Comparative Aspects of the Norwegian and Finnish Limitation Acts

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Summary: During the 2000s, certain features of the Norwegian Limitation Act (NLA) as well as their interpretation by the Norwegian Supreme Court were strongly criticised in Norwegian legal literature. These criticisms related to, inter alia, 1) the rules on commencement of the limitation period for a damages claim and 2) the rules on interrupting limitation by taking legal action, particularly in respect of situations where legal proceedings end without a resolution on the substance. The general objectives and principles underlying the criticised rules are similar to the corresponding rules in the Finnish Limitation Act (FLA), but their structure and formulation in the FLA is simpler and more straightforward compared with the NLA. This article analyses whether the problems encountered in applying the NLA also encumber the FLA. It is found that problems are not wholly unknown in Finland either, but their magnitude is far from those faced under the NLA. Thus, the analysis supports the conclusion by many Norwegian scholars: the rules of the NLA could be fine-tuned to function better.

1. Introduction

The Norwegian Limitation Act (*lov om foreldelse av fordringer*, LOV-1979-05-18-18; hereinafter 'NLA') came into force on 1 January 1980. According to the words of the then Minister of Justice *Inger Louise Valle*, the act, with its relative short limitation periods, was a modern piece of legislation, even the most modern in the world.[2] Those were not empty words. At that time, general limitation periods in different legal systems were typically quite long, somewhere between ten to thirty years, and the law of limitation as a field of law, or *law of prescription* as the scholar *Reinhard Zimmermann* recommends calling it, was often regarded as being old world, uninteresting and dull.[3]

A chief feature in the NLA was, and still is, a short general limitation period of three years (NLA Section 2) which starts to run, roughly speaking, from the date when the creditor first becomes able to claim performance. An important element of the creditor's possibility to present a claim is, quite clearly, their knowledge of their claim. In any case, the general limitation period is supplemented with long time limits of ten or twenty years, the commencement of which is not bound to a creditor's knowledge of their right to performance (Section 9(2) and 10(1), (4)). Together, these time limits form a kind of two-tier system of limitation periods – although it is worth noting that during drafting of the law a proposition was raised for an even more widely applicable and clear-cut version of the two-tier regulatory model, but this was eventually abandoned.[4] In addition, the NLA contains special limitation periods for different types of debt,

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[2] Stortingstidende inneholdende 123, ordentlige Stortings forhandlinger 1978–79 (Forhandlinger i Odelstinget) 396.

[3] Reinhard Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (CUP 2002) 65–66, 86–87; DOI: https://doi.org/10.1017/cbo9780511495113.

[4] Ot.prp.nr.38 (1977-1978) Om Lov om forelding av fordringer, 20–25. The subsequently abandoned 'real' two-tier model was initially introduced in the pan-Nordic reform proposition on the law of prescription in the 1950s. See e.g. Mauritz Wijnbladh, *Fordringspreskription m. m.: Betänkande avgivet av inom justitiedepartementet tillkallad* (Statens offentliga utredningar 1957:11, 1957) 9–10 (Sections 3, 5, 6), 12 (Section 16) and 46–47 (reasoning). Prior to enactment of the NLA, the two-tier model had been enacted at least in the Scottish Prescription and Limitation Act of

such as debts based on a promissory note, pension or maintenance or a right to recourse (NLA Sections 5–8).[5]

The partial two-tier model of limitation periods and some other essential features of the NLA have subsequently been adopted in many legal systems where there has been a reform of prescription legislation, for example in Germany and France.[6] The same holds true for the two international model laws, *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (DCFR) and the *UNIDROIT Principles of International Commercial Contracts 2016* (UNIDROIT PICC). As regards Nordic countries, in Denmark a new Limitation Act (*Lov om forældelse af fordringer (forældelsesloven), LOV nr 522 af 06/06/2007*) was enacted in 2007. It is understood as having been strongly inspired by the NLA.[7] In Finland, a new Limitation Act (*laki velan vanhentumisesta, 15.8.2003/728*, hereinafter 'FLA'), was enacted in 2003. As is described in more detail above, the FLA may be understood as a combination of the earlier Finnish-Swedish tradition and the modern regulatory model represented by, inter alia, the NLA.

Thus, from a wider perspective one could understand the NLA as a masterpiece of legislation that has not only maintained its modernity but also served as a model for legislators in other countries even until today. However, this does not seem to be the whole truth. In legal literature, many aspects of the NLA have been criticised quite strongly. The focus of criticism has not only been on the provisions of the NLA as such, but also – or even mostly – on the interpretations adopted by the highest court instance, the Norwegian Supreme Court (*Høyesterett*), especially two features of the NLA as they are interpreted by the Supreme Court: 1) the rules on commencement of the limitation period for a damages claim and 2) the rules on interrupting a limitation period by initiating legal proceedings.[8]

As regards the starting point of the limitation period, the first problem is that damages claims based on a breach of contract are treated differently from claims based on an extra-contractual act or omission – that is, a *delict*. The first type of claim – contractual claims – is subject to a three-year general limitation period commencing from the occurrence of a non-performance (Section 3.2), a one-year additional time limit where the grounds for the claim or the identity of the creditor have not been observable to the damaged party (Section 10.1), and a ten-year maximum for postponing the operation of prescription (Section 10.4). A claim in delict, on the other hand, is subject to a three-year general limitation period, which starts running when the grounds for the claim have become observable to the damaged party (Section 9.1). The absolute maximum time limit for interrupting the limitation period is 20 years, with certain exceptions for personal injuries, (Section 9.2), not ten years as in the case of a contractual damages claim. Differences between limitation periods in contractual and delictual claims weaken the coherence of the regime and essentially

1973 (see Sections 6 and 7) as well as in the United Nations Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974; see Arts 8 and 23).

[5] For a compact survey of rules on determining the limitation period, see Espen Nyland in Marte Eidsand Kjørven, Herman Bruserud, Håvard H Holdø, Jon Vegard Lervåg, Mona Nygård and Espen Nyland, *Foreldelse av fordringer* (Universitetsforlaget 2011) 91–92.

[6] For a comparative survey, see Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law*: *Draft Common Frame of Reference (DCFR)* (Full Edition, Volume 2, Sellier 2009) 1148–49.

[7] Stefan Lindskog, *Preskription: Om civilrättsliga förpliktelsers upphörande efter viss tid* (4th edn, Wolters Kluwer 2017) 45.

[8] In addition to these points of criticism, the peremptory nature of the NLA has been criticised as being too wide in scope, as Section 28 precludes, as a main rule, all deviation from the provisions of the NLA to the detriment of the debtor, regardless of the identity of the debtor. See Herman Bruserud in Kjørven and others (n 5) 515. Furthermore, it has even been suggested that the general limitation period should be lengthened from three years to five, at least in some situations, in order to achieve uniformity with the EU law-based rules on prescription of a damages claim based on an infringement of competition law. Magnus Strand, 'EU och civilrättens splittring: exemplet preskription och ränta vid skadestånd', (2017) 130 Tidsskrift for Rettsvitenskap 313, 343–344; DOI: https://doi.org/10.18261/issn.1504-3096-2017-04-01.

increase the significance of drawing the line between contractual and delictual claims[9] – a borderline whose vagueness is one the most classic among topics of conversation in the field of law of obligations.[10]

Another special characteristic in the context of damages claims is that according to established case law of the Norwegian Supreme Court, the three-year limitation period for a damages claim based on defective performance does not, in the context of different consultation services, start to run from the moment of non-performance, as enacted in NLA Section 3(2). Instead, the decisive moment, according to the Supreme Court, occurs when the defectiveness of advice has led to occurrence of loss.[11] Either way, the moment of non-performance is decisive, even according to the Supreme Court, in the context of contracts such as sale of goods and building contracts.[12]

The problems of the way of interpretation described are abundantly clear: First, liabilities that arise in different types of contract are treated in essentially different ways without any justification for doing so in the wording of NLA Section 3(2).[13] Second, because commencement of the three-year limitation period of Section 3.2 is postponed in the context of consultation contracts until loss caused by defective performance has emerged, these types of contract have no limitation period that would start to run regardless of incidents after defective performance occurs. In other words, if the negative consequences of negligent advice neither come up instantly nor fall through spontaneously but stay latent, there is no time limit after which the advisor would be released from their potential liability and the risk of being drawn into litigation to assess the regularity of the advice at the time it was issued.[14]

