PRESCRIPTION IN THE PROPOSAL FOR A COMMON EUROPEAN SALES LAW[1]
Is harmonization (of European legal traditions) achieved?

ABSTRACT
The Draft Regulation on a Common European Sales Law (CESL) deals with prescription in Articles 178 to 186. This paper discusses the level of legal harmonization supposedly achieved within the European Union concerning extinctive prescription. A number of significant inaccuracies that might substantially affect the effectiveness and application of the Optional Instrument are noted, demanding an amendment before becoming EU law.

KEY WORDS
Extinctive prescription, effects of prescription, running of the period, interruption, suspension, postponement of expiry, prescription and party autonomy.

1. FROM PECL AND DCFR TO CESL

The Draft Regulation on a Common European Sales Law (CESL) focuses on prescription in Articles 178 to 186, contained in Part VIII, Chapter 18 of Annex I. This paper systematically analyses the proposed regulation from the point of view of legal harmonization within the European Union.

The precedents of the Optional Instrument can be found in Chapter 14 (Articles 14:101 to 14:601) of the Principles of European Contract Law (PECL)[2], and in Chapter

[1]This article is part of the publications of the Spanish National Research Project MICINN DER2012-37898-C02-01 called "The Optional Instrument of European Contract Law", and the activities of the consolidated research group "Catalan Civil Law and European Private Law" funded by the Generalitat de Catalunya (2014SGR223). The author is also a member of the Research Center CEJEM (Centro de Estudios Jurídicos Europeos y de Mediación), at the University of Lleida. She is grateful for the financial aid received to carry out this project. She is also grateful for the assistance provided by Ricard Serrano Barqué.

7 of Book III (Articles III-7:101 to III-7:601) of the Draft Common Frame of Reference (DCFR)[3], the latter within the general theory of obligation. There are no significant changes between these regulations, although it should be noted that DCFR replaces the heading «Claims subject to prescription»[4] for «Rights subject to prescription»[5]. Other previous texts seeking harmonization is worth to be mentioned are the UN Convention of 14 June 1974 on prescription regarding the international sale of goods[6], and the PICC.

CESL approaches prescription differently, not only from a terminological but also from a substantive point of view. The object of CESL is more limited, since it only applies to sales contracts and some specific services contracts[7], whilst PECL and DCFR scope was general. It was developed along with other issues in the general part dedicated to the Law of Obligations. Because CESL is more specific it is questionable whether its provisions on prescription can be applied to contracts other than sales and related services[8]. The «right to enforce performance of an obligation» (Article 178 CESL), is a sufficiently broad concept so as to need a specific set of rules; these rules, in turn, should have a scope of application common to the whole Law of Obligations. Applying the rules on prescription only to the right to enforce performance would cause, in practice, countless difficulties and hurdles. The willingness to generalize the legal regime of prescription can be inferred from the CESL recitals[9], which refer more

---

[2] Cf. Ole LANDO et al. (eds.), *Principles of European Contract Law*, Part III, The Hague, London and New York, 2003, pp. 233-308.

[3] Christian VON BAR, Eric CLIVE, (eds.), *Draft Common Frame of Reference*, Full Edition, Volume II, Munich, 2009, pp. 1139-1206.

[4] Article 14:101 PECL.

[5] Article III-7:101 DCFR. Article III-7:302 DCFR Full Edition is the only different rule in respect to the Outline and Interim Editions, since it includes mediation as a possible ground for suspension. See a comparative study on provisions on this issue, Reinhard ZIMMERMANN, *Comparative foundations of a European Law of Set-off and Prescription*, Cambridge, 2002, p. 65 ff.; Andrés DOMINGUEZ LUELMO and Henar ÁLVAREZ ÁLVAREZ, "La prescripción en los PECL y en el DCFR", *InDret* 3/2009, pp. 1ff.

[6]Hereinafter, Limitation Convention 1974, which has been an important factor when drafting subsequent harmonizing texts (PICC, PECL, DCFR). However this Convention has been ratified only by a few European States: Poland, Czech Republic, Romania, Slovakia, Slovenia, Hungary and Belgium. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html (last connection 6.10.2014).

[7] On service contracts in European Law, Chris JANSEN, "Principles of European Law on Service Contracts: Background, Genesis, and drafting Method", in Reinhard ZIMMERMANN, *Service Contracts*, Tübingen, 2010, pp. 43-57; Marco LOOS, "Service Contracts" in Arthur HARTKAMP, *Towards a European Civil Code*, London, 2011, pp. 760 ff.; Antoni VAQUER ALOY, "Contratos de servicios: entre el derecho de consumo y el derecho contractual general", in Sergio CÁMARA LAPUENTE (dir.), *La revisión de las normas europeas y nacionales de protección de los consumidores*, Cizur Menor, 2012, p. 421.

[8] Obviously, this is an important question that has been criticized by the doctrine in a majoritary way: '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' Esther ARROYO I AMAYUELAS/Antoni VAQUER ALOY, "Prescription in the Proposal for a Common European Sales Law", *ERCL* 2013, number 1, p. 40), see also Marco LOOS, "Scope and application of the Optional Instrument" (paper written for the conference 'Vers un droit européen des contrats spéciaux/Towards a European law of specific contracts', held in Lille, France, on 17 June 2011, available at http://dare.uva.nl/document/2/132371 (last connection 6.10.2014).; Guido ALPA, "El texto de viabilidad y el reglamento Opcional sobre la compraventa", *Revista de Derecho Privado*, 2013, number 2, p. 126.

[9] See, for exemple, Recital 8 CESL: "Contract-law-related barriers prevent consumers and traders from fully exploiting the potential of the internal market and are particularly relevant in the area of distance selling, which should be one of the tangible results of the internal market. In particular, the digital dimension of the internal market is becoming vital for both consumers and traders as consumers increasingly make purchases over the internet and an increasing number of traders sell online. Given that

to the contractual relationship than to the specific sales contract. Furthermore, the rules on prescription consider «debtor» and «creditor» instead of mentioning «buyer» and «seller»[10]. Article 179 CESL specifically deals with prescription of the right to damages for personal injuries, which oddly occurs in the context of sales contracts. Broadly speaking, the contents of the entire regulation reproduce, albeit shortened, the contents of the provisions of PECL and DCFR[11]. Finally, amendment nº 75 adopted at the sitting of 26 February 2014 by the European Parliament ("*k) prescription and preclusion of rights*") omits any reference to sales[12].

Hence, the regulations on prescription might be applied to the right to performance of any obligation. However, one may wonder whether this is feasible. When a cross-border contract is governed by one European national rule, and its content is not the delivery of a product in exchange for a price –for instance, a work contract-, it is doubtful whether the parties may resort to the Optional Instrument. CESL requires the contracting parties to state an express intention to be governed by its rules[13], as well as it allows them to exclude the application of some of its provisions[14]. Considering the

---

communication and information technology means are constantly developing and becoming increasingly accessible, the growth potential of internet sales is very high. Against this background, and to overcome such contract-law-related barriers, parties should have the possibility to agree that contracts they conclude at a distance, and, in particular, online, should be governed by a single uniform set of contract law rules with the same meaning and interpretation in all Member States, a Common European Sales Law. That Common European Sales Law should represent an additional option for distance selling and, in particular, internet trade, increasing the choice available to parties and open to use whenever jointly considered to be helpful in order to facilitate cross-border trade and reduce transaction and opportunity costs as well as other contract-law-related obstacles to cross-border trade. It should become the basis of a contractual relationship only where parties jointly decide to use it". (Cf. Amendment 1, Texts adopted (Part III) at the sitting of 26 February 2014 by the European Parliament. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20140226+SIT-03+DOC+PDF+V0//EN&language=EN p. 84, (last connection 6.10.2014).

[10] For example, Articles 184 and 185 CESL.

[11] It should be borne in mind that prescription is regulated in the general part in both texts, which is common to the whole of European contract law.

[12] Amendment 75: Article 11a (new). Cf. Texts adopted 26.2.2014, p. 115.

