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# Regulation of Limitation Periods in Estonian Private Law: Historical Overview and Prospects

The rules concerning limitation periods is an area of private law that can be easily overlooked. Jurists consider the law on limitation periods boring, even a technical topic the theoretical potential of which is restricted to the discussion about how justified one or another limitation period is. The issues related to limitation have largely been disregarded also in the reform discussion opened in Estonian private law after the restoration of independence. The debate has been limited to a relatively small circle of people who participate in the working groups preparing the drafts. In a situation where the processing of the draft Law of Obligations Act and the new draft of the General Part of the Civil Code Act in the *Riigikogu* (Estonian parliament) is about to come to an end as the last stage of the Estonian private law reform, it is the right time to change such practice, taking into account, above all, the topicality of the issue all over Europe in the light of the German law of obligations reform and the anticipated completion of the parts of the Lando Commission's Principles of European Contract Law and the UNIDROIT Principles of European Commercial Contracts focusing on the law on limitation periods. The author has derived additional inspiration from the article by Prof. Dr. Reinhard Zimmermann on the main features of the contemporary law on limitation periods published recently in *Juristenzeitung*.<sup>\*1</sup>

The more specific purpose of the article is to examine the development of the regulation of limitation in Estonian private law and provide a more detailed overview of the discussion and debates that the working groups have held when preparing the provisions of the General Part of the Civil Code Act, particularly with a view of the latest developments in European private law.

## 1. Historical overview

When speaking about the history of Estonian private law, we have to distinguish between the period preceding the Second World War (1918–1940) and the years following the restoration of independence (1992). The actual impact of the historical argument on the development of Estonian contemporary private law is disputable. In principle, the Estonian legislator has continually stressed

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<sup>1</sup> R. Zimmermann. "... ut sit finis litium" Grundlinien eines modernen Verjährungsrechts auf rechtsvergleichender Grundlage. – *Juristenzeitung*, 2000, S. 859 ff.

the importance of the doctrine of legal continuity after the restoration of independence.<sup>\*2</sup> The relevant guidelines of the *Riigikogu* were included in the decision on the legal continuity of the Republic of Estonia<sup>\*3</sup>, which determined unambiguously the effect of the historical argument on legislation, obliging the government to maintain legal continuity in that field. In the field of private law, such assignment did not mean an automatic re-establishment of the Acts applicable until 1940, but has a dramatic effect on the ideological foundation of the civil law reform. The main effect entailed by such approach was the justified ties with the German legal family facilitated by the historical argument of the post-reindependence legislator; the trend can be clearly identified in Estonian legislation of the 1990s.

## 1.1. Years 1918–1940

Estonian legislation of that period never came to the codification of its own private law — when the main part of the draft Civil Code was completed in 1940, the tide of history had already turned. The main source of private law during the whole period of independence had been the Baltic Private Law Code<sup>\*4</sup>, representing the country and town law of *Estland*, *Livland* and *Kurland* as codified in 1864. It was essentially a collection of Roman law, heavily influenced by German traditions.<sup>\*5</sup> The draft Civil Code of 1940 served is an updated and simplified version of the Baltic Private Law Code<sup>\*6</sup>, nevertheless containing some significant implications derived from the more important civil law codes of the beginning of the 20<sup>th</sup> century (German *BGB*, Swiss *ZGB* and *OR*).

The Baltic Private Law Code (BPLC) contained general rules concerning limitation in sections 3618–3640. The legal nature of limitation, however, cannot be clearly identified on the basis of the provisions, the Act governs both the limitation of a claim<sup>\*7</sup> and the right of action.<sup>\*8</sup> According to section 3639, the effect of limitation is “not only the termination of the right of action but also the extinguishment of the right of claim itself”.

The regulation of limitation found in the BPLC stood out by its relatively short limitation periods. The general limitation period set out in section 3620 of the BPLC was ten years, in *Kurland* even five years. The limitation period commenced with collectibility of the claim (section 3623), while the unawareness of the person entitled to claim of the existence of the claim did not hinder limitation (section 3626). The limitation periods provided for several contractual claims were even shorter. Above all, the following should be mentioned: the one-year limitation period established with regard to the claim to reduce prices<sup>\*9</sup> due to the defects of the object of sale in the case of a contract of sale (section 3271) and the six-month limitation period established with regard to the claim to terminate a contract<sup>\*10</sup> (section 3272), which commenced as from the delivery of the object of sale or from the conclusion of the contract (sections 3271 and 3272 respectively).<sup>\*11</sup>

The same principles were in fact taken as a basis when preparing the draft Civil Code in which the general regulation of limitation established in the BPLC was retained as well as the system of remedies with specific periods of limitation for transfer deeds represented by *actio quanti minoris* and *actio rehibitoria*.

<sup>2</sup> It has been expressed in its utmost form in the preamble of the applicable Constitution.

<sup>3</sup> The *Riigikogu* resolution on the legal continuity of the Republic of Estonia of 1.12.1992.

<sup>4</sup> I.e. private law of *Livland*, *Estland* and *Kurland* contained in Part III of the provincial law of the Baltic provinces (Provinzialrecht der Ostsee-Gouvernements. Theil III. Privatrecht Liv-, Est- und Curlands).

<sup>5</sup> The provinces of *Estland*, *Livland* and *Kurland* maintained their legal autonomy also as parts of the Russian Empire, particularly in the field of private law.

