

# 1 | The concept of nullity

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## 1 INTRODUCTION

At the close of the nineteenth century the concept of nullity was hardly discussed. Contracts were either valid or they were null and void. Void contracts were considered non-existent, so the juridical effects intended by the parties simply did not occur. The concipients of the German *Bürgerliches Gesetzbuch* (BGB) concisely gave voice to this idea:

§ 108. Ein nichtiges Rechtsgeschäft wird in Ansehung der gewollten rechtlichen Wirkungen so angesehen, als ob es nicht vorgenommen wäre.

In the BGB as enacted in 1900 this provision is not to be found. The underlying reason is not that the authors disagreed, but rather that they considered the provision to be superfluous. In legal doctrine the concept of nullity (*Nichtigkeit*) was considered an established fact, so that the legislator saw no need to insert a precise definition in the code after all.<sup>1</sup> The views of Dutch legal scholars of that time fitted this understanding seamlessly.<sup>2</sup>

More than one hundred years later the situation has changed fundamentally. The concept of nullity is no longer self-evident. In the place of the simple observation that the juridical effects which the parties intended fail to occur, a question has emerged: how '(null and) void' is '(null and) void' actually?<sup>3</sup> This question is the result of the gradually developed awareness that a nullity should not interfere beyond what is justified by its rationale. In this twenty-first

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1 *Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs, Band I, Allgemeiner Theil und Recht der Schuldverhältnisse*, Berlin: J. Guttentag 1897, p. 125.

2 See e.g. G. Diephuis, *Het Nederlandsch Burgerlijk Regt, Tweede Deel*, Groningen: J.B. Wolters 1872, p. 190; N.K.F. Land, *Verklaring van het Burgerlijk Wetboek, Vierde deel (Boek III, Titel 1-4)*, revised by W.H. de Savornin Lohman, Haarlem: Erven F. Bohn 1907, p. 492. Further on 19<sup>th</sup>-century nullity: A.C. van Schaick, *Contractsvrijheid en nietigheid* (diss. Brabant), Zwolle: W.E.J. Tjeenk Willink 1994, pp. 214-221.

3 E.g. Jac. Hijma, *Hoe nietig is nietig?*, *Beschouwingen omtrent het nietigheidsbegrip in het contractenrecht* (lecture Ghent), Thorbeckecollege 22, Antwerpen: E. Story-Scientia 1998.

century the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) explicitly gives voice to – and applies – this ‘starting point of the new Civil Code that nullities in principle do not extend further than their purpose justifies’.<sup>4</sup> In the modern way of thinking the qualification ‘null and void’ no longer indicates a total rejection. A null and void juridical act is not considered non-existent; it exists, but it is burdened with a problem which makes the attribution of juridical effects questionable. Surely Dutch law does not stand alone in this development. For Germany, Beer observed even in 1975 that the doctrine of nullity had become the doctrine of the limitation of nullity.<sup>5</sup> The recently published contract law ‘principles’ also display the wish to refrain from interventions which surpass what is really necessary.<sup>6</sup>

The purpose of this essay is to analyse the current status of the concept of nullity, also with a view to international developments.<sup>7</sup> Although the doctrine of nullity applies to all juridical acts, for reasons of compactness the text will focus predominantly on contracts.

## 2 EXPLORATION

As a starting point I still hold for valid the definition presented by Eggens in 1939: a juridical act is void, if and insofar as the law withholds the intended juridical effects.<sup>8</sup> At this basic conceptual level little seems to have changed in the course of three quarters of a century. In the elaboration, however, there appears to be a lot going on. In the first place, positive law turns to the nullity verdict less quickly. In the second place, when a juridical act is null and void after all, the law appears to be inclined to smooth over the edges of this verdict.<sup>9</sup> Both aspects come forward prettily in recent HR 28 November 2014 (*Snippers q.q./Rabobank*), in which decision the Dutch Supreme Court refers to – and concurs with – ‘the legislator’s endeavour to push back nullities and

4 HR 17 February 2006, ECLI:NL:HR:2006:AU9717, NJ 2006/378, with commentary from M.M. Mendel (*Royal c.s./Universal Pictures*), sub 4.7; likewise HR 5 January 2007, ECLI:NL:HR:2007:AZ2221, NJ 2008/502 (*AVM/X*), sub 3.4.2.

5 H. Beer, *Die relative Unwirksamkeit, Eine Darstellung unter besonderer Berücksichtigung des Interessen- und Wertungsjurisprudenz*, Berlin: Duncker & Humblot 1975, p. 77.

6 See *infra*, par. 6-7.

7 A nullity can be the result of an annulment, e.g. on the basis of error (art. 6:228 DCC). This essay, however, concentrates on juridical acts which are automatically null and void. Earlier publications on nullity (and annullability) by the author include Jac. Hijma, *Nietigheid en vernietigbaarheid van rechtshandelingen* (diss. Leiden), Deventer: Kluwer 1988; Hijma 1998; Jac. Hijma, ‘Nietigheden in het vermogensrecht’, *RM Themis* 1992, pp. 403-417.

8 J. Eggens, ‘Vormen van nietigheid en vernietigbaarheid van rechtshandelingen’, *WPNR* 1939/3629, p. 325; also recorded in J. Eggens, *Verzamelde Privaatrechtelijke Opstellen, Deel 2*, Alphen aan den Rijn: N. Samsom 1959, p. 31.

9 Likewise Van Schaick 1994, pp. 255-313 (‘Nietigheidsrelativering en nietigheidsecartering’).

their consequences'.<sup>10</sup> In my opinion these two aspects are inextricably interwoven;<sup>11</sup> therefore they jointly constitute the object of this study.

### 3 VIOLATION OF GOOD MORALS OR PUBLIC POLICY

Contracts contrary to good morals or public policy are null and void. The Dutch Civil Code (*Burgerlijk Wetboek*) (DCC) ordains so in art. 3:40 (1);<sup>12</sup> other codifications contain similar provisions.<sup>13</sup> By this means the legislator grants, in the words of Neuner, an 'ethical minimum', which should be borne in mind when discussing the inclination to avoid nullities.<sup>14</sup>

The answer to the question what good morals and public order prescribe, varies according to place and time. Developments in this – basic – part of the law are mostly gradual. However, the observation seems appropriate that nowadays people tend to conclude less quickly to an infringement of good morals or public policy than they did in the past. On the issue of prostitution for instance the German Supreme Court (*Bundesgerichtshof*) notes a change in the sentiment of people, thus that 'die Prostitution überwiegend nicht mehr schlechthin als sittenwidrig angesehen wird'.<sup>15</sup> Such a development will not leave (the validity of) contracts in such a domain untouched.<sup>16</sup> In the Netherlands we can also point at the erosion – to be discussed below<sup>17</sup> – of the idea that a contract leading to performance violating a mandatory statutory provision will be void because it is contrary to public policy.

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10 HR 28 November 2014, ECLI:NL:HR:2014:3460, *RvdW* 2015/3 (*Snippers q.q./Rabobank*), sub 3.6.2.

11 Cf. A. Tenenbaum *et al.*, in: B. Fauvarque-Cosson & D. Mazeaud (eds.), *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, Munich: Sellier 2008, pp. 144-145 ('The sanction brings us back to the notion: "The choice is not only technical, it also affects the notion. [...]").