[13] "Recital 9 CESL: This Regulation establishes a Common European Sales Law for distance contracts and in particular for online contracts. It approximates the contract laws of the Member States not by requiring amendments to the first national contract law regime, but by creating a second contract-law regime for contracts within its scope. This directly applicable second regime should be an integral part of the legal order applicable in the territory of the Member States. In so far as its scope allows and where parties have validly agreed to use it, the Common European Sales Law should apply instead of the first national contract-law regime within that legal order. It should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract". Cf. Texts adopted 26.2.2014, amendment 2, p. 85).
According to Sir John THOMAS, President of the Queen's Bench Division Royal Courts of Justice Strand, (*Proposal for a Regulation on a Common European Sales Law: Making the Proposal simpler and more certain, briefing note*, European Parliament, manuscript completed in October 2012, European Union, 2012, p. 9): 'The basis on which parties can opt-in to CESL in the context of B2C contracts is complex. It requires at least two separate agreements: one for CESL to apply and another for the individual sale itself. This is apt to discourage consumers'. See also Martijn HESSELINK, "How to opt into the Common European Sales Law? Brief comments on the Commission's proposal for a regulation" in Ignace CLAEYS and Régine FELTKAMP (eds.), *The Draft Common European Sales Law: towards an alternative sales law?, A Belgian Perspective*, Cambridge, 2013, pp. 1-15; Caroline HARVEY and Michael SCHILLIG, "Consequences of an Ineffective Agreement to Use the Common European Sales Law", *ERCL*, 9-2, 2013, pp. 143-162; Jürgen BASEDOW, "The Optional Instrument of European Contract Law: Opting-in through Standard Terms – A Reply to Simon Whittaker", in *Max Planck Private Law Research Paper* No. 12/10, pp. 1-8.

[14] Article 1.2 CESL.

clear existing relationship between the rules governing prescription and those affecting the content of the contractual relationship, it is unlikely that the parties choose to be governed by the rules on prescription included in CESL when the underlying contract is not a sales contract[15]. Therefore, the usefulness of the CESL rules on prescription lies more in its potential capacity to inspire national and European lawmakers as well as courts, than to govern the relationship between contracting parties.

2. OBJECT OF PRESCRIPTION

The issue of the object of prescription has been traditionally discussed. The substitution of the heading «Claims subject to Prescription» (Article 14:101 PECL) by «Rights subject to Prescription» (Article III-7:101 DCFR) evidences this debate. Article 178 CESL follows the DCFR approach, since it identifies the object of prescription as '*a right to enforce performance of an obligation'*. Such a change in the wording does not imply a legislative decision to amend object of prescription. As well as in PECL and DCFR *"right to enforce performance"* tackles neither the right of ownership, nor personal or procedural rights[16]. The DCFR drafters clarify that the object of prescription is the right to performance, not other rights such as property rights or the right to marry[17]. Indeed, Article 178 CESL only incorporates two minor modifications: the introduction of the word *enforce* and the allusion to prescription of ancillary rights.

On the other hand, the translation into national languages of European texts helps understanding what is considered the object of prescription in each national law: *actions*, in the English Limitation Act 1980, *créance* or simply *droit*, in French law[18]; *acciones* in Spanish law[19], *credito* o *diritto di credito* in Italian law[20], A*nspruch* in German law[21]. For some Italian authors, this terminological diversity is due to the difficulties encountered by the Italian and French translators to understand what they consider to be the abandonment by the European lawmaker of the Roman tradition; from a traditional point of view, the object of prescription is the obligation and not the right to enforce performance[22]. In their opinion European law has biased to the *common*

[15] On the effectiveness of CESL see Horst EIDENMÜLLER, Nils JANSEN, Eva-Maria KIENINGER, Gerhard WAGNER and Reinhard ZIMMERMANN, "The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law", *Edinburgh Law Review* 16.3, 2012, pp. 301-357; Eric CLIVE, "Recent legal developments: a Common European Sales Law. A general perspective on the European Commission's proposal for a regulation on a Common European Sales Law" *Maastricht Journal of European and Comparative Law*, 19,-1, 2012, pp. 120-131.

[16] *Principles of European Contract Law*, Part III, Madrid, 2007, Comment B to Article 14:101PECL, p.234.

[17] DCFR, Volume 2, Comment D to Article III.-7:101, p. 1122.

[18] Cf. Reinhard ZIMMERMANN, ''Extinctive' Prescription under the Avant-projet', in *European Review of Private Law*, 2007, 15-6, p. 805.

[19] Cf. Luis DIEZ PICAZO, *La prescripción extintiva en el Código civil y en la jurisprudencia del Tribunal Supremo*, Cizur Menor (Navarra) 2007, p. 109 ff.

[20] Cf. Paolo VITUCCI, Federico ROSELLI, *II Codice Civile, Commentario, La prescrizione*, I, art. 2934-2940, 2012, p. 4.

[21] The new German Law of Obligations was promulgated in novembre of 2001, and the first international draft for a general prescription regime was adopted, also in 2001, by the Lando-Commission (PECL). Cf. Reinhard ZIMMERMANN, *Comparative foundations of a European Law of Set-off and Prescription*, Cambridge, 2002, p. 87; see also "The new German Law of prescription and Chapter 14 of the Principles of European Contract Law", in Antoni VAQUER ALOY (ed.) *La tercera parte de los Principios de Derecho contractual europeo*, Valencia, 2005, pp. 458; Gerhard DANNEMANN, "The CESL as Optional Sales Law: Interactions with English and German Law", in Gerhard DANNEMANN and Stefan VOGENAUER, *The Common European Sales Law in Context*, Oxford, 2013, pp. 708-731.

[22] According to Article 234 of the French-Italian Project of a Code of Obligations published in 1927, prescription discharges the obligations.

law system, which does not fit in the Romanist civilist-continental tradition of Italian and French law. This is the reason why the translators from these countries have wandered off, more or less consciously, from the English version[23]. Yet, Spanish and German translators have remained faithful to the original English text. In the Common Law, the expression is *limitation of actions*, so the emphasis is placed on the procedural character of the institution[24]. Thus, the English version of the UN Convention of 1974 on prescription uses the expression *limitation period*, as well as the English version of the PICC. From a Spanish perspective, prescription has both a substantive and procedural nature, Article 1930 Spanish CC refers to extinction by prescription of *rights and actions*[25] and, in a procedural way, the exception of prescription should be alleged as a defense by the respondent[26]. The Civil Law of Navarra[27] refers to prescription of *actions* (real as well as personal). With greater precision, the Catalan Civil Law[28], alludes to prescription of *claims*[29]. Article 178 CESL, which copies what is laid down in 14:101 PECL and III-7:101 DCFR, establishes that what is prescribed is the «right to enforce performance of an obligation», which technically means that prescription is predicated from the «claims». After expiry of the period, the debtor is entitled to refuse performance, but whatever has been performed in order to discharge a claim may not be reclaimed (as stated in Article 14:501 PECL, Article III-7:505 DCFR, and Article 185.2 CESL). The PICC has a similar regulation in this point, establishing precise rules in this subject matter[30]. In conclusion, when Article 178 CESL mentions the «right to enforce performance» it resorts to the definition of the German term *Anspruch.* Certainly, the word A*nspruch* as translated into *claim* that the PECL used, has been rejected. Yet the object of prescription is still the *Anspruch.* But *Anspruch* is only considered the object of prescription in a few legal systems, while others still think of *rights* or *actions*. Therefore, it is unclear that CESL contributes to legal harmonization in this crucial point.

It is worth mentioning that an amendment to Article 178 CESL has been agreed[31]. The amendment aims at clarifying the object of prescription, specifically the

---

[23] Cf. Alessio ZACCARIA, "Garantías comerciales: en particular, plazos y protección del consumidor", in Sergio CÁMARA LAPUENTE (dir.), *La revisión de las normas europeas y nacionales…*, p. 544; Federica FURFARO, "The revival of romanistic scholarship between the 19th and 20th centuries as a 'centralizing force' in European Legal History. The Masterpieces of German Pandectist Literature Revised by Italian Translators", *MJ*, 2012, 19-2, p. 280.

[24] David M. WALKER, *Prescription and limitation of actions*, Edimburg, 1996, p. 3.