As regards regulation on interrupting a limitation period by initiating legal proceedings, two major problems have been spotted. The first is the complexity of the regime. In the NLA, regulation of judicial measures interrupting limitation is spread among nine sections (Sections 15–19, 21–23). Relationships between different sections are not clear in all issues, nor is there a clear relationship between the rules of the NLA and legislation on procedural law. The problem of complexity has been there partly from enactment of the NLA, but it has essentially escalated in the 2000s due to law reforms to the NLA itself as well as interconnected procedural legislation. Another – and perhaps worse – problem in the NLA rules on judicial measures interrupting limitation is that because the regime is not wholly coherent and

[9] Herman Bruserud in Kjørven and others (n 5) 169–70; Miriam Skag, *Starttidpunkt for foreldelsesfrister* (Cappelen Damm 2012) 471; Kåre Lilleholt, *Kontraktsrett og obligasjonsrett* (Cappelen Damm 2017) 592.

[10] See e.g. Bertil Bengtsson, *Om ansvarsförsäkring i kontraktsförhållanden I: Den skadeståndsrättsliga bakgrunden* (Försäkringsjuridiska Föreningen 1960) 20–21; Lars Erik Taxell, *Avtal och rättskydd* (Åbo Akademi 1972) 258; Henry Ussing, *Erstatningsret* (6 edn, Juristforbundets forlag 1962) 7.

[11] See case Rt. 2000.679, at 691. See case Rt. 2002.286, at 295, indicating that in addition to occurrence of loss, even a creditor's awareness of the loss would be required. However, the latter interpretation was rejected in a recent case HR-2019-2034-A, paras 51, 53, confirming that the decisive criterion is the occurrence of the loss. See also Espen Nyland in Kjørven and others (n 5) 135–42; Viggo Hagstrøm, *Obligasjonsrett* (2nd edn, Universitetsforlaget 2011) 768–70.

[12] See, e.g., cases Rt. 2006.1705 and Rt. 2007.1236.

[13] Espen Nyland in Kjørven and others (n 5) 136–37. However, the Supreme Court reasoned their interpretation, inter alia, with the general rule of Section 3(1), according to which the general limitation period starts to run when the creditor first has a right to claim performance. See case Rt. 2000.679, at 691.

[14] Hagstrøm (n 11) 768–70; Amund Bjøranger Tørum, 'Tid for revisjon av foreldelsesloven?' (2002) 41 Lov og rett 257, 257; Skag (n 9) 284–85; Rune Sæbø, 'Høyesteretts rolle ved utviklingen av formueretten', in Tore Schei, Jens Edvin A Skoghøy & Toril M Øie (eds), *Lov, sannhet, rett: Norges Høyesterett 200 år* (Universitetsforlaget 2015) 756–57; Lilleholt (n 9) 591–92; Marte Eidsand Kjørven, 'Foreldet til tross for fristavbrytende skritt – en kritisk analyse av foreldelseslovens regler om virkningen av fordringshaverens skritt til inndrivelse som ikke fører til realitetsavgjørelse om fordringen', (2020) 22 Tidsskrift for forretningsjus 159, 188; DOI: https://doi.org/10.18261/issn.0809-9510-2019-02-01.

comprehensive, in some situations there is a danger of a "legal trap", meaning here a situation in which a claim becomes unexpectedly time-barred even though the creditor has tried to pursue it.[15]

The scope of this article is to compare the rules in the NLA causing the above-described problems with corresponding rules in the FLA. The existence and content of the problems in the NLA are mostly taken for granted as pointed out in Norwegian legal literature. Thus, my purpose is not to perform a thorough analysis of the NLA and alleged problems therein. Instead, my research subject is the *conclusion* of previous criticism, namely that the NLA should be revised. My method in questioning the validity of that conclusion is to analyse whether the FLA rules have led to a better situation in Finland. This comparison ought to be fruitful, because – and only because – the FLA rules on limitation periods for a damages claim and judicial measures interrupting limitation periods follow the same general ideas and principles introduced in the NLA, the only difference being that the Finnish rules are formulated in a more straightforward manner. Thus, my question is whether the problems faced in Norway could be solved or at least mitigated through a slight reformulation and simplification of the provisions under criticism. In other words, my purpose is not to challenge the objectives and general ideas of the Norwegian legislator but only how to implement them.

The article is divided into three main sections. First, I briefly describe regulation on prescription of a debt in Finland and its relation to corresponding regulation in other Nordic countries, with the exception of Iceland. Second, I analyse the FLA rules on commencement of the limitation period for a damages claim and assess whether the problems faced in Norway are familiar in Finland, too. Third, I perform a similar analysis on the FLA rules on judicial measures interrupting limitation.

2. Generally on Regulation of Prescription in Finland and Its Position in the Nordic Regulatory Framework

Historically, one may differentiate two paradigms of prescription regulation in the Nordic countries. Simply – or even slightly misleadingly – these may be termed *western* and *eastern Scandinavian traditions*. The division is inaccurate because both paradigms have been prevalent in different countries at different times. Despite their merely indicative nature, speaking of western and eastern Scandinavian traditions may help frame an overall picture of regulation and its development, and is thus used here. Another simplification in the following overview is that my focus is merely on general prescription norms, even though a significant part of different types of debt has been subject to prescription norms of special legislation in Nordic countries since as far back as the 19th century.[16]

Of these two paradigms, the eastern Scandinavian one is the elder. The central characteristics of eastern Scandinavian regimes are 1) a relatively long limitation period – at least ten years, 2) commencement of the limitation period from the occurrence of the legal basis for the claim, and 3) broad possibilities for both parties to interrupt limitation with the effect that the limitation period starts to run afresh. The eastern Scandinavian tradition has been prevalent in Sweden until now as well as in Finland up to enactment of the FLA in 2003, but historically also in Denmark and Norway. According to Section 5-14-4 of *Kong Christian den Femtis Danske Lov af 15. April 1683*, a promissory note became prescribed after twenty years unless, prior to that, renewed through, for instance, a creditor's notification. A corresponding provision was in force in Norway by virtue of Section 5-13-12 of *Kong Christian Den Femtis Norske Lov of 1687*.

The 'eastern Scandinavian' era in the Norwegian law of prescription ended in 1896 when the *Lov om Forældelse af Fordringer* was enacted. The act introduced all the central features of the 'western

[15] In more detail, Kjørven, 'Foreldet til tross for fristavbrytende skritt' (n 14) 162–84.
[16] See e.g. Martin Fehr, *Bidrag till läran om fordringspreskription enligt svensk rätt* (Almqvist & Wiksells boktryckeri 1913) 54–58.

Scandinavian' type of prescription regime: a short general limitation period of three years, commencing, as a main rule, from the debt falling due, and being immune from interruption by the creditor without taking legal action. A similar regime was brought into force in Denmark in 1908 through the *Lov om forældelse af visse fordringer,* though this contained two essential differences from the Norwegian act. First, the Danish act was not applicable generally to all types of debt but only to those mentioned in Section 1 of the act. Debts that were left outside of the *forældelseloven,* and which were not subject to any special enactment either, were subject to Section 5-14-4 of the *Danske Lov*, as before. The second essential difference between the Danish *forældelseloven of* 1908 and its Norwegian counterpart was the length of the limitation period, which in the Danish act was five years instead of three, as in Norway.

When the NLA in 1979 replaced the old limitation act of 1896, the central features of western Scandinavian prescription paradigm were maintained. The same holds true of the current Danish act of 2007, which, however, adjusted the content of regulation to resemble the NLA more closely than before, for example by making the regulation generally applicable to all debts and shortening the general limitation period from five years to three.

