Comparative Foundations of a European Law of Set-Off and Prescription

Reinhard Zimmermann

CAMBRIDGE

This page intentionally left blank

COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION

The emergence of a European private law is one of the great issues on the legal agenda of our time. Among the most prominent initiatives furthering this process is the work of the Commission on European Contract Law ('Lando Commission'). The essays collected in this volume have their origin within this context. They explore two practically very important topics which have hitherto been largely neglected in comparative legal literature: set-off and 'extinctive' prescription (or limitation of actions). Professor Zimmermann lays the comparative foundations for a common approach which may provide the basis for a set of European principles.

At the same time, the essays provide practical examples of the arguments that can be employed in the process of harmonizing European private law on a rational basis: they consider the comparative experiences in the various modern legal systems, they explore the extent to which there is a common core of values, rules and concepts, they explain existing differences and they analyse the direction in which the international development is heading.

The introduction to the present volume discusses the terms of reference of the Lando Commission that has set itself the task of elaborating a 'restatement' of European contract law and places its work within the wider context of the Europeanization of private law.

REINHARD ZIMMERMANN is Professor of Law at the University of Regensburg. Among his many publications are *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990/1996) and *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (2001). Co-edited volumes include *Good Faith in European Contract Law* (2000) and *A History of Private Law in Scotland* (2000).

COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION

REINHARD ZIMMERMANN
University of Regensburg

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published in printed format 2002

ISBN 0-511-03032-0 eBook (Adobe Reader)
ISBN 0-521-81461-8 hardback

CONTENTS

PREFACE

Comparative legal scholarship in the twentieth century has been dominated by private law; within private law by the law of obligations; within the law of obligations by tort/delict and contract; and within contract by a standard range of topics including conclusion of contract, validity, breach of contract and third-party rights. The magisterial treatise by Zweigert and Kötz both reflected and largely determined that agenda. That treatise has prepared the ground for intense scholarly discussions on offer and acceptance, causa and consideration, specific performance, frustration and privity, to mention some examples. At the same time, however, even within the law of obligations a number of topics not discussed by Zweigert and Kötz have received only scant attention. Set-off and (negative) prescription/limitation of claims are among those topics. Conditions, substitution of debtors and plurality of debtors or creditors might also be mentioned. Even the great *International Encyclopedia of Comparative Law* neglects these topics. One can only speculate about the reasons. Is it because they offer 'fearsome technicalities but few issues that really stir the blood' (Rory Derham, *Set-off*, 2nd edn, 1996, VII)?

The three essays collected in this booklet attempt to explore two of these hitherto comparatively neglected areas. They originated within the context of the Commission on European Contract Law ('Lando Commission'). First drafts of all three papers were submitted as 'position papers' for

that commission. The approach adopted towards the two topics covered by them is slightly different. The chapter on set-off is based on as many legal systems of the European Union as were accessible to me. The framework for the two prescription papers is both wider and narrower. Fewer legal systems of the European Union have been taken into consideration. But an attempt has been made to integrate the wider international trends and developments. For the private law of the European Union cannot be looked at in isolation. Thus, obviously, the Uncitral Convention had to be considered. But even legal systems as far away as Québec or South Africa can offer interesting perspectives, not only because both legal systems once inherited their private laws from Europe but also particularly in view of the fact that in reforming their prescription laws they have taken account of the experiences gathered in Europe (and elsewhere). I have benefited very much from the critical discussion of my papers in the commission, from advice on matters of content and style by Hugh Beale and Roy Goode, and from a very intensive discussion on the law of prescription at a meeting of a small working party consisting of Ole Lando, Ulrich Drobnig, Hugh Beale and Ewoud Hondius at Goodhart Lodge in Cambridge. I am very grateful to all my colleagues on the commission and in that working party. At the same time, it must be emphasized that the views expressed in these papers in no way commit or prejudice the commission. Earlier versions of two of the three chapters have appeared in Germany.

At the same time, these chapters constitute practical exercises in the Europeanization of private law. The emergence of a European private law is one of the great issues on the legal agenda of our time. Much has been written about it. In particular, there has been considerable discussion as to the approach to be adopted. I do not think that there is only one approach. As in early nineteenth-century Germany this

is the hour of legal scholarship; and legal scholarship both requires and encourages a stimulating diversity of outlook and approach. Many different paths will be, and will have to be, explored. The same method may not prove fruitful for all problems. In many instances we will find a common core of values, rules and concepts. In others we can discern, by looking beyond our national borders, a European or even international development clearly heading in a particular direction. It may be helpful to demonstrate that differences between two or more legal systems are not as great as is commonly presumed; or that an approach prevailing in another country has also once prevailed in ours. It may be necessary, occasionally, to remove ideological preconceptions that have become firmly entrenched in more than one hundred years of national legal scholarship. Often we will be able to learn from past experiences, equally often from the experiences in other countries. Such experiences will provide arguments for making a rational choice between conflicting solutions. Sometimes we will also find that for a long time we have been caught up in thinking patterns of the past. Any enlargement of the lawyer's horizon, as Ernst Rabel has said, will bear reward. The three essays collected in this volume attempt to prove the truth of this statement. They neither follow nor develop a master-method. But they provide practical examples for the arguments sketched in the previous sentences.

I had the great privilege of spending the academic year 1998/9 as A. L. Goodhart Professor of Legal Science in the University of Cambridge and as a Fellow of St John's College, Cambridge. I am very grateful to my friends and colleagues both in the Faculty of Law and at St John's for having invited me and for making my time in Cambridge so memorable and enjoyable. I first learnt about the Goodhart Chair when I read the preface of Raoul van Caenegem's famous book on *Judges, Legislators and Professors: Chapters in European*

Legal History. It is based on a course of lectures given as Goodhart Professor in 1984/5. A few years later John Fleming also published his Goodhart Lectures for 1987/8 under the title *The American Tort Process*. The modest and preliminary reflections in this volume are quite different in scope and ambition from these predecessor volumes. Like them, however, the present collection of essays is inspired by the desire to establish a small token of my gratitude. It can only claim the title of 'Goodhart Lectures' in a very liberal sense of the word; for while the course I taught in 1998/9 in Cambridge did cover the work of the Contract Law Commission as well as my thoughts on set-off and prescription, it extended far beyond these topics in that it dealt with the development of European private law in general. But much of my time in Cambridge in the course of spring and summer 1999 was devoted to the preparation of the material presented in this volume.

Among my friends in Cambridge I am particularly grateful to David Johnston and Neil Andrews for sharing their thoughts on prescription with me. I also wish to record my thanks to Catherine Maxwell (Cape Town/Regensburg) and Oliver Radley-Gardner (Oxford/Regensburg) for their help in preparing this volume.

GOODHART LODGE
Summer 1999

ABBREVIATIONS

ABGB	Allgemeines bürgerliches Gesetzbuch
AC	Appeal Cases
Amb.	Ambler's Chancery Reports
AO	Abgabenordnung
AtomG	Atomgesetz
B & S	Best & Smith's Queen's Bench Reports
BGB	Bürgerliches Gesetzbuch
BGB-KE	Bürgerliches Gesetzbuch, Kommissionsentwurf (draft of the German law of prescription submitted by the commission charged with the reform of the law of obligations)
BGB-PZ	Bürgerliches Gesetzbuch, Peters and Zimmermann (draft of the German law of prescription submitted by Frank Peters and Reinhard Zimmermann at the request of the German minister of justice)
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
Burr.	Burrow's King's Bench Reports
BW	Burgerlijk Wetboek
CISG	Convention for the International Sale of Goods
DLR	Dominion Law Reports
ECJ	European Court of Justice
ER	English Reports
HaftpflG	Haftpflichtgesetz
Hare	Hare's Chancery Reports
HGB	Handelsgesetzbuch
HL	House of Lords

HR	Hoge Raad
Jac & W	Jacob & Walker's Chancery Reports
Lev	Levinz's King's Bench and Common Pleas Reports
LuftVG	Luftverkehrsgesetz
OJEC	Official Journal of the European Communities
OR	Bundesgesetz über das Obligationenrecht
PECL	Principles of European Contract Law
PflVersG	Pflichtversicherungsgesetz
PIQR	Personal Injuries and Quantum Reports
PrALR	Preußisches Allgemeines Landrecht
RabelsZ	*Rabels Zeitschrift für ausländisches und internationales Privatrecht*
SC	Session Cases
SCR	Supreme Court Reports
StVG	Straßenverkehrsgesetz
Willes	Willes Common Pleas Reports, ed. Dunford
WLR	Weekly Law Reports
ZGB	Schweizerisches Zivilgesetzbuch
ZGB (GDR)	Zivilgesetzbuch (German Democratic Republic)
ZPO	Zivilprozeßordnung

INTRODUCTION: TOWARDS A RESTATEMENT OF THE EUROPEAN LAW OF OBLIGATIONS

I THE EUROPEANIZATION OF PRIVATE LAW AND LEGAL SCHOLARSHIP

One of the most significant legal developments of our time has been the gradual emergence of a European private law.[1] This process was driven, initially, by the regulations and directives issued by the competent bodies of the European Union[2] and by the decisions of the European Court of Justice.[3] Our general frame of mind, however, has long

[1] See, e.g., the contributions to Nicolò Lipari (ed.), *Diritto Privato Europeo* (1997); Arthur Hartkamp, Martijn Hesselink et al., *Towards a European Civil Code* (2nd edn, 1998); Thomas G. Watkin (ed.), *The Europeanisation of Law* (1998) (also covering other areas of the law); Peter-Christian Müller-Graff (ed.), *Gemeinsames Privatrecht in der europäischen Gemeinschaft* (2nd edn, 1999); Martin Gebauer, *Grundfragen der Europäisierung des Privatrechts* (1998); Jan Smits, *Europees Privaatrecht in wording* (1999); Arthur Hartkamp, 'Perspectives for the Development of a European Civil Law', in Mauro Bussani and Ugo Mattei (eds.), *Making European Law: Essays on the 'Common Core' Project* (2000), pp. 39ff.; on contract law, see Jürgen Basedow, 'The Renascence of Uniform Law: European Contract Law and Its Components', (1998) 18 *Legal Studies* 121ff.

[2] For a collection of all directives (and other relevant texts) affecting the law of obligations, see Reiner Schulze and Reinhard Zimmermann (eds.), *Basistexte zum europäischen Privatrecht* (2000); see also Stefan Grundmann, *Europäisches Schuldvertragsrecht* (1999).

[3] On the importance of which see, for instance, the contributions by David A. O. Edward and Lord Mackenzie Stuart, both in David L. Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law* (1997), pp. 307ff., 351ff.; W. van Gerven, 'ECJ Case-Law as a Means of Unification

remained untouched by these developments; it is still predominantly moulded by the national systems of private law. Only comparatively recently has the perception been gaining ground that considerable efforts are required to overcome this somewhat anachronistic discrepancy; and that a new European legal culture can emerge, organically, only by an interaction of several, hitherto largely separate, disciplines: European community law and modern private law doctrine, comparative law[4] and legal history.[5] Also to be taken into account is the uniform private law based on international conventions and covering important areas of commercial law.[6] In a programmatic article published in 1990, Helmut Coing called for a 'Europeanization of Legal Scholarship',[7] and he drew attention to the *ius commune* as a historical, and to the private law of the United States as a modern, model. In the meantime, some measure of progress has been made. Legal periodicals have been established that pursue the objective of promoting the development of a European private law;[8] textbooks have been written that analyse particular areas of private law under a genuinely

of Private Law?', (1997) 5 *European Review of Private Law* 293ff.; most recently, see the analysis by Martin Franzen, *Privatrechtsangleichung durch die europäische Gemeinschaft* (1999), pp. 291ff.

4 See, e.g., Hein Kötz, 'Rechtsvergleichung und gemeineuropäisches Privatrecht', in Müller-Graff (n. 1) 149ff.; Abbo Junker, 'Rechtsvergleichung als Grundlagenfach', (1994) *Juristenzeitung* 921ff.

5 See, e.g., Reinhard Zimmermann, 'Das römisch-kanonische *ius commune* als Grundlage europäischer Rechtseinheit', (1992) *Juristenzeitung* 8ff.

6 See, e.g., Jan Ramberg, *International Commercial Transactions* (1997), and the contributions in Franco Ferrari (ed.), *The Unification of International Commercial Law* (1998).

7 Helmut Coing, 'Europäisierung der Privatrechtswissenschaft', (1990) *Neue Juristische Wochenschrift* 937ff.

8 The first ones were *Zeitschrift für Europäisches Privatrecht* and *European Review of Private Law*; both started to appear in 1993.

European perspective and deal with the rules of German, French or English law as local variations of a general theme;[9] ambitious research projects have been launched that attempt to find a 'common core' of the systems of private law prevailing in Europe;[10] more and more law faculties in Europe attempt to attain a 'Euro'-profile by establishing integrated courses and programmes with European partner faculties, or by setting up chairs in European private law or European legal history; bold schemes like the establishment of a European law school[11] or even of a European Law Institute are being discussed;[12] and so forth. Twenty years ago, all this was hardly imaginable.

[9] See the programme sketched by Hein Kötz, 'Gemeineuropäisches Zivilrecht', in *Festschrift für Konrad Zweigert* (1981), p. 498, and now implemented in Hein Kötz, *European Private Law*, vol. I (1997, transl. T. Weir); see also Christian von Bar, *The Common European Law of Torts*, vol. I (1998), vol. II (2000); Filippo Ranieri, *Europäisches Obligationenrecht* (1999). For the historical background, see Helmut Coing, *Europäisches Privatrecht*, vol. I (1985), vol. II (1989); Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, paperback edn 1996).

[10] On the Trento 'common core' project, see the contributions in Bussani and Mattei (n. 1). The first volume to have appeared is Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000).

[11] For proposals for a Europeanization of legal education, see Axel Flessner, 'Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung', (1992) 56 *RabelsZ* 243ff.; Gerard-René de Groot, 'European Legal Education in the Twenty-First Century', in Bruno de Witte and Caroline Forder (eds.), *The Common Law of Europe and the Future of Legal Education* (1992), pp. 7ff.; Hein Kötz, 'Europäische Juristenausbildung', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 268ff.; Roy Goode, 'The European Law School', (1994) 13 *Legal Studies* 1ff.

[12] Werner Ebke, 'Unternehmensrechtsangleichung in der Europäischen Union: Brauchen wir ein European Law Institute?', in *Festschrift für Bernhard Großfeld* (1999), pp. 189ff.

II THE COMMISSION ON EUROPEAN CONTRACT LAW

1 *First commission*

A particularly interesting initiative that has been taken, in this context, was the establishment of a Commission on European Contract Law. It came into being as a result of a private initiative but its work has been financially supported, for many years, by the Commission of the European Communities. The Contract Law Commission (which consisted initially of about fifteen lawyers drawn from all member states of the European Union) has set itself the task of working out Principles of European Contract Law and laying them down in a code-like form. For it was realized, at the outset, that the Rome Convention on the Law Applicable to Contractual Obligations was inadequate to ensure the smooth functioning of an internal market as envisaged by Art. 8 a of the EEC Treaty. Thus, already in 1976, Ole Lando called for a European Uniform Commercial Code.[13] In the course of two subsequent symposia in Brussels in 1980 and 1981 the commission constituted itself and decided on its schedule of work. By 1990, it had met twelve times in various European cities. It was chaired by Ole Lando of the Copenhagen Business School. England was represented by Roy Goode and, since 1987, Hugh Beale, Scotland by Bill Wilson. As the European Community increased, so did the Commission on European Contract Law: members for Spain, Portugal and Greece were co-opted. In 1995, after more than fourteen years of work, the first

[13] Ole Lando, 'Unfair Contract Clauses and a European Uniform Commercial Code', in Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (1978), pp. 267ff.

volume of the *Principles of European Contract Law* was published.[14] The preface lists all members of the commission and describes the working method that was adopted. The volume consists of an introductory overview which sets out the objectives pursued by the Principles and outlines their main content. This is followed by the text of the fifty-nine articles in which these Principles are laid down. The main part is made up of comments which have been drafted for every article; in addition, in most cases short comparative notes have been included. The volume is written in English; the provisions themselves, however, have also been translated into French. The Principles were subdivided into four chapters: the first containing 'general provisions', the second dealing with 'terms and performance of the contract' and the third and fourth being devoted to 'non-performance'.[15]

[14] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law*, Part I (1995). A French translation of the entire volume appeared in 1997: Isabelle de Lamberterie, Georges Rouhette and Denis Tallon (eds.), *Les principes du droit européen du contrat*. A German translation of the articles was published in (1995) 3 *Zeitschrift für Europäisches Privatrecht* 864ff.

[15] For comment, see Ole Lando, 'Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?', (1992) 56 *RabelsZ* 261ff.; Lando, 'Is Codification Needed in Europe? Principles of European Contract Law and the Relationship to Dutch Law', (1993) 1 *European Review of Private Law* 157ff.; Ulrich Drobnig, 'Ein Vertragsrecht für Europa', in *Festschrift für Ernst Steindorff* (1990), pp. 1141ff.; Hugh Beale, 'Towards a Law of Contract for Europe: The Work of the Commission on European Contract Law', in Günter Weick (ed.), *National and European Law on the Threshold to the Single Market* (1993), pp. 177ff.; Oliver Remien, 'Möglichkeiten und Grenzen eines europäischen Vertragsrechts', in (1991) *Jahrbuch Junger Zivilrechtswissenschaftler* 103ff.; Reinhard Zimmermann, 'Konturen eines Europäischen Vertragsrechts', (1995) *Juristenzeitung* 477ff.; and see the contributions to Hans-Leo Weyers (ed.), *Europäisches Vertragsrecht* (1997) and to the *Festskrift til Ole Lando* (1997).

2 *Second and third commissions*

By the time Part I of the Principles was published, a second commission had constituted itself and had started work on formation of contracts, validity, interpretation and agency. Since its inaugural meeting in 1992 the second commission has met eight times; it concluded its deliberations in 1996. Over the course of time, it has been joined by members for Austria, Sweden and Finland. Once again, the task of editing the work produced by the commission was undertaken by Ole Lando and Hugh Beale.[16] At the same time, Part I was slightly revised and amended. The volume published early in 2000, therefore, contains a consolidated version of Parts I and II. As a result, the numbering of the articles contained in volume I has changed, a fact which has occasionally caused slight irritation. In view of the way in which the Principles have originated this was, however, unavoidable. In its new version the Principles contain 131 articles organized into nine chapters; for the rest the structure of the volume corresponds to that of its forerunner.[17]

In the course of the final meeting of the second commission, a third commission was created which started its work in December 1997 in Regensburg. The topics under consideration are plurality of debtors and creditors, assignment of claims, substitution of debtor and transfer of contract, set-off, prescription, illegality, conditions and capitalization of interests. The third commission thus moves into a number

[16] Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law*, Parts I and II (2000). French and German translations of the entire volume are in preparation. For a German translation of the text of the articles, see Schulze and Zimmermann (n. 2) III.10.

[17] For comment, see Reinhard Zimmermann, 'Die "Principles of European Contract Law", Teile I und II', (2000) 8 *Zeitschrift für Europäisches Privatrecht* 391ff. and the contributions to (2000) *Nederlands Tijdschrift voor Burgerlijk Recht* 428ff.

of fields which have largely been neglected in comparative legal literature. In addition, some of the topics mentioned go beyond the area of contract law; they would be classified as belonging to the general law of obligations, or even the general part of private law, in Germany. The third commission is partly identical with the second (as was the second with the first); it numbers twenty-three members (plus observers from Norway and Switzerland). It is hoped that the results of the work of the third commission will be published in 2002 or 2003. The studies contained in the present volume have their origin in the context of that third commission.

III OBJECTIVES OF THE PRINCIPLES OF EUROPEAN CONTRACT LAW

The structure of what is now the consolidated version of Parts I and II shows that the Principles have been inspired by the idea of the American Restatements.[18] Like the Restatements, the Principles of European Contract Law are not aimed at becoming law that is directly applicable. Rather, according to the statement of their authors,[19] the Principles are intended (i) to facilitate cross-border trade within Europe by providing contracting parties with a set of rules which are independent of the peculiarities of the different national legal systems and on which they can agree to subject their transaction; (ii) to offer a general conceptual and systematic basis for the further harmonization of contract law within

[18] On which see, e.g., Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, 1998, transl. Tony Weir), pp. 251f.; W. Gray, 'E pluribus unum? A Bicentennial Report on Unification of Law in the United States', (1986) 50 *RabelsZ* 119ff.; James Gordley, 'European Codes and American Restatements: Some Difficulties', (1981) 81 *Columbia Law Review* 140ff.

[19] Lando and Beale (n. 16) xxi ff.

the European Union (the editors refer to an 'infrastructure for community laws governing contracts'); (iii) to mediate between the traditions of the civil law and the common law; (iv) to give shape to and to specify a modern European *lex mercatoria*; (v) to be a source of inspiration for national courts and legislatures in developing their respective contract laws; and finally (vi) to constitute a first step towards the codification of European contract law. Several of these objectives have also been pursued and have, at least partly, been achieved by the American Restatements. However, the Principles differ from the American Restatements in at least one important point. For while the Restatements were designed to lay down the law as it was currently applied, by means of a set of concise, clearly structured and easily comprehensible rules, the Principles, to a much greater extent, aim at harmonization of the law, i.e., from the point of view of the national legal systems, at reform and development of the law. But it is easy to exaggerate this contrast. For in spite of their common roots in the English common law, the legal systems of the various American states are nowadays probably less uniform than is often thought;[20] and thus the Restatements do not merely have a declaratory function, solely 'identifying' the common American private law. On the other hand, of course, the European systems of contract law have been characteristically moulded by a common tradition and, as a result, are based on common systematic, conceptual, doctrinal and ideological foundations which may be hidden behind, but have not been obliterated by, the scree material piled up in the course of the nationalization of legal development over the

[20] See Gray, (1986) 50 *RabelsZ* 111ff.; Mathias Reimann, 'Amerikanisches Privatrecht und europäische Rechtseinheit: Können die USA als Vorbild dienen?', in Reinhard Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht: Impressionen aus der Neuen Welt* (1995), pp. 132ff.

past two hundred years.[21] Thus, the editors of Parts I and II of the Principles expressly refer to a common core of contract law of all the member states of the European Union which has to be uncovered and which may still provide the basis for a modern set of rules. All in all, however, they concede that this is a somewhat more 'creative' task than that tackled by the draftsmen of the American Restatements.[22] The three essays collected in this volume will provide examples of uncovering a common core, of attempting to reconcile different approaches and of situations where a rational choice between conflicting solutions has to be made.

