Core Concepts in the Dutch Civil Code. Continuously in Motion

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Continuously in Motion

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Introduction

Fault, failure in performance, company, prescription, reasonableness and fairness. For (Dutch) lawyers, these concepts may seem a beacon of stability in an ever changing legal environment. Whereas the Dutch Civil Code has been amended many times since its entry into force in 1992, these concepts form a permanent *core*. They appear to be a constant factor, the building blocks out of which the system has been made.

However, appearances may be deceptive. These concepts today are not what they were in 1992. E.M. Meijers, who drafted the Dutch Civil Code wrote about the core concept of *nullification*:[1]

> 'When (…) the consequences of the juridical act are first denied, after the court has nullified that act; when the court is not allowed to do so of its own motion, but only one or more interested parties are allowed a claim to that effect; when, in addition, this claim is subject to prescription and the interested party can waive its right to claim, then we have a case of nullification.'

The lawyer who in 2016 reads Article 6:233 (a) DCC with this description by Meijers in mind, might come to the wrong conclusions. Article 6:233 (a) DCC deals with the nullification of a term in general terms and conditions which is unreasonably onerous. From the decision in *Heesakkers/Voets* by the Dutch Supreme Court it follows that a court may, on the basis of Article 6:233 (a), be obliged to ascertain of its own motion whether a contract term is unfair. If it deems the contract term unfair, it must annul it.[2]

Although the core concepts *themselves* are a constant factor within the Civil Code, the *meaning* of these concepts is thus not fixed. Once *nullification* meant that action by the interested party was required in order to withhold effect from a juridical act, nowadays it is not inconceivable that a court needs to ascertain of its own motion whether the act can be set aside. The core concepts of the Dutch Civil Code are continuously in motion.

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1 E.M. Meijers, *De Algemene Begrippen van het Burgerlijk Recht*, Leiden: Universitaire pers Leiden 1958, p. 245.

2 Dutch Supreme Court 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014/274, note H.B. Krans, no 3.7.1, 3.7.3.

This observation in itself is not new. Meijers himself warned against too static an interpretation of the concepts within the Code:[3]

> 'In this matter of interpretation there is again a risk of a dogmatic application of the law; in a code of law the terms null and void and nullifiable are always to be given the same meaning with invariable legal effects, without regard to what is required by the object and purport of the statutory provision. In the Dutch administration of justice a clear break has fortunately been made with this manner of interpretation regarding the concepts of null and void and nullifiable.'

New, however, is the increased influence of transnational developments on the Dutch core concepts. In *Heesakkers/Voets*, the Dutch Supreme Court extensively cites the case law of the European Court of Justice before coming to its decision.[4] Not only EU Directives and Regulations and the case law of the ECJ have an impact on Dutch concepts, but these concepts may also be influenced by e.g. the European Convention on Fundamental Rights and Freedoms and the case law of the European Court of Human Rights, by the United Nations Convention on Contracts for the International Sale of Goods and other international treaties and by instruments such as the various sets of Principles. The interpretation of the core concepts of the Dutch Civil Code is therefore becoming an increasingly tricky business: not only should lawyers pay attention to Dutch sources – such as the parliamentary history, Dutch case law and legal literature – , they should also be aware of the various transnational sources which may have an impact on the particular concept.

This edition of the Leiden Yearbook of Private Law aims to offer a helping hand to confused lawyers. It analyses several core concepts within the Dutch Civil Code and makes it clear how these concepts have been influenced by transnational instruments. The Yearbook covers three large areas of the Dutch Civil Code – contract, tort and institution.[5]

PART I – CONTRACT

Hijma analyses the concept of *nullity* and concludes that it shows a downward trend. Nullity of a contract is accepted less easily and when it is, its effects are often mitigated. An exception is the nullity found in Article 101 par. 2 TFEU on cartels; as becomes clear from the case law of the ECJ, there is not much room for correction when this nullity is concerned. However, the consequences of this case law for the general concept of nullity should not be overestimated.

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3 Meijers 1958, p. 251.

4 See no. 3.5.1-3.6.2.

5 The translations of Dutch Civil Code provisions in this edition of the Yearbook are from H.C.S. Warendorf, R. Thomas, I. Curry-Sumner, *The Civil Code of the Netherlands*, Alphen a/d Rijn: Kluwer Law International 2013.

Hijma observes that cartel law is a special field of law in which motives of deterrence and prevention play a predominant role.

One of the core concepts of the Dutch Civil Code is undoubtedly *reasonableness and fairness*. The reliance placed on this concept is, according to *Cartwright*, 'part of the Dutch lawyer's DNA.' Cartwright explores – with a focus on the law of contract – why 'reasonableness and fairness' does not match with the common lawyer's thinking. One of the reasons is that in common law the view is accepted that the bargaining has to be left to the parties; therefore common law is, in general, reluctant to intervention by the courts. Moreover, it is felt that the freedom of the court to intervene in the contract on the mere basis of reasonableness and fairness can undermine the certainty and security of contracts.

The contribution of *Knigge* and *Verhage* also focuses on the concept of *reasonableness and fairness*, but within the specific context of the contract of binding advice. It follows from Article 7:904 par. 1 DCC that a decision taken by binding advisors may be annulled if it is unacceptable to hold a party to it according to standards of reasonableness and fairness. Knigge and Verhage examine whether the ADR Directive influences the interpretation of the concept of 'reasonableness and fairness' in the sense of Art. 7:904 par. 1. They argue that the ADR Directive opens extensive possibilities for parties to challenge decisions taken in a binding advice procedure covered by the Directive and thus seems to take away a great deal of the binding force of such decisions.

Van Kogelenberg examines the concept of *failure in performance* of an obligation. He shows that, unlike Dutch law, most supranational legal instruments require a 'fundamental' breach of contract to have access to the remedy of termination of the contract. Van Kogelenberg argues that, despite the international 'pressure', this requirement should not be incorporated into Dutch law. Dutch law contains other thresholds to limit access to termination, for example the requirement of default. In his contribution Van Kogelenberg furthermore analyses the consequences of the implementation of the Directive on consumer rights for the concepts of 'failure in performance' and 'default'.

PART II – TORT

De Tavernier and *Van der Weide* examine the concept of *fault* against the background of efforts to arrive at a European harmonization of tort law. They argue that a harmonization project should take as a starting point a concept of fault meaning 'legal blameworthiness'. The concept should not be confused with the concept of 'wrongfulness' or with a combination of wrongfulness and blameworthiness. Moreover, De Tavernier and Van der Weide argue that the concept of fault should be interpreted in a subjective way.

De Graaff investigates the concept of *prescription* in light of the right of access to a court under Article 6 of the European Convention of Human Rights

(ECHR). The Dutch Supreme Court placed Dutch private law on *prescription* at 'the forefront of human rights protection' with its ruling in the *Van Hese/De Schelde* case, as De Graaff notes. The Supreme Court decided that the application of the statutory prescription period may under certain circumstances be set aside, because its application is contrary to 'standards of reasonableness and fairness.' De Graaff analyses to what extent the possibility of setting aside binding rules under Article 6(2) DCC can contribute to human rights protection, given the Dutch constitutional framework. According to De Graaff, the Dutch solution is 'generally in line with' recent case law of the ECHR. In the absence of judicial review against the Dutch Constitution, the Dutch Civil Code thus provides a legal basis to reach a result that is in conformity with the demands of fundamental rights law.

Part III – Institution

Bruning and *Florescu* explore the concept of *discharge of parental authority* in light of the European Convention on Fundamental Rights and Freedoms. On 1 January 2015, the conditions for discharging parents of their responsibilities were relaxed. Bruning and Florescu investigate whether the new conditions are in line with Article 8 ECHR and formulate recommendations for courts deciding cases of discharge in order to comply with the requirements ensuing from this provision.

De Groot investigates the interaction between two core concepts of Dutch company law: the *company* and the duty of directors to be guided by the *best interests* of the company. De Groot discusses established case law wherein the view is held that the management board has to serve the interests of the company rather than the interests of the majority shareholder. This line of case law, however, lacks some guidance. What are the interests of the company? Here the Cancun case is of importance. It follows from the Cancun case that the prime duty of corporate boards is to advance the success of the undertaking that is connected with the company as well as to preserve the company's other organizational characteristics. De Groot shows that this 'duty to advance and preserve' is neatly in line with a consideration by the Supreme Court of the State of Delaware in the Selectica case.

Dijkhuizen and *Nijland* examine the shareholders' *right to put items on the agenda* of the general meeting. In their contribution, they focus on the influence of both domestic and European legislative developments on this core concept. They conclude that the regulatory developments on a national and European level regarding the right for shareholders in a listed company to put items on the agenda, seem to be moving in opposite directions. The Dutch legislator is endeavouring to counteract shareholder activism by limiting the shareholders' right to put an item on the agenda. On the EU level, by contrast, the

role of shareholders as 'watchdog' is emphasized in the current debate on corporate governance.

Core concepts are continually in motion. An understanding of core concepts is necessary for an understanding of civil law. However, as Hans Nieuwenhuis has rightly pointed out, this is not the whole picture: imagination is indispensable for a lawyer. As co-editor of the Leiden Yearbook of Private Law, Hans' imagination inspired us for many years. He was editor of the Yearbook since 2005. After turning 65, he considered resigning as editor just about every year. We praise ourselves for having convinced him to stay. Thus we continued to profit from his wisdom and experience. Sadly, Hans passed away on 18 June 2015. In honour of Hans, the first contribution of this Yearbook is dedicated to his work.

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In memoriam

Understanding private law. On the work of Hans Nieuwenhuis, 1944 – 2015

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Hans Nieuwenhuis' work is difficult to capture in a single sentence. It aims to impart an understanding of private law which, Nieuwenhuis says, requires an awareness of time, space and balance. We measure his work by his own yardstick.

INTRODUCTION

Leopold Bloom, the well-known character in James Joyce's *Ulysses*, was a reader who derived pleasure from reading 'literature of instruction rather than of amusement'. He sometimes turned to Shakespeare:[1]

> 'for the solution of difficult problems in imaginary or real life. Had he found their solution? In spite of careful and repeated reading of certain classical passages, aided by a glossary, he had derived imperfect conviction from the text, the answers not bearing in all points.'

Hans Nieuwenhuis, professor of private law at Leiden University, wrote texts of instruction and amusement. Initially it is the new Dutch private law that is the focus of his work, the heart of which is formed by his thesis (1979), inaugural lectures in Tilburg and Leiden (1980 and 1982) and a series of

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▪ All authors are attached to the University of Leiden's Institute for Private Law. A Dutch version of this contribution has been published in *Ars Aequi:* 'Hoe begrip van burgerlijk recht mogelijk is. Over het werk van Hans Nieuwenhuis', *Ars Aequi* 65-9, pp. 835-840. The authors wish to thank Willem van Boom, Margreet Duynstee, Jaap Hijma, Wouter den Hollander, Marte Knigge and Henk Snijders for their input, Kath Starsmore for the translation and John Cartwright for his careful reading.

1 J.A.A. Joyce, *Ulysses*, Penguin Modern Classics 1969, p. 598.

inspiring annotations in the law journal *Ars Aequi* (1985-1992). But following his foray to the Supreme Court (1992-1996) he concentrates more and more on the influence of Europe, the world, other legal systems and cultures on the development of private law. Not in order to counter distorting influences on the structure and content of national private law, but time and again to understand this area of law in its time and context. The culmination of his work is formed by *Een steeds hechter verbond* [An ever closer union] (2015), a triptych on enemy stereotypes, alliances and spoils of war in which he paints a picture of Europe as a community of values.[2]

It is a work 'of amusement', thanks to the author's literary talent and inspiring associations. And 'of instruction', because of its many layers and surprising insights. Anyone reading his work does not do so simply, like Leopold Bloom, to find the solution to a complex problem, but does so to learn to understand the problem and to learn to find the law, often on the basis of ideas and images from world history and literature.

When asked, Nieuwenhuis counted his early work *Legitimatie en heuristiek van het rechterlijk oordeel* [Legitimation and heuristics of judicial decisions] as one of his three – naturally *three* – favourite publications. The reader has to battle his way through a rather abstract discourse, in which the position of deduction and heuristics in judicial decision-making is determined. Nieuwenhuis challenges the view that the importance of deductive reasoning to a judicial decision is no more than a 'pious sham':[3]

> 'The "pious sham" does not exist. Arriving at a judicial decision involves two different activities. On the one hand the "finding" of the decision. This is certainly not a logical, linear activity running from the rule via the facts to the decision, but rather a confrontation between (draft) rules, (draft) views of the facts and (draft) decisions.
> This confrontation continues until the case "fits", i.e. until an acceptable decision has been found which meshes with an acceptable rule which in turn is in tune with an acceptable view of the facts. On the other hand, there is a need to *shape* the *justification* of the decision.'

What, then, is the correct shape?

> 'Whether that shaping can be said to be a success does not depend on whether or not it is a true reflection of the search strategy actually employed by the court, but on the degree to which it provides insight into the extent to which the grounds justify the decision.'

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2 J.H. Nieuwenhuis, *Een steeds hechter verbond. Europa op weg naar Europa* [An ever closer union. Europe en route to Europe], Amsterdam: Balans 2015.

3 J.H. Nieuwenhuis, 'Legitimatie en heuristiek van het rechterlijk oordeel' [Legitimation and heuristics of judicial decisions], *RM Themis* 1976, pp. 494-515, p. 501.

And yet what interests him most are the substantive grounds – civil law and civic morals. Nieuwenhuis poses the question: what does understanding private law require? The answer can be found in his speech to the meeting of the Literature department of the Royal Netherlands Academy of Sciences on 8 October 2007, his second favourite publication:[4]

> 'spatial insight, an awareness of the passing of time and the ability to establish the weight of things which, as far as the balance is concerned, are at first sight *imponderable*.'

He is convinced that this triad actually exists in the world of law, and that it allows legal concepts to be rendered imaginable. Lawyers need this imagination in order to arrive at a considered judgment.

Virtually all of Nieuwenhuis' publications contributed to the substantive strength of his readers' work, by expanding their spatial insight and awareness of time, and by giving clear directions for the use of bathroom scales or balance. This common thread shows him to be a man who is utterly reliable. We have picked up the thread, in an attempt to interpret his legacy.

SPACE

According to Nieuwenhuis the spatial dimension of private law can be depicted in three ways. Jurists should define the space by focusing on departure *point* and goal and then checking the *line* along and *plane* across which the goal is to be reached.

Take the departure point of liability law that each party should bear their own loss. Only a claimant who successfully 'hops' along the requirements for liability arising from a tort reaches the other extreme of the spectrum, full compensation.[5] These requirements may be construed in different ways: as a sharp *line* or as a *plane* with vague contours.[6]

Or contract law, which is:[7]

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4 J.H. Nieuwenhuis, *Hoe is begrip van burgerlijk recht mogelijk? Drie vormen van voorstelling: ruimte, tijd, gewicht* [How can private law be understood? Three forms of representation: space, time and weight], Amsterdam, KNAW Press 2008, p. 8; also in *RM Themis* 2007, pp. 227-240, p. 228.

5 J.H. Nieuwenhuis, 'Hinkelspel rond de boom der kennis van goed en kwaad' [Hopscotch around the tree of the knowledge of good and evil], in: J.H. Nieuwenhuis, *Waartoe is het recht op aarde?* [What is the purpose of justice on earth], The Hague: Boom Juridische uitgevers 2006, pp. 5-32; also in: J.H. Nieuwenhuis & C.J.J.M. Stolker (ed.), *Vooruit met het recht* [Advancing the law], The Hague: Boom Juridische uitgevers 2006, pp. 1-18.

6 J.H. Nieuwenhuis, 'Hoi topoi', in: J.H. Nieuwenhuis, *Confrontatie en compromis* [Confrontation and Compromise], Deventer: Kluwer 2007, pp. 81-90

7 J.H. Nieuwenhuis, 'Wat mogen koper en verkoper van elkaar verwachten?' [What can buyer and seller expect of each other?], *WPNR* 1998, p. 157.

> 'a forest of expectation. Sometimes the path comes to a fork: did the item sold come up to what the buyer was entitled to expect? Yes or no? But there are also open spaces, where the path can continue in more than two directions. Could the disappointed expectation be the fault of both parties? The position of the compass needle is in that case decided by the question of the extent to which the circumstances attributable to each party contributed to that disappointment.'

Nieuwenhuis leans towards the compass needle. Following his research into the principles underlying the law of contract (*Drie beginselen van contractenrecht* [Three principles of the law of contracts])[8] he moves into the border regions between contract law and property law (*Uit de ban van hier en nu* [Breaking the spell of the here and now]),[9] between contractual and non-contractual liability law (*Anders en eender* [Different and yet the same]),[10] and between fault-based and strict liability (*De ramp op het Pikmeer* [The Pikmeer disaster]).[11] He describes the spatial planning of modern private law as a 'system of transitional forms', which can be found between ownership and obligation,[12] between non-performance and tort (a *mixed* right of action),[13] but also between general termination and annulment.[14] He traces rules back to principles which in turn are determined by the space in which they operate: by how the world *is* arranged and by how it *should be* arranged.[15]

The principal task of private law according to Nieuwenhuis is to 'regulate legal relationships', not to confer subjective rights which an interested party can use as it sees fit.[16] He is interested in coordination between rules of law,

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8 J.H. Nieuwenhuis, *Drie beginselen van contractenrecht* (dissertation, Leiden), Deventer: Kluwer 1979.

9 J.H. Nieuwenhuis, *Uit de ban van hier en nu. Ontwikkelingen op het gebied van de overdracht van roerende zaken bevattende tevens enige beschouwingen omtrent de status van overgangsvormen in het privaatrecht* [Breaking the spell of the here and now. Developments in the field of the transfer of movable goods, also containing some thoughts on the status of transitional forms in private law] (inaugural lecture Tilburg), Deventer: Kluwer 1980.

10 J.H. Nieuwenhuis, *Anders en eender. Beschouwingen over samenloop van wanprestatie en onrechtmatige daad* [Different yet the same. Thoughts on the convergence of non-performance and tort] (inaugural lecture Leiden), Deventer: Kluwer 1982.

11 J.H. Nieuwenhuis, *De Ramp op het Pikmeer. Bezwaren tegen de geest van het postmoderne aansprakelijkheidsrecht* [The Pikmeer disaster. Objections to the spirit of post-modern liability law] (inaugural lecture Groningen), Deventer: Kluwer 1997.

12 *Uit de ban van hier en nu*, p. 112. In Nieuwenhuis' view there are various types of ownership transfer of movable goods, with transfer and actual handover being 'decoupled'. He refers to transfer by means of 'traditional papers' (bill of lading, warehouse warrant), retention of title and delivery in advance. See *Uit de ban van hier en nu*, p. 8.

13 Nieuwenhuis supports the view that in the event of convergence between non-performance and tort there is a 'mixed right of action'. See *Anders en eender*, pp. 27-30.

14 J.H. Nieuwenhuis, 'Vernietigen, ontbinden of aanpassen (I), Wat is het lot van teleurstellende overeenkomsten?' [Nullify, terminate or modify (I), What is the fate of disappointing contracts?], *WPNR* 1995, pp. 23-26, part II (and conclusion), *WPNR* 1995, p. 37-41.

15 *Drie beginselen van contractenrecht*, p. 41.

16 *Anders en eender*, p. 15.

not simple solutions. He opposes both the unconditional exclusivity of contract law and the unlimited competence of a claimant to rely on the rule most favourable to him.[17] He describes the maxim *lex specialis derogat legi generali* as a 'totally unreliable compass': a specific rule does not automatically override a general rule.[18] The sharp distinction between fault-based and strict liability is 'totally unsound': ultimately it is a question of whether a person could have acted in a manner other than he did,[19] based in Nieuwenhuis' view on the tort category of 'infringement of a right'.[20] The landscape of remedies too has become 'less rough'. Instead of general termination and annulment, modification of the agreement is preferred, e.g. by lowering the purchase price or reducing reciprocal performances:[21]

> 'So, dissolution and annulment only if the tears of the disappointed contracting party cannot be dried in any other way.'

Yet Nieuwenhuis himself also has to make choices. In *Uit de ban van hier en nu* he introduces the concept of 'contractualising the transfer of ownership' in Dutch private law.[22] Nieuwenhuis' aim with this concept is to entice the legislator to scrap the requirement of the transfer of possession when delivering movable goods and to embrace the so-called real agreement, so as to create as great a degree of flexibility as possible for the parties: 'in with the real agreement, out with the requirement of handing over possession.'[23] Brunner praises Nieuwenhuis' ability to let off brilliant fireworks, but adds that they may dazzle the reader.[24] The tide is against Nieuwenhuis. When the new Dutch Civil Code was introduced the legislator stuck to the acquisition of possession as the form of delivery of movable goods and the legitimating function of possession.[25] Nonetheless, the additional requirement of a real agreement is still defended by many, even if this requirement is not explicitly laid down in the law.

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17 See also J.H. Nieuwenhuis, 'They still rule us from their graves', *WPNR* 2007, p. 5.

18 See later also J.H. Nieuwenhuis, 'Fraudulent thoughts. On the position of the general and the particular in law', *RM Themis* 1997, pp. 41-42; J.H. Nieuwenhuis, 'The fraudulent transfer seen as a claim under tort', in: L. Timmerman (ed.), *Vragen rond de faillissementspauliana* [Questions concerning the action to set aside a fraudulent conveyance] (Insolad Yearbook 1998), Deventer: Kluwer 1998, pp. 51-64.

19 J.H. Nieuwenhuis, 'De tuinman en de dood' [Death and the gardener], *RM Themis* 1989, pp. 193-201, also in J.H. Nieuwenhuis, *Confrontatie en compromis. Recht, retoriek en burgerlijke moraal*, [Confrontation and compromise. Law, rhetoric and bourgeois morality] Deventer: Kluwer 2007, pp. 129-140.

20 *De ramp op het Pikmeer*, pp. 19-22.

21 *Vernietigen, ontbinden of aanpassen (I)*, p. 25.

22 *Uit de ban van hier en nu*, p. 18.

23 *Uit de ban van hier en nu*, p. 9 and 83.

24 C.J.H. Brunner, 'J.H. Nieuwenhuis/Uit de ban van hier en nu, inaugural lecture Tilburg University', *RM Themis* 1982, pp. 36-43.

25 Sec. 3:90(1) *BW*.

In *Anders en eender* Nieuwenhuis formulates three points of view to coordinate the convergence of non-performance and tort: a gap in the one regulation should be plugged by a norm from the other cause of action, a general rule should defer to a concrete rule, in the case of two concrete provisions the contractual rule should prevail.[26] After all, problems of concurrence are encountered more often at a fork in the road than in an open space in the woods. Even though Nieuwenhuis stresses that it is 'a typology and not a chest of drawers', it again meets with criticism from Brunner, who argues that Nieuwenhuis is in danger of ending up in the 'camp of the exclusive', if he isn't already in it.[27]

So can we expect no sharp lines from Nieuwenhuis? Far from it. Not everything can be mixed and merged. His criticism is severe when the Supreme Court fails to settle a point or draw a sharp line but instead uses the plane for the figure of precontractual liability[28] and for the figure of proportional liability.[29] Two *inclined* planes, according to Nieuwenhuis, that are at odds with the system of the law, which after all allows an offer to be retracted and prohibits the award of damages if the requirement of causality is not met, or at least not in full.[30]

The requirement of causality presented a problem for the DES daughters as well. They were unable to prove which manufacturer had supplied the medication their mothers had taken during pregnancy and which later in life caused cancer in these daughters. In their case it is not the plane, liability according to market share, but the sharp line that is appropriate: reversal of the burden of proof, applying section 6:99 of the Dutch Civil Code (*BW*). Even though this solution too, just like proportional liability, undermines 'one of the traditional pillars of the law of liability, the requirement that it be established that the defendant did actually cause the damage'.[31] The line of reason-

26 *Anders en eender*, pp. 32-40.

27 C.J.H. Brunner in his discussion of Nieuwenhuis 1982, *WPNR* [weekly journal] 1983, p. 659.

28 HR [Supreme Court] 18 June 1982, ECLI:NL:HR:1982:AG4405, *NJ* [Dutch Case Law] 1983/723 (*Plas/Valburg*).

29 HR [Supreme Court] 31 March 2006, ECLI:NL:HR:2006:AU6092, *RvdW* [Judicial decisions online] 2006/328 (*Nefalit/Karamus*).

30 J.H. Nieuwenhuis, 'Point of no return', *RM Themis* 1989, pp. 467-468; J.H. Nieuwenhuis, 'Disproportionele aansprakelijkheid' [Disproportional Liability], *RM Themis* 2006, pp. 177-178.

31 J.H. Nieuwenhuis, 'Alternatieve causaliteit en aansprakelijkheid naar marktaandeel' [Alternative causality and liability according to market share], in: *Productenaansprakelijkheid. Preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht* [Product Liability. Preliminary recommendations issued for the Dutch Society for Private Law], Koninklijke Vermande publishers: Lelystad 1987, p. 15.

ing can be discerned in the Supreme Court's ruling,[32] much to the author's satisfaction.[33]

So with Nieuwenhuis legal rules have both an open and a closed dimension. Open, because they are 'responsive to external influences and imperfect'.[34] For example, the impact of social, medical and technological developments has been to bring agreements on surrogacy into the spatial domain of contract law.[35] But closed as well, part of and confined by the system and the systematics of the law. An embryo created through *in vitro* fertilisation is not a natural person outside the womb and according to Nieuwenhuis is not covered by the fiction of section 1:2 *BW*.[36] A woman cannot be a little bit pregnant; section 1:2 *BW* contains a – literally – *spatial* boundary. For the time being at least, because private law is a living thing.

TIME

Understanding private law is impossible without a conception of time. After all, the law matures. It is the work of man, like the construction of cathedrals. Through increasing ingenuity people were able over the centuries to raise cathedrals higher and make them lighter. In the same way ideas in the law – like freedom of contract – are the work of man, in which growth, maturity and decay can be discerned.[37]

It is in literature, among other places, that Nieuwenhuis finds the views held by society. To be precise, in the books that have found a sustained response, with the number of reprints counting more than high sales figures. It is a

> 'list of narrative prose which every jurist should read and re-read, not because it will benefit their general development and speaking and writing skills, but more so because this canon constitutes the foundation of unwritten law: reasonableness

32 HR [Supreme Court] 9 October 1992, ECLI:NL:HR:1992:ZC0706, *NJ* [Dutch Case Law] 1994/535.

33 J.H. Nieuwenhuis, 'Eenzame hoogte: het DES-arrest' [Lonely Heights: the DES ruling], *Ars Aequi* 2010, pp. 417-419.

34 *Anders en eender*, p. 13.

35 J.H. Nieuwenhuis, 'Promises, promises. Over contracten en andere afspraken' [On contracts and other agreements], *NJB* [Journal for Dutch lawyers] 2001, edition 37, pp. 1795-1799.

36 'Het kind waarvan een vrouw zwanger is wordt als reeds geboren aangemerkt, zo dikwijls zijn belang dit vordert [The child a woman is expecting shall be deemed to have already been born whenever its interests so dictate].'

37 *Hoe is begrip van burgerlijk recht mogelijk* [How can private law be understood], p. 18.

> and fairness as pillars of the law of contract and the unwritten duty of care as a cornerstone and touchstone of the liability arising from an unlawful act.'[38]

We do not come across *Ulysses* in the list, but we do find Greek tragedies. Where the 'tragic core of the law' demands a response to injustice that has been done, the *Oresteia* turns out to be an exercise in revenge imposed by the gods.[39] The Laws of the Twelve Tables dictate an eye for an eye, a tooth for a tooth. These days it is the acknowledgement by the tortfeasor that his actions were wrong, whether or not accompanied by compensation for the damage caused. So Leopold Bloom assessed the possible responses to his wife's adultery:[40]

> 'What retribution, if any? Assassination, never, as two wrongs did not make one right. Duel by combat, no. Divorce, not now. Exposure by mechanical artifice (automatic bed) or individual testimony (concealed ocular witnesses), not yet. Suit for damages by legal influence or simulation of assault with evidence of injuries sustained (selfinflicted), not impossibly.'

We are clearly dealing with advancing human insight which, as always, needs perfecting.

Timeless works help us in formulating social views and in the process of fleshing out unwritten law. Furthermore, they sharpen the empathy we need to pass judgement in concrete cases. The Old Testament – you cannot get more timeless – is a source often consulted, for example, to gain an understanding of the tensions between fault and risk. In his valedictory address, Cain – Am I my brother's keeper? – and Abel form the introduction to a discourse on the increasing role of strict liability and the decreasing role of fault.[41] Previously, Job had been discussed in order to be able to understand the 'claim culture', just as Deuteronomy 23:20 – You may not charge interest if you lend something to a brother – stood model for views held in society, together with the Koran and Shakespeare's *The Merchant of Venice,* incidentally.[42]

European private law too is a living thing, which in Nieuwenhuis' work shows itself through the canon of literature. In his last book Nieuwenhuis

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38 J.H. Nieuwenhuis, 'De zeven zuilen van het ongeschreven recht' [The seven pillars of unwritten law], *NJB* 1999, p. 2130. This theme is also the focus of J.H. Nieuwenhuis, *Orestes in Veghel. Recht, Literatuur, Civilisatie* [Law, Literature, Civilisation], Amsterdam: Uitgeverij Balans 2004, see pp. 7-10.

39 *Orestes in Veghel*, pp. 13-26.

40 James Joyce, *Ulysses,* Penguin Modern Classics 1969, p. 654

41 J.H. Nieuwenhuis, *Paternalisme, Fraternalisme, Egoï¨sme. Een kleine catechismus van het contractenrecht* [Paternalism, Fraternalism, Egoism. (valedictory speech Leiden), Leiden: Leiden University 2009, p. 11; also in *NJB* 2009/1711. Cain and Abel also feature (more extensively) in *Orestes in Veghel*, pp. 57-76.

42 J.H. Nieuwenhuis, *Het vierspan, Eigendom, Contract, Persoon, Staat*, [The team of four, Ownership, Contract, Person, State] Zutphen: Paris 2013, pp. 155-161.

searches for the pillars on which the European community of values rests. In the first part, *enemy stereotypes*, he focuses on armed struggle as the father of the peoples of Europe. Some enemies came from outside:

> 'These enemies were after European territory. Persians demanded land and water from the Greek city states as a mark of subjection. Carthaginians stood before the gates of Rome (*Hannibal ad portas*), Huns and Moors got as far as Paris in the fifth and eighth centuries respectively.'[43]

Other enemies were chosen by the peoples of Europe:[44]

> 'In 326 BC the Indian king Poros was forced to battle against Alexander the Great and his allies. In the first century AD the Berber kingdom of Mauretania was annexed by the Roman Empire. In 1521 Hernan Cortes defeated the Aztec army of king Cuauhtemoc. Mexico City rose out of the ashes of the conquered capital Tenochtitlan.'

These centuries of conflict marked the continent and, according to Nieuwenhuis, should be cherished. War constitutes the cradle of European art and literature, which depicts and describes the public enemies of olden times. Through these we get to know others, and hence ourselves and our *allies*:[45]

> 'Literature is an essential deepening of language, understood to be our temple. Dreverhaven, Boorman and Havelaar are as much a part of our idiom as the grammatical rule that brands "Them are right." as unconventional and the semantic convention that determines the meaning of "snigger" (half-concealed mocking laugh). Literature is our window onto the outside world, our neighbours' temples of language. "Many cities did he visit, and many were the nations with whose manners and customs he was acquainted." As an armchair traveller with *Crime and Punishment* in our hand we get to know St. Petersburg in the nineteenth century through the eyes of Raskolnikov better than with the aid of a Baedeker of that period.'

Through imagination we acquire an understanding of the shared values of the European community, a *spoil of war* cherished and defended by Nieuwenhuis:[46]

> 'Values constitute the foundation of the Europesan Union, but they are also windows offering a view of an alluring prospect: an earthly paradise of freedom, equality and fraternity. The fact that the horizon is beyond reach is no reason not

43 *Een steeds hechter verbond*, p. 23.
44 *Een steeds hechter verbond*, p. 23.
45 *Een steeds hechter verbond*, p. 146.
46 *Een steeds hechter verbond*, p. 19.

> to continue along the path taken in 1957 in Rome towards an ever closer union between the peoples of Europe.'

A passionate plea for Europe, and even for a European Civil Code – and that in spite of the spirit of the time, which is dominated by euroscepticism and deregulation. It is characteristic of Nieuwenhuis, who was especially interested in the follow-up questions. How do we put meat on the bones of the European integration project? How can *European* private law be understood?

WEIGHT

An awareness of space and time is not enough. Ultimately lawyers need to balance interests. And that is what they really do. Interests have a *real* weight:[47]

> 'The weight of an interest is the argumentative force that interest develops in a legal dispute.'

In many places in his work Nieuwenhuis searches for seemingly imponderable interests. His attention is drawn by new reproduction techniques. How should the law deal with agreements on surrogate motherhood? Is an agreement to give birth to a child and to hand it over to someone else immoral and hence void (art. 3:40 *BW*)?

> 'The conclusion that handing over the child is an immoral act is difficult to maintain in an era in which fertility clinics engage in implanting embryos from commissioning couples into surrogate mothers with the approval of the minister of health. Indeed, the unmistakeable purpose of this socially accepted form of medical service is that after birth the child will be handed over to the commissioning couple.'[48]

As a result of all the progress made it is no longer even certain who the mother of the child is: the genetic mother or the birth mother? But have we come to the point where the performance of agreements on surrogacy can be enforced at law?[49]

A considered judgement regarding the enforceability of surrogacy agreements comes down to the weight and the balancing of the interests of the child and of all its parents concerned at the time the surrogate mother changes her mind. If there has been no performance at all of the agreement, it will be impossible to hold the surrogate mother to the agreement. Obliging the woman to undergo implantation of the embryo is going too far for Nieuwenhuis. But

47 *Hoe is begrip van burgerlijk recht mogelijk*, p. 24.
48 *Promises, promises*, p. 1797.
49 *Promises, promises*, p. 1797-1798.

the situation changes if implantation has resulted in pregnancy, due to the genetic relationship of the embryo and the commissioning parents. The situation changes again when the pregnancy is full-term and the child has already been handed over to the commissioning parents and grows up with them. As Nieuwenhuis writes, in that case a court ruling holding the woman to her original promise deserves serious consideration.[50]

Nieuwenhuis regularly turns his attention to the *Valkenhorst* case law, in which the Supreme Court decided that the right of a child that had come of age to know from whom it was descended was not absolute, but that its interest did in principle weigh heavier than the interest of the mother to respect for her private life.[51] When during lectures he talked about the Evans case, he invariably lowered his voice and said: 'On any view the 10th October was a terrible day in Natallie Evans' life'. He continued by saying that it was not the opening sentence of a novel by Jane Austen, but the first sentence, literally, of the judgment in the said case, in which the Court had to rule on the question of whether Natallie Evans, contrary to her ex-partner's wishes, could have the embryo they had created implanted.[52]

In his essay 'Who fathered me?' Nieuwenhuis wonders whether genetic selection should be allowed, starting with gender selection. Should parents be given the right to determine what the gender of their next offspring should be? Or have we here reached the boundary of human interference in the domain of life and death? Nieuwenhuis is clear on this point: it should be allowed. He considers the risk of mass selection of one of the two genders to be extremely small; family balancing will in most cases be the motive, as for most people having a child feels like receiving a gift:[53]

> 'This is countered by the fact that future spouses have an interest in to some extent regulating the stream of gifts. Three gourmet sets is too much of a good thing. A wedding list placed on internet (…) offers a solution. So why not open up the possibility (…) on the occasion of IVF treatment of opting for a son?'

Three daughters and three gourmet sets. Of course they are disparate quantities, but that does not mean that the choice of 'not another daughter' is imponderable. Will allowing 'deselection' of an embryo on the grounds of gender lead to other selections, on grounds of the risk of breast cancer, of intelligence or athletic abilities? On this point Nieuwenhuis takes the quickest exit: this type of selection is for the time being pure science fiction, *we will*

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50 *Promises, promises*, p. 1798.

51 HR [Supreme Court] 15 April 1994, ECLI:NL:HR:1994:ZC1337, *NJ* 1994/608, with note WH-S. Cited in *inter alia*: J.H. Nieuwenhuis, *Kant & Co*, Amsterdam: Uitgeverij Balans 2011, pp. 58-60; J.H. Nieuwenhuis, 'Kinderwens' [Desire to have children], *RM Themis* 1999, p.73-74; *De zeven zuilen van het ongeschreven recht*, [The seven pillars of unwritten law] pp. 2134-2135.

52 *Kant & Co*, pp. 11-15.

53 *Kant & Co*, pp. 64-73, p. 70.

cross that bridge when we come to it. Anyone reading Nieuwenhuis will not always be given the solution, but will always be handed arguments.[54] *Imponderables*, interests that cannot be weighed, do not exist for a lawyer, as long as the right questions are asked.

Thus Nieuwenhuis writes about the Baby Kelly ruling, in which the question arises as to whether there is any such thing as the right not to be born, and whether it is possible to bring a claim for a handicapped life:[55]

> 'Is Kelly suffering a loss? Is living, with or without a handicap, not more valuable than not living? I am fairly certain that this question, put in this way, cannot be answered, at least not in a way that can count on broad support. I myself retain the best of memories of the years *prior to* my birth.'

Anyone who misses out on income as a result of an unlawful act committed by another is entitled to compensation for loss of income. Their lost working capacity is calculated in *concrete* terms. From the traditional point of view this requires a *truthful* prediction of the person's hypothetical working capacity and hence an investigation into all relevant personal circumstances. In the case of a 50-year-old paving contractor with incipient knee complaints the loss will probably be considerably lower than in the case of a young woman with an academic education. But does this do justice to the position of the victim? The victim not only has an interest in remaining ignorant of intimate information concerning his or her hypothetical life: an increased risk of cancer, a predisposition to psychological disorders, their chances on the matrimonial market. It could also be that the victim would benefit far more from maximising the possibilities *after* the accident, than from a claim based on a picture of the victim's life if the accident had not happened.[56] In this way an understanding of the interests to be balanced and their weight will ultimately lead to an alternative to the previously standard solutions.

Once in a while Nieuwenhuis appears to have little time for *weight watchers*. In his research into the possibilities of multicultural law he advises the working members of the *Netherlands Lawyers Association* not to weigh precisely interests based on religion or ideology. Multicultural law would benefit more from

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54 Other examples: freedom of contract and human dignity, justice and welfare, and written and unwritten law. See J.H. Nieuwenhuis, *Waartoe is het recht op aarde?*, The Hague: Boom Juridische uitgevers 2006, p. 27 and 46-48, and *Orestes in Veghel*, pp. 39-56, respectively.

55 J.H. Nieuwenhuis, 'Hellend vlak, Kelly en de claimcultuur' [Inclined plane, Kelly and the claim culture], *NJB* 2003, p. 1381.

56 J.H. Nieuwenhuis, 'Wat is waarheid? Waarheidsvinding en privacy in het letselschaderecht' [What is truth? Establishing the truth and privacy in personal injury law], in: D.H.M. Peeperkorn (ed.), *Waarheidsvinding en privacy* [Establishing the truth and privacy], The Hague: Sdu uitgevers 2005, pp. 83-95.

mutual acknowledgement as a fully fledged participants in society, which confers rights and obligations that are the same for everyone.[57]

His season was spring

In the end everything has its basis in his third favourite, *Hoofdstukken Vermogensrecht* [Chapters on private law]. From the foreword:[58]

> 'A first acquaintance with positive law requires a firm line of reasoning. Time and again questions of law are answered with yes or no, words many a mature lawyer has long forgotten.'

To continue:

> 'Putting things into perspective is the next step. We need to pave a way for transitional forms of, for example, ownership and right of action, unlawful acts and non-performance. This is only possible after the contours of these legal concepts have first been sufficiently sharply defined. The emphasis here is totally on this preparatory work.'

To the last Nieuwenhuis was involved in educating and training young lawyers. For more than forty years first-year students of law have been reading his *Hoofdstukken*. Shortly before his death foreign master's students followed him on a cycling tour of the bulbfields north of Leiden, after taking a course on *Comparative Tort Law*. He had planned another tour with young colleagues to Louvain, Belgium. Two days after his death on 18 June 2015 they went, following his directions.

What have we gained from this preparatory work and from putting it into perspective? The question of valorisation can be answered by the decision of judge Woolsey who eleven years before Nieuwenhuis was born had to pass judgment on the morality of *Ulysses*, the book written by James Joyce. Should this book full of obscenities be suitable for the eyes of the judge's youngest daughter? Should it be judged by the more liberal standards of Learned Hand? Woolsey was convinced that the time was ripe for according greater weight to the integrity of the author. Although the decision does not reveal how he arrived at this judgment – with 'something stronger than sherry' and 'a

57 J.H. Nieuwenhuis, *Multicultureel recht: hoe is het mogelijk?* [Multicultural law: how is it possible?] (Handelingen Nederlandse Juristen-Vereniging 2008-I), Deventer: Kluwer 2008, p. 164.

58 J.H. Nieuwenhuis, *Hoofdstukken vermogensrecht* (11th edition, edited by M.C.I.M. Duynstee and O. Nieuwenhuis), Deventer: Kluwer 2015, Foreword to the first edition.

dripping razor in his left hand'[59] – the grounds bear witness to spatial understanding, awareness of time and an ability to balance:[60]

> 'The words which are criticized as dirty are old Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe. In respect of the recurrent emergence of the theme of sex in the minds of his characters, it must always be remembered that his locale was Celtic and his season spring.'

Hans Nieuwenhuis: *his season was spring*.

Further reading
Otto Nieuwenhuis has placed the annotations, articles, books, lectures and reports of Hans Nieuwenhuis on a special website at Leiden University. The majority is open access. The readers are cordially invited to visit <www.law.leidenuniv.nl/nieuwenhuis>.

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59 K. Birmingham, *The most dangerous book, The battle for James Joyce's Ulysses*, New York: Penguin Books 2014, pp. 319-328.

60 District Court for the Southern District of New York 6 December 1933, 5 F.Supp. 182 (*United States/One Book Called 'Ulysses'*).

PART I

Contract

1 The concept of nullity

Jaap Hijma ▪

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 rea-son 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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1 *Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetsbuchs, 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 19th-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'.[4] 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.[5] The recently published contract law 'principles' also display the wish to refrain from interventions which surpass what is really necessary.[6]

The purpose of this essay is to analyse the current status of the concept of nullity, also with a view to international developments.[7] 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.[8] 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.[9] 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'.[10] In my opinion these two aspects are inextricably interwoven;[11] 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);[12] other codifications contain similar provisions.[13] 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.[14]

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'.[15] Such a development will not leave (the validity of) contracts in such a domain untouched.[16] In the Netherlands we can also point at the erosion – to be discussed below[17] – of the idea that a contract leading to performance violating a mandatory statutory provision will be void because it is contrary to public policy.

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 Burgerlichen 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;[18] 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.[19] 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*).[20] 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.[21] 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.[22]

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*).[23] 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 parapraph 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.[24]

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.[25] In the Memorandum of Reply (1971) the Minister, keeping a low profile but meaningfully, inserts into this opinion the words 'in principle'.[26] 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.[27]

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

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 Zeben *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.[28] 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.[29] 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.[30]

> '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),[31] published in 2009, the following article is devoted to the infringement of mandatory rules:

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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 (*Parkeerexploitatie/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.[32] 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,[33] 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.[34] The

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.[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* case[36] 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

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.[42] In Germany too this is considered obvious.[43] 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).[44]

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.[45] 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:[46]

> '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.

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.[47] 'The intention behind these norms is obviously to confer upon the judge the broadest possible discretion', as Zimmermann – apparently sighing – observes.[48] Meanwhile it should be noted that inside the Commission there were serious doubts about this approach.[49]

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,[50] 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,[51] 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,[52] 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

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'.[53] Some scholars observe with astonishment that this provision, 'in spite of its crucial importance […] has not spurred much doctrinal interest, to say the least'.[54] 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'.[55]

Thirdly the article is a matter of public policy which must be automatically applied by national courts.[56]

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'.[57] For a general civil lawyer it seems strange to come across an automatic nullity with retroactive effect;[58] retroaction only seems fit in situations commencing with validity, as is the case with voidabilities.[59] 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.[60] 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;[61] in

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. Zippro, *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; Zippro 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.[62] 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'.[63] The words 'in so far' are fundamental and essential. The prudence they embody already appears in early judgments of the Court:[64]

> '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[65] therefore are definitely possible; the question whether the nullity should be only partial can and must be answered according to the relevant national law.[66] The follow-up question whether a conversion[67] is possible too is less easy to answer.[68] 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.[69] 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.

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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) i*nfra*, 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. Zippro, '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);[70] 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;[71] to me it seems that with regard to 'lighter' infringements there is no necessity to exclude any conversion in advance.[72]

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),[73] conversion (art. 3:42 DCC)[74] 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?[75] 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.[76] 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?).[77] In a recent procedure these two approaches were put face to face and were thus brought before the Dutch

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.[78] The case is about a contract for the operation of a petrol station, which contains a void exclusivity clause.[79] 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.[80] 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,[81] 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.[82] 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').[83]

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*.[84] 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').[85] 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/Mediq*), 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.[86] 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).[87] 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.[88]

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.[89] 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

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;[90] 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.[91] In the Code itself this is shown by art. 6:211 DCC:[92]

> *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,[93] 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.[94] 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.

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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/Klijsen*) deals with a tariff contract between health insurance companies and pharmacists which is void because the required permit is lacking.[95] 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.[96] Sometimes it turns out impossible to redress a performance, just as if the contract had been valid.[97] 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.[98]

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

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

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.[99]

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,[100] 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.[101]

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.[102]

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*.[103] 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.'[104] 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.[105] Entering into an agreement '*sich gegen ein Entgelt geschlechtlich hinzugeben*' stays problematic nevertheless, because the creation of such an obligation violates human dignity.[106] 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:[107]

> *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.[108] For the Netherlands Van den Brink suggests the same – attractive – solution.[109] The German documentary history makes mention of a unilaterally binding contract,[110] which qualification seems inaccurate. Ellenberger speaks of a contract becoming (partly) valid afterwards,[111] whereas Neuner accepts validity right from the start.[112]

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.

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105 *Deutscher Bundestag*, *Drucksache* 14/5958, p. 4; see also s*upra*, 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.[113] 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).[114]

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).[115]
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

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.

2 *Redelijkheid en billijkheid:* a view from English law

John Cartwright ▪

1 INTRODUCTION

Amongst the core concepts in the Civil Code of The Netherlands, *redelijkheid en billijkheid* ('reasonableness and fairness') marks one of the most fundamental differences from the common law. The principle of 'reasonableness and fairness' appears to be part of the Dutch lawyer's DNA; and it is as surprising – perhaps even shocking – to the Dutch lawyer to find that it is not matched in the common lawyer's thinking, as it is to the common lawyer to discover the reliance placed on 'reasonableness and fairness' in Dutch law. The purpose of this paper is to explore why the common lawyer does not see a similar place for such a principle.

It is not unusual for a legal system to use an objective norm of 'reasonableness' or 'fairness' in a variety of contexts. English law is no exception: much use is made of the standard of 'reasonableness' in both private law and public law, at common law and in statute. To give just a few examples: the standard of 'reasonableness', often personified as a hypothetical 'reasonable person',[1] is used in both tort and contract in a range of matters, such as defining the standard of conduct which constitutes negligence,[2] the extent of recoverable

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1 See also J. Cartwright, 'The Fiction of the "Reasonable Man"' in: A.G. Castermans, Jac. Hijma, K.J.O. Jansen, P. Memelink, H.J. Snijders & C.J.J.M. Stolker (eds), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, p. 143.

2 Court of Exchequer 6 February 1856, *Blyth v. Birmingham Waterworks* (1856) 11 *Exch*. 781, p. 784 (Alderson B: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'); House of Lords 16 April 1943, *Glasgow Corporation v. Muir* [1943] *AC* 448, p. 454, 457, 468; High Court 26 February 1957, *Bolam v. Friern Hospital Management Committee* [1957] 1 *WLR* 582, p. 586 (situation involving special skill or competence: 'the ordinary skilled man exercising and professing to have the special skill').

loss,[3] how to interpret the contract,[4] and how to determine the price where the contract is silent on the matter.[5] Whether a decision of an administrative authority can be challenged may depend on whether it is so 'unreasonable' that no reasonable authority could properly have made it;[6] and whether a decision of a fact-finding jury or court can be re-opened on appeal may depend on whether no reasonable jury or court could have come to such a decision.[7] Legislative provisions use tests based on 'reasonableness', and '(un)fairness' to determine the validity of certain contractual or non-contractual exemption clauses and notices,[8] or other contract terms;[9] and sometimes a court has

3 The test of 'remoteness of damage', based on whether the loss suffered was of the kind that a reasonable person in the defendant's position would have foreseen when he committed the wrong (tort): Privy Council 18 January 1961, *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co. Ltd (The Wagon Mound)* [1961] *AC* 388, p. 423, 426; or would have had in contemplation at the time of formation of the contract (contract): House of Lords 17 October 1967, *Koufos v. C. Czarnikow Ltd* [1969] 1 *AC* 350, p. 385.

4 In the case of a contract constituted by (written or oral) offer and acceptance, 'an offer falls to be interpreted ... objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer': Court of Appeal 4 March 1983, *Centrovincial Estates plc v. Merchant Investors Assurance Co* [1983] *Com. LR* 158, p. 158 (Slade L.J.). In the case of a contract contained in a single written document agreed by the parties, the courts look for 'the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract': House of Lords 19 June 1997, *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 *WLR* 896, p. 912 (Lord Hoffmann).

5 The 'reasonable price' for the goods or services in question: e.g. Court of Appeal 16 March 1934, *Foley v. Classique Coaches Ltd* [1934] 2 *KB* 1; Sale of Goods Act 1979, s. 8; Supply of Goods and Services Act 1982, s. 15.

6 So-called '*Wednesbury* unreasonableness': Court of Appeal 10 November 1947, *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 *KB* 223; W. Wade & C. Forsyth, *Administrative Law*, 11th edn, Oxford: Oxford University Press 2014, p. 302-305.

7 See, e.g., House of Lords 24 October 2002 *Grobbelaar v. News Group Newspapers Ltd* [2002] *UKHL* 40, [2002] 1 *WLR* 3024, par. 66, 73, 74 (jury in civil proceedings in defamation trial).

8 Unfair Contract Terms Act 1977, which applies only to non-consumer contracts and non-consumer notices, and uses in ss. 2(2), 3(2), 6(1A), 7(1A) and 7(4) 'the requirement of reasonableness', defined in s. 11 by reference to whether the contractual term was 'a fair and reasonable one to be included' in the contract, or, in the case of a non-contractual notice, whether it is 'fair and reasonable to allow reliance on it'. Further guidance on the operation of this test is given in s. 11 and Sched. 2.

9 Consumer Rights Act 2015 Part 2, providing in s. 62(1) that an 'unfair term of a consumer contract is not binding on the consumer' (but, in so far as it is transparent and prominent, excluding by s. 64 the assessment of a term for fairness to the extent that it specifies the main subject matter of the contract, or the assessment is of the appropriateness of the price payable). The Act implements Council Directive 93/13/EC on unfair terms in consumer contracts, and in consequence defines a contract term as 'unfair' if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer': s. 62(4), following the language of art. 3(1) of the Directive. There were earlier implementations of the Directive in 1994 (Unfair Terms in Consumer Contracts Regulations 1994, S.I. 1994 No. 3159) and 1999 (Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999 No. 2083).

power by statute to determine an issue by reference to what the court judges to be 'just' and/or 'equitable', classic terminology indicating a judicial discretion.[10]

In the Dutch Civil Code there are many references to 'reasonableness' (*redelijkheid*), or to 'fairness' (*billijkheid*), often in situations which will sound familiar to the English lawyer.[11] However, here we are concerned not with such instances but with the composite term, 'reasonableness *and* fairness' (*redelijkheid en billijkheid*), which is referred to as a set of 'standards' or 'requirements'.[12] The pervasive role of 'reasonableness and fairness' in Dutch private law is demonstrated by its reference in many articles throughout the Civil Code,[13] but we shall focus on its use within the general law of contract. In that context, two provisions are relevant as the starting-point.[14] First, amongst the general provisions governing *obligations in general*, at the start of Book 6 (General Part of the Law of Obligations) the Dutch Civil Code provides:[15]

> '1. An obligee and obligor must, as between themselves, act in accordance with the requirements of reasonableness and fairness.
> 2. A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.'

10 Law Reform (Frustrated Contracts) Act 1943, s. 1(2), (3); Law Reform (Contributory Negligence) Act 1945, s. 1(1); Civil Liability (Contribution) Act 1978, s. 2(1).

11 E.g. where a decision hangs on whether a price or another term of a contract meets a standard of 'reasonableness' or 'fairness' (e.g. DCC Book 7, art. 618: remuneration under an employment contract where the rate is not settled by the parties' agreement or by custom); or where 'fairness' requires a particular solution in the circumstances of the case, such as the reduction or increase of the sum to be paid under a penalty clause (Book 6, art. 94), the reduction of damages to take account of the claimant's own fault (Book 6, art. 101) or the departure from the general rule requiring equal contribution to damages by joint tortfeasors (Book 6, art. 166)). Occasionally, 'fairness' is also used in a similar context to the general principle of 'reasonableness and fairness' discussed in this paper (e.g. Book 7, art. 440 and 685: termination of commercial agency contract or employment contract where 'fairness' so requires as a result of change of circumstances).

12 See esp. DCC Book 6, art. 2:2 and 248:2 (*maatstaven* – standards) and Book 6 art. 2:1 and 248:1 (*eisen* – requirements), set out below.

13 DCC Book 1 (Family Law and the Law of Persons), art. 137, 141, 157, 159, 401; Book 2 (Legal Persons), art. 8, 15, 322, 334r, 444; Book 3 (Law of Property), art. 12, 30, 298; Book 4 (Inheritance Law), art. 123, 133, 139; Book 5 (Rights *in rem*), art. 78, 80, 97; Book 6 (General Part of the Law of Obligations), art. 2, 23, 211, 248, 258; Book 7 (Specific Contracts), art. 176, 269, 333, 394, 613, 904, 906, 909; Book 7A (Specific Contracts, continued), art. 1686; Book 8 (Law of Carriage and Means of Transportation), art. 28, 68, 88, 89, 162, 396, 524, 525, 912, 914, 1116, 1162, 1163, 1193, 1363, 1407, 1408.

14 See also DCC Book 6, art. 258 (below, section 3) for change of circumstances; and Book 3, art. 12 (below, section 4) for a definition of 'reasonableness and fairness'.

15 DCC Book 6, art. 2.

This general provision generates a particular application within the provisions governing *contracts in general*:[16]

> '1. A contract not only has the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, apply by virtue of law, usage or the requirements of reasonableness and fairness.
> 2. A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.'

The purpose of this paper is not to examine these provisions in detail, nor to attempt to give a detailed account of the use of 'reasonableness and fairness' within Dutch law. Rather, drawing on the general approach to 'reasonableness and fairness', and some particular illustrations of its use, we can identify some significant points of contrast with English law: contrasts both of principle and in the substantive law of contract in the two systems.

In the provisions of the Civil Code set out above, we can see two distinct uses of 'reasonableness and fairness' which contrast with the common law approach. First, 'reasonableness and fairness' is set as a general standard of conduct within the law of obligations, imposed by the law as a positive general (and mutual) duty on the parties to an obligation (and therefore on the parties to a contract). Secondly, 'reasonableness and fairness' is used as a standard by reference to which the terms of the contract can in certain circumstances be judged, and in particular to fill out the terms and to justify the modification of the effects of the contract or the disapplication of rules that would otherwise be binding on the parties as a result of the contract.

2 THE GENERAL STANDARD OF CONDUCT BASED ON 'REASONABLENESS AND FAIRNESS'

One of the most striking things for the English lawyer is the provision that 'an obligee and obligor must, as between themselves, act in accordance with the requirements of reasonableness and fairness'[17] – that is, that the law should impose a general legal duty of this kind on obligors and obligees, and therefore on parties to a contract. Whatever the analysis of this legal duty within Dutch law – as a norm for judicial decision-making (addressed to the court in order to resolve disputes in particular cases) or as a mandatory norm addressed to the parties in their mutual dealings, itself based on a broader societal norm of 'reasonableness and fairness';[18] and even if it does not create

16 DCC Book 6, art. 248.
17 DCC Book 6, art. 2:1.
18 P.S. Bakker, *Redelijkheid en billijkheid als gedragsnorm* (thesis Amsterdam VU), Deventer: Kluwer 2012 (there is an English summary at p. 147-153).

a directly actionable private law obligation in itself but operates more in the nature of a pervasive fundamental principle, underlying and justifying other more particular legislative rules[19] and allowing the development of new particular rules by the courts[20] – this general approach to the use of general principle and generally-stated duties is not the way in which English law works, nor does a general duty, or principle, of 'reasonableness and fairness' fit with the general approach to obligations, or contracts, in English law.

2.1 The use of general principle

English lawyers do refer to 'principles' of the law of contract: most commonly, freedom of contract;[21] and sanctity of contract[22] or the binding force of contract.[23] *Chitty on Contracts*,[24] the leading practitioner work on the law of contract, even contains within its opening chapter a section headed 'Fundamental Principles of Contract Law', identifying a number of legal norms which might be given the label of 'principle'[25] although it is made clear that there is no

19 E.g. DCC Book 6, art. 248, itself a broad provision which allows the contract to be both supplemented and derogated from in a range of contexts, and Book 6, art. 258 (see below, section 3).

