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

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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


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.\footnote{See for a different view Tjong Tjin Tai (2011), p.11 who also raises the question regarding liability of consumers.}

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.\footnote{Du Perron, E., 'Contract and Third Parties' in A Hartkamp et al. (eds), Towards a European Civil Code (2nd edn, Kluwer Law International, Den Haag 1998), p.314.}

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.\footnote{As articulated for instance in: the Study Group on a European Civil Code and Research Group on EC Private Law (ed), Draft Common Frame of Reference (Sellier, Munich 2009), Article II.1:102(1) and p. 62 and Lando, O. and H. Beale (eds), The Principles of European Contract Law Parts I and II (1999) Article art.1:102.}

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.\footnote{Cahen, J.L.P., Overeenkomst en derden (2nd edn Monografieën Nieuw BW B-57, Kluwer, Deventer 2004)Du Perron, C.E., Overeenkomst en derden (Kluwer Rechtswetenschappelijke Publicaties, 1999)Du Perron (1998).}

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).\footnote{Loth, M.A., Dwingend en aanvullend recht (Monografieën Nieuw BW A-19, Kluwer, Deventer 2009).} In this context, the consumer is the model example of a weaker party and consumer protection rules are the model of justified mandatory rules.
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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.11 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.12

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

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. 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. 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, dynamic developments in the context of European integration have brought and continue to bring definite change in the area of contract law. 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.

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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).
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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.\(^9\) 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.\(^9\) 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.\(^2\) 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.\(^2\) 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.

\(^9\) 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/consumers_safe_shop/fair_bus_pract/cont_law/stakeholders/5-31.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

\(^{32}\) Ibid.p.20.
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conduct.\textsuperscript{34} 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.\textsuperscript{35} Notably, taking into consideration the fact that the European legislator articulates rules of contract law\textsuperscript{36}, 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.\textsuperscript{37}

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.\textsuperscript{38} 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.\textsuperscript{39} 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.

\textsuperscript{34} Both the DCFR and the CESL can be addressed as potential European models of just market conduct. See also: Hesselink, M.W., ‘The Politics of a European Civil Code’ (2004) 10 European Law Journal 675-697.
\textsuperscript{35} Ibid. Study Group on Social Justice in European Private Law (2004).
\textsuperscript{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.
\textsuperscript{37} Study Group on Social Justice in European Private Law (2004)
\textsuperscript{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


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efficiency. 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. The question raised by Hesselink, regarding the immorality and invalidity of contracts that infringe on the fundamental rights of others elsewhere, 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.”

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. Globalization has accelerated in the last four decades particularly in the dimensions

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44 See for instance, Commission (2011), in which consumer protection is understood as an instrument to boost consumer confidence and enhance cross-border sales.
45 See section 1.1.1.2, footnote 13.
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of consumption and production.⁴⁸ 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.⁴⁹ 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.⁵⁰ 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.⁵¹ In this

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.\textsuperscript{52} In this context of global inequality consumption decisions have been framed as "(...) decisions about the levels of wealth inequality (...) that individuals believe are appropriate (...)".\textsuperscript{53} 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."\textsuperscript{54} Although this analysis is contentious,\textsuperscript{55} 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.
\textsuperscript{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).

\textsuperscript{54} Ibid., p. 636.
\textsuperscript{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.
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.