[25] Cf. Luis DIEZ PICAZO, "Comentario al art. 1930 CC español" in *Comentario del Código civil*, Mº de Justicia, Madrid, 1991, p. 2.084; and, in the same vein, Manuel ALBALADEJO GARCÍA, *La prescripción extintiva*, Madrid, 2004, p. 24; Rosa Mª GARCÍA PÉREZ, "La prescripción en el Derecho europeo" in Sixto SÁNCHEZ LORENZO, *Derecho contractual comparado. Una perspectiva europea y transnacional*, Cizur Menor (Navarra), 2013, p. 1735.

[26] Article 405.1 Spanish LEC.

[27] Laws 26 ff.

[28] Articles 121-1ff. of the Book I CCCat.

[29] Cf. Ferran BADOSA COLL, "Termes que resulten dels Arts. 121-1 i 2", in Antoni VAQUER ALOY and Albert LAMARCA I MARQUÈS,*Comentari a la nova regulació de la prescripció i la caducitat en el Dret civil de Catalunya*, Barcelona, 2005, p. 24.

[30] However, they specifically limit their scope of application to Contract Law, while the recent Common European Sales Law shows a larger scope when referring to prescription of all kinds of claims. Cf. Article 11 a) CESL (amendment of February 2014).'

[31] Cf. *Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law*, Vienna, 2012 (see the Proposal with parallel texts showing the suggested amendments, specifically page 321ff.); and the draft of June 2013, "1st Supplement: Reactions to the Draft Report of 18 February 2013 of the EP Committee on Legal Affairs", (see in p. 108 the new Article 156 that was proposed).

notion of ancillary rights. According to this proposal the new Article 178 says: *"A right to enforce performance of an obligation, and any right ancillary to such a right, including the right to any remedy for non-performance except withholding performance, is subject to prescription by the expiry of a period of time in accordance with this Chapter"*[32]

3. PERIODS OF PRESCRIPTION AND THEIR COMMENCEMENT

3.1. Periods of prescription in comparative perspective and in European soft law

National laws set out very different periods of prescription. This diversity of periods hinders cross-border contracts and raises many claims[33]. Some legal systems establish detailed periods for certain claims along with a general long period of fifteen to thirty years[34]. Other systems have carried out legislative reforms in recent years, showing a trend towards shortening all these periods and simplifying the regime of prescription. This approach shows further harmonization with the European texts, and, specifically, with CESL[35]. The Bill of the new Spanish Commercial Code, adopted by the Government on 30 May of 2014, clearly follows European soft law because it reduces and unifies the periods of prescription affecting commercial obligations. It establishes a general period of prescription of four years[36], that will be applied to the

[32] Amendment nº 248, p. 179. Finally, on 31 July 2014, the ELI Council approved the 1st Supplement to the Statement on the Proposal for a Regulation on a Common European Sales Law.

[33] Cf. STJUE 21.6.2012, issue C-294/11: '(…) the periods concerning the prescription of rights are not harmonized in the Union and, therefore, can vary from one Member State to another. Thus, such an interpretation would be contrary to the objective claimed by the Eighth Directive VAT to put an end to the divergences between the existing provisions in the Member States'; STJUE 8.9.2011, Joined Cases C-89/10 and C-96/10: 'In the absence of harmonized rules governing the reimbursement of charges imposed in breach of EU law, the Member States retain the right to apply procedural rules provided for under their national legal system, in particular concerning limitation periods, subject to observance of the principles of equivalence and effectiveness'; STJUE 2.12.1997, Case C-188/95: 'By means of its seventh issue, the referring court basically requests an explanation of whether Community Law forbids that a Member State invokes a national period of prescription with the objective of opposing the actions for the duty drawback whose payment has been contrary to the Directive as such Member State has not correctly transposed its national law into this Directive'.

[34] See for instance Article 3:306ff. BW (The Netherlands), Article 2262 CC (Luxembourg), Article 249 CC (Greece), Article 309 CC (Portugal). In Spain, the periods are different depending on the claim affected and depending on the civil law at stake (Article 1964 State CC, Article 121-20 CCCat and Law 39 FN).

[35] In Germany, the influence of the works on European Contract Law is noticiable. The modernized BGB sets a general period of prescription of three years, applicable both to contractual and non-contractual claims (§ 195 BGB).Cf. Reinhard ZIMMERMANN, *The new German Law of obligations: historical and comparative perspectives*, Oxford, 2005, p. 139ff. In France, the amendment introduced in the *Code* by means of Act 561/2008, of 17 June, includes a general period of five years (Article 2224). It might also be cited § 4 of the Law of Prescription of Finland (3 years), § 3 of Law of Prescription of Denmark as last amended on December 2013 (3 years); Article 2517ff. Romanian CC adopted in 2011, (3 years), Article 225 of the Law of Obligations of Croatia adopted in 2005 (5 years), § 629.1 Czech Republic NCC which came into force on 1 January 2014 (3 years), Article 346 CC and Code of Obligations of Slovenia (5 years), and Articles 117-125 Polish CC (3 years).

[36] Article 712-1 of the Draft Commercial Code prepared by the General Codification Commission (Bulletin of the Ministry of Justice, Madrid, 2013) established a period of three years as CESL, but the Bill adopted by the Government increases it to four years. See on this legislative proposal José Luis GARCÍA Y LASTRES, "La prescripción y la caducidad en el libro VII de la Propuesta de Código mercantil", *Revista de Derecho Mercantil*, 2014, 291, pp. 33-76. Certainly, Spanish authors have suggested for some years a reform of the civil periods of prescription considering that, in the case of obligations, the general period of fifteen years is too long, while the period of one year for the action for non-contractual liability is too short. However, the Bill concerns only commercial law and leaves the *Código civil* unamended.

possibility of enforcing performance of all commercial obligations, in the whole of Spain, including the regions that have kept their own Civil Law and have implemented regulations on the subject-matter, such as Navarra or Catalonia[37].

The aim of PECL and DCFR is the simplification of the periods of prescription. Thus, Article 14:201 PECL and Article III.-7:201 DCFR set out a general prescription period of three years that affects all rights to enforce performance of an obligation, both contractual and non contractual obligations. Being one of the purposes of the law of prescription the avoidance of endless and expensive litigations, it would be unacceptable that the rules on prescription themselves led to excessive litigation. Moreover, there are no convincing enough reasons to defend a set of different specific periods, at least not in the Law of Obligations. The option for periods of prescription differentiated according to the legal nature of the right is not suitable, because the issue of prescription will often have to be determined at a time when the legal position between the parties is still under discussion[38].

Along with the general period of three years, Articles 14:202 PECL and III-7:202 DCFR foresee a special period of ten years applicable to claims established by judgment, by an arbitral award or other instruments which are enforceable as if it were a judicial decision. This is the only special period of prescription. The reason lies in the fact that the claimant has judicially pursued the suit and the court has resolved the legal dispute between the parties[39].

It is necessary to stress the existing close relationship between the option in favor of a certain general period of prescription, and the determination of the initial day of prescription. The way in which the *dies a quo* is determined has an impact in the others elements of prescription, provided that the legal system takes into account all the conflicting interests. If the *dies a quo* is based on an objective criterion, the period of prescription should be relatively long in order to ensure that the creditor, at some point over the course of this period, is in a position to enforce her right. Conversely, in the subjective system, the duration of the period of prescription can be shorter, because prescription only runs from the day in which the creditor is aware of the facts that give rise to her claim.

The Limitation Convention 1974 supports the objective criterion of determination of the *dies a quo*, albeit with some nuances[40]. Yet the PICC lay down that the general period of prescription begins on the day after the day the creditor knows or ought to know the facts as a result of which her right can be exercised (rule of cognoscibility)[41]. There is suspension in case of force majeure[42], whenever it happens.