20 E.g. the development of the principles of precontractual liability by the Dutch Supreme Court beginning in HR 15 November 1957, ECLI:NL:HR:1957:AG2023 (*Baris/Riezenkamp*) (by entering into negotiations with a view to concluding a contract, the parties come into 'a special legal relationship, governed by good faith': *een bijzondere, door de goede trouw beheerste, rechtsverhouding*; M. Hesselink in J. Cartwright & M. Hesselink, *Precontractual Liability in European Private Law*, Cambridge: Cambridge University Press 2008, p. 46-49); and the development by the Dutch Supreme Court of the judicial power to modify the contract in light of unforeseen circumstances, in anticipation of the legislative provision in Book 6, art. 258 of the new Civil Code: J. Chorus, P.-H. Gerver & E. Hondius (eds) *Introduction to Dutch Law for Foreign Lawyers*, 4th revised edn, Alphen aan den Rijn: Kluwer Law International 2006, p. 139. Before the new Civil Code of 1992, the legislature and the courts referred in such contexts to 'good faith' (*goede trouw*) which had both an objective sense and a subjective sense. The new Code replaces this terminology with 'reasonableness and fairness' (*redelijkheid en billijkheid*) when it is used in the objective sense: Chorus, Gerver & Hondius 2006, p. 138.

21 J. Beatson, A. Burrows & J. Cartwright (eds), *Anson's Law of Contract*, 29th edn, Oxford: Oxford University Press 2010, p. 4-5; E. Peel (ed.), *Treitel's Law of Contract*, 14th edn, London: Sweet & Maxwell 2015, par. 1-005; H. Beale (ed.), *Chitty on Contracts*, 32nd edn, London: Sweet & Maxwell 2015, par. 1-026 to 1-027.

22 Beatson, Burrows & Cartwright 2010, p. 7-8.

23 Beale 2015, par. 1-036 to 1-038.

24 Beale 2015, par. 1-025 to 1-056.

25 Beale 2015, par. 1-025: 'There are a number of norms of the English law of contract of a generality, pervasiveness and importance to have attracted the designation of principle, though such a designation does not have a technical legal significance. A number of legal norms could be advanced as included within such a category of principle, including the principle of privity of contract, the principle of "objectivity" in agreement, and principles of contractual interpretation. However, two linked principles remain of fundamental

technical legal significance to the notion of underlying principles, but that by the two principles of freedom of contract and the binding force of contract:[26]

> 'English law has expressed its attachment to a general vision of contract as the free expression of the choices of the parties which will then be given effect by the law. However, while the modern law still takes these principles as the starting-point of its approach to contracts, it also recognises a host of qualifications on them, some recognised at common law and some created by legislation.'

The language here is significant. Even if we can identify underlying 'principles' of contract law, they do not equate to general *duties* imposed by the law on the parties, but form the philosophical basis of the law in this area: the 'general vision' of contract, the 'starting-point' of the law's 'approach to contracts'. This reflects a matter of legal technique in the common law which contrasts in general with the civil law: the reluctance to use general principle as a source of legal duties, and the preference for particular, concrete rules.

Given that the English law of obligations is essentially contained in the common law (case law) rather than statute, it is not surprising that it should not be expressed in broad general principles. The common law of contract is found in the body of cases which have decided particular points arising in litigation between particular parties. Decisions are fact-specific, and the *ratio decidendi* of a case – the legal rule which develops the law and forms a precedent for future cases – is grounded in the facts of the case. Judges may make broad statements of principle and general rules to support their decision, but do not generally formulate the decisions themselves in terms of principle – and so although we can state the general rules of the English law of contract or of tort,[27] the way in which we find the rules in the common law is by a process of inductive reasoning from the decided cases, rather than there being a general statement of a rule such as one might expect to find in the text issued by the civil law legislator. This different approach between the traditions is

importance, *viz* the principles of freedom of contract and of the binding force of contract'.

26 Beale 2015, par. 1-025.

27 The English textbooks on the law of contract, or the law of tort, necessarily contain general statements of the relevant principles of the law, in a form not dissimilar to that which one might find in a textbook on the law of obligations in a civil law system. There is, however, a significant difference in the authorities which lie behind the general statements in the text in an English law textbook: in effect, the difference lies in the footnotes. In the common law the authorities from which the textbook writers derive their general statements are usually cases, and often very particular cases for particular points rather than any authoritative general statement of principle for which the cases stand as evidence.

well known and has often been commented upon: for example,[28] Roscoe Pound wrote that the common lawyer:[29]

> 'prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals'

and Lord Cooper wrote from the perspective of the Scottish judge:[30]

> 'The civilian naturally reasons from principles to instances, the common lawyer from instances to principles'.

This difference, and its practical effects, must not be overstated, but it remains true to the extent that the English judges do not normally expect to start from general principles but from particular cases; and there is still a natural tendency to use the specific rule, often derived from a specific case, rather than to abandon the specifics in favour of some broader general principle even if it can be derived from the earlier cases.

An illustration can be found in the law of torts. English law does not have a single general principle of tort law, such as that found in art. 162 of the Dutch Civil Code,[31] but a series of particular torts which have their own

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28 The quotations from Roscoe Pound and Lord Cooper are both given by K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd edn, translated by T. Weir, Oxford: Clarendon Press, 1998, p. 259, with a caveat that 'it would certainly be wrong to make out that there was an unbridgeable opposition between the [Common Law]'s method of inductive problem-solving and the [Civil Law]'s method of systematic conceptualism. Such an antithesis would emphasize the dominant trends and tendencies in the Common Law and Civil Law but, in its absolute form, it would be an increasingly inaccurate and incomplete reflection of what can actually be seen happening in these two great legal families today when lawyers set about the task of discovering the law.' Zweigert & Kötz 1998, ch. 18 contains a valuable general comparative discussion of the different approaches of common law and civil law legal systems to finding the law, also giving many useful references to other accounts.

29 R. Pound, 'What is the Common Law?' in: R. Pound (ed), *The Future of the Common Law*, Cambridge, Mass.: Harvard Law School 1937, p. 19. Pound was Professor at Harvard Law School, and Dean from 1916 to 1936.

30 T.M. Cooper, 'The Common Law and the Civil Law – A Scot's View' *Harvard Law Review* (63) 1950, p. 471. Lord Cooper was Lord Justice General and Lord President of the Court of Sessions of Scotland. Scotland is a 'mixed' legal system with influences of both the civil law tradition and the English common law: not codified, but still based heavily on the principles of law set out in the texts of institutional writers of the 17th, 18th and 19th centuries (Stair, Erskine and Bell), and now developed by the courts which have adopted the common law doctrine of precedent: Cooper 1950, p. 472-473; R. Zimmermann, D. Visser & K. Reid (eds), *Mixed Legal Systems in Comparative Perspective – Property and Obligations in Scotland and South Africa*, Oxford: Oxford University Press 2004, p. 8-12.

31 Liability under art. 162 requires proof of unlawfulness, fault, damage and a causal link between the act and the damage; but there are also separate provisions imposing liability for the acts of other persons and for damage caused by things: see Chorus, Gerver & Hondius 2006, p. 145-149. There is no common view amongst civil law systems about the

historical roots.[32] In the modern law, the most general of the torts is negligence, although even that tort does not have a single general principle. We can say that that a person is liable for (reasonably foreseeable) damage caused by a breach of a duty of care, but the devil is in the detail, and in particular in the fact that there is no single general test for the existence of a duty of care: the courts begin by considering whether the case in question falls within an established category of duty, for which the authority can be found in particular cases; and they develop beyond those existing categories only cautiously. There are some apparently wide statements of general principle: for example, in *Donoghue v. Stevenson*, the case which is now seen as the origin of the modern tort of negligence Lord Atkin said:[33]

> 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

However, this was no more than an explanation of the common thread uniting the existing cases in the context of the case in hand – the claim by a consumer in respect of personal injury caused by a defective product. Lord Atkin built on the general idea that a person should be liable for foreseeable harm to persons whom he ought reasonably have had in contemplation, but by articulating a very precise rule for the type of case in hand:[34]

> 'if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him

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appropriate structure for tortious liability: French law has a very broad principle of liability for damage caused by fault (with in addition strict liability for damage caused by persons and things for which one is responsible) (French Civil Code, art. 1382-1384; the provisions in the old Dutch Civil Code were based on this, and have been developed into the new form of art. 162 ff. of the new Code); German law defines liability for intentional and negligent harm by reference to protected interests (life, body, health, freedom, property or other rights of another person) and for other losses generally requires their intentional infliction contrary to public policy (German Civil Code, s. 823, 826). See generally C. van Dam, *European Tort Law*, 2nd edn, Oxford: Oxford University Press 2013, ch. 3 (France), 4 (Germany); W. van Gerven, J. Lever & P. Larouche, *Tort Law* (Ius Commune Casebooks for the Common Law of Europe), Oxford: Hart Publishing 2001, p. 57-68.

32 See generally van Dam 2013, ch. 5; van Gerven, Lever & Larouche 2001, p. 44-57; W.E. Peel & J. Goudkamp (eds), *Winfield & Jolowicz on Tort*, 19th edn, London: Sweet & Maxwell 2014, p. 35-40, 49-54.

33 House of Lords (Scotland) 26 May 1932 *Donoghue v. Stevenson* [2032] *AC* 562, p. 580.

34 House of Lords (Scotland) 26 May 1932 *Donoghue v. Stevenson* [2032] *AC* 562, p. 599.

> with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.'

This decision was later applied by analogy to similar cases involving defective products where the defendant was not a manufacturer but was a repairer of a product whose defective workmanship resulted in a risk of injury to the user of the product[35] or to a third party;[36] or the seller of a second-hand product which resulted in injury to the user.[37] Moreover, the decision in *Donoghue v. Stevenson* was later extended beyond the case of products, and in particular from the 1960s onwards it came to be seen as the basis of a general development of the tort of negligence. However, it was still not simply a broad general principle under which a duty of care is based on foreseeability of harm, but was taken as the basis of the development of a series of very carefully particularised duties, which are defined by reference to types of factual situation – duties in relation to statements giving rise to economic loss,[38] but not duties in relation to economic loss generally;[39] duties to exercise control over third parties;[40] duties in relation to psychiatric (as opposed to bodily) harm,[41] and so on.[42] The 'categories of negligence' are not closed, as Lord Macmillan said in *Donoghue v. Stevenson*[43] – but although general tests have been devised to ascertain when a duty of care is owed,[44] there are still *categories* of duty; and the categories are defined by different types of factual situation, and above all their application depends on the particular facts of the case in hand.[45]

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35 Court of Appeal 31 July 1941 *Haseldine v. C.A. Daw & Son Ltd* [1941] 2 *KB* 343.

36 High Court 10 March 1939 *Stennett v. Hancock* [1939] 2 *All ER* 578.

37 High Court 23 October 1939 *Herschtal v. Stewart and Ardern Ltd* [1940] 1 *KB* 155; High Court 30 July 1956 *Andrews v. Hopkinson* [1957] 1 *QB* 229.

38 House of Lords 28 May 1963 *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] *AC* 465; House of Lords February 8 1990 *Caparo Industries plc v. Dickman* [1990] 2 *AC* 605.

39 House of Lords 14 July 1988 *D. & F. Estates Ltd v. Church Commissioners for England* [1989] *AC* 177; House of Lords 26 July 1990 *Murphy v. Brentwood District Council* [1991] 1 *AC* 398.

40 House of Lords 6 May 1970 *Home Office v. Dorset Yacht Co. Ltd* [1970] *AC* 1004.

41 House of Lords 28 November 1991 *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 *AC* 310, building on House of Lords 5 August 1942 *Bourhill v. Young* [1943] *AC* 92.

42 See generally Peel & Goudkamp 2014, ch. 5.

43 [1932] *AC* 562, p. 619.

44 e.g. House of Lords February 8 1990 *Caparo Industries plc v. Dickman* [1990] 2 *AC* 605, p. 617-618 (Lord Bridge: 'in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other').

45 See also J. Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, Oxford: Hart Publishing 2013, p. 34-42.

The same general approach can be seen in the law of contract. Judges will sometimes refer explicitly to general principles to explain their reasoning: for example, judges who reject an extension of the scope of mistake as a vitiating factor in contracts may explain that this reflects an underlying principle of the binding force of contract.[46] But they will not apply the general principle as a primary source of the decision. Even where a judge derives a general principle from a group of established cases which might then be applied in place of the particular cases there is a marked reluctance in the courts to accept the move from the specific to the general. Lord Denning sought to replace certain specific instances of contractual invalidity by a general principle of 'inequality of bargaining power':[47]

> 'There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms – when the one is so strong in bargaining power and the other so weak – that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court. ...
>
> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power." By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.'

This was rejected, however, by Lord Scarman in a later case on the basis that undue influence – one of the existing categories referred to by Lord Denning – is sufficiently developed not to need the support of a general principle; and he doubted 'whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task – and it is essentially a legislative task – of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve

46 House of Lords 15 December 1931 *Bell v. Lever Brothers Ltd* [1932] *AC* 161, p. 224.

47 Court of Appeal 30 July 1974 *Lloyds Bank Ltd v. Bundy* [1975] *QB* 326, p. 336-337. The specific instances were duress of goods, unconscionable transactions, undue influence, undue pressure and salvage agreements.

against the mischief'.[48] Those legislative provisions are all specifically targeted; even legislation within the field of contract law is normally specific rather than laying down general principles.

2.2 No general duty of 'reasonableness and fairness' in English contract law

As we have seen above, English courts do not usually apply general principles in deciding cases in private law. In the particular context of contract law, we can add that there is no general principle of 'reasonableness and fairness', and certainly no general duty of 'reasonableness and fairness' of the kind stated in art. 2.1 of Book 6 of the Dutch Civil Code. This can be seen in *Chitty on Contracts* which, having discussed the 'fundamental principles' of freedom of contract and the binding force of contract,[49] goes on to note that, by contrast with civil law jurisdictions, and EU law, and even with some other common law systems, English common law does not recognise a general principle of 'good faith', or 'good faith and fair dealing'.[50] The standard of 'reasonableness' or the 'reasonable man' is used within the law of contract; but it is used for particular purposes, or in particular contexts, and not as an overarching general principle nor can it be translated into a general duty of 'good faith' or 'reasonableness and fairness'.

The standard of 'reasonableness' is used in interpreting contracts and contractual communications. A person is held to have intended not what he in fact meant his words to say, but what a reasonable person in the position of the recipient would have understood them to mean.[51] But this does not mean that there is any overriding general rule the terms of the contract must in themselves be 'reasonable' or 'fair'. There is such a rule for certain types of clause, in particular types of contract – the most general being the requirement for terms (except the definition of the main subject matter and the adequacy of the price) not to be 'unfair' within the legislation governing

48 House of Lords 7 March 1985 *National Westminster Bank Ltd v. Morgan* [1985] *AC* 686, p. 708. See also Privy Council 9 April 1979 *Pao On v. Lau Yiu Long* [1980] *AC* 614, p. 634, where Lord Scarman rejected an argument that there was a rule of public policy by which unequal bargaining could be controlled in the absence of duress proved in accordance with the established cases: 'Such a rule of public policy as is now being considered would be unhelpful because it would render the law uncertain. It would become a question of fact and degree to determine in each case whether there had been, short of duress, an unfair use of a strong bargaining position'.

49 Beale 2015, par. 1-025, quoted above, n. 25.

50 Beale 2015, par. 1-025, 1-039 to 1-056.

51 For the interpretation of communications between negotiating parties, the 'reasonable man' is placed in the position of the other party; for the interpretation of written instruments the 'reasonable man' is rather more external, reading the instrument with knowledge of its context but not of what the parties themselves intended by their words: above, n. 4.

consumer contracts;[52] but even this broad category is a targeted protection of a class of contracting parties (consumers), and is effected by a particular legislative rule, rather than by a rule of the common law: the courts may find ways to protect parties against unfair terms in certain situations, but they have rejected the idea that the common law should have a general rule requiring the terms to be reasonable, or giving the courts the power to strike down terms on the basis of substantive unfairness.[53] As we have already seen, the courts have rejected a general principle of 'inequality of bargaining power' in favour of the application of particular rules regulating specific forms of misconduct between parties negotiating a contract. There are specific categories of misconduct, such as misrepresentation, duress, and undue influence: but these have their own individual rules and have not become generalised into a broader principle.[54] Sometimes the common law does require a particular type of term to be 'reasonable': for example, a term in an employment contract restricting the employee's work for third parties after the employment is terminated must be reasonable in both its physical scope and the time of its operation if it is not to be unenforceable as being in restraint of trade.[55] Such cases are the exception, however, rather than the rule.

A general duty on contracting parties to act in good faith, or 'reasonably and fairly', can be translated into duties to act in good faith in the negotiation, performance and enforcement of the contract. Dutch law is not alone in recognising such duties, which (in particular ways and with differences of detail and of nuance) are generally known and accepted amongst continental civil law jurisdictions.[56] English law, however, admits neither the general duty to act in good faith nor the more particular duties to negotiate, perform and enforce one's contractual rights and remedies in good faith. There are particular types of contract where the courts have determined that the nature of the relationship between the parties is such that they should owe each other general duties of good faith in the negotiation and performance of the contract:

52 Consumer Rights Act 2015, Part 2; above, n. 9. For the control of exemption clauses in non-consumer contracts by a test of 'reasonableness' see Unfair Contract Terms Act 1977; above, n. 8.

53 Privy Council 22 May 1985 *Hart v O'Connor* [1985] *AC* 1000, p. 1018 ('Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing').

54 See the rejection of Lord Denning's approach in *Lloyds Bank Ltd v. Bundy* [1975] *QB* 326, above, n. 47, by Lord Scarman in *National Westminster Bank Ltd v. Morgan* [1985] *AC* 686 (preferring to apply the rules of undue influence); *Pao On v. Lau Yiu Long* [1980] *AC* 614 (duress); above, n. 48.

55 House of Lords 8 February 1916 *Herbert Morris v. Saxelby* [1916] 1 *AC* 688.

56 In relation to precontractual duties, see generally Cartwright & Hesselink 2008 with case studies of 16 jurisdictions, and esp. p. 461-470 discussing English law and Dutch law as the two European jurisdictions with apparently the most marked differences of approach.

most obviously, a contract of partnership,[57] but also traditionally this was also applied to insurance contracts which are described as contracts *uberrimae fidei* – of 'utmost good faith'.[58] However, these are the exception rather than the rule; and the courts do not accept a general principle that the parties must act reasonably, fairly or in good faith in their negotiations for a contract. In *Walford v. Miles* Lord Ackner said:[59]

> 'the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.'

If one party commits a recognised, actionable wrong during the course of the negotiations, such as a misrepresentation, then the other party will have a remedy. But there is no general positive duty of good faith.[60]

Similarly, in English law[61] there is no general positive duty of good faith during the performance of a contract, although recently a trial judge has said that he sees no reason why the courts could not more easily find an implied term of good faith in contracts, even commercial contracts:[62]

> 'Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between

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57 Court of Appeal 20 December 2006 *Conlon v. Simms* [2006] *EWCA Civ* 1749, [2008] 1 *WLR* 484.

58 Marine Insurance Act 1906, s. 17; King's Bench *Carter v. Boehm* (1766) 3 *Burr*. 1906, p. 1909-1910. The parties' mutual duties of disclosure which flowed from this duty of good faith have however now been removed (for consumer insurance contracts) or replaced by more particularised duties (for commercial insurance contracts): Consumer Insurance (Disclosure and Representations) Act 2012, s. 2; Insurance Act 2015, s. 14 and Part 2.

59 House of Lords 23 January 1992 *Walford v. Miles* [1992] 2 *AC* 128, p. 138.

60 Nor does English law impose other positive duties during the negotiations which might be derived from a general duty of good faith, such as duties of disclosure: the general rule is that there is no liability for non-disclosure unless there is a particular duty of disclosure by reason of the type of contract or the relationship between the parties: Beatson, Burrows & Cartwright 2012, p. 332-347.

61 This is an even stricter approach than in some other common law jurisdictions: e.g. in the United States the Uniform Commercial Code (2002) §1-304 provides that 'Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement', 'good faith' being defined as generally meaning 'honesty in fact and the observance of reasonable commercial standards of fair dealing': §1-201(b)(20). See also Restatement of Contracts Second (1981) §205; E.A. Farnsworth, *Contracts*, 4th edn, New York: Aspen 2004,§7.17, noting that 'some courts, concerned lest the doctrine of good faith get out of hand, have imposed a judicially fashioned restriction under which the doctrine does not create "independent" rights separate from those created by the provisions of the contract', although 'not all courts have been so respectful of the express provisions of the contract'.

62 High Court 1 February 2013 *Yam Seng Pte Ltd v. International Trade Corp. Ltd* [2013] *EWHC* 111 (*QB*), [2013] 1 *CLC* 662, par. 132 (Leggatt J.).

> partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.'

This statement does not go so far as to argue for a general principle of good faith in contracts, and apart from the context of 'relational contracts'[63] it has been received with some scepticism.[64]

3 'Reasonableness and fairness' as a standard to fill out the terms of a contract, or to modify its effects or disapply otherwise binding rules

In the context of contracts, by virtue of art. 248 of Book 6 of the Dutch Civil Code, the general principle of 'reasonableness and fairness' has both a 'supplementing' function, and a 'derogating' function: it can be used as the justification for filling out the terms of the contract, and for modifying the effects of

63 High Court 2 July 2014 *Bristol Groundschool Ltd v Whittingham* [2014] *EWHC* 2145 (*Ch*), par. 196, following the reference of Leggatt J. to relational contracts in *Yam Seng* [2013] *EWHC* 111 (*QB*), [2013] 1 *CLC* 662, par. 142: 'a longer term relationship between the parties which they make a substantial commitment. Such "relational" contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements'. In High Court 13 February 2015 *D & G Cars Ltd v Essex Police Authority* [2015] *EWHC* 226 (*QB*), par. 175 Dove J. preferred to use the term 'integrity', rather than 'good faith', 'to capture the requirements of fair dealing and transparency' in a long-term relational contract.

64 See, e.g. Court of Appeal 15 March 2013 *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd* [2013] *EWCA Civ* 200, par. 105, 150 (discussing an express term to co-operate in good faith); High Court 8 May 2013 *TSG Building Services plc v. South Anglia Housing Ltd* [2013] *EWHC* 1151 (*TCC*), par. 46 (Akenhead J.: 'Because cases and contracts are sensitive to context, I would not draw any principle from this extremely illuminating and interesting judgment which is of general application to all commercial contracts'); High Court 31 October 2013 *Hamsard 3147 Ltd v. Boots UK Ltd* [2013] *EWHC* 3251 (*Pat*), par. 86 (Norris J.: 'I do not regard the decision in *Yam Seng Pte Ltd v. International Trade Corporation* as authority for the proposition that in commercial contracts it may be taken to be the presumed intention of the parties that there is a general obligation of "good faith"').

the contract or disapplying rules binding on the parties as a result of the contract.[65]

All legal systems need some form of 'supplementing' function in their law of contract, if only because the parties to a contract will often not fully articulate their intentions, or will fail to consider whether certain provisions might be necessary which turn out to be important in the performance of the contract. English lawyers see this in a doctrine of *implied terms*, but there is a certain restraint. Terms are implied into contracts on the facts to give effect to the intentions of the parties, or to what the parties can (objectively) be taken to have intended,[66] and sometimes terms are implied by law by reason of the nature of the contract, often to protect one party to such a contract;[67] and as a rule a term cannot be implied which would contradict an express term, so the parties' freedom of contract is the clear starting-point (and often the end-point).[68] But there is no general principle by which a term will be implied on the facts into a contract simply on the basis that the term would be 'reasonable';[69] and, as we have seen above, there is no term implied by law into all contracts requiring the parties to perform the contract in good faith.[70]

In relation to the 'derogating' function of the principle of 'reasonableness and fairness' within Dutch law we see a sharply different view in England. Indeed, when the courts have been faced with arguments that a party should be dispensed from a general rule of contract law on the basis that to do so would be 'fair', or 'reasonable', or 'equitable', there has been a clear tendency to reject the argument on the basis that it undermines the security of contracts. The rules of 'Equity' – those devised by the Courts of Equity from the fifteenth century onwards, to mitigate the strict rules applied by the Common Law

65 DCC Book 6, art. 248: 1 (supplementing), 248: 2 (derogating), quoted above, section 1. See generally Chorus, Gerver & Hondius 2006, p. 137-140; A.S. Hartkamp, M.M.M. Tillema & A.E.B. ter Heide, *Contract Law in the Netherlands*, 3rd edn, Alphen aan den Rijn: Wolters Kluwer Law & Business 2011, par. 32.

66 See, e.g. Privy Council 18 March 2009 *Attorney General of Belize v. Belize Telecom Ltd* [2009] *UKPC* 10, [2009] 1 *WLR* 1988, par. 27 (Lord Hoffmann: 'the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant').

67 E.g. terms in leases requiring landlords to maintain property in favour of residential tenants: House of Lords 31 March 1976 *Liverpool City Council v. Irwin* [1977] *AC* 239; Landlord and Tenant Act 1985, s.11.

68 The exceptions are where by statute a party is not permitted to exclude or restrict liability for breach of a particular kind of term implied by law, usually designed to protect a type of contracting party (such as consumers).

69 House of Lords 31 March 1976 *Liverpool City Council v. Irwin* [1977] *AC* 239, p. 253-254 (Lord Wilberforce, rejecting such a principle stated by Lord Denning M.R. in the Court of Appeal on the basis that it would 'extend a long, and undesirable, way beyond sound authority').

70 High Court 1 February 2013 *Yam Seng Pte Ltd v. International Trade Corp. Ltd* [2013] *EWHC* 111 (*QB*), [2013] 1 *CLC* 662, par. 132 (Leggatt J.); above, n. 62.

Courts[71] – may have been motivated by the desire to inject fairness into the body of legal rules in our legal system, including the law of contract.[72] But they have crystallised into rules in the modern law, and there is no general power in the courts to 'do equity' in individual cases.[73]

A good illustration of this is *Union Eagle Ltd v. Golden Achievement Ltd* where the Privy Council rejected an argument that the seller of a flat in Hong Kong should not be entitled to forfeit the buyer's deposit and rescind the contract of sale where the buyer missed by only ten minutes the deadline set in the contract to tender the balance of the purchase price. The argument was that the court should have power to dispense from the strict terms of the contract where their operation would be 'unconscionable'. Lord Hoffmann noted that there are circumstances when the courts can relieve against forfeiture of property rights, but rejected the argument here and as a matter of general principle:[74]

> 'The notion that the court's jurisdiction to grant relief is "unlimited and unfettered" (*per* Lord Simon of Glaisdale in *Shiloh Spinners Ltd v. Harding*[75]) was rejected as a "beguiling heresy" by the House of Lords in *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana* (*The Scaptrade*).[76] It is worth pausing to notice why it continues to beguile and why it is a heresy. It has the obvious merit of allowing the court to impose what it considers to be a fair solution in the individual case. The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see *per* Lord Radcliffe in *Campbell Discount Co. Ltd v. Bridge*[77]) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation

71 J.H. Baker, *An Introduction to English Legal History* London: Butterworths LexisNexis 2002, ch. 6.

72 Equitable doctrines and rules in contract law include the remedies of specific performance and injunction, and rectification of a written contract; and a broader right to rescission of a contract in equity for misrepresentation (even innocent: the common law required fraud) and undue influence (the common law allowed rescission only for the more narrowly-defined duress): Beatson, Burrows & Cartwright 2010, p. 575-584, 262-265, 311, 349.

73 Cartwright 2013, p. 5-8.

74 Privy Council 3 February 1997 *Union Eagle Ltd v. Golden Achievement Ltd* [1997] *AC* 514, p. 518-519.

75 House of Lords 13 December 1972 *Shiloh Spinners Ltd v. Harding* [1973] *AC* 691, p. 726.

76 House of Lords 30 June 1983 *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana* (*The Scaptrade*) [1983] 2 *AC* 694, p. 700.

77 House of Lords 25 January 1962 *Campbell Discount Co. Ltd v. Bridge* [1962] *AC* 600, p. 626.

> to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.'

This is evidence against the proposition that a party must act reasonably and fairly, or in good faith, in exercising his contractual rights and the remedies provided by the law or expressly by the contract for the other party's breach. It does not mean that the courts cannot sometimes find solutions which lean in favour of finding a 'fair', 'reasonable' or 'equitable' result where they are able to use the established general rules of contract law in order to achieve a specific targeted result in an individual case.[78] Our judges are not immune to feeling that the law needs sometimes to be softened at the edges. But they reject the idea that there is a general power to allow them to dispense a party from the contract simply on the basis of a principle of reasonableness or fairness.

Similarly, the courts have rejected the idea that a party who makes a mistake about the subject-matter of the contract should be able to avoid the contract on the basis of a judicially-operated principle of fairness. Lord Denning proposed an approach to mistake based on fairness;[79] but this was contrary to an earlier clear statement by Lord Atkin in the House of Lords:[80]

> 'All these cases involve hardship on A. and benefit B., as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts – i.e., agree in the same terms on the same subject-matter – they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them. ...
>
> The result is that in the present case servants unfaithful in some of their work retain large compensation which some will think they do not deserve. Nevertheless it is of greater importance that well established principles of contract should be

78 For example, they may be able to interpret a contract term so as to achieve a fair result, even if it appears to be drafted to the contrary: Court of Appeal 30 June 2000 *Rice v. Great Yarmouth Borough Council* (2001) 3 *LGLR* 4 (clause allowing local authority to terminate 4-year contract with sole trader if 'the contractor ... commits a breach of any of its obligations under the contract' was construed as referring only to breaches sufficient to allow termination of a contract under the general law); S. Whittaker, 'Termination Clauses' in: A. Burrows & E. Peel (eds), *Contract Terms* Oxford: Oxford University Press 2007, p. 253.

79 Court of Appeal 25 November 1949 *Solle v Butcher* [1950] 1 *KB* 671, p. 692 ('the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained').

80 House of Lords 15 December 1931 *Bell v. Lever Brothers Ltd* [1932] *AC* 161, p. 229 (discussing both hypothetical cases of mistakes and the facts of the case itself, in which the House of Lords held that the parties' mistake was not sufficient to avoid the contract).

> maintained than that a particular hardship should be redressed; and I see no way of giving relief to the plaintiffs in the present circumstances except by confiding to the Courts loose powers of introducing terms into contracts which would only serve to introduce doubt and confusion where certainty is essential.'

The stricter approach set out by Lord Atkin was reasserted, and Lord Denning's broader approach was rejected, by the Court of Appeal in 2002.[81] The Court noted that Lord Denning's preferred equitable jurisdiction to grant rescission for mistake would give greater flexibility than the narrower common law doctrine of mistake but thought that the courts could not develop it, although there was scope for legislation on the point – but, as always, what the Court clearly had in mind was a specific legislative provision for mistake, and not any broader general legislative principle of reasonableness and fairness.[82]

In addition to the general provision relating to 'reasonableness and fairness' in contracts under art. 248 of the Dutch Civil Code, there is also a more particular provision relating to change of circumstances in art. 258, where the court has power to modify the terms of the contract on the basis of 'reasonableness and fairness':[83]

> '1. Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.
> 2. The modification or the setting aside shall not be pronounced to the extent that it is common ground that the person invoking the circumstances should be accountable for them or if this follows from the nature of the contract.
> 3. For the purposes of this article, a party to whom a contractual right or obligation has been transmitted, is treated as a contracting party.'

Every legal system needs to determine the appropriate provision to be made in the case of a significant change of circumstances during the performance of a contract, whether such a change has the drastic effect of rendering performance accordance with the terms entirely (physically) impossible, or merely makes some change in the nature or value of the contractual performance. The English common law developed the doctrine of 'frustration' for this case: if the performance of the contract becomes impossible, illegal, or 'radically different' as a result of an unforeseeable change of circumstances for which

81 Court of Appeal 14 October 2002 *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd* [2002] *EWCA Civ* 1407, [2003] *QB* 679, par. 156-157, 160.
82 Court of Appeal 14 October 2002 *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd* [2002] *EWCA Civ* 1407, [2003] *QB* 679, par. 161.
83 DCC Book 6, art. 258.

the contract makes no provision, the contractual obligations of both parties are automatically discharged in so far as they had not yet fallen due for performance;[84] and there is provision by statute for the court to have the power to make limited financial orders for repayment of money already paid under the contract, and for a party to pay for benefits already received under the contract.[85] The point to notice for present purposes, however, is that the court's role in the doctrine of frustration is limited: in the event of dispute it can adjudicate on whether the test for frustration has been satisfied; and it has a statutory power to determine (on a discretionary basis) certain particular aspects of the financial consequences of the discharge of the contract. But it has no power to intervene so as to change the terms of the contract itself. There are cases where a court has found a way of intervening indirectly, not by changing the terms but by interpreting the contract, or by implying terms, so as to decide that the contract in fact (objectively) provided for the change of circumstances.[86] But the idea that the court should have an express power to modify the contract or its effects, in the broad way described in art. 258 of the Dutch Civil Code, is simply unthinkable. The contract is for the parties; and even in the most extreme cases where performance becomes impossible or radically different, the most that the law can do is to terminate the contract to discharge the parties and leave them to re-negotiate their transaction in the light of the changed circumstances. Indeed, that is what the doctrine of frustration does within English law: it encourages the parties either to make provision within their contract for future events, in so far as they can do so; or to sort out the consequences of the change by renegotiation when the change occurs.[87] And in such a renegotiation – unlike in Dutch law[88] – the parties are free to act in their own interests: there is no general duty to negotiate in good faith, or to take the other party's interests into account in the negotiations; nor is there any duty to *re*-negotiate in good faith in light of change of circumstances.[89] This further highlights the different understanding of English and Dutch law in relation to the positions of the parties, as well as the role of the court, in solving the problems which arise in such cases.[90]

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84 Beale 2012, ch. 23; Beatson, Burrows & Cartwright 2010, ch. 14; Cartwright 2013, ch. 11.

85 Law Reform (Frustrated Contracts) Act 1943.

86 E.g. Court of Appeal 2 May 1978 *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* [1978] 1 *WLR* 1387 (long-term contract to supply water at fixed price could be terminated by notice, either on basis of interpretation of the contract, or implied term).

87 E. McKendrick, '*Force Majeure* Clauses: The Gap between Doctrine and Practice' in: A. Burrows & E. Peel (eds), *Contract Terms* Oxford: Oxford University Press 2007, p. 233.

88 cf. HR 15 November 1957, ECLI:NL:HR:1957:AG2023 (*Baris/Riezenkamp*), above, n. 20.

89 House of Lords 23 January 1992 *Walford v. Miles* [1992] 2 *AC* 128, p. 138 (above, n. 59). Even an express term of the contract requiring the parties to renegotiate is not effective in English law, although the courts are uncomfortable with this: Court of Appeal 15 July 2005 *Petromec Inc v. Petroleo Brasileiro SA* [2006] 1 Lloyd's Rep. 121, par. 121.

90 Bakker 2012, ch. 4 argues that DCC Book 6, art. 258 expresses the parties' own duty to act reasonably and fairly to solve the problems arising from the change of circumstances.

4 CONCLUSIONS

The use of a general standard, or norm, of 'reasonableness and fairness' feels natural – indeed, instinctive – to the Dutch lawyer; and both its articulation as a general duty, and its translation into particular rules of contract law, seem to be equally natural and instinctive. The Dutch Civil Code identifies the content of the requirement of 'reasonableness and fairness' in the general provisions at the start of Book 3 (Property Law):[91]

> 'In determining what reasonableness and fairness require, generally accepted principles of law, current judicial views in the Netherlands and the societal and private interests involved in the case must be taken into account.'

Dutch lawyers explain this further in different ways, but it is not out of line for one to write:[92]

> 'Society cannot do without reasonableness and the legal community cannot do without the principle of reasonableness and fairness, which is based on this societal norm.'

English law does not share the same vision, at least in the context of the legal duties owed by parties in private law. We have seen that this results from a number of different factors. In the first place, English law prefers to use particular rules to identify particular legal responses, rather than deriving the answer for a case from a broad general principle. This may be a natural consequence of a case-law method such as typifies the common law, but even legislative intervention in England tends to be particular rather than laying down general principles as the source of legal rules.

Secondly, in the context of contracts the approach of the courts to intervention is generally rather restrained. There is a general view that it is for the parties to determine their bargain rather than for the courts, and as long as there is no particular misconduct by either party (such as fraud or duress in its formation) the parties should be free to regulate their own affairs. There are exceptions, often to protect particular classes of contracting parties (the broadest class being consumers) or where the contract is of a type which justifies closer judicial control. But these are exceptions to the general rule, which is based on the parties' freedom of contract.

Thirdly, there is a clear view that if the courts had the freedom to intervene in contracts on the basis of some general principle such as 'reasonableness and fairness' this would undermine the certainty and security of contracts.

91 DCC Book 3, art. 12.
92 Bakker 2012, p. 153.

Even the power to intervene only in extreme cases[93] would be enough to open the door to parties claiming that their case was the one in which the court should exercise the power in their favour; so it is better to take a tough line for all at the expense of a few individual hard cases.

We cannot simply weigh these different views of the two legal systems against each other and conclude that one is right, the other wrong. The reality is that they represent different visions of contract, but we must not make the mistake of placing our systems in direct opposition, as if English law did not see any place for reasonableness and fairness, or Dutch law failed to respect freedom of contract, and certainty and sanctity of contract. The law of contract in any legal system must contain aspects of both views: there will be contracts where certainty is paramount, and the courts should not only hesitate to intervene but should simply not intervene on the basis that it is for the parties to determine their own affairs–such cases are typically those between commercial parties who negotiate at arm's length and for whom no paternalistic intervention is appropriate. But in all systems there are other cases where the contract is of a kind where the parties (or, generally, one of the parties) needs some protection by the courts' intervention, and one way for the courts to do this is to apply some overriding general rule based on fairness or reasonableness which can allow it to intervene in cases which do not have to be contained within the straightjacket of particular rules. However, in formulating its rules of contract law, a legal system needs to adopt a paradigm case: is a contract seen at its core as a co-operative venture between parties who in the creation, formation and enforcement of their venture can be expected to meet certain objectively-definable standards of behaviour? Or is it an arm's length commercial transaction, in which the parties are in principle entitled to determine their own risks and rewards, free from external intervention? English law has protective rules, for individual types of contract and individual types of contracting party – and in the modern law the range and scope of such protective rules, particularly in the case of non-commercial contracts, has grown very significantly. But the paradigm case of a contract in English law remains the arm's length commercial transaction; and given the general reluctance of the English courts to abandon particular duties in favour of a general principle as a source of legal obligation, it seems inherently unlikely that the English courts would wish to turn the particular protective rules within the sphere of contract law into an overriding general principle so as to reverse the paradigm business model.

93 In Dutch law the 'derogating' function of the principle of reasonableness and fairness under DCC Book 6, art. 248:2 can be applied only where the rule otherwise binding on the parties is 'unacceptable' (*onaanvaardbaar*): this 'indicates that such a decision should be reserved for exceptional situations, but even so the provision is frequently applied by the courts': Chorus, Gerver & Hondius 2006, p. 138.

Why does this difference in the two systems' vision of contracts matter? It is of course significant for parties negotiating a contract in relation to choice of law in cross-border transactions. But it may also help to explain the coolness (to say the least) of the reaction in England to proposals in recent years to harmonise the law of contract in Europe. For example, article 2 of the proposed Common European Sales Law provided:[94]

> '1. Each party has a duty to act in accordance with good faith and fair dealing.
> 2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
> 3. The parties may not exclude the application of this Article or derogate from or vary its effect.'

The Dutch lawyer should see no difficulty with this: it fits the Dutch model of contract and its use of general principle as a source of legal duties to give effect to a basic underlying principle of the law. It is not so, however, for the English lawyer.

94 COM(2011) 635 final *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Annex 1, art. 2 ('Good faith and fair dealing'). See also O. Lando & H. Beale, *Principles of European Contract Law Parts I and II*, The Hague, Kluwer Law International 2000, art. 1:201; C. von Bar & E. Clive (eds), *Principles Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition* Munich: Sellier 2009, III.-1:103.

3 The impact of the ADR Directive on article 7:904 par. 1 DCC explored

What is 'unacceptable according to standards of reasonableness and fairness' after the implementation of the Directive?

Marte Knigge & Eline Verhage ▪

1 INTRODUCTION

'Reasonableness and fairness' can undoubtedly be reckoned among the 'core concepts' of the Dutch Civil Code (hereafter: 'DCC'). The important role this concept plays within the law of obligations is made clear by art. 6:2 and art. 6:248 DCC.[1] Next to these more general provisions, the Dutch Civil Code contains several specific applications of the concept.[2] One of the provisions in which the concept of reasonableness and fairness is applied is art. 7:904 par. 1 DCC. This specific application forms the central theme of this contribution.

Art. 7:904 par. 1 DCC is part of the title on the contract of settlement. A species of the contract of settlement is the contract of binding advice. Binding advice is a method of Alternative Dispute Resolution (hereafter: 'ADR') in which an independent third party (one or more 'binding advisor(s)') gives a binding decision that resolves the dispute between the parties.[3] Especially in consumer disputes, this method of alternative dispute resolution is used very often. The Netherlands has a successful system of consumer dispute resolution through binding advice by e.g. Consumer Complaints Boards ('Geschillencommissies').[4] Binding advice resembles arbitration to some extent, but it differs from it in

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1 See also the contribution of Cartwright to this yearbook.

2 Cartwright gives an overview; see footnote 13 of his contribution.

3 Binding advice can also be used in situations where there is no legal dispute between the parties, but where the third party supplements or modifies the rules governing the juridical relationship between the parties; P.E. Ernste, *Bindend advies* (diss. Nijmegen), Deventer: Kluwer 2012, p. 1; B. van der Bend, M. Leijten & M. Ynzonides (eds.), *A guide to the NAI Arbitration Rules*, Alphen a/d Rijn: Kluwer Law International 2009, p. 46.

4 See on the Dutch consumer dispute resolution system further section 2.

that its procedure is much less regulated and a grant of execution ('exequatur') for the decision cannot be obtained. Since binding advice is based on a contract, the decision has the force of an agreement between the parties. A party can request performance before a court.[5] Although its name is somewhat ambiguous, binding advice is thus a *binding* form of ADR. From art. 7:902 DCC it follows that a decision taken to terminate an uncertainty or dispute in the field of the law of property, proprietary rights and interests is valid, notwithstanding that it proves to be in breach of mandatory law, unless it would also be in breach of good morals and public policy. The DCC holds very limited grounds on which a decision taken by binding advisors can be challenged. Art. 7:904 par. 1 DCC states:

> 'A decision of a party or third person may be annulled if it would be unacceptable to hold him[6] to it in connection with the content or manner of its establishment in the given circumstances, according to standards of reasonableness and fairness.'

Art. 7:904 par. 1 DCC introduces a marginal review of the decisions of binding advisors. Only if it is *unacceptable* to hold a party to it *according to standards of reasonableness and fairness*, may the decision be annulled.[7] The case law makes it clear that this can only be assumed in exceptional circumstances.[8]

However, it is questionable whether this limited possibility of review can be maintained with the implementation of Directive 2013/11/EU on consumer ADR (hereafter: ADR Directive) in tandem with Regulation (EU) 524/2013 on consumer ODR (hereafter: ODR Regulation; ODR stands for 'Online Dispute Resolution').[9] Directive 2013/11/EU aims to facilitate access for consumers to ADR procedures and establishes several quality requirements for ADR Proced-

5 Binding advice is a typical Dutch legal construct. For foreign structures that are to some extent comparable, see Ernste 2012, pp. 11-12. See on the construct of binding advice further section 2.

6 This translation of art. 7:904 par. 1 DCC suggests that it is the party or the third person who has taken the decision that may annul the decision. Obviously, it is the parties that are bound by the decision that have this authority. 'Him' refers to the parties that have brought their dispute to ADR, not to the binding advisor who has decided their case.

7 Toelichting Meijers, Vierde gedeelte, Boek 7, pp. 1146-1147; C. Hodges, I. Benöhr & N. Creutzfeldt-Banda, *Consumer ADR in Europe*, Oxford: Hart Publishing 2012, p. 142; Ernste 2012, p. 73; Dutch Supreme Court 15 June 2012, ECLI:NL:HR:2012:BW0727 (PWC/x), par. 3.5.2.

8 Dutch Suptreme Court18 June 1993, *NJ* 1993/615 (*Gruythuysen c.s./SCZ*), par. 4; Dutch Supreme Court 25 March 1994, *NJ* 1995/23 (*Midden Gelderland/Lukkien*), par. 3.3; Dutch Supreme Court 12 September 1997, *NJ* 1998/382, note M.M. Mendel (*Confood/Zürich*), par. 3.5; see also Ernste 2012, p. 73; Asser/Van Schaick 2012 (7-VIII*), no. 163.

9 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC; Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

ures.[10] Member states need to ensure that disputes covered by the Directive can be submitted to an ADR entity which complies with these requirements.[11] The aim of the ODR Regulation is to create an online ADR platform, which should increase access for consumers and traders online to ADR procedures and make the online resolution of consumer disputes possible.[12]

This contribution examines the impact of the ADR Directive on the interpretation of the concept of reasonableness and fairness within the context of art. 7:904 par. 1 DCC. If a binding advice procedure does not comply with the quality requirements set out in the Directive, will this make it 'unacceptable according to standards of reasonableness and fairness' to hold a party to the decision? Does the ADR Directive require that the decision can be annulled in such a case? These questions will be addressed in this contribution (sections 6-7), after a further analysis of the Dutch system of resolving consumer disputes by means of binding advice is given (section 2) and the aims of the ADR Directive (section 3), its quality requirements (section 4) and the implementation in the Dutch legal system (section 5) are described. This contribution closes with suggestions for alternative ways to enhance the quality of consumer ADR (section 8).

2 Resolving consumer disputes through binding advice in the Netherlands

In the Netherlands, alternative resolution of consumer disputes is well developed. Different institutions that provide out-of-court resolution for consumer disputes co-exist. Characteristic of the Dutch Consumer Dispute Resolution system (hereafter: 'Dutch CDR system') is the triad of the Foundation for the Consumer Complaints Boards (the 'Stichting Geschillencommissies voor Consumentenzaken', hereafter: 'SGC'), the Financial Services Complaints Tribunal ('Klachteninstituut Financiële Dienstverlening', hereafter: 'Kifid') and the Health Insurance Complaints and Disputes Board ('Stichting Klachten en Geschillen Zorgverzekeringen', hereafter: 'SKGZ'). The SGC, Kifid and SKGZ use a variety of ADR procedures that range from an ombudsman scheme to mediation. However, central part of the dispute resolution scheme of almost all of these institutions is a binding advice procedure.[13]

Binding advice is an informal method of ADR. Binding advice is based on a contract between the parties. This contract is seen as a species of the contract

10 See for example recital 7 of the ADR Directive.
11 See art. 5 ADR Directive.
12 See art. 1 ODR Regulation; recital 18 ODR Regulation.
13 See on the Dutch CDR system Hodges, Benöhr & Creutzfeldt-Banda 2012, pp. 129-165. By way of exception, arbitration is used instead of binding advice. This is the case at the Geschillencommissie Garantiewoningen.

of settlement ('vaststellingsovereenkomst'), governed by title 15 of book 7 of the Dutch Civil Code. By this contract, parties agree in advance to be bound by the decision given by one or more binding advisors. An important difference with arbitration is that the decision taken by binding advisors cannot acquire the force of *res judicata* and a grant of execution ('exequatur') cannot be obtained. However, the decision does have the force of an agreement between the parties. Non-compliance is seen as breach of contract and a party can request performance before a court.[14] In practice, enforcement is not problematic for the consumer when binding advice at the SGC is concerned. The Consumer Complaints Boards under the umbrella of the SGC are established after negotiations between trade associations and consumer association(s). The trade association guarantees payment of the claim if the trader fails to do so.[15]

There are limited grounds on which the validity of a decision taken by binding advisors can be challenged. A decision may be annulled on the basis of art. 7:904 par. 1 DCC if it would be unacceptable to hold a party to it according to standards of reasonableness and fairness. Art. 7:904 par. 1 DCC mentions two grounds for review. It may be unacceptable to hold a party to a decision either in connection with the *content* of the decision or in connection with the *manner of its establishment*. Art. 7:904 par. 1 DCC also makes it clear that the given circumstances should be taken into account while making the assessment.

When is it unacceptable according to standards of reasonableness and fairness to hold a party to a decision in connection with the content of this decision? Art. 7:904 par. 1 DCC should be read in conjunction with art. 7:902 DCC. This provision makes it clear that a decision is binding on the parties even if it is in breach of mandatory law. This is different when the decision is also in breach of good morals and public policy:

> 'A settlement to terminate an uncertainty or dispute in the field of the law of property, proprietary rights and interests 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.'

Art. 7:902 DCC has implications for art. 7:904 par. 1 DCC. Since art. 7:902 DCC makes it clear that a decision is even valid if it is in breach of mandatory law, it is not possible to annul a decision on the basis of art. 7:904 par. 1 DCC on

14 See for English legal literature on binding advice Van der Bend, Leijten & Ynzonides 2009, pp. 46-47; J.M.J. Chorus, P.H.M. Gerver & E.H. Hondius (eds.), *Introduction to Dutch law*, Alphen a/d Rijn: Kluwer Law International 2006, pp. 239-240, p. 268; M. van Hooijdonk & P. Eijsvoogel, *Litigation in the Netherlands. Civil Procedure, Arbitration and Administrative Litigation*, Den Haag: Kluwer Law International 2012, pp. 149-150.

15 Hodges, Benöhr & Creutzfeldt-Banda 2012, p. 140, p. 144; Chorus, Gerver & Hondius 2006, pp. 240, 268.

the sole ground that it is in breach of mandatory law.[16] An error in the decision is not enough to challenge the decision.[17] Only serious defects in the decision will justify the conclusion that it is unacceptable to hold a party to it.[18]

Art. 7:902 DCC in combination with art. 7:904 par. 1 DCC thus makes it possible for the SGC to apply a different standard for deciding their cases than the rules of law. Instead, they decide the disputes submitted to them according to 'reasonableness and fairness, while taking into account the contract between the parties and the conditions included therein'.[19] These conditions are usually the conditions bilaterally agreed between trade associations and consumer association(s).[20] Research shows that these conditions play a role in a substantial number of decisions of the SGC.[21] The decisions by the SGC are therefore not necessarily in accordance with (mandatory) law.[22] Art. 7:902 DCC approves this possible deviation from the law, as long as good morals or public policy are not breached.

A decision may also be annulled on the basis of art. 7:904 par. 1 DCC in connection with the manner of its establishment. The manner of establishment of a decision may for example be contested when the principles of a fair trial have not been observed. However, the case law of the Dutch Supreme Court makes it clear that the principles of a fair trial are not applicable in full in every binding advice procedure. Binding advice can also be used in situations where there is no legal dispute between the parties, but where binding advisors supplement or modify the rules governing the juridical relationship between the parties.[23] For example, in case of a leasehold the parties may agree not to determine the amount of the ground rent payable by the leaseholder in the

16 Asser/Van Schaick 2012 (7-VIII*), no. 163; see Dutch Supreme Court 12 September 1997, *NJ* 1998/382, note M.M. Mendel (*Confood/Zürich*) and the opinion of Advocate General Bakels, no 3.26-3.29.

17 Dutch Supreme Court 18 June 1993, *NJ* 1993/615 (*Gruythuysen c.s./SCZ*), par. 4; Dutch Supreme Court 25 March 1994, *NJ* 1995/23 (*Midden Gelderland/Lukkien*), par. 3.3; Dutch Supreme Court 12 September 1997, *NJ* 1998/382, note M.M. Mendel (*Confood/Zürich*), par. 3.5.

18 Dutch Supreme Court 12 September 1997, *NJ* 1998/382, note M.M. Mendel (*Confood/Zürich*), par. 3.5; Dutch Supreme Court 15 June 2012, ECLI:NL:HR:2012:BW0727 (*PWC/x*), par. 3.5.2.

19 See for example the rules of procedure of the Geschillencommissie Afbouw, art. 16.1; Geschillencommissie Reizen, art. 15.1. See also Ernste 2012, pp. 61-63.

20 See on the process of negotiating conditions and establishing a Consumer Complaints Board Hodges, Benöhr & Creutzfeldt-Banda 2012, pp. 137-139.

21 J.M.P. Verstappen, W.H. van Boom, M.B.M. Loos & J.G.J. Rinkes, *Onderzoek naar de rol van algemene voorwaarden in de praktijk van de geschillencommissies SGC*, Ministerie van Economische Zaken 2007, in particular pp. 4, 16.

22 See also M.B.M. Loos, 'Verboden exoneraties in energieleveringsovereenkomsten en vernietiging van met de wet strijdige bindende adviezen', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2006, pp. 3-6, in particular pp. 3-4.

23 See also footnote 3.

contract itself, but to leave the determination to binding advisors.[24] In such a case, laxer standards apply. By contrast, if the binding advice procedure comes closer to a judicial procedure, the principles of a fair trial become more important.[25] This contribution focuses on binding advice procedures in which consumer disputes are being resolved. Since these procedures resemble judicial procedures, the principles of a fair trial will play a more important role. However, even if the judge establishes that one of the principles of a fair trial was breached in a binding advice procedure, this will not necessarily mean that the decision may be annulled. The Supreme Court has held that if a procedural fault has been made in the establishment of a decision, one of the factors that should be considered in assessing whether the decision should be set aside is whether, and if so, to what extent, the procedural fault has disadvantaged the other party .[26] There are cases in which the principle of *audi alteram partem* was breached during the binding advice procedure, but where annulment was rejected on the basis of this 'disadvantage criterion'.[27]

The standard set by art. 7:904 par 1 DCC for the annulment of decisions given by binding advisors is thus very strict. Annulment is only possible if it is *unacceptable* according to standards of reasonableness and fairness for a party to be held to the decision. There are good reasons for this strictness. With regard to arbitration procedures, the Dutch Supreme Court considers that an annulment procedure may not be used as a *de facto* appeal of the decision by arbitrators. The general interest of an effectively functioning arbitral procedure entails that the civil courts should only intervene in arbitral decisions in striking cases.[28] Similar reasons apply when binding advice procedures are concerned. Parties turn to binding advice to put an end to their conflict. This aim cannot be achieved if the decision taken by binding advisors can be challenged too easily. However, the question is whether this strict standard can still be maintained with the implementation of the ADR Directive in the Dutch judicial system.

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24 This was for example the case in Dutch Supreme Court 20 May 2005, *NJ* 2007/114, note H.J. Snijders under *NJ* 2007/115 (*Gem. Amsterdam/Honnebier*).

25 For example, the Dutch Supreme Court has considered that a decision should be better motivated as the binding advice procedure is more in the nature of a judicial procedure. See Dutch Supreme Court 20 May 2005, *NJ* 2007/114, note H.J. Snijders under *NJ* 2007/115 (*Gem. Amsterdam/Honnebier*), par. 3.4; Dutch Supreme Court 24 March 2006, *NJ* 2007/115, note H.J. Snijders (*Meurs/Newomij*), par. 3.4.2.

26 Dutch Supreme Court 20 May 2005, *NJ* 2007/114, note H.J. Snijders under *NJ* 2007/115 (*Gem. Amsterdam/Honnebier*), par. 3.3; Dutch Supreme Court 24 March 2006, *NJ* 2007/115, note H.J. Snijders (*Meurs/Newomij*), par. 3.4.4; Dutch Supreme Court 1 July 1988, *NJ* 1988/1034 (*Delta Lloyd/N.*), par. 3.2.

27 Dutch Supreme Court 24 March 2006, *NJ* 2007/115, note H.J. Snijders (*Meurs/Newomij*), par. 3.4.4; Dutch Supreme Court 1 July 1988, *NJ* 1988/1034 (*Delta Lloyd/N.*), par. 3.2.

28 Dutch Supreme Court 17 January 2003, *NJ* 2004/384, note HJS (*IMS/Modsaf c.s. I*), par. 3.3; Dutch Supreme Court 9 January 2004, *NJ* 2005/190, note HJS (*Nannini/SFT*), par. 3.5.2; Dutch Supreme Court 24 April 2009, *NJ* 2010/171, note H.J. Snijders (*IMS/Modsaf c.s. II*), par. 4.3.1.

3 THE ADR DIRECTIVE AND ODR REGULATION: AN INTRODUCTION

On 21 May 2013 the European legislator passed the ADR Directive and the ODR Regulation; both published in the Official Journal of the EU on 18 June 2013. The ADR Directive and ODR Regulation, two interlinked and complementary legislative instruments, promote and facilitate the simple, fast and *digital* (out-of-court) resolution of consumer disputes.[29]

The ADR Directive aims to assure that consumers can submit complaints against traders to ADR entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures.[30] The ODR Regulation on the other hand establishes an ODR platform at Union level in the form of an interactive website, offering a single point of entry to consumers and traders seeking to resolve their dispute out of court.[31] The Regulation and the Directive are complementary in the sense that the EU framework of ADR entities and ADR procedures covered by the ADR Directive[32] will be linked to the ODR platform.[33] The availability of ADR entities and procedures across Europe qualified according to the ADR Directive is a precondition for the proper functioning of the ODR platform.[34] The ADR Directive should have been implemented in the Member States no later than 9 July 2015.[35] The ODR Regulation has gone into effect on 15 February 2016.[36]

As mentioned the ADR Directive aims to assure that consumers can submit complaints against traders to ADR entities offering ADR-procedures.[37] To qualify as an ADR entity under the Directive, an entity (regardless of its name or how it is referred to) should be established on a durable basis and offer dispute resolution by means of an ADR procedure.[38] Currently the ADR procedures and in a wider sense the ADR systems still differ a lot across the Union. However, the ADR Directive allows such diversity (even post-implementation) as it states that on a Member States level different forms of ADR procedures to resolve consumer disputes co-exist or that a combination of two or more ADR procedures are being used.[39] The ADR Directive builds on existing ADR proced-

29 Recital 12, 15 ADR Directive.
30 Art. 1 ADR Directive.
31 Recital 18 ODR Regulation.
32 Which means that the ADR entity and the ADR procedure both comply with the (quality) requirements set out in the ADR Directive (recital 24 ADR Directive).
33 Recital 12 ADR Directive.
34 Recital 12 ADR Directive.
35 Art. 25 ADR Directive.
36 Art. 22 ODR Regulation, with the exceptions specified therein.
37 Art. 1 ADR Directive.
38 Art. 4 par. 1 sub (h) ADR Directive. The entity that qualifies as an ADR entity under the Directive shall be listed in accordance with art. 20 par. 2 ADR Directive.
39 Recital 21 ADR Directive.

ures in the Member States and respects their legal traditions.[40] The Directive therefore has a spacious scope, which also follows from art. 2 par. 1 ADR Directive:

> 'This Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.'