IV THE IDEA OF CODIFICATION TODAY

Parts I and II of the Principles were drafted at a time when the notion of codification has, once again, been gaining considerable attention.[23] Contrary to a view that used to be widely held, it has become increasingly clear that the idea of

[21] See Reinhard Zimmermann, '"Heard melodies are sweet, but those unheard are sweeter . . . ": Conditio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', (1993) 193 *Archiv für die Civilistische Praxis* 122ff., 166ff.; Zimmermann, 'Roman Law and European Legal Unification', in Hartkamp, Hesselink et al. (n. 1) 21ff.; Rolf Knütel, 'Rechtseinheit in Europa und römisches Recht', (1994) 2 *Zeitschrift für Europäisches Privatrecht* 244ff.; Eugen Bucher, 'Recht – Geschichtlichkeit – Europa', in Bruno Schmidlin (ed.), *Vers un droit privé commun? Skizzen zum gemeineuropäischen Privatrecht* (1994), pp. 7ff.

[22] Lando and Beale (n. 16) xxvi.

[23] Rodolfo Sacco, 'Codificare: modo superato di legiferare?', (1983) *Rivista di diritto civile* 117ff.; Karsten Schmidt, *Die Zukunft der Kodifikationsidee: Rechtsprechung, Wissenschaft und Gesetzgebung vor den Gesetzeswerken des geltenden Rechts* (1985); Franz Bydlinski, Theo Mayer-Maly and Johannes W. Pichler (eds.), *Renaissance der Idee der Kodifikation* (1992); Shael Herman, 'Schicksal und Zukunft der Kodifikationsidee in Amerika', in Zimmermann (n. 20) 45ff.; Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea', (1995) 3 *European Review of Private Law* 95ff.; and see the symposium 'Codification in the Twenty-First Century', (1998) 31 *University of California at Davis Law Review* 655ff.

codifying the law is not at all outdated. In view of the growing particularization of modern legal scholarship,[24] and the hectic activity of the modern legislature, legal systems require this kind of intellectual focus today more than ever before. This realization, for example, has prompted the Dutch legislature to recodify the entire system of Dutch private law. After a long period of deliberation and comparative studies, central parts of the new Burgerlijk Wetboek came into force in 1992. Thus, the Netherlands possesses, at least in the field of the law of obligations, the most modern European codification and one which has benefited from the experiences gathered in other countries.[25] Of even more recent date is the civil code of Québec which entered into force in 1994. Another interesting mixed legal system at the intersection between common law and civil law is just about to modernize its codification substantially.[26] In Germany, ambitious schemes to reform the entire law of obligations have been aborted, but a draft commissioned by the minister of justice and limited to the two most notorious problem areas[27] was published in 1992[28] and appears to have a chance of being implemented in due course.[29] The English Law

[24] On which see Reinhard Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', (1996) 112 *Law Quarterly Review* 582ff.; Albrecht Zeuner, 'Rechtskultur und Spezialisierung', (1997) *Juristenzeitung* 480ff.

[25] See Arthur Hartkamp, 'International Unification and National Codification and Recodification of Civil Law', in Attila Harmathy and Agnes Nemeth (eds.), *Questions of Civil Law Codification* (1990), pp. 67ff.

[26] See Joachim Zekoll, 'Zwischen den Welten: Das Privatrecht von Louisiana als europäisch–amerikanische Mischrechtsordnung', in Zimmermann (n. 20) 11ff.

[27] These are breach of contract and (liberative) prescription.

[28] Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992).

[29] Possibly in the context of implementation of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (25 May 1999) which has to occur by 1 January 2002. See Jürgen Schmidt-Räntsch,

Commission asked for the preparation of a Contract Code in 1966. The draft code, produced by Harvey McGregor, became known outside England in 1990 on the occasion of a conference in Pavia; and even though the project has been dropped in England, it was published jointly by Giuffré and Sweet and Maxwell in 1993.[30] In many states of Central and Eastern Europe, endeavours to replace the socialist civil codes by modern codifications have made remarkable progress.[31] The significance attached to this issue was reflected by the great interest displayed by the governments of these states in the Colloquium on Codification that was organized by the Council of Europe, in co-operation with the Czech secretary of justice, in September 1994 in Kroměříž.[32] In the area of international commerce, the success story of the (Vienna) Convention on Contracts for the International Sale of Goods of 1980 springs to mind; it has been adopted by close to fifty states (among them ten of the member states of the European Union[33]) and is

'Gedanken zur Umsetzung der kommenden Kaufrechtsrichtlinie', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 294ff.

[30] Harvey McGregor, *Contract Code: Drawn up on Behalf of the English Law Commission* (1993). Professor Gandolfi, in his foreword, compares the significance of this draft with man's landing in the moon and with the fall of the Iron Curtain.

[31] Thus, for example, Part I of the new Russian Civil Code entered into force on 1 January 1995, Part II on 1 March 1996. See Oleg Sadikov, 'Das neue Zivilgesetzbuch Rußlands', (1996) 4 *Zeitschrift für Europäisches Privatrecht* 258ff.; Sadikov, 'Das zweite Buch des neuen Zivilgesetzbuches Russlands', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 903ff. For an English translation, see Peter B. Maggs and A. N. Zhiltsov, *The Civil Code of the Russian Federation*, Parts I and II (1997).

[32] See the report by Miroslav Liberda in (1995) 3 *Zeitschrift für Europäisches Privatrecht* 672ff.

[33] It has not been implemented by Greece, Portugal, Belgium, the United Kingdom and Luxembourg; concerning Great Britain, see the comments by Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* (1993).

starting to give rise to a considerable amount of case law in the Convention's member states.[34]

Of particular significance for the private law of the European Union has been a resolution of 26 May 1989 by the European Parliament calling upon the member states to begin with the necessary preparations for the drafting of a uniform European code of contract law.[35] This was reemphasized in another resolution of 6 May 1994 which specifically endorsed and supported the work of the Commission on European Contract Law.[36] The Principles of European Contract Law were also warmly welcomed at the symposium 'Towards a European Civil Code' that was organized by the Dutch government early in 1997, at a time when the Netherlands chaired the Council of the European Union.[37]

V OTHER PROJECTS

Another initiative that has to be mentioned in the present context are the Principles of International Commercial Contracts, prepared by the International Institute for the Unification of Private Law in Rome (Unidroit) and published

[34] See Michael R. Will, *International Sales Law Under CISG: The First 284 or so Decisions* (1996); for Germany, see Ulrich Magnus, 'Stand und Entwicklung des UN-Kaufrechts', (1995) 3 *Zeitschrift für Europäisches Privatrecht* 202ff.; Magnus, 'Das UN-Kaufrecht: Fragen und Probleme seiner praktischen Bewährung', (1997) 5 *Zeitschrift für Europäisches Privatrecht* 823ff.; Magnus, 'Wesentliche Fragen des UN-Kaufrechts', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 642ff.

[35] See (1993) 1 *Zeitschrift für Europäisches Privatrecht* 613ff.

[36] See (1995) 3 *Zeitschrift für Europäisches Privatrecht* 669 and the comments by Winfried Tilmann, 'Zweiter Kodifikationsbeschluß des europäischen Parlaments', (1995) 3 *Zeitschrift für Europäisches Privatrecht* 534ff.

[37] See, e.g., the report by Winfried Tilmann, 'Towards a European Civil Code', (1997) 5 *Zeitschrift für Europäisches Privatrecht* 595ff., and the contributions collected in (1997) 5 *European Review of Private Law* 455ff.

late in 1994.[38] Their structure is similar to that of the Principles: each provision is followed by corresponding comments and illustrations. Comparative notes have, however, been deliberately excluded. It is unclear how this is supposed to emphasize the international character of the rules.[39] The Unidroit project[40] differs from that of the Commission on European Contract Law mainly in the fact that its objective is global, rather than merely European. As early as 1971, a group of three prominent comparative lawyers representing the civil law, common law and socialist legal families were entrusted with the preparation of the project, until, almost simultaneously with the Commission on European Contract Law, a working group of almost twenty members started with the preparation of a set of Principles. That group included, among others, members from the United States,

[38] Unidroit (ed.), *Principles of International Commercial Contracts* (1994). See also Michael Joachim Bonell, *An International Restatement of Contract Law* (2nd edn, 1997). A German translation of the entire book has appeared under the title *Grundregeln der internationalen Handelsverträge ('Unidroit-Prinzipien')*; for the text of the articles, see also Schulze and Zimmermann (n. 2) III.15.

[39] Unidroit, *Principles* (n. 38) viii.

[40] On which see, e.g., Jürgen Basedow, 'Die Unidroit-Prinzipien der internationalen Handelsverträge und das deutsche Recht', in *Gedächtnisschrift für Alexander Lüderitz* (2000), pp. 1ff.; Klaus-Peter Berger, 'Die Unidroit-Prinzipien für internationale Handelsverträge: Indiz für ein autonomes Wirtschaftsrecht?', (1995) *Zeitschrift für Vergleichende Rechtswissenschaft* 217ff.; Michael Joachim Bonell, 'Die Unidroit-Prinzipien der internationalen Handelsverträge: Eine neue Lex Mercatoria?', (1996) 37 *Zeitschrift für Rechtsvergleichung* 152ff.; Arthur Hartkamp, 'The Unidroit Principles for International Commercial Contracts and the Principles of European Contract Law', (1994) 2 *European Review of Private Law* 341ff.; Johann Christian Wichard, 'Die Anwendung der Unidroit-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte', (1996) 60 *RabelsZ* 269ff.; and the contributions by various authors published in (1992) 40 *American Journal of Comparative Law* 617ff. and in (1995) 69 *Tulane Law Review* 1121ff.

Japan, China, Australia, Québec and Ghana. Like the Commission on European Contract Law the Unidroit working group consists predominantly of professors, though some of them simultaneously pursue careers in practice. A certain degree of co-ordination between the two groups was (and continues to be) achieved as a result of the fact that several members belonged (and continue to belong) to both of them. In most areas both sets of Principles follow a very similar approach and come to similar, or even identical, solutions. By the time when Part I of the Principles of European Contract Law was published, the Unidroit Principles were ahead insofar as they already contained rules on formation, validity and interpretation. With the publication of the consolidated version of Parts I and II the Commission on European Contract Law has taken the lead in that it includes rules on the authority of agents. Unidroit is currently dealing with this topic; apart from that, it has an agenda which very largely corresponds to that of the European Contract Law Commission.[41]

Other projects aiming at providing sets of Principles of European Private Law are under way. In Pavia an 'Academy of European Private Lawyers' established itself in 1990 and

[41] For further discussion of the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts, of their legal nature and their relationship with the national legal systems, and of other means of unifying international commercial law, see Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1999); Berger, 'Einheitliche Rechtsstrukturen durch außergesetzliche Rechtsvereinheitlichung', (1999) *Juristenzeitung* 369ff.; Franco Ferrari, 'Das Verhältnis zwischen den Unidroit-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen', (1998) *Juristenzeitung* 9ff.; Ralf Michaels, 'Privatautonomie und Privatkodifikation: Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien', (1998) 67 *RabelsZ* 580ff.; Paul-A. Crépeau and Elise M. Charpentier, *Les Principes d'Unidroit et le Code civil du Québec: valeurs partagées?* (1998); and the contributions to Jürgen Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000).

is busy, under the direction of Giuseppe Gandolfi, drafting a European Contract Code.[42] The approach and methodology adopted by the Academy appear to be quite different from that of both the Commission on European Contract Law and Unidroit. In particular, the Academy has decided to adopt as models for its work Book IV of the Italian *codice civile* (as taking an intermediate position between the two principal strands which form the continental civil law, i.e., the French and the German) and the McGregor Code.[43] In 1999 an International Working Group on European Trust Law produced a volume entitled *Principles of European Trust Law*, containing a set of principles, a commentary and national reports for Scotland, Germany, Switzerland, Italy, France, Spain, Denmark and the Netherlands.[44] Since 1992 a group of scholars in the area of delict/tort has met on a regular basis to discuss fundamental issues of delictual liability and the future structure and direction of a European law of tort/delict. Several volumes dealing with individual issues of central importance have been published;[45] on this basis a set of European Principles will be elaborated. The most ambitious project, so far, is the Study Group on a European Civil Code which was established in 1998 by Christian von Bar and which aims at identifying fundamental rules covering the law relating to economic assets (or the patrimony)

[42] See, e.g., Giuseppe Gandolfi, 'Pour un code européen des contrats', (1992) *Revue internationale de droit comparé* 707ff.

[43] See n. 30.

[44] D. J. Hayton, S. C. J. J. Kortmann and H. L. E. Verhagen, *Principles of European Trust Law* (1999).

[45] Jaap Spier (ed.), *The Limits of Liability* (1996); Spier (ed.), *The Limits of Expanding Liability* (1998); Helmut Koziol, *Unification of Tort Law: Wrongfulness* (1998); for general background, see Ulrich Magnus, 'Elemente eines europäischen Deliktsrechts', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 602ff.; Spier and Olav A. Haazen, 'The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 469ff.

at large.[46] Three working groups have been established, one in Osnabrück dealing with non-contractual obligations, one in Hamburg dealing with secured transactions and financial services and one in Tilburg/Utrecht dealing with sales and services. These rules will be presented, eventually, in the form of a Restatement with commentary. The Principles of European Contract Law will form an integral part of this overarching structure.

I should perhaps add that personally I have regarded my work in the (third) Commission on European Contract Law as a particularly stimulating opportunity for furthering the development of a European legal scholarship in the field of private law. This, I think, is of far greater importance today than the implementation of a European code of contract law.[47] Even if such a code should, one day, be implemented,[48]

[46] Christian von Bar, 'Die Study Group on a European Civil Code', in *Festschrift für Dieter Henrich* (2000), pp. 1ff.

[47] I have expressed my views, in that regard, in 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', (1996) 112 *Law Quarterly Review* 576ff. and in the Clarendon Lectures for 1999 which will by published by Oxford University Press in 2001 under the title *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*. See also, e.g., the discussion in Reiner Schulze, 'Allgemeine Rechtsgrundsätze und europäisches Privatrecht', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 442ff.; Christoph Schmid, 'Anfänge einer transnationalen Privatrechtswissenschaft in Europa', (1999) 40 *Zeitschrift für Rechtsvergleichung* 213ff.; Jürgen Basedow, 'Anforderungen an eine europäische Zivilrechtsdogmatik', in Reinhard Zimmermann, Rolf Knütel and Jens Peter Meincke (eds.), *Rechtsgeschichte und Privatrechtsdogmatik* (2000), pp. 79ff.

[48] For forceful arguments in favour of a code on the law of obligations, see Winfried Tilmann, 'Artikel 100 a EGV als Grundlage für ein Europäisches Zivilgesetzbuch', in *Festskrift* (n. 15) 351ff.; Jürgen Basedow, 'Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex', (2000) 200 *Archiv für die Civilistische Praxis* 445ff.; see also Ole Lando, 'The Principles of European Contract Law After Year 2000', in Franz Werro (ed.), *New Perspectives on European Private Law* (1998), pp. 59ff. and the contributions to Dieter Martiny and Norman Witzleb (eds.), *Auf dem Wege zu einem Europäischen*

it will benefit much from the kind of intensive scholarly endeavour that preceded the drafting of the German Civil Code at the end of the nineteenth century. Primarily, therefore, I see the Principles of European Contract Law as an attempt to provide a starting point and conceptual focus for a discussion of problems in contract law transcending the borders of the individual legal systems; and also as a yardstick against which the solutions in the national legal systems may be evaluated. The Principles, in other words, might serve a similar function as did Roman law in those parts of nineteenth-century Germany where a codification of private law (the Prussian code, the Austrian code, the *code civil*, the Saxonian Civil Code, etc.) prevailed: they may constitute a conceptual basis for the comprehension of all particular laws prevailing in Europe.[49]

Zivilgesetzbuch (1999). For a contrary view, e.g., Pierre Legrand, 'Against a European Civil Code', (1997) 60 *Modern Law Review* 44ff.

[49] See, for nineteenth-century Germany, Paul Koschaker, *Europa und das römische Recht* (4th edn, 1966), p. 292; see also Reiner Schulze, 'Vergleichende Gesetzesauslegung und Rechtsangleichung', (1997) *Zeitschrift für Rechtsvergleichung* 193. For first steps in that direction concerning Québec and German law, see Crépeau and Charpentier and the contributions in Basedow (both n. 41).

1

CONTOURS OF A EUROPEAN LAW OF SET-OFF

I SIX PRELIMINARY POINTS

For the purposes of this chapter, the following legal systems have been taken into account: Austrian law, Dutch law, English law, French law, German law, Greek law, Italian law, Scots law, Spanish law and Swedish law. Belgian, Danish, Finnish, Irish and Portuguese law have been insufficiently accessible to me.[1] Following the approach adopted, for instance, by Zweigert and Kötz,[2] French, English and German law are regarded as the prime exponents of the three major 'legal families' traditionally recognized within Europe.[3] Specific attention will also be paid to Dutch and Italian law in view of the fact that both countries, in the process of recodifying their private law, have drawn on the (continental) comparative experience and can no longer simply be regarded as

[1] Danish law, in this area, largely corresponds to Swedish law: see B. Gomard, *Obligationsret*, 3rd part (1993), pp. 177ff. and the overview by Inger Dübeck, *Einführung in das dänische Recht* (1996), pp. 199f.; Belgian law is very similar to French law: see H. de Page, *Traité élémentaire de droit civil Belge*, vol. III (3rd edn, 1967), pp. 613ff. and the overview by J. Herbots, *Contract Law in Belgium* (1995), n. 387.

[2] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, 1998, transl. Tony Weir), pp. 323ff.

[3] On the notion of 'legal families' and its usefulness for comparative studies, see Hein Kötz, 'Abschied von der Rechtskreislehre?', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 493ff.

members of the 'Romanistic' legal family.[4] But, as will become apparent, other legal systems (such as, in the present context, the Nordic ones) are also able to contribute valuable experiences.[5]

The first two propositions are straightforward. (i) All legal systems under consideration recognize that a debtor may, under certain circumstances, defeat his creditor's claim in view of a cross-claim against that creditor. All legal systems, in other words, recognize the institution of set-off (compensation/Aufrechnung/verrekening/kvittning).[6] (ii) The most important effect of set-off in all legal systems consists in a discharge of the obligations of the debtor

[4] As far as the *codice civile* is concerned see, e.g., Giorgio Cian, 'Fünfzig Jahre italienischer Codice civile', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 120ff.; concerning the Burgerlijk Wetboek, see Ulrich Drobnig, 'Das neue niederländische Gesetzbuch aus rechtsvergleichender Sicht', (1993) 1 *European Review of Private Law* 171ff. Generally on the idea of codification in contemporary Europe, see above pp. 9ff.

[5] On the fundamental unity of private law in the Nordic countries, see Zweigert and Kötz (n. 2) 276ff.; Gebhard Carsten, 'Europäische Integration und nordische Zusammenarbeit auf dem Gebiet des Zivilrechts', (1993) *Zeitschrift für Europäisches Privatrecht* 335ff.; see also the observations in Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape', in Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000), pp. 55ff.

[6] It should, however, be noted that set-off tends to be recognized only at a fairly mature stage within the development of a legal system. For Roman law, see Heinrich Dernburg, *Geschichte und Theorie der Kompensation* (2nd edn, 1868), pp. 15ff.; W. W. Buckland and Peter Stein, *A Textbook of Roman Law from Augustus to Justinian* (3rd edn, 1963), p. 703; Michael E. Tigar, 'Automatic Extinction of Cross-Demands: Compensatio from Rome to California', (1965) 53 *California Law Review* 226ff. For medieval Germanic law, see Werner Ogris, 'Aufrechnung', in *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 1 (1971), cols. 254ff. For France, see Dernburg 272ff. For English law, see Roy Goode, *Legal Problems of Credit and Security* (2nd edn, 1988), pp. 132ff.; Rory Derham, *Set-Off* (2nd edn, 1996), pp. 7ff.

and the creditor towards each other, as far as they are coextensive.[7]

Two more preliminary points should be uncontroversial. (iii) All legal systems allow set-off by agreement: two parties may agree to discharge their mutual obligations by setting off one against the other.[8] This follows from the general recognition of freedom of contract. The admissibility of contractual set-off appears to be so self-evident that most codifications do not even mention it.[9] (iv) Set-off must be distinguished from counterclaim ('Widerklage').[10] The latter is a purely

[7] France: 'les deux dettes s'éteignent réciproquement' (Art. 1290 *code civil*); England: 'to the extent of his set-off . . . discharged from performance' (*Halsbury's Laws of England*, vol. XLII (4th edn, 1983), n. 410); Germany: 'daß die Forderungen, soweit sie sich decken, als . . . erloschen gelten' (§ 389 BGB); Netherlands: 'gaan beide verbintenissen tot hun gemeenschappelijk beloop teniet' (Art. 6:127 BW).

[8] See the overview provided by Philip R. Wood, *English and International Set-Off* (1989), 24-43ff.; for England, see Derham (n. 6) 540ff.; for Scotland: William W. McBryde, *The Law of Contract in Scotland* (1987), 22-70; for Germany: Joachim Gernhuber, *Die Erfüllung und ihre Surrogate* (1994), pp. 326ff.; for Austria: Silvia Dullinger, *Handbuch der Aufrechnung* (1995), pp. 295ff. There is now a comprehensive monograph by Klaus-Peter Berger, *Der Aufrechnungsvertrag* (1996). Usually the parties resort to set-off by agreement if one or other of the normal requirements for set-off is not met. This is particularly obvious for the French *compensation conventionnelle*, or *facultative*; see François Terré, Philippe Simler and Yves Lequette, *Droit Civil: Les Obligations* (5th edn, 1993), n. 1312. An agreement for a current account implies that the debits and credits will be set off against each other at each balancing of the account; on set-off in current account relationships, see Wood, 3-1ff.; Berger, 173, 285ff.; Art. 6:140 BW; C. J. van Zeben, J. W. du Pon and M. M. Olthoff, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek*, Boek 6 (1981), pp. 517ff.; for a comparative evaluation, see Wood, 24-36ff.

