contractual balance apparently envisaged by the parties, however, acts as a limit to the reasonable exercise of such prerogative.

While the *Modernisierung* has brought about more restrictive drafting rules carrying a somewhat regulatory mode – as suggested by the reference to the “typical interests” in early case law on *Widerrufsvorbehalte* and unfair terms control – it seems that in both the German and the French case the aim of determinacy requirements is to make sure that the employee can later check – or ask a court to check – whether the prerogative has been fairly exercised. This protective intervention, as suggested above, appears well in tune with a concern for guaranteeing a degree of equality between the parties.

#### **5.4.4. Governance: Penalty clauses**

Rules of contract law expressly aim to establish the consequences of a breach of contractual obligations. In general contract law, the default response to the violation of a contractual obligation – in particular when specific performance is not appropriate – is a claim for damages. Different rules apply to employment contracts. On the one hand, in this context liability of the employee for damages is usually limited to gross negligence, making a claim for compensation less likely to arise and succeed; on the other hand, employers have disciplinary powers through which they can react to contractual breaches. In case of particularly severe breaches, the typical remedy will be the termination of the contract.

Parties entering contracts may decide to complement the remedies offered by general and specific legal rules by introducing contractual penalties. In simple terms, a contractual penalty is a term that pre-determines the amount of money that a breaching party has to pay upon violation of a certain obligation. Although most legal systems place some limitations on contractual freedom in case of extremely low or extremely high penalties, it is generally not strictly required that the penalty constitute a genuine estimate of expected damage. From a functional perspective, these stipulations can have multiple effects. First, they spare the non-breaching party the need to prove how much damage they have suffered as a result of breach – even stronger, they in principle allow them to do away with any need to prove having suffered damage; second, they encourage the other party to perform, by making clear that there will be consequences in case of non-performance and by making these consequences potentially more costly than performance.

In employment contracts, penalties can be of particular interest since often the damage suffered by an employer in case of breach of the employee’s obligations

will be difficult to prove.<sup>702</sup> They are also particularly suspicious due to the hierarchical relationship in place, arguable structural imbalances and the fact that they partially subvert the indeterminate nature of the employee's duty to work. This is true in two ways. On the one hand, the usual construction of the obligations arising from the contract for the employee refers to compliance with the employer's managerial prerogative,<sup>703</sup> and not with the achievement of specific results – unless these are specifically mentioned in the contract. Thus, performance or non-performance within the employment relationship do not have the same objective standards that characterise other service contracts. Connected to this understanding of the employee's contractual liability is the establishment of specific rules concerning tortious liability for damages caused during the performance. These rules tend to limit the relevance of non-gross negligence and improve employees' procedural position in terms of burdens of proof.<sup>704</sup> Contractual penalties can be connected to the main performance due under the contract or to ancillary terms. The further these terms are from the contract's "core", the less intense their interference with the liability rules recalled above.

#### 5.4.4.1. Germany

German doctrine distinguishes between two forms of penalty clause, which can be either "independent" or "dependent". A dependent penalty clause is meant to sanction the violation of contractual duties and is therefore "accessory" to the preliminary existence of an obligation. The "independent" penalty, on the other hand, is a form of guarantee which can be undertaken by one party when no "main" obligation exists. Thus, for instance, an independent penalty clause can be agreed for the case in which, after negotiations, an employment contract does not come into existence – or, on the other hand, when an existing open-ended contract is terminated before a certain amount of time has passed. In principle, however, the same "promise" to pay a fine could be given for any kind of behaviour and to

---

<sup>702</sup> Or present specific challenges in respect of the employer's trade secrets.

<sup>703</sup> For French law, Lokiec defines the employment contract as "*la convention par laquelle une personne physique met son activité au service d'une autre personne, physique ou morale, sous l'autorité de laquelle elle se place, moyennant le versement d'une rémunération*". See p 109 Lokiec, *Droit Du Travail Tome I Les Relations Individuelles de Travail*. The definition is borrowed from Jeammaud (reference in text); for a similar definition see the new art. 611a BGB.