Hence the Directive is without prejudice to the form that ADR procedures take within the Member States and applies horizontally to all types of ADR procedures.[41] However, the scope of the ADR Directive is restricted by par. 2 of art. 2. The ADR Directive is most notably not applicable to procedures initiated by a trader against a consumer.[42] Dutch binding advice *imposes* a solution on the parties (sections 1 and 2) and, as the Dutch implementation legislation proves to be true, binding advice falls within the scope of ADR procedures covered by the ADR Directive.[43] Therefore, binding advice (as the ADR procedure chosen by the ADR entity under the scope of the ADR Directive) should comply with different requirements, i.e. access to and quality of ADR entities and ADR procedures, information and cooperation on national and EU level and enforcement.[44]

As this contribution addresses the question whether the breach of the quality requirements put forward in the ADR Directive makes it 'unacceptable according to standards of reasonableness and fairness' to hold a party to the decision taken by binding advisors, the next section will highlight the various quality requirements set out in the ADR Directive and, where applicable, of the ODR Regulation.

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40 Recital 15 and 24 ADR Directive. This means that if no ADR procedure is yet available in a Member State this Member State is free to choose the *form* of the ADR procedure preferred to comply with the ADR Directive.

41 Recitals 19 and 21 ADR Directive.

42 Art. 2 par. 2 ADR Directive.

43 Wet van 16 april 2015 tot implementatie van de Richtlijn 2013/11/EU van het Europees Parlement en de Raad van 21 mei 2013 betreffende alternatieve beslechting van consumentengeschillen en tot wijziging van Verordening (EG) nr. 2006/2004 en Richtlijn 2009/22/EG en uitvoering van de Verordening (EU) nr. 524/2013 van het Europees Parlement en de Raad van 21 mei 2013 betreffende onlinebeslechting van consumentengeschillen en tot wijziging van Verordening (EG) nr. 2006/2004 en Richtlijn 2009/22/EG (Implementatiewet buitengerechtelijke geschillenbeslechting consumenten), *Stb*. 2015, 160.

44 Chapters II, III, IV and V ADR Directive.

4 QUALITY REQUIREMENTS SET OUT IN THE ADR DIRECTIVE

Chapter II of the ADR Directive (arts. 6-11) contains a set of quality requirements which ADR entities and ADR procedures must comply with to be accredited as ADR entities respectively ADR procedures under the Directive.[45] The applicability of certain quality principles to both ADR entities and ADR procedures is meant to strengthen consumers' and traders' confidence in such entities and procedures.[46] A designated ADR entity will be under the supervision of a competent authority to ensure that in practice the quality standards set out in the ADR Directive are met.[47] The development of the set of quality requirements laid down in the Directive took place in a couple of stages.[48] For example, certain quality principles of the Directive derive from soft legal measures taken at Union level in Recommendations 98/257/EC and 2001/310/EC.[49] By making some of these (soft legal) principles (e.g. effectiveness, liberty, transparency) *binding* in the ADR Directive, the Directive itself 'establishes a set of quality requirements which apply to all ADR procedures carried out by an ADR entity […]'.[50] All ADR entities that wish to be accredited must comply with the following six quality requirements:

I Expertise, independence and impartiality

To enhance trust in out-of-court redress mechanisms for consumer complaints a minimum level of procedural safeguards is built into the Directive. Art. 6, par. 1 of the ADR Directive requires that 'the natural persons in charge of ADR possess the necessary expertise and are independent and impartial'. A third neutral party should thus be competent, which means it should possess the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of the law.[51] Furthermore the persons in charge of ADR should be independent and impartial: they should have no conflict of interests and should be appointed for a term of office of sufficient duration to ensure independence.[52]

45 Also recital 24 ADR Directive.
46 Recital 37 ADR Directive.
47 Art. 20 par. 2 ADR Directive and recital 55.
48 See for a broader description of these stages: N. Creutzfeldt, 'How Important is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers', *Journal of Consumer Policy*: Volume 37, Issue 4 (2014), p. 532.
49 Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.
50 Recital 37 ADR Directive.
51 Art. 6 par. 1 (a) ADR Directive, recital 36 ADR Directive.
52 Art. 6 par. 1 (b), (c), (d) ADR Directive, recitals 32, 33, 34, 35.

II Transparency

To build consumer trust in both ADR and ODR as means of dispute resolution, ADR schemes and ADR procedures must be transparent. In respect thereof art. 7 ADR Directive aims to ensure that information about the ADR entity, its procedures, and other data are easy to obtain by both parties via an up-to-date website or on a durable medium upon request.[53] The information provided by the ADR entity must be easy to understand in order to give parties the opportunity to deliberately engage in an ADR procedure.[54] Furthermore, ADR bodies make publicly available on their websites, or by any other means they consider appropriate, annual activity reports.[55] The principle of transparency laid down in the Directive contains elements of its prior non-binding predecessor expressed in art. II of Recommendation 98/257/EC. It can be seen as a point of reference to both parties in their quest for information about e.g. preliminary requirements they have to meet before initiating an ADR procedure in front of an ADR entity. The use of the term 'transparency' in the light of the ADR Directive is thus quite broad and obliges ADR entities to disclose 'practical' information or formal requirements such as cost of procedures and languages in which complaints can be submitted.[56] Therefore, the definition of transparency under the ADR Directive should not be confused with the use of the term in a mere procedural sense, e.g. under art. 6 ECHR (hearings being open to the public or the result of procedures being published).

III Effectiveness

The quality requirement of effectiveness set out in art. 8 ADR Directive contains different compartments. First of all the ADR procedure must be available and easily accessible online and offline to both parties; irrespective of where the parties are. The online access to the ADR procedure is a precondition for resolving disputes that arise out of e-commerce transactions (ODR context). Furthermore effectiveness means: no obligation to retain a lawyer or legal advisor; the ADR procedure is free of charge or at moderate costs for consumers; and disputes are resolved within a short period of time (within 90 calendar days from the date on which the ADR entity has received the complete complaint file).[57]

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53 Art. 5 par. 2 ADR Directive.
54 Recital 39 ADR Directive.
55 Art. 7 par. 2 ADR Directive.
56 Art. 7 (1)(a),(h) and (l) ADR Directive.
57 In case of highly complex disputes the 90-calendar-day period may be extended by the ADR entity in charge (art. 8 (e) ADR Directive).

IV Fairness

According to art. 9 ADR Directive the ADR procedure to resolve a consumer dispute should be fair, which means that both parties are fully informed about their rights and the consequences of the decisions they make in the light of and during an ADR procedure.[58] Parties should also be granted the possibility to express their point of view and be provided by the ADR entity with the arguments and the evidence of the other party (adversarial process).

V Liberty

The principle of liberty is laid down in art. 10 ADR Directive. The first paragraph ensures that an agreement between a consumer and a trader to submit a complaint to an ADR entity is not binding on the consumer if this contractual agreement was concluded before the dispute arises and the agreement has the effect of depriving the consumer of his right to bring the dispute before the courts.[59] Paragraph 2 of art. 10 reads as follows: '(…) in ADR procedures which aim at resolving the dispute by imposing a solution, the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.'

VI Legality

The quality requirement of legality, as set out in art. 11 ADR Directive, entails in short that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer, the solution imposed should not result in the consumer being deprived of the protection guaranteed by mandatory law of the Member States where the consumer is habitually resident.[60]

The ADR Directive is a framework Directive which means minimum harmonization is intended by the EU legislator. The quality principles of arts. 6-11 ADR Directive are therefore *minimum* requirements. Recital 38 states that the Directive 'should not prevent Member States from adopting or maintaining rules that go beyond what is provided for in this Directive'. Thus, more stringent national legislative measures are possible.[61] In this respect the Directive does

58 Recital 42 ADR Directive.

59 Recital 43 ADR Directive. Important fact: 'Agreements to go to arbitration must be carried out post-dispute' P. Cortes, A.R. Lodder, 'Consumer Dispute Resolution goes online: reflections on the evolution of European law for out-of-court redress', *Maastricht Journal of European and Comparative Law* 2014/1, p. 26.

60 See also recital 44 ADR Directive. Art 11 ADR Directive distinguishes between three different situations and is thus somewhat difficult to read. See on the corresponding categories in the Implementation Act *Kamerstukken II* 2014/15, 33 982, no. 3, pp. 21-22.

61 See also art. 2 par. 3 ADR Directive.

not specify how Member States should implement the quality principles in their national context. However, art. 20 ADR Directive clarifies that it is the task of the competent authority (art. 18 ADR Directive) to assess whether the dispute resolution entities accredited as ADR entity comply with the quality requirements.[62] If they do not, according to art. 20 par. 2 ADR Directive the competent authority shall 'contact that dispute resolution entity, stating the requirements the dispute resolution entity fails to comply with and requesting it to ensure compliance immediately.' If the dispute resolution does not fulfil the requirements after a period of three months, the competent authority shall remove the entity from the list of ADR entities notified to the Commission. However, sections 6 and 7 of this contribution examine whether the non-compliance of an ADR entity with the quality standards set out in the ADR Directive also makes the decision taken by binding advisors (in the Dutch scenario) unacceptable according to standards of reasonableness and fairness and subject to a possible annulment.

5 IMPLEMENTING THE ADR DIRECTIVE IN THE NETHERLANDS: A FRAMEWORK LAW

As put forward earlier the ADR Directive should have been implemented by the Member States no later than 9 July 2015.[63] The Dutch Implementation Act (hereafter: 'Implementation Act') to transpose the ADR Directive into Dutch law was published in the Bulletin of Acts and Decrees on 30 April 2015 and entered into force on 9 July 2015.[64] The Dutch government chose to implement the ADR Directive via a framework law instead of implementing the provisions of the Directive into different existing laws like the Civil Code, the Code of Civil Procedure and the Law on the Enforcement of Consumer Protection.[65] According to the Dutch government, most of the provisions laid down in the Implementation Act are of a *public-law nature*. The Implementation Act contains requirements which dispute resolution entities need to comply with in order to be designated as ADR entities under the Directive. These provisions by their nature would not fit in with the aforementioned existing laws.[66] Furthermore, the government is of the opinion that framework legislation is the designated solution for the Netherlands because the scope of the provisions of the ADR Directive ('ADR/ODR for consumers') is broad but not generally applicable.

62 Creutzfeldt 2014, p. 532.
63 Art. 25 ADR Directive.
64 *Stb*. 2015, 160.
65 *Kamerstukken II*, 2014/15, 33 982, no. 3, p. 8.
66 *Kamerstukken II* 2013/14, 33 982, no. 3, p. 8; *Kamerstukken II* 2014/15, 33 982, no. 4, p. 4; *Kamerstukken II* 2014/15, 33 982, no. 6, p. 9. The Council of State ('Raad van State') was of a different opinion, see *Kamerstukken II* 2014/15, 33 982, no. 4, pp. 3-4.

Also, a framework law offers the benefits of accessibility, clarity and coherence.[67]

According to the Explanatory Memorandum, the SGC, Kifid and SKGZ wished to be accredited as ADR entities under the ADR Directive.[68] The status of accredited ADR entity under the Implementation Act has been granted to the SGC, Kifid and SKGZ by the designated Dutch competent authorities (the Minister of Security and Justice (SGC), the Minister of Finance (Kifid and SKGZ) and the Minister of Public Health, Welfare and Sport (SKGZ)).[69]

6 ANNULMENT OF A DECISION IN CONNECTION WITH THE MANNER OF ITS ESTABLISHMENT

As discussed in section 4, the ADR Directive formulates several procedural requirements which ADR procedures governed by the Directive should comply with.

What is the consequence if these procedural requirements are not met in a particular ADR procedure? If the ADR procedure was a binding advice procedure (as will be the case in the Netherlands most of the time), will the decision taken by binding advisors be subject to annulment on the basis of art. 7:904 par. 1 DCC in connection with the manner of establishment of the decision?

The Dutch government does not devote much attention to these possible *private-law* consequences of non-compliance with the quality requirements. As discussed before, the government holds the opinion that the act implementing the ADR Directive is largely of a *public-law* nature. The consequence of non-compliance with the procedural requirements is that the Minister will withdraw the accreditation as an ADR entity under the Directive.[70] It is questionable whether this conclusion is correct. The Dutch government itself does not entirely preclude a possible effect of the quality requirements set out in the ADR Directive on the private relationship between the parties. Asked by members of parliament what means parties have if they are of the opinion that the ADR entity did not follow the procedural rules, the government answers that the decision may be annulled if it would be unacceptable to hold parties to it according to standards of reasonableness and fairness.[71]

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67 *Kamerstukken II* 2013/14, 33 982, no. 3, p. 8.

68 *Kamerstukken II* 2013/14, 33 982, no. 3, p. 7 and *Kamerstukken II* 2013/14, 33 982, no. 6, pp. 3 and 6.

69 *Stcrt*. 2015, 45980 (SGC), *Stcrt*. 2015, 19487 (Kifid), *Stcrt*. 2015, 19094 and *Stcrt*. 2015, 19487 (SKGZ). The activities of the SKGZ fall within the scope of both the Ministry of Finance and the Ministry of Public Health, Welfare and Sport. Hence, the SKGZ has been designated as an ADR entity by two competent authorities.

70 See art. 17 par. 4-5 of the implementation Act.

71 *Kamerstukken II* 2014/15, 33 982, no. 6, p. 17.

The conclusion that non-compliance with the quality requirements *may* sometimes lead to annulment is not surprising. Under national law, it is clear that the fact that a binding advisor is subject to instructions from one of the parties (art. 6 par. 1 (c) of the ADR Directive) or the fact that the parties did not have the possibility of expressing their point of view (art. 9 par 1 (a) of the ADR Directive), may be a reason to conclude that it is unreasonable to hold a party to the decision according to standards of reasonableness and fairness.[72] In this respect, the inclusion of these procedural requirements in the ADR Directive adds nothing new. A much more interesting question is whether the ADR Directive implies that non-compliance with these requirements *should* make the decision non-binding on the parties. Although the Directive sees the procedural requirements as preconditions for the qualification as an ADR entity (see art. 20 par. 1-2 of the ADR Directive), it is not unthinkable that the ADR Directive requires more. The ADR Directive provides that Member States shall 'ensure' that the procedural requirements are met.[73] According to the case law of the European Court of Justice the obligation of Member States to implement a directive involves the adoption of all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues.[74] Have Member States done enough to 'ensure' the observance of the quality requirements of the ADR Directive, if their only sanction in case of non-compliance is the withdrawal of the accreditation as an ADR entity under the Directive?

This withdrawal does not in all cases seem a very effective means of enforcement. It will not be easy for the competent authorities to assess whether the ADR entities comply with the quality requirements. It will for example be difficult to determine whether an ADR entity in practice always gives parties the possibility to comment on the arguments, evidence, documents and facts put forward by the other party (see art. 9 par. 1 (a) of the ADR Directive). In this respect it is interesting to note that the provision implementing art. 9 par. 1 (a) only requires ADR entities to make sure that *their procedural rules* provide for the possibility of parties to comment on each other's arguments et cetera. The wording of art. 9 par. 1 (a) of the ADR Directive suggests that parties should *in practice* be able to comment on each other's arguments. This point aside, even if a competent authority succeeds in showing that an ADR entity does not comply with one of the quality requirements, the sanction – withdrawal of the accreditation as an ADR entity – seems rather severe, certainly when minor deficiencies are concerned. Since ADR entities will first be notified

72 See for example Dutch Supreme Court 30 October 2009, ECLI:NL:HR:2009:BK1548, *JBPr* 2010/16 note P.E. Ernste; Dutch Supreme Court 20 May 2005, *NJ* 2007/114, note H.J. Snijders under *NJ* 2007/115 (*Gem. Amsterdam/Honnebier*).

73 See for example art. 6, art. 5 par. 2 and 5 and art. 7- 9 ADR Directive.

74 See ECJ 17 June 1999, C-336/97 (*Commission/Italy*), par. 19; ECJ 8 March 2001, C-97/00 (*Commission/France*), par. 9; ECJ 5 December 2002, C-324/01 (*Commission/Belgium*), par. 18.

and given a period of three months to fulfil the requirements (see art. 20 par. 2 of the ADR Directive and art. 17 par. 4 of the Implementation Act), it is questionable whether it will ever be imposed. Other, more subtle, enforcement mechanisms thus do seem desirable.

For some of the procedural requirements, it does not seem problematic if the ADR Directive implied that non-compliance makes the decision subject to annulment. One could for example argue that the fact that a binding advisor is remunerated in a way that is linked to the outcome of the procedure (art. 6 par. 1 (d) of the ADR Directive), constitutes such a grave deficiency in the procedure that the decision should be non-binding on the parties in all circumstances. The same can be said of the fact that the ADR entity did not provide the parties with the arguments, evidence, documents or facts put forward by the other party (art. 9 par. 1 (a) of the ADR Directive). The courts would thus need to deviate from the case law that even in case of breach of the principle of *audi alteram partem*, one of the factors that should be considered in assessing whether the decision should be set aside is whether and if so, to what extent, this fault has disadvantaged the other party (the 'disadvantage criterion').

For other quality requirements included in the ADR Directive, it seems more problematic to conclude that the mere breach would make the decision subject to annulment. Should the mere fact that a binding advisor was appointed for too short a term of office (art. 6 (d) of the ADR Directive), make all the decisions that he has taken during his appointment subject to annulment? Does the fact that parties were obliged by the ADR entity to retain a lawyer make it unacceptable for a party to be held to the decision taken by that entity (see art. 8 par. 1 (b) of the ADR Directive)? May a decision be annulled purely because a party shows that the ADR entity did not make publicly available on a website information on the natural persons in charge of ADR (art. 7 par. 1 (a) of the ADR Directive)? Problematic in these examples is that it is difficult to see in what way a party is affected by the deficiency. In what way is a party affected by the circumstance that a binding advisor was appointed for too short a term of office? Although the requirements mentioned are important to guarantee the quality of ADR procedures in general, it is more problematic to make the connection with the quality of a specific procedure. In these examples, it seems important for the other party to be able to invoke the fact that the party was not disadvantaged by the procedural fault.

However, if the 'disadvantage criterion' can still be relied on, there seems to be no effective remedy for the parties against breach of one of these requirements. It will be very difficult to show that a party has been disadvantaged by the fact that a binding advisor was appointed for too short a term of office or by the fact that the ADR entity did not make publicly available on a website information on the natural persons in charge of ADR. This conclusion is not much altered by the fact that it is likely that disadvantage should be presumed and that it is for the other party to show that the party was *not* disadvantaged

by a deficiency.[75] If a party provides no indication at all in what way it was disadvantaged, the other party may easily bear this burden.

Art. 7:904 par. 1 DCC does not seem to provide a very effective means to enforce the procedural requirements included in the ADR Directive when the 'disadvantage criterion' can still be relied on. Should the conclusion thus be that the ADR Directive implies that the 'disadvantage criterion' can no longer be applied when cases covered by the ADR Directive are concerned? Let's hope not. In our opinion this criterion is necessary to select those cases in which annulment is appropriate. To abandon the criterion would mean that decisions can be set aside too easily. This would, for example, make all the decisions of a binding advisor who, as it turns out, does not possess a 'general understanding of law' (6 par. 1 (a) of the ADR Directive), subject to annulment, even if this particular binding advisor is part of a collegial body and other members have more than enough knowledge to compensate for his deficiency. If parties could so easily challenge the validity of decisions taken in binding advice, the aim of providing them with a 'simple, efficient, fast and low-cost way' of resolving disputes will not be achieved.[76] The risk of having to follow a court procedure *after* the completion of the ADR track, will become very high. This risk may be especially high for the consumer. Since compliance with the procedural requirements is in the interest of *both* parties to the ADR procedure, not only the consumer, but also the trader has the possibility to invoke the fact one of these requirements was breached. It may be expected that the trader will make use of this possibility more often than the consumer, since the threshold of going to court will in many cases be lower for the trader. It is therefore likely that the consumer will more often be dragged into a court procedure after completing an ADR procedure which ended favourably for him than the trader. In our opinion, the 'disadvantage criterion' is therefore necessary to select those cases in which annulment is appropriate. However, we shall have to await the case law of the European Court of Justice on the ADR Directive to know for certain whether this criterion can still be relied on.

In conclusion, in our opinion breach of one of the quality requirements included in the ADR Directive should not automatically make the decision taken in a binding advice procedure subject to annulment. That does not mean that non-compliance with the quality requirements included in the ADR Directive is of no significance in the setting of art. 7:904 par. 1 DCC. The breach of these requirements is an important argument that it is unacceptable according to standards of reasonableness and fairness to hold a party to the decision in connection with the manner of its establishment. Therefore, the courts may sometimes come to a quicker annulment of the decision by binding advisors

75 Snijders in his note for Dutch Supreme Court 20 May 2005, *NJ* 2007/114 (*Gem. Amsterdam/Honnebier*) and Dutch Supreme Court 24 March 2006, *NJ* 2007/115 (*Meurs/Newomij*), no. 2e; Ernste 2012, pp. 74-75; Asser/Van Schaick 2012 (7-VIII*), no. 163.

76 Recital 4 ADR Directive.

than in the situation before implementation of the ADR Directive. For example, the mere fact that one of the parties was not provided by the ADR entity with the arguments, evidence, documents or facts put forward by the other party (art. 9 par. 1 (a) of the ADR Directive), may be sufficient reason to conclude that the decision should be annulled on the basis of art. 7:904 par. 1 DCC.

The fact that one of the procedural requirements included in the ADR Directive was breached might even be used as an argument when ADR procedures *not* covered by the Directive are concerned. Since the quality requirements mentioned in the ADR Directive are of a general nature, it is not excluded that they have an indirect effect in such cases. An indirect effect seems certainly likely in the situation in which *a trader* starts an ADR procedure against a consumer. Since such a procedure falls outside the scope of the ADR Directive and of the Implementation Act, the procedural requirements do not apply. However, it is not clear what can justify this lower level of protection offered to the consumer. It is thus quite defendable that in this situation, the fact that a procedural requirement mentioned in the ADR Directive was breached can be used as an argument that it is unacceptable according to standards of reasonableness and fairness to hold a party to the decision.

The procedural requirements of the ADR Directive and the law implementing them thus do influence the concept of 'reasonableness and fairness' in art. 7:904 par. 1 DCC. In ADR procedures covered by the ADR Directive, the mere fact that one of the procedural requirements is breached should not automatically make the decision of binding advisors subject to annulment on the basis of art. 7:904 par. 1 DCC. However, the non-compliance with these requirements is a very serious indication that it is unacceptable according to standards of reasonableness and fairness to hold a party to the decision in connection with the manner of its establishment. Outside the scope of application of the ADR Directive, the procedural requirements may have an indirect effect.

7 ANNULMENT OF A DECISION IN CONNECTION WITH ITS CONTENT

As was seen in the previous section, the procedural requirements mentioned in the ADR Directive may influence the standard for annulment of a decision in relation with its manner of establishment. Does the ADR Directive have an influence on the possibility of annulment of a decision in connection with its content as well?

As was pointed out before, art. 11 of the ADR Directive requires Member States to ensure that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer, the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the

mandatory law of the Member State where the consumer is habitually resident.[77] This provision is implemented in Dutch law by means of art. 10 of the Implementation Act. Art. 10 par. 1 of the Implementation Act tries to ensure that the protection of mandatory law is afforded to the consumer by simply stating that the solution imposed on the consumer shall not deprive him of it. What are the consequences in the event a decision is taken that *does* deprive the consumer of the protection afforded to him by mandatory law? What happens, for example, when binding advisors have refused to annul a term in the general terms and conditions of the trader in a case where the trader gave these terms and conditions to the consumer *after* the time of entry into the contract (this in contradiction with art. 6:233(b) and 6:234 DCC)? Although the Implementation Act is not entirely clear on this point, the non-compliance with this quality requirement is probably a reason to withdraw from the entity that has taken the decision the accreditation as an ADR entity under the Directive (see art. 20 par. 2 of the ADR Directive and art. 17 par. 4 of the Implementation Act). However, it follows from art. 10 par. 2 of the Implementation Act that the non-compliance has consequences for the parties as well. This provision states that art. 7:902 DCC does not apply to ADR procedures governed by the Directive.[78]

As was seen in paragraph 2, it is not possible to annul a decision on the basis of art. 7:904 par. 1 DCC on the sole ground that it is in breach of mandatory law. The reason is that art. 7:902 DCC makes it clear that a decision to terminate an uncertainty or dispute in the field of the law of property, proprietary rights and interests 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.[79] Art. 10 par. 2 of the Implementation Act abolishes art. 7:902 DCC when ADR procedures covered by the Directive are concerned. A decision in breach of mandatory law will in those cases no longer be valid.

One could wonder whether the abolishment of art. 7:902 DCC was really necessary. First of all, it is questionable whether the Directive requires that breach of mandatory law has consequences for the validity of the decision taken by the ADR entity. It might be sufficient for a Member State to withdraw the accreditation as an ADR entity when this entity imposes solutions on consumers which are not in accordance with mandatory law. However, this method of enforcement appears to be rather ineffective. It will be very difficult for a competent authority within a Member State to verify whether the de-

77 See section 4.

78 'Op procedures tot buitengerechtelijke geschilbeslechting die beslecht worden door een vaststelling als bedoeld in artikel 7:900 van het Burgerlijk Wetboek is artikel 7:902 van het Burgerlijk Wetboek niet van toepassing.'

79 Asser/Van Schaick 2012 (7-VIII*), no. 163; see Dutch Supreme Court 12 September 1997, *NJ* 1998/382, note M.M. Mendel (*Confood/Zürich*) and the opinion of Advocate General Bakels, no. 3.26-3.29.

cisions of an ADR entity are in accordance with mandatory law. Art. 20 par. 1 ADR Directive provides that a competent authority makes the assessment whether an entity complies with the quality requirements in particular on the basis of information it has received from the ADR entity itself in accordance with art. 19 ADR Directive. Art. 19 ADR contains a list of information that ADR entities need to notify to the competent authority, but information on the *content* of the decisions taken by the ADR entity is missing from this list. Since the ADR Directive requires minimum harmonization, the Dutch legislator can impose farther-reaching duties on ADR entities to provide information, but the legislator did not make use of this possibility (see art. 17 par. 1 and 18 Implementation Act). The competent authorities within the Netherlands will therefore not have the data necessary to verify effectively whether the decisions of an ADR entity are in accordance with mandatory law. Therefore, additional measures to ensure that the ADR entities apply the mandatory law correctly seem necessary.

One could also wonder whether decisions in breach of mandatory provisions for the protection of the consumer were not already invalid without the abolition of art. 7:902 DCC. It could be argued that such mandatory provisions for the protection of the consumer can be seen as rules of public policy which fall under the exception of art. 7:902 DCC.[80] However, although *some* mandatory rules for the protection of the consumer may indeed be qualified as rules of public policy, it is not likely that this is true for *all* the provisions covered by art. 11 ADR Directive. Art. 11 ADR Directive uses the words 'provisions that cannot be derogated from by agreement' (par. 1 (a) and (b)) and 'mandatory rules' (par. 1 (c)), by which reference is made to the Rome I Regulation respectively the Rome Convention.[81] As regards the Rome I Regulation, it is assumed that the words 'provisions that cannot be derogated from by agreement' in art. 6 par. 2 do not only cover rules that specifically aim to protect the consumer, but also more general private-law rules that may have the effect of offering protection to the consumer.[82] These words should be distinguished from the concept of 'overriding mandatory provisions' mentioned in art. 8 of the Rome I Regulation, which should be construed more restrictively.[83] It therefore does not seem likely that all the 'provisions that cannot be de-

80 Case law of the European Court of Justice may support this view; see ECJ 6 October 2009, C-40/08, *NJ* 2010/11, note M.R. Mok (*Asturcom/Rodríguez Noguiera*), par. 52-53, 59; ECJ 16 November 2010, C-76/10 (*Pohotovost'/Korèkovská*), par. 50-54. ECJ 1 June 1999, C-126/97, *NJ* 2000/339 (*Eco Swiss/Benetton*), par. 36-37.

81 See also *Kamerstukken II* 2013/14, 33 982, no. 3, pp. 21-22.

82 M. McParland, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford: Oxford University Press 2015, no. 12.185, p. 551; F. Ragno, 'The Law Applicable to Consumer Contracts under the Rome I Regulation', in: F. Ferrari & S. Leible (eds.), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe,* München: Sellier 2009, p. 152.

83 See recital 37 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). See also McParland 2015, no. 12.185. p. 551.

rogated from by agreement' in the sense of art. 11 ADR Directive can be qualified as rules of public policy. In order to make sure that the consumer is not bound by a decision in breach of mandatory law, the legislator could therefore not leave art. 7:902 DCC unamended.

As a consequence of the abolition of art. 7:902 DCC, decisions in breach of mandatory law taken in a procedure covered by the Implementation Act are no longer valid on the basis of art. 7:902 DCC. But if they are no longer valid, what regime does apply to them? Are the decisions null and void? Are they subject to annulment? The parliamentary papers accompanying the Implementation Act do not offer clarity. They only state that with the abolition of art. 7:902 DCC in these situations, there is no longer any room for departure from mandatory law.[84] Various theories may be developed. First of all, a decision in breach of mandatory law may simply be null and void. Legal literature points in this direction, since the same is assumed in other situations falling outside the scope of art. 7:902 DCC. For example, decisions in breach of mandatory law in disputes outside the field of the law of property, proprietary rights and interests (such as disputes in the field of family law) are seen as null and void. This would follow *a contrario* from art. 7:902 DCC.[85] The downside of a solution in which the decision is simply null and void, is that it also makes it possible for the *trader* to invoke the invalidity of the decision. Art. 11 ADR Directive, by contrast, seems written solely for the benefit of the consumer.

From the explanatory memorandum accompanying the preliminary draft of the Dutch Civil Code, another view may be deducted. Here it is stated that the normal rules apply to cases falling outside the scope of art. 7:902 DCC.[86] The question is obviously what these 'normal' rules are. Possibly, reference is made to art. 3:40 DCC, which offers a general arrangement for acts in breach of statutory provisions. Paragraph 3:40 par. 2 DCC states 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 juridical act, the act may only be annulled; in both cases this applies to the extent that the provision does not otherwise provide.[87] Art. 3:40 par. 2 DCC thus makes it possible to take into account which party the mandatory law intends to protect. Therefore, the trader may not be able to invoke the invalidity of the decision because mandatory law protecting the

84 *Kamerstukken II* 2014/15, 33 982, no. 3, p. 22.

85 According to Van Schaick, no obligations arise for the parties from the binding advice agreement in such circumstances. He does not make it clear why this is so. See Asser/Van Schaick 2012 (7-VIII*), no. 153, no. 156. According to Ernste, if a decision is not only in breach of mandatory law, but also in breach of good morals and public policy, the decision is null and void. In her opinion, this follows *a contrario* from art. 7:902 DCC.

86 Toelichting Meijers, Vierde gedeelte, Boek 7, p. 1141.

87 See on art. 3:40 DCC A.S. Hartkamp, M.M.M. Tillema & A.E.B. ter Heide, *Contract Law in the Netherlands*, Alphen a/d Rijn: Kluwer Law International 2011, nos. 93-95, pp. 87-89.

consumer was breached. It is problematic, however, that art. 3:40 par. 2 DCC offers the possibility to take the purpose of the mandatory provision into account only in case of a *multilateral* juridical act. The decision by binding advisors is seen as a *unilateral* juridical act.[88]A *literal* interpretation of art. 3:40 par. 2 DCC would therefore mean that the decision in breach of mandatory law is simply null and void; the second sentence of art. 3:40 par. 2 DCC does not apply. Although a different interpretation of art. 3:40 par. 2 DCC is certainly defendable, the above shows that application of this provision is not entirely unproblematic in the specific situation of binding advice, in which the parties are bound by a juridical act performed by another party (the binding advisor(s)).

A last possibility is to assess decisions in breach of mandatory law on the basis of art. 7:904 par. 1 DCC. It could be argued that with the abolition of art. 7:902 DCC, the mere fact that mandatory law was breached *is* sufficient reason for annulment of the decision. The non-compliance with mandatory law makes it unacceptable according to standards of reasonableness and fairness for a party to be held to the decision in connection with its content. The advantage of this solution is that art. 7:904 DCC offers an arrangement specifically adapted to binding advice. The validity of decisions taken in binding advice will be covered exclusively by art. 7:904 DCC. Another advantage is that art. 7:904 par. 1 DCC makes the decision subject to annulment. One could therefore argue that only the *consumer* may invoke the invalidity of the decision if mandatory law protecting the consumer was breached. The trader would not be able to annul the decision in such circumstances.

In our opinion, this last option is preferable. Since art. 7:904 par. 1 DCC specifically deals with the situation of binding advice, this provision can be seen as a *lex specialis* to art. 3:40 par. 2 DCC. Even in this solution, the abolition of art. 7:902 DCC for ADR procedures covered by the Directive has far-reaching consequences. First of all, it means that it will be difficult for the SGC to use 'reasonableness and fairness' as a standard for deciding their cases instead of the rules of law, since the Complaints Boards will at least need to apply mandatory law. But even if an ADR entity uses the rules of law as a standard, its decisions are in danger of being subject to annulment. A decision by an ADR entity may easily be in breach of mandatory law. Large areas of consumer law are of a mandatory nature. Many disputes submitted to ADR will thus require the application of mandatory rules. Since these rules are not always clear, an ADR entity may easily give an incorrect interpretation of such a provision. Even if the ADR entity (as it later turns out) interprets the provision in the correct way, a party may be of a different opinion and contest this interpretation in court. The validity of many decisions taken in ADR is thus up for discussion. In this respect it is interesting to note that the explanatory

88 Ernste 2012, pp. 59-60.

memorandum accompanying the preliminary draft of the Dutch Civil Code makes it clear that since decisions in a dispute not pertaining to the field of the law of property, proprietary rights and interests, can be examined unrestrictedly for compatibility with mandatory law, it will make little sense to submit such a dispute to binding advice.[89] Art. 10 par. 2 of the Implementation Act in connection with art. 11 of the ADR Directive thus seems to take away a great deal of the binding force of a decision taken in a binding advice procedure covered by the Directive. This would be the case even more so if not only the consumer, but also the trader could invoke the invalidity of a decision in breach of mandatory law protecting the consumer. A solution in which only the consumer can in those circumstances invoke this ground is preferable.

A disadvantage of the fact that art. 7:904 par. 1 DCC makes the decision subject to annulment may be that the consumer would actively need to annul the decision taken by binding advisors. If he does not, he remains bound by it.[90] It is questionable whether the law thus complies with art. 11 ADR Directive. If the consumer does not actively annul the decision, he *will* be deprived of the protection afforded to him by mandatory law. An interpretation in the light of the ADR Directive might lead to the conclusion that the court may annul the decision of its own motion in such cases.[91]

It is important to note that art. 10 par. 2 of the Implementation Act is not confined to mandatory law protecting the consumer, but abolishes art. 7:902 DCC altogether. If mandatory law that – in the particular circumstances of the case – protects the interests of the trader is breached, this will thus have consequences for the validity of the decision as well. By contrast, art. 11 of the ADR Directive is confined to mandatory law protecting the consumer. The binding force of decisions taken in binding advice is thus reduced further by the Implementation Act than was strictly necessary under the ADR Directive. As was observed before, it seems likely that the trader will more often make use of the possibility to set aside a decision unfavourable to him in court than the consumer.

Added to this is the fact that art. 11 of the ADR Directive and art. 10 par. 1 of the Implementation Act do not seem to be confined to *the breach* of mandatory law. They state that the solution imposed 'shall not result in the consumer being deprived of the protection afforded to him' by mandatory law. If binding advisors establish the facts in another way than a regular court would have done, this obviously can have consequences for the application of mandatory law. The difference in the established facts may for example result in the ADR

89 Toelichting Meijers, Vierde gedeelte, Boek 7, p. 1141.

90 Hartkamp, Tillema & Ter Heide 2011, no. 100, pp. 92-93; Chorus, Gerver & Hondius 2006, p. 154.

91 Cf. Dutch Supreme Court 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014/274, note H.B. Krans (*Heesakkers/Voets*), par. 3.7.1-3.7.3.

entity concluding that a certain mandatory rule is not applicable, where a regular court would have applied that rule. In this situation, one could say that the consumer was 'deprived of the protection afforded to him' by mandatory law. Do art. 11 of the Directive and art. 10 of the Implementation Act thus imply that the decision should not be valid in such a situation? If this conclusion is correct, it would offer parties the opportunity to challenge the establishment of the facts by binding advisors at the regular court. The procedure on the validity of the decision at the regular courts will thus come very close to a full appeal.

Another point is worth mentioning in connection with art. 10 par. 2 of the Implementation Act. It is interesting to see that this provision only abolishes art. 7:902 DCC in binding advice procedures governed by the ADR Directive.[92] This choice implies that the decision taken in a procedure started by *the consumer against a trader* can be scrutinized for compatibility with mandatory law, whereas a decision taken in a procedure started by *the trader against a consumer*, cannot. In this latter situation, art. 7:902 DCC still applies and the decision is valid notwithstanding the fact that it is in breach of mandatory law protecting the consumer. This difference in the way the interests of the consumer are protected, depending on which party started the ADR procedure, is difficult to defend. In some instances, this difference might be avoided by the fact that the provision protecting the consumer can be seen as a rule of public policy, so that the exception of art. 7:902 DCC applies. In other instances, it might be possible to find a solution by making use of art. 7:904 par. 1 DCC. The fact that the decision was in breach of mandatory law protecting the consumer may be reason to conclude that it is unacceptable according to standards of reasonableness and fairness for the consumer to be held to the decision in connection with its content. In order to come to this conclusion, the courts would need to deviate from the case law that it is not possible to annul a decision on the basis of art. 7:904 par. 1 DCC on the sole ground that the decision is in breach of mandatory law. This deviation might be justified by the wish to avoid a different treatment of the consumer depending on which party started the ADR procedure. Whether courts are willing to take this approach remains to be seen. This approach would mean that art. 7:902 DCC is *de facto* of little meaning in those cases.

As has become clear in this section, art. 11 of the ADR Directive in combination with art. 10 of the Implementation Act has an influence on the binding force of decisions taken in binding advice. Here again, it is questionable whether the extensive powers of the court to scrutinize the decisions by binding advisors are desirable. Parties turn to ADR to put an end to their conflict. If decisions taken in binding advice can be challenged too easily, all that parties achieve by turning to ADR may be adding an extra stage to their

92 See art. 2 of the Implementation Act.

proceedings. If the risk of having to follow a court procedure after the completion of the ADR procedure becomes too high, parties will turn away from ADR. This raises the question whether there are alternative ways in which the compatibility with mandatory law of decisions taken in binding advice can be enhanced.

8 SAFEGUARDS TO ENHANCE COMPATIBILITY WITH MANDATORY LAW UNDER ART. 11 ADR DIRECTIVE

To enhance compatibility with mandatory law of decisions taken in binding advice, certain safeguards on both the national and the European level could be introduced. In this section two possible national safeguards and a European one will be touched upon.[93]

As mentioned in section 4, the ADR Directive is a framework Directive that allows Member States to introduce rules that go beyond those laid down by the Directive.[94] The Dutch legislator was given some policy latitude to decide whether the national ADR entities that use binding advice as an ADR procedure should comply with an extra information duty that goes a little beyond the list of requirements as set out in art. 19 par. 3 ADR Directive, laid down in art. 18 Implementation Act. One could add to art. 18 Implementation Act an extra duty for ADR entities to communicate data to the competent authority on cases where mandatory law has been applied in the dispute resolution process. Via the construction of a specific IT application, which e.g. recognizes provisions of mandatory law in the documents it screens, it should be possible for Dutch ADR entities to build a database of decisions taken in binding advice where mandatory law has been applied. The content of this database should be sent to the competent authority every two years.[95] However, this safeguard could result in extra costs in the sense that this IT application should be developed (by either the government or the ADR entities themselves) and integrated into the workflow systems of the appointed Dutch ADR entities. Furthermore, this extra information duty could increase the workload of the secretariat of the competent authority[96] as it should test if the mandatory law has been applied properly in the decisions given by binding advice. The Dutch legislator did not use the policy latitude given by the European legislator to include a more

93 A more in-depth analysis of the illustrated safeguards is subject to further studies and goes beyond the scope of this contribution.

94 Art. 2 par. 3 ADR Directive.

95 Every two years the ADR entities are obliged to send information to the competent authority. See art. 19 par. 3 ADR Directive, art. 18 Implementation Act.

96 Art. 18 ADR Directive, art. 1, par. 1(i) in conjunction with art. 16 Implementation Act.

stringent information duty in art. 18 of the Implementation Act. However, this might be a future option when the ADR Directive is evaluated.[97]

Which leads to the illustration of a different national safeguard. Since 2012 it has been possible to address a prejudicial question to the Supreme Court at (one of the) parties' request or *ex officio* by the judge of first instance via articles 392-394 Code of Civil Procedure. The prejudicial question addressed to the Supreme Court could be a valuable option to check whether mandatory law is applied correctly in decisions taken in binding advice. Grounds for addressing a prejudicial question are a multiplicity of claims based on similar facts and/or questions of law.[98] Both are not unlikely to occur in consumer cases.[99] For the realization of this safeguard binding advisors should be granted the possibility to address a prejudicial question to the Supreme Court about how to apply mandatory law correctly.[100] This new competence of binding advisors could be a liaison between ADR and the courts, which might be an argument for the Supreme Court to allow the aforementioned questions addressed as an alternate safeguard.[101] This option too has a downside though, since addressing a prejudicial question would put the binding advice procedure on hold and the binding advisors therefore might struggle to reach a decision within the period of 90 calendar days from the date on which the ADR entity has received the complete complaint file (art. 8(e) ADR Directive). Further research on the feasibility of this safeguard is therefore necessary.

Last but not least, a safeguard at European level might be an option. Art. 16 ADR Directive emphasizes that Member States shall ensure that ADR entities cooperate and exchange best practices with regard to the settlement of disputes. In line with this European push to cooperate would be the establishment of a European judicial committee that monitors a selection of ADR decisions on legality and gives advice to ADR entities on how mandatory law could be applied best in the various European CDR models.

97 By 9 July 2019, and every four years thereafter, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the ADR Directive, art. 26 ADR Directive.

98 Art. 392 par. 1(a), (b) Code of Civil Procedure.

99 See recital 30 ADR Directive and art. 19 par. 3 (e) ADR Directive.

100 Arbitrators are not permitted to address a prejudicial question to the Court of Justice of the European Union (See ECJ 23 March 1982, C-102/81, *NJ* 1983/149 (*Nordsee*)). The route to address a prejudicial question to the Supreme Court is therefore likely not to be open to binding advisors either.

101 The relation between the prejudicial question addressed to the Supreme Court and ADR is not clarified in literature and practice and thus the feasibility of this default option is subject to further studies.

9 CONCLUSION

In this contribution, we addressed the question whether the ADR Directive influences the interpretation of the core concept of 'reasonableness and fairness' within the context of art. 7:904 par. 1 DCC. If a binding advice procedure does not comply with the quality requirements set out in the Directive, does this make it 'unacceptable according to standards of reasonableness and fairness' for a party to be held to the decision taken by binding advisors? Can the decision therefore be annulled in such a case? It was argued that the ADR Directive to a certain extent does influence the interpretation of this concept.

When the manner of establishment of the decision is concerned, the fact that one of the procedural requirements of the ADR Directive was breached forms a very serious indication that it is unacceptable according to standards of reasonableness and fairness to hold a party to the decision. However, this contribution argued that the breach of one of these requirements should not automatically make the decision subject to annulment. If a party was not disadvantaged by the deficiency, the decision may, depending on the circumstances, be upheld. It would be undesirable if the ADR Directive implied otherwise. In binding advice procedures falling outside the scope of application of the ADR Directive, the procedural requirements may have an indirect effect, in the sense that the fact that one of the procedural requirements mentioned in the ADR Directive was breached, can be used as an argument that the decision should be annulled. Such an argument seems especially strong in cases in which a trader started an ADR procedure against a consumer.

With regard to the content of the decision it is clear that the ADR Directive (and the Implementation Act) has an influence on the standard of art. 7:904 par. 1 DCC, although it is not entirely certain in what way. Art. 10 par. 2 Implementation Act abolishes art. 7:902 DCC for ADR procedures covered by the ADR Directive, so that decisions in breach of mandatory law are no longer valid on the basis of this provision. However, it is not clear what regime does apply to them. This contribution argues that decisions in breach of mandatory law are subject to annulment on the basis of art. 7:904 par. 1 DCC. If a mandatory provision protecting the consumer is breached, it will be unacceptable for the consumer to be held to the decision according to standards of reasonableness and fairness. In this view, the trader will not be able to invoke the fact that a mandatory provision protecting the consumer was not applied. However, even in this view art. 10 par. 2 of the Implementation Act has far-reaching consequences. Consumer law is to a large extent mandatory by nature. A decision may easily entail a wrong interpretation of mandatory law and thus be subject to annulment. In cases in which a trader starts an ADR procedure against a consumer (and in which the ADR Directive thus does not apply), art. 7:902 DCC remains unaltered. However, the desire to afford the consumer the same protection in those cases as is given to him in situations

in which he himself turns to ADR may bring the court to a quicker annulment of the decision on the basis of art. 7:904 par. 1 DCC as well.

The ADR Directive in combination with the Implementation Act does seem to take away a great deal of the binding force of decisions taken in a binding advice procedure covered by the Directive. Since the ADR Directive opens such extensive possibilities for parties to challenge the decisions imposed on them, the risk of having to follow a court procedure after the completion of the ADR track will become high. Thus, the aim of the ADR Directive of providing parties with a 'simple, efficient, fast and low-cost way' of resolving disputes might not be achieved. Therefore, this contribution has examined alternative ways in which the quality of consumer ADR can be enhanced. Two national safeguards and a European one have been touched upon. In the Dutch CDR system one could think of a future extra information duty for ADR entities with regard to the legality requirement in art. 18 of the Implementation Act. Furthermore, binding advisors might be granted the opportunity to address a prejudicial question to the Supreme Court. Finally, at the European level a European judicial committee that monitors a selection of ADR decisions on legality might enhance compatibility with mandatory law in binding decisions throughout Europe.

4 Failure in performance of an obligation in Dutch law

A confusing mix of national, transnational and linguistic interpretation

Martijn van Kogelenberg ▪

1 INTRODUCTION

In this contribution the Dutch notion of 'tekortkoming in de nakoming van een verbintenis' – i.e. failure in performance of an obligation: hereafter also 'failure in performance' – will be examined from a European and transnational perspective. Only the obligations arising from a *contract* are subject to research. This contribution focuses on the relationship between the notion 'failure in performance' and the concept of default (*verzuim*) on the one hand and setting aside the contract or termination (*ontbinding*) on the other hand.

This contribution starts with an exploration of the notion of 'failure in performance' and its context in Dutch law. This step is necessary before dealing with the two following issues, which are both from a transnational origin and are relevant for the interpretation of the relevant notion in Dutch law.

First, the connection between failure in performance and the notion of default deserves attention. The already delicate balance between these terms in Dutch law is complicated further by the recent implementation of the Directive on consumer rights, resulting in the new provision in art. 7:19a DCC on default and written notice in a consumer sales contract.[1]

Second, the relationship is discussed between the Dutch notion of failure in performance and the notion of fundamental non-performance – a notion returning in several jurisdictions surrounding the Netherlands and in practically all European and transnational instruments regarding contract law. Is there

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1 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (PbEU L 304/64); see also *Kamerstukken II* 2012/13, 33 520, no. 2 (legislative proposal) and no. 3 (explanatory memorandum). The provision entered into force on 13 June 2014; *Stb* 2014,140.

any sign of acceptance of this notion in the Dutch jurisdiction, implicitly or explicitly, and should Dutch law be more in line with 'Europe' on this point?

Finally, this contribution pulls some threads together in a conclusion, focusing on a common denominator which returns when attempting to discover the positive and negative aspects of European and transnational influences on national law: language and translation.

2 Failure in performance: a brief introduction to Dutch law

2.1 Positioning the term and language problems

Failure in performance of an obligation is a key notion in the Dutch Civil Code. It is a central requirement for establishing liability in contract leading to the availability of remedies to the obligee or creditor. The link with liability and the connection to the various remedies contributes to the legal relevance of this notion. Consequently, failure in performance of an obligation cannot be interpreted and commented on – certainly not from a European and transnational perspective – without linking this notion to various other relevant notions in this respect, in particular the notions of possibility or impossibility to perform (*(on)mogelijkheid van nakoming*), attribution (*toerekenbaarheid*), default (*verzuim*) and written notice (*ingebrekestelling*). Knowledge of these terms is necessary to come to better understanding of the implications of 'failure in performance of an obligation' and how this term and its connected terms may be influenced by European or transnational instruments.

First, it is necessary to address a common problem for any research with comparative connotations. If a Dutch element from the Civil Code or one or several provisions from that Code have to be translated into and analysed in the English language, one should be very careful to avoid linguistic confusion.

The phrase 'failure in performance' returns several times in the Dutch Civil Code, especially to indicate which remedial options the obligee or creditor may have when he is faced with such a failure in performance.[2] A concrete and logical starting point to start from is art. 6:74 par. 1 DCC. This provision represents the Dutch way of approaching the idea of failure in performance of an obligation and one of the most logical consequences: damages.
Art 6:74 par. 1 DCC:[3]

2 See for example articles 6:263 and 265 DCC on suspending performance and setting aside the contract.

3 All translations of Dutch Civil Code provisions are from H.C.S. Warendorf, R. Thomas, I. Curry-Sumner,*The Civil Code of the Netherlands*, Alphen a/d Rijn: Kluwer Law International 2013.

> 'Every failure in performance of an obligation shall require the obligor to repair the damage which the obligee suffers therefrom, unless the failure is not attributable to the obligor.'

According to Dutch law, the concept of 'failure in performance of an obligation' is more limited than the notion of non-performance in general.[4] Non-performance is a purely objective assessment – the debtor did not or not fully perform the obligation for any reason. For example, the justifiable suspension of performance of an obligation can be qualified as non-performance, but not as a failure to perform. The notion of failure to perform is still a neutral term, but nevertheless more specified. This notion implies that the performance of the obligation is not what may be expected from the debtor. Failure to perform implies non-performance, delayed performance and defective performance.[5] It may be that the failure to perform cannot be attributed to the debtor – therefore the term itself is still neutral – but the evidentiary threshold to be overcome by the debtor is high.[6] The debtor may exonerate himself from facing the consequences of failing to perform, but he has to prove that the failure cannot be attributed to him in any way.

The translation used of the aforementioned provision is not without difficulties, because it may give a wrong impression of its meaning. The term which may cause a certain level of confusion is the term 'repair'. This term has two meanings. The most common translation in Dutch is *'herstellen'*,[7] an English synonym is 'to mend'. However, an obligation to 'mend' is not what the provision in Dutch intends to impose on the obligor. The obligor is not required to physically repair or mend the damage caused by the failure to perform, at least not according to art. 6:74 par.1 DCC. The obligor is required to *compensate* the obligee for the damage suffered as a result of the failure in performance. This is a monetary sanction.[8] 'To repair' may also imply 'to compensate financially', but it is certainly not the most straightforward meaning.

However, this linguistic confusion coincidentally points at a strong systematic presumption of Dutch contract law, which is characteristic of most legal

4 Asser/Hartkamp & Sieburgh 6-I* 2012/317; GS Verbintenissenrecht, art. 74 Boek 6 BW, note 2 (Broekema-Engelen).

5 Asser/Hartkamp & Sieburgh 6-I* 2012/370.

6 Asser/Hartkamp & Sieburgh 6-I* 2012/345 et seqq.

7 Van Dale Online Woordenboek Engels-Nederlands; http://surfdiensten2.vandale.nl/zoeken/zoeken.do (18 February 2015).

8 In theory, a creditor may demand 'performance in kind', but this exception is still '*specialis*' of monetary damages and , furthermore, only available if the court uses its discretionary power to award a specific form of damages. The full text of the relevant provision (art. 6:103 DCC) is as follows: 'Damages shall be paid in money. Nevertheless, upon the demand of the person suffering the loss, the court may award compensation in a form other than payment of a sum of money. Where such judgment is not complied with within a reasonable period, the person suffering the loss shall recover the right to claim damages in money.'

systems with a 'civil-law' background. The presumption is that the law encourages performance of contractual obligations, because contractual obligations *should* be performed (*pacta sunt servanda*). This well-known maxim provides for a system which gives the obligee not merely a remedy, but a right to performance of the contractual obligation.[9]

The right to performance of contractual obligations is not codified, although some would say it should be, but the idea is that the right to performance – self-evidently – follows from the underlying principle that parties are bound to their contractual obligations.[10] Therefore, codification is not strictly necessary.

In case of failure in performance, the obligee may in theory choose between performance, damages or termination. However, the gateway to the remedy of damages (and, for that matter, the gateway to termination as well, see art. 6:265 DCC), requires the obligor to be in default according to art. 6:74 par.2 DCC.[11]

In most cases, the obligor should provide written notice in order to put the obligee into default (arts. 6:81 and 6:82 DCC). Giving written notice is in fact nothing more than giving the obligor a second chance to perform correctly. This requirement underlines the level of significance given to eventual performance of the contractual obligation. Notice has to be given accompanied with a clear moment, until which the obligor has the opportunity to perform correctly. If he does not, the obligor will be in default, and only if the other requirements of art. 6:74 par. 1 are fulfilled, will the obligor be liable for damages.

Therefore, although the translation of art. 6:74 par. 1 DCC is not the most convenient one in my opinion, it unintentionally points at this important feature of Dutch contract law.

2.2 Failure in performance, default, written notice, impossibility and attribution

Following the justification of the requirement of default – giving the obligor the opportunity to perform correctly – it is logical that the obligor *must be able*

9 Asser/Hartkamp & Sieburgh 6-I* 2012/380.

10 D. Haas, *De grenzen van het recht op nakoming* (diss. Amsterdam), Deventer: Kluwer 2009, pp. 49, 50. Moreover, the 'right in action' is codified in art. 3:296 DCC s.1: 'Unless it otherwise follows from the law, the nature of the obligation or a juridical act, the person obliged to give, to do or not to do something as regards another may be ordered to do so by the court upon the demand of the person to whom the obligation is owed.' This provision is more of a procedural nature and, if anything, may indirectly imply a substantive right to performance of a (contractual) obligation.

11 'To the extent that it is established that performance is and will remain impossible, paragraph (1) shall apply only if in accordance with the provisions of §2 regarding the default of obligors.' See also art. 6:81 DCC.

to perform correctly. If performance has become impossible,[12] default is not required, because it is useless to give the obligor more time to perform.

If a debtor delivers 50 lorries instead of the promised 100, he fails to perform the contractual obligation. However, it is not impossible for the obligor to perform and to deliver the remaining 50 lorries. When a debtor has to deliver a painting that has been destroyed by a fire, it is impossible for the debtor to perform the original obligation.

The law also provides for situations where performance may be theoretically possible but where the requirement of default automatically applies without the requirement to give notice (art. 6:83 DCC). In this respect, the most important category is the obligation with a set term. If the term expires, default is not required.[13] Performance of the obligation may still be possible – the remaining 50 lorries can be delivered – but not within the term set in the contract. A theoretical discussion arises on the topic whether the term set in the contract is part of the obligation or not. If so, one could also argue that performance is impossible – and default is not required in that case – or that performance is possible, but default applies automatically. Because legal consequences do not differ substantially, this discussion does not have any substantive relevance in this respect.[14]

Another theoretical discussion is whether the requirement of default and the term failure in performance are really distinguishable. In other words, can a failure in performance in the sense of art. 6:74 DCC exist without liability because the obligor is not (yet) in default? The Dutch Supreme Court rules that these terms are not distinguishable, because it asserts that the situation before being in default gives the obligor the opportunity to perform without failing to perform.[15]

The connections between failure in performance and default and between failure in performance and impossibility in Dutch law have been briefly

12 The distinction between absolute and temporary impossibility will not be discussed in this contribution (see the difference on this point between art. 6:74 par. 2 and art. 6:265 par. 2 DCC).

13 Case law on this issue is quite extensive. See e.g. Dutch Supreme Court 6 October 2000, *NJ* 2000/691 (*Verzicht/Van Eijndhoven*); Dutch Supreme Court 4 February 2000, *NJ* 2000/258 (*Kinheim/Pelders*); Dutch Supreme Court 4 October 2002, *NJ* 2003/257 (*Fraanje/Götte*); Dutch Supreme Court 22 October 2004, *NJ* 2006/597 (*Endlich/Bouwmachines*); Dutch Supreme Court 13 January 2012, *RvdW* 2012/107 (*Cubeware/A-line*).