[9] But see Art. 1252 *codice civile* (compensazione voluntaria).

[10] For France, see Terré, Simler and Lequette (n. 8) n. 1313; for England, see Sheelagh McCracken, *The Banker's Remedy of Set-Off* (1993), pp. 117ff.; Wood (n. 8) 6-1ff.; Derham (n. 6) 2f.; Gerhard Kegel, *Probleme der Aufrechnung: Gegenseitigkeit und Liquidität rechtsvergleichend dargestellt* (1938), pp. 14ff.; for Germany, see Leo Rosenberg, Karl-Heinz Schwab and Peter Gottwald, *Zivilprozeßrecht* (15th edn, 1993), pp. 552ff.

procedural device which, under certain circumstances, allows the court to consider the claimant's action and an independent cross-action brought by the defendant in the same proceedings. The present paper does not deal with counterclaim but confines itself to set-off.

(v) A note on terminology: six member states of the European Union use a term derived from the Latin 'compensatio'. Austrian law uses it as an alternative to 'Aufrechnung'.[11] And even though 'set-off' is now in common use in Scotland, the traditional Scottish term is 'compensation'.[12] Since it is therefore used, or at least understood, in the three major linguistic families within the EU, the term 'compensation' may well be regarded as the most suitable choice for a set of principles of European law. On the other hand, however, it must also be taken into account that 'compensation' has a different meaning for English lawyers[13] and might therefore be a source of ambiguity or misunderstanding. Thus, somewhat reluctantly, we will continue to use the term 'set-off'. (vi) Set-off has not traditionally been a topic to which a large amount of scholarly attention has been devoted.[14] In some countries there are now signs of a change in attitude.[15] But the comparative literature remains very sparse.[16] At the same time, it

[11] See Helmut Koziol and Rudolf Welser, *Grundriß des bürgerlichen Rechts*, vol. I (10th edn, 1995), p. 277.

[12] McBryde (n. 8) 22-48; see also *The Laws of Scotland: Stair Memorial Encyclopedia*, vol. XV (1996), n. 877.

[13] See, e.g., David M. Walker, *The Oxford Companion to Law* (1980), p. 262; Peter Cane, *The Anatomy of Tort Law* (1997), pp. 103ff., 231ff.

[14] This may be due to the fact that 'set-off is a body of law that offers fearsome technicalities but few issues that really stir the blood' (see the quotation in Derham (n. 6) vii).

[15] Particularly in England. See the monographs by Goode, McCracken and Derham (nn. 6, 10) and the handbook by Wood (n. 8). For Germany, see the work by Berger (n. 8); for Austria the work by Dullinger (n. 8).

[16] For significant contributions, see Wilhelm Haudek, 'Kompensation (Aufrechnung)', in *Rechtsvergleichendes Handwörterbuch für das Zivil- und*

should be noted that set-off is of very considerable practical significance, on both a national and an international level.[17] It covers an enormous range of situations, including, perhaps most prominently, banking relationships.[18] The present paper, however, attempts to map out the contours of a general regime of set-off without taking account of specificities arising in the field of banking law.

II PROCEDURAL OR SUBSTANTIVE NATURE OF SET-OFF?

1 *A civil law/common law divide?*

The first important issue to be determined is whether set-off should be regarded as a purely procedural device or as a matter of substantive law. At first blush, we appear to be dealing with a clear-cut civil law/common law divide with Scotland, in this instance,[19] joining English law. Roy Goode, in particular, has emphasized the purely procedural character of

Handelsrecht des In- und Auslandes (ed. F. Schlegelberger), vol. v (1936), pp. 58ff.; Kegel (n. 10); Heiko Eujen, *Die Aufrechnung im internationalen Verkehr zwischen Deutschland, Frankreich und England* (1975); Wood (n. 8) 24-1ff. Most recently, see the comparative remarks, focusing on Italian law, by Giorgio Cian, 'Hundert Jahre BGB aus italienischer Sicht', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 219ff. and Gerhard Wagner, 'Die Aufrechnung im europäischen Zivilprozeß', (1999) *Praxis des Internationalen Privat- und Verfahrensrechts* 65ff.

[17] '[It] plays a crucial role in international financial and commercial affairs': Wood (n. 8) vii.

[18] The 'Banker's Remedy of Set-Off' (see the title of Sheelagh McCracken's book) was prominent in Roman law already; it was referred to as *agere cum compensatione*. For details see the literature quoted in n. 25.

[19] On the traditionally close relationship between Scots law and continental civil law, see, however, the contributions in David L. Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997); on its development as a mixed legal system, see Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland*, 2 vols. (2000).

set-off.[20] All continental legal systems, on the other hand, agree on the substantive nature of set-off. This difference, according to Professor Goode,[21] is reflected in the fact that the civilian set-off operates retrospectively to extinguish the claim *pro tanto* at the moment the cross-claim becomes due, whereas set-off in English law takes effect on and from the date of judgment. English law, in other words, is based on a two-stage inquiry. The courts first have to determine whether, as a matter of substantive law, the defendant owes to the claimant the sum claimed by the latter. If this has been established, judgment would normally have to be against the defendant. In view of the defendant's claim against the claimant, the court may now dismiss the claim (or grant judgment for a reduced sum).[22] But up to the moment of judgment, the defendant is liable to the claimant for the full amount of the claimant's claim. This has a number of consequences.[23] Most importantly, perhaps, neither the mere assertion of the cross-claim nor its assertion prior to legal proceedings provides justification for withholding payment. As a result, the claimant is not prevented from exercising his extrajudicial rights and remedies for default, such as termination of the contract.

2 *The civilian experience*

Upon closer inspection, however, the differences between the English and continental models of set-off do not appear to

[20] Goode (n. 6) 132f., 138ff.; and see the references in McCracken (n. 6) 113ff. But cf. Roy Goode, *Commercial Law* (2nd edn, 1995), p. 671 ('What is not clear is whether set-off is purely procedural, so that it does not relieve the defendant from liability in respect of the plaintiff's claim except at the point of judgment, or whether in certain circumstances it operates as a substantive defence').

[21] Goode (n. 6) 139. [22] See, e.g., *Halsbury* (n. 7) n. 410.

[23] See Wood (n. 8) 2-192ff.; Goode (n. 6) 144f.

be quite as deeply rooted. In the first place it has to be remembered that the continental model originated in Roman law. Yet one of the most characteristic features of set-off in Roman law was its distinctly procedural flavour.[24] Whether – and, if so, in which manner and under which circumstances – a set-off could be effected depended entirely on the nature of the formula applicable in a given situation. Four different regimes were eventually developed:[25] the one relating to *bonae fidei iudicia*, the next to *actiones stricti iuris* in general, the third to a specific *actio stricti iuris* concerning bankers (*argentarii*) where an automatic set-off was built into the formula and the fourth one operating with regard to debts due to an insolvent estate. With the demise of the classical formulary procedure, we find a trend towards assimilation and generalization which culminated in Justinian's Corpus Juris Civilis.[26] According to Inst. IV, 6, 30, Justinian's streamlined form of set-off operated 'ut actiones ipso iure minuant'.[27] This phrase, which seems to be in strange contrast to the language used in other places of the Corpus Juris,[28] has given rise to intense disputes lasting from the thirteenth to

[24] Both Gaius and Justinian deal with set-off as part of their discussion of the law of actions: Gai. IV, 61ff.; Inst. IV, 6, 30. For modern English law see, e.g., Peter Birks (ed.), *English Private Law*, vol. II (2000), where set-off is dealt with in the chapter on civil procedure (19.174ff.).

[25] For details, see Max Kaser, *Das römische Privatrecht: Erster Abschnitt* (2nd edn, 1971), pp. 644ff.; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, paperback edn 1996), pp. 761ff.

[26] See Max Kaser, *Das römische Privatrecht: Zweiter Abschnitt* (2nd edn, 1975), pp. 447f.; Zimmermann (n. 25) 766f.

[27] See also C. 4, 31, 14: 'Compensationes ex omnibus actionibus ipso iure fieri sancimus.'

[28] See C. 4, 31, 14, 1 ('compensationis obici iubemus', 'opponi compensationem'). Whether texts like C. 4, 31, 4, Paul. D. 16, 2, 4 and Paul. D. 16, 2, 21 are interpolated (as is very widely assumed) needs to be examined again. The phrase 'ipso iure' may have been used by the classical jurists.

the twentieth centuries.[29] Two different schools of thought eventually emerged. The one found its clearest expression in Art. 1290 *code civil*: 'La compensation s'opère de plein droit par la seule force de la loi, même à l'insu des débiteurs.'[30] As soon as (and to the extent that) two debts capable of being set off against each other confront each other, both of them are extinguished *ipso iure*.[31] French courts and legal writers have not, however, found it practical to implement this regime in its most literal and uncompromising form. Set-off is held to be effective only if the defendant raises it in court.[32] Strictly speaking, therefore, the automatic discharge of the two debts confronting each other is subject to a *condicio iuris* that the defence of compensation be pleaded in court.[33]

The other school of thought, dating back to the glossator Azo,[34] always insisted on the necessity of a declaration by

[29] For details, see Dernburg (n. 6) 281ff.; Fridolin Eisele, *Die Compensation nach römischem und gemeinem Recht* (1876), pp. 211; Tigar, (1965) 53 *California Law Review* 235ff.; Otto Prausnitz, *Die Geschichte der Forderungsverrechnung* (1928), pp. 133ff.; J. H. Loots and P. van Warmelo, 'Compensatio', (1956) 19 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 176ff.; Pascal Pichonnaz, 'The Retroactive Effect of Set-Off (Compensatio)', (2000) 68 *Tijdschrift voor rechtsgeschiedenis* 547ff.

[30] Essentially the same regime was adopted in the Netherlands (Art. 1462 old BW), in Spain (Art. 1.202 *código civil*), in Italy (Art. 1286 *codice civile* of 1865) and also in Austria (§ 1438 ABGB).

[31] On the term 'ipso iure' in this context, see Robert Joseph Pothier, *Traité des obligations*, in *Oeuvres, Paris* (1835), § 635: 'Cette interprétation est conforme à l'explication que tous les lexicographes donnent à ces termes, ipso iure. Ipso iure fieri dicitur, dit Brisson, quod ipsa legis potestate et auctoritate, absque magistratus auxilio et sine exceptionis ope fit . . . Verba ipso iure, dit Spigelius, intellegitur sine facto hominis. Ipso iure consistere dicitur, dit Pratejus, quod ex sola legum potestate et auctoritate, sine magistratus opera consistit.'

[32] Terré, Simler and Lequette (n. 8) n. 1311 ('en dépit de la lettre de l'article 1290').

[33] Haudek (n. 16) 64.

[34] '[S]ed ego puto ea[m] ipso iure tunc demum fieri cum a partibus est opposita': *Summa Codicis*, Lib. IV, 'De compensationibus rubrica' (p. 140, left column, in Azo, *Summa Codiciis*, Lugduni, 1552).

the defendant in the course of the legal proceedings brought against him, to set off his claim against that of the claimant. The effect of that declaration, however, is retroactive: the claims are 'deemed to have expired, *pro tanto*, at the moment when they first confronted each other being suitable for set-off'.[35] Down to the end of the nineteenth century, it was maintained by influential authors that the *exceptio compensationis* had to be raised in court.[36] The draftsmen of the BGB eventually decided to give in to a strong tendency to regard an extrajudicial declaration to the other party as sufficient to effect set-off.[37] While, therefore, the substantive character of set-off is undisputed in both French and German law, it is still remarkable that there traditionally used to be (Germany) or still is (France) a procedural side to it.

3 *The English experience*

Secondly, the differences are also reduced in significance if we look at the English experience. Set-off in English law developed slowly. General recognition of set-off was only brought about by two statutes dating from the first half of the eighteenth century.[38] According to s. 13 of the Insolvent Debtors

[35] See § 389 BGB.

[36] See Dernburg (n. 6) 529ff.; Bernhard Windscheid and Theodor Kipp, *Lehrbuch des Pandektenrechts* (9th edn, 1906 (reprint 1963)), § 349, 5 (acknowledging, however, that the contrary view was widespread in practice); cf. also Pichonnaz, (2000) 68 *Tijdschrift voor rechtsgeschiedenis* 552ff.

[37] For the background, see Franz von Kübel, *Recht der Schuldverhältnisse*, part 1 of Werner Schubert (ed.), *Die Vorlagen für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches* (1980), pp. 1075ff.; 'Motive', in Benno Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol. II (1899), pp. 58f. The same approach has been adopted in Greece (Art. 441 ZGB) and in the Netherlands (Art. 6:127 (1) BW).

[38] For details, see William H. Loyd, 'The Development of Set-Off', (1916) 64 *University of Pennsylvania Law Review* 551ff.; Goode (n. 6) 133ff.; McCracken (n. 10) 53ff.; Derham (n. 6) 9ff.

Relief Act of 1729 (which was confirmed and amended by s. 4 of the Debtors Relief Amendment Act of 1735), where there are mutual debts between the claimant and the defendant, 'one Debt may be set against the other'. These Statutes of Set-Off were designed to avoid circuity of action and multiplicity of suits.[39] At the same time, they aimed at mitigating the rigour of the common law:[40] recognition of set-off, so it was stated, was 'highly just and reasonable at all times'.[41] Prior to the enactment of the statutes, the Court of Chancery had occasionally intervened in order to assist defendants on the basis of a cross-claim against the claimant.[42] But equitable relief was usually either founded upon a custom that the accounts should be balanced, or on an implied agreement to this effect.[43] Apart from that, set-off was recognized in bankruptcy.[44] The Statutes of Set-Off stimulated the Court of Chancery to develop a set of rules which came to be known as equitable set-off and covered a considerably wider range of cases.[45] The resulting

[39] See, e.g., *Hutchison v. Sturges*, (1741) Willes 261, 125 ER 1163, at 1163–4 (per Willes, C. J.) and the references in Derham (n. 6) 9.

[40] Goode (n. 6) 135. [41] See McCracken (n. 10) 54.

[42] See the references in Loyd, (1916) 64 *University of Pennsylvania Law Review* 547ff.; Goode (n. 6) 134; and Derham (n. 6) 7f., 38. There may be an intellectual link between cross-claim in Chancery and the civilian *reconventio* (counterclaim) procedure; Tigar, (1965) 53 *California Law Review* 249 refers to (Lord Chief Justice) Gilbert, *The History and Practice of the High Court of Chancery* (1758), pp. 45ff., for this proposition. It is not unlikely that proceedings in Chancery may have been inspired, more particularly, by the treatment of cross-demands in canon law. The canonists referred to 'mutuae petitiones' (which, in turn, they took from C. 4, 31, 6): see Tigar, 242ff.

[43] Derham (n. 6) 7.

[44] For the development of insolvency set-off, see Goode (n. 6) 134f.; Derham (n. 6) 158ff.

[45] For details, see Goode (n. 6) 136f.; McCracken (n. 10) 57ff.; Derham (n. 6) 38ff. Civilian ideas may have played a role: Kegel (n. 10) 12; Loyd, (1916) 64 *University of Pennsylvania Law Review* 546ff.; and see the discussion by Joseph Story, *Commentaries on Equity Jurisprudence* vol. II (13th edn, 1886

discrepancy between equitable and statutory set-off has been considerably reduced as a result of the fusion of common law and equitable jurisdiction by the Supreme Court of Judicature Act of 1873. All courts are now empowered to administer both equity and law. Still, modern authors continue to distinguish between statutory and equitable set-off even though it is acknowledged that, as a result of the expansion of the latter, the former has become of significantly less importance.[46]

It is obvious that, like its continental counterpart, set-off originated as a procedural device. Much less obvious is the answer to the question whether it still has to be considered in this light. For even if it has to be pleaded in court, such a plea may still be based on a substantive defence. This is indeed the view increasingly taken by modern English commentators, as far as equitable set-off, or at least certain forms of it, are concerned.[47] The arguments advanced are complex and largely, of course, turn on the correct interpretation of the relevant case law. It is not possible to attempt, within the wider framework of this chapter, to present an independent evaluation of these cases and come to a considered conclusion as to the true nature of set-off in English law. Still, it is significant to note that a strong body of opinion now favours

(reprint 1988)), nn. 1430ff.; William David Evans and Robert Joseph Pothier, *A Treatise on the Law of Obligations*, translated from the French, vol. II (Appendix) (1826), pp. 98ff.; and Tigar, (1965) 53 *California Law Review* 249ff. Roman law was discussed in, *inter alia*, *Whitaker v. Rush*, (1761) Amb., 27 ER 272 and *Freeman v. Lomas*, (1851) 9 Hare 109, 68 ER 435, 437. Lord Mansfield's statement in *Green v. Farmer*, (1768) 4 Burr. 2214, 98 ER 154 ('Natural equity says, that cross-demands should compensate each other, by deducting the lesser sum from the greater; and that the difference is the only sum which can be justly due') is often referred to. Lord Mansfield, however, continues: 'But positive law, for the sake of the forms of proceedings and convenience of trial, has said that each must sue and recover separately.'

46 Goode (n. 6) 154f.

47 McCracken (n. 10) 111ff.; Derham (n. 6) 56ff.; Wood (n. 8) 4-1ff.

the substantive nature of equitable set-off.[48] There is, as yet, no agreement, as to what exactly that entails. According to Derham,[49] the creditor as a matter of equity is not entitled to treat the debtor as being indebted to him if there is an entitlement to an equitable set-off. While the cross-demands, as a matter of law, remain in existence between the parties until extinguished by judgment, it is unconscionable, in equity, for the creditor even before then to regard the debtor as being in default under these circumstances. Philip R. Wood goes even further when he asserts that set-off may be exercised either as a self-help remedy or in judicial proceedings and that, for default purposes, it should be retroactive to the time when the debtor's cross-claim accrued.[50]

From the point of view of comparative jurisprudence, the modern approach is attractive for at least two reasons. While it has never been doubted that insolvency set-off aims to do justice between the parties,[51] it recognizes that equitable set-off, too, is based on notions of fairness and natural justice.[52] As a result, all forms of set-off appear to be rooted in a common set of values and can thus be regarded as emanations of one and the same substantive idea rather than of somewhat idiosyncratic procedural technicalities. Such an analysis would, moreover, tie in very well with the underlying rationale traditionally advanced for set-off in continental jurisprudence: that a person who sues another for an amount which he is bound to pay to him is acting in contravention of the precepts of good faith (*dolo petit qui petit quod statim redditurus est*).[53] In the second place, there can be no doubt

[48] Derham (n. 6) 56ff.; Wood (n. 8) 4-1ff. [49] Derham (n. 6) 57.
[50] Wood (n. 8) 4-24ff. [51] McCracken (n. 10) 48ff.; Goode (n. 6) 135.
[52] See, in particular, McCracken (n. 10) 53ff., 66ff.
[53] Dernburg (n. 6) 361; Windscheid and Kipp (n. 36) § 349, 2; Börries von Feldmann, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (3rd edn, 1994), § 387, n. 1; Berger (n. 8) 61ff. The 'dolo petit' rule appears in Paul. D. 44, 4, 8 pr.

that both insolvency set-off and set-off by agreement are substantive in nature. This is immediately obvious for the latter form of set-off: the parties agree extrajudicially to set off their mutual claims against each other.[54] But it is also generally acknowledged for insolvency set-off: it operates automatically upon the occurrence of a bankruptcy or a winding-up so as to bring about a set-off at that date.[55] Equitable set-off, however, is closely related to both insolvency set-off and contractual set-off and thus it would be awkward to qualify it as a merely procedural shield rather than as a substantive defence. It is closely related to *insolvency set-off* in that equitable considerations require the protection of a person who is sued even though he has a claim for the same amount against his creditors. His dilemma is only much more obvious in cases where that creditor has become insolvent. This is the reason why insolvency set-off led the way towards a general recognition of set-off:[56] a substantive legal idea often gains momentum only when it has established itself in a situation of specific distress.[57] Yet, it is still the same idea on account of which the defendant is seen to deserve protection. And equitable set-off is closely related to *contractual set-off* in that (i) before the enactment of the Statutes of Set-Off, equity tended to look for an implied agreement for a set-off,[58] and (ii) even today there is a considerable readiness on the part of the courts to infer such an agreement.[59] Both from a historical point of view and from a comparative perspective there does not appear to be a sharp division but rather a sliding scale between equitable and contractual set-off.

[54] See also Goode (n. 6) 169.

[55] Goode (n. 6) 177; Derham (n. 6) 186ff.; see also McCracken (n. 10) 186ff.

[56] See Goode (n. 6) 134f.; McCracken (n. 10) 48ff.; Derham (n. 6) 158ff.

[57] Kegel (n. 10) 42.

[58] Derham (n. 6) 8 ('in the absence of an insolvency, equity at that time would look for evidence, however slight, of an agreement for a set-off').

[59] Goode (n. 6) 144.

4 *Evaluation*

The last point leads us to a more general comparative evaluation between set-off in England and on the continent. The fragmentation between statutory set-off, equitable set-off and insolvency set-off still today reflects the development of the notion of set-off in English legal history. On the one hand, of course, it was based on the jurisdictional distinction between law and equity which, in the meantime, has become obsolete. On the other hand, it is related to the traditional notion of the independence, in principle, of the mutual promises constituting a contract[60] (which, in turn, derives from the origin of modern English contract law in the action of *assumpsit*). But just as refined rules relating to breach of contract have been developed from this point of departure,[61] neither the notion of independent promises nor the formal distinction between warranties and conditions[62] (which has given way to a substantive inquiry into whether or not there was substantial failure of performance) should today stand in the way of a streamlined and substantive approach towards set-off. Even in England, arguably, a general contract law requires a general and uniform answer to the question of when a debtor may refuse to pay as a result of the fact that the creditor is under an obligation to pay the same, or a greater, sum to him. The progress from a fragmented to a streamlined and uniform approach, of course, implies a shift from procedure to substance. It has occurred in continental jurisprudence without having led to any adverse consequences. A set of European principles should therefore

[60] See also Goode (n. 6) 133.

[61] See Reinhard Zimmermann, "'Heard melodies are sweet, but those unheard are sweeter . . .": Condicio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', (1993) 193 *Archiv für die Civilistische Praxis* 153ff., for an account of this development and for further references.

