The missing stone in the Cathedral

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

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Summary

Unfair terms control is a landmark of contemporary European contract laws. How we talk about it is important to our general understanding of contract law – and arguably beyond that. Over the past decades, a very prominent debate has emerged around the so-called Unfair Terms Directive of 1993, which has harmonised the control of *non-negotiated terms in consumer contracts* across the European Union. Much attention in this context has been devoted to the *justifications* of unfair terms control. This discussion has gradually turned away from the various national paths of doctrinal discussion and has focussed on the *regulatory* features of judicial control: the elimination of market failures and, less convincingly, the advancement of social justice or consumer interests have become staple arguments and benchmarks for criticism or normative contributions. This broad engagement with ultra-individual effects has been termed regulatory *rationality:* a matter of questions asked, not of answers given. The *question* of what basic contractual justice requires between the parties involved in the concerned exchanges has lost centrality, increasingly to the advantage of arguments apparently unconcerned with justice writ large.

This dissertation attempts to partially refocus the debate on unfair terms control, exploring the contribution that the emergence of unfair terms control in employment contracts in two legal systems can make to articulating the respective positions of judicial control, regulation and justice in contract law. By reconstructing the developments preceding the adoption of rules allowing judicial control of non-negotiated employment contracts in France and Germany, the book focusses on judicial control as a response to *contractualisation* of employment relations. Such contractualisation – in itself a combination of broad trends in labour law, doctrinal developments and, increasingly, HR practices – is paralleled to the movements which, at the outset of the 20th century, gave rise to the notion of *contrat d'adhésion*. Employers have good reasons to use the contract as a tool: to customise the contents of the employment relationship, to include elements of flexibilisation and to put in place dispute-management procedures. This increases the saliency of contracts, and contract law, in employment relations. Such success of contract law as a means of managing unequal relations calls for a reconsideration of its basic tenets, and in particular of what corrective justice means between the parties concerned.

In the book's two parts, both case-law of the EU Court of Justice and salient adjudication on "unfair" terms in employment contracts are scrutinized with a view to assessing the extent to which regulatory and "justice" rationales are reflected in the way judicial control is shaped. While the EU case law (perhaps

unsurprisingly) displays a remarkable degree of regulatory ambition, both case studies show the crucial role of "contractual" or corrective justice concerns in making sense of judicial and interpretive practices. Interestingly, the case of Germany shows how the more recent legislative regulation of unfair terms control has *increased* the regulatory features of a judicial scrutiny that had been established by labour courts already decades earlier. This shift is particularly visible in the field of the consequences of unfairness – albeit with less far-reaching and less unsettling consequences than the similar rule put in place by the Court of Justice in the only apparently far apart field of consumer contracts. In both countries, furthermore, exclusive focus on *non-negotiated* or standardised terms is also a novelty brought about by legislative intervention: a very important distinction to the ends of certain doctrinal accounts and one that is crucial to the purchase of regulatory arguments, but perhaps not a very useful one in court disputes where lack of (meaningful) negotiation could easily be assumed. Rather than letting this distinction over-determine our analysis, thus, the story invites us to once again reconsider the idea that standardisation justifies exceptions from non-intervention and perhaps rather ask at what conditions principled *non*-intervention is justified. The little clog on the book's cover reminds us of injustice lingering when the law abides by arbitrary will under the vestige of contract.

Samenvatting

De regulering van oneerlijke bedingen is een centraal en actueel thema in het Europese contractenrecht. De manier waarop dit thema wordt benaderd en besproken heeft invloed op ons begrip van het contractenrecht – en wellicht nog breder: op ons begrip van het privaatrecht in het algemeen. In de afgelopen decennia is een belangrijke discussie ontstaan over de zogeheten Richtlijn oneerlijke bedingen (1993), die de rechterlijke toetsing van *niet-onderhandelde bedingen in consumentenovereenkomsten* in de Europese Unie heeft geharmoniseerd. Hierbij is veel aandacht besteed aan de *rechtvaardiging* van de rechterlijke toetsing van oneerlijke bedingen. De focus van dit debat is geleidelijk verschoven van de verschillende, soms ambigue argumenten in de oorspronkelijke nationale discussies naar de *regulerende* aspecten van rechterlijke toetsing. Het tegengaan van marktfalen en, controversiëler, het bevorderen van sociale rechtvaardigheid of consumentenbelangen zijn tegenwoordig standaardargumenten en -uitgangspunten voor kritiek of normatieve bijdragen geworden. De nadruk die daarbij wordt gelegd op zaakoverstijgende effecten wordt de *regulerende rationaliteit* genoemd: "rationaliteit" in die zin dat het geen antwoorden of uitkomsten voorschrijft, maar eerder bepaalt welke *vragen* relevant worden geacht. Juist de *vraag* wat contractuele rechtvaardigheid in de basis vereist tussen de betrokken partijen is buiten beeld geraakt, in toenemende mate ten gunste van argumenten die schijnbaar niets van doen hebben met rechtvaardigheid in brede zin.