Sweden and Finland long went hand in hand in the context of prescription regulation – of course, partly because Finland was a part of Sweden until 1809.[17] In any event, correspondence of prescription legislation, as well as most other civil law legislation, was maintained between these two countries even during the era when Finland was an autonomous part of the Russian Empire, from 1809–1917. In Sweden, the *Kunglig förordring (1862:10 s 1) om tioårig preskription och om kallelse å okända borgenaren* was enacted in 1862. This contained the provisions of a ten-year general limitation period that started running from occurrence of the legal basis of debt, and was open to be interrupted by, for example, notification by the creditor to the debtor. An almost identical statute, the *Förordning om preskription i fordringsmål och om offentlig stämning på borgenärer 9.11.1868*, was enacted in Finland in 1868.

These decrees enacted in Sweden and Finland in the 1860s were in force for over a hundred years in each country. In Sweden, the decree of 1862 was replaced by the *Preskriptionslag (1981:130)* in 1981. Notwithstanding the age of the decree of 1862 and international winds of change having just started to blow in the field of the law of prescription,[18] the Swedish legislator adopted a conservative stand and contented itself with chiefly technical updates to the decree. The core implications of the eastern Scandinavian paradigm were maintained unchanged in the *Preskriptionslag*: a ten-year general limitation period from occurrence of the legal basis of debt, and openness to out-of-court interruption.

In Finland, the lifespan of the decree of the 1860s lasted even longer than in Sweden – 135 years – but the nature of the subsequent reform was also more fundamental. The FLA, enacted in 2003, may be described as a synthesis of both eastern and western Scandinavian traditions. The length of the general limitation period was shortened from ten years to three. The point of commencement of the period is stipulated separately for different types of debt, but the leading principle behind most of these rules is understood as being the so-called *principle of possibility to claim*, as labelled in my previous publications.[19] According to this principle, a limitation period does not begin to run before the creditor has had a real possibility to present a claim.[20] For certain types of claim, such as damages claims and correspondent claims (Section 7)

[17] On the history of prescription rules in Sweden and Finland prior to the reforms in the 1860s, see e.g. R A Wrede, *Obligationsrättens allmänna del* (3rd edn, Juridiska fakultetens förlagsrörelse 1925) 237–38; Aarne Rekola, *Saamisoikeuden vanhentuminen Suomen lain mukaan I–II* [Prescription of a Claim Under Finnish Law I–II] (Tyrvään kirjapaino Oy 1938) 31–33; Lindskog (n 7) 39–41.

[18] I refer particularly to the UN Convention on the Limitation Period in the International Sale of Goods (1974) (n 4).

[19] See, inter alia, Olli Norros, *Obligationsrätt* (Alma Talent 2018) 556–57.

[20] On justification of this principle from a more general viewpoint, see Zimmermann, *Comparative Foundations* (n 3) 78–80.

as well as conditional claims, indemnity claims and on-demand claims (Section 8), there is also a so-called secondary limitation period of ten years. The secondary limitation period starts to run from occurrence of the legal basis of the claim, as is enacted in more detail for different types of claim.

Thus, as regards determining the limitation period, enactment of the FLA meant a paradigm shift from the eastern Scandinavian tradition to the western Scandinavian tradition. However, it may be also noted that the secondary limitation period and the rules on commencement thereof uphold a linkage to the eastern Scandinavian paradigm.[21]

As regards regulation of interruption of limitation, the big question in front of the Finnish legislator was whether it was functional to stick to the eastern Scandinavian tradition and enable a creditor to interrupt the limitation period even with an informal notification out of court. In the legislative materials, it is noted that in many foreign legal orders it is possible for the debtor to interrupt a limitation period only through an informal acknowledgment of liability, but for the creditor to interrupt limitation, legal proceedings must be started against the debtor. Furthermore, it was noted that even in Finnish law certain types of debt are subject to special provisions requiring a creditor to take legal action in order to prevent their claim from being prescribed.[22]

At the end of the day, the legislator preferred to maintain the previous main rule, thus even allowing a creditor to interrupt the limitation period through an informal measure. The legislator reasoned this decision through the objectives of regulation on interrupting limitation. According to the legislative materials, it is sufficient that an interruptive measure, when it occurs, keeps the parties aware of the existence of the debt and prevents the debtor from assuming that the creditor has given up the right to performance. In order to achieve these objectives, it was held as sufficient for a debtor to receive from the creditor an informal reminder of the existence of the debt. According to the legislator, more far-reaching requirements on interruptive measures, such as requiring the creditor to take legal action, would cause problems that could not be justified by the possible advantages of such regulation.[23]

Thus, in the context of rules on interruptive measures, the legislator decided to follow the eastern Scandinavian tradition with one minor exception: In damages claims and corresponding claims, it is not sufficient that the creditor merely notifies the debtor of the debt, but the creditor must also present the grounds and amount of the claim as is reasonable in the circumstances, unless the debtor is already aware of these facts (Section 10(2) of FLA).

Of course, interrupting limitation is also possible by taking legal action. At this stage, it is sufficient to note that the basic principles underlying the rules of the FLA on interrupting limitation by taking legal action are similar to the corresponding rules in Norway (NLA Sections 15–19, 21–23), Sweden (Section 7 § of the *preskriptionslagen*) and Denmark (Sections 16–21 of the *forældelsesloven*). Details of the FLA rules are addressed in Section 4 below.

The legal effects of a debt being prescribed are, when the FLA is applied (see Sections 14–18), mostly the same as in Norway (NLA Sections 24–27), Sweden (Sections 8–11 of the *preskriptionslagen*) and Denmark (Section 23–25 of *forældelsesloven*), apart from certain differences in detail. The core effect of prescription is that the debtor is released from their debt so that it can no longer be collected. However, even a

[21] This linkage is noted also in the legislative materials concerning FLA. Regeringens proposition till riksdagen med förslag till en reform av lagstiftningen om preskription av skulder och offentlig stämning (187/2002 rd) 20; see also Norros, *Obligationsrätt* (n 19) 543.
[22] RP 187/2002 rd, 21.
[23] In more detail, see RP 187/2002 rd, 21–22.

prescribed debt preserves a part of its antecedent legal validity – for example, it may be used in set-off under some restrictions.

Next, we move on and focus our comparative analysis on the two questions already noted where the NLA is found as leading to unsatisfactory outcomes, namely 1) commencement of a limitation period for a damages claim and b) interrupting the limitation period by taking legal action.

3. Critical Point 1: Commencement of Limitation Period for a Damages Claim

3.1 Differentiation of Contractual and Extra-contractual Liability

As mentioned in the introductory section, the NLA rules on commencement of the limitation period for a damages claim have been criticised for two reasons: first, the abruptness of the difference between treatment of contractual and extra-contractual claims and, second, the interpretative anomaly in the context of liability for negligent advice.

As noted above, the former problem relates strongly to the fact that contractual and extra-contractual damages claims are subject to limitation periods differing essentially from each other. The expediency of such regulation would require fulfilment of two conditions. First, there should be weighty reasons why liability of one of the two kinds may justifiably cease because of passing of time earlier than with liability of the other kind. In other words, the differentiation could be justified if there were reasons to regard, for example, that situations of contractual liability as such need to be settled quicker than those of delictual liability, or, that evidence relating to delicts is prone to be lost more quickly than if the question was of contractual liability.

The reasons for differentiating between contractual and delictual damages claims in the NLA do not appear clearly from the legislative materials. Before enactment of the NLA, prescription of a delictual damages claim was subject to a special provision in the implementing act of the criminal code (Section 28 of *Lov om den almindelige borgerlige Straffelovs Ikrafttræden 22. mai 1902 Nr. 11*). It seems that the legislator has taken it for granted that a special provision for extra-contractual damages claims must be maintained even after the reform.[24] The legislator certainly paid attention, according to the legislative materials, to the need to regulate different remedies for a breach of contract in a coherent way so that the same limitation periods would apply, inter alia, to the creditor's right to damages, price reduction and provision of substitute performance.[25] Furthermore, it was noted that the length of the general limitation period for damages claims must be the same as for other types of claim.[26] Why the need for uniformity did not extend to the rest of the rules relating to determination of the limitation period was left unclear.

