

Articles

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Prescription in the Proposal for a Common European Sales Law*

Abstract: The rules on prescription in Part VIII, Chapter 18, of the Proposal for a Common European Sales Law (CESL) follow the provisions of the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR), which, in general, have deserved favourable comments. Yet, a number of rules contained in those texts have been omitted. It is necessary to ascertain whether the CESL rules only apply to provisions on rights and claims resulting from sales or related services contracts, or whether they are also applicable to any other contractual right or claim and also to rights or claims of non-contractual origin. One of the most problematic issues concerns general prescription periods: firstly, because there are two general periods, a short one and a long one, without any specification about the claims or rights covered by each one of them; secondly, because neither period is suitable in case of non-conformity. There are also some interpretation problems due to missing, ambiguous or defective definitions. The systematic approach demands clarification too.

Résumé: Les règles sur la prescription dans la partie VIII, chapitre 18, de la proposition de règlement européen sur la vente reprennent les dispositions des principes du droit européen des contrats (PDEC) et du projet de cadre commun de référence (CCR) qui, en général, ont reçu des commentaires approuvés. Cependant, un certain nombre de règles contenues dans ces textes ont été omises. Il est nécessaire de vérifier si les règles de la proposition de règlement s'appliquent seulement aux dispositions sur les droits et actions résultant de ventes ou de contrats de services liés, ou si elles sont aussi applicables à n'importe quel autre droit ou action de nature contractuelle et aussi aux droits et actions d'origine non contractuelle. Une des questions les plus problématiques concerne la durée générale de la prescription: d'abord parce qu'il y a deux périodes générales, une courte et une longue, sans aucune spécification relative aux demandes

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ou actions couvertes par chacune d'elles; en second lieu parce qu'aucune de ces deux périodes ne convient dans l'hypothèse d'une non-conformité. Il y a aussi quelques problèmes d'interprétation dus aux définitions manquantes, ambiguës ou défectueuses. L'approche systématique requiert aussi quelques clarifications.

Zusammenfassung: Die Regeln zur Verjährung in Teil VIII, Kapitel 18 des Vorschlags für ein Gemeinsames Europäisches Kaufrecht (GEK) folgt den Vorschlägen in den Principles of European Contract Law (PECL) und im Draft Common Frame of Reference (DCFR), die – überwiegend – jeweils positiv aufgenommen wurden. Freilich wurden gewisse Teile aus jenen Texten weggelassen. Daher muss geklärt werden, ob das GEK nur auf Rechte und Ansprüche aus Kaufverträgen und verbundene Dienstleistungsverträge unter dem GEK anwendbar sein soll oder allgemein auf vertragliche Rechte und Ansprüche oder gar auch außervertragliche. Eine der problematischsten Fragen betrifft die allgemeine Verjährungsfrist: zunächst, weil es zwei allgemeine Verjährungsfristen gibt, eine kurze und eine lange, ohne Klarstellung welche für welche Rechte und Ansprüche eingreift, sodann, weil keine der beiden Fristen angemessen ist für den Fall der nicht Vertragsgemäßigkeit. Hinzu kommen einige Interpretationsprobleme auf Grund fehlender, zweideutiger oder fehlerhafter Definitionen. Auch der systematische Ansatz ruft nach einer Klärung.

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1 Introduction

The CESL Proposal does not only rule the typical legal regime of sales (parties' obligations and remedies, conformity, passing of risk, etc). While regulating sales, the legislator uses the opportunity to handle also other issues, such as formation and interpretation of contracts, unfair terms, defects of consent and the like.¹ CESL is thus a compendium of legal rules that a national lawyer would find suitable not only for special contracts (sales being the paradigm) but also for a

¹ Whereas 26 Proposal for a Regulation on CESL: 'The rules [...] should cover the matters of contract Law that are of practical relevance during the life cycle of the types of contracts falling within the material and personal scope [...].' Concerning the matters not addressed in CESL, see whereas 27. Critical with the argument that topics excluded lack practical relevance, R. Zimmer-

general part of the law of obligations, general part of contract law or *Rechts-geschäftslehre*. However, even if such a general part could be applicable to contracts other than those ruled by CESL (sales and related services), the scope of CESL is in fact restricted to sales and related services. The legal regime of prescription (Chapter 18) is affected by this ambivalent approach. It is unfortunately not clear whether the provisions on prescription only apply to seller and buyer's claims or rights or, by contrast, whether they have a vocation for general application. We will deal with that point under section 2. In the following sections we will analyze the rules on prescription provided in Chapter 18, mainly the subject-matter of prescription (section 3), periods of prescription and their commencement (section 4), extension of periods of prescription (section 5), renewal (section 6), effects of prescription (section 7) and party autonomy concerning prescription (section 8). After a short description of the respective provisions in each Chapter, we will compare them with the Principles of European Contract Law (PECL)² and the Draft Common Frame of Reference rules (DCFR),³ other EU Legislation⁴ and, when necessary, some national laws. To a lesser extent, the Unidroit Principles of International Commercial Contracts (PICC)⁵ and relevant rules in the international context⁶ will also be taken into account. Comments will highlight possible gaps and inconsistencies in CESL, aiming at improving the balance between business certainty and parties' protection, in particular when a consumer is a party to the contract. Some concluding remarks will summarize the main problematic aspects (section 9).

mann, 'Perspektiven des künftigen österreichischen und europäischen Zivilrechts' (2012) 134 *Juristische Blätter* 2 at 8–10 and 14, who also points out other gaps in the text.

2 O. Lando, E. Clive, A. Prüm and R. Zimmermann (eds), *Principles of European Contract Law*, Part III (The Hague, London and New York: Kluwer Law International, 2003).

3 C. von Bar and E. Clive (eds), *Draft Common Frame of Reference. Full Edition*, II (Munich: Sellier, 2009).

4 Directive 99/44/EC, of the European Parliament and of the Council, of 25 May 1999, on certain aspects of the sale of consumer goods and associated guarantees (*OJEC L 171*, 7.7.1999).

5 See Principles of International Commercial Contracts (3rd ed, Rome: Unidroit, 2010).

6 United Nations Convention on the Limitation Period in the International Sale of Goods (New York, 14.6.1974).

2 From The General Character Of Soft Law (PECL And DCFR) To The Special Character Of Hard Law (CESL): Influence On The Legal Regime Of Prescription

Extinctive prescription typically refers to the effect of lapse of time on a right to enforce an obligation, due to the creditor inactivity (Articles 178 and 180(3) CESL).

In general, it does not matter whether the obligation has a contractual origin. This becomes evident in PECL, where Chapter 14 is placed among the chapters devoted to the general part of the law of obligations.⁷ The same is valid for DCFR (Article III.-7:101 DCFR in conjunction with Article III.-1:101 DCFR).⁸ In DCFR extinctive prescription is ruled in Chapter VII of Book III ('Obligations and corresponding rights') and Book III is systematically located before specific contracts (Book IV), benevolent intervention in another's affairs (Book V), non-contractual liability (Book VI) and unjustified enrichment (Book VII).