In dit proefschrift wordt een aanzet gedaan voor een gedeeltelijke heroriëntatie van het debat over oneerlijke bedingen. Hierbij wordt verkend welke bijdrage de ontwikkeling van rechterlijke toetsing van oneerlijke bedingen in arbeidsovereenkomsten – zoals onderzocht in twee rechtsstelsels: Duitsland en Frankrijk – kan leveren aan het verduidelijken van de rol van rechterlijke toetsing, regulering en rechtvaardigheid in het contractenrecht. Aan de hand van een reconstructie van de ontwikkelingen die voorafgingen aan de implementatie van wetgeving die rechterlijke toetsing van niet-onderhandelde arbeidsovereenkomsten in Frankrijk en Duitsland mogelijk heeft gemaakt, schetst dit boek een beeld van rechterlijke toetsing als antwoord op de *contractualisering* van de arbeidsverhouding. Die contractualisering kan worden gezien als een combinatie van brede tendensen in het arbeidsrecht, de juridische doctrine en, in toenemende mate, hr-praktijken, die parallel loopt aan de ontwikkelingen die aan het begin van de twintigste eeuw hebben geleid tot de opkomst van het begrip *'contrat d'adhésion*'. Voor werkgevers zijn er goede redenen om het contract als instrument te gebruiken: om de inhoud van de arbeidsrelatie te specificeren, om elementen van flexibilisering op te nemen en om procedures voor

geschillenbeslechting in te voeren. Dit verhoogt de relevantie van contracten en het contractenrecht in arbeidsrelaties. Het geconstateerde succes van het contractenrecht als middel om ongelijke verhoudingen te beheersen vraagt om een herdefiniëring van de belangrijkste aspecten van het contractenrecht – met name wat de vraag betreft naar de betekenis van correctieve rechtvaardigheid voor de betrokken partijen.

In de twee delen van dit boek worden zowel de jurisprudentie van het Europese Hof van Justitie over de Richtlijn oneerlijke bedingen als relevante uitspraken over "oneerlijke" bedingen in arbeidsovereenkomsten op nationaal niveau geanalyseerd, om te onderzoeken in hoeverre grondgedachten op het gebied van regulering en "rechtvaardigheid" tot uiting komen in de wijze waarop rechterlijke toetsing is vormgegeven. Terwijl de jurisprudentie van het Hof van Justitie (wellicht niet verrassend) een aanzienlijke mate van reguleringsambitie laat zien, tonen beide casestudies aan dat "contractuele" of correctieve rechtvaardigheid van cruciale betekenis is voor een meer volledig begrip van rechterlijke interpretaties en uitspraken. In het geval van Duitsland laat de analyse zien hoe de meer recente wettelijke regulering van oneerlijke bedingen de regulerende kenmerken heeft vergroot van een rechterlijke toetsing die al tientallen jaren eerder door de arbeidsrechtbanken was geïntroduceerd. Deze verschuiving naar een meer "regulerende" aanpak is vooral zichtbaar ten aanzien van de gevolgen van oneerlijkheid – zij het met minder verstrekkende en ingrijpende gevolgen dan de vergelijkbare regel die het Hof van Justitie heeft ingevoerd op het gebied van consumentenovereenkomsten. Verder is in beide landen de exclusieve aandacht voor *niet-onderhandelde* of gestandaardiseerde bedingen bovendien een vernieuwing die door wetgevend optreden tot stand is gebracht. Het onderscheid tussen gestandaardiseerde en onderhandelde bedingen is zeer belangrijk vanuit het perspectief van bepaalde doctrines en mogelijk cruciaal voor de overtuigingskracht van reguleringsargumenten, maar misschien een minder onderscheidend criterium in een concrete rechtszaak, waar het ontbreken van (zinvolle) onderhandelingen relatief snel zal kunnen worden aangenomen. In plaats van te veel waarde te hechten aan dit onderscheid, nodigt deze waarneming ons uit om het idee dat standaardisatie uitzonderingen op non-interventie rechtvaardigt nog eens te heroverwegen en ons eerder af te vragen onder welke voorwaarden principiële *non*-interventie gerechtvaardigd is. Het klompje op de omslag van het boek herinnert ons aan het onrecht dat dreigt wanneer de wet vasthoudt aan de willekeur van het contract.