12 On this subject: V. van den Brink, *De rechtshandeling in strijd met de goede zeden* (diss. Amsterdam (UvA)), Den Haag: Boom Juridische Uitgevers 2002; A.S. Hartkamp & C. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, 6, Verbintenissenrecht, Deel III, Algemeen overeenkomstenrecht*, Deventer: Kluwer 2014, nr. 330-347g; C.C. van Dam, in: Jac. Hijma (ed.), *Rechtshandeling en Overeenkomst*, Deventer: Kluwer 2013, nr. 154-158; H.J. van Kooten, in: Jac. Hijma (ed.), *Groene Serie Vermogensrecht*, Deventer: Kluwer (loose-leaf and online), Art. 3:40, nr. 7.1-12.

13 E.g. § 138 BGB (good morals) and art. 1133 of the French *Code civil*; see also art. II.-7:301 DCFR (and art. 15:101 PECL) regarding 'contracts infringing fundamental principles'.

14 M. Wolf & J. Neuner, *Allgemeiner Teil des Bürgerlichen Rechts*, München, C.H. Beck 2012, § 46, nr. 1.

15 BGH 13 July 2006, I ZR 241/03, *NJW* 06, 3490, sub 21.

16 Further *infra*, par. 13.

17 Par. 5.

## 4 CONTRACT FORMATION VIOLATING A MANDATORY STATUTE

Art. 3:40 (2) DCC provides that a juridical act which violates a mandatory statutory provision becomes null and void;<sup>18</sup> if, however, the provision is intended solely for the protection of one of the parties to a multilateral contract, the act may only be annulled; in both cases this applies to the extent that the provision does not otherwise provide.<sup>19</sup> Art. 3:40 (3) DCC adds that statutory provisions which do not purport to invalidate juridical acts in conflict therewith, are not affected by the preceding paragraph. As paragraph 3 shows, Dutch law knows provisions which prohibit the formation of contracts, but have no repercussions for the validity of a contract concluded anyway. Sometimes they are (only) sanctioned by means of a penalty or punishment, sometimes they are not sanctioned at all (*leges imperfectae*).<sup>20</sup> A well-known example is the sale in a shop after opening hours (violation of art. 2 Trading Hours Act (*Winkeltijdenwet*)): the shopkeeper may be fined, but the validity of the concluded sales is not at stake.<sup>21</sup> Paragraph 3 appears to be meant for exceptions, but has a considerable potential. Besides, in some cases the violated statutory provision itself mentions explicitly that it does not purport to invalidate infringing contracts.<sup>22</sup>

It is interesting to observe that the partition between art. 3:40 (2) and art. 3:40 (3) DCC is not in a fixed place. Sometimes, as a consequence of developments in society, certain contracts can shift from paragraph 2 to paragraph 3 so that the sanction is lost. An example is produced by HR 7 September 1990 (*Catoochi*). On the Caribbean island of Aruba (part of the Kingdom of the Netherlands) Gomez buys a ticket in a so-called *catoochi* lottery; taking part in this kind of lottery is prohibited by the local Lottery Ordinance (*Loterijverordening*).<sup>23</sup> Gomez wins a considerable prize. He demands payment by Ruiz, but Ruiz refuses, arguing that the ticket sale is forbidden and void. The Dutch Supreme Court establishes that this sale is indeed forbidden by a statutory provision. But the Supreme Court also finds that, as the Court of Appeal

18 For the (limited) scope of this provision see also *infra*, par. 5.

19 On this subject: Asser/Hartkamp & Sieburgh 6-III 2014/314-329; Van Dam 2013, nr. 146-158; H.J. van Kooten, in: *Groene Serie Vermogensrecht*, Art. 3:40, nr. 6.1-9.

20 TM, in: Van Zeben *et al.* (ed.), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 3, Vermogensrecht in het algemeen*, Deventer: Kluwer 1981, p. 191.

21 An overview of court judgments on paragraph 3 is presented by H.J. van Kooten, in: *Groene Serie Vermogensrecht*, Art. 3:40, nr. 6.7.

22 Examples are art. 1:352 DCC, regarding transactions by a guardian, and art. 1:23 Financial Supervision Act (*Wet financieel toezicht*), regarding juridical acts contrary to this Act. Cf. art. 7:902 DCC: 'A settlement [...] is valid, notwithstanding that it proves to be in breach of mandatory law, unless it would also, as to content or necessary implication, be in breach of good morals and public policy'.

23 HR 7 September 1990, *NJ* 1991/266, with commentary from C.J.H. Brunner (*Catoochi*). The judgment was made according to the old Civil Code (art. 1371/1373 *old* DCC), but would have read the same under the present Code.

observed, in broad sections of Aruban society the organisation of this kind of lottery is no longer felt to be socially undesirable, illegal or deserving of punishment and is therefore tolerated by the government. Such being the case, it can no longer be said that the sole violation of a statutory provision at present still entails the nullity of the sale of tickets in such a lottery. This judgment actually registers a 'loss of purport': the Lottery Ordinance may have entailed nullity in the past, but in view of the changed perceptions in society nowadays it no longer does so.<sup>24</sup>

## 5 CONTRACT PERFORMANCE VIOLATING A MANDATORY STATUTE

The legislator intended art. 3:40 (2) and (3) DCC solely for cases in which the conclusion of the contract as such is prohibited by a statutory provision. Cases in which the contracting itself is not affected but 'only' the content or the necessary implication of the contract is prohibited, are not governed by these paragraphs 2 and 3. They are actually passed on to art. 3:40 (1) DCC, which provides that a contract which by its content or necessary implication is contrary to good morals or public policy is null and void. With regard to that 'passing on' the past decades have witnessed an interesting development.

Meijers' Commentary (1954) mentions that if a performance to which the contract by its content or necessary implication obliges is prohibited by a statutory provision, the contract will be null and void under paragraph (1); taking on an obligation to perform in defiance of a statute can be deemed to violate public order.<sup>25</sup> In the Memorandum of Reply (1971) the Minister, keeping a low profile but meaningfully, inserts into this opinion the words 'in principle'.<sup>26</sup> On the occasion of the introduction of the Civil Code (1987) a next step is taken. The government commissioner emphasises that many (higher as well as lower) legislators in their rulemaking simply do not consider the private law consequences; the decision whether the contract is void or valid must therefore be left to the court.<sup>27</sup>

A similar liberalisation is noticeable in legal practice. In a first phase the Dutch Supreme Court showed on a casuistic basis that the mere fact that a statutory provision prohibits the content or necessary implications of a contract does not necessarily entail the nullity thereof because of (a violation of) public

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24 Evidence of a similar line of thought, on the crossroads of statutory law and good morals, is given by HR 2 February 1990, NJ 1991/265 (Club 13), regarding the sale of goodwill and inventory of a sex club (violation of the 'ban on brothels' of art. 250*bis old* Penal Code).