In contrast to PECL, where no specific contract is ruled, and DCFR, where – besides a general part of the law of obligations – contracts other than sales are also regulated, CESL essentially only deals with sales. The structure and at least part of CESL contents resemble CISG; however, CESL regulates prescription and CISG does not. Hence, from a systematic point of view, one could say that prescription in CESL only refers to buyer and seller's claims. Yet, no provision in Part VIII, Chapter 18, of CESL speaks of 'buyer' or 'seller'. Instead, the rules refer to 'creditor' and 'debtor' (Articles 184, 185 CESL), 'parties' (Articles 182, 186), or 'person' (Article 183). Such neutral terminology could perhaps rest on the fact that, in addition to prescription of claims resulting from sale of goods and digital content, CESL also tackles prescription of claims resulting from related services, even if it is not absolutely clear that such services might be the object of an autonomous type of contract.⁹ In any case, it does not give a proper answer as to

7 Lando *et al.*, n 2 above, xvi, xviii: 'the source of the obligation to perform does not matter. It might, for example, be a contract or a rule of law giving right to damages (for example, non-performance of a contract or for harm caused by another in a non-contractual situation) or a rule of law on unjustified enrichment'. *Vid* also comment D to art 14:101 and comment A to 14:201 PECL 158–159, 163.

8 Von Bar and Clive (eds), n 3 above, comment D to art III.-7:101 DCFR 1140.

9 Zimmermann, n 1 above, 14, assumes that claims affected by prescription have a contractual character; M. Schmidt-Kessel, 'Der Torso des allgemeinen Leistungsstörungenrechts, Artt. 87–90 GEKR', in M. Schmidt-Kessel (ed), *Ein einheitliches europäisches Kaufrecht. Eine Analyse des Vorschlags der Kommission* (Munich: Sellier, 2012) 290, considers that these are provisions that

why prescription of the right to damages for personal injuries is also covered (Article 179(2) CESL). This kind of damages can stem either from a contract (any type of contract) or from any other act lacking contractual character. Article 120 (3) CESL (the buyer who accepts a price reduction is entitled to damages for any further loss suffered) and, more generally, Chapter 16 (on damages for non-performance of the contract) do not hinder a wider interpretation of Article 179(2) CESL. Moreover, they only refer to 'loss', whilst the somewhat redundant definition of Article 2(g) CESL also covers 'injuries', a head of damages expressly mentioned in Article 179(2) CESL.

The CESL rules on extinctive prescription follow the provisions of PECL and DCFR; in fact, there are only minor differences between PECL and DCFR.¹⁰ Yet, a number of rules contained in PECL and DCFR have been omitted. Sometimes, changes are explained by the Expert Group, arguing that certain topics are outside the scope of the optional instrument. An example is the period of prescription for a right established by legal proceedings (Articles 14:202 PECL and III.-7:202 DCFR).¹¹ Without further explanation, Articles 14:203(3) and III.-7:203(3) DCFR (commencement of the period of prescription when the judgment or arbitral award obtains the effect of *res judicata*), Articles 14:402 PECL and III.-7:402 DCFR (renewal by attempted execution) or Articles 14:503 PECL and III.-7:503 (effect on set-off) have not been incorporated into CESL either.¹² Intuition says that some rules have probably been considered superfluous in the context of sales. For example, this explanation probably applies to the rule on postponement of expiry by a claim held by or against an heir or by or against a representative of the

operate regardless the specific claims stemming from a contract of sale or a contract for related services; M. Müller, 'Die Verjährung im EU-Kaufrecht' (2012) *Zeitschrift für Gemeinschaftsprivatrecht* 1 at 12, restricts them to sales.

¹⁰ See W. Ernst, 'Das Verjährungsrecht des (D)CFR', in O. Remien (ed), *Verjährungsrecht in Europa – zwischen Bewährung und Reform. Würzburger Tagung vom 8. und 9.5.2009* (Tübingen: Mohr Siebeck, 2011) 68–69.

¹¹ See the synthesis of the of the tenth meeting on 17 and 18 February 2011, where the rules of Part VIII on prescription were passed: 'The Group decided to delete Article 7:202, as a majority considered that prescription of judgment is outside the scope of the instrument' (available at ec.europa.eu/justice/contract/expert-group/index_en.htm).

¹² Critical, H. Eidenmüller, N. Jansen, E.M. Kieninger, G. Wagner and R. Zimmermann, 'Der Vorschlag für eine Verordnung über ein gemeinsames Europäisches Kaufrecht. Defizite der neuesten Textstufe des europäischen Vertragsrechts' (2012) *JuristenZeitung* 269 at 272, 285; B. Zöchling-Jud, 'Verjährungsrecht (Teil VIII CESL – Entwurf)', in C. Wendehorst and B. Zöchling-Jud (eds), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts. Zum Verordnungsentwurf der Europäischen Kommission vom 11.10.2011* (Vienna: Manz, 2012) 258; Zimmermann, n 1 above, 13–14.

estate.¹³ Nevertheless, despite the fact that CESL does not deal with issues of legal capacity of persons,¹⁴ the rule on postponement of expiry in case of incapacity has been kept, albeit modified (Article 183 CESL; compare with Articles 14:305 PECL and III.-7:305 DCFR). By contrast, there is no provision on suspension because of an impediment beyond creditor's control (Articles 14:303 PECL and III.-7:303 DCFR), even though it is considered in order to excuse non-performance (Article 88 CESL).¹⁵

In conclusion, clarification on some key aspects of the regulation of prescription in Chapter 18 CESL would be very welcome in the future legislative process concerning the Proposal. Essentially, it must be discussed whether those rules apply only to rights and claims resulting from a sale contract (or related services contracts) or, by contrast, they apply to any other rights or claims. Should the latter be the case, it must also be clarified if rules on prescription should apply irrespective of their contractual origin. In our opinion there is no good reason why the entire regulation of PECL or DCFR should not be incorporated into CESL. In addition, even if the rules were intended to be applicable only to contractual rights or claims, the picture is now one of an incomplete regulation.

3 Subject-matter of Prescription

Article 14:102 PECL resorted to the word 'claim' to identify the object of prescription. Claim was defined as 'the right to performance of an obligation', a translation of the German word '*Anspruch*' (§ 194 BGB; '*pretensió*' in Article 121-1 Civil Code of Catalonia). Without using the word claim, the same idea is to be found in DCFR when Article III.-7:101 lays down that 'a right to performance of an obligation is subject to prescription'. The same happens in CESL where Article 178 establishes that the object of prescription is 'a right to *enforce* performance of an obligation'.¹⁶ It must be taken into account that the verb 'enforce' evokes the idea

¹³ Müller, n 9 above, 12.