[62] Cf. the argument advanced by Goode (n. 6) 143.

opt for set-off as a substantive device. This is all the more desirable since there is, as yet, no uniform law of procedure which could accommodate a procedural conception.[63]

III SET-OFF *IPSO IURE* OR BY DECLARATION?

1 *Introduction*

The second problem to be resolved relates to the operation of (a substantive concept of) set-off. Five different models are distinguishable. Set-off may lead to the two obligations being discharged, *ipso iure*, as soon as they confront each other. This is the rule laid down in Art. 1290 *code civil*. However, as has been pointed out already,[64] French courts require set-off to be pleaded in court. In actual fact, therefore, they apply a second model: discharge *ipso iure* subject to the matter being raised by the defendant in subsequent judicial proceedings. This model has also been adopted in Spanish[65] and, at least at first blush, in Italian law.[66] The position in Scotland is similar but not identical (a third model): compensation must be pleaded in court and sustained by judgment before it has effect. If it is sustained, it works retrospectively.[67] It does not, therefore, operate *ipso iure*.[68]

[63] But see, e.g., Jeroen M. J. Chorus, 'Civilian Elements in European Civil Procedures', in Carey Miller and Zimmermann (n. 19) 295ff. (referring, *inter alia*, to a report by the Storme Commission, published in 1994); C. H. van Rhee, 'Civil Procedure: A European Ius Commune', (2000) 8 *European Review of Private Law* 589ff.

[64] See n. 32.

[65] See Art. 543 *in fine*, Ley de Enjuiciamento Civil (Civil Procedure Act).

[66] See Art. 1242 (1) *codice civile*: 'La compensazione estingue i due debiti dal giorno della loro coesistenza. Il giudice non può rilevarla d'ufficio.'

[67] McBryde (n. 12) 22-70; *Laws of Scotland* (n. 12) n. 877.

[68] In spite of James Viscount of Stair, *The Institutions of Scotland*, vol. 1 (4th edn, 1826), Book I, Tit. XVIII, VI ('for thereby two liquid obligations do extinguish each other ipso jure, and not ope exceptionis only').

Whether there is a practical difference between the second and the third model is not immediately clear. The fourth model is the one adopted first in German law: set-off has to be asserted by an extrajudicial, informal and unilateral declaration to the other party, whereupon it works retrospectively.[69] It has been followed in Austrian law (in spite of the fact that § 1438 ABGB would appear to endorse the *ipso iure* effect of set-off),[70] in Greece[71] and in the new Dutch Civil Code.[72] It also appears to enjoy widespread support in Italian law.[73] Finally, one can imagine a (fifth) model, in terms of which a declaration to set off one claim against another does not operate retrospectively but merely has *ex nunc* effect. This is the view to which, according to the prevailing opinion, Swedish law subscribes.[74]

Obviously therefore, set-off should not be allowed to operate *ipso iure* in the strict sense of the word: the obligations are discharged *sine facto hominis* and this state of affairs has to be taken account of *ex officio* in subsequent legal

[69] §§ 388f. BGB.

[70] Koziol and Welser (n. 11) 279, 280f.; Peter Rummel, in Peter Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch* (2nd edn, 1992), § 1438, nn. 11, 14 (prevailing view).

[71] Art. 441 *Astikos Kodikas*; on which see Michael P. Stathopoulos, *Contract Law in Hellas* (1995), n. 241.

[72] Artt. 6:127 (1), 129 BW; on which, see A. S. Hartkamp, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht*, Part I (11th edn, 2000), nn. 530, 538.

[73] See Massimo Bianca, *Diritto civile*, vol. IV (L'obbligazione) (1990), p. 494; Giorgio Cian and Alberto Trabucchi, *Commentario breve al Codice civile* (5th edn, 1997), Art. 1242 (2); P. Perlingueri, *Dei modi di estinzione delle obbligazioni diversi dell'adempimento* (1975), pp. 273ff.; Cian, (1998) 6 *Zeitschrift für Europäisches Privatrecht* 220f.

[74] There are no statutory provisions in Swedish law regulating the requirements and the effect of set-off ('kvittning'). The matter is thus left to custom, courts and legal writers. For details, see Stefan Lindskog, *Kvittning: Om avräkning mellan privaträttsliga fordringar* (1984), pp. 533ff., 526f. English law also merely attributes *ex nunc* effect to set-off: it takes effect on and from the date of judgment.

proceedings. It appears to be the common European experience that this kind of regime would pay insufficient attention to the requirements of legal certainty.

2 *Extrajudicial declaration or defence to be pleaded in court?*

Apart from that, there are two separate issues that may be distinguished. In the first place it has to be determined whether an extrajudicial and informal, unilateral declaration by one party to the other is sufficient or whether an *exceptio compensationis* has to be pleaded in court. The general drift of European legal development appears to be leading towards the former solution. This was the view already of the draftsmen of the German Civil Code who pointed to the Saxonian Civil Code (1863), to the draft code of Bavaria (1860–4), to the Dresden Draft of a General German Law of Obligations (1866) and to developments in Swiss legislation and in German legal practice,[75] and it has recently been confirmed by the draftsmen of the new Dutch Civil Code who have moved away from the French model and have essentially adopted the German one.[76] On a practical level, both solutions very largely coincide[77] and thus the choice is more one of technique than legal policy. In this respect, however, it is obvious that the French solution is merely an attempt to make the best of the practically unsatisfactory, and much criticized,[78] provision of Art. 1290 *code civil*. It is based on the doctrinal anomaly that an automatic discharge

[75] Von Kübel (n. 37) 1079, 1081.

[76] See *Parlementaire Geschiedenis* (n. 8) 489f., 494, 499; *Asser*/Hartkamp (n. 72) n. 530. Italian law has experienced a similar shift of approach towards the German model; see n. 71.

[77] For this view, see also Haudek (n. 16) 64; Kegel (n. 10) 9.

[78] See, e.g., Terré, Simler and Lequette (n. 8) n. 1309.

of an obligation may not automatically be taken into account in judicial proceedings involving this obligation. This, in turn, is usually justified by imputing a waiver to a defendant who does not raise the defence of set-off in the course of the legal proceedings initiated against him by the claimant:[79] an artificial construction that tends to contort the concept of a 'waiver'.

Moreover, the French solution which was originally more liberal in recognizing set-off would now appear to be marginally more restrictive as a result of requiring a declaration in court. From the point of view of legal certainty, this is unnecessarily rigorous since, as between the parties, an extrajudicial declaration is quite sufficient. As long as, however, legal certainty prevails, the general policy of the law should be to facilitate the exercise of a right of set-off. After all, it is squarely based upon the general principle of good faith,[80] as recognized in Art. 1:201 PECL[81] and leads to a considerable practical simplification in the implementation of payments. Moreover, if set-off aims to avoid circuity of action and multiplicity of suits,[82] a solution is arguably preferable which, at least occasionally, avoids a lawsuit altogether, rather than making the effect of set-off depend upon legal proceedings having been instituted. In many cases, of course, the same result could be arrived at by relying on set-off by agreement. But a creditor whose debtor has declared set-off does not always agree with the debtor's act in the sense that he can be taken to have concluded a contract with him concerning set-off. Often, he merely acquiesces in the mutual

[79] 'Rénonciation': Terré, Simler and Lequette (n. 8) n. 1310.

[80] See above, text before n. 53.

[81] On the questions of whether, and how far, this provision can be regarded as giving expression to a principle inherent in the national private laws of the member states in the European Union, see the case studies, the comparative observations and the final evaluation in Zimmermann and Whittaker (n. 5).

[82] See n. 39.

discharge of the obligations and any attempt to construe an agreement would be purely fictitious.

It is therefore proposed that set-off in European private law should operate on the basis of an informal, unilateral declaration which has to be communicated to the other party. If the matter subsequently comes to court, the judgment has a merely declaratory effect: it does not bring about the set-off but merely confirms that it has been brought about.[83]

3 *Retroactivity or* ex nunc *effect?*

Secondly, the issue of retroactivity. All legal systems of the 'Romanistic' and the 'Germanic' legal families regard the obligations as discharged from the moment when, being suitable for set-off, they first confronted each other.[84] They do this either because they subscribe to the *ipso iure* operation of set-off or because they attribute *ex tunc* effect to the declaration of set-off. There are subtle differences between these two ways of looking at the matter.[85] *Ipso iure compensatur*: this would appear to entail that examination of the requirements of set-off has to be thrown back to the moment in the past when the obligations have become discharged. A legal system operating with the notion of a retroactive declaration, on the other hand, would normally attribute retroactivity only to the effect of set-off. The substantive requirements of set-off have to be met at the time when set-off is declared.[86] This difference of approach has consequences in cases where

[83] As to the merely declaratory nature of the judgment, French and German law are not, of course, in disagreement. A different view had been adopted by a number of German pandectists: see, e.g., Windscheid and Kipp (n. 36) § 349, 4. Contra: von Kübel (n. 37) 108off.

[84] See above pp. 25f. [85] For what follows, see Eujen (n. 16) 65f.

[86] Helmut Heinrichs, in *Palandt, Bürgerliches Gesetzbuch* (58th edn, 1999), § 387, n. 3; Gernhuber (n. 8) 310. For Austria, see Rummel/Rummel (n. 70) § 1438, n. 10.

set-off was possible at some time in the past but where one of its substantive requirements has, in the meantime, fallen away. Contrary to French law, German law would not, in principle, regard set-off as possible in this situation.[87]

By and large, however, both approaches lead to the same practical results. Thus, for instance, it is generally accepted that interest no longer accrues (and where it has been paid it may be reclaimed by means of the *condictio indebiti*),[88] that neither party can be held to have been in *mora debitoris* and that conventional penalties have not become exactable.[89] Also, a claim against which the defence of prescription may be raised can still be used for purposes of set-off, if prescription had not yet occurred when set-off could first have been declared. This consequence is natural enough for a legal system subscribing to the *ipso iure* effect of set-off[90] but it does not fit in well with the notion of set-off which is retroactively effective.[91] For at the time when set-off was

[87] There are, however, many important exceptions to this principle; see §§ 390 (2), 392, 406 BGB and Gernhuber (n. 8) 286ff. The difference mentioned in the text becomes relevant, for instance, where one of the parties assigns his claim to a third party after set-off has become possible but before one of its requirements has fallen away again. See Eujen (n. 16) 65f.

[88] But see Art. 6:129 (2) BW with *Parlementaire Geschiedenis* (n. 8) 497.

[89] See Haudek (n. 16) 63f.; for Germany: Karl-Heinz Gursky, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (13th edn, 1995), § 389, nn. 18ff.; Gernhuber (n. 8) 309ff. For Austria, see Rummel/Rummel (n. 70), § 1438, n. 14; for the Netherlands: *Asser*/Hartkamp (n. 72) n. 538 and also Art. 6:134 BW; for Italy: Cian and Trabucchi (n. 73) Art. 1242 (2).

[90] Boris Starck, Henri Roland and Laurent Boyer, *Droit Civil: Les Obligations*, vol. II (5th edn, 1997), n. 2103. For Italy, see Art. 1242 (2) *codice civile*.

[91] Hence the special rules of §§ 390, 2 BGB, Art. 443 *Astikos Kodikas* and Art. 6:131 (1) BW (on which see *Parlementaire Geschiedenis* (n. 8) 503). For Scotland, see David Johnston, *Prescription and Limitation* (1999), 4.101 (1); for England, see Wood (n. 8) 13-18ff.; for Austria, see Koziol and Welser (n. 11) 281, but also the objections raised by Rummel/Rummel (n. 70) § 1438, n. 15 and Dullinger (n. 8) 165ff. In German law, too, the rule of § 390, 2 BGB has been criticized as being in conflict with the general policy of the law of prescription by Frank Peters and Reinhard Zimmermann, 'Verjährungsfristen', in

declared, one of its substantive requirements (that the claim of the person declaring set-off must be enforceable)[92] was no longer met. This draws our attention to the fact that neither *ipso iure* set-off nor retroactivity are carried through in all their consequences. To the contrary: they have to suffer a whole range of exceptions.[93] A conspicuous example, regarding French law,[94] concerns the situation where a debtor has paid his debt even though it had already been discharged by way of set-off. Here one should have expected the debtor to be granted the *condictio indebiti*: he has, after all, paid a debt that had already been discharged. According to the *code civil*, however, this is only the case if he had 'une juste cause d'ignorer la créance qui devait compenser sa dette'.[95] In all other situations, 'l'effet de plein droit est totalement écarté'.[96] In Germany, the question has for a long time been disputed;[97] the prevailing view today is that a

Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I (1981), p. 266; Peter Bydlinski, 'Die Aufrechung mit verjährten Forderungen: Wirklich kein Änderungsbedarf?', (1996) 196 *Archiv für die Civilistische Praxis* 293ff. Swedish law, strangely, also has a rule which mirrors § 390, 2 BGB: § 10 preskriptionslag. It does not correspond to the general *ex nunc* effect of set-off in Swedish law and is therefore, understandably, the subject of criticism; see Lindskog (n. 74) 115ff.

92 See IV.3 in this chapter.

93 See also *Parlementaire Geschiedenis* (n. 8) 494 ('Welk stelsel men ook kiest, er zullen derhalve steeds correcties met betrekking tot de rechtsgevolgen daarvan moeten worden aangebracht'). Concerning the system of a retroactive declaration as it prevails in Austria and Germany, see the analysis by Dullinger (n. 8) 158ff.

94 For exceptions to the German rule of retroactivity of the effects only, not of the substantive requirements of set-off, see n. 87.

95 Art. 1299 *code civil*.

96 Terré, Simler and Lequette (n. 8) n. 1310. Cf. also Haudek (n. 16) 63.

97 Largely as a result of the fact that the *condictio indebiti* had been granted under the *ius commune*; see Ulp. D. 12, 6, 30; Ulp. D. 16, 2, 10, 1 ('Si quis igitur compensare potens solverit, condicere poterit quasi indebito soluto'); Dernburg (n. 6) 587ff.; Windscheid and Kipp (n. 36) § 349, 3. See also the critical discussion of the question in von Kübel (n. 37) 1083f.

person who has paid without realizing that he could have declared set-off cannot avail himself of an unjustified enrichment claim.[98]

These inconsistencies raise the question of whether it is sound, in principle, to attribute *ex tunc* effect to the declaration of set-off. The only policy arguments raised in favour of retroactivity are (i) that it is typically in accordance with the presumed intention of the parties,[99] and (ii) that protection must be granted to parties who rely on a position in which they may give notice of set-off.[100] Retroactivity, so it is argued, would therefore lead to results which are in conformity with equity and good faith.[101] The first of these arguments is based on speculation. There is no evidence as to what people generally think once they realize that they are in a position both of creditor and debtor towards each other.[102] The second argument, which is related to the first one, is even less convincing. As long as a person is unaware of the fact that he may easily effect payment or discharge his obligation by giving notice of set-off there can be no reliance that might require protection. Any advantage arising to him

[98] *Staudinger*/Gursky (n. 89) § 389, n. 4; Gernhuber (n. 8) 288f. The same view is taken for Austrian law by Rummel/Rummel (n. 70) § 1438, n. 15 (who, however, records a number of dissenting authors); and for Italian law by Cian and Trabucchi (n. 73) Art. 1242 (1). See also the discussion by Dullinger (n. 8) 162ff.

[99] See, e.g., Gernhuber (n. 8) 309.

[100] See, e.g., *Palandt*/Heinrichs (n. 86) § 389, n. 2.

[101] See, e.g., Protokolle, in Mugdan (n. 37) 562.

[102] The operation of current account ('Kontokorrent') may even be taken as an indication that set-off is not supposed, by the commercial community, to operate retrospectively, since interest is taken into account as it has become due for each of the mutual obligations up to the moment when the balance is drawn; see Bydlinski, (1996) 196 *Archiv für die Civilistische Praxis* 287f. If it were true that whoever is in a position to give notice of set-off no longer regards himself as debtor and thus relies on not having to make payment, this argument would favour set-off *ipso iure* rather than a retroactive one: Dullinger (n. 8) 180f.

under the regime of retroactivity would be a windfall. Once he does realize that he may effect set-off, the policy of the legal system should be to encourage him to do so as soon as possible. The state of pendency[103] existing before set-off has been declared is undesirable from the point of view of clarity and legal certainty. As long as the law does not require more than an informal declaration to the other party, it hardly asks too much of a debtor who wants to be sure that he no longer has to pay interest or of a creditor whose claim is about to prescribe. Arguably, therefore, reliance on the mere possibility of declaring set-off does not deserve to be protected. The law, after all, not only puts up certain substantive prerequisites for set-off but also requires set-off to be declared; and it does so for good reason.[104] Much of what is said by the proponents of retroactivity appears to be inspired by an unfounded belief that this notion is intrinsically related to the 'essence' of set-off.[105] Historically, we are probably dealing here with an unreflected continuation of a thinking pattern of the *ius commune*.[106] And while a true 're-statement' of private law in Central and Southern Europe[107]

[103] See von Kübel (n. 37) 1081.

[104] The reason for requiring a declaration as opposed to accepting set-off *ipso iure* is to promote legal certainty; see III.1 *in fine* and *Parlementaire Geschiedenis* (n. 8) 494. Legal certainty is gravely jeopardized, however, if the law first regards two obligations as existing, in order to declare subsequently that they must not be taken to have existed, after all. The result is that certain legal consequences concerning these obligations (like *mora debitoris*) first arise and later have to be taken not to have arisen.

[105] See the references in Gernhuber (n. 8) 229. That there is no real justification in modern contract law for maintaining the retroactive effect of set-off is also emphasized by Pichonnaz, (2000) 68 *Tijdschrift voor rechtsgeschiedenis* 560ff.

[106] See Pichonnaz, (2000) 68 *Tijdschrift voor rechtsgeschiedenis* 552ff.

[107] Along the lines of the American Restatements; on which see *Juristenzeitung* 1995, 478; Shael Herman, 'Schicksal und Zukunft der Kodifikationsidee in Amerika', in Reinhard Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht* (1995), pp. 71ff.; Thomas Schindler, 'Die

might well have to perpetuate these thinking patterns, the Principles of European Private Law have a greater room for manoeuvre as a result of the fact that those legal systems that have not been encumbered by the heritage of Justinian's dark pronouncements[108] (i.e., Swedish law and English law[109]) merely attribute *ex nunc* effect to set-off. It is proposed to follow their lead in this respect and to adopt a rule according to which the notice of set-off leads to a discharge *pro tanto* of the obligations confronting each other.

What would be the consequences arising under such a regime? Interest (on both obligations) would run until set-off has been declared. It is therefore advantageous to the party paying the higher rate of interest to declare set-off. This he will normally do as soon as he becomes aware of this possibility. And as long as he is unaware of it, he must, in any event, expect to pay whatever statutory or conventional interest may be applicable.[110] Concerning liability for *mora debitoris* the position would be as follows. If B under a contract of sale has to pay A a sum of 100,000 on 10 October and fails to pay on that date, he would normally have failed to perform without excuse under Art. 8.108 PECL. A has the option of claiming performance, of claiming damages, or of terminating the contract. If B fails to declare a set-off or if it is only subsequently that he becomes aware of the fact that he has a claim against A for the same amount, this does not condone his inactivity on 10 October. Whether conventional penalties have become due from a party who has not exercised his right to give notice of set-off depends on the

Restatements und ihre Bedeutung für das amerikanische Privatrecht', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 277ff.

[108] See p. 24. [109] See pp. 23, 33.

[110] It is remarkable, in this context, that Art. 6:129 (3) BW now restricts the retroactive effect of set-off, in that interest that has been paid may not be reclaimed. For the convincing arguments in favour of this rule, see *Parlementaire Geschiedenis* (n. 8) 497.

interpretation of the relevant clause. Normally, the penalty will have to be paid. Particularly difficult restitution problems do not arise. If payment is made after set-off has been declared it may be reclaimed since it is *indebitum solutum*. If it was made before the declaration of set-off, it has had the effect of discharging the obligation and thereby removing the mutuality requirement for set-off.

These results, to my mind, cannot be regarded as inequitable.[111] On the contrary: since they reflect the situation as it would have had to be evaluated if both obligations had been *paid* at the moment when notice of set-off was given, they tie in well with the normal rules relating to the discharge of an obligation.[112] In any event, they do not justify a set of rules that is (i) based on a somewhat artificial fiction (both obligations 'must be taken to have been discharged at the moment')[113] and therefore difficult to explain doctrinally,[114] (ii) detrimental to legal certainty,[115] (iii) not practicable without recognizing a number of exceptions,[116]

[111] For an excellent, and detailed, argument along these lines, see Bydlinski, (1996) 196 *Archiv für die Civilistische Praxis* 281ff.; and Dullinger (n. 8) 174ff., 182ff.

[112] See the example given by Bydlinski, (1996) 196 *Archiv für die Civilistische Praxis* 286f.

[113] See § 389 BGB.

[114] For a discussion of what happens, conceptually, at the moment when two claims confront each other being suitable for compensation ('Aufrechnungslage' – are the two obligations still entirely independent or are they already, in some way or other, related to each other?), see Kegel (n. 10) 6ff.; Gernhuber (n. 8) 229ff.; *Staudinger*/Gursky (n. 89) Vorbem. zu §§ 387ff., nn. 13ff. This was, of course, also a topic which was hotly debated in the pre-codification *ius commune*; see, e.g., Windscheid and Kipp (n. 36) § 349, 1–4; von Kübel (n. 37) 1075ff., 1080f.; Dullinger (n. 8) 151ff.

[115] It was already acknowledged by the draftsmen of the BGB that the introduction of a notice requirement without retroactive effect would lead to 'legal clarity and simplicity'. A few lines later they referred to 'a principle which is admittedly fascinating in view of its clarity and simplicity': 'Motive', in Mugdan (n. 37) 60.

[116] See the discussion earlier in this section.

(iv) fraught with difficult problems of calculation as, for instance, in cases of a claim for damages on account of the loss of negotiable instruments which are subject to fluctuating market rates[117] and (v) more likely to lead to windfall gains than to the protection of reasonable reliance.

