



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.

The missing stone in the Cathedral

Candida Leone

The missing stone in the Cathedral

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

Candida Leone



sabot
[noun]

clog, a shoe made entirely of wood

In its notorious “*arrêt sabots*” from 1866, the French *Cour de 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 had decided in equity, to be in breach of article 1134 of the Code civil – in other words, they had failed to properly honour the binding force of contract. This was one of many cases through which, towards the end of the 19th century, contract law rules came to be seen as an instrument of workers’ oppression.

The missing stone in the Cathedral

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

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor aan de
Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. ir. K.I.J. Maex

ten overstaan van een door het College voor
Promoties ingestelde commissie,
in het openbaar te verdedigen
op 12 juni 2020, te 11 uur

door

Candida Leone
geboren te Rome

Promotiecommissie:

Promotor(es):

Prof. dr. A.A.H. van Hoek Universiteit van Amsterdam

Prof. dr. M.B.M. Loos Universiteit van Amsterdam

Copromotor(es):

Prof. dr. M. Bartl Universiteit van Amsterdam

Overige leden:

Dr. K.J. Cseres Universiteit van Amsterdam

Dr. N. Maggi-Germain Université Panthéon-Sorbonne – Paris 1

Prof dr. C. Mak Universiteit van Amsterdam

Prof. dr. H-W. Micklitz University of Helsinki

Prof. dr. C. U. Schmid Universität Bremen

Prof. dr. E. Verhulp Universiteit van Amsterdam

Faculteit der Rechtsgeleerdheid

Table of Contents

CHAPTER 1 INTRODUCTION: CORRECTING THE NARRATIVE ON UNFAIR TERMS CONTROL	1
1.1. <i>Introduction</i>	1
1.2. <i>A Prequel: background and terminology</i>	2
1.3. <i>Private (or contract) law and regulation</i>	12
1.4. <i>Methodology</i>	19
1.5. <i>Final remarks</i>	23
PART I THE “POLICY” DISCUSSION IN EUROPEAN CONTRACT LAW AND ITS LIMITATIONS	26
<i>Introduction</i>	26
CHAPTER 2 DIRECTIVE 93/13, JUSTIFICATION AND AIMS	29
2.1. <i>Justification and aims of the Unfair Terms Directive</i>	29
2.2. <i>European private law and the rise of “aims” discussions</i>	48
2.3. <i>Conclusion: unfair terms control for whom?</i>	51
CHAPTER 3 THE DIRECTIVE “IN ACTION”, A THREE-PRONGED ANALYSIS	53
3.1. <i>The unfairness test: substantive unfairness and transparency</i>	57
3.2. <i>Consequences of unfairness</i>	73
3.3. <i>Ex officio control and the relationship between individual and collective proceedings</i>	82
3.4. <i>Conclusions</i>	87
PART II THE APPEARANCE OF UNFAIR TERMS CONTROL IN LABOUR LAW AND THE CONTRACTUALISATION OF EMPLOYMENT RELATIONS	90
<i>Introduction</i>	90
CHAPTER 4 THE ROAD TO UNFAIR TERMS CONTROL	92
4.1. <i>Similar stories, different paths</i>	92
4.2. <i>Germany</i>	94
4.3. <i>France</i>	119
4.4. <i>Conclusions</i>	137
CHAPTER 5 CONTRACTUALISATION AND EMPLOYMENT RELATIONS	142
5.1 <i>Introduction</i>	142
5.2. <i>The contractualisation of employment relationships in historical perspective</i>	142
5.3. <i>Contractualisation as a tool: contract terms in employment practices</i>	153
5.4. <i>Contractualisation in practice and judicial responses: analysing certain contentious terms</i>	161
5.5. <i>Conclusions</i>	195
6. CONCLUSIONS AND OUTLOOK	200
BIBLIOGRAPHY	208
CASE LAW	227
LEGISLATION	232
SUMMARY	237
SAMENVATTING	239
ACKNOWLEDGEMENTS	243