¹⁴ See 'A European Contract Law for Consumers and Business: Publication of the Results of the feasibility Study carried out by the Expert Group on European Contract Law for Stakeholders' and Legal Practitioners Feedback' (http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf) 6: '[...] Certain topics which would be less relevant for cross-border contracts – such as rules on capacity, representation or assignment – were not covered by the Expert Group Work'. See now Whereas 27 of the Proposal for a Regulation on CESL.

¹⁵ See below subsection 5.1.

¹⁶ Critical, A. Zaccaria, 'Garantías comerciales: en particular, plazos y protección del consumidor', in S. Cámara Lapuente (dir) and E. Arroyo Amayuelas (coord), *La revisión de las normas europeas y nacionales de protección de los consumidores. Más allá de la Directiva sobre derechos*

of 'execution', although no provision in CESL refers to prescription of rights acknowledged by an executive title.¹⁷ Therefore, 'enforce' is meant to be used in the most general sense.

Article 178 CESL also mentions prescription of 'any ancillary right', yet it does not define 'ancillary right'. Two interpretations are possible:

a) 'Ancillary right' means also a 'right to enforce performance of an obligation', since this is the only accepted object of prescription. It would then cover obligations ancillary to a principal obligation, such as the obligation to pay interest (Articles 184, 185(3) CESL). But then Article 178 CESL would be redundant. The expression also raises the question whether security rights (Article 184 CESL) have to be considered ancillary claims in the context of CESL.¹⁸

b) 'Ancillary right' is tantamount to any other right different from a 'right to enforce performance of an obligation'. It would cover the buyer's remedies to withholding performance, price reduction and termination, as well as the seller's remedies to withholding performance and termination.¹⁹

However, if we leave aside withholding performance, which is not affected by prescription of the debtor's claim in accordance with Article 185(1) CESL, price reduction may be considered as a buyer's right to enforce performance too, that is, a right to recover the price excess already paid (Article 120(2) CESL; Article III.-3:601 DCFR). Therefore, the right would be subject to the normal rules on prescription, as any other right to enforce performance. Otherwise, if the buyer has still not paid, the right will become effective as a defence when the seller claims payment and, consequently, this remedy can not be subject to autonomous rules on prescription.²⁰ It is worth stressing that Article 120 CESL does not require that the buyer declares or gives notice to the seller of his/her intention to reduce the price in a reasonable time.

In some cases, the right to terminate a contractual relationship is lost if a notice is not given within a reasonable time (Articles 119(1), 139(1) and (2) CESL). It is debatable whether this 'reasonable time' is the prescription period of two (or of ten?) years (Article 179 CESL). If this were not the case (and probably it is not),

rules on prescription would not be applicable to such remedy. In other cases exempt from notice, in particular where a consumer contract is at stake (Article 119(2)(a) CESL), it is by no means evident that the rules on prescription must be always applied to termination. More probably, the right to terminate extinguishes as a result of the prescription of the debtor's obligation. Actually, if the obligation affected by prescription becomes unenforceable and, consequently, it cannot be non-performed anymore, the creditor loses the right to terminate the contract and, in general, any remedy for non-performance as Article 185(1) CESL points out. If extinction of this remedy is a consequence of prescription of the right to enforce an obligation, such extinction should not result in an autonomous case of prescription.²¹

In conclusion, either the reference to prescription of an 'ancillary right' is superfluous, because it means the same as the 'right to perform an obligation', or it must be clarified that the right to terminate the contract (and perhaps other remedies) has to be treated in the same way as a 'right to perform an obligation'.²² In fact, it may be considered whether Article 178 CESL should be suppressed, because of the existence of Articles 185(1) and 185(3) CESL. Furthermore, the outcome of linking the definitions in Article 178 and 2(y) CESL is a bit awkward. Provided that 'obligation' 'means a duty to perform which one party to a legal relationship owes to another party' (Article 2(y) CESL), Article 178 CESL turns into 'a right to enforce performance of a duty to perform'.

4 Periods Of Prescription And Their Commencement

Contrary to Articles 14:201 PECL and III.-7:201 DCFR, where there is one general period of prescription of three years, and to Articles 14:202 PECL and III.-7:202 DCFR, which lay down one specific period of ten years for claims established by legal proceedings,²³ Article 179 CESL lays down two apparent *general* periods of prescription and one specific period for rights to damages for personal injuries.

²¹ On this problem, see Faust, n 20 above, 263.

²² Zöchling-Jud, n 12 above, 256.

²³ On the grounds for a short and uniform period of prescription and the need for a special period for claims established by judgement and other instruments, see Lando *et al.*, n 2 above, comments to art 14:201 and comments to art 14:202 PECL 162–164 and 166–167; von Bar and Clive (eds), n 3 above, comments to art III.-7:201 and comments to art III.-7:202 DCFR 1144–1146 and 1150–1151.

de los consumidores y del Instrumento Opcional sobre un Derecho europeo de la compraventa de octubre de 2011 (Cizur Menor [Navarra]: Civitas-Thomson Reuters, 2012) 543–544.

¹⁷ Müller, n 9 above, 12. See also below subsection 5.1.

¹⁸ See section 7.

¹⁹ Müller, n 9 above, 12 and 18. Hesitant, Zöchling-Jud, n 12 above, 256 and 264.

²⁰ Lando *et al.*, n 2 above, comment C to art 14:101 PECL 158; von Bar and Clive (eds), n 3 above, comment C to art III.-7:101 DCFR 1140. See also, Ernst, n 10 above, 78; F. Faust, 'Das Kaufrecht im Vorschlag für ein Gemeinsames Europäisches Kaufrecht', in H. Schulte-Nölke, F. Zoll, N. Jansen and R. Schulze (eds), *Der Entwurf für ein optionales europäisches Kaufrecht* (Munich: Sellier, 2012) 264.

There is one short period of two years, which means that the general period of PECL and DCFR is reduced from three to two years (Article 179(1) CESL), and one long period of ten years (Article 179(2) CESL).²⁴ Their respective commencement dates (*dies a quo*) is different. The commencement of the short period is subjective: '[...] when the creditor has become or could be expected to have become, aware of the facts as a result of which the right can be exercised'; instead, that of the long period is objective: '[...] when the debtor has to perform [...]'].

Since the Proposal does not express which claims or rights are covered by either rule,²⁵ it is self-evident that both periods cannot be general. Provided that the general period is in PECL and DCFR the short one, one could presume that the general period in CESL is also the short one (two years). Nevertheless, the ten-year period of prescription could never be considered a special one because it is unknown to which claims or rights it applies.

