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

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Citation for published version (APA):

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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.¹ Contractual freedom may, however, conflict with other principles, such as the idea that contractual relations must be socially acceptable.² 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 rechtshandeling die door inhoud of strekking in strijd is met de goede zeden of de openbare orde, is nietig.”³ 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.⁴ 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

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 Hijma 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, Invoering boeken 3,5 en 6, Boek 3, Vermogensrecht in het Algemeen (Kluwer, Deventer 1990), p.1138-1142.
before the court.\(^5\) 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.”\(^6\)

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.\(^7\) 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.\(^8\) 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.

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\(^6\) As articulated by advocate-general Langeméjer 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.

\(^7\) Similar to any other type of juridical act.

\(^8\) On immoral content see: Asser/Hartkamp & Sieburgh 6-III, (2010), nr.333; also Van Zeben et al. (1981), p.190.
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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.9 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 an ordinary kitchen knife, with regard to which the buyer expresses the intention to harm a third person.10 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.11 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).

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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.

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.\textsuperscript{17} 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.\textsuperscript{18} 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.\textsuperscript{19}

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.”\textsuperscript{20} 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

\textsuperscript{17} Hoge Raad 11 May 1951, NJ 1952,128 (Burgman/Avioland).
\textsuperscript{18} 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.
\textsuperscript{19} The Hoge Raad left the question unanswered in Hoge Raad, 28 June 1991, NJ 1992, 787 (Verkerk/Van der Veen), r.o. 3.2.
\textsuperscript{20} 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.”
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facts 2) that someone must have been aware of the contract’s implications.21 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.22

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.23

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

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,

\(^{24}\) See Van den Brink (2002), particularly p.122 and further, with references.


\(^{26}\) Van den Brink (2002), chapter 5.

\(^{27}\) Ibid., p. 127-128 and p. 194, 209. Van den Brink’s monograph of 2002 is the most recent comprehensive study on the Dutch concept of good morals.

\(^{28}\) Ibid., p.194.
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such as the sweatshop case.\textsuperscript{29} The degree of consensus regarding moral viewpoints is moreover subject to divergence and evolution over time and place,\textsuperscript{30} and current Dutch society seems to be increasingly pluralistic in this regard.\textsuperscript{31} 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.\textsuperscript{32} 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.\textsuperscript{33} 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.\textsuperscript{34} 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.\textsuperscript{35} 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.\textsuperscript{36} Although special importance is to be given to written sources of law that refer to fundamental rights, Dutch courts have only rarely

\textsuperscript{29} Ibid., p. 122-132 (2002).
\textsuperscript{30} Loth (2009), nr. 16; Hoge Raad 2 February 1990, NJ 1991, 265 (Sibelo/Lamet; Club 13); Hoge Raad, 7 September 1990, NJ 1991, 266 (Catoochi).
\textsuperscript{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.
\textsuperscript{32} Van den Brink (2002), p. 194.
\textsuperscript{33} Asser/Hartkamp & Sieburgh 6-III, (2010), nr. 330-331; Groene Serie, aant. 7.2.
\textsuperscript{34} Van den Brink (2002), p.211.
\textsuperscript{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.
referred to such sources directly. 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). 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. 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. 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

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 mensensdieck exercises in her practice.
39 Hoge Raad, 15 April 1994, NJ 1994, 608 (Valkenhorst II), r.o. 3.2.
40 See discussion in section on German law.
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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.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.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

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 The

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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).  

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.” 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. A German court must determine ex officio whether a contract is immoral and invalid. Over time, scholars developed different categories (Fallgruppen) of immoral contracts as they emerged in case law. Case law thus plays an important role for questions concerning contractual immorality. 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

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45 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.

46 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.

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

48 Ellenberger (2010), Rn. 21; also Armbrüster (2012), Rn. 9 and Rn. 155.

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

50 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 concretization 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.

