The effects of contracts beyond frontiers: A capabilities perspective on externalities and contract law in Europe

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Many goods bought and sold on the market in Europe are produced by others elsewhere in the world. Although Europeans are often physically removed from the locations where and the ways in which the goods they buy are made, the knowledge thereof is often not so remote. Indeed, as a topic of debate, cases involving deplorable production conditions have proven to be structural and persistent over time, receiving media, political, and academic attention, raising broad moral concern.

This dissertation takes the example of transactions for goods made in sweatshops to raise questions regarding the minimum standards applicable to market conduct in Europe. It argues from a capabilities perspective to minimum contractual justice that a society aiming to be minimally just should not support market activities that have adverse effects on the central capabilities of others elsewhere. As such, the book provides reasons of justice for why economic transactions for goods made in sweatshops should be considered immoral and for that reason invalid under rules of contract law in Europe.
The Effects of Contracts Beyond Frontiers | A Capabilities Perspective on Externalities and Contract Law in Europe

Lyn K.L. Tjon Soei Len
THE EFFECTS OF CONTRACTS
BEYOND FRONTIERS | A CAPABILITIES PERSPECTIVE
ON EXTERNALITIES AND CONTRACT LAW IN EUROPE

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Faculteit: Faculteit der Rechtsgeleerdheid
For Nima and Dawa
“(...) in a time of rapid globalization, when non-moral interests are bringing us together across national boundaries, we have an especially urgent need to reflect about the moral norms that can also, and more appropriately, unite us (...)”

Martha Nussbaum

Women & Human Development (2000)

“Something is profoundly wrong with the way we live today. (...) We know what things cost but have no idea what they are worth.”

Tony Judt

Ill Fares the Land (2010)
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Winston Thompson, Winston thanks for always interpreting and seeing me in your characteristic kindhearted way. Your virtues make the ocean disappear. In your absence many sounds of joy are veiled in silence. Klaar.

Lyn
Amsterdam Mei 2013

* Those who know me well are familiar with the fact that my sincere appreciation and affection is usually revealed through ‘roasting’. I hope that the absence thereof here will be given a charitable interpretation.
INTRODUCTION

This book poses questions about the way we live in terms of the transactions we engage in and the transactions that our society supports through contract law.

The deplorable production conditions of goods on the market in Europe...

On 11 January 2012, mainstream media reported on the threat of mass suicide by Chinese assembly line workers at a factory that produces popular consumer goods.\(^1\) Reports varied regarding the number of workers (ranging from 80 to 300) who threatened to end their lives.\(^2\) The news regenerated concern regarding actual suicides at the same location a few years earlier, allegedly caused by poor working conditions. For instance, in 2010 the BBC had reported on a young man, who had jumped off the top of a building.\(^3\) According to media reports, deplorable working conditions had led twelve of his co-workers to similar desperate acts earlier that year.\(^4\)

...give rise to moral concern and public scrutiny...

This case is one of many to invoke critical scrutiny regarding the conditions under which popular consumer goods sold on the

---


\(^2\) The threat followed an alleged labour dispute over transfer policies.

\(^3\) ‘Taiwan iPhone-maker Foxconn suffers another death’ The BBC, Online <www.bbc.co.uk/news/10169595> accessed 27 May 2011.

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European market are produced elsewhere.5 These goods figure as intimate elements in European citizens’ lives: we exchange money to eat these goods, to wear them, and use them to write dissertations, which makes the association between these goods

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And with regard to modern forms of (child) slavery see:

and the deplorable production conditions under which they are produced unsettling. Although Europeans are often physically removed from the locations where, and the ways in which the goods they buy are made, the knowledge thereof is often not so remote. As a topic of debate, cases involving deplorable production conditions have proven to be structural and persistent over time, receiving media, political and academic attention, raising broad moral concern.  

...regarding costs imposed on others elsewhere...
Arguably, these moral concerns arise because these cases entail market activities that are perceived as imposing unacceptable costs on others who are already disadvantaged. The production of goods under deplorable conditions, externalizes costs that are associated with producing goods under decent conditions. The market transactions in Europe, which consumers and corporations engage in, do not reflect the costs of decent production. Instead, these costs are borne by those who are affected by deplorable conditions, but who lack the ability to adjust their conduct accordingly in response to these market activities.

...as an issue of minimum justice...
These cases of cost externalization raise a particular concern in the current global setting. Although the globalization of economic and social cooperation is praised for the potential to contribute to economic growth and human welfare, the current distribution of advantages and disadvantages thereof is heavily criticized as

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unjust.\textsuperscript{8} Those who are already the most vulnerable and who have the least power, bear a disproportionate share of the disadvantages of global cooperation.\textsuperscript{9} In this context, imposing costs of market activities on others who are disadvantaged elsewhere, raises an issue of minimum justice. The inability to adjust one’s conduct in response to the market activities of others may entail the inability to function in a way that is thought to be of central importance for human beings. The latter raises an issue from a capabilities perspective on minimum justice. From this perspective all human beings are entitled to a basic set of abilities to function in valuable ways and a decently just society should be structured in a way that promotes and secures these basic capabilities to all individuals.\textsuperscript{10} This book explores a capabilities perspective on the fundamental legal structure underlying market transactions, in particular in relation to transactions in Europe that impose costs on others elsewhere.

...raise questions regarding minimum standards in contract law in Europe...

Contract law provides the fundamental legal structure underlying market transactions: it contains normative standards that reveal


\textsuperscript{9} In commenting on the recent crisis of the global economy Amartya Sen pointed to disproportionate distributive effects stating that “(…) the people most affected are those who were already worst off.” Sen, A., ‘Capitalism Beyond the Crisis’ \textit{The New York Review of Books} <www.nybooks.com/articles/archives/2009/mar/26/capitalism-beyond-the-crisis/?pagination=false> accessed 17 April 2013.

how transacting parties should behave towards each other, others and society as a whole when engaging in market activities, if they wish to have state power available for the enforcement of their transactions.\textsuperscript{11} Contract law reflects a society’s fundamental values and a contemporary vision of a way of life through minimum standards for contractual behaviour.\textsuperscript{12} This thesis understands contract law to represent a model for just market conduct.\textsuperscript{13}

How is a regime of contract law to deal with transactions on a market that imposes negative effects on others elsewhere? Should a model for just market conduct in Europe take account of the costs imposed by market transactions on others elsewhere and should Europe support such transactions through a contractual regime? And, are these transactions compatible with the fundamental values reflected in minimum standards for contractual behaviour?

The specific normative question is central to the current inquiry: \textit{should mutually beneficial contracts that have adverse effects on the basic capabilities of others elsewhere be invalid under a regime of contract law in Europe?} This question is raised in tandem with a question of positive law, namely: \textit{are mutually beneficial transactions that have adverse effects on the basic capabilities of others elsewhere, immoral and on that ground invalid under current rules of contract law in Europe?}

...\textit{which aim to contribute to a larger debate on social justice in contract law in Europe.}

These questions can be read as a continuation and exploration of current moral concerns that people have about goods sold on the market in Europe, which have been produced under deplorable production conditions elsewhere. In the context of this book,

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However, these questions are raised in tandem, first and foremost, as part of a larger topic of debate concerning social justice and contract law in Europe. Specifically, this book approaches the negative implications of contracts on others elsewhere as an issue of contractual justice, and takes a specific case thereof to illustrate the implications of a capabilities perspective on contractual justice. Hence, this book aims to contribute to the current debate on social justice and contract law in Europe by addressing a topic and a perspective that deserve additional consideration.

The debate on social justice and contract law in Europe encompasses several large questions, including the contentious issue whether or not contract law should pursue social justice aims. This book, however, starts from the assertion that contractual justice is, in part, a matter of social justice, and that the central question is what notion of social justice should be reflected by contract law in Europe. This book does not purport to give a comprehensive answer to this larger question, nor does it suggest that it can or should be answered by legal academic research. Instead, this book aims to engage in the normative debate that this question generates. It will contribute by putting forward a capabilities perspective on contractual justice applied to the particular case of effects of contracts on others elsewhere.

The role of contract law in actually bringing about just outcomes in the world should not be inflated. Contract law is not the most effective or efficient instrument particularly in relation to the specific case discussed in this book. The objective of the research has not been to search for an instrument to improve

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44 In theories of private law the question regarding the relationship, or absence thereof, between social justice and private law (or contract law in particular) is foundational. The question of whether or not social justice is a legitimate aim of private law is answered in the negative, by Weinrib, for instance in Weinrib, E.J., *The Idea of Private Law* (Harvard University Press, 1995) and recently in Weinrib, E.J., *Corrective Justice* (Oxford University Press, 2012), see also Gordley, J., *Foundations of Private Law* (Oxford University Press, 2007), but in the affirmative by Collins, for instance in Collins (2003).

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directly or contribute to solving the problem of deplorable production conditions globally, i.e. this book does not propose contract law as a problem-solving instrument. The purpose of raising contract law questions with regard to mutually beneficial transactions for goods made under deplorable conditions elsewhere, is to reflect on the normative standards of contract law in Europe, and on the underlying narrative of European initiatives in the area of contract law. This exploration asserts the underlying idea that whether or not the market order in Europe can be considered just depends, in part, on its contract law.
1. A CAPABILITIES APPROACH TO EXTERNALITIES AND CONTRACTUAL JUSTICE IN EUROPE: CONTEXT AND OUTLINE

This chapter provides a broader context for this book’s questions, which reveals the scope and limits of the inquiry (section 1.1). The following section provides an outline offered through an integrated discussion of underlying methodology (section 1.2).

1.1. The questions in a broader context

1.1.1. Private law questions
The deplorable production conditions elsewhere of goods sold on the market in Europe receive much attention in civil society, politics and academia. Also in the area of private law and the particularly the realm of contract law, this topic raises questions.¹

1.1.1.1. A focus on consumer protection and corporate social responsibility
Deplorable production conditions of goods bought and sold in Europe are viewed primarily as issues pertaining to corporate conduct, often discussed under the heading of corporate social responsibility.² In the area of tort law questions are raised, for instance, regarding the liability of corporations involved in practices that cause harm to others, either directly or through the

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activities of supply chain partners. For instance, can an injured party claim damages from the corporation or its shareholders? In the area of contract law, deplorable production conditions have raised questions regarding the non-conformity of the good delivered to the consumer. Can a consumer rescind a sales contract, if the good does not meet her reasonable expectation, i.e. the expectation that a good is produced under decent conditions? Another issue is the potential relevance of publicly expressed corporate commitments to responsible conduct, for instance as part of a traditionally non-binding normative framework, i.e. a code of conduct, for the interpretation of legal standards. The shared perspective underlying these questions brings to the fore both an ‘usual suspect’ and ‘victim’ in this context. Namely, in relation to the issue of deplorable production conditions of goods sold on the market in Europe, the questions perceive corporate actors as suspect transgressors of legal and

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4 This question is raised in legal scholarship, not (yet) in practice. See: Wilhelmsson, T., ‘Varieties of Welfarism in European Contract Law’ (2004) 10 European Law Journal 712-733. This question was also raised by Collins at the Conference on ‘Public Policy and Social Justice in European Contract Law’ hosted by the Groningen Centre for Law and Governance at the University of Groningen, October 2012.

5 The most pertinent issues are whether or not the publicly expressed commitment can be understood as ‘firm’ rather than aspirational (i.e. as a misleading commercial practices under article 6 section 2 under b of the Unfair Commercial Practices Directive) and whether or not production conditions are to be understood as ‘qualities’ of the good with regard to which the consumer had reasonable expectations. If buying and selling ‘goods’ is understood as buying and selling ‘brands’ (i.e. an image or identity) production conditions may be essential qualities of the good as they may constitute the image/identity, e.g. as they relate to a product’s ‘green’ or ‘responsible’ image. See: Klein, N., *No Logo* (Macmillan, 2003). See on the relation between publicly expressed commitments and liability for instance Van Dam (2008), nr.16.

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social norms, and consumers as parties in need of protection respectively.\textsuperscript{6}

Perhaps, consumer protection, as the focal point for questions of contract law regarding deplorable production conditions is unexpected. The descriptive starting point for contract law in Europe is, by and large, the principle of freedom of contract, often referred to in the same sentence with the binding nature of contract and the relativity (or: privity) of contract, representing different expressions or sides of the concept of party autonomy.\textsuperscript{7} The principle of freedom of contract states that parties should be free to decide whether or not to contract, with whom and on what terms.\textsuperscript{8} The principle of relativity of contract, refers to the idea that contracts are generally only binding between the contracting parties, that is to say, they only confer rights to and impose obligations on those persons who are parties to the contract.\textsuperscript{9} In other words, contract law focuses on the legal positions of contracting parties, their autonomy, and freedom to engage in market transactions. The salient justice issues for contract law and the corresponding questions are found primarily in those instances where the autonomy of contracting parties is at stake—for instance because they are weaker parties—; examples that may be brought to the fore as justifications for mandatory rules (i.e. rules from which private parties cannot deviate).\textsuperscript{10} In this context, the consumer is the model example of a weaker party and consumer protection rules are the model of justified mandatory rules.

\textsuperscript{6} See for a different view Tjong Tjin Tai (2011), p.11 who also raises the question regarding liability of consumers.
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1.1.1.2. Considering the interests of vulnerable third parties

Whilst the autonomy of the contracting parties is the point of departure, contract law also takes account of the interests of thirds parties and society as a whole. Private parties—whether as businesses or consumers—are able to make decisions, which the State does not wish to endorse and support. The question arises as to how a society is to deal with mutually beneficial transactions for goods made under deplorable production conditions. Consumers and businesses need not have been deceived, otherwise misinformed or uninformed when they engage in such transactions. As transacting parties, they may be indifferent to the conditions under which their goods are made in light of their potential preferences; for instance preferences for lower costs or higher profits.

In the context of the development of an (optional) instrument of European contract law, Hesselink raised the questions whether or not such transactions are immoral, because their performance will lead to foreseeable infringements of fundamental rights of others, and whether or not immoral contracts should be enforceable under contract law in Europe.

These questions draw attention to the fact that, in some cases, the

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11 Available information with regard to the deplorable conditions under which products are made, can potentially undermine claims of non-conformity (see above). Namely, if information is provided regarding the product’s production conditions, a consumer can no longer reasonably expect other conditions. For instance: Article 2 of the Consumer Sales Directive 99/44.


interests of third parties or society as a whole take priority over the interests of contracting parties.¹⁴ Legal systems impose, through contract law, a minimum standard of decency applicable to all contracts and the ways in which contracts may affect others and society as a whole.¹⁵ A society does not support all individual preferences through contract law, regardless of what those preferences are. And, where the interests of others are weighed in against the interests of contracting parties, the question arises: which interests count and how are these interests balanced against the interests of contracting parties?

1.1.2. Tracing developments in European contract law
Until recently, the answers to contract law questions in Europe were exclusively dependent on rules of contract law of national origin. However, changes have taken place in the last three decades. Besides for the introduction of legal instruments on an international level, the discussion of which lies outside the scope of this book,¹⁶ dynamic developments in the context of European integration have brought and continue to bring definite change in the area of contract law.¹⁷ In this context, ‘contract law in Europe’ (also: European contract law (ECL)), refers to the rules that originate from a structure of multi-level law-making in Europe that includes rules of national and European origin.¹⁸

¹⁴ For an integrated approach to the relation between freedom of contract and society see Sieburgh, C., Tertium datur: de niet uitgesloten derde in het burgerlijk recht (Kluwer, 2004).
CHAPTER 1

1.1.2.1. Some historical points of reference

In the context of European integration, contract law is used by the European legislator as a tool for the enhancement of the functioning of the internal market, one of the primary aims pursued by the European Union. In this context, the divergence between different national regimes of contract law in Europe, has been perceived and presumed to be an obstacle to its functioning. This outlook, communicated by the European Commission since 2001, started to emerge in earlier academic initiatives on European contract law in the 1980’s.59 The European Commission injected political energy into the exploration of a more coherent and common contract law in Europe by means of changing existing laws and introducing new EU legislation, and by developing common frameworks for European contract law. The European Commission put forward ‘An Action Plan’ in 2003, in which the articulation of a political view and position towards contract law in Europe took further shape.20 The Action Plan and the publication of ‘The way forward’ in 2004 placed several concrete action points on the agenda, including the development of a Common Frame of Reference (CFR) and the consideration of an optional instrument of European contract law.22 Currently, neither the CFR nor an optional instrument is fully established, but they have developed from action points into an academic Draft Common Frame of Reference (DCFR) and a proposal for a Common European Sales Law (CESL) respectively.

59 An important first initiative that firmly establishing the ongoing study of European contract law was the Commission on European Contract Law. This academic commission, also known as the Lando-Commission, embarked on the development of Principles of European Contract Law (PECL) in 1980. See: PECL (I-II), (1999) and Lando, O. et al. (eds), Principles of European Contract Law, Part III. (2003). The formulation of principles of European contract law, aimed to formulate principles, which would be favourable for trade on the internal market of Europe and explicitly reflected what the Lando-Commission believed the law should be, given this aim. See: Lando, O., ‘Contract law in the EU The Commission Action Plan and the Principles of European Contract Law’ <www.ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/s-31.pdf>.


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The outline edition of a Draft Common Frame of Reference (DCFR) was published in 2009, the result of an academic undertaking and collaboration primarily between the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). The DCFR was presented as an important preparatory work for the development of a political Common Frame of Reference. In 2010, the European Commission set up an Expert Group to give advice on the development of a politically endorsed instrument of European contract law to stimulate economic activity and increase efficiency in the internal market by offering a ‘user-friendly and legally certain’ contractual regime. The work of the Expert Group was published in May 2011 as the ‘Feasibility Study’. In October 2011, the Commission presented the political output of a decade of developments: a proposal for a Common European Sales Law. The proposed CESL now represents the latest effort to enhance the functioning of the internal market through common contract law. It is proposed as an instrument of contract law that is to be shared between all Member States, as a second optional national regime of contract law for contracting parties who engage in cross border sale transactions on the internal market, with the possibility for Member States to extend the instrument to internal transactions as well.

24 Commission, On policy options for progress towards a European Contract Law for consumers and businesses, (2010) COM (2010) 348 Final . Various forms for such an instrument were suggested, among which both the ‘toolbox’ option as originally connected to an idea of a CFR, as well as a Regulation, which would set up an optional instrument as a second regime of contract law in all Member States.
28 The CESL is proposed with limited scope, primarily focused on cross-border sales between consumers and traders (B2C contracts). See Art.4-7 CESL.
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1.1.2.2. A language of market efficiency

The developments of contract law in Europe have been predominantly embedded in the language of market efficiency. Notably, the initiatives of the European Commission towards a European contract law instrument have aimed, from the outset, at enhanced market functioning in terms of market efficiency. This language is, for instance, reflected by the Commission’s emphasis on a commitment to the principle of freedom of contract, which “should be one of the guiding principles of such a contract law instrument.”29 The Commission has referred to mandatory rules as restrictions on contractual freedom, only justified for ‘good reasons’.30 In this context, the Commission has emphasized the main goal of pursuing common European rules of contract law: the smooth functioning of the internal market.31 As such, ‘good reasons’ for mandatory rules, i.e. restrictions on contractual freedom, for instance in the area of consumer protection, are to be found in the economic importance of consumption for the internal market, that is, in their contribution to market efficiency.32 The language of market efficiency is similarly used in support of the proposed CESL as an instrument intended to promote and increase cross border buying and selling.33

1.1.2.3. A maturing European model of just market conduct

For a future contract law instrument in Europe to fulfil the aims of the European legislator, it will be influential in setting normative guidelines as to how private parties are to behave towards each other, others and society as a whole, when engaging in (internal) market activities. The developments in contract law in Europe reflect the stages of a maturing European model for just market

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32 Ibid.p.20.
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conduct. As such, the language in which these developments are embedded has special meaning.

From the outset, the project of developing rules of general contract law on a European level has been focused on market functioning. It has been criticized for being presented as a ‘technical’ project, while nevertheless involving normative choices that are politically contentious. Notably, taking into consideration the fact that the European legislator articulates rules of contract law, a group of legal scholars (further: Social Justice Group) argued that the development thereof should be accompanied by a larger, democratic debate on the notion of social justice reflected in (an instrument of) European contract law. The Social Justice Group emphasized the political dimensions of the development of contract law in Europe in its Manifesto.

The Social Justice Group argued that contract law expressed the contemporary ideals of social justice in a market society because the market plays a pivotal role for the satisfaction of individual basic needs (increased by privatization of central realms of life relating to, for instance, education and health), and contract law provides the basic guidelines for just conduct on the market. The argument is based on the recognition that the market functions as a prominent mechanism through which an order of wealth and power is established in a society. Contract law’s normative stance on the transactions that are or are not, permissible on the market, has predictable distributive outcomes. A particular set of rules governing the market order, thus patterns a predictable distribution of advantages and disadvantages from market activities. As such, the Social Justice Group argued, questions of contract law in Europe should be answered in consideration of an articulate notion of social justice.

36 The Europeanization and harmonization of rules of contract law in Europe itself is also subject to critical scrutiny, see for instance: Legrand, P., ‘Against a European Civil Code’ (1997) 60 The Modern Law Review 44-63.
38 Ibid.p.655 and 667.
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The view put forward by the Social Justice Group is supported by developments observed in national legal systems in Europe during the 20th century, the associated collapse between a principled distinction between private law and public law; and the corresponding arguments put forward by the Critical Legal Studies movement (CLS), which build on legal realism. This principled distinction between public and private law, refers to the idea that public law should be concerned with public and social aims such as social justice, whereas private law should be free from public and social aims and only pattern corrective justice, i.e. justice between the contracting parties.40

The arguments from CLS challenge the idea that this distinction makes sense, viewing every legal rule essentially as a form of state regulation that reflects a particular set of beliefs.41 From this perspective, private law (and contract law), does not form a politically or value neutral autonomous discipline, but rather a discipline permeated by its political function. In the context of contract law in Europe, moreover, the distinction is thought to have collapsed, firstly, in view of the fact that national legal systems in the 20th century increasingly countered market outcomes considered unfavourable or incompatible with national notions of social justice.42 The national rules of contract law increasingly reflected protection for certain categories of persons, in order to provide them with more advantages, or less disadvantages, than they would have received otherwise (e.g. consumers, tenants, employees). Secondly, the principled distinction has given way to a dominant instrumental view of contract law in Europe, reflected in the language of market

efficiency.\textsuperscript{43} Provided that the European legislator conceives of contract law as an instrument of governance to pursue the public aim of the enhanced functioning of the market, other public aims cannot be ruled out from questions of contract law on the basis of its principled distinction from public law.

As a central subject of social justice in contract law, the protection of categories of weaker parties has focused predominantly on the contracting parties (e.g. contracting parties as consumers, as tenants, as employees). And in the context of developments in contract law in Europe, consumer protection is positioned as a central instrument to the enhanced functioning of the internal market.\textsuperscript{44} The question raised by Hesselink, regarding the immorality and invalidity of contracts that infringe on the fundamental rights of others elsewhere,\textsuperscript{45} is raised however as a concern of social justice in relation to non-contracting parties: “If at least one of the aims of European contract law is to contribute to social justice through enhancing substantive freedom it is inconceivable that the concern for justice will be only limited to those who are already the most privileged on our planet.”\textsuperscript{46}

1.1.3. Market conduct in Europe in a global setting

The market is also a prominent mechanism through which private parties engage in cooperative activities with one another globally. Today’s world is commonly described with reference to globalization, a term used in relation to a wide range of dimensions – including economic, social, governance, culture, and information –, to indicate an increasing interconnection and interdependence across national borders.\textsuperscript{47} Globalization has accelerated in the last four decades particularly in the dimensions


\textsuperscript{44} See for instance, Commission (2011), in which consumer protection is understood as an instrument to boost consumer confidence and enhance cross-border sales.

\textsuperscript{45} See section 1.1.1.2, footnote 13.

\textsuperscript{46} Hesselink (2005), p.505.

of consumption and production. The goods bought and sold on the European market are produced in many countries and information is increasingly available to European citizens through the development of new technology. Provided that market activities are increasingly globalized, and information is increasingly available, modern regimes of contract law are confronted with the challenge of how to govern market transactions. The patterns of welfare distribution to which a market order contributes globally are becoming increasingly predictable. A modern regime of contract law in Europe thus answers the question of which interests count globally and how these interests are to be balanced with the interests of contracting parties.

Globalization influences the lives of individuals throughout the world in complex ways. The globalization of economic and social cooperative structures is normatively ambiguous. On the one hand, globalization is praised for stimulating economic growth, but on the other hand, also fiercely criticized for its negative impact on the social dimensions of life and the exacerbation of global inequality. Much attention has been paid, to the conduct of corporate actors engaged in cross border activities. In the context of pervasive global inequality, multinational corporations are able to increase profits and offer lower prices to consumers, while those who produce the goods (or who live close to production facilities) work under deplorable conditions and are exposed to environmental damage. In this

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48 These topics were also central in the UNDP Human Development Report (1999) and the UNDP Human Development Report, 'The Real Wealth of Nations' (2010).
49 Although globalization is not new, there are new aspects of globalization, such as global consumer markets with global brands, new actors such as multinational corporations who have shifted centres of influence, and new tools of communication and technology. UNDP Human Development Report (1999) UNDP Human Development Report (2010), chapter 4.
50 The criticism regarding exacerbation of inequality does not merely pertain to economic wealth see for instance in: UNDP Human Development Report (1999); but also to social and environmental factors that influences the lives individuals are able to live. Some critical perspectives are presented in De Greiff and Cronin (eds), (2002), see for instance the contributions by A. Sen, M. Nussbaum and T. Pogge.
51 The race to the bottom is commonly referred to as an illustration of the way in which current global structures maintain and exacerbate global inequality by securing disproportionate advantage for those who are already advantaged and imposing disproportionate disadvantage on those who are already disadvantaged.
narrative, current consumption patterns too are associated with perpetuation of and exacerbation of global inequality and consumption decisions are associated with disposal and production processes that negatively impact the lives of others elsewhere.\(^5^2\) In this context of global inequality consumption decisions have been framed as "(...) decisions about the levels of wealth inequality (...) that individuals believe are appropriate (...)."\(^5^3\) Namely, "because consumption is now a principal vehicle by which individuals are connected to a globalized world that includes social injustice (...) it is also through consumption that those individuals' hesitancies and objections are becoming most apparent."\(^5^4\) Although this analysis is contentious,\(^5^5\) it illustrates the underlying view regarding the potential incompatibility between consumption decisions for goods made under deplorable production conditions and notions of social justice in a global setting of inequality.

If issues of social justice are appropriately considered within the realm of contract law, its normative stance with regard to the negative implications of transactions elsewhere is significant within a context of predictable substantive outcomes globally. And, if a society is concerned with issues of global justice, and their place in a setting of global inequality, questions that engage these concerns in the realm of contract law deserve our attention.

The race to the bottom hypothesizes that globalization of profit making by powerful corporations pressures regulatory regimes of poor countries towards lower environmental standards, labour standards and tax regimes. See for instance: Van Dam (2008), section 2 & 3.

52 UNDP Human Development Report,'Consumption for Human Development' (1998), chapter 3. "Because consumption is now a principle vehicle by which individuals are connected to a globalized world that includes social injustice and ecological fragility, it is also through consumption that those individuals' hesitancies and objections are becoming most apparent." Kysar, p. 636. That consumers preferences increasingly reflect awareness and importance placed on responsible (e.g. ecologically and morally) methods of production. See Kysar (2004).


54 Ibid., p. 636.

55 As Kysar discusses, this view goes against the dominant view that individuals express "public-regarding values" when acting as citizens as opposed to acting as consumers on the market. Ibid., p.531-533, 636.
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1.2. Outline
This book employs several methods that correspond to the interdisciplinary character of the underlying study. The structure of the book follows a methodological division between a normative and positive approach, which are connected by a concrete example, i.e. the example of sweatshops. Each book section sheds light on the relationship between transactions in Europe and deplorable production conditions of goods sold on the European market from a different perspective. These perspectives are brought together in the present section. The thesis that this book aims to defend is: mutually beneficial market transactions that have adverse effects on the basic capabilities of others elsewhere should not be endorsed and supported as acceptable conduct on the European market. The following sections provide an outline to the chapters, starting with the normative approach underlying the central thesis.

1.2.1. A capabilities approach to contractual justice
The main question discussed—should mutually beneficial contracts that have adverse effects on the basic capabilities of others elsewhere be invalid under a regime of contract law in Europe—is a normative one. To avoid an idiosyncratic answer, this question is answered within a normative framework rooted in the capabilities approach as developed by Martha Nussbaum (chapter 2).

Nussbaum’s capabilities approach is part of a broader development of capabilities based frameworks. The capability concept was developed initially by Amartya Sen for the purpose of evaluating ‘individual advantage’ in the area of welfare economics. It has become increasingly influential in the area of human development, for instance, shaping the Human Development Index (HDI) used by the United Nations to rank nations in the Human Development Reports. Nussbaum articulated her capabilities approach as a political philosophy, developing a partial theory of social justice, in which she identifies central human capabilities that each human being is entitled to. Her capabilities approach functions as a minimum benchmark, to evaluate whether or not a human society can be considered minimally decent and just. This book explores the implications of this
minimum standard of decency and justice within the realm of contract law, specifically, for the question as to whether or not mutually beneficial contracts with adverse effects on the basic capabilities of others elsewhere should be invalid. This book argues that the answer to this question is affirmative, in light of the political function of contract law in shaping a market order that has predictable consequences for the lives that people are able to live. Contract law reflects the normative guidelines and the basic structure for just market conduct, i.e. for just social and economic cooperation. The implications of a capabilities approach to contractual justice are found in the basic structure for minimally decent and just social and economic cooperation: not mutual advantage, but the ability for each human being to live a minimally decent life is the basic normative principle. The universal character of the capabilities approach does not exempt domestic structures from scrutiny in light of their adverse effects on the abilities of others to live minimally decent lives. Structuring a market order in such a way as to endorse and support transactions that have adverse effects on the central capabilities of others elsewhere is incompatible with the notion of minimum justice put forward in Nussbaum's capabilities approach.

1.2.2. Sweatshops as an example
The positive approach to the question of contractual immorality and invalidity under rules of contract law in Europe (Chapters 4-5) will be illustrated by the specific example of sweatshops in the supply chains of clothes bought and sold on the market in Europe. Chapter 3 provides the background for this type of case. It describes the term ‘sweatshop’ on the basis of the literature, commonly referred to as a combination of deplorable working conditions that includes low pay and long working days, unhealthy and unsafe conditions and a regime entailing elements of force and degradation. The chapter also provides an overview of the main arguments brought to the fore in the debate on the objectionable status of sweatshops predominantly characterized by an economic case for sweatshops, and an ethical case against sweatshops. As such, the overview on this debate illustrates why transactions for goods made by others in sweatshops elsewhere raise questions of contract validity in Europe. Moreover, the
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debate illustrates the relevance of the normative language used to justify the existence of contractual rules and outcomes. Namely, to examine the question whether or not a contract should be held immoral and invalid because of the cost imposed on others (externalities) much depends on the underlying language that determines what is to be understood as unacceptable cost externalization.

1.2.3. Contractual immorality in Europe: a sweatshop test case

The positive legal question of whether or not mutually beneficial contracts that have adverse effects on the basic capabilities of others elsewhere are invalid under current rules of contract law in Europe (Chapter 4). The case study entails a mutually beneficial contract for clothes made in a sweatshop elsewhere and the contracting parties are presumed to be aware of that fact. Chapter 4 also discusses several objections to the hypothesis that the contract in the case study would be held immoral and on that ground invalid under several legal systems, including Dutch, German, French and English law, as well as a the CESL and the DCFR. These objections include the fact that the sweatshop is too remote from the transaction and that the potential objectionable aspect of the transaction does not affect the contracting parties’ interests. Chapter 5 shows, however, that these facts are not, on principle grounds, beyond consideration in any of the legal systems within the inquiry. However, the rules of contract law in different legal systems in Europe do yield diverging approaches to the question of contractual immorality and consequent invalidity. There are some general differences in the approach, for example, the fact that the contract would be invalid if the sweatshop conditions would be considered immoral foreseeable consequences under Dutch law whereas this would depend on the question whether or not the sweatshop production conditions of the clothes would render the contract’s comprehensive character as immoral under German law. Specific differences can be noted, for instance regarding the knowledge requirements that the legal systems apply concerning the fact that clothes are made in sweatshops. Notably, under the DCFR parties’ knowledge appears to be irrelevant, but under national systems this knowledge is
relevant either if at least one party was, or both parties were aware of the sweatshop production conditions. Overall, the divergences lead to varying degrees of the likelihood that the case study contract will be held invalid.

1.2.4. The frontiers of contractual justice
The final chapter brings together the capabilities perspective on contractual justice with the resulting assessment regarding the contractual immorality and invalidity of transactions for clothes made in sweatshops. From a capabilities perspective on contractual justice, a decently just society should not endorse contracts that have adverse effects on the basic capabilities of others elsewhere. That is to say, if a society aims to construct a just market order it should consider such market conduct as unacceptable. The capabilities perspective applied to contractual justice thus favours the outcomes of certain legal systems over others, corresponding to the varying degrees of likelihood with which legal systems will hold the case study contract as immoral and on that ground invalid. The book’s normative claim regarding the immorality and invalidity of mutually beneficial contracts that have adverse effects on the basic capabilities of others elsewhere, reflects a critical view regarding the frontiers of contractual justice, and regarding the current developments in contract law in Europe.
2. **A CAPABILITIES APPROACH TO CONTRACTUAL JUSTICE**

This chapter aims to develop a minimum standard of contractual justice on the basis of Martha Nussbaum’s capabilities approach. This standard will function as a normative benchmark for the question as to whether or not the legal systems discussed in Chapter 5 are to be regarded as decent and just if they provide support to and enforce contracts that have foreseeable adverse implications for the basic capabilities of others elsewhere.