Another option is the application of both periods to the same claims or rights. Thus, the period of prescription is completed two years after the creditor becomes aware of the facts as a result of which the right can be exercised or after ten years since the debtor had to perform, irrespective of when the creditor knows about the facts. The idea of two distinct periods of prescription running together has notable drawbacks. It is probably better to consider the ten-year period (as well as the thirty-year-period for personal injuries) a long-stop rule ('maximum length of period', in terms of Article 14:307 PECL and III.-7:307 DCFR). We will come back to that issue.²⁶

Leaving aside the question whether rules on prescription should be applicable to all rights and remedies in case of lack of conformity, or only to those which represent a right to enforce performance an obligation (ie, substitution, repair, reduction of price), it must be considered whether these periods are too short or too long. The long period appears as excessive from the very beginning, for it may seriously affect the seller's interest, since the later the defect becomes apparent the less likely it is that it results from lack of conformity. As far as the short period is concerned, due to the fact that it begins when the creditor becomes aware – or should become aware – of the facts, the consequence is that the buyer could sue the seller many years after the conclusion of the contract. This is equally unconvincing. The rule which makes prescription dependent on knowledge could cause problems of evidence: it may be very difficult to prove if the buyer has or not the right, i.e. if he/she was or should have been aware, or if he/she lacks of good faith

(Article 2(2) CESL). As a result, sellers would increase prices in order to reduce losses or, alternatively, they would avoid making use of CESL.

Therefore, the application of the CESL system of periods of prescription to remedies for lack of conformity is not useful. A single period after delivery or passing of risk favours certainty and promotes the efficient development of the sales contract in Europe. The solution provided in Article 5(1) Directive 99/44 on consumer sales (a single and minimum period of two years after delivery) seems more adequate.²⁷ In case of personal injuries, a longer period whose commencement depends on knowledge may be necessary, but thirty years seems unreasonable and probably not appropriate in the context of sales.²⁸

5 Extension Of Periods Of Prescription

Section 3 of Chapter 18 reads 'Extension of Periods of Prescription'. Extension in terms of suspension implies neither a lengthening nor a prorogation of the period; the period of prescription is the same, the only thing is that the period during which prescription is suspended due to a certain event is not counted in calculating the period of prescription legally established.

CESL follows mainly the lines of PECL and DCFR. Hence, suspension and postponement of expiry are distinguished. However, only one ground of suspension and two of postponement are listed.

5.1 Suspension

For PECL (Article 14:301) and DCFR (Article III.-7:301), the first ground for suspension is ignorance of the identity of the debtor or of the facts giving rise to the right. This discoverability criterion is still more essential in CESL because the short period of prescription is reduced to two years. But CESL has modified the systematic approach of PECL, since ignorance is no longer a ground for suspen-

²⁷ Zimmermann, n 1 above, 13–14, n 143; Zöchling-Jud, n 12 above, 257, 263; Eidenmüller *et al*, n 12 above, 284.

²⁸ It must be remembered that the cases to which the thirty-year period of art 14:307 PECL applies are very serious and not necessarily linked to contracts: medical malpractice, asbestosis or sexual abuse of children. See Lando *et al*, n 2 above, comment A to art 14:307 PECL 193; R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (Cambridge: Cambridge University Press, 2002) 101–102. See also, von Bar and Clive (eds), n 3 above, comment A to art III.-7:307 DCFR 1186.

²⁴ Critical, Zimmermann, n 1 above, 13.

²⁵ Critical, Faust, n 20 above, 263.

²⁶ See subsection 5.3.

sion. CESL distinguishes two basic periods, the short of two years and the long one of ten years, and establishes a different commencement date for each one. The short period commences when the creditor becomes aware of the facts as a result of which the right can be exercised (Article 180(1) CESL). The practical result is the same, as if the period begins to run from the time when the debtor has to effect performance, but is suspended as long as the creditor does not know (or could reasonably not know) about the relevant facts, which is the perspective adopted in Articles 14:301 PECL and III.-7:031 DCFR. The difference is that according to CESL, the debtor alleging prescription must prove that the creditor was aware or should have been aware of the facts as a result of which the right can be exercised. Additionally, such an option requires a complementary rule establishing a maximum length of period. Unfortunately, this is not clear in the current Proposal.²⁹

The beginning of judicial proceedings is deemed to be a ground for suspension in CESL. However, Article 181(1) CESL neither conceptualizes 'judicial proceeding' nor specifies when a judicial proceeding has begun. If that had been done, the long list of § 204(1) BGB would be unnecessary, but because it has not been done, some cases envisaged in § 204(1) BGB are not covered by CESL. Since a common concept of 'beginning of judicial proceedings' is really difficult to find, an alternative solution is to leave the question to national laws (cf Article 10.5 PICC, Article 13 New York Convention on the Limitation Period in the International Sale of Goods). On the other hand, Article 181(3) CESL introduces a reference to proceedings 'to avoid' insolvency which is missing in Articles 14:302 PECL and III.-7:302 DCFR. It comes from Article 10.5(1)(b) PICC, where insolvency proceedings are also deemed to be judicial proceedings. Nevertheless, CESL does not mention 'insolvency proceedings' in general, but only those addressed to 'avoid insolvency'. According to Article 1(1) Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, '(t)his Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.³⁰ If insolvency has not been avoided and liquidation brings a company to the end, are insolvency proceedings not affected by suspension?

²⁹ For pros and cons of each solution, *vid* Lando *et al*, n 2 above, comment D to art 14:301 PECL 177–178; von Bar and Clive (eds), n 3 above, comment D to art III.-7:301 DCFR 1163–1164. Zöchling-Jud, n 12 above, 259, welcomes the solution laid down in art 180(1) CESL.

³⁰ OJEC L 160, 30.6.2000.

Most European legal systems consider the beginning of judicial proceedings as a ground for renewal and not for suspension.³¹ Only in Germany, England, Ireland and Estonia is prescription suspended. Yet this solution seems to have turned into an international trend: see Article 13 New York Convention on the Limitation Period in the International Sale of Goods (although speaking of 'cessation' of prescription). This is also the solution adopted in Articles 14:302(1) and (2) PECL and III.-7:302(1) and (2) DCFR. There are some convincing arguments to state that suspension gives a balanced protection both to creditor and debtor, especially in cases where the claim has not been properly filed,³² but it is disputable whether all judicial proceedings should lead only to suspension of the running of prescription. Execution proceedings which presuppose that the right has previously been judicially asserted and that the party obtained a favourable decision, or that the party is provided with an executive title, should interrupt prescription, for the creditor has obtained a judgment that officially acknowledges his/her right. It must be stressed that CESL neither provides specific rules on postponement of prescription in case of execution proceedings, nor gives a special prescription period for claims established by judgement (cf Articles 14:202 PECL and III.-7:202 DCFR; § 201 BGB).³³

Similarly, suspension lasts until a 'final decision' has been made. Perhaps a clearer expression would be the one used in PECL: 'a decision which has the effect of *res judicata*'.

Article 181(2) CESL lays down that where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended. This provision is probably too broad.

On the one hand, it departs from PECL in one point. Article 14:302(2) only distinguishes between 'a decision which has the effect of *res judicata*' and 'the case has otherwise disposed of'. Article III.-7:302 DCFR adds the reference in a separate sentence to 'end of the proceedings without a decision on the merits'. It is not specified whether 'without a decision on the merits' is but an example of 'otherwise disposing of the case' or it covers other situations.