14 See Dutch Supreme Court 27 June 2008, *NJ* 2010/ 83 (*Moerings/Mol*), note J. Hijma; A.C. van Schaick, 'Blijvende onmogelijkheid', *Nederlands Tijdschrift voor Burgerlijk Recht* (NTBR) 2012/40.

15 Dutch Supreme Court 20 September 1996, *NJ* 1996/748 (*Büchner/Wies*): 'Daarbij verdient nog aantekening dat een ingebrekestelling niet de functie heeft om 'het verzuim vast te stellen', doch om de schuldenaar nog een laatste termijn voor nakoming te geven en aldus nader te bepalen tot welk tijdstip nakoming nog mogelijk is zonder dat van een tekortkoming sprake is, bij gebreke van welke nakoming de schuldenaar vanaf dat tijdstip in verzuim is.' Legal doctrine does not agree unanimously with this line of reasoning. See *e.g* Asser/Hijma 7-I* 2013/421-422.

indicated. A last thread in this respect is the link between failure in performance and the requirement of attribution in relation to the remedies available to the obligee.

As stated earlier, the obligee has a self-evident right to performance of the contractual obligation. This right is more than a remedy in reaction to failure in performance. This right can be exercised not only after failure in performance of the obligor, but in any case, provided that the applicable obligation is due. The right to performance naturally evolves from the contract. The circumstances of an eventual failure to perform are therefore not relevant. Whether the failure in performance can be attributed to the obligor is not relevant for access to the right to performance. The only impediment to invocation of the right to performance is an impossibility to perform, but the interpretation of the notion of impossibility is quite strict, because the right to performance should not be limited more than strictly necessary.[16]

In conclusion, the Dutch concept of failure in performance has its peculiarities, which mainly evolve from the principles underlying the Dutch Civil Code. In practice, failure in performance simply means that performance is not up to standard according to the obligation agreed upon in the contract. However, the notion of failure in performance can only be understood when it is connected with other notions such as impossibility, attribution and default on the one hand and with the remedies triggered by failure in performance, such as damages and termination on the other hand. The next section analyses two specific sources of influence on the national interpretation of the notion of failure in performance.

3 Failure in performance: a European and transnational perspective

3.1 Failure in performance and default in Directive 2011/83/EU and 7:19a DCC

On a European level, instruments regarding *general* contract law are in general not binding, such as the PECL and DCFR.[17] In that sense, it does not directly affect national contract law.

However, the good exception is the area of consumer law, including the part of consumer law regarding the law of contract. The European Union is concerned about the position of consumers and strives to protect consumer

16 See art. 3:296 DCC and also Dutch Supreme Court 5 January 2001, *NJ* 2001/79 (*Multi Vastgoed/Nethou*)

17 The Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM/2011/635) (CESL) is the most recent project which was cancelled in February 2015.

interests via Directives, which should be implemented on a national level.[18] The influence on national law is therefore considerable.

In 2011, the European Parliament issued a new Directive in order to harmonise and improve regulations from previous directives concerning consumer law. The development of the Directive was not without problems, because the Parliament wanted to adopt a Directive with maximum harmonisation.[19] This objective caused severe problems – an earlier proposal for a much more ambitious Directive did not survive, mainly because of the maximum harmonisation objective[20] – and the predictable result was that the new Directive in 2011 did not contain many substantive provisions changing the level of consumer protection substantively, except for incorporating a range of information obligations on the side of the seller.

An exception is formed by art. 18 of the Directive. This provision is specifically drafted for sales contracts. The most relevant parts of the provision are the first section and the first part of the second section:

> '1. Unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract.
> 2. Where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances. If the trader fails to deliver the goods within that additional period of time, the consumer shall be entitled to terminate the contract. (…)'

The highlights of this provision are the following. The trader should deliver the goods within a period of 30 days or within a time of delivery. If the trader fails to do so, the consumer gives the trader an additional period of time appropriate to the circumstances. If the trader fails to deliver within that additional period of time, the consumer is entitled to terminate the contract.

At first glance, the rationale behind this rule seems to be a guarantee to a quick delivery by the trader. If quick delivery cannot be triggered, the consumer may terminate the contract. The implementation of this provision causes problems which have a direct effect on the notion of failure in performance in Dutch law.

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18 Art. 169 TFEU.

19 See art. 4 of the Directive. See e.g. A.L.M. Keirse, S.A. Kruisinga & M.Y. Schaub, 'Nieuws uit Europa: Twee nieuwe wetgevingsinstrumenten: de Richtlijn Consumentenrechten en het gemeenschappelijk Europees kooprecht', *Contracteren* 2012/1, pp. 11-26; M.B.M. Loos & J.A. Luzak, 'De nieuwe Richtlijn consumentenrechten', *Tijdschrift voor Consumentenrecht* 2011/5, pp. 184-191.

20 C.A.N.M.Y. Cauffman, M.G. Faure & T. Hartlief, 'Het richtlijnvoorstel consumentenrechten: quo vadis?', *Contracteren* 2010-3, pp. 71-78.

A first hint at problematic implementation is that the scope of the provision is slightly blurred by section 53 of the Preamble. This section says that

> 'in addition to the consumer's right to terminate the contract where the trader has failed to fulfil his obligations to deliver the goods in accordance with this Directive, the consumer may, in accordance with the applicable national law, have recourse to other remedies, such as granting the trader an additional period of time for delivery, enforcing the performance of the contract, withholding payment, and seeking damages.'

This sentence may imply that the rule of art.18 of the Directive does not only trigger termination as a remedy, but also, amidst other remedies, damages, but this recourse is only possible if it is in accordance with national law.

Art. 18 Directive is implemented via art. 7:19a DCC.[21] The relevant part of the provision says:[22]

> 'If, in the case of a consumer sale, a seller fails to perform the contract within a prescribed or agreed period as referred to in Article 9 (4) (*the 30-day period, MvK*), he shall be in default if he is given notice of default by the buyer in which he is allowed a further reasonable period for delivery but still fails to perform within this period.'

Several authors have already criticized this provision.[23] One of the most problematic issues is the use of the terms 'default' (*verzuim*) and 'notice' (*ingebrekestelling*). Both terms are already embedded in a Dutch context, so a lawmaker should be extremely careful when using these terms in another context.

First, a translation issue hides an obvious dichotomy in Dutch law. Within the context of arts. 6:74 BW and 6:265 BW, the obligee has to provide *written* notice in order to put the obligee into default. The Dutch term is *'ingebrekestelling'*. However, in the case of art. 7:19a DCC, the Dutch term *'ingebrekestelling'* is translated to notice: without the adjective 'written'. In other words, apparently the consumer may give notice over the telephone or in person. This situation causes problems, for according to Dutch law, an obligee can only be notified

21 *Kamerstukken II* 2012/13, 33 520, no. 2 (legislative proposal) and no. 3 (explanatory memorandum).

22 'Komt de verkoper bij een consumentenkoop de in artikel 9 lid 4 gestelde of overeengekomen termijn niet na, dan is hij in verzuim wanneer hij door de koper in gebreke wordt gesteld bij een aanmaning waarbij hem een redelijke termijn voor de aflevering wordt gesteld, en nakoming binnen deze termijn uitblijft.'

23 A.G. Castermans, 'Verzuim en ingebrekestelling bij consumentenkoop: de beperkte reikwijdte van artikel 7:19a BW', *NTBR* 2014/38; H.N. Schelhaas, 'In verzuim', *NTBR* 2013/37.

correctly, if written notice is provided.[24] The term *'ingebrekestelling'* implies that the notice given is written. Through the incorporation of the new art. 7:19a DCC the meaning of the term *'ingebrekestelling'* is not certain anymore, because two manifestations of the term now exist in the Civil Code.

A second issue is the introduction of the term 'default' in combination with the requirement of giving notice. In section 2 of this contribution it has been made clear that the notion of default is one with a very specific meaning especially in combination with the notion of written notice and failure in performance. One of its features, laid down in the law (art. 6:83 DCC), is that giving written notice is unnecessary when a set term expires. In this situation, the obligor is *automatically* in default after expiry of the set term. Art. 7:19a DCC confuses this system, because this provision *always* requires giving notice to the obligor, even when a set term is agreed upon. The only exception is when timely performance is essential for the performance because of the nature of the contractual obligation – *e.g.* in case of the delivery of a wedding dress on a specific date. Again, the use of the terms default and notice is questionable, because of the incongruent meaning of the terms.

A third matter is the scope of the provision in the DCC compared with the scope of art. 18 in the Directive. The scope of the provision in the Directive is clearly limited. The obligee has access to termination when the obligor fails to deliver. As mentioned before, the consumer may have access to other remedies, but only if in accordance with national law. In art. 7:19a DCC the connection with termination is not clearly made. This omission suggests that this provision may also be applicable in case a creditor claims compensation via art. 6:74 DCC. The European legislator did not prescribe this elaboration, because now it is slightly unclear whether the 'national' default rules apply or the 'European' rules. The aim of this contribution is to establish any influence of transnational law on the interpretation of Dutch law. Since this provision has been implemented quite recently, it is difficult to assess the degree of influence, especially because there is no case law yet. However, a few predictions can be made.

First, the relationship between the new art. 7:19a DCC and the concepts of default and (written) notice needed to trigger damages and termination in general (arts. 6:74 DCC and 6:265 DCC) need to be clarified. The practical result could be, as Castermans already suggested, always to remain on the safe side and send a written notice in any case in which the buyer-consumer would like to get access to a remedy.[25] To be fair, the Dutch system of default

24 There are exceptions (Dutch Supreme Court 22 October 2004, *NJ* 2006/597 (*Endlich/Bouwmachines*)), where the Dutch Supreme Court allows other forms of notice, but the law is clear on this point.

25 Castermans 2014.

and notice is in itself quite hard to understand: the advice to practitioners has always been to give written notice in any situation.[26]

Second, although the national system is not without flaws either, an important 'tool' in the law of obligations to prevent unfair solutions is the application of the principle of good faith (or reasonableness and fairness). This principle is not without significance in the area of failure of performance, default and notice. For example, notice is by law only valid when it is written, but in exceptional circumstances, good faith may imply that notice may be given in another form (*e.g.* by telephone).[27] Art. 7:19a DCC provides a strict application of giving notice in every applicable case, but in practice one may want to deviate from this legal principle in exceptional circumstances. The absence of a general principle of good faith to deal with such situations may hamper the smooth application of this new provision.[28]

Most importantly, implementation of the new provision seems to have a negative influence on the internal coherence of the Dutch Civil Code. The Dutch Supreme Court aligns the concepts of failure in performance and default, but the new provision seems to disentangle these two concepts. Avoidance of these specific terms in the concepts would have been preferable, but maybe this new provision provides a trigger to review the complete system of default and written notice. Then, the concept of failure in performance will be affected too.

3.2 Failure in performance, non-performance and fundamental non-performance

According to Dutch law, failure in performance is required to have access to damages and to termination. As far as termination is concerned, art. 6:265 DCC applies. It is necessary to take a closer look at this provision, par. 1:

> 'Every failure of one party in the performance of one of its obligations gives the other party the right to set aside the contract in whole or in part, unless the failure, given its special nature or minor significance, does not justify the setting aside of the contract and the consequences flowing therefrom.'

For the purpose of this contribution, the focus lies on the phrase 'unless the failure, given its special nature or minor significance, does not justify the setting aside of the contract'. This phrase suggests that the obligee cannot set aside the contract in *every* case of failure in performance. As a remedy, termina-

26 See e.g. V. van den Brink, 'Verzuim en ingebrekestelling (deel I/II)', *Maandblad voor Vermogensrecht* 2005-10/11.

27 Dutch Supreme Court 22 October 2004, *NJ* 2006/597 (*Endlich/Bouwmachines*).

28 Castermans 2014.

tion is considered to be severe. Therefore, apart from the requirement of 'failure in performance' in general – and default according to par. 2 – an extra threshold is applicable.

Nevertheless, the Dutch Supreme Court decided that applicability of the exception of minor breach is exceptional and that in virtually all cases of failure in performance, termination is available as a remedy.[29] On the other hand, it should be taken into account that seriousness of the failure is a factor which is taken into account in assessing the availability and extent of remedies in contract and possible defences of the party that fails to perform.[30]

Most European or supranational bodies of law or legal instruments, as well as many national legal systems, also recognize a qualified level of breach necessary to have access to the remedy of termination, but not in the same way.[31] Most commonly, the term 'fundamental breach of contract' is introduced. The instruments mentioned all have their own specific provision on fundamental breach of contract.

Art. 25 CISG states:

> 'A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.'

Art. 8:103 PECL states:

> 'A non-performance of an obligation is fundamental to the contract if:
> (a) strict compliance with the obligation is of the essence of the contract; or
> (b) the non-performance substantially deprives the aggrieved party of what i[t] was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or
> (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.'

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29 Dutch Supreme Court 4 February 2000, *NJ* 2000, 562 (*Mol/Meijer*). See for a dissertation on a possible reshuffling of availability of traditional remedies, taking into account seriousness of the breach M.M. Stolp, *Ontbinding, schadevergoeding en nakoming: De remedies voor wanprestatie in het licht van de beginselen van subsidiariteit en proportionaliteit* (diss. Leiden), Deventer: Kluwer 2007.

30 See for an example Dutch Supreme Court 25 March 2011, ECLI:NL:HR:BP8991, *NJ* 2013, 5, note T.F.E. Tjong Tjin Tai (*Ploum/Smeets II*); T. Hartlief, *Ontbinding* (diss. Groningen), Deventer: Kluwer 1994; F.B. Bakels, *Ontbinding van wederkerige overeenkomsten* (diss. Leiden), Deventer: Kluwer 1993.

31 M.B.M. Loos & H. Schelhaas, 'Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention', *European Review of Private Law* 2013 (21), Issue 1, pp. 105–130; G. Dannemann & S. Vogenauer (eds.), *The Common European Sales Law in Context, Interactions with English and German Law*, Oxford: Oxford University Press 2013. The practical value of the CESL provisions has naturally declined due to its cancellation.

Art. III.3:502 (2) DCFR states:

> 'A non-performance of a contractual obligation is fundamental if
> (a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or
> (b) it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on.'

Art. 7.3.1 (2) Unidroit PICC states:

> 'In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether
> (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
> (b) strict compliance with the obligation which has not been performed is of essence under the contract;
> (c) the non-performance is intentional or reckless;
> (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
> (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.'

The CESL also contains a provision on the meaning of fundamental non-performance. Art. 87 par. 2 reads:[32]

> 'Non-performance of an obligation by one party is fundamental if:
> (a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or
> (b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.'

Before analysing the meaning of the term 'fundamental breach of contract', it is relevant to note that the different instruments use different terms for what in Dutch law is called 'failure in performance of an obligation'. The terms used are 'breach of contract' (CISG) and, more commonly, 'non-performance'.

The CISG tends slightly more towards the common-law terminology, where 'breach of contract' is also used to indicate a 'failure to perform'. This term

32 See for an elaboration of this term M. von Kossak, 'The Remedial System under the Proposed Common European Sales Law (CESL)', *European Journal of Commercial Contract Law* 2013-1, p. 9.

does not take into account the notion of fault or 'attribution'. Under English law many contractual duties are strict. Especially in cases where a buyer cannot pay the price or where the deliverer of generic goods cannot deliver the promised goods due to non-performance of his own supplier or for another reason, in general the other party does not have to establish fault to obtain a remedy due to breach of contract.[33] Strict liability can be considered as the starting point instead of fault liability. However, it is very dangerous to make general statements like this when referring to English law, as the bottom-up structure of English contract law seldom allows one to generalize solutions and approaches chosen in specific cases.[34]

The other instruments all use the term 'non-performance'. According to Dutch law, as mentioned before, this term is more neutral than the term 'failure in performance', because non-performance can be justified, for example in case of a justified withholding of the performance.

The general idea is that termination of the contract should not be available as a remedy without a good reason. Terminating the contract is considered to be a severe remedy, which on the one hand cancels contractual obligations of the parties and on the other hand forces the parties to undo what they already did under the previously existing contract. A small breach of contract is not sufficient to make termination available, but even a 'normal' breach is not. Only a fundamental breach is sufficient to trigger the remedy of termination. The CISG, the DCFR, the PICC and the CESL all incorporated this notion one way or another. The question is what fundamental breach means exactly. When is a breach fundamental? As shown by the three provisions mentioned, the three instruments use different definitions.

All instruments in general recognize that fundamental breach occurs when the aggrieved party is substantially deprived of the very object of the contract. The PICC contains the clearest explicated notion of fundamental breach and devotes explicit attention to the notion of intentional breach as a form of fundamental breach. However, the importance of this notion is immediately downplayed a bit by the official comments on the PICC.[35] In case a breach is intentional, but insignificant, the principle of good faith can block the non-performance from becoming fundamental.

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33 E. Peel & G.H. Treitel, *The Law of Contract* (13th ed.), London: Sweet & Maxwell 2011, p. 834.

34 For example, according to the Supply of Goods and Services Act 1982, it can be said with some restrictions that liability for a contract which exclusively supplies for services is based on fault.

35 www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples 2004-e.pdf, art. 7.3.1, p. 222. See also S. Vogenauer & J. Kleinheisterkamp, *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, Oxford: Oxford University Press 2009, pp. 827-828: 'The isolated focus on the 'state of mind' of the non-performing party as suggested by Art. 7.3.1(2)(c) should therefore be given less weight than the other factors in Art. 7.3.1(2).'

The PECL and the DCFR are also very brief about the connection between fundamental breach and intentional breach.[36] Seriousness of the breach gets a lot of attention, but this factor is not directly linked to the intention of the party in breach. It should be mentioned that an intentional breach as mentioned in the provisions of the PECL and DCFR does not qualify directly as a fundamental breach. A second requirement next to the deliberateness of the breach is that the aggrieved party must have reason to believe that the debtor's future performance cannot be relied on. In my opinion, an intentional breach by its very nature causes a justified lack of confidence in the debtor's future performance. The connection with future performance may therefore not only be a requirement but also a justification to qualify intentional breach as fundamental. In addition, there may be cases where a party intentionally withholds performance, *e.g.* because he is angry about another, unrelated transaction. In such cases the additional requirement may have added value. Although the wording of the provision in the CESL is similar to the wording of the comparable provision of the DCFR, the reference to intentional non-performance is omitted. Nevertheless, it can be argued that the minimal difference in formulation now implies that intentional breach is also covered by referring to the 'nature' of the breach.

The provision in the CISG does not mention that intentional breach may also constitute fundamental breach. The definition of fundamental breach reveals the most important precondition – substantial deprivation of what is to be expected from the contract, but leaves out several others.

From this exercise it may be derived that termination should not be easily available, but only in case of a serious breach. The difference between the threshold in Dutch law and the requirement of fundamental breach is not a theoretical one. In principle, every failure in performance should give access to termination.[37] The refusal to incorporate the 'fundamental' requirement into Dutch law is not an accidental, but a conscious decision by the lawmaker, mainly because the requirement was thought to be too vague.[38] Although the available transnational or European instruments show that the requirement is interpreted in different ways, I am not certain that this argument alone is sufficiently convincing to deny incorporation of this requirement. In my opinion, the relevant question should be whether Dutch law recognizes the principle behind the 'fundamental' requirement, in particular that termination should not be accessible too easily.

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36 See for a more in-depth analysis on this point M. van Kogelenberg, *Motive matters! An exploration of the notion of 'deliberate breach of contract' and its consequences for the application of remedies*, Cambridge: Intersentia 2013, Chapters 2 and 4.

37 Dutch Supreme Court 4 February 2000, *NJ* 2000, 562 (*Mol c.s./Meijer Beheer BV*); Asser/Hartkamp & Sieburgh 6-III* 2014/671.

38 Asser/Hijma 7-I* 2013/425 with references.

At first glance, the Dutch Supreme Court seems to deny this principle by stating that 'a failure in performance justifies termination of the contract'.[39]

However, it is too simple to conclude that Dutch law does not at all recognize the idea behind the requirement of fundamental breach. First, the requirement of default already mentioned also applies in order to acquire access to termination. Default is not by definition a requirement in every transnational instrument. The objective of a 'default' requirement – an attempt to 'save' the contract – is comparable with the objective of the requirement of fundamental breach. Second, in transnational instruments the requirement of fundamental breach is not always necessary when the obligee/buyer wants price reduction. Price reduction is not much more than partial termination, which is a possibility under Dutch law (art. 6:270 DCC). Third, the provision itself already excludes the possibility of terminating the contract due to minor failures.

Taking into account this systemic approach, the addition of a requirement such as 'fundamental non-performance' is not really necessary in Dutch law, if not causing the wrong idea that termination is a last resort option. It is not the vagueness of the term itself, but the systemic vagueness caused by adding this requirement which leads me to the conclusion that international 'pressure' should not lead to incorporation of this term into Dutch law.

The purpose of this contribution is to analyse whether transnational interpretations of well-known concepts influence the interpretation of a comparable concept in Dutch law and if so, how. As far as the idea of fundamental non-performance is concerned, one could say that until now Dutch law has held firm in refusing to incorporate this concept into its own legal system. The law allows the court to rule that failure is too minor to have the contract terminated. However, a simple circumvention by limiting the access to termination via the principle of reasonableness and fairness is not going to work. This principle does not stretch the exception laid down in art. 6:265 significantly further.

The provisional conclusion is slightly ambiguous. Dutch law recognizes a higher threshold for termination – there is an extra requirement added to failure in performance alone – but the requirement of fundamental non-performance is not accepted in Dutch law.

4 CONCLUSION

The purpose of this contribution is to consider whether the Dutch concept of 'failure in performance of an obligation' has been influenced by European and transnational developments and/or instruments. Two specific developments have been discussed. First, the recent implementation of art. 7:19a DCC has

39 Dutch Supreme Court 22 July 2007, ECLI:NL:HR:2007:BA4122, *NJ* 2007/343 (*Fisser/Tycho*), par. 5.2.

been discussed. Second, the widely accepted notion of fundamental non-performance and its possible effects on Dutch law have been analysed.

Both issues show that the term 'failure in performance' cannot be understood and analysed in isolation. The term 'failure in performance' and its European and transnational counterparts 'breach of contract' and 'non-performance' have close relationships with concepts such as attribution, default, impossibility and the remedies performance, damages and termination.

The concept of failure in performance as used in the Dutch Civil Code in general is not directly influenced by European or transnational developments or instruments. Courts do not refer to European or transnational instruments when they apply provisions in which the relevant notion returns.

Related concepts such as default and written notice are influenced by the European Directive on consumer rights, implemented via art. 7:19a DCC. This implementation may have its implications for the interpretation of the notion of failure in performance.

The notion of fundamental non-performance, although present in many other national legal systems and in European and transnational systems, has not found its way into the Dutch Civil Code. Nevertheless, art. 6:265 DCC has its own way of limiting access to termination as a remedy, though the principle of easy access to termination prevails according to the Supreme Court.

Nevertheless, there is a more general way in which the influence of transnational and European instruments finds its way into the Dutch legal environment more and more convincingly. For many years the CISG has been applicable to certain contractual (sales) relationships. The scope of certain European instruments seems to widen as the years pass and consequently, the influence of the national code may decline. Although the draft Regulation on a Common European Sales Law has been withdrawn, a new, more focused, initiative on the development of a so-called Digital Single Market is already announced, which will be accompanied by – inter alia – rules of contract law.[40] It is not clear yet, whether these new rules will be developed on a basis of minimum or maximum harmonisation. The most recent Directive on consumer rights is largely based on a principle of maximum harmonisation, which leaves no serious room for national provisions to be of added value, because they ought to be replaced or rewritten.

Finally, the comparison and analysis of comparable concepts in national law and transnational law always triggers language problems. It is not just a matter of possible misunderstandings in communication. Due to linguistic confusion, the legal interpretation of terms and its connection to other terms and concepts can be influenced. The implementation of art. 7:19a DCC shows

40 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 6 May 2015, COM(2015) 192, pp. 4, 20.

that this well-known concern is not obsolete or outdated. This lesson may even be the most significant one of this contribution.

PART II

Tort

5 Harmonising tort law
Exploring the concept of fault

Pieter De Tavernier & Jeroen van der Weide ▪

1 150 YEARS IN SEARCH OF FAULT: THE MATTERHORN TRAGEDY

After a tragic event, breaking news, headlines from newspapers and opinion papers often start with a twofold question: First: what really happened? And second: who was at fault or who is to blame? Sometimes, these questions do not get a clear and convincing answer. Let us illustrate this with the following event, which was commemorated on the 14th July 2015, during the drafting process of this article.

In 1865, one hundred and fifty years ago, an international expedition of French, Swiss and English climbers conquered the Matterhorn, the well-known mountain that reigns in splendid isolation above Zermatt, in the Swiss Pennine Alps. During the descent, the English climber Douglas Hadow, who afterwards was considered as the most inexperienced of the group, 'knocked over his aid and foot placer, the Chamonix guide Michel Croz. The next man up the rope, the Rev. Charles Hudson, was dragged from his feet and so, in turn, was Lord Francis Douglas. All of them fell to their deaths. Only three people survived the tragedy: the Englishman Edward Whymper and the two Zermatt guides Old Peter and Young Peter Taugwalder, because the Englishman and Old Peter had planted themselves firmly to try and take the strain, but the thinner rope Old Peter had tied between himself and Douglas broke midway between the two.'[1]

After the tragedy, a persistent discussion arose about the mistakes that had been made during the descent. For instance, in the Alpine Journal, Arnold Lunn, a famous English climber, wrote about the tragedy:[2]

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1 See <http://www.independent.co.uk/news/matterhorn-conqueror-cleared-over-fatal-falls-1248170.html>.

2 A. Lunn, 'Whymper Again', *Al*pine Journal 1966, pp. 228-235 and available at <http://www.alpinejournal.org.uk/Contents/Contents_1966_files/AJ%201966%20228-235%20Lunn%20Whymper%20Again.pdf>.

> 'Whymper did not accuse Taugwalder of deliberately using a weak rope; he dealt with the awkward fact that such a rope was used. The Official Enquiry had also to deal with this; it was such an obvious difficulty that any Enquiry would have been badly *at fault* had it been slurred over. If Lunn will read our remarks on the roping he will see that we agree that Croz was *not blameless* in the matter, nor can Hudson, Douglas or Whymper be wholly excused of varying degrees of *blame*. But Old Peter was the main offender.'

Till now, the answer to the question what really happened during the tragic event of 14 July 1865, as well as the elucidation of the blameworthiness of one or more of the members of the expedition, has remained a subject of fierce debate in books, magazines and newspapers.[3]

2 The notion of fault in the year 2015

2.1 Fault in common parlance and in the legal dictionaries

The frequent use of the notion of fault – sometimes disguised in terms such as 'blame' or 'wrong' – after the occurrence of a tragedy, is striking. Some illustrations: 'That rioting in Baltimore? It's all Our *Fault*'.[4] Or: 'Police: Cyclist at *fault* in crash that killed him'.[5] And: 'Dubai climbing wall was 'no one's *fault*', says manager'.[6] This brings us to the inevitable question: what does 'fault' actually mean?

Both in common parlance as well as in legal dictionaries, fault is defined in many different ways. In the Cambridge Dictionary, we discovered a quite impressive list of meanings:

> '(1) a mistake, especially something for which you are to blame; (2) a weakness in a person's character; (3) a broken part or weakness in a machine or system; (4) in sport and some other games: a mistake made by a player who is beginning a game by hitting the ball; (5) to have done something wrong: her doctor was at fault for/in not sending her straight to a specialist and (6) to criticize someone or something, especially without good reasons: he's always finding fault with my work.'[7]

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3 See e.g. M. Taugwalder, *Die Suche nach der Wahrheit. 150 Jahre Erstbesteigung Matterhorn vom 14. Juli 1865,* Visp: Rotten Verlag 2015, 204 p. H. Taugwalder & M. Jaggi, *Der Wahrheit näher (*Taschenbuch) , Aarau: Glendy Verlag 2015, 220 p.; R.W. Clark, *The Day the Rope Broke: The Tragic Story of the First Ascent of the Matterhorn*, Mara Books 2008, 216 p. and <http://www.merian.de/magazin/matterhorn-schweizer-gipfel-tragoedie.html>.

4 See<http://www.nationalreview.com/article/417638/debunking-obamas-bilious-baltimore-babble-michelle-malkin>.

5 See <http://www.burlingtonfreepress.com/story/news/local/2015/08/03/police-blame-cyclist-fatal-crash/31088263/>.

6 See <http://www.thenational.ae/news/uae-news/dubai-climbing-wall-fall-was-no-ones-fault-says-manager>.

7 See <http://dictionary.cambridge.org/dictionary/english/fault>.

With regard to legal dictionaries, Black's Law Dictionary gives us, in its 6th Edition, no less than eight (!) definitions of fault:

> '(1) negligence; an error or defect of judgment or of conduct; (2) any deviation from prudence, duty, or rectitude; (3) any shortcoming, or neglect of care or performance resulting from inattention, incapacity, or perversity; (4) a wrong tendency, course, or act; (5) bad faith or mismanagement; (6) neglect of duty; (7) breach of a duty imposed by law or contract; or (8) an act to which blame, censure, impropriety, shortcoming or culpability attaches.'

In its 7th edition, these definitions are condensed into a couple of information-packed entries. According to this version, fault is either '[a]n error or defect of judgment or conduct', or 'any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith, or mismanagement.'[8] A quite kaleidoscopic picture.

2.2 The legal notion of fault in tort law: issues to be questioned

In this article, we focus on the notion of fault in tort law. Three issues will be examined. First: what is the role of fault in tort law? Second: how *is* fault legally defined and how *should* it be defined? And third: how does the assessment of fault take place: with an objective or with a subjective yardstick?

Taking into consideration the aims of this BWKJ project, we start with a brief description of the concept of fault in the Dutch Civil Code (DCC) (§ 3). After an overview of the achievements and the ongoing attempts to harmonise European tort law, in the context of which the notion of fault is challenged (§§ 4-5), we continue with the examination of the concept of fault in the three most representative jurisdictions of the European Union (England, France, Germany), in a recent recodification (Estonia) and in a number of harmonisation (the PETL and the DCFR) and reform (the French Projet Terré and the Revision of the Swiss Code of Obligations 2020) proposals (§ 6). This analysis takes place, of course, in comparison with the aforementioned Dutch approach. In order to make some points of discussion more concrete, we have selected the liability for damage caused by minor children as *Leitmotiv* of our *exposé*.

We have pursued the following aims. First of all, we will try to make a clear choice between the different notions of fault that circulate under (Dutch) tort lawyers. Secondly, we would like to demonstrate that, despite some points of convergence, there are still considerable differences between the aforementioned sources with regard to the examined notion of fault. Perhaps in the future some points of convergence, as well as the cautious choices we formulate

8 A. Calnan, 'The Fault(s) in Negligence Law', *Southwestern Law School Working Paper* No. 0712, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975695>.

in this paper, could serve as reference point for the harmonisation of European tort law.

3 The notion of fault in Dutch tort law: a short overview

In the Dutch Civil Code, with regard to tort law, the notion of fault surprisingly appears in just six (!) provisions. In the first of these provisions, art. 6:162 DCC, fault refers to the legal appreciation of the actor, the (subjective) blameworthiness of the tortfeasor (in Dutch: *schuld*). In the second of these provisions, art. 6:185 DCC, fault refers to circumstances that have contributed to the damage and which can be attributed to the person suffering the loss (one of these circumstances being fault in the meaning of (subjective) blameworthiness). In the other provisions, the articles 6:169, 6:170, 6:171 and 6:172, fault (in Dutch: *fout*) refers to the combination of both the appreciation of the act of the tortfeasor (the wrongful nature of the act or, in Dutch, *de onrechtmatige daad*), and to one[9] of the grounds of attributability of the act to the tortfeasor (the blameworthiness or, in Dutch, *de schuld*). It is in the latter sense that Willem van Boom, Professor of private law at Leiden University, has defined the notion:[10]

> 'This might lead to the following definition of fault: the legal blameworthiness of the person committing a wrongful act that *could* and *should* have been avoided.'

Under the second definition of fault, i.e. the wrongful act that can be attributed to the tortfeasor, Dutch academics remain divided about the pertinence of the distinction:[11]

> 'in most cases it is unnecessary (and sometimes even impossible) to isolate the actor from its act. In nine out of ten cases, condemning the act leads to condemnation of the actor. Whenever wrongfulness has been established, the fault requirement will usually not present any difficulties.'

9 According to art. 6:162, par. 3 DCC, an unlawful act can be attributed to the defendant not only if it is due to his fault (*schuld*), but also if it is due to 'a cause for which he is accountable by law or pursuant to generally accepted principles (*verkeersopvattingen*).' See C.H. Sieburgh, *Toerekening van een onrechtmatige daad* (diss. Groningen), 2000, p. 262.

10 W.H. van Boom, 'Fault under Dutch Law', in: P. Widmer (ed.), *Unification of Tort Law,* The Hague: Kluwer Law International 2005, p. 170.

11 Van Boom 2005, p. 170.

Cees van Dam agrees:[12]

> 'It should be emphasized that the two aspects (conduct and person) are very much intertwined.'

We will, later in this article, express an opposite point of view: when we use the concept of fault, this term should only mean that the tortfeasor is legally to blame for his wrongful act. Therefore, fault requires that the conduct of the tortfeasor is subjectively wrongful. Fault should only be defined as legal blameworthiness (*schuld*) and not as an attributable wrongful act (*fout*).

With regard to the assessment of fault, Dutch scholars are divided about the yardstick that should be used in establishing whether the tortfeasor acted negligently (objective or subjective assessment). Those who hold the idea that one should not distinguish wrongfulness from attributability, argue that unlawfulness is 'subjectivised', because the defendant's specific characteristics are taken into account.[13] We do not agree with them. Wrongfulness and attributability are two distinct requirements of tortious liability. The first 'hurdle' for liability – wrongfulness (*onrechtmatigheid*) – must provide the answer to the question whether the tortfeasor *should* have acted in a different way. The test of wrongfulness is objective. The second 'hurdle' for liability – attributability based on fault (*schuld*) needs to be assessed in a subjective way: *could* the actor, when we take his personal characteristics into account, have acted in a different fashion.[14]

Under Dutch law, it is important to mention that, with regard to the objective element of wrongfulness (*onrechtmatige daad*) and the subjective element of blameworthiness (*schuld*) with regard to damage caused by children, the legislator has opted for a specific solution.[15] 'If the wrongful act has been committed by a child under the age of fourteen, the child itself is immune for liability (art. 6:164 DCC); instead his parents can be held (strictly) liable, provided that the child's act would have resulted in liability of that child, had he been older than thirteen (art. 6:169 DCC).'[16]

12 C. van Dam, *European Tort Law,* Oxford: Oxford University Press 2013, p. 235.

13 C. van Dam, *Zorgvuldigheidsnorm en aansprakelijkheid. Een rechtsvergelijkend onderzoek naar plaats, inhoud en functie van de zorgvuldigheidsnorm bij de aansprakelijkheid voor letsel- en zaakschade,* Deventer: Kluwer 1989, no. 99.

14 Sieburgh 2000, pp. 259-161. Compare Van Boom 2005, pp. 169 and 172.

15 Van Boom 2005, p. 171.

16 Van Boom 2005, p. 171.

4 'FAULT' IN CONTEXT: THE PROCESS OF HARMONISATION, RECODIFICATION AND REFORM OF TORT LAW IN EUROPE

How does the Dutch notion of fault relate to the notion of fault that circulates in other jurisdictions and in existing unification or reform proposals? This question cannot be answered without painting the picture of recent developments that tort law, and thus fault, has gone through in Europe during the last decades.

A More Coherent European Contract Law; an Action Plan (2003).[17] The way forward (2004).[18] Towards a European Civil Code.[19] The call to harmonise the area of tort law fits into a broader trend of harmonisation initiatives that should lead to a more coherent European system of private-law rules or even a European Civil Code. By some legal scholars and notably also the British House of Lords, the Draft Common Frame of Reference (DCFR)[20] published in 2009 was seen as a blueprint of a (future) European Civil Code.[21]

The most far-reaching harmonisation initiatives took place in the field of contract law. The so-called Lando group started at the end of the 1970s and in 1995 presented the first part of the Principles of European Contract Law (PECL).[22] The PECL were a source of inspiration for the proposal for a Regulation on a Common European Sales Law (CESL) that was launched by the European Commission on 11 October 2011.[23] The withdrawal of this proposal in December 2014 by the European Commission in its Work Programme for

17 Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law; an Action Plan (2003/C 63/01), OJ 2003, C 63/1.

18 Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the acquis: the way forward, Brussels 11 October 2004, COM(2004) 651 final.

19 A.S. Hartkamp et al., *Towards a European Civil Code*, Nijmegen: Ars Aequi Libri 2011.

20 C. von Bar & E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR).* Full Edition. Volume 1-6. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), München/Oxford: Sellier European Law Publishers/Oxford University Press 2009/2010.

21 House of Lords, European Union Committee, Twelfth Report, European Contract Law: the Draft Common Frame of Reference, available at < http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/9502.htm>.

22 O. Lando & H. Beale (eds.), *Principles of European Contract Law (Parts I and II), Prepared by The Commission on European Contract Law,* The Hague: Kluwer Law International 2000; O. Lando et al. (eds.), *Principles of European Contract Law (Part III), Prepared by The Commission on European Contract Law*, The Hague: Kluwer Law International 2003. The PECL are also called the 'Lando Principles'.

23 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11 October 2011, COM(2011) 635 final, 2011/0284 (COD), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>.

2015[24] led to a – temporary? – stagnation in the process of unification of (European) contract law.[25]

Failure or success? Although both the PECL and the DCFR served as a source of inspiration for and influenced the case law of the European Court of Justice (ECJ) and that of the Member States,[26] a political Common Frame of Reference (CFR) is still out of reach.

In this article, we will turn a blind eye to contract law and focus on the harmonisation of tort law. With regard to the feasibility of such a harmonisation, we will examine a series of sources, namely (1) the existing tort law of some EU member States (e.g. Estonia, France, Germany, the Netherlands and England), (2) the Principles of European Tort Law (PETL)[27] published in 2005 by the European Group on Tort Law and Book VI of the DCFR (Non-contractual liability out of damage caused to another) and (3) two reform proposals (the French Projet Terré and the Revision of the Swiss Code of Obligations 2020). This examination will make it clear that some aspects of tort law tend to converge, while at the same time profound differences continue to exist.

In contrast with the PETL and the DCFR, the Projet Terré and the Revision of the Swiss Code of Obligations (OR 2020) deserve a short presentation, before starting our exploration of the concept of fault.

The French Projet Terré forms a part of a movement to reform the French law of obligations, including tort law. A first reform proposal, The Avant-projet de réforme du droit des obligations et du droit de la prescription, the so-called Projet Catala,[28] was submitted to the French Minister of Justice on the 22nd September 2005. The Projet Catala constitutes a comprehensive reform proposal

24 See item 60 of Annex 2 (List of withdrawals or modifications of pending proposals) to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015, A New Start, Strasbourg, 16 December 2014, COM(2014) 910 final, available at <http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf>.

25 See, however: <http://europa.eu/rapid/press-release_MEMO-15-4920_en.htm> and E. Clive, Rebirth of EU contract law proposal, available at <http://www.epln.law.ed.ac.uk/>

26 ECJ: Opinion of AG Trstenjak in Case ECJ 17 April 2008, C-404/06 (Quelle); Opinion of AG Poiares Maduro in Case ECJ 10 April 2008, C-412/06 (*Hamilton/Volksbank Filder eG*). Dutch case law: Opinion of AG Timmerman in Case Dutch Supreme Court 26 September 2008, ECLI:NL:HR:2008:BD7598; Opinion of AG Timmerman in Case Dutch Supreme Court 11 July 2008, ECLI:NL:HR:2008:BD2406; Opinion of AG Huydecoper in Case Dutch Supreme Court 13 November 2009, ECLI:NL:HR:2009:BJ8724; AG Langemeijer, in Case Dutch Supreme Court 1 April 2011, ECLI:NL:HR:2011:BP1475. See also District Court Zutphen 3 November 2010, ECLI:NL:RBZUT:2010:BQ0980;District Court 's-Hertogenbosch 24 June 2010, ECLI:NL:RBSHE:2010:BN0636.

27 European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Wien: Springer 2005. Also available at <www.egtl.org>.

28 Named after Pierre Catala, Professor Emeritus at the Université Panthéon Assas Paris 2.

of the general part of the law of obligations.[29] Five years later, in 2010, a bill (*proposition de loi*) was presented in the French Senate by Laurent Béteille. This bill only relates to tort liability[30] and is based on the tort liability section of the Projet Catala. The Projet Terré, the subject of our examination of the concept of fault, was proposed in 2008 and 2011 by an academic group, led by François Terré, just like Pierre Catala, a Professor Emeritus at the Université Panthéon Assas Paris 2.[31] His research group submitted two draft proposals, the first to reform the law of contract[32] and the second to reform the law of tort.[33] Both were prepared with the cooperation of the Ministry of Justice under the aegis of the Academy of Moral and Political Sciences, of which Terré is a distinguished member.[34] The Terré Group took into account both the PETL and the DCFR.[35] With regard to the above-mentioned reform proposals, it must be emphasised that, until today, 'the reform of French tort law is not yet on the French political agenda.'[36]

In the Swiss OR 2020,[37] scholars of all Swiss Law faculties, supported by the Federal Department of Justice and the Swiss Institute of Comparative Law,[38] have reviewed the provisions of the General Part of the Swiss Code of Obligations currently in effect and adapted it to current developments.[39] The draft was published in 2013 and will be the basis for an official revision of the General Part of the Swiss Code of Obligations. Parliamentary work has already started.[40]

29 O. Moréteau, 'French Tort Law in the Light of European Harmonisation', *Journal of Civil Law Studies*, 2013, p. 762. The Avant-projet is available in English at <http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf>.

30 Proposition de loi portant réforme de la responsabilité civile, Sénat, no. 657 (9 July 2010), available at <http://www.senat.fr/leg/ppl09-657.html>.

31 It should be emphasised that the Projet Terré is not a prolongation of the Projet Catala. Both Projets are to be considered as *competitive* drafts.

32 F. Terré, *Pour une réforme du droit des contrats. Réflexions et propositions d'un groupe de travail,* Paris: Dalloz 2009, 310 p.

33 F. Terré, *Pour une réforme du droit de la responsabilité civile,* Paris: Dalloz 2011, 224 p.

34 Moréteau 2013, p. 763.

35 O. Moréteau, 'France', in H. Koziol and B.C. Steininger (eds.), *European Tort Law,* Wien: Springer 2005, p. 226.

36 B. Fauvarque-Cosson, *The French Contract Law Reform in a European Context,* online available at <http://eltelawjournal.hu/french-contract-law-reform-european-context/>.

37 Code des obligations suisse 2020. Projet relatif à une nouvelle partie générale, available at <http://or2020.ch>.

38 The project is chaired by the professors Claire Huegenin and Reto M. Hilty, both professors at the Universität Zürich.

39 P. Loser, 'Revision of the Swiss Code des Obligations (Schweizerisches Obligationenrecht, OR) – A Vision for the Revision of the General Part', in: *European Tort Law Yearbook* 2014, Volume 3, Issue 1, p. 675.

40 Loser 2014, p. 675.

5 A CLOSER LOOK AT THE EUROPEANISATION OF TORT LAW

5.1 EU Directives, EU Regulations and the influence of the decisions of the ECJ and the ECHR

The trend of 'Europeanisation' of tort law is set at two different levels. In the first place by way of EU Directives and Regulations. Although this legal framework of directives and regulations applies mainly in the area of contract law, to a certain extent also tort law is subject to this type of harmonisation. An important example is the Product Liability Directive of 25 July 1985 that created a regime of strict liability for defective products.[41] Another example is the Unfair Commercial Practices Directive of 11 May 2005 that regulates and harmonises unfair business-to-consumer commercial practices in the internal market.[42] In addition to the harmonisation of substantive law rules, the European Union has become very active in the unification of private international law rules. An important example is the Rome II Regulation on the law applicable to non-contractual obligations that has applied since 11 January 2009.[43]

Secondly, in terms of harmonisation, the tort law systems of the several EU Member States are influenced by the decisions of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). The European Convention on Human Rights (ECHR)[44] protects a basic catalogue of human rights. The right to life (art. 2 ECHR) is the most fundamental human right. According to art. 2 ECHR everyone's life shall be protected by law. However, due to the case law of the ECtHR, converging developments occur in the area of the protection of private and family life (privacy). On a vertical and horizontal level, art. 8 ECHR ensures that the right to respect for private and family life, home and correspondence is not violated by the State, fellow citizens or companies. In its famous decision in the case Von Hannover v Germany (No. 2)[45] the European Court of Human Rights applied five considerations for balancing the right to respect for private life (art. 8 ECHR) against the right

41 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985, L 210/29.

42 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005, L 149/22.

43 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/40.

44 The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, available at <http://www.echr.coe.int/Documents/Convention_ENG.pdf>.

45 ECtHR 7 February 2012, nos. 40660/08 and 60641/08 (*Von Hannover v Germany (No. 2)*). See also ECtHR 24 June 2004, no. 59320/00 (*Von Hannover v Germany (No. 1)*) and ECtHR 19 September 2013, no. 8772/10 (*Von Hannover v Germany (No. 3)*).

to freedom of expression (art. 10 ECHR), such as whether the published information (photos) contributes to a debate of general interest.[46]

Since the fundamental rights of the ECHR are primarily vertically effective (relationship State/individual) they lack direct horizontal effect. Nevertheless the basic human rights of the ECHR can be effective in horizontal relations (individual/individual or corporation) but only in an indirect manner.[47] Examples of this so-called 'indirect horizontal effect' could be found in national case law related to open standards such as good faith and fair dealing (contract law) and the required standard of due care (tort law). In its decision of 9 January 1987, NJ 1987, 928 the Dutch Supreme Court ruled that a violation of art. 8 ECHR is considered to be a tortious act according to the open, required standard of due care that underlies art. 1401 of the old Dutch Civil Code (currently: art. 162, Book 6 Dutch Civil Code).

Another example of indirect horizontal effect at a national level is the decision of the Dutch Supreme Court of 12 December 2003, ECLI:NL:HR:2003:AL8442; NJ 2004, 117.[48] A dental surgeon cuts one of his fingers during an operation and is brought into contact with the patient's blood. The patient is possibly HIV infected. Can the dental surgeon force the patient to supply blood for an HIV test? In its decision the Dutch Supreme Court balances the fundamental rights of privacy and bodily integrity of the patient (articles 10 and 11 Dutch Constitution) against the individual interest of the dental surgeon to prevent possible damage. Subsequently the Supreme Court rules that the underlying general principle of reasonableness and fairness[49] requires that a patient, after finishing medical treatment, should take all necessary measures to prevent his dental surgeon from suffering damage. This includes the patient's (forced) participation in a blood test.

According to art. 267 Treaty on the Functioning of the European Union (TFEU) the European Court of Justice has jurisdiction to give preliminary rulings on references from national courts concerning the interpretation of EU acts

46 Other relevant viewpoints are: (i) how well-known is the person concerned and what is the subject of the report?; (ii) the prior conduct of the person concerned; (iii) the content, form and consequences of the publication; (iv) the circumstances in which the photos were taken.

47 See for instance C. Mak, *Fundamental Rights in European Contract Law. A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England* (diss. University of Amsterdam) 2007, available at <http://dare.uva.nl/document/2/52678>; O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party. A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (diss. Utrecht) 2007, available at <file:///F:/Downloads/full%20(1).pdf>; G. Brüggemeier, A. Colombi Ciacchi & G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union*, Cambridge: Cambridge University Press 2010; G. Brüggemeier, A. Colombi Ciacchi & P. O'Callaghan (eds.), *Personality Rights in European Tort Law*, Cambridge: Cambridge University Press 2010.

48 Available via <www.rechtspraak.nl>.

49 See artt. 2 and 248, Book 6 DCC (Law of obligations/Contract law).

such as Directives or Regulations. More specifically in the area of tort law art. 340, par. 2 TFEU is of great relevance. The provision deals with the non-contractual liability of EU institutions for damage caused. Art. 340, par. 2 TFEU reads as follows:

> 'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

In order to create a liability under art. 340, par. 2 TFEU there must be a wrongful act of the Union, the applicant must have suffered damage, and there must be a causal link between the wrongful act and the damage that has occurred. However, the exact meaning of the provision is still unclear. The term 'common' probably means that the principle is accepted in a sufficiently large number of Member States.

The 'general principles common to the laws of the Member States' to which art. 340, par. 2 TFEU refers served as a starting point in the development of Member State liability for the breach of EU law. On this basis the ECJ developed a form of harmonisation by way of a three-layered framework of requirements for liability. In the famous Francovich case,[50] the ECJ ruled that on the basis of the national tort law rules a Member State is liable for the infringement or violation of EU law when: (i) the result prescribed by the directive should entail the grant of rights to individuals; (ii) it should be possible to identify the content of those rights on the basis of the provisions of the directive; (iii) there is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.[51]

Since the two types of unification that we briefly addressed in this section are not the main theme of this paper, we will not go into further detail at this point.

5.2 Further steps to harmonise tort law: the long way to Tipperary

During the First World War, the world famous song 'It's a long way to Tipperary' symbolised the longing for home of every soldier.[52] The song is an expression of a wish that is attainable and unattainable at the same time. The restrained views on the important issue of how a more coherent and/or harmonised European private law should be achieved, can be illustrated by

50 ECJ 19 November 1991, Joint cases C-6/90 and C -9/90, ECR 1991, I-5357 (*Francovich and Bonifaci v Italy*).

51 Van Dam 2013, pp. 39-44.

52 See https://en.wikipedia.org/wiki/It%27s_a_Long_Way_to_Tipperary. Tipperary is a town and civil parish in County Tipperary, Ireland.

a book that has recently been published. In his book, which is entitled 'The Struggle for European Private Law. A Critique of Codification', the British scholar Leone Niglia 'investigates the position of codifiers and their discontents in the shadow of the codification strategy pursued by the European Commission (...).'[53]

Does this observation mean that the harmonisation efforts undertaken by the drafters of the PETL and the DCFR should be abandoned, particularly in the field of tort law? We do not think so. Although there are many arguments that plead against harmonisation of tort law.

Let us start with the enumeration of some pros. *First*, a single European tort law might help to achieve a common area for free movement of goods, capitals and people.[54] Helmut Koziol, the famous Austrian tort law scholar from Vienna, writes:[55]

> 'The rationale for harmonisation is that differences between the legal systems hinder commercial cross-border transactions in Europe. Entrepreneurs who offer their wares or services in other Member States are disadvantaged in comparison with competitors who are only active nationally, because while domestic providers only have to inform themselves of the legal frameworks in their own legal system, a foreign provider is forced to inform itself about a legal system that diverges from its domestic law and to comply with it.'

Second, 'a harmonised tort law regime would minimise the risk of European businesses' forum shopping in search of the jurisdiction with the lowest quality and liability standard, thus fending off pressures on states to engage in a race to the bottom.'[56] *Third*, a harmonisation 'would facilitate courts' handling of transboundary torts, decrease the length and complexity of transnational litigation and guarantee more uniformity between judicial outcomes.'[57]

However, the pros have not been supported by everyone. A *first* counter-argument is that there is no empirical evidence supporting the allegation that

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53 L. Niglia, *The Struggle for European Private Law. A Critique of Codification,* Oxford: Hart Publishing 2015.

54 U. Magnus, 'Towards European civil liability', in: M. Faure, J. Smits and H. Schneider (eds.), *Towards a European ius commune in legal education and research,* Antwerpen: Maklu 2002, pp. 206-207. See about this pro: M. Bussani & M. Infantino, 'Harmonization of Tort Law in Europe', in: *Encyclopedia of Law and Economics*, New York: Springer 2014, p. 3.

55 H. Koziol, 'Harmonising Tort Law in the European Union: Advantages and Difficulties', *ELTE Law Journal* 2013/1, pp. 73-74, available via < http://eltelawjournal.hu/harmonising-tort-law-in-the-european-union-advantages-and-difficulties/>.

56 M. Faure, 'How law and economics may contribute to the harmonisation of tort law in Europe', in: R. Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts,* Baden-Baden: Nomos 2003, pp. 47-51. See about this pro: Bussani & Infantino 2014, p. 3.

57 Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), recitals nos. 16 and 20. See on this pro: Bussani & Infantino 2014, pp. 3-4.

fragmentation of tort laws affects the free circulation of people and goods[58] and the establishment and movement of businesses in Europe.[59] *Second*, we should also give consideration to the costs of harmonising tort law, such as the difficulty of changing existing rules of tort law and the abolition of regulatory competition.[60] *Third*, it has been argued that 'any top-down harmonisation effort would put into circulation rules foreign to the tradition and heritage of some (…) legal traditions involved'.[61] *Fourth*, the idea of harmonisation of tort law will have to face the same critics that were directed against a harmonised contract law (cf. the arguments raised against a Common European Sales Law), such as the lack of competence of the EU to harmonise private law,[62] the political legitimacy of its drafters and the desirability of a European Civil Code in general.[63]

Keeping in mind the above-mentioned pros and cons, the *desirability* of harmonising tort law remains highly controversial. Yet even those who would like to continue the efforts towards such harmonisation should be aware of the following question, dealt with in the following section: is tort law harmonisation *feasible*?

6 Is tort law harmonisation feasible? An exploration of the concept of fault

It is beyond doubt that fault-based liability is still a cornerstone of European tort law. However, when we take a closer look at the concept of fault in the current European jurisdictions, the PETL, the DCFR and two current reform proposals (the French Projet Terré[64] and the Revision of the Swiss Code of Obligations 2020), it becomes clear that unifying tort law is a race with many hurdles that must be taken. In our research of the similarities and differences in the legal sources examined with regard to the notion of the fault of the tortfeasor, several issues will be discussed. Some of them were already a subject

58 Faure 2003, p. 44. See on this counter-argument Bussani & Infantino 2014, p. 4; W.H. van Boom, 'Harmonizing Tort Law. A Comparative Tort Law and Economics Analysis', in: M. Faure (ed.), *Tort Law and Economics* (Vol. 1 of the Encyclopedia of Law and Economics, 2nd ed.), Cheltenham: Edward Elgar 2009, pp. 442-443.

59 T. Hartlief, 'Harmonizing of European Tort Law. Some critical remarks', in M. Faure, J. Smits and H. Schneider (eds.), *Towards a European ius commune in legal education and research,* Antwerpen: Maklu 2002, pp. 225-236.

60 Faure 2003, p. 36. See about this counter-argument Bussani & Infantino 2014, p. 4.

61 Bussani & Infantino 2014, p. 4.

62 Cf. the discussion about art. 114 TFEU and the questionable competence of the European Union to introduce an optional instrument with regard to contract law.

63 Magnus 2002, pp. 208-212. See about this counter-argument Bussani & Infantino 2014, p. 4.

64 F. Terré (ed.), *Pour une réforme du droit de la responsabilité civile,* Paris: Dalloz 2011, p. 224.

of comparative research by the European Group of Tort Law (EGTL) in 2005.[65] Since the publication of that research project (the volume 'Unification of tort law: fault'[66]), the PETL and the DCFR , two model texts that 'represent the best reflection of contemporary approaches to, and developments in, the field of European tort law',[67] have been published, together with the aforementioned reform proposals in France and Switzerland. That brought us to the idea that an update of issues of fault liability was desirable.

In the following sections, we will review the most important questions of the EGTL project of 2005, namely: What is the role and importance of fault in establishing tort liability (relationship between liability based on fault and strict liability) (§ 6.1)? Is there a statutory or otherwise generally accepted definition of fault? (§ 6.2) What kind of yardstick has to be used in establishing fault? (§ 6.3)

The issue of liability for damage caused by children will form an illustration of the quite abstract theories that circulate within the European Union with regard to the concept of fault in tort law.

6.1 The role and importance of fault liability[68]

6.1.1 Examination of the existing law and the existing reform proposals

In a recent article about the harmonisation of tort law,[69] Helmut Koziol , the Director of the European Centre of Tort and Insurance Law in Vienna, provides us with a very clear outline of the differences between the existing jurisdictions with regard to the role of fault liability. According to Koziol, these differences must be seen in relation to the aims that tort law wants to satisfy. In some

65 European Group of Tort Law, Principles of European Tort Law. *Text and Commentary*, Wien/New York: Springer, 2005, 282 p.

66 P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 391.

67 J. Lahe, 'The Concept of Fault of the Tortfeasor in Estonian Tort Law: A Comparative Perspective', *Review of Central and East European Law* 2013, p. 142.

68 In this section, we describe the dichotomy of fault-based liability versus strict liability, without giving a definition of fault in the legal sources we have explored. At this stage of our contribution, we do not formulate an opinion about the definition of fault we prefer to be used in view of a future harmonisation of tort law. As already mentioned in the introduction to our contribution, several definitions of fault circulate, such as: fault as identical with wrongfulness, fault as identical with blameworthiness or fault as a combination of both wrongfulness and blameworthiness. On the issue of the distinction between fault-based liability and strict liability, we refer to the interesting contribution by J. Lahe, *Forms of Liability in the Law of Delict: Fault-Based Liability and Liability without Fault*, available at <http://www.juridicainternational.eu/public/pdf/ji_2005_1_60.pdf>.