The articulation of a standard of contractual justice on the basis of Nussbaum’s partial theory of social justice (i.e. minimum justice) proceeds as follows. This chapter begins with an introduction to the constitutive elements of Nussbaum’s capabilities approach (section 2.1). These constitutive elements form a fruitful starting point to consider the implications of her partial theory of justice within the realm of contract law (section 2.2). The central question is: must contract law, or parts of it, be understood to be part of the ‘responsibility bearing structure’ for supporting, enhancing and protecting individual central capabilities? If so, what are the implications, if any, of the requirements of minimum justice for questions concerning the validity of contracts, or in other words, for the availability of state power for the enforcement of agreements between individuals? And consequently, what does this tell us about the justice of legal systems that do enforce such contracts?

### 2.1. **Nussbaum’s capabilities approach to minimum justice**

Nussbaum’s capabilities approach is part of a larger development of capabilities based frameworks that have gained increasing impetus in areas of human development, welfare economics and political philosophy.⁴ Initially, Amartya Sen developed the

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⁴ Notably, since 1990 the United Nations Development Program (UNDP) publishes the Human Development Reports, which are based on a capabilities-inspired index, i.e. the Human Development Index (HDI). On the basis of the HDI, the UN ranks nations in terms of their success regarding the quality of human lives, measured in the areas of education, health, and living standards. For an overview of the developments and applications of capabilities based frameworks see: Robeyns, I., ‘The Capability Approach: a theoretical survey’ (2005) 6 *Journal of Human*
capabilities concept for the purpose of evaluating ‘individual advantage’: if we want to know how well people are doing, we have to look at what people are really able to be and do in their lives. Sen coined these abilities, capabilities or substantive individual freedoms with which he countered dominant approaches that focused on what people collectively (e.g. national GDP) or individually (e.g. GDP per capita, primary goods) have. Divergences among human beings, Sen argued, lead to salient differences between what people are able to be and accomplish with the means at their disposal. The basic counter claim of a capabilities approach to justice (against approaches to justice that are based on what people have) is that these divergences matter for questions of justice.

The capabilities concept guides Nussbaum’s minimum or partial theory of justice as a basis for asking what a human society is to do for its members. She argues that a minimally just human

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Development 93-114; and for more applied forms see: Deneulin, S. and L. Shahani (eds), An Introduction to the Human Development and Capability Approach (Earthscan, London 2009).


2 For instance, utilitarian approaches that focus on aggregate measures such as GDP, or Rawlsian frameworks that focus on primary goods. See: Sen (1992), chapter 5; Sen (1999), chapter 3.


4 Martha Nussbaum developed her capabilities approach in the area of political philosophy as a partial theory of justice. See for a first synthesis of the approach: Nussbaum (2000a); see her approach to justice extended to issues of disability,
society secures certain central capabilities up to a threshold level for all its members, which is compatible with human dignity (section 2.1.1-2.1.2). There is a central role for the political principles and their supporting (legal) institutions in performing this task. In order to respect the equal dignity of persons, a pluralistic society should commit to political liberalism, endorsing only a political conception of the good life that can be accepted by all who recognize the equal dignity of other human beings (section 2.1.3). This approach to minimum justice is built fundamentally on the idea that living with others on decent and respectful terms is part of one’s conception of the good. The centrality of justice as part of the good also guides a conception of social cooperation away from the exclusive focus on mutual advantage. Nussbaum’s capabilities approach argues that cooperative structures that are not mutually advantageous can be justified by justice reasons, i.e. the concept of justice itself (section 2.1.4).

2.1.1. Central capabilities as fundamental entitlements of all human beings

Nussbaum’s capabilities approach incorporates a minimum standard of justice. It does not put forward principles of justice, which function as a touchstone of how a society should look like if it is to be fully just. Rather, Nussbaum puts forward a basic benchmark for what a decently just society should secure for all its members as a basic social minimum. Nussbaum articulates this basic minimum in terms of ten central capabilities, i.e. spaces of substantive choice or opportunity to function. According to


CHAPTER 2

Nussbaum, all human beings are entitled to a threshold level of these central capabilities.\(^7\) The threshold level of the central capabilities corresponds to what individuals need in a society in order to live a life that is worthy of human dignity.\(^8\) Nussbaum proposes the following list of central capabilities:\(^9\)

<table>
<thead>
<tr>
<th>Life</th>
<th>Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bodily health</td>
<td>Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.</td>
</tr>
<tr>
<td>Bodily integrity</td>
<td>Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.</td>
</tr>
<tr>
<td>Senses, imagination and thought</td>
<td>Being able to use the senses, to imagine, think and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and though in connection with experiencing and producing works and events of one’s own choice, religious, literacy, musical. And so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise.</td>
</tr>
</tbody>
</table>

\(^7\) Ibid., p. 226-227; Nussbaum (2011a), p.62.  
\(^9\) The list of capabilities is included in full and represents the most recent articulation of Nussbaum (2011), p.33-34, same in Nussbaum (2006), p.76-78.
### Chapter 2

<table>
<thead>
<tr>
<th>Being able to have pleasurable experience and to avoid nonbeneficial pain.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Emotions</strong></td>
</tr>
<tr>
<td>Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)</td>
</tr>
<tr>
<td><strong>Practical reason</strong></td>
</tr>
<tr>
<td>Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance.)</td>
</tr>
<tr>
<td><strong>Affiliation</strong></td>
</tr>
</tbody>
</table>
| A. Being able to live with and towards others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)  
B. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin. |
| **Other species** |
| Being able to live with concern for and in relation to animals, plants, and the world of nature. |
| **Play** |
| Being able to laugh, to play, to enjoy recreational activities. |
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| Control over one's environment | A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.
B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers. |

The capabilities on the list represent spaces of choice and individuals should remain free regarding their pursuits and achievements. A capabilities approach to questions of justice does not focus on the actual 'functionings' that people have effectuated within the areas articulated on the list, but focuses on the space of substantive freedom, or the ability that people have to choose to function. For Nussbaum then, a capability, i.e. an ability to do or be something, consists of the combined existence of 1) internal ability and 2) the external social, material and political preconditions necessary for the effective exercise of this internal ability. An unbridgeable gap may exist, for instance, between being able to exercise physical control over property and to be able to do so effectively. For instance, women have been and in some countries often still are excluded from the ability to hold property and exercise control over it on an equal basis with men because of their gender. Within the context of European legal

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11 For a more elaborate discussion on the distinction between basic capabilities (also: "rudimentary abilities"), internal capabilities and combined capabilities (also: "central capabilities") see Nussbaum (2000a), p.83-86.
systems, the exclusion of married women from the ability to exercise property rights in past times provides a salient example.\textsuperscript{13}

The relevant distinctions that a capabilities perspective pushes forward are often illustrated in capabilities literature with introductory examples with the following structure. We imagine two women, living on opposite sides of the globe, neither of them holds property and their lives are characterised by equal levels of dependence on others around them to provide for their material needs. Dawa has renounced all claims to property when she joined an association of faith. If she would choose to do so, Dawa could easily become a holder of property and property rights: the political principles that shape her society would recognize such rights on an equal basis with others. On the other side of the world Nima is dependent on the community in which she lives for her material needs. Her dependence is however shaped by the fact that she lives on the street and is sustained by the charity of passersby. Previously she lived in a small home with her husband, but after his death she was expelled from that home, because the society she lives in does not recognize her as someone who is able to be the holder of a property right. Although both Dawa and Nima may have equal levels of functioning in relation to their exercise of control over their material environments, their capabilities levels differ vastly due to the external social and political preconditions that shape their lives. Dawa has chosen her level of functioning and is able to take leave of the dependence that shapes her current life, whereas Nima lacks this support and the ability to change her dependence. From a capabilities perspective, Nima’s situation would be cause for concern in terms of minimum justice, whereas Dawa’s situation would not.

The example illustrates what Nussbaum’s conceptualization of minimum justice requires: the social bases for all the central capabilities must be put into place for each individual to be able to function effectively. The focus thus lies in creating and securing an enabling environment for each individual. The question arises where the responsibility for minimum justice is located. Who or what is responsible for creating and securing an enabling environment in the central areas listed by Nussbaum? Before turning to this question, however, something more needs

\textsuperscript{13} Hesselink (2005), p.496.
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to be said about the status of Nussbaum’s list, its relation to choice and the notion of respect, and their links to Nussbaum’s endorsement of political liberalism.

2.1.2. Moral content of the list: some freedoms are bad
Nussbaum’s list developed on the basis of the question of how a life that is worthy of human dignity would look like: which functionings are required to make a life truly human, or, asked differently, which abilities exert a moral claim towards development, because they are evaluated as valuable?  

In the first place, Nussbaum develops an answer to this question by elaborating on the activities considered of central importance for the recognition of a human life. At which benchmark do people deny that a human being still exists? In the second place, Nussbaum raises this benchmark towards a morally rich standard: asking when the engagement in such activities is fully human. For the latter, Nussbaum’ conception of humanity focuses centrally on the value of having control over the shaping of one’s own life (rational) and doing so in relation with and to others (social). In this context, two capabilities on Nussbaum’s list enjoy a special status: the capability of practical reason and the capability of affiliation. Nussbaum calls these two capabilities “architectonic”; they are the architectural pillars of Nussbaum’s ethical conception of humanity performing the central role of making any activity become a human activity, and are thus engaged in all other central capabilities. For instance, the question of whether or not someone is able “to work as a human being”, asks whether a person is able to work in accordance with their own life plan and conception of the good (practical reason); and whether or not one is able to enter into meaningful relationships of mutual recognition with other workers (affiliation). Thus, Nussbaum’s list has

48 See: List “Control over one’s environment” under B, section 2.1.1, p.29.
significant substantive moral content, providing a basis for making
claims about the circumstances under which human lives are
deprieved of full human functioning and therefore deprived of
human dignity.\textsuperscript{19}

Nussbaum’s minimum standard of justice focuses on
creating, maintaining and protecting an enabling environment in
which individuals enjoy substantive freedom to choose the beings
and doings that are in accordance with their own life plans and
conceptions of the good. However, the beings and doings for
which minimum justice requires a social basis are qualified. Not all
freedoms are protected under the banner of basic justice.
Nussbaum’s minimum standard of justice has nothing to say with
regard to many activities and freedoms.\textsuperscript{20} But, as a matter of
minimum justice, certain freedoms should also be repudiated, and
excluded from people’s pallets of choice.\textsuperscript{21}

Certain freedoms are considered as bad on the basis of
Nussbaum’s list as they undermine the basic capabilities of others.
A clear example provided by Nussbaum is men’s freedom to have
intercourse with their wives, regardless of whether they consent.\textsuperscript{22}
The slaveholders’ freedom to own other human beings would fall
within the same category. Indeed, there is broad consensus, not
only in denying that people are entitled to such freedoms, but also
in deeming such freedoms as bad. Other examples include
freedoms, although not categorically unjust if available in a
society, can be used in such a manner that is to be curtailed, for
instance a situation in which a person pollutes to the degree that
the natural environment of others is destroyed along with the
opportunities to provide for their basic needs.\textsuperscript{23}

\textsuperscript{19} Nussbaum refers to it, as a “thick vague” conception of the good. The label is used
to contrast with Rawls’ primary goods, which he coined a ‘thin conception of the
articulation of a part of Nussbaum’s capabilities approach, which she has later
revised and developed towards political conception of the good, a proposed
overlapping conception between otherwise competing conceptions of the good,
which serves the political purpose of creating a decently just society.
\textsuperscript{20} Certain freedoms might be subject to demands of full justice, but most are
probably not subject to the demands of justice at all.
\textsuperscript{21} Nussbaum, M., ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’
\textsuperscript{22} Nussbaum (2003), p. 45.
\textsuperscript{23} Ibid., p.44-45.
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Similarly, the list also provides a basis for making claims about the types of freedoms that should be excluded in light of a person’s own basic capabilities. Namely, the approach is not neutral regarding a person’s freedom to be excluded from the central abilities to function. In order to be regarded as a human being with dignity, central choices should remain open, even if one voluntarily agrees to be excluded from such freedom. Closing central abilities to function upon one’s request, is deeply problematic for Nussbaum’s capabilities approach, as it would require that a society stops treating that person with equal respect (section 2.1.3.).

Because of its morally rich content in defining a limited pluralistic account of valuable capabilities, Nussbaum’s list has invoked the criticism that it is insufficiently ‘objective’ (i.e. illiberal) and illegitimate with regard to its claim of universal application. These points are not discussed in full here; what matters is whether or not these criticisms affect the place of Nussbaum’s capabilities approach in the context of this book. Is the morally rich content of the approach problematic as a basis for a standard of contractual justice in the European context? Any question regarding social justice must provide to some extent an account of the good. In asking questions about the political function of contract law, the question is whether or not the moral content of the capabilities approach is so far from what could be acceptable as a political account of the good as to render a proposal based on Nussbaum’s capabilities approach irrelevant to the debate. On this point, one should note that the capabilities on Nussbaum’s list enjoy support in the world; indeed, as Nussbaum argues, there is a broad endorsement with respect to the importance of articulated fundamental rights in internationally endorsed documents with

26 For an elaborate defense of universal application see Nussbaum (2000a), chapter 1; also, Nussbaum (2006a), p.79-80; Nussbaum (2011a), p.36-37.
which her list corresponds.\textsuperscript{27} To the extent that the content of Nussbaum’s capabilities list overlaps with internationally recognized fundamental rights, criticism directed at the underlying procedure through which the list evolved diminishes in force.\textsuperscript{28} The latter is especially relevant with relation to the recognition of fundamental rights (overlapping with the capabilities on the list), in a European context.\textsuperscript{29} The consensus within this area is sufficient to answer to a potential controversy regarding the moral content of Nussbaum’s capabilities approach in relation to its place in this book. As a more general point it should also be emphasized that Nussbaum’s proposed list is a tentative proposal, and a proposal of a particular kind: namely, only as a political conception of the good: i.e. a conception that has the function to ensure a decently just society under the circumstance of plurality (see section 2.1.3). The anchoring idea of Nussbaum’s approach is that members of the human species are entitled to certain central capabilities in a decently just world, whereas the articulation of their specific content is tentative and proposed as a point of departure for further debate. The former provides the basis for evaluative judgments that extend beyond national borders.

\textbf{2.1.3. Equal respect in a pluralistic society}

Nussbaum is concerned with articulating a minimum standard of justice for a society that shows equal respect to individuals who hold different values, and who are characterized (internally and through their external circumstances) by individual differences.\textsuperscript{30} Its moral content must be understood in this context, i.e. serving the political purpose of creating a decently just society.\textsuperscript{31} By putting forth the moral content of the capabilities approach as a


\textsuperscript{28} Provided that the list is offered as one that can form the object of consensus, broad endorsement supports that claim.

\textsuperscript{29} The legally binding status of the Charter of Fundamental Rights of the European Union is equal to that of the founding treaties.

\textsuperscript{30} Nussbaum (2000a), p.31-32.

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political conception of the good, Nussbaum illustrates her explicit endorsement of political liberalism.\textsuperscript{32} Political liberalism refers to the idea that in a pluralistic society (i.e. a society in which plural comprehensive conceptions of the good compete), the state is to show equal respect to all its members by refraining from the endorsement of a particular comprehensive conception.\textsuperscript{33} Instead, the state is to adhere to a set of political principles that serve basic justice.

In Nussbaum’s view, a society is to show equal respect to all its members by ensuring that each individual has the ability to formulate, hold and pursue reasonable conceptions of the good on equal grounds with others. Nussbaum describes respect as “(...) a way of regarding and treating persons, closely related to the Kantian idea of treating humanity as an end and never as a mere means. Respect is thus closely linked to the idea of dignity, to the idea that humanity has worth and not merely a price. Equal respect would then be respect that appropriately acknowledges the equal dignity and worth that persons have as ends.”\textsuperscript{34} This means that the political institutions, which bind those whom they govern, are not to grant privileges to some over others by adhering to a particular comprehensive conception of the good, as it may support the life plans of some individuals, while barring those of others. The result of such a structure would be, as Nussbaum shows, one in which some individuals would be denigrated continuously: “When the institutions that pervasively govern your life are built on a view that in all conscience you cannot endorse, that means that you are, in effect, in a position of second-class citizenship. Even if you are tolerated (...), government will state, every day, that a different view, incompatible with yours, is the correct view, and that yours is wrong.”\textsuperscript{35}

In Nussbaum’s conception of political liberalism, the qualification of equal respect to individuals who hold reasonable conceptions of the good is informed by the idea of equal respect

\textsuperscript{32} For critical views on Nussbaum’s liberalism references in footnote 25 in this chapter.
\textsuperscript{34} Nussbaum (2011b), p. 18.
\textsuperscript{35} Ibid., p. 35.
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A reasonable individual is, according to Nussbaum, one who accepts equal respect as a political value, and who holds a conception of the good that is compatible with equal respect in the political realm. Conversely, unreasonable individuals are those who hold unreasonable conceptions of the good, i.e. conceptions that are incompatible with respecting others as equals for political purposes. An example of an unreasonable conception of the good is, for example, one which considers unproblematic the use of individuals of a darker skin colour as a means for the ends of people with lighter skin colour; the use of women as a means for the ends of men; or the use of individuals of certain nationalities as a means for the ends of individuals with other nationalities. Reasonable conceptions of the good thus share an overlap ('overlapping consensus') defined as the idea of equal respect as a political value. Nussbaum presents her capabilities approach as an expression of this overlap, i.e. as a substantive proposal of an overlapping consensus that can be acceptable to reasonable citizens for the political purpose of creating a decently just society. The question addressed in this book is whether or not contract law is, or parts of it are, subject to the demands of Nussbaum's minimum standard of justice. This question is central in section 2.2. First, however, the following section discusses the normative principle underlying Nussbaum's capabilities approach in a global context.

2.1.4. A capabilities approach to issues of global injustice

As mentioned above, Nussbaum refers to the central capabilities on the list as fundamental entitlements of each human being. Their existence is thus independent of institutional recognition and as fundamental human entitlements the central capabilities have normative force even in the absence of political structures that could secure them coercively. On a moral basis then, Nussbaum states that everyone has moral duties to secure these capabilities. In order to protect individual lives from this overwhelming and capabilities undermining task, Nussbaum

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36 Ibid., p. 20.
37 Ibid., p. 33.
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however, assigns these duties, derivatively, to institutional structures.39

Nussbaum states, with a direct reference to Rawls' basic structure, that the responsibility for securing basic capabilities is located within the basic structure of society, i.e. “that set of institutions that determines people's life chances pervasively and from the start of a human life.”40 For Nussbaum, the concept of the basic structure of a society coincides with the state. The central capabilities as fundamental entitlements are, in the first place, significant as constitutional entitlements of citizens towards their own states, i.e. the basic structures of the society in which they live.41 Nussbaum focuses on the way in which the capabilities approach forms a basis for the articulation and interpretation of constitutions.42 This focus is not accidental. For Nussbaum, the correlation between the basic structure of the state and the fundamental political entitlements of its members is of derivative moral importance, because of the democratic connection that exists between the two.43 In the overall structure of Nussbaum's capabilities approach, her focus on (nation) states is however first and foremost a concern of implementation.44 The central capabilities should not be imposed on others; rather, individuals should have control over their articulations and specification in the societies in which they live.45

Nussbaum’s approach to the concept of the basic structure also has a non-political, ethical counterpart within the global context. Nussbaum’s capabilities approach is first and foremost fully universal.46 Although threshold levels of capabilities are to be specified on state levels, Nussbaum asserts the importance of all the central capabilities, for all human beings, regardless of their membership within a particular society. In much

44 Ibid., p. 255-262.
46 Ibid., chapter 5; Nussbaum (2000a), chapter 1; Nussbaum (2011a), chapter 6.
of her work she addresses the disproportionate distribution of advantage and disadvantage from global cooperation that shapes the lives of individuals in different nations in the world.\textsuperscript{47} In this context Nussbaum discusses how the power of more prosperous states has been and currently is used in favour of those states, creating unfair conditions of global competition, thereby contributing to the existence and continued existence of global inequality in the capabilities of individuals.\textsuperscript{48}

In light of global inequality, Nussbaum also articulates an allocation of responsibility for global justice.\textsuperscript{49} The allocation of responsibility for minimum global justice corresponds structurally to the state and its institutional structure. However, in the absence of a political coercive global structure, Nussbaum refrains from referring to the responsibility for global justice in political terms, but deems the allocation of responsibility ethical, and the requirements of minimum justice moral.\textsuperscript{50}

The responsibility to address global injustice is placed within the structure that influences, globally, the life chances that people have. In light of fluid positions of power and influence, Nussbaum only makes a provisional and informal suggestion for the responsibilities of parts of the global structure.\textsuperscript{51} For example, she refers to the responsibility of ‘prosperous nations’ to commit to the redistribution of economic resources, the responsibility of multinational corporations to enhance the capabilities of those who are located in the areas of their operations; and to international institutions, such as the World Bank and the IMF to work towards just global trade agreements.\textsuperscript{52} Nussbaum also makes reference to the responsibility of consumers to “bring pressure to bear on a corporation to perform better than is has been performing.”\textsuperscript{53} The latter reflects the recognition, urgently needed in today’s world, that individual positions of advantage and disadvantage are causally connected. A denial of that connection “(...) cannot possibly be made about distant people in today’s world."

\textsuperscript{47} Ibid.
\textsuperscript{49} Nussbaum (2006a), p. 306-324.
\textsuperscript{50} Ibid., p. 315 and Nussbaum (2006b), p.1317.
\textsuperscript{51} Nussbaum (2006a), p.315.
\textsuperscript{52} Ibid., p.315-323.
\textsuperscript{53} Ibid., p.328.
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Even were the global economy not unfair to poorer nations, it engages us with them and gives use reason to think responsibly about how those engagements should continue.\(^{54}\)

Although, the specific responsibilities and institutions proposed by Nussbaum are not definitive, the general structure behind their identification is. The responsibility for supporting and enhancing global equality lies with those institutions and institutional structures that influence the central capabilities of individuals, regardless of their state membership. In asking what people across the world are able to be and do (i.e. which capabilities they have) and which preconditions for capabilities are lacking in their worlds, attention is focussed on the basic structures that underlie cooperation extending across national borders. There is no principled reason why domestic basic structures are exempt from scrutiny in this context if they shape or maintain the cooperative structures with others elsewhere, in ways that are detrimental to their abilities to live decent lives. Thus, although it cannot be politically coerced, moral responsibility exists for the enhancement of the capabilities of those across borders. State membership (i.e. nationality) is morally irrelevant to the question of whether or not an individual has a fundamental entitlement grounded in Nussbaum’s articulation of minimum justice, and, for the question of whether or not others have a moral duty to support and protect them.\(^{55}\)

The constitutive elements of the capabilities approach to minimum justice and notably the basic claim that reasonable conceptions of the good embrace the idea that justice itself is good and valuable also contributes to a conception of social cooperation. From a capabilities perspective, reasons based in justice can justify independently cooperative global structures that do not necessarily create mutual economic advantage. The basic (political) conception of the good entailed in Nussbaum’s capabilities approach presupposes that individuals can accept that each human being has basic entitlements founded on justice. The underlying purpose of cooperating and living with and towards others is found, Nussbaum emphasizes, not exclusively in mutual advantage, but in the creation of a decently just world in which

each person enjoys the central capabilities. The approach to minimum justice and its demands on the basic structure thus enforces deeply this conception of the good. The latter carries moral judgements beyond national borders and a critical reflection on the way in which domestic engagements sustain or contribute to global injustice. The global interconnectedness and interdependence that is characteristic of today’s world brings forward claims founded on justice, highlighted in a context of global inequality. These claims also resonate when we consider the ways in which the domestic basic structures of prosperous societies contribute to shaping social cooperation that extends national borders.

2.2. A capabilities approach to minimum contractual justice in Europe

This section examines the questions as to whether or not contract law in Europe, and specifically the rules concerning contractual immorality and invalidity, should be understood as part of the responsibility bearing structure that is subject to the requirements of minimum justice. That is to say, whether contract law, or parts of it, should be constructed in conjunction with the entire structure so as to enhance and secure minimum justice. How can we identify ‘responsibility bearing’ (basic) structure from ‘non-responsibility bearing’ (non-basic) structure in Nussbaum’s conception thereof (sections 2.2.1-2.2.3)? In order to consider contract law in light of minimum justice, we must consider its function as a political institution and the role that it, or parts of it, plays in human lives (sections 2.2.4-2.2.5). If rules on contractual immorality are basic structure, as is argued here, this entails that they must be constructed, in conjunction with the entire basic structure, in ways that are compatible with minimum justice. The concluding section discusses the basic structure of minimally just contractual relationships by considering whether or not there are conceptions of contract law that are incompatible with minimum justice (section 2.2.6).

57 Ibid., p.158.
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2.2.1. Nussbaum’s conception of the basic structure of society

Nussbaum’s institutional focus concerns the basic structure of society, with which she directly refers to Rawls’ concept: “The responsibility-bearing structure [for securing basic capabilities: added by the author] is what John Rawls has called a nation’s “basic structure”, that set of institutions that determines people’s life chances perversely and from the start of a human life.” The question is whether or not contract law, more specifically the rules on contractual immorality, is part of the basic structure of a society. If the rules on contractual immorality are part of the basic structure, i.e. part of ‘the responsibility-bearing structure’, they are subject to the requirements of minimum justice, as articulated by Nussbaum in terms of the central human capabilities. The question whether or not (parts of) contract law are part of the basic structure has also been raised and debated in relation to Rawls’ theory of justice. A brief consideration of this debate yields a fruitful point of departure for discussing the question in the context of Nussbaum’s capabilities approach.

2.2.2. Basic structure & contract law

Rawls’ concept of the basic structure has been subject to diverging interpretations and consequent discussion concerning the question of whether or not (parts of) contract law should be understood as included in it. For instance, in Rawls and Contract Law, Kordana and Tabachnik discuss this question reviewing several conceptions of the basic structure with relation to contract law. They distinguish between: the narrow conception, which excludes contract law as a whole, including only the constitutional liberties and the system of tax and transfer; the medium and

59 The question of whether or not contract law is drawn into the basic structure as a whole, if some parts are to be considered basic structure need not be answered conclusively here, good arguments for that position are made by Kordana, K.A. and D.H. Tabachnick, ‘Rawls and Contract Law’ (2005) 73 The George Washington Law Review 598-632, p.617-619.
61 Kordana and Tabachnick (2005).
coercive conceptions, which include only parts of contract law that have distributive effects, or only parts, which are legally coercive, respectively; and the broad conception, which includes any aspect of social life that affects an individual’s life chances pervasively and from the start. Notably, they argue against what they call “the conventional narrow conception”, which holds that Rawls’ theory of justice is neutral regarding the way in which contract law is constructed in relation to questions of just distribution. Instead, Kordana and Tabachnik assert that contract law should be understood as part of Rawls’ basic structure, because a broad conception, which includes “(...) all aspects of social living that affect citizen’s life prospects (...)", holds true. As such, contract law should be constructed in conjunction with the basic structure as a whole in a way that aims to maximize the position of the least well-off.

The discussion on Rawls’ conception of the basic structure, and the ambiguity associated with its relation to contract law arise allegedly from Rawls’ own writings. In particular, in passages where Rawls refers in different places to: 1) the distinction between “the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions”; 2) both coercive and non coercive institutions; and 3) the inclusive idea that basic structure institutions are identified by their pervasive influence on life chances. These allegedly diverging conceptions of the basic structure have been subject to debate concerning similarly diverging implications for the question of whether or not contract law should be properly understood as being subject to Rawlsian political philosophy.

The relation between Nussbaum’s capabilities approach and contract law is not similarly ambiguous. Although it has been argued from a Rawlsian perspective that contract law is to be

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62Ibid., p.606.
63Ibid., p. 621-622.
64 As identified in ibid., different scholars elaborate on their interpretation of Rawls’ basic structure on the basis of different passages of his work.
66 Notably, his inclusion of the family in the basic structure, see discussion in Nussbaum (2000a), chapter 4.
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excluded entirely from the basic structure, a similar argument is difficult to produce in the context of Nussbaum’s capabilities approach.

2.2.3. The “responsibility-bearing” basic structure
Nussbaum’s capabilities approach is oriented towards the creation of a right outcome, i.e. securing the ten central capabilities up to the threshold level to all individuals. The ten capabilities function as an independent criterion for determining whether or not the procedure through which they have been achieved is good. Namely, minimum justice pertains if, and only if, the ten capabilities are secured up to an appropriate threshold level to members of a society. This orientation towards a just substantive outcome guides the type of argument that needs to be made in order to distinguish between ‘responsibility bearing’ (basic) structure and ‘non-responsibility bearing’ (non-basic) structure.

The outcome-oriented nature of Nussbaum’s approach is important throughout. For example, the importance of securing a threshold level of basic capabilities to all provides grounds for the institutional focus of Nussbaum’s approach. The ten capabilities, similarly, provide guidance for thinking about what is and is not part of the basic structure and, for the allocation of responsibility to institutions. The identification of the responsible institutions for securing and enhancing individual capabilities is not removed from the orientation towards human lives: what matters is the role an institution plays in relation to the basic capabilities of individuals. Similarly, in Nussbaum’s work, specific references to particular institutional structures follow directly from the influence they have on the basic human capabilities of individuals.

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68 Nussbaum identifies this as the "deepest difference" between her partial theory of justice and Rawls’ theory of justice. Nussbaum (2006a), p. 81 et seq.
69 Ibid., p.82-83, starts with a justice outcome, contrary to Rawls, see Rawls (1971), p. 74-75.
70 Nussbaum (2006a), chapter 5, §vii-viii. Although people are responsible for securing the central capabilities to all, the burden of the pursuit of minimum justice is not to fall on individuals, as this would undermine individual capabilities and would therefore be counterproductive.
71 Even in the global context, Nussbaum identifies elements of a basic structure on the basis of this reverse procedure, identifying for instance, multinational corporations as subjects of principles of justice for the global order. See: ibid., p. 315-323.; Nussbaum (2006b), p.1323. More generally on criteria for identifying a
not make ambiguous claims regarding the basic structure, but refers clearly to all institutions that pervasively influence the lives that people are able to live.

2.2.4. A minimum standard for contractual conduct
Thus, we must first ask what role contractual immorality plays in legal systems in Europe. For the discussion of this question, it is convenient to start with the observation that all of the legal systems under discussion contain rules that impose on contractual relations substantive standards of morality without exception. These rules determine, together with other requirements on contractual validity, which agreements between private parties will be legally recognized and may be enforced by means of state power.

Contractual immorality functions as a minimum standard for the content and implications of an agreement, i.e. it is a substantive benchmark for the agreement itself. The category of substantive standards also applies to contracts that are not strictly labelled ‘immoral’, but illegal or otherwise contrary to public policy or ordre public. Other rules on contractual validity pertain to the qualities of the contracting parties, for example their age as a proxy for the ability to make independent judgments (legal capacity) and the circumstances surrounding the formation of parties’ consent and intention (defects of consent).

Jointly, the rules on contractual validity set out the basic or defining structure of a contract, i.e. an agreement that is legally binding between private parties. Although people may wish to refer to all types of agreements as ‘contracts’, what is legally recognized in a society, and supported as a contract depends on these legal standards. Parties cannot deviate from the standards

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72 See chapter 5.

73 Taken as a whole, the category of substantive standards on contractual behavior is commonly dealt with under headings of immorality or illegality in comparative legal studies. For instance: Basedow, J. et al. (eds), The Max Planck Encyclopedia of European Private Law Volume I (Oxford University Press, Oxford 2012), Kötz and Flessner (1997), chapter 9; and treated in national legal systems under various headings including those of good morals and public policy. See chapter 5.
of contractual validity. Moreover, the content of what is considered immoral as contractual behaviour is determined exogenously to what private parties may have held and articulated. Agents of the state determine that contracts can be immoral and invalid (e.g. the legislator through a civil code) and determine which contracts are immoral and invalid (the courts). The question of whether or not an agreement is legally binding is thus, in important ways, dependent on normative standards exogenous to standards that the parties may hold between them.

In descriptions of contract law, the binding nature of contract and freedom of contract are often referred to in the same sentence, as expressions of party autonomy. The principle of freedom of contract reflects the idea that private parties are free to choose whether or not to enter into a contract, with whom and on which terms. Freedom of contract is described both in negative terms, as freedom from state control or intervention, and in positive terms, as the ability to engage in contractual relationships as a form of individual self realization. Depending on one’s conception of contract law (see Section 2.2.6), one may think of the relation between the involvement of the state in determining the defining structure of contracts and the freedom of private parties to shape their own contractual relationships, to be one of tension.

One purpose of contractual immorality in contract law is to avert the negative externalities that private agreements may have on third parties or society as a whole. All agreements have external effects simply because they exclude others from engaging in the relationship which parties seek to form. On the basis of contractual immorality, a distinction is made between those effects that are considered acceptable, and those that are not. As a whole contract law conveys to those who are governed by it,

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74 They are mandatory rules of law. Loth (2009)
how they are to behave towards each other, and towards others, when engaging in contractual relations. Contractual immorality reveals when self-interested pursuits are devoid of recognition and support, due to unacceptable effects on others. Contractual immorality sets a minimum standard for contractual conduct in a society, i.e. for economic and social cooperative structures between private persons.

2.2.5. *Human capabilities and market exchanges* 

Thus, the rules on contractual immorality are part of the defining structure of contractual relations and they reveal when self-interested pursuits are devoid of recognition and support, due to unacceptable effects on others. This however, does not divulge much about the way these rules relate to human lives, unless we know in how contractual relations are *important* for human lives. When we think about contracts as market exchanges, we are in a better position to consider the significance of contractual relations, and contractual immorality, for human capabilities.