25 TM, in: *Parl. Gesch. NBW, Boek 3*, p. 191.

26 MvA II, in: *Parl. Gesch. NBW, Boek 3*, p. 192.

27 VC II Inv. and Lijst v. Antw. II Inv., in: Van Zeven *et al.* (ed.), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Invoering Boeken 3, 5 en 6, Boek 3, Vermogensrecht in het algemeen*, Deventer: Kluwer 1981, pp. 1138-1141.

policy.<sup>28</sup> In HR 1 June 2012 (*Esmilo/Mediq*) the Supreme Court takes a second, more fundamental, step. The decision concerns a cooperation contract in the medicine sector; its performance implies the infringement of several statutory provisions.<sup>29</sup> Is this contract null and void? According to the Supreme Court, the view that the sole fact that the contract obliges to a performance prohibited by a statutory provision implies a violation of public order and thus leads to nullity is no longer valid.<sup>30</sup>

‘A contract infringing such a statutory prohibition does not necessarily violate public order. Therefore, if a contract obliges to a performance infringing a statutory provision, the judge who has to decide whether the contract violates public order for that reason, in any case shall take into consideration which interests are served by the infringed provision, whether the infringement violates fundamental principles, whether the parties were aware of the infringement, and whether the provision supplies a sanction; and the judge shall render account thereof in the reasons stated in the judgment.’

This consideration contains two elements which are important to the doctrine of nullity. In the first place the Supreme Court fundamentally opens up the assessment. It does not declare the contract void and even does not declare it void in principle; the decision is left to the judge. In the second place it should be noted that the Supreme Court introduces an approach in terms of (a number of) ‘perspectives’. It is left to the judge to decide, but in motivating his decision the judge is obliged to run through (at least) the four indicated perspectives and must report on his findings in his verdict. Any automatism is off; nullity has to settle for less than before.

## 6 VIOLATION OF A STATUTE ACCORDING TO THE DCFR

These Dutch legal developments do not stand alone in the least. In the *Draft Common Frame of Reference* (DCFR),<sup>31</sup> published in 2009, the following article is devoted to the infringement of mandatory rules:

28 HR 22 January 1999, NJ 2000/305 (*Uneto/De Vliert*); HR 7 April 2000, ECLI:NL:HR:2000:AA5401, NJ 2000/652, with commentary from Jac. Hijma (*Parkeereexploitatie/Amsterdam*).

29 HR 1 June 2012, ECLI:NL:HR:2012:BU5609, NJ 2013/172, with commentary from T.F.E. Tjong Tjin Tai (*Esmilo/Mediq*).

30 See *Esmilo/Mediq*, sub 4.4.

31 Chr. von Bar & E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Full Edition, Volume I*, Munich: Sellier 2009, Art. II.-7:302. The accompanying commentary runs largely parallel to an essay by H.L. MacQueen, ‘Illegality and Immorality in Contracts: Towards European Principles’, in: A.S. Hartkamp *et al.* (eds.), *Towards a European Civil Code*, Alphen aan den Rijn & Nijmegen: Kluwer Law International & Ars Aequi Libri 2011, pp. 555-570.

*Art. II.-7:302: Contracts infringing mandatory rules*

- (1) Where a contract is not void under the preceding Article but infringes a mandatory rule of law, the effects of that infringement on the validity of the contract are the effects, if any, expressly prescribed by that mandatory rule.
- (2) Where the mandatory rule does not expressly prescribe the effects of an infringement on the validity of a contract, a court may;
  - (a) declare the contract to be valid;
  - (b) avoid the contract, with retrospective effect, in whole or in part; or
  - (c) modify the contract or its effects.
- (3) A decision reached under paragraph (2) should be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including:
  - (a) the purpose of the rule which has been infringed;
  - (b) the category of persons for whose protection the rule exists;
  - (c) any sanction that may be imposed under the rule infringed;
  - (d) the seriousness of the infringement;
  - (e) whether the infringement was intentional; and
  - (f) the closeness of the relationship between the infringement and the contract.

The cited article should be read in combination with the preceding article II.-7:301 DCFR, which provides that contracts infringing fundamental principles are void. Because these 'heavy' cases are withdrawn from art. II.-7:302 DCFR (see paragraph 1), only 'lighter' cases remain.<sup>32</sup> Against that background the article does not aim at nullity. It offers the judge an array of possibilities: he can declare the contract valid (paragraph 2 sub a), he can avoid the contract, with retrospective effect, in whole or in part (paragraph 2 sub b), or he can modify the contract or its effects (paragraph 2 sub c).

The judge is granted a discretionary power to make a choice between those options,<sup>33</sup> provided that his solution is 'an appropriate and proportional response to the infringement' (beginning of paragraph 3). The article closes with a non-exhaustive enumeration of six relevant perspectives, starting with 'the purpose of the rule which has been infringed' (paragraph 3 sub a-f).

The DCFR article is largely derived from art. 15:102 of the *Principles of European Contract Law* (PECL), formulated by the Lando Commission.<sup>34</sup> The

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32 Von Bar & Clive 2009, Art. II.-7:302, Comments, A.

33 Von Bar & Clive 2009, Art. II.-7:302, Comments, D.

34 The commentary too is largely copied from the PECL: cf. O. Lando *et al.* (eds.), *Principles of European Contract Law, Part III*, The Hague/London/New York: Kluwer Law International 2003, pp. 213-221. A compact comparison of the PECL-regime with that of the Dutch art. 3:40 DCC is made by A.C. van Schaick, in: D. Busch *et al.* (eds.), *The Principles of European Contract Law (Part III) and Dutch Law, A Commentary II*, The Hague: Kluwer Law International 2006, ad Art. 15:102, pp. 248-251.

UNIDROIT *Principles of International Commercial Contracts* (PICC) contain related – but not identical – provisions.<sup>35</sup>

## 7 CONTINUATION; SOME OBSERVATIONS

The interesting DCFR article induces me to four – dissimilar – observations.

To start with, it is conspicuous that the greater part of the perspectives the Dutch Supreme Court mentions in the *Esmilo/Mediq* case<sup>36</sup> are found in this DCFR provision (as well as in its predecessor in the PECL): which interests are served by the infringed provision (cf. paragraph 3 sub a-b), whether the infringement violates fundamental principles (cf. paragraph 1),<sup>37</sup> whether the parties were aware of the infringement (cf. paragraph 3 sub e), whether the provision provides a sanction (cf. paragraph 3 sub c). It is plausible that this relationship is no coincidence; the Supreme Court has probably been inspired by PECL and/or DCFR.<sup>38</sup>

Secondly it should be observed that the framework is fundamentally different from the Dutch one. Under article 3:40 DCC the question has to be answered whether the contract is automatically null and void (because of a violation of good morals or public order) or valid.<sup>39</sup> According to art. II.-7:302 DCFR, however, the contract is simply valid; when the case is never brought before a judge (or arbitrator) the infringement of the statute stays without consequences.<sup>40</sup> Only when a party takes legal action and forces a judge to choose between the options mentioned in paragraph 2 can a sanction follow. An automatic nullity is principally not in order. It is strange to see that this ‘pending approach’ was propagated enthusiastically in the Netherlands more than a century ago, by Van Hamel,<sup>41</sup> without success. The most significant counter argument is that this opinion distinguishes insufficiently between

35 Art. 3.3.1 PICC. See *UNIDROIT Principles of International Commercial Contracts 2010*, Roma: UNIDROIT 2010, pp. 124-133 (text and commentary), on which M.J. Bonell, ‘The New Provisions on Illegality in the UNIDROIT Principles 2010’, *Uniform Law Review/Revue de droit uniforme* 2011, pp. 517-536. A notable difference with the DCFR is that UNIDROIT does not grant the judge a discretionary power to modify the contract (cf. par. 7).