<sup>704</sup> See for German law the additional burdens posed on employers seeking compensation by 619 BGB, next to the various modifications to the liability regime introduced by means of case law – for an overview, para 532 ff in Däubler, 9783766362681. For French law, para 379 in Lokiec, *Droit Du Travail Tome I Les Relations Individuelles de Travail*.

any bystander: a “classical”<sup>705</sup> example is that of someone promising to stop smoking and to give someone else a certain amount of money in case of violation. Encompassed in the broad notion of penalty clause, thus, can be several kinds of stipulations. On the other hand, “sanctions” for employee’s violating common obligations such as those linked to health and safety regulations (think for instance of a ban on smoking within the company or plant area, or of a duty to wear security garments, or other behaviours whose enactment of omission can be submitted to a fine) will typically be found in company regulations separate from the employment contract.<sup>706</sup> These cases probably fall out of the reach of standard terms control because those penalties will find their source not in the individual (though standard) contract but in other forms of workplace regulations which are not incorporated in the contract. In principle, however, all sorts of accessory duties (Nebenpflichten) could be guaranteed with a penalty clause, and in practice penalty clauses were reported almost a decade ago to concern almost a fourth of all employment contracts.<sup>707</sup> Hence, the domain covered by AGB control seems to remain potentially very wide. Common stipulations challenged in BAG decisions are:

- Sanctions for not taking the job;
- Fees for violation of confidentiality or non-competition duties;
- Penalties for terminating the relationship without respecting the agreed notice period.

The two generally recognised functions of penalty clauses in German civil law are “incentivising” the debtor to comply and “guaranteeing” the creditor with a basic form of compensation in case of non-performance which is pre-liquidated and thus not submitted to the general rules on proof.<sup>708</sup> The first of these functions has been particularly underlined by the BAG when it had to decide of the admissibility of Vertragsstrafen in labour law after the removal of the branch exclusion<sup>709</sup> and especially the applicability of § 309 n. 6, which prohibits the stipulation of penalty clauses in standard contracts “in the event of non-acceptance or late acceptance of the performance, payment default or in the event that the other party to the

---

<sup>705</sup> Or as such presented by Bernd Kaiser, “Die Vertragsstrafe Im Wettbewerbsrecht,” 1999, 17.

<sup>706</sup> Eg under the measures adopted as implementation of the Arbeitsstättenverordnung - ArbStättV (BGBl. I Nr. 44 vom 24.8.2004, S. 2179)

<sup>707</sup> Preis/Stoffels, Der Arbeitsvertrag, 2002, II V 30 RdNr. 1.

<sup>708</sup> See 4. 3. 2004 - 8 AZR 196/03, NZA 2004, 727

<sup>709</sup> See BAG 04.03.2004, 8 AZR 196/03.

contract frees himself from the contract". While payment defaults are, as a matter of fact, irrelevant for labour contracts, the events of renunciation of an accepted job or "illicit" termination are important and often considered by the drafters. In this context, the Court made use of the "arbeitsrechtliche Besonderheiten" clause of § 310 n. 4 to establish that, "under appropriate consideration" of these specificities, penalty clauses had to be considered in principle not unfair.

This conclusion was reached mainly in light of the fact that the typical object of an employment contract, i.e. the personal performance of the agreed behaviours by the worker, is not suitable for judicial enforcement.<sup>710</sup> In other words, the worker can not be forced to perform their job and therefore the employer has a justified interest in using other means of persuasion. Even starting with this consideration of fundamental admissibility of penalty clauses, though, a "stricter" (than in general contract law) standard has to be adopted in view of the objectives of workers' protection.<sup>711</sup>

The penalty clause, in particular, should not entail an unbearable limitation to the employee's fundamental rights, and especially occupational freedom. This mainly affects the amount of the penalty, which should not exceed a standard of reasonableness. This standard is not statically determined (i.e. it is not the same for every contract and every kind of clause) but has to be adapted to the different contexts in which it was stipulated. Whereas, for instance, in the case of a "classical" penalty clause a fine amounting to one month of salary is generally regarded as fair, this does not entail that amounts exceeding this threshold will be considered excessive. On the other side of the coin, the penalty for non-entering into or early termination of the relationship should be commensurate to the notice period, which is considered as a good proxy of the employer's interest in the performance. When the notice period, as during probation, amounts to less than one month, there will be reasons to suspect that a penalty corresponding to one-month (gross) salary is excessively high.<sup>712</sup>

---

<sup>710</sup> § 888 III ZPO. Additionally, avoiding indiscriminate applicability of the black lists was one of the aims pursued by the legislator by inserting the "*arbeitsrechtliche Besonderheiten*" reservation (BT-Dr 14/6857 r. 54).