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deemed immoral and invalid in light of general or third party interests.\footnote{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.}

5.2.1. Das Gesamtscharakter: 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 ‘Gesamtscharakter’ (further: comprehensive character).\footnote{Armbrüster (2012), Rn. 9 (Umstandssittenwidrigkeit); Ellenberger (2010), Rn. 7-8 and 40 (Gesamtscharakter); 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).} 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.\footnote{Armbrüster (2012), Rn. 9, Ellenberger (2010), Rn.8, Köhler (2009), p.192.} 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.\footnote{Ellenberger (2010), Rn.40 et seq.} 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.\footnote{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.}

5.2.2. 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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{58}

\begin{footnotesize}
\footnote{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 verschliesen, die die Sittenwidrigkeit des Rechtsgeschäfts begründen.", p. 568.}

\footnote{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.}

\footnote{Ellenberger (2010), Rn. 1; Armbrüster (2012), Rn. 1.; Beck'scher Online-Kommentar BGB/Wendtland, §138, Rn.2., Stand: 01.11.2011 Edition: 21.}
\end{footnotesize}
5.2.3. Good morals: die Gesamtbearbeitung

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.59 The concretization of good morals results from the interaction between ethical norms in the legal order and social order.60 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.61 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.62

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 Anstandsgedächtnis aller billig und gerecht Denkenden"63. Although die Anstandsformel is criticized and questioned for its lack of determinate guidance64, current commentaries attribute the

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62 ‘Die Gesamtbearbeitung’ 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 (§134 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 Anstandsgedächtnis aller billig und gerecht Denkenden widerspricht."
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 §138 I 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 \textit{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 \textit{Bundesverfassungsgericht} referred to the GG as the primary source for the interpretation of general clauses in the BGB in its seminal \textit{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
constitutio nal rights, as well as the overall purpose of the constitution.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 Sozialstaat klausel) 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 all people.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.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 Sozialstaat klausel that characterizes the fundamental form of the German state as a social state.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.75 For example, the right to free

Beurteilung menschlichen Verhaltens auf ausser-zivilrechtliche, ja zunächst überhaupt ausserrechtliche Massstäbe, wie die “Guten Sitten”, verweisen. Denn bei Entscheidung darüber, 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.”

71 Armbrüster (2012), Rn.20, Ellenberger (2010), Rn. 3-5.
72 Grundgesetz für die Bundesrepublik Deutschland, Article 1: (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.
(2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.
(3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.
73 See footnote 43.
74 Armbrüster (2012), Rn. 16, Ellenberger (2010), Rn. 2, Köhler (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-Nölke (eds), Fundamental Rights and Private Law (Sellier, Munich 2011) represents a practical tool on the subject for judges.
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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. \textit{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 \textit{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 \textit{Bundesgerichtshof} considered whether the purpose of the American legislation included an interest of vital importance to Germany. The \textit{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 \textit{Bundesgerichtshof} reasoned,

\textsuperscript{76} European Convention on Human Rights, Article 4 & 11.  
\textsuperscript{77} Ellenberger (2010), Rn. 3, Armbrüster (2012) Rn. 16.  
\textsuperscript{78} \textit{Bundesgerichtshof} 21 December 1960, BGHZ 34,169/NJW 1961,  822 (Borax).  
\textsuperscript{79} 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.
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.\footnote{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.”}

The Bundesgerichtshof also addressed the question of German interest in another case regarding the morality of a contract.\footnote{See also ibid., Rn.17.} The Nigerian cultural heritage case concerned an insurance contract for the transport of Nigerian objects of art over sea. \footnote{Bundesgerichtshof 22 June 1972, BGHZ 59,82/NJW 1972, 1575, (Nigerian Cultural Heritage), p. 85.} 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.\footnote{Ibid., p.1576-1577.} 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.\footnote{Ibid., p.1576.} However, the Bundesgerichtshof also considered whether
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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 Seeversicherungsbedingungen (ADS). This article required that the insurance contract protected a permissible interest, i.e. an interest that would not be deemed immoral under §138. 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. 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, 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

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.
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.
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.

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important role there.\textsuperscript{88} 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.