In modern societies, market participation is not akin to participating in a game one happens to enjoy and is able to afford. Rather, the ability to engage in market exchanges is important for the pursuit of one’s life plan, whatever it may be. Although people can, in principle, exchange whatever they wish, and markets form wherever supply and demand meet, ‘the market’ is characterized by state involvement. The market is governed by legal structures, notably by contract law, which makes available legal enforcement of transactions for exchange. The power of the state is available to coerce people into behaving in accordance with what they have agreed upon with others. There are thus great advantages and disadvantages attached to the recognition of a transaction as a contract. As discussed above, the state is selective in making state power available for this purpose. Not all transactions are recognized and enforced, but only those that comply with the standards articulated in the rules of contract law. Contract law reflects the norms about how people are to behave towards each other, and others more broadly, when engaging in market exchanges.

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77 ‘The market’ refers to the manner of exchange that is legally recognized and has a formal and official character, as opposed to ‘black’ markets, which function underground or outside structures established as legitimate.
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transactions.

The market plays a prominent role in people’s lives in modern societies. This role is most evident when we directly ask how people function in the areas of the central capabilities, i.e. abilities to achieve valuable functionings, Nussbaum has deemed central for a human dignified life. For instance, how do people obtain adequate nourishment or adequate shelter, how do people obtain a decent education and execute control over their material environment?\(^7\)

The answers to these questions share the commonality that people participate in market exchanges, at least primarily, to achieve valuable functionings.

The ability to participate in the market has been constructed in light of Sen’s capability concept in the Capacitas project.\(^7\) Deakin, for instance, describes individual capability in terms of “the substantive freedom to realize, through participation in the market, a range of desired end-states and activities.”\(^6\) Deakin shows how thinking about legal (contractual) capacity in terms of capability, contributes to the explanation of the existence of modern rules of contract law. Namely, contract law can be understood as an area of law that aims to enhance substantive contractual capacity from a capability perspective.\(^3\) And Hesselink, raises the normative question of whether or not one of the central aims of the internal market in Europe should be to enhance European citizens’ capability, i.e. the ability to choose the lives they have reason to value.\(^2\)

The conceptualization of market exchange in light of Sen’s capability theory does not show straightforwardly that contractual capability would be important in the same way for minimum justice in the context of Nussbaum’s capabilities approach.\(^1\) Indeed, Nussbaum’s capabilities list, does not

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\(^3\) Deakin argues that contractual capacity can be understood as contractual capability, on the basis of Sen’s capability approach. See also: Deakin, S., ‘Contracts and capabilities: an evolutionary perspective on the autonomy-paternalism debate’ (2010) 3 Erasmus Law Review 141-153.

\(^2\) Hesselink (2005).

\(^1\) Compare: Sen (1999), p.25-26 and Nussbaum (2003), p.44-46; Nussbaum (2011a), p. 71. By contrast, Sen seems to adhere to the idea that the ability to transact with

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articulate explicitly the ability to participate in market exchange as a central human capability. As a matter of minimum justice, contractual capability might not be a necessary item on the list. We can imagine a human society in which the absence of the ability to contract is not problematic for human dignity, like the absence of the ability to be adequately nourished would be. In other words, a person’s inability to participate in market exchange is not reflective of a lack of human dignity per se. However, for modern societies, we can think of the ways in which the ability to contract is of crucial importance to human lives, that is, important for the central capabilities on Nussbaum’s list. Such a line of thought follows closely the construction of freedom of contract in light of Sen’s capability concept, but must pay special attention to the moral content of Nussbaum’s approach.

For Nussbaum, the importance of the individuals’ abilities to do and be valuable things as a matter of minimum justice is qualified with reference to the list of central capabilities. Only insofar as market exchange is entailed in those capabilities can its construction be deemed salient for minimum justice. It is clear that where market exchange is the primary mechanism through which individuals fulfil some of their basic needs, such as obtaining food, the ability to exchange deserves serious consideration. The construction of contractual relations is of importance for minimum justice to the extent that market exchanges are important in order to function in valuable ways.

In a direct sense, the ability to have control over one’s material environment (capability 10B, see section 2.1.1 above) cannot be understood in modern societies without recognizing the prominent role of economic exchange. To be able to hold property and have property rights on an equal basis with others simply excludes that the ability to exercise those rights would be constructed unequally. Moreover, the ability to hold property and

others is a valuable activity per se, in the same way that having conversations is valuable, i.e. as a mode of social interaction. It seems that any restriction on contractual freedom, i.e. the ability to transact, would entail a loss of something valuable from that perspective. Sen (1999), p.6-7.

See section 2.1.2.

Although Nussbaum does not discuss this explicitly, it must be entailed in her discussion about property rights in Nussbaum (2000a), e.g. p. 156 and further chapter 4, p. 282.
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property rights seems devoid of real meaning, if these do not include, centrally, the possibility to exchange. In other words, if the capability to exercise control over one's material environment is to be constructed on an equal basis for each individual, the ability to engage with others in economic exchanges should be constructed in the same way.

In the context of Nussbaum’s capabilities approach, it is important to emphasize that the ability to engage in market exchange is only valuable in relation to the central capabilities on the list. This means that the ability to engage in market exchange is not valuable per se, but only insofar as other valuable pursuits entail it. In this context, the interdependence between all the capabilities on the list is of special significance. Deprivation in one area can undermine valuable functioning in other areas. For instance, the inability to be adequately nourished quickly erodes not only the ability to live a life of normal length, but also the architectonic capabilities of practical reason and affiliation. Pervasive need can push people into activities—including exchanges with others—that have detrimental effects on their abilities to function in valuable ways. Market exchanges can be sources or facilitating factors of capability deprivations and therefore infringements of fundamental entitlements. Moreover, in a similar sense, market exchanges and the structure of the market overall can have adverse affects on the capabilities of others. For the minimum justice as defined in Nussbaum’s capabilities approach, market exchanges, i.e. private contractual relations, are not to be disregarded as potential sources of capability deprivation. As such, private contractual relations represent sights of human interaction where questions of justice pertain.

The market and market exchanges can thus be considered of significance for the central capabilities on

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86 See different Sen, footnote 83.
88 From a capabilities viewpoint on minimum justice, the central capabilities should be effectively achieved in a decently just society, it follows that the state has reasons based in justice to intervene where the market or private parties represent an impediment to individuals’ real abilities to function in valuable ways. Ibid., p. 286-287.
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Nussbaum’s list in two ways. First, the ability to engage in market exchange is implied within a meaningful understanding of the ability to have control over one’s material environment and stands in an interdependent relation with the other central capabilities on Nussbaum’s list. Secondly, the market and market exchanges can be properly understood as potential sources or facilitating factors of capability deprivation. Since contract law governs the relations between private actors who engage in market exchange, contract law must be considered in conjunction with the other institutions, as part of the basic structure.

2.2.6. Nussbaum’s minimum standard of justice and contractual justice

Can Nussbaum’s capabilities approach be neutral towards the way in which contractual immorality is constructed given 1) the fact that contractual immorality imposes on market-based exchanges substantive moral requirements, and 2) the importance of markets and market-based exchanges in people’s lives? It should be emphasized that the question is not whether or not Nussbaum’s capabilities approach requires the existence of rules pertaining to contractual immorality, or even rules of contract law altogether in an abstract sense, i.e. for every imaginable type of human society. Rather, the question is raised in a contextual setting, and asks whether or not Nussbaum’s capabilities approach can be indifferent to diverging conceptions of contract law in modern societies, specifically in Europe given the fact that ‘contract law’ exists. Thus, the question takes for granted the availability of state power for the enforcement of agreements between persons.

2.2.6.1. Conceptions of contract law

There are various conceptions of contract law that diverge significantly in their understanding of the appropriate relation between this area of law and the involvement of the state. These diverging conceptions correspond to different normative ideas about how contract law should be constructed, specifically, in relation to aims of social justice. The main differences come to the fore, particularly, in the debate about the distinction between private and public law. This debate does not concern the positive distinction between private law, as governing the (horizontal)
relations between private persons, and public law, as governing the (vertical) relation between the state (acting as a state) and its citizens. Rather, the debate concerns a distinction in a more ideological sense, regarding the underlying ideas and assumptions about the principal differences between private and public law.\footnote{The debate corresponds to the debate about corrective and social justice in private law. See for example: Gordley (2007), chapter 1; Weinrib (1995), chapter 1; Smith, S.A., \textit{Contract Theory} (Clarendon Law Series, Clarendon, 2004), chapter 2.} This debate has gained renewed impetus particularly in the course of the development of new transnational European instruments of contract law.

On the one hand, contract law is understood as an area of law that is autonomous and independent from public or political goals and aims.\footnote{See notably the conception of private law as argued by Weinrib in Weinrib (1995) and Weinrib (2012).} Contract law’s rules are to be understood in terms of expressions of contracting parties’ will, as if they were their own legislators through contract. In the classic view that renders contract law principally distinct from public law, private law is said to deal with the restoration, or correction, of a wrong that has occurred between interacting parties.\footnote{Weinrib (1995), chapter 3.} The underlying structure of contract law aims to achieve corrective justice between contracting parties. In a normative sense, this area of law should be free from political considerations because they would interfere with the autonomy of persons. Contract law is to remain politically neutral, in order to assure that individuals are able to express their autonomous choices without being burdened by public goals. According to this view, contract law is distinctly \textit{not} to be concerned with social (distributive) justice.\footnote{Ibid., p. 61-63.} In other words, contractual justice is separate, as a matter of principle, from the requirements of social justice. In a classic conception of contract law, the contractual immorality and invalidity of mutually beneficial contracts cannot be identified as anything other than an \textit{infringement} of party autonomy, i.e. freedom of contract.

The ideological distinction between private and public law that is maintained in the classic view of contract law has been deconstructed by legal realism, in particular, by critical legal
The basic viewpoint follows the logic that every legal rule is in essence a form of state regulation. Contract law cannot be considered as anything other than an allocated form of public state power. Namely, the state determines the boundaries of the realm of life that is governed by its rules, enacts the rules as law, and exercises state power in the enforcement of contractual rights and obligations. This view emphasizes that the state shapes social life through contract law and does so, in accordance with normative ideas about how this should be structured. According to this conception, labelling contract law as ‘private law’ indicates that it governs the relations between private persons (in the positive sense). It does not connote that it is or should be divorced from public or political considerations. In the absence of a principled distinction between private and public law, it is not illegitimate for the state to pursue social justice aims through contract law. In other words, contractual justice cannot be separated from social justice on principle. As such, the contractual immorality and invalidity of mutually beneficial contracts are not necessarily explained in terms of infringements of party autonomy, i.e. freedom of contract. Indeed, the contractual immorality and invalidity of mutually beneficial contracts may be justified directly on a notion of contractual justice that reflects a notion of social justice.

The denial of a principled distinction between private and public law, has led to the claim that social justice is not only legitimately pursued through contract law, but that, as a matter of fact, contract law necessarily reflects an idea of social justice adhered to by the state. This point is made in reference to contract law’s role in regulating market transactions. The market is described as the primary mechanism through which wealth and power is allocated in modern societies, i.e. in Europe. By regulating market relations, contract law determines the relevant sources of power, and importantly the relevant sources of

95 Collins (2003), chapter 1; Study Group on Social Justice in European Private Law (2004).
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weakness, which determine market outcomes.\textsuperscript{96} As such, a predictable pattern of advantage and disadvantage in an important social area of life is endorsed and shaped through contract law. In other words, by enacting a particular set of rules through contract law, a state establishes a particular market order, which is attached to a predictable pattern of advantage and disadvantage, i.e. a predictable distributive outcome.\textsuperscript{97} Thus, according to this view, a notion of contractual justice necessarily reflects a notion of social justice.

Both views regarding the distinction between private and public law, and consequently, the nature of contract law in relation to social justice, find articulation in current debates on this topic.\textsuperscript{98} The classic view is however hard pressed to explain the existence of modern rules of contract law, which are purposely used to achieve or prevent substantive outcomes that correspond to public aims.\textsuperscript{99} Mandatory rules of contract law, which, for instance, aim to protect consumers, are the leading examples in this context.

2.2.6.2. Nussbaum’s minimum standard of justice and contractual immorality

If the market is important to the central capabilities of persons, the capabilities standard of minimum justice cannot be neutral in relation to the way in which freedom of contract is constructed. Indeed, market exchanges form important means through which to pursue valuable ends, but they can also undermine the central capabilities, both of contracting parties and of others. Nussbaum’s capabilities approach of course says nothing directly about such exchanges, or their terms, considered individually. The requirements of minimum justice apply to the basic structure as a whole, not to individual or specific transactions on the market. However, as stated previously, the construction of freedom of contract reflects a defining structure for market exchanges in general. That is to say, it reveals the types of market relations

\textsuperscript{99} For instance as they correspond to notions of social justice, but also to efficiency in terms of enhanced market functioning.
considered acceptable in a society, i.e. those recognized as contracts and enforceable by means of state power.

Contractual immorality functions as the basis for determining the selective availability of state power for the enforcement of agreements between persons. For instance, norms of good morals construct certain contracting options and outcomes as closed. Contract law could be alternatively constructed if selective enforcement on the basis of substantive standards would be excluded from its rules. In this case, state power for the enforcement of mutually beneficial agreements would be available independently of the substantive content or outcomes of agreements for the parties. Such a construction would not necessarily be problematic under the classic view of contract law. Namely, provided that an agreement is mutually beneficial, party autonomy deserves respect regardless of what persons may define as beneficial for themselves. Imposing on their choice an assessment that is based on normative standards exogenous to what they have agreed to in the absence of defects of consent represents, necessarily an infringement of their autonomy.\(^\text{100}\)

To exclude contracting options from the availability of state enforcement is only justified on the basis of a denial that an agreement is mutually beneficial (i.e. without defects of consent) according to this view. In order to justify that mutually beneficial contract options are excluded from recognition and enforcement something external to party autonomy must be considered of overriding importance. In other words, the justification must be found external to contract law, i.e. the state must find a justification for imposing external constraints on contractual relations. In refusing to recognize and enforce a mutually beneficial agreement, the state must say: even though your freedom to contract is valuable by its very nature, something other of value has priority over its exercise in this particular case. Or in other words, the state must say that it will impede on one’s party autonomy in light of a normative standard that takes priority.

However, in the context of Nussbaum’s capabilities approach, there is no reason to maintain that substantive norms must be understood as external constraints on contractual

\(^{100}\) See Kordana and Tabachnick (2005), p. 599; 626-629.
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behaviour, nor that freedom of contract must be recognized as a valuable freedom per se. Instead freedom of contract and contractual relations must be read in a different light. Namely, what is recognized as a contractual relation is in a direct sense constructed by the state, i.e. the rules of contract law. Indeed, although people may wish to refer to all types of agreements as contracts between themselves, what is recognized in a society as truly being a contract depends on the question whether or not it complies with the substantive standards set by the state. In other words, there is nothing external about the substantive norms that shape freedom of contract. That is to say, they do not impose constraints on existing contractual relations (as if they were phenomena of nature), but they construct in what contractual relations really are in a defining way. The line of argument presented here follows Nussbaum’s arguments concerning the relation between the family and the state. In this context she argues: “For there is really no entity, “the family”, into which the state either does or does not intervene. People associate in many different ways, live together, love each other, have children. Which of these will be given the name “family” is a legal and political matter, never one to be decided simply by the parties themselves.”

Although the institution of the family may be more appealing and accessible as an institution central in a human life, the institution of contract is of undeniable importance to the lives people are able to live in modern societies. Although both may invoke the idea that they are somehow ‘private’ and should be separate or free from state intervention, this should not obscure the importance of their underlying political legal structure for questions of justice.

If contract law is responsible for constructing, in conjunction with other institutions, the defining structure of contractual relations (state supported exchange between market actors), it must do so in a way that is compatible with the requirements of minimum justice. In the first place we can say that freedom of contract must be constructed as to create an enabling environment in which persons have the ability to pursue valuable functionings through market exchange on an equal basis with others. In this view, the state only impedes one’s freedom of contract, if it fails to secure the ability for persons to engage in

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valuable functionings through contractual relations. This is an important qualification that reflects the moral content of Nussbaum’s capabilities approach. Namely, in the second place, the political conception of the good as enounced in the capabilities approach to minimum justice also provides a basis for identifying contracting options that should not be constructed as open, because they are incompatible with the standard of minimum justice to which a society adheres. By excluding those contracting options from the support of state power for recognition as legitimate market transactions, society safeguards itself from involvement in activities that are not only not considered valuable, but which may be considered patently bad.

As such, Nussbaum’s capabilities approach provides a basis for a standard of minimum contractual justice. Namely, the recognition and enforcement of agreements is to be compatible with the requirements of minimum social justice as it applies to the basic structure as a whole. A capabilities approach to contractual justice identifies those agreements that are incompatible with securing and protection the threshold level of central capabilities (those entailed by Nussbaum’s list) and which should not be recognized consequently as contracts.

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102 As a minimum standard of justice, there are many activities on which Nussbaum’s capabilities approach is neutral. That is not to say that those activities would not be relevant to justice in a fuller sense, i.e. a complete theory of justice may demand more than securing a threshold level of capabilities. However, such demands are outside the scope of discussion for the purpose of this book.

103 A similar justification is provided by Shiffrin, S.V., ‘Paternalism, unconscionability, and accommodation’ (2000) 29 Philosophy and Public Affairs 205-250 in relation to the unconscionability doctrine where she states: “But Self-Regarding Refusal is propelled by C’s self-regarding reasons, namely her refusal to lend herself to an unfair or exploitative project on grounds that it would implicate her and use her energies in a way she disapproves of. By analogy, it seems then that a state’s refusal to enforce an unconscionable contract could reflect an unwillingness to lend its support and its force to assist an exploitative contract because it is an unworthy endeavor to support.” P.227-228.
3. The effects of market transactions in Europe beyond frontiers: the example of a sweatshop

This chapter is devoted to establishing the plausibility that there are transactions governed by contract law in Europe with negative implications on others elsewhere, which can give rise to questions concerning contractual immorality and invalidity (Chapter 4). The case of sweatshops in the supply chains of goods sold on the market in Europe is taken as the main illustration of production conditions that are publicly scrutinized. The first part of this chapter provides a description of sweatshops’ most common features, as they are referred to in studies on sweatshops in the garment industry, as well as the context in which sweatshops exist and have persisted over time (section 3.1-3.2). Subsequently, the main arguments articulated in the debate regarding the objectionable status of sweatshops are described (section 3.3). The final section illustrates a capabilities perspective on the example of sweatshops as externalities of market transactions in Europe and concludes with the question of why sweatshops evoke questions of contractual immorality and invalidity (section 3.4).

3.1. Deplorable production conditions of goods on the market in Europe

This section provides a descriptive overview and background of the defining features of sweatshops, as they are reported on in academic studies. These sweatshop features overlap with those described in mainstream media sources. In mainstream media reports, sweatshops are publicly scrutinized amongst a range of production conditions of goods sold on the market in Europe.

3.1.1. Reports in mainstream media on deplorable production conditions

There are many popular consumer goods sold in Europe that are linked to conditions of production that are subject to (moral) criticism. The types of harm that are caused allegedly throughout the supply chains of popular goods are numerous, ranging from human rights violations and animal cruelty, to environmental damage. A well-known example of the latter, highlighted in media
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reports, concerns Shell’s involvement in gas flaring activity in the Niger Delta, which has caused environmental damage over a time span of more than 50 years.\(^1\) Gas flaring is notorious for its contribution to greenhouse gases and severe health problems for local residents. Oil spills have caused water contamination, the loss of fisheries, plants and vegetation, which in turn has led to economic deprivation for Nigerian farmers who have lost their source of income.\(^2\) Another much-publicized example concerns industrialized agriculture, which has been critiqued for its low levels of animal welfare. The industry is castigated for using methods of animal production that cut costs at the expense of animal and human welfare, causing public health and environmental threats.\(^3\) And, in the area of human rights violations, chocolate manufacturers are blamed for creating conditions in which cacao-farmers resort to child slavery by bargaining for increasingly lower prices.\(^4\) All these examples illustrate a spectrum of criticism in the public sphere relating to a variety of production conditions in which our goods are made, i.e. the goods that are bought and sold in European shops and the transactions of which are governed by contract law in Europe.\(^5\)

The case of sweatshops in the supply chains of popular consumer goods can be counted amongst these examples. In mainstream media reports, the term is used in relation to the example with which this book began: a corporation was

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1 Zembla, ‘Vuile Olie van Shell’; ‘Shell dringt affakelen gas in Nigeria terug’
2 Together with several Nigerian farmers, Friends of the Earth Netherlands (an NGO) started judicial proceedings against Shell Nigeria and Royal Dutch Shell for compensation for damages. Recently, the Rechtbank Den Haag held Shell Nigeria liable for the damages of one Nigerian farmer, because under Nigerian law, they breached a duty of care to prevent his damages. See: Rechtbank ‘s-Gravenhage, 30 January 2013, LJJ BY9854.
4 In the Netherlands a Dutch consumer, four alleged former child slaves from Burkina Faso and 2136 other ‘worried consumers’, demanded prosecution by the Dutch state of the aforementioned consumer for buying chocolate made with cacao picked by child slaves (Opzeteling (handling unlawfully obtained goods), art.416 Dutch Criminal Code) see: Chocolate slavery: Gerechtshof Amsterdam, 5 April 2007, LJJ BA2372.
5 The above examples also illustrate test cases, regarding civil and criminal liability, similar to the sort that may be envisaged with regard to the hypothetical case regarding contractual invalidity as described in this book.
discredited for outsourcing the production of popular consumer goods to a supplier abroad with allegedly unsafe and low standard working conditions. The corporation confirmed the claims made in the media reports, referring to the use of n-hexane, the occurrence of suicides and involuntary labour, unsafe working conditions, falsification of wage statements and bribery in the supply chain first in its ‘Supplier Responsibility Progress Report’ of 2011. These production conditions correspond to the way in which sweatshops in other contexts are described, particularly as they occur in supply chains of the garment industry. The garment industry has been the object of elaborate studies, which unanimously assert that sweatshops are endemic and structural features of its global supply chains. In this book, the case of sweatshops is singled out as a basis for a case study, to be the focus of questions of contractual immorality (Chapters 4-5).

3.1.2. Sweatshops

The word sweatshop has been primarily associated with dispersed workspaces located in the homes of agents who obtained work orders from manufacturers, for which they employed workers compensated poorly with low pay. However, over the course of the 20th century, the term transposed into the context of full-fledged factories, denoting primarily low standard working conditions in the manufacturing stage of globalized supply chains.

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6 See Introduction of this book.
8 For instance: Klein (2003); Ross, R.J.S., Slaves to Fashion (University of Michigan Press, 2004), p.13. Bonacich, E. and R.P. Appelbaum, Behind the Label: Inequality in the Los Angeles Apparel Industry (University of California Press, 2000) show that sweatshops have also been located in affluent countries, where vulnerable groups (e.g. illegal immigrants) make up majority of the workforce p.169-175.
9 See Ross (2004), p.13-19, for a discussion on the historical development of the term sweatshop.
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Although there is no univocal agreement on the exact definition of a sweatshop,\textsuperscript{10} studies into sweatshops reveal nevertheless a descriptive core that includes features concerning wage, working hours, health and safety standards, elements of force and coercion, and degrading practices.\textsuperscript{11}

From the outset of its usage, the term denotes a very low wage received by workers, indicated by various benchmarks.\textsuperscript{12} Some refer to the structural violation of minimum wage legislation, if in place and applicable. But, the applicability of such legislation can be displaced for the sake of trade, as is the case in Exporting Processing Zone’s.\textsuperscript{13} As a standard, minimum wage legislation is also said to disguise the deprivation characteristic of workers’ lives. The claim is that although workers receive

\textsuperscript{10} See for an overview of various definitions ibid. who shows how the term is historically connected to features of labour that connote “material deprivation and extreme exploitation and to abusive relations and degrading conditions.”, p.24. A more restrictive definition is offered for purposes of measurement, in accordance with the U.S. General Accounting Office a sweatshop is defined as a business that “regularly violates both wage or child labour and safety or health laws”, p.26-27. Bonacich and Appelbaum (2000) expand the definition which refers to the structural violation of legal standards to include “factories that fail to pay a “living wage”, meaning a wage that enables a family to support itself at a socially defined, decent standard of living.”, p.3-4. Arnold, D.G. and L.P. Hartman, ‘Worker Rights and Low Wage Industrialization: How to Avoid Sweatshops’ (2006) 28 \textit{Human Rights Quarterly} 676-700 refer to sweatshops as “any workplace in which workers are typically subject to two or more of the following conditions: income for a 48 hour workweek less than the overall poverty rate for that country; systematic forced overtime; systematic health and safety risks due to negligence or the willfull disregard of employee welfare; coercion; systematic deception that places workers at risk; and underpayment of earnings.” Zwolinski, M., ‘Structural Exploitation’ (2012) 29 \textit{Social Philosophy and Policy} 154-179points to the fact that the definition of sweatshops centrally takes on a pejorative meaning. The term sweatshops refers to “a place of employment in which worker compensation or safety is compromised, child labour is employed, and/or local labour regulations are routinely disregarded in a way that is prima facie morally objectionable.”, p. 11.


\textsuperscript{12} Ross (2004), p. 16-18.

minimum wage they may remain in poverty. Others therefore refer to ‘living wages’ as a benchmark for identifying low wage levels in sweatshops. The notion of a ‘living wage’ refers to the ability of a family to support itself at a decent standard of living, defined in terms of the fulfilment of basic needs, such as food, shelter and basic health care. Along with low wages, sweatshops are also described in references to practices that lead to discrepancies in formal statements of wage and actual income. Those practices include the deduction of excessive amounts for workers’ transportation and housing. Moreover, they include the practice of firing and re-hiring, which allows employers to pay a ‘training-wage’ during extended probation time that is below minimum wage. Fraudulent records may also show that workers receive minimum wage, while they are not paid for overtime and their wage statements (if existing) may not show the actual amount of hours that they have worked. Moreover, wages are reported to be deducted on the basis of mistakes, refusals to work overtime, failures to reach daily quotas, and for taking breaks for lunch, bathroom visits and talking during work.

Another feature of sweatshop labour is the excessively long working day and workweeks. Workweeks of 60-80 hours are commonly described, as well as frequent (and often uncompensated) overtime. Overtime is purportedly imposed on workers either through physically enclosing them in buildings or by means of threats. Common examples include the threat to be fired or to lose earned wages through penalties for noncompliance with supervisors’ orders. Next to low wages and long working days, sweatshops are also described to operate under unhealthy and unsafe working conditions, such as overcrowding, lack of ventilation, unsafe equipment and materials, unsanitary toilets and lack of clean water. These conditions lead to ailments such as asthma, bronchitis and tuberculosis. Moreover, the lives of

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17 Ibid., p.63.
18 Ibid., p.64.
19 Arnold and Bowie, p. 229, ibid., p. 72.
20 Ibid., p.66-68.
workers are endangered by the practice of locking workers in factory buildings –closing doors and windows from the outside, which leads to a high number of deaths in the event of a fire.21

Other sweatshop features that studies consistently make mention of are degrading and abusive practices including mental and physical abuse by superiors.22 There are specific cases of verbal and physical abuse, which have been documented (including cases of rape and beatings),23 but sweatshop regimes are also generally described by practices that reveal a high level of control over basic human freedoms. Notably, sweatshop regimes are characterized by severe restrictions on workers’ freedoms to interact socially with others during their work, receiving fines for talking. They are restricted from eating and from making use of basic sanitary facilities.24 In reported cases, restrictions to leave the workplace in order to receive medical care have resulted in health hazards, miscarriages and death.25

Lastly, reports make mention of the suppression of worker unions by supply chain actors.26 Such suppressive actions include: firing, blacklisting, bribing and threatening of organizers and participants of union initiatives.27

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24 Ross, p.23.
25 Ibid., p.191-192. Experiences of women show that they feel that they are treated as less than human beings: as “dogs” or as “machines”; Armbruster-Sandoval (2005), p.62.
3.2. Context: sweatshops in the garment industry

3.2.1. Outsourcing
Production of clothing has moved (with the production of many other goods) to developing countries during the last three decades of the 20th century. This move is part of the broader development of globalization in which the competitiveness of corporations depends to a large degree on their ability to take advantage of the opportunities made available by the increasing scope of business environments. Corporations have used internationalization strategies to achieve or maintain competitiveness and are able to capitalize on the supply of factor conditions (i.e. land, labour and capital) abroad. Previously, many manufacturers therefore moved their own facilities for production abroad, but internationalization is now observed in the cross border extension of supply chains through the outsourcing of production. Outsourcing is a specific strategy in which corporations subcontract activities to other business entities in order to increase competitive advantage. For most garment corporations, production is outsourced completely to other entities. This strategy provides many benefits for corporations such as increases in capacity, flexibility, specialization and cost reduction. Corporations give orders for their goods to contractors and agents in the supply chain, who serve as middlemen between retail and production level. The distance between the beginning and end of the supply chain is increased as well as the number of players with which the corporation is directly or indirectly engaged. Corporations become more flexible in their ability to have orders fulfilled and meet the demands of the market. This flexibility is important for corporations in the garment industry given the nature of the demand and competition within the industry. (See 3.2.3) Outsourcing production is an advantageous strategy in the labour-intensive garment industries, as globalization offers the

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32 Ibid., p.276.
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opportunity to make use of low-cost labour sources in other countries.\textsuperscript{34} Economic studies have revealed diverging correlations between the globalization of production and the wage levels and working conditions at production level.\textsuperscript{35} On the one hand, globalized production is said to create employment options with higher wage levels, than would otherwise be available, while, on the other hand, other researchers point to adverse effects on working conditions due to unequal bargaining power.\textsuperscript{36}

3.2.2. Bargaining power

Studies on sweatshops point to systemic features in the garment industry that place retailers in powerful bargaining positions in supply chains.\textsuperscript{37} At the beginning of the supply chain, clothes are manufactured in factories owned by contractors and subcontractors who employ garment workers. The barriers to enter the market at this level are relatively low (i.e. low start-up costs) and the number of players is high, which leads to a high level of competition.\textsuperscript{38} The number of players involved in retail, is relatively low. And, the barriers to enter the market are high, making control and power concentrated to the extent that a small number of retailers control a big market share. The high level of concentration is described as being the result of consolidation of retailers, and so-called manufacturers.\textsuperscript{39} Manufacturers are not involved in the actual production of clothes, but in activities of design and branding.\textsuperscript{40} Consolidation occurs on the one hand, where retailers take on the activities of designing and branding the clothes they sell, and on the other hand, where corporations

\textsuperscript{34} Rugman (2003), p.279; Varley et al. (1998), p.61.
\textsuperscript{36} See references footnote 35.
\textsuperscript{37} Armbruster-Sandoval (2005), p. 5-7.
\textsuperscript{40} Klein (2003): “What was changing was the idea of what (...) was being sold. The old paradigm had it that all marketing was selling a product. In the new model, however, the product always takes a back seat to the real product, the brand, and the selling of the brand acquired an extra component that can only be described as spiritual.”, p.21. “(...) Brand X is not a product but a way of life, an attitude, a set of values, a look, an idea.”, p.23.
originally engaged solely in the design and branding of clothes move into retail, in effect merging the two levels in the supply chain to one. A high concentration at the end of the supply chain gives corporations at this level increased bargaining power. Retailers and manufacturers place their orders for the production of clothes with contractors around the globe who compete on their ability to produce at low-cost. The bargaining power of retail and manufacturing corporations reportedly results in the practice of top-down price dictation. Price dictation refers to the ability of powerful corporations to set the price levels for the orders they need fulfilled, and the inability of competing contractors (see further in the next section) to negotiate prices that cover certain cost levels of production cost. The result is described in terms of a race to the bottom, or downward squeeze of all determinants of production costs such as wages, health and safety standards and overall working conditions. In cases where production facilities have been tailored to process large orders, accepting orders for prices that do not cover costs is described as a preferred alternative over leaving facilities unproductive.

3.2.3. Fashionability and flexibility
The demand for clothing is subject to seasonal fluctuation, and is highly unpredictable. Retailers’ and manufacturers’ success depends on their ability to meet the rapidly shifting demands of their customers. Consumer demand pushes the need for corporations to use flexible means of production. By outsourcing production processes, corporations eliminate the need to make investments, and long-term commitments to any one supplier or location. Subcontracting various suppliers provides corporations with the freedom to move quickly towards the best available

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41 Armbruster-Sandoval (2005), p.7; Another reason for increased concentration of power is due to mergers and acquisitions at retail level during the 1980’s and 1990’s. Bonacich and Appelbaum (2000), p.80-86.
43 Armbruster-Sandoval (2005), p.8-9; Appelbaum, R.P. et al., 'The End of Apparel Quotas: A Faster Race to the Bottom?' University of California, Santa Barbara, Center for Global Studies accessed 15 April 2013, p. 2.
44 Varley et al. (1998), p.21, 94-95.
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competitors. The purchasing processes in place are set up in support of this freedom. For example, large retailers are said to use fully electronic auction processes for their orders. In such a system, contractors are placed in direct competition with each other. As they are assessed in the first place on their costs, but also on their ability to offer short lead-times, contractors strive to improve on features in their production process that work against low cost and short lead-time. Studies on sweatshops point to the incentives created within such systems towards sweatshop conditions.