36 *Supra*, par. 4.

37 Art. II.-7:302 (1) refers to art. II.-7:301 DCFR (Contracts infringing fundamental principles).

38 In his advisory Opinion preceding *Esmilo/Mediq* Advocate-General Wissink refers to the DCFR article: ECLI:NL:PHR:2012:BU5609, sub 3.19. See also T.F.E. Tjong Tjin Tai, *NJ 2013/172*, commentary, sub 3.

39 I.e. valid on the understanding that no judge will sentence a party to display forbidden behaviour; HR 11 May 1951, *NJ 1952/128*, with commentary from Ph.A.N. Houwing (*Burgman/Aviolanda*).

40 Thus explicitly Von Bar & Clive 2009, Art. II.-7:302, Comments, D.

41 J.A. van Hamel, *De leer der nulliteiten in het burgerlijke recht* (diss. Amsterdam (UvA)), Amsterdam: J.H. de Bussy 1902. Similar for France: R. Japiot, *Des nullités en matière d’actes juridiques, essai d’une théorie nouvelle* (thèse Dijon), Paris: Rousseau 1909.



substantive and procedural private law. Substantive private law – including the nullities – takes effect automatically, without (the need for) a court judgment. The parties who studied the nullities profoundly after Van Hamel, like Tieleman, the Nypels Commission and Eggens, all accept that the law of nullities is effective automatically.<sup>42</sup> In Germany too this is considered obvious.<sup>43</sup> It seems to me that wherever it can be avoided (which is the case here), juridical situations should not be kept ‘pending’, in particular because it then becomes necessary to start a legal procedure to reach the desirable legal status. There is good reason why the trend is exactly opposite, in the direction of ‘deformalisation’. In the Netherlands the number of situations in which court intervention is required to create certain legal effects has considerably decreased since the adoption of the new Civil Code (1992).<sup>44</sup>

A third observation concerns the array of options. The option to ‘declare the contract to be valid’ of paragraph 2 sub a fits in with the possibility recognised in art. 3:40 (3) DCC that no invalidity occurs.<sup>45</sup> In my opinion, the retroactive avoidance mentioned in paragraph 2 sub b is in essence not a voidability (to be invoked by a protected party); it is rather a regular nullity, with the peculiarity that it only occurs if and insofar as a judge so decides. The most important difference with Dutch law is that instead of this validity or invalidity a third type of solution can follow: a modification of the contract or of its effects by the judge (paragraph 2 sub c). The latter option implies various possibilities:<sup>46</sup>

‘The power to modify would include power to dispense with future performance of obligations under the contract but to let matters otherwise rest as they are, without any restitution. Equally, the contract may be given some but not complete future effect: for example, it may be made enforceable by one of the parties only, or only in part, or only at a particular time. It may be that some remedies, such as an order for specific performance, are not to be available, while others, such as damages for non-performance, are to be.’

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42 Further Hijma 1988, nr. 3.34, pp. 113-116.

43 Wolf/Neuner 2012, § 55, nr. 4.

44 E.g. the annulment of a juridical act (art. 3:49 DCC) or the termination of a contract (art. 6:267 DCC) no longer requires the intervention by a judge. Cf. former articles 1485 (‘eene regtsvordering’) and 1302 DCC. In France the nullity verdict is still considered ‘constitutive’; see, concise, Von Bar & Clive 2009, Art. II.-7:302, Notes, II, 10. The French view has its origins in the strong influence Japiot’s dissertation (mentioned above) got there. In the new French contract law, to be enacted in 2015/2016, termination no longer requires a judgment (art. 134), but nullity still does: ‘La nullité doit être prononcée par le juge’ (art. 86). See Ministère de la Justice, *Avant-projet de réforme du droit des obligations*, Document de travail, 23 octobre 2013.

45 *Supra*, par. 4.

46 Von Bar & Clive 2009, Art. II.-7:302, Comments, D.

A fourth striking aspect is that under the DCFR the judge has a discretionary power to choose between the various results mentioned. The DCFR Commentary stresses this judicial power.<sup>47</sup> ‘The intention behind these norms is obviously to confer upon the judge the broadest possible discretion’, as Zimmermann – apparently sighing – observes.<sup>48</sup> Meanwhile it should be noted that inside the Commission there were serious doubts about this approach.<sup>49</sup>

The trio constitutive judgment, array of sanctions and judicial power produce a flexible system, which is advantageous in principle. On the other hand it can be argued that *very* much is left for the judge to decide. The possibility of a contract modification too is allotted to him in a general manner, the only directive being that he must choose ‘an appropriate and proportional response’, accompanied by six perspectives of a largely general nature. In the Dutch Code the judicial modification of contracts is not an unknown phenomenon; see art. 3:54 (2) DCC (undue influence), art. 6:230 (2) DCC (error) and art. 6:258 DCC (unforeseen circumstances). However, this phenomenon is limited to a few specific situations, and the judge is given as much guidance as possible (‘to remove the detriment’; thus art. 3:54 (2) DCC and art. 6:230 (2) DCC). Against this background I wonder, with Van Schaick,<sup>50</sup> whether art. II.-7:302 DCFR does not leave the matter too broadly and too easily to the judge’s discretion. Therefore I am somewhat less enthusiastic than Hartkamp and Sieburgh, who recently converted to the system of art. 15:102 PECL,<sup>51</sup> from which art. II.-7:302 DCFR is derived.

## 8 NULLITY IN EUROPEAN UNION LAW

European Union (EU) law contains, in various types of instruments,<sup>52</sup> all kinds of nullity provisions. A general European nullity doctrine is not perceptible, though. The most prominent location is probably art. 101 lid 2 TFEU (cartel

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47 Von Bar & Clive 2009, Art. II.-7:302, Comments, D.

48 R. Zimmermann, ‘*Restitutio in integrum*: The Unwinding of Failed Contracts under the Principles of European Contract Law, The UNIDROIT Principles and the *Avant-projet d’un Code Européen des Contrats*, *Uniform Law Review/Revue de droit uniforme* 2005-4 (hereinafter: Zimmermann 2005), pp. 725-726.

49 With ‘Commission’ I here allude to the Lando Commission, which designed the predecessor in the PECL. See MacQueen 2011, pp. 562-563. The then proposals of the Law Commission of England and Wales seem to have been a decisive factor: Consultation Paper No. 154, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, 1999 (see MacQueen 2011, *ibidem*; Zimmermann 2005, *ibidem*). By now the British Government has communicated it does not intend to implement the Law Commission’s proposals: *Report on the Implementation of Law Commission proposals*, March 2012, sub 52.

50 A.C. van Schaick, in: Busch c.s. 2006, Art. 15:102, p. 251. Critical also Zimmermann 2005, pp. 725-726.

51 Asser/Hartkamp & Sieburgh 6-III 2014/309.

52 Treaties, Regulations, Directives.

ban), which provides that '[a]ny agreements or decisions prohibited pursuant to this Article shall be automatically void'.<sup>53</sup> Some scholars observe with astonishment that this provision, 'in spite of its crucial importance [...] has not spurred much doctrinal interest, to say the least'.<sup>54</sup> The European Court of Justice has repeatedly had the occasion to give shape to its view on this nullity. All in all the following picture arises.