On the other hand, according to CESL, the plaintiff that abandons his/her action has nevertheless six extra months until the right prescribes. This is prob-

³¹ See the references in Lando *et al*, n 2 above, n 2 to art 14:302 PECL 182–183; von Bar and Clive (eds), n 3 above, n II.2 to art III.-7:302 DCFR 1170–1171. See also art 121–11(a) and (b) Civil Code of Catalonia and art 2241 French Civil Code passed in 2008.

³² Zimmermann, n 28 above, 121–124.

³³ Müller, n 9 above, 13.

ably an excessive advantage.³⁴ Irrespective of whether the beginning of judicial proceedings is shaped as a ground for interruption or for suspension, the creditor's mere passivity should not deserve the same treatment as a claim filed before an incompetent court. Significantly, comment B to Article III.-7:302(2) DCFR copy-pastes comment B to Article 14:302 PECL but for a sentence. Where PECL, after arguing the reasonableness of fixing a minimum period which the claimant should have for taking action after the end of suspension, warns that 'however, there appears no reason to place the creditor in a better position than if no action had been brought in the first place',³⁵ the DCFR instead points out that the goal of fixing a minimum period is achieved by the second sentence of paragraph (2). This sentence grants a minimum of six months after the proceedings have ended without a decision on the merits. Consequently, it is not clear whether the six extra months of Article 181(2) CESL have to be added to the remaining time after suspension (as the heading of the article would indicate), or they are supposed to be a postponement of expiry, precisely because of the fact that prescription is not suspended,³⁶ as it has to be understood for other cases of postponement (Articles 182 and 183 CESL). Article 181(2) CESL follows the same systematic approach of article III.-7:302 DCFR and both move away from article 14:302(2) PECL, which was in our opinion more coherent, at least from a systematic point of view.

Arbitration proceedings and mediation are treated in the same way as judicial proceedings in relation to the suspensive effect. Article 181(4) CESL offers a concept of mediation. Since this definition is a reiteration of Article 3(a) Directive 2008/52/CE on mediation, but for the last sentence, it seems unnecessary.³⁷ Furthermore, it raises the question why other concepts are not defined in CESL, such as 'beginning of proceedings' (Article 181(1) CESL) or 'acknowledgment' (Article 184 CESL). Despite the broad wording of Article 181(3) CESL, the explicit mention of consumer arbitration would be welcome.

There is a missing ground for suspension: an impediment beyond creditor's control.³⁸ It is to be found in Article 14:303 PECL as well as in Article III.-7:303 DCFR.³⁹ Several national laws acknowledge this ground for suspension: Germany

³⁴ Müller, n 9 above, 15.

³⁵ See Lando *et al*, n 2 above, comment B to art 14:302 PECL 181.

³⁶ Cf art 17 New York Convention on the Limitation Period in the International Sale of Goods.

³⁷ See also, Eidenmüller *et al*, n 12 above, 285.

³⁸ Critical, Zimmermann, n 1 above, 10, 13.

³⁹ For the differences between these two provisions, see Ernst, n 10 above, 68–69.

(§ 206 BGB), France (Article 2234 French Civil Code⁴⁰), Catalonia (Article 121–15 Civil Code), Portugal, Greece, Poland or Austria.⁴¹ Even if this ground for suspension is unforeseen in other legal systems, it should be included in CESL. An impediment beyond the party's control excuses non-performance (Article 88 CESL), hence there is no reason why it should not be considered as a ground for suspending prescription.

5.2 Postponement of Expiry

Postponement means that although the period of prescription runs its course it is completed only after the expiry of a certain extra period. Following partially PECL and DCFR, there are two grounds for postponement in CESL: negotiations and incapacity.

As far as negotiations are concerned, the wording of Article 182 CESL copies PECL (Article 14:304) and DCFR (Article III.-7:304) but for the last sentence. This last sentence builds an alternative: 'neither period of prescription expires before one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations'. The communication to the other party that the communicating party does not wish to pursue the negotiations is also a 'communication made in the negotiations', and in all likelihood it would be the 'last communication'. Therefore, in fact the second part of the abovementioned provision does not constitute an alternative but the reiteration of the same idea. Along the same lines of PECL and DCFR, the term 'negotiations' is not defined⁴² and no formalities are required, therefore national courts will have broad discretion and consequently the risk of divergent national solutions is vivid. In any case, extension for one year looks excessive (compare with an extension of three months in § 203 BGB),⁴³ in particular because postponement is linked, in the first alternative, to a 'last communication' and not to a communication bringing to an end the negotiations. Furthermore, this ground for extension should be considered in relation to agree-

⁴⁰ W.B. Janke and F.X. Licari, 'The French Revision of Prescription: A Model for Louisiana?', (2010) 85 *Tulane Law Review* 46, welcome the codification of force majeure as a ground for suspension in the *Code Civil*.

⁴¹ See Lando *et al*, n 2 above, n 1 to art 14:303 PECL 185–186; von Bar and Clive (eds), n 3 above, n 1 to art III.-7:303 DCFR 1176–1177.

⁴² But see Lando *et al*, n 2 above, comments to art 14:304 PECL 187; von Bar and Clive (eds), n 3 above, comments to art III.-7:304 DCFR 1178.

⁴³ Along these lines, Zöchling-Jud, n 12 above, 260, although she seems happy with the rule.

ments on prescription under Article 186 CESL: the explicit admission of agreements on the length of the period of prescription and eventually on the grounds for suspension could be an easier way to approach this issue.⁴⁴

Article 183 CSL deals with postponement of expiry in case of incapacity, although this is probably not very consequent with the fact that CESL does not cover issues of capacity of persons, as has already been said.⁴⁵ The provision deals with this question in a very simplified manner in comparison to PECL and DCFR. These soft law texts distinguish claims between a person subject to an incapacity and another person, and claims between that person and his/her representatives. Moreover, claims by or against that person are affected. Conversely, Article 183 CESL states that '(i)f a person subject to an incapacity is without a representative, neither period of prescription of a right held by that person expires before one year has passed since either the incapacity has ended or a representative has been appointed'. There is no postponement when the claim is against the person and his/her representative since the provision only speaks of 'a right held by that person [without a representative]'. The consequence of the unilateral character of the provision is that rights against that person are affected neither by suspension nor by postponement. It is unreasonable that the provision is not bilateral. CESL only protects persons under a legal incapacity in case they are creditors. Again, it is disputable if one year of postponement is an excessive period.

There is a third case of postponement in PECL (Article 14:306) and DCFR (Article III.-7:306) that has rightly not been considered by CESL: the deceased's estate. Nevertheless, the case is parallel to that of incapacity: the party – creditor or debtor – dies and the estate has no representative.

5.3 Maximum Length Of Period

There is no specific rule on maximum length of period (long-stop), in contrast to Article 14:307 PECL and III.-7:307 DCFR.⁴⁶ Since the commencement of the short

period of prescription hinges on reasonable discoverability, and there are some cases of suspension of the running of the period, prescription could be postponed for too long a period, or even indefinitely. The long-stop period tries to avoid such an inconvenience.