The question has been elaborated in legal literature by *Miriam Skag*, who raises certain practical differences between situations of contractual and delictual liability, which might explain the differences between the NLA rules on contractual and delictual claims. In cases of contractual liability it may be, on average, easier and quicker to negotiate and reach a settlement on compensation than in a typical case of delictual liability, because the parties already know each other and, as businesses, are better aware of their legal position. This could be regarded as justifying the discrepancy in the NLA where in cases of delictual liability the injured party has the full three years to reach a settlement with the liable party before expiry of the general limitation period, while in cases of contractual liability Section 10.1 grants an additional period

[24] Ot.prp.nr.38 (1977-78) 25.
[25] Ot.prp.nr.38 (1977-78) 26. On significance of this argument, see Skag (n 9) 383–85.
[26] Ot.prp.nr.38 (1977-78) 27.

of only one year after the grounds of the claim and identity of the creditor have become observable to the injured party.[27]

As regards the maximum time limit for interruption of limitation and the difference between contractual (3 + 10 years) and delictual liability (20 years), Skag notes that the difference between contractual and delictual liability would not in itself justify such difference, but the differences in need of protection of different objects of legal protection perhaps would. Personal injuries and their economic consequences may be understandably subject to longer limitation periods than property-related damages and economic loss. But as noted, this does not directly relate to differentiation between contractual and delictual liability.[28]

If there are no acceptable reasons for setting a claimant in a contractual damages claim in a worse position than a claimant in a delictual claim, divergence between the limitation periods in these situations leads to separation of analogous situations on haphazard grounds. Clearly, such a situation would not meet the requirement of good legislation, namely that similar cases be treated similarly.[29] In extreme cases, it may even be asked whether groundless differentiation of analogous cases infringes the fundamental right to equal treatment before the law.[30]

However, even if we found the justification for applying different limitation periods to contractual and delictual damages claims to be sufficient, the functionality of such legislation would ensure that the separation itself would be clear and simple, at least in the vast majority of cases. In other words, if in a significant share of cases it is more or less unclear whether the liability of the party causing damage is to be understood as contractual or extra-contractual, the appropriateness of the regime is questionable because a claimant's possibilities to identify what limitation period applies in their case would be limited. In drafting legislation on prescription, a vital requirement is that the content of the rules is clear, so that prescription cannot occur unexpectedly.[31]

It is well known that there are many types of situations – of which some are even quite common in practice – in which it is difficult to say whether a damaging act must be understood either as a breach of a contractual obligation or neglect of an extra-contractual duty of care. As examples, one may raise the following: a) cases of product liability and analogous situations where physical damage is caused by a

[27] Skag (n 9) 386–89.
[28] Ibid 389–90.
[29] See e.g. the Finnish Government Bill for the reform of regulation on fundamental rights, where it is stated that the general requirement on equal treatment, which also binds the legislator, includes both a prohibition of arbitrariness and a requirement to treat similar cases similarly. Regeringens proposition till Riksdagen med förslag till ändring av grundlagarnas stadganden om de grundläggande fri- och rättigheterna 309/1993 rd 46.
[30] The Belgian Constitutional Court issued two judgments in 1995–96 declaring certain provisions of limitation periods as contrary to the constitutional principle of equality before the law. In the first of the two judgments, issued on 21 March 1995, the subject of assessment was a prescription provision according to which a damages claim based on a criminal offence may become time-barred after five years, unless the time limit for penal action by the state is longer. The limitation period for damages claims based on other kinds of illicit acts was at that time 30 years in Belgian law. The Constitutional Court held that such differentiation infringed the constitutional principle of equality before the law. In the second judgment, issued on 15 May 1996, the question was of admissibility of an established interpretation of prescription rules, according to which a damages claim against the state becomes time-barred more quickly than a similar claim against a private person. The Constitutional Court held the interpretation as contrary to the principle of equality before the law. On both cases, see Matthias E Storme, Andrew McGee & Barbara Pozzo, 'Constitutional review of Disproportionately Different Periods of Limitation of Actions (Prescription)' (1997) 5 European Review of Private Law 79.
[31] Lindskog (n 7) 55, 62; Norros, *Obligationsrätt* (n 19) 529–30.

product or service;[32] b) personal injuries caused on business premises, for example in a department store;[33] c) cases where one party has relied on information or advice they have received from someone with whom they are not in a contractual relationship, and the information turns out to be false or misleading;[34] d) other loss-causing conduct of a professional towards a non-contracting party;[35] and e) cases of *culpa in contrahendo*, that is, cases where one party has misled its negotiating counterparty or otherwise caused loss through inappropriate conduct in contract negotiations.[36]

Thus, it seems questionable whether a regulatory model stipulating essentially different limitation periods for contractual and delictual damages claims is either justifiable with respect to content or functional in practice. A straightforward solution would be to wholly detach determination of the limitation period for a damages claim from the legal grounds of liability.[37] Such a regulatory model has been strongly recommended in the legal literature by *Zimmermann*[38] and, perhaps partly due to his influence,[39] adopted in the DCFR academic model law.[40] According to Article III. – 7:203 of the DCFR, the general period of prescription, namely three years, 'begins to run – – in the case of a right to damages, from the time of the act which gives rise to the right'. Furthermore, according to Article III. – 7:301, '[t]he running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably be expected to know of – – the facts giving rise to the right including, in the case of a right to damages, the type of damage'.

However, even prescription rules that are neutral as regards the basis of liability have their weaknesses. If one cannot use any legal concepts relating only to either contractual or delictual liability, for instance the concept of a breach of a contract, the point of commencement of the limitation period must unavoidably be described in quite abstract terms, such as 'facts giving rise to the right' in the above-cited DCFR provision. The abstractness of legal terminology may weaken the understandability of the rules, especially for non-lawyers, and render norms more difficult to interpret and apply in the courts.

Then, if a regime that is totally detached from differentiation between contractual and delictual liability is not optimal,[41] could the problems of the provisions of the NLA on damages claims be remedied by harmonising the provisions on contractual and extra-contractual liability, but still maintain differentiation in the structure and wording of the provisions? The Finnish experience favours an affirmative answer.

FLA Section 7 provides for limitation periods for different kinds of damages and restitution claims. The structure of the provision is simple. Subsection 1 enacts that a general, three-year limitation period starts to run from the moment when the injured party has become or ought to have become aware of the facts

[32] Hagstrøm (n 11) 467; Lena Sisula-Tulokas, *Ren ekonomisk skada* (Lakimiesliiton kustannus 2012) 218–20; Jan Hellner & Marcus Radetzki, *Skadeståndsrätt* (9th edn, Norstedts Juridik 2014) 23–24.
[33] Hellner & Radetzki (n 32) 24; Pauli Ståhlberg & Juha Karhu, *Finsk skadeståndsrätt* (Talentum 2014) 127–28. – However, situations of personal injuries are unproblematic as regards interpretation of the NLA and differentiation of contractual and delictual liability, because Section 9(3) renders all those situations subject to Section 9, that is, the provision mostly applicable to delictual liability – irrespective of the legal grounds for the liability.
[34] Jan Kleineman, *Ren förmögenhetsskada*: *Särskilt vid vilseledande av annan än kontraktspart* (Juristförlaget 1987) 424–25; Hagstrøm (n 11) 467; Sisula-Tulokas (n 32) 227; Hellner & Radetzki (n 32) 24.
[35] Sisula-Tulokas (n 32) 221–27; Ståhlberg & Karhu (n 33) 49–50.
[36] Kleineman (n 34) 428–33; Kalle Mäenpää, 'Contract Negotiations and the Importance of Being Earnest' (2010) 146 Tidskrift utgiven av juridiska föreningen i Finland (JFT) 322, 340–43; Ståhlberg & Karhu (n 33) 47–49.
[37] See also Skag (n 9) 469–87, analysing three such regulatory models and their potential applicability in the framework of the NLA.
[38] Zimmermann, *Comparative Foundations* (n 3) 82–85.
[39] It is worth noting that a significant part of the commentary text in DCFR Full Edition on questions of prescription is more or less directly from the book Zimmermann, *Comparative Foundations* (n 3).
[40] See von Bar & Clive (eds) (n 6) 1145–46, commenting DCFR III. – 7:201 Art.
[41] Cp Skag (n 9) 471–87, being quite favourably disposed towards such regulatory models.

giving grounds for the claim. Even though this general principle is common for all kinds of damages and restitution claims, facts whose observability leads to commencement of the limitation period are different in each of the four subtypes of claim recognised in the provision.[42]

As for contractual liability, the decisive factor is observability of the breach of contract (FLA Section 7(1)(1)). As regards extra-contractual liability, it is observability of loss and the party liable for it that are decisive (FLA Section 7(1)(3)). In addition to these provisions, there is a special rule on different kinds of assignment contracts and positions of trust. According to this provision – that is, FLA Section 7(1)(2) – the limitation period for a damages claim against an assignee starts to run from the moment when the assignee's defect or omission has become observable through an account given by the assignee or otherwise. This provision applies to liability of all kinds of assignees and trustees irrespective of whether the grounds for their liability is understood as being contractual, such as liability towards an assignor, or extra-contractual, for example liability of a bankruptcy trustee towards a creditor.[43] The fourth subsection of FLA Section 7(1) concerns different kinds of restitution claims and thus falls outside our scope of interest.

