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The missing stone in the Cathedral

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

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Chapter 6 Conclusions and outlook

The first part of the book has focused on unfair terms control in European – ie EU – private law. Since the adoption of Directive 1993/13, a large space has opened for debating unfair terms control. While at the national level separate conversations have continued, the discussion centering on the Directive and its interpretation by the Court of Justice of the European Union has gathered increasing momentum since the start of the century, and particularly after the financial crisis of 2008-2009 and the following eurocrisis. This discussion has a growing influence on the way in which unfair terms control is understood and conceptualized well beyond Directive 93/13.

Beyond the Directive itself and the many CJEU cases interpreting it, the EU acquis concerning unfair terms control encompasses a large body of literature discussing the rationales and justifications implied in the various choices made by the Directive, as well as in the above-mentioned case-law. The book has reconstructed the discussion around the rationales and has placed it in the context of the larger debate on European Private Law: not only did this debate already at earlier stages take a relatively openly policy-oriented take (what in Italy is traditionally called “*politica del diritto*”, that is an operation which academics are cautioned *against* engaging in), in the last decade it has come to be dominated by one specific policy-infused paradigm. Whereas in 2010 Schmid provided the first comprehensive account – and denunciation – of private law *instrumentalisation* at the end of the (CJ)EU, within a few years the European Regulatory Private Law (ERPL) account developed by Hans Micklitz had essentially come to embrace such instrumentalisation as the new normal in the European market states. The plausibility of the claim from an explanatory perspective and the extensive studies which have accompanied its descriptive efforts have made Micklitz’s account a central point of reference for anyone engaging with European private law. From a normative perspective, ERPL focusses on the notion of *access justice* and conveys skepticism as to the attainability of social justice through private law and in particular through EU private law. For unfair terms control, such regulatory account further tilts the competition between the two main rationales that have emerged in the debate – a wobbly notion of collective weaker party protection against the correction of information-related market failures – in favour of economic arguments. Materialised corrective justice does not fare well in the regulatory arena.

Against this background, the thesis has sought to provide – within the same debate rather than outside of it – a partial counterweight to (and, to an extent, a caveat against) an unconditioned embrace of instrumentalisation in European

private law. The approach, is, in a way, opposite to that taken by Schmid: instead of looking for instances of instrumentalisation, I have sought to highlight the *limits* of instrumental rationalities in unfair terms adjudication. Looking at a number of core elements in the Unfair Terms Directive – as interpreted by the Court of Justice – I have sought to rebalance the description of an overall-instrumental European private law by highlighting the ambiguous dynamics between instrumental and non-instrumental rationalities in CJEU adjudication. The tension between the two is a pervasive feature characterizing, when looking close enough, all the considered aspects of the directive. The standardization fostered by the significant imbalance test is to be seen next to the productive but unstable relationship between transparency and the circumstances of the individual case.⁷³³ The mobilization – or more often setting aside – of procedural rules to enhance the directive’s effectiveness seems often guided by genuinely non-regulatory considerations.⁷³⁴ In the area of the consequences of unfairness, the Court’s difficulty in embracing more nuanced private law reasoning has resulted in a series of increasingly opaque decisions which undermine a crucial element in the Directive’s guidance function for national courts.⁷³⁵ The example of the “possibly vulnerable” average consumer that the Court seems to presuppose in its unfair terms case-law is particularly telling: while in most configurations the average consumer is a relatively straightforward regulatory concept – a more or less protective one depending on the attributes attached to the normative model – the possibly vulnerable average consumer is mainly an instrument of flexibility aimed at reaching plausible solutions in individual cases without giving in too much to an instrumental protective rationale.

Rebalancing the narrative about unfair terms control in European private law matters. The failure or projects based on more traditional understandings or private law has reinforced the image of a European private law devoid of meaningful general principles or a sense of justice not based on a more or less visible hand of the market. The centrifugal inclinations of European “regulatory” private law go hand in hand with the regulatory rationalities. The ongoing proliferation of sectoral interventions, such as most recently the *Directive on Unfair Trading Practices in the agricultural supply chain*, does not happen in a vacuum: suffice it to see how most of the substantive core of the latter directive is centred on the prohibition of certain contractual practices – even stronger, of certain uses of contract terms. Both this directive and the equally recent *Directive on transparent*

⁷³³ See *supra* section 3.1.

⁷³⁴ See section 3.3.

⁷³⁵ See section 3.2.

and predictable working conditions in the European Union (whose articles 8 and 9 in particular also have a clear focus on contract terms similar to those discussed in the second part of the book) refrain from the more comprehensive ambitions that characterized consumer legislation in the past three decades. Fragmentation is alive and well, also outside of the hyper-specialised regulatory silos. However, given the visibility of unfair terms control in the debate on European contract law, rediscovering the non-regulatory rationalities in this area has the potential of radiating similar concerns into seemingly distant areas such as agricultural supply chains – and of course European labour law.

