The concept of nullity

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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.¹ The views of Dutch legal scholars of that time fitted this understanding seamlessly.²

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?³ 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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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’. 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. The recently published contract law ‘principles’ also display the wish to refrain from interventions which surpass what is really necessary.

The purpose of this essay is to analyse the current status of the concept of nullity, also with a view to international developments. 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 withholding the intended juridical effects. 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. 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

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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.
9 Likewise Van Schaick 1994, pp. 255-313 (‘Nietigheidsrelativering en nietigheidsecartering’).
their consequences’. In my opinion these two aspects are inextricably interwoven; 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); other codifications contain similar provisions. 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.

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’. Such a development will not leave (the validity of) contracts in such a domain untouched.

In the Netherlands we can also point at the erosion – to be discussed below – of the idea that a contract leading to performance violating a mandatory statutory provision will be void because it is contrary to public policy.

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’.
15 BGH 13 July 2006, I ZR 241/03, NJW 06, 3490, sub 21.
16 Further infra, par. 13.
17 Par. 5.
Art. 3:40 (2) DCC provides that a juridical act which violates a mandatory statutory provision becomes null and void, 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. 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). 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. 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.

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). 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
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.  

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. In the Memorandum of Reply (1971) the Minister, keeping a low profile but meaningfully, inserts into this opinion the words ‘in principle’. 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.

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. 250bis old Penal Code).
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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. 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.

'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), published in 2009, the following article is devoted to the infringement of mandatory rules:

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.
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. 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, 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).

UNIDROIT Principles of International Commercial Contracts (PICC) contain related – but not identical – provisions.35

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 case36 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),37 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.38

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.39 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.40 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,41 without success. The most significant counter argument is that this opinion distinguishes insufficiently between

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.
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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. In Germany too this is considered obvious. 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). 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. 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:

‘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.’

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.