The three-year limitation period of Section 7(1) is supplemented with Section 7(2), which sets a ten-year limitation period whose commencement is not dependent on the observability of the grounds of the claim – as was the case with Section 7(1). Under Section 7(2), prescription of a claim must be interrupted before ten years have passed from the breach of contract or the event that led to the damage or occurrence of unjustified enrichment. Thus, Section 7(2) sets a secondary limitation period for all kinds of damages claims, apart from claims based on personal injuries or environmental damage, which are specifically excluded from the scope of the provision.[44] The length of the limitation period is the same for all kinds of claim, as is the basic principle for the point of commencement of the period; the only factor that varies is the exact circumstance to which commencement of the period is bound.

Comparing FLA Section 7 with the corresponding rules in the NLA, it is easy to see that the rules on delictual liability are almost identical in Finland and Norway, the most important difference being the length of the secondary limitation period – ten years in Finland and twenty in Norway. As regards contractual damages claims, the basic principles concerning commencement of limitation periods are similar, but the Norwegian regulatory model, based on a three-year general limitation period and additional time limits of one and ten years, is significantly more complex.

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[42] The exact wording of the subsection, in Swedish, is the following: 'Preskriptionstiden för skadestånd och gottgörelse av annat slag börjar löpa,
1) när det gäller ersättning för avtalsbrott, då köparen har upptäckt felet eller bristen i köpeobjektet eller då någon annan avtalspart som är borgenär har eller borde ha upptäckt en felaktighet i fullgörandet av avtalet,
2) när det gäller skadestånd som grundar sig på ett ombuds, en företrädares eller någon annan uppdragstagares fel eller försummelse, då uppdragstagaren har lämnat sin redovisning eller, om skadeståndsgrunden inte framgår av de redovisade uppgifterna, då huvudmannen har eller borde ha upptäckt felet eller försummelsen,
3) när det gäller skadestånd som grundar sig på något annat än ett avtalsförhållande, då den skadelidande fick kännedom om eller borde ha känt till skadan och vem som ansvarar för skadan,
4) när det gäller återbäring av obehörig vinst, då den som kan framställa ett sådant krav fick kännedom om eller borde ha känt till att en betalning skett av misstag, att ett avtal är ogiltigt eller att något annat har skett som har lett till att det uppstått obehörig vinst som skall återbäras och vem som fått den obehöriga vinsten.'

[43] On the scope of application of Section 7(1)(2) of FLA, see RP 187/2002 rd, 48–49 where, however, the neutrality of the provision as regards differentiation between contractual and extra-contractual liability is not touched upon. On this aspect, see Olli Norros, *Vahingonkorvausvelan vanhentuminen* [Prescription of a Damages Claim] (Talentum 2015) 329–31.

[44] The exact wording in Swedish is the following: 'Preskriptionen av ett skadestånd eller någon annan skuld som avses i 1 mom. måste dock avbrytas innan tio år har gått från avtalsbrottet eller från den händelse som har orsakat skadan eller lett till uppkomsten av obehörig vinst. Denna tidsfrist begränsar dock inte den skadelidandes rätt att kräva ersättning för person- eller miljöskador.'

Thus, the differences between Finnish and Norwegian rules on limitation periods for damages claims are in detail, not in basic principles. However, the old idiom 'the devil is in the detail' seems to be apposite here – because in Finland such problems as reported in Norway regarding differentiation between contractual and extra-contractual liability have, at least so far, been marginal. One may ask why that is so.

In cases where it is difficult to say whether the liability of a party must be understood as contractual or extra-contractual, it is clear that the point of commencement of the limitation period may become different if the decisive factor is not observability of the loss and the party liable but merely the observability of a breach of contract, or vice versa. However, even a limitation period of three years seems to be so long that even if different prerequisites for liability become observable at different moments in time, temporal differences are normally still minor in proportion to the length of the limitation period. Thus, within three years from exposure of the first relevant fact the injured party normally has sufficient information and time to investigate their possible right to compensation and interrupt limitation. This reduces the significance of what exactly is the fact whose observability leads the limitation period to commence, and thus reduces the significance of whether liability in the case is understood as being contractual or extra-contractual in respect of FLA Section 7(1).

Under the NLA, the situation may be quite different in a case where the breach of a contract or delict has occurred more than two years before any part of the prerequisites for liability have become observable. In such a case, it depends on the classification of liability – as extra-contractual or contractual – whether the injured party has three years (NLA Section 9(1)) or only one year (Section 10(1)) to react before prescription of the claim. The difference between one and three years may become essential in such a situation.

Moreover, the special rule on liability of assignees and trustees (FLA Sections 7(1)(2)) decreases the significance of differentiation between contractual and extra-contractual liability. This is because, as noted above, situations where a professional causes damage to someone related to the assignment but not formally an assignor[45] form a central group of situations where the nature of liability as contractual or extra-contractual is often unclear.[46] Because of Section 7(1)(2), it is not necessary to take a stand on whether the liability of a certain assignee or trustee is contractual or extra-contractual by nature,[47] but the question is merely when the defect or omission of that actor has become observable to the injured party.[48] However, this holds true only in respect of the three-year general limitation period. As regards the ten-year secondary limitation period, there is no special rule for liability of an assignee, but the point of

[45] On assessment of this kind of situation under the NLA, see Skag (n 9) 404–08. According to Skag, a party's liability for defective or misleading information given to a non-contracting party is to be regarded as delictual and assessed under NLA Section 9 – although the question appears as being open to interpretation.

[46] The above-mentioned classification difficulties may be illustrated by the following case examples from the Finnish Supreme Court: In case KKO 1992:165 the liability of a draftsman of a deed of gift to the donee was held as being contractual by nature even though there was no contract between the parties. Accordingly, in case KKO 1999:19 the liability of a consultant to their client's contracting party was held as being contractual by nature. In case KKO 2001:70 the liability of a bankruptcy trustee was described as being 'of a special type of liability in the borderland between contractual and extra-contractual liability'. However, in a later case – KKO 2003:81 – a similar kind of liability was held as being extra-contractual. In case KKO 2005:14 the liability of an arbitrator towards a party to the arbitration was held as being contractual by nature.

[47] Norros, *Obligationsrätt* (n 19) 572.

[48] As regards the relationship between the general rule on contractual liability, Section 7(1)(1), and the special rule on assignee's liability, Section 7(1)(2), it has been held that there is no difference on how commencement of the limitation period is determined through these provisions. Thus, as regards situations where the liability of an assignee is contractual by nature, the special rule has no independent significance. Norros, *Vahingonkorvausvelan vanhentuminen* (n 43) 329; accordingly Tuula Linna & Ari Saarnilehto, *Velan vanhentuminen* [Prescription of a Debt] (Alma Talent 2016) 44–45.

commencement of such limitation period must be assessed by virtue of the general rule which, as mentioned above, is based on differentiation between contractual and extra-contractual liability.