69 H. Koziol, 'Harmonising Tort Law in the European Union: Advantages and Difficulties', *ELTE Law Journal* 2013/1, available via < http://eltelawjournal.hu/harmonising-tort-law-in-the-european-union-advantages-and-difficulties/>.

European countries, the emphasis is more on corrective justice. In English law, for instance, the emphasis is on 'the principle of the rule 'casum sentit dominus', which expresses the idea that the person who suffers damage must, in principle, bear his damage himself. There must be particular reasons to justify allowing the victim to pass the damage on to another person', writes Koziol.[70] One of the consequences of that policy is that fault in the English law of torts is generally based upon the fault of the defendant. Or, 'fault takes multiple guises in tort, but fault there must be'.[71] The English legal system is therefore very reluctant to recognise strict liability.[72]

In France, by contrast, tort law is essentially victim-oriented and thus emphasises the idea of distributive justice.[73] Also in the French Projet Terré, strict liability rules remain important.[74] However, fault-based rules appear in several tort law provisions, for instance with regard to the requirement of wrongfulness[75] and the issue of liability of parents for damage caused by their children.[76] Moreover, some existing strict liability regimes are maintained, though with extra requirements. Thus, the general provision of liability for movable objects is limited to physical and psychological harm,[77] which is a substantial reduction of the scope of the Jand'heur II jurisprudence of the French Supreme Court,[78] through which the liability for things was turned from a rebuttable *faute* into one of strict liability.[79]

With regard to the Revision of the Swiss Code of Obligations 2020, particular liability regimes are planned to become stricter,[80] for instance the liability of commercial enterprises.[81] Furthermore, a general provision for strict liability of persons carrying out particularly dangerous activities will be

70 Koziol 2013, p. 80.
71 H.V. Horton Rogers, 'Fault under English Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 65.
72 Koziol 2013, p. 82.
73 Koziol 2013, p. 80.
74 Terré 2011, p. 163 ff.
75 Art. 5 Projet Terré: '*La faute* consiste, volontairement ou par négligence, à commettre *un fait illicite* (…).'
76 Terré 2011, p. 155: 'La responsabilité parentale redevient une véritable responsabilité du fait d'autrui, à savoir *une responsabilité personnelle* de l'auteur du dommage (…).'
77 Art. 20 Projet Terré: 'Le gardien répond de plein droit de l'atteinte à l'intégrité physique ou psychique d'une personne causée par le fait de la chose corporelle dont il a la garde'. See Moréteau 2013, p. 772.
78 Cour de Cassation ch. réun. 13 February 1930, *DP* 1930, I. 57, comm. Ripert, *S.* 1930, I. 121, comm. Esmein.
79 Van Dam 2013, p. 60.
80 See art. 59 Swiss Code of Obligations 2020: 'A commercial enterprise is liable for the damage caused in connection with the enterprise's activity, unless it proves that the organisation of the enterprise was suitable to avoid such damage'.
81 Loser 2014, p. 676.

introduced.[82] With this provision, the Swiss draft takes up an idea of the general revision of tort law of 2000 that has failed,[83] because of the fact that such a general provision for dangerous activities met with great resistance from politics and businesses.[84]

What about the role and importance of 'fault' in the PETL and the DCFR? According to Title III, Chapter 4 (Liability Based on Fault) the basic condition of tort liability under the PETL is the liability based on fault. Art. 4:101 PETL reads as follows:

> 'A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct.'

Chapter 5 (Strict Liability), Title III of the PETL addresses those forms of liability which are not based on fault, but are 'strict' in the sense that they cover various types of risk leading to no-fault liability, such as abnormally dangerous activities (art. 5:101 PETL)[85] or other categories of strict liability (art. 5:102 PETL). An interesting question can be raised about the relevance of fault-based liability and the proportion of cases in practice that are resolved according to strict-liability rules.[86] With regard to that question, the PETL Commentary of 2005 argues that the basis of liability is not intended to be in a descending hierarchy. This means that fault liability is not considered as the fundamental category of liability and that all other forms of liability should be seen as exceptions: both areas of liability exist side by side.[87]

The same consideration that fault-based liability and strict liability are two equally important forms of liability goes for the DCFR. The basic rule of art. VI. – 1:101 DCFR starts from the assumption that each and every claim for reparation requires the presence of three fundamental elements: (i) damage (Chapter 2), (ii) accountability (Chapter 3) and (iii) causation (Chapter 4).[88] Subsequently, Book VI of the DCFR contains three grounds for being held

82 'Article 60. D. Absolute liability
1. A person who carries out a particularly dangerous activity is liable for the damage resulting from the realisation of the characteristic risk of this activity.
2. A particularly dangerous activity is an activity which, because of its nature or the nature of the used substances, equipment or forces, is particularly suited to cause frequent or severe damage even if due diligence has been applied.'

83 Art. 50 Avant-Projet de loi fédérale (Révision et unification du droit de la responsabilité civile, par P. Widmer et P. Wessner, available at <https://www.bj.admin.ch/dam/data/bj/wirtschaft/gesetzgebung/archiv/haftpflicht/vn-ber-f.pdf>): 'La personne qui exploite une activité spécifiquement dangereuse est tenue de réparer le dommage dû à la réalisation du risque caractérisé que celle-ci comporte, même s'il s'agit d'une activité tolérée par l'ordre juridique.'

84 Loser 2014, p. 676.

85 Example: blasting a building in a developed area of the city.

86 Lahe 2013, p. 149.

87 Lahe 2013, p. 145.

88 Von Bar 2008, p. 35.

accountable for damage caused to another: (i) intention (art. VI. – 3:101), (ii) negligence (art.VI. – 3:102), (iii) accountability without intention or negligence (art. VI. – 3:201 *et seq.).* Contrary to the PETL, the DCFR does not make a clear distinction between the tortious conduct and the accountability. The basic rule of art. VI. – 1:101, Book VI DCFR brings together in one norm liability for intention, liability for negligence and liability without intention or negligence. According to art. VI. – 3:101, a person acts intentionally when he deliberately causes such damage, while negligence (art. VI. – 3:102) is at hand when the tortfeasor does not meet the required standard of care. Despite the avoidance of the notion of fault in the DCFR, the basic norm of art. VI. – 1:101 DCFR shows that fault-based liability constitutes an important ground for liability, but not in a hierarchically higher position than strict liability.

What is the role of fault in the recently enacted Estonian Law of Obligations Act (Estonian LOA)?[89] Art. 1043 Estonian LOA states that a person who unlawfully causes damage to another must compensate the victim for the damage if the tortfeasor is at fault in causing the damage or is liable pursuant to the law.[90] In an interesting comparative study about the concept of fault of the tortfeasor, Lahe refers to a 2007 judgment of the Estonian Supreme Court,[91] ruling that the element of fault is the last one to be checked in the context of assessing general tort liability. Before that assessment, the judge has to verify that the tortfeasor had caused damage and that his act was unlawful. The author continues with the assertion 'that the question of the fault of the tortfeasor does not play a crucial role in Estonian tort law. Most liability disputes are decided via the hurdles of causation and wrongfulness'.[92]

6.1.2 Fault liability versus strict liability? The case of parental liability

Let us now give a concrete illustration of the importance and the role of fault liability with regard to a specific issue. We have chosen the issue of liability of parents for damage caused by their minor children.[93] This topic makes it perfectly clear that the existing and proposed tort law regimes in Europe differ to a great extent. Four models could be distinguished as far as the liability of parents for damage caused by their minor children is concerned.

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89 The Estonian Law of Obligations Act, in Estonian and English, is available at <http://www.legaltext.ee/en/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X30085K2.htm&query=collateral&tyyp=SITE_X&ptyyp=I&pg=1>.

90 Lahe 2013, p. 144.

91 Estonian Supreme Court 31 May 2007, no. 3-2-1-54-07. The decisions of the Supreme Court are available in Estonian at <http://www.riigikohus.ee>.

92 Lahe 2013, p. 144.

93 See on this topic M. Martin-Casals (ed.), *Children as tortfeasors*, Wien: Springer 2006, 476 p. and M. Martin-Casals (ed.), *Children as victims*, Wien: Springer 2007, 320 p.; Van Dam 2013, pp. 493-497; H. Koziol (ed.), *Basic Questions of Tort Law from a Comparative Perspective*, Wien: Jan Sramek Verlag 2015, pp. 798-801.

Under the first model, there is no specific rule for parental liability and the victim of the damage caused by a child has to prove the parents' fault and the causal connection with the harm (e.g. England).[94] Under the second regime, the parental liability (fault) is presumed, but the parents or those in charge of the minor may be exonerated when proving that they exercised reasonable care and diligence in the child's supervision and education (e.g. Germany, Switzerland and Estonia). Under the third model, persons in charge of minors are strictly liable (e.g. France). Finally, under the fourth model the parental liability is a mixture of fault liability and strict liability (e.g. the Netherlands).

Since the majority of legal systems operate under the second model of the rebuttable presumption, the drafters of both the PETL and the DCFR agreed upon this model as a common denominator. As art. 6:101 PETL[95] clearly points out, the fault-based liability of parents or persons in charge of minors is presumed and exoneration is possible if the duty of care to supervise children was performed in an adequate way. The DCFR follows the same path:[96]

> 'As far as parental liability is concerned, we decided, after a long discussion, not to opt for liability without intention or negligence. We thought that the mere fact that a parent has a child is simply not enough as a ground of accountability in the law on liability for damage.'

However, art. VI. – 3:104 DCFR sets a clear age limit. According to par. 1 of art. VI. – 3:104, parents or other persons obliged by law to provide parental care for a person under fourteen years of age are accountable (and liable) for the causation of legally relevant damage where that under-age person has caused the damage by conduct that would constitute intent or negligence if it were the conduct of an adult. Parents and other persons providing parental care are excused for the causation of damage if they show that there was no defective supervision of the person causing the damage. At this point, the DCFR also makes use of the defence mechanism of the rebuttable presumption. Although art. VI. – 3:104(1) DCFR prescribes parental liability regarding torts committed by children under fourteen years of age, this does not mean that the parents of children between fourteen and seventeen years of age are not liable for the torts committed by their children.[97] The liability of parents may also be invoked with regard to damage caused by children in the said age

94 See Van Dam 2013, p. 496 and p. 499.

95 Art. 6:101 PETL reads as follows: 'A person in charge of another who is a minor or subject to mental disability is liable for damage caused by the other unless the person in charge shows that he has conformed to the required standard of conduct in supervision.'

96 Von Bar & Clive 2009/2010, p. 3435.

97 Lahe 2013, p. 158.

gap, provided that the victim proves that the parents failed to fulfil their supervisory obligations.[98]

The Estonian LOA makes a distinction between provisions governing liability for torts committed by minors who lack fault capacity and for torts committed by minors who have full fault capacity. With respect to the first category of minors, art. 1053(1) LOA reads as follows:

> 'The parents or curator of a person under 14 years of age shall be liable for damage unlawfully caused to another person by the person under 14 years of age regardless of the culpability of [the] parents or curator'

With regard to the second group of minors, art. 1053(2) LOA prescribes that 'the parents or curator of a person of 14 to 18 years of age shall also be liable for damage unlawfully caused to another person by the person of 14 to 18 years of age regardless of the culpability of the parents or curator, unless they prove that they have done everything which could be reasonably expected in order to prevent the damage.' Compared to the parental liability rules in the DCFR and the PETL with regard to the regulation of parental liability for children younger than fourteen, the Estonian LOA is remarkably strict. Lahe gives the example of a child of four years of age that plays with matches and causes a fire. According to the LOA, the parents of the child will be liable regardless of whether they did anything objectionable in connection with the incident.[99] With regard to torts committed by a minor with full fault capacity, a precondition is that the minor is liable for the damages, whereas in the DCFR, a child of thirteen years old could potentially not be liable for causing damage if the conduct causing the damage would not be objectionable for a child of the same age. The same kind of behaviour by an adult may be objectionable, which would be sufficient for invoking parental liability under the DCFR.[100]

According to French law, art. 1384, paragraph 4 Civil Code holds that a father and a mother, insofar as they exercise parental authority, are jointly and severally liable for damage caused by their minor[101] children who live with them. The parents only have the defence of an external cause and the victim's contributory negligence.[102] Until 1997, parental liability was based on a rebuttable presumption of fault in the education (*faute d'éducation*) and

98 Lahe 2013, pp. 158-159. Art. VI. – 3:104(1) DCFR reads as follows: 'Parents or other persons obliged by law to provide parental care for a person under fourteen years of age are accountable for the causation of legally relevant damage where that person under age caused the damage by conduct that would constitute intentional or negligent conduct if it were the conduct of an adult.'

99 Lahe 2013, pp. 159-160.

100 Lahe 2013, p. 161.

101 According to French law, minors are children under the age of 18 (art. 388 of the French Civil Code).

102 Van Dam 2013, p. 493.

the supervision (*faute de surveillance*) of their child.[103] In the famous *Bertrand* decision of the French Supreme Court of 19 February 1997,[104] this defence was struck out and replaced by a general strict liability rule.[105] Compared to, for instance, the rules of parental liability as embedded in the DCFR, the parental liability according to art. 1384, paragraph 4 Civil Code, is exceptionally strict, because the liability of the father and the mother is not only triggered when the child has committed an unlawful act (*acte objectivement illicite*), but also when the child's conduct was the direct cause of the damage suffered by the victim (*un acte qui soit la cause directe du dommage invoqué par la victime*).[106] This solution has been criticised by several French authors,[107] who consider the rule that makes parents strictly liable for *any* damage caused by their child, regardless of his or her fault, especially problematic. One of them, Jean-Sébastien Borghetti of the Université Panthéon-Assas (Paris II), has argued that the rule is rather counter-intuitive and difficult to accept on the basis of common conceptions of fairness:[108]

> 'How can it be that damage caused by the normal behaviour of an adult will not give rise to any liability, whereas, if it is caused by a child's normal behaviour, liability will ensue? Therefore, it was no surprise that the Projet Terré suggests suppressing this rule and a return to the older rule,[109] whereby parents should only be liable for damage caused by their child's tortious conduct.'

Let us end this section, in which we have illustrated the great variety of existing and proposed tort law regimes in Europe, with the following question:[110]

> 'Should a future harmonised tort law follow the classical model that makes parents only liable for damage caused by the – objectively negligent – behaviour of their children if the parents can be held accountable for misconduct themselves, above

103 Van Dam 2013, p. 494.

104 Cour de Cassation 2e ch. civ. 19 February 1997, *D.* 1997. 265, comm. Jourdain, *JCP* 1997, II. 22848, comm. Viney, *RTDC civ.* 1997, 668.

105 The Projet Terré continues this strict liability regime in art. 14: 'Sont responsables de plein droit du fait du mineur: – ses père et mère, en tant qu'ils exercent l'autorité parentale (…).'

106 Cour de Cassation ass. plén. 13 December 2002, *D.* 2003.231 , comm. Jourdain; *Yearbook on European Tort Law* 2002, 199, comm. Brun. See on this landmark decision the comparative case comments in *EPRL* 2003 (11) 5, pp. 691-751.

107 See e.g. J.-S. Borghetti, 'Liability of Children as well as Persons with Reduced Abilities and the Notion of Fault. Statements by Country Reporters. France', in: H. Koziol (ed.), *Comparative Stimulations for Developing Tort Law*, Wien: Jan Sramek Verlag 2015, pp. 112-113; see on these critics Van Dam 2013, p. 494.

108 Borghetti 2015, pp. 112-113; Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, p. 799.

109 See art. 13 Projet Terré, 'Dans tous les cas, cette responsabilité n'a lieu que lorsqu'est caractérisé *un délit civil* au sens du présent chapitre.'

110 Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, p. 799.

all for a breach of their supervision or at least child-rearing duties,[111] or can justification be found for how French law imposes a strict liability upon parents and only frees them from liability in case of force majeure?'

So far parliamentary initiatives in the Netherlands[112] and Belgium[113] in that sense have remained without success.

There are surely arguments in favour of the French approach. A strict parental liability can indeed be objectively justified by the fact that it corresponds to the general basic tendency to focus primarily on the compensation of the victim. The French system is good in accomplishing this aim.[114] Furthermore, the risk of damage that emanates from children can surely be used as an argument in favour of strict parental liability.[115] Finally, the transaction costs are low. Claims for damages are handled by insurance companies[116] which treat such claims on a rational basis, defending them only when this seems worthwhile. Because the requirements for liability of the parents are so weak, there is little scope for defence.[117]

However, as the French system contrasts sharply with those of other European jurisdictions, we must also examine the disadvantages of strict liability of parents. First, and we agree with this criticism, tort law is not only concerned with a redistribution of damage costs (= distributive justice) but also aims at preventing accidents from occurring in the future (= corrective justice). In terms of incentives to educate their children towards prudent behaviour and supervise them accordingly, the problem with the French system is not strict liability by itself, but liability insurance. Parents who know that any damage caused will be covered by an insurance company[118] will have little incentive to take precautions to avoid harm being caused by their chil-

111 Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, p. 798.

112 Initiatiefvoorstel Verruiming aansprakelijkheid voor gedragingen van minderjarigen vanaf veertien (Proposal to Extend the Age Limit for Liability for Minors), Documents of the Second Chamber of Parliament (2009-2010), No. 30 519.

113 Wetsvoorstel tot invoering in het Burgerlijk Wetboek van een objectieve aansprakelijkheid van de ouders voor de schade veroorzaakt door hun minderjarige kinderen (Proposal to Introduce a Strict Liability of Parents for Damage Caused by Their Minor Children), Documents of the First Chamber of Parliament (2010) , No. 5-48/1.

114 G. Wagner, 'Final Conclusions: Policy Issues and Tentative Answers', in M. Martin-Casals (ed.), *Children in Tort Law. Part II: Children as Victims*, Wien/New York: Springer 2007, p. 295.

115 Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, p. 800.

116 We must keep in mind that a large majority of families (in the Netherlands approximately 80%) have insurance policies that cover the liability of parents and children. These policies are not compulsory, but are quite intensively promoted and the premiums are low.

117 Wagner 2007, p. 295.

118 In cases when there is no liability insurance or where the insurance policy does not cover all the damage that resulted, as can happen in particular when the sums involved are very large, Koziol proposes an unlimited *social liability insurance* for damage caused by children, financed by the general public: Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, p. 801.

dren.[119] Furthermore, strict parental liability treats children like 'a source of danger which the 'owner' keeps at his peril, while children should be seen as human beings and be treated as such.'[120] Finally, the argument that strict liability is balanced by a cheap liability insurance does not always apply, because such insurance is not obligatory, not every household has such an insurance and insurance companies limit cover to a certain maximum sum. When there is no insurance, the parents will be subject to the full harsh burden of the very strict liability.[121]

We think that a compromise can be found in the Dutch Civil Code (DCC).[122] Art. 6:164 DCC states that children under the age of fourteen cannot be held liable for their own personal conduct. In these cases, parents are strictly liable, on two conditions: that the child's conduct was not an omission, and that it was objectively negligent.[123] In case of torts committed by children between the ages of fourteen and sixteen, parents are subject to a presumption of fault.[124] Once the child is sixteen years old, no special rule applies, so parents are only liable on grounds of the general fault-based liability norm.[125] At the end of our contribution, we will formulate a proposal that can be considered as a regime of liability for damage caused by children that is, even slightly adapted, strongly inspired by the aforementioned Dutch approach, being a layered system.

6.2 The definition of fault in the legal instruments explored

In connection with our main findings in § 6.1, two questions should be answered: (1) *Is* fault defined in the sources examined ? (2) How *should* fault be defined in a future harmonised tort law instrument?

Most of the legal instruments analysed do not have a statutory definition of fault. For instance, there is no definition of fault in the French Civil Code. The French legislator has left the interpretation of *faute* to the courts and the

119 Wagner 2007, p. 296.
120 Wagner 2007, p. 296.
121 Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, pp. 800-801.
122 See N. Ferreira, 'The harmonisation of private law in Europe and children's tort liability: A case of fundamental and children's rights mainstreaming', *International Journal of Children's Rights* 2011, p. 588.
123 That is that the same conduct of the child adopted would be considered a tortious act if it had been that of an adult: art. 6:169(1) DCC.
124 Art. 6:169(2) DCC. According to case law, parents can easily rebut this presumption, in the light of the difficulty to control the behaviour of youth of this age. See e.g. Dutch Supreme Court 9 December 1966, *NJ* 1967/69, note GJS (*Joke Stapper*).
125 Art. 6:162 DCC.

doctrine.[126] In England, lawyers do not speak in terms of a general concept of fault, but in terms of negligence and intentional wrongdoing as separate categories.[127] Even in Germany, there is no general statutory definition of fault (*Verschulden*) as such. But the Bürgerliches Gesetzbuch (BGB) makes it clear that the meaning of fault is, such for instance in the PETL, twofold. It is constituted by the two categories of intentional (*Vorsatz*) and negligent (*Fahrlässigkeit*) behaviour. *Fahrlässigkeit* is defined in § 276(2) BGB as the omission of due care (*Außerachtlassen der im Verkehr erforderlichen Sorgfalt*).[128]

The Swiss OR 2020 does not use the term fault, but only indicates in art. 46[129] that a person who infringes upon a duty of care without justification is liable for damages. The proposal makes no distinction in definition between unlawful and careless behaviour.[130] Neither does the Estonian LOA give a definition of fault. Art. 1043 LOA[131] just stipulates that:[132]

> 'A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is *culpable* of causing the damage or is liable for causing the damage pursuant to the law.'

There are exceptions, however. For instance, the French Projet Terré defines fault in art. 5:

> 'La faute consiste, volontairement ou par négligence, à commettre un fait illicite. Un fait est illicite quand il contrevient à une règle de conduite imposée par la loi ou par le devoir général de prudence et de diligence.'

This means that fault, according to the Projet Terré, corresponds to the (objective) requirement of wrongfulness (*illicéité*), and not to the notion of attributab-

126 Many legal writers have tried to fill this gap. So did Planiol, who defined fault as the violation of a pre-existing duty (*la violation d'une obligation préexistante*). This vague definition is frequently referred to and means that *faute* is not only the breach of a statutory duty which amounts to fault, but also the infringement of general duties, such as the duty to behave, in all circumstances, in a careful and diligent way (*le devoir général de prudence et de diligence*): see S. Galand-Carval, 'Fault under French Law', in: P. Widmer, *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 92.

127 Horton Rogers 2005, p. 69, with reference to the remark by Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562: 'The liability for negligence, whether you style it such or treat it as in other systems as a species of "*culpa*" (…).'

128 U. Magnus & G. Seher, 'Fault under German Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 105.

129 A. General Provisions. I. Conditions of Liability.

130 Loser 2014, pp. 675-676.

131 Compensation for unlawfully caused damage. Art. 1043 LOA reads as follows: 'A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law.'

132 Lahe 2013, p. 144.

ility (*imputabilité*), which, in the Project, is only used as the title for a series of strict liabilities for the acts of others, e.g. the strict liability of the parents for the wrongful acts of their children.[133]

While the PETL 'embraces' the concept of fault, the DCFR – according to one of its main drafters, Professor Christian von Bar – 'deliberately avoided the notions of fault and strict liability.'[134] According to the Commentaries on the PETL (art. 4:101), the term fault is used as a comprehensive term, embracing intent as well as negligence. Thus, according to art. 4:101 PETL and its Commentaries, the meaning of the term fault is twofold. It covers both intentional or deliberate and negligent acts of violation of the required standard of conduct.[135] Contrary to the regulations under the PETL, the DCFR carefully avoids the notions of fault and strict liability. The comments on the DCFR remain silent at this point. In his article entitled 'Non-Contractual Liability Arising out of Damage Caused to Another under the DCFR' Professor Christian von Bar sheds some light on this issue:[136]

> 'In the basic rule we have deliberately avoided the notions of 'fault' and 'strict liability'. Both would have been misleading in our view because negligence does not require fault in a moral sense and also because a liability, once arisen, is always strict in nature.'

As we will explain in the next section and as we have already pleaded for in a former edition of BWKJ dedicated to the 'reasonable person' (*de maatman*),[137] when we use the concept of fault, this term should only mean that the tortfeasor is legally *to blame for* his wrongful act. Therefore, fault requires that the conduct of the tortfeasor is *subjectively* wrongful. Fault should only be defined as *legal* blameworthiness (*schuld*) and not as an attributable wrongful act (*fout*).[138] That brings us to the discussion to what extent wrongfulness and fault are to be seen as distinct requirements and, if a distinction is to be

133 Projet Terré, § 4. De l'imputation du dommage causé par autrui.

134 C. von Bar, 'Non-Contractual Liability Arising out of Damage Caused to Another under the DCFR', *ERA Forum* 2008, p. 35.

135 The concept of the 'required standard of conduct' is described in art. 4:102 PETL. In here the 'reasonable person' (man or woman) is the central figure. Therefore, in order to establish a fault-based liability according to the PETL two requirements have to be fulfilled: (i) an intentional or negligent act; (ii) violation of the required standard of conduct. See also P.C.J. De Tavernier & J.A. van der Weide, 'De maatman in het onrechtmatige daadsrecht: onderzoek naar enkele regels van soft law', in: A.G. Castermans *et al.* (eds.), *De maatman in het burgerlijk recht* (BWKJ 24), Deventer: Kluwer 2008, pp. 119-148.

136 Von Bar 2008, p. 35.

137 De Tavernier & Van der Weide 2008, pp. 130-131.

138 In the same sense for Belgium: Cour de Cassation 13 October 1999, *Arr. Cass.* 1999, p. 528; Cour de Cassation 16 February 1984, *Arr. Cass.* 1983-84, p. 750 and *Pas.* 1984, I, 684.

made, what yardstick – an objective or a subjective one – is to be used when assessing the fault of the tortfeasor.[139]

6.3 THE YARDSTICK IN ESTABLISHING FAULT: OBJECTIVE OR SUBJECTIVE?

6.3.1 Objective or subjective assessment of fault: the debate

In order to deal with the objective or subjective assessment of fault, we need to make a clear statement about the requirement of wrongfulness. Although the concept of wrongful conduct is in the heart of each fault-based (and sometimes also strict-based[140]) liability system,[141] different things have been said about this term and its relation to fault has been the subject of intense debate. It is not our ambition to reiterate this entire matter, referred to by Van Dam as 'the mystery only the Germans dare to speak openly about'.[142] Why not try to build a harmonised European tort law on what Koziol calls a threefold division into clearly distinguished terms, so that the debate could focus on the resolution of the real issues behind the terminology? According to Koziol, 'the threefold division into factual elements of the offence (*Tatbestandmäßigkeit*), breach of a duty of care and subjective blameworthiness reflects practical necessity and is ultimately significant in this respect even in legal systems that only base the decision on fault and do not openly recognise the notion of wrongfulness, for example French law.'[143] Therefore, we welcome his idea to completely avoid the ambiguous expression of wrongfulness and talk about factual elements of the offence (impairment of a protected interest),[144] negligence (breach of an objective duty)[145] and fault (subjective blameworthiness).[146]

What does this all precisely mean? Firstly, we propose that negligence, as a breach of an *objective* duty, should no longer be subjectivised, because such a test 'would not provide a clear enough forewarning of what kind of care will be expected.'[147] Therefore, we do not agree with art. 4:102(2) PETL, stating that 'the above standard may be *adjusted* when due to age, mental or

139 See on this topic e.g. H. Koziol, 'Liability Based on Fault: Subjective or Objective Yardstick?', *Maastricht J. Eur. & Comp. L.* 1998, pp. 111-128.
140 See for Switzerland: P. Widmer, 'Switzerland. Function and Relevance under Swiss Law', in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness*, The Hague: Kluwer Law International 1998, p. 115 ff.
141 H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective*, Wien: Jan Sramek Verlag 2012, p. 172.
142 Van Dam 2013, p. 138.
143 Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, p. 783.
144 Result-based.
145 Behaviour-related.
146 Koziol, Basic Questions of Tort Law from a Comparative Perspective 2015, p. 784.
147 Compare Sieburgh 2000, p. 259.

physical disability or due to extraordinary circumstances the person cannot be expected to conform to it'.

Secondly, we defend the idea that fault must be interpreted as being subjective. When we decide whether someone has been at fault, we do take the tortfeasor's personal characteristics into account.[148] Does all this sound very revolutionary? We do not think so. It is merely a plea for a mere terminological and structural clarity, in order to make court decisions in tort law more coherent, so that more predictability and thus legal certainty in this complex area in private law can be achieved. With regard to our home country, the Netherlands, we would therefore welcome judges weighing the act (*should* the actor have acted differently?) and the actor (*could* the actor have acted in a different way?) in two stages. We do not agree with those who think that the aforementioned two aspects (the conduct and the person) can be mixed up.[149]

Thirdly, the assessment of the question whether the tortfeasor *should* have acted differently, will no longer deal with the concept of fault, but becomes part of the second hurdle in establishing liability, the breach of an *objective* duty. Here, *distributive* justice is at play. This means that expressions like 'faute objective' as used in French law,[150] should not be used anymore. The question whether someone *could* have acted differently, must be assessed in two steps. Firstly: is there tortious capacity?[151] Secondly: was the tortfeasor able to behave in conformity with his or her capacity?[152] Here, *corrective* justice is at play.

6.3.2 Subjective or objective yardstick: the case of the personal liability of children

Now, what are the consequences of our proposal for the personal liability of children? The existing and proposed solutions to the liability for their own conduct differ 'to an extent that is almost unbelievable.'[153] Indeed, the image of the existing and proposed legal rules and provisions is really kaleidoscopic. Therefore, let us first present some examples taken from the instruments we have analysed. In most of these instruments, even when an objective test of

148 See Sieburgh 2000, p. 261; P. Widmer, 'Comparative Report on Fault as a Basis of Liability and Criterion of Imputation', in: P. Widmer, *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, pp. 357-358.

149 Compare Van Boom 2005, p. 170.

150 Galand-Carval 2005, p. 90.

151 Compare with the concept of *Deliktsfähigheit* in current German tort law and the notion of *toerekeningsvatbaarheid* under Belgian law.

152 Compare with the concept of *Steuerungsfähigkeit* in current German tort law.

153 H. Koziol, 'Liability of Children as well as Persons with Reduced Abilities and the Notion of Fault. Comparative stimulations', in: H. Koziol (ed.), *Comparative Stimulations for Developing Tort Law*, Wien: Jan Sramek Verlag 2015, p. 105.

fault is the rule, a particular position is taken for children.[154] Then, we will formulate a personal choice between the existing and proposed alternatives.

In relation to tort liability of children, Section 1, Chapter 3, Book VI of the DCFR contains two provisions. These provisions can be found in the same Section as the provisions on intention and negligence. Art. VI. – 3:103 deals with issues of intention and negligence on the part of persons under eighteen. Art. VI. – 3:103 DCFR distinguishes between children and juveniles aged seven to seventeen (par. 1) and children under the age of seven (par. 2). Par. 2 of art. VI. – 3:103 provides for an age limit whereby children under seven years of age are not accountable for causing damage intentionally or negligently. A significant aim of the rule of art. VI. – 3:103 DCFR, par. 2 is to safeguard children from premature financial burdens through liability for damage caused by them.

According to par. 1 of art. VI. – 3:103 DCFR, persons aged seven to seventeen are accountable for causing legally relevant damage. This accountability only exists in so far as the person involved does not exercise such care as could be expected from a reasonably careful person of the same age in the circumstances of the case. Subsequently, par. 3 of art. VI. – 3:103 DCFR contains a counterweight to the rules of both preceding paragraphs. Paragraphs 1 and 2 of art. VI. – 3:103 do not apply when the person suffering the damage cannot obtain reparation from another and liability to make reparation would be equitable having regard to the financial means of the parties and all other circumstances of the case.

Certain jurisdictions, such as Austria,[155] Germany,[156] the Netherlands[157] and the Estonian LOA[158] have decided on a determined (or presumed) limit of age below which a tortfeasor cannot be held liable[159]

In the PETL this model has not been followed. The PETL adopts a so-called 'flexible system.'[160] The question whether or not a person had sufficient insight into or control of his or her behaviour has to be answered from case

154 Van Dam 2013, p. 269.

155 § 153 ABGB fixes the limit at 14 years. However, the presumption is rebuttable, so that the plaintiff may prove that, in a concrete situation, a younger child had enough capacity of discernment to justify its individual liability: H. Koziol, 'Fault under Austrian Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, pp. 14-15.

156 No liability for children under 7 (§ 828 par. 1 BGB; see U. Magnus & G. Seher, 'Fault under German Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 107.

157 Tortious immunity up to 14 years of age: art. 6:164 BW.

158 Art. 1052(1) LOA provides that all children under the age of fourteen are deemed to lack fault capacity: see Lahe 2013, p. 146.

159 See P. Widmer, 'Comparative Report', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 344.

160 European Group of Tort Law, *Principles of European Tort Law. Text and Commentary*, Wien/New-York: Springer 2005, p. 80.

to case, according to the mental development of that person. This is also the case with regard to Belgian law.[161]

A liability on grounds of equity has been chosen in the Swiss OR 2020. Art. 57 OR 2020 reads as follows:

> 'B. Haftung urteilsunfähiger Personen. 1 Wenn es der Billigkeit entspricht, kann das Gericht auch eine urteilsunfähige Person, die Schaden verursacht hat, zum Ersatz verurteilen.'[162]

This liability depends on the financial means of the child and the needs of the victim.[163]

From a comparative perspective, the French system of personal liability of children occupies a particular position. In 1984, the Cour de Cassation had to decide about a 7-year-old boy who deliberately bumped into another boy in a school playground, as a consequence of which the latter hit a bench and was seriously injured.[164] The French Supreme Court held the 7-year-old boy liable, because his conduct could be qualified as a fault regardless of whether he has reached the age of discretion.[165] The Cour de Cassation decided that the standard of reference that had to be applied to the case was not a child of the same age but an adult, *le bon père de famille*.[166] What do we think about this opinion?

The French approach might be considered as 'interesting and instructive',[167] because concerns about the imposition of liability on children who have not reached the age of discretion might be alleviated by the fact that such liability has little practical significance, as the victims tend to only pursue an action against their parents.[168] The French rule of liability of *infantes* (very young children) should also be interpreted in relation to the tort law culture of France that generates as much compensation as possible for a victim for the damage he has suffered. In other words, it fits in with the French articulation of distributive justice. Furthermore, in most cases the risk of damage caused by minors is covered by liability insurance.[169] Finally, legal systems that show regard for the restricted capacity of children provoke a contradiction by refusing to take the subjective abilities of other persons into account.[170]

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161 H. Cousy & D. Droshout, 'Fault under Belgian Law', in: P. Widmer (ed.), *Unification of Tort Law: Fault*, The Hague: Kluwer Law International 2005, p. 37.

162 B. Liability of persons lacking capacity. 1 On grounds of equity, the court may also order a person who lacks capacity to compensate for the damage he or she has caused.

163 Compare with the German provision of § 829 BGB; see Van Dam 2013, p. 270.

164 See Van Dam, 2013, p. 273.

165 Cour de Cassation 2e ch. civ. 12 December 1984, *Gaz. Pal.* 1985, 235.

166 Van Dam 2013, 273.

167 Koziol, Comparative Stimulations 2015, p. 106.

168 Koziol, Comparative Stimulations 2015, p. 106.

169 Koziol, Comparative Stimulations 2015, p. 106.

170 Koziol, Comparative Stimulations 2015, p. 143.

On the other hand, however, it cannot be denied that the legal position of young children can be severely threatened if their liability is not covered by a liability insurance.[171] Applying an objective standard is not in the interest of young children, because they are not able to meet the standard of the reasonable adult *bonus pater familias*.[172] It has also been argued that 'leaving (child) tortfeasors with extremely limited economic resources and depriving them of the possibility of carrying on their lives in a way held compatible with European societies' and legal systems' values and minimum standards, may also constitute a violation of their fundamental rights, namely the rights to human dignity, development of personality, equality, private autonomy, minimal livelihood, maximal development, and special protection of children'.[173]

We agree with Koziol that, in view of a future harmonisation of European tort law with regard to liability for damage caused by children, two alternatives exist:[174]

> 'On the one hand in developing the French system of a combination of children's (…) liability for objectively wrongful behaviour without taking regard of subjective capacity (…), combined with social liability insurance and redress against supervisors in case of negligent supervision. On the other hand, the traditional system (…) of taking into regard of subjective capacity of children (…) in combination with a general subjective notion of fault, also in regard to adults (…) and, thus, not only with regard to children.'

We believe that the second option is to be preferred. However, being aware of the majority of jurisdictions and scholars who nowadays continue to defend the idea of an objective assessment of fault, a 'third way' may be considered in order to find a solution for what Van Dam calls the dilemma between emotional objections to the liability of children on the one hand (the element of corrective justice) and the desirability of liability of children to protect victims (the element of distributive justice).[175]

That compromise might be found in the adoption of the rules on liability for damage caused by children as laid down in the Dutch Civil Code. The Dutch solution combines strict liability of parents until a certain age and the presumed fault of parents at a later age, with the lack of fault of children until a certain age and children's tortious liability according to the general fault-based liability standard at a later age.[176] This might be an interesting path to follow. However, in view of the existing age limits in the current legal

171 Koziol; Comparative Stimulations 2015, p. 140.
172 Van Dam 2013, p. 269.
173 Ferreira 2011, p. 582.
174 Koziol, Comparative Stimulations 2015, pp. 145-156.
175 Van Dam 2013, p. 269.
176 Ferreira 2011, p. 588.

systems (from the age of seven in Germany until the age of fourteen in Estonia), fixing the limit of children's personal liability at the age of twelve seems more realistic in an attempt to harmonise the existing rules. Moreover, with an age limit of twelve, the insurability of the risk (low premiums) would be easier to maintain, bearing in mind the statistics with regard to criminal behaviour committed by minors over that age. But let us stay prudent: many scholars are not in favour of fixing children's liability at a certain age. 'While the concept of legal certainty can be used for the use of rigid age limits', writes Koziol, 'the counterarguments would seem to outweigh this concern: this concerns subjective imputation and as the personal development of children varies considerably and in diverse situations very different powers of discernment are required, rigid age limits thus lead to results which in individual cases cannot be objectively justified.'[177]

7 Conclusion

In this paper we have drawn some lines for a future harmonised tort law with regard to (a) the importance of fault liability, (b) the definition of fault and (c) the assessment of fault by a well-determined yardstick.

(a) Illustrated by the case of parental liability we showed that the existing and proposed tort law regimes in Europe differ to a great extent. At both ends of the tort law spectrum, regimes of fault liability and strict liability could be found. In our paper we did not aim to provide an answer to the question whether strict liability rules should, in certain cases, replace existing fault liability rules. The choice of mere strict liability regimes rather than preserving classical fault liability approaches is just a matter of policy: should tort law focus exclusively on distributive justice (strict liability), or is corrective justice (fault liability) the fundamental goal?

(b) In order to overcome the existing catastrophic Babylonian confusion about the meaning of the concept of fault in the harmonisation and reform projects examined, we reiterated an opinion in this contribution that we defended already seven years ago in this BWKJ series.[178] Fault should only be defined as legal blameworthiness. An unfortunate confusion of the concept of fault with the concept of wrongfulness[179] or with a combination of wrongfulness and blameworthiness should be avoided. By taking

177 Koziol, Comparative Stimulations 2015, p. 792.
178 De Tavernier & Van der Weide 2008, pp. 119-148.
179 For a future harmonised tort law, we propose to delete the concept of wrongfulness and to replace it by the twofold requirement of (1) the proof of the factual elements of the offence (impairment of a protected interest) and (2) negligence (breach of an objective duty).

Dutch law into consideration we therefore proposed in this paper to use the current concept of fault only in a strict sense of attributability, that is to say blameworthiness, or in Dutch: *schuld* (art. 6:162 DCC). Moreover, according to our opinion, the word 'fault' as used in the articles 6:169, 6:170, 6:171 and 6:172 DCC – referring to a combination of wrongfulness and attributability – should be replaced by 'a wrongful act that can be attributed to the tortfeasor'. Our proposal implicates that we cannot identify with a series of soft law and reform proposals, such as the DCFR, in which the concept of fault has been carefully avoided, or the Projet Terré, in which the concept of fault converges with the concept of negligence. Acceptance of our proposal will lead to a terminological shift of the Dutch Civil Code provisions into which the concept of fault is incorporated.[180] However, we would like to emphasise that we do not aim to adjust the requirements for tortious liability in general.

(c) Against the background of the kaleidoscopic image of both the definition of fault and its assessment, we have proposed that the concept of fault must be interpreted in a subjective way. In case of the liability of children, we therefore do not adhere to the French approach that does not take the tortious capacity and the blameworthiness of children into consideration. This leads us to the following question. Do we prefer to leave the assessment of the tortious capacity to judicial discretion, or do we give preference to a rigid age limit that excludes the liability of a child? We prefer the latter solution, but by taking the insurability of the risk of damage caused by the child into account, we propose to replace the current limit of fourteen years of age by that of twelve years of age. In this case legal certainty and predictability should prevail over *Einzelfallgerechtigkeit*.

180 With the exception of art. 6:162 DCC, where fault is used in the sense of blameworthiness (*schuld*).

6 Prescription
A private-law concept at the forefront of fundamental rights protection

Ruben de Graaff ▪

1 FUNDAMENTAL RIGHTS AND PRIVATE LAW – A TALE OF TWO 'LIVING INSTRUMENTS'

If the defendant successfully relies on an absolute prescription period, the claimant has no right of action anymore. This is problematic in 'long-tail' cases, when the losses are concealed and cannot be established before the absolute prescription period lapses. The prime example is the development of lung cancer as a result of the exposure to asbestos. As the latency period is very long, the victim usually becomes aware of the losses after the claim is already time-barred. Other claimants face similar problems, for example victims of childhood abuse or victims of crimes against humanity committed by the State. It is questionable whether they can be expected to be fully aware of the losses and familiar with the possibility to hold the person responsible liable before the prescription period lapses.

These are first of all problems that have to be solved within the system of private law, under its own rules and principles, including the right to access to a court, which is recognised as a fundamental principle of civil procedural law. However, they can also be understood in terms of fundamental rights law, because the right to access to a court is recognised under art. 6 of the European Convention on Human Rights (hereafter: Convention or ECHR) as well. A court that is confronted with these problems therefore has to take into account two 'living instruments' of law – private law and the Convention – each with their own distinctive developments and possibilities.

In practice, the protection of fundamental rights in the private sphere depends very much on a construction of private-law concepts that complies with the requirements derived from fundamental rights law. An evolution has to come from within the system of private law in the first place, as Lord Bingham argued in the context of the law of tort:

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> '[T]he question does arise whether the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems or whether it should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention. I prefer evolution.'[1]

Against the background of the relationship between the Convention system, national constitutional law and national private law, this contribution examines the *influence* of the right to access to a court under art. 6 ECHR on the *core concept* of prescription, with a focus on the prescription of 'long-tail' claims. Has private law been able to fashion 'appropriate remedies', or has a solution only been reached after this contemporary problem has been 'swept up by the Convention'?

In order to fully understand the interplay between private law and fundamental rights, the general constitutional framework is first analysed. As the European Court of Human Rights (hereafter: ECtHR or Strasbourg Court) has a subsidiary role and often leaves a considerable margin of appreciation to the national authorities, national courts are encouraged to come up with solutions to fundamental rights problems. This task is becoming more important, because the Strasbourg Court is in crisis and transition (section 2). However, Strasbourg jurisprudence still serves as a valuable substitute for national constitutional arguments in the Netherlands (section 3) and the United Kingdom (section 4), countries that do not have a separate constitutional court and do not have a tradition of judicial review on the basis of a national constitutional document.[2]

In this constitutional context, an important role has been preserved by and for private law. Within Dutch private law, one instrument is of particular importance: the possibility to set aside binding statutory rules on the basis of art. 6:2 (2) of the Dutch Civil Code (hereafter: DCC) (section 5). It is this provision that has been used to 'remedy' the problem of the prescription of 'long-tail' claims (section 6), before this issue reached the Strasbourg Court (section 7). After having examined the compatibility of Dutch private law with the relevant requirements arising from recent Strasbourg jurisprudence (section 8), it is argued that an evolving interpretation of the core concepts of the Dutch Civil Code can be used to contribute to the protection of fundamental rights in the Netherlands (section 9).

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1 Lord Bingham in his dissenting judgment in House of Lords 21 April 2005, [2005] *UKHL* 23, at 50 (*JD/East Berkshire Community Health NHS Trust*), a case about the possible liability of a local authority to parents whose children had been wrongfully taken into care.

2 The United Kingdom does have a Human Rights Act, which incorporates the Convention rights into the British legal order. See further in section 4.

2 WHAT THE STRASBOURG COURT EXPECTS FROM NATIONAL COURTS

In order to understand the interplay between the Convention and national law, it is essential to grasp the general principles that should be followed by national courts in matters touched on by the Convention.[3] The Preamble emphasises the importance of the ECHR as a system of 'collective enforcement' of fundamental rights. The national authorities have the primary responsibility to safeguard the Convention rights, and it is up to the Strasbourg Court to supervise their compliance and to protect fundamental rights in the last instance. The Court has a *subsidiary* role:

> 'The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. (…) The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. (…) By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.'[4]

The margin of appreciation doctrine is a corollary of this principle of subsidiarity. The scope of the margin of appreciation – between 'wide' and 'narrow' – determines the leeway afforded to national authorities to interpret and apply the Convention within their domestic systems. It is important to stress that the Court uses the margin of appreciation doctrine to define the relationship between the Convention system and the national authorities. The doctrine is not meant to dictate the position of national courts towards the legislature and executive bodies. In the words of the Court, the doctrine 'cannot have the same application to the relations between the organs of State at the domestic level'.[5]

Formally, the obligations under the Convention do not go further than remedying the breach in the instant case.[6] The respondent State has 'a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing

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3 J.H. Gerards, 'Samenloop van nationale en Europese grondrechtenbepalingen – hoe moet de rechter daarmee omgaan?', *TvCR* 2010, pp. 224-255; J.H. Gerards, 'The European Court of Human Rights and the national courts – giving shape to the notion of "shared responsibility"', in: J.H. Gerards & J.W.A. Fleuren, *Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak. Een rechtsvergelijkend onderzoek* (Report for the Dutch Research and Documentation Centre WODC, 2013), Nijmegen: Radboud Universiteit Nijmegen 2013, pp. 71-124.

4 ECtHR 7 December 1976, 5493/72, at 48 (*Handyside/United Kingdom*); ECtHR 23 July 1968, 1474/62, at I.B.10 (*Belgian Linguistic case*).

5 ECtHR 19 February 2009, 3455/05, at 184 (*A. and others/United Kingdom*).

6 Art. 46 ECHR.

before the breach'.[7] The Court does not only decide individual cases on their merits, though. It has the task 'to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'.[8] When the Court is faced with a new case, the Court considers 'whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States'.[9]

From the perspective of the Court, national courts have to guarantee compliance and the State can be held accountable before the Court if they have not fulfilled this duty. But can national courts provide a higher level of protection than the Convention requires? art. 53 ECHR plays a central role here:

> 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'

This provision must be interpreted as meaning that the Convention system guarantees a *minimum* level of fundamental rights protection, which has to be observed by the executive, legislative and judicial branches of the State, also when they act in a private capacity, or when they regulate and decide matters of private law.[10] In principle, it is not problematic if national authorities afford a level of fundamental rights protection higher than the protection provided under the Convention. On the contrary: the level of national fundamental rights protection matters, because the level of protection under the Convention is influenced by the commonly accepted standards in the different member States of the Council of Europe.[11] The Court is informed and inspired by these standards. It may accept a certain interpretation of the Convention when there is a general agreement amongst the majority of the States parties.[12]

The *minimum* level of protection may be hard to determine. A certain problem may not yet have reached the Court, and even when it has, the answer may be ambiguous or leave a considerable margin of appreciation to the national authorities. It may also be difficult to determine the *minimum* level of protection when one fundamental right has to be weighed against another fundamental right, or against other interests. It has to be ensured that 'generos-

7 ECtHR 31 October 1995, 14556/89, at 34 (*Papamichalopoulos and Others/Greece*).
8 ECtHR 7 January 2010, 25965/04, at 197 (*Rantsev/Cyprus and Russia*).
9 ECtHR 9 June 2009, 33401/02, at 163 (*Opuz/Turkey*).
10 The latter point has been reaffirmed in ECtHR 16 December 2008, 23883/06, at 33 (*Khurshid Mustafa and Tarzibachi/Sweden*), referring to ECtHR 13 July 2004, 69498/01, at 59 (*Pla and Puncernau/Andorra*).
11 ECtHR 25 April 1978, 5856/72, at 31 (*Tyrer/United Kingdom*).
12 Gerards 2013, p. 88, with examples.

ity for one party does not lead to a disproportionate burden for the other'.[13] Take for example art. 6 ECHR. The prescription of a claim limits the right to access to a court of the claimant in order to protect the legitimate expectations of the defendant. Both interests are protected under art. 6 ECHR, and both interests have to be weighed to decide whether the prescription period serves a legitimate aim and satisfies the principle of proportionality in the case at hand.

It is clear that in the end, the Court sets the standards and determines whether the national authorities have complied with their obligations. Yet the initial assessment has to be made by the national authorities. That task is becoming more important, because the Strasbourg Court is in crisis and transition. In crisis, because the Court still faces a serious backlog of admissible applications with no prospect of a definitive solution,[14] despite recent reforms.[15] In transition, because these reforms – including the prioritisation of applications,[16] the pilot judgment procedure,[17] the possibility to declare an application inadmissible when the applicant 'has not suffered a significant disadvantage'[18] and the future introduction of an advisory opinions procedure[19] – indicate that the Court focuses more of its attention on the most serious and systemic problems, and on important questions of interpretation of the ECHR,[20] and less on the delivery of justice in each individual case.[21]

13 R.A. Lawson, 'Beyond the Call of Duty? Domestic Courts and the Standards of the European Court of Human Rights', in: H.J. Snijders & S. Vogenauer (eds.), *Content and Meaning of National Law in the Context of Transnational Law*, Munich: Sellier 2009, p. 38.

14 By the end of November 2015, 64,450 applications were still pending before a judicial formation, compared to a total of 69,900 in January 2015 (http://echr.coe.int/Documents/Stats_month_2015_ENG.pdf, last accessed 5 January 2016).

15 For an overview of the latest developments, consult the *CDDH report on the longer-term future of the system of the European Convention on Human Rights* (CDDH(2015)R84 Addendum I), Strasbourg: December 2015 (www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/CDDH(2015)R84_Addendum%20I_EN-Final.pdf, last accessed 5 January 2016).

16 Rule 41 of the Rules of Court enables the Court to have regard to the importance and urgency of the issues raised in deciding the order in which cases are to be dealt with.

17 Rule 61 of the Rules of Court enables the Court to select one or more applications for priority treatment, in order to be able to identify the structural problems underlying repetitive cases and give the Government clear indications of the type of measures needed to remedy these problems.

18 Art. 35 (3)(b) ECHR.

19 In the near future, highest national courts may ask the Strasbourg Court for an preliminary advisory opinion (Protocol No. 16 to the ECHR). The Protocol is optional and will enter into force if it is ratified by a minimum of 10 member States (Art. 8 of the Protocol). As of 11 December 2015, the Protocol was signed by 16 and ratified by 6 member States.

20 Brighton Declaration, issued after the High Level Conference on the Future of the European Court of Human Rights on 20 April 2012, at 33 (www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf, last accessed 5 January 2016).

21 S. Greer & L. Wildhaber, 'Revisiting the Debate about "constitutionalizing" the European Court of Human Rights', *Human Rights Law Review* 2012, p. 686.

National authorities have to follow the principles arising from the judgments by the Court and have to guarantee that they are quickly and effectively implemented in national law and judicial decision-making. The question whether, and to what extent, national *courts* will come up with these solutions, as opposed to the legislative or executive branch, is primarily a question of national law.[22] The answer depends on constitutional and institutional considerations, such as the need for a legal basis in national law to provide fundamental rights protection.

3 WHY NATIONAL FUNDAMENTAL RIGHTS PROTECTION IS LIMITED

When it comes to fundamental rights protection, the Netherlands forms an exception to the European rule.[23] It does not have a specialised constitutional court that reviews legislation. On the contrary, judicial review of primary legislation against the rights embodied in the Constitution is prohibited.[24] art. 120 of the Dutch Constitution reads:

> 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'[25]

Are the courts nonetheless entitled to review primary legislation against other constitutional norms, notably fundamental principles of Dutch law? Reluctantly, the Supreme Court decided that Dutch courts may not review primary legislation against such legal principles either.[26] Such a review is only possible

22 National courts may also provide additional protection on the basis of EU law or international human rights law, but these categories fall outside the scope of this contribution.

23 J. Uzman, T. Barkhuysen & M.L. van Emmerik, 'The Dutch Supreme Court: A Reluctant Positive Legislator?', in: A.R. Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators*, Cambridge: Cambridge University Press 2013, p. 646.

24 Even if such a review were possible, the Constitution would be of little help, because the right of access to a court is not embodied in the Constitution. In 2014, a draft bill was tabled to include such a provision in the Dutch Constitution, see *Kamerstukken II*, 2014/15, 31 570, no. 25, p. 5-6.

25 In Dutch:'De rechter treedt niet in de beoordeling van de grondwettigheid van wetten en verdragen.' A translation of the Constitution is available on www.government.nl. Legislation has been proposed to allow judicial review against national constitutional rights: 'Voorstel van wet van het lid Halsema tot verandering in de Grondwet, strekkende tot invoering van de bevoegdheid tot toetsing van wetten aan een aantal bepalingen van de Grondwet door de rechter', *Kamerstukken II*, 2009/10, 32 334, 2, pp. 1-2. On 5 March 2015, the proposal was discussed in the Lower House (*Tweede Kamer*). There is no two-thirds majority in that house, so the future of this proposal is uncertain, see *Handelingen II* 2014/15, 60, item 11, pp. 1-24.

26 HR 14 April 1989, ECLI:NL:HR:1989:AD5725, *NJ* 1989/469, at 3.6 (*Harmonisatiewet*). The Supreme Court did so reluctantly, because it made clear that it deemed the legislation at issue to violate the legitimate expectations of the students concerned, and thus to violate the principle of legal certainty (*Harmonisatiewet*, at 3.1).

when the circumstances and interests at stake have not been considered by the legislature during the decision-making process.[27]

That is not to say that Dutch courts do not review primary legislation against fundamental rights standards. On certain conditions, treaty provisions – such as the Convention rights – have a direct effect in the Dutch legal order, as is stipulated in art. 93 of the Dutch Constitution.[28] Individuals may challenge legislative acts for violation of such treaty provisions on the basis of art. 94 of the Dutch Constitution:

> 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.'[29]

Dutch courts are thus caught between a ban and a command: they shall not review primary legislation against the Constitution, but they shall review primary legislation against international law with direct effect.[30] Although the courts do not have the power to annul legislative acts, they are empowered to set aside a conflicting provision of national law in the instant case,[31] or to interpret that provision in conformity with the demands of international law. On this basis, the courts have enforced – and sometimes clarified[32] – the requirements arising from the Convention and Strasbourg jurisprudence.[33]

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27 *Harmonisatiewet*, at 3.9.

28 On the assessment of direct effect: HR 10 October 2014, ECLI:NL:HR:2014:2928, *NJ* 2015/12 (*Staat/Nietrokersvereniging CAN*).

29 In Dutch: 'Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties.' This kind of review is not the exclusive prerogative of the Dutch Supreme Court, but may be exercised by any court in the Netherlands: Uzman, Barkhuysen & Van Emmerik 2013, p. 646.

30 Dutch courts are also obliged to ensure the effective application of EU law. From the perspective of the Court of Justice of the EU, this is not a matter of national constitutional law, but a matter of EU law itself: ECJ 5 February 1963, Case 26/62 (*Van Gend & Loos*); ECJ 15 July 1964, Case 6/64 (*Costa/E.N.E.L.*); ECJ 9 March 1978, Case 106/77, at 21 (*Amministrazione delle Finanza dello Stato/Simmenthal SpA*). A discussion on the interaction between EU law and national constitutional law is beyond the scope of this contribution.

31 An increasing number of authors argues that the courts may also declare a provision *generally* non-binding on the basis of Art. 94 of the Dutch Constitution. This should only be possible if the courts are convinced that the statutory rule cannot be applied lawfully to any case, which is a rare occasion and certainly not the case when it concerns the law of statutory limitations. See for further discussion and references J. Uzman, *Constitutionele remedies bij schending van grondrechten* (diss. Leiden), Deventer: Kluwer 2013, pp. 70-85.

32 In the context of criminal procedural law, the Supreme Court has, for example, given further guidance after ECtHR 27 November 2008, 36391/02 (*Salduz*) and subsequent judgments by the Strasbourg Court, in: HR 30 June 2009, ECLI:NL:HR:2009:BH3079, *NJ* 2009/349; HR 1 April 2014, ECLI:NL:HR:2014:770, *NJ* 2014/268; HR 22 December 2015, ECLI:NL:HR:2015:3608.