<sup>6</sup> The crucial role of the BPLC in the Civil Code is also emphasised in the explanatory memorandum of the draft: “Estonia is a country with a rich civil law past while its historical development has been excessively unique, consisting of elements that originate from ancient to the modern era. This legacy had to be updated and supplemented /.../ the draft attempts to retain the currently applicable rules, and also supplement and renew it with rules that have been tried out, more or less, in Estonia or elsewhere and inevitably due to the reasons provided below.” Seletuskiri Tsiviilseadustiku 1936. aasta eelnõu juurde (Explanatory memorandum to the draft Civil Code of 1936). Prof. J. Uluots. Available in the Ministry of Justice library (in Estonian).

<sup>7</sup> E.g. sections 3618 and 3620 of the BPLC.

<sup>8</sup> E.g. section 3621: “/.../ erloschen alle Civilklagen /.../ durch Nichtanstellung”; section 3637.

<sup>9</sup> It was essentially *actio quanti minoris* as known from Roman law, or *Minderungsklage* in German.

<sup>10</sup> *Actio rehibitoria*; *Wandelungsklage* in German.

<sup>11</sup> The regulation concerning the defective object of sale in the case of a contract of sale originated directly from Roman law, particularly with regard to faultless liability, freedom of choice with regard to the applicability of remedies and, above all, in relation with the short-term extinguishment of these claims.

The draft Civil Code (hereinafter: the dCC<sup>12</sup>) regulated the limitation issues in its general part or in Part 5 of Book 1 of the draft (Exercise and Protection of Rights). The regulation was contained in Chapter 2 (sections 223–248) of the part mentioned. Unlike the regulation of the BPLC, limitation was laid down purely as procedural objection. The notion of limitation was contained in subsection 223 (1) of the draft, the legal effect of limitation was the extinguishment of the right to demand protection of the right before court. According to section 246, limitation was also of great import in substantive law. Namely, the expiry of the limitation period meant, besides the extinguishment of “right of action”, the extinguishment of the claim proper, which is, in principle, a controversial effect, taking into account that according to subsection 223 (2) limitation retained its objectional nature that the court could not take into account due to its official duties (a solution identical to that of the BPLC). Section 247, however, excluded *condictio indebiti* in the case of performance after the expiry of the limitation period.

As to the limitation periods, the dCC retained the general limitation period of ten years as known from the BPLC (section 230), from which a number of important exceptions were made, particularly the three-year limitation period of several contractual claims as set out in section 231 (rentals (clause 1)), claims arising from the contract for service of craftsmen and the claims of persons engaged in free trades, claims arising from contracts of sale on condition that the objects are “small-scale goods” (clause 3)). In the case of defects detected in a transferred thing, the regulation involving remedies and limitation periods derived from the BPLC and was based on Roman law applied (see above and section 1502<sup>13</sup>). The regulation concerning the accrual of the limitation period was largely derived from the BPLC. According to the general rule contained in section 232 of the draft, the limitation period accrued on the “date when the right to protection by court emerged”. As for claims under the law of obligations, subsection 233 (1) (more precisely, section 3623 of the BPLC) provided for the accrual of the limitation period as from the collectibility<sup>14</sup>, in the case of transfer deeds, the claims to reduce prices and terminate a contract extinguished as from the delivery of the thing. The question about the commencement of the extinguishment of the claims arising from the violation of a(n) (debt) obligation or delicts. There is no special regulation to govern these matters. In the case of delictual claims, the “eternal” question was whether damage as such served as an element of the claim for damages or only an important component for determining the consequences of breach of an obligation under the law of obligations or delictually protected legal benefit.

In any case, “the unawareness of a person entitled to claim of his or her right” did not preclude limitation (section 225), while this also applied in the case of delictual claims.

The regulations concerning suspension (sections 235–240) and interruption (sections 241–247) of the limitation period set out rather traditional compositions (limitation in the case of claims between spouses, parents and children, absence of a guardian and *force majeure*; interruption when an action is filed and in the case of acts equivalent thereto).

## 1.2. Reforms after restoration of independence

The situation in Estonian private law after the restoration of independence has been complicated. As it was impossible to re-enact the Baltic Private Law Code valid during the first era of independence (the act was in German), the ESSR Civil Code dating from 1964 remained in force at first. A new Estonian civil law was approached step by step, gradually replacing the respective parts of the civil code by adopting new specific acts. For limitation, the primary significance rests with the general part of the civil code, replaced by the General Part of the Civil Code Act in 1994. It largely has the status of a transitional regulation: in connection with the last stage of the civil law reform — the adoption of the Law of Obligations Act — the applicable General Part of the Civil Code Act will be thoroughly revised.

The provisions concerning limitation contained in Chapter 6 of the general part of the ESSR Civil Code (sections 81–94) generally represented a relatively compact, balanced and reasonable regulation of limitation periods

<sup>12</sup> The draft has been republished in *Tsiviilseadustik* (Civil Code). Tartu: Tartu Ülikool, 1992 (in Estonian).

<sup>13</sup> “The right to file an action for cancellation of a contract lapses in six months, the right to file an action for reduction of prices in one year of the transfer date or the date when the defects of a thing had been denied later or the qualities thereof had been stated” (section 1502 of the CC).

<sup>14</sup> “/.../ the limitation period commences on the date when the claim is in such a condition as an action may immediately commence against the debtor failing to fulfil his or her obligation /.../”.

According to the Civil Code, limitation was, above all, a procedural category. As a special feature of Soviet civil law, limitation did not serve as an objection — the court was obliged to inspect limitation at its own initiative (section 85). The consequences of limitation were also procedural — expiry of a term acted as a basis for dismissal of the action (subsection 90 (1)). As limitation represented a procedural term, it was also possible to restore it “with good reason” (subsection 90 (2)).