In PECL and DCFR, the general period of prescription begins also to run from the time when the debtor has to effect performance or, in the case of a right to damages, from the time of the act which gives rise to the right[43]. Some authors understand that both PECL and DCFR turn to the subjective criterion when enforcing performance of an

[37] The variety of applicable regulations regarding prescription throughout the Spanish territory is not a pacific issue in practice. According to the judgment of Spanish Supreme Court of 6.9.2013 (Id Cendoj: 28079119912013100019), regional periods of prescription cannot tackle claims based on state legislation.
[38] Cf. DCFR, Volume 2, Comment A to Article III.-7:201, p. 1147.
[39] Cf. DCFR, Volume 2, Comment A to Article III.-7:202, p. 1151.
[40] According to Article 9 Limitation Convention 1974, the period begins "*on the date of which the claim accrues"*. Exceptionally it resorts to the knowledge by the creditor in case of *dolus*.
[41] Article 10.2 PICC.
[42] Article 10.8 PICC.
[43] Article 14:203 PECL and Article III.- 7:203 DCFR.

obligation, and to the objective criterion in the case of claims for damages[44]. This argument has faced some criticism, especially in relation to damages, because then the period would run even if damages had not completely manifested and even when the victim does not know about the damage[45]. However, the Comments to the DCFR state that this 'should not be a problem for the claimant'[46] as the running of the period of prescription is suspended as long as the creditor (or the victim of the damage) 'does not know or cannot be reasonably expected to know (a) the identity of the debtor or (b) the facts that have given rise to the origin of the included right, and in the case that it is a right of compensation for damages, the type of damage'. Additionally, where the duration or nature of the impediment is such that it would be unreasonable to expect the creditor to take proceedings to assert the right within the part of the period of prescription which still has to run after suspension comes to an end, the period of prescription does not expire before six months have passed after the time when the impediment was removed[47]. Therefore, this rule means that the period of prescription will be initially suspended (which in practice is not the same as if it did not begin to run) until the creditor knows the identity of the debtor and the existence and extent of the damages. Suspension may also take place when the period has already begun to run.

Finally, PECL and DCFR refer to two special rules on the beginning of the period of prescription. In the case of a continuing obligation (to do or not to do something), the period of prescription begins to run with each breach of the obligation. This is applied especially in cases of continuing obligations not to do something, where prescription begins at every opportunity in which the debtor, incurring in a new non-performance, carries out the action that was banned for her. This implies rejecting the day in which the obligation was enforceable as a *dies a quo.* With respect to the period of prescription of ten years foreseen in Article 14:203 PECL and III-7:203 DCFR for a right established by judicial proceedings, arbitral award or other instrument which is enforceable as if it were a judgment, the period begins to run from the time when the judgment or arbitral award obtains the effect of res judicata, or the other instrument becomes enforceable. Thus, instead of using as a reference point the date of the judgment itself[48], the date when the decision becomes definitive is used.

3.2. CESL: reduction and unification of periods

Articles 179 and 180 CESL represent a new approach to the issue of the period of prescription and their commencement (the *dies a quo*). CESL does not set out one but two general periods of prescription irrespective of the type of claims or obligations involved. There is a short period of two years –one less than the general period of PECL and DCFR[49]- and a long one of ten years that has been recently reduced to six years[50].

---

[44] Cf. Andrés DOMÍNGUEZ LUELMO and Henar ÁLVAREZ ÁLVAREZ, "La prescripción en los PECL y en el DCFR" cit., p. 13.

[45] Cf. Fernando PEÑA LÓPEZ, "El *dies a quo* y el plazo de prescripción de las acciones de responsabilidad por daños en el CC: criterios procedentes de algunos textos europeos de *soft law* y del Derecho estadounidense que podrían servir para su reforma e interpretación", *InDret* 4/2011, p. 10.

[46] Cf. DCFR, Volume 2, Comment B to Article III–7:203, p. 1154.

[47] Cf. Article III-7:303 DCFR.

[48] As in the Dutch Civil Code, see Article 3:324 BW.

[49] See the critical of The Law Commission of UK and The Scottish Law Commission: *"Although under the current draft, the prescription period is two years rather than three years, the right to terminate is still much longer under the CESL than under the laws of the UK. It would be regrettable if the CESL were to not to be used for this reason. We would suggest that the consumer's right to terminate under the CESL be restricted to a period of months rather than years"* (*An Optional Common European Sales Law: Advantages and Problems Advice to the UK Government*, by, November 2011, (s. 4.130), p. 62 available

This new approach is not based on the legal nature of the claim but in the criterion, objective or subjective, that determines the *dies a quo*, the moment in which one of the periods –the sort or the long one- commences. Article 180 CESL resorts to the subjective system for the short period "from the time 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". Conversely for the long period -six or thirty years- the objective system is used (from the time when the debtor has to perform or, in the case of a right to damages, from the time of the event which gives rise to the right). Thus, according to CESL, it might be that the same claim is affected by both periods of prescription. This may happen because more than two years have passed since 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. But also because more than six years have passed since the objective time when the debtor should have performed. This solution has been confirmed in the amendment 250 adopted in February 2014, despite some criticism from those who argue in favor of uniform periods as a means to foster legal certainty. Two different periods of prescription should not be applicable to the same claim but indeed this is explicitly the intention of the CESL's drafters: "2n. *Prescription takes effect when either of the two periods has expired, whichever is the earlier*"[51].

The shortening of the long period (from ten to six years) does not completely end with the discussion as to whether this is to be considered a long-stop period, like the one in DCFR and in PECL known as maximum length of period[52]. A negative answer stems from Articles 181 (suspension that affects the two periods of prescription), 182 and 183 (postponement of expiry of the two periods of prescription, in the case of negotiations or incapacity), 185.1 (effects of prescription after expiry 'of the relevant period of prescription'), and 186 (conventionally enabling shortening or lengthening the long period of prescription, which would not be possible if this period was really a final deadline) [53]. Nevertheless, a long-stop period is missing for reasons of legal certainly.

National lawmakers are progressively regulating a long-stop period[54]. What should be the maximum length of this period is debatable; in this regard it seems reasonable that the solution be different depending on the type of claim. The wide variety of national legislations has to be taken into consideration[55]. Therefore, Article

---

at http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf (last connection 27.10.2014).

[50] Cf. Texts adopted by European Parliament at February 2014, Amendment 250, p. 179. Authors pushed for a reduction such as Esther ARROYO I AMAYUELAS /Antoni VAQUER ALOY "Prescription in the Proposal…" cit. p. 46: "*It must be considered whether these periods are too short or too long in case of lack of conformity. The long period of prescription appears as excesive from the very beginning if we consider it as a real period of prescription for it may seriously affect the seller's interest…*".

[51] Amendment 250, Annex I – Article 179 – paragraph 2 a (new). The working group ELI proposed this amendment in a different way (see Article 157.3 of the Proposal, "1st Supplement:…" cit. p. 110).

[52] Cf. Article 14:307 PECL, and Article III.-7:307 DCFR.

[53] Esther ARROYO I AMAYUELAS /AntoniVAQUER, "Prescription in the Proposal…" p. 53. These authors highlight the reasons why the 'long period of prescription' is a prescription period and not a closing date, and they demand clarification of this issue in the successive amendments of the Proposal.

[54] Cf. Germany, §199 BGB, France Article 2232 CC, United Kingdom (although only for the actions as a result of the right to damages, *Section 14B* Limitation Act 1980, Denmark (§ 3 Prescription Act), Austria (§1489 ABGB), Latvia (Article 1895, fin, CC), Lithuania (Article 6300.2 CC), Malta (Article 2143 CC), Cyprus (Law 66(I) ,2012), Norway (§ 23 Law of Prescription amended last in 2014), The Netherlands (Article 3:306 BW).

[55] Cf. Article 11 of Directive 85/374/EEC on liability for damages arising from defective products. See the case Aventis Pasteur SA against OB (Case C-358/08), available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d52b46886cd32e444381bbc3f34dbc890d.e34KaxiLc3eQc40LaxqMbN4Ob3uPe0?text=&docid=76602&pageIndex=0&doclang=EN&m

179 CESL cannot be considered a step towards harmonization, since there is not a long-stop period. There are two periods that run concurrently but only one of them will lead to prescription. In fact, the regulation does not match with Recital 26 CESL[56]. Such a solution is unacceptable. There must be a maximum period after which the right cannot be claimed, regardless of the knowledge of the creditor, in order to balance the subjective commencement of the running of the period.

Article 179.2 CESL provides a special period of 30 years in the case of damages for personal injuries. This rule could be considered as a long-stop period that balances the subjective principle of knowledge of the damage. The reason for such a different approach is that, in these cases, there is usually a long period of latency. Life, health and bodily integrity in general, are particularly valuable and must be subject to a sufficient legal protection: personal injury is usually considered more seriously than property and economic damages. The spectrum of possible claims is too broad, and these issues are a lot more diverse than the lack of conformity in a sales contract. Thus, its regulation within CESL can only be justified provided that prescription applies generally to the Law of Obligations, and not specifically to sales contracts.