Since the two periods of prescription to be found in Article 179 CESL are apparently general, the outcome is that the same claim or right is subject to the two-year and to the ten-year period and that both periods interact, in the sense that the long prescription period should limit the short one. Effectively, if the buyer discovers non conformity, for instance, twenty years after delivery, it would not be reasonable to give him/her two more years to sue the seller (Article 180(1) CESL). In order to preserve efficiency in trade and business and promote security in transactions, the ten-year period should act as a long-stop rule. This means that any incident must be treated as definitely closed even if the creditor is not aware of the facts as a result of which the right might be exercised. The same holds true for the thirty-year period in case of claims for personal injuries: it should constitute a limit to the shorter period of prescription of two years.

However, as has already been said, this is not made explicit in CESL. Article 179 does not state that a right is affected by prescription as soon as one of the two periods is completed. Moreover, there are strong arguments to support the view that there are two periods of prescription and none of preclusion. Article 181(1) CESL refers to 'both' periods; Articles 182 and 183 CESL to 'neither period'; Article 185(1) CESL to 'the relevant period'. And, above all, Article 186 CESL allows shortening or lengthening the two of them. This would not be possible if the ten-year period was a true long-stop.

The necessity of a long-stop rule in a subjective system of commencement of prescription is confirmed by *Recital* 26 Proposal for a Regulation on CESL, where a distinction is drawn between 'prescription and preclusion of rights'. Nevertheless, Article 179 CESL uses the same term 'prescription' indistinctly to refer to genuine prescription periods (which can be suspended and interrupted) and to long-stop periods, which instead have to be treated as preclusion ones. Surpris-

contains only one period, which runs from when the cause of action arose, but the running of prescription is suspended until the debtor knows of the claim, up to a maximum of ten years. The second system contains two periods (1) the "short stop period", which runs from the date of knowledge and (2) the "long stop period", which runs from when the cause arose whether or not the creditor knew about it'. Following discussion the Group agreed to adopt the second system which contains two periods: '(a) a "short stop period" which is three years running from the date of substantiated knowledge of the claim and (2) a "long stop period" which is running from 10 years from the date the claim arises.' It is really odd to speak of a two maximum periods of length and in fact the confusion between period of prescription and long-stop is quite evident.

⁴⁴ See M.J. Bonell, 'Limitation Periods', in A.S. Hartkamp, M. Hesselink, E.W. Hondius, C. Mak and C. Edgar du Perron (eds), *Towards a European Civil Code* (Alphen aan der Rijn: Wolters Kluwer and Ars Aequi Libri, 2011) 726, who remarks the lacking of such a rule in the PICC.

⁴⁵ See above section 2.

⁴⁶ Nevertheless, it must be taken into account the synthesis of the tenth meeting on 17 and 18 February 2011 of the Experts Group (see above n 11), according to which '[t]he Rapporteur explained that there were basically two possible systems which both take the moment of knowledge of the claim as a starting point but are elaborated in different manner. The first system

ingly, the distinction made in the above mentioned *Recital 26* has not been incorporated into the provisions. Definitively, it would have been much clearer if Article 179 CESL had provided for a general prescription period of two years and a long-stop period of ten years (or thirty years in case of personal injuries), resembling more Articles 14:307 PECL and III.-7:307 DCFR.⁴⁷

6 Renewal Of Prescription Periods

Article 184 CESL foresees only one ground for renewal of prescription: acknowledgment by the debtor. According to it, '(i)f the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new short period of prescription begins to run'. The article follows essentially Articles 14:101(1) PECL and III.-7:401(1) DCFR, yet set-off is not included in the wording of this articles.

The main consequence of renewal is that the time which has elapsed before the interrupting event is not taken into account and a new period has to run afresh.

Acknowledgment of the creditor's right is generally considered a ground for renewal of prescription periods.⁴⁸ What is 'acknowledgment' is not defined in CESL. Although article 4 CESL advocates an autonomous interpretation of CESL, the concrete acts resulting in acknowledgment are going to be determined by national laws as a consequence of a missing European concept of 'acknowledgment'. This opens the door to different constructions of the term and, since it is the only ground for renewal, this is not a minor point. It is true that the article lists some acts which are usually considered to interrupt prescription, such as part payment, payment of interest, giving security and set-off, but since other acts can also have the same effect, the article adds 'or in any other manner'. In general, any act of the debtor accepting the existence of the debt may lead to renewal, yet national courts will enjoy discretion to assess the relevant facts of each case.⁴⁹

Article 184 CESL requires that the acknowledgment is 'vis-à-vis the creditor'. Consequently, any act that may lead to renewal which is addressed to a third

⁴⁷ The option chosen by CESL perplexes Zimmermann, n 1 above, 13. By contrast, Zöchling-Jud, n 12 above, 259, considers that CESL approach is preferable because it reaches the same outcome in a simpler way.

⁴⁸ Zimmermann, n 28 above, 126–128; Lando *et al*, n 2 above, notes to art 14:401 PECL 200; von Bar and Clive (eds), n 3 above, n 1 to art III.-7:401 DCFR 1194.

⁴⁹ On that question see Zöchling-Jud, n 12 above, 261.

party has no interruptive effect. It must be understood that agents stand for creditor and debtor.

Acknowledgment requires no formalities, along the lines of PECL and DCFR. Most of European legal systems do not require formalities, but in England the Limitation Act 1980 section 30 does.⁵⁰

In Article 184 CESL, renewal amounts to the beginning of a new *short* period of prescription, irrespective of the length of the initial period which is affected by renewal. This is also the solution established in Article 14:402(2) PECL, but for one point. Leaving aside that Article 14:402(2) PECL deals with the special period for a right established by legal proceedings – a provision lacking in CESL –, the rule sets out that 'this Article does not operate so as to shorten the ten year period' (Article III.-7:401(2) DCFR opts for the same wording). Therefore, under PECL, when the ten year period is renewed, the new period cannot be less than ten years. This is not so clear under CESL. Literally, renewal implies that a short period begins to run regardless of whether the original period was a long or a short period. Therefore, renewal never amounts to a longer period of prescription but may entail a significant reduction of the original period. This result favours debtors, perhaps too much. PECL's approach is probably more balanced. On the other hand, according to Article 180(1) CESL, commencement of short periods of prescription is subjective, depending on being aware of the facts, yet Article 184 CESL presupposes an objective commencement resulting from acknowledgment. In conclusion, the solution proposed by PECL seems more coherent. Since we have argued that the ten-year period is a real period of prescription and not a long-stop,⁵¹ it is questionable that renewal amounts always to a short period of prescription irrespective of the length of the interrupted period.