\textsuperscript{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. 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.” 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, 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), which are determinable (under article 1129), the contract’s validity in the

89 Fabre-Magnan (2012), p. 57 et seq.
90 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.”
91 Article 1126 CC states: “Tout contrat a pour objet une chose qu’une partie s’obligé à donner, ou qu’une partie s’obligé 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.”
92 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.
93 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
hypothesised case seems not to be questionable on the basis of the substantive 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”.94 For our hypothetical sweatshop case, particularly the latter reference regarding a contract’s ‘cause illicite’ is of relevance (see next section).95 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).96 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.97

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,98 the concept of cause has long been subject to

peut être incertaine, pourvu qu'elle puisse être déterminée. Translated in Civil Code: “Only things which may be the subject matter of legal transactions between private individuals may be the object of agreements.” And “An obligation must have for its object a thing determined at least as to its kind. The quantity of the thing may be uncertain, provided it can be determined.”

94 This article is translated in ibid.: “Obligations have no effect when the cause is absent, false or unlawful.”

95 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.

96 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.

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

98 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.

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 (Dalloz, 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.

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 88-89 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.

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 mœurs, ou, plus généralement, à une règle impérative. »; Projet de la Chancellerie (2008), articles 88-89: La licéité du contrat; Projet Terré (2008) article 59: “Le contrat ne peut déroger à l’ordre public au bonnes mœurs, 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.”

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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 moeurs", and more specifically in article 1133: "La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes moeurs 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., 1, 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
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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

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.

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 that contract in absolute terms: its inexistence is of importance to society as a whole.

Ghestin (2006), nr. 1249, Terré et al. (2009), nr.366.

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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.\footnote{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.

\footnote{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 (...)”.

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.

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.

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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’intéret 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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\(^{115}\) 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’),\textsuperscript{117} 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\textsuperscript{118} 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.\textsuperscript{119} Although Atiyah described


\textsuperscript{118} As suggested by Mekki (2004).

\textsuperscript{119} Whittaker (2008), nr. 1-011 et seq. and 1-021; Prentice (2008), nr. 16-004.
the decline of freedom of contract during the 20\textsuperscript{th} 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.\footnote{Atiyah (1979), p. 717 et seq.} 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.\footnote{Whittaker (2008), nr. 1-011 et seq.; Prentice (2008), nr. 16-004.} 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).\footnote{Prentice (2008), nr. 16-142,16-153. Other authors also refer to ‘unenforceable terms and contracts’, Atiyah, P.S. and S.A. Smith, Atiyah’s Introduction to the Law of Contract (Oxford University Press, Oxford 2005), chapter 8.} 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?”\footnote{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).} 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 foregoes distinctions between the
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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 voidance 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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contrary 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 contrary 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

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relocate, or sell his property without the consent of the lender, Lord Cozens Hardy M.R. referred as the contract as to “savour of serfdom”, p.312. Lord Warrington L.J. agreed with the invalidity of the contract, because “Even in the most trivial incidents of life he cannot do as he pleases; he can only act in a way to which this money-lender will consent.”, p. 314. And of the same opinion, Lord Scrutton L.J. stated that he could “(…) conceive nothing more dangerous to the interests of the public than (…) a system of money-lending like this (…)”, p.318.

135 Prentice (2008)nr. 16-004.

136 Ibid., nr. 16-004.
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\(^{137}\) 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\(^{138}\) 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.\(^{139}\)

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.\(^{140}\) 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.¹⁴¹

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

¹⁴¹ 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).
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

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\(^{142}\) 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.\(^{145}\) 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\(^ {146}\) and for revealing a lacuna in the CESL’s reflection of a “European model of just conduct”\(^ {147}\).

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.\(^ {148}\) 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.\(^ {149}\)

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.\(^ {150}\) On the one hand, the comments to the article


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,\(^{354}\) rather than those of the contracting parties.\(^{355}\) 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

\(^{354}\) As suggested in the sections on the principles of the DCFR under nr. 5. Ibid., p. 64-65.

\(^{355}\) 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
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 ‘illicite’. 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
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approach would thus suggest a different balance of interests, placing comparatively more weight on the interests of others and society as a whole.