4 *Insolvency set-off*

Most legal systems have special rules dealing with insolvency set-off.[118] Generally speaking, these rules attest to a very widespread feeling among all legal systems that the commencement of insolvency proceedings should not deprive a creditor of his right to effect set-off. Even English law, insofar, attributes 'automatic' effect to set-off; insolvency set-off was in fact the first type of set-off that was formally recognized by legislation.[119] The policy ground usually given for this preferential treatment is the perceived injustice that a person should have to pay the full amount of his liability to a bankrupt and at the same time be confined, as far as his own claim is concerned, to a proportional share in the

[117] For details, see *Staudinger*/Gursky (n. 89) § 389, nn. 31ff.; and see Art. 6:129 (3) BW (sanctioning another exception to the principle of retroactivity!); for comment, see *Parlementaire Geschiedenis* (n. 8) 497f. and *Asser*/Hartkamp (n. 72) 539.

[118] For France, see Art. 33 (1) loi du 25 janvier relative au redressement et à la liquidation judiciaire, as modified by the loi du 10 juin 1994, on which see Georges Ripert and René Roblot, *Traité de droit commercial*, vol. II (15th edn by Philippe Delebecque and Michel Germain, 1996), nn. 3039f.; for England, see s. 323 Insolvency Act (1986), on which see Goode (n. 6) 176ff. and the discussion by Wood (n. 8) 7-1ff. and Derham (n. 6) 149ff.; for Germany, see §§ 94ff. Insolvenzordnung; for Italy, see Art. 56 I legge fallimentare, on which see Bianca (n. 73) 511ff. and Perlingueri (n. 73) 260ff.; for Austria, see §§ 19f. Ausgleichsordnung and §§ 19f. Konkursordnung, on which see Rummel/Rummel (n. 70) § 1439, n. 9 and Dullinger (n. 8) 307ff.; for Sweden, see chapter 5, §§ 15–17 konkurslag (1987); for Scotland, see McBryde (n. 12) 22-75ff. For a comparative evaluation, see Wood (n. 8) 24-49.

[119] See the references in n. 38.

insolvent estate. This argument does not seem to be particularly strong. For it should be kept in mind that the effect of set-off is to prefer one creditor over the general body of creditors, and that it therefore operates against the policy favouring equal treatment of creditors.[120] 'It is debatable', as Derham points out,[121] 'whether the justice in favour of setting off cross-demands is always so great that it should allow assets available for distribution amongst the general body of creditors to be depleted in favour of a single creditor in possession of the right, with the consequent reduction in the dividend payable generally.' None the less, in view of the unanimity among European legal systems on the point, it may be advisable to retain some measure of protection for a creditor who, at the time of commencement of the insolvency proceedings, was in a position to give notice of set-off. This could be done by requiring the administrator of the bankrupt's estate to deduct from his own claim on behalf of the bankrupt's estate whatever the bankrupt himself owed to that particular creditor. He would thus only be allowed to claim 'cum deductione'.[122] Such a rule cannot, however, be part of a set of principles of private law; it would have to feature in a European insolvency regime.

IV THE REQUIREMENTS FOR SET-OFF

1 *Mutuality*

We now have to turn our attention to the requirements under which set-off may be declared. There is fairly widespread agreement, in principle, among the legal systems under consideration but a few differences in detail have to be

[120] Derham (n. 6) 153. [121] Derham (n. 6) 154.
[122] Like the Roman *bonorum emptor*; see Kaser 1 (n. 25) 645f.; Zimmermann (n. 25) 765.

considered. In the first place, there has to be *concursus debiti et crediti* (mutuality, réciprocité, Wechselseitigkeit)[123] in the sense that the creditor of the one claim is the debtor under the other, and vice versa.[124] In England, the underlying idea is often expressed by stating that the claims must exist between the same parties and in the same right.[125] Thus, there can be no set-off between a debt due by a person in his own right and one due to him as trustee, tutor, administrator or executor.[126] The Dutch BW has specifically added a provision according to which the right of set-off does not exist with reference to a debt and a claim falling into estates which are distinct from each other.[127] This clarification is arguably unnecessary in a code. Details as to what exactly *concursus debiti et crediti* implies also need not be set out. The details follow from general principle and depend upon the way in which the national legal systems deal with issues like trusteeship and agency.[128]

Two problems, however, deserve to be mentioned. (i) Where a debt has been secured by way of suretyship it is widely regarded as inequitable if the creditor were able to recover from the surety in cases where the main debtor may declare set-off.[129] French law, of course, does not have a

[123] On the German terminology (normally the term 'Gegenseitigkeit' is used), see Dieter Medicus, *Schuldrecht I: Allgemeiner Teil* (10th edn, 1998), n. 263.

[124] See Art. 1289 *code civil* and Terré, Simler and Lequette (n. 8) 1297; Wood (n. 8) 14-1ff.; Derham (n. 6) 319ff.; § 387 BGB and Gernhuber (n. 8) 233ff.; Art. 1241 *codice civile* and Bianca (n. 73) 481ff.; Art. 1195 *código civil*; Art. 6:127 (2) BW and *Asser*/Hartkamp (n. 72) n. 533; §§ 1438, 1441 ABGB and Koziol and Welser (n. 11) 278; Dullinger (n. 8) 5ff.; McBryde (n. 12) 22-60ff.; Art. 440 *Astikos Kodikas*; Lindskog (n. 74) 43; Haudek (n. 16) 59f.; Wood (n. 8) 24-155ff.

[125] See, e.g., Goode (n. 6) 154.

[126] McBryde (n. 12) 22-60.

[127] Art. 6:127 (3) BW (on which, see *Parlementaire Geschiedenis* (n. 8) 491).

[128] For a detailed comparative discussion, see Kegel (n. 10) 51ff.

[129] The same applies in cases of real securities of an accessory nature, like pledges or hypothecs. See, for example, Art. 1247 (2) *codice civile*, Art. 6:139 BW and

problem with this situation: since set-off operates *ipso iure*, the surety can simply draw attention to the fact that the main debt has been discharged and that consequently he is no longer liable.[130] Under the regime for set-off proposed in the present essay protection should be granted to a surety against a claim by the creditor in situations where the creditor can satisfy himself by declaring set-off against a claim of the main debtor, and perhaps also where the main debtor may declare set-off against the claim of the creditor.[131] But this must be left to a set of principles dealing with suretyship. (ii) All legal systems concur in granting some measure of protection to a debtor whose creditor has assigned the claim to a third party. If the debtor could have discharged his obligation towards the assignor by declaring set-off, he may still do so

§§ 1137, 1211 BGB. Real security, however, does not fall within the compass of the present inquiry.

[130] This follows from the accessory nature of the surety's obligation; on the accessoriness of suretyship in general, see Zimmermann (n. 25) 121ff., 142ff.; Mathias Habersack, 'Die Akzessorietät: Strukturprinzip der europäischen Zivilrechte und eines künftigen europäischen Grundpfandrechts', (1997) *Juristenzeitung* 801ff. For France, see Art. 1294 (1) *code civil* ('La caution peut opposer la compensation de ce que le créancier droit au débiteur principal'). For Spain, see Art. 1197 *código civil*; for Italy see Art. 1247 *codice civile*.

[131] Cf. § 770 II BGB (which, however, applies only to the first of the two situations mentioned). For details, see Reinhard Zimmermann, 'Die Einrede der Aufrechenbarkeit nach § 770 Abs. 2 BGB', (1979) *Juristische Rundschau* 495ff. Art. 6:139 (1) BW corresponds to § 770 II BGB (see *Parlementaire Geschiedenis* (n. 8) 515f.). In Austria the same approach is supported by a number of authors, but there are others who argue that the surety may declare set-off by relying on the main debtor's claim against the creditor; see Rummel/Rummel (n. 70) § 1442, n. 20 and the discussion by Dullinger (n. 8) 20off. The latter approach is the one endorsed by Art. 447 *Astikos Kodikas*. According to English law, the surety may rely on the principal debtor's set-off, as far as insolvency set-off and set-off agreements are concerned. The position concerning statutory and equitable set-off is uncertain. For details, see Derham (n. 6) 639ff. He argues that 'the surety can defend himself on the basis of any defence of set-off available to the debtor, provided that the debtor is a party to the action'. For a comparative analysis, see Kegel (n. 10) 132ff.

if he is sued by the assignee, provided his own claim already existed and had become due[132] at the time when the assignment became effective.[133] If the two obligations arise from the same legal relationship, the debtor may even rely on his right to set-off without the latter restriction.[134] In some legal systems the pertinent rules are, it is submitted rightly, seen to belong to the law relating to the assignment of claims,[135] since they constitute an integral part of a broader inquiry: how the legal system has to protect a debtor when the creditor assigns his claim to a third party.[136] None of the legal systems under consideration requires the debtor's consent, though some of them insist upon a formal notification.[137] Thus, he will usually be faced with a *fait accompli*: he knows that he now has to pay to his new creditor but he has lost the chance to discharge his obligation by declaring set-off to the old: hence, his need to be protected.[138]

[132] According to some legal systems it does not matter whether the debtor's claim was due at the time when the assignment was effected, as long as it was not to become due later than the claim against which it was to be set off.

[133] Or (where that is not implicit, see n. 137) when the debtor got to know about the assignment.

[134] For a clear statement to this effect, see Art. 6:130 (1) BW, on which see *Parlementaire Geschiedenis* (n. 8) 499ff. and *Asser*/Hartkamp (n. 72) nn. 541ff. For similar rules, see Art. 1295 *code civil* and Eujen (n. 16) 35f.; Derham (n. 6) 567ff.; see also Art. 1248 *codice civile*, Art. 1198 *código civil*, § 406 BGB, §§ 448, 463 *Astikos Kodikas*, § 1442 ABGB, §§ 18, 28 lag om skuldebrev. See also Hein Kötz, *European Contract Law* (1997, transl. Tony Weir), p. 430 and, for a detailed comparative discussion, Kegel (n. 10) 138ff.; Wood (n. 8) 24-170ff.

[135] See §§ 406 BGB and 463 *Astikos Kodikas*.

[136] See Kötz (n. 134) 281ff.; see also Zimmermann (n. 25) 66.

[137] For a comparative analysis, see Hein Kötz, 'Rights of Third Parties: Third Party Beneficiaries and Assignment', in *International Encyclopedia of Comparative Law*, vol. VII, chapter 13 (1992), nn. 86ff. German law, on the other hand, requires merely an agreement between assignor and assignee.

[138] The same applies in cases of an attachment of the claim against the person who wishes to declare set-off and also where a limited real right has been created. See, for example, Art. 6:130 (2) BW, §§ 392, 1070 I, 1275 BGB.

2 *Obligations of the same kind*

Secondly, both obligations must be of the same kind:[139] a money claim can be set off only against a money claim, a debt for the delivery of grain only against a claim for the delivery of grain of the same kind. English law confines set-off to money debts.[140] This is explicable in view of the exceptional character of specific performance. Moreover, it reflects economic realities in that, in other countries too, compensation usually relates to money debts. The prime example of non-monetary obligations, to which set-off may be relevant today, are securities, whether certificated or dematerialized. Whether claims are of the same kind depends on their state at the time that notice of set-off is given. The most important practical problem, in the context of the present requirement for set-off, relates to foreign currency debts. A straightforward solution was the one traditionally adopted in English law where foreign currency debts were always converted to pounds sterling at the rate of exchange of the date when they fell due. In the 1975 case of *Miliangos v. George Frank (Textiles) Ltd*,[141] however, it was held that an English court may give judgment for a sum of

[139] § 387 BGB ('ihrem Gegenstande nach gleichartig'); for details, see Gernhuber (n. 8) 236ff.; Art. 6:127 (2) BW ('een prestatie . . . die beantwoordt aan zijn schuld'); for details, see *Asser*/Hartkamp (n. 72) n. 534; § 1438 ABGB; for details, see Rummel/Rummel (n. 70) § 1440, n. 1 and Dullinger (n. 8) 77ff.; Art. 440 *Astikos Kodikas*; Art. 1234 (1) *codice civile*; Art. 1196 (2) *código civil*; Lindskog (n. 74) 43; McBryde (n. 12) 22-53f. Art. 1291 (1) *code civil* lays down the same principle but adds: 'Les prestations en grains ou denrées non contestées, et dont le prix est réglé par les mercuriales, peuvent se compenser avec des sommes liquides et exigibles.' According to Terré, Simler and Lequette (n. 8) n. 1298, '[c]ette innovation des rédacteurs du code civil, dont le bien fondé et l'opportunité sont loin d'être évidents, ne paraît pas avoir connu beaucoup d'applications'. For a general comparative survey, see also Wood (n. 8) 24-145c ff.

[140] Goode (n. 6) 153, 157f.; Wood (n. 8) 9-1ff.; Eujen (n. 16) 52.

[141] [1976] AC 443 (HL).

money expressed in a foreign currency and that conversion will normally take place at the date when the court authorizes enforcement of the judgment in pounds sterling.[142] This applies to statutory set-off; the position with regard to equitable set-off still appears to be unclear.[143] According to the prevailing opinion in German law, debts in foreign and domestic currency are never 'of the same kind'. Set-off can consequently be effected only if the parties have so agreed.[144] There are good reasons for regarding this view as outdated.[145] French legal writers incline towards accepting set-off concerning debts in different currencies except where they are not convertible.[146] The Principles should take their lead from Art. 8 (6) of the EU Regulation on the Introduction of the Euro[147] which came into force on 1 January 1999. In terms of this regulation, the euro has become the uniform denomination for those countries that have joined the monetary union. For a transitional period (until 31 December 2001) the former national currencies will be regarded as sub-units of the euro. As a result, set-off is no longer prevented, within the euro-zone, as a result of the fact that the obligations are expressed in different currencies. This should also be the rule with respect to other currencies. It is in line with the modern view increasingly adopted in the national legal systems[148] since it facilitates set-off without

[142] Derham (n. 6) 130f.

[143] Derham (n. 6) 131f. See also the detailed discussion by Wood (n. 8) 11-1ff. on foreign currency debts in the context of set-off in general. Scots law follows *Miliangos*; see *Commerzbank Aktiengesellschaft v. Large*, 1977 SC 375.

[144] See, e.g., *Münchener Kommentar*/von Feldmann (n. 53) § 387, n. 16; Staudinger/Gursky (n. 89) § 387, n. 67.

[145] Gernhuber (n. 8) 238ff. (conversion at the date of set-off).

[146] Terré, Simler and Lequette (n. 8) n. 1298; see also Eujen (n. 16) 37. For the Netherlands, see *Asser*/Hartkamp (n. 72) n. 534. For a comparative evaluation, see Wood (n. 8) 24-34.

[147] No. 974/98 of 3 May 1998 OJEC 1998, 139 (1).

[148] Cf., e.g., Artt. 1278f. *codice civile*; Rummel/Rummel (n. 70) § 1440, n. 2.

unduly prejudicing the reasonable interests of the creditor of the principal claim.[149]

3 *Cross-claim due, party declaring set-off may perform*

Discussion of the next requirement first of all calls for a terminological clarification. The claim brought against the party declaring set-off will henceforth be referred to as the principal claim, whilst the claim of the party declaring set-off will be termed the cross-claim. This, I think, is a fair reflection of the terminology prevailing in most European legal systems. Since set-off amounts to a form of enforcement of the cross-claim, the cross-claim has to be enforceable (exigible, durchsetzbar, afdwingbaar). Thus, it has to be due, the other party must not be able to raise a defence, and we must not be dealing with a *naturalis obligatio*.[150] The principal claim, on the other hand, does not necessarily have to be due; it is quite sufficient that the person declaring set-off may effect performance.[151] For as soon as a debtor may thrust his payment upon his creditor (which may be long before the claim falls due) there is no reason not to allow him to declare set-off. Before the debtor of the principal claim may effect performance, however, he may not

[149] On the legal nature of a foreign currency debt, see Karsten Schmidt, in *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch* (12th edn, 1983), § 244, nn. 11ff.; Helmut Grothe, *Fremdwährungsverbindlichkeiten* (1999), pp. 558ff.; Dullinger (n. 8) 78ff.

[150] Terré, Simler and Lequette (n. 8) n. 1300; Derham (n. 6) 27f.; §§ 387, 390 (1) BGB and Gernhuber (n. 8) 247ff.; Art. 6:127 (2) BW and *Asser*/Hartkamp (n. 72) n. 536; Art. 1243 (1) *codice civile* and Bianca (n. 73) 485f.; Art. 1196 (3 and 4) *código civil*; Art. 440 *Astikos Kodikas*; Lindskog (n. 74) 43; Koziol and Welser (n. 11) 279; Dullinger (n. 8) 78ff.

[151] § 387 BGB and Gernhuber (n. 8) 252ff.; Art. 6:127 (2) BW and *Parlementaire Geschiedenis* (n. 8) 492; Rummel/Rummel (n. 70) § 1439, n. 7; Stathopoulos (n. 71) 164 (against the wording of Art. 440 *Astikos Kodikas*); Lindskog (n. 74) 43.

declare set-off. These rules appear to flow naturally from the way in which set-off is proposed to operate. If some national legal systems, at the moment, decide differently, this is attributable to the different construction of set-off chosen by these systems. Thus, according to English law, the principal claim also has to be enforceable. This is a natural consequence of the – traditionally – procedural character of set-off in that legal system: if the claimant were to sue on a claim which is not enforceable the defendant would not even have to plead set-off in order to secure a judgment in his favour.[152] And if Art. 1291 (1) *code civil* also requires both claims to be 'exigible',[153] this follows from the *ipso iure* effect of compensation: none of the claims can be labelled principal claim or cross-claim. French courts, however, often reach the same result as German law by means of *compensation facultative*:[154] the party exposed to a claim which has not yet become due may renounce the legal protection granted to him.[155]

4 *Liquidity*

There is an obvious danger that a defendant may protract legal proceedings by invoking set-off on account of cross-claims which cannot easily be proved, the existence of which is as yet uncertain, etc. This danger was already recognized by Justinian; he ordered judges to take account of the plea of set-off only 'si causa ex qua compensatur liquida sit et non multis ambagibus innodata, sed possit iudici facilem

[152] Eujen (n. 16) 63.

[153] Cf. also Art. 1243 (1) *codice civile* and Bianca (n. 73) 485f.; Art. 1196 (3) *código civil*.

[154] See Eujen (n. 16) 63.

[155] On *compensation facultative*, see Terré, Simler and Lequette (n. 8) n. 1312; Kegel (n. 10) 10; Eujen (n. 16) 45f.

exitum sui praestare'.[156] French law has elevated this criterion ('liquidité') to a fifth substantive requirement of set-off which, moreover, does not apply only to the cross-claim but also to the principal claim.[157] This must be seen against the background of the *ipso iure* effect of set-off in French law: unless the principal claim and the cross-claim are easily ascertainable it would be impossible to say whether, and to what extent, they have been discharged. But the requirement of 'liquidité' also gives rise to a number of problems. The status of a claim may change and a claim which is likely to succeed today may be entirely unlikely to succeed tomorrow (as, for instance, when the creditor has lost some crucial documents proving his claim).[158] If a legal system determines the issue of 'liquidité' at the moment when the two claims first confronted each other, the procedural considerations justifying the requirement would be disregarded: for if a lawsuit were to arise later, its speedy progress would now be encumbered by sorting out the details of an (unascertained) cross-claim.[159] If, on the other hand, 'liquidité' is required at the moment when legal proceedings commence, we are faced with an awkward state of pendency: who knows whether, at some stage in the future, a lawsuit may still be filed concerning the one or other claim and how difficult it may, by then, have become to prove the latter and to determine its extent?[160] It is small wonder that the practical significance of the requirement of 'liquidité' has been watered down considerably in French legal practice. On the one hand, the judge

[156] C. 4, 31, 14, 1; cf. also Inst. 4, 6, 30 and Kaser 1 (n. 25) 448.

[157] Art. 1291 and see Terré, Simler and Lequette (n. 8) n. 1299; Kegel (n. 10) 160ff.; Wagner, (1999) *Praxis des Internationalen Privat- und Verfahrensrechts* 72. Cf. also Art. 1243 *codice civile* (on the interpretation of which, see Perlingueri (n. 73) 294); Art. 1196 (4) *código civil*, and (somewhat differently) Art. 1244 *Astikos Kodikas*.

[158] Kegel (n. 10) 166.

[159] Kegel (n. 10) 166.

[160] Kegel (n. 10) 167.

is granted some leeway in determining whether the claim is sufficiently certain in order to be treated as 'liquide' and can thus be taken into account for purposes of set-off.[161] On the other hand, and more importantly, the device of *compensation judiciaire* may be resorted to, provided the defendant asserts his cross-claim by way of a cross-action (*demande reconventionelle*). The legal nature of *compensation judiciaire* is disputed[162] but since the judge may decide to deal with both actions at one and the same time, and to give judgment for the balance, it has at least the practical effect of set-off.[163] Where both claims arise from the same legal relationship this is the way the judge has to proceed.[164]

Even in France, therefore, the emphasis has shifted from substantive law to procedure. The path towards an *entirely* procedural solution had been mapped out, many centuries before, by Justinian. Using his constitution in C. 4, 31, 14 as a basis, the glossators placed the matter into the hands of the judge (*officium judicis*).[165] Dernburg in his great monograph[166] and Windscheid in his influential textbook[167] subscribed to the same view: set-off is not prevented on account of the fact that the cross-claim still needs to be ascertained, by way of calculation or proof. But the judge may (and has to) refuse to consider the issue of set-off in the present legal proceedings if its determination would unduly

[161] Eujen (n. 16) 38.

[162] On *compensation judiciaire*, see Starck, Roland and Boyer (n. 90) n. 2095; Terré, Simler and Lequette (n. 8) 1313; Eujen (n. 16) 38ff.; Kegel (n. 10) 10f.; Bianca (n. 73) n. 257; Wagner, (1999) *Praxis des Internationalen Privat- und Verfahrensrechts* 69.

[163] According to Terré, Simler and Lequette, the obligations are, however, not to be taken to be discharged *ipso iure* but only from the date of judgment.

[164] According to Terré, Simler and Lequette, we are dealing with a privileged form of set-off which therefore operates *ipso iure*.

[165] See the quotation provided by Kegel (n. 10) 162: 'liquidi ad non liquidum an compensatio fiat, vel non fiat, officio judicis definitur'.