Firstly, as the article provides explicitly, the prohibited contracts are 'automatically void'. Therefore neither a party activity nor a judgment is required for the nullity to occur.

Secondly the European Court has decided that the nullity concerned is absolute, so that 'an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties'.<sup>55</sup>

Thirdly the article is a matter of public policy which must be automatically applied by national courts.<sup>56</sup>

Fourthly the European Court has indicated that such nullity 'is capable of having a bearing on all the effects, either past or future, of the agreement [...], and consequently [...] is of retroactive effect'.<sup>57</sup> For a general civil lawyer it seems strange to come across an automatic nullity with retroactive effect;<sup>58</sup> retroaction only seems fit in situations commencing with validity, as is the case with voidabilities.<sup>59</sup> The retroaction the Court has in mind is probably not meant in a 'technical' sense; it rather seems to paraphrase that the nullity has been there right from the start.<sup>60</sup> Moreover, it should be noted that competition law is a special field of law, where contracts can be prohibited (and void) during some periods and can be tolerable during other periods;<sup>61</sup> in

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53 Formerly art. 81 EC Treaty (initially numbered 85).

54 A. Lamadrid de Pablo, L. Ortiz Blanco, 'Nullity/Voidness: An overview of EU and national case law', *e-Competitions*, nr. 49199, sub 2 (www.concurrences.com). The nullity of art. 101 TFEU is e.g. discussed by M. Fallon & S. Francq, in: J. Basedow, S. Francq & L. Idot (eds.), *International Antitrust Litigation*, Oxford and Portland: Hart 2012, pp. 82-90; under the terms of art. 81 EC E.-J. Zippo, *Privaatrechtelijke handhaving van mededingingsrecht* (diss. Leiden), Deventer: Kluwer 2008, pp. 47-84.

55 ECJ 25 November 1971, C 22/71, ECLI:EU:C:1971:113 (*Béguelin*), sub 29.

56 ECJ 13 July 2006, C 295-298/04, ECLI:EU:C:2006:461 (*Manfredi et al.*), sub 31.

57 ECJ 6 February 1973, C 48/72, ECLI:EU:C:1973:11 (*Brasserie de Haecht II*), sub 26-27.

58 Cf. J. Appeldoorn, 'Ex nihilo nihil fit? De vlottende nietigheid van artikel 81 lid 2 EG', *VrA* 2006/3, p. 66 ('gebrekkig geformuleerd' ('defectively formulated')).

59 Cf. Art. 3:53 lid 1 DCC.

60 ECJ 6 February 1973, C 48/72, ECLI:EU:C:1973:11 (*Brasserie de Haecht II*), sub 24.

61 Appeldoorn, *o.c.*, speaks of 'vlottende nietigheid' ('floating nullity'). In England a doctrine of 'transient nullity' has been developed; see *inter alia* G. Monti, in: C. Twigg-Flesner (ed.), *The Cambridge Companion to European Private Law*, Cambridge: University Press 2010, pp. 291-293. On retroactive effect in this connection J. Appeldoorn, *Eenheid in verscheidenheid: de gespreide toepassing van artikel 81 EG* (diss. Groningen), w.p. 2004, pp. 232-242; Zippo 2008, pp. 68-70.

such an atypical field the thought of retroactivity is less strange than it is in a more general context.

From all this the picture arises that we are dealing here with a ‘traditional’ nullity, which by its purpose does not leave much room for mitigation.<sup>62</sup> On the other hand it should be noted that the European Court does not demarcate the problem area more widely than necessary: a contract ‘becomes null and void in so far as its object or effect is incompatible with the prohibition’.<sup>63</sup> The words ‘in so far’ are fundamental and essential. The prudence they embody already appears in early judgments of the Court:<sup>64</sup>

‘Article 85 (2) provides that “any agreements or decisions prohibited pursuant to this article shall be automatically void”. This provision, which is intended to ensure compliance with the treaty, can only be interpreted with reference to its purpose in community law, and it must be limited to this context. The automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the treaty, fall outside community law.’

Partial nullities<sup>65</sup> therefore are definitely possible; the question whether the nullity should be only partial can and must be answered according to the relevant national law.<sup>66</sup> The follow-up question whether a conversion<sup>67</sup> is possible too is less easy to answer.<sup>68</sup> With regard to the parallel of art. 101 TFEU in the national law, art. 6 of the Competitive Trading Act (*Mededingingswet*) (CTA), the Dutch Supreme Court holds the view that conversion is incompatible with the present absolute nullity, which is aimed at the expulsion of contracts which illicitly reduce competition.<sup>69</sup> To that end the Supreme Court refers on the one hand to the deterrent purpose of the cartel ban and on the other hand to the judgments of the European Court of Justice regarding art.

62 Cf. A.S. Hartkamp, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht*, 3, *Vermogensrecht algemeen, Deel I, Europees recht en Nederlands vermogensrecht*, Deventer: Kluwer 2011, nr. 46.

63 ECJ 25 November 1971, C 22/71, ECLI EU:C:1971:113 (*Béguelin*), sub 26.

64 ECJ 30 June 1966, C 56-65, ECLI:EU:C:1966:38 (*Société Technique Minière*). Accordingly EFTA Court 1 April 1998, E-3/97, IIC 1998, 681 (*Jæger*), sub 77.

65 The concept of partial nullity is discussed *infra*, par. 9-10.

66 See also ECJ 14 December 1983, C 319/82, ECLI:EU:C:1983:374 (*Société de Vente de Ciments et Bétons de l’Est*), sub 11-12.

67 See (concise) *infra*, par. 10.

68 Negative, among others, M.R. Mok, with reference to ECJ 13 July 2006, NJ 2007/34 (*Manfredi*), commentary, sub 3; E.-J. Zippo, ‘Conversie onverenigbaar met de absolute nietigheid van ongeoorloofde kartelafspraken’, *MvV* 2010/3, pp. 29-35.

69 HR 18 December 2009, ECLI:NL:HR:2009:BJ9439, NJ 2010/140 (*Prisma/Slager*), with commentary from M.R. Mok; HR 20 December 2013, ECLI:NL:HR:2013:2123, NJ 2014/347, with commentaries from M.R. Mok and Jac. Hijma (*BP/Benschop*), sub 3.6.2.

101 TFEU. The fact that the Supreme Court follows the example of the European Court is only logical, considering the close relationship between art. 6 CTA and art. 101 TFEU. The question remains, however, whether the Supreme Court does not construe the qualification ‘absolute’, as used by the European Court, too strictly. The label ‘absolute’ contains information regarding the issue to whom the nullity applies (namely: towards everybody),<sup>70</sup> materially speaking it does not make the nullity so intensive as not to tolerate any restraint. In Germany the question whether art. 101 TFEU tolerates a *geltungserhaltende Reduktion* is debated;<sup>71</sup> to me it seems that with regard to ‘lighter’ infringements there is no necessity to exclude any conversion in advance.<sup>72</sup>

I wind up this paragraph with the observation that cartel law is a special field of law, in which motives of deterrence and prevention play a predominant role. As a result thereof the judgments of the European Court with respect to art. 101 TFEU do not produce many clues for (the development of) the concept of nullity in its general civil law sense.