<sup>711</sup> See § 343 BGB.

<sup>712</sup> Such was the case in BAG 23.09.2010, 8 AZR 897/08, where the parties had agreed a penalty of one month salary in case of termination without due notice but also stipulated a six-month probation period during which the notice only amounted to two weeks. In this case, the term was considered invalid and the employee freed of the obligation even though the termination had occurred *after* the probation period had expired- in accordance with the general objective of market-policing.

The penalty clause, indeed, should not represent a form of “over-insurance” for the employer, entailing the “creation of new claims detached from the drafter’s proper interests.”<sup>713</sup> For the same reason, when longer or more complex termination periods are agreed, the entity of the fine should be adapted to the importance of the violation and the subsequently emerging damage. For instance, in the case<sup>714</sup> of a teacher whose contract foresaw notice period of two months *to the end of the school year* (thus only one moment for termination each year), the court has found that simply establishing a penalty of three times the monthly salary for an irregular termination of any kind was not appropriate to the situation and was likely to represent an “over-insurance” for the benefit of the employer. The “benefit”, moreover, does not have to immediately concern the “drafter”, personally or as the representative of an organisation. Even when, as in the case discussed, the money obtained were to be used entirely for the benefit of the school’s pupils, a “mediated” advantage is enough to trigger unfairness- also in light of the fact that the debtor’s position is indifferent to whom the concrete beneficiaries of their expense will be.

A similar “over-insurance” can also take place when the penalty clause is stipulated for contractual violations and the conducts triggering the penalty clause are already “punishable” through immediate termination (*fristlose Kündigung*). So has the Court argued in a 2005 decision<sup>715</sup> concerning a penalty stipulated- *inter alia*- for the event that “the employer was legitimated to resort to termination without notice by a culpable contractual breach by the employee”, under reservation that the employer could still claim a higher damage. In this case, the BAG observed that the penalty was only stipulated for a breach on the side of the employee, thus requiring a close scrutiny to assess whether the interests of both parties had been taken in reasonable account. In this case, in principle only the employer has a legitimate interest in obtaining a suitable performance, whereas the employee has no justified claim to contractual breach. The employer’s interest, however, is typically protected against serious violations of the main contractual duties by the possibility to immediately terminate the employment contract. A further penalisation of the employee by means of the penalty clause can, in the words of the Court, only be justified by “the violation of other protection-worthy

---

<sup>713</sup> Ibid. par [64] the clause is considered to entail an unreasonable disadvantage because it represents “eine unangemessene “Übersicherung” des Beklagtes [...] und insoweit nur zur blossen Schöpfung neuer, vom Sachinteresse des Verwenders losgelöster Gerforderungen”.

<sup>714</sup> BAG 25.09.2008, 8 AZR 717/07, NZA 2009, 370.

<sup>715</sup> BAG 21.04.2005, NZA 2005, 1053.

interests of the employer”.<sup>716</sup> In the context of the same decision, other provisions foreseeing a penalty remained unaffected, concerning refusal to enter the job and termination “in breach of contract” (*unter Vertragsbruch*). The validity of a penalty clause for violation of contractual duties presupposed that two elements of the term are sufficiently determined: the obligations whose violation is sanctioned with a penalty – thus the behaviours that the employee should avoid in order to stay away from the penalty – and the entity of the potential fine. As to the first, in order to allow the worker to discern, it will not suffice to mention “serious violations” but a concrete – and not merely exemplary – indication of what is considered a “serious” violation is required. As to the height of the fine, which should also be reasonable in the context of the relationship, it should not be formulated in a way which leaves the employer excessive discretion. So for instance a penalty for violations of “non-competition duties, secrecy or in case of exceeding the powers of mandate” was considered sufficiently determined as to the conducts but not as to the consequences since it foresaw “one to three months” of gross salary for each violation, opening the doors of an unacceptable enrichment.<sup>717</sup>