In respect of the length of limitation periods, the Civil Code was very user-friendly — section 81 of the Civil Code provided for three years as a general limitation period.<sup>\*15</sup> In relation with the effective length of the limitation period, we still have to consider also the regulations concerning the accrual and length of the limitation period. As a rule, the length of the limitation period accrued from “the day when the right of action was created” (section 86), which actually meant a moment when the person entitled to claim became aware or ought to have become aware “of the violation of his or her right”.

For several important contractual claims, above all, for sale and employment, the Civil Code provided for shortened limitation periods, modifying also the starting moment of the period. Hence, the claims arising from the defect of a sold thing expired, according to sections 254 and 252, during the maximum of one year of the delivery of the object of sale. In the case of employment contracts, subsection 367 (1) of the Civil Code provided for a limitation period of six months after the acceptance of the work. In the case of hidden deficiencies or deficiencies that could not be identified by exercising ordinary care upon acceptance of the work, the limitation period extended to one year (the last part of subsection 367 (1)), in the case of buildings even up to three years (subsection 367 (2)).

The General Part of the Civil Code Act that entered into force in 1994 replaced the ESSR Civil Code part containing general provisions. With regard to limitation as an integrated institution this entailed certain confusion as the specific provisions of limitation contained in the only part of the Civil Code that is still applicable — in the part concerning the law of obligations<sup>\*16</sup> — continue to be valid in their previous form (this concerns, above all, limitation of claims arising from contracts of sale and employment contracts).

Nevertheless, we must be careful when assessing the provisions of the General Part of the Civil Code Act governing limitation (sections 113–123). We must keep in mind that the General Part of the Civil Code Act was one of the first acts adopted in the course of the civil law reform in Estonia. The draft was prepared under considerable time pressure and the essential value of the solutions opted for therein is questionable in several instances (*e.g.* in the part where the general limitation period of ten years, originating from the BPLC, was established for contractual relationships, among other relationships). Yet we cannot disregard the advantages of the Act and its general legal and political disposition upon the transfer from Soviet civil law to the regulation of private law relationships characteristic of a market economy.

However, a large part of the General Part of the Civil Code Act represents a mixture of the Civil Code and the principles derived from the draft Civil Code of 1940. This applies, above all, to the regulation of limitation periods.

In connection with the preparation of the draft Law of Obligations Act, the regulation of which should replace the last applicable part of the Civil Code (law of obligations), amendment of the currently valid General Part of the Civil Code Act also became topical. Occasional changes, when combined, have yielded a new draft General Part of the Civil Code Act which should, upon the entry into force of the Law of Obligations Act, fully replace the applicable regulation of the General Part of the Civil Code Act. One of the significant issues that has caused much debate during the development of the new General Part of the Civil Code has been the chapter on the law on limitation (sections 139–168); this is, on the one hand, due to the negative assessment of the regulation of limitation periods in various European legal orders and, on the other hand, the uncertainty prevailing during the preparation of the draft with regard to the specific development trends in the law on limitation in the unifying European private law.

In the following overview, an attempt is made to describe the dangers and threats during the preparation of the regulation of limitation and to assess the work done. The provisions of the draft

<sup>15</sup> The provision was, in fact, more complicated, also providing a one-year limitation period for the claims between state organisations.

<sup>16</sup> The ownership provisions of the Civil Code were replaced by the Law of Property Act, adopted in 1993; the family law part was replaced by the Family Law Act (1994) and the law of succession part by the Law of Succession Act (1997).

General Part of the Civil Code Act can also be assessed in the light of the recent developments in European private law.

### 3. Point of departure of regulation of limitation periods (functions of limitation)

The point of departure of the preparation of any regulation of limitation periods definitely relates to the functions of limitation periods as an institute of law in private law. The main functions of limitation periods in various European legal orders are, *prima facie*, very similar and can be summed up in three basic statements<sup>\*17</sup> that should justify imposition of time limits upon the enforcement of a claim:

- it will become increasingly difficult for a debtor to defend himself or herself from the creditors' claim as time passes;
- delay upon enforcement of claims gives rise to the debtor's justified expectation that the possible claims against him or her will not be filed;
- it is in public interest to ensure the reviewal of legal disputes as quickly as possible or guarantee restoration of legal peace in any other manner.

The results achieved by specification of such relatively general and also generally accepted principles in various legal orders still differ significantly.

In order to inquire about the possible structure of a modern regulation of limitation periods, the main components of the institution of limitation periods should be identified on the basis of the functions presented. Comparison of different systems of limitation periods and drawing of conclusions from such comparison is complicated, above all, due to the fact that the components of the regulation of limitation periods must be viewed collectively and in the context of their combined effects, taking frequently also into account their substantive law background, *i.e.* the character, prerequisites and competitive situations of expiring claims.<sup>\*18</sup> It is relatively pointless to compare limitation periods prescribed for a particular claim in different legal orders without saying anything about the accrual of the particular period, possible interruptions and suspensions and periods applicable to competing claims. As a rule, the following set may be examined as the main components of the regulation of limitation periods: length of the limitation period, accrual of the period, bases for the suspension and interruption of the limitation period and finally, the issue of the imperativeness of the regulation of limitation periods or, *vice versa*, of the permissibility of the agreements deviating therefrom.<sup>\*19</sup>

### 4. Structure of law of limitation, criticism of system

The traditional method of structuring the rules concerning limitation periods would be to regard the above-mentioned "main points" in the context of various classes of typical claims and attempt to find for such groups solutions that would satisfy the main functions of the law on limitation. When doing this, the legislator frequently makes use of the structure that foresees an abstract "general limitation period" for all possible claims together with the rules of the accrual, suspension and interruption of the period. The next step is usually the provision of specific rules for different classes of claims or for individual claims belonging to a particular class.