Acknowledgements

A large project is over. Thanks to my considerable personal and professional luck at the University of Amsterdam, other projects are already underway. None of these would have been possible without the support of my supervisors, Aukje van Hoek and Marco Loos. As in other types of families, we did not know each other at the start. Patiently but firmly, you have nonetheless directed me towards overcoming the several obstacles I put on my own way. Marco, the trust you have come to put in me over the past years is a source of pride next to, more importantly, gratitude. Aukje, besides the key advice you had for me at several points, your generosity and dedication – whether expressed in the form of sharp reading or pizza-buying – have literally pulled me over the last few meters. It goes without saying that all that is wrong with the thesis is to be put down to me alone.

I am grateful to the members of the reading committee – Kati Cseres, Nicole Maggi-Germain, Chantal Mak, Hans-Wolfgang Micklitz, Christoph Schmid and Evert Verhulp, who deserve special mention not only for their willingness to assess the manuscript but also for their patience in accommodating a bunch of delays and their perseverance in reading through a pandemic, university closures and lockdowns.

Thanks, also, to a number of outstanding scholars who have lent a few hours of their time to discussing unfair terms with me: Judith Rochfeld, Philipp Hellwege, Rudiger Krause and Hugh Collins provided not only their scholarship but also words of wisdom and in some cases hospitality at their institutions. Jérôme Porta's reading suggestions gave me valuable insights and whole weeks of intellectual enrichment.

Martijn Hesselink opened the door of CSECL to me and over time convinced me that I was simply not thinking wild enough. Whether this was true or not, I am grateful for his criticism and his friendship. My Guardian breaks would not be the same without you – nor would my scholarship, for what that matters. Chantak Mak stewarded me through my very first teaching experience: I can now perhaps say, I had no idea what I was doing. She most likely suspected as much and never held it against me, feeding me confidence and boterkoek at critical times. Hereby my heartfelt thank you.

At CSECL (now ACT), I have been blessed with many amazing encounters and a number of genuine friendships. My highly accomplished *paranymphen*, former roommates and occasional movie pals Bram and Mirthe have accompanied very different stages in the making of the book with very similar unassuming warmth. Bram, Hawaii tosti's are gross to the core but quite delicious in fact, would never have known without you. Mirthe, I hope "Cass.soc."is not the one thing you will remember about our various thesis-related discussions – but I am still hugely grateful for your help and support *("sending today?"*). The rest, we'll see. Or, thanks for all the fun, the food, the flea market trips and your resolve to bring order to my working methods – it's only my fault that your efforts are often frustrated. Your sabich has twice been crucial to the book, and your wits much more often to my sanity *("It could be that everybody at the UvA hates you, but could it be the hormones instead?"*). I miss you. Alon, you are still in time to move to Brussels before fully falling for Leeds. Anna, it's a real blessing that we can still share joys and defeats in our respective academic and life paths, and great fun to have nerdy exchanges where I pretend to understand civil procedure. I'd