3.3. The debate on the moral status of sweatshops
In the debate concerning sweatshops, the discussion focuses on the role of corporate actors. Divergent solutions have been evaluated in terms of their potential to improve or worsen sweatshop conditions, notably voluntary codes of conduct and legal regulatory measures. In the context of the debate on the moral dimensions concerning sweatshops, different questions have generated different arguments concerning, for example, the moral duties of specific actors, including corporations (and groups within corporations, e.g. shareholder, management) and consumers. The purpose of this section is not to bring to the fore a comprehensive overview of all questions and arguments raised, or to take on grand questions of moral theories and their application to sweatshops. Instead, a general overview of the dominant arguments used to substantiate either the moral legitimacy (3.3.1-3.3.4) or the moral objectionability of sweatshops (3.3.5-3.3.6), is sufficient to show why sweatshops raise moral concern.

3.3.1. The 'it’s a choice’ argument
The most active and forceful contribution in defence of sweatshops comes in the form of, what is referred to as, the

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47 Hearson, M., ‘Cashing In’ (Clean Clothes Campaign, Amsterdam 2009), p.47.
49 For an overview of these arguments see Varley et al. (1998), chapter 3; from a different (economic) perspective see Powell and Zwolinski (2012).
mainstream libertarian position on sweatshops. Arguments are articulated with regard to conditions of low wage and long working hours, rather than features of coercion, threats and forms of degradation. The most widely used arguments put forward are the ‘it’s a choice’ and the ‘better-than-nothing’ argument, which hinge together (see 3.3.2). The ‘it’s a choice’ argument is articulated from a consequentialist perspective, which takes the following form. Under the condition that workers are not forced to accept sweatshop labour against their will, they choose, freely, to accept the conditions of their work and therefore engage in a voluntary agreement. Such choices are good indications of individual preferences, as they reflect the fact that individuals who work in sweatshops prefer to accept the work rather than decline it. In the absence of force, individuals choose the best alternative available to them. The individual liberty of sweatshop workers to make choices has priority over third party interference, because interference is assumed to take away a preferred and therefore best option from individuals. Measures and actions against sweatshops are likely to cause workers harm and on that ground, opposing sweatshops is considered immoral. This version of the ‘it’s a choice argument’ thus turns on empirical evidence for the claim that external efforts to improve working conditions in sweatshops engender harmful consequences. The argument shifts to the extent that it could be shown that regulation or other actions would not cause harm, but would even offer better alternatives to sweatshops workers.

Before examining this point, another libertarian version of the ‘it’s a choice‘ argument should be discussed that is independent from the possible consequences of interference. In this version of the argument the priority of liberty is based on principle, i.e. on the idea that sweatshop workers’ choices are autonomous choices that deserve respect. Interference with the autonomous choice for sweatshop work is wrong not because it brings about harmful consequences, but because it shows a lack of respect for a person. According to this line of reasoning, an

52 Miller (2003), p.103-106.
individual's choice to accept sweatshop-working conditions is no different from an individual’s choice of religion. Namely, the claim is that the choice to work in a sweatshop likely involves a decision that is of central importance to a person, for instance it may represent securing survival or the provision of basic nutrition for children and family. As such, the choice to work in a sweatshop expresses personal identity and an understanding of what it means to be a parent or member of a family. Opposing sweatshops is immoral, according to this view because it is reflective of a lack of respect for sweatshop workers’ autonomy.\textsuperscript{54}

Against both versions of the ‘it’s a choice’ argument, stand claims of coercion.\textsuperscript{55} These claims address the acceptance of sweatshop work in the first place, but also in relation to requirements on workers’ productivity in the context of their job.\textsuperscript{56} In the latter context, a claim of physical coercion points to the fact that sweatshops regimes include practices in which workers are physically forced to work, either through enclosing them on factory grounds or by means of physical abuse.\textsuperscript{57} More often than not, however, the claim addresses the features of non-physical coercion that are associated with threats to which workers are exposed. Namely, critics of sweatshops point to the fact that workers often work overtime because supervisors threaten to fire them, or withhold their wage or impose penalties in case of non-compliance.\textsuperscript{58} These threats constitute forms of psychological coercion that erode arguments based on voluntary acceptance. From this perspective, the fact that workers yield and comply with demands under such threats provides no evidence of voluntary choice.

\textsuperscript{54} Ibid. Zwolinski states: "But when the subject matter of the choice is of central importance to the agent’s identity or core projects, it is plausible to suppose that autonomous choices do generate strong claims to liberty. And it is hard to deny that the choices made by potential sweatshop workers are of central importance in just this way.", p. 692.
\textsuperscript{55} Powell and Zwolinski (2012), p. 463-466.
\textsuperscript{56} For reasons previously mentioned, cases in which the acceptance of sweatshop work is subject to coercion, debt labour etc., are kept separate in this discussion.
\textsuperscript{57} These sweatshop features are focused on for instance by Arnold and Bowie (2003), p. 229. Neither version of the ‘it’s a choice’ argument addresses situations in which sweatshops coincide with modern forms of slavery, such as debt bondage.
\textsuperscript{58} Ibid., p. 229-231.
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The ‘it’s a choice’ argument is also refuted on the basis of its inability to answer the question of the moral status of sweatshops to begin with beyond arguments that focus on practices in sweatshops that constitute physical or non-physical coercion. Can individual choices, regardless of the conditions in which they are made, disprove claims of immorality? Sweatshop critics have argued that immorality cannot be established without taking into account the conditions in which workers choices are formed. In other words, they have argued that the ability to choose, and the availability of alternative options inform what it means to voluntarily accept sweatshop-working conditions. Their arguments are discussed in sections 3.3.5-3.3.6 on exploitation and background conditions, but first, we turn to another oft-used argument in defence of the moral legitimate status of sweatshops, namely the ‘better than nothing’ argument.

3.3.2. The ‘better than nothing’ argument
The ‘it’s a choice’ argument (section 3.3.1) is often combined with the claim that sweatshops represent the best available alternatives to the workforce in those circumstances. Namely, in the absence of force, individuals choose the best alternative available to them. Defenders of sweatshops view the fact that sweatshop workers do not have valuable alternatives as an argument in favour of sweatshops, or rather, as an argument against intervention. The ‘better than nothing’ argument is not a freestanding justification for opposing any effort to improve the conditions of sweatshop but is dependent on the assumption that any effort to improve working conditions will be counterproductive (as such it is closely associated to the argument from impossibility, see section 3.3.3). Specifically, improvements in working conditions are claimed to, in effect, take away a preferred and therefore better alternative from the world’s poor. The claim is based on the idea that if conditions in sweatshops were to be improved, corporations


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would not use the labour forces in developing countries as they would otherwise.\textsuperscript{61} The argument puts forward, that due to rising production costs, developing countries will lose their competitive advantage since corporations would produce their goods elsewhere, leaving current sweatshop workers without their preferred option.\textsuperscript{62} Moreover, increases in wages and other improvements in working conditions thwart employment opportunities for others in developing countries, as the demand for goods is diminished with increases in production costs. In other words, from this viewpoint sweatshops are good and desirable, as they generate economic growth and lift people out of poverty.\textsuperscript{63}

However, the ‘better than nothing’ argument is contested on the basis of the empirical assumptions on which it depends. Improvements in working conditions and increased wages in the past have not cancelled incentives for corporations to outsource their production activities in the developing world since production costs remain substantially lower than elsewhere.\textsuperscript{64} And, raising wages and improving working conditions need not affect demand and result in unemployment. Much depends on the way goods are branded, which may lead to increased demand for goods that are produced under better conditions.\textsuperscript{65} In fact, research suggests that consumers would be willing to pay higher prices for goods produced under socially responsible conditions.\textsuperscript{66}

3.3.3. The impossibility argument

The impossibility argument claims the absence of an alternative to sweatshops, to be precise, the argument claims the impossibility of improvement in sweatshop conditions. If the existence of sweatshops is a necessary fact of world production, sweatshops cannot be immoral, as morality cannot demand what is

\textsuperscript{61} Powell (2006), p.1037.
\textsuperscript{62} Varley et al. (1998), p.48, Krugman, 'In Praise of Cheap Labor'.
\textsuperscript{65} Varley et al. (1998), p.50.
\textsuperscript{66} Klein (2003).
impossible. In one form, the argument is based on a notion of sweatshops as part of a ‘natural’ progression, namely, as necessary a step on the road to prosperity. This ‘step on the road to prosperity’ argument holds that all nations (necessarily) go through a phase of deplorable working conditions as they strive towards prosperity. A sweatshop-phase is considered essential, because it is the only source that gives developing countries a competitive edge over developed nations. Support for this view is found often in the historical development of developed countries that went through a similar period in which sweatshop existed before wages increased and working conditions improved. In response to this claim, others point to the fact that historically, improvements in working conditions often resulted from political pressure, not as a ‘natural’ result of market forces. Some have argued that wages sometimes fall even when productivity is rising, contrary to economic models. The assumption that developing nations move towards prosperity, because productivity itself will necessarily lead to improved working conditions over time is not supported empirically. Notably, critics of sweatshops point to the fact that the benefit that workers obtain from sweatshop arrangements are insufficient to pull them and their family members (including future generations) out of poverty. In any case, the argument of a step on the road to prosperity does not show that alternative forms of development are impossible.

In a second form, the impossibility argument refers to the economic impossibility for corporations to make shifts away from sweatshop production. Corporations who currently produce their

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goods in sweatshops would lose their source of competitive advantage, if sweatshop conditions were to improve (i.e. production costs were to rise) and thereby would be unable to survive over time. This claim does not however, contest the objectionable status of sweatshops, but rather, indicates a possible issue with regard to competitive forces that determine the success and survival of corporations.

3.3.4. The argument from relativism
Another argument found in the debate on global sweatshops is based on various forms of relativism. The argument generally expresses the view that individuals or groups of persons hold different beliefs about morality and that these beliefs can only be considered within the context in which they are held. Relativism problematises the debate on the moral status of sweatshops as a whole, to the extent that participants take as points of departure standards of morality that are articulated outside the context in which a sweatshops is situated. The argument takes shape primarily in terms of cultural relativism as a counter argument against those who consider sweatshops to be immoral. According to this viewpoint, it is considered illegitimate to assess sweatshops located in foreign nations on the basis of moral standards defined externally to the culture in which they are embedded. A counter argument against the immoral status of sweatshops is based on the idea that sweatshop-working conditions reflect standards that are considered acceptable within the cultural context in which they are situated.

Two arguments counter this cultural relativist view. In the first place, the standards according to which the status of sweatshops is debated need not be (exclusively) ‘external’ to the culture in which they are embedded. It is in particular the voices from within, that is, from those who work in sweatshops that inform moral concern. Moreover, the argument can be

74 Ibid.
75 Varley, p.20-22.
formulated that the standards that sweatshops infringe are universally articulated standards of decent working conditions and therefore not externally imposed on others from a high-handed position. In the second place, the claim that sweatshops are in some sense an expression of a culture, which demands respect, is countered by claims that sweatshops are manifestations of the exact opposite. Namely, critics of globalization argue that the domination of capitalist market culture encroaches on the integrity of other cultures, by requiring their engagement in commodification as a form of cooperation. From this perspective, sweatshops are manifestations of capitalism imposed as a foreign element on other cultures.

3.3.5. The exploitation argument
Those defending the moral acceptance of sweatshops find a large number of critics who argue that sweatshops are morally objectionable, because they represent wrongful exploitation. The exploitation argument engages both the ‘it’s a choice’ argument, as well as the ‘better than nothing’ argument, in either claiming their irrelevance with regards to the moral status of sweatshops or in claiming a mistaken understanding of choice, as merely the absence of force and deception. In the first case, where critics claim that consent to or benefit from an arrangement does not necessarily transform an otherwise immoral status, the exploitation argument is generally framed in terms of unfairness or degradation.

For instance, exploitation predicated on unfairness points to a party taking advantage of the deprivation of another by

76 Indicated by their articulation in the Fundamental Conventions of the ILO.
78 There are several forms in which this argument is made, in which exploitation is based on harm, insufficient benefit, unfairness or the infringement of a minimum standard. See for an overview Zwolinski (2007), p.704-711, who argues that even though other features of sweatshops may be exploitative, low wages are not. Also: Meyers (2004), who argues that wrongful exploitation may occur even if the person exploited benefits from it and even if that person prefers the exploitation over other alternatives. Of interest is the fact that in the CESL Commission (2011), plural conceptions of exploitation have been included in article 51, for instance excessive benefit and unfair advantage, but also the background conditions of the transaction. See section 3.3.6 on the ‘unjust background conditions’ argument.
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securing a benefit that is considered disproportionate in relation to the contribution.\textsuperscript{79} On the basis of this argument sweatshops are immoral, because of the distribution of advantages that are generated in part by those who work in sweatshops is disproportionately favourable to corporate actors and those who are in the position to buy these finished goods. This focus on disproportionate advantage is mirrored by a focus on insufficient benefit received by sweatshop workers. Exploitation arguments based on unfairness are countered on the basis that they fail to show why disproportionate benefit from an arrangement is a matter of moral concern, particularly under conditions that the arrangement is entered voluntarily.\textsuperscript{80} Moreover, the claim that sweatshop workers receive insufficient benefit is criticized for underestimating the benefit that sweatshop jobs represent to those who are in desperate need of work to meet basic needs.

A second variation of the argument is based on a notion of exploitation that focuses on a lack of respect for sweatshop workers. This argument points to the ways in which sweatshop conditions infringe on human dignity, by treating workers as mere means to the ends of others, rather than as ends themselves. As illustrations, examples are brought to the fore of compromises in workers’ safety for the sake of productivity, and to aspects of coercion such as the refusal to allow workers to seek medical attention during working hours.\textsuperscript{81} In a similar spirit, the argument from exploitation based on lack of respect is also articulated with reference to basic needs.\textsuperscript{82} This argument develops to substantiate the claim that low wage and long working hours characteristic of sweatshop, independent of threats, coercion and degrading practices, represent objectionable exploitation. Needs exploitation, refers to an arrangement in which one takes advantage while disregarding the basic needs of the other.\textsuperscript{83} In the

\textsuperscript{79} Meyers (2004), p. 324-327.
\textsuperscript{81} Arnold and Bowie (2003), p. 230-231. They argue from a Kantian perspective that sweatshops are immoral as they are representative of a lack of respect for those who work in them.
\textsuperscript{82} Snyder (2008)focuses on the fact that the basic needs of the individuals working in sweatshops are disregarded and therefore they are not respected as persons.
\textsuperscript{83} Ibid.; also Sample (2003), p. 159-160.
context of sweatshops, the notion of needs exploitation is evidenced by the fact that workers are unable to fulfil their basic needs while working up to 80 hour work-weeks.  

The exploitation arguments need not necessarily claim the irrelevance of choice. Instead, these arguments may take into account the influence of the conditions that characterize the lives of those who accept sweatshop jobs. In such form, arguments based on exploitation rebut the claim that sweatshop workers voluntarily agree to sweatshop conditions, merely because they are not physically forced or deceived. Unfavourable life circumstances may coerce an individual to agree to what would otherwise have been unacceptable. In this light, the fact that sweatshops are—as claimed under the better than nothing-argument—the only alternative aside from starvation, substantiate the wrongfully exploitative status of sweatshops rather than their moral legitimacy. This argument draws attention to the fact that the morally objectionable character of sweatshops cannot be properly understood by isolating the exchange which sweatshop workers engage in, from the overall circumstances of their lives. The unjust background conditions in which sweatshops are embedded represent a freestanding source of moral concern, which are paramount to the debate on the moral status of sweatshops.

3.3.6. The (unjust) background conditions argument
There are at least two ways in which the life circumstances are said to matter for the moral status of sweatshops. Firstly, sweatshop workers’ life circumstances are relevant in a notion of choice that goes beyond the absence of force or deceit and thereby contribute to an understanding of why a particular exchange is morally objectionable. Secondly, the moral status of sweatshop can be predicated on the unjust background conditions that caused the circumstances that shape sweatshop workers’ lives.

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84 This argument is used in particular to substantiate the claim that workers should receive a living wage. See for example Snyder (2008) who argues that wage levels that fall below a decent minimum are for that reason morally problematic.
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The first argument does not focus on the reasons behind the circumstances that shape lives. The mere fact that there is a lack of alternative options of a certain quality (e.g. beyond starvation and death) for sweatshop workers substantiates the claim that there is a defect in consent, or at least that the acceptance does not perform its ‘moral magic’.\(^\text{86}\) Namely, under conditions of severe deprivation and inequality, people accept conditions that they would otherwise never have agreed to.\(^\text{87}\) According to this line of reasoning, the morally relevant comparison to make is between sweatshop conditions and conditions to which people would have agreed under fair background conditions, e.g. in the absence of pressing necessity. People with excellent life chances do not, in fact, choose sweatshop work. And, sweatshops are not generally considered as just another category of job among a range of alternative occupations. The argument aims to show that there is a morally significant difference between choices made under conditions of urgent need, and those made under conditions of substantive freedom, i.e. the availability of valuable alternatives.\(^\text{88}\)

The second argument points to the reasons why some people do not have alternative options beyond sweatshop work. In this context it is of relevance to draw attention to the fact that individuals who lack alternative options are not distributed randomly among societies, or among groups of individuals at varying starting positions in life. Rather, sweatshop workers are located predominantly in developing countries, or, are members of a particular vulnerable and marginalized group, such as (illegal) immigrants.\(^\text{89}\) The arguments concerning the unjust background conditions follow an inquiry into the context in which vulnerability, and comparatively, favourable bargaining positions of those who gain advantage from vulnerability, are shaped. The claim that the


\(^{88}\) This line of reasoning, which focuses on the importance of substantive choice and freedom, shows significant overlap with the type of reasoning based on capabilities frameworks.

moral status of sweatshops is predicated on unjust background conditions, appeals to the idea that sweatshops are indicative of structural injustice, i.e. that sweatshops only prevail within an unjust context.\(^9\) This argument has been made in reference to both previous and current ongoing injustices, which are claimed to contribute to disadvantage on one side, and advantage on the other. Previous injustices that are brought to the fore include the seizure of natural resources and land under periods of colonialism, conditions of slavery and war.\(^9\) Current features are also referred to as aggravating and sustaining the current measure of inequality between the lives of individuals in different nations and regions exemplified by institutional structures supportive of terms of trade that protect the interests of those who are already well-off or the suppression of unions and labour protection at the request of corporate actors.\(^9\) All these features are said to create a context of structural injustice and inequality that enables and sustains the existence of sweatshops over time.\(^9\) It is not the very idea that these background conditions are unjust, or that they matter for the moral status of sweatshops, rather, the question of how these conditions transform the moral status of sweatshops is the subject of debate.

### 3.4. Sweatshops as contractual externalities?

The previous sections show that sweatshops are the topic of critical scrutiny in popular media and of academic debate regarding their moral status. Sweatshops and forms of slavery are often bracketed together as examples of fundamental rights violations in corporate supply chains and as examples of production conditions that illustrate costs imposed on others, i.e.

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9 In some instances, this argument targets specific actors. For example, MNE’s are faulted for bargaining and lobbying for advantages, such as lower tax rates and diminished standards of labour protection in return for investments.
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externalities. However, the contrasts between sweatshops and slavery as subjects of moral debate and as examples of externalities relate to this book’s questions regarding contractual immorality and injustice.

3.4.1. Sweatshops and slavery as subjects of moral debate
In the debate on the moral status of sweatshops, the latter are distinguished from modern forms of slavery on the basis of consent. Sweatshop workers subject to practices described above are said to have the freedom to leave their jobs whereas slaves do not. As such, sweatshop work is set apart from modern forms of slavery where total control is exercised over a person by means of force for the purpose of economic exploitation.96 Where past forms of slavery entailed ‘legal’ ownership of persons, modern forms of slavery are recognized as all forced or compulsory labour, defined by the International Labour Organization (ILO) as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”95

Modern forms of slavery occur in today’s world as part of supply chains of goods that are sold in Europe.96 In the first place, modern forms of slavery can also be said to occur within the context of sweatshops. Namely, studies on sweatshops also describe the most common form of compulsory labour today, namely debt bondage or bonded labour.97 Debt bondage occurs where workers have incurred debt and agree to repay their debt through labour.98 For instance, a worker may incur a debt in order to pay for transportation by a contractor or agent to a factory location. The debt often escalates as excessive payments are

98 International Labour Organization (ILO), The Cost of Coercion: Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 2009.
required for housing and food, and high interest rates compound with the initial amount. Required payments exceed the low wages received by workers, which leads them to be enduringly unable to pay off their debts. In these circumstances workers find themselves trapped and tied indefinitely to their contractors.\textsuperscript{99} In the second place, and apart from the context of sweatshops, reports also show that goods sold in Europe are made by slaves, for instance by child slaves on cacao plantations in Ivory Coast, the largest world producer of cacao and main supplier to the world’s chocolate industry.\textsuperscript{100} Chocolate production depends on labour intensive cacao production and children are trafficked from neighbouring countries into Ivory Coast to work on cacao farms.

Thus, although a categorical distinction maintains between slavery and sweatshops with respect to the question regarding moral status, they both exist in supply chains of goods sold in Europe. Moreover, in light of modern conceptions of forced labour, forms of slavery may also overlap, as factual descriptions of sweatshops illustrate. Thus, for the purposes of this book, one could apply equally the question of contract law regarding validity to the example of transactions for goods made by slaves (including child slaves), as a replacement for the hypothetical case study of sweatshops (see Chapter 4). However, this book deals with the latter, more controversial example, because it brings to the fore more readily the potentially salient elements regarding questions of contractual immorality. By doing so, the book engages in the debate on the moral status of sweatshops that stands in contrast to the universal condemnation of slavery. The abolition of slavery and its universal illegality was established after dispute regarding its moral status, and only after that the idea took hold, by now ubiquitously shared, that slavery is immoral. Unlike sweatshops, slavery has moved beyond debates in which its (economic)

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benefits are put to the fore as a contribution to a defence for permissibility.\footnote{Even though arguments could be articulated for the economic efficiency of slavery, for instance: Gray, L.C., 'Economic Efficiency and Competitive Advantage of Slavery under the Plantation System' (1930) 4 Agricultural History 31-47. "Obviously, this question involved neither the ethical aspects of slavery (...). Unfortunately however, the consideration of the economic aspects of slavery as a competitive institution have been largely mixed up with these broader considerations(...)". p. 33.}

3.4.2. Sweatshops and slavery as externalities?
The potential difficulties of a categorical distinction between various forms of forced labour and sweatshops are taken as a point of departure in the following discussion on contractual externalities. The distinction is further based on a formal conception of consent, which points to the absence of physical force or coercion.

The link between sweatshop conditions and transactions for sweatshop goods has been described in economic terms: the former are identified as \textit{negative externalities} of the latter.\footnote{For instance: Lipschutz, R.D., 'Sweating It out: NGO Campaigns and Trade Union Empowerment' (2004) 14 Development in Practice 197-209, p.197.} The term externality is described in economics as a direct effect (either positive or negative) of an actor’s action on the welfare of another actor, without the effect being incorporated in the market price.\footnote{Varian, H.R., \textit{Microeconomic Analysis} (W.W. Norton & Company, New York 2006), chapter 24; Katz, M.L. and H.S. Rosen, \textit{Microeconomics, 2nd Edition} (Irwin, Boston 2009), chapter 17; Baye, M.R., \textit{Managerial Economic and Business Strategy, 4th International Edition} (McGraw-Hill, New York 2002), p.508-510.} Externalities can cause efficiency problems and represent market failure, since the price paid for a good does not reflect the costs that are necessary for the production thereof.\footnote{Baye (2002), p.510.} Environmental damage caused in the course of production is the archetypical example of a negative externality. If the costs associated with environmental damage are not transmitted as production costs throughout the supply chain, these costs are externalized and incurred by others who are affected by the environmental damage, but remain nevertheless uncompensated. Similarly, sweatshop conditions are identified as costs incurred by those who work in sweatshops. Namely, those who engage in transactions for
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goods made in sweatshops need not pay the price for safe production conditions, decent wages or overtime compensation. Instead such costs are imposed on those who produce them through substandard working conditions.

This line of reasoning imports into the economic definition of externalities, normative standards about what a ‘decent’ wage would be or what ‘substandard’ conditions are. However, in a strict definition of externalities such normativity is to be found in the choice made by individuals themselves. That is to say, whatever wage or working conditions one accepts as compensation is to be taken for granted; the market establishes what is adequate compensation, as opposed to a level of wage or working conditions labelled ‘decent’ or ‘substandard’ respectively. Consequently, whatever the sweatshop workers accept as compensation is equivalent to the costs incorporated within the total production costs. Those who work in sweatshops define for themselves what adequate compensation is –expressed by their voluntary acceptance— and thus they do not incur any residual costs. In short, sweatshop conditions are not negative externalities of the activities of others and do not represent market failure because workers can adjust their conduct. It is for this reason that modern forms of slavery in supply chains can and should be considered as negative externalities, since voluntary acceptance is absent and slaves are not compensated for the costs they incur in the course of production. It follows from this view that the price of goods made by slaves does not reflect all production costs, whereas the price of goods made in sweatshops does.\(^\text{105}\)

Therefore, in terms of efficiency and market functioning, modern forms of slavery are deemed problematic, whereas sweatshops are not.

Taken on their own, however, the morally problematic aspects of lowering working conditions to sweatshop conditions need not be insignificant to consider the negative externalities of transactions for goods made in sweatshops. Namely, if one considers sweatshop conditions as acceptable this may be seen as reflective of lowering standards regarding the respect for human life, which is in turn associated with social costs of increased

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\(^{105}\) In other words slavery as an externality reveals market failure, whereas sweatshops do not.
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criminality and violence, i.e. the deterioration of social life.\textsuperscript{106} The erosion of standards of respect for human life is described as a possible negative externality, and can be seen as an externality of transactions for goods, which are made under sweatshop conditions in supply chains. In such a case it is not the sweatshop conditions that represent external costs of transactions, but rather the negative effects on society, namely the lowered standards of respect for human life and associated social costs.

3.4.3. **Contractual externalities: a capabilities perspective**

As articulated in the previous chapter, sweatshop conditions and the context in which they are embedded do not escape critical scrutiny from a capabilities perspective. To the extent that sweatshops are not identified as problematic on the basis of workers’ acceptance of sweatshop conditions this view is incompatible with a capabilities perspective of which the focus is on the individuals’ substantive ability to choose. In asking what individuals are able to be and do in their lives, the capabilities approach points to the salience of the absence of valuable alternatives in the lives of those who work in sweatshops.\textsuperscript{107} From a capabilities perspective, the arguments brought forward to substantiate the moral legitimacy of sweatshops do not have a transformative effect on the concerns that come to the fore in terms of basic capabilities pertaining to minimum justice. Namely, in a context of absent valuable alternatives and exit options, individuals do not have the basic capabilities, i.e. the substantive freedom to choose.

Thus, firstly the ‘it’s a choice’ argument fails for being based on a formal conception of choice that neglects the consideration of the impediments in the broader context that


\textsuperscript{107} People with excellent life chances do no work in sweatshops (see section 3.3.5). In today’s world many people travel for professional and other reasons, but well-off people do not pursue sweatshop job opportunities. Even as opportunities to spend some time abroad, sweatshops do not appear to be among a range of valuable options, as for instance agricultural labour is (e.g. apple picking). Sweatshops as valuable research opportunities appear to be the exception, i.e. the experience of working in a sweatshop provides valuable input. See: Fries, M., ‘Stressforscher im Sweatshop’ Zeit Online <www.zeit.de/studium/uni-leben/2011-02/interview-bangladesch> accessed 7 November 2012.
constrain individuals’ abilities to choose.\(^{108}\) Secondly, the ‘better-than-nothing’ argument does not engage the normative claim based on minimum justice that translates into fundamental entitlements of basic capabilities for individuals. Thirdly, the impossibility argument does not work, as considerations regarding global redistribution, normatively supported by a capabilities approach to minimum justice would counter the impossibility of improvement. Moreover, where the impossibility argument identifies corporate economic impossibility, the argument becomes irrelevant, as the survival of a corporation does not represent a fundamental entitlement based on minimum justice.\(^{109}\) And lastly, a capabilities perspective counters the argument from relativism by defending the universal status of basic capabilities.\(^{110}\) One may debate about the appropriate threshold level of the central capabilities as they would be defined locally, but the argument that sweatshops could be compatible with any threshold level is difficult to sustain.

From a capabilities perspective, a sweatshop’s objectionability is found in the absence of the social preconditions necessary for individuals to be able to make substantive choices in important areas of human functioning, i.e. the basic capabilities on Nussbaum’s list. In that context, sweatshop conditions impair workers abilities “to work as human beings, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers”.\(^{111}\) Sweatshop conditions do not escape critical scrutiny on the basis of Nussbaum’s capabilities approach, because they cannot be separated from the background conditions in which sweatshop workers accept them. A capabilities perspective treats sweatshop conditions and the overall (global) context in which they are embedded as inseparable for its normative judgments.\(^{112}\) Critical scrutiny thus extends to the

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\(^{110}\) This universalist spirit is captured in the question: “Why should we follow the local ideas, rather than the best ideas we can find?”, Nussbaum (2000a), p.49.

\(^{111}\) As articulated on Nussbaum’s list (under 10 b), which reflects the central importance of the architectonic capability of practical reason and the capability of affiliation. See section (2.1.1).

\(^{112}\) Arguably, such direct scrutiny of sweatshop conditions would escape from a capabilities perspective as articulated by Sen in the absence of a list of specific capabilities. On this point: Bagchi, A.K., ‘Freedom and Development as End of
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sweatshop conditions, and to the overall context that sustains them, which includes parts of domestic basic structures of society.\(^{113}\)

Of particular concern for this book are the ways in which contract law in Europe regulates market exchanges that create advantages to those in affluent regions of the world, which are only possible in light of the costs (impairment of basic capabilities) borne by others in less affluent regions. From a capabilities perspective, there are normative reasons why sweatshops should be taken into account within the realm of relevant costs of transactions for goods made in sweatshops. As such, this represents a perspective on externalities that should be counted as problematic contractual externalities.

3.4.4. Raising the question of contractual immorality in Europe

The question of contractual invalidity and immorality in Europe (subsequent chapters) follows both from the existence of the debate on the moral status of sweatshops in public space, as well as from the identification of sweatshops as costs imposed on others (externalities) elsewhere through market activities. To start with the latter, the concept of externalities represents a potential normative justification for denying the binding force of an agreement, i.e. the existence of a valid contract.\(^{114}\) The previous sections showed that the identification of the costs that are taken into account as externalities depends on the underlying normativity that is captured in the application of the notion of voluntary choice. The economic interpretation of externalities in section 3.4.2 would likely distinguish between forms of forced labour (slavery) and sweatshop conditions identifying only the former as problematic in that context. Conversely, a capabilities perspective (section 3.4.3) would include the critical assessment of both.

\(^{113}\) See section 2.1.4.


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In addition, and beyond the concept of externalities, the question of contractual immorality and invalidity also arises in light of the focus on sweatshops as a subject of public scrutiny and sweatshops as a topic of debate in academia. First, to the extent that contractual immorality reflects public morality, developments in the latter are of relevance to questions of contract law. Second, as the attention for deplorable production conditions of goods sold on the market in Europe increases as a subject of critical scrutiny, the awareness of market participants also increases. The question remains to what extent these developments are relevant under rules of contract law in Europe.
4. THE POTENTIAL FRONTIERS OF CONTRACTUAL JUSTICE: A SWEATSHOP CASE STUDY

The present and subsequent chapter deals with the question of whether contracts, mutually beneficial to contracting parties, are invalid for immorality under the current rules of contract law in Europe, if the exchanged clothes are made under sweatshop conditions. To answer this question, a case-based method is used to test the hypothesis that, indeed, such contracts are immoral and invalid under the rules of different legal systems in Europe (section 4.2.). Several objections against the hypothesis potentially refute the immorality and invalidity of the transaction (section 4.1.). This chapter discusses the hypothesis, the objections, and, the methodology through which they are tested. The following chapter focuses on selected legal systems.

4.1. Contractual immorality and its potential frontiers

4.1.1. The hypothesis for several legal systems in Europe

The articulation of the hypothesis follows in the first place from the normative from the previous chapter, which shows that sweatshop conditions in supply chains of goods bought and sold on the market are matters of current moral concern. This issue has attracted increasing attention and scrutiny, suggesting a changing awareness of a situation that has existed over time, but for which the conditions of modern life make information more easily accessible. This development corresponds to similar attention for related issues pertaining to corporate responsibility, sustainable production and fair trade, which may reflect changes in (moral) standards that have occurred and continue to occur.

Furthermore, the hypothesis is based on Hesselink's suggestion that transactions of this sort could and would be immoral and invalid under the applicable rules in the Dutch legal system. Thus Dutch law is included amongst the legal systems selected for discussion. The choice to include the other legal systems is based on the idea that some legal systems, namely English, French and German legal systems are influential in terms of the developments of contract law in Europe. Also, the proposed Common European Sales Law (CESL) is discussed, as it is

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1 Hesselink (2005), p.506.
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representative for the developments in contract law in Europe that are likely to take place in the very near future. The proposed instrument is also compared to the Draft Common Frame of Reference (DCFR), which was intended as an (academic) basis for a future proposed instrument. Practical considerations regarding time and language constraints played a role in the decision to exclude other legal systems.²

4.1.2. The potential frontiers of contractual immorality and invalidity

The following sections present an inventory of several objections against the hypothesis that transactions for clothes made in sweatshops are invalid for immorality under the rules of contract law in Europe.³ These objections claim to sever, in relevant ways, the link or association between the moral concerns evoked by sweatshops elsewhere and the transactions in Europe for the exchange of clothes made in sweatshops. They thereby inform —on different grounds— the conclusion that contracts mutually beneficial to contracting parties for the exchange of sweatshop clothes are not immoral and invalid under rules of contract law in Europe. These objections are discussed in the following sections.

