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

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

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

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

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

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

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

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

Given the exclusion of rules regarding contractual immorality from its scope, the CESL does not navigate between these diverse outcomes towards an outcome that is favoured from a capabilities perspective. Provided that a European instrument of contract law is adopted, the DCFR proposal would represent a preferred alternative from a capabilities perspective, if the contract in our hypothetical case would be held invalid under it. Such a conclusion would require that the uniform European standard of contractual morality that matures under the DCFR would give priority to the importance of entitlements that pertain to minimum justice, i.e. central capabilities, including those of others elsewhere, over other kinds of interests. Moreover, the commentary on the DCFR suggests an uncommon approach to the requirements of parties’ knowledge that is favourable to the interests of others. This approach would lead to the conclusion that contractual invalidity may follow in the absence of the parties’ knowledge regarding the sweatshop conditions under which the clothes were made. The latter approach corresponds to the priority that a capabilities approach to contractual justice would give to the ability of individuals to work as human beings, i.e. those who work in sweatshops, over the interests of contracting parties.

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6.2. Recommendations...
This book suggests that a model for just market conduct should take account of the costs imposed by market transactions in Europe on others elsewhere in the world: transactions that impair the basic capabilities of others elsewhere should be held invalid for immorality. This conclusion, together with the conclusions regarding the likelihood of a transaction’s invalidity for immorality in the examined legal systems in the case of exchanges of money for clothes made in sweatshops, lead to three recommendations.

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

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

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