It must also be considered whether new grounds for renewal should be introduced. Article 14:402 PECL lays down that the ten-year period begins to run again with each reasonable attempt at execution undertaken by the creditor. The same is stated by Article III.-7:402 DCFR. Similar provisions are to be found in § 212(1) BGB and Article 2244 French Civil Code. The reason for opting for renewal and for that longer new period is that the creditor has expressed his/her interest in the right or claim. Here again, the provisions in PECL and DCFR seem more balanced. The use of the word 'reasonable' in both soft law texts embraces the cases where cancellation or revocation of the act of execution prevents recommencement of the prescription period; both are expressly considered in § 212(2) and (3) BGB.

⁵⁰ 'An acknowledgment must be in writing and signed by the person making it'.

⁵¹ See above subsection 5.3.

Whether some cases of judicial proceeding should lead to renewal instead of suspension or not has been already been dealt with under section 5.1.

7 Effects Of Prescription

Article 185 CESL deals with the effects of prescription. Article 185(1) CESL mixes the weak and the strong effect of prescription depending on the character of the right, ie claims to enforce performance or other remedies for non performance. As it has already been said,⁵² the wording of this article is not coherent with the wording of Article 178 CESL, where prescription refers to rights and other 'ancillary rights', provided that this last expression should cover the 'remedies for non-performance' mentioned in Article 185(1) CESL. In this article, the creditor's remedies are 'extinguished' after the expiry of the relevant period of prescription of the debtor's obligation (either the short or the longer one, depending on the case). This approach is consequent on the fact that a prescribed obligation is not enforceable anymore and therefore can no longer be 'non-performed'. The exception is the possibility for the creditor to withhold performance (Articles 106(1)(b), 113, 131(1)(b), 133 CESL): the creditor can withhold performance of his/her own obligation, notwithstanding prescription of his/her right to enforce the debtor's obligation, in order to preserve the contractual balance.⁵³

Article 185(1) CESL makes clear that the debtor is entitled to refuse performance of the obligation. Therefore, prescription of the right to enforce an obligation has to be invoked by the debtor (see also, Articles 14:501 PECL and III.-7:501 (1) DCFR) and it has a weak effect, i.e. despite prescription the creditor's right continues to exist, because prescription only affects enforceability.⁵⁴ Consequently, whatever has been voluntarily paid or transferred by the debtor in performance of the prescribed obligation extinguishes the obligation and cannot be treated as donation. It is a due payment (Article 185(2) CESL). This approach is followed in most European law systems and has been expressly adopted by Articles 14:501(2) PECL and III.-7:501.2 DCFR.⁵⁵ Spontaneity of the payment is not specifically required, but since Article 185(2) CESL establishes that performance cannot be reclaimed *merely* because the period of prescription had expired at the moment that the performance was carried out (cf Article 2249 French Civil Code),

⁵² See above section 3.

⁵³ Müller, n 9 above, 19.

⁵⁴ Zimmermann, n 28 above, 72–73.

⁵⁵ Lando *et al*, n 2 above, comment A and n 1 to art 14:501 PECL 202–204; von Bar and Clive (eds), n 3 above, comments A and n I.1 to art III.-7:501 DCFR 1196–1198.

it may open the door to reclaim whether payment has not been spontaneous, along the lines of some national laws (cf Article 304(2) Portuguese CC; Article 2940 Italian CC).⁵⁶ On the contrary, ignorance or mistake about the fact of prescription is irrelevant, like in many national laws (cf Article 272.2 Greek Civil Code; Article 121–9 Civil Code of Catalonia)⁵⁷ and in Article 26 of the New York Convention on the Limitation Period in the International Sale of Goods.

Another consequence resulting from the fact that the unenforceable claim still exists is that despite prescription the debtor can set off his/her obligation with the creditor's claim. It is expressly admitted in Articles 14:503 PECL, III.-7:503 DCFR and, with different requirements, 25(2)(b) of the New York Convention on the Limitation Period in the International Sale of Goods. Set-off of rights affected by prescription was included in the Feasibility Study (Article 188(2)), but it has been suppressed in CESL. This is probably due to the fact that neither is set-off regulated,⁵⁸ nor national laws of prescription admit unconditionally set-off.⁵⁹ Therefore, this issue is left to national legislations.⁶⁰

Periods of prescription of ancillary rights (in the sense of claims to enforce performance of an obligation) do not expire later than the main right to enforce obligation (Article 185(3) CESL), but obviously expiry may happen before. The rule corresponds to a common trend (cf § 217 BGB, Article 274 Greek Civil Code).⁶¹ Article 185(3) CESL is borrowed from Articles 14:502 PECL and III.-7:502 DCFR. As an example of ancillary claims, Article 185(3) CESL mentions 'the right to payment interests'. It is doubtful whether it only refers to interest for delayed payment to the seller (Articles 131(1)(d); Articles 166 *et seq* CESL) or it also covers remuneratory interests in a contract of loan. In this latter case, it would not be so obvious that the obligation of interest has to be considered ancillary, at least from a juridical point of view, because it represents the 'counter-performance' for the lending of capital and, consequently, payment can also be considered a main obligation. Furthermore, the provision raises the question whether security rights have to be considered ancillary rights in the context of CESL, since Article IX.-6:103 DCFR on

⁵⁶ See also, in Germany, F. Peters, in *Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, I (Berlin: Sellier/de Gruyter, 2004) § 214 BGB, para 35, 735. However, it is not so obvious in Spain. See L. Díez-Picazo, *La prescripción extintiva en el Código civil y en la jurisprudencia del Tribunal Supremo* (Madrid: Thomson/Civitas, 2003) 98.

⁵⁷ See also § 214(2) BGB, art 304(2) Portuguese Civil Code.

⁵⁸ Whereas 27 Proposal for a Regulation on CESL.

⁵⁹ For further references, Lando *et al*, n 2 above, n to art 14:503 PECL 206; von Bar and Clive (eds), n 3 above, n to art III.-7:503 DCFR 1202; Zimmermann, n 28 above, 160.

⁶⁰ Zöchling-Jud, n 12 above, 261. Critical, Zimmermann, n 1 above, 14.

⁶¹ See also art 133 Swiss Code of Obligations and art 27 New York Convention on the Limitation Period in the International Sale of Goods.

prescription of the secured right has not been incorporated, probably on the assumption that CESL does not deal with property law.⁶² Security rights are nonetheless mentioned in Article 184 CESL as a form of acknowledgment of the right.

8 Party Autonomy Concerning Prescription

Article 186 CESL is devoted to the agreements concerning prescription, an issue on which national laws are quite divergent.⁶³ The first rule states that the rules of Chapter 18 may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription. The wording follows that of Articles 14:601 PECL and III.-7:601 DCFR.⁶⁴ However, it must be taken into account that a series of rules contained in the soft law texts have not been incorporated into CESL. It is doubtful, then, what exactly means 'in particular'. If these words mean that shortening or lengthening are but examples of the autonomy that enjoy the parties, the question arises whether the parties can provide for other grounds for suspension than those enshrined in Articles 181 and 182 CESL or for new grounds for postponement of expiry, transform grounds for suspension into grounds for renewal, etc. In other words, there are no clear borders to party autonomy.