## 9 PARTIAL NULLITY

The Dutch legislator embedded three nullity-limiting doctrines in the 1992 Civil Code: partial nullity (art. 3:41 DCC),<sup>73</sup> conversion (art. 3:42 DCC)<sup>74</sup> and ratification (art. 3:58 DCC).

Regarding partial nullity for a good length of time the Dutch Supreme Court utilised the criterion of the hypothetical choice: is it plausible, either because of the nature of the contract or on the basis of certain actual circumstances, that the contract would not have been concluded without the void clause?<sup>75</sup> This criterion was abandoned with a view to the new Code, in favour of the ‘inextricably related so as not to be severable’ test embodied in art. 3:41 DCC.<sup>76</sup> A hypothetical-subjective approach (what would the parties have done otherwise?) has thus evolved into a more objective one (what connections does the contract show?).<sup>77</sup> In a recent procedure these two approaches were put face to face and were thus brought before the Dutch

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70 Thus explicitly ECJ 25 November 1971, C 22/71, ECLI EU:C:1971:113 (*Béguelin*), sub 29; see also ECJ 13 July 2006, C 295-298/04, ECLI:EU:C:2006:461 (*Manfredi et al.*), sub 56-59.

71 Further P. Stockenhuber, in: E. Grabitz, M. Hilf & M. Nettesheim (ed.), *Das Recht der Europäischen Union, Band I*, Munich: C.H. Beck 2014, Art. 101 AEUV, nr. 234.

72 Likewise Advocate-General Keus, Opinion before HR 20 December 2013, ECLI:NL:PHR:2013:875, NJ 2014/347 (*BP/Benschop*), sub 2.31.

73 On partial nullity in general: Asser/Hartkamp & Sieburgh 6-III 2014/645-647; S.A.M. de Loos-Wijker, in: *Groene Serie Vermogensrecht*, Art. 3:41.

74 See *infra*, par. 10.

75 HR 18 April 1941, NJ 1941/940, with commentary from E.M. Meijers (*Van der Molen/Erven De Lange Klaasz*).

76 HR 16 November 1984, NJ 1985/624, with commentary from C.J.H. Brunner (*Buena Vista*).

77 Further Hijma 1988, p. 262 ff.

Supreme Court as conflicting options.<sup>78</sup> The case is about a contract for the operation of a petrol station, which contains a void exclusivity clause.<sup>79</sup> The Court of Appeal followed an objective course. It examined whether the remainder of the contract embodied an arrangement which was meaningful for both parties and by which the aims of the contract were still partly realised; it reached a positive conclusion.<sup>80</sup> Before the Supreme Court BP argues that such a line of thought shows an incorrect view of the law, because the codified demand of an ‘inextricable relation’ refers to what the parties would have done without the forbidden exclusivity clause. The Advocate-General agrees with BP,<sup>81</sup> but the Supreme Court sides with the Court of Appeal. The Supreme Court considers that whether such a relation exists is a matter of interpretation of the juridical act, taking into account the nature, content and necessary implication of the juridical act, the extent to which the different parts are related, and what the parties intended. In the light of these factors the judge will have to decide, the Supreme Court argues, whether – considering also the further circumstances of the case and the interests of all parties involved – there is or is not enough justification for the partial upholding of the juridical act.<sup>82</sup> To the said perspectives, one should add ‘nature, content and purpose of the violated provision’. The judgment is not only interesting because it abandons the old hypothetical approach, but also because it shifts the juridical construction: the place of one criterion is taken by a number of perspectives (which fill in the ‘inextricable relation’).<sup>83</sup>

With regard to the point of departure, too, the doctrine of partial nullity is moving. The German § 139 BGB, dating from 1900, provides that ‘das ganze Rechtsgeschäft nichtig [ist], wenn nicht anzunehmen ist, dass es auch ohne den nichtigen Teil vorgenommen sein würde’. Here the starting point is *Gesamtnichtigkeit*.<sup>84</sup> Art. 3:41 DCC is formulated in a more neutral way (‘to the extent that’). Finally in art. 15:103 (1) PECL we read that ‘the remaining part continues in effect unless [...] it is unreasonable to uphold it’. In the latter text validity of the remainder is the point of departure (‘unless’).<sup>85</sup> With regard to consumer contracts the European Court of Justice follows, more

78 HR 20 December 2013, ECLI:NL:HR:2013:2123, NJ 2014/347, with commentaries from M.R. Mok and Jac. Hijma (*BP/Benschop*).

79 The exclusivity clause is automatically void under art. 6 par. 2 of the Dutch *Mededingingswet*. Likewise art. 101 (2) TFEU.

80 Court of Appeal Amsterdam 26 June 2012, sub 2.32, included in the judgment of the Supreme Court, sub 3.7.1.

81 Advocate-General Keus, Opinion before HR 20 December 2013, ECLI:NL:PHR:2013:875, NJ 2014/347 (*BP/Benschop*), sub 2.33-34.

82 See sub 3.7.3.

83 This technique fits in with the one used in HR 1 June 2012, NJ 2013/172 (*Esmilo/Media*), discussed *supra*, par. 5.

84 Wolf/Neuner 2012, § 56, nr. 1.

85 The DCFR does not mention this rule for nullity, but does so for annulment: art. II.-7:213 DCFR (‘the avoidance is limited to those terms unless [...]’).

explicitly, the latter course: if one or more contract clause(s) is/are unfair, the remainder of the contract must continue to exist, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible.<sup>86</sup> It should be kept in mind that this view of the European Court is nourished by considerations of consumer protection.

## 10 CONVERSION

With respect to conversion, unlike partial nullity, the hypothetical choice of the parties has the status of a codified guideline (see art. 3:42 DCC).<sup>87</sup> Nevertheless I would be surprised if the Dutch Supreme Court, confronted with a conversion issue, would fall back on the dry hypothetical choice it side-tracked at partial nullity. I rather expect that the course plotted at partial nullity will be extendable towards the conversion doctrine.<sup>88</sup>

In the field of unfair clauses in consumer contracts the European Court of Justice holds the opinion that a judge, in a case where he finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, is not allowed to modify that contract by revising the content of that term. Otherwise sellers and suppliers would be tempted to keep using such clauses, to the detriment of consumers.<sup>89</sup> Under Dutch law the latter subject is located on the interface between partial nullity, conversion and the general effect of the requirements of reasonableness and fairness (art. 6:248 DCC).

## 11 CORRECTION BY MEANS OF GENERAL DOCTRINES

A void contract lacks the juridical effects intended by the parties. It therefore does not bind the parties. If a party performs by paying nevertheless, there is no legal ground for this performance. According to Dutch law we then have

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86 ECJ 14 June 2012, ECLI:EU:C:2012:349, *NJ* 2012/512, with commentary from M.R. Mok (*Banesto*), sub 65; ECJ 30 May 2013, ECLI:EU:C:2013:341, *NJ* 2013/487, with commentary from M.R. Mok (*Asbeek Brusse et al.*), sub 57. A refining is brought by ECJ 30 April 2014, ECLI:EU:C:2014:282, *NJ* 2014/355, with commentary from M.R. Mok (*Kásler et al.*)

87 On conversion in general: Asser/Hartkamp & Sieburgh 6-III 2014/648-658; S.A.M. de Loos-Wijker, in: *GS Vermogensrecht*, Art. 3:42.