When examining the issue with a view to the law of obligations which is undoubtedly, both theoretically and practically, the most important area of interest for the law on limitation, we may, first and foremost, distinguish between contractual and non-contractual claims. Within the classes, the making of distinction may have a multilevel effect. The possible claims may be distinguished by means of the types of contract or by means of the function or content of the claim itself — enforceable claims and secondary claims aimed at compensation for damage, reduction of price, *etc.*

<sup>17</sup> See, above all, (together with the following references) R. Zimmermann (Note 1), p. 854; specifically of German law, *e.g.* von Feldmann. — Münchener Kommentar zum Bürgerlichen Gesetzbuch. Hrsg. von K. Rebmann; F. J. Säcker. 3<sup>rd</sup> ed., Vol. 3. Schuldrecht. — Besonderer Teil (sections 433–606). Rev. by H. P. Westermann. München: Beck, 1995, paragraph No. 6 for section 194.

<sup>18</sup> Thus also Kommission zur Überarbeitung des Schuldrechts: Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts. Hrsg. vom Bundesminister der Justiz. Köln: Bundesanzeiger, 1992, p. 34.

<sup>19</sup> R. Zimmermann (Note 1), p. 857; Note 17, p. 34.

We may continue such distinction-making endlessly and it is obviously possible, when approaching from the micrological level for example, to reason also that a claim for compensation of damage arising from the employment contract due to the deficiency of work should expire basically as a result of other criteria than a claim caused by breach of a lease contract. At a particular moment, however, it seems more reasonable to turn around and shift our attention from differences back to general regulation and search for harmonisation opportunities.

The German *BGB* provisions concerning limitation constitute a brilliant example of the problems entailed by an over-complicated system of limitation periods. The consequence of an abundance of different limitation provisions, their scatteredness and mutual distinction and the competition problems arising therefrom is the fact that a system the main purpose of which is allegedly a rapid restoration of legal peace and avoidance of debates related to complicated verification problems is, in its complexity, an important source of complicated legal debates.<sup>\*20</sup> Countless titles of legal literature, commentaries and court decisions have been dedicated to the issue of limitation periods. The need to alter the provisions concerning limitation periods has been regarded as the main concern also in the framework of the German law of obligations reform.<sup>\*21</sup> A situation in which a significant part of the court cases related to a particular type of contract is made up by debates concerning the expiry of claims is, by all means, unsatisfactory, while this is true from the perspective of all interests functionally protected by the regulation of limitation periods (interest of the public in the restoration of legal peace, a debtor's interest in clarification of the claim and the creditor's interest in the availability of effective means for the enforcement of claims). Thereby, on the micrological level, just and reasoned rules of limitation lose their efficiency with regard to the system as a whole.

We may generalise and claim that similar problems exist in all legal orders where the legislator has paid relatively little attention to the compactness of the regulation of limitation periods and harmonisation of individual limitation periods and the bases for their duration, suspension and interruption. Above all, danger arises in connection with a solution where the limitation regime applied depends on the nature of the extinguishing right of claim. Thus, the English Law Commission whose primary task is to prepare proposals concerning areas of law in need of reform describes the applicable regulation of limitation periods using expressions “incoherent, needlessly complex, outdated, uncertain, unfair and wastes costs”.<sup>\*22</sup> The most radical reform schemes of the law of limitation in Europe originate from Germany, and above all, from the expert analysis published by Peters-Zimmermann in the framework of the *BGB* law of obligations reform<sup>\*23</sup>, and from England in the form of the Law Commission Consultation Paper referred to above. These proposals have also had a significant impact on the harmonisation tendencies of European private law.

## 5. Description of problem

The problems related to the regulation of limitation periods described above have, as a rule, two sources: the problem of restriction and competition of limitation provisions or, more generally, expiring claims. Although the problem of restriction is more of legal-technical nature and the issues of competitiveness primarily have a substantive law background, both are closely interrelated and it is difficult to separate them. These issues usually emerge when different types of claims are subject to different regulation of limitation periods.

The distinction-making problem arises from a simple and, *prima facie*, banal fact that the various criteria prescribed by law for distinguishing between expiring claims frequently remain imprecise and ambiguous. Such difficulties may have their roots in a simple question, for example, taking German law as a basis, in the question of what are “the works performed on a construction” or *Arbeiten an Bauwerken* for the purposes of the first sentence of subsection 638 (1) of *BGB*. They may end up with problems that are complicated already at first glance, such as a question of whether breach of a contract of sales was committed by “supply of a deficient thing” (*Lieferung einer*

<sup>20</sup> As vividly expressed by R. Zimmermann (Note 1), p. 858.

<sup>21</sup> See, e.g. Abschlussbericht (Note 1), p. 15: “Der rechtspolitisch dringendste Handlungsbedarf wurde im Verjährungsrecht erkannt.”; or a more recent one: Informationspapier zum Entwurf eines Schuldrechtsmodernisierungsgesetzes (Stand 4. August 2000). Bundesministerium der Justiz, 2000, pp. 5–6. Available at: <http://www.bmj.de/ggv/arbeitssh.pdf> (28.04.01).

<sup>22</sup> Limitation of Actions. Law Commission Consultation Paper 151. The Law Commission of England and Wales: 1998 (hereinafter: the Law Commission), p. 241. Available at: <http://www.lawcom.gov.uk/library/lccp151/cp151ind.htm> (28.03.01).