[166] Dernburg (n. 6) 554ff. [167] Windscheid and Kipp (n. 36) § 350, 5.

protract these proceedings. An exception was recognized in cases in which principal claim and cross-claim arise from the same legal relationship. The draftsmen of the BGB followed suit and did not, therefore, make liquidity of the cross-claim a requirement for set-off.[168] They could refer to two provisions of the Civil Procedure Act (which have been preserved, essentially unchanged, until today) according to which the court may decide to deal separately with principal claim and cross-claim (as long as both of them do not arise from the same legal relationship) and that a provisional judgment may be given, under these circumstances, concerning the claim.[169]

It may have become obvious that the French and German approaches do not differ much in their practical results: there is a fairly wide judicial discretion as to whether the cross-claim may be set off against the principal claim except in cases where both claims arise from the same legal relationship.[170] The German solution does not appear to be particularly elegant in that a claimant who wishes to enforce his (provisional) judgment runs the risk that such a step may later turn out not to have been based on a valid title, after all: with the consequence that he will have to render restitution and to pay damages.[171] The French solution, on the other hand, overshoots the mark in two respects and suffers from a fundamental weakness on a conceptual level. (i) There is no reason to require the *principal* claim to be ascertained.[172]

[168] Von Kübel (n. 37) 1092. The same view is usually today advocated (in spite of § 1439 ABGB) for Austrian law: see Rummel/Rummel (n. 70) § 1439, n. 6; Koziol and Welser (n. 11) 279; Dullinger (n. 8) 90ff. For a comparative evaluation, see Kegel (n. 10) 158ff.; Eujen (n. 16) 27f.

[169] See §§ 145 III, 302 ZPO.

[170] See the comparative evaluation by Eujen (n. 16) 63f.

[171] § 302 III, IV ZPO; and see the criticism in *Parlementaire Geschiedenis* (n. 8) 509f.

[172] *Parlementaire Geschiedenis* (n. 8) 490.

This applies *a fortiori* in a system where set-off would not operate *ipso iure*. (ii) Not always does it constitute an act of chicanery if the defendant pleads set-off on the basis of an unascertained cross-claim: it may be quite possible to establish all details concerning the cross-claim within the period which legal proceedings involving the principal claim will take anyway; it may be certain that the cross-claim exceeds the amount of the principal claim, etc.[173] Thus, a substantive requirement of liquidity, without any discretion on the part of the judge, would too much inhibit the possibility of set-off as a convenient means of discharging two obligations at one and the same time. If, however, such discretion is granted to the judge, then (iii) it appears awkward to establish a requirement for set-off on the level of substantive law which is, in practice, undermined procedurally.[174]

It may therefore be preferable to adopt a third approach which can, essentially, be regarded as a compromise between the first two. If the cross-claim cannot readily be ascertained, the judge is empowered to adjudicate upon the principal claim without taking account of the set-off declared by the defendant, provided the principal claim is otherwise ready for adjudication.[175] Thus, the judge is given discretion. He will have to take account of all the circumstances of the case, such as the probable duration of the proceedings concerning both principal claim and cross-claim, or the effect of a delay on the claimant. But it may be possible to guide him in the exercise of this discretion by distinguishing two

[173] *Parlementaire Geschiedenis* (n. 8) 490f. Cf. also the idea underlying Art. 1243 (2), first alternative, *codice civile*.

[174] Thus, it was pointed out by Meijers that Art. 1463 (old) BW was usually circumvented ('ontgaan') by a procedure similar to the French *compensation judiciaire* ('conventie en reconventie'): *Parlementaire Geschiedenis* (n. 8) 490.

[175] This is the approach adopted in Dutch law; see Art. 6:136 BW; *Parlementaire Geschiedenis* (n. 8) 509f.; *Asser*/Hartkamp (n. 72) nn. 550f. Meijers had originally proposed a solution along the lines of German law.

cases. (i) If the principal claim and the cross-claim arise from the same legal relationship, the judge will not normally confine his attention to the principal claim but will deal also with the cross-claim and consider the issue of set-off. (ii) If the principal claim and the cross-claim do not arise from the same legal relationship, the decision will normally go the other way: commercial predictability and fairness demand that, when a party has an ascertained claim, he should not be held up in pursuing this claim. If the judge decides to adjudicate upon the principal claim, his judgment is not merely of a provisional nature. His decision rests solely on the merits of the claimant's claim which he regards as being unaffected by the declaration of set-off. As a result, the declaration of set-off must be regarded as ineffective, set-off as not having occurred. The defendant will therefore have to pursue his claim by means of an independent suit.[176]

V SITUATIONS WHERE SET-OFF IS EXCLUDED

Every legal system recognizes situations where set-off is excluded. Occasionally, this results from the application of more general principles of law ('estoppel');[177] in other cases we are dealing with peculiarities based on national traditions

[176] This solution should also be acceptable to English law where as far as statutory set-off is concerned, both claims are traditionally required to be liquidated or ascertainable with certainty. As in German law, the matter is considered only in the course of legal proceedings. As in French and German law, the matter is considered in a different light where the claims have arisen from the same legal relationship. Some doubt has been expressed as to how stringently the liquidity rule will continue to be applied in other cases. For details of what constitutes a liquidated claim, see Wood (n. 8) 2-68ff.; for a comparative discussion, see Kegel (n. 10) 170ff.; Eujen (n. 16) 53, 63f. For Scotland, see McBryde (n. 12) 22-56ff.

[177] See Eujen (n. 16) 54.

and concerns (such as the German rule of § 395 BGB which is based entirely on reasons of administrative expediency).[178] But we also find a number of rules which appear to embody evaluations which are found, in some or other form, in all, or most, European legal systems. Firstly, it is recognized everywhere that the right of set-off may be excluded by contract.[179] This follows from the general principle of freedom of contract. Of course, the general limitations of private autonomy must be observed (e.g., the rules dealing with unfair standard terms in consumer contracts). Secondly, the view is widely held that set-off should not be allowed to deprive a person of claims (such as those for maintenance or wages) which provide him with a minimum level of subsistence.[180] The simplest, most appropriate and most

[178] Against a claim by a local authority, by a state or by the Federal Republic, set-off is permissible only if the performance is due to the same fund, or 'statio fisci', from which the claim of the party declaring set-off is to be paid. For details, see Gernhuber (n. 8) 273f.; for Austria: § 1441 ABGB; for Sweden: Lindskog (n. 74) 373f. (applying this rule also for the benefit of certain private enterprises). In Germany, an exception is recognized concerning tax claims: cf. § 226 AO and *Staudinger*/Gursky (n. 89) § 395, n. 8: set-off may be declared against tax claims, as long as the cross-claim is liquidated. The restriction of § 395 BGB does not apply. In other countries, set-off against tax claims is excluded; for France, see Terré, Simler and Lequette (n. 8) n. 1302 *in fine*; for special rules in England, see Wood (n. 8) 12-172; Derham (n. 6) 418ff.; in the Netherlands *Asser*/Hartkamp (n. 72) n. 553; in Italy Cian and Trabucchi (n. 73) Art. 1246, VI, n. 1.

[179] Starck, Roland and Boyer (n. 90) n. 347; Derham (n. 6) 140ff.; Gernhuber (n. 8) 274f.; Bianca (n. 73) n. 251; *Asser*/Hartkamp (n. 72) n. 531; Koziol and Welser (n. 11) 280; Lindskog (n. 74) 303f.; McBryde (n. 12) 22-74; Eujen (n. 16) 64f.

[180] Cf. Art. 1293, no. 3 *code civil* and Terré, Simler and Lequette (n. 8) n. 1302; § 394 BGB and Gernhuber (n. 8) 261ff.; Art. 1246 (3) *codice civile* and Bianca (n. 73) n. 251; Art. 6:135 (a) BW and *Asser*/Hartkamp (n. 72) n. 552; Art. 1200 (2) *código civil*; Koziol and Welser (n. 11) 280 and Dullinger (n. 8) 121ff.; Art. 451 *Astikos Kodikas*; Lindskog (n. 74) 247ff., 283; concerning English law, see Wood (n. 8) 12-104ff.; Eujen (n. 16) 53; for a comparative evaluation, see Haudek (n. 16) 61.

comprehensive way of dealing with this issue is to prohibit set-off to the extent that the principal claim is not capable of attachment.[181] Whether, and to what extent, the principal claim is capable of attachment is decided by the law applicable to that issue.

Thirdly, all continental legal systems have preserved a provision which dates back to the Codex Iustiniani: 'Possessionem autem alienam perperam occupantibus compensatio non datur.'[182] The French code contains a fairly literal version of this rule: set-off may not take place as far as the claim for restitution of an object is concerned of which the owner was unlawfully deprived.[183] The German BGB has generalized the underlying idea:[184] set-off is not permissible against a claim arising from a wilful delict. The same rule has now been enacted in the Netherlands,[185] in view of the serious criticism levelled against its French-inspired predecessor.[186] But what exactly is the underlying idea? Two propositions have been advanced. (i) The rule is designed to ensure that the creditor receives what is due to him within a reasonable time and without having to argue about cross-claims by the tortfeasor.[187] (ii) The rule aims at keeping self-help under

[181] See, most recently, Art. 6:135 (a) BW and *Parlementaire Geschiedenis* (n. 8) 508.

[182] C. 4, 31, 14, 2: on which see Dernburg (n. 6) 511ff.

[183] Art. 1293, no. 1 *code civil* and Terré, Simler and Lequette (n. 8) 1302; Art. 1246 (1) *codice civile*; § 1440 ABGB.

[184] § 393 BGB, von Kübel (n. 37) 1094f. and Gernhuber (n. 8) 259ff.; along the same or very similar lines Greece (Art. 450 (1) *Astikos Kodikas*), Spain (D. Ignacio Casso y Romero, *Diccionario de derecho privado*, vol. 1 (3rd edn, 1967), p. 1015); Sweden (Lindskog (n. 74) 258ff.) and the Netherlands (Art. 6:135 (b) BW). For a comparative evaluation, see Haudek (n. 16) 62. For certain traces, or 'latent expressions', of the rule in English law, see Wood (n. 8) 12-127ff.

[185] See n. 184. [186] See *Parlementaire Geschiedenis* (n. 8) 508.

[187] See BGH, *Neue Juristische Wochenschrift* 1987, 2997 (2998); *Münchener Kommentar*/von Feldmann (n. 53) § 393, n. 1.

control; for a creditor who is unable, for some or other reason, to collect what is due to him, might otherwise be tempted to seek satisfaction by wilfully inflicting injuries on his debtor and then giving notice of set-off.[188] It has correctly been pointed out[189] that the first of these propositions barely does more than repeat the content of the rule. It does not say why proceedings have to be sped up in this specific case and not in others. The second proposition is more convincing, even though the usual textbook example of a disappointed creditor boxing the ears of his debtor may not appear to be practically relevant. More realistic is the situation where the creditor is in a position of bailee vis-à-vis some or other object belonging to his debtor and proceeds wrongfully to sell that object in order to satisfy himself. Thus, a rule along the lines of § 393 BGB might be advisable, in spite of the fact that it has given rise, in its practical application, to a number of problems.[190]

Fourthly, in some national legal systems it is regarded as desirable to prohibit contributories to a company from setting off the company's debt to them against their liability for unpaid calls.[191] Such a rule serves to safeguard the interest of the company's creditors in the undiminished capital fund of the company. It will, however, have to be implemented as part and parcel of a regulation of company law rather than the general rules on set-off.

[188] Gernhuber (n. 8) 259f.; *Staudinger*/Gursky (n. 89) § 393, n. 1.

[189] Gernhuber (n. 8) 259.

[190] Does it apply to intentional breaches of contract (for details, see *Staudinger*/Gursky (n. 89) § 393, nn. 7f.)? What is the position if both the principal claim and the cross-claim arise from a wilful delict (Gernhuber (n. 8) 260f.)?

[191] There are a number of differences in detail; see, for England, Wood (n. 8) 12-130ff.; Derham (n. 6) 250ff.; for Germany, Gernhuber (n. 8) 270ff.; for Austria, Rummel/Rummel (n. 70) § 1440, n. 28; for France, Eujen (n. 16) 43 and 64. The matter is widely held to be one of company law.

VI MISCELLANEOUS PROBLEMS

Finally, there are two miscellaneous matters which are dealt with in a number of legal systems. (i) Set-off is not excluded by the fact that performance of the two obligations has to occur at different places. Thus, it may happen that the creditor of the principal claim suffers damages as a result of not receiving performance or not being able to effect performance at the right place. It appears reasonable to grant him a claim to recover such damages.[192] (ii) If either of the parties has several claims suitable for set-off, the party giving notice of set-off may determine which of these claims are to be set off against each other. If no such specification is given, or if the other party objects without undue delay, the general rules relating to the appropriation of performance[193] apply *mutatis mutandis*.[194]

VII SUMMARY

To sum up: the Principles of European Contract Law should deal with set-off as a matter of substantive law (II). Set-off should operate on the basis of an extrajudicial, informal and unilateral declaration which has to be communicated to the other party (III.1–2). Such a declaration should not

[192] Art. 1296 *code civil*; § 391 BGB; Art. 1245 *codice civile*; Art. 6:138 BW; Art. 1199 *código civil*; Art. 446 *Astikos Kodikas*. And see *Parlementaire Geschiedenis* (n. 8) 514f.; Dullinger (n. 8) 80ff.; Wood (n. 8) 24-31ff.

[193] See Art. 7:109 PECL.

[194] For Germany, see § 396 BGB; for the Netherlands, see Art. 6:137 BW; for Greece, see Art. 452 *Astikos Kodikas*; for Austria, see Rummel/Rummel (n. 70) § 1438, n. 17. And see von Kübel (n. 37) 1093f.; *Parlementaire Geschiedenis* (n. 8) 512ff.; Wood (n. 8) 24-33. In legal systems where set-off operates *ipso iure*, the first part of this proposition does not, of course, apply and the rules relating to the appropriation of performance apply *mutatis mutandis*; for France, see Art. 1297 *code civil*, for Italy, see Art. 1249 *codice civile*; for Spain, see Art. 1199 *código civil*.

have retrospective effect (III.3). The operation of set-off depends upon five requirements. There has to be *concursus debiti et crediti* (IV.1) and both obligations must be of the same kind (IV.2). The cross-claim has to be due (IV.3) and the party declaring set-off must be entitled to effect performance (IV.3). A debtor may not normally set off a claim which is unascertained as to its existence or to its amount. He may only do so if the set-off does not prejudice the interests of the other party. Where the claims of both parties arise from the same legal relationship, it is presumed that the interests of the other party will not be prejudiced (IV.4). Set-off may be excluded by agreement. It cannot be effected against a claim to the extent that that claim is not capable of attachment, and against a claim arising from a wilful delict (V). There have to be rules dealing (i) with the problem of set-off concerning two obligations which have to be performed at different places and (ii) with the situation where one of the parties has two or more claims against the other party or has to perform two or more obligations towards the other party (VI).

2

LIBERATIVE PRESCRIPTION I: THE CORE REGIME

I POLICY CONSIDERATIONS

An obligation is a legal tie which binds a debtor to the necessity of making some performance.[1] If such performance is not forthcoming, the creditor may bring an action. But he may not wait indefinitely before he chooses to enforce his right. All legal systems today recognize certain temporal limitations, be it under the name of (negative, or extinctive) prescription, or limitation of actions.[2] But they have not always done so. In classical Roman law most actions were not subject to any limitation period.[3] In England the first Statute of Limitations dates from the early seventeenth century.[4] In pre-reception Germany the view prevailed that something that has been wrong for hundred years cannot be right even for an hour.[5] And the South

[1] This is the famous definition contained in Inst. See III, 13 pr., as translated by Peter Birks and Grant McLeod, *Justinian's Institutes* (1987).

[2] Concerning terminology, see pp. 69ff., 75.

[3] See Max Kaser, *Das römische Privatrecht: Zweiter Abschnitt* (2nd edn, 1975), p. 71; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, paperback edn 1996), pp. 769f.; E. Kaufmann, in *Handwörterbuch zur Deutschen Rechtsgeschichte*, vol. V (1998), cols. 734ff.; David Johnston, *Prescription and Limitation* (1999), 1.13. For a more detailed discussion of the development of prescription of actions in Roman law, see Mario Amelotti, *La prescrizione delle azioni in diritto romano* (1958).

[4] Andrew McGee, *Limitation Periods* (3rd edn, 1998), p. 2.

[5] Eduard Graf and Mathias Dietherr, *Deutsche Rechtssprichwörter* (2nd edn, 1869), p. 95.

African Xhosa have a proverb according to which 'debts never rot'.

This obvious reluctance in pre-modern societies to impose limitation periods is readily understandable in view of the fact that any such measure effectively amounts to an act of expropriation:[6] a claim is an asset within the property of the creditor which largely loses its value if it can no longer be pursued in court. What, then, are the reasons that have prompted the introduction of limitation periods? The English limitations legislation is, essentially, based on the considerations[7] (i) that, as the years pass by, it becomes more and more difficult for the debtor to defend himself against his creditor's claim; (ii) that the lapse of time engenders the reasonable expectation that an incident which might have given rise to a claim may be treated as closed, and that potential debtors may adjust their behaviour accordingly; and (iii) that it is in the public interest that legal disputes are resolved swiftly so as not to create a source of uncertainty, unfairness and increased cost of litigation.

The same reasons have been advanced in continental legal systems. Loss of right as a result of lapse of time is a means to an end, not an end in itself, as the draftsmen of the German Civil Code recognized.[8] Protection must be granted

[6] See also Christian von Bar, *The Common European Law of Torts*, vol. II (2000), n. 554. In this context it may be interesting to observe that acts of expropriation were also not recognized as such in classical Roman law; see Max Kaser, *Das römische Privatrecht*: *Erster Abschnitt* (2nd edn, 1971), pp. 404f. But see Martin Pennitz, *Der 'Enteignungsfall' im römischen Recht der Republik und des Prinzipats* (1991).

[7] See the succinct analysis in *Consultation Paper* No. 151, entitled 'Limitation of Actions', by the English Law Commission (1998), pp. 11ff.; cf. also N. H. Andrews, 'Civil Procedure', in Peter Birks (ed.), *English Private Law*, vol. II (2000), 19.94.

[8] 'Motive', in Benno Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol. I (1899), p. 512; see also Johnston (n. 3), 1.31, drawing attention to a variety of authors in the civilian tradition

to a debtor who, in view of the 'obfuscating power of time',[9] finds it increasingly difficult to defend a claim (i); lapse of time suggests a certain indifference on the part of the creditor towards his claim which, in turn, engenders a reasonable reliance in the debtor that no claim will be brought against him (ii); and prescription prevents long-drawn-out litigation about claims which have become stale (iii).[10] 'Interest rei publicae ut sit finis litium' was described, in this context, as a 'favourite and universal maxim' in an English case;[11] 'ne autem lites immortales essent, dum litigantes mortales sunt', as the matter had been put, 'with singular felicity',[12] by a Dutch writer about a century earlier.[13] Friedrich Carl von

who regarded prescription as a matter of utility rather than equity. Even if it is not just, it satisfies practical demands.

[9] Bernhard Windscheid and Theodor Kipp, *Lehrbuch des Pandektenrechts* (9th edn, 1906), § 105 (at 544).

[10] See, for a detailed analysis, Karl Spiro, *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen*, vol. 1 (1975), §§ 3ff.; see also Frank Peters and Reinhard Zimmermann, 'Verjährungsfristen. Der Einfluß von Fristen auf Schuldverhältnisse. Möglichkeiten der Vereinheitlichung von Verjährungsfristen', in Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. 1 (1981), pp. 104, 112f., 189f., 288ff.; Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992), pp. 34f.; Frank Peters, in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (13th edn, 1995), Vorbem. zu §§ 194ff., nn. 5ff.; Matthias Unterrieder, *Die regelmäßige Verjährung: Die §§ 195 bis 202 BGB und ihre Reform* (1998), pp. 14ff.; Hartmut Oetker, *Die Verjährung* (1994), pp. 33ff.; Helmut Heinrichs, 'Überlegungen zum Verjährungsrecht, seine Mängel, seine Rechtfertigung und seine Reform', in *Karlsruher Forum* (1991), pp. 6f.; A. S. Hartkamp, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht*, Deel I (10th edn, 1996), n. 653; M. M. Loubser, *Extinctive Prescription* (1996), pp. 22ff.; Johnston (n. 3), 1.40ff., 1.58ff.

[11] *Cholmondeley v. Clinton*, (1820) 2 Jac & W 139, 37 ER 527 (577).

[12] Joseph Story, *Commentaries on the Conflict of Laws* (8th edn, 1883), n. 576.

[13] Johannes Voet, *Commentarius ad Pandectas* (Halae, 1778), Lib. II, Tit. I, 53. Voet's great commentary on the Digest first appeared in two volumes, in 1698 and 1704.

Savigny counted the prescription of claims among the most important and beneficial of legal institutions;[14] Joseph Story thought that it was based on 'the noblest policy'.[15] Prescription thus aims, in a very special sense, at legal certainty.

II LEGAL LITERATURE AND LAW REFORM

Obviously, therefore, we are dealing with an institution that constitutes an indispensable feature of a modern legal system. Moreover, it is of enormous practical importance.[16] At the same time, however, surprisingly little academic attention has traditionally been devoted to it.[17] For in spite of having been graced by the attention of some of the greatest legal minds of the nineteenth century,[18] the topic of prescription, or limitation, has until recently very widely been regarded as dull and unrewarding.[19] This may be due to the fact that, both in England and on the continent, prescription, or limitation,

[14] Carl von Savigny, *System des heutigen Römischen Rechts*, vol. v (1841), p. 272. Along the same lines, see P. A. Fenet, *Recueil complet des travaux préparatoires du Code civil*, vol. xv (1836) 573 ('Of all the institutions of private law, prescription is the one that is most necessary for the social order'); I am grateful to Professor Denis Tallon for drawing my attention to this. Most recently, see N. H. Andrews, 'Reform of Limitation of Actions: The Quest for Sound Legal Policy', (1998) 57 *Cambridge Law Journal* 590 ('truly the gateway to justice'). On the other hand, it is occasionally emphasized that the defence of prescription does not rest on strong grounds for substantive justice, or morality; see, e.g., von Bar II (n. 6), n. 545 (the 'morally weakest defence').

[15] Story, *Commentaries* (n. 12), n. 576.

[16] See, for instance, Peters and Zimmermann (n. 10) 103ff.

[17] This applies at least as far as prescription as a general topic of academic discussion and inquiry is concerned. Henner Haug, *Die Neuregelung des Verjährungsrechts* (1999), p. 11, on the other hand, correctly points out that it is hardly possible to keep track of the literature devoted to specific aspects of prescription.