88 See Jac. Hijma, 'Gezichtspunten bij nietigheid', *WPNR* 2014/7034, p. 930.

89 ECJ 14 June 2012, ECLI:EU:C:2012:349, *NJ* 2012/512, with commentary from M.R. Mok (*Banesto*), sub 58-72; ECJ 30 May 2013, ECLI:EU:C:2013:341, *NJ* 2013/487, with commentary from M.R. Mok (*Asbeek Brusse et al.*), sub 54-60.

a case of undue payment;<sup>90</sup> on that basis the performing party has a right to restitution by the receiving party (art. 6:203 ff. DCC).

The fact that, in spite of the nullity, a party did perform creates a complicated situation. Exactly then it appears that things are not as straight as they look; both the legislator and the judiciary devote themselves to knocking the rough edges off the idea that the contract is worthless and without any juridical effect.<sup>91</sup> In the Code itself this is shown by art. 6:211 DCC.<sup>92</sup>

*Art. 6:211.* (1) Where a performance made on the basis of a contract which is null and void cannot by its nature be reversed and where this performance ought not to be valued in money, a claim to reverse a counter-performance or reimbursement of its value is also barred, to the extent that such claim would, for that reason, offend reasonableness and fairness.

The situation resulting from this provision is in agreement with that which would have been the case if the contract were considered valid. The provision, written for the special situation that a performance ought not to be valued in money,<sup>93</sup> actually shows the tip of the iceberg. Court decisions reveal more of that iceberg. In that respect the courts utilise several of the general doctrines of the law of obligations, like torts ('unlawful acts', art. 6:162 DCC) and reasonableness and fairness (art. 6:248 DCC).

HR 13 May 1977 (*Ziekenhulp/Brilmij*) concerns a cooperation contract in health care which is void because the required permit was not obtained.<sup>94</sup> On the basis of this contract Brilmij sold numerous spectacles at a reduced price to persons insured by Ziekenhulp. When Brilmij claims the agreed compensation, Ziekenhulp invokes the nullity of the contract. The Dutch Supreme Court considers that it is possible that a health insurance breaches a duty imposed by a rule of unwritten law pertaining to proper social conduct by first inducing a supplier to deliver his merchandise at a low price and by later not being prepared to pay the promised compensation. If this situation occurs the health insurance thus on the basis of tort law (art. 6:162 DCC) is obliged to pay the agreed amount, just like it would have been obliged to do – on a contract law basis – if the contract were considered valid.

90 TM, in: Van Zeben *et al.* (ed.), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 6, Algemeen gedeelte van het verbintenissenrecht* (hereinafter: *Parl. Gesch. NBW, Boek 6*), Deventer: Kluwer 1981, pp. 805 and 821; likewise HR 28 June 1991, NJ 1992/787, with commentary from C.J.H. Brunner (*Verkerk/Van der Veen q.q.*).

91 This part of the subject is also discussed in my Ghent lecture, Hijma 1998, nr. 12 ff.

92 Another example (for specific situations) is art. 6:278 DCC, which by means of its second paragraph also applies to nullities and voidabilities; MvA II, *Parl. Gesch. NBW, Boek 6*, pp. 1042-1043.

93 Which is not easily accepted: HR 13 April 2001, ECLI:NL:HR:2001:AB1055, NJ 2001/581, with commentary from Jac. Hijma (*Polyproject/Warmond*).

94 HR 13 May 1977, NJ 1978/154, with commentary from A.R. Bloembergen (*Ziekenhulp/Brilmij*).



HR 5 November 1982 (*Ziekenfonds/Klijzen*) deals with a tariff contract between health insurance companies and pharmacists which is void because the required permit is lacking.<sup>95</sup> Although the insurance companies are familiar with the problem, for years and years they pay the pharmacists on the basis of the said contract, which is favourable to the pharmacists. Afterwards the insurances demand restitution of the surplus, on account of undue payment. The Court of Appeal dismisses the claim because it clashes with reasonableness and fairness: after having paid without reservation for so many years, the insurances cannot go back on their long-lasting attitude and the confidence they thus established with the pharmacists. The Supreme Court rejects the appeal in cassation. As a result we detect a void contract which does not give rise to the normally present restitution claim; materially speaking this situation cannot be distinguished from the situation in which the contract would simply have been valid. Instrumental in this case is the doctrine of 'forfeiture of rights' (*rechtsverwerking*), a special application of the general doctrine of the derogating power of reasonableness and fairness (art. 6:248 (2) DCC).

In HR 28 June 1991 (*Verkerk/Bouwservice*) the Dutch Supreme Court observes in a general way that with void contracts, too, sustaining a claim for restitution, in the circumstances of the case, can be unacceptable according to standards of reasonableness and fairness.<sup>96</sup> Sometimes it turns out impossible to redress a performance, just as if the contract had been valid.<sup>97</sup> In addition, the Supreme Court has indicated that under certain circumstances the invocation of (a violation of) good morals can as such be blocked by reasonableness and fairness.<sup>98</sup>

## 12 STRUCTURAL EXTENUATION

By means of such general doctrines as torts (art. 6:162 DCC) and reasonableness and fairness (art. 6:248 DCC), void contracts can materially go in the direction of valid contracts. These are incidental interventions, however, which demonstrate that the traditional concept of nullity soon leads to undesirably drastic consequences. From the same background emerges the idea that the provisions of art. 3:54 (2) DCC and art. 6:230 (2) DCC, which create the possibility of a judicial contract modification in cases of (voidability because of) undue

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95 HR 5 November 1982, NJ 1984/125, with commentary from C.J.H. Brunner (*Ziekenfonds/Klijzen*).

96 HR 28 June 1991, NJ 1992/787, with commentary from C.J.H. Brunner (*Verkerk/Van der Veen q.q.*), regarding building activities performed without a permit.

97 Further on this matter H.J. van Kooten, *Restitutierechtelijke gevolgen van ongeoorloofde overeenkomsten/Restitutionary Consequences of Illegal Contracts* (diss. Utrecht), Deventer: Kluwer 2002, p. 33 ff. (summary pp. 118-123).

98 HR 19 December 2014, ECLI:NL:HR:2014:3650, *RvdW* 2015/137 (*B./H. et al.*), sub 3.4, with respect to an invocation by a third party.

influence or error, can be used *per analogiam* with respect to automatic nullities.<sup>99</sup>

On consideration of the development of the nullity concept, the utilisation of these and similar remedies does not come as a surprise. The starting point that nullities in principle do not extend further than their purpose justifies, endorsed by the Dutch Supreme Court,<sup>100</sup> is a crucial finding. If that principle is taken seriously, the extenuation cannot come to an end when the contract is labelled ‘null and void’. Also *within* that label a structural space for restraint can and must be allowed, like the Code itself demonstrates in regulating conversion and ratification and in denying restitution claims in certain situations.<sup>101</sup>

In my opinion that structural space for restraint should be elaborated thus that the qualification ‘(null and) void’ means that, guided by the rationale of the violated rule, we will have to decide for every juridical effect separately whether or not it can be accepted. In this way a claim for specific performance can be treated differently than a claim for damages or termination, and these again can be treated differently than a claim for restitution. In this way the results which as yet are reached by means of incidental corrections gain a logical position within the – differentiated – nullity concept.<sup>102</sup>

### 13 CONTINUATION; COMPARATIVE LAW EXCURSIONS

The desirability of a (structural) qualification in terms of the juridical effects also emerges during two comparative law excursions.