33 Gerards & Fleuren 2013, with many examples.

In spite of its imperative wordings, art. 94 of the Constitution has its limits. The possibility to interpret legislation in conformity with international law is – to some extent – limited by general rules of interpretation.[34] While a consistent interpretation may therefore not be feasible, setting aside the conflicting statutory rule may not be effective, because it does not remedy the underlying problem. The Supreme Court decided that in such a case, the need to provide effective legal protection has to be weighed against the need for the courts to exercise restraint when developing new rules and intervening in existing statutory regulations.[35] The courts may fill the resulting gap by falling back on another statutory rule, provided that this solution is in concordance with the statutory legal system and the rules already laid down for similar situations.[36] However, if different solutions are possible and if the choice between those options involves considerations of public policy, the courts have to defer the question to the legislature – at least for the time being.[37]

art. 94 of the Constitution is also limited when it comes to the interpretation of the content of the Convention itself. This became clear when the Dutch Supreme Court was asked to decide whether same-sex couples have the right to marry under art. 1:30 DCC. Such a right could not be derived from art. 12 ECHR, which grants the right to marry to 'men and women' and is interpreted by the Strasbourg Court as referring to 'the traditional marriage between persons of opposite biological sex'.[38] According to the Supreme Court, there was no 'sufficient basis' to interpret the content of art. 12 ECHR as being 'more dynamic' than followed from Strasbourg jurisprudence.[39]

In another landmark case, the Supreme Court was asked whether the obligation to provide for the cost of the care and the upbringing of a child under art. 1:394 DCC only rested on 'the man' – as the provision stated – or also extended to a female companion who 'has agreed to an act which could have resulted in the begetting of the child'.[40] The right to family life under

34 S.K. Martens, 'De grenzen van de rechtsvormende taak van de rechter', *NJB* 2000, p. 750. In practice, these limits can be stretched in order to effectively enforce fundamental rights, see for examples Uzman 2013, pp. 60-63.

35 HR 12 May 1999, ECLI:NL:HR:1999:AA2756, *NJ* 2000/170, at 3.14 *et seq.* (*Arbeidskostenforfait*).

36 This part of the test essentially stems from HR 30 January 1959, *NJ* 1959/548 (*Quint/Te Poel*).

37 See for an overview of the relevant case law Uzman 2013, pp. 119-136.

38 ECtHR 17 October 1986, 9532/81, at 49 (*Rees/United Kingdom*). In 2010, the Court noted that the institute of marriage 'has undergone major social changes since the adoption of the Convention', but was not prepared to decide that Art. 12 ECHR grants this right to same-sex couples, because 'there is no European consensus regarding same-sex marriage'. See ECtHR 24 June 2010, 30141/04, at 58 (*Schalk and Köpf/Austria*)

39 HR 19 October 1990, ECLI:NL:HR:1990:AD1260, *NJ* 1992/129, at 3.4. Since 1 April 2001, Art. 1:30 BW has read as follows: 'A marriage may be entered into by two persons of a different or of the same sex.'

40 This contribution relies on the translation by H. Warendorf *et al.*, *The Civil Code of the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2013.

art. 8 ECHR did not require the State to grant the child such a claim. The Supreme Court held:

> 'Art. 53 ECHR leaves the national legislature the discretion to provide more protection than the provisions of the ECHR do. However, the Dutch courts are bound by art. 94 of the Dutch Constitution, which states that statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties. Such a conflict cannot be determined solely on the basis of an interpretation by the national – Dutch – courts of the concept of "family life", in view of recently adopted legislation, which leads to more protection than may be assumed on the basis of the case law of the ECtHR with regard to art. 8 ECHR.'[41]

On the one hand, art. 94 of the Constitution obliges the courts to enforce the Convention rights, on the other hand the Supreme Court cautions that the courts have to conform to the interpretation of those rights by the Strasbourg Court. This has prompted constitutional lawyers to conclude that the Supreme Court exercises more restraint when there is no 'clear mandate by the European Court of Human Rights'.[42] In a series of judgments, the House of Lords, now the Supreme Court of the United Kingdom, seems to have taken a similar position. It is useful to take note of this debate, in order to understand the relationship between the Convention system, national constitutional law and national private law.

4 THE 'MIRROR PRINCIPLE': NO MORE, NO LESS

The United Kingdom does not have a constitutional court and does not have a codified, but an 'unwritten' constitution, which is derived from a number of sources, such as statute law, common law and constitutional conventions.[43] As it is a dualist State, international law does not have any direct effect until it is incorporated into the domestic legal order.[44] Despite the fact that the

41 HR 10 August 2001, ECLI:NL:HR:2001:ZC3598, *NJ* 2002/278, at 3.9: 'Art. 53 EVRM laat de nationale wetgever de vrijheid om een verdergaande bescherming te bieden dan de bepalingen van het EVRM geven. De Nederlandse rechter is evenwel gebonden aan art. 94 Gr.w, ingevolge welke bepaling binnen het Koninkrijk geldende wettelijke voorschriften geen toepassing vinden, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen. Een zodanige onverenigbaarheid kan niet worden aangenomen uitsluitend op basis van een uitleg door de nationale – Nederlandse – rechter van het begrip "family life" in het licht van recent tot stand gekomen wetgeving, die leidt tot een verdergaande bescherming dan op grond van de rechtspraak van het EHRM met betrekking tot art. 8 EVRM mag worden aangenomen.'

42 Uzman, Barkhuysen & Van Emmerik 2013, p. 659.

43 P. Leyland, *The Constitution of the United Kingdom. A Contextual Analysis*, Oxford: Hart 2012, Chapter 2.

44 The exception to the rule being EU law, which constitutes an autonomous legal order (footnote 30).

United Kingdom was amongst the founding fathers of the Convention, it lasted until 1998 before the Convention rights were incorporated into the Human Rights Act.

Prior to the adoption of the Human Rights Act, Lord Bingham, then Lord Chief Justice, stated that the Act would allow British courts to make 'a significant contribution (…) in the development of the law of human rights'.[45] In the *Ullah* case, however, Lord Bingham ruled that an evolving interpretation of the Human Rights Act was not to be preferred. Here, apparently, the law should remain static until either the legislature or the Strasbourg Court flexes its muscles:

> 'It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[46]

This approach was supported by the other Lords and has been coined the 'mirror principle'.[47] The message is twofold: national courts are not obliged to provide additional protection and they *should* not provide such protection, because that would risk undermining the uniformity of the Convention and would involve a choice that should be made by the legislature. In the *Al-Skeini* case, Lord Brown even reversed the last sentence: the courts should do 'no less, but certainly no more'. He added that a 'danger' of a more generous interpretation of the Convention by the highest national court is that 'the member state cannot itself go to Strasbourg to have it corrected'.[48]

A number of objections have been raised against the 'mirror principle'.[49] First of all, no distinction is made between clear, unclear and non-existent Strasbourg jurisprudence. The principle seems to prevent domestic courts from developing the interpretation of the ECHR, even when there is no clear Strasbourg authority. Second, the Strasbourg Court itself does not think that the Convention should be applied in a strictly uniform manner. As we have seen, the Court leaves a margin of appreciation to the national authorities, who have

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45 Statement by Lord Bingham in the House of Commons on 3 November 1997: HL Deb, Vol. 582, col. 1245, referred to by Lady Hale, Justice of the Supreme Court: B. Hale, '*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?', *Human Rights Law Review* 2012, p. 70.

46 House of Lords 17 June 2004, [2004] *UKHL* 26, at 20 (*R. (Ullah)/Special Adjudicator*).

47 J. Lewis, 'The European Ceiling on Human Rights', *Public Law* 2007, pp. 720-747.

48 House of Lords 13 June 2007, [2007] *UKHL* 26, at 106 (*Al-Skeini and others/Secretary of State for Defence*).

49 Lewis 2007, p. 720 *et seq.*; T. Rainsbury, 'Their Lordships' Timorous Souls', *UCL Human Rights Review* 2008, pp. 32-52; Lord Irving, 'A British Interpretation of Convention Rights', *Public Law* 2012, p. 237 *et seq.*; Hale 2012.

the primary responsibility to safeguard the Convention rights and are 'evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests'.[50] Third, the result of the 'mirror principle' is that controversial questions are not only deferred to the legislature, but also to another court: the Strasbourg Court.[51]

The Supreme Court of the United Kingdom has not yet overruled the 'mirror principle' as such, but its application has been refined in later jurisprudence. With regard to the first point ('no less'), the Supreme Court has made it clear that it may refuse to follow Strasbourg authority,[52] although it would have

> 'to involve some truly fundamental principle or some most egregious oversight or misunderstanding before it could be appropriate (…) to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level'.[53]

With regard to the second point ('no more'), the Supreme Court has shown that it does interpret the Convention rather independently in the absence of clear Strasbourg authority.[54] Such an approach has been suggested by Lord Wilson:

> 'At any rate where there is no directly relevant decision of the ECtHR with which it would be possible (even if appropriate) to keep pace, we can and must do more. We must determine for ourselves the existence or otherwise of an alleged Convention right. And, in doing so, we must take account of all indirectly relevant decisions of the ECtHR and, in particular, of such principles underlying them (...).'[55]

Lord Mance even warned against a 'tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights'. He indicated that the common law embraces many of the rights that are protected under the Convention as well:

> 'In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence (…).

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50 *Pla and Puncernau/Andorra*, at 46.
51 Rainsbury 2008, p. 36.
52 Supreme Court (United Kingdom) 9 December 2009, [2009] *UKSC* 14, *per* Lord Phillips, at 11 (*R./Horncastle*).
53 Supreme Court (United Kingdom) 16 October 2013, [2013] *UKSC* 63, *per* Lord Mance, at 27 (*R. (on the application of Chester)/Secretary of State for Justice*).
54 For example in House of Lords 18 June 2008, [2008] *UKHL* 38 (*In re P. and others*). See for other examples Hale 2012, pp. 71-77.
55 Supreme Court (United Kingdom) 17 December 2014, [2014] *UKSC* 67, at 105 (*Moohan and another/The Lord Advocate*). Lord Wilson refers to similar statements in other judgments of the Supreme Court (at par. 104).

> And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.'[56]

This may have been a strategic statement, in an attempt to take the wind out of the sails of critics who claim that the Strasbourg Court imposes unwanted policies on the United Kingdom, and to anticipate a possible retreat of the United Kingdom from the Convention system. This threat is not at all imaginary, because the Conservative Party has proposed to 'scrap the Human Rights Act and curtail the role of the European Court of Human Rights'.[57] However, it is also very sensible to take domestic law as the natural starting point, as a matter of judicial policy. Not in order to refuse to follow Strasbourg authority, but to see how domestic law can contribute to the protection of fundamental rights. And as long as fundamental rights protection on the basis of national constitutional law remains limited, an evolving interpretation of other domestic rules may serve as a valuable alternative.

5 Standards of reasonableness and fairness as a valuable alternative

In the Dutch context, it is interesting to focus the attention on one private-law instrument that shows striking similarities with art. 94 of the Dutch Constitution: the possibility to set aside binding rules, in particular statutory provisions, in private relationships. This possibility was acknowledged already under the former Dutch Civil Code,[58] but has been codified in art. 6:2 (2) DCC:

> 'A rule binding upon [obligee and obligor, RdG] by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.'[59]

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56 Supreme Court (United Kingdom) 26 March 2014, [2014] *UKSC* 20, *per* Lord Mance, joined by Lord Neuberger and Lord Clarke, at 46 (*Kennedy/The Charity Commission*).

57 The Conservative Party Manifesto 2015, pp. 58-60, available through www.conservatives.com/manifesto.

58 Art. 1374 (3) of the former DCC stipulated that contracts had to be executed in 'good faith'. This provision has been used by the Supreme Court to rule that a private party may not invoke a statutory rule in certain circumstances, for example in: HR 29 April 1983, ECLI:NL:HR:1983:AG4579, *NJ* 1983/627 (*Spruijt/Sperry Rand Holland*); HR 1 July 1983, ECLI:NL:HR:1983:AB7666, *NJ* 1984/149 (*Herzfeld/Groen*); HR 13 November 1987, ECLI:NL:HR:1987:AC3287, *NJ* 1988/254 (*X/Y*); HR 20 January 1989, ECLI:NL:HR:1989:AD0580, *NJ* 1989/322 (*Wesselingh/Weisz*).

59 Art. 6:2 (2) DCC. In Dutch: 'Een tussen [schuldeiser en schuldenaar, RdG] krachtens wet, gewoonte of rechtshandeling geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn.'

The 'standards of reasonableness and fairness' filter through the entire law of obligations and even the law of property in general.[60] They are used to interpret, to supplement or – in this case – to correct the law. Although the latter possibility is not considered to be a 'review' of the relevant rule, but merely a derogation thereof in a specific case, the result seems hard to square with the *Wet Algemeene Bepalingen* – an Act from 1829 that holds general provisions about the applicability of the law – which stipulates in art. 11 that 'the judge must rule according to statutory law', and that 'under no circumstances, may he judge the inner value or fairness of statutory law'.[61] Just like art. 94 of the Dutch Constitution, art. 6:2 (2) DCC is an important exception to this old rule.

Both provisions allow the courts not to apply otherwise applicable statutory rules to the cases presented to them, but the focal point is different. While art. 94 of the Dutch Constitution focuses on international law, art. 6:2 (2) DCC uses a different angle:

> 'In determining what reasonableness and fairness require, generally accepted principles of law, current juridical views in the Netherlands and the societal and private interests involved in the case must be taken into account.'[62]

Standards of reasonableness and fairness can be considered to include fundamental rights norms,[63] but their interpretation is not limited by the content and direct effect of these international norms, as is the case under art. 93 and 94 of the Dutch Constitution. The Supreme Court has always emphasised that art. 6:2 (2) DCC has to be applied with restraint. And in 2014, the Supreme Court added for the first time that the instrument may not be used to interfere with the express considerations of the legislature:

> 'Because the constitutionality of Acts of Parliament may not be reviewed by the courts against any other law than international law (art. 120 of the Dutch Constitution), the courts may not review the considerations of the legislature against general legal principles or (other) unwritten law (cf. HR 14 april 1989, ECLI:NL:HR:1989:AD5725, NJ 1989/469 (Harmonisatiewet)). The same holds true when that review is placed

60 The new Dutch Civil Code contains many references, see for an overview H.J. Snijders, 'Redelijkheid en billijkheid in het vermogensrecht van het Burgerlijk Wetboek voor en na 1992', *Ars Aequi* 2012, pp. 771-778.

61 In Dutch: 'De regter moet volgens de wet regt spreken: hij mag in geen geval de innerlijke waarde of billijkheid der wet beoordeelen.'

62 Art. 3:12 DCC. In Dutch: 'Bij de vaststelling van wat redelijkheid en billijkheid eisen, moet rekening worden gehouden met algemeen erkende rechtsbeginselen, met de in Nederland levende rechtsovertuigingen en met de maatschappelijke en persoonlijke belangen, die bij het gegeven geval zijn betrokken.' The list is not exhaustive: M.v.A. II, *Parl. Gesch. Inv. Boek 3*, p. 1035.

63 C. Mak, *Fundamental rights in European contract law* (diss. Amsterdam UvA), Alphen aan den Rijn: Kluwer Law International 2008, p. 41.

in the key of the reasonableness and fairness that govern the legal relationship between parties to a contract (art. 6:2 and 6:248 DCC).'[64]

In that sense, the mandate under art. 6:2 (2) DCC is perhaps more limited than the mandate under art. 94 of the Dutch Constitution. Yet art. 6:2 (2) DCC does have an added value. It provides a statutory basis to reach a result that is in conformity with the demands of fundamental rights law. This is also important for those cases that may not benefit from a review against those rights. Parties may, for instance, not have invoked fundamental rights norms,[65] while the courts are not bound to apply such norms *ex officio*.[66] It may also be the case that the parties have relied on fundamental rights norms, but that these norms do not provide enough direction, because Strasbourg jurisprudence is ambiguous or leaves a considerable margin of appreciation, or because a certain problem has not yet reached the Strasbourg Court.[67] One of the important examples within Dutch private law is the solution for the prescription of long-tail claims, which is discussed in the following sections.

6 Prescription and the right to access to a court in the Netherlands

In some cases, the prescription of a claim is problematic, because the losses are concealed and cannot be established before the prescription period lapses. The prime example is the development of mesothelioma, a type of lung cancer that is caused almost exclusively by exposure to asbestos, when fibres are inhaled or ingested into the body.[68] The disease is very aggressive and causes the death of most patients within the period of one or two years after diag-

64 HR 19 December 2014, ECLI:NL:HR:2014:3679, *NJ* 2015/344, at 3.6.1 (*Bosentan*): 'In verband met het grondwettelijke verbod wetten in formele zin te toetsen aan ander recht dan internationaal recht (art. 120 Grondwet), kan de rechter de afweging van de wetgever niet toetsen aan algemene rechtsbeginselen of (ander) ongeschreven recht (vgl. HR 14 april 1989, ECLI:NL:HR:1989:AD5725, NJ 1989/469 (Harmonisatiewet)). Dat geldt ook indien die toetsing plaatsvindt in de sleutel van de redelijkheid en billijkheid die de rechtsverhouding van partijen bij onder meer een overeenkomst beheersen (art. 6:2 en 6:248 BW).'

65 In the *Bosentan*-case, concerning the question whether a health insurer should cover the costs for an experimental medical treatment, the parties could have relied on international law (e.g. Art. 2 ECHR), but they did not. The case was decided on the basis of Art. 6:2 (2) DCC.

66 ECtHR 15 November 1996, 18877/91 (*Ahmet Sadik/Greece*).

67 HR 13 November 1987, ECLI:NL:HR:1987:AC3287, *NJ* 1988/254 (*X/Y*) is an early example.

68 There is therefore no problem of multiple causality, as may be the case with other forms of lung cancer, caused both by asbestos and by the smoking habit of the victim itself. For those problems, the Dutch Supreme Court has decided on a solution based on proportional liability in HR 31 March 2006, ECLI:NL:HR:2006:AU6092 (*Nefalit/Karamus*).

nosis.[69] In the Netherlands, approximately 330,000 employees were exposed to asbestos in the past.[70] It is expected that 12,400 of them will die as a result of mesothelioma in the period of 2000-2028.[71] The latency period of the disease is very long: usually thirty to forty years between initial exposure and diagnosis.[72] This is problematic for the patients, because art. 3:310 (2) DCC stipulates that 'the right of action to compensate for the loss shall in any event be prescribed on the expiry of thirty years from the occurrence of the event which caused the loss'.[73]

The Dutch legislature offered a solution for such personal injury cases by adding a new paragraph to art. 3:310 DCC:

> 'In derogation of paragraphs 1 and 2, a right of action to compensate for damage by injury or death is prescribed only upon the expiry of five years from the beginning of the day following the one on which the person prejudiced has become aware of both the damage and the identity of the person responsible therefor. If the person prejudiced was a minor on the day on which the damage and the identity of the person responsible therefor became known, the right of action is prescribed only on the expiry of five years from the beginning of the day following the one on which the person prejudiced became of age.'[74]

Since this provision has no retroactive effect and has only been applicable from 1 February 2004 onwards, many old cases are governed by the long period of thirty years. One of those cases concerned Mr. Van Hese, who was employed as a painter with *De Schelde*, a shipbuilding company, from 16 March 1957 until 7 June 1963, where he was exposed to asbestos. In the course of 1996, Van Hese was diagnosed with mesothelioma. He died shortly after, at the age of 61. Before his death, Van Hese commenced proceedings against *De Schelde*, claiming both material and non-material damages.

His heirs continued this lawsuit against his former employer. *De Schelde* claimed that the action for damages was barred because Van Hese had been exposed to the asbestos more than thirty years earlier.[75] The heirs of Van Hese tried to convince the courts not to apply the long prescription period, mainly on the basis that such a strict application would, in the given circumstances,

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69 Gezondheidsraad, *Asbest: Risico's van milieu- en beroepsmatige blootstelling* (Report no. 2010/10), Den Haag: Gezondheidsraad 2010, p. 33.

70 Gezondheidsraad 2010, p. 30.

71 Gezondheidsraad 2010, p. 23, referring to O. Segura, A. Burdorf, C. Looman, 'Update of predictions of mortality from pleural mesothelioma in the Netherlands', *Occupational and Environmental Medicine* 2003, pp. 50-55.

72 Gezondheidsraad 2010, p. 41.

73 Art. 3:310 (2) DCC.

74 Art. 3:310 (5) DCC.

75 HR 28 April 2000, ECLI:NL:HR:2000:AA5635, *NJ* 2000/430, at 3.1 (*Van Hese/De Schelde*).

be contrary to 'standards of reasonableness and fairness' under art. 6:2 (2) DCC.[76] Before the Supreme Court, they raised another argument: strict application of the long prescription period would be contrary to art. 6 ECHR, which should have been taken into account by the lower courts.[77]

This was not the first time the Supreme Court had to rule on the validity of a long prescription period. In earlier cases, the Supreme Court had been very reluctant. Faced with a case of medical malpractice[78] and a case concerning childhood abuse,[79] the Supreme Court admitted that it may be hard to accept that an action is barred by prescription before there could be awareness of the losses on the side of the claimant, but that the long prescription period should be applied strictly, because of the important aim of providing legal certainty, also in the interest of the defendant.

Faced with the case of Van Hese, the Supreme Court again acknowledged the importance of the 'principle of legal certainty', but decided to provide a window of opportunity for 'exceptional cases', when the losses are concealed and cannot be established before the prescription period lapses. The Supreme Court noted that the legislature had not considered such a possibility when drafting the applicable law on statutory limitations.[80] The Supreme Court decided that the courts may declare the prescription period inapplicable on the basis of art. 6:2 (2) DCC, because application would, in the given circumstances, be contrary to 'standards of reasonableness and fairness'. On the basis of certain factors, a court must assess whether a case is indeed that exceptional:

a) whether it concerns the compensation of pecuniary losses or non-pecuniary losses, and whether the amount of compensation benefits the victim himself, his heirs or a third party;
b) whether there exists a claim for compensation on another ground;
c) whether the defendant may be blamed for the event that caused the losses;
d) whether the defendant calculated, or should have calculated, the possibility that he would be found liable for the losses;
e) whether the defendant still has a chance of reasonably defending himself;
f) whether the liability is covered by insurance;

76 In the first and second instance, the heirs also argued that the moment that the tumour starts to grow should be considered 'the event which caused the loss', and not the moment of exposure (*Van Hese/De Schelde*, at 3.2).

77 In addition, the heirs invoked Art. 1, 3, 5 and 13 ECHR, Art. 3 and 11 of the European Social Charter and Art. 7 of the International Covenant on Economic, Social and Cultural Rights. The arguments raised by the heirs have been published in *NJ* 2000/430. These arguments are not considered in this contribution.

78 HR 3 November 1995, ECLI:NL:HR:1995:ZC1867, *NJ* 1998/380, at 3.4 (*Van B./Vereniging voor Diaconessenarbeid*).

79 HR 25 June 1999, ECLI:NL:HR:1999:ZC2934, *NJ* 2000/16, at 5.1.

80 *Van Hese/De Schelde*, at 3.3.1. This may have been an implicit reference to the exception created in *Harmonisatiewet*. See further in section 3.

g) whether the claimant brought his claim within a reasonable period after the diagnosis.[81]

This discretion has not only been used in cases of mesothelioma. The Supreme Court has reaffirmed the possibility to set aside a statutory prescription period in a case concerning custody.[82] And the District Court The Hague has set aside the relevant prescription period in several cases concerning the liability of the State for crimes committed by Dutch military forces in Indonesia in the period from 1945 to 1949.[83]

The list of factors has been criticised for its lack of clarity: it is neither exhaustive nor hierarchical, and some factors may be interpreted both as favourable and as detrimental to the position of the claimant.[84] Courts do not always pay attention to all factors in their judgments,[85] despite the fact that the list is imperative.[86] In practice, culpability (c), the chance of conducting a defence (e) and the expeditiousness of the claimant (g) are compelling factors for lower courts in reaching a decision.[87] The decision on factor (g) may be regarded as preliminary: if the claimant has not acted within two years after diagnosis, he has wasted his chances.[88] While lower courts have thus contributed to greater clarity and consistency,[89] several authors still call on

81 *Van Hese/De Schelde*, at 3.3.3.

82 HR 20 June 2014, ECLI:NL:HR:2014:1492, at 3.6.2.

83 District Court The Hague 14 September 2011, ECLI:NL:RBSGR:2011:BS8793, at 4.13-4.14, and District Court The Hague 11 March 2015, ECLI:NL:RBDHA:2015:2442, at 4.4-4.18; District Court The Hague 27 January 2016, ECLI:NL:RBDHA:2016:701, at 4.4-4.24; District Court The Hague 27 January 2016, ECLI:NL:RBDHA:2016:702, at 4.5-4.22.

84 J.L. Smeehuijzen, 'Naar een scherpere gezichtspuntencatalogus bij verjaring van asbestzaken', *AV&S* 2005, pp. 48-60; J.L. Smeehuijzen, *De bevrijdende verjaring* (diss. VU Amsterdam), Deventer: Kluwer 2008, p. 256-258; J.E. Jansen, 'Geen bevrijdende verjaring zonder rechtsverwerking', *RMThemis* 2009, p. 215.

85 J.P. Quist, *Gezichtspunten in het privaatrecht* (diss. Rotterdam), Den Haag: Boom Juridische uitgevers 2014, p. 331.

86 Most lists of the Dutch Supreme Court are not imperative (Quist 2014, pp. 63-65). Quist criticises the use of imperative lists, because it does not encourage parties and the courts to consider other relevant factors (Quist 2014, pp. 577-578). In some mesothelioma cases, lower courts do consider other factors, such as the fact that the victim died at the age of 87 years (The Hague Court of Appeal 25 January 2011, ECLI:NL:GHSGR:2011:BP1109), or the exposure to asbestos during a previous employment (Subdistrict Court Almelo 25 August 2009, ECLI:NL:RBALM:2009:BJ9333).

87 M.R. Hebly & S.D. Lindenbergh, 'Doorbreking van de absolute verjaring in geval van mesothelioomclaims: de toepassing van de gezichtspunten uit Van Hese/De Schelde', *AV&S* 2013, pp. 162-172.

88 Hebly & Lindenbergh 2013, p. 171. This period of two years was advised by T. Hartlief, Jac. Hijma & H.J. Snijders, *Advies over doorbreking van de verjaringstermijn en stelplicht en bewijslast voor aansprakelijkheid voor het Instituut asbestslachtoffers* (report of 6 Februari 2009), pp. 34-35. The report can be consulted via www.asbestslachtoffers.nl.

89 According to Wolters, case law shows more consistency than is presumed in literature: P.T.J. Wolters, 'Het vaste gewicht van de gezichtspunten van Van Hese/De Schelde', *AV&S* 2015, pp. 15-25.

the Supreme Court to indicate the relative importance of the different factors.[90]

What influence did art. 6 ECHR have on this outcome? The argument was raised by the heirs and played a prominent role in the reasoning of the Advocate-General.[91] Yet it does not seem to have influenced the decision, and it is used by the Dutch Supreme Court to justify the outcome only in a limited way. On the one hand, the Supreme Court noted that the long period of prescription restricted the right to access to a court under art. 6 ECHR, but that this restriction fell within the 'margin of appreciation' of the States parties, considering the length of the period and the important aim of legal certainty. On the other hand, the Supreme Court noted that its solution for 'exceptional cases' was nonetheless 'in line with' the right of access to a court under art. 6 ECHR.[92]

7 Prescription and the right to access to a court before the ECtHR

At that time, the leading ECtHR judgment on the compatibility of limitation periods with art. 6 ECHR was *Stubbings/United Kingdom*.[93] The case concerned Ms. Leslie Stubbings, born on 29 January 1957, who alleged that she had been sexually assaulted by her adoptive father Webb on a number of occasions between December 1959 and December 1971. Since 1976 Stubbings experienced severe psychological problems (schizophrenia, emotional instability, paranoia, depression and agoraphobia). She was hospitalised on three occasions and attempted suicide once. Allegedly, it was only after she consulted a psychiatrist in September 1984 that Stubbings realised her mental health problems may have been caused by the childhood abuse. In August 1987, she brought an action in damages against her adoptive parents and brother.

It was unclear which limitation period was applicable to the facts of the case. Under section 2 of the Limitation Act 1980, the general period of limitation for an action in tort is six years from the date on which the cause of action accrued, or from the eighteenth birthday.[94] The courts have no discretion to extend this period in favour of the claimant. Under section 11(1), the period of limitation for 'any action for damages for negligence, nuisance or breach of duty' is three years from either the date when the cause of action accrued or the 'date of knowledge',[95] whichever is the later. Section 33(1) does give

90 Smeehuijzen 2005 and 2008, supported by Chr.H. van Dijk, 'Kroniek verjaring en stuiting: de praktijk blijft weerbarstig', *AV&S* 2011, p. 15 and Hebly & Lindenbergh 2013, p. 172.
91 Opinion of Advocate-General Spier, ECLI:NL:PHR:2000:AA5635, at 9.1-9.9.
92 *Van Hese/De Schelde*, at 3.3.2.
93 ECtHR 22 October 1996, 22083/93 and 22095/93 (*Stubbings/United Kingdom*).
94 When it concerns an infant, the period expires after six years from the eighteenth birthday: section 28(1) in conjunction with section 38(2) of the Limitation Act 1980.
95 As defined in section 14 of the Limitations Act 1980.

the courts the discretion to disapply this period when 'it would be equitable to allow an action to proceed'. As has been the case in the Netherlands since *Van Hese/De Schelde*, the courts have to take into account certain factors in exercising this discretion. They 'shall have regard to all the circumstances of the case', and in particular to:

a) the length of, and the reasons for, the delay on the part of the claimant;
b) the effect of this delay upon the evidence;
c) the conduct of the defendant after the cause of action arose, including his or her response to the claimant's reasonable request for information;
d) the duration of any disability of the claimant arising after the accrual of the cause of action;
e) the extent to which the claimant acted promptly and reasonably once he or she knew that he or she might have a claim;
f) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he or she may have received.[96]

Unfortunately for victims of childhood abuse, the Lords unanimously decided that section 11(1) applied in cases of *accidentally* inflicted injuries, and not in cases of *intentionally* inflicted injuries, such as rape and indecent assault.[97] As a result, claims for compensation for psychological injury caused by childhood abuse were subject to the general period of limitation of six years under section 2 and the courts could not exercise any discretion on the basis of section 33(1). The Law Commission described this result as 'anomalous', because 'a claimant who has been sexually abused by her father may have longer to bring a claim for damages against her mother for negligently failing to prevent the abuse than to bring a claim against her father for actually committing the abuse'.[98]

Four British nationals, including Ms. Stubbings, decided to lodge applications against the United Kingdom before the Strasbourg Court. They complained that this construction by the House of Lords of the Limitation Act 1980

96 Section 33(3) of the 1980 Limitation Act 1980, summarised by the author.
97 House of Lords, [1993] *AC* 498 (*Stubbings/Webb*).
98 The Law Commission, *Limitation of Actions* (Report No. 270, laid before the Parliament on 9 July 2001), p. 2 (www.lawcom.gov.uk/wp-content/uploads/2015/03/lc270_Limitation_of_Actions.pdf, last accessed 5 January 2016). In 2008, the House of Lords overruled *Stubbings/Webb* in *A/Hoare* (House of Lords 30 January 2008, [2008] *UKHL* 6). From that moment on, section 11(1) does include sexual assault, and the courts may exercise their discretion under section 33 in favour of victims of childhood abuse. Art. 6 ECHR and the Human Rights Act are not mentioned in *A/Hoare*.

violated their right of access to a court under art. 6 ECHR.[99] The Court recalled that art. 6 ECHR embodies the right to institute proceedings before a court in civil matters, but noted:

> 'However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with art. 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'[100]

The Court showed restraint when applying these standards to the cases of childhood abuse. According to the Court, limitation periods in personal injury cases pursue 'several important purposes'. They ensure 'legal certainty and finality', protect defendants from 'stale claims which might be difficult to counter' and prevent problems of 'evidence which might have become unreliable and incomplete because of the passage of time'.[101] The prescription period of six years from the eighteenth birthday was 'not unduly short' and could have been used by the applicants to initiate civil proceedings.[102] In addition, 'criminal prosecution could be brought at any time and, if successful, a compensation order could be made'.[103] The very essence of the right of access to a court had therefore not been impaired, according to the majority.[104]

Whereas the Strasbourg Court acted with restraint in *Stubbings/United Kingdom*, recent cases show that the Court is prepared to find a violation. One of those judgments is *Moor/Suisse*.[105] For the first time, the Strasbourg Court had the chance to examine the compatibility of a strict application of limitation periods to mesothelioma cases with art. 6 ECHR. The case concerned Hans

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99 In addition, all of the applicants complain that the difference in the rules applied to themselves and other types of claimants was discriminatory, contrary to Art. 14 ECHR. Furthermore, three applicants, including Ms. Stubbings, complain that the State has failed in its positive obligation to protect their right to respect for their private lives, by failing to provide them with a civil remedy, contrary to Art. 8 ECHR, also in combination with Art. 14 ECHR. These complaints are not considered in this contribution.

100 *Stubbings/United Kingdom*, at 50.

101 *Stubbings/United Kingdom*, at 51.

102 *Stubbings/United Kingdom*, at 52-53.

103 *Stubbings/United Kingdom*, at 52.

104 The Court noted that this may not be a perfect solution to the underlying problem, but found that it was up to the national authorities to consider making 'special provision for this group of claimants in the near future'. *Stubbings/United Kingdom*, at 56.

105 ECtHR 11 March 2014, 52067/10 and 41072/11 (*Moor /Suisse*), only available in French.

Moor, who worked as a machine fitter with *Oerlikon* (now *Alstom*) from 1965 until 1978, where he was exposed to asbestos. In May 2004, just before his retirement, he was diagnosed with mesothelioma. In November 2005, he died at the age of 58.

Before his death, Moor commenced proceedings against *Alstom*. After his death, these proceedings were continued by his two daughters as heirs. His daughters also joined the proceedings commenced by Moor's wife against the Swiss *Caisse nationale suisse d'assurance en cas d'accidents*. Ultimately, the Federal Supreme Court of Switzerland dismissed both claims, because they were subject to a prescription period of ten years after the events which caused the damage.[106] Mother and daughters lodged an application in Strasbourg, claiming that art. 6 ECHR had been breached. They argued that their right of access to a court was rendered theoretical and illusory, because the prescription period of ten years expired before they could have been aware of the losses.[107]

The Strasbourg Court first reiterated its statements in *Stubbings/United Kingdom* and acknowledged that limitation periods pursue the legitimate aim of providing legal certainty. It also repeated its findings in *Eşim/Turkey*, where it stated that 'in personal injury compensation cases, the right of action must be exercised when the litigants are actually able to assess the damage that they have suffered'.[108] The Court then acknowledged that a strict application of absolute limitation periods to persons suffering from diseases which could not be diagnosed until many years after the triggering events deprives those persons of the chance to assert their rights before the courts.[109] The Court considered that when it is scientifically proven that a person could not know that he or she was suffering from a certain disease, as is the case with mesothelioma, that fact should be *taken into account* ('devrait être prise en compte') in *calculating the limitation period* ('pour le calcul du délai de péremption ou

106 Art. 20 (1) Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördemitglieder und Beamten: 'Die Haftung des Bundes (Art. 3 ff.) erlischt, wenn der Geschädigte sein Begehren auf Schadenersatz oder Genugtuung nicht innert eines Jahres seit Kenntnis des Schadens einreicht, auf alle Fälle nach zehn Jahren seit dem Tage der schädigenden Handlung des Beamten.' Art. 127 Obligationenrecht: 'Mit Ablauf von zehn Jahren verjähren alle Forderungen, für die das Bundeszivilrecht nicht etwas anderes bestimmt.' And Art. 130 Obligationenrecht: '1 Die Verjährung beginnt mit der Fälligkeit der Forderung. 2 Ist eine Forderung auf Kündigung gestellt, so beginnt die Verjährung mit dem Tag, auf den die Kündigung zulässig ist.'

107 Appealing to the motto of the ECtHR that the Convention must be interpreted in a manner which renders its rights 'practical and effective, not theoretical and illusory'. ECtHR 9 October 1979, 6289/73, at 24 (*Airey/Ireland*) and ECtHR 21 February 1975, 4451/70 (*Golder/United Kingdom*), where the ECtHR constructed Art. 6 ECHR to include the right of access to a court.

108 ECtHR 17 September 2013, 59601/09, at 25 (*Eşim/Turkey*).

109 *Moor/Suisse*, at 77.

de prescription').[110] The Court concluded, with a six-one majority, that art. 6 ECHR had been violated.

After *Moor/Suisse*, it is clear that a strict application of absolute limitation periods on mesothelioma cases impairs the very essence of the right to access to a court under art. 6 ECHR and does not fall within the 'margin of appreciation' of the States parties, as the Dutch Supreme Court suggested in *Van Hese/De Schelde*. Moreover, it is clear that a solution has to be found for all personal injury cases that involve losses that remain concealed and cannot be established before the prescription period lapses. The Dutch Supreme Court has provided a solution under art. 6:2 (2) DCC for old cases that are not governed by art. 3:310 (5) DCC. Does this solution comply with the requirements arising from *Moor/Suisse*?

8 THE COMPATIBILITY OF *VAN HESE/DE SCHELDE* WITH ART. 6 ECHR

The Strasbourg Court has not indicated how national authorities should take the long latency period 'into account', or what it means that 'the right of action must be exercised when the litigants are actually able to assess the damage that they have suffered'. The Dutch Supreme Court did mention seven relevant factors that lower courts have to take into account when they exercise their discretion under art. 6:2 (2) DCC. According to several authors,[111] the Dutch Minister of Justice[112] and several lower courts,[113] the current Dutch practice is in conformity with *Moor/Suisse*. Others call the compatibility of *Van Hese/De Schelde* with art. 6 ECHR into question.[114] After all, Dutch courts may still decide not to exercise their discretion in favour of the claimant. Is that not contrary to art. 6 ECHR?

For the Strasbourg Court, the chance of conducting a defence (factor e) is a relevant circumstance as well. According to the Court, one of the 'important purposes' of prescription periods is to

110 *Moor/Suisse*, at 78.

111 M.R. Hebly, 'Werpt Straatsburg een nieuw licht op de verjaring van asbestclaims?', *Letsel & Schade* 2014, pp. 40-42; P.T.J. Wolters, 'Het vaste gewicht van de gezichtspunten van Van Hese/De Schelde', *AV & S* 2015, pp. 24-25; J. Emaus in her case note under *Moor/Suisse*, *EHRC* 2014/164, at 8.

112 *Aanhangsel Handelingen II* 2013/14, 1864.

113 District Court Midden-Nederland 10 November 2014, ECLI:NL:RBMNE:2014:5507, at 4.7; District Court Den Haag 5 November 2014, ECLI:NL:RBDHA:2014:13593, at 4.4-4.5; Court of Appeal The Hague 24 November 2015, ECLI:NL:GHDHA:2015:3152, at 4.5.

114 Statement of B. Ruers in the Dutch newspaper *Trouw*: 'Uitspraak Hof vergroot kans op schadevergoeding asbest', *Trouw* 3 April 2014, p. 7; Questions by the Dutch member of parliament De Wit to the Minister of Justice, *Aanhangsel Handelingen*, 2013/14, no. 1758; C.C. van Dam, *Aansprakelijkheidsrecht. Deel I: Rechtsbescherming, rechtsmiddel en rechtsherstel*, Den Haag: Boom Juridische uitgevers 2015, p. 49.

> 'protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.'[115]

It therefore seems appropriate to take this circumstance into account, even if this may not always have a beneficial effect on the outcome for the claimant.[116]

The Strasbourg Court does not consider the expeditiousness of the claimant (factor g). For Dutch courts, the decision on this point may be regarded as preliminary: if the claimant has not acted within two years after diagnosis, he has wasted his chances.[117] It is argued that this factor is not contrary to art. 6 ECHR. After all, the real problem in *Moor/Suisse* was that the claim was time-barred *before* the losses could be established. The requirement that the claimant has to bring his claim within a reasonable period *after* the diagnosis does not restrict or reduce the access to a court in such a way or to such an extent that the very essence of the right is impaired. It serves the legitimate aims of 'legal certainty and finality',[118] while it cannot be said that the period of two years is 'unduly short'.[119]

The Strasbourg Court does not consider whether the defendant may be blamed for the event that caused the losses (factor c). Hebly and Lindenbergh have shown that lower courts do examine whether the actual defendant could reasonably have been expected to know the health risks and take the precautionary measures. The courts do find it relevant, in this context, whether the employer produced or processed asbestos, and what kind of job the employee had at the time.[120] If there is little to blame the defendant, this factor may contribute to the decision that the court will not exercise its discretion in favour of the claimant. Hartlief, Hijma and Snijders caution that this is essentially a question of liability, and not of prescription.[121] That does not mean that the law should regard the question of culpability as irrelevant. But the law should deal with that problem under the question of whether the actual defendant may be held liable. Although it cannot be said that the current application is contrary to art. 6 ECHR, the fact that the Strasbourg Court does

115 *Stubbings/United Kingdom*, at 51; *Moor/Suisse*, at 72.
116 An additional argument may be that it is also a relevant factor under section 33(3) (b) of the Limitations Act 1980.
117 Hebly & Lindenbergh 2013, p. 171.
118 *Stubbings/United Kingdom*, at 51.
119 An additional argument may be that it is also a relevant factor under section 33(3) (e) of the Limitations Act 1980.
120 Hebly & Lindenbergh 2013, p. 166.
121 Hartlief, Hijma & Snijders 2009, pp. 35-36. Culpability is not a relevant question under section 33(3) of the Limitation Act 1980 either.

not examine whether the defendant may be blamed may constitute an argument for the Dutch Supreme Court to reconsider its case law on this point.[122]

The other circumstances mentioned in *Van Hese/De Schelde* are of minor importance in Dutch practice. Just as the Dutch Supreme Court, the Strasbourg Court finds it relevant to know whether the claimants have already been compensated on another ground (factor b), but such a compensation should not deprive them of the possibility to claim all their losses:

> 'Par ailleurs, la Cour ne méconnaît pas que les requérantes ont touché certaines prestations. Elle se demande cependant si celles-ci sont de nature à compenser entièrement les dommages résultés pour les intéressées de la péremption ou de la prescription de leurs droits.'[123]

The remaining circumstances are not mentioned in *Moor/Suisse*: whether it concerns the compensation of pecuniary losses or non-pecuniary losses, and whether the amount of compensation benefits the victim himself, his heirs or a third party (factor a), whether the defendant calculated, or should have calculated, the possibility that he would be found liable for the losses (factor d), and whether the liability is covered by insurance (factor f). As these factors are not compelling for Dutch courts either, it is argued that they will not lead to problems under art. 6 ECHR. It may be concluded that the solution provided in *Van Hese/De Schelde* for exceptional cases is generally in line with the current requirements under art. 6 ECHR. By providing this solution under art. 6:2 (2) DCC, private law has therefore been at the forefront of fundamental rights protection.

9 PRIVATE LAW AT THE FOREFRONT OF FUNDAMENTAL RIGHTS PROTECTION

Since the European Court of Human Rights has a subsidiary role and often leaves a considerable margin of appreciation to the national authorities, domestic courts have an important stake in protecting fundamental rights at the national level. Yet the possibilities to do so are limited in the Netherlands, because judicial review of primary legislation against the rights embodied in the Dutch Constitution is forbidden. And even though the Constitution obliges the courts to enforce the Convention rights, constitutional lawyers claim that the Supreme Court exercises considerable restraint when it is not backed by the European Court of Human Rights.

This contribution has balanced this claim by pointing out a *third way* to protect fundamental rights in the private sphere: an evolving interpretation

122 Provided that such a case is brought before the Supreme Court and provided that the argument is raised.

123 *Moor/Suisse*, at 76.

of the *core concepts* of the Dutch Civil Code. The solution to the problem of the prescription of 'long-tail' claims, the object of this study, illustrates this point. Fourteen years before the first mesothelioma case reached the Strasbourg Court, the Dutch Supreme Court decided that an absolute prescription period may be declared inapplicable on the basis of art. 6:2 (2) DCC. Strasbourg jurisprudence provided some guidance at the time, but the influence of art. 6 ECHR on this outcome has been fairly limited. Still, the Supreme Court did not defer the matter to the legislature, but used a private-law concept – the standards of reasonableness and fairness – to provide a solution that is in line with the requirements arising from recent Strasbourg jurisprudence, as this contribution has shown.

In the absence of judicial review against the Dutch Constitution, the Dutch Civil Code therefore provides a legal basis to reach a result that is in conformity with the demands of fundamental rights law. This is important, also for those cases that may not benefit from a review against those rights, because the parties did not rely on those rights, or because Strasbourg jurisprudence is unclear or silent on the matter. It is also important, as it is expected that the Strasbourg Court will increasingly focus its attention on the most serious and systemic problems, and on important questions of interpretation of the ECHR, and less on the delivery of justice in each individual case. In this constitutional context, a significant role has been preserved by and for private law.

PART III

Institution

7 Discharge of parental authority

Considerations regarding the compatibility of the new provision of the Dutch Civil Code with the European Convention on Human Rights

Mariëlle Bruning & Simona Florescu ▪

1 INTRODUCTION

The notion of parental responsibilities is closely related to the evolution of the legal position of the child. Historically, the legal position of the child has evolved from being seen as the property of the parents, to a vulnerable individual in need of protection to a rightholder in his/her own right.[1] The initial terminology of parental rights has also been gradually replaced by that of parental responsibilities so as to reflect the subordination of the parents' interests and rights to those of the children.[2]

It should be noted from the outset that there is no universal definition of 'parental responsibilities'. In the European Union 'parental responsibility' has been interpreted to mean 'all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access'.[3] Pursuant to the Dutch Civil Code (the 'DCC'), parental authority comprises the duties and rights of parents with regard to the care and upbringing of their child (Art. 1:247(1) DCC). Care and upbringing include the care and responsibility for the child's mental and physical well-being, and fostering the development of its personality.

State authorities may limit or withdraw parental responsibilities. Such limitations can be imposed via three different types of child protection orders,

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1 M.A. Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States,* Columbia University Press New York1994; J.M. Eekelaar, 'The Emergence of Children's Rights, *6 Oxford Journal of Legal Studies* 1986, 161.

2 S. Lifshitz, 'The Best Interests of the Child and Spousal Laws', in: Y. Ronen, C.W. Greenbaum (ed.), *The Case for the Child, Towards a New Agenda*, Intersentia Antwerp 2008, p. 46.

3 Art. 2(7) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L338/1, 2003.

as follows: a supervision order, a care order for the discharge of parental responsibilities,[4] and an emergency care order.

This contribution analyses the concept of discharge of parental responsibilities from the perspective of the Dutch Civil Code and the ECtHR.

Important legislative amendments to the DCC with regard to child protection orders (Arts. 1:254-278 DCC) that came into force on the first of January 2015 have led to a significant shift of legal conditions for discharge of parental responsibilities. The legal conditions for discharging parents of their responsibilities have been eased, so as to facilitate the possibilities for courts to impose such measures.

Until 1 January 2015 the legal conditions for discharge of parental responsibilities were focused on parental behaviour or parental failure (is a parent a 'good enough parent?'). Article 1:266 DCC referred to the parent being 'unfit or unable to fulfil the duty of caring for the child or its upbringing'. Relevant case law underscored the use of a discharge order as a measure of last resort.[5] As long as parents accepted that their child was living in alternative care with a supervision order, a discharge order was not legitimized.

The intention of the legislator with the recent amendments was to shift the attention from the parent(s) to the child. It is, however, important to assess whether the newly introduced conditions to discharge of parental rights are in line with the right to respect for family life of parents and child as is guaranteed in Article 8 of the European Convention on Fundamental Rights and Freedoms (the 'ECHR' or 'Convention'). Does the new DCC take sufficient account of the rights and interests of parents and children to stay together without state interference as guaranteed under Article 8 ECHR? The assessment of compliance with the ECHR is highly relevant from both a theoretical and practical perspective. According to Articles 93 and 94 of the Dutch Constitution, international human rights treaties or provisions which by nature of their content can be binding on everybody have binding power and shall take precedence over national law. The substantive ECHR provisions are directly enforceable in Dutch practice[6] and there have been several situations where the Netherlands had to change either its laws or its practice following negative rulings of the European Court of Human Rights (the 'ECthR' or 'Court').[7]

4 In this contribution the term 'discharge of parental authority' has been used. In the case-law of the ECtHR the terminology used is usually 'deprivation of parental responsibilities/ authority'.

5 HR 25 April 1997, *NJ* 1997/596; HR 7 April 2000, *NJ* 2000/563.

6 J.H. Gerards & J.W.A. Fleuren, *Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak*, Nijmegen: Radboud Universiteit 2013 (in opdracht van het WODC), pp. 35-36.

7 Following Salduz/Turkey (ECtHR 27 November 2008, no. 36391/02) & Panovits/Cyprus (ECtHR 11 December 2008, no. 4268/04) the Dutch Supreme Court on 30 June 2009 'implemented' the relevant conditions of the ECtHR with regard to juveniles' right to counsel during police interrogations (ECLI:NL:HR:2009:BH3081) and following S.T.S./the Netherlands (ECtHR 7 June 2011, no. 277/05) the Dutch Supreme Court overruled the established

Section 2 of this contribution focuses on the provisions of the DCC regarding discharge of parental responsibilities. For a clearer picture of the recent legislative changes, a brief outline of the relevant provisions of the 'old' DCC is provided. Section 3 presents an overview of the ECtHR's relevant case law, with a focus on the aspects which are likely to have an impact on the Dutch situation. Finally, section 4 assesses the impact of the European case law on the Dutch practice in the area of discharge of parental responsibilities.

2 Discharge of parental authority under Dutch law

The Dutch system of child protection as regulated in the DCC provides for three possible measures: a supervision order, a care order or an emergency protection order. A *supervision order* entails the temporary limitation of parental authority to a third person, without discharging the parents of their parental responsibilities. It may be imposed with or without the placement of the child in alternative care for a maximum of one year with the possibility of extension for successive one-year periods. A *care order* entails that the legal parents are discharged of parental responsibilities and a third party (natural or legal person) will be granted the custody over the child. Finally, an *emergency protection order* (emergency supervision order or emergency care order) may be imposed for a maximum duration of three months.

Bill No. 32 015, in force as of 1 January 2015, amended the DCC with respect to the imposition of care and supervision orders. According to the explanatory memorandum, this bill aims – in line with the UN Convention of the Rights of the Child ('CRC') – to better protect children against parents who fail to bring them up in a healthy and balanced manner.[8]

This section analyses the relevant provisions of the DCC with respect to discharge of parental responsibilities. For a better understanding of the current legislative framework, subsection 2.1. briefly illustrates the legal provisions in force before 2015. Subsection 2.2. highlights the new legal concept of discharge of parental responsibilities that was introduced on 1 January 2015.

2.1 Discharge of parental authority before 1 January 2015

Until 1 January 2015, the Dutch *care order* could be ordered by a court on two different legal grounds: (1) if the parent was 'unfit or unable to fulfil the duty of caring for the child or its upbringing' (Arts. 1: 266 and 268 DCC), or (2) on

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case law of the Supreme Court with regard to the inadmissibility of an appeal if the court's authorization to a juvenile's placement in alternative care had in the meantime lapsed (HR 24 June 2011, ECLI:NL:HR:2011:BQ2292; HR 14 October 2011, ECLI:NL:HR:2011:BR5151).

8 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 2.

grounds of abuse, certain irrevocable criminal convictions, an improper way of living, the serious disregard of the directions of the foundation responsible for the protection of the child or the existence of a well-founded risk of neglect of the best interests of the child because of the parent reclaiming or taking back the child from other caregivers (Art. 1:269 DCC).[9] As mentioned above the imposition of a care order resulted in the deprivation of parental responsibilities. The effect of discharge of parental authority, regardless of the ground used, was that the parent could no longer take decisions with regard to the upbringing of the child, which were entrusted to a third party. Where the court is convinced that a minor may again be confided to the discharged parent, it could reinstate such a parent with parental authority (Art. 1:277(1) DCC). Therefore the option to regain parental authority was always open to parents.

Further, it is important to note that discharge of parental authority did not entail a severance of ties between a child and its parents. Parents still had the right to (request) contact and access, children remained their heirs, the legal ties with their blood relatives such as grandparents remained equally unchanged, and parents' maintenance obligation to their children remained intact. The Dutch child protection system did not include an adoption order as the most far-reaching form of child protection, unlike many other European countries. Although theoretically adoption could be used as a protection measure, in practice it hardly happened. Adoption orders were only used for cases when parents were no longer alive or consented to an adoption.

However, it should be stressed that the Dutch courts showed reluctance to use the aforementioned *care order* and preferred ordering the other, less intrusive measure, the *supervision order*, which was perceived as temporary, to be discontinued as soon as the family reunification became possible.[10] Even when it was clear that the future of the child was not with the biological family but in foster care, case law shows that the supervision order was often used instead of a care order as long as parents consented to the placement in care of their child.[11] Courts perceived the care order – intended by the legislator

9 Until 1983 parents who were deprived of parental authority on the basis of intentional (mis)behaviour lost their right to vote; this reflects the punitive nature of the child protection order '*ontzetting*' that was established over 100 years ago; this first child protection order was introduced in 1905. The care order '*ontheffing*' (unintentional behaviour) was later introduced (in 1947). The supervision order was introduced in 1922 in combination with the introduction of the children's court judge.

10 Art. 1:262 DCC (until 1 January 2015 Art. 1:257 DCC) states that 'the help and support of the foundation shall be directed to ensure that the parent vested with parental authority shall as much as possible remain responsible for the care and upbringing (section 2) and shall foster the family ties between the parent and the minor (section 4)'.

11 See e.g. HR 8 May 1992, *NJ* 1992/498; HR 25 April 1997, *NJ* 1997/596. Several (law) reviews have criticized the use of supervision orders for long-term foster care placements; see e.g. *Met recht onder toezicht gesteld, Evaluatie herziene OTS-wetgeving*, Utrecht: Verweij-Jonker Instituut 2000 (law review supervision order); E.C.C. Punselie, *Juridische haken en ogen*, Den

for situations in which it was clear that parents had no educational role in the future upbringing of their child – as too far-reaching, too radical, and an unnecessary punishment for parents. This led to a child protection practice in which permanency planning for the child was rarely ordered.[12] It should also be recalled that, as stated above, a supervision order needed to be renewed annually. Therefore, due to the preference for this measure to the care order, children for whom it was clear that they would not return to their legal parents during childhood were faced with yearly court hearings and decisions. This led to tensions for the child and the foster parents as well as for the legal parents. All parties were uncertain about the situation of the child after another year of supervision by the court-appointed Youth Care Office which was made responsible for the implementation of the supervision order.

The Dutch Supreme Court nuanced this approach only in 2008.[13] It decided that a stable parental consent to placement in foster care of the child should be taken into account when deciding about a care order. However, such consent should not always preclude courts from imposing care orders while taking into account the child's best interests with regard to stability and continuity of his/her educational environment. The Supreme Court decision can be seen as precursory to the relevant legislative amendments that came into force on 1 January 2015.

Further, in practice the second type of care order provided for under Art. 1:269 DCC and based on the legal ground of intentional improper behaviour of the parents (*ontzetting*) was hardly used. Instead, the courts preferred to rely on the first ground, i.e. the parents' unfitness for or inability of the appropriate upbringing of the child (provided for under Art. 1:268 DCC). The existence of the two different legal grounds and provisions for a care order was therefore being questioned.[14]

Haag: Trillium 2000; Werkgroep wetgeving Beter Beschermd, *Kinderen Eerst!*, The Hague 2006 (governmental advisory group for the revision of child protection orders).

12 Until the 1980s the number of children faced with a supervision order or a care order was almost similar (in 1980 around 10,000 children with a supervision order and 10,000 children with a care order). As per 30 September 2012 the number of children faced with a supervision order (around 30,000 children) is four times higher than the number of children with a care order (around 7,500). See www.cbs.nl (search 'Bijna 40 duizend kinderen onder toezicht of voogdij').

13 HR 4 April 2008, *NJ* 2008/506.

14 See e.g. the Committee Wiarda 1971 (Commissie voor de herziening van het kinderbeschermingsrecht, *Jeugdbeschermingsrecht*, The Hague: Staatsuitgerij 1971; J.E. Doek, 'De ontheffing van het ouderlijk gezag – enige beschouwingen over de noodzaak van bezinning op en vernieuwing van de ontneming van gezag', *FJR* 1997, nr. 5, pp. 106-114; M.R. Bruning, *Rechtvaardiging van kinderbescherming – naar een nieuw maatregelenpakket na honderd jaar kinderbescherming* (diss. VU Amsterdam), Deventer: Kluwer 2001, p. 421).

2.2 Discharge of parental authority after 1 January 2015

As mentioned above, the care order could be imposed by courts on two different grounds: (i) unfitness or unwillingness to adequately care for a child or (ii) intentional misbehaviour of the parents. The effect of a care order, regardless of the ground used was the same, i.e. discharge of parental authority. Moreover, the second ground (intentional misbehaviour of parents) was rarely used in practice. These factors contributed to the legislator's decision to merge the two grounds into one provision for the new care order (the so-called 'discharge of parental authority'). Article 1:266 DCC as in force at the moment reads:

> 'The district court may discharge a parent of parental authority
> (a) if a minor grows up in a manner which constitutes a serious threat to his or her development, and the parent is unable to take responsibility for the child's upbringing within a period of time deemed reasonable for the person and the development of the minor, or
> (b) if the parent abuses his or her parental authority.'

This amendment was intended as a simplification of the two different types of care orders as described above.[15] In addition, the legislator aimed to better balance the care order and the supervision order. Until 2015, without parental consent a care order on the basis of unfitness or unwillingness of the parent(s), could only be imposed when a supervision order proved unsuccessful. In practice a supervision order was only followed by a care order when parents did not consent to or obstructed a placement in care. This led to long-term foster care arrangements without legal certainty for the child in alternative care, even when it was evident that the child could or would no longer go back to the original caregivers. Since the supervision order aimed to reunite the parent(s) and the child, the use of a supervision order for long-term foster care situations was often incongruous and led to many uncertainties for all parties involved.