A first limit is that the short period of prescription may not be reduced to less than one year or extended to more than ten years. Parties are thus not allowed to extend the short prescription period beyond the long prescription period; and they cannot shorten it by more than half. This maximal shortening is particularly negative in case of B2B contracts. Nevertheless, it must be remembered that there is no long-stop rule in CESL,⁶⁵ so that in fact the situation may lead hypothetically to a prescription period commencing once the agreed long period would have expired. It must be assumed that the parties cannot reach this forbidden result by other means such as providing for a subjective commencement of prescription.

⁶² Whereas 27 Proposal for a Regulation on CESL.

⁶³ See Lando *et al*, n 2 above, n to art 14:601 PECL 208–209; von Bar and Clive (eds), n 3 above, n to art III.-7:601 DCFR 1204–1206. Art 121–3 Civil Code of Catalonia accepts agreements on the length of prescription under certain conditions: irrespective of the legal period, which is not uniform (10, 3, 1 year), parties cannot shorten it more than the half or extend it more than the double, always under the condition that it does not leave undefended both parties. See J. Ferrer Riba, in A. Lamarca and A. Vaquer (eds), *Comentari al Llibre Primer del Codi Civil de Catalunya. Disposicions Preliminars. Prescripció i Caducitat* (Barcelona: Atelier, 2012) 350 *et seq.*

⁶⁴ Compare art 10(3) PICC and art III.-7:601 DCFR with article 22 New York Convention on the Limitation Period in the International Sale of Goods. See Bonell, n 44 above, 24.

⁶⁵ See above subsection 5.3.

A second limit is that the long period of prescription may not be reduced to less than one year or extended to more than thirty years. This provision makes evident that the parties are free to reduce the periods significantly. The minimum – one year – is the same, irrespective of the length of the legal period. By contrast, the short period can only be lengthened to ten years and the long period to thirty years. A reminder of the reflection on the absence of a long-stop period must be done again here.

A third limit concerns consumers, and has thus a protective aim. 'In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer'. It is questionable if the article can be applied to the detriment of any party, be that a consumer or not, once there are some insuperable limits, those of subsections (2) and (3). Moreover, this rule comes after subsection (4) which, as said, emphasizes party autonomy, since the only mandatory provisions are those dealing with the length of the periods. It must be highlighted that Article 186(4) CESL establishes that '(t)he parties may not exclude the application of this Article or derogate from or vary its effects'. Attention must be paid to the fact that the provision refers to the 'article' and not to any specific subsection of the article, mainly those containing real limits to party autonomy (sections 2 and 3). In this sense, the article needs reordering and clarification.⁶⁶ On the other hand, is it not absolutely clear whether the provision's aim is to establish that consumer claims against the seller can never be shortened, but only extended⁶⁷ or whether the policy of this provision is to allow extension without limits. In the latter case, it would then be questionable why prescription of a consumer claim may happen, for instance, forty years after conclusion of the contract. This would contradict the goal of prescription (*ut sit finis litium*).

Anyway, these are not the only limits. Of course, the principle of good faith plays its role (Article 2), as well as the control of unfair terms (Article 7 and Chapter 8 CESL).

9 Conclusions

1. It must be clarified whether CESL rules on Prescription apply only to provisions on rights and claims resulting from a sale or services related contract or, by contrast, they apply to any other right or claim, irrespective of their contractual or

⁶⁶ See also, Zöchling-Jud, n 12 above, 262–263.

⁶⁷ In this sense, Zöchling-Jud, n 12 above, 263.

non-contractual origin. Whatever the answer might be, the picture is one of an incomplete regulation.

2. It is not clear in CESL whether the two general periods of prescription interact and if the long prescription period should limit the short one, acting as a long-stop period. If it is not the case, as we think, a long-stop rule, along the lines of PECL and DCFR, should be introduced into CESL.

3. In case of rights for lack of conformity, a single period after delivery or passing of risk is recommended. The solution provided in Article 5.1 Directive 99/44 for consumer contracts (a single and minimum period of two years after delivery) seems adequate.

4. In case of personal injuries, a longer period the commencement of which depends on knowledge may be necessary, but thirty years is excessive and not very appropriate in the context of sale contracts.

5. CESL should define concepts such as 'any ancillary right', 'beginning of proceedings', 'acknowledge', 'negotiations' and 'final decision' in order to avoid divergent interpretations. By contrast, other definitions to be found in CESL, like 'mediation', are not necessary.

6. CESL neither provides specific postponement or renewal rules in case of execution proceedings, nor does it give a specific prescription period for claims established by judgment. The second part of Article 181(2) CESL deserves clarification in order to know whether there is a case for suspension or postponement or both of them.

7. It may be considered if a period of one year of postponement in case of negotiations is too long. It may prompt opportunistic behaviour to open negotiations when the period of prescription is close to being completed. Additionally, the broad wording of Article 186 CESL may make unnecessary Article 182 CESL.

8. Article 183 CESL unreasonably only protects persons subject to an incapacity, and not their creditors. Furthermore, prescription should be postponed between a person subject to an incapacity and that person's representative.

9. The wording of 'in particular' in Article 186 CESL raises the question if it means '*in concreto*' or '*as an example*'. Depending on its meaning, party autonomy could be more or less reduced. The rule protecting consumers needs specificity to avoid excessive protection.

10. The maximal lengthening of thirty years by agreement appears excessive, whilst there is no good reason to prevent businesses, in B2B relations, to agree on periods shorter than one year.

Articles

Giesela Rühl

Regulatory Competition in Contract Law: Empirical Evidence and Normative Implications*

Abstract: Regulatory competition has been high on the agenda of lawyers and economists for several years. Initially, the focal point of the debate was corporate law. Only recently the attention has shifted to other areas of law, notably contract law. However, in contrast to corporate law where there is little doubt that states do compete for corporate charters both in the United States and in Europe, it is hotly debated whether there is – or whether there can be – regulatory competition in contract law. In the first part of the following article I argue that this question must be answered in the affirmative: empirical evidence shows that there is regulatory competition in contract law just like in other areas of law, notably corporate law. Most importantly, empirical evidence shows that businesses and consumers actually choose the applicable contract law based on the quality of the law and that states actually respond to these choices by adjusting their contract laws. With this finding, however, the discussion about regulatory competition in contract law has not yet reached its end. To the contrary: the fact that states actually do compete for application of their contract law raises a number of normative questions. Should regulatory competition be promoted because it induces a race to the top? Should it be banned because it induces a race to the bottom? In the second part of the paper I argue that regulatory competition in contract law will generally induce a race to the top. It should, therefore, generally be promoted. However, I also argue that regulatory competition may induce a race to the bottom in some cases, namely where a choice of law does not account for the interests of all parties affected by the choice. In these cases, I conclude, that regulatory competition should be regulated. More specifically, I argue that it should be regulated on the level of private international law by limiting freedom of choice.

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