#### 5.4.4.2. France

The subject of penalty clauses is particularly hard to apprehend under French law. Under article L. 1331-2, the *Code du Travail* prohibits all sorts of “fines or other pecuniary sanctions”, declaring all contrary “provisions or stipulations” invalid.<sup>718</sup> This means, in essence, that disciplinary violations by employees cannot be sanctioned by means of monetary fines. Faulty execution of the employee’s obligation – for instance, failure to show up for work on a given day or similar breaches – must be dealt with through the several instruments available to the

---

<sup>716</sup> Ibid. p. 1055: “Bei einem schuldhaften vertragswidrigen Verhalten, das den Arbeitgeber zu einer fristlosen Kündigung veranlasst, wird der Interessenausgleich in erster Linie durch die Möglichkeit der fristlosen Kündigung des Arbeitgebers herbeigeführt. Eine darüber hinausgehende Bestrafung des Arbeitnehmers durch die Vertragsstrafe kann nur durch Verletzung weiterer schutzwürdiger Interessen des Arbeitgebers gerechtfertigt sein, so z.B. durch bestimmte Eigentums- oder Vermögensverletzungen durch den Arbeitnehmer”.

<sup>717</sup> BAG 18.08.2005, NZA 2006, 34. Similarly intransparent has been considered the penalty concerned in BAG 14.08.2007, 8 AZR 973/08 which amounted to “two months in each case of penalisation and” but also foresaw that “in case of an enduring violation of secrecy or non-competition duties, very month of duration is considered as renewed violation”. The provision, in the BAG’s opinion, did not give any guarantee as to the maximum amount reachable by the penalty in a reference period of, e.g., one month.

<sup>718</sup> Article L. 1331-2 Code du Travail reads: “Les amendes ou autres sanctions pécuniaires sont interdites.

*Toute disposition ou stipulation contraire est réputée non écrite.”*

employer in the exercise of its disciplinary powers. Internal sources, in particular the *reglement interieur*, have to clearly establish the nature and extent of the possible sanctions: one could think, here, of warnings, suspensions and so forth, scaling up to violations sanctioned with termination.<sup>719</sup>

Next to this, it is important to keep in mind that, as a general rule, employee liability for damaging actions committed on the job can only be triggered in case of “*faute lourde*”,<sup>720</sup> a form of negligence which would probably be best transposed as intent to harm.<sup>721</sup> Contract terms should not seek to circumvent this restriction by “contractualising” specific duties of care: it is for instance not open to employers to stipulate that the employee is responsible for the loss of registered stock items irrespective of their (gross) negligence being demonstrated.<sup>722</sup>

Penalties are however not excluded for specific violations of accessory duties and where the legislator establishes that a lesser degree of fault is sufficient to give rise to liability. For instance, in the case of a fixed-term contract, the law establishes certain reasons which allow the employee to unilaterally terminate the contract ahead of time. Outside of these hypotheses, premature termination by the employee gives rise to a claim for damages on the side of the employer.<sup>723</sup> In this case, the use of a penalty clause has been validated by the *Cassation*.<sup>724</sup> The case

---

<sup>719</sup> Article L 1321-1 Code du Travail limits the scope of a *reglement interieur* to health and safety rules, the conditions under which employees may be required to “cooperate in restoring” appropriate health and safety conditions and more generic “general and permanent rules concerning discipline, in particular the nature and extent (*échelle*) of the sanctions which the employer is allowed to adopt”. Article R 1321-1 of the same law, on the other hand, enunciates that the rules are displayed in easily accessible locations within the workplace as well as “in the rooms and at the entrance of the rooms” where hiring takes place.

<sup>720</sup> See Pélissier, Auzero, and Dockès, “Droit Du Travail, Précis Dalloz, 27e Édition 2013,” 643.

<sup>721</sup> The Social division of the Cassation, since Soc. 31 May 1990, affirms consistently that establishing *faute lourde* requires proving the employee’s intention to hurt the company’s interest or: it entails “*la volonté du salarié de porter préjudice à son employeur dans la commission du fait fautif et ne résulte pas de la seule commission d’un acte préjudiciable à l’entreprise*” (see recently Cass. Soc. 22 octobre 2015, n°14-11291 ; Cass. Soc. 22 octobre 2015, n°14-11801).

<sup>722</sup> 23 January 1992, JCP 1993.II.22000.