The new care order aims at giving room for a direct discharge of parental authority when it is clear that there is no educational prospect for the child in the biological family within a period of time deemed reasonable for the child. Such a situation may occur, for example, when the primary caregiver of the child is a severe drug abuser and the child is in urgent need of care.[16] In this case a supervision order may not be of an added value.

Furthermore, the new wording used for care orders and supervision orders provides additional insight into the legislator's intent to better balance these two measures with the best interests of the child. Thus, a care order may be

15 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 11.
16 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), pp. 11-12.

imposed 'if a minor grows up in a manner which constitutes a serious threat to his or her development, and the parent is *unable* to care for the child within a period of time deemed reasonable for the person and the development of the minor' (Art. 1:266 DCC). Conversely, a supervision order may be imposed if 'a minor grows up in a manner which constitutes a serious threat to his or her development, and the parent is *able* to care for the child within a period of time deemed reasonable for the person and the development of the minor' (Art. 1:255 DCC).

The phrasing 'a period of time deemed reasonable for the person and the development of the minor' is intended to stimulate that decisions about the proper child protection order are made from the perspective of the child instead of the perspective of parental rights.[17] Decision-makers have to give child-specific reasons and must also deal with aspects related to the future situation of the child, including a time line for permanency planning. It is in line with current sociological research according to which young children need swifter permanent decisions about their educational environment and family situation.[18]

According to the explanatory memorandum, the interpretation of 'a time reasonable [for the child]' is dependent on the age and development of the child. The provision was left open intentionally, so as to allow for tailored approaches without imposing fixed time and age limits for the use of the supervision or care orders.[19]

The use of a supervision order for many consecutive years cannot normally be considered to be in line with the condition of 'a time reasonable for the child'. Nevertheless, the explanatory memorandum says that in order to adhere to the conditions that follow from Article 8 ECHR and the ECtHR's case law, in most situations a supervision order should precede a care order.[20] That is, the use of a care order following an unsuccessful supervision order better legitimizes why this far-reaching court decision is necessary in order to protect the child: because professional support aimed at keeping the family together or reuniting parent and child has failed and the care order thus responds to the principle of proportionality.

The explanatory memorandum further specifically mentions four factors that need to be taken into account when imposing a care order (discharge of parental authority) and when the child is living in foster care:[21,22]

17 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), pp. 7-9.

18 See e.g. F. Juffer, *Beslissingen over kinderen in problematische opvoedingssituaties. Inzichten uit gehechtheidsonderzoek*, Raad voor de Rechtspraak 2010. Download via: http://www.rechtspraak.nl (search: 'Juffer').

19 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 34.

20 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 35.

21 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 34.

'a. a foster child has the right to a full and harmonious development in foster care; therefore especially for young children permanency planning in relation to the educational and developmental perspective of the child is paramount;
b. if reuniting parent(s) and child is no longer feasible or realistic a yearly renewal of a supervision order will lead to uncertainty for all parties; in principle a long-term supervision order of several years with a yearly renewal of the court order is not the appropriate response;
c. the interests of the child to continuity in its upbringing and an undisturbed secure attachment relation should then prevail;
d. parents' consent to a placement in foster care of their child should not be decisive for an imposition of a care order.

If an authorized foundation responsible for the implementation of the supervision order requests a children's court judge to extend the supervision order with an outplacement of the child after two years, the request should comprise a recommendation of the Child Protection Board (Art. 1:265j(3) DCC). The Child Protection Board has been given a new legislative duty to review such requests and to consider whether an extension of the supervision order for the child in alternative care is indeed in his or her best interests and meets the 'time reasonable for the child' requirement. The new duty to review long-term supervision orders for children in alternative care reflects the legislator's goal to better respond to the child's best interests when deciding between a supervision order and a care order to protect the child.

Initially, the legislator intended to include a new duty for the Child Protection Board to have compulsory periodic reviews of whether the actions taken would best guarantee the rights of the child (Art. 1: 305(1) DCC). This compulsory periodic review was meant to have parties evaluate aspects such as the efforts made to move children from residential care to foster care, whether enough contact was secured between the child and its parents. However, this legal provision was ultimately not included as it was deemed that the guardianship agency was already conducting periodic reviews, which would render an actual legal obligation superfluous.

22 This article takes into account the legislative situation as of January 2015. Even if it does not form the scope of the present contribution, it should be noted that Dutch case law published after the drafting of the present contribution shows that courts continue to be reluctant in using a care order in situations of children in foster care with parents who cooperate. Although the Dutch legislator has clearly explained that a supervision order is not fit for situations of permanent foster care, both courts and the Child Protection Board that is responsible for requesting child protection orders to the court seem to be hesitant to use a care order when parents cooperate with long-term foster care of their child, even when it is clear that the child has no future at home; Hof Den Bosch 27 August 2015, ECLI:GHSHE:2015:3336; Rb. Overijssel 21 April 2015, ECLI:RBOVE:2015:2652. See for a care order decision that was not preceded by a supervision order to protect the child against further physical abuse Rb. Amsterdam 17 June 2015, ECLI:RBAMS:2015:3778.

It should be noted that the possibility of the district court to reinstate a parent with parental authority remains intact. The reinstatement may occur upon the parent's request if the court is convinced that this is in the child's best interests and that the parent is able to permanently bear responsibility for the child's upbringing (Art. 1:277(1) DCC). The interests of the child are paramount in these situations. Thus, sometimes, even if the parent meets the legal requirements to be reinstated with parental authority a court may rule against it if, for example, the child has been living in a foster family for a long period of time. Damaging this long-standing situation would be contrary to the child's best interests.[23]

3 DISCHARGE OF PARENTAL AUTHORITY BEFORE THE ECTHR

The previous section analysed the provisions of the new DCC with respect to discharge of parental authority. It has been shown that the DCC in force as of 1 January 2015 has brought substantial changes to matters of parental responsibilities especially by expanding the judges' discretion when deciding on discharge of parental duties. This section provides an overview of the case law of the ECtHR on matters of parental responsibilities. The focus will be on the requirements which may prove of specific relevance to the Dutch context.

The ECtHR has analysed cases of discharge of parental authority mainly from the perspective of Article 8 of the ECHR (right to respect for private and family life). Situations where applicants' complaints related to procedural matters such as length of proceedings[24] or access to a lawyer[25] which are more typically linked to Article 6 of the ECHR (the right to a fair trial) have been equally dealt with under Article 8 of the ECHR. The Court has justified its position by arguing that Article 8 includes implicit procedural guarantees.[26] For these reasons, this contribution will focus on the ECtHR's case law under Article 8 ECHR.

Further, before going into the case law analysis it is worth recalling that the main aim of the ECtHR is to secure the effective protection of individual fundamental rights.[27] The principle of effectiveness essentially entails that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[28] This aspect should be borne in mind when analysing the compatibility of Dutch practice with the ECtHR case law as the ECtHR will look beyond the formal definition ascribed

23 *Kamerstukken II* 2008/09, 32 015, no. 3 (MvT), p. 37.
24 ECtHR 28 June 2014, no. 40245/10 (*X/Slovenia*).
25 ECtHR 8 January 2013, no. 37956/11 (*A.K. and L/ Croatia*).
26 ECtHR 8 January 2013, no. 37956/11 (*A.K. and L/Croatia*), para 63.
27 ECtHR 9 October 1979, no. 6289/99 (*Airey/Ireland*), para 24.
28 ECtHR 9 October 1979, no. 6289/99 (*Airey/Ireland*), para 24.

to certain terms but rather how the discharge of parental authority works in practice, and what are the consequences in law and in reality of such a measure.

3.1 The scope of states' obligations under Article 8 ECHR

Article 8 ECHR provides:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The ECtHR has ruled that Article 8 primarily entails the states' obligations to refrain from interfering with family life (negative obligation). Whenever a state had interfered with family life, such interference would be compatible with Article 8 ECtHR if it was provided for by law, pursued a legitimate aim (in these cases usually the rights of others and the protection of health), and it was necessary in a democratic society, i.e. the reasons adduced for an interference were relevant and sufficient to the aim pursued. In the context of this analysis the decision whether there was a violation of Article 8 ECHR or not would depend on whether the reasons put forward were relevant and sufficient (the so-called proportionality analysis), notwithstanding the state's margin of appreciation. It is nevertheless worth mentioning that the 'legality requirement' may sometimes play a role as the ECtHR has developed an autonomous interpretation of the term 'provided for by law'.[29] Therefore, an interference does not only need to be provided for by national law, but the national law in question needs to be clear, accessible and foreseeable. In cases of restriction of parental rights, the discretion allowed to national authorities by law may raise certain issues. This matter was raised in *Olsson v Sweden* where the applicants complained that the authorities were allowed wide discretionary powers to intervene whenever the child's health and development were jeopardised, without requiring any actual proof of harm.[30] However, the ECtHR did not perceive this wide discretion as incompatible with the Convention requirements. The ECtHR emphasised that overly strict legal provisions may

29 D.J. Harris, M. O'Boyle & M. Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press: Oxford 2014

30 ECtHR 24 March 1988, no10465/83 (*Olsson/Sweden*), para 62.

interfere with the requirement that authorities intervene efficiently for protecting children from harm.
Further, in addition to the aforementioned negative obligation, the ECtHR will analyse whether the decision-making process was fair and ensured due respect for the interests safeguarded by Article 8 ECHR (procedural obligations).[31] As part of this requirement, the ECtHR looks whether the parent(s) and the children had been given the opportunity to participate in the proceedings, if they were heard, if they had been represented by an attorney, or if there were any other obstacles which in practice led to the impossibility to participate adequately in the proceedings which led to the removal of parental rights.

It should also be noted that cases of deprivation of parental rights give rise to positive obligations of the state. In cases of separation of parents from their children the positive obligations usually mean that the state needs to take steps to reunite children with parents. Further, the ECtHR repeatedly stated that the boundaries between negative and positive obligations do not lend themselves to precise definition.[32]

It is worth recalling that the ECtHR's intervention is limited by the principle of subsidiarity. One aspect of this principle is the 'margin of appreciation' doctrine. The margin of appreciation is essentially used by the ECtHR to refer to situations where the domestic authorities enjoy certain discretion in dealing with fundamental rights (see also section 3.2. below). The ECtHR will only intervene if the domestic authorities have overstepped this discretion.[33] Further limitation arises from the scope of review of the court. Thus, as repeatedly stated in its case law, the ECtHR will not act as a court of fourth instance, i.e. it will not review decisions of national courts unless there was a breach of a Convention Article.[34]

The paragraphs above outlined in general lines the states' obligations with respect to family cases under Article 8. The following section shall analyse the specific principles applicable to cases of separation of children from parents and deprivation of parental rights.

3.2 Principles for separation and deprivation of parental rights

Usually separation of parents and children precedes deprivation of parental rights. The basic assumption in the ECtHR's case law is that separation will only be temporary, for the least amount of time possible.[35] States should make

31 ECtHR 8 July 2004, no. 11057/02 (*Haase/Germany*), para 94.
32 ECtHR 25 November 2004, no. 23660/02 (*Vitters/The Netherlands*).
33 Harris, O'Boyle & Warbrick 2014, on p. 11.
34 Harris, O'Boyle & Warbrick 2014, on p. 11
35 ECtHR 18 June 2013, no. 28775/12 (*RMS/Spain*), para 71.

efforts to ensure that children are reunited with their parents as soon as reasonably possible.[36] Whenever deprivation of parental rights entails a permanent severance of the family ties, the state must put forward extraordinary compelling reasons for justifying such a measure.[37] Domestic authorities need to take into account the child's best interests at all stages. While the child's best interests are a primary consideration in cases of separation, a permanent severance of family ties (for example by deprivation of parental rights or putting a child up for adoption) requires an analysis of the child's best interests as a paramount consideration.[38] Also, the ECtHR stresses that in some circumstances the interests of children and parents do not coincide and the best interests of the child override those of the parent(s).[39]

Further, for all the above measures of separating parents from children, the states are allowed a certain margin of appreciation. The intervention of the ECtHR is inversely proportional to the margin of appreciation: the wider the margin of appreciation, the less intensively will the ECtHR scrutinize the domestic decisions. In cases of separating children from parents the ECtHR ruled that states enjoy a wide margin of appreciation with regard to the initial decision to separate.[40] However, this margin of appreciation will decrease with the passage of time, in the sense that the longer the separation, the weightier the reasons put forward by the state must be.[41] Further, when it comes to newborn babies, extraordinary compelling reasons must exist to justify a separation from their mothers at birth.[42]

3.3 Areas of ECtHR intervention

The sections above have outlined the way the ECtHR analyses cases of family separation and discharge of parental authority and the general principles applicable thereto. This section will zoom into sensitive areas where the ECtHR tends to intensify its scrutiny.

36 ECtHR 18 June 2013, no. 28775/12 (*RMS/Spain*), para 71.
37 ECtHR 27 June 1996, no. 17383/90 (*Johansen/ Norway*) and ECtHR 28 October 2010, no. 52502/07(*Aune/ Norway*). It should be noted that these cases entailed deprivation of parental rights and authorization for adoption of the children.
38 ECtHR 28 October 2010, no. 52502/07 (*Aune/ Norway*), ECtHR, 13 March 2012, no. 4547/10 (*YC/ UK*).
39 ECtHR 8 July 2004, no. 11057/02 (*Haase/ Germany*), para 93.
40 ECtHR 17 July 2012, no. 64791/10 (*M.D. and Others/Malta*), para 71.
41 ECtHR 17 July 2012, no. 64791/10 (*M.D. and Others/Malta*), para 71.
42 ECtHR 12 July 2001, no. 25702/94 (*K. and T./ Finland*), para 168. In this paper we do not focus on emergency protection orders.

First, with specific relevance for Dutch practice it is worth recalling that ECtHR has so far issued one inadmissibility decision.[43] The case concerned the relieving of a father of his parental authority due to criminal proceedings against him and the authorities' subsequent refusal to reinstate him to his parental rights (following his acquittal of criminal charges). The ECtHR declared inadmissible the complaint about the deprivation of parental rights for non-observance of the six-month time limit. As to the complaint regarding the restoration of parental rights, the ECtHR dismissed it as manifestly ill-founded. The Court placed particular emphasis on the fact that the applicant had not been denied contact with his children. It further held that the domestic decisions had been fully reasoned and that the Dutch authorities acted within their margin of appreciation.

However, notwithstanding a state's margin of appreciation, there are situations where the ECtHR looks more closely at the decision-making process. The ECtHR repeatedly noted that 'the fact that a child could be placed in a more beneficial environment for its upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents'.[44] In view of this principle ECtHR found violations where parents were separated from their children on account of the parents' financial situation[45] or intellectual capacity.[46] In these cases it was deemed that the domestic authorities should have looked into alternative means of overcoming these difficulties, without resorting to (prolonged) family separation. Also, in the aforementioned cases ECtHR stressed that there had been no allegations of ill treatment of the children.[47]

Further, whenever deprivation of parental authority was applied automatically as a consequence of criminal convictions of the applicant, without domestic courts having weighed *in concreto* whether the measure was in the best interests of the children concerned, the ECtHR has equally found violations of Article 8 ECHR.[48]

It is also important to note that even though states enjoy a wide margin of appreciation when it comes to the initial decision to separate, this does not mean that the ECtHR will refrain from reviewing domestic decisions all together. In a case where such initial decision to separate was taken against the back-

43 ECtHR 25 November 2004, no. 23660/02 (*Vitters/The Netherlands*). One other relevant judgment against the Netherlands concerning separation of a child from its parents rather than deprivation of parental rights is ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*). This judgment will be analysed in more detail in the paragraphs below.

44 ECtHR 26 February 2002, no. 46544/99 (*Kutzner/Germany*), para 69.

45 ECtHR 18 June 2013, no. 28775/12 (*RMS v. Spain*); ECtHR 26 October 2006, no. 23848/04 (*Wallova and Walla/Czech Republic*).

46 ECtHR 26 February 2002, no. 46544/99 (*Kutzner/Germany*).

47 ECtHR 26 February 2002, no. 46544/99 (*Kutzner/Germany*).

48 ECtHR 28 September 2004, no. 46572/99 (*Sabou and Pircalab/Romania*), para 48; ECtHR 17 July 2012, no. 64791/10 (*M.D. and Others/Malta*), para 77.

ground of an apparent conflict between a social worker and the applicants, the ECtHR assessed whether the national authorities had been entitled 'to consider that there existed circumstances justifying the abrupt removal of the child from the care of the parents without any prior contact and consultation' of the parents.[49] On the facts of the case, it found that the authorities had not properly justified the urgency of the situation, and did not adequately consider whether there was a risk of harm to the children.[50]

Moreover, as to the decision-making process, previous case law demonstrates that particular emphasis will be placed on the domestic courts administration and evaluation of evidence as well as to the degree of the parties' involvement into the decision making process.[51] Thus, for example if the reports administered by psychologists or psychiatrists are conflicting, regardless of whether some of those reports had been filed by the applicants themselves, the ECtHR tends to reinforce the presumption against parental separation/ deprivation of parental rights.[52] It is important that decisions of social workers and other authorities involved are scrutinized by domestic courts.[53] Even if the child was heard by administrative authorities and such child was opposed to contact with a parent, absence of a court scrutiny of the administrative proceedings is likely to tilt the balance in favour of the aggrieved parent.[54] Conversely, not hearing the parents or not involving them in the process may trigger a violation of Article 8. The case of *Venema v. The Netherlands* is illustrative in this sense.[55] In this case the Dutch authorities, suspicious of the mother suffering of a mental illness imposed a supervision order whereby the applicants' one year old daughter was placed in foster care. The order was issued without informing or hearing the parents. In its reasoning, the ECtHR placed considerable weight on the absence of involvement of the parents. In this context, it stated that it must 'be satisfied that the national authorities were entitled to consider that there existed circumstances to justifying the abrupt removal of the child from the care of its parents without any prior contact or consultation'.[56] On the facts of the case, the Court did not consider that the alleged 'unpredictable reaction' of the parents was on its own a sufficient justification for excluding them from the procedure.[57] It should be stressed that the Court did not find a violation on account of the supervision order *per se,* but rather as the parents were faced with such an order without

49 ECtHR 8 July 2004, no. 11057/02 (*Haase/ Germany*), para 93.
50 ECtHR 8 July 2004, no. 11057/02 (*Haase/ Germany*), para 97.
51 ECtHR 8 July 2004, no. 11057/02 (*Haase/ Germany*); ECtHR 26 February 2002, no. 46544/99 (*Kutzner v. Germany*).
52 ECtHR 26 February 2002, no. 46544/99 (*Kutzner/Germany*).
53 ECtHR 17 July 2014, no. 19315/11 (*T./ Czech Republic*), para 126.
54 ECtHR 17 July 2014, no. 19315/11 (*T./ Czech Republic*), para 126.
55 ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*).
56 ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*), para 93.
57 ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*), para 96.

having the possibility to submit their comments or evidence beforehand.[58] Even if this case does not concern deprivation of parental rights as in this case the family was eventually reunited, it nevertheless sheds light on the procedural aspects the Court takes into account in its reasoning.

Furthermore, contact between a parent and child is of the utmost importance to the ECtHR, as in the absence of contact, separation may lead to an impossibility to resume family life. In this respect, the Court has also ruled that there should be a periodic *ex officio* review of the situation in order to assess whether such separation is still warranted or whether contact is possible.[59]

It follows that national authorities are required to conduct careful and personalized assessments of the individual situations bearing in mind the principle that separation should be seen as a temporary measure and its application necessary only whenever other measures are not suitable in the individual circumstances of the case.

4 IMPACT OF THE ECtHR CASE LAW ON DUTCH LEGISLATION AND PRACTICE

Sections 2 and 3 above outlined the Dutch present and past legislation and practice on matters of parental authority and the relevant ECtHR case law, respectively. It has been shown that the beginning of 2015 marked what appears to be a significant change in the Dutch legislation on discharge of parental authority. The aim was to replace the current prevailing practice of imposing temporary supervision orders in cases where the possibility to reunite children with their biological parents is remote. Thus, the conditions for instituting care orders have been relaxed in the sense that the current legislation allows for more judicial discretion for discharge of parental authority (i.e. the care orders). Importantly, a new criterion of 'reasonable time' has been introduced which should be one determining factor for the decision-making process. As per this new criterion, a *supervision order* is to be imposed if the judge deems the parent(s) able to resume their responsibility for the child within a reasonable time. Conversely, a *care order* (entailing discharge of parental authority) should be imposed if the parents are unable to care for the child within a reasonable time. In the absence of any legal provision it will be for courts to determine on a case-by-case basis the amount of time needed for the 'reasonableness criterion'.

The ECtHR, on the other hand, has on several occasions examined matters of separation between parents and children and discharge of parental authority. Even if in these cases the factual context is of high relevance, several principles and areas to which the Court tends to pay particular attention can be distilled

58 ECtHR 17 December 2002, 35731/97 (*Venema / The Netherlands*), para 96.
59 ECtHR 17 July 2014, no. 19315/11 (*T./ Czech Republic*), para 128.

from its case law. In this section an attempt is made to point out the implications of ECtHR's rulings for Dutch future practice in light of new legislation.

One aspect that merits brief attention is the 'legality' requirement under the ECtHR. As discussed, interferences in private life need to be provided for by law and the law should meet conditions of clarity, accessibility and foreseeability. Since the new Dutch care order grants significant discretion to domestic courts in assessing the need to impose the measure, it is possible that a challenge will be brought as to the foreseeability of this law. However, it is not likely that such a challenge will succeed as especially in matters of parental authority the ECtHR perceives discretion as an inherent element in the decision-making process.[60]

The core aspects which may trigger a more intensive scrutiny or potential infringements of Article 8 on the part of the ECtHR will probably relate to the manner of implementation of the care order and to the application in practice of 'the reasonable time' requirement.

As to the manner of implementation, it should be pointed out that there is no clear legal requirement in the new DCC to the effect that a care order is to be applied only after unsuccessful supervision order(s).[61] Therefore, since the care order entails relief of parental authority and it is as such a more far-reaching measure, imposing such a care order directly will be more difficult to justify in line with the ECtHR principle that separation is to be temporary and family reunification should be ordered as soon as reasonably possible. Clearly, weighty reasons need to be adduced in support of the argument that family reunification was not foreseeable in view of the concrete circumstances. As mentioned above, one example put forward by the legislator in the explanatory memorandum is that of a heavy drug user. In that case, according to the explanatory memorandum, a care order would be better suited for the child than a supervision order. In this regard, it should be noted that in previous case law the ECtHR placed strong emphasis on improvements in the situation of the parents. In those cases, the ECtHR did not accept the argument of separation based on past conduct of the parent(s), where they showed signs of improvement.[62] The Court looked at whether the authorities made genuine efforts aimed at family reunification. The success or failure of such a claim will depend on the domestic arrangements for contact and on the chances of success for the parent to regain parental authority if the situation improves. It bears stressing that the ECtHR has always placed importance on contact arrangements between parent and child. Put differently, regular contact should not be withdrawn, especially if there are no allegations of violence of the parent to the child.

60 ECtHR 24 March 1988, 10465/83 (*Olsson/Sweden*), discussed in section 3.1. above.

61 As discussed in section 2 above, at the moment the explanatory memorandum contains an indication to this effect, but this is not binding on domestic courts.

62 ECtHR 12 July 2001, no. 25702/94 (*K. and T./Finland*), para 179.

Further, some remarks should be made with respect to the 'reasonable time' requirement in the new DCC. Even if this is an aspect to be determined on a case-by-case basis, national decision-makers should not lose sight of the ultimate aim: to reunite parents with children. Thus, supervision measures should be temporary and it must be shown that regular efforts were made to reunite families. Also, in line with European case law, domestic authorities are to undertake these efforts of their own motion, and not only at the request of an interested party. The longer the separation, the closer will the ECtHR scrutinize whether genuine efforts were made to bring parents and children back together. In this vain it is worth recalling that the ECtHR has repeatedly stressed that the best interests of the child do not always coincide with those of the parents and that in cases of conflict the former override the latter. From this perspective, it can be argued that the new DCC is more attuned to the requirements of Article 8 ECtHR as successive prolongations of supervision orders without ensuring permanency for children can hardly be considered to serve their best interests. In these circumstances children may form bonds with the foster family and these bonds deserve adequate legal protection. It will be for the domestic judges to adequately balance all the interests at stake and to ensure that the child's best interests are observed. It is important that throughout the duration of a supervision order authorities show that a genuine effort was made to reunite families, that forensic evidence (such as psychiatric, psychological reports etc.) was duly considered by domestic courts and that evidence of, for example, improvement in the personal situations was not easily dismissed. The ECtHR has repeatedly stressed that the fact that the child is placed in a more beneficial environment cannot on its own justify a child's removal from its biological family.[63]

One other aspect to be noted is that foster parents could also benefit from the protection of Article 8 ECHR. This contribution focused mainly on the right to respect for family life of biological parents with their children who are placed into care. However, long-term fostering agreements trigger family bonds between foster parents and children.[64] These foster parents too may claim a breach of family life if, for example, supervision orders last unreasonably long in spite of lack of evidence of improvement of the situation of the biological parent which triggered the placement of children into care.[65] In this sense, the aim of the new DCC to put a stop to uncertainties for foster families is arguably more in line with the requirements of Article8, seen from the perspective of foster parents.

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63 ECtHR 26 February 2002, no. 46544/99 (*Kutzner /Germany*), para 69.

64 ECtHR 17 January 2012, 1598/06 (*Kopf and Liberda/ Austria*).

65 The scenario envisaged in that situation is not that of a separation between foster parents and children but rather a situation where they would claim that the uncertainty of a situation (triggered for example by yearly prolongations of supervision orders or other related measures) goes against the principle of legal certainty which is embedded in their right to respect for family life.

5 CONCLUSION

Aspects related to (deprivation of) parental rights are not only private family matters. While it is mainly for national authorities to regulate how and when intervention is necessary, such intervention needs to observe the general principles of the ECHR, in particular Article 8. The ECtHR will exercise its supervision in line with the margin of appreciation doctrine and the subsidiarity principle. Moreover, cases of placing children into care are highly factual, which poses certain difficulties for forecasting in abstract the implication of the new DCC in the light of Article 8 ECHR.

However, this contribution sought to highlight the main aspects of the new Dutch Civil Code against the principles distilled from the ECtHR case law. Even if the ultimate assessment will be based on actual facts, it is nevertheless important for domestic authorities to take into account these principles when deciding on concrete cases.

Thus, in the light of the analysis above, one aspect which may prove highly problematic is the possibility of imposing care orders directly, without having them preceded by a supervision order. For such situations to comply with the ECHR, the Dutch courts would have to show that there was clearly no possibility for the parent(s) to improve their situation so as to resume family life with the child. Also, if such imposition results in a lack of efforts on the part of the authorities to assist in family reunification, it may entail a strong adverse reaction from the ECtHR. In the same vein, the 'reasonable time' requirement may face some scrutiny from the ECtHR, depending on how it is assessed by national courts. Periods of separation should be accompanied by the authorities' efforts to reunite children with their parents. In their efforts the authorities must show that they have effectively tried to achieve such reunification, which was ultimately not possible. Last but not least, parties should be offered reasonable opportunities to present their case and submit evidence. While it may be acceptable not to involve the parents/children in emergency situations, such justifications will be less compelling with the passage of time. Also, the Court will most likely look into the actual circumstances, i.e. so as to assess whether a particular circumstance was indeed of an emergency nature. As to the hearing of parties, both children and parents are to be heard, but when it comes to children, aspects such as their age and maturity will play a significant role in the Court's review of the domestic decision-making process.

8 The Duty of Directors to be Guided by the Best Interests of the Company

Cees de Groot ▪

1 INTRODUCTORY REMARKS

The corporate form (referred to as the *company* or the *corporation*) is a core concept in corporate law that is recognized worldwide. In its basic appearance the corporate form is a legal person (as opposed to *e.g.* partnerships) with a capital that is divided into transferable shares, that is led by a corporate board, and in which neither the shareholders nor the corporate directors are personally liable for the obligations of the company. This contribution considers the nature of the company as a statutory core legal concept in the Netherlands. After some observations of a more general nature, the discussion of the company as a core legal concept will take place against the backdrop of another statutory core legal concept that is firmly rooted in corporate law in the Netherlands: the duty of corporate directors in the performance of their duties to be guided by the best interests of the company and the undertaking that is connected with it. Paragraph 2 is introductory and describes some elements of corporate law in the Netherlands. Paragraph 3 investigates the origins of the company in the Netherlands. Then attention shifts to the core legal concept that corporate directors must be guided by the best interests of the company and its undertaking. Paragraphs 4 and 5 discuss landmark cases of the Dutch Supreme Court on corporate law: historic case law (the Doetinchemse IJzergieterij and Forum-Bank cases in paragraph 4) and a more recent case (the ASMI-case in paragraph 5) that show how the core legal concept of acting in the best interests of the company and its undertaking has in Netherlands case law gradually shaped thinking about the company as such. Whereas the origins of the company are in contract law (as is also reflected in the historic case law), both the historic and the more recent case law show that the company has developed over time into an abstract organizational form in which (as would be expected in such an abstract organization) the authority of the board of directors is pre-eminent. The idea of the corporate form as an abstract organizational form in which the position of the corporate board is paramount is not

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exceptional, as is borne out by the discussion of the judgment of the Supreme Court of the State of Delaware (United States of America) in the Selectica case in paragraph 6. This judgment as well as the case law discussed from the Netherlands show that companies have similar characteristics, however different the jurisdictions are in which they appear. However, a recent judgment by the Dutch Supreme Court in 2014 in the Cancun case (discussed in paragraph 7) may prompt a re-evaluation of the thinking on the nature of the company. The Cancun case could be a watershed in the sense that the Dutch Supreme Court seems to indicate that – when interpreting the core legal concept that directors in performing their duties must be guided by the best interests of the company and the undertaking that is connected with it – the organizational characteristics of an individual company may play an important role in determining the duties of the corporate directors. Thus interpreted, a company should no longer be regarded just as an abstract organizational form but also as an organization whose specific organizational characteristics determine how corporate directors should perform their duties. Interestingly, this recent development in the case law of the Dutch Supreme Court occurred in a situation where the company that was the object of the legal proceedings was a joint venture company of a highly contractual nature.

2 A PRELIMINARY OBSERVATION ON THE CORPORATE FORM (IN THE NETHERLANDS)

In the Netherlands there are two types of companies, the public limited company (or company limited by shares, in Dutch the *naamloze vennootschap*, abbreviated *NV*) and the private limited company (or private company with limited liability, in Dutch the *besloten vennootschap met beperkte aansprakelijkheid*, usually referred to as the *besloten vennootschap* for short, abbreviated *BV*). Legislation on the public limited company dates back as far as 1838, in what was then the Commercial Code, and legislation on the private limited company dates back to 1971, also in what was then the Commercial Code. Today, public limited companies and private limited companies are regulated in the Dutch Civil Code.

Articles 2:64 and 175 DCC are the opening articles of Title 4 and Title 5 of the Second Book of the DCC respectively. These articles hold the definitions of the two types of companies. Under Article 2:64, par. 1 DCC a public limited company 'is a legal person with an authorized capital divided into transferable shares', and under Article 175, par. 1 DCC a private limited company 'is a legal person with an authorized capital divided into one or more transferable shares', to which in both provisions is added: 'The shareholders shall not be personally liable for acts performed in the name of the company and shall not be liable to contribute to losses of the company in excess of the amount which must be paid up on their shares'. In accordance with Articles 2:64, par. 2

and 175, par. 2 DCC both a public limited company and a private limited company may be incorporated by either one (natural or legal) person or several (natural or legal) persons, and shall be established by a notarial deed of incorporation. In accordance with Articles 2:66, par. 2 and 177, par. 2 DCC the name of a public limited company and a private limited company shall begin or end with the words *Naamloze Vennootschap* (or the abbreviated form *NV*) or *Besloten Vennootschap met beperkte aansprakelijkheid* (or the abbreviated form *BV*) respectively. In comparison with the public limited company the private limited company is intended to be a 'light' company in the sense that the private limited company is more 'flexible' than the public limited company and is more 'simplified' as opposed to the public limited company.

There are several notable differences between public limited companies and private limited companies under Netherlands company law. To note but a few, *first*, both the issued share capital and the paid up part of the issued share capital of a public limited company shall be at least 45,000 euros (and shall be expressed in euros), whereas the issued share capital of a private limited company shall be at least one euro cent only and the paid up part of the issued share capital of a private limited company may be as little as zero (and need not be expressed in euros). *Second*, as a general rule the directors of a public limited company shall be appointed by the company's general meeting (in principle by a majority decision), whereas the directors of a private limited company may be appointed by either the company's general meeting (in principle by a majority decision) or by a meeting of holders of shares of a specific class or type (in principle by a majority decision) as opposed to the company's general meeting as a whole. *Third*, all shareholders of a public limited company shall have both voting rights and the right to distribution of profits, whereas a private limited company may have shareholders that have shares to which either no voting rights or the right to distribution of profits are attached (with the express provision that shares cannot be devoid of voting rights and the right to distribution of profits cumulatively). *Fourth*, the articles of a public limited company may provide that the company's board of directors must conduct itself in accordance with the directions of a corporate body (*e.g.* the general meeting) in respect of the general policy to be pursued in areas further specified in the articles, whereas the articles of a private limited company may simply provide that the company's board of directors must conduct itself in accordance with the directions of another corporate body (*e.g.* the general meeting), with no limitation to only the general policy to be pursued and without the need of specifying the relevant areas in the articles.

There are also some notable similarities between public limited companies and private limited companies under Netherlands company law. *First*, on the level of its board of directors both a public limited company and a private limited company may be organized as a one-tier board or a two-tier board. In a one-tier board (also: unitary board) the board of directors consists of both executive directors and non-executive directors, the non-executive directors

performing the internal supervisory function. In a two-tier board (also: dual board) next to the management board (comprised of managing directors) there is a supervisory board (comprised of supervisory directors), the supervisory directors performing the internal supervisory function. However, as a general rule Netherlands company law does not require that there is an internal supervisory function. This means that a public limited company and a private limited company may just have a board of directors comprised of only executive directors, or may just have a management board without having a supervisory board. *Second*, under Articles 2:129 par. 5 and 239 par. 5, and 140, par. 2 and 250, par. 2 DCC all corporate directors, whether executive directors and non-executive directors (if the latter have been appointed) in a one-tier board, or managing directors and supervisory directors (if the latter have been appointed) in a two-tier board, shall, in the performance of their duties, 'be guided by the best interests of the legal person and the undertaking connected with it'. It is precisely this provision that has been regarded as underlining that public limited companies and private limited companies are an abstract organizational form. A widely held view on this provision holds that corporate directors should take into account and balance the interests of all stakeholders in the company and not just the interest of the company's shareholders.[1]

3 An observation on the origins of the corporate form (in the Netherlands)

The fading years of the sixteenth century witnessed a remarkable economic development in the Netherlands. These years saw the establishment of a number of companies devoted to far-reaching overseas trade. Next to sailing to the northern Baltic and Hanseatic regions, ships now also sailed in eastbound directions to the Indies (and later in westbound directions to the Americas as well as to Africa).[2] The first of these companies was the Company of Far (the *Compagnie van Verre*, an abbreviation of *Compagnie van Verre Reizen*: Company of Far Travels), established in the city of Amsterdam in 1594). As successive companies in other cities followed, competition between these companies grew. This prompted the Netherlands government to bring at least most of these companies under the aegis of one overarching organization, called the East India Company (the *Oost-Indische Compagnie*, usually referred to as the *Verenigde Oost-Indische Compagnie*: the United East India Company)

1 P.J. Dortmond (main author), *Handboek voor de naamloze en de besloten vennootschap*, Deventer: Kluwer 2013, no 231, J. Winter & J.B. Wezeman, *Van de BV en de NV*, Deventer: Kluwer 2013, pp. 27-29. *Cfr.* M. Olaerts, 'De aandeelhouder en het vennootschappelijk verband: de kwalificatie van de vennootschap en de invloed op de vennootschappelijke belangenafweging', *Tijdschrift voor Ondernemingsbestuur* 2015-2, pp. 51-64.

2 J. de Vries & A. van der Woude, *Nederland 1500-1815. De eerste ronde van economische groei*, Amsterdam: Uitgeverij Balans 1995, pp. 411-417, 450-462 and 462-469.

in 1602.[3] The modern public limited company (with legislation dating back to 1838) and by extension the modern private limited company (with legislation dating back to 1971) are mostly regarded as descendants of the United East India Company. However, there are conflicting views about the way in which the public limited company (and the private limited company) build on the earlier United East India Company.[4]

As a starting point on the heritage of the public limited company, all views recognize that the United East India Company was a company whose shares were traded on a stock exchange (this being the Amsterdam stock exchange). *The first (majority) opinion* holds that the previously existing companies were in effect limited partnerships in which the most important partners, who also formed the board of directors of these companies, were as general partners jointly and severally liable for the debts of these companies, and in which the other less important partners as limited partners were not liable for the debts of these companies.[5] Building on this analysis, this opinion suggests that the succeeding United East India Company was a company in which none of the partners (including the most important partners who formed the board of directors of the United East India Company) were liable any longer for the debts of the United East India Company. *The second (minority) opinion* argues that both the previously existing companies as well as the succeeding United East India Company were business partnerships in which all partners were liable for the debts of the company, although not jointly and severally, but only proportionally.[6] In addition, this opinion argues that any partner in both the previously existing companies and the United East India Company could escape from this proportional liability by giving up his shares in the company. This would be the effect of the so-called *droit d'abandon* (the right to renounce) that allowed shareholders to give up their shares (this right being the consequence of the then common idea regarding the commercial law of the sea that 'no one can lose more to the sea than he has entrusted to it'). A strong point of *the first (majority) opinion* is that it regards the United East India Company and thereby the later public limited company as a logical follow-up to the concept of the limited partnership, by simply extending non-liability

3 H.M. Punt, *Het vennootschapsrecht van Holland. Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland*, Deventer: Kluwer 2010, pp. 100-101.

4 P.J. Dortmond (main author), *Handboek voor de naamloze en de besloten vennootschap*, Deventer: Kluwer 2013, nos. 1-39.

5 Discussed by: H.M. Punt, *Het vennootschapsrecht van Holland. Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland*, Deventer: Kluwer 2010, pp. 95-107. *Cfr.* On the United East India Company: L.O. Petram, *The world's first stock exchange. How the Amsterdam market for Dutch East India Company shares became a modern securities market, 1602-1700* (2011: published at http://dare.uva.nl).

6 Advanced by: W.M.F. Mansvelt, *Rechtsvorm en geldelijk beheer bij de Oost-Indische Compagnie*, Amsterdam: Swets & Zeitlinger 1922.

for the debts of the partnership to all members of the company. However, a weakness of this opinion is that it introduces non-liability of any and all members for the debts of the United East India Company into an era where the concept of legal personality had not been thought through. *The second (minority) opinion* has a strong point in that it logically connects the *droit d'abandon* in the United East India Company and its predecessors to the notion that none of the members of a public limited company needs to be liable for the debts of the company. A weak point of this opinion is that the idea that both the most important partners and the less important partners of the United East India Company were liable (albeit proportionally) for the debts of the company is difficult to reconcile with the United East India Company having shares that were traded on a stock exchange, making it difficult to retrieve the identity of the partners that were liable for the debts of the company as long as they did not invoke the *droit d'abandon*.

The legislation of 1838 clearly struggled with the proper way to regulate the public limited company. It decided to regulate the business partnership, the limited partnership and the public limited company on a par in the Commercial Code (next regulating the professional partnership in the DCC). The opening provision of the Title called 'On the partnership of trade' read:[7] 'The law recognizes three partnerships of trade: the commercial partnership, the limited partnership or partnership *en commandite*, [and] the public limited company'.[8] Interestingly, the public limited company was named (as it still is today) *naamloze vennootschap* (meaning *anonymous company*), derived from the French term *société anonyme*. In this respect (and also as an explanation of the phrase *naamloze vennootschap*), the opening article on the public limited company read: 'The public limited company shall not have a common name, nor shall it carry the name of one or several of its partners, but shall only be indicated by the object of its business enterprise'.[9] This somewhat strange provision meant that the 1838 legislation tried to distinguish the public limited company (a novelty in terms of legislation at the time) from the commercial partnership and the limited partnership: unlike the commercial partnership and the limited partnership the public limited company could not carry a 'fantasy' company name or have the names of its partners as part of its company name (note the use of the phrase partners instead of shareholders), but could only be named *e.g.* Coal Trading Company or Grain Importing Company. This is all the more understandable as the legislation of 1838 did not require that the name of a public limited company should include the words *Naamloze*

7 'Van vennootschap van Koophandel'.

8 'De Wet erkent drie soorten van Vennootschappen van Koophandel: De vennootschap onder eene firma; De vennootschap bij wijze van geldschieting, anders compagnieschap *en commandite* genaamd; De naamlooze vennootschap'.

9 'De naamlooze vennootschap heeft geen firma, noch draagt den naam van een of meer der vennooten, maar zij ontleent hare benaming alleen, van het voorwerp harer handelsonderneming'.

Vennootschap or the abbreviated form *N.V*. The 1838 legislation further stated that 'The partners or holders of the parts or shares shall not be liable beyond the full amount of those parts or shares',[10] and 'The company shall be led by directors, appointed by the partners, who may or may not be partners themselves, and may or may not receive a salary, with or without supervision by supervisory directors'.[11] The 1838 legislation also stated that 'The managing directors shall be responsible only for proper execution of the tasks they are commissioned with; as regards third parties they shall not be liable for the debts of the company'.[12] Under the present regulation of the public limited company and the private limited company in the DCC the fact that directors of a company are not responsible for the debts of the company in respect of third parties is something that is regarded as being so logical and obvious that there is not even a provision anymore that states this in so many words. Interestingly, nowhere did the legislation of 1838 refer to the public limited company as a 'legal person'.

In 1928 a major overhaul took place of the legislation on the public limited company in the Commercial Code.[13] Under the new legislation the public limited company was referred to as a 'legal person' and was required to have the indication *Naamloze Vennootschap* or the abbreviated form *N.V*. as part of its company name.[14] Also, the ban on the use of a 'fantasy' company name or the use of the names of its shareholders as part of the company name was repealed.

4 Historic case law (in the Netherlands) observed

4.1 Introduction

This paragraph discusses two older judgments of the Dutch Supreme Court that were rendered when Netherlands corporate law was still nascent. These judgments give insight into the way in which the Dutch Supreme Court already at that time underlined the strong position that corporate boards have vis-à-vis both individual shareholders and the general meeting. These judg-

10 'De vennooten of houders dier actien of aandeelen zijn niet verder aansprakelijk, dan voor het volle beloop derzelve'.

11 'De vennootschap wordt beheerd door daartoe, door de vennooten, aangestelde bestuurders, deelgenooten of andere, al dan niet loontrekkende, met of zonder toezigt van commissarissen'.

12 'De bestuurders zijn niet verder verantwoordelijk, dan ter zake van de behoorlijke uitvoering van den aan hen opgedragen last; zij zijn uit kracht der verbindtenissen van de vennootschap, aan derden niet persoonlijk verbonden'.

13 *Stb.* 1928/216.

14 'De naamlooze vennootschap is rechtspersoon […]' and 'De naam vangt aan of eindigt met de woorden Naamlooze Vennootschap, hetzij voluit geschreven, hetzij afgekort tot "N.V."'.

ments form the basis of the later judgment in the ASMI case discussed in paragraph 5.

4.2 The Doetinchemse IJzergieterij case (1949)

In the *Doetinchemse IJzergieterij* case NV Uitgevers Maatschappij C. Misset (*Misset*) had been the majority shareholder of NV Doetinchemse IJzergieterij (*Doetinchemse IJzergieterij*) since 1933.[15] Under the articles of Doetinchemse IJzergieterij the supervisory board had the power to issue new shares of the company. Two managing directors of Misset had been members of the supervisory board of Doetinchemse IJzergieterij but had died in 1945 and 1947 respectively, leaving Misset no longer represented in the supervisory board of Doetinchemse IJzergieterij. During the general meeting of Doetinchemse IJzergieterij that was held in August 1947 Misset became aware of the fact that the supervisory board had issued a large number of shares. As a consequence, Misset had lost its position as majority shareholder (it should be noted that Netherlands company law at that time did not give existing shareholders a right of first refusal when a public limited company issued new shares). Misset brought a lawsuit against Doetinchemse IJzergieterij asking the District Court to order provisional measures that would prohibit the new shareholders from exercising their rights on the shares they had acquired. The District Court did not award this request, but the Court of Appeal ruled in favour of Misset.

Doetinchemse IJzergieterij appealed to the Dutch Supreme Court. On its part, the Dutch Supreme Court annulled the Court of Appeal's decision and affirmed the decision of the District Court that had ruled in favour of Doetinchemse IJzergieterij. The main argument in the proceedings before the Dutch Supreme Court forwarded by Misset was phrased in quite plain terms. In the opinion of Misset 'supervisory directors could not take a decision that contravenes the interests and wishes of the majority shareholder'. The Dutch Supreme Court rejected Misset's argument in a very short consideration:

> 'Supervisory directors who exercise their powers as a corporate organ shall be guided by the interest of the company and shall give precedence to the interest of the company in case this clashes with the interests of whatever shareholder'.

4.3 The Forum-Bank case (1955)

In the *Forum-Bank* case two shareholders of NV Forum-Bank (*Forum-Bank*) had proposed that Forum-Bank buy back shares these shareholders held in the company and that the price to be paid by Forum-Bank be used mainly to

15 Dutch Supreme Court 1 April 1949, *NJ* 1949/465 (Doetinchemse IJzergieterij).

reduce the amount of debt these shareholders owed to the company.[16] When this proposal was discussed by the general meeting both the management board and the supervisory board of Forum-Bank as well as five of the eight shareholders who attended the general meeting opposed the proposal. The management board and the supervisory board argued that accepting the proposal would not be in the interest of Forum-Bank itself and its shareholders, as it would undermine the liquidity of the bank, and that in accordance with the articles this was a matter not to be decided by the general meeting but by the management board. When it came to a vote, the voting power of the two shareholders who had made the proposal (296 and 110 shares), combined with the votes of the one shareholder who supported the proposal (5 shares), was enough to have the proposal accepted by a majority of 411 votes in favour of the proposal to 117 votes against the proposal. This prompted two opposing shareholders to bring the matter before the District Court, asking the District Court to declare that the decision by the general meeting was null and void as it was outside the realm of the general meeting's powers. The District Court ruled in favour of these claimants and the Court of Appeal, on the basis of the articles of Forum-Bank, confirmed this judgment.

One of the two shareholders who had originally proposed that Forum-Bank buy back the shares lodged an appeal to the Dutch Supreme Court. In this appeal, the main argument was phrased in equally plain terms as the argument in the Doetinchemse IJzergieterij case: even if it were to be accepted that the competence to decide on buying back Forum-Bank's shares fell within the powers of the management board, the decision made by the general meeting could not be null and void because:

> 'the general meeting of shareholders […] has competence to order the management board to act in certain ways, to wit to decide to buy back shares as is debated in this case, for which reason that decision, in any case and as such and to that extent, was made in a competent way and is not null and void.'

The Dutch Supreme Court, however, did not accept this line of reasoning and dismissed the appeal. The Dutch Supreme Court first interpreted the appeal as arguing in essence that:

> 'it brings to the fore that the general meeting, in spite of the fact that buying back the company's shares […] falls within the competence of the management board, has the power to instruct the management board to buy back shares of the company for a specified price from certain sellers because the managing directors are subordinate to the public limited company and the general meeting exercises the ultimate power in the public limited company.'

16 Dutch Supreme Court 21 January 1955, *NJ* 1959/43 (Forum-Bank).

Then the Dutch Supreme Court rebutted the appeal in – again – a very short consideration:

> 'this argument, thus read, ignores that the general meeting too shall not transgress the powers given to it by statutory law or by the articles.'

4.4 A short comment

Interestingly, in one consideration in the Doetinchemse IJzergieterij case ('[Incorrectly, the] Court of Appeal took as a starting point that the nature of the corporate contract entails as a fundamental right that shareholders have a right of first refusal when shares are issued') the Dutch Supreme Court rendered a reference that the Court of Appeal had made to 'the nature of the corporate contract'. Apparently, the Court of Appeal at the time still regarded the corporate form as a contractual relationship between its participants. On its part, the Dutch Supreme Court underlined the autonomous position of the '[s]upervisory directors who exercise their powers as a corporate organ'. Likewise, in the Forum-Bank case the Dutch Supreme Court underlined the autonomous position of the management board. Both cases indicate a line of thinking whereby the corporate form gradually developed into an abstract organizational form in which the role of the corporate directors is pre-eminent.

5 A more recent case (in the Netherlands) observed

5.1 Introduction

In the ASMI case the Dutch Supreme Court had the opportunity to lay down what a modern twenty-first century company is: an abstract organizational form wherein the duty of the directors to be guided by the best interests of the company and the undertaking that is connected with it implies that both shareholders and the general meeting can exert very little leverage when it comes to influencing the company's policies or asking directors to act in certain ways. In a two-tier board this applies to both (the members of) the management board and (the members of) the supervisory board.

5.2 The ASMI case (2010)

ASM International NV (*ASMI*) was a listed public limited company that had been established by A.H. del Prado in 1968. ASMI held 53% of the shares in ASM Pacific Technology Ltd (*ASMPT*) that was also a listed company (in Hong Kong). A.H. del Prado held approximately 21% of the shares of ASMI. He had been

the chief executive officer (*CEO*) of ASMI from its establishment in 1968 and remained so until 1 March 2008. On that day his son, C.D. del Prado, who had been on the management board of ASMI since 2006, became the new CEO of ASMI. Since 2005 a number of shareholders of ASMI had been raising concerns about the way ASMI was run. These shareholders were Fursa Master Global Event Driven Fund LP (*Fursa*), an investment fund that held approximately 6% of the shares of ASMI, and a number of investment funds that operated under the name of Hermes and together held approximately 15% of the shares of ASMI. Their concerns concentrated on two issues. They argued that the way in which the articles of ASMI provided for the appointment of the members of both the management board and the supervisory board of ASMI was not in conformity with what shareholders of a listed company would expect. In their opinion especially the fact that since 2006 both A.H. del Prado and C.D. del Prado had been on the management board of ASMI resulted in 'family ties' that raised 'doubts and concerns that there will not be enough distance between the members of the management board'. They also commented on the fact that the shares in ASMPT traded against approximately EUR 18 per share whereas the shares in ASMI traded against approximately EUR 12 per share only. In their opinion this could only mean (since ASMPT as a 53%-subsidiary company of ASMI was being favoured more by investors than ASMI) that the financial results of ASMI were negatively influenced by its own business that was not profitable enough. The differences of opinion between ASMI's management board and supervisory board on the one hand and Fursa and Hermes on the other hand resulted in extended talks between these parties and finally a lawsuit against ASMI under the provisions on Right of Inquiry in Title 8 of the Second Book of the Dutch Civil Code. In these proceedings the Enterprise Court of the Amsterdam Court of Appeal in 2009 came to the conclusion that there were well-founded reasons to doubt ASMI's policies.[17] On appeal, however, this judgment was set aside by the Dutch Supreme Court.[18] One reason for this was that the judgment of the Enterprise Court was, as the Dutch Supreme Court considered, flawed because 'it follows to a sufficient degree from the facts of the case that the management board did start a dialogue with the external shareholders, went into their arguments and dismissed these arguments on the basis of well-founded and defendable counter-arguments, taking into account the long-term interests of all those involved in the company.' What follows below are two considerations of the Dutch Supreme Court on general issues of company law:

17 Enterprise Court 5 August 2009, *JOR* 2009/254 (ASMI).

18 Dutch Supreme Court 9 July 2010, *JOR* 2010/228 (ASMI). M.M. Mendel & W.J. Oostwouder, 'Het vennootschappelijk belang na recente uitspraken van de Hoge Raad', *Nederlands Juristenblad* 2013, no. 1776.

> 'The management board of a company, when fulfilling its obligations under statutory law or the articles, shall give precedence to the best interests of the company and the undertaking connected with it and shall in its decision-making take into account the interests of all stakeholders, among whom the shareholders are to be reckoned. Therefore, ASMI's strategy is in principle a matter for the management board to decide on, and it shall be the management board, under the supervision of the supervisory board, which is to judge whether and to what extent it is desirable to discuss this with the 'external' shareholders. Although the management board is under an obligation to give account to the general meeting of shareholders it is, in the absence of arrangements under statutory law or the articles, not obliged to involve the general meeting of shareholders in advance in matters that fall within its competence.'

And:

> 'The supervisory board shall supervise the management board's policy as well as the general course of affairs in the company and the undertaking connected with it and shall advise the management board […]. This function under statutory law does not entail an obligation for the supervisory board to intermediate in conflicts between the management board and shareholders. Neither is the supervisory board under an obligation to give account to the shareholders on this matter. […] The supervisory board, when approached by shareholders requesting it to intermediate or to take other action, will have to act adequately on the basis of its own function. However, an obligation to intermediate actively would […] contravene the margin of discretion that the supervisory board has in fulfilling its function.'

5.3 A short comment

The ASMI case represents the apex in the Netherlands of the line of thought that regards the corporate form as an abstract organizational form in which the authority of the corporate directors is pre-eminent. The Dutch Supreme Court decided that a management board is in principle 'not obliged to involve the general meeting of shareholders in advance in matters that fall within its competence' and that a supervisory board is not obliged to 'intermediate in conflicts between the management board and shareholders'. Being the apex of that line of thought, the Dutch Supreme Court's judgment is also questionable. The judgment puts extreme emphasis on the autonomous position of both the management board and the supervisory board of a company vis-à-vis the company's shareholders. In doing so, the judgment shows little regard for the interests of the shareholders as investors in the company. After all, should a management board not be obliged to at least consult the company's general meeting on major issues that are important to the shareholders? And likewise, what is the use of having a supervisory board that refrains from intermediating in conflicts between the management board and the company's investors?

6 THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF DELAWARE IN THE SELECTICA CASE (2010)

6.1 Introduction

The judgment of the Supreme Court of the State of Delaware in the Selectica case shows that the general features of the corporate form are much alike across jurisdictions: as in the Netherlands the Delaware Supreme Court allows corporate boards a wide margin of appreciation that shareholders are unable to encroach upon.

6.2 The Selectica case

Selectica, Inc. (*Selectica*) was a listed corporation that provided enterprise software solutions. Selectica had become a listed corporation in 2000 and had since incurred substantial losses. The price of Selectica shares had fallen from $ 30 per share at the time of the initial public offering to less than $ 1 per share. The value of Selectica consisted mainly of cash reserves, intellectual property rights, goodwill and 'accumulated NOLs'. NOLs are 'net operating loss carryforwards' that under (U.S. federal) tax law a corporation that does not achieve a positive net income may use as a fiscal means 'to provide a refund of prior taxes paid or to reduce the amount of future income tax owed'. Therefore, NOLs are a valuable asset. Selectica's NOLs amounted to approximately $ 160 million. A corporation may only make use of NOLs that it has generated itself and under (U.S. federal) tax law the use of NOLs is limited following an 'ownership change'. For the purposes of applying this limitation, an ownership change generally occurs when over a period of time of three years 50% of a corporation's shares change ownership; *however, in this calculation only shareholders who hold 5% or more of a corporations's shares are counted*.

Selectica had employed a 'shareholder rights plan' (a poison pill) as a protective measure against a possible hostile takeover since 2003. This shareholder rights plan would become active if a Selectica shareholder would acquire 15% (or more) of Selectica's shares. In 2008 the board of directors of Selectica amended this shareholder rights plan *as a means of protecting the value of its NOLs* to the effect that the plan would be triggered when a shareholder would acquire 4.99% (or more) of Selectica's shares.

In December 2008 Trilogy, Inc. (Trilogy), together with its subsidiary company Versata Enterprises, Inc. (Versata) intentionally surpassed the 5% threshold ('bought in excess of' the threshold) by then acquiring 6.7% in total of Selectica's (common) shares. Its reasons for doing so were to 'bring some clarity and urgency' to their relationship that had been troubled (also by lawsuits) for a number of years. Under these circumstances the board of

directors of Selectica in January 2009 decided to put the shareholder rights plan into action. This meant that the shareholder rights plan 'doubled the number of shares of Selectica common stock owned by each shareholder of record, other than Trilogy or Versata, thereby reducing their beneficial holdings from 6.7% to 3.3%'. Preceding this, in December 2008, Selectica had filed suit in the Delaware Court of Chancery 'seeking a declaration that the NOL Poison Pill was valid and enforceable'. On their part, Trilogy and Versata argued that the (use of the) shareholder rights plan was unlawful. The Court of Chancery ruled in favour of Selectica.[19] Trilogy and Versata appealed to the Supreme Court of the State of Delaware, but in its judgment of 4 October 2010 the Supreme Court affirmed the judgment of the Court of Chancery.[20] The Supreme Court considered: 'The Court of Chancery concluded that the protection of company NOLs may be an appropriate corporate policy that merits a defensive response when they are threatened. We agree', because:

> 'The Court of Chancery found the record "replete with evidence" that, based upon the expert advice it received, the Board was reasonable in concluding that Selectica's NOLs were worth preserving and that Trilogy's actions presented a serious threat of their impairment. […] Those findings are not clearly erroneous. They are supported by the record and the result of a logical deductive reasoning process',

and because the shareholder rights plan (that was also a protective measure) was not such that it had the effect of precluding a possible takeover of Selectica:

> 'The Court of Chancery concluded that the NOL Poison Pill and Reloaded NOL Poison Pill were not preclusive.[21] […] The record supports the Court of Chancery's factual determination and legal conclusion that Selectica's NOL Poison Pill and Reloaded NOL Poison Pill do not meet that preclusivity standard.'