In any case, the last-mentioned rule, namely FLA Section 7(2), has also turned out to be functional, and the need to classify liability situations as contractual or extra-contractual has not caused problems in practice. The reasons for this seem to be much the same as in respect of Section 7(1). In a case where classification of liability is unclear, it is possible that the point of commencement of limitation period is determined slightly differently depending on whether the decisive factor is occurrence of the act that leads to damage or occurrence of the breach of contract. However, as the length of the limitation period in both cases is the same and as long as ten years, the possible difference in determining the point of commencement does not normally become relevant.[49]

3.2 Interpretative Anomaly Regarding Liability for Advice

As mentioned in the introduction, another problem in respect of the NLA rules on commencement of the limitation period for a damages claim is that in the context of liability based on defective advice, the Norwegian Supreme Court has adopted an interpretation that seems to differ both from the wording of Section 3(2) of the NLA and the established interpretation in the context of other contract types. According to the Supreme Court, the general limitation period for liability based on defective advice commences not earlier than when the defective advice has actually led to loss. As noted above, this interpretation has been widely criticised in legal literature because, first, it formulates an anomaly in relation to other contract types, and second, because the interpretation leads to the situation that – in the context of advisory services – there is no limitation period that would commence on objective grounds irrespective of incidents after defective performance.

As regards the interpretation described, which I venture to call an interpretative *anomaly*, comparing the respective provisions of the NLA and the FLA is perhaps not so fruitful as in the context, analysed above, of differentiation between contractual and extra-contractual liability. This is because the prevailing legal state in the context of advisory services in Norway seems to be rather a result of creative interpretation of law by the Supreme Court than any direct 'casting defect' in the NLA itself. However, it seems clear that the complexity of the NLA has rendered the law prone to different interpretations, of which some may be held as unanticipated.

That said, it may be noted that under the FLA rules there has not been particular pressure for divergent interpretation of the point of commencement of a limitation period for a damages claim based on negligent professional advice. As emerged in the previous section, such situations are under the FLA subject to a special rule on the liability of an assignee or trustee (Section 7(1)(2)) as regards the general limitation period, and subject to the general rules of Section 7(2) as regards the secondary limitation period. Applying these provisions, it is clear that the general limitation period starts to run from the defectiveness of the

[49] The situation was different prior to the coming into force of the FLA. At that time, contractual and extra-contractual liability in damages was subject to the same 10-year limitation period, but the rules on commencement of the period were different for contractual and extra-contractual liability. An illustrative example is case KKO 2009:92 of the Finnish Supreme Court, where the buyer of a used boat claimed compensation from the manufacturer on the grounds of an alleged safety defect. The district court regarded the claim as based on the initial sales contract in 1987, which led to vacating the claim as having become time-barred in 1997. However, according to the Supreme Court, extra-contractual liability norms applied to the case, and because the limitation period for such liability started to run from the occurrence of the damage, in this case 2000, the claim was not prescribed.

advice becoming observable,[50] while the secondary limitation period starts to run from the moment of giving the advice.[51]

Even though the legal status on commencement of the limitation period for a damages claim based on defective advice is clear *de lege lata*, it has been recognised that the prevailing interpretation may become harsh for the injured party in some situations. As regards the general limitation period, one may raise as an example a resolution recommendation APL 16/13 (2014) from the Securities Complaints Board.[52] A Finnish investment firm had marketed to its customers a structured bond issued by the American investment bank *Lehman Brothers*. According to the service provider, there was no risk of losing any capital in the investment offered. However, the issuer of the bond as well as a group company thereof, which had guaranteed the bond, became insolvent in autumn 2008. In 2013, the Finnish bondholder claimed compensation from the Finnish investment firm on the grounds of misleading marketing of an investment product. The firm denied the claim, alleging that it was prescribed.

The majority (4–1) of the Securities Complaints Board held the claim as having been prescribed by virtue of FLA Section 7(1)(2). According to the Board, the alleged defect in the firm's conduct, namely giving misleading information about the risks related to the bond, had become observable to the customer at the latest in autumn 2009 when the firm had sent a letter notifying the insolvency of the issuer. The dissenting member, however, came to the opposite conclusion, noting that the customer had had reason to rely on the firm's advice to wait until the original due date of the bond, that is, 1 March 2013. Thus, in this case the defectiveness of the advice became observable to the damaged party years before materialisation of the loss. However, this did not affect the conclusion of the majority, who decided the case simply according to the wording of FLA Section 7(1)(2).[53]

Case KKO 2013:72 illustrates the application of the ten-year secondary limitation period of FLA Section 7(2) in the context of an advocate's liability. When drafting an application for a summons, an advocate had, due to a misinterpretation of the law, claimed compensation from an insurance company of only 15 percent of the total loss caused to their client. The action had been sustained by the court. After the client later realised that they would not be compensated for the rest of the loss from other insurance or any other source, they filed a new action against the insurance company as well as against the advocate who pleaded the first case for them. The Supreme Court dismissed the action against the insurance company on the grounds of the *res judicata* effect of the first judgment. The action against the advocate was rejected because the majority of the Supreme Court (4–1) held that the possible defect in the advocate's performance had occurred on the date the advocate filed the first application for a summons, which had happened just over ten years before the action against the advocate was set in motion.

The dissenting Justice of the Supreme Court pointed out that as the advocate's assignment continued for years even after filing the lawsuit, the point of commencement of the limitation period for their liability could not have been regarded as being that particular moment. According to the Justice, the decisive

[50] Norros, *Vahingonkorvausvelan vanhentuminen* (n 43) 232, 327–28.
[51] On a more general level, Norros, *Vahingonkorvausvelan vanhentuminen* (n 43) 157–61.
[52] The Securities Complaints Board, nowadays the Investment Complaints Board, is one of the complaint boards organised under the Finnish Financial Ombudsman Bureau, which is a purely private body. The complaints boards submit recommendations to the parties involved. However, the *de facto* significance of the decisions as a legal source is often notable because they are well reasoned decisions by a multi-member body, with members who are specialists in the field of law applicable to the dispute. Furthermore, especially in the financial sector, the recommendations are almost universally followed by the parties. – The author was the chairman of the panel in case APL 16/2013.
[53] It is worth noting that the claim was not prescribed in dozens of other cases based on the same kind of investment, and in a significant part of these the Securities Complaints Board held the investment firm liable for the customer's loss. One similar case was taken to the Finnish Supreme Court, which also decided the case in favour of the customer (case KKO 2015:93).

moment was when the advocate found out during the litigation that they would not obtain the rest of the compensation from other insurance, but the advocate, notwithstanding, neglected to amend the action to cover the whole loss. Such an amendment would have been possible at that time in the process.

The case illustrates that even the ten-year limitation period may appear relatively short in some circumstances when the point of commencement of the limitation period is bound to defective performance, not to the occurrence of loss because of the defect. However, in this case the outcome was according to the wording of the FLA.[54] In other words, interpretation of prescription rules in the context of liability for advice goes hand in hand with other contract types without such deviation, as has emerged in Norway.

4. Critical Point 2: Interrupting Limitation by Taking Legal Action

4.1 Complexity and Non-uniformity of the Regulation

As regards the NLA rules on interrupting limitation by taking legal action, two interrelated problems have been raised in legal literature. First, the NLA rules on this subject are found to be complex and non-uniform to the extent that understanding the content of the rules is often difficult. Second, and partly because of the former problem, the rules are prone to cause situations where a creditor's claim becomes time-barred even though they have tried to take legal action to pursue their claim prior to expiry of the limitation period.

The basic principles in the background to the NLA rules on interrupting limitation by taking legal action are quite simple as such – and correspond to those adopted later by the Finnish legislator in the FLA. The principles may be summarised as follows: First, the running of a limitation period is interrupted when a creditor initiates legal proceedings in order to obtain performance of their claim or confirmation of its existence (see NLA Sections 15, 15a(1), 16, 17, 18 and 19). Second, after such proceedings have been initiated, the running of any limitation period is suspended, so that a claim cannot become prescribed during the proceedings (see NLA Sections 21(1) and 23(1)). Third, if the proceedings end in a result confirming or at least favouring the creditor's right to performance, a new limitation period – whose length may be different from what it initially was – starts to run from the end of the proceedings (see Sections 21(2)–(3) and 23(2)). Fourth, if the proceedings end without resolution, the creditor is granted a reasonable time to prepare the next steps to exercise their possible right (see Sections 15a(1), 22 and 23(1)).[55]

Even though the underlying principles of the NLA rules are simple and understandable, the way they have been implemented in the NLA provisions is far from simple. The number of sections dealing with this issue is as great as nine (Sections 15–23) – over a quarter of the 33 sections in total.