<sup>723</sup> Art L. 1243-3 Code du travail : “*La rupture anticipée du contrat de travail à durée déterminée qui intervient à l’initiative du salarié en dehors des cas prévus aux articles L. 1243-1 et L. 1243-2 ouvre droit pour l’employeur à des dommages et intérêts correspondant au préjudice subi.* » *The cases admitted by the two provisions mentioned are faute grave, force majeure ou inaptitude constatée par le médecin du travail and having found a permanent position.*”

<sup>724</sup> Cass. soc. 9 février 2011 n° 09-42485, inédit.

concerned a circus artist that had been employed on a fixed-term contract of 1 year to perform a martial arts act within the employer's show. The contract included a penalty clause on which we have little information, except that it prescribed "a forfait equal to the salary for 10 working days for each established violation, up to a maximum of 8 times the amount payable for a single violation", which in turn amounted to a third of the total salary to be perceived for the entire duration of the contract. In light of this relative assessment, the contractual penalty had been considered as manifestly excessive<sup>725</sup> and the recoverable damages had been set at a little more than half the rate that would have derived from the contract.<sup>726</sup> Nonetheless, the clause has been respected to the extent that the damages have been awarded without requiring the (former) employer to provide specific proof as to the extent of the damages that they had suffered as a consequence of the employee's wrongful termination.<sup>727</sup>

Non-competition clauses are arguably the most likely context in which penalties appear. The validity of such clauses is in itself subject to several cumulative conditions. The incorporation of a penalty clause makes the non-competition obligation considerably more prominent and has a clear interest for employers. Although the subject of non-competition clauses is much discussed, and these

---

<sup>725</sup> In line with the general rule of article 1231-5 second part of the Code Civil.

<sup>726</sup> The Cassation decision as published on legifrance contains an excerpt from the Cour d'Appel decision: "*Certes, l'article VII du contrat prévoit dans un tel cas une indemnité égale à 10 fois le montant de son honoraire journalier par violation constatée, limité à 8 fois le montant de l'amende due pour une infraction unique soit la somme de 14. 299, 72 €. Mais une telle disposition s'analyse, en droit, en une clause pénale que l'article 1152 du Code civil permet au juge de réduire si elle est manifestement excessive. Elle doit être considérée comme telle en l'espèce, dès lors qu'elle représente l'équivalent de 3 mois et demi de salaire puisqu'aux termes du contrat, 24 journées de représentation étaient garanties par mois soit un tiers de la rémunération prévue pour la durée totale du contrat.*"

<sup>727</sup> From the same excerpt: The cour d'appel had considered that the « non respect par ce salarié de ses engagements a nécessairement causé un dommage à l'employeur ». However, the court also observed that no proof of specific costs – printing the programme, finding a replacement – had been given, thus the estimate of 8000 euro must be assumed to properly cover the inconvenience occasioned to the employer by the artist's untimely departure: "*Et la SARL CIRCUS FLIC FLAC GMBH ne fournit pas le moindre élément de quelque nature, pièce ou attestation ou autre, susceptible de venir étayer les frais prétendument exposés pour l'impression des programmes ou pour pourvoir au remplacement de cet artiste, tous chefs de réclamations qui, au demeurant, se rattachent directement et étroitement à la rupture du contrat et n'en sont pas distincts. L'évaluation ci-dessus retenue couvre le préjudice réellement subi né des perturbations nécessairement subies, des tracas dives et démarches qui ont dû être effectuées pour suppléer dans la précipitation à la défection inopinée de cet artiste, alors que la saison avait débuté depuis plus d'un mois et que le show initial avait été choisi plus de six mois auparavant.*"

discussions always mention the likelihood that the clause will be supported by a penalty, there is relatively little indication of what criteria determine a penalty's "non-manifest disproportion" in this context.

#### 5.4.4.3. Comparison

At first glance, the French approach appears much more restrictive than the one adopted by German law. The general prohibition of pecuniary sanctions may lead observers to conclude that penalty clauses are not allowed at all in French employment contract. Upon closer scrutiny, however, such terms appear to be allowed when they are used to secure specific obligations, such as non-compete clauses and the respect of a contract's agreed duration or notice periods. These cases appear remarkably similar to the German practice, where we have also seen the same type of obligations being among the ones characteristically secured by penalties. Penalty clauses should in general not be "manifestly disproportionate" under both German and French civil law, and courts in both countries apply such scrutiny.