The first one takes us back to the *Draft Common Frame of Reference*.<sup>103</sup> One of the various possibilities mentioned in the commentary on art. II.-7:302 DCFR is that ‘some remedies, such as an order for specific performance, are not to be available, while others, such as damages for non-performance, are to be.’<sup>104</sup> Although I made a few critical remarks above regarding the broad (modification) powers which the DCFR bestows upon the judge, it may be clear that precisely this differentiation – which can be easily separated from discretionary power and constitutive judgment – strongly appeals to me.

The second excursion leads to Germany. The German legislator recently pondered over the prostitution contract, i.e. the contract whereby one party undertakes to perform sexual activities and the other party undertakes to pay

99 See Asser/Hartkamp & Sieburgh 6-III 2014/644; Eindverslag I, *Parl. Gesch. NBW, Boek 3*, pp. 240-241.

100 See the quotation given in par 1.

101 See *supra*, par. 10-11.

102 Further Hijma 1988, pp. 51-120; likewise M.W. Scheltema, *Onverschuldigde betaling* (diss. Leiden), Deventer: Kluwer 1997, pp. 235-236.

103 See par. 6-7.

104 Von Bar & Clive 2009, Art. II.-7:302, Comments, D. Almost identical MacQueen 2011, p. 562.

a price therefor. Generally speaking, as the *Bundesgerichtshof* states, prostitution is nowadays no longer considered a violation of good morals.<sup>105</sup> Entering into an agreement ‘*sich gegen ein Entgelt geschlechtlich hinzugeben*’ stays problematic nevertheless, because the creation of such an obligation violates human dignity.<sup>106</sup> On the other hand the legislator considers it unacceptable that the customer (*der Freier*), once the pursued activities have been performed, can escape from his obligation to pay the price by simply referring to the nullity of the contract. The result of these considerations is the following provision.<sup>107</sup>

*Prostitutionsgesetz*

§ 1. *Begründung eines Forderungsrechts*

(1) Sind sexuelle Handlungen gegen ein vorher vereinbartes Entgelt vorgenommen worden, so begründet diese Vereinbarung eine rechtswirksame Forderung.

According to this approach the prostitution contract does not oblige the prostitute, but it does establish an obligation to settle the bill as soon as the sexual services have been rendered.<sup>108</sup> For the Netherlands Van den Brink suggests the same – attractive – solution.<sup>109</sup> The German documentary history makes mention of a unilaterally binding contract,<sup>110</sup> which qualification seems inaccurate. Ellenberger speaks of a contract becoming (partly) valid afterwards,<sup>111</sup> whereas Neuner accepts validity right from the start.<sup>112</sup>

This is not the place to labour this German legislation. I present it as a further foundation of the position that nullity law has a need for the possibility to differentiate between the individual juridical effects. In the given example a claim against the prostitute should not be granted, but a (later) claim against the customer should. This can be elaborated in the law for a specific context, as was done in the *Prostitutionsgesetz*. This result can also be reached in a more fundamental and structural way, by accepting that a contract labelled ‘null and void’ will lack some of the intended juridical effects but can still produce some of the other. In this way the attribution of effects is structurally guided by the rationale of the violated rule, against the background of the general interest.

105 *Deutscher Bundestag, Drucksache 14/5958*, p. 4; see also *supra*, par. 3.

106 J. Ellenberger, in: *Palandt, Bürgerliches Gesetzbuch*, München: C.H. Beck 2012, Anhang zu § 138, ProstG 1, nr. 2, mentioning further sources.

107 *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz) 2001*, BGBl. I S. 3983.

108 J. Ellenberger, *ibidem*.

109 Van den Brink 2002, p. 227.

110 *Deutscher Bundestag, Drucksache 14/5958*, p. 6 (‘einseitig verpflichtender Vertrag’).

111 J. Ellenberger, *ibidem*.

112 Wolf/Neuner 2012, § 46, nr. 36.

## 14 A LAST STEP

I propose one more step. The principle that a nullity does not extend further than its purpose justifies is closely connected with an even more fundamental principle: the freedom of contract.<sup>113</sup> This contractual freedom implies that we must approach every contract from a positive starting point. In my opinion this also applies to contracts which are labelled 'null and void'. There is no reason to accept that, as if by magic, this qualification shifts the tone from white to black. In a legal system which takes the freedom of contract seriously and in which nullities do not extend further than necessary, it is not plausible to start at 'nothing' and see whether things turn out less drastic than expected. On the contrary, it is logical to start at 'everything' and consider which effects are specifically unacceptable (and, conversely, which ones can simply be accepted).<sup>114</sup>

## 15 CONCLUSION

The findings of the research conducted in this essay are, on the main issues, as follows.

1. Nowadays the nullity of a contract is accepted less easily than before. This decrease is apparent with the violation of good morals or public policy (par. 3) as well as with the violation of statutory provisions (par. 4-5), and also – though this was not discussed in this essay – with the violation of statutory formal requirements (art. 3:39 DCC).<sup>115</sup>
2. Traditional criteria make way for a 'weighing' approach, taking into account a number of perspectives, which are mainly of an objective nature (par. 5 and 9-10).
3. PECL and DCFR suggest an expansion of the array of sanctions, in such a way that instead of being declared valid or invalid the contract can also be modified, in various respects, by the judge (par. 6-7).
4. Where a nullity is established, legal practice appears inclined to smooth over the edges of that qualification with respect to performance or restitution (par. 11).
5. The curbing tendency can be pursued within the concept of nullity too, in such a manner that within this concept the rationale of the violated rule rings through structurally. In this approach some of the intended juridical

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113 On freedom of contract in general: Asser/Hartkamp & Sieburgh 6-III 2014/40-64; T. Hartlief & C.J.J.M. Stolker (eds.), *Contractvrijheid*, Deventer: Kluwer 1999.

114 Further Hijma 1988, pp. 51-120.

115 See for a – rather spectacular – relativistic judgment regarding a formal requirement HR 9 December 2011, ECLI:NL:HR:2011:BU7412, NJ 2013/273 (cassation in the interest of the law), on the requirement of writing in art. 7:2 (1) 1 DCC (sale of residential accommodation).

effects can and will be treated differently than other of these effects (par. 12-13). A positive starting point is plausible, as a result of which the lack of an effect becomes an exception instead of being the rule (par. 14).

6. In some fields of law there is relatively little room for the said tendencies. The cartel ban of Art. 101 TFEU, with its deterrent purpose, provides an illustration (par. 8).

If we try to bring all these things together in a covering observation, this observation would read as follows.

As a result of the combined efforts of legislator, judiciary and legal scholarship, nullity is showing a downward trend. It is not threatened with extinction, but a new heyday is improbable.

