



Groningen, Ghent, Uppsala, Turku
Annual Legal Research Network Conference 2008
30-31 October 2008, hosted by the University of Groningen

**Calendar or Conduct: Problems with
Extinctive Prescription and Mistake of Law.**

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April/2008

Abstract

Does the calendar, i.e. a mere computation of time, or the conduct of the parties determine the extinctive prescription of claims?

In order to promote legal certainty the new Dutch Civil Code of 1992 introduced a new system of negative prescription. The long term of limitation – starting when the legal

claim is due – was reduced from 30 to 20 years. More importantly, a 5 year short term of limitation was introduced. The starting point of the 5 year period is the moment when the creditor ‘actually’ is able to submit his claim against the debtor, i.e. is acquainted with the facts that are relevant for the existence of his claim. This starting point in fact contains a norm for the conduct of the creditor. He is expected to act at the moment he knows about his claim, where in the past his right was safe for 30 years.

The introduction of the 5 year term has triggered litigation which in turn has forced the Dutch Supreme Court to relax the new rules. In certain cases (negotiations, sexual abuse) the defendant’s own conduct may bar him from relying on the statute of limitations. Here, the conduct of the debtor interferes with the strict application of the statutory rules on limitation by just counting 5 years on the calendar.

Cases of ‘mistake of law’ merit special attention. How to deal with cases in which the creditor can not know he has a claim because the law is uncertain (e.g. in the absence of a court decision on the issue)? Contrary to what might have been expected, the Dutch Supreme Court ruled that this uncertainty does *not* prevent the limitation term to start running at the moment a person knows the facts relevant to the claim (even if at that moment he can not know these facts will merit a claim in law at all). Here, the calendar rules.

Our paper analyses the conflict in the Dutch case law between the calendar based and the conduct based approaches to prescription of claims. The Dutch experience will be compared to that of other legal systems (having introduced similar short terms). Do these systems experience the same problems and do they reach similar outcomes and what explains any differences?

Keywords: Extinctive Prescription; Mistake of Law