Disposition of the sections is not wholly coherent. The basic structure is that the different legal procedures or measures whose initiation is capable of interrupting limitation are defined in Sections 15–19, and the legal effects following from those procedures and measures are regulated in Sections 21–22. However, the legal effect of interrupting limitation at the moment of initiating the proceedings is regulated separately in

[54] In legal literature, the present author has accepted the outcome as corresponding fairly well the wording of the FLA and the general doctrines in the background. Norros, *Vahingonkorvausvelan vanhentuminen* (n 43) 175–76; in Swedish, Norros, *Obligationsrätt* (n 19) 588. However, Linna and Saarnilehto criticise the judgment and support the standing of the dissenting Justice. Linna & Saarnilehto (n 48) 65–66.

[55] The formulation of the above-mentioned principles is by the author, but their content broadly corresponds to what is presented in Norwegian legal literature. See Hagstrøm (n 11) 781–82; Marte Eidsand Kjørven in Kjørven and others (n 5) 410–13, 415–16; Anne Cathrine Røed, *Foreldelse av fordringer: Kommentarer til foreldelsesloven og foreldelsesbestemmelser i spesiallovgivningen*: Del II (4th edn, Cappelen Damm 2019) 564–565, 816–817, 856–857.

each of Sections 15–19. The legal effects stipulated in Sections 21–22 are determined for most – but not all – types of proceedings separately, but all under the aforementioned two sections. As an exception, Section 15a on class actions contains rules on the legal effects of ending such proceedings, even though corresponding rules applicable to other forms of process are under Section 22. The international applicability of the rules is determined mostly under Section 23, but also Section 17(3) on execution contains rules on the subject.

The above presents just a part of the inconsistencies in the NLA. Additional time set in Section 22 for situations where proceedings end without resolution may be precluded if the ending is a consequence of intentional action by the creditor; however, this exception applies only to some forms of legal procedure covered by Sections 15–19, but not all of them.[56] Furthermore, within the same section there may be rules with deviating scope of application. Further, a plethora of internal references weakens the understandability of the regime.[57]

As we have seen, the FLA rules on interrupting limitation by taking legal action are based on the same general principles as those underlying NLA Sections 15–23.[58] However, the formulation of the provisions implementing these principles differs essentially from the NLA. In the FLA, all rules on interrupting limitation by taking legal action are in Section 11, containing four subsections, and in two short subsections under Section 13.

The structure of the regulation is fairly simple. Subsection 1 of Section 11[59] defines exhaustively which legal measures lead to suspension and possibly interruption of a limitation period.[60] Subsection 2 first defines when exactly the suspension takes effect in each of the cases mentioned in subsection 1. Then, it is defined when the limitation is regarded as having been interrupted as proceedings mentioned in subsection 1

[56] Kjørven, 'Foreldet til tross for fristavbrytende skritt' (n 14) 169.
[57] Kjørven in Kjørven and others (n 5) 410.
[58] On those, see RP 187/2002 rd, 22–24.
[59] 'Preskriptionen av en skuld avbryts på det sätt som anges i 2 mom., om
1) borgenären väcker talan angående fordran mot gäldenären eller i fråga om fordran framställer ett krav vid domstol, konsumenttvistenämnden eller vid något annat lagstadgat organ eller i ett förfarande där ett avgörande eller en rekommendation i ärendet kan meddelas, eller vid ett organ som har anmälts till Europeiska kommissionen i enlighet med artikel 20.2 i Europaparlamentets och rådets direktiv 2013/11/EU om alternativ tvistlösning vid konsumenttvister och om ändring av förordning (EG) nr 2006/2004 och direktiv 2009/22/EG,
2) borgenären anmäler sin fordran utifrån en offentlig stämning som gäller gäldenären eller i gäldenärens konkurs eller i något annat insolvensförfarande eller skulden annars beaktas i samband med förfarandet,
3) borgenären anhängiggör ett utsökningsärende eller skulden annars beaktas i samband med ett utsökningsförfarande, eller
4) fordran tas till behandling vid medling i domstol eller vid ett sådant medlingsförfarande där förlikningen kan stadfästas så att den blir verkställbar på det sätt som föreskrivs i lagen om medling i tvistemål och stadfästelse av förlikning i allmänna domstolar.'
[60] It is worth noting that unlike under the NLA, under the FLA interruption of limitation does not yet occur when legal proceedings are initiated, but this leads only to suspension of limitation. Interruption – or an additional time limit – follows only after the proceedings come to an end. On the anatomy of interruption of limitation by taking legal measures, see Norros, *Obligationsrätt* (n 19) 619–20; Linna & Saarnilehto (n 48) 99.

end.[61] Subsections 3[62] and 4[63] set an additional time limit of a one-year maximum in a case when a claimant cancels their application or the proceedings otherwise end without resolution. Section 13(1)–(2) enacts that after a limitation has been interrupted, this leads to commencement of a new limitation period of the same length as previously, or, where a debt has been confirmed in a non-appealable judgment or other grounds for execution, commencement of a five-year limitation period.

Even though the basic structure of the above-described regulation is simple, the norms within Section 11 contain a great number of details and thus give rise to numerous questions of interpretation.[64] As the case seems to be with the NLA, also in the FLA the most complex part of the regulation is the one on situations where the legal procedure in question has not ended in resolution but has "fallen through" for some other reason.[65] This may be because, for instance, the claimant cancelled their application or the court dismissed the action without prejudice due to it having been filed in the wrong venue.

However, so far only one of the interpretation questions relating to FLA Section 11 has been difficult and significant enough to gain the attention of the Finnish Supreme Court and the legislator.[66] The question related to the original wording of FLA Section 11(3) that was interpreted by the Supreme Court in two precedents (KKO 2012:107 and KKO 2015:28) so that initiating execution did not lead to interruption of limitation if the execution authority did not succeed in serving a notice on the debtor. The legislator was not satisfied with this interpretation and, promptly after the latter precedent, amended Section 11(3) so that initiating execution leads to interruption of limitation even though the debtor never gained information of the execution attempt, providing that the authority in other respects has acted in accordance with the rules of conduct.[67]

In conclusion, even though the FLA rules on interrupting limitation by taking legal action are complex to some extent, the magnitude of complexity does not reach the same levels as the NLA.

4.2 "Legal Traps"

The other and perhaps more burning issue in relation to the NLA rules on interrupting limitation by taking legal action is that in certain situations the regulation seems to be prone to cause "legal traps" for incautious creditors. By a "legal trap" I refer here to situations where a creditor has tried to pursue their

[61] 'När ett ärende enligt 1 mom. 1 eller 3 punkten blir anhängigt, när det fattas beslut om inledande av ett förfarande som avses i 2 punkten eller beslut om ett interimistiskt förbud som gäller skulden, eller när det fattas beslut eller ingås avtal om inledande av medling enligt 4 punkten avstannar preskriptionen för den tid förfarandet i fråga pågår. Den dag det meddelas en dom som vinner laga kraft eller handläggningen av ärendet avslutas av någon annan orsak anses preskriptionen ha avbrutits.'

[62] 'Om borgenären återkallar sin ansökan eller handläggningen av ärendet avslutas av någon annan orsak utan att gäldenären tillställts en sådan delgivning eller annat sådant meddelande om borgenärens krav som enligt lag borde ha tillställts gäldenären, anses preskriptionstiden inte ha avbrutits. I ett sådant fall preskriberas skulden dock tidigast ett år från det att handläggningen av ärendet avslutades. Preskriptionstiden kan förlängas på detta sätt bara en enda gång.'