In conclusion, the short period of two years included in CESL does not follow the pattern of the DCFR three years period[57]. On the contrary, it resembles the period provided by Article 5 of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees: the seller is liable for lack of conformity of the good, that is known within a period of two years from the objective moment when the delivery takes place[58]. The significant difference with the system provided by Article 5 of Directive 99/44 is that CESL sets out two parallel periods, the short and the long one. This legislative decision can seriously affect cross-border transactions. In particular, the double period proposed in CESL may prevent sellers from making use of it.

4. INCIDENTS AFFECTING THE RUNNING OF THE PERIODS OF PRESCRIPTION

Sections 3 and 4 of Chapter 18, rule the incidents affecting the running of the periods of prescription. Articles 181, 182, and 183, under the heading "Extension of

---

ode=lst&dir=&occ=first&part=1&cid=8281. See Article 121-24 CCCat and §1489 Austrian ABGB with a preclusion period of 30 years, or 10 years in the specific case of actions that fall within the scope of the application of the *Product Liability Act* 1988. See, on Belgian law, Denis PHILIPPE, "CESL: change of circumstances and prescription", in Ignace CLAEYS and Règine FELTKAMP, *The draft Common European Sales Law*... cit. p.310ff.

[56] Recital 26: "Apart from the rights and obligations of the parties and the remedies for non-performance, the Common European Sales Law should therefore govern pre-contractual information duties, the conclusion of a contract including formal requirements, the right of withdrawal and its consequences, avoidance of the contract resulting from a mistake, fraud, threats or unfair exploitation and the consequences of such avoidance, interpretation, the contents and effects of a contract, the assessment and consequences of unfairness of contract terms, restitution after avoidance and termination and the prescription and preclusion of rights. (...)"

[57] Cf. Article 158.1 of the ELI Proposal ("1st Supplement: …" cit. p. 110).

[58] Article 5 Directive 1999/44/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. According to it, the existing periods of prescription in national legislations concerning remedies for lack of conformity cannot be shorter than two years from the delivery of the good. See also Directive 2014/17/EU of 4/2/2014 of the EP and of the Council on credit agreements for consumers relating to residential immovable property. Cf. Oren BAR-GILL and Omri BEN SAHAR, "Regulatory techniques in consumer protection: a critique of the Common European Sales Law", paper available at http://www.law.uchicago.edu/files/files/OBS-OBG%20paper_0.pdf , p. 25ff (last connection 10.10.2014).

Periods of Prescription", contain the regulation of both suspension and extension of the periods. On the one hand, prescription may be suspended in certain situations, for instance when a judicial proceeding to assert the right begins. Two new grounds for suspension have been added: as amendment in February 2014, repair or replacement of a good lacking conformity, and force majeure[59]. On the other hand, CESL recognizes in Article 184 a ground for interruption of prescription: if the debtor acknowledges the right, by part payment, payment of interest, giving of security, set-off or in any other manner.

In this way, the Optional Instrument distinguishes, as it is done in many national laws –Italy[60], Germany[61], France[62]– between interruption and suspension of prescription. In the cases of interruption, when the cause disappears the period of prescription begins to run anew. Suspension temporarily paralyzes the running of time. This is, there is an interval in the running of the limitation period and, when this situation disappears, then the running is restarted without eliminating the time elapsed previously. The Bill of the new Spanish Commercial Code follows the line of PECL, DCFR and CESL, clearly amending the applicable law[63]. The distinction between suspension and interruption of prescription is largely supported and, in this regard, CESL reflects the harmonization of the European legal traditions. Nevertheless, the particular circumstances that are defined as grounds for suspension or of interruption vary greatly from country to country. In fact, CESL introduces significative modifications with respect to the rules of PECL and DCFR. We will deal separately with these legislative changes in the following sections.

There is still a third incident that affects the running of the period: the postponement of expiry due to two possible causes; namely the negotiations between the parties and the incapacity of the creditor.

4.1. Suspension

CESL only contained one cause of suspension, the beginning of judicial proceedings, before the amendments approved in February 2014. PECL and DCFR establish the initiation of judicial proceedings as ground for suspension, but also the ignorance of the debtor's identity or of the facts as a result of which the right can be exercised. CESL achieves the same practical results by other means: ignorance is no more a ground for suspension, yet the short period of two years only begins to run from the time when the creditor has become, or could be expected to have become, aware that her right can be exercised. Both solutions are not technically identical. In CESL system the defendant must prove the moment when the creditor could have begun to exercise

[59] Cf. Amendments 251 and 252, p. 179 ff.
[60] Articles 2941-2945 *Codice Civile.*
[61] §§ 203-213 BGB.
[62] Articles 2234 to 2246 *Civil Code*. Also, They separately distinguish and rule the interruption and suspension of prescription, Luxembourg (Articles 2246ff. CC), Malta (Articles 2123-2131 CC), Bulgaria (Article 115ff. Law of Obligations and Contracts Number 275/22.11.1950), Czech Republic (§§ 622 and 645-647 NCC), Lithuania (Article 1129ff. CC), Portugal (Article 318 ff. CC), Poland (Article 121ff. CC), Slovakia (Article 112ff. CC), Rumania (Article 2532-2538 CC), Austria (§ 1496 ABGB), the Netherlands (Article 3:306-325ff. BW), Greece (Article 255ff. CC).
[63] Cf. Articles 1973 to 1975 CC. However, the applicable Article 955 Commercial Code already admits suspension of prescription, but with a more exceptional regulation that has been hardly applied in practice. Furthermore, the suspension of prescription has been recently regulated in Spain by Act 15/2009, of 11 November, of the contract of inland transport of dangerous goods (Article 79.3), and Act 5/2012, of 6 July, of mediation in civil and commercial matters (Article 4). The regional private law of Catalonia sets out both suspension and interruption of prescription (Article 121-11 and 121-15 CCCat, and concordant).

her right. That makes the defense of prescription more difficult. The absence of a long-stop period is another problem. Certainly, the system of Article 14:301 PECL and of III-7:301 DCFR appears to be more effective, since the burden of proof is reversed. The creditor must prove that the action is not affected by prescription because of the suspension of the running of the period based on the ignorance of the identity of the debtor, or the facts giving rise to the claim including, in case of a right to damages, the type of damage[64]. Moreover, that system ensures that the period of prescription is suspended. When the period has begun to run, the ignorance suspends the running; when the period has not begun to run, the ignorance avoids commencement of it[65].

4.1.1. Beginning of judicial proceedings

The first ground of suspension in CESL is the beginning of judicial proceedings. It also applies to the other dispute settlement proceedings, including arbitration proceedings, mediation proceedings, etc (article 181.3 y 4 CES). Insolvency proceedings also deserve to be mentioned (article 181.3). This is a clear influence of the PICC[66], because PECL and DCFR did not refer to it[67]. However, only proceedings relating to avoid insolvency are a ground for suspension. The question is then whether a proceeding seeking liquidation of a company suspends or not the running of the period. CESL does not give a clear answer.

The suspension of prescription lasts until a final decision has been made, or until the case has been otherwise disposed of (by abandonment, compliance, withdrawal, settlement). CESL basically agrees with the European soft law. However, it has to be borne in mind that in some national legislations judicial proceedings are a ground for interruption and not for suspension[68]. The solution of suspending the running of prescription adopted by CESL is the best one. If proceedings end and no final decision has been made on the merits of the case (due to procedural defects or because it has been subsequently withdrawn), the creditor has the remainder of the old period of

---

[64] Cf. DCFR, Volume 2, Comment D to Article III–7:301, p. 1163, and *Principles of European Contract Law*, Part III, Comment D to Article 14:301 PECL, p. 177. See also Article 121-18 CCCat on burden of proof when the defendant invokes suspension of prescription, applied by the High Court of Catalonia in the Judgment of 19.3.2009 (Id Cendoj: 08019310012009100011).