<sup>23</sup> F. Peters, R. Zimmermann. “Verjährungsfristen” im Gutachten und Vorschläge zur Überarbeitung des Schuldrechts Bd. I. Hrsg. vom Bundesminister der Justiz, 1981, S. 77–373.

*mangelhafter Sache*<sup>\*24</sup>) or “violation of other obligations”. The former case would be subject to a limitation period of six months provided for in subsection 477 (1) of *BGB*, and the latter case to a general thirty-year limitation period according to section 195 of *BGB* (only on condition that the claim “was not founded on circumstances immediately and inseparably related to the deficiency of the thing” — in such a case, subsection 477 (1) of *BGB* would apply on the basis of analogy).<sup>\*25</sup> The purpose of this example is not to start a detailed discussion of the issues related to sections 459 and 477 of *BGB*. It should demonstrate that the distinction-making problem creates a potential danger that the actual aim of the limitation provision is lost in formal reasoning. This may easily lead to contradicting assessments. The example of the contract of sale would create a situation where the claims concerning breach of contract arising from the circumstances related more immediately to the main performance of the seller would expire faster than the claims the relation of which to the supply duty is more far-fetched and less immediate.

A similar threat to the balance of the law on limitation arises from the problems of competition related to functionally similar claims, *i.e.* a situation where the same collection of vital circumstances constitutes a basis for different types of claims while these claims aim at the satisfaction of similar interests. In a developed system of private law, competition of claims is inevitable. In this respect, problems arise, above all, in the law of obligations where competition occurs between contractual claims as well as between contractual and extracontractual claims, and first and foremost, between delictual claims. If these claims expire according to different rules, it creates several problems. Firstly, it gives easily rise to contradicting assessments that are substantially difficult to reason. Secondly, the implementer of the right is frequently tempted to artificially overlook the apparently troublesome limitation provisions of the individual case concerned, and to settle the matter by means of a competing rule of claim under the conditions of a more favourable limitation regime. However, thereby the regulation of limitation periods tends to directly affect the content and impact of substantive law, eliciting special solutions, determined by the law of limitation, and actually directing the development of substantive law itself. Thus, the special character of the regulation of limitation periods in the case of contracts of sale and employment in *BGB* has caused the barycentre between contractual and delictual liability to shift considerably towards delictual law solutions and a more favourable limitation regime for creditors (as a result of which the specific behavioural requirements generally falling under the contract law and effective only *intra partes* transfer to law of delict, affecting and altering its functions significantly).

The same circumstances have been in focus in the English Law Commission that has foregrounded incoherence as the primary problem of the applicable law of limitation.<sup>\*26</sup>, which arises, first and foremost, from different limitation regimes applicable to different claims. This, in turn, leads to contradicting assessments in result as the law of limitation as a whole has not been constructed on the basis of uniform principles.<sup>\*27</sup>

To sum it up, it thus seems that finding the best limitation regime for each potential claim cannot be the priority purpose upon the development of the foundations of the law on limitation periods. The advisable point of departure should rather be an attempt at uniform and universal principles that could offer acceptable solutions for a possibly wide range of different claims and represented conflicting interests (debtor-creditor-public).

The main question arising in this context is naturally whether such a theoretical wish can be realised in its pure form. In other words: is there a universal limitation regime offering satisfying solutions for different types of claims and what are the possible and necessary exemptions therefrom.

<sup>24</sup> Such test is simple only at first glance. In a situation where an undefined legal notion carries an extremely important practical meaning (*e.g.* to identify the area of application of different limitation periods the lengths of which differ fundamentally), legal practice, if pressed by need, may end up using extremely specific criteria when furnishing the simplest notion. An illustrative example is “deficiencies of a thing” for the purposes of section 459 of *BGB* H. Putzo. – O. Palandt. Bürgerliches Gesetzbuch. 60<sup>th</sup> edition. Beck: Munich, 2000, section 459, paragraphs No. 1 and 3.

<sup>25</sup> Continuing and prevailing court practice in the form of a quote from the judgement of *Bundesgerichtshof* of 07.03.83, published in: *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (hereinafter: BGHZ). Vol. 87, p. 92 (with the following references): “Insbesondere findet die kurze Verjährungsfrist auch auf Schadenersatzansprüche wegen positiver Vertragsverletzung Anwendung, sofern die Schäden **aus einem Sachmangel hergeleitet werden und zu diesem in unmittelbarem, untrennbarem Zusammenhang stehen**. Dagegen ist § 477 Abs. 1 nicht auf Ansprüche aus positiver Vertragsverletzung anwendbar, die nicht aus einer Mangelhaftigkeit der Kaufsache selbst, also nicht aus einer Verletzung der Lieferungspflicht, hergeleitet werden, sondern aus einer Verletzung von Nebenpflichten, **die mit der Mangelhaftigkeit der Kaufsache in keinem unmittelbarem Zusammenhang stehen**.”

<sup>26</sup> Law Commission (Note 22), pp. 241–242.