rather you'd still have haring with me every now and then – whether here, in Noordwijk or elsewhere – but I guess I can cope. Two more roommates have made my PhD days less lonely. I have learnt a great deal from each (from bears to sharks to furniture to Scandinavian legal theory and political philosophy) while also having a lot of fun. Josse, you made up pretty quickly for calling me "the shortest CSECL member" the first time we talked. While you never condoned my undecisive attitude to the whole PhD-finishing issue, your saintly composure upon finding out that we had to drive back three hundred kms to retrieve my passport somewhere along the Australian coast will never be forgotten. Karoline, as long as you were around I could pretend I had an idea what cool people did, wore and ate. Although I was never great at being hip by proxy, we should still see each other more often so you could give me some *bijles*. Olga, we never sat in a room together but still we went through some *good* (and less good) *times*. But we are getting better by the year, so more to come. I have shared drinks, reads, trips, frustrations and parenting questions with many others at the Centre: Joasia, Sacha, Aart, Beatrijs, Irina, Laura, Mia, Rafal (of course!), I promise that at some point there will be *some* celebration! It goes without saying that the many lovely colleagues (in particular but not only from the Private Law department) whom I am certainly forgetting are also invited. Same goes for the many students who have so much enriched my academic life in the past years – I would have loved to share with you the day I become a more respectable lecturer.

That CSECL has by now turned into ACT and so many exciting things are going on is due to collective work, courage and determination but also to the efforts of a single human, my beloved friend and daily source of inspiration – not to mention, over the past couple of years, officially appointed *co-promotor* – Marija Bartl. You know how much I love you and admire your scholarship but *I* know you will be happy to see it repeated here.

I would not have ended up at the University of Amsterdam – and probably would have quickly fallen out of any passion for legal research – without my supervisor and mentor in Pisa, Giovanni Comandé, and my first role-model in the (we can now say it) sometimes very misogynistic environment of Sant'Anna, Caterina Sganga. My first steps in Dutch academia led to a number of encounters, some bumpier than others. Thanks to Franck Hendrickx, thus, for once reminding me that *also supervisors have feelings*. I hope I am able to carry his wisdom with me in all my academic interactions nowadays.

Our life in Amsterdam has been blessed with the gift of a number of extended families: Stefania and Giovanni, how *bijzonder* that we ended up in the business of parenting pretty much at the same time and more or less in the same place. It is wonderful to see Enrico, Emma, Elena and Matteo grow next to our own kids. Marghe, look what we are all doing! Piet, thanks for bearing with all the Italian and chaos. Ale & Francy, well you know, I think; we will resume our visits to Pizzabakkers and weekly meals soon enough. Teresa, I will get to you in a sec.

Back in Italy, some of my friends were considerably quicker on finishing their dissertations but managed their objective high ground with plenty of grace. Cinzia, thanks for the fun visits here and there, le merende chez Maria Teresa (ciao!), the updates on labour law and the fundamental literature references. Vio, thanks for being my constant reminder that form

is substance, a crucial aesthetical but also critical tool (even though one which we must also subject to critique!). We may not always be in touch as much as we'd like to, but you are always with me. [Elia e Andrea, baciotti]

Talking of extended families above should not detract from more conventional constellations. Teresa (zia Teresa!) has been the first in her family to get a PhD – and also in ours. Luckily (for your nephews and their parents) you are also very good at ball games, videocalling gym and many other things, but I directly enjoy your conversation skills the most I must say. Carlo's parents, Lucio and Lucia, and the rest of the Veneto crowd – Alessandra, Ivana and Renzo – have been putting up with distance and worries about our meanderings with remarkable steadiness and regularly offered wonderful prosecco and culinary escapes. Next to, more recently, being a great uncle to Leo and Dario, Davide has given us a reason and excuse to travel back since short after moving away from Italy. Unbelievable how big you have got! Big hug.

Whether I was waiting for a bus under the rain, getting a piercing or wondering whether I should totally change career plans, I knew someone in Fondi had my back. Maria Nives, Raniero, Marta and Marco, if love had to be expressed in food it would have to be olive oil and artichokes travelling across Europe in a glass jar. Extra thanks, by the way, to talented Marta for designing the book's cover and her patience in complying with my obsessive suggestions re colours, lines, text orientation and spacing. Mario e Sara, here is the book we have been talking about for years – not as fun as Murakami, but it's done at last. Rossella, thanks for always insisting that we stay sane and grounded.

The book is for my parents, Ester and Massimo – somewhat ironically, since they disagree on almost everything but have always both insisted that my study and career choices should be for me and not for them. As a grown-up person and as an academic, I will never be grateful enough for the combination of empowerment and consciousness that this has endowed me with. I would, however, likely not have become the kind of person who actually *finishes* a book without my partner Carlo, who every day dares me to be a more decent, more reflexive human and my two sons, Leo and Dario, who give me endless happiness even though I can't seem to learn how to play.