While assuming the general admissibility of penalty clauses, German case-law in practice strives, without the textual support offered by the French *Code du travail* provision, to make sure that these do not fulfil a hidden disciplinary function or pursue unjustified enrichment for the employer: see the requirement that they do not represent an additional sanction for something which could be punished with termination. So in a way while French law departs from the disciplinary perspective and allows deviations from the prohibition when the penalty fulfils a genuinely contractual function, German law departs from the general doctrines of penalty clauses but seeks to limit their application to cases where the employer can demonstrate a genuine interest. Furthermore, *German* case-law makes a clear attempt at regulating the terms, ie at providing guidelines on what would make for valid penalty clauses.

One could say that the German regime represents more a reaction to contractualisation whereas the French cases testify more to a *discovery* of contractualisation, whereby we can expect more and more cases to emerge as employers devise new suitable ancillary obligations. In both cases, civil law rules provide a background standard; we can see however how German case-law provides much further-reaching operationalisation, going further away from the general rules on contractual penalties. A final difference is of course, as observed

elsewhere, that under French (but not German) law, courts are allowed to rewrite an unfair penalty into an acceptable one.<sup>728</sup>

## 5.5. Conclusions

This chapter has reconstructed the interplay between contract and other legal figures in the configuration – conceptual or practical – of employment relations. Contract has been part of this story from the inception – the beginning of labour law in a way is the birth of the employment contract – but its relevance has changed over time. No one would suggest today that the employment contract is merely an “acte-condition” whose conditions are entirely set outside of the agreement. A number of concurring factors – from deregulation to the emergence of increasingly sophisticated HR practices to the increased awareness that modern day labour markets are to a large extent based on the service sectors – has expanded the contractual arrangement of individual employment relations well beyond the few high-skilled employees who actually negotiate bespoke contracts. Individual employment contracts are more complex than they used to be in Fordist times, as acknowledged by the recently reformed Employment information directive.

The chapter has outlined a series of reasons that make it attractive for contract drafters, and specifically employers and their lawyers, to make use of any spaces afforded to them by the existing legal frameworks. Assuming that drafting such terms for internal use, as a standardisation exercise, is effectively an exercise in regulation, I have turned the regulatory challenges associated by Collins with employment relations into reasons for making use of contract terms and sought to identify, still within Collins’s framework and on the basis of some insights in HR and legal literature, which kinds of functions such terms would pursue. I hence distinguished between customisation, functional flexibility, financial flexibility and the establishment of governance structures – in particular with an eye to dispute resolution.

This chapter shows that the three main aims for pursuing through contractual drafting can be seen as mirrored by contractual practice in the legal systems. More accurately, the pursuit of these aims by means of contract terms seems to have generated *court litigation*, and thus to have proven contentious between the parties. The courts’ reactions to the contractual arrangements considered are remarkably

---

<sup>728</sup> The fact that, under unfair terms rules, unfair penalties cannot be adjusted establishes a further incentive to provide guidance – but the BAG had already established similar blueprints before the *Modernisierung*.

similar in the two systems: rather than allowing or disallowing certain terms in their entirety, courts have often endeavoured to establish conditions for their validity. The blunter resistance against functional flexibility is telling in this respect, in particular since in both countries the employee's *qualification* enjoys tighter protection than determinations concerning the place of work.

It is important to stress that in France, contrary to Germany, the cases analysed were decided outside of the "original" framework of unfair terms control – which was and still is only applicable to consumer contracts.<sup>729</sup> This makes it all the more remarkable that, outside of transparency rules, determinacy requirements seem to be on the ascent. An echo of concerns with the incorporation of non-negotiated terms can probably be discerned where, such as in the case of *clauses de dédit formation*, the terms have to be expressly accepted by or presented to the employee.

An additional effect of framing the subject within unfair terms/standard terms control is that "fair" drafting gains relevance vis à vis (or possibly next to) reasonable or good faith enforcement of the term. Transparency as developed by the BAG, especially qua *Bestimmtheitsgebot*, has important affinities with the concern over arbitrariness which emerges from the *Cassation's* treatment of salary modification terms. The most striking similarity, however, is how in both cases courts have – somewhat contentiously – made use of the notion of the binding force of contract to express the foundations and substantive standards of judicial control in this field. If the binding force of contract had been an instrument of oppression at the time of the *arrêt sabots*, it seems to now have been turned – at least in certain contexts – in an instrument of resistance.