4.1.2.1. Beyond the frontiers of knowledge

As a first objection, a lack of knowledge may be brought forward against the hypothesis that transactions for clothes made in sweatshops are immoral and invalid under the rules of contract law in Europe. This objection may focus on the idea that contracting

² The scope of the inquiry has excluded other instruments such as the Unidroit Principles of International Commercial Contracts from discussion in this thesis. However, it is of interest to note that the hypothesis finds support under this legal system in light of the comments to article 3.3.1 regarding contracts infringing mandatory rules. See illustration 5, which refers to a contract between a retailer and manufacturer for the supply of goods made by child labourers, of which both parties were aware, or should have been aware. Unidroit Principles 2010 edition, available at: http://www.unilex.info/dynasite.cfm?dssid=2377&dssmid=136378&x=1. See also: Bonell, M.J., ‘The New Provisions on Illegality in the UNIDROIT Principles 2010’ (2011) 16 Uniform Law Review, 517-536, p. 525.

³ As is the case for the remainder of this book, references to the rules of contract law in Europe are only based on the legal systems included in this chapter.
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parties have no knowledge of the production conditions under which the clothes they buy and sell are made, because of the distance –either geographically or in terms of the number of transactions– between the production and retail locations. If contracting parties cannot be cognizant of the conditions under which the clothes they sell and buy are made, transactions for clothes made in sweatshops cannot be distinguished from transactions for clothes that are produced under decent working conditions. As such, all transactions would become suspect in terms of contractual immorality and invalidity, or perhaps, on the contrary none would be suspect.

However, to the extent that popular media sources draw attention to sweatshop conditions, both as a general issue of concern, as well as in relation to specific brands, stores and goods, an assumption of awareness among contracting parties is not implausible. In that context, moreover, the terms of specific transactions may, at least, raise doubts as to the production conditions of a good. In particular, the price of a good can be an indication to consumers of sweatshop conditions in a supply chain.4 Consumers’ pursuit for low priced goods presupposes decisions made in supply chains that drive costs down. An extremely low-priced good may or perhaps should therefore raise suspicion, as it indicates low cost production. Low prices may raise red flags for consumers regarding the production conditions of these goods especially in combination with previous media attention for goods sold on similar terms.5

In light of the aforementioned, this book raises the question of contractual immorality and invalidity in relation to those cases for which the knowledge of contracting parties is not disputed; i.e. knowledge is included in the design of the case study (see section 4.2.3). However, to the extent that features of

4 The idea that consumers reasonably doubt the origin of a product on the basis of a low price is also used in advertising, for instance, a Dutch company, HEMA, advertised their coffee stating that the consumer must think that HEMA is not paying a fair price to coffee farmers because the price is ridiculously low, immediately following with the statement that HEMA’s coffee is a fair trade product and that in this case the consumer should buy HEMA coffee without reservations. (TV commercial on Dutch tv in 2010).

5 Information regarding deplorable production conditions may represent ‘inconvenient facts’ for consumers. See section 1.1.1.2, footnote 12.
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distance between those who engage in transactions in Europe for goods made in sweatshops dissolves the degree of certainty that one can have concerning the conditions of production, the objection of knowledge raises the question to what extent knowledge makes any difference for questions of contractual immorality and invalidity under the rules of contract law in Europe.

4.1.2.2. Beyond the frontiers of contract law: third parties

Contract law governs the legal aspects of relationships that private parties, i.e. the contracting parties, voluntarily engage in. Notions of freedom of contract, the binding nature of contract and the relativity or privity of contract are central to contract law, often referred to in the same sentence, as representing different expressions or sides of party autonomy. The principle of relativity of contract, or privity of contract, refers to the idea that contracts are (generally) only binding for the contracting parties, that is to say, they only confer rights and impose obligations on the parties to the contract. The principle expresses contract law’s central focus on the ‘internal’ and relational aspect of transactions, that is, the effects of contracts on those who have given their assent.

Since the contract for a good made in a sweatshop focuses on the external implications of that contract this may bring to mind the idea that the question regarding its morality and validity falls beyond contract law’s scope of consideration. From this perspective, the fact that a good is made in a sweatshop seems to be unrelated to questions concerning the legal status of the contract and the rights and obligations it confers on the contracting parties. However, the principle of relativity or privity of contract does not exclude the relevance of the external effect of contracts on third parties within the realm of contract law altogether. The question of contractual immorality and invalidity as raised in this chapter, does not raise questions regarding the consequences of contracts for the legal positions of third parties, i.e. whether the contract results in legal obligations or rights for third parties. Rather, the question goes in the opposite direction, namely, to what extent the external

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implications of a contract may influence whether or not the contract indeed confers rights or imposes obligations on contracting parties to begin with. The question is directed at the legal position of private parties engaged in exchange, rather than to the legal positions of others as a result of such exchange.

Nevertheless, the idea that the sweatshop conditions are irrelevant to the legal status of the transaction between consumer and retailer, may still inform an effective objection to the hypothesis of immorality and invalidity. Namely, all contracts have external effects on others, as they exclude others from engaging in the exchange.\(^7\) Contractual relations imply exclusion as a matter of demarcation, which can be considered as a negative feature for those who have been excluded. However, not all (negative) implications of contracts on others, result in a hypothesis of invalidity. For contractual immorality and invalidity the question is: which external effects are relevant for the evaluation of the status of the contract itself; which external effects are acceptable, and which are not?

4.1.2.3. Beyond the frontiers of Europe: geography

In the context of this book, the location of the sweatshop is presented as remote from the transaction and located beyond the frontiers of Europe in a low labour-cost country.\(^8\) The purpose of focusing on sweatshop locations in developing countries serves to incorporate aspects of global inequality of (dis)advantage and its salience for the questions concerning the standard of justice reflected in contract law in Europe.

However, the remoteness of the sweatshop location from the transaction, gives rise to the objection that, because of geographical distance, the transaction lacks sufficient connection to the morally objectionable source to be immoral and invalid. Why geographical distance would, independently, dissolve concerns of morality is not immediately evident. But the objection

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\(^7\) Shavell (2004), p.320.

\(^8\) The existence of sweatshops, and more generally deplorable production conditions located in Europe is of course not denied. See for instance the case on exploitation in the asparagus harvest in the Netherlands: *Gerechtshof 's-Hertogenbosch, 6 July 2012, LJJ BX0599 (Asparagus exploitation).*
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can also be understood as to express the claim of uncertain knowledge (see above) or, the involvement of different communities and the associated divergence of (social, moral and legal) standards. In the latter interpretation, the objection of geographical distance addresses the question as to which standards are to be applied when assessing the morality and validity of the contract. Namely, if sweatshop conditions would be objectionable by the standard applicable in the community of the consumer and retailer, this may be deemed irrelevant, if sweatshops are to be judged by the standards of the local community in which they are located. This objection raises the question as to which standards the norms of contractual immorality and invalidity are based.

4.1.2.4. Beyond the frontiers of discipline: the legal and moral realms

The previous chapter explored different arguments in the debate on the morally objectionable nature of sweatshops. Moral theorists articulate these arguments in a sophisticated manner of which parallels can be found in popular media reports. However, as this chapter (and the book more broadly) focuses on legal questions, one may wonder about the relevance of moral theory and moral concerns expressed publicly, within the legal realm. The legal and moral orders remain independent normative orders, which, although they may overlap, do not coincide. On the one hand, law may be immoral, and on the other hand, considerations of morality need not resonate with any legal significance: moral objectionability does not equal legal objectionability.

However, contractual immorality, if recognized within a legal order, is a legal concept. Indeed, no legal system in Europe supports transactions, which are considered to be immoral. All legal systems incorporate the rule that contractual immorality may lead to contractual invalidity. The question remains to what extent the arguments put forward by moral theorist and those found in public debate, are relevant to the legal norms that determine

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contractual immorality and invalidity. How do legal systems determine the legal standards that govern the morality of a contract?

4.2. Methodology: how will the hypothesis of contractual immorality and invalidity be tested?
The hypothesis is tested through a functional approach to legal comparison and is framed by the formulation of a specific case (section 4.2.3). The underlying legal methodology is similar to one methodological pillar of the Trento Common Core Project. This methodology combines functionalism with a case-based (factual) methodology and compares "the way in which the national systems of the different member States deal with the same practical cases relating to some of the main topics in some of the main areas of private law."

4.2.1. Functional method
A functional approach refers to the idea that legal rules can be compared with regard to their similar functions, for example, where they address the same societal problem or conflict of interest and, in the present context: how legal systems address the same practical case. This chapter designs a hypothetical case regarding a transaction for clothes produced in a sweatshop, which functions as a basis for legal comparison (section 4.2.3). This case puts forward a question regarding the balance of the interests of the contracting parties in relation to those of others and society as a whole. Legal systems value the freedom of contracting parties to decide what, with whom and on which terms to exchange. Legal systems are also founded on other basic or fundamental values and thereupon set minimum standards to which individuals must adhere, if they want their contracts to be recognized by law. The

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Issue could be framed in terms of a tension between the interests of contracting parties to contract and be able to exercise their contractual freedom, on one side, and the interests of others who encounter the adverse effects thereof, on the other side. Asking how, if at all, these issues are dealt with in the realm of contract law, helps to identify the legal concepts that are the focus of the analysis.

All of the legal systems that will be evaluated impose substantive limitations on the freedom of contracting parties. Contracts that are considered to be substantively objectionable within a legal system, may not obtain the effects that contracting parties pursue through engaging in a contractual relationship. If a contract infringes the basic principles on which the legal system is founded, it is held invalid (i.e. it is not recognized as a binding contract) and therefore cannot be enforced with the support of State power. The present legal analysis focuses on the rules of contractual validity, and in particular, the legal concepts that reflect substantive limitations on contracts. In different legal systems, these concepts are referred to in terms of good morals and public policy. A considerable part of the substantive restrictions imposed on contractual freedom, seek primarily to protect weaker contracting parties, for example based on inequality of bargaining power. But limitations on contractual freedom are also imposed with a view to the interests of others or society as a whole. In those cases, the circumstances under which the contracting parties entered into the contract normally are unobjectionable, i.e. there are no defects of consent and the parties have the intention to be bound to the contract.

4.2.2. Methodological criticisms
The Common core project is based on another methodological pillar, namely the theory of legal formants. This theory reflects the idea that ‘the living law’ is created from a diversity of formants, e.g. statutes, scholarship, case law, custom and usage, which function as sources of law and need not generate a homogeneous

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13 In such cases it can of course also be said that the protection of the interests of society at large, play a role.
answer as to what the law is. The common core project incorporates this theory by reflecting on several levels of formants on which national reporters participating in the project respond to by questionnaire. There are two reasons why this methodological element is not adopted in this book. The first reason is practical, namely a Dutch lawyer should not undertake to report rigorously on the different levels of legal formants in different legal systems. National reporters provide answers in the common core project, which make the outcomes more representative of the legal system. The legal analysis in this chapter is based primarily on the traditional sources of private law, namely statutes, case law and legal scholarship. In particular, the discussion of the law has focused on the authoritative representations thereof, in different legal systems. The second reason is substantive: the limited scope of the legal inquiry in this book corresponds with the intended purpose of that analysis in its context, which differs from the ambitious aim of the Common core project to develop a reliable legal cartography of private law in Europe. In this book, the legal analysis has a much more modest and narrow purpose and scope, which is to test the hypothesis: the transaction described in the hypothetical case is invalid.

However, the deviation from substantiating the analysis on different levels of legal formants exposes the methodology to several points of criticism. These points are related to the functional element and the case based method of the approach. Functionalism, in particular, encounters strong opposition in debates concerning comparative law more generally (the main points have been addressed by some of the editors of the common core project). I will briefly address the most significant issues in relation to the methodological design in this book, which relate to the fact that the functional question and case formulation have

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17 For a more elaborate discussion and further references see: Cartwright and Hesselink (eds), (2008), chapter 1.
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both been articulated by the author, rather than a representative group of national reporters. This invokes the criticism that the results of the legal analysis are entirely dependent on these pronunciations. In response, I refer to the fact that the legal methodology in this book is embedded in a broader methodology in which, unlike the Common core project, an external perspective, i.e. one of minimum social justice, is central (see Chapter 2). This external perspective informs the formulation of the case and the identification of the functional question. In effect, this response pushes the traditional criticism to functionalism back to a different methodological level and informs a basic criticism. Namely, the external perspective imposes on all legal systems a ‘function’, which may be foreign to or reductive of them. In particular, contract law may not be considered the appropriate locus for references to minimum social justice at all. This matter is discussed in Chapter 0, to which I refer here.

4.2.3. Case design
The following chapter analyses legal systems on the basis of the same factual representation of a case, which represents a mutually beneficial transaction, for the sale on the internal market of Europe of a good, which has been made under sweatshop conditions.

A European consumer buys a good in a European retail store. The contract parties enter into concerns a straightforward and everyday transaction: clothes purchased for money. No special circumstances pertain, which would affect the legal capacity of contracting parties or the formation of the contract. The exchange is mutually beneficial to contracting parties; consumer and retailer enter the contract in the absence of any circumstances that compromise their consent. The clothes that are exchanged between consumer and retailer were made under production conditions that constitute a sweatshop, as described in chapter 3. Both parties are aware that the clothes were made in such a sweatshop, for example because this fact has been brought to their attention through the media. This knowledge does not constitute a reason for the contracting parties to refrain from entering the contract in the first place nor does it interfere with their
pursuit to have the contract enforced by the court, in the event of a dispute.

The case design is informed by the scope of the inquiry in this book. This results, on the one hand, in the exclusion of some issues that may appear to be relevant prima facie. On the other hand, the case includes some elements that raise questions or criticism in two directions: the first pertaining to the degree of realism of the case, the second to its ability to test the hypothesis. Both matters will be discussed in the following sections, starting with issues that fall beyond the scope of this book’s inquiry.

4.2.3.1. Matters of scope
The case design aims to bring to the fore particular reasons for contractual invalidity in the legal systems discussed, namely, those that engage in the negative effects of contracts with others, i.e. with non-contracting parties. Outside the scope of the legal analysis lie questions that focus on the contractual aspects pertaining to positions of the contracting parties. For example, questions may arise concerning aspects relating to restitution following invalidity, or apart from contractual validity, questions of contractual breach.\textsuperscript{18} Questions of contractual breach come into consideration, for instance, if the consumer claims that the good is not what she could reasonably expected, namely a good that is made under decent production conditions.\textsuperscript{19} Such issues of non-conformity fall outside the scope of this book, because these issues focuses the attention on consumer preferences and the interests of contracting parties, as opposed to the positions of non-contracting, disadvantaged individuals elsewhere.

The emphasis on the position of already disadvantaged third parties, namely those who work in sweatshops, may induce an inclination to focus on their interests and their fate more

\textsuperscript{18} Questions regarding the process of unwinding a contract are matters relating to restitution or unjust enrichment and outside the scope of this book. Basedow, J. et al. (eds), The Max Planck Encyclopedia of European Private Law Volume II (Oxford University Press, Oxford 2012); Van Kooten, H.J., Restitutierechtelijke aspecten van ongeoorloofde overeenkomsten (Kluwer, 2002).

\textsuperscript{19} See references in section 1.1.1.1, footnote 4.
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generally. That is to say, the context in which the questions raised in this book may be read as an attempt to offer relief and solutions to the existence of sweatshops and the positions in which disadvantaged third parties find themselves. Consequently, the topic provokes the question of how the interests of third parties can be addressed and sweatshops combated, in an efficient and effective way. For such purposes, however, contract law is not the first instrument that comes to mind and this book does not intend to inflate its relevance with regard to these matters.

Moreover, within the realm of private law more broadly, questions of liability may seem more central when thinking about the ways in which third parties are affected by the engagements of others. The focal points of these questions are the rectification of harm, the rights of those affected and the obligations of the wrongdoers. These matters are separate from the subject of this book.\(^{20}\) The starting point of the questions raised in this book is not the position of individuals who work in sweatshops, or the question as to how the production conditions that characterize sweatshops can best be addressed or improved. This book focuses on the position of the contractual relations between European private actors that negatively affect third parties, within the European legal order and the values it reflects, i.e. the validity of contract is framed as reflective of a minimum standard of social justice to which a society adheres.

Since this book is concerned with the ways in which the rules of contract law in Europe are reflective of a minimum standard of justice, the case design exemplifies solely a transaction that is governed by contract law in Europe. Thus, although other transactions associated with the same deplorable production conditions may be perceived to be *prima facie* more relevant or objectionable, these transactions fall outside the scope of consideration. For instance, contracts in the supply chain between contractor and subcontractor, or between sweatshop workers and subcontractors governed by other legal orders are not considered. The case is submitted to each legal system for evaluation, on the

\(^{20}\) To the extent that a contract obliges one party to commit a tort in relation to a third party, the contract can consequently be deemed invalid under rules of contract law in Europe. See on this matter for instance Van den Brink, V., *De Rechtshandeling in strijd met de goede zeden* (Boom Juridische Uitgevers, 2002), p.217.
assumption that the contract is governed by that system. Questions of applicable law in cross border cases are not considered. The transaction between consumer and retailer is chosen as subject, because the hypothesis of contractual invalidity represents in some sense the most difficult for this case, for example in relation to the knowledge concerning supply chain conditions. It is possible that other contracts in the supply chain are similarly governed by rules of contract law in Europe, to which the lines of reasoning put forward in this chapter may be extended (for instance between a retailer and supplier).

Associated with the attention concerning the validity of other transactions, the case may also gives rise to questions regarding the legal relevance of a link between different transactions. In particular, the question of contractual invalidity may be considered dependent on the relationship between the contract and other contracts in the supply chain. Namely, legal systems may, under certain circumstances and to certain degrees, consider the validity of a contract dependent upon the validity of contracts to which it is somehow linked.21 For instance, under French law, the invalidity of one contract may affect the legal status of another contract if they form a unity (ensemble de contrats indivisibles), i.e. if they share the same purpose. If one of the contracts in the unit is held invalid and shared purpose can no longer be pursued by the other contracts, then its causa (see section 5.3.1) ceases to exist.22 Under Dutch law, a contract that has the effect of building on an existent juridical relation is voidable on the basis of Article 6:229 BW (voortbouwende overeenkomst). This article reflects the distinction between the existence and lawfulness of causa under ‘old’ Dutch law, where 6:229 incorporates the absence of causa.23 The underlying aim of considering the link between such contracts as relevant for their

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21 Validity here refers to the legal status of a contract including not only the question of whether or not its void, but also, and primarily, whether or not its voidable.

22 Ghestin, J., Cause de l’engagement et validité du contrat (Libraire Générale de Droit et de Jurisprudence, Paris 2006), nr. 383; see also, comments by Ghestin to Avant-Projet de Reforme du Droit des Obligations (Projet Catala), Article 1125.

For example: Cass. Civ. 1e, 3 July 1996, Bull.civ I, nr. 286 (D 1997, 499, ann. P. Reigne). Video club case: The cause was absent, because the purpose could not longer be achieved.

23 Asser/Hartkamp & Sieburgh 6-III, (2010), nr. 299.
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legal status lies in the protection of contracting parties.24 The topic falls outside the scope of this book since the latter focuses on the invalidity of contracts which are mutually beneficial, and invalid because of their negative implications for others. Moreover, the issue of linked contracts is primarily relevant to complex commercial realities. Although subcontracting systems in some cases may reflect complex relations between contracts, this would not include the contract between consumer and retailer. For example, the contract between consumer and retailer cannot be said to build on a pre-existing relationship (required to constitute a “voortbouwende overeenkomst”).

A matter of scope of a different order is the question of compatibility between a judicial decision of contractual immorality and invalidity on the basis of the conditions of production on the one hand, and free trade rules on the other hand. This question may be expressed as a challenge of ‘protectionism in disguise’, i.e. the claim that if transactions for goods made in sweatshops elsewhere were held immoral and invalid this may be viewed as undermining the competitive advantage of low-cost labour countries and to creating benefits for domestic actors.25 This question of compatibility would, however, not arise as an issue for the question of immorality and invalidity regarding the horizontal

24 Ibid., nr. 300.
25 A striking parallel can be found between this issue and the debate about a distinction between product- and process-based regulation (i.e. the so-called ‘process-product’ distinction) in the WTO/GATT context. Process-based regulation refers to measures that are grounded, not in features of goods themselves —as is the case in product-based restrictions—, but in the process or production method by which they are produced (therefore also known as: process and production method (PPM)-based regulation). Previously, such PPM measures were deemed irremediably illegitimate, wrongful barriers to trade. However, they may now be justifiable under Article XX GATT, which concerns the general exceptions to the prohibition of trade restrictive measures and permits countries to adopt measures that are, among others, “necessary to protect public morals”. See on PPM measures in the WTO context Kysar (2004) and a expanding the issue from the WTO context to EU law, Davies, G., "Process and Product Method'-based Trade Restrictions in the EU’ in C Barnard (ed) Cambridge Yearbook of European Legal Studies (Hart Publishing, 2008). See on the general exceptions under Article XX GATT: Venzke, I., 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 12 German Law Journal 1111-1140.
relationship between the transacting parties and therefore falls beyond the scope of discussion.

4.2.3.2. Criticism: realistic representation and testability?

The case is meant to represent a regularly occurring transaction in the market, and at least realistic and representative for some transactions that occur on the market. Against the claim that the case design has a realistic factual basis, stands the claim that some features of the case raise doubt as to this point, making it a marginal and irrelevant case. The claim may, in particular, be directed at the occurrence of sweatshops in supply chains of clothes bought and sold by European citizens and/or to the awareness of contracting parties thereof. It can be argued that exchanges of clothes for money occur, in general, in ignorance of the conditions in the supply chain, at least on the side of the consumer. This claim could be informed by the belief that consumers would not buy clothes if they knew that the supply chain included sweatshops. In a similar line of thought, it may also be assumed that consumers would choose to return the clothes (i.e. raise non-conformity) if, after entering the contract, they would obtain knowledge of deplorable production conditions.\(^\text{26}\) In other words, the claim would criticize the case design for not occurring, or not occurring often enough to be of any significance.

The question as to which set of assumptions is most representative (quantitatively) is an empirical matter: this book does not set out to provide a decisive answer on this matter, but rather present a plausible case. To answer questions raised in this book, we need to show there are cases in which consumers do buy those clothes with knowledge of those conditions of production. Since information on the issue is readily available through renowned and popular media, it is plausible that a significant number of consumers is aware of the issue. There are at least two different factors that provide a basis to assume awareness, namely in cases where media extensively reported on deplorable production conditions in the supply chain of a particular company

\(^{26}\) For such cases, non-conformity questions are pertinent. See references in section 1.1.1.1, footnote 4.
or brand; or when terms of the contract raise doubt about the origin of the clothes, for instance the price paid for them.\textsuperscript{27}

Conversely, a claim can be made that the case design represents too many cases. Again, the plausibility of this claim depends on empirical data, on which this book provides no decisive answer. However, even if it is plausible that both the occurrence of sweatshop conditions is ubiquitous for all or most clothes bought and sold, as well as consumer knowledge thereof, this does not undermine the case design. The suggestion that the case design could somehow represent \textit{all} transactions on the market—an exaggeration of the previous claim—does not erode the relevance of the case for this book. The inclusion of many or most market transactions does not pose a problem for questioning the minimum standard of justice in contract law. And, the (in)frequency of transactions does not refute moral concern. However, the claim does raise the question of whether or not frequency of behaviour could be considered as an indicator for underlying values, and as a decisive factor for determining the values that inform the norms determining contractual invalidity. In addition, the inclusion of too many cases could be problematic on different grounds, for instance, the invalidity of many transactions on the market could be deemed problematic for economic activity.

Another pragmatic response to the case design is to ask how the issue will be raised in court. Under the assumption that the contract is mutually beneficial to contracting parties who in addition, are aware of the fact that the clothes exchanged are made in a sweatshop, it seems unrealistic that the issue of immorality and invalidity would be raised before a court. This question informs the claim that the question is only of theoretical relevance, and lacks interest in practice, because contracting parties will have no interest in the question’s answer. However, in this respect, the contract is not distinct from other contracts that are immoral and invalid. And even where neither contracting party raises the issue, a court often can and even must raise the issue of its own motion. No court will enforce a contract that is contrary to \textit{good morals or public policy}, even if the parties do not raise that

\textsuperscript{27} See on this issue section 4.1.2.1.

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matter themselves. The different roles that judges play, and the variances observed between common law and civil law procedures, have no bearing in this context, if the relevant facts of a case are presented to the court. For the objection to be effective, and render the significance of the question of contractual immorality and invalidity for the case design entirely bare, it would have to be shown that it is impossible for a court (currently and in the future) to have to consider a case similar to the sweatshop case; or, substantively, that the circumstances, as formulated, are in all cases evidently irrelevant for the court to consider.

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5. **Contractual immorality in Europe**

This chapter will test the hypothesis that a contract, although mutually beneficial to contracting parties, is invalid for immorality under current rules of contract law in Europe, if the parties exchange money against clothes that are made under sweatshop conditions. Since the courts in the jurisdictions under examination have not previously dealt with such a case, and, since it is not a case that easily fits with established categories of case law, the results presented in this chapter are largely conjectural. The assessment considers the likelihood of immorality and invalidity under current rules of contract law in Europe. This section—given the fact that the book employs a case-based method—restates the case study, as designed to test the hypothesis on the basis of which the legal systems are analysed; the sections that follow deal with the assessments under the respective legal systems.

*The hypothetical sweatshop case revisited: buying clothes made in sweatshops*

A consumer buys clothes in a retail store. The contract concerns a straightforward and commonplace transaction: an exchange of money for clothes. No special circumstances, which would affect the legal capacity of the contracting parties or the formation of the contract, pertain. The exchange is mutually beneficial to the contracting parties; the consumer and the retailer entered the contract in the absence of any circumstances that might compromise their consent. The clothes that are exchanged between the consumer and the retailer is made under production conditions that constitute a sweatshop, as described in Chapter 3. Both parties are aware that the clothes purchased have been made in a sweatshop. This knowledge does not constitute a reason for the contracting parties to refrain from entering the contract in the first place or from pursuing the enforcement of the contract in the event of a dispute. Is the contract immoral and on that ground invalid?

**5.1. The Netherlands**

Party autonomy is a descriptive point of departure for the rules of contract law in the Netherlands and is often accompanied in the same sentence with a reference to contractual freedom. The latter
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refers to the idea that parties are, in principal, free to arrange their relations by means of contracts, including the freedom to decide whether or not to transact; to freely choose contractual counter parties; and to give shape to the content, consequence and conditions of the transaction. Contractual freedom may, however, conflict with other principles, such as the idea that contractual relations must be socially acceptable. This principle holds that contractual validity presumes the contract’s compatibility with the society’s fundamental values, and is reflected in Dutch law by article 3:40 (1) Burgerlijk Wetboek (BW), which states that: “Een rechtszaken houding die door inhoudb str ing in strijd met de goede zeden of de openbare orde, is nietig.” Here, the legislator incorporated the concept of good morals, an open norm, leaving it to the courts to determine its substantive content with reference to the facts of a particular case. As such, the courts and case law are of particular importance to questions concerning contractual immorality. If a court holds a contract immoral, the contract is invalid whether or not the contracting parties raise the question

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1 Asser/Hartkamp & Sieburgh 6-III, (2010), nr.43; Loth (2009), nr.14.
2 Asser/Hartkamp & Sieburgh 6-III, (2010), nr.43.
The principle of 'maatschappelijke aanvaardbaarheid' is translated here as social acceptability.
3 Translation in Warendorf, H. et al., The civil code of the Netherlands, (Kluwer Law International, Alphen aan den Rijn 2009) Article 3:40 subsection 1, p. 447: "A juridical act which by its content or necessary implication is contrary to good morals or public policy, is a nullity."
4 In case law, good morals and public policy are not often distinguished. For the hypothetical case, further discussion on public policy is immaterial as public policy is only independently mentioned in cases involving the infringement of a legislative provision. As an exception see: Hoge Raad, 11 May 2001, NJ 2002,364 (OZF/AZL en AZL/Erven Maerman) where the HR referred only to public policy ("zo fundamentele beginselen van de rechtsorde" translated as “fundamental principles of the legal order), r.o. 4.4. In the case note, Hijma observed that this is a divergence from the practice to refer to good morals and public policy together. See case note from Hjima under nr.2. See on the distinction: van Kooten, H.J., 'Burgerlijk Wetboek 3, Artikel 40' inGroene Serie Vermogensrecht (2012), nr. 7.2; Asser/Hartkamp & Sieburgh 6-III, (2010), n. 330 and 345; Van Zeben, C.J. et al., Parlementaire Geschiedenis van het Nieuw Burgerlijk Wetboek, Boek 3, Vermogensrecht in het Algemeen (Kluwer, Deventer 1981), nr.191-192; Reehuis, W.H.M. and E.E. Slob, Parlementaire Geschiedenis van het Nieuw Burgerlijk Wetboek, Invoer boeken 3,5 en 6, Boek 3, Vermogensrecht in het Algemeen (Kluwer, Deventer 1990), p.1138-1142. 110
before the court.\textsuperscript{5} The ex officio application corresponds to the underlying idea that the invalidity of an immoral contract lies in the objectionability of the availability of state power for the enforcement, which can be described in terms of “the offence it would cause if the agreement would be realized by means of the law.”\textsuperscript{6}

5.1.1. Contractual immorality: content and necessary implications
Thus, notwithstanding contractual freedom, a mutually beneficial contract can be considered immoral under Dutch law on the basis of either its content, or its necessary implications, in which case the contract is invalid.\textsuperscript{7} In our hypothetical sweatshop case, there are no facts that support the immorality of the contract’s content. The contractual obligations of the consumer and the retailer in the hypothetical case are neither independently immoral nor in relation to each other (i.e. the exchange of clothes for money) and therefore the contract’s content is not objectionable.\textsuperscript{8} Namely, what the parties have obliged themselves to exchange, i.e. the performances to which parties have agreed, does not involve the performance of an immoral act: neither the obligation to pay money for clothes nor the obligation to supply clothes for money raises any issue of morality. Nor do the contractual obligations in relation to each other form an immoral exchange. An example of such a case involves for instance a case in which money is exchanged for things that are external to the market, i.e. things that cannot be exchanged for money, such as human organs.

The answer is not so obvious in relation to the question of the contract’s possible immorality regarding its ‘necessary implications’. In fact, there are reasons to suggest that the contract’s invalidity could and should follow, if a court considers the sweatshop conditions a form of objectionable exploitation.

\textsuperscript{5} Article 25 Wetboek van Burgerlijke Rechtsvordering (Dutch Civil Procedure Code). On the ex officio application of 3:40 (1) see further: Asser/Hartkamp & Sieburgh 6-III, (2010), nr. 312; Loth (2009), nr. 19; Van den Brink (2002), p. 35.
\textsuperscript{6} As articulated by advocate-general Langemeijer in the opinion to HR 16 November 1956, NJ 1957,1(De Vries/Van Kroon), p.7; also Van den Brink (2002), p. 35-36.
\textsuperscript{7} Similar to any other type of juridical act.

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These reasons relate to the fact that the necessary implications of a contract refer not only to the motives of contracting parties, but also to the contract’s foreseeable consequences. The facts of our hypothetical case do not call into question the morality of the parties’ motives, and may be assumed to be similar in nature to the typical reasons parties have for buying or selling clothes (e.g. to be clothed, to follow the latest trends; to generate income and profit). This would only be different, if the hypothetical case would be designed to include the specific, and rather unusual, intentions of parties to engage in the exchange specifically in order to exploit others elsewhere by having them produce clothes in sweatshops. The factual basis would then be very much unlike common market transactions, and more similar to the typical, yet unrealistic, illustration of a case in which parties exchange money for a ordinary kitchen knife, with regard to which the buyer expresses the intention to harm a third person. The contract’s invalidity in our hypothetical sweatshop case could be based, instead, on the immorality of the contract’s foreseeable consequences for others elsewhere.

5.1.2. The exploitation of third parties

In the Sibelo/Lamet case the Hoge Raad referred explicitly to the fact that a contract is immoral and invalid, if its foreseeable consequences constitute facilitation of the exploitation of third parties. Although the case itself did not bring to the fore facts that provided sufficient support for such a decision, this may be different in our hypothetical case.

In the Sibelo/Lamet case, Lamet had agreed to buy a sex club, Club 13, from Sibelo for the price of 35,000 Dutch guilders. The price was primarily determined by the sex club’s goodwill, which was based on the potential profit Club 13 could generate. In turn, this profit was significantly based on the fact that Lamet would receive payments for the use of two rooms for use by prostitutes. The Court of Appeal declared the contract void,

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10 This is the classic illustration of a contract that is invalid due to its immoral implications. See: Van Zeben et al. (1981), p.190; also Van den Brink, V., ‘Artikel 3:40 onder het mes?’ (2012) 44 Nederlands Tijdschrift Burgerlijk Recht.
11 Hoge Raad 2 February 1990, NJ 1991, 265 (Sibelo/Lamet; Club 13).
because the transaction entailed the exchange of money for the possibility to deliberately bring about or advance prostitution.\textsuperscript{12} Although the Hoge Raad overruled the decision on the basis of the considerable changes in popular opinion regarding prostitution, it made explicit reference in the judgment to the contract’s possible invalidity on the basis of its immoral foreseeable consequences. Notably, the Hoge Raad stated that the contract could have been invalid on the basis of an infringement of \textit{good morals}, if it paved the way for or advanced the exploitation of prostitutes or abuses of other kinds.\textsuperscript{13}

Taking this decision into account, the invalidity of the contract in our hypothetical sweatshop case is not implausible. Namely, the contract’s foreseeable consequences could be considered immoral, if the facts of the case show that it advances the exploitation of workers in sweatshops. If the courts consider the exploitation of workers in sweatshops immoral, the contract should be held invalid. Thus even though both consumer and retailer may be in agreement concerning the existence of mutual contractual obligations between them, in the event of a dispute, a court may find the contract to be immoral due to its necessary implications for third parties and refuse to lend its support for its enforcement. Under Dutch law, the fact that the sweatshop workers are third parties to the contract that is assessed does not preclude the application of article 3:40 BW. The interests of third parties are not beyond the frontiers of consideration for questions of contract law and a court can consider a contract invalid under article 3:40 (1) BW, on the basis of its immoral foreseeable consequences for third parties.