[65] Thus Spanish case law applying Article 1969 CC. The running of the period of prescription shall be suspended while the right cannot be exercised. E contrario, this doctrine is used to sanction the inactivity of the claimant who could bring an action (STS 26.5.2014 JUR 157239). Therefore, Spanish case law admits certain grounds for suspension of prescription (SSTS 20.2.1988 RJ 1075, 28.11.1932 RJ 1317; 12.6.1956 RJ 2482; 25.2.1960 RJ 928; 27.11.1992 RJ 9597). Cf. Francisco RIVERO HERNÁNDEZ, *La suspensión de la prescripción en el Código civil español. Estudio crítico de la legalidad vigente*, Madrid, 2002, pp. 26ff.

[66] Article 10.5.1.b) PICC.

[67] Cf. Article 14:302 PECL, Article III.- 7:302 DCFR.

[68] Article 1973 Spanish CC (although with the exception already mentioned in Article 4 of Act 5/2012 on mediation in civil and commercial matters), Law 40 FN, Article 121-11 CCCat, Article 2241 French *Code*, Article 323 Portuguese CC, Article 2943 Italian *Codice civile*. On the other hand, according to §204 BGB, any form of judicial exercise of the claim suspends the running of period of prescription. Cf. ZIMMERMANN, *Comparative foundations…*p. 121; Antoni VAQUERALOY, "La suspensión de la prescripción en el Derecho civil catalán: ¿un modelo para la reforma del Código Civil?", in VV.AA., *Libro Homenaje al Profesor Doctor D. Manuel Albaladejo García*, Volume II, Murcia, 2004, p. 4970. Spanish case law follows a very flexible criterion and accept any sort of judicial notification to the debtor (STS 12.11.2007 RJ 2008\248), as well as the application for the grant of legal aid (SSTS 26.11.1988 RJ 8714, and 7.2.1991 RJ 1151). Article 121-11 a) CCCat moves away from European law –influenced by Spanish law- and even admits the interruptive effect when the claim is disallowed due to procedural defects.

prescription to bring the action again. The doubts about the existence of the claim have not been eliminated, hence it is not logical that the period begins running again.

Finally, it must be pointed out that the suspensive effect of the extrajudicial claim is not ruled. European soft law does not rule it either. Arbitration, mediation and any other dispute resolution process are only comparable to a judicial claim[69]. The Bill of a Spanish Commercial Code, the same as current law[70], recognizes the interruption of prescription by extrajudicial notification, but for first and only time, thus avoiding that a right of credit can be maintained indefinitely by means of successive extrajudicial notifications. This middle ground solution is more convenient than the solution proposed by CESL, except for the problem of determining the exact moment when the period commences running again. When should it be understood that the debtor rejects the claim and, therefore, the running starts again? What interpretation has to be given to the silence of the debtor? These cases can raise many conflicts; hence, it is preferable to disregard the extrajudicial claim, both as a ground for interruption and for suspension.

CESL takes on a rule inherited from DCFR ("Article III-7:302.2: 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 solution can be found in some national laws[71], although the creditor ends in a better situation than she would have if she had not begun proceedings[72]. In fact, it can be disputed whether article 181.2 rules a case of suspension or of postponement of expiry, because the period is extended for six extra months in the same way as articles 182 and 183 CESL.

4.1.2. The case of *force majeure*

Before the amendments introduced by the European Parliament, there was a missing ground for suspension: an impediment that the creditor cannot control. CESL did not rule the case of force majeure[73] unlike Articles 14:303 PECL and III-7:303 DCFR and some national regulations[74]. The slight difference in soft law is that this circumstance has occurred within the last six months of the period of prescription. It seems that the creditor should not be protected when the impediment beyond her control disappears long before the end of the period of prescription[75]. The amendments passed in February 2014 require an impediment that is out of control and that could not have been reasonably avoided by the creditor[76]. Thus, CESL follows PECL and DCFR, but

---

[69] Cf. Article184, 3 and 4 CESL, Article 14:302 (3) PECL, Article III-7:302 (3) and (4) DCFR, Articles 10.6 and 10.7 PICC, and Article 14 Limitation Convention 1974.

[70] Article 1973 CC. In Spain, the extrajudicial claim is equated to the judicial claim for the purposes of causing the interruption of prescription (STS 16.1.2003 Id Cendoj: 8079110012003101930 and STS 25.5.2010 Id Cendoj: 28079110012010100350).

[71] See Article 2895 of the Civil Code of Québec (up to three months), § 3:316 (2) BW y §204 (2) BGB (up to six months), Article 2238 French CC, or the Limitation Convention of 1974 (up to one year).

[72] Reinhard ZIMMERMANN, *The new German Law of obligations: historical and comparative perspectives*, Oxford, 2005, p. 144.

[73] Cf. Peter MOGELVANG-HANSEN, "Article 181 CESL" in Reiner SHULZE, *Common European Sales Law –Commentary-*, Baden-Baden (Germany), 2012, p. 733.

[74] Germany (§ 206 BGB), France (Article 2234 CC), Austria (§ 1496-1497 ABGB), Lithuania (Article 1129.1 CC), Portugal (Article 321CC), Poland (Article 121 CC), Slovenia (Article 359.1 CO), Rumania (Article 2532 CC). In the Spanish current Commercial Code, Article 955 already admits the suspension of prescription, exceptionally in cases of war, epidemic officially declared or revolution, and the new Article 713-3 of the Bill generalizes the cause of suspension of prescription by *force majeure*. Moreover, this ground for suspension is possible not only at the starting date but also during its course.

[75] Cf. DCFR, Volume 2, Comments to Article III–7:303, p. 1.175. In the same way, Article 121-15 CCat.

[76] Article 183 a (new): "*1. The running of the short period of prescription shall be suspended for the period during which the creditor is prevented from pursuing proceedings to assert the right by an*

only in relation to the short period of prescription. This period can be suspended and, even, extended six extra months provided that the duration or nature of the impediment is such that it would be unreasonable to expect the creditor to take proceedings to assert the right within the part of the period of prescription which has still to run[77]. European scholars push for the incorporation of this ground for suspension, based in a new understanding of the old roman rule "*contra non valentem agere nulla currit praescriptio*"[78].

4.1.3. Repair or replacement of a defective good

Another recent amendment of CESL proposes the suspension of prescription in case of repair or replacement of a non-conformity good[79]. This rule refers to the remedies for lack of conformity in consumer sales. The suspension concerns the short period. This entails a protection of the buyer[80] because, if the new performance of the debtor is defective too –delivery of the repaired good or another good-, the creditor can claim her right. The introduction of this rule is coherent with article 109.6 CESL: "The buyer may withhold performance pending cure, but the rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired". The suspension is effective from the time when the creditor has informed the debtor of the lack of conformity, and lasts until the time when the non-conforming performance has been remedied.

4.2. Interruption

Article 184 CESL tackle "Renewal by acknowledgment". It restricts PECL and DCFR rule. The traditional effect of the interruption of prescription -the time elapsed so far is not taken into account and the period must begin to run again-, was accepted in PECL and DCFR in two cases: a) the acknowledgment of the debtor b) the execution attempted by the creditor[81]. Undertaking execution not incorporated to CESL. It is not enough for renewal of the period the fact that the creditor formally makes clear that she is still claiming her right. This is similar to the extrajudicial notification, which is not regarded as sufficient for suspending the running of the period. However, if the debtor

---

impediment which is beyond the creditor's control and which the creditor could not reasonably have been expected to avoid or overcome. 2. Paragraph 1 shall apply only if the impediment arises, or subsists, within the last six months of the prescription period. 3. Where the duration or nature of the impediment is such that it would be unreasonable to expect the creditor to take proceedings to assert the right within the part of the period of prescription which has still to run after the suspension comes to an end, the period of prescription shall not expire before six months have passed after the impediment was removed".

[77] Cf. Esther ARROYO I AMAYUELAS /Antoni VAQUER ALOY "Prescription in the Proposal…" cit. p. 51.