Other differences - in particular the very diverging level of detail in the regulation of several terms, are difficult to attribute to one specific factor but also resonate with broader questions on unfair terms control. At face level, one may be tempted to attribute the difference, at least in part, to the different legal basis justifying control – the "black list" item of § 309 n. 6 BGB vis à vis the general provision on "manifestly disproportionate" contractual penalties of art 1152 CC (now 1231-5 CC). Other factors, such as judicial culture and legal style at large may also play a role: the different motivation styles of German and French courts are almost a commonplace in comparative law.<sup>730</sup> However, at the same time, it seems plausible to think that the different theoretical approaches to judicial scrutiny of contract

---

<sup>729</sup> And other similar contracts "between a professional and a non-professional", see art L 212-2 Code de la Consommation.

<sup>730</sup> See for a classic account John P. Dawson, *The Oracles of the Law* (Ann Arbor: Michigan University Press, 1968).

terms may also be a relevant factor. For German law, the idea of objective interpretation – ie somewhat normative nature – of standard terms may play a role in the way the BAG seeks to provide guidance to parties. In French law, there is a less strict distinction between the policing of terms’ drafting and of their enforcement.

The regimes attached to a finding of unfairness are also illustrative of these patterns of convergence and divergence: while often an unfair term will be deemed as invalid or non-applicable, it is not infrequent, in French cases, to see that a term is “reduced to fairness”. This is notably the case of cases in which drafting requirements have been formally met but the limits of acceptable “subordinations” have been trespassed: see the case of *clauses de dédit formation* which extend over a too long period. The logic is similar to the one applied in the moderation of manifestly excessive penalties – the clause’s core is preserved. In Germany, this used to be the case, for penalty clauses, under pre-reform *Inhaltskontrolle*. Nowadays, the standard interpretation of the remedies provision in the standard terms chapter is to the effect that unfair terms have to be eradicated. This way of acting is deemed necessary to make sure that employers<sup>731</sup> are incentivised to provide reasonable terms rather than relying on the freezing effect of draconian penalties, knowing that, even if unfair, they will still give them an advantageous position in court. The eradication rule, thus, transcends the achievement of a fair balance between the two parties concerned, concentrating on employers as repeat players. Contrary to the CJEU, however, the BAG partially justifies such rule with concerns for the position of the *individual* consumer/employee, who would otherwise only find out what their rights and duties are at the end of long court proceedings.

To sum up, the study shows that, even if acting within rather different legal framework and sometimes having to deal with slightly different terms, judicial law-making in both countries shows a similar, if not overlapping, mix of labour law-based reasoning and reliance on notions of contract law equality and justice. Admittedly, the adoption of *standard terms*-based unfair terms control in Germany has led to a higher penetration of regulatory influences. While this is quite univocally the case for the radical eradication of unfair terms. Perhaps not incidentally, this is the main change brought about – in Germany and, if 1171 Code Civil becomes the new standard, also in France – by the legislative reforms, with

---

<sup>731</sup> But one should speak more generally of drafters: the rule, which as we have seen (see supra 3.3.1.) has been adopted by the CJEU as well, applies under German law to all control-subject non-negotiated and standard terms.

no anchoring in the pre-existing case-law.<sup>732</sup> I have sought to show that transparency requirements can be brought back to a more classical private law rationale: on the one hand, they aim to secure that parties are not prevented from exercising their rights; on the other hand, in the form of the determinacy requirement or *Bestimmtheitsgebot*, they perform a substantive function of delimiting the employer's unilateral modification powers – something which we have seen is high in the mind of the French *Cassation* with no influence from regulatory concerns.

In conclusion: contractualisation is plausible; employers make use of the spaces that the applicable legal frameworks make available for them to use contract terms strategically; the response to such practices in the two legal systems is at points surprisingly similar and relies heavily on making a protective use of traditional and less traditional notions of contract law. The book is, thus, over.

---

<sup>732</sup> See also Hellwege, *Allgemeine Geschäftsbedingungen, Einseitig Gestellte Vertragsbedingungen Und Die Allgemeine Rechtsgeschäftslehre*, 148:12–13.