[63] 'Vad som föreskrivs i 3 mom. tillämpas på tiden för väckande av talan också då ett ärende som avses i 1 mom. 1 punkten har avvisats utan prövning eller ärendet har lämnats därhän efter att det har delgivits gäldenären.'

[64] See Linna & Saarnilehto (n 48) 91–185, who spend nearly a quarter of the pages in their overview on the FLA on questions of interrupting limitation by taking legal action.

[65] The complexity is also noted in Norros, *Obligationsrätt* (n 19) 632.

[66] See also case KKO 2016:50 of the Supreme Court applying a transition provision of Section 11(3) in an unsurprising manner.

[67] On the background to the amendment, see Regeringens proposition till riksdagen med förslag till lagar om ändring av utsökningsbalken och av 11 § i lagen om preskription av skulder 137/2015 rd, 14–15; for further clarification, see Norros, *Obligationsrätt* (n 19) 633–34.

right to performance by initiating some form of legal procedure that is, according to the NLA rules, capable of suspending limitation. After the creditor has thus "stepped into the trap", something goes wrong and the legal procedure ends without resolution. If the main rules of the NLA on such situations apply, the creditor is protected by an additional time limit of one year at the maximum (NLA Section 22) to prepare the next move in collecting the claim. However, if the creditor is unlucky and the circumstances of the case fall through some of the gaps in the NLA, the "legal trap" is triggered, and the creditor is hit by the claim becoming time-barred with unexpected speed.

The anatomy of such "legal traps" has recently been thoroughly analysed by *Marte Eidsand Kjørven*, so it is unnecessary to go into the details here. *Kjørven* has recognised the creditor's right to performance as being jeopardised at least in situations where a creditor 1) initiates execution without having lawful grounds for execution of the claim;[68] 2) initiates a procedure in a complaints board in a dispute that is outside the competence of the board;[69] 3) initiates arbitration without an arbitral agreement covering the dispute in question;[70] 4) takes part in procedure before a mediation board (*forliksrådet*) but fails to reach a settlement;[71] or 5) takes part in a class action that is subsequently rejected.[72]

As regards the FLA, the problem of "legal traps" in the above-described sense is virtually unknown. The first reason for this seems to be the wide scope of application of the rule on the one-year "grace period" (FLA Section 11(3)–(4)). Even though the FLA rules on the consequences of ending a legal procedure without resolution are complex to some degree, as noted in the previous section, there is one crucial difference when compared to the NLA. That is: under FLA Section 11, initiating any of the types of legal procedure mentioned in subsection 1 always leads either to a) interruption of the limitation period or b) applicability of the rule on the one-year "grace period".[73] The only exception is a situation in which the creditor has already gained the benefit of the "grace period" because of a previous unsuccessful attempt to pursue the claim – according to Section 11(3), a limitation period may be extended by virtue of this provision only once. In other words, under the FLA there is no corresponding problem as there is with the NLA that certain types of case, where a creditor's attempt to collect a claim has failed, fall into one of the gaps of the regime and lead to an unanticipated quick prescription of the claim.

In Finnish legal literature the rule of Section 11(3) on the one-year "grace period" has even been criticised because of allowing a creditor to extend the applicable limitation period too easily even without the debtor being informed of this.[74] In addition, it has been asked whether the possibility to interrupt and thus renew even *a period for filing suit*, based on a special enactment, by initiating a non-binding procedure in a complaints board, leads to deviation from the objective of such special limitation provisions to speed up final settlement of the claim.[75] The criticism shows at least that no regulatory model is perfectly balanced –

[68] Kjørven, 'Foreldet til tross for fristavbrytende skritt' (n 14) 164–66.
[69] ibid 166.
[70] ibid 166–67.
[71] ibid 171–80.
[72] ibid 181–83.
[73] Norros, *Obligationsrätt* (n 19) 632. According to Røed, the idea behind the NLA rules is the same – however, as we have seen, implementation of the idea has not fully succeeded. Røed (n 55) 856–857.
[74] Erkki Havansi, *Määräajat ja oikeudenkäynti: Tutkimus prosessiliitännäisistä määräajoista* [Time Limits and Legal Proceedings: A Research on Process-related Time Limits] (WSOY Lakitieto 2004) 176–79 – who we may also thank for the apposite term "grace period" (*armonvuosi* in Finnish). Similar criticism has been presented in Germany by Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP 2005) 144.
[75] Olli Norros, *Vakuutuksenantajan korvauspäätös* [An Insurer's Decision on Compensability of Loss] (Talentum 2016) 193–94.

but nevertheless it seems clear that the subtle creditor-friendliness of the FLA rules in some special situations is a minor problem compared to the "legal traps" embedded in the NLA.

On the other hand, even the FLA rules may leave gaps in some special situations. This may happen in some situations where legal proceedings are pending between the parties but the character of the process does not meet the criteria formulated in FLA Section 11(1). One example of such a situation is *a negative declaratory action* brought by the debtor. The wording of Section 11(1)(1) requires, as regards interrupting limitation by filing suit, that it is the creditor who has presented a claim against the debtor – unlike NLA Section 15(1) that explicitly covers a negative declaratory action brought by the debtor. Due to the wording of FLA Section 11(1)(1) as well as to several accordant statements in the legislative materials,[76] it is highly questionable if limitation is interrupted by virtue of Section 11 in a case where the debtor, for example, seeks a declaratory judgment to confirm that their liability towards the creditor is not more than 100 000 euros.[77]

Another example of a situation where a legal procedure between creditor and debtor does not necessarily lead to applicability of FLA Section 11 is one where the subject of the process is not the claim directly but, for example, some underlying circumstance of the possible claim or other preliminary question. For example, if a private party challenges the validity of an administrative action in an administrative court, this does not bring the question of a possible damages claim by the private party against the authority within the sphere of litigation, and thus FLA Section 11 is not applicable.

However, an essential feature in the FLA that complements protection of a creditor in such situations where the rules on interrupting limitation by taking legal action appear to contain gaps is the possibility of interrupting limitation via measures by the parties out of court. It is clear that if communication between a creditor and a debtor meets the criteria set in FLA Section 10 on informal measures interrupting limitation, interruption occurs by virtue of that section regardless of whether the communication in question takes place in the context of legal proceedings or elsewhere.[78] However, the above described "final safety net", that is, the possibility to interrupt limitation informally, diverges, as a legislative option, from the ones in the NLA on a fundamental level, and because of this, is actually left outside of the scope of this article, which compares the NLA and the FLA on questions where the underlying principles of the regulation are uniform.

5. Conclusions

The purpose of this article was to analyse whether certain rules of the FLA that share the same objectives and underlying principles with their strongly-criticised counterparts in the NLA are able to function better because of their more straightforward structure and formulation. The answer seems to be clearly in the affirmative. Even though the problems faced by the NLA are not wholly unknown either in Finland, their magnitude is not comparable in these two legal systems. It is not my affair to make any propositions to the Norwegian legislator – that is the task of Norwegians and Norwegian jurisprudence – but my comparative

[76] RP 187/2002, 59–60: 'Preskriptionen avbryts genom anhängiggörande av talan om fordran *mot gäldenären* och genom att framställa ett krav som gäller fordran vid domstol. – – Enligt bestämmelsen bör talan eller kravet gälla fordran. Detta betyder inte att talan väcks endast för att få en fullgörelsedom utan det avgörande även i detta fall är att *borgenären* genom sitt krav visar att hans fordringsrätt fortfarande är giltig. – – Enligt bestämmelsen skall talan *väckas av borgenären mot gäldenären*. Också ett krav som framställs i någon annan form, till exempel en ansökan om säkerhetsåtgärder, skall vara *framställt av borgenären och avse gäldenären*.' [emphasis by the author]

[77] Norros, *Obligationsrätt* (n 19) 621; see also Linna & Saarnilehto (n 48) 105–06, who do not take a clear stand on the question.

[78] RP 187/2002, 60; Norros, *Obligationsrätt* (n 19) 621.

findings support the conclusion by many Norwegian scholars: the above-analysed rules of the NLA could be fine-tuned to function better.