[18] See, e.g., nn. 14, 15.

[19] See Reinhard Zimmermann, 'Die Verjährung', (1984) *Juristische Schulung* 409; Loubser (n. 10) 1; McGee (n. 4) 2f.

is entirely a creation of statutory law; and that the relevant provisions still reflect the somewhat haphazard history of the subject. The first comprehensive modern treatise, based on Swiss law but also taking account of other continental codifications, appeared in 1975.[20] Since then, academic interest has picked up considerably, notably in Germany. In England, too, a number of treatises devoted to limitation periods have been published in recent years.[21] 'Extinctive prescription' was one of the topics discussed at the XIVth Congress of the International Academy of Comparative Law in August 1994;[22] since then, important monographs have appeared, *inter alia*, in South Africa[23] and Scotland.[24]

A not inconsiderable amount of legal literature has also been generated by attempts to reform or harmonize the law of prescription/limitation.[25] For, on the one hand, in a number of countries the relevant body of law is viewed with great concern. In Germany, the rules relating to prescription are

[20] This is the standard treatise by Spiro, quoted n. 10.

[21] See the references in McGee (n. 4) 3 and Andrews, (1998) 57 *Cambridge Law Journal* 589f.

[22] Documented in Ewoud H. Hondius (ed.), *Extinctive Prescription: On the Limitation of Actions* (1995).

[23] The work by Loubser, quoted n. 10.

[24] The work by Johnston, quoted n. 3. For the Netherlands, see M. W. E. Koopmann, *Bevrijdende verjaring* (1993).

[25] See, for Germany, Helmut Heinrichs, 'Reform des Verjährungsrechts', (1982) *Neue Juristische Wochenschrift* 2021ff.; Heinrichs (n. 10) 3ff.; Wolfgang Grunsky, 'Vorschläge zu einer Reform des Schuldrechts', (1982) 182 *Archiv für die Civilistische Praxis* 453ff.; Karl Spiro, 'Zur Reform der Verjährungsbestimmungen', in *Festschrift für Wolfram Müller-Freienfels* (1986), pp. 617ff.; Dieter Rabe, 'Vorschläge zur Überarbeitung des Schuldrechts: Verjährung', (1992) *Neue Juristische Wochenschrift* 2395ff.; for Belgium, see M. E. Storme, 'Perspectieven voor de bevrijdende verjaring in het vermogensrecht met ontwerpbepalingen voor een hervorming', (1994) *Tijdschrift voor Privaatrecht* 1977ff. For a comparative discussion, focusing on English, Dutch and Greek law, and the German reform proposals, see Gerhard Dannemann, Fotios Karatzenis and Geoffrey V. Thomas, 'Reform des Verjährungsrechts aus rechtsvergleichender Sicht', (1991) 55 *RabelsZ* 697ff.

widely regarded as one of the least satisfactory features of the BGB;[26] in England, the law of limitation of actions is considered to be incoherent, unnecessarily complex, outdated, uncertain, unfair and inefficient.[27] But these are not the only countries in which a pressing need for legislative reform has been recognized.[28] Reform proposals have been submitted by a special commission charged with the revision of the law of obligations in Germany[29] and by the Law Commission in England.[30] Other countries have overhauled their law of prescription in the process of recodification, most notably the Netherlands[31] and Québec.[32] The most recent piece of reform legislation, however, is the one enacted in Belgium.[33]

[26] For all details, see Peters and Zimmermann (n. 10) 186ff.; for a discussion in English, see Reinhard Zimmermann, 'Extinctive Prescription in German Law', in Erik Jayme (ed.), *German National Reports in Civil Law Matters for the XIVth Congress of Comparative Law in Athens* (1994), pp. 153ff.

[27] *Law Commission Consultation Paper* (n. 7) 241ff.

[28] See, e.g., Ewoud Hondius, 'General Report', in Hondius (n. 22), pp. 24f. ('At present, the law relating to extinctive prescription is in turmoil'). Regarding France, see Alain Bénabent, 'Le chaos du droit de la prescription extinctive', in *Mélanges dédiés à Louis Boyer* (1996), pp. 123ff.

[29] See *Abschlußbericht* (n. 10). This commission was established early in 1984 and it was instructed to revise the law of (liberative) prescription, the law relating to breach of contract and warranty claims. Concerning the law of prescription, the commission took as its starting point a report and reform proposal submitted, at the request of the minister of justice, in 1981 by Frank Peters and Reinhard Zimmermann (see above n. 10). For further literature, see Zimmermann (n. 26) 155.

[30] See *Law Commission Consultation Paper* (n. 7); on which, see Andrews, (1998) 57 *Cambridge Law Journal* 589ff.

[31] See, in particular, the monograph by Koopmann (n. 24); *Asser*/Hartkamp (n. 10), nn. 648 ff.; Dannemann, Karatzenis and Thomas, (1991) 55 *RabelsZ* 697ff.

[32] See Patrice Deslauriers, 'Québec', in Hondius (n. 22), pp. 287ff.

[33] Wet van 10 juni 1998 tot wijziging van sommige bepalingen betreffende de verjaring. Artt. 2262, 2262bis and 2263 Belgian *code civil* were inserted or amended by this statute. See Ignace Claeys, 'De nieuwe verjaringswet: een inleidende verkenning', (1998–9) *Rechtskundig Weekblad* 377ff. for details,

On the other hand, it is widely acknowledged that the adoption of a uniform regime governing limitation periods, particularly in international sales law, would facilitate the development of international trade. For this reason a convention was drafted by the United Nations Commission on International Trade Law (Uncitral) in the early 1970s; it was approved in June 1974, amended by a Protocol adopted in 1980 and entered into force on 1 August 1988.[34] However, it has, so far, been conspicuously less successful than the Convention on the International Sale of Goods, since it has been ratified by only seventeen states, none of them belonging to the European Union.[35]

as well as the contributions to Hubert Bocken et al. (eds.), *De herziening van de bevrijdende verjaring door de Wet van 10 juni 1998: De gelijkheid hersteld?* (1999).

[34] It can be consulted at www.un.or.at/uncitral/english/texts/sales/limitcon.htm. The German version may be found in Reiner Schulze and Reinhard Zimmermann (eds.), *Basistexte zum europäischen Privatrecht* (2000), II.10. For a commentary, see (1979) 10 *Uncitral Yearbook* 145ff.; see also, e.g., Karl Spiro, 'Befristung und Verjährung der Ansprüche aus dem Wiener Kaufrechtsübereinkommen', in Hans Hoyer and Willibald Posch (eds.), *Das einheitliche Wiener Kaufrecht* (1992), pp. 195ff.; Ulrich Magnus, 'Aktuelle Fragen des UN-Kaufrechts', (1993) 1 *Zeitschrift für Europäisches Privatrecht* 90ff.; Magnus, 'Stand und Entwicklung des UN-Kaufrechts', (1995) 3 *Zeitschrift für Europäisches Privatrecht* 214f.; K. Boele-Woelki, 'De verjaring van vorderingen uit internationale koopovereenkomsten', in *Europees Privaatrecht* (1996), pp. 99ff.

[35] As per 1 February 1999 the convention had entered into force, in its amended version, in Argentina, Belarus, Cuba, Czech Republic, Egypt, Guinea, Hungary, Mexico, Moldova, Poland, Romania, Slovakia, Slovenia, Uganda, United States of America, Uruguay and Zambia. See Schulze and Zimmermann (n. 34) II.10 for details. For the reason why the Convention has been ratified, so far, mainly by third-world and ex-socialist countries (conspicuous exception: the United States, where the Convention entered into force in December 1994), see Frank Diedrich, 'Lückenfüllung im Internationalen Einheitsrecht', (1995) *Recht der Internationalen Wirtschaft* 362: the export-oriented nations in Western Europe regard the four-year period of Art. 8 as too long. See also the interesting background information on the origin of this provision provided by Boele-Woelki (n. 34) 120f.

III PRESCRIPTION OF CLAIMS AND LIMITATION OF ACTIONS

Hitherto two different terms have been employed for the legal institution under consideration: (negative/extinctive) prescription and limitation of actions. The former is used in the legal systems belonging to the Romanistic legal family and is derived from the Roman *longi temporis praescriptio*.[36] The bracketed qualification[37] is intended to make clear that we are not dealing here with acquisitive (or positive) prescription: the acquisition of title to property as a result of lapse of time. This was the historical root of the notion of *longi temporis praescriptio*[38] which was extended only in the post-classical period to the limitation of actions.[39] Under the older *ius commune* the Roman term was still used in a broad sense to cover what was usually referred to as 'acquisitive' and 'extinctive' prescription.[40] The natural law codifications proceeded from this basis[41] as do Scots[42] and South African law.[43] Predominantly, however, the combination of both

[36] The German (and Austrian) term is 'Verjährung', the Dutch one 'verjaring'.

[37] The term 'negative prescription' is used in Scotland. See Johnston (n. 3) 1.13.

[38] See Kaser I (n. 6) 424ff.; Johnston (n. 3) 1.15; Dieter Nörr, *Die Entstehung der longi temporis praescriptio* (1969).

[39] Kaser II (n. 3) 71f., 285ff.; Amelotti (n. 3) 211ff.; Johnston (n. 3) 1.116ff.; cf. also Peters and Zimmermann (n. 10) 112f.

[40] See the references in Zimmermann (n. 3) 768, n. 141. For a discussion of the development, see Helmut Coing, *Europäisches Privatrecht*, vol. I (1985), pp. 183ff.; Coing, *Europäisches Privatrecht*, vol. II (1989), pp. 280ff.; Oetker (n. 10) 20off.; Johnston (n. 3) 1.31ff.

[41] §§ 1478ff. ABGB; Artt. 2219ff. *code civil*. In both countries, however, this approach is criticized today and both institutions are usually discussed separately, the one in the context of the law of obligations, the other of the law of property. See Helmut Koziol and Rudolf Welser, *Grundriß des bürgerlichen Rechts*, vol. I (10th edn, 1995), pp. 184ff.; vol. II (10th edn, 1996), 86ff.; Murad Ferid and Hans-Jürgen Sonnenberger, *Das französische Zivilrecht*, vol. I/1 (2nd edn, 1994), 1 C 191.

[42] Prescription and Limitation (Scotland) Act 1973.

[43] Prescription Act 68/1969; and see Loubser (n. 10) 21f.

legal institutions under one and the same doctrinal umbrella is no longer regarded as helpful today since they are largely governed by different rules. The modern approach gained ground in nineteenth-century scholarship[44] and found its way into the twentieth-century codifications.[45] In England, interestingly, prescription is a term that has retained its original, acquisitive flavour.[46]

The functional equivalent to 'extinctive' prescription in English law is 'limitation of actions'. As the term suggests, the English institution is procedural in nature: limitation does not affect the right (i.e., the substantive 'cause of action') but merely the ability to pursue that right in court.[47] This approach is by no means alien to the civilian tradition. Up to the nineteenth century, *longi temporis praescriptio* was usually related to the right to sue and was thus seen to bar the action.[48] In Germany, the notion of 'Klageverjährung' gave way to that of a prescription affecting

[44] Savigny (n. 14) 266 referred to acquisitive and extinctive prescription as 'artificial terms' which are 'totally reprehensible'; cf. also, e.g., Windscheid and Kipp (n. 9) § 105, nn. 1a and 6; Coing II (n. 40) 281f.

[45] Thus, prescription of claims is dealt with in §§ 194ff. BGB (general part), usucaption ('Ersitzung') in §§ 937ff. BGB (law of property). The *codice civile* deals with usucaption ('usucapione') in Artt. 1158ff. (law of property) and with prescription ('prescrizione') in Artt. 2934ff. (as part of book 6, devoted to protection of rights). For the Dutch BW, see Artt. 3:99ff. and 3:306ff. (both in book 3 dealing with patrimonial law in general, the former (still called 'verkrijgende verjaring') in title 4 (acquisition and loss of property), the latter ('bevrijdende verjaring') in title 11 (rights of action)).

[46] Andrew McGee, 'England', in Hondius (n. 22), p. 135: 'for a Common Lawyer the term "extinctive prescription" has an odd ring. "Prescription" is a term usually used in the common law to denote the process by which limited rights of use over another's land (such as easements) may be acquired.'

[47] Characteristically, therefore, limitation is discussed in the chapter devoted to civil procedure in Birks (n. 7).

[48] See, for example, §§ 150, 151, 155 of the Saxonian Civil Code; Savigny (n. 14) 265ff.; Alois Brinz, *Lehrbuch der Pandekten*, vol. I (3rd edn, 1884), § 114; Coing I (n. 40) 187; see also *Staudinger*/Peters (n. 10) § 194, n. 2. On the Roman notion of 'actio', see Kaser I (n. 6) 223ff.

the substantive claim, i.e., barring the right rather than the remedy ('Anspruchsverjährung'), only as a result of Bernhard Windscheid's famous monograph on the action of Roman private law from the point of view of contemporary law.[49] A number of continental legal systems have followed suit.[50] But there are also other views. According to the French *code civil* '[t]outes les *actions* . . . sont prescrites'[51] and Art. 2223 *code civil* enjoins judges not to supply 'd'office le moyen résultant de la prescription'. This is clearly a procedural approach. On the other hand, however, prescription is described as 'un moyen . . . de se libérer' in Art. 2219 and as a means of extinguishing an obligation in Art. 1234.[52] Understandably, in view of these somewhat contradictory pronouncements, academic opinion has vacillated: the *théorie classique*, prevailing in the nineteenth century, took a procedural perspective

[49] Windscheid, *Die Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts* (1856); Windscheid and Kipp (n. 9) §§ 43, 106. 'Anspruch' was the term coined by Windscheid in order to remould the German *actio* into a term of substantive rather than procedural law. It has become one of the central conceptual pillars of modern private law doctrine in Germany; see, e.g., Reinhard Zimmermann, 'An Introduction to German Legal Culture', in Werner F. Ebke and Matthew W. Finkin, *Introduction to German Law* (1996), p. 31, with references.

[50] See, for the Netherlands, Art. 3:306 BW, referring to 'verjaring van een rechtsvordering'; significantly, Koopmann uses the term 'Anspruchsverjährung'. See also Spiro (n. 10) § 241 who regards this as the approach generally followed in continental legal systems. According to Loubser (n. 10) 13, 'denial of the ability to enforce a substantive right by legal process is an integral part of such a right'. The qualification of prescription/limitation as substantive or procedural used to be of considerable practical importance for private international law (is prescription/limitation governed by the *lex causae contractus* or the *lex fori*?). However, England and Scotland now also apply the *lex causae* (Foreign Limitation Periods Act of 1984, in force since October 1985). For details, see Boele-Woelki (n. 34) 100ff.

[51] Art. 2262 *code civil* (emphasis added).

[52] See also Art. 2934 (1) *codice civile*: 'Ogni diritto si estingue per prescrizione'; Art. 2938 *codice civile*: 'Il giudice non può relevare d'ufficio la prescrizione non opposta.'

whereas in the course of the twentieth century prescription came to be seen, predominantly, as an institution of substantive law, extinguishing the right rather than merely barring the action.[53] As a result of parliamentary endorsement of the procedural perspective in the course of the reform of the *code de procédure civile* in 1975 (the draftsmen still following Pothier in this respect!), opinion has started to vacillate again;[54] still, however, prevailing doctrine today subscribes to the principle that the obligation itself is extinguished.[55]

But even if a legal system regards prescription as a matter of substantive law, it may take what is often dubbed a 'weak' or a 'strong' approach. Once the period of prescription has run out, the claim may be held to have ceased to exist (strong effect);[56] or the debtor may merely be granted a right to refuse performance (i.e., a defence on the level of substantive law; weak effect).[57] Thus, if the debtor has paid

[53] See Ferid and Sonnenberger (n. 41) 1 C 245.

[54] Ferid and Sonnenberger (n. 41) 1 C 245f.; François Terré, Philippe Simler and Yves Lequette, *Droit Civil: Les Obligations* (7th edn, 1999), n. 1403.

[55] Gabriel Marty, Pierre Raynand and Philippe Jestaz, *Les Obligations*, vol. II (2nd edn, 1989), nn. 341f. French law also recognizes a number of cases where expiration of very short periods of prescription merely leads to a presumption that payment has been made ('prescription présomptive'): Artt. 2271ff. *code civil*; Terré, Simler and Lequette (n. 54) n. 1376; Ferid and Sonnenberger (n. 41) 1 C 250; Unterrieder (n. 10) 84ff.; cf. also Artt. 2954ff. *codice civile*. Such a presumption provides only an imperfect protection against unjustified claims and therefore always requires, in addition, a proper prescription regime. If the general period is brief, an additional presumptive prescription would render the law in this area unnecessarily complex. For criticism, see Spiro (n. 10) § 254; Peters and Zimmermann (n. 10) 263f.; Loubser (n. 10) 9f.

[56] According to ss. 8A, 6, 7 Prescription and Limitation (Scotland) Act 1973 prescription has the effect of extinguishing the obligation in question; see also Johnston (n. 3) 4.101. The same position applies in South Africa: s. 10 (1) Prescription Act 68 of 1969; and see Loubser (n. 10) 15ff. Also according to Art. 2934 (1) *codice civile*, prescription extinguishes the obligation; and see § 1449 ABGB; Art. 1234 *code civil*.

[57] See § 222 1 BGB and *Staudinger*/Peters (n. 10) § 222, nn. 34ff.; cf. also Art. 272 1 *Astikos Kodikas* and, for Dutch law, *Asser*/Hartkamp (n. 10) n. 655. This

in spite of prescription having occurred, he has paid with legal ground according to the latter approach and should be unable to recover;[58] whereas he should be able to recover as having paid without legal ground according to the former approach.[59] This consequence, however, is not normally drawn by legal systems subscribing to the strong effect of prescription.[60] Nor do all of them, as might have been thought logical, regard prescription as a matter which must be taken into account by the court *ex officio*.[61] Effectively, therefore, it is the weak effect of prescription that has been gaining ground internationally. This is not surprising in view of the fact that it would appear to be most appropriate in view of the aims pursued by the law of prescription.[62] For there is no reason for a legal system to foist its protection upon a debtor who is willing to pay[63] and who can thus be taken to acknowledge that he is under an obligation to do so; and the public interest ('ut sit finis litium'[64]) is not adversely affected if a debtor is allowed to pay even after the period

approach is supported by Spiro (n. 10) §§ 226ff., 241, 244; Loubser (n. 10) 14f.; *Abschlußbericht* (n. 10) 100f.

58 § 222 II BGB; Art. 63 II OR; Peters and Zimmermann (n. 10) 136; Koziol and Welser (n. 41) 189; Spiro (n. 10) § 233; Loubser (n. 10) 16; Art. 26 Uncitral Convention (n. 34).

59 Whether payment has been made with or without legal ground is the key issue for the application of the modern civilian version of the *condictio indebiti*; for details, see Reinhard Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach', (1995) 15 *Oxford Journal of Legal Studies* 403ff.

60 See, e.g., Art. 2940 *codice civile*; s. 10 (3) (South African) Prescription Act 68 of 1969.

61 § 1501 ABGB; Art. 2938 *codice civile*; s. 17 (1) (South African) Prescription Act 68 of 1969; see also von Bar II (n. 6) n. 545.

62 See also the analysis by Spiro (n. 10) §§ 241, 244; Loubser (n. 10) 14ff.; Oetker (n. 10) 60ff.

63 The arguments advanced in the course of preparing the BGB are still valid today; for a summary see Peters and Zimmermann (n. 10) 136.

64 See pp. 63f.

of prescription has run out.[65] While any prescription regime will inevitably result in creditors being unable to pursue even entirely valid claims, the law should not endorse this consequence where it is unnecessary in terms of the underlying policy objectives.

It is noticeable that legal systems attributing a strong effect to prescription come very close, as far as practical results are concerned, to those subscribing to the weak approach. The same is true if one compares legal systems adopting a substantive with those adopting a procedural approach.[66] Thus, under the common law, since prescription bars the remedy and not the right, it is a matter of course that the debt can still be paid and that any such payment cannot later be recovered.[67] All in all, the discussion is less concerned with practical results than with the true construction, or theory, of prescription. On that level, however, it may be maintained that the weak substantive approach is able to explain the practical results more satisfactorily;[68] and that,

[65] To the contrary, it may be argued that to allow the debtor to reclaim what he has given would be detrimental to the public peace: after the debtor has paid the matter must be regarded as settled.

[66] See, as far as French and German law are concerned, Ferid and Sonnenberger (n. 41) 1 C 197, 1 C 246; concerning German and English law see, e.g., *Law Commission Consultation Paper* (n. 7) 234 (10.144). But see also the remarks by Spiro (n. 10) § 241.

[67] French law reaches the same result; see Ferid and Sonnenberger (n. 41) 1 C 248.

[68] See also Loubser (n. 10) 15ff. What remains of the obligation after prescription has occurred is often described as 'naturalis obligatio', both in legal systems which, in principle, proceed from the assumption that the obligation is extinguished and in those which hold that the obligation continues to exist: see, e.g., Philippe Malaurie and Laurent Aynès, *Les Obligations* (10th edn, 1999/2000), n. 1097; *Staudinger*/Peters (n. 10) § 222, n. 34; *Asser*/Hartkamp (n. 10) n. 657; Spiro (n. 10) § 244. But it has also, correctly, been noted that the use of such terminology is not very helpful in view of the fact that we are not dealing with a 'naturalis obligatio' in the historical sense of the word: after all, the creditor's claim is perfectly enforceable (as long as prescription is not invoked).

moreover, the procedural flavour inherent in the notion of a defence (though one on the basis of substantive law) provides a bridge between a purely procedural and a purely substantive concept of prescription.[69] Notice must also be taken of the decision in the Rome Convention on the Law Applicable to Contractual Obligations in favour of a substantive characterization of limitation/prescription.[70] And finally, it would appear that in a code of contract law the notion of a 'remedy' (as employed in chapter 9 of the *Principles of European Contract Law*) can hardly be taken to be a purely procedural one and that the right to withhold performance under Art. 9:201 presumably constitutes a defence like the defence of prescription in the jurisdictions endorsing a 'weak' prescription regime. As a result, then, it may be desirable to abandon the current terminology. 'Extinctive prescription' is inappropriate in view of the fact that prescription does not extinguish the right. 'Limitation of actions' should be avoided because of its purely procedural frame of reference. 'Limitation of claims' would be one possibility, 'liberative prescription' the other. Of these two the latter is more specific and descriptive, and hence preferable.