Indeed, as the second part of the book has hopefully shown, the contrast between an old-fashioned general contract law and the ever-developing “special” laws should not be drawn in too crude terms. Over time, we have seen, unfair terms control has found its way into the employment laws of France and Germany quite separately from the direct intervention of legislators. Studying the emergence of unfair terms control in France and Germany has allowed to show a number of (almost) parallel developments. On the one hand, perhaps with some delay in comparison with other areas of contract law, – and notably, of course, consumer law – courts have been mobilizing different legal rules in order to address the emergence of certain terms. On the other hand, the whole picture painted by these individual rules seems more than the sum of its parts. In particular, what is telling is the way in which labour law and general contract law have been both deployed by courts to similar effects. In Germany, the case law pre-dating the *Modernisierung*'s official opening up of standard terms control to employment contracts was all along seen as tightly connected to the *Inhaltskontrolle* taking place in other areas. The legal basis invoked by courts was, if sometimes elusive, roughly identified in the same rules that played a role in such other areas, such as the good faith clause. At the same time, courts' interventions against terms allegedly circumventing employment rules were also ultimately identified as belonging to the same phenomenon. In France, calls for “*un droit des clauses du contrat de travail*” have been gradually followed by questions being raised as to whether the general notion of unfair term (clause abusive) was slowly infiltrating labour law. As to the legal basis, control based on specific labour law provisions took place next to prominent developments under the banner of the “very contract law” idea of the binding force of contract. *Why* this has happened is of course not an answer that can be drawn conclusively from this work.

A hypothesis, however, has been presented. The development of unfair terms control has been connected to contractualisation of individual employment relationships. In the first place, contractualisation has been discussed as a macroscopic phenomenon; the uneasy position of contracts within employment

relations has been traced back to the earliest stages of labour laws. While contract has always been present at the basis of free labour relationships – at least for the past two hundred years and more – its role has been questioned in the past to gain more visibility in the last four decades. The precise borders of this phenomenon vary depending on the legal systems that one considers. While in Germany contractual arrangements have been popular for a longer time and are likely to have played a role in the strategy of internally flexible open-ended contracts, in France the academic discussion has more recently clearly reconsidered the interest of employment contracts.

All in all, this may be less the result of deregulation in itself than of the growing creativity of Human Resources professionals and lawyers at the service of employers. At a more micro level, we have seen, contractualisation concerns the use of contractual tools – in other words, contractual terms – in order to manage individual employment relationships. The increased relevance of services entails a different configuration of the work-salary nexus than the one prevalent in the industrial era. Employment contracts contain more terms in order to cater to specific function-related needs and greater differentiation among different employees is functional to flexibilization of the employer's internal operations. Contract terms are apt tools for managing the risks inherent to long-term relationships. Flexibility and legal certainty are both aims that can be pursued by means of contract drafting. The second part of chapter 5 has thus identified three main functions that terms can fulfill.

First, “customization” terms can be used to specify certain duties (or sometimes rights, granted under certain conditions) of the employee that are deemed central to the relationship. Second, contract terms can be used to achieve *flexibility*, particularly valuable in the context of long-term relationships. This flexibilization can namely be achieved by means of terms operating in the sphere of the worker's performance (eg mobility clauses) or affecting the remuneration (bonusses, variable remuneration). Third and last, terms were identified as suitable to establish mechanisms of contractual governance, especially with an eye to the governance of contractual disputes, in the form of rules on dispute resolution directed to courts or other procedural arrangements designed to reduce legal jeopardies in case of disputes. According to these functions, some broadly defined groups of terms were included in an overview of case-law in the next chapter.

The parallel analysis of contentious terms in the two countries has shown that, in many cases, similar contractual practices exist – often leading in turn to quite similar reactions in court. The comparison in the field of variable remuneration suggests the existence of very different contracting practices. The section on

contractual penalties suggests a much more cautious approach on the side of French employers in the face of a generally negative attitude expressed by the legislator – but penalties make inroads in French practice too. Considerable similarities have emerged, on the other hand, both with reference to our example of customization term (the restitution of education costs) and, interestingly, terms aiming at functional and territorial mobility. In the latter groups, courts in both countries showcase a resistance against broad functional flexibilization; such opposition to enlargements of the employer’s unilateral prerogatives, it has been said, seems to reflect a concern for the parties’ contractual equality – already affected by the very existence of the managerial prerogative. A main difference across the board was the occasional readiness of French courts to rewrite an excessively broadly defined term into a less far-reaching one – a possibility acknowledged by German case-law before the *Modernisierung* but excluded under current standard terms control rules.

The fact that a significant portion of the terms emerging from the case-law of various courts in the two countries lent itself to being placed within the functional framework devised and employed in the book provides some corroboration to the hypothesis that unfair terms control and contractualisation are connected. In other words, if the terms emerging are in line with the functions of contract terms that justify contractualisation at the micro-level, then we can see the appearance of those terms as a manifestation of contractualisation – and advance the hypothesis that unfair terms *control* is a response to such phenomenon. The hypothesis postulates a connection between court disputes not necessarily having taken place *under an express legislative framework allowing unfair terms control*, nor under any discernible sub-set of rules. If accepted, this idea forefronts the bottom-up judicial formant of unfair terms control. That these court decisions would all be following a regulatory agenda rather than trying to address unfairness in the contractual relationships before them seems, in turn, implausible.