Indeed, for questions of contract law the interests of third parties can be of significant weight beyond concerns of contractual immorality. For instance, in the \textit{Negende van Oma} case the \textit{Hoge Raad} considered whether or not the municipality of Vlaardingen was contractually obliged to place a work of art on an

\textsuperscript{12} At the time, the intention to drop the so-called brothel-prohibition in the Dutch Criminal Code was in a far advanced stage, yet the court of appeal held that the contract’s invalidity followed from the enforcement of that prohibition. Ibid., r.o. 2.2.

\textsuperscript{13} Ibid., r.o. 3-3. The facts of the case in question, however, did not substantiate that this was the case.
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apartment building. The residents of the apartment building were elderly people, and third parties regarding the contract between Vlaardingen and the artist. They felt denigrated and stigmatized by the word ‘Oma’ (which means ‘grandma’), which would be placed on their building, and consequently objected. The Court of Appeal considered their objections so weighty that, in accordance with good faith they should prevail over the interest of the artist, a contracting party, in having the work displayed. In this case, the Hoge Raad confirmed that the interests of third parties were to be considered when determining the existence of rights and obligations between contracting parties.

5.1.3. **What is foreseeable?**
Under Dutch law the parties’ knowledge in our hypothetical sweatshop case proves to be a crucial requirement for the contract’s immorality and invalidity. Namely, in order for the contract to be considered immoral and invalid, it is required that both contracting parties were aware of the contract’s immoral implications. The Hoge Raad articulated this requirement in Burgman/Aviolanda, in which it overruled the decision of the Court of Appeal in view of the latter’s decision that the good faith of one party was irrelevant for the contract’s invalidity. Although this case concerned the infringement of a statutory prohibition, the knowledge requirements regarding the contract’s necessary implications can generally be regarded as applying also to foreseeable consequences that are immoral yet not prohibited.

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15 Hoge Raad 11 May 1951, NJ 1952,128 (Burgman/Aviolanda). Aviolanda, a manufacturer of airplane parts, was to manufacture 250,000 hair combs for Burgman, which fell outside its normal operational activity. Under Dutch law, Aviolanda was only permitted to do so, if she obtained a license. Aviolanda was not granted such a license and therefore could not lawfully manufacture the goods ordered by Burgman. Burgman claimed the termination of the contract as well as damages on the ground that Aviolanda had failed to perform its obligations under the contract. Before the court of appeal Aviolanda brought forward the defence that the contract was invalid on the basis of articles 1356 (4) and 1371 of the Old BW (now 3.40 BW), which required a lawful cause. In turn, Burgman had argued that she was unaware of the fact that the required license had not been obtained, and of the fact that Aviolanda was not permitted to produce the combs.

16 See Hoge Raad 2 February 1990, NJ 1991, 265 (Sibelo/Lamet; Club 13), section 5.1.2.
In Burgman/Avioland the Hoge Raad held that the contract could be invalid due to its necessary implications only if both parties pursued, or were aware that the performance of the contract would lead to, the infringement of a prohibition.\footnote{Hoge Raad 11 May 1951, NJ 1952,128 (Burgman/Avioland).} For cases that concern a violation of good morals not relating to a statutory prohibition — such as the contract in our hypothetical sweatshop case — the contract’s invalidity depends on the question of whether both contracting parties were aware of the implications of the contract’s performance.

Although, in relation to our hypothetical sweatshop case, the contracting parties had knowledge regarding the sweatshops conditions under which the product is made, it should be noted that it has been subject of debate whether or not the foreseeability of the contract’s necessary implications, entails a normative and objectified standard, i.e. that the parties should have been aware. Most authors hold that in order for a contract to be considered immoral and on that ground invalid under Dutch law, it suffices that parties should have been aware of the contract’s immoral implications.\footnote{See for instance in Asser/Hartkamp & Sieburgh 6-III, (2010), nr.325; van Kooten, in Groene Serie Vermogensrecht, art.3:40 Strijd met goede zeden, openbare orde of wet, aant.7.6; van Schaick in Busch, D. et al. (eds), The Principles of European Contract Law (Part III) and Dutch Law (Kluwer Law International, The Hague 2006), chapter 15, p. 246.} Until recently, however, the Hoge Raad had not been explicit on the matter. In previous case law, notably in the Verkerk/van der Veen case, the Hoge Raad put this question aside.\footnote{The Hoge Raad left the question unanswered in Hoge Raad, 28 June 1991, NJ 1992, 787 (Verkerk/Van der Veen), r.o. 3.2.} In this case note, Brunner reflected further on the issue, stating that: “The appraisal that someone should have been aware or must have been aware is not merely a normative attribution of not-knowing, but also and primarily a rule of evidence for the factual judgement as to whether he knew or with great certainty suspected what he states not to have known.”\footnote{Case note Brunner, nr.2. “Het oordeel dat iemand iets behoorde te weten of moest weten, is niet slechts een normatieve toekenning van niet-weten, maar ook en vooral een bewijsregel voor het feitelijk oordeel dat hij wist of met grote waarschijnlijkheid vermoedde wat hij zegt niet geweten te hebben.”} In Brunner’s phrasing, a distinction can be found between the strictly normative statement that 1) someone should have been aware and the presumption of
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facts 2) that someone must have been aware of the contract’s implications. However, the potential importance of this distinction appears to have been superseded by more recent case law, in which the Hoge Raad has held that the fact that parties should have been aware of the contract’s immoral implications suffices for contractual invalidity.

As noted previously, this is not of decisive importance for the contract in our hypothetical sweatshop case. However, for situations in which the parties do not expressly state that they knew that the clothes purchased were made in a sweatshop, it remains to be seen what facts, or their combined concurrence, would be sufficient for the claim that the contracting parties must have known of the contract’s consequences. It seems highly unlikely that a court would consider the mere fact of a product’s low price sufficient for such claim.

5.1.4. How to concretize good morals?
So far, we have seen no principled obstacles under Dutch law for the immorality and invalidity of the contract in our hypothetical sweatshop case: neither the parties’ knowledge requirements nor the fact that the necessary implications concern third parties constitute an obstacle. However, the statements of the Hoge Raad in Sibelo/Lamet concern the exploitation of third parties in the Netherlands and our hypothetical case may be assessed differently, because the sweatshops is located beyond the national borders. And thus the question remains whether or not a court would deem the exploitation of individuals in sweatshops located

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21 The distinction may be of importance. Namely, for the latter statement, the burden of proof is relevant, since the question whether someone actually has knowledge is relevant, whereas for the former (normative) statement, a parties’ factual ignorance is not.

22 See Hoge Raad, 28 October 2011, RvdW 2011, 1314 (Ponzi-scheme); and Hoge Raad, 1 June 2012, RvdW 2012, 765 (Esmilo/Mediq), notably the Opinion, Advocate General Wissink, nr.3.27.

23 Compare the Hoge Raad, 28 October 2011, RvdW 2011, 1314 (Ponzi-scheme) case. The case concerned a loan agreement from which one party (an investor) received excessive interest, which was generated by the borrower through a so-called ponzi-scheme (a fraudulent investment scheme). The apparent disproportionate interest rate, did not suffice for the claim that the investor must have been aware of the ponzi-scheme, nor for the claim that the interest rate should have motivated the investor to conduct further research into the practices of the borrower.
elsewhere immoral and the contract on that ground invalid. In other words, is the necessary reliance by contracts governed by Dutch law on sweatshops located in other countries considered as contrary to good morals?

Since good morals is a rather open textured concept, its content cannot be described through an abstract definition.\(^24\) The absence of clear guidelines for interpretation complicates the articulation of its substance in light of a new case, such as the hypothetical sweatshop case. Generally, the concept of good morals is described in reference to the sources that can and cannot be used as direct reference points. For the hypothetical case it is of relevance to note that alongside ideologies and religious doctrines,\(^25\) ethical theories have no direct impact on the legal standard of good morals.\(^26\) Such sources can influence the legal standard of good morals only indirectly through common social opinion, prevalent in Dutch society (see below). Thus, although the moral arguments regarding the moral status of sweatshops, described in Chapter 3 cannot directly inform the standard of contractual immorality, they can be relevant insofar as they are endorsed, as a matter of common social opinion in Dutch society. It is, however, more difficult to work out how one can establish what ‘common social opinion’ is for any particular case.

Common social opinion is described predominantly to consist of those moral viewpoints that enjoy the largest degree of consensus in a society. According to Van den Brink, this formula is understood implicitly as referring to majority opinion.\(^27\) Although Van den Brink seems to agree with this interpretation of good morals, he describes common social opinion in different terms, referring to a minimum degree of consensus in social opinion regarding morality.\(^28\) Regardless of these divergences, it remains rather obscure as to how one can fathom the degree of consensus (whether majoritarian or minimum) that exists regarding moral views. This is particularly true in relation to new concrete cases,
such as the sweatshop case. The degree of consensus regarding moral viewpoints is moreover subject to divergence and evolution over time and place, and current Dutch society seems to be increasingly pluralistic in this regard. Thus, in this context the hypothetical sweatshop case may not only exemplify a ‘new’ case with regards to the facts, but also as a case that brings to the fore possible changes in moral viewpoints. Of course both developments are mutually interdependent.

The moral views that are at stake in cases of contractual immorality are those deemed fundamental to the social fabric of society. These views are often described as those that are part of common social opinion regarding basic decency (‘het maatschappelijke oordeel omtrent hetgeen behoort’) as related to Dutch society. Since the degree of consensus in social opinion with regard to our hypothetical sweatshop case is not prima facie evident, the content of good morals is to be found in the fundamental values that are encompassed within the legal system. When considering the potential infringement of goods morals or public policy under article 3:40 (1) BW, the Hoge Raad also uses the language of ‘fundamental principles’ within the legal order. In this context, courts are likely to rely on objective sources, i.e. treaties, legislation, case law and general principles of law, which express a society’s common social opinion over time. Although special importance is to be given to written sources of law that refer to fundamental rights, Dutch courts have only rarely

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30 Loth (2009), nr. 16; Hoge Raad 2 February 1990, NJ 1991, 265 (Sibelo/Lanet; Club 13); Hoge Raad, 7 September 1990, NJ 1991, 266 (Catoochi).
31 Nevertheless, in Asser/Hartkamp & Sieburgh 6-III, (2010), nr. 330 the assumption is made that an overall consensus can (still) be found as to what is considered decent in most cases.
See also the discussion by Van den Brink (2002), p. 129-130.
33 Asser/Hartkamp & Sieburgh 6-III, (2010), nr. 330-331; Groene Serie, aant. 7.2.
35 See footnote (4) and recently in ‘Esmilo/Mediq’ (see footnote 22, r.o. 4.4.). This case involved a contract requiring a performance contrary to a statute. The Hoge Raad confirmed that under article 3:40 (1) BW a court must consider whether such a contract is, amongst others, contrary to the fundamental principles of the legal order, constituting an infringement of good morals or public policy.
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referred to such sources directly.\textsuperscript{37} An example is provided by the Mensendieck case in which the Hoge Raad considered whether a contractual clause that prohibited a contracting party from teaching a paramedical therapeutic method, the Mensendieck method, infringed the party’s right to education (European Convention on Human Rights, First Protocol, Article 2).\textsuperscript{38} Although the Hoge Raad held that the contract did not infringe the party’s fundamental right, the case is an example of the court’s consideration of fundamental rights in articulating the concept of good morals. Another example of the effect of fundamental rights on private relations came to the fore in the Valkenhorst case in which the Hoge Raad recognized a general personality right, which granted a child the right to ascertain the identity of her biological parents.\textsuperscript{39} The child’s (fundamental) right offset the private obligation that Valkenhorst held to keep such information secret in relation to the mother. This case suggests that the fundamental rights of third parties may have an effect on the private obligations that contracting parties possess with regard to each other.

As such, fundamental rights may be of special importance for the articulation of contractual immorality in the sweatshop case. The European Convention on Human Rights contains explicit articles on the prohibition of slavery and forced labour (Article 4) and the right to freedom of assembly and association, which includes the right to form trade unions (Article 11). Similarly, such fundamental rights are articulated in the fundamental conventions of the International Labour Organization, to which the Netherlands is a party.\textsuperscript{40} To the extent that Dutch courts take account of the interest of third parties in determining whether or not a contract is immoral and invalid, they may do so in light of


\textsuperscript{38} A studentmember of the Mensendieck Union (‘Nederlandsche Mensendieck Bond’) had failed to comply with the requirements of the Union to become a certified mensendieck fysiotherapist teacher, and consequently, she was prohibited from teaching mensendieck lessons on the basis of the contract. The student however, presented herself as a mensendieck teacher by, first assisting her mother who was a certified mensendieck teacher, and later starting her own practice. The Mensendieck Union then obtained an injunction to stop the student’s teaching mensendieck exercises in her practice.

\textsuperscript{39} \textit{Hoge Raad, 15 April 1994, NJ 1994, 608 (Valkenhorst II)}, r.o. 3.2.

\textsuperscript{40} See discussion in section on German law.
fundamental rights. There is no principled reason why the geographical location of those third parties would thwart such consideration, particularly, where it concerns universal fundamental rights.

Nevertheless, there is no case law in which a court articulated contractual immorality explicitly in reference to fundamental rights of third parties who were not engaged in the dispute in question. Thus, the explicit consideration of contractual immorality in light of fundamental rights in our hypothetical case seems unlikely.\textsuperscript{43} The absence thereof, however, does not preclude the relevance of the expressed values of in Dutch society through universally endorsed fundamental rights.

Moreover, there is no indication that the fact that the sweatshop is located elsewhere (beyond the geographic borders of the Netherlands) should be of decisive relevance for the evaluation of the contract on the basis of 3:40 BW. The concept of good morals should be established on the basis of the norms that are prevalent in the community in which the norms are applied.\textsuperscript{42} And in terms of the values fundamental to Dutch society, neither objective sources (universal fundamental rights) nor expressions in public opinion suggest that sweatshops located beyond national borders are exonerated from scrutiny, merely because of their distanced location.

What is considered to be immoral in the hypothetical sweatshop case depends both on (developments in) common social opinion and the values of society that have been expressed in objective sources. Whether or not the contract will be held invalid, depends on how a court will weigh the interest of society in eschewing transactions, for products made by means of third party exploitation, recognized and enforced with support of State power, against the interests of contracting parties in realizing such a transaction through law. Where sweatshops are the subject of (increasing) moral scrutiny, society may come to view the

\textsuperscript{43} One may more reasonably expect such references in cases that entail an alleged infringement of a contracting party’s fundamental right. E.g. Hoge Raad, 31 October 1969, NJ 1970, 57 (Mensendieck I); Hoge Raad, 18 June 1971, NJ 1971, 407 (Mensendieck II). See also Mak (2008), p.30-31 and 83-86, Van den Brink (2002), p.211.


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enforcement of contracts for products made in sweatshops through law, as offensive.

5.1.5. Concluding remarks: contractual invalidity on the basis of third party exploitation

A court may hold the contract in the hypothetical case invalid for immorality under Dutch law. This could be the case if a court considers the performance of the contract to advance the exploitation of third parties, i.e. those who work in sweatshops, and for that reason the court could declare the contract immoral and invalid. In other words, a court could consider the advancement of third party exploitation in sweatshops to be an immoral necessary implication of the contract, i.e. an immoral foreseeable consequence, and therefore invalid. The contracting parties’ awareness is a decisive factor in the analysis. In the event that parties would not confirm that they were aware that the clothes exchanged were made in a sweatshop, other factual circumstances of the case would be the determining factor as to whether or not a court would hold that the parties should have been aware. The standard of good morals may be articulated in light of the fact that the exploitation relates to the infringement of fundamental rights, but would depend ultimately on whether the court would regard the moral views that are at stake in the case as fundamental to Dutch society.

5.2. Germany

Freedom of contract in Germany is regarded as the expression of private autonomy and the fundamental right to give shape to and develop one’s personality.43 In principle, private parties are free to engage in market transactions, such as the exchange of money for clothes, as they see fit. However, this freedom is not absolute, and demarcated by, not only the rights of others, but also, by the ethical norms fundamental to the German legal order.44

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43 Grundgesetz für die Bundesrepublik Deutschland: Article 2 subsection (1): Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt. Armbrüster, ‘Münchener Kommentar zum Bürgerlichen Gesetzbuch (BGB) 6. Auflage 2012’ in(Beck Juristischer Verlag, 2012), Rn. 20; Köhler (2009), p.32 et seq.
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German legislator ensured the protection of the fundamental values of the legal order from infringement by private agreements, by including the concept of good morals in the German Bürgerliches Gesetzbuch (BGB).\(^6\) Article 138 I BGB holds that contracts (more broadly: juridical acts), which infringe good morals, are invalid: “Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.”\(^4\) Thus, although the contracting parties are in principle free to exchange money for clothes, this freedom may be curtailed if the exchange is deemed contrary to the ethical norms that form the foundations of the German legal order, in short, if the contract is considered immoral.

The German concept of good morals is articulated as a general clause and its content is to be established by courts in light of the circumstances of a particular case.\(^5\) A German court must determine ex officio whether a contract is immoral and invalid.\(^6\) Over time, scholars developed different categories (Fallgruppen) of immoral contracts as they emerged in case law.\(^7\) Case law thus plays an important role for questions concerning contractual immorality.\(^8\) Of particular interest for the sweatshop case is the distinction between contracts deemed immoral in light of the interests of contracting parties and contracts that have been

\(^4\) Next to the purpose of §138 to protect these fundamental values on which the legal system is built, an additional aim is found in the deterrence of those who wish to pursue immoral aims through their contracts. The legal order does not facilitate such contracts, which are considered to reflect an abuse of party autonomy (freedom of contract). §138 is considered a significant contribution to the protection of values, even though the legal order has alternative ways in which to uphold its fundamental values from abuse of private autonomy (regulation in the area of public law offers alternatives) see: Armbrüster (2012), Rn. 1-2.

\(^6\) A juridical act, which is contrary to good morals, is void. Although the article does not explicate it, it also includes juridical acts, i.e. contracts, that are against ‘ordre public’. Ellenberger (2010), Rn. 3.

\(^5\) Ibid., Rn. 1, Armbrüster (2012), Rn.1; Teubner, G., Standards und Direktiven in Generalklauseln (Athenäum Verlag, 1971).

\(^6\) Ellenberger (2010), Rn. 21; also Armbrüster (2012), Rn. 9 and Rn. 155.

\(^7\) There is no uniform system of categorization and categories generally overlap and exclude many individual cases, which do not fit neatly within any category.

\(^8\) The important role of the judiciary is reflected in the Delegationsfunktion of the general clause good morals, as identified by Teubner. The delegationsfunktion refers to the fact that the legislator delegated the concretion of the concept of good morals for specific cases to the judiciary. Teubner (1971), Part IV Erörterung der Funktionen. Current commentaries to the BGB still make reference to the three functions Teubner identified. See for example: Armbrüster (2012), Rn.3.
deemed immoral and invalid in light of general or third party interests.\textsuperscript{51}

5.2.1. \textit{Das Gesamtcharakter: the interests of third parties and society}

In principle, the contract in our hypothetical sweatshop case can be held invalid under German law, in spite of the fact that the question of contractual immorality is not raised because the contracting parties’ interests are at stake. On the basis of §138 I BGB, courts will look at a contract’s ‘Gesamtcharakter’ (further: comprehensive character).\textsuperscript{52} Important factors that constitute a contract’s comprehensive character are: objective content, the motivations and purposes of the contracting parties, as well as the circumstances that have led to the conclusion of the contract.\textsuperscript{53} Contractual immorality need not follow from any one of these features considered separately, but may be based on the way in which different aspects of a specific case contribute to its character. The contract’s implications for third parties, or society as a whole, reflect one aspect of a contract’s character and are thus to be taken into account in the assessment of a contract’s validity.\textsuperscript{54} It is thus relevant whether or not the terms of a contract, or the particular circumstances of a case, lead to the exploitation of others under German law.\textsuperscript{55}

5.2.2. \textit{Knowledge requirements}

A court is likely to consider the knowledge of contracting parties in the sweatshop case to be of particular salience in asking the question of contractual immorality. Namely, for contractual

\textsuperscript{51} Ellenberger (2010) p.132 distinguishes Fallgruppen on the basis of immorality against counter parties and immorality against general and third party interests. Palandt distinguishes different Fallgruppen on the basis of this distinction.

\textsuperscript{52} Armbrüster (2012), Rn. 9 (Umstandssittenwidrigkeit); Ellenberger (2010), Rn. 7-8 and 40 (Gesamtcharakter); Köhler (2009), Rn. 22, p.192 (Gesamtwürdigung). The only exception is made where contracts are deemed contrary to good morals on the basis of their objective content (Inhaltssittenwidrigkeit).

\textsuperscript{53} Armbrüster (2012), Rn. 9, Ellenberger (2010), Rn.8, Köhler (2009), p.192.

\textsuperscript{54} Ellenberger (2010), Rn.40 et seq.

\textsuperscript{55} Similar to the case under Dutch law (section 5.1.2), the Bundesgerichtshof held that agreements for rent of a brothel were valid, unless the terms of the contract (e.g. the high rent) would lead to the exploitation of the persons working there. See: Bundesgerichtshof 1 January 1975 BGH NJW 1975, 638.
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immorality to have a bearing on the exchange between consumer and retailer, it is required that both parties knew of the facts that underlie the immorality associated to general or third party interests.56 Accordingly, in the sweatshop case, the parties’ awareness of the fact that the object of sale was made in a sweatshop is of decisive importance in order for a court to consider the contract’s possible invalidity. But under German law, the contracting parties need not have been aware of the infringement itself or of the harm that is caused. For contractual immorality to have a bearing on the case, it suffices that the parties were consciously or grossly negligent as to obtaining knowledge of these facts.57 Whether the contract in the sweatshop case will be considered immoral depends on how a court will consider sweatshops in light of the fundamental ethical values that provide the basis for the German legal order.58

56 Ellenberger (2010), Rn. 8. BGH NJW 2005, 41, p. 2992 (see footnote 57). Also: BGH NJW, 90, 9, p. 568. The case involved a lease contract for a guesthouse, the price of which was based on a minimum required sale of beer. The court of appeal deemed the contract immoral because it was against the interests of others and society (in light of societal, health and social implications), as it was possible or even likely that the keeper would for instance sell alcohol to minors in order to meet the minimum amount of sales. The Bundesgerichtshof held that the agreement was not contrary to good morals since the case did not bring forward any facts that supported the claim that both parties indeed engaged in immoral activities, or were aware of those activities. “(…) die Vorschrift des §138 i BGB unter der Gesichtspunkt der Verletzung von Interessen der Allgemeinheit oder Dritten grundsätzlich nur anwendbar ist, wenn alle Beteiligten sittenwidrig handeln, also die Tatsachen kennen oder sich zumindest ihrer Kenntnis grob fahrlässig verschliessen, die die Sittenwidrigkeit des Rechtsgeschäfts begründen.”, p. 568.
57 Ibid. And Köhler (2009), p.193, Rn. 23. Standard German case law holds that it is sufficient if the parties were consciously or grossly negligent with regard to the facts underlying the immoral character of the transaction. See for instance in the case of stolen goods Bundesgerichtshof 9 October 1991 NJW 92, 310 (Stolen goods) or with regard to the inexperience of an older consumer Bundesgerichtshof 29 June 2005, NJW 2005, 41 in which the court refers to the fact that “(…) das Bewusstsein der Sittenwidrigkeit noch eine Schädigungsabsicht erforderlich, es genügt vielmehr, wenn der Handelnde die Tatsachen kennt, aus denen die Sittenwidrigkeit folgt; dem steht es gleich, wenn sich jemand bewusst oder grob fahrlässig der Kenntnis erheblicher Tatsachen verschliesst.”, p.2992.

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5.2.3. **Good morals: die Gesamtbewertung**

Under German law, the legal norm of good morals reflects a minimum basis of shared ethical norms that is considered a precondition for, and therefore fundamental to, German society.\(^5^9\)

The concretization of good morals results from the interaction between ethical norms in the legal order and social order.\(^6^0\) In the evaluation of the contract’s morality in the sweatshop case, a court would take account of all the moral conceptions of the social and legal order that are relevant to its particular facts.\(^6^1\) This means, in particular, that a court may take account of (changing) norms in the German social order regarding exchanges of money for clothes produced in sweatshops.\(^6^2\)

It is likely that, consistent with case law involving contractual morality under German law, a court would make use of the so-called *Anstandsformel* in the wording of the assessment: "das Anstandsgefühl aller billig und gerecht Denkenden"\(^6^3\). Although *die Anstandsformel* is criticized and questioned for its lack of determinate guidance\(^6^4\) current commentaries attribute the

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62 ‘Die Gesamtbewertung’ reflects that the concept of good morals does not only reflect values that have absolute protection under the law, under those conditions contracts are not immoral, but illegal (§344 BGB).

63 Next to the Delegationsfunktion (see above), Teubner identified the Rezeptionsfunktion, which refers to the legal significance given to norms and norm structures external to the legal order through good morals; and the Transformationsfunktion, which refers to recognition of the transformation of norms in society in the legal norm of good morals. G. Teubner, Standards und Direktiven in Generalklauseln, Athenäum Verlag, 1971, Part IV Erörterung der Funktionen.

64 Ellenberger (2010), Rn.2, Köhler (2009), p.191; Armbrüster (2012), Rn. 14; For a historical discussion see Teubner, section 4.4; see for an example of a recent reference by the Bundesgerichtshof: BGH NJW 2009, 19, p. 1346, §10: "Die Frage der Sittenwidrigkeit nach § 138 Absatz 1 BGB beurteilt sich danach, (...) dass es dem Anstandsgefühl aller billig und gerecht Denkenden widerspricht."


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exclusion of certain methodologies through which to define contractual morality to this legal formula. Notably, contractual morality cannot be based on widespread practices or beliefs, as they would emerge from public opinion polls or empirical research.\textsuperscript{65} This methodological exclusion is of relevance to the sweatshop case because it shows that the transaction’s empirical frequency, i.e. the sale of clothes produced in a sweatshop for money, cannot on its own rebut the immorality of the transaction and its invalidity under §1381 BGB.\textsuperscript{66}

Moreover, although developments in moral convictions can and do take place in the social order, the legal order, and in particular the German Constitution is the primary source and point of reference for interpreting the legal norm of good morals.\textsuperscript{67} This primacy follows not only from procedural reasons, i.e. a judge is bound primarily by the law,\textsuperscript{68} but also from substantive reasons, i.e. the legal order is presumed to encompass the ethical values that have been, over time, fundamental for a society.\textsuperscript{69} Therefore, the primacy of the legal order does not express its prevalence over the social order; it is more of a reflection of the moral conceptions that have been, over time, of central importance to the social order itself.

Especially, in light of the fact that it is not prima facie evident that a contract for the sale of clothes produced in sweatshops is considered immoral and unacceptable in the German society, the German Constitution (GG) forms an important starting point for its assessment. The Bundesverfassungsgericht referred to the GG as the primary source for the interpretation of general clauses in the BGB in its seminal Lüth judgment. The court held that it is primarily the values articulated and enacted by society in the Constitution are to guide the concretization of general clauses in civil law by courts, explicitly referring to the interpretation of the concept of good morals.\textsuperscript{70} Courts should consider both the articulation of specific

\textsuperscript{65} Armbrüster (2012), Rn. 14, suggested differently by Teubner.
\textsuperscript{66} ibid., Rn. 14.
\textsuperscript{67} Ellenberger (2010), Rn. 3.
\textsuperscript{68} Köhler (2009), Rn. 20 (Reference to Art. III, 20, III GG).
\textsuperscript{69} See reference to Lüth case footnote 70.
\textsuperscript{70} BverfGE 7, 198 (206) Rn. 29 =NJW 1958, 257. "Die Rechtsprechung bieten sich zur Realisierung dieses Einflusses vor allem die "Generalklauseln", die, wie §826 BGB, zur 126
constitutional rights, as well as the overall purpose of the constitution.\textsuperscript{71}

With regard to the sweatshop case, Articles 1 (human dignity); 2 (1) (development of personality); 9 (freedom of association); 12 (the right to choose an occupation freely without threat or coercion) and 20 (the \textit{Sozialstaatlausel}) GG are of particular relevance. The first article refers to the obligation of all forms of state power to respect and protect the human dignity of \textit{all people}.\textsuperscript{72} Similarly, Article 2 (1) is interpreted to reflect the right of individuals to contract freely with others. This freedom is restricted, in the same article, by the rights of others and the GG’s underlying moral order.\textsuperscript{73} Conversely, Articles 9 and 12 regarding freedom of assembly and occupation are not formulated as rights for all people, but rather as rights applicable to German citizens. Article 20 encompasses the so-called \textit{Sozialstaatlausel} that characterizes the fundamental form of the German state as a social state.\textsuperscript{74} Furthermore, with regard to the assessment of the contract in the sweatshop case, the fundamental values as expressed on a European level, for example in the European Convention on Human Rights, may also play a role for the interpretation of good morals.\textsuperscript{75} For example, the right to free

\begin{footnotesize}
\begin{itemize}
\item Beurteilung menschlichen Verhaltens auf ausser-zivilrechtliche, ja zun\‘ächst "uberhaupt ausserrechtliche Massst\‘abe, wie die "Guten Sitten", verweisen. Denn bei Entscheidung dari\‘er, was diese sozialen Gebote jeweils im Einzelfall fordern, muss in erster Linie von der Gesamtheit der Wertvorstellungen ausgegangen werden, die das Volk in einem bestimmten Zeitpunkt seiner geistig-kulturellen Entwicklung erreicht und in seiner Verfassung fixiert hat."\textsuperscript{76}
\item Armbr\‘ster (2012), Rn. 20, Ellenberger (2010), Rn. 3-5.
\item Grundgesetz f\‘ur die Bundesrepublik Deutschland, Article 1: (1) Die W\‘rede des Menschen ist unantastbar. Sie zu achten und zu sch\‘utzen ist Verpflichtung aller staatlichen Gewalt.
\item Das Deutsche Volk kennt sich darum zu unverletzlichen und unver\‘a\‘erlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.
\item Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.
\item See footnote 43.
\item Armbr\‘ster (2012), Rn. 16, Ellenberger (2010), Rn. 2, K\‘ohler (2009), Rn. 19. For a comprehensive discussion of the way in which general clauses function as a gateway for the effects of fundamental rights in contract law, see Mak (2008), and Busch, C. and H. Schulte-N\‘olke (eds), \textit{Fundamental Rights and Private Law} (Sellier, Munich 2011) represents a practical tool on the subject for judges.
\end{itemize}
\end{footnotesize}
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association is recognized in the European Convention on Human Rights as a right for all in Article 11 and Article 4 refers to the prohibition of slavery and forced labour.\textsuperscript{76}

In the context of the sweatshop case, a court is to consider whether or not the freedom of contracting parties is restricted by the rights of others and the moral values as expressed in these instruments. The standard of good morals in §138 is articulated on the basis of values that are found within German society and the German legal order.\textsuperscript{77} In principle, the norms of the sweatshop’s country of origin are immaterial.

5.2.4. **German interest: Borax and Nigerian cultural heritage**

Although the norms articulated in foreign legal orders are, in principle, immaterial to the German concept of good morals, the fact that the sweatshop is located beyond German borders may not be entirely irrelevant. In the *Borax* case the *Bundesgerichtshof* considered a contract’s morality in light of the question of whether a German interest was at stake.\textsuperscript{78} This case concerned a contract for the sale of borax, a substance that is used in the process of generating nuclear power, among other uses. The contract between an American export company and a German importer, infringed an American export prohibition targeting the market of Eastern bloc countries.\textsuperscript{79} In evaluating the contract, the *Bundesgerichtshof* considered whether the purpose of the American legislation included an interest of vital importance to Germany. The *Bundesgerichtshof* asked whether a German interest was at stake in the potential export of borax to Eastern bloc countries. If this were the case, the *Bundesgerichtshof* reasoned,

\begin{itemize}
  \item European Convention on Human Rights, Article 4 & 11.
  \item Ellenberger (2010), Rn. 3, Armbüster (2012) Rn. 16.
  \item *Bundesgerichtshof* 21 December 1960, BGHZ 34,169/NIW 1961, 822 (Borax).
  \item Namely, the seller, an American export company, required a license to export borax, which would not have been issued if the borax was intended for the market of Eastern bloc countries. The license was conditional upon the buyer’s provision of a statement regarding the location of the borax and its final destination of use. If the buyer intended to sell the substance to a third party, a similar statement was required from the third party, replaceable by an explicit guarantee of the buyer that the borax would not be delivered directly or indirectly to countries in the Eastern bloc. In the case in question, the third party refused to provide the required statement, and the German importer refused to provide the explicit guarantee. Subsequently, the American exporter refused to proceed with the delivery.
\end{itemize}
then the American prohibition would include the protection of a German interest and the contract would be contrary to good morals (§138). The Bundesgerichtshof held that, although the prohibition did not specifically protect German interests, the latter was at stake since the strengthening of Eastern bloc countries in times of war was contrary to the German interest at that time during the Cold War. The Bundesgerichtshof referred to the interests of the West as a whole, which included German interests.\textsuperscript{80}

The Bundesgerichtshof also addressed the question of German interest in another case regarding the morality of a contract.\textsuperscript{81} The Nigerian cultural heritage case concerned an insurance contract for the transport of Nigerian objects of art over sea.\textsuperscript{82} Several artefacts were lost en route from Nigeria to Germany, for which the transporter claimed insurance compensation. At the time, however, a Nigerian export prohibition was in place for Nigerian cultural heritage, and the insurer argued that the contract was invalid on the basis of §138, because it infringed the prohibition. The Oberlandesgericht (Court of Appeal) Hamburg disagreed holding that the contract was not immoral and invalid on the basis of §138, principally, because there was no German interest at stake. Subsequently, the Oberlandesgericht also denied immorality in light of the Nigerian interest to protect its cultural heritage. Yet it suggested that in the case that a Nigerian interest regarding public health, or the growth of the welfare state had been at stake, the judgment would differ.\textsuperscript{83} The Bundesgerichtshof agreed with the Oberlandesgericht that the prohibition did not protect a German interest and could not be immoral and invalid for that reason.\textsuperscript{84} However, the Bundesgerichtshof also considered whether

\textsuperscript{80}Armbrüster comments that it would have been more convincing if the court would have based the immorality on the maintenance of its internal order, in light of treaty obligations at the time that included the embargo the United States placed on East European countries at the time. See Armbrüster (2012), Rn. 17: “In derartigen Fällen ist vielmehr ausschlaggebend, dass auf Grund der Bündnisverpflichtungen der Bundesrepublik Deutschland eine Beziehung zur inländischen Ordnung besteht.”