<sup>27</sup> *Ibid.*

## 6. Solution variants and topical treatments

Recognition of the above-described problems has led to a serious discussion about limitation periods in European private law during the recent years, both within national legal orders and under the framework of attempts to harmonise private law extending all over Europe. Two most conspicuous and radical reform projects — the already mentioned Peters-Zimmermann study prepared in relation with the German *BGB* law of obligations reform<sup>\*28</sup> and the Discussion Paper on the law on limitation periods, published by the English Law Commission in 1998<sup>\*29</sup> — have developed from the problems of national legal order. The obvious similarity between the typical problems of the law on limitation periods and solutions offered in two countries with such controversial legal traditions testifies that significant potential exists for harmonisation in this area. It is apparently not a coincidence that the problems related to limitation periods have become a topical issue also in the two main committees engaging in the harmonisation of European private law — UNIDROIT and the Commission on European Contract Law headed by Prof. Ole Lando. Publication of both the UNIDROIT principles and the chapters on limitation periods of the Principles of European Contract may be expected in the near future.<sup>\*30</sup> We may also presume that both the UNIDROIT Principles and the European Principles follow, in their proposals, the principles the content and ideology of which are similar to the proposals made by Peters-Zimmermann for reforming German and by the Law Commission for reforming English law on limitation periods.

As briefly indicated above, the proposals made by Peters-Zimmermann in the framework of German law of obligations and the solution offered by the Law Commission for English law are very similar as to their point of departure and results. Taking into account the problems related to the regulation of limitation periods described above, the purpose of both of them is to develop as uniform regulation of limitation periods as possible for all claims. In order to accomplish this, one should return to examining the functions of the law on limitation periods and the conflicting interests serving as the basis therefor.

On the one hand, the regulation of limitation periods should preclude a situation where the filing of a claim is delayed over a considerable period of time, which would be in conflict with the debtor's interests (renders it more difficult to defend oneself against the claim efficiently; is in conflict with the debtor's increasing expectation that the potential claim will not be filed) as well as public interest in speedy and efficient settlement of the legal dispute and establishment of legal peace. This argument is in favour of a short limitation period, which confirms a general legislative trend in Europe. On the other hand, the regulation of limitation periods must ensure for the creditor a reasonable opportunity to enforce his or her claim. Above all, the creditor must be provided with a sufficiently long period for identifying a potential claim, verifying the legitimacy of the claim, collection of evidence therefor and preparation of an effective enforcement in court. Both according to Peters-Zimmermann and the Law Commission, it would be unfair if, when weighting the functions of limitation periods and the parties' interests, the creditor was punished under the rules of limitation by depriving him or her of the claim, while he or she did not have an opportunity to discover the claim during the limitation period and thus also to enforce thereof.<sup>\*31</sup> This statement concerns the accrual or suspension of the limitation period — the limitation period cannot commence or should be at least suspended until the expiring claim is not discoverable for the creditor or if the creditor is unable to enforce the claim due to any other reason. Besides the creditor's justified interest public interest also has to be taken into account. There can be no question of the establishment of legal peace and speedy and efficient settlement of disputes thereby if the creditor would be, due to the limitation regime, deprived of an opportunity to file a justified claim and the claim would expire before the enforcement thereof would become feasible.<sup>\*32</sup> After all, when relating the limitation period with discoverability of a claim, it is not in conflict with the debtor's justified interests that are important with regard to the functions of limitation periods. The rules of limitation must impede the development of a situation where the debtor experiences, due to the opportunities of presenting evidence that deteriorate over time, difficulties in defending himself or herself against (potentially) unjustified claims, granting to himself or herself for that purpose a summary objection to limitation. However, it is not the purpose of

<sup>287</sup> F. Peters, R. Zimmermann (Note 23).

<sup>298</sup> Law Commission (Note 22).

<sup>30</sup> R. Zimmermann. Die "Principles of European Contract Law", Teile I und II. – Zeitschrift für Europäisches Privatrecht, S. 391–393 (392).

<sup>31</sup> R. Zimmermann (Note 1), p. 7.

<sup>32</sup> *Ibid.*

limitation periods to create a situation in which such an objection would allow to disregard also the justified claims in full.<sup>\*33</sup>

According to the proposal of Peters-Zimmermann, all claims would principally expire during a two-year limitation period. This limitation period would commence with collectibility of the claim and the limitation period would be suspended for the period when the creditor is unaware and needs not be aware of the existence of the claim against the debtor. The suspension possibility must still be taken into account together with the absolute limitation period. According to the proposal, the limitation period may, as a result of suspension, extend up to ten years.

There are only technical differences between the proposals of the Law Commission and those of Peters-Zimmermann: the Committee proposes three years as a general limitation period, while the limitation period would accrue from the moment when the creditor became aware or ought reasonably to have become aware of the existence of the claim. Besides the short limitation period, the so-called long stop limitation period must be also taken into account; it commences from the “act or omission” serving as the basis of the claim and as a result of which the maximum limitation period may extend up to ten years (in the case of personal damage, up to thirty years).

The definite advantage of such solution is the fact that it allows to subject the expiry of all claims to uniform principles and terms. If the limitation period accrues when the person discovers the existence of the claim or the limitation period has been suspended until that moment, there is principally no difference in whether the expiring claim arises from a contract, delict or unjust enrichment, providing the creditor with sufficient and justified opportunity to enforce his or her claim.<sup>\*34</sup>

Criticism of such proposals has, to date, relied on the argument that it would not be the limitation period that is important for practice with regard to such limitation structure, but rather the moment when the creditor became or should have become aware of his or her right of claim.<sup>\*35</sup> This creates, above all, a danger that the debtor is, as a rule, unable to identify the possible expiry of the claim by means of circumstances belonging to the sphere of his or her impact or knowledge. The expiry of a claim rather depends on circumstances related to the creditor as a person and belong to his or her sphere of knowledge.<sup>\*36</sup> The Law Commission points out the same potential problems, admitting that the uncertainty of the central component of the solution is the price for increased legality achieved with regard to the creditor by means of the criterion of discoverability<sup>\*37</sup>, particularly for contractual relationships where the parties have a justified interest in objective assessment of the moment when the limitation period expires.<sup>\*38</sup>