[78] Jean CARBONNIER, *Droit civil*, vol. 4, París, 2000, p. 181;J. GHESTIN et al. *Traité de Droit civil. Les régime des créances et des dettes*, París, 2005, p. 1181; Paolo CENDÓN, Commentario Codice Civile, vol. VI, Turin, 1991, p. 649, M. TESCARO *Decorrenza della prescripzionee autoresponsabilità*, Milan, 2006, p. 100, Francisco RIVERO HERNÁNDEZ, *La suspensión de la prescripción en el Código civil español*, Madrid, 2002, p. 33, Magdalena UREÑA MARTÍNEZ, *La suspensión de la prescripción extintiva en el derecho civil*, Granada, 1997, p. 311, R. WINTGEN "Reforming the French Law of Prescription: a French perspective", in J. WHITTAKER et al., *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription*, Oxford, 2009, p. 351; Pedro DEL OLMO, "La suspensión de la prescripción liberatoria: fragmentos de tradición y algunas dudas", en *La prescripción extintiva*, Valencia, 2014, p. 397.

[79] Amendment nº 251, Annex I – Article 181: *"1.Where a lack of conformity is remedied by repair or replacement, the running of the short period of prescription is suspended from the time when the creditor has informed the debtor of the lack of conformity. 2. Suspension lasts until the time when the non-conforming performance has been remedied"* (p. 179).

[80] Article 3.3 Directive 1999/44/EC.

[81] Articles 14:401 and 14:402 PECL, and III-7:401 and 7:402 DCFR.

acknowledges her debt vis-à-vis the creditor, such a significant fact cannot merely have a suspensory effect. The period of prescription begins to run again for the benefit of the creditor since it is understood that the debtor that has acknowledged her debt has rejected the protection offered by prescription because she does not need or want it. Any doubt about the existence of the credit is removed, so it seems logical that the period begins to run again. Thus, in this limited case, there is a clear harmonization between CESL and many national laws[82].

Two issues regarding this case of interruption of prescription are noteworthy: a) what is "interruptive acknowledgment" –CESL does not give any definition-, and b) how the new beginning of the running of the period takes place.

It is generally considered that acknowledgment requires no form; many legal systems admit the possibility of an express or tacit acknowledgment[83]. Articles 14:401 PECL and III-7:401 DCFR refer in general to any act of acknowledgment such as part payment, payment of interests, or giving of security. Article 184 CESL, after listing some acts which are usually considered to interrupt prescription, ends with a generic: 'or in any other manner'. Therefore, national courts will enjoy discretion to assess the relevant facts of each case. To interrupt the prescription, the act of acknowledgment has to be addressed to the creditor, not to a third party.

In relation to the renewal of the period, soft law and CESL depart from the traditional approach in national laws. It is not the same period that starts again but the three years period regardless of whether the claim was originally subject to the general period under PECL and DCFR, or the special ten year period. Yet Article 14:401 (2) PECL highlights that it does not operate so as to shorten the ten year period, if applicable. Instead Article 184 CESL states that a new 'short' period of prescription begins to run. This two years period begins to run regardless of the fact that the initial period was the short period or any of the long periods (six years or, in the case of a right to damages, thirty years)[84]. In this way, the renewal may lead to a significant reduction

[82]Article 1973 Spanish CC, § 1497 ABGB, Article 325 Portuguese CC, Article 2538 Rumanian CC, Article 2248 Belgian CC, Article 2944 Italian CC, Article 2248 Luxembourg CC, Article 2133 Malta CC, § 15 Law of Prescription of Norway, Article 116 a) The Obligations and Contracts Act of Bulgaria, § 15 Law of Prescription of Denmark, Article 1130.2 Lithuanian CC. In Catalonia, it is worth mentioning the "*Projecte de llei de modificació dels llibres primer, segon, quart i cinquè del Codi civil de Catalunya i de modificació de la Llei 10/2008, de 10 de juliol, del llibrequart, relatiu a les successions*", Butlletí Oficial del Parlament de Catalunya, number 190, of 10.11.2013. The future Catalan law affects the interruption of prescription in case of acknowledgment, reforms Article 121-12 and 121-14 about requirements and effects of the interruption of prescription).

[83] Cf. In Italy, Cassazione civile, sez. III, 01/02/2010, n. 2267 - c. - Diritto & Giustizia 2010, available at http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20100202/snciv@s3@a2010@n02267@tO.clean.pdf (last connection 20.10.2014): "*l'anticipo versato dall'assicurazione interrompe la prescrizione del diritto all'indennizzo per ildanneggiatonell'incidentestradale. Il pagamento, sia pure parziale, implica il riconoscimento del credito vantato dalla vittima del sinistro*". And in France, available at http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000020684427&fastReqId=488495015&fastPos=1 (last connection 20.10.2014): "*Ilestpossible de renoncer à la prescription de façonexpresseoutacite. La renonciation tacite doit résulter de "circonstances établissant sans équivoque la volonté de nepas se prévaloir de la prescription" (Code Civil: Article 2251, al. 2). Le fait de payer sans réserve les sommes demandées par le bailleur ne constitue pas une tellerenonciation. La Cour de cassation confirme ainsiclairementsajurisprudence* (Cass. Civ III: 26.5.09). In Spain, case law requires a conclusive act of acknowledgment by the debtor. Cf. STSS 18.12.1964 (RJ 5895); 12.3.1970 (RJ 1849); 21.3.2000 (RJ 2022); 26.6.2001(RJ 5084); 30.12.2005 (RJ 2006\171); 16.4.2008 (RJ 4357).

[84] ELI proposes adding a sentence to this article in order to clarify this circumstance: 'In this case, the long period of prescription will not expire before the renewed short period' ("1st Supplement: …" cit. p. 112).

of the initial period. This solution benefits the debtor unjustifiably; despite she has acknowledged the claim. Neverthless, if the acknowledgment takes place less than two years before the expiry of the long period, it may also lengthen the period of six or thirty years. This construction can be supported since CESL does not provide for a long-stop period.

4.3. Postponement of expiry

Articles 182 and 183 CESL postpone the expiry of the period on the basis of negotiations between the parties, or incapacity of the creditor. Thus, the running of the period loses part of its relevancy because its expiry is postponed for another year, once the legal case has disappeared. Both provisions, that are systematically placed between the regulation of suspension and the interruption of prescription constitute the third incident affecting the running of the period in CESL. Their origin is to be found in Articles 14:304 as well as 14:305 PECL, and III.- 7:304 and 7:305 DCFR. It is not always easy to differentiate these cases of postponement of expiry from the grounds for suspension.

There is a similarity between the negotiations and the judicial proceedings, the arbitration or the mediation: its main purpose is to bring the dispute to an end[85]. Yet a judicial process suspends the running of the period in CESL, whilst negotiations between the parties achieve the postponement of expiry for one year after they come to an end unsuccessfully. The parties can freely agree to suspend the running of the period during the negotiation. Hence, the postponement of expiry imperatively established in Article 182 CESL is not necessary.

The personal incapacity of the creditor is included in many national laws[86] as a ground for suspension of prescription. Usually, minors of age without representative are expressly mentioned. CESL does not refer to it, but minor must be included as *"persons subject to incapacity"*. The postponement of expiry was hold by the doctrine because it interferes the least with the running of the period in comparison to interruption and suspension. In fact, this choice is gaining force in the harmonizing texts and in the modern regulations, although the concrete period of postponement can be disputed. CESL opts for a one year period once the situation of incapacity ends or a representative of the incapacitated person (or of the minor) is designated[87]. Article 183 CESL deserves some criticism because it only deals with the right held by the person subject to an incapacity without a representative. Article 14.305 PECL and III.- 7:305 (1) DCFR protect the person subject to an incapacity whether she is the debtor or the creditor, whilst CESL expressly refers only to the rights of the person that is subject to an incapacity, that is, she is only protected when she is the creditor[88].

There is a third case of postponement of expiry in soft law that CESL omits: where the creditor or debtor has died[89]. The basis is the same as in the previous case, the lack of a representative of the estate. Therefore, this case should be incorporated in CESL.

5. EFFECTS OF PRESCRIPTION

[85] See §205 BGB.

[86] See, for instance, *Part II: Section 28 (1), Limitations Act* 1980 in the system of England and Wales, Article 2252 French CC, § 210 BGB, Article 2252 CC and Secc. 35 § 2 *Land Insurance Contracts Act* of Belgium, 2942.1 CC of Italy, 320 CC of Portugal.

[87] In the §210 BGB a 6 month period of postponement of expiry of prescription is laid down.

[88] Cf. ARROYO/VAQUER, "Prescription in the Proposal…" p. 52.

