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

Tjon Soei Len, L.K.L.

Citation for published version (APA):
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

---

1 Hesselink (2005), p.506.
CHAPTER 4

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.  

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. 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?ssid=2377&dsmid=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.
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 AFORESAID, 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 1.1.2, FOOTNOTE 12.
CHAPTER 4

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

---

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. 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. 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

---

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: Gerechtsz. ’s-Hertogenbosch, 6 July 2012, Ljin BX0599 (Asparagus exploitation).
CHAPTER 4

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

---

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."10

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.11 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

---

CHAPTER 4

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

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.\textsuperscript{14} 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.\textsuperscript{15} 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\textsuperscript{16} (the main points have been addressed by some of the editors of the common core project).\textsuperscript{17} 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

\textsuperscript{15} Bussani and Mattei (1997).
\textsuperscript{17} For a more elaborate discussion and further references see: Cartwright and Hesselink (eds), (2008), chapter 1.
CHAPTER 4

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.\(^{18}\) Questions of contractual breach come into consideration, for instance, if the consumer claims that the good is not what she could reasonably have expected, namely a good that is made under decent production conditions.\(^{19}\) 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


\(^{19}\) See references in section 1.1.1.1, footnote 4.
CHAPTER 4

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. 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.\(^2^2^2\) 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.\(^2^2\) 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*.\(^2^3^\) The underlying aim of considering the link between such contracts as relevant for their

\(^{21}\) 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.
CHAPTER 4

legal status lies in the protection of contracting parties.\textsuperscript{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 “voortbouwendereenkomst”).

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.\textsuperscript{25} This question of compatibility would, however, not arise as an issue for the question of immorality and invalidity regarding the horizontal

\textsuperscript{24} Ibid., nr. 300.

\textsuperscript{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. 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.  

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 *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 *good morals or public policy*, even if the parties do not raise that

---

{*27* See on this issue section 4.1.2.1.}  
106
matter themselves.\textsuperscript{38} 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 \textit{all} cases evidently irrelevant for the court to consider.