Furthermore, 'The implementation of the Reloaded NOL Poison Pill was also a reasonable response':

> 'The record indicates that the Board was presented with expert advice that supported its ultimate findings that the NOLs were a corporate asset worth protecting, that the NOLs were at risk as a result of Trilogy's actions, and that the steps that the Board ultimately took were reasonable in relation to that threat.'

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19 Court of Chancery of the State of Delaware 26 February 2010, CA #4241-VCN (Selectica), at: http://courts.delaware.gov.

20 Supreme Court of the State of Delaware 4 October 2010, no. 193, 2010 (Selectica), footnotes deleted, at: http://courts.delaware.gov.

21 The Reloaded Poisin Pill refers to the amendment of the shareholder rights plan to the effect that the it would be triggered when a shareholders would acquire 4.99% (or more) of Selectica's shares.

6.3 A short comment

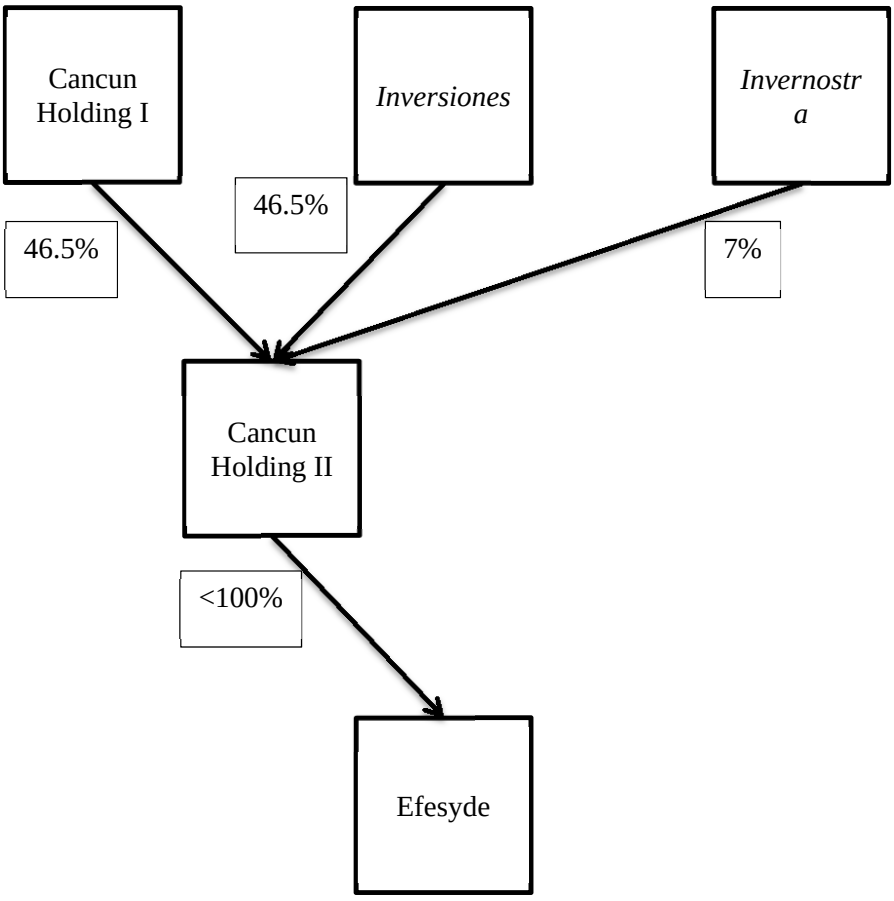
The judgment of the Supreme Court of the State of Delaware in *Selectica*, like the judgments of the Dutch Supreme Court in the Doetinchemse IJzergieterij, Forum-Bank and ASMI cases, allows corporate boards a wide margin of discretion in conducting the affairs of the corporation. That corporate boards have this wide margin of discretion is inherent in the corporate form where shareholders as investors entrust resources to the corporation.[22] In that sense, the judgments of the Dutch Supreme Court and the Selectica judgment of the Supreme Court of the State of Delaware point in the same direction. However, the idea that corporate boards have this wide margin of discretion does not in itself give much guidance to a corporate board as to whose interests it should take into account in conducting the affairs of the corporation. On that issue, the judgment of the Dutch Supreme Court in *Cancun* may be of help. This judgment is discussed in the following paragraph.

7 THE CANCUN CASE IN THE NETHERLANDS: IS THE PENDULUM SWINGING IN A NEW DIRECTION?

7.1 The Cancun case (2014)

Cancun Holding II BV (*Cancun Holding II*) had been established in August 2005 by Cancun Holding I BV (*Cancun Holding I*, an (investment) company of the Lliteras family) for the purpose of realizing a hotel complex in the Mexican city of Cancun through its (almost wholly-owned) subsidiary company Efesyde SA de CV (*Efesyde*). In October 2006 Cancun Holding II became a joint venture company between Cancun Holding I and Inversiones Ma y Mo SL (*Inversiones*, an (investment) company of the Nicolau family). On 18 June 2009 Invernostra SL (Unipersonal) (*Invernostra*) acquired 7% of the shares of Cancun Holding II; Cancun Holding I and *Inversiones* each retained 46.5% of the shares of Cancun Holding II.

22 R. Kraakman, 'The Durability of the Corporate Form', in: P. DiMaggio (ed.), *The Twenty-First-Century Firm. Changing Economic Organization in International Perspective*, Princeton/Oxford: Princeton University Press 2001, pp. 147-160 (150).

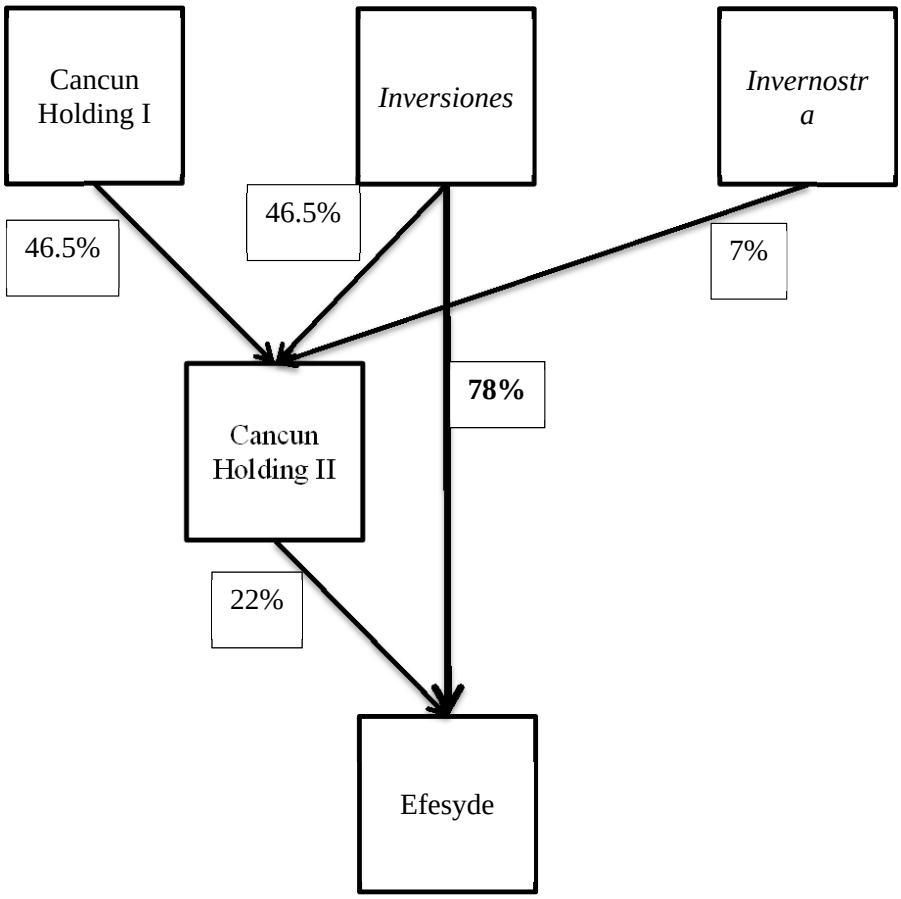


The costs of realizing the hotel complex amounted to USD 140 million; the hotel complex ('Secret Silver Sands') started operating in August 2008. During the summer and fall of 2008 differences of opinion began to emerge between Cancun Holding I (the Lliteras family) and *Inversiones* (the Nicolau family) about the costs involved with building and operating the hotel complex.

The shares that Cancun Holding I held in Cancun Holding II were 'A shares', the shares that *Inversiones* held in Cancun Holding II were 'B shares', and the shares that Invernostra held in Cancun Holding II were 'C shares'. Under the articles the A, B and C shares carried with them the right to nominate managing directors of Cancun Holding II. The C shares carried with them additional rights that implied that some decisions of the management board could only be made in a meeting of the management board where at least two board members were present, among whom at least one board member who was nominated by the holder of the C shares, and that these

decisions had to be approved also by at least one board member who was nominated by the holder of the C shares. Since 18 June 2009 the management board of Cancun Holding II had consisted of K.H.K.L.B. Roovers (managing director A, on behalf of Cancun Holding I), Equity Trust Co. NV (managing director B, on behalf of *Inversiones*) and J.M. Navarro Lacoba (managing director C, on behalf of Invernostra).

Inversiones had a claim against Efesyde (that was at the time not completely immediately due) for work it had performed on the hotel complex. When Efesyde asked its bank to enhance its credit, the bank indicated that it would only be willing to do so if Efesyde was somehow able to bring its debt position vis-à-vis *Inversiones* to an end. In order to accomplish this, Efesyde issued a large number of shares to *Inversiones* on 1 July 2009 that *Inversiones* paid up by balancing its claim against Efesyde. As a consequence of this, *Inversiones*

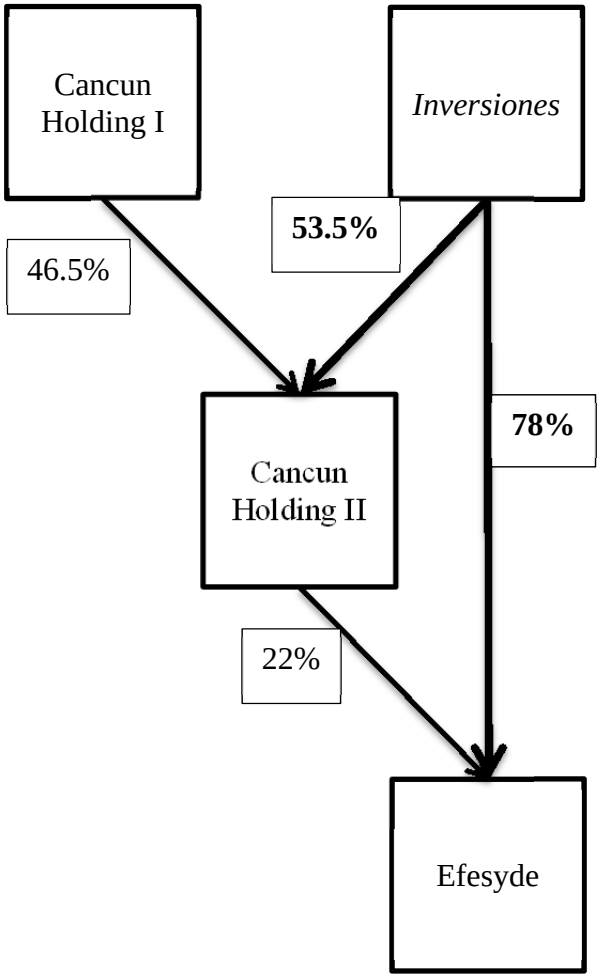


became a 78%-shareholder in Efesyde and the participation of Cancun Holding II in Efesyde decreased from almost 100% to 22% ('the first watering down' of the participation of Cancun Holding II in Efesyde). This arrangement was intended to be temporary only.

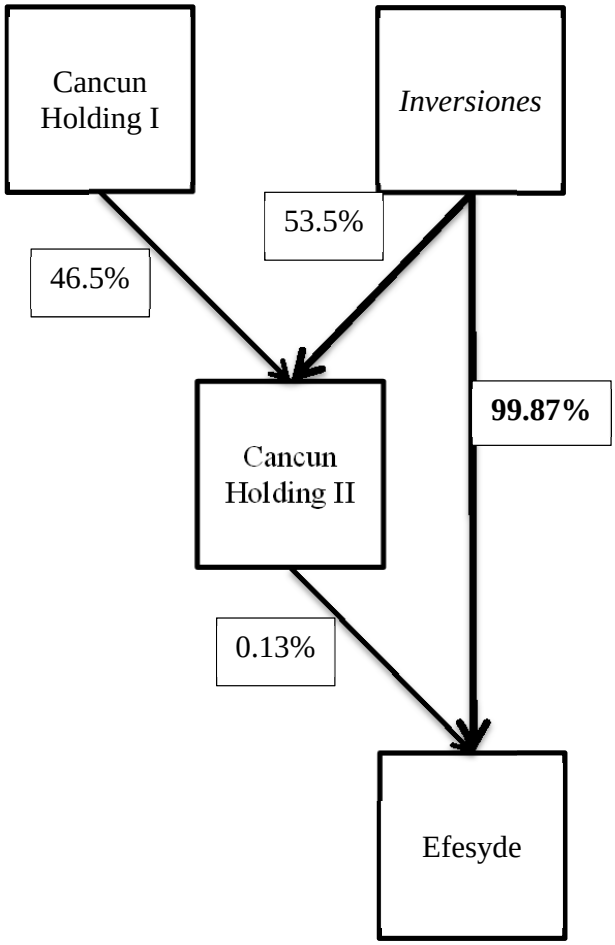
The management board of Efesyde had for a time consisted of three persons from the Lliteras family. Of these three persons, following the issue of shares to *Inversiones*, only Margarita Lliteras remained on the board, and G. Nicolau Salleras (on behalf of *Inversiones*) and J.M. Navarro Lacoba (on behalf of Invernostra) became board members.

At some point during the summer of 2009 the management board of Cancun Holding II put forward the proposal that Cancun Holding II issue shares to *Inversiones* and Invernostra (but not to Cancun Holding I). This proposal would result in the participation of Cancun Holding I decreasing to 0.08%, Invernostra retaining its participation of 7% and *Inversiones* increasing its participation to 92.92%. The background of this proposal was to compensate *Inversiones* for giving up its claim against Efesyde. Obviously, Cancun Holding I was against the proposal and did not attend the general meeting that would decide on the issue of the shares. As a result, the shares could not be issued because under the articles of Cancun Holding II a decision to issue shares required the presence of all shareholders and a unanimous vote. However, the articles also provided that in such a case a second general meeting could be convened where a decision to issue shares could be made regardless of the number of shareholders present and by a simple majority. The management board of Cancun Holding II convened such a meeting. This meeting was never held because on 21 September 2009 Cancun Holding I filed a lawsuit against Cancun Holding II under the provisions on the Right of Inquiry in Title 8 of the Second Book of the Dutch Civil Code. But then …

… on 1 October 2009 Invernostra made over its participation in Cancun Holding II to *Inversiones*. *Inversiones* now held 53.5% of the shares in Cancun Holding II.



Also, on 3 November 2009 the general meeting of Efesyde decided to issue shares to *Inversiones*. The notice convening this general meeting had been published in a local Mexican newspaper. Cancun Holding I was not represented in this general meeting because it was not aware that it had been convened (the fact that the general meeting would be held had been discussed during a meeting of the board of Efesyde but Margarita Lliteras had not attended that board meeting). As a consequence, the participation of *Inversiones* in Efesyde increased from 78% to 99.87% and the participation of Cancun Holding II BV in Efesyde decreased from 22% to 0.13% ('the second watering down' of the participation of Cancun Holding II in Efesyde).



In the proceedings instituted by Cancun Holding I against Cancun Holding II the Enterprise Court in its judgment of 28 April 2010 came to the conclusion that there were well-founded reasons to doubt Cancun Holding II's policies and awarded the request of Cancun Holding I that an independent investigation be conducted into the policies and the course of affairs of Cancun Holding II.[23] On the basis of the outcome of this investigation, the Enterprise Court on 19 July 2012 concluded at the request of Cancun Holding I that there had been mismanagement on the part of Cancun Holding II.[24] The Enterprise Court in particular held it against the management board of Cancun Holding II that it had not done enough to protect the position of Cancun Holding I during 'the first watering down' of the participation of Cancun Holding II

23 Enterprise Court 28 April 2010, *ARO* 2010/71 (Cancun).
24 Enterprise Court 19 July 2012, *JOR* 2013/7 and *ARO* 2012/113 (Cancun).

in Efesyde, the transfer by Invernostra of its participation in Cancun Holding II to *Inversiones* and 'the second watering down' of the participation of Cancun Holding II in Efesyde.

Several parties involved lodged an appeal to the Dutch Supreme Court against this judgment of the Enterprise Court. On 4 April 2014 the Dutch Supreme Court rebutted these appeals in four judgments.[25] Some of the arguments put forward before the Dutch Supreme Court raised the question whether the Enterprise Court could have based its judgment that there was mismanagement on the part of Cancun Holding II on the conduct of the company's management board. In two considerations the Dutch Supreme Court went into the duties of the management board of a company both in general and with a focus on a joint venture company. The first consideration reads:

> 'In fulfilling their duties the managing directors are to be guided by the best interests of the company and the undertaking connected with it […]. What these interests are, depends on the circumstances of the case. If there is an undertaking connected with the company, the interests of the company are normally defined by the advancement of the continued success of this undertaking. In the case of a *joint venture* company the interests of the company are furthermore defined by the nature and the contents of the cooperation as agreed upon by the shareholders. The nature and the contents of the collaboration in a *joint venture* company where the shareholders are on an equal footing may imply that the interests of the company too are served best by the continuation of stable relationships between the shareholders; this may mean that the relationships between the shareholders must not be changed any further than is necessary in the light of the circumstances.'

The second consideration reads:

> 'In fulfilling their duties the managing directors are furthermore […] bound to exercise due care towards the interests of all those associated with the company

25 Dutch Supreme Court 4 April 2014, *ARO* 2014/71 (Cancun), Dutch Supreme Court 4 April 2014, *ARO* 2014/72 (Cancun), Dutch Supreme Court 4 April 2014, *ARO* 2014/73 (Cancun) and Dutch Supreme Court 4 April 2014, *JOR* 2014/290 and *ARO* 2014/74 (Cancun). M.J.G.C. Raaijmakers, 'Cancun: een joint venture klem tussen contract en instituut', *Ars Aequi* 2014, pp. 459-465. M.J.G.C. Raaijmakers, 'Bestuursautonomie in een (gezamenlijke) dochter-B.V.: een novum in concernverhoudingen?', *Tijdschrift voor Ondernemingsbestuur* 2015-1, pp. 2-12. M.J.G.C. Raaijmakers, 'De "institutionele opvatting": grondslag en inhoud?', *Ondernemingsrecht* 2015-5, pp. 155-164. On the implications of the Cancun judgment: *Autonomie van het bestuur en haar grenzen voor en na de Cancun-uitspraak*, Deventer: Kluwer 2015: M.J.G.C. Raaijmakers, 'Over de oorsprong, zin en betekenis van de "institutionele" opvatting', pp. 10-29, A.F.M. Dorresteijn, '"Cancun", bestuursautonomie en vennootschapsbelang, pp. 30-38, J.B. Huizink, 'Bestuursautonomie na Cancun', pp. 39-48, W.J.M. van Veen, 'Vennootschapsrechtelijke doorwerking, bestuursautonomie en bestuurstaak bij joint ventures na Cancun: what's new?', pp. 49-66, A.F. Verdam, 'Iets over de verhouding tussen de institutionele opvatting, het vennootschapsbelang en de norm van redelijkheid en billijkheid, mede in relatie tot bestuurders, commissarissen en aandeelhouders', pp. 67-78. M.P.P. van Buuren, 'Vennootschappelijk belang? Leg uit en pas toe', *Fiscaal Tijdschrift Vermogen* 2014 pp. 13-18.

> and its undertaking. […] This duty of care may imply that managing directors in serving the interest of the company shall ensure that the interests of all those associated with the company or its undertaking are not being harmed unnecessarily or disproportionately. As also follows from [the last part of] the foregoing consideration, the duty of the managing directors of a *joint venture* company to exercise due care towards the shareholders may involve a special duty of care towards the position of a shareholder whose interest is watered down or threatens to be watered down (further).'

7.2 A short comment

In the Cancun case the Dutch Supreme Court did not in so many words refer to the corporate form as a contractual relationship between its participants. However, the Dutch Supreme Court did refer to a joint venture company as a company where 'the interests of the company are […] defined by the nature and the contents of the cooperation as agreed upon by the shareholders', and added to this that the management board of a joint venture company is under an obligation to protect 'the position of a shareholder whose interest is watered down or threatens to be watered down'. This could be regarded as an implicit recognition of the special organizational nature of a joint venture company as a contractual relationship between its shareholders.

8 Concluding remarks: the duty to advance and preserve

For courts in adjudicating cases before them to refer to the chacteristics of a company is not unusual and would only be expected. The Dutch Supreme Court *e.g.* in a judgment of 6 December 2013 upheld a judgment of the Enterprise Court by considering that the Enterprise Court had not erred in considering that 'more knowledge and insight (and more efforts to acquire that knowledge and insight) may be expected on the part of a systemic bank (in view of its duty of care […]) than from others under other circumstances'[26] However, the Dutch Supreme Court had not before referred to the characteristics of a company in connection with the duty of directors to be guided by the best interests of the company and the undertaking connected with it. In connection with this duty, the Dutch Supreme Court on several occasions underlined the autonomous position of corporate directors vis-à-vis the company's shareholders and the general meeting: corporate directors are free to take decisions that contravene the interests of shareholders (*Doetinchemse IJzergieterij*); in the absence of provisions in the articles corporate directors are not obliged to follow instructions given to them by the general meeting (*Forum-*

26 Dutch Supreme Court 6 December 2013, *JOR* 2014/65 (Fortis).

Bank); in the absence of statutory provisions or provisions in the articles a management board is not under an obligation to consult the general meeting about strategic issues; and a supervisory board is not under an obligation to intermediate in conflicts between the management board and shareholders (*ASMI*). This reasoning principally left it to corporate boards and directors themselves to determine what is in the best interests of the company and the undertaking connected with it. While allowing boards and directors a wide margin of discretion, this reasoning also provided little guidance. It would seem that for the first time such guidance is now available. It follows from *Cancun* that corporate boards and directors are obliged to advance the continued success of the undertaking that is connected with the company, taking into account the organizational specifics of the company. In *Cancun* these organizational specifics were that the company was a joint venture company in which the shareholders were, and were supposed to remain, on an equal footing. In other cases other organizational characteristics may be relevant: *e.g.* that the company is the parent company of a group, that the company is a subsidiary company in a group, that the company has only one shareholder or that the company is a family business. That corporate boards shall be guided by the best interests of the company and the undertaking connected with it means, as the Cancun judgment indicates, that their prime duty is to advance the success of the undertaking that is connected with the company (the fact that there is an undertaking connected with the company is certainly an important characteristic) as well as to preserve the company's other organizational characteristics. Thus, this is *The Duty to Advance and Preserve*. Interestingly, this is neatly in line with a consideration of the Supreme Court of the State of Delaware in the Selectica case on protective measures against a possible hostile takeover: 'Delaware courts have approved the adoption of a Shareholder Rights Plan as an anti-takeover device […]. Any NOL poison pill's principal intent, however, is *to prevent the inadvertent forfeiture of potentially valuable assets*, not to protect against hostile takeover attempts' (italics added). As a conclusion it would seem safe to say that in the Netherlands the statutory core legal concept of the company is now being decisively influenced by another statutory core legal concept: the duty of corporate directors in the performance of their duties to be guided by the best interests of the company and the undertaking that is connected with it. Whereas the company remains an abstract organizational form in which the authority of the board of directors is pre-eminent, corporate boards are now being offered guidance in deciding how they should fulfil this duty. Corporate directors may go on the assumption that they should regard the undertaking that is connected with the company as well as the company's other organizational characteristics as strong indications of what 'their' company is about essentially.

9 Shareholders' right to put items on the agenda of the general meeting

Colliding perspectives on a core right of shareholders ▪

Tom Dijkhuizen & Jelle Nijland ▪▪

1 INTRODUCTION

The role and position of shareholders within a listed public company has been a subject of debate on both the national and the international level for decades. This debate focuses primarily on the rights that are, or perhaps, should be conferred upon shareholders in such a company and, consequently, on the active or effective exercise of those rights by the same shareholders. In this contribution, we focus on one particular core concept, namely the right that is conferred upon shareholders to put items on the agenda of the general meeting. The right of shareholders to secure influence in the company through a dialogue with the board can be considered as a core instrument within company law that ensures the possibility of checks and balances within the company. Whether under the shareholders' or the stakeholders' model, this core concept is paramount for the legal structure of companies. Since the general meeting is considered to be the traditional means through which shareholders can exert influence in the investee company,[1] the right to put items on the agenda or to table resolutions for such a meeting can be considered to be a *core right* for shareholders since this is one of the few legal possibilities though which they can exert influence if they so desire. The exercise of this right enables shareholders to debate with the management of the company they have invested in, but also with each other about all matters

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▪ This article draws and elaborates on forthcoming publications from the first-mentioned author on the specific topic of shareholders' right to put items on the agenda of the general meeting.

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1 The High-Level Group of Company Law Experts, *Report of the High-Level Group of Company Law Experts on a modern Regulatory Framework for Company Law in Europe*, Brussels, 4 Nov. 2002, available at <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf>, p. 49.

that they deem to be of interest to their investments.[2] This specific shareholders' right has been under scrutiny in the last two decades because of two conflicting developments. On the one hand, the right has been introduced in order to strengthen the position of shareholders within the public limited company; firstly when it was formulated in the form of *soft law* and later when it was codified on a national and European level. On the other hand, certain parties have been looking for a way to diminish the shareholders' influence by counteracting the shareholders' right to put an item on the agenda because the corresponding *shareholder activism* led to alarm in certain sectors in society.[3]

In this contribution, we will focus on the development of this core right for shareholders in the Netherlands, as codified in Book 2, Article 114(a) Dutch Civil Code (hereafter: DCC), under the influence of both domestic and European legislative developments, which might be conflicting with each other. We will put this specific development also within its broader context, namely within the debate about the role and the position of shareholders in a public company.

This contribution is structured as follows. After this introduction, the contribution will firstly address how the right to have items put on the agenda was introduced in the Netherlands in the form of self-regulation. Subsequently, the third section will focus on the codification of this right in the Netherlands and the fourth section will provide an overview of the developments at EU level that have an influence on the (wording of the) provision comprising the right to put items on the agenda, whilst the fifth section will deal with the domestic legislative developments regarding this Article as a response to shareholder activism in the Netherlands. The final section will make some concluding remarks about the influences of both developments on shareholders' right to put items on the agenda.

2 THE INCREASING ATTENTION FOR THE ROLE AND POSITION OF SHAREHOLDERS

As has been pointed out earlier, the shareholders' right to (have the board) put items on the agenda of the general meeting forms part and parcel of the debate on the role and position of shareholders in listed public limited companies (*NV's*) in the Netherlands. Peters and Eikelboom even state that 'the right of listed companies to place items on the agenda appears to act in the Netherlands as the point at which shareholders' power and managing authority

2 The High-Level Group of Company Law Experts 2002, p. 49.

3 F.M. Peters & F. Eikelboom, *Memorandum: the shareholders' right to put items to the agenda and the risk for the Dutch state of being liable due to breaches of EU law*, May 2015, available at <http://bureaubrandeis.com/wp-content/uploads/2014/08/Artikel-Ingelse-veralgemeniseerd.pdf?1d13cc>, p. 6.

are balancing'.[4] From the late 1980s and 1990s, the attention in the Netherlands for this pivotal role has increased rapidly due to a growing awareness that the role of shareholders and the general meeting in the corporate governance of Dutch listed companies were marginalized as a consequence of the introduction of the special two-tier board regime (*de structuurregeling)* for certain 'big' companies. As a result, the balance of power, or rather, the system of checks and balances within Dutch listed companies was lost according to some.[5] The debate concerning the position of shareholders within listed companies was part of a bigger corporate governance debate that took place in Dutch society at that time. This debate was primarily focused on the viability of the corporate governance structures of Dutch listed companies in light of the growing internationalization of the Dutch economy and the increasing international attention for the (marginalized) position of shareholders in listed public companies. As a result of this wider debate, a so-called Corporate Governance Committee was installed in April 1996.[6]

This committee – commonly referred to as the Peters Committee, after its chairman – was asked to examine the viability of the then existing corporate governance structures against the background of the continuing internationalization of the Dutch economy and the increased international attention for the role, position and influence of shareholders within listed companies.[7] The Committee notes, in its first interim report, that within Dutch listed companies a great diversity of arrangements and structures exists that limits the influence of shareholders within these companies.[8] The Committee also specifies some subjects ('*toetspunten*'), including the company's strategic policy, upon which shareholders should, in the opinion of the Committee, be able to exert their influence.[9] The committee draws the conclusion that, in the context of the desired dialogue and the accountability required from the board, it is pivotal that shareholders can exert influence on the composition of the agenda of the

4 F.M. Peters & F. Eikelboom, *The conflict between Boskalis and Fugro concerning the right to place items on the agenda*, available at <http://bureaubrandeis.com/wp-content/uploads/2014/08/19-05-15-Bureau-Brandeis-Engelse-vertaling-De-strijd-over-het-agenderingsrecht-tussen-Boskalis-en-Fugro-DEF.pdf?1d13cc>, 2; F.M. Peters & F. Eikelboom, 'De strijd over het agenderingsrecht tussen Boskalis en Fugro', *WPNR* 2015, 7061, p. 407.

5 B.F. Assink, 'Facetten van verantwoordelijkheid in hedendaags ondernemingsbestuur', in B.F. Assink & D.A.M.H.W. Strik, *Ondernemingsbestuur en risicobeheersing op de drempel van een nieuw decennium: een ondernemingsrechtelijke analyse*, preadvies van de Vereeniging 'Handelsrecht' 2009, Deventer: Kluwer 2009, p. 20.

6 The Corporate Governance Committee was specifically set up as a result of an agreement between the Association of Securities-Issuing Companies (*de Vereniging Effecten Uitgevende Ondernemingen*) and the Amsterdam Stock Exchange Association (*de Vereniging voor de Effectenhandel*). See *Kamerstukken II* 1997/98, 25 732, no. 5, p. 2.

7 The Corporate Governance Committee, *Corporate Governance in Nederland. Een aanzet tot verandering en een uitnodiging tot discussie*, Amsterdam: Secretariaat Corporate Governance 1996, p. 9; Assink 2009, p. 20.

8 The Corporate Governance Committee 1996, p. 21

9 The Corporate Governance Committee 1996, p. 22.

general meeting. The committee also emphasizes that although only some companies have granted the right to put items on the agenda of the general meeting to shareholders and holders of depository receipts in their articles of association, management boards of listed companies should in principle honour a timely request to put an item on the agenda of the general meeting, unless compelling circumstances dictate otherwise.[10] In its final report, the Committee formulates 40 recommendations, including a specific recommendation regarding the right of shareholders to put items on the agenda of the general meeting. This recommendation implies that requests of investors – either shareholders and/or holders of depository receipts, who solely or jointly represent one per cent of the issued capital or whose shares on the date of convening the meeting have a market value of at least *f*500,000 to place items on the agenda of the general meeting should be honoured by the board or the chairman of the supervisory board if they are submitted at least thirty days before the date of the meeting, unless, in the opinion of the management or supervisory board, the request conflicts with substantial interests of the company.[11] Moreover, the Committee also recommends that if the board refuses such a request, this notification shall be made explicit at the beginning of the meeting. The board should also justify why it has refused to include the item in drawing up the agenda.[12] The committee explicitly chooses not to submit proposals to amend existing legislation, because it argues that the implementation of the recommendations, in addition to existing legislation, can reinforce the corporate governance structures of Dutch listed companies sufficiently.[13] The committee also assumes that the listed companies will voluntarily implement the recommendations.[14] In short, the right or power for shareholders and holders of depository receipts to put an item on the agenda of the general meeting should, if it is not provided for in the articles of association, be ensured through self-regulation.

3 The (prelude to the) codification of the shareholders' right to put items on the agenda of the general meeting

After the publication of the final report of the Peters Committee, a Monitoring Committee was installed with the responsibility to examine to what extent

10 The Corporate Governance Committee 1996, p. 26. The committee defines abuse of rights or a legitimate expectation that the request will only disrupt the orderly conduct of the general meeting as such compelling circumstances.

11 Recommendation 30. See The Corporate Governance Committee, *Corporate Governance in Nederland. De Veertig Aanbevelingen*, 25 juni 1997, < http://commissiecorporategovernance.nl/commissie-peters>, pp. 29 and 36.

12 The Corporate Governance Committee 1997, p. 29.

13 The Corporate Governance Committee 1997, p. 4.

14 The Corporate Governance Committee 1997, p. 4.

the recommendations were implemented. The committee concluded, regarding the functioning of the general meeting and the role of the investors, that in this domain the gap between ambition and reality was significant and that the slight movement regarding the (re)valuation of the position of investors in listed companies was in contrast with international developments.[15] The Dutch government soon responded to the publication by stating that boards of listed companies should honour reasonable requests by shareholders or holders of depository receipts to put items on the agenda of the general meetings and, moreover, indicated that a legislative reform on this specific subject was under way. The right or power to put items on the agenda for shareholders will, in the opinion of the government, enhance an open and balanced communication between the directors and the capital, which is necessary for proper accountability by the board towards the investors.[16]

The continued attention for and discussion about the corporate governance structure of Dutch (listed) companies has also prompted the government to request the Social and Economic Council (*Sociaal-Economische Raad*, hereafter: SER) to review and advise on the viability of the two-tier board regime (*de structuurregeling)*.[17] Although the shareholders' right to put items on the agenda of the general meeting, strictly speaking, was not part of the request for advice, the SER also discussed the position of shareholders in this two-tier board regime and, consequently, also the right to put items on the agenda. In its advisory report,[18] the SER called for a revaluation of the position of investors in two-tier companies, especially against the background of developments on the international securities markets. In the opinion of the SER, these developments required a proper corporate governance system in the sense that this system creates balanced relations between investors on the one hand and the management and supervisory board on the other.[19] The SER believed that this desirable revaluation could in principle be realised in two ways, namely (i) through legislative amendments which reinstate certain powers of shareholders that were taken away by the introduction of the two-tier board regime; and (ii) by introducing measures that enhance the position of investors within listed companies. As part of the latter, the SER argued that the management and supervisory boards should be required to honour a request from

15 Monitoring Committee Corporate Governance, *Monitoring Corporate Governance in Nederland: bericht van de Monitoring Commissie Corporate Governance en de uitkomsten van het onderzoek verricht door het Economisch Instituut Tilburg (EIT), verbonden aan de Katholieke Universiteit Brabant,* Deventer: Kluwer 1998, p. 7 and 10.

16 *Kamerstukken II* 1998/99, 25 732, no. 8, pp. 13 and 16.

17 *Kamerstukken II* 2001/02, 28 179, no. 3, p. 1 (MvT). Incidentally, the Dutch Lower Chamber (*de Tweede Kamer*) also sought advice from the SER concerning this topic. Zie *Kamerstukken II* 1999/2000, 25 372, no. 13.

18 The Social and Economic Council, *Advies over het functioneren en de toekomst van de structuurregeling* (advies van 19 January 2001, SER 01/02), Den Haag: Sociaal-Economische Raad 2001; *Kamerstukken II* 2001/02, 25 732, no. 17.

19 The Social and Economic Council 2001, p. 79.

shareholders and/or holders of depositary receipts, who solely or jointly represent at least one per cent of the issued share capital, to have an item put on the agenda of the general meeting, unless this request conflicts with substantial interests of the company.[20]

The government responded quickly to the advisory report of the SER by stating that it would undertake legislative action in order to adapt the two-tier board regime in accordance with the aforementioned report.[21] The government also indicated that it would undertake an initiative to codify the shareholders' right to put items on the agenda of the general meeting. On 8 January 2002, the government, in accordance with earlier statements, introduced a legislative proposal that aimed to adapt the two-tier board regime and to enhance the role of the general meeting as a platform for exchange of information.[22] The government also introduced this proposal in order to fulfil the then felt need to improve the relationship between the investors and the management board of investee companies. In accordance with the Peters Committee and the SER, the proposal introduces *inter alia* a right to have an item put on the agenda of the general meeting for one or more shareholders who solely or jointly represent one per cent of the issued capital. Unlike the Peters Committee, which introduces a market value criterion representing ƒ 500,000, the Cabinet suggests a market value criterion of € 50 million.[23] Companies can lower these alternative[24] criteria in their articles of association.[25] The right to put items on the agenda is also granted to holders of depositary receipts for shares issued with the company's cooperation.[26] In addition to these eligibility thresholds, the legislative proposal introduces some formal requirements regarding the request to put an item on the agenda. Firstly, this request must be submitted in writing. Moreover, the request must be filed at least 60 days prior to the general meeting.[27] The deadline for lodging the request can be shortened in the articles of association.[28] If the request is made by one or more shareholders

20 The Social and Economic Council 2001, p. 84.
21 *Kamerstukken II* 2000/01, 25 732, no. 18.
22 Wetsvoorstel wijziging van boek 2 van het Burgerlijk Wetboek in verband met aanpassing van de structuurregeling, *Kamerstukken II* 2001/02, 28 179, no. 2.
23 The government justifies this market value criterion by stating that a shareholder shows engagement with the investee company through the investment of such an amount, regardless of the corresponding percentage of the share capital. *Kamerstukken II* 2001/02, 28 179, no. 3, p. 22.
24 F.J. Oranje, 'Convocatie- en agenderingsrecht van aandeelhouders. Toegevoegde waarde in het systeem van checks and balances tussen bestuur en aandeelhouders', in: P.J. van der Kost, R. Abma & G.T.M.J. Raaijmakers (eds.), *Handboek onderneming en aandeelhouder, Serie Onderneming en Recht, deel 69*, Deventer: Kluwer 2012, pp. 275-305, p. 284.
25 Article 2:114a (3) DCC.
26 Article 2:114a (4) DCC.
27 Article 2:114a (1) DCC.
28 Article 2:114a (3) DCC.

who have a sufficient interest in the company and the formal requirements are satisfied, the request must in principle be honoured. This does not apply if the request conflicts with a substantial interest of the company.[29] A refusal on this ground is conceivable, as follows from the explanatory memorandum (*de memorie van toelichting*), if the sole aim of the series of items to be put on the agenda is to seriously disrupt the order of the meeting.[30] From the memorandum of reply (*de nota naar aanleiding van het verslag*) it follows that a refusal is also justified in case the request comprises of an extreme series of items.[31] Moreover, the general standards of reasonableness and fairness and abuse of rights can also be seen as 'lower limits', but the concrete interpretation of these statutory provisions regarding the exercise of the shareholders' right to put items on the agenda of the general meeting remains unclear.[32] After the legislative proposal was accepted, the shareholders' right to put items on the agenda was embedded in law with the introduction of the Act to amend Book 2 of the Dutch Civil Code in connection with the adaptation of the two-tier board structure regime,[33] which entered into force on October 1, 2004.[34] The exercise of this right can be refused if substantial interests of the company conflict with the exercise of the right or if such exercise is in conflict with general standards of reasonableness and fairness and is tantamount to abuse of law. The management and/or supervisory board do not have the right of a substantive assessment of the issues that investors – shareholders or holders of depositary receipts – request to be put on the agenda. Consequently, the investors could vote and/or decide on topics regarding which the general meeting is not formally authorized to make decisions, such as the strategy of the company, which is formally reserved for the management board. However, if the general meeting has decided on such a topic, this is to be seen as a decision (*beslissing*), but not as a resolution (*besluit*). Consequently, the outcome of such a vote is not binding and can be brushed aside by the management board.[35]

29 Article 2:114a (3) DCC. See also F.G.K. Overkleeft, 'Het agenderingsrecht voor aandeelhouders in beursvennootschappen: een aanzet tot (her)bezinning', *Ondernemingsrecht* 2009, 167, pp. 714-723, p. 715.

30 *Kamerstukken II* 2001/02, 28 179, no. 3, p. 21. See also Overkleeft 2009, p. 715.

31 *Kamerstukken II* 2001/02, 28 179, no. 5, p. 24. See also Overkleeft 2009, p. 715.

32 Overkleeft 2009, p. 715.

33 Wet van 9 juli 2004 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met aanpassing van de structuurregeling, *Stb.* 2004, 370.

34 *Stb.* 2004, 405.

35 Overkleeft 2009, p. 717.

4 SHAREHOLDERS' RIGHTS *IN MOTION*: THE IMPLEMENTATION OF THE SHAREHOLDERS RIGHTS' DIRECTIVE

At European level, the attention for the role and position of shareholders in listed companies also increased, especially after corporate scandals involving companies such as Enron and WorldCom in the US and Parmalat, Vivendi and Mannesmann in Europe. The idea was that in a proper corporate governance system, those types of scandals would not take place. In reaction to the corporate scandals, the European Commission extended the mandate of a so-called High-Level Group of Company Law Experts (hereafter: the High-Level Group), chaired by Jaap Winter, to address a number of issues related to best practices in corporate governance and auditing.[36] The focus of the group is on strengthening the – cross-border – exercise of shareholders' rights and solving the problems associated with cross-border voting. In its report, the High Level Group focused *inter alia* on the position of shareholders within European listed companies. The group argued that 'in a proper system of corporate governance, shareholders should have effective means to actively exercise influence over the company'.[37] In their perspective, the shareholders – as the residual claimholders – needed to be able to ensure that management pursues – and remains accountable to – their interests. The traditional means for shareholders to exercise this influence is, in the opinion of the High Level Group, through the general meeting, as this is the forum where shareholders can debate with the management board and each other, and vote on resolutions put forward to them.[38] Moreover, the group also stated that 'the right for shareholders to submit proposals for general meeting decisions plays an important role in the corporate context'.[39] However, in the opinion of the High Level Group, the legal requirements or restrictions with respect to those rights often prevent small shareholders from being active.[40] Therefore, the group asked, in its consultative document, whether there was a need, at EU level, to provide for minimum standards regarding the right for shareholders to ask questions and submit proposals for decision-making at the general meeting. The respondents saw no ground for doing so, however, and for that reason the group concluded by recommending that the threshold for the right to put items on the agenda of the general meeting should not exceed 5% of the issued capital and that the European Union should consider imposing this

36 The High-Level Group of Company Law Experts 2002, p. 1. Until then, the High-Level Group was requested to make recommendations on a modern regulatory framework in the EU for company law and this group dealt in particular with issues related to the Takeover Bids Directive.
37 The High-Level Group of Company Law Experts 2002, p. 48.
38 The High-Level Group of Company Law Experts 2002, p. 49.
39 The High-Level Group of Company Law Experts 2002, p. 51.
40 The High-Level Group of Company Law Experts 2002, p. 51.

as a minimum rule on Member States.[41] Furthermore, listed companies should be required to explicitly disclose to their shareholders how they can ask questions, how and to what extent the company intends to answer questions, and how and under what conditions they can submit proposals to the shareholders' meeting. This should, in the opinion of the group, be an element of the mandatory annual corporate governance statement of listed companies.[42]

The European Commission responded quickly to the findings of the High-Level Group and in May 2003 published its 'Action Plan for Modernisation of the corporate law and enhancement of corporate governance in the European Union'.[43] In this action plan, the Commission stated that 'recent financial scandals have prompted a new, active debate on corporate governance, and the restoration of confidence is one more reason for new initiatives at EU level. Investors, large and small, are demanding more transparency and better information on companies, and are seeking to gain more influence on the way the public companies they own operate.'[44] Consequently, there is a need 'for enhancing the exercise of a series of shareholders' rights in listed companies'.[45] Therefore, the Commission concluded 'that some new tailored initiatives should be taken with a view to enhancing shareholder rights'.[46] These initiatives resulted, finally, in the adoption of the Directive on the exercise of certain rights of shareholders in listed companies (hereafter: the Shareholders' Rights Directive (SRD)), which was published on July 11, 2007.[47] This Directive, as expected, was aimed at strengthening the – cross-border – exercise of shareholders' rights and solving the problems associated with cross-border voting. The objective of the Directive was the effective exercise of the (voting) rights throughout the European Community,[48] as (i) effective shareholder control is a prerequisite to sound corporate governance; and (ii) these rights are reflected in the price to be paid at the acquisition of the shares.[49] Therefore, as follows from the same preamble, 'certain minimum standards should be

41 The High-Level Group of Company Law Experts 2002, p. 52.
42 The High-Level Group of Company Law Experts 2002, p. 74.
43 The European Commission. *Communication from the Commission to the Council and the European Parliament. Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*. COM (2003), 284 final.
44 The European Commission 2003, p. 7.
45 The European Commission 2003, p. 14.
46 The European Commission 2003, p. 8.
47 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., *L* 184/17.
48 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., *L* 184/17, recital no. 14, p. 19.
49 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., *L* 184/17, recital no. 3, p. 17.

introduced with a view to protecting investors and promoting the smooth and effective exercise of shareholder rights attaching to voting shares'.[50]

The Directive also paid particular attention to the right to put items on the agenda of the general meeting. According to the preamble, shareholders should in principle have the opportunity to put items on the agenda of the general meeting and to table draft resolutions for items on the agenda.[51] The exercise of this right should, as follows from the preamble, be made subject to two basic rules, namely (i) that any threshold required for the exercise of those rights should not exceed 5% of the company's share capital; and (ii) that all shareholders should in every case receive the final version of the agenda in sufficient time to prepare for the discussion and voting on each item on the agenda.[52] The shareholders' right to put items on the agenda as such is laid down in Section 6 of the Directive. This article requires Member States to ensure that shareholders, acting individually or collectively, have the right to put items on the agenda, provided that each such item is accompanied by a justification or by a draft resolution to be adopted in the general meeting.[53] Shareholders also have the right to table draft resolutions for items included or to be included on the agenda of the general meeting.[54] The requesting shareholder should, however, hold a minimum stake in the company[55] and the request must be lodged within the time limit laid down in national legislation.[56]

The implementation of this Directive into national legislation had the effect that the then existing Article 2:114a DCC needed to be amended. Before the implementation, this Article granted the possibility for the management and/or supervisory board to refuse the request for inclusion of items on the agenda on the ground that the request conflicted with substantial interests of the company. This ground for refusal, with the entry into force of the Shareholders' Rights Act[57] on July 1, 2010,[58] was deleted as the Directive did not contain

50 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., *L* 184/17, recital no. 4, p. 17.

51 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., *L* 184/17, recital no. 7, p. 18.

52 *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies*, 2007 O.J., *L* 184/17, recital no. 7, p. 18.

53 Section 6 (1)(a) SRD.

54 Section 6 (1)(b) SRD.

55 Section 6 (2) SRD. It is up to the national legislator to decide upon the minimum stake a shareholder has to hold in a company in order to be eligible to exercise the right, but such minimum stake, as laid down in national legislation, shall, in accordance with the recommendations of the High-Level Group, not exceed 5% of the share capital.

56 Section 6 (3) SRD.

57 Wet van 30 juni 2010 tot wijziging van boek 2 van het Burgerlijk Wetboek en de Wet op het financieel toezicht ter uitvoering van richtlijn nr. 2007/36/EG van het Europees Parlement en de Raad van de Europese Unie van 11 juli 2007 betreffende de uitoefening van bepaalde rechten van aandeelhouders in beursgenoteerde vennootschappen, *Stb.* 2010, 257.

58 *Stb.* 2010, 258.

any explicit ground to refuse a request.[59] In addition, the requirement to have the request accompanied by a justification or by a draft resolution to be adopted in the general meeting was added, in accordance with Section 6 (1)(a) SRD. The new Article 2:114a DCC also provides for the shareholders' right to table draft resolutions for items included or to be included on the agenda of the general meeting. Consequently, the management board and/or supervisory board can no longer refuse a request by invoking the aforementioned ground for refusal. The board may, however, still refuse a request where the exercise of the right to put items on the agenda is in conflict with the standards of reasonableness and fairness or where there is abuse of rights.[60]

5 SHAREHOLDERS' RIGHTS *IN MOTION*: THE RIGHT TO PUT ITEMS ON THE AGENDA UNDER (DOMESTIC) SCRUTINY AFTER SHAREHOLDER ACTIVISM

Next to the developments at the European level as described above, there were also developments at the national level that put the exercise of shareholders' rights under scrutiny. In particular, increased shareholder activism and infamous conflicts within Dutch listed companies between the board and shareholders about the strategy of the company were reasons for the Corporate Governance Code Monitoring Committee[61] to reevaluate the relationship between the company and its shareholders in the Dutch corporate governance model, including an evaluation of the exercise of the right to put items on the agenda by shareholders.[62] In December 2006, the Monitoring Committee published a document for consultation containing several proposals regarding the relationship between the company and its shareholders. The reactions to this consultation indicated broad support for the Committee's initial proposals. Consequently, the Committee advised the government to lay down further *rules of play* concerning the relationship between the company and its share-

59 F.M. Peters & F. Eikelboom 2015a, p. 4. These authors refer to the reply of the Minister of Justice in the memorandum of reply (*de nota naar aanleiding van het verslag*), *Kamerstukken II* 2008/09, 31 746, no. 7, p. 5.

60 In *Stork*, however, the Enterprise Division of the Amsterdam Court of Appeal ruled, by way of injunctive relief, that the general meeting could not vote on an item put forward by shareholders, i.e. the removal of the supervisory board, because this was in conflict with standards of reasonableness and fairness. One could argue that the ground for refusal in this case is also that the removal of the supervisory board conflicted with – in short – substantial interests of the company and, consequently, the item was in conflict with standards of reasonableness and fairness. See Court of Appeal Amsterdam (Enterprise Division) 17 January 2007, ECLI:NL:GHAMS:2007:AZ6440, *JOR* 2007, 42 with commentary from J.M. Blanco Fernández (*Stork*).

61 This Committee was originally installed to monitor the implementation of the first Dutch Corporate Governance Code.

62 Corporate Governance Code Monitoring Committee, Advisory report on the company-shareholder relationship and on the scope of the Code, available at <http://www.corpgov.nl/advies-kabinet-2007>, p. 8.

holders through an elaboration of the then existing Dutch Corporate Governance Code, commonly referred to as the Code Tabaksblat, after the chairman of the committee that drafted the Dutch Code, and also puts forth some recommendations regarding legislative action.[63] Two of the proposed *rules of play* pertain to the shareholders' right to put items on the agenda of the general meeting. One should, however, keep in mind that the provisions of the Dutch Corporate Governance Code are not binding and, moreover, are predominantly addressed to the listed company.

First, the Committee introduced a so-called response time for the management board. The Committee considers that it is good practice for shareholders to exercise the right to put an item on the agenda only after they have raised it with the management board of the company in case the proposed item could lead to a change in the strategy of the company, such as the dismissal of the management board members and/or supervisory board members.[64] In such an instance, the board has to be given the opportunity to formulate a reaction during a reasonable period of time. The Committee proposes a response time of a maximum of 180 days, since this period should suffice for the board to have further deliberation and constructive consultation with (other) shareholders and to form an opinion on the view of the investor and possible alternatives.[65] The proposal regarding the response period was included as best-practice provision IV.4.4 in the revised Code Tabaksblat, which was commonly referred to as the Code Frijns, after the chair of the Monitoring Committee.[66] A shareholder shall, in accordance with this best-practice provision, exercise the right to put an item on the agenda only after he has consulted the management board about this. If one or more shareholders intend to request that an item be put on the agenda that may result in a change in the company's strategy, the management board shall be given the opportunity to stipulate a reasonable period in which to respond (the response time). This shall also apply to an intention as referred to above for judicial leave to convene a general meeting pursuant to Article 2:110 DCC. Moreover, the shareholder shall respect the response time stipulated by the management board within the meaning of best-practice provision II.1.9.[67] Although the provision is in principle addressed to the listed company,[68] it limits the exercise of the

63 Corporate Governance Code Monitoring Committee, 2007, p. 3. The Committee considers that such further rules 'are necessary to regulate the company-shareholder relationship in order to ensure that the processes involving the management board, supervisory board and shareholders (i.e. the general meeting of shareholders) pass off smoothly and that the best possible balance is struck between the various interests'.

64 Monitoring Committee Corporate Governance Code 2007, p. 6.

65 Monitoring Committee Corporate Governance Code 2007, pp. 15 & 16.

66 Monitoring Committee Corporate Governance Code, *De Nederlandse corporate governance code. Beginselen van deugdelijk ondernemingsbestuur en best practice bepalingen*, 10 december 2008, http://commissiecorporategovernance.nl/download/?id=609.

67 Oranje 2012, p. 292; Overkleeft 2009, p. 721.

68 Overkleeft 2009, p. 721, under cit. 58.

shareholders' right to put items on the agenda since it only allows them to exercise this right after a consultation with the board and after respecting a possible response time the board could invoke.

The Committee's second recommendation with regard to the right to put items on the agenda is directed to the legislator. Although the right to put an item on the agenda was not covered by the consultation document itself, it became apparent from the reactions to the consultation document that there was a need for raising the admissibility barrier. The Committee therefore recommended to the legislator that the position with regard to the right to put items on the agenda should be brought into line with international practice and that the threshold should be raised to 3%.[69] The Committee is of the opinion that the market value criterion of € 50 million could be abolished.[70] In reaction to the advisory report of the Committee, the Minister of Finance readily accepted this specific recommendation and proceeded to an adjustment of the then current rules accordingly. The Minister also acknowledged that raising the threshold would mean a limitation of the shareholders' right on the one hand, but stressed on the other hand that without it, activist shareholders, who represent a relatively small percentage of the voting rights, would be able to have a significant impact on the general meeting.[71] This would put such a strain on the balance of power in the Dutch corporate governance system[72] that raising the threshold to 3 per cent and abolishing the market value criterion were desirable.[73] The government on 3 January 2008[74] published a draft for an Act implementing these rules, also referred to as 'the Act Frijns', which was passed on 24 July 2009.[75] Article 2:114a DCC has been adjusted accordingly by the entering into force of the Act Frijns.[76] The new provision entered into force on 1 July 2013.[77] The introduction of this Act puts a further restriction on the shareholders' right to put items on the agenda of the general meeting as only shareholders and holders of depository receipts that solely or jointly represent three per cent of the issued capital have this right as opposed to the situation prior to the Act Frijns.

However, these domestic regulatory developments seem to be in conflict with the objective of the European Directive, namely the effective exercise of

69 Furthermore, this 3% threshold is also in keeping with the threshold proposed by the Monitoring Committee for control disclosure. See Monitoring Committee Corporate Governance Code 2007, p. 22.

70 Monitoring Committee Corporate Governance Code 2007, p. 20.

71 *Kamerstukken II* 2006/07, 31 083, no. 1, p. 7.

72 *Kamerstukken II* 2006/07, 31 083, no. 1, p. 2.

73 *Kamerstukken II* 2006/07, 31 083, no. 1, p. 7.

74 Zie Overkleeft 2009, p. 721.

75 *Kamerstukken II* 2008/09, 32 014, no. 2.

76 Wet van 15 november 2012 tot wijziging van de Wet op het financieel toezicht, de Wet giraal effectenverkeer en het Burgerlijk Wetboek naar aanleiding van het advies van de Monitoring Commissie Corporate Governance Code van 30 mei 2007, *Stb.* 2012, 588.

77 *Stb.* 2012, 693.

shareholders' rights throughout the European Community. If the board invokes the response time, shareholders are obliged to respect this response time and, consequently, have to wait for at most 180 days before the issue forwarded by them is discussed in the general meeting. One could argue that this response time delays and therefore hinders the effective exercise of the right to put items on the agenda. Subsequently, the increase of the threshold to 3% can also be seen as a further limitation of (the exercise) of shareholders' right to put items on the agenda. The new Article 2:114a DCC, however, is in conformity with the Directive, as the threshold does not exceed the maximum threshold of 5%. In short, the rules are in conformity with European legislation, but one may doubt if the rules, and the response time in particular, are fully in line with the underlying objective of the Directive. Although shareholders must realize that differentiations in national approaches of member states in the EU with regard to shareholders' rights that are in conformity with the Directive are allowed, (foreign) shareholders might be surprised by such 'local arrangements' to the core concept of the shareholders' right to put items on the agenda.

6 Concluding remarks

The regulatory developments on a national and European level regarding the role and position of shareholders within a listed public company as illustrated with regard to the core right for shareholders in a listed company to put items on the agenda of the general meeting, seem to be moving in opposite directions. On a national level, the Dutch legislator is endeavouring to counteract shareholder activism by limiting shareholders' right to put an item on the agenda by introducing a response period for the board in the Dutch Corporate Governance Code during which shareholders cannot exercise this right and by raising the threshold from 1% to 3% of the issued share capital in a listed company. On the EU level, the role of shareholders as a "watchdog" not only on their own behalf, but also on behalf of other stakeholders, is emphasized in the current debate on corporate governance. Effective shareholder control is a prerequisite to sound corporate governance and as such, a proper system of corporate governance should ensure the effective exercise of the right for shareholders to put items on the agenda of the general meeting in order to have the means to actively exercise influence upon the company. The Dutch Civil Code and accompanying legislation as discussed fall within these norms and are in conformity with the Directive. However, since the objective of the Directive is to allow shareholders to make effective use of their rights throughout the Community, one may wonder whether the rules introduced are in conformity with the objectives of the Directive.

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