Nevertheless, the main objection to the regulation of limitation periods that are absolutely connected to the criterion of discoverability lies elsewhere. Namely, such solution is based on the idea that a limitation period may not, due to its nature, be in effect at the time when the creditor lacks an opportunity to enforce his or her claim, also in the cases when the creditor cannot discover the existence of the claim.<sup>\*39</sup> However, the absoluteness of this argument is questionable: it is directly dependent on the functions to be performed by the regulation of limitation periods in legal order. No problems will emerge if only the functions of limitation periods listed in Part 3 above are used. This list may not be exhaustive. Problems arise, above all, in connection with the purpose of the limitation provisions in contractual relationships.

Namely, we may claim that in contractual relationships, short limitation periods carry a considerably different function when compared to ordinary limitation provisions. The limitation periods in contract law, again on condition that they are effectively short limitation periods, perform, above all, the function of temporal apportionment of contractual risk for parties to the contract.<sup>\*40</sup> Upon the expiry of the limitation period, the debtor is released from contractual risks. The deficiencies that become evident after the expiry of the limitation period in the object of contract or damage incurred will be borne by the creditor. If the limitation provisions in contract law are understood, first and foremost, as rules temporally redistributing contractual risks between the parties, the possibility that the claims

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<sup>33</sup> *Ibid.*

<sup>34</sup> See Note 17, p. 36.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Law Commission (Note 22), p. 252.

<sup>38</sup> *Ibid.*, p. 253.

<sup>39</sup> R. Zimmermann (Note 1), p. 20.

<sup>40</sup> Thus, for *BGB* section 477 D. Leenen. “§ 477 BGB: Verjährung oder Risikoverlagerung?” (Schriftenreihe der Juristischen Gesellschaft zu Berlin, book 148). Berlin, 1997, p. 15 *ff.*; Similarly, W. Flume. *Archiv für die civilistische Praxis*. 1993, Vol. 193, p. 89 *ff.*

arising from the contract expire before the creditor has an opportunity to discover that the nature of the claim is absolutely legitimate with regard to such purpose.

If the limitation provisions are understood as a means to apportion contractual risk, this gives inevitably rise to the accrual of the limitation period irrespective of the criterion of discoverability examined above. This means that the limitation period is inevitably related to a criterion traditionally known from contract law — expiry accruing from collectibility of a claim or, in the case of claims arising from breach of contract, expiry accruing from the occurrence of the circumstance serving as the basis for breach of contract.

When opting for apportionment of contractual risk between the parties as the main function of contractual limitation provisions, which also justifies the situation where, particularly in the case of latent damage, the limitation period may expire before the creditor has an opportunity to discover breach of the contract and his or her claim, we may definitely keep in mind the limits within which such apportionment of risk is still acceptable. Such apportionment of contractual risk is justified only if the expiring claim really serves as a risk factor for the creditor, *i.e.* as a more or less likely threat that a particular circumstance may occur. A person who is, upon the contractual performance, aware of the deficiencies of the performance or must be aware of breach of contract, is not worthy of protection by means of the limitation period. Interestingly enough, attention has not been paid to such considerations in German law where the analogous function of apportionment of risk in the case of contracts of sale is borne by *BGB* section 477. Leenen and Flume are obviously right when claiming that the debatable regulation found in *BGB* section 477 is acceptable as to its purpose<sup>\*41</sup>, if the provision is correctly understood (once again: the function of apportionment of contractual risk!).<sup>\*42</sup> Unfair and condemnable results are rendered only by an analogous application of the short limitation period of the section (six months) to claims for damages in the case of delictual liability of the seller<sup>\*43</sup> (the original area of application of the provision, also justifying the short limitation period and arising from Roman law was faultless liability of the seller<sup>\*44</sup>). Taking into account the particular features of a contract of sale, the wrongful breach of contract by the seller with regard to the defects of a thing usually includes cases where the seller does not inform the purchaser of the defect that is discoverable to him or her or that the seller should have discovered (the seller is not the manufacturer, as a rule). Thus, the conclusion is similar to the one above.<sup>\*45</sup>

Hence, the traditional treatment of limitation periods that relates the accrual of the contractual limitation period to the occurrence of the circumstance serving as the basis for breach of contract in the case of breach of contract needs to be corrected. It is already a question of legal technology how the classes of such cases should be described (debtor's fraudulent acts, intentional or delictual breach of contract, discoverability or expected discoverability of the deficiency of performance or breach of contract).

## 7. Assessment

Which of the two solutions should be preferred is obviously largely a legal and political question affected by various financial considerations. However, several facts are contrary to the absolute relation of the principle of limitation periods to the criterion of discoverability. It is clear that upon apportionment of contractual risks, the temporal criterion is at least as important for contractual relationships as other means of apportioning risk liability between the parties, particularly in a situation where the bases for the debtor's contractual liability are increasingly less related to the criterion of fault (and it will undoubtedly be the prevailing trend in future European private law).

A situation where it is virtually impossible for the debtor to temporally predict contractual liability risks is economically definitely unsatisfactory.<sup>\*46</sup> If a definite wish to limit contractual risks tempo-

<sup>41</sup> *I.e.* principally acceptable, disregarding the question of the legitimacy of the six-month limitation period (the general opinion is that it is too short).

<sup>42</sup> D. Leenen (Note 41); W. Flume (Note 41).