\textsuperscript{81}See also ibid., Rn.17.


\textsuperscript{83}Ibid., p.1576-1577.

\textsuperscript{84}Ibid., p.1576.
the insured activity was contrary to good morals, in which case the contract would be without effect in light of Article 2 of the Allgemeine Deutsche Seeverversicherungsbedingungen (ADS). This article required that the insurance contract protected a permissible interest, i.e. an interest that would not be deemed immoral under §138.\textsuperscript{85} The Bundesgerichtshof held that the contract lacked a permissible interest (§2 ADS) and held that the contract was invalid, because the interests protected by the insurance were not insurable. Contrary to the Oberlandesgericht, the Bundesgerichtshof placed decisive weight on Nigeria’s interest to maintain possession over cultural heritage and protect that heritage from foreign traders, referencing UNESCO (in particular the World Heritage Convention) and the fact that the protection of people’s cultural heritage was generally endorsed.\textsuperscript{86} Consequently, the Bundesgerichtshof considered the interest protected under the insurance impermissible and contrary to good morals.

Although both the Borax case and the Nigerian cultural heritage case differ from the contract in the sweatshop case as they involve the infringement of a statutory prohibition,\textsuperscript{87} these cases suggest a possible distinction between situations in which the alleged immoral activity facilitated by the contract affects a German interest and those in which it does not under German law. In cases in which the activity does not affect a German interest, courts may question whether the (foreign) interests at stake are considered of such significance that infringement thereof is contrary to German values. For the sweatshop case, a court may consider international conventions regarding fundamental rights at work similar to the Bundesgerichtshof’s reference to the World Heritage Convention. In particular, it seems that the ILO’s fundamental conventions and the general recognition of the importance of decent labour standards for all people could play an

\textsuperscript{85} The impermissibility of the insured interest would be established if the insurer could not have entered the contract without it being invalid under §138 I BGB.

\textsuperscript{86} At the time, Germany had ratified the World Heritage Convention, but it had not yet entered into force. Convention concerning the protection of the world cultural and natural heritage, November 16, 1972.

\textsuperscript{87} Such contracts are generally not dealt with under §134, on the basis of which contracts can be deemed void if contrary to a statutory prohibition, but assessed on the basis of §138. See Armbrüster (2012), §138 Rn. 17 and §134 Rn. 40.
important role there. As Germany is a member of the ILO and has ratified all the fundamental conventions established by that organization, the fundamental principles endorsed therein could be viewed as specific formulations of values endorsed by the German legal order.

5.2.5. Concluding remarks: overcoming the absence of a German interest
Under German law, the contract in the sweatshop meets, in principle, all the requirements for contractual immorality on the basis of §138 BGB, or rather, there are no principled grounds on the basis of which the contract could not be held invalid for immorality. There are several elements in our hypothetical sweatshop case that suggest the likelihood of contractual immorality under German law. First, the contracting parties' knowledge regarding the production conditions under which the clothes are produced establishes that the contract could in principle be deemed immoral in light of the interests of third parties or society as a whole. Second, those production conditions seem, in principle, incompatible with the ethical norms fundamental to the German legal order, as expressed among others, in the German Basic law and the fundamental ILO conventions. That said, however, the sweatshop location may have some bearing on the evaluation of whether the contract as a whole infringes the concept of good morals in §138. The question regarding the German interest involved in the Borax and Nigerian cultural heritage cases may be raised similarly with relation to the sweatshop case. In the absence of an infringement of a German interest in the sweatshop case, however, the contract may still be held to be immoral and invalid by a court if the ethical norms that are at stake are broadly endorsed. In light of the fundamental conventions of the ILO, it seems that a court would have a substantial basis to consider sweatshops reprehensible, regardless of their location.

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88 Fundamental conventions of the ILO: including fundamental rights are: freedom of association, elimination of all forms of forced or compulsory labour, effective abolition of child labour, elimination of discrimination in respect of employment and occupation. Also: Fundamental Principles and Rights at Work and its Follow-up, adopted June 18 1998.
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5.3. France

Similar Dutch and German law, freedom of contract is a foundational principle in the French law of contract.\(^8\) The idea that contracting parties are to be free to engage in and give shape to their contractual relations runs counter to the hypothesis of contractual immorality and invalidity in the designed sweatshop case. Under French Law the contract in the hypothetical sweatshop case may, however, encounter substantive limitations – equivalent to those found in Dutch and German law—through the requirements regarding the contract’s *objet* and *cause*. For, in relation to the validity of a contract, Article 1108 of the French Code Civil (CC) requires “(...) un objet certain qui forme la matière de l’engagement” and “une cause licite dans l’obligation.”\(^9\) The requirements in relation to the contract’s *objet* and *cause*, are found in articles 1126-1130 CC, and articles 1131 and 1133 CC, respectively.

The contract’s *objet* (further also: subject matter) refers to the ‘things’, which the contracting parties engage to transfer to each other,\(^10\) i.e. in our hypothetical sweatshop case: the retailer obliges herself to deliver the clothes, and the consumer is obliged to pay the price. Since this exchange represents a regular transaction on the market, and the exchange concerns commodifiable goods (as required by article 1128),\(^11\) which are determinable (under article 1129),\(^12\) the contract’s validity in the

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9. Translation in *Civil Code*, Article 1108 CC: “Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract; A definite object which forms the subject-matter of the undertaking; A lawful cause in the obligation.”
10. Article 1126 CC states: “Tout contrat a pour objet une chose qu’une partie s’oblige à donner, ou qu’une partie s’oblige à faire ou à ne pas faire.,” translated in ibid.: “Any contract has for its object a thing which one party binds himself to transfer, or which one party binds himself to do or not to do.”
11. The requirement of commodifiability reflects the fact that certain things may not be owned or alienated; under French law it is immoral (contrary to public order or good morals) to exchange certain things. Examples in this context include contracts for surrogate motherhood. See *Code Civil 2011 Paris Dalloz*, comments to article 1128, p.1289-1293.
12. Article 1128 states: Il n’y a que les choses qui sont dans le commerce qui puissent être l’objet des conventions. Article 1129 states: Il faut que l’obligation ait pour objet une chose au moins déterminée quant à son espèce. La quotité de la chose
hypothetical case seems not to be questionable on the basis of the substantiative requirements regarding the contract’s subject matter.

The requirements for the validity of a contract, pertaining to the notion of cause are stated in Article 1131 CC “L’obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet”.\(^4\) For our hypothetical sweatshop case, particularly the latter reference regarding a contract’s ‘cause illicite’ is of relevance (see next section).\(^5\) This prerequisite for valid contractual relations reflects a control of contractual morality and its underlying rationale is found in the protection of the general interest (l’intérêt général).\(^6\) Under French law, a court can determine (without the parties bringing the legal issue to the fore) whether or not a contract is invalid for immorality ex officio.\(^7\)

Before continuing the discussion as to how requirements of contractual morality take shape under French law, and how they may affect the validity of the contract in the hypothetical case, it should be mentioned that, together with the concept of a contract’s objet,\(^8\) the concept of cause has long been subject to

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\(^4\) This article is translated in ibid.: “Obligations have no effect when the cause is absent, false or unlawful.”

\(^5\) The concept of cause in relation to its required existence in generally understood to refer to the contractual counter-performance, which is sometimes also described in terms of the objective notion of cause. See footnote 106. Translated to the contract in the sweatshop case this notion of cause refers to the delivery by the retailer of the clothes, and the transfer by the consumer of the money, as the contractual counter-performance (cause l’obligation) is dependent on the contractual structure, i.e. sale. This notion of cause does not affect the validity of the contract in the sweatshop case.

\(^6\) See for instance, Terré, F. et al., Droit Civil: Les Obligations (Dalloz, Paris 2009), nr. 359. The requirement regarding the existence of cause reflects a protection of the parties’ interests, i.e. a party’s obligation is to be sufficiently justified.

\(^7\) Article 423 Code de procedure civile; see also Fabre-Magnan (2012), p. 465-466.

\(^8\) The contested issues are found in the multiplicity of the concept’s interpretations and references: a discussion regarding the question to what the notion of objet refers to, i.e. the obligation, performance and/or contract as a whole? On the one hand the requirement of lawfulness is referred to in terms of l’objet de l’obligation, to which, on the other hand, some authors add the idea that contracts are also to be assessed, independently (from commodifiability and the lawfulness of the cause) on the lawfulness of l’objet du contrat, i.e. the contract’s overall subject
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diverging approaches in the courts’ case law and debate among legal scholars and is under debate in the context of proposals for reform of the entire French law of obligations. A forthcoming revision is however, unlikely to affect the underlying rationale and function that a substantive control of contractual morality plays through the concept of cause. Under each proposal for reform, French law will require the parties’ compliance with standards of morality and will consider any contract—even when mutually beneficial—that undermines the general interest, to be invalid.

matter. This latter idea is contested among French authors; where some consider it redundant, as the lawfulness of the agreement is sufficiently covered by the other requirements, others find it useful to use as an explication of the contract’s unlawfulness. See for a brief overview, for example Ghéstin (2006), nr. 1295. Terré et al. (2009) seem to be proponents of this idea, nr. 265, 318.

99 The proposals vary in retaining or replacing the concept of cause, for instance, the Avant-Projet de Réforme du Droit des Obligations (Projet Catala) (2007) maintains reference to cause, while the Projet de la Chancellerie (2008) replaces it with the concept of intérêt, while Terré, F., Pour une Réforme du Droit des Contrats (Daloz, Paris 2009) puts the concept aside entirely. For background information on the instigation and development of these projects see: Cartwright, J. et al. (eds), Reforming the French Law of Obligations. Reflections on the Avant-projet de réforme du droit des obligations et de la prescription (‘the Avant-projet Catala’) (Hart Publishing, Portland 2009), pp. 15-20.

100 The contested issues pertain particularly to the requirement of the existence of cause, and the alternative concept of intérêt, for instance place a role there, whereas the control of contractual morality is articulated in terms of ‘La licéité du contrat’. See articles 88-8g in Projet de la Chancellerie (2008). Moreover, the debate on the existence of cause was related to case law of the Cour de cassation, notably the Chronopost and Video club cases (both decided in 1996) where the Cour de cassation annulled a clause and the contract respectively, for absence of cause, even though in both cases there was a cause in the definition that was up to then prevalent.

101 Avant-projet (2007), articles 1124 and 1126-1: “La convention est valable quand l’engagement a une cause réelle et licite qui le justifie.” And “L’engagement est sans justification, faute de cause licite, lorsqu’il est contracté, par l’une au moins des parties, dans un but contraire à l’ordre public, aux bonnes moeurs, ou, plus généralement, à une règle impérative.” ; Projet de la Chancellerie (2008), articles 88-8g: La licéité du contrat; Projet Terré (2008) article 59: “Le contrat ne peut déroger à l’ordre public au bonnes moeurs, ni par son contenu ni par son but que ce dernier ait été connu, ou non, par toutes les parties. Il ne peut, pareillement, porter atteinte aux libertés et droits fondamentaux que dans la mesure indispensable à la protection d’un intérêt sérieux et légitime.”
5.3.1. *La cause illicite*

The contract in the hypothetical sweatshop case may encounter substantive limitations to the contracting parties’ freedom on the basis of *cause illicite* (article 1131 CC). This concept takes further shape in Article 6 CC: “*On ne peut déroger, par des conventions particulières, aux lois qui intéressent l’ordre public et les bonnes mœurs*”, and more specifically in article 1133: “*La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes mœurs ou à l’ordre public.*” In the context of contractual morality, the concept of *cause* refers to the determining, subjective reasons (les mobiles déterminants) for the existence of the contract, in particular the contracting parties’ subjective reasons for entering the contract; their motives, desired effects and the purposes pursued through the contract. In this sense any single contract is

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102 Article 6 is translated in *Civil Code*: “Statutes relating to public policy and morals may not be derogated from by private agreements.” And article 1133 as: “The cause is unlawful, if it is contrary to the law, good morals or public order.”

103 See for instance in: Fabre-Magnan (2012), p. 445 et seq.; Terré et al. (2009), nr.366; also Ghestin (2006), nr.1238; Mekki, M., *L’Intérêt Général et le Contrat* (Libraire Générale de Droit et de Jurisprudence, Paris 2004), nr. 1247; for a brief overview see also the conclusion from the Conseiller rapporteur to the *Cour de cassation*, for instance: M. Bizot, Arret n 519 October 29, 2004 under nr III. This notion of cause is different from the objective notion of cause that is meant in the context of the requirement of an existing cause (also in article 1131 CC). The *Cour de cassation* distinguished between the different notions of cause in a decision on July 12 1989. (First Civil Chamber *Cour de cassation* 12 July 1989, Bull. Civ., I, nr. 293). In this case, two parapsychologists had entered a contract for the sale of books and materials concerning occultism. The Court of appeal held the contract invalid due to an unlawful cause. The buyer had intended to use the material for activities involving paranormal phenomena, which was prohibited by law at the time. This judgment was upheld by the Court de cassation, where the seller had appealed on the basis of the fact that the contract’s *cause* does not entail the buyer’s (subjective) intended use of the material, but the objective contractual counter performance, i.e. the delivery of the material by the seller. In its judgment the *Cour de cassation* distinguished between the cause of the obligation, which was indeed the contractual counter performance, and the cause of the contract, which was also to be based on subjective motives of the parties: “*si la cause de l’obligation de l’acheteur réside bien dans le transfert de propriété et dans la livraison de la chose vendue, en revanche la cause du contrat de vente consiste dans le mobile déterminant*”. The duality of the concept of cause and its specific interpretation is a source of disagreement among French legal scholars: see for instance, Rochefeld, J., *‘A Future for la cause? Observations of a French Jurist’* in J Cartwright et al. (eds), *Reforming the French Law of Obligations Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription* (*‘the Avant-projet Catala’*) (Hart Publishing, Oxford 2009), p.77-81, who argues that the *cause de l’obligation*
likely to have a variety of reasons that fall under the control of the concept *cause illicite*. Under French law if only one reason is immoral, the contract will be held invalid. For the question of the contract’s immorality and invalidity in our hypothetical case depends on the following questions under French law: first, whether the fact that the clothes are produced in a sweatshop is a determining subjective reason (*mobile déterminant*) for the existence of the contract, and second, whether or not it will be considered immoral by the court.

**5.3.2. *Un mobile déterminant?***

Legal scholars describe ‘les mobiles déterminants’ in terms of the contracting parties’ subjective reasons for entering into a contract, which includes their motives or the desired effects and purposes pursued through the contract. The focus lies on the factors that contribute to the contracting parties’ will to contract, which go beyond the mere counter-performance they receive. In a general sense, however, the determining reasons extent to a multiplicity of factors that may contribute to the conclusion of any particular contract and it may be difficult to determine whether or not one factor can be identified as decisive. In relation to the context of the contract in our hypothetical sweatshop case, the phrase *cause* in terms of the parties’ motives—the desired effect and purpose—suggests that the contract did not have an immoral *cause*. Namely, the contracting parties’ motives, desired effect and purpose is not likely to have been *determined* by the fact that the clothes exchanged are produced in a sweatshop. In the hypothetical case, the contracting parties do not have the specific intention to sell or buy clothes produced in a sweatshop; rather, the case assumes their indifference to this fact. From this perspective, it seems that

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refers to the real interests that contracting parties have in the contractual counter-performance, which departs from the more objective notion of cause, in which the reasons why contracting parties took on the obligations under the contract are explained in terms of the contractual counter-performances.

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105 Ibid., p.461 et seq; Terré et al. (2009), nr. 369. Under French law, immoral contracts are sanctioned with absolute nullity (*nullité absolue*), which refers to the fact that the invalidity affects the contract in absolute terms: its inexistence is of importance to society as a whole.
107 Ghexist (2006), nr. 1249, Terré et al. (2009), nr.366.
the sweatshop conditions under which the clothes are produced may not constitute a *mobile déterminant*, as to render the contract invalid because of an immoral cause under French law.\(^\text{108}\)

However, it could be argued that the interest and benefit that the contracting parties pursued under the contract are determined by the fact that the clothes were produced under sweatshop conditions. Moreover, one may point out that the sweatshop conditions are part of broader background conditions and contexts in which the contract has been formed. The contracting parties might not have entered into a contract, or even might not have been able to enter this contract, if not for the fact that the clothes were produced under sweatshop conditions. For instance, in a general sense (abstracted from the particular contract) a consumer might not have entered the contract if the price of the product was higher. If the terms of the contract are inextricably bound to the conditions of production, the latter may indeed be a determining reason why contracting parties decide to engage in the exchange. Although low price motivation is not by itself objectionable, it may become objectionable if the contracting party knew that the clothes were produced in a sweatshop. Generally, one may ask whether the contracting parties would have entered the contract if the clothes had not been produced under sweatshop conditions. Namely, one may argue that what is relevant for the hypothetical case relates to the question whether the contracting parties could have entered this contract—a transaction under the same terms—if not for the fact that the clothes were produced in a sweatshop. Or, it may be argued that the sweatshop conditions have to be considered as a determining reason for the contract’s existence because the particular clothes that are sold would not have been available for sale to begin with, and, in any case, not under the terms of the contract, if not for its production in a sweatshop. In other words, there would not have been a contract, at least not this particular contract, if not for where the sweatshop workers produced the clothes.

\(^{108}\) I have found no case law in which the determining factors included foreseeable consequences of the contract for others, which did not form the reason for contracting parties to enter the contract.
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5.3.3. Knowledge requirements: only one party

The knowledge requirements that pertain to contractual immorality and invalidity under French law reveal the importance of the protection of general interest. Whereas in both the Netherlands and in Germany, contractual invalidity requires that both contracting parties were aware of the facts that engendered the contract’s immorality, under French law the knowledge of one of the contracting parties suffices. In 1998, the Cour de cassation, contrary to prevalent requirements regarding knowledge in the case of contractual immorality and invalidity, confirmed this. The decisive case, concerned a dispute between a divorced couple over an agreement concerning the conversion of a payable loan from the ex-wife to the ex-husband into an increase in alimony. It was clear from the facts of the case that the ex-wife had been unaware of any unlawful purpose under this agreement. However, the ex-husband had set up the agreement to obtain unlawful tax deductions. In spite of the ex-wife’s uncontested ignorance, the court deemed the agreement invalid stating: "Mais attendu qu’un contrat peut être annulé pour cause illicite ou immorale, même lorsque l’une des parties n’a pas eu connaissance du caractère illicite ou immoral du motif déterminant de la conclusion du contrat (...)".¹⁰⁹

This case overturned the prevalent understanding that contractual immorality and invalidity required the knowledge of both contracting parties (similar to the current laws of both the Netherlands and Germany). That requirement had been criticized for undermining the protection of the general interest in the control of contractual morality for the sake of the private interests of unknowing contracting parties.¹¹⁰

Thus, for the hypothetical sweatshop case it seems that in light of the decision of the Cour de cassation (1998), under current French law, it would suffice that only one of the contracting parties’ had knowledge of the sweatshop conditions under which the clothes were produced to render the contract invalid.

¹⁰⁹ Cour de cassation First Ch. Civ 7 october 1998. Translation by the author: “However, a contract may be invalidated on the basis of an unlawful or immoral cause, even if one party was unaware that the determining reasons underlying the contract’s existence were unlawful or immoral.”
¹¹⁰ Ghestin (2006), nr. 1243-1247.
5.3.4. L’intérêt général: l’ordre public et les bonnes mœurs
If the conditions under which the clothes are produced are accepted as a factor that determined the existence of the contract (mobile déterminant) in our hypothetical case and at least one of the parties was aware thereof, the question arises whether or not a sweatshop would be deemed immoral under French law.

French law restricts contractual relations that undermine the general interest through the concepts of public order and good morals (l’ordre public et les bonnes mœurs). The Cour de cassation held explicitly that this control is not confined to a mere control of legality, but extends to a wider notion of l’ordre public.111 The content and application of this notion is under the discretion of the courts, as it changes over time.112 In this sense, it is unlikely that the contract in our hypothetical case will be considered immoral and invalid, because it does not fit in with existing case law regarding contractual invalidity in light of a contract’s ‘cause illicite’. Legal scholars distinguish between the narrow content given to the substantive limitations through the concept of good morals (mostly relating to infringements of sexual morality and personal relations),113 and a wide conception of public order with subdivisions of an ‘ordre public de direction’ and an ‘ordre public de protection’.114 Under the latter subdivision, protection is offered to weaker contracting parties in light of the values that are part of the French social and economic order,115 whereas the former commands respect for the fundamental values of French society in light of its traditional and political order.116 A public order in which the protection of fundamental rights is central has been

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112 Terré, Les Grands arrêts de la jurisprudence civile Henri Capitant, T.1, 11e ed., 2000, comments nr. 2 and 5 to Cour de cassation Civ. 4 décembre 1929.
115 In the discussion of contractual morality, the concept of human dignity is given shape in reference to contractual restrictions of a party’s freedom, e.g. through specific clauses that are thought to be too restrictive, such as celibacy, or through duration of an obligation. See for instance Mekki (2004), nr. 455 et seq.
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recognized by legal scholars (‘l’ordre public philanthropique’), but there is no French case law in which the interests of others have been articulated in light of fundamental rights. The contractual invalidity of our hypothetical case does not seem to be easily accommodated under current French law. Particularly, if, as Mekki suggests, the notion of general interest reflects the outcome of a particular hierarchy of both public and private interests it seems unlikely that in our hypothetical case, the interest of others elsewhere would take priority over other interests at stake, as to render the contract invalid under French law.

5.3.5. Concluding remarks: the centrality of general interest
It is not likely that the contract in our hypothetical case will be held invalid for immorality under French law. The current implausibility thereof depends for the most part on the rare case law in which courts find a contract’s cause ‘illicite’. The question of the substantive immorality would however only become relevant if the court would find that the conditions under which the clothes are produced constitute the contract’s cause, i.e. that it would fall under the contract’s determining, subjective reasons (mobile déterminant). There seems to be, however, a fair case for the latter to be argued under French law. The hypothesis of contractual invalidity is not undermined by requirements of knowledge under French law. Even if the facts of the hypothetical case would be such as to deny the knowledge of one of the parties, this would not obstruct the contract’s invalidity.

5.4. England
The question of contractual validity in the hypothetical sweatshop case –similar to the other legal systems discussed above– engages a part of contract law in England that presents a tension between the principle of freedom of contract and the law’s disapproval of certain contractual arrangements. Although Atiyah described

118 As suggested by Mekki (2004).
119 Whittaker (2008), nr. 1-011 et seq. and 1-021; Prentice (2008), nr. 16-004.
the decline of freedom of contract during the 20th century and even stated that, beyond the law courts, it “ceased to be a living issue”; it remains to be a fundamental principle that suggests prevailing restraint on interference with contractual relations.

Under the English law of contract, the relevant substantive limitations to the contractual freedom of the contracting parties are discussed under the heading of public policy and illegality. It is noteworthy that under the heading of public policy authors and courts alike, do not always deal with the question of contractual invalidity in isolation from other legal questions, which, for instance, pertain to the legal consequences of invalidity (i.e. questions of restitution). Moreover, the question of contractual invalidity is often dealt with in the form of a question regarding the enforceability of a particular claim, by a particular party, or regarding the legitimacy of the use of public policy or illegality as a defence against such a claim. Both Prentice, and more recently the Law Commission have suggested that contractual invalidity in relation to public policy should be understood in reference to the basic question: “does public policy require that this claimant, in the circumstances which have occurred, should be refused relief to which he would otherwise have been entitled with respect to all or part of his claim?”

The present discussion of English law will focus on the question of contractual invalidity, as necessitated by the scope of this book’s inquiry and forgoes distinctions between the

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120 Atiyah (1979), p. 717 et seq.
121 Whittaker (2008), nr. 1.011 et seq.; Prentice (2008), nr. 16-004.
123 See also Atiyah and Smith (2005), p.209.
124 Prentice (2008), nr.16-001; also The Law Commission, Consultation Paper No 189 2009, The Illegality Defence, A Consultative Report, nr.3.143. The Law Commission has, over the last decade, scrutinized the area of law that deals with contracts that are unlawful or contrary to public policy. The Law Commission however excluded from consideration contracts involving conduct that is not strictly unlawful, but immoral or otherwise contrary to public policy, stating: “We believe the courts remain the best arbiters of which transactions, while not involving unlawful conduct, should be regarded as contrary to public policy (…)”, ibid., nr.1.11. Moreover, the Government has communicated that the proposed reform is not a “pressing priority” in light of the “severe economic situation”. See: Report on implementation of the Law Commission proposals, p. 3 and 15, (2012).
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specificities of the circumstances under which the case might be brought to court.

5.4.1. Contracts contrary to public policy
Under the heading of public policy, contracts are held invalid even though the parties themselves have voluntarily engaged in them. As a general rule, a contract is rendered void (invalid) if it is illegal or otherwise contrary to public policy and courts will not enforce the contract.\textsuperscript{125} There are various rationales to support contractual invalidity in such cases, amongst which the protection of the interest of the general public, interests of others and the contracting parties themselves.\textsuperscript{126} Other justifications are found in the idea that a court cannot be called on to support and advance illegal or immoral activities; that aiding a party’s illegal or immoral activities would offend the dignity of the courts; and that contractual invalidity would have a deterring effect on illegal and immoral conduct.\textsuperscript{127} The courts decide which transactions are against public policy.\textsuperscript{128}

Different authors identify various configurations that may lead to invalidity, because the law disapproves of the contract.\textsuperscript{129} In relation to our hypothetical sweatshop case, it is helpful to draw an initial distinction between contracts that are prohibited by statute per se (statutory illegality), and contracts that are objectionable (through formation), or become objectionable (through performance), because they are associated with activities that are either illegal, or deemed reprehensible and are therefore contrary to public policy. The former category (statutory illegality) is irrelevant to the discussion of our hypothetical case because the

\textsuperscript{125} Prentice (2008), chapter 16. However, although strictly, a void contract does not exist, as avoidance implies the non-existence of the contract, sometimes ‘void contracts’ do have legal effects, especially in the case in which illegality constitutes the ground of voidance. See: Whittaker (2008), nr. 1-080.

\textsuperscript{126} Atiyah and Smith (2005), p.208. Also Deakin distinguishes two protective functions: the first concerns protection of the market against its own functioning, the second concerns protection of society (or certain social institutions) against the functioning of the market. Deakin and Supiot (eds), (2009), p. 3.


\textsuperscript{128} This judicial task was also affirmed by the Law Commission, see references footnote 124.

\textsuperscript{129} Compare Prentice (2008)nr. 16-002-003; Atiyah and Smith (2005), p.209.
contract does not belong to a class or category of contracts prohibited by statute.\textsuperscript{130} The latter category encompasses a vast range of cases, which can be further categorized on the basis of diverging grounds of public policy. Prentice, for instance, distinguishes between contracts that are associated with activities which are illegal; are injurious to good government; interfere with the proper working of justice; are immoral; and contracts in restraint of trade.\textsuperscript{131} In relation to the hypothetical case, there seems to be no close match between the existing heads of public policy that currently inform contractual invalidity. Under English law, immorality only applies to a narrow selection of contracts, mostly relating to sexual or marital matters.\textsuperscript{132} And cases dealing with exploitative agreements only include exploitation between the contracting parties, such as those dealt with under the restraint of trade. Under the heading of restraint of trade, contracts that restrict personal liberties may be held to be unreasonable between the contracting parties or in relation to the public interest.\textsuperscript{133} Contracts that deal with voluntary enslavement for instance, or contracts with features that ‘savour of slavery’ or ‘savour of servitude’ are held invalid, because they are contrary to public policy.\textsuperscript{134} It is thus clear that under English law it would be

\textsuperscript{130} Prentice (2008) nr. 16-142 et seq.

\textsuperscript{131} Ibid nr. 16-005.

\textsuperscript{132} Atiyah and Smith (2005), p. 212-214. Under immorality, for instance, a contract that facilitates prostitution is likely to be deemed invalid. In Pearce v. Brooks [1866] the court held that a contract for hiring out a carriage was invalid, because it facilitated prostitution, which the court qualified as an immoral purpose. Pearce had hired out a carriage to Brooks, who used it in the exercise of her profession (i.e. prostitution). Since the court held that Pearce had known about Brooks’ profession, and the fact that she would use the carriage in exercising it, the contract was deemed invalid. Even though Pearce had denied knowledge, Judge Pollock C.B. held that “If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiffs’ knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency.” p. 218.

\textsuperscript{133} Prentice (2008), nr. 16-075 et seq. An example of an unreasonable restriction is an agreement under which a songwriter was obliged to offer his services exclusively for a period of five years to a publisher, while the latter was not obliged to publish or promote the work of the songwriter. The consideration only consisted thereof that the latter would receive royalties from published work. A Schroeder Music Publishing Co. Ltd. v. Macaulay [1974] 1 W.L.R. 1308.

\textsuperscript{134} In Horwood v. Millar Timber and Trading Company Ltd. [1917], a case that dealt with a loan agreement that stipulated that the borrower, amongst others, could not
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counter to public policy to enforce contracts that resemble —
elements of— slavery. However, there is no case law that suggests
contractual invalidity for cases in which the features that ‘savour of
serfdom’ are found in the contract’s foreseeable consequence, let
alone in circumstances where those features concern others
elsewhere. Although the fact that a contract does not fall neatly
under the existing heads of public policy, does not rule out its
invalidity, a conclusion as to contractual invalidity in the
hypothetical sweatshop case lacks positive support.

However, changes can occur as to what courts consider as
counter to public policy. The role that the courts may play in
prompting such a change has been controversial. In this respect,
Prentice refers to the two sides of the debate representing a
‘narrow’ view and a ‘broad’ view.135 Whereas the former denies the
creation of new heads of public policy by courts, the latter accepts
judicial law-making in the area of public policy. Although the
doctrine of public policy is still perceived as conservative, the
debate is now confined to creation of entirely new heads of public
policy and it is dominant opinion that courts can extend heads of
public policy to cases constituting new situations and that public
policy changes over time in accordance with developments in
society’s values.136 Thus, although, as it stands the contract in the
hypothetical sweatshop case seems to steer clear of potential
invalidity under English law new developments may occur. For our
hypothetical case, such a development may go in the direction of
perceiving the contract for clothes made in a sweatshop as
facilitating or assisting in activities that ‘savour of slavery’. Therefore,
although support for the hypothesis that the contract is
invalid for immorality is thin under English law in light of the
existing heads of public policy, given potential changes in public
policy over time, it still is of interest to explore briefly the

135 Prentice (2008)nr. 16-004.
136 Ibid., nr. 16-004.

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requirements regarding the contracting parties’ knowledge for the hypothetical sweatshop case.

5.4.2. Knowledge of both contracting parties
Under English law, the invalidity of a contract may follow from various connections between a contract’s performance and activities deemed objectionable. For instance, a contract may require that a party engages in activities deemed objectionable; its performance may facilitate objectionable activities or it may be performed with objectionable means. With respect to these connections, it is not easy to discern clear-cut guidelines that can be used to determine the circumstances under which a particular contract will be held invalid by a court. However, in all cases where the contract is not objectionable prima facie, the contracting parties’ knowledge regarding the objectionable activities (facts) is of decisive weight. Notably, in Chitty on Contracts, Prentice refers to four sets of circumstances under which contracts are not enforced and both parties are prevented from suing on the contract entirely. Namely, if: 1) both knew that its performance necessarily involved the commission of an act which, to their knowledge, is legally objectionable, that it is illegal or otherwise against public policy; 2) both knew that the contract is intended to be performed in a manner which to their knowledge is legally objectionable in that sense; 3) the purpose of the contract is legally objectionable and that purpose is shared by both parties; or 4) both participate in performing the contract in a manner which they know to be legally objectionable.