[89] Cf. Articles 14:306 PECL, and III.-7:306 DCFR. The European texts were inspired by the applicable solution in Germany (§211 BGB).

Article 185 CESL makes clear that prescription produces its effects once the period is completed. The debtor is entitled then to refuse performance of the obligation and the creditor loses all remedies for non-performance, except withholding performance. It is also necessary that prescription is invoked by the debtor and that it is endorsed by the judge or the creditor. Prescription in European law does not take effect *ipso iure*. This approach usually appears in national and international modern legal texts[90].

The Limitation Convention 1974 determines that the expiry of the period of prescription under the wing of a proceeding could only be taken into account if it is invoked by one of the parties in such proceeding[91]. It is the so-called *weak effect*, peculiar to the systems where prescription does not extinguish the right but only the claim of the creditor. The PICC also lay down that the expiration of the limitation period does not extinguish the right. For the expiration to be effective, the obligor must assert it as a defense[92]. In addition, where performance has been carried out in order to discharge an obligation, there is no right to restitution merely because the limitation period has expired[93]. Article III-7:501(1) DCFR lays down the general effect of prescription: the debtor may resort to a defense that entitles her to refuse performance without affecting the subsistence of the credit. Therefore, whatever has been paid or transferred by the debtor in performance of the obligation may not be reclaimed, even though the period of prescription had expired[94]. DCFR also establishes that the prescription of ancillary rights –interest is expressly mentioned- takes place at the same time. Moreover, the expiry of the period of prescription does not prevent setting off the right of credit[95].

The Optional Instrument simply states that prescription entitles the debtor to refuse performance. On this basis, case-law understands that prescription cannot be assessed *ex officio* by the courts, but it must be opposed by the debtor by way of a defense[96]. The foundation of prescription is legal certainty; thus, this non-automatic system of effects ensures the necessary balance between the interests of the creditor that has not recovered her credit and the debtor that has not performed her obligation.

In CESL, the effect of prescription is the extinction of the claim (whether the performance of the obligation or the remedies for non-performance) it does not affect rights that have given raise to the claim. Since the subjective right persists, the payment made by the debtor after expiry of the period is justified. Performance after the expiry of the period may be due to a waiver to prescription or simply to ignorance. The waiver requires full knowledge of the debtor that voluntarily, does not invoke that prescription is completed. It is valid provided that the period of prescription has entirely expired.

---

[90] See for instance, § 214 (2) BGB, Article 304.2 CC of Portugal, Sections 1, 5 and 8 of the *Limitations Act* 1980, Article 2262 CC Belgian, Article 3:307-1 BW, Article 2262 CC of Luxembourg, Article 272 CC of Greece and *Law* 66(I) of 2012 of Cyprus. Regarding the Italian -Article 2940 CC-, French -Article 2249 or 2219 CC-, and Austrian -§1449 ABGB- legal systems, it must be pointed out that although, in principle, after the expiry of the period of prescription the substantive right and not only the claim is extinguished, yet the truth is that they require, in order that the extinction is effective, the allegation of the defense by the debtor. Moreover, as far as the legal relations that the debtor can dispose of are concerned, the debtor can withdraw the prescription she has completed. The final result is thus similar to the *weak effect* of prescription.

[91] Article 24 Limitation Convention 1974.

[92] Article 10.9 PICC.

[93] Article 10.11 PICC.

[94] Cf. III-7:501ff. DCFR. See also Articles 14:501 to 14:503 PECL which derived from it.

[95] III-7:502 and III- 7:503 DCFR.

[96] The same applies to arbitrators, who are also banned from appraising the prescription ex officio.

Otherwise, it turns into an acknowledgment by the debtor only leading to the interruption of the period of prescription. An anticipatory waiver of the debtor to allege prescription is not accepted.

The effects of prescription are applicable both to the principal claim as well as to the ancillary guarantees, even if a different period of prescription had been established for these. As long as they only make sense in order to ensure the performance of the debt, if this cannot be claimed any longer, neither the ancillary guarantees. The accessory relation involves that the period of prescription of such guarantees is only relevant if it is shorter than the period that affects the principal obligation; otherwise, prescription of both claims is completed at the same time. CESL , as its *soft law* precedents, expressly mentions the interests of the debt, but it does not specify whether it refers to moratory or conventional interest. It seems logical to affirm that conventional interests should not be considered ancillary to the principal debt in any case; on the contrary, they are sometimes part of the principal obligation.

6. AGREEMENTS CONCERNING PRESCRIPTION

Article 186 CESL allows the parties to modify by agreement the period of prescription. Some restrictions, however, must be observed. This is an the intermediate model between the systems containing an absolute prohibition, because of the mandatory character of the rules on prescription[97], and the systems that allow all kind of pacts, such as France since the reform of 2008[98]. It is reasonable to think that if the parties can agree on the different aspects of their contractual relationship –length of the contract, time and form of performance- they can also do it on the period within which a party must bring a claim. The only limit is preventing prescription of the claim. The solutions given by international texts are diverse. Article 22 Limitation Convention 1974 lays down as a general rule that the period of prescription cannot be amended and must not be affected by any statement or agreement between the parties. Yet paragraph 2 of the article allows the debtor to extend the period by means of a written declaration to the creditor. Similarly, paragraph 3 admits a clause in the sales contract that sets out a shorter period of prescription for the arbitration process, as long as the stipulation is valid in accordance with the applicable law to the contract. Article 10.3 PICC starts from the opposite general rule (the parties can modify the periods of prescription), although it restricts private autonomy by stating that the parties may not shorten the ordinary period of prescription to less than one year, or the maximum period of prescription to less than four years, or extend the latter to more than fifteen years. The possibility of a conventional modification of the regime applicable to prescription, particularly the reduction or extension of its periods, is expressly recognized in Articles 14:601 PECL and III.–7:601DCFR. However, there are some limitations: the period of prescription may not be reduced to less than one year or extended to more than thirty years. The admissible pacts on prescription may refer to different aspects, especially the periods, but also the requirements of prescription, such as the time of commencement or the grounds for suspension of the running of the period, for example.

[97] See Article 300 Portugal CC, Article 2936 Italian CC, among others.

[98] Many other systems do not recognize the role of party autonomy, like the Spanish CC. Traditionally, this gap has led to prohibition of such agreements because it is understood that if the parties could establish a period of prescription too long, they would exclude prescription de facto to the detriment of the debtor. Cf. Andrés DOMÍNGUEZ LUELMO, "Alteración convencional de los plazos de prescripción extintiva en Derecho de obligaciones", in *Estudios Jurídicos en Homenaje al Profesor Luis DIEZ PICAZO*, Madrid, 2003, p. 492. Nowadays, this approach has been overcome.

In CESL, the objective legal limits are laid down in Article 186, sections 2 to 5. The half or the double of the legal period is the range within which the parties have a margin of discretion. Thus, the short period of prescription may not be reduced to less than one year or extended to more than ten years; the long period may not be reduced to less than one year or extended to more than thirty years. The question arises as to whether the wording of Article 186.1 CESL[99] allows not only to shorten or lengthen the periods but also to agree on other aspects, such as the suspension or renewal of the period. Section 5 is also noteworthy, because it specifically excludes any detrimental pact for consumers in B2C contracts. However, the legal formula is too broad and imprecise, consequently, its application could hinder cross-border contracts[100].

7. CONCLUSIONS

Articles 178-186 CESL provide a relevant regulation for European Contract Law, yet more clarity would be welcome at least in some key aspects. It is crucial to clarify the scope of application of the rules on prescription; these rules should be applicable to any contract, not just sales contracts and related services. The delimitation of the cases of suspension and postponement of expiry, which sometimes can lead to confusion, should also be addressed. The postponement of expiry in the case of negotiations is not necessary, because party autonomy under Article 186 with regard to licit agreements on prescription is enough. Two general periods of prescription is confusing. The period of 30 years in case of a right to damages is too long and unlikely to be applied provided that it only refers to sales contracts. Finally, the rule on the prescription of ancillary rights requires greater concretion.

[99] Similar to the drafting of 2254 CC of France.

[100] Much more correct Article 2515 CC of Rumania, that rules out the possibility of pact in standard-form contracts and insurance policies, and that, in any case gives preference to the consumer protection regulations.