The limited – if clearly discernible – impact of such regulatory drive becomes visible by closely analysing the case-law presented in the last part of the book: the responses articulated by the highest courts in France and Germany appear remarkably similar as to the *underlying concerns* that they reveal. This similarity appears in the face of possibly different contractualisation practices and different legal frameworks. Concern with contractual equality emerges at several points, as expressed in different forms: not only through substantive limitation of the employer’s unilateral prerogatives but also, interestingly, through *formal* limitation in the form of determinacy requirements. This is clearly the case in Germany, but also emerges as a trend in France. The “transparency” requirements

so expressed are better explained in terms of contractual equality than in terms of market competition.

In German law, judicial control certainly exhibits more regulatory features than in France – and, importantly, more so under the “new” rules on standard terms than it did before the *Modernisierung*. Prominent examples are the rejection of *geltungserhaltende Reduktion*, or total eradication approach, and the irrelevance of the employee’s protection-worthiness in the concrete case, in most cases determining a stricter distinction between the drafting of the contract and its enforcement.⁷³⁶ The limitation of judicial control to non-negotiated terms, and express exclusion of core terms, ensuing from the *Modernisierung* does not seem to have had much impact on the reach of judicial scrutiny. In France, it is still unclear whether courts will adopt the new unfair terms control as replacement of the various forms of intervention they have engaged in so far. If that would be the case, the German experience leaves some room for hoping that the legislative restrictions will not overly affect the reach of judicial control. Besides the BAG’s attempt to justify the total eradication approach in mixed terms and its willingness to make exceptions to it,⁷³⁷ what stands out is that this feature is the only one that directly reconnects to legislative intervention: total eradication, in turn still more moderate than what CJEU adjudication requires,⁷³⁸ made its first appearance with the Standard Terms Act. The judicial reaction was, perhaps unsurprisingly, more genuinely concerned with securing contractual equality and justice in the face of contractualisation than the later legislative interventions.

The overview reconnects the second part of the book to its introduction, where the early literature on adhesion contracts was also reframed as a story of, and a reaction to, contractualisation. Contract law has been expanding its scope and gaining in complexity. While some – especially commercial – transactions have arguably *left* the reach of state- (or EU-) based contract law, to land in the realm of transnational codes or self-regulation, other transactions and subjects have sometimes gained prominence. Working class consumers have entered the main arena of contract law with the advent of mass distribution. Employees appear to be re-entering this arena. In such contexts, it does not seem outlandish to expect contract laws to be under some pressure to acknowledge the different players and different stakes that it stretches out to. This does not entail, of course, that change

⁷³⁶ See the discussion of modification terms under 5.4.2. and 5.4.3.

⁷³⁷ See supra 5.4.1. and 5.4.3.1.

⁷³⁸ See supra 3.2.

will take place in all cases and under all circumstances, let alone necessarily in the guise of unfair terms control.

Where it does happen, however, seeing such change (where it takes place) as a gradual development in connection with the phenomenon of contractualisation has an impact on how we understand unfair terms control and its relationship with contract law. Quite obviously, it becomes difficult to see unfair terms control as inherently limited to consumer transactions. In both systems, at this point civil code rules on unfair terms control encompass a very wide range of standardised contracts. Furthermore, we have seen how in both cases the limitation to non-negotiated contracts has re-emerged in the legislation – case-law did not really hinge on the question of negotiation, probably in the (we assume: unchallenged) assumption that no meaningful negotiation had taken place.

There is little reason, at this point, to think of these rules as *exceptions* from the general contract law rules based on arm's length negotiation. Outside a number of specific areas, most day-to-day contracts are not the subject of any meaningful negotiations. Seeing such growing lists of *exceptions* as the emerging *rule* seems in line with basic principles of parsimonious thinking.⁷³⁹ It also seems more likely to secure that the basic commitment of private law to corrective justice is not essentially hollowed out by contractual practice and interpretive formalism. The point is mainly relevant for private law theories that aim to be relevant in reconstructive terms but do not aim to be entirely in line with positive law. Purely normative theories and purely positivist approaches alike may not find much to be learned from the contribution the book seeks to make.

Commitment to (some) such idea of justice seems like something on which few contract lawyers would disagree. The book suggests that the surveyed developments showcase an adaptation of relevant practices of corrective justice by means of unfair terms control in the face of contractualisation. Recognizing the role of this development in thinking about viable private laws for the coming decades may hopefully be a little easier with the help of the tiny stone that the

⁷³⁹ Principle of parsimony: The principle that the most acceptable explanation of an occurrence, phenomenon, or event is the simplest, involving the fewest entities, assumptions, or changes. In phylogenetics, for example, the preferred tree showing evolutionary relationships between species, molecules, or other entities is the one that requires the least amount of evolutionary change, that is, maximum parsimony (<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100346221>, last accessed 8 March 2020).

book has sought to add to the cathedral Caruso reminded us to look at from an appropriate distance.