It seems that the contract in the hypothetical case could fall under the first category: the necessary implication of the contract’s performance entails the production of the clothes in a sweatshop and the contracting parties in our case are assumed to have been aware of that fact. Moreover, if sweatshops would be

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137 See for instance, Pearce v. Brooks [1866] in which the contract was deemed invalid because the parties knew that it facilitated an immoral purpose: i.e. prostitution. See: reference footnote 132.
138 Which is distinct from the category of ‘unenforceable contracts’, which refers to contracts that are valid, yet “one or both parties cannot be sued on the contract”. Whittaker (2008), nr. 1-084.
139 Prentice (2008), nr. 16-010.
140 See case design, section 4.2.3
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considered to entail objectionable activities contrary to public policy according to courts, the contracting parties’ awareness of these activities would be sufficient to render the contract invalid. Where the legal objectionability of the activities is based on a statute (e.g. the activities are prohibited), contractual invalidity requires a higher degree of the parties’ involvement in that reprehensible behaviour; mere knowledge does not suffice, but must either constitute intention or must be present in combination with participation.\footnote{This would be different if the activities would be considered legally objectionable, because they are ‘merely’ prohibited, for instance, if it would become prohibited to import sweatshop goods. In such case, it is not only required that the parties were aware of the sweatshop production and the illegal import thereof, but that they participated therein. For instance, in Ashmore, Benson, Pease & Co Ltd v A.V. Dawson Ltd. [1968 A. No. 218] the court held that parties could not sue on the contract, because they had participated in the illegal performance of it. Ashmore (...) and Dawson had agreed that the latter would transport two tube banks for the former, even though both were aware that Dawson did not have at his disposal suitable vehicles, which could legally transport them. The underlying motivation was the fact that this way the transport would be “done cheaper” (Lord Denning M.R. p. 833), i.e. Ashmore contracted Dawson “in order to economise on the job” (Lord Phillimore L.J. p. 834). Yet, the fact that the parties were aware of the fact that the transport could not take place legally was insufficient to bar the parties from suing, rather this was the case because the parties had also participated in the transport (i.e. had observed the loading process etc).}

5.4.3. Concluding remarks: unlikely invalidity in light of current heads of public policy

The contract in our hypothetical case would not likely be held contrary to public policy under English law and thus the hypothesis of contractual invalidity seems weak. The existing heads of public policy do not appear to include the objectionability of the production of clothes in sweatshops elsewhere, which would render the contract void. Only if the contract would be considered contrary to public policy (as to performance), the knowledge of contracting parties would suffice for its invalidity. If legal objectionability would be based on unlawfulness, e.g. relating to a statutory prohibition, the contract’s invalidity would require a higher degree of involvement, such as the parties’ intention or participation in the activities disapproved of by the law. It seems unlikely that the contract in our hypothetical sweatshop case

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would be deemed invalid under English law, due to the contracting parties’ knowledge of the contract’s implication, i.e. the production of clothes in sweatshops elsewhere.

5.5. European instruments of contract law: DCFR & CESL

There is no European instrument of general contract law in place at the present time. It is not inconceivable, however, that in the (near) future such an instrument will be created. The developments in the field of European contract law reveal diverging stances towards the articulation of a European norm concerning contractual invalidity on the basis of immorality. In Part I of the Principles of European Contract Law (PECL) – an academic project published in 2000– Chapter 4 on validity, for instance, stated that it did not deal with contractual invalidity arising out of immorality.\(^{142}\) To quote, “because of the great variety among the legal systems of Member States as to which contracts are regarded as unenforceable on these grounds (...) further investigation is needed to determine whether it is feasible to draft European Principles on these subjects.” Part III of the PECL, as published in 2003, however, included contractual immorality in a chapter on ‘illegality’. This chapter opens with article 15:101, which states: “A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.”\(^{143}\) With this articulation, the drafters explicitly intended to avoid diverging national conceptions of immorality, referring instead to fundamental principles found across the European Union. The Draft Common Frame of Reference (DCFR) took over this rule in chapter 7 of its Book II. Article 301 therein states: “A contract is void to the extent that: a) it infringes a principle recognized as fundamental in the laws of the Member States of the European Union; and b) nullity is required to give effect to that principle.”\(^{144}\) The comments to this article in the DCFR were taken over in full from the comments to Article 15:101 PECL, without major amendments. By contrast, recent developments towards enacting a Common European Sales Law

\(^{142}\) Article 4:101, PECL (I-II), (1999).
\(^{143}\) PECL (III), (2003).
\(^{144}\) DCFR, (2009).
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(CESL) reveal the absence of the articulation of a common European standard concerning contractual morality. Contractual immorality has been excluded from the scope of the CESL proposal. Applicable national rules will govern this aspect of the contract even if parties opt into the CESL. The exclusion of a CESL-based control of contractual morality has been criticized for missing the opportunity to provide a basis for developing further a common conception of European values and for revealing a lacuna in the CESL’s reflection of a “European model of just conduct”.

Indeed, on the basis of the CESL there would be no European answer to our hypothetical sweatshop case and the question of the contract’s immorality and invalidity. The proposal on CESL refers to the diverging national rules of contract law in the Member States and explicitly excludes a substantive norm for contractual immorality leading to invalidity that is shared by all Member States. On the basis of the proposed CESL, the minimum requirements for interactions on a European level are thus dependent on the applicable national rules, and internal market transactions remain governed by diverging national regimes in this respect.

The DCFR, thus, represents the most recent suggestion for a European rule on contractual invalidity due to immorality (in contrast to the CESL) in the wording of infringements of fundamental principles. The question arises as to what is meant by such principles recognized as fundamental in the laws of the Member States. On the one hand, the comments to the article

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suggest, guidance from European sources, such as the European Convention on Human Rights,\textsuperscript{151} and the Treaty on European Union and EU Charter on Fundamental Rights.\textsuperscript{152} In this sense, the DCFR seems to put forth a European Union Law based articulation of fundamental principles. The comments, for instance, state that the national concepts (such as good morals and public policy) would have no direct effect under this article. On the other hand, however, the wording of the article does not refer to principles recognized as fundamental in the European Union, but to those recognized as fundamental in the laws of its Member States. The comments moreover suggest that a comparative study of national concepts could be helpful for the 'identification and elucidation' of the principles referred to in Article II 7: 301. Overall, the DCFR seems to provide a potential basis for developing a more autonomous European notion of contractual immorality. The autonomy of this notion seems to be supported, in addition, by the comments that refer to the irrelevance of the intentions and knowledge of the parties under the article.\textsuperscript{153} In the national legal systems discussed in this chapter, the knowledge of the contracting party was not irrelevant to the question of immorality and invalidity. As such the DCFR diverts from what seems to be a common—albeit not uniformly applied—requirement in contract law in Europe for contractual immorality and invalidity.

Comparatively, then, the DCFR may provide, on the one hand, a more favourable basis for our hypothetical sweatshop case than the other legal systems discussed in this chapter. For instance, since contractual invalidity on the basis of the DCFR would seem not to depend on a particularly close involvement or association of the contracting parties, as not even their awareness of the facts underlying the immorality is required. Strictly, this has


\textsuperscript{152} Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, \textit{Official Journal of the European Union} 2007, C 306/01. The comments explicitly mentioned are the prohibition of slavery and forced labour (Article 3 ECHR); the freedom to choose an occupation and the right to engage in work (Article 15 European Union Charter on Fundamental Rights) and the right of collective bargaining and action (Article 28 European Union Charter on Fundamental Rights).

\textsuperscript{153} DCFR, (2009) Book II chapter 7 Article 301, comment under C.
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no direct relevance to the hypothetical sweatshop case, as knowledge is assumed. However, more so than is the case for the national legal systems, the absence in the DCFR’s of the requirement of contracting parties’ knowledge suggests that the underlying rationale of article II 7:301 is found emphatically in safeguarding the interests of third persons or society at large, rather than those of the contracting parties. In this sense the DCFR article may provide a promising alternative to articles in national legal systems that do not place a similar emphasis on the protective potential of contractual immorality and invalidity for others (i.e. non-contracting parties) and society as a whole. In fact, the stated irrelevance of the contracting parties’ intentions and knowledge in the DCFR removes objections to the hypothesis of contractual immorality and invalidity that are directed at the impossibility or uncertainty relating to parties’ knowledge through arguments of distance (see section 4.1.2.1). For this reason, the fact that the immorality in our hypothetical sweatshop case is associated with the interest of others elsewhere, may play less of a role than it could potentially in national legal systems. Moreover, as already stated above, the fundamental documents of the European Union (the EU treaty, the EU charter on fundamental rights and the European Convention on Human Rights) are mentioned as primary guiding sources for contractual immorality, in the context of the DCFR. With this guidance, a more universal character of contractual immorality would be able to develop under the DCFR, which can express European values regarding contractual conduct externally. If so, such a conception would also have the potential to take more easily into account, the interests of others living elsewhere, who may be impacted negatively by contractual relations governed by contract law in Europe.

5.6. Comparative conclusions
All jurisdictions under examination hold that the mutually beneficial character of a contract does not settle the question of

\footnotesize{As suggested in the sections on the principles of the DCFR under nr. 5. Ibid., p. 64-65. This line of reasoning corresponds to criticism expressed by French legal scholars to the former requirement of both parties’ knowledge of the facts underlying the immorality, which the Cour de cassation reversed in 1998 to requiring only the knowledge of one of the parties. See section 5.3.3 above.}
contractual validity and build in space for the consideration of the interests of third parties or society as a whole. The case design aimed to test the hypothesis of immorality and invalidity and bring forward the potential decisive nature of the contracting parties’ knowledge and the location of the sweatshop. These two factual aspects of the case represent two central pillars of objection against the hypothesis. Given the fact that the case has not been dealt with by a court – the contract has not yet been held immoral and invalid— the presented results are conjectural and the discussion is oriented towards the likelihood that courts will deem the contract in our hypothetical sweatshop case immoral and invalid.

From the previous sections we can see that the legal systems show considerable similarity in the underlying rationale and fundamental issues that come to the fore in our hypothetical case. Although private autonomy, expressed through the freedom to contract, represents a point of departure in contract law in Europe, no jurisdiction assists in the realization of a private transaction that is contrary to the society’s values and in that sense inimical to the general interest. The contracts that are deemed contrary to a society’s values are discussed under various national concepts such as: immorality, illegality, public policy or public order, or good morals. These concepts express that in spite of the parties’ potential interests in the contract’s realization through law, the courts refuse to make such assistance available.

5.6.1. Knowledge

Under Dutch, German and English law it is of decisive importance for the contract’s invalidity that both parties were aware that the clothes were produced in a sweatshop. If one of the parties were to deny such awareness (contrary to the design of the case study), it suffices that due to the circumstances of the case, the court would hold that this party should have been aware or must have been aware in the Netherlands and Germany. In this context weight may be attached to media attention with regards to sweatshop production of a specific product or corporation, and perhaps to the price of the product, although the latter would be an insufficient basis on its own. Is it noteworthy that although knowledge is also a decisive requirement for contractual invalidity under French law,
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knowledge is only required by one of the parties corresponding to case law of the Cour de cassation since 1998.

What is most striking is that the DCFR suggests the irrelevance of the parties’ knowledge altogether. This approach is exceptional in the sense that it represents an approach that is uncommon among the national legal systems of Europe examined here. Under national rules of contract law, the absence of the knowledge of one (Netherlands, Germany, France) or both (France) of the contracting parties seems to sever, in relevant ways, the link or association between the moral concerns evoked by sweatshops elsewhere in the world and the transaction engaged in by contracting parties in Europe. The DCFR approach is of interest in light of the development in French law and the criticism expressed to the requirement of knowledge of both contracting parties’ as it was overturned by the Cour de cassation. This requirement was criticized for undermining the protection of the general interest for the sake of the private interests of contracting parties. From this perspective the divergent knowledge requirements in national legal systems (both parties or one) and the DCFR (none/irrelevant), reveal divergences in the balance between the interests of the parties on the one hand, and the general interest or the interests of others on the other hand. In this sense, the suggested DCFR approach assigns relatively more weight to the latter, in comparison to the Netherlands, Germany and England where the interests of contracting parties appear to lead. In this context, the French requirements represent a middle ground position.

5.6.2. Sweatshop location
The distance of the sweatshop’s location from the contracting parties is a relevant feature of our hypothetical case in relation to the knowledge requirements discussed above, insofar as the former dissolves the degree of certainty that a party can have concerning the production conditions of the clothes sold. None of the legal systems, however, incorporate independent requirements regarding the geographical location of the objectionable aspect of a case, which would suggest that geographical distance does not dissolve immorality or sever the connection between the objectionable aspect of the case and the
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contractual behaviour. However, case law in Germany suggested that a question of German interest might arise in cases where the objectionable activities take place beyond national borders, affecting primarily the interests of others elsewhere in the world. Yet even in the case in which the Bundesgerichtshof discussed the question of German interest, and found no German interest at stake in relation to an objectionable activity, contractual immorality and invalidity still followed as a result of the infringement of fundamental values. Thus, the location of the sweatshop does not appear to be of decisive weight as an independent factor in any of the legal systems and as such provides no principled obstacle to the invalidity of the contract for immorality.

Moreover, the sweatshop's geographical location does not play a decisive role in any of the legal systems, to determine the substantive content of what is considered immoral. In all national legal systems the content of contractual immorality relates to the underlying values of their own legal and social orders and it is the judiciary's task to interpret and concretize such fundamental values in specific cases. Moreover, the law develops in light of new cases that give rise to the opportunity to reflect changes in social and moral convictions occurring over time.

5.6.3. Concluding remarks

With regard to the contract in our hypothetical case, the legal comparison shows that the hypothesis of contractual immorality and invalidity finds no principled obstacles in any of the jurisdictions such as those brought forward in section 4.1.2. In spite of the absence thereof, the likelihood the hypothetical contract's invalidity for immorality varies across the legal systems in light of the (absence of) obvious connections in the existing national case laws and the observations in legal scholarship regarding contractual morality in those national legal systems. The hypothesis of immorality and invalidity finds support in the existing case law regarding contractual invalidity in light of the contract's immoral foreseeable consequences under Dutch law. The Hoge Raad’s explicit reference to the exploitation of third parties provides support in this context. The decision as to how far the freedom to contract goes, and at what point the interests of
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third parties and society at large prevail is a matter of balancing the conflicting interests. The developments in public opinion regarding sweatshops may play a decisive role. The same observation is to be made under German law where the contract’s invalidity depends on whether the court would consider the contract’s comprehensive character to be immoral, taking into account several aspects of the case including the question of the parties’ knowledge of facts constituting the immorality. Compared to the Dutch approach, the German approach, which assesses the contract’s comprehensive character, may leave more room for the consideration of the sweatshop’s location. Under French law, the contract’s invalidity depends on whether the production conditions of the clothes can be said to constitute the contract’s ‘cause’ (mobile déterminant), and if so, whether it would be deemed ‘illicit’. It seems that the contract’s invalidity under French law would depend on whether the contracting parties could have entered the contract, if not for the sweatshop conditions. The knowledge requirements under French law –i.e. that only one of the parties must possess the knowledge that the clothes were made in a sweatshop– however suggest that the interests of others and society as a whole may have comparatively more weight under French law than under Dutch or German law. The latter could provide additional support for the hypothesis of the contract’s invalidity for immorality, but only marginally so. It seems least likely under English law that the hypothetical case will be held immoral and invalid. Although the contract’s invalidity may follow in light of the necessary implications of its performance (the production of clothes under sweatshop conditions) the case is rather far removed from the established categories of transactions deemed contrary to public policy. The contract is, therefore, not likely to be held contrary to public policy unless the English courts are prepared to develop the law in this direction. The current proposal of the EU Commission for a common sales law (CESL) refers to the national laws regarding to contractual immorality and invalidity. Yet, the academic proposal for a common frame of reference (DCFR) suggests a European approach, on the basis of which the contracting parties’ knowledge, however, becomes irrelevant. The absence of knowledge requirements is, as we have seen, uncommon to the national jurisdictions included in the inquiry. Such a European
approach would thus suggest a different balance of interests, placing comparatively more weight on the interests of others and society as a whole.
6. A SYNTHESIS:

This book has discussed the issue of contractual externalities as an issue of contractual justice. First, the book has presented a capabilities approach to contractual justice particularly pertaining to contractual immorality and invalidity and has illustrated through the example of sweatshops, a capabilities perspective on externalities and contract law in Europe. Subsequently the book has provided some insight into the way in which different legal systems in Europe would deal with the hypothetical case of a transaction for clothes made in a sweatshop. In this concluding chapter the capabilities perspective on contractual justice is brought together with the results found in answer to the question of contractual immorality and invalidity for the hypothetical case, with a view to ranking the contract laws in Europe in relation to a minimum standard of justice.

6.1. A ranking of contract laws in Europe based on a minimum standard of justice

First, it is useful to recapitulate the book’s submission regarding the normative implications of Nussbaum’ capabilities approach to minimum justice within the realm of contract law in particular as applied to contractual immorality and invalidity. These implications derive from a conception of contract law that recognizes its political function in establishing a just market order, and the role that rules of contractual validity play in constructing the institution of economic exchange recognized and supported by the state, i.e. the contract. In this context, rules on contractual immorality and invalidity demarcate the realm of acceptable market conduct from unacceptable market conduct and they reflect the minimum substantive standards for contractual conduct within that realm. The normative implication of a capabilities approach to contractual justice, as put forward in this book, identifies unacceptable market relations as those that impair basic capabilities of the contracting parties themselves or of certain other (non-contracting) parties. The alternative, namely that the state would make available its coercive power to realize such transactions would run counter to the orientation of a decently just society: those transaction options are not expressions of valuable freedoms and contrary to the political
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conception of the good that is ensconced in a capabilities perspective to minimum justice. In other words, a legal system should deny the recognition as contracts of transactions that impair the basic capabilities of others whatever else a legal system may find unacceptable as market conduct under rules of contractual immorality and invalidity.

From the capabilities perspective on contractual justice, so defined, there is no need for a complicated balancing of the contracting parties’ interests against the interests of others in the hypothetical case of transactions of clothes made in sweatshops elsewhere. For the question of contractual immorality and invalidity, the interests of the contracting parties are not to be given decisive weight in the assessment. Namely, consumers are not entitled to the ability to buy products, or products at a certain price, that are made through the exploitation of others; and similarly, corporations are not entitled to the ability to obtain a profit from the production and sale of products made in sweatshops. By contrast, every human being is entitled to being able to work as a human being; an ability that is at stake for those who work in sweatshops. From a capabilities perspective, only the latter comes into view for considerations of minimum justice within a market order.

The capabilities perspective on contractual justice as articulated in this book suggests a general conclusion that legal systems, which are more likely to take account of the basic capabilities of others elsewhere in the assessment of contractual immorality and invalidity in the hypothetical case, do better in terms of shaping a just market order. This raises the question of the likeliness that the contract would be held immoral and invalid in several legal systems in Europe on the basis of the hypothetical case of transactions for clothes made in sweatshops elsewhere. Provided that contractual immorality allows for the consideration of the interests of others than the contracting parties, the assessment offers a response to the question of which interests actually count and how they are balanced against the interests of contracting parties. The two parts of this inquiry correspond to two salient aspects of the hypothetical case represented in this book as potential frontiers for contractual justice. First, the distance of the sweatshop in the hypothetical case raises the question as to whether or not the interests of others elsewhere in
the world count in the assessment of contractual immorality. Second, the contracting parties’ knowledge may be considered indicative of the weight attached to the interests of contracting parties.

Although the location of the sweatshop does not appear to present a principled obstacle to the contract’s immorality within any of the legal systems part of the book’s inquiry one should not easily assume that the contract will be held invalid, given the absence of obvious connections between existing case law and the hypothetical case. Nevertheless, such connections are found in some legal systems more easily and convincingly than in others. From a capabilities perspective, the most favourable outcome is perhaps to be expected under Dutch law. Namely, contractual invalidity follows from a contract’s immoral foreseeable consequences and the exploitation of others than the contracting parties may constitute such immoral implications. The independent importance of the contract’s foreseeable consequences for the assessment of its immorality and consequent invalidity under Dutch law bodes well for the type of consideration that the basic capabilities of others should receive. If a court would consider the hypothetical case to represent the exploitation of others as a necessary implication of the contract, those implications are sufficient for contractual invalidity. Also German law is likely to take account of the exploitation of others as implications of the contract. It is however less certain that this aspect of the case would be decisive for establishing the contract’s comprehensive character as invalid for immorality under German law. The broader analysis leaves room for the conclusion that although the contract’s implications may be deemed objectionable, the contract’s comprehensive character would not be. The latter brings with it an uncertainty as to the conclusion of contractual immorality and invalidity in the hypothetical case, and thus leaves more room for a conclusion that runs counter to what is required by a capabilities perspective on contractual justice.

However, the Dutch and the German approach are similar in that they balance between the contracting parties’ interests against those of others. This is reflected in the knowledge requirements for contractual immorality and invalidity. Both legal systems give decisive weight to the contracting parties’ interests under circumstances in which they are considered unaware of the
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sweatshop conditions. This priority of the interests of contracting parties is not easily accounted for in a capabilities perspective on contractual justice. In this sense, a capabilities perspective assesses French law more favourably, since it provides a balance that requires that only one of the parties is aware of the sweatshop conditions, thereby giving more weight to the interests of others. With regard to the hypothetical case, however, it remains uncertain whether the production conditions would be considered as the contract’s mobile déterminant. And thus, it remains uncertain whether the outcome in the hypothetical case would be compatible with the capabilities perspective as articulated in this book. The contract’s invalidity seems least likely under English law, as it would depend on the willingness of the courts to develop the law more in this direction. This does not appear likely given the controversial nature of developments in the case law that are not easily argued for under existing heads of public policy. The ranking of the national legal systems thus suggests diverse outcomes in terms of justice as understood from a capabilities perspective.

Given the exclusion of rules regarding contractual immorality from its scope, the CESL does not navigate between these diverse outcomes towards an outcome that is favoured from a capabilities perspective. Provided that a European instrument of contract law is adopted, the DCFR proposal would represent a preferred alternative from a capabilities perspective, if the contract in our hypothetical case would be held invalid under it. Such a conclusion would require that the uniform European standard of contractual morality that matures under the DCFR would give priority to the importance of entitlements that pertain to minimum justice, i.e. central capabilities, including those of others elsewhere, over other kinds of interests. Moreover, the commentary on the DCFR suggests an uncommon approach to the requirements of parties’ knowledge that is favourable to the interests of others. This approach would lead to the conclusion that contractual invalidity may follow in the absence of the parties’ knowledge regarding the sweatshop conditions under which the clothes were made. The latter approach corresponds to the priority that a capabilities approach to contractual justice would give to the ability of individuals to work as human beings, i.e. those who work in sweatshops, over the interests of contracting parties.
6.2. Recommendations...
This book suggests that a model for just market conduct should take account of the costs imposed by market transactions in Europe on others elsewhere in the world: transactions that impair the basic capabilities of others elsewhere should be held invalid for immorality. This conclusion, together with the conclusions regarding the likelihood of a transaction’s invalidity for immorality in the examined legal systems in the case of exchanges of money for clothes made in sweatshops, lead to three recommendations.

...for expanding the scope of concerns
As a first and general point, the book adds to the range of social justice concerns around which discussions and questions of contract law revolve: issues of global injustice. The increased and increasing interconnectedness between the lives people all over the world are able to live requires attentiveness to global justice concerns in the realm of contract law, as it is no longer true that we are unable to decipher the causal connections our market conduct has to the lives that others elsewhere are able to live. The book’s discussion of the question of how we understand unacceptable externalities of market conduct is an exercise in envisaging a contract law and a just market order that is attentive to those concerns. The fact that contract law is not the most effective and efficient instrument for contributing to a solution to global justice issues does not require the absence of these kinds of questions in the realm of contract law. Contract law’s minimum substantive standards for economic and social interactions cannot avoid reflecting a society’s account of decency and justice towards others beyond national borders. If contract law fulfils the political function of constructing a just market order, it is not clear why the concern for externalities manifested elsewhere should not be, at least, a topic of debate in that context.

...for considering a European minimum standard for contractual conduct
Second, the issue of externalities beyond European geographical borders poses a challenge to the position that the minimum substantive standards for contractual relations should be exclusively governed by national legal systems. Namely, in leaving
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the question of what externalities are acceptable and unacceptable to the discretion of the Member States, the European Union cannot ensure that its market order will be compatible with a minimum standard of decency and justice. The argument does not extend to the full range of substantive standards under national rules of contractual immorality, but rather engages the idea that the European Union is not indifferent to the minimum standards that are applicable to conduct on its market. Especially in the case of externalities of transactions on the internal market, a European vision may be preferred over divergent national views. Moreover, by articulating concretely the implications of a capabilities perspective for the realm of contract law and specifically for the question of contractual invalidity in the case of transactions for clothes made in sweatshops, the book illustrates in a slender fashion, an approach to making these issues accessible and debatable more broadly.

...for a test case
In order for contract law in Europe to be compatible with the requirements of a capabilities approach to contractual justice, contractual immorality should be understood to encompass those cases in which transactions impair the basic capabilities of others. If courts are willing to develop the law in this direction, this book provides a moral argument engaging contractual justice, to support such a decision. For the courts to be able to develop the law in this direction, a test case could be brought forward, which is most likely to be successful under Dutch law, similar to our hypothetical case regarding the sale of clothes produced in sweatshops. This book offers the court not only a capabilities based argument of contractual justice, but also the legal points of departure through which it may motivate a decision of invalidity for immorality.
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SAMENVATTING*

Introductie en Hoofdstuk 1: Een capibilities-visie op externaliteiten en contractuele rechtvaardigheid in Europa

Met enige regelmaat komen ondernemingen in opspraak in de media, omdat de producten die zij aan consumenten verkopen op de Europese markt geproduceerd worden onder erbarmelijke omstandigheden elders. Dergelijke voorbeelden zijn vaak onderwerp van morele verontwaardiging. De kosten voor fatsoenlijke productieomstandigheden worden afgewendelt op individuen die slecht af zijn en weinig waardevolle alternatieven hebben. Deze afwenteling van kosten kan worden beschreven als kosten externalisatie: de marktprijs die consumenten voor deze producten betalen, reflecteert niet de volledige kosten van fatsoenlijke productieomstandigheden, maar ‘externaliseert’ een gedeelte daarvan naar degenen die deze producten maken.

In dit boek fungeert het voorbeeld van sweatshops in de kledingindustrie als rode draad om het probleem van dergelijke externaliteiten te bespreken. In het licht van de veelvuldig geuite kritiek op sweatshops, kan de vraag worden gesteld hoe het contractenrecht in Europa zich zou moeten verhouden tot overeenkomsten tussen private partijen, zoals tussen consument en winkelier, die deze vorm van kosten externalisatie met zich meebrengen. Het contractenrecht is het rechtsgebied dat de normen van een samenleving weerspiegelt ten aanzien van wat als acceptabel en onacceptabel handelen op de markt moet worden beschouwd. Daarmee geeft het een visie van een rechtvaardige markt. Soms druist het gedrag van contractspartijen in tegen de fundamentele waarden van een samenleving en wordt een overeenkomst als immoreel aangemerkt en op basis daarvan ongeldig geacht. In dergelijke gevallen weigert een rechter staatsmacht beschikbaar te stellen om private partijen te ondersteunen bij het afdwingen van gemaakte afspraken, zoals dat in principe bij voor contractspartijen wederzijds voordelige geldige overeenkomsten het geval is.

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* For the English summary see chapter 1.2.

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Dit proefschrift bespreekt het onderwerp van de ongeldigheid van een overeenkomst tussen private partijen op de Europese markt in het licht van de kosten die afgewerkt worden op anderen die zich buiten de Europese grenzen bevinden, op twee manieren. In de eerste en voornaamste plaats, gaat het in dit boek om een normatieve benadering en wordt het onderwerp bezien vanuit een capabilities visie op hoe een samenleving die er naar streeft om minimaal rechtvaardig te zijn om zou moeten gaan met dergelijke overeenkomsten. Dit boek ontwikkelt een normatief kader waarin de partiële rechtvaardigheidstheorie van Martha Nussbaum als uitgangspunt wordt genomen voor het bespreken van een minimum standaard voor contractuele rechtvaardigheid. In de tweede plaats bespreekt het boek de waarschijnlijkheid dat een overeenkomst daadwerkelijk als ongeldig zal worden aangemerkt op basis van immoraliteit onder het contractenrecht zoals dat in Nederland, Duitsland, Frankrijk en Engeland geldt. Tevens behandelt het de mogelijk in de toekomst geldende Europese regels op dit gebied.

Het onderwerp is mede van belang in het kader van de voortgaande integratie van de Europese markt, welke ook via het ontwikkelen van ‘Europees contractenrecht’ tot stand wordt gebracht. Hier rijst met name de vraag wat een Europese visie van een ‘rechtvaardige interne markt’ zou moeten zijn. Hoewel het proefschrift deze laatste vraag niet beoogt te beantwoorden, heeft het wel tot doel het belang van de vraag zelf te illustreren. Door een concrete rechtvaardigheidstheorie toe te passen op het contractenrecht en de implicaties daarvan te bespreken voor het specifieke voorbeeld van overeenkomsten voor sweatshop-producten laat dit proefschrift zien dat het ertoe doet welk contractenrecht van toepassing is op de markt in termen van rechtvaardigheid.

Hoofdstuk 2: Een capabilities-visie op contractuele rechtvaardigheid

In hoofdstuk 2 wordt Martha Nussbaums capabilities-theorie besproken. Het capabilities concept heeft een brede toepassing en wordt gebruikt als maatstaf voor het vergelijken van de kwaliteit van leven in welvaartstheorieën, maar ook als basis voor rechtvaardigheidstheorieën. Het gaat bij deze capabilities benaderingen om het idee dat het er in een samenleving vooral
toe doet welke werkelijke mogelijkheden individuen hebben om waardevolle dingen te kunnen doen en zijn, dat wil zeggen, welke capabilities zij hebben. Dit idee staat in contrast met concepten die de welvaart of rechtvaardigheid in een samenleving op een andere wijze beoordelen, bijvoorbeeld bij het meten van de hoeveelheid eenheden van geld of goederen, die landen als geheel of individuen hebben. Als basis voor een oordeel over minimale rechtvaardigheid in een samenleving articuleert Nussbaum een aantal centrale capabilities die tot een minimumniveau moeten worden gegarandeerd voor elk individu. Een voorbeeld hiervan is de mogelijkheid om de eigen omgeving vorm te geven door controle te kunnen hebben over goederen en land, bijvoorbeeld middels eigendomsrechten. In het hoofdstuk worden de essentiële onderdelen van de theorie belicht om vervolgens de plaats van de markt te bespreken als onderdeel van de basisstructuur van een samenleving. Dat laatste is van belang, omdat binnen Nussbaums capabilities-theorie deze basisstructuur van een samenleving minimale rechtvaardigheid moet garanderen. Het hoofdstuk beargumenteert dat de standaard van minimale rechtvaardigheid ook implicaties heeft voor de regels van het contractenrecht die de geldigheid van het contract betreffen.

**Hoofdstuk 3: Het voorbeeld van een sweatshop**

Hoofdstuk 3 schetst de achtergrond voor de in het volgende hoofdstuk beschreven sweatshop-casus die als centraal voorbeeld in het boek fungeert van een overeenkomst die negatieve implicaties heeft voor de basis capabilities van anderen elders in de wereld. De term ‘sweatshop’ wordt gebruikt om een combinatie van erbarmelijke arbeidsomstandigheden aan te duiden, waaronder een laag loon, lange werkdagen, ongezonde en onveilige omstandigheden en een werkregime waarbinnen elementen van dwang en vernedering een rol spelen. Het hoofdstuk geeft een overzicht van de centrale argumenten die in het debat over sweatshops naar voren worden gebracht, enerzijds om de verwerpelijkheid te onderbouwen, en anderzijds het economische belang en de wenselijkheid van sweatshops. Het debat illustreert mede het belang van en de reden voor de vraag naar contractuele immoraliteit en de daaruit voortvloeiende ongeldigheid van een overeenkomst met betrekking tot een sweatshop-product.
Hoofdstuk 4 en 5: De grenzen van contractuele rechtvaardigheid en contractuele immoraliteit in Europa
In hoofdstuk 4 wordt een concrete casus beschreven van een wederzijds voordelige overeenkomst voor het kopen van kleding die gemaakt is in een sweatshop buiten Europa. De kennis van contractspartijen ten aanzien van de productieomstandigheden wordt in de casus verondersteld. Het hoofdstuk bespreekt verder niet alleen de hypothese dat een dergelijke overeenkomst ongeldig zou zijn in de rechtsstelsels die in hoofdstuk 5 worden besproken, maar ook de mogelijke bezwaren die in het licht van het debat over sweatshops (besproken in hoofdstuk 3) naar voren komen. Hieronder valt bijvoorbeeld het argument dat een sweatshop die zich elders in de wereld bevindt te ver afstaat van de overeenkomst om deze overeenkomst als immoreel te kunnen aanmerken. De bespreking van de rechtsstelsels in hoofdstuk 5 laat echter zien dat geen van de tegenargumenten zoals die in hoofdstuk 4 naar voren zijn gekomen de immoraliteit en daaruit voortvloeiende ongeldigheid op principiële grond in de weg staat. Het blijkt echter ook dat het nog maar zeer de vraag is of een rechter op basis van het contractenrecht in Engeland, Frankrijk, Duitsland of Nederland tot de conclusie zou komen dat de overeenkomst daadwerkelijk ongeldig is op basis van immoraliteit.

Hoofdstuk 6: Synthese
Dit laatste hoofdstuk brengt de resultaten van de eerdere hoofdstukken samen en geeft een beoordeling van de verschillende rechtsstelsels (besproken in hoofdstuk 5) in het licht van het capabilities-perspectief ten aanzien van contractuele rechtvaardigheid zoals dat in hoofdstuk 2 is besproken. De conclusie is kritisch ten aanzien van de ontwikkelingen van het contractenrecht in Europa evenals ten aanzien van de grenzen van contractuele rechtvaardigheid.