<sup>43</sup> *Ibid.*

<sup>44</sup> W. Flume (Note 41), p. 89 *ff.*

<sup>45</sup> According to W. Flume, the system of apportionment of risk related to short limitation periods differs "categorically" from the cases involving delictual liability of the seller, where the seller should have discovered the defects of the object of sale, in which case a "long" (section 195 of *BGB*) limitation period should be applied; see W. Flume (Note 41), p. 119.

<sup>46</sup> See, *e.g.* *BGH* judgment BGHZ 77, 215 referred to German law (Note 24), pp. 222, 223.

rally may be expected from a reasonable participant in transaction, the same principle should also be, as a rule, provided in statutes.

Proceeding from similar considerations, the German *Schuldrechtskommission* also opted, in its final report, for a less radical way of resolving the issues related to limitation periods and disregarded the bulk of the proposals by the experts Peters and Zimmermann.<sup>\*47</sup> At the moment, we may presume that the same principles dominate in the revived *BGB Schuldrechtsrechtsmodernisierungsgesetz*<sup>\*48</sup> that has, until recently, adhered to the principles reflected in the final report of *Schuldrechtskommission* with regard to limitation periods.<sup>\*49</sup>

However, we may argue that the choice between different solutions largely depends on the subjective assessment of the person who makes the decision. In principle, we may claim that the solutions offered by Peters-Zimmermann or the Law Commission are in need of correction as regards their claims in contract law, primarily in order to relate the commencement of the limitation period to traditional criteria (collectibility, occurrence of the circumstance serving as the basis for breach, delivery of the object of sale or acceptance of work). On the one hand, such variant should obviously take better account of the needs upon fair apportionment of contractual risks; on the other hand, it gives rise to many legal and technological problems represented by various exceptions and correctives, which were described above as typical inadequacies of the regulation of limitation periods.

## 8. Regulation of limitation periods in new draft General Part of Civil Code Act

The problems described above served as the topics of an important discussion also during the preparation of the new draft General Part of the Civil Code Act. In its final version, the working group still opted for a solution the main features of which largely remind us of the proposals found in the final report of the German *Schuldrechtskommission*; expert analysis of the draft also supported such choice of solution.<sup>\*50</sup>

Although the waiver of the criterion of discoverability may be considered a principally correct or at least theoretically acceptable solution with regard to the claims in contract law, this inevitably entails many problems that should be avoided upon the development of the regulation of limitation periods.

When the limitation periods in contract law are considered as means for the temporal apportionment of contractual risk, a situation is created where the legislator should, through the limitation period to be established, attempt to determine average and fair apportionment of risk for all types of contracts. In this case, it is difficult to achieve as logically, the claims arising from relationships that entail a greater risk potential or potentially latent and hardly identifiable damage should expire during a longer period than ordinary claims. This is clearly testified by the specific regulation concerning deficient constructions found in subsection 141 (2) of the draft General Part of the Civil Code Act.<sup>\*51</sup> Hence, the general three-year limitation period (subsection 141 (1) of the draft General Part of the Civil Code Act) creates tension with regard to both aspects, but should, however, provide a fair solution in the majority of cases. The provision of the law on limitation periods as optional law should also contribute to the avoidance of problems.

A problem similar thereto but arising from a different aspect can not principally be disregarded in solutions based on the criterion of discoverability: the long stop period offered frequently proves to be too long for contractual relationships (according to the solutions of Peters-Zimmermann and the Law Commission, for example, it is ten years). A significant reduction thereof (*e.g.* to three to five years that would be reasonable for contractual relationships) does not satisfy the interests in the case of extracontractual claims. However, when two limitation periods — the short limitation period accruing from the discovery and the long stop period come relatively close to each other, it is obviously more reasonable to abandon the uncertain criterion of discoverability (the same tasks are functionally performed by different obligations concerning reporting of deficiencies).

<sup>47</sup> See Note 21, p. 36.

<sup>48</sup> Entwurf eines Schuldrechtsmodernisierungsgesetzes (Diskussionsentwurf – Stand 4. August 2000). Bundesministerium der Justiz, 2000. Available at: <http://www.bmj.de/ggv/eschurmo.pdf> (28.04.01).

<sup>49</sup> With reservations, see Note 21, pp. 5–6.

<sup>50</sup> Prof. Dr. Walter Rolland, the former chair of the above-mentioned *Schuldrechtskommission*.

<sup>51</sup> Substantially, see Note 21, *BGB-KE* subsection 195 (2).

Application of different limitation regimes to different types of claims inevitably gives rise to the dangers accompanying the problems of competition described above. As the claims in contract law expire according to the same principles, the issue of competition primarily arises in relation with non-contractual obligational relationships and, first and foremost, regulation of law of delict, to which the limitation regime related to the criterion of discoverability applies (section 145 of the draft General Part of the Civil Code Act). From the viewpoint of Estonian law, the dangers entailed thereby may be considered minimum. This is primarily due to the reason that section 1149 of the draft Law of Obligations Act precludes the competitive situation of compensation for delictual and contractual damage for the majority of cases. The exemption applies, in principle, only to personal damage<sup>52</sup> and is justified, taking into account the high level of protection of such legal benefits.

In conclusion, the author considers the choices made upon the preparation of the draft General Part of the Civil Code Act as correct. However, this is not an absolute truth free of any criticism, which should also be testified by this article.

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<sup>52</sup> This actually applies also to damage the prevention of which was not the purpose of the contractual duty violated. In such a case, a claim for damages can be filed according to the provisions of delictual liability, but this case does not represent a competitive situation (such damage is not compensated for according to the contract).