[69] The truth of the matter is, as Kurt Lipstein has pointed out, that prescription/limitation in every European system contains substantive as well as procedural elements: 'Qualification', in *International Encyclopedia of Comparative Law*, vol. III, chapter 5 (2000), n. 29; cf. also *Staudinger*/Peters (n. 10) § 194, n. 4. It may be pointed out, in this context, that the Uncitral Convention attempts, as it were, to sit on the fence; it 'avoids choosing between whether it deals with the institution of prescription as it is known in certain legal systems or of limitation as it is known in others': Hans Smit, 'The Convention on the Limitation Period in the International Sale of Goods: Uncitral's First-Born', (1975) 23 *American Journal of Comparative Law* 339; cf. also Boele-Woelki (n. 34) 112ff. Thus, it merely uses the term 'limitation'; on the other hand, it uses the notion of 'claims' which can no longer be exercised.

[70] Art. 10 (1) (d).

IV STRIKING THE BALANCE

1 *Principal components of a prescription regime*

One of the most characteristic features of any prescription regime is the close interrelation between its individual components.[71] The principal components are: the period of prescription; when the period begins to run; under which circumstances prescription is suspended; in which cases the period begins to run afresh; and whether the parties, by agreement, may facilitate or render more difficult the prescription of a claim. Thus, for instance, a uniform period of prescription may be more acceptable if the parties are able to extend or shorten it to suit the requirements of a specific type of claim. A great degree of uniformity may therefore be balanced by making the prescription regime non-mandatory. Or, if the period of prescription is very long, the rules about suspension, or renewal, will not be practically very relevant. They become crucially important, however, in case of short prescription periods. Or, perhaps, most importantly: a period of one year may be a relatively short period; and it may be too short, at least from the point of view of the creditor, if it runs from an objective date (such as delivery) and without any regard as to whether the creditor knew about his claim or could have known about it. By the same token, even a one-year period may be perfectly adequate if the prescription regime does take account of these subjective factors. Generally speaking it may be said that a debtor-friendly (i.e., a short) period of prescription requires the rules concerning commencement, suspension and renewal to be tilted in favour of the creditor to achieve an acceptable balance. Thus, it is always dangerous to look at any one individual facet of a prescription regime in isolation.

[71] See also Spiro (n. 10) §§ 256ff.

2 *Balancing the interests*

In addition, it must always be kept in mind that the prescription regime as a composite whole reflects a balancing of conflicting interests.[72] Here we may turn to the policy considerations mentioned above.[73] They require the law to recognize the institution of liberative prescription. Considerations (i) and (ii) focus on protection of the debtor and militate in favour of a strict regime whereas (iii) is more ambiguous. For the public interest is not served if creditors do not have a reasonable chance to pursue well-founded claims. A prescription regime which bites too hard would ultimately lead to the fundamental inconsistency that the legal system takes away with the one hand what it gives with the other. It would grant legal rights without practical value. Moreover, it would induce creditors to pursue their rights prematurely and would thus engender rather than prevent unnecessary lawsuits.[74] If the law of prescription enables the debtor summarily to defend himself against a claim brought against him by invoking prescription, it does so because the claim may well be unfounded and because it may have become impossible for him to establish that fact: policy consideration (i) above. For a certain period, however (e.g., for as long as one usually keeps receipts for payments made), it is not normally difficult for a debtor to show that the claim brought against him is unfounded (e.g., because he has already paid). Were he allowed to resort to the defence of prescription when the law could reasonably expect him to raise whatever other defence may be available to him, his protection would, as it

[72] See also Oetker (n. 10) 55; and Andrews, (1998) 57 *Cambridge Law Journal* 595, who emphasizes that a satisfactory law of limitation must involve the balancing of competing considerations.

[73] See pp. 63f.

[74] See also *Law Commission Consultation Paper* (n. 7) 14.

were, overshoot the mark. For by resorting to the defence of prescription, the debtor would be able to defeat claims which are, very often, well-founded.

That well-founded claims may be defeated is, of course, the necessary price a legal system has to pay if it wishes to provide the debtor with an easy means to defeat unfounded ones.[75] A very delicate line therefore has to be drawn as to when that price (to be paid by the creditor!) is justified by a preponderance of benefits for the debtor. But since it is the creditor who has to pay the price, policy consideration (ii) comes into play again. A creditor, in a way, is acting against the precepts of good faith if he sits on his rights without exercising them[76] and only pounces upon his debtor at some later stage. His behaviour has engendered a reasonable reliance in the debtor that he may treat the matter as closed. But the creditor's behaviour can be held against him only if he has had a chance to pursue his claim. It would be manifestly unjust to hold a creditor accountable for not bringing an action against his debtor if he either was unable or could not reasonably be expected to do so.[77] This would seem to

[75] Attention very widely tends to focus on the fact that prescription rules may have the effect of depriving a creditor of a well-founded claim. Much less attention tends to be paid to the many cases in which prescription rules prevent unjustified claims from being successfully pursued: Peters and Zimmermann (n. 10) 104.

[76] Inherent in prescription is thus an element of 'Verwirkung'; on which see, in general, *Staudinger*/Peters (n. 10) § 194, nn. 17ff.; Günter H. Roth, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (3rd edn, 1994), nn. 360ff.; and see the references in Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Landscape', in Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000), pp. 25, 31f., as well as case study 22 in the same volume (at 515ff.).

[77] As to the required balance which needs to be struck see also Spiro (n. 10) § 258. That the commencement of the period of prescription is the most crucial point in determining the reasonableness of a prescription regime has also been noted by others; see, e.g., Matthias E. Storme, 'Constitutional Review of

be a strong argument in favour of a regime which, while taking account of the creditor's position in determining when the period of prescription begins to run and under which circumstances it may be suspended (broadly speaking, the creditor must have a fair opportunity of pursuing his claim), would revolve around a comparatively short prescription period.[78]

V THE ARGUMENT FOR UNIFORMITY

1 *Public policy*

The first of these two considerations obviously applies to all kinds of claims: with whichever claim we are dealing, the creditor must have a fair chance of pursuing it. The rules about commencement and extension may thus be of general application. Arguably, therefore, the period can also be of general application. For if the rules concerning commencement and suspension ensure that a claim does not prescribe in a situation where the creditor could not have known about

Disproportionately Different Periods of Limitation of Actions (Prescription)', (1997) 5 *European Review of Private Law* 84. Commencement of prescription is also the key issue inspiring Neil Andrews' comments in (1998) 57 *Cambridge Law Journal* 589ff.

[78] See, in this context, two decisions of the Belgian Constitutional Court (Arbitragehof) of 21 March 1995 and 20 September 1996, in the latter of which a prescription rule was struck down as unconstitutional. An important element in the reasoning of the court was the fact that the short period of prescription applicable in the case had started to run long before the damages had become apparent. For discussion, see Storme, (1997) 5 *European Review of Private Law* 82ff.; Claeys, (1998–9) *Rechtskundig Weekblad* 381 (who concludes that all short prescription periods might eventually be regarded as unconstitutional as long as they begin to run before the injured person could become aware of the damage caused). There has also been some doubt about the constitutionality in Irish law of a limitation regime which has the effect of depriving a person of a property right even when he was ignorant of the fact that he had such a right in the first place; see the references in von Bar II (n. 6) n. 554.

it, where it was impossible for him to pursue it, or where it would otherwise be unreasonable to expect him to do so, even a two-year period would give him enough time, no matter whether his claim is based on contract, tort/delict or unjustified enrichment. On the other hand, even a much longer period may sometimes be insufficient if it were to be counted from an objective date and without adequate grounds for extension.

A prescription regime which is as simple, straightforward and uniform as possible would also be desirable from the perspective of public policy.[79] Liberative prescription is intended, *inter alia*, to prevent unnecessarily costly and long-drawn-out lawsuits ('ut sit finis litium'). It would therefore be intolerable if the prescription rules themselves could easily give rise to litigation – litigation which merely concerns the question whether or not prescription has occurred in a particular case. Before this question was decided by the final court of appeal, even more years would have passed and it would now be all the more difficult to litigate about the merits of the case, which would, however, be necessary if it were ultimately held that prescription had not in fact occurred. The German law reports are full of litigation of this kind; it is typical of an extremely differentiated system of liberative prescription.[80] Wherever we have a rule laying down a period of prescription for a specific type of claim, it is necessary to define that type of claim. The concepts used in any such definition, however, are open to interpretation, even if they

[79] See Peters and Zimmermann (n. 10) 289. Andrews, (1998) 57 *Cambridge Law Journal* 596, on the other hand, regards strict uniformity of limitation periods as undesirable.

[80] For a detailed discussion, see Peters and Zimmermann (n. 10) 186ff.; see also the overview in English in the volume edited by Jayme (n. 26) 154ff. Similar criticisms have been made in England: *Law Commission Consultation Paper* (n. 7) 244; for France, see Bénabent (n. 28) 123ff.

are as specific as '[claims concerning] work on buildings'[81] or payment for a 'service rendered for the trade conducted by the debtor'.[82] At the same time, any type of claim described in one prescription rule will border on other rules providing for different periods of prescription. Every creditor against whom the shorter of the two periods has expired will thus be tempted to argue that his claim falls under the provision with the longer period, and the courts will then have to determine where exactly the line between these two provisions must be drawn. If, moreover, for some or other reason one of these different prescription rules is regarded as inadequate, or as less adequate than the other, there is the added danger that courts and legal writers may be tempted to distort the concepts used in these rules[83] and to redefine the borderline between contracts of service (*locatio conductio operarum*) and contracts for work (*locatio conductio operis*),[84] or between contract and delict[85] *sub specie praescriptionis* rather than from a general perspective.

2 *Criteria for differentiation?*

Moreover, there do not appear to be any general criteria which would be both sufficiently clear and convincing to provide a basis for a differentiated prescription regime, at

[81] § 638 BGB; see Zimmermann (n. 26) 168.

[82] § 196 I no. 1, II BGB; see Zimmermann (n. 26) 161 and Peters and Zimmermann (n. 10) 176f.

[83] On the explosive potential inherent in a differentiated prescription regime, see the discussion by Peters and Zimmermann (n. 10) 196ff., with examples. See also Claeys, (1998–9) *Rechtskundig Weekblad* 379, with the observation that '[i]n de rechtsspraak was de vindingrijkheid dan ook groot om te ontsnappen aan de korte verjaring'. And see Andrews, (1998) 57 *Cambridge Law Journal* 605 (the tail – limitation rules – must no longer wag the dog – the substantive principles of liability in contract and tort).

[84] See Zimmermann (n. 26) 172.

[85] See the example discussed in Zimmermann (n. 26) 170.

least not within the law of obligations.[86] Of course, one might want to subject claims arising from everyday transactions, or claims of a petty nature, to shorter periods of prescription than complex or extraordinary claims. But it is impossible to draw a plausible borderline and to define this borderline in precise statutory terms. Another potential point of reference might be the professional position of debtor and/or creditor.[87] But any regulation based on it would either be very casuistic and in permanent danger of becoming outdated,[88] or too abstract and general (and thus open to conflicting interpretation). Moreover, any such differentiation would only appear to make sense as far as the right to performance and possibly also a claim for damages for breach of contract are concerned. It is much less convincing for claims arising *ex lege*: claims, in other words, with the handling of which even a professional person often has little experience. At the same time, however, such claims arising *ex lege* always provide a possible alternative to a claim for specific performance; for non-performance by the debtor may be based on the conviction that the contract is invalid.

The most common criterion employed in the context of differentiated periods of prescription is the (legal) nature of the claim.[89] But this criterion, too, does not ultimately appear

[86] Peters and Zimmermann (n. 10) 290ff.

[87] See, most recently, the proposal by Andrews, (1998) 57 *Cambridge Law Journal* 600ff. (arguing for a different starting date concerning claims of 'those engaged in trade and business'. The concerns underlying this proposal can, however, be accommodated by the way in which the discoverability test is applied. What is reasonably discoverable depends, of course, not least of all on the experience and professional status of the claimant).

[88] See, for example, the regulation in § 196 BGB (discussed in Zimmermann (n. 26) 159ff.).

[89] See, e.g., the draft of the commission charged with the reform of the German law of obligations, drawing a distinction between claims arising *ex contractu* and those arising *ex lege*. For trenchant criticism of this dichotomous structure of the law of prescription, see Haug (n. 17) 20ff. For equally forceful

to be suitable. Whether or not prescription has occurred is a question which often has to be determined at a time when the legal position between the parties is unclear. It may be doubtful whether a contract is valid. The creditor, therefore, does not know whether he has a claim for specific performance, or for damages, or a claim based on unjustified enrichment or perhaps even *negotiorum gestio*. Or a contract lies on the borderline between sale and lease, or sale and contract for work, or contract for work and contract of service. Or the creditor's claim for damages may be based on contract or tort/delict (or *culpa in contrahendo*, wherever that may fit in[90]). What the older codifications tended to overlook is that hardly any claim within the field of the law of obligations can be dealt with in isolation. This interconnectedness is of particular relevance with regard to the law of liberative prescription – with the result, *inter alia*, that differentiated periods of prescription tend to lead to inconsistencies in result and evaluation.[91]

criticism concerning a similar approach adopted by the new Belgian law, see Claeys, (1998–9) *Rechtskundig Weekblad* 391ff.; Bart Claessens and Delphine Counye, 'De repercussies van de Wet van 10 juni 1998 op de structuur van het gemeenrechtelijke verjaringsregime', in Bocken et al. (n. 33) 82f.; cf. also Andrews, (1998) 57 *Cambridge Law Journal* 605ff.

[90] It is governed by the rules relating to contracts in German law (see Zimmermann and Whittaker (n. 76) 172f.) and forms part of the law of delict in France (see, e.g., Stephan Lorenz, 'Die culpa in contrahendo im französischen Recht', (1994) 2 *Zeitschrift für Europäisches Privatrecht* 218ff.). The development in Germany has been most recently outlined by Tomasz Giaro, 'Culpa in contrahendo: Eine Geschichte der Wiederentdeckungen', in Ulrich Falk and Heinz Mohnhaupt (eds.), *Das Bürgerliche Gesetzbuch und seine Richter* (2000), pp. 113ff. Cf. also Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law* (2000), Artt. 2:301f., and comparative notes at 189ff.; Spiro (n. 10) § 298.

[91] For the following paragraph, see Peters and Zimmermann (n. 10) 292. For similar criticism concerning English law, see *Law Commission Consultation Paper* (n. 7) 242f. The Belgian Constitutional Court has even held, in two startling pronouncements from 1995 and 1996, that such inconsistencies, based upon widely diverging periods of prescription, may constitute an act of

Thus, for instance, restitution claims arising as a result of the invalidity of a contract should not prescribe after a longer period than contractual claims for specific performance: the obfuscating power of time hits the debtor as hard in the one case as in the other. At the same time, it would be inadvisable to differentiate between contractual restitution claims and those based on unjustified enrichment,[92] or between the different types of unjustified enrichment claims. Unjustified enrichment, however, is frequently an alternative to *negotiorum gestio*. There is also so often a concurrence between claims based upon unjustified enrichment and delict that they should be subject to the same prescription regime. Delictual claims, in turn, are so closely related to *culpa in contrahendo* or to contractual claims for consequential loss that no distinction should be drawn here either; and claims in damages for non-performance should not, at any rate, be subject to a longer period of prescription than the claim for specific performance in view of the aggravated problems of proof. In this way nearly all important types of claims are interconnected with each other. This is, incidentally, also the reason why the prescription rules should not be tailored specifically to contractual claims (as might be expected in a set of Principles of European Contract Law). If prescription rules are to conform to the general policy objectives mentioned above, they cannot attempt to provide the best possible regime for each individual type of claim but must be applicable as broadly

unconstitutional discrimination. For comment, see Storme, (1997) 5 *European Review of Private Law* 82ff.; Claeys, (1998–9) *Rechtskundig Weekblad* 379ff. For details, see Hubert Bocken, 'Gelijkheid in aanspreeklikheid – De rechtspraak van het Arbitragehof en de ontwikkeling van het aansprakelijkheidsrecht', in Bocken et al. (n. 33) pp. 3ff.

[92] The BGB provides two different sets of rules in this context; for discussion, see Reinhard Zimmermann, 'Restitution After Termination for Breach of Contract in German Law', (1997) *Restitution Law Review* 13ff. Other countries (as, for instance, Italy) recognize only one restitution regime.

as possible.[93] In particular, they have to take account of the need for clarity, certainty and predictability which is jeopardized by any unnecessary complexity.[94] Thus, it is distinctly better to have a regime that does not suit all claims equally well than one that makes it difficult for debtors as well as creditors to assess their position and adjust their behaviour accordingly.[95]

VI THE DEVELOPMENT OF THE LAW OF LIBERATIVE PRESCRIPTION: INTERNATIONAL TRENDS

If we look at the development of the law of liberative prescription, at new enactments and proposed drafts,[96] we find a number of trends that have arisen over the past hundred years which appear to fall in line with the above considerations.[97]

[93] This is one reason why the Uncitral Convention (n. 34) should be treated with caution: it merely deals with claims arising from a contract for the international sale of goods.

[94] Peters and Zimmermann (n. 10) 288f.; Loubser (n. 10) 24; Johnston (n. 3) 1.63; Andrews, (1998) 57 *Cambridge Law Journal* 591.

[95] See also Spiro (n. 10) § 259; Hondius (n. 22) 16 ('Legal certainty requires the law to provide for as few exceptions as possible'). On the notion of legal certainty, in this context, see also Oetker (n. 10) 36ff.

[96] For a comparative overview of the relevant provisions in England, the Netherlands and Greece, see Dannemann, Karatzenis and Thomas, (1991) 55 *RabelsZ* 697ff. Comparative remarks concerning England, France, Austria, Czechoslovakia, Sweden, Turkey and Greece may be found in *Karlsruher Forum* (1991), pp. 30ff. For the prescription of claims arising from delict/tort, see the comprehensive comparative overview (concerning the member states of the European Union) by von Bar II (n. 6) n. 547.

[97] The present chapter will confine its attention to claims arising within the law of obligations. This is the field covered by many modern prescription regimes, either expressly or effectively: see Art. 127 OR; § 1451 read in conjunction with § 1458f. ABGB. According to Artt. 3:306ff. BW, prescription refers to 'rechtsvorderingen'; on which concept, see *Asser*/Hartkamp (n. 10) nn. 638ff.; for Belgium, see Claeys, (1998–9) *Rechtskundig Weekblad* 386ff.; for South Africa, see Loubser (n. 10) 26ff. For general discussion see Spiro (n. 10)

1 *Shorter prescription periods*

In the first place, there is a clear tendency towards shorter periods of prescription.[98] The German Civil Code (1900) still retained the thirty-year period of post-classical Roman vintage as the 'regular' period of prescription.[99] But it is generally recognized today that the ever-increasing 'acceleration of history' has rendered this period entirely unsuitable to modern circumstances.[100] It effectively constitutes an exemption from prescription. Even the BGB,[101] therefore, subjected a whole variety of practically very important claims to shorter periods of prescription;[102] and since 1900, the German Parliament has laid down further exceptions to the regular period in countless statutes outside the framework of the BGB.[103] Significantly, however, it has not only been

§§ 334ff. The German notion of 'Anspruchsverjährung' covers much wider ground than the law of obligations; for criticism, see Peters and Zimmermann (n. 10) 186, 287f. The law of obligations is a sufficiently broad and distinct area to warrant a special set of rules. Of course, there is a very close relationship to the law of property. But there we are often dealing with the protection of absolute rights (such as the right of ownership). If they were subject to prescription, this would entail a considerable, and arguably unjustifiable, qualification of the absolute right. Thus, it may be maintained that claims arising from absolute rights should perish only with the absolute right itself. At any rate, there will have to be careful co-ordination with the law of usucaption.

98 See also Hondius (n. 22) 7f.

99 § 195 BGB. On the historical background, see the references in nn. 38f.

100 See also the *Law Commission Consultation Paper* (n. 7) 243, criticizing the traditional six-year (!) period for having originated at a time 'when documents sent by horse or ship where the sole means of communication other than face to face contact'. But cf. also Spiro (n. 25) p. 630 (who draws attention to factors rendering claims today less precarious than in former times).

101 But the trend towards shorter periods started much earlier. Generally one may say that the history of the prescription periods is the history of these periods gradually becoming shorter. For nineteenth-century German law, see Peters and Zimmermann (n. 10) 115f.

102 For an overview, see Peters and Zimmermann (n. 10) 108ff., 115ff.

103 For details, see Peters and Zimmermann (n. 10) 149ff.; see also the overview in *Staudinger*/Peters (n. 10) § 195, nn. 52ff.

Parliament that has severely reduced the field of application of § 195 BGB:[104] the courts, too, have done their utmost to reinforce this tendency.[105] The Swiss Code of Obligations (as revised in 1911) has a general prescription period of ten years;[106] at the same time, its range of application is even more narrowly circumscribed by shorter periods than in Germany.[107] A similar regime (general prescription period of ten years with exceptional, shorter periods for a range of important claims) prevails under the Italian *codice civile* (1942).[108] Somewhat more conservative is the new Dutch Civil Code. Its prescription provisions, contained in Book 3 of the BW, came into force in 1992 but they are based on a draft by Professor E. M. Meijers which was published in 1954.[109] Meijers had considered introducing a general ten-year period but, in the end, decided not to break with tradition quite so dramatically. Thus, he introduced a twenty-year period.[110] But this is only nominally the general period; effectively it is the five-year period prescribed in Artt. 3:307 (performance of a contractual obligation), 3:308 (payments of interest, life rents, dividends, etc.), 3:309 (unjustified enrichment), 3:310 (damages) and 3:311 BW (right of action to

[104] The same trend may be observed in France; see Monique Bandrac, 'France', in Hondius (n. 22) 151ff.

[105] For details, see Zimmermann (n. 26) 157 ff.; Peters and Zimmermann (n. 10) 191f. and the references cited there. The general prescription period in the Greek code (1940) is twenty years (Art. 249 *Astikos Kodikas*); for many practically very important claims, however, the code lays down much shorter periods. Cf. also Artt. 309, 310, 482, 498 of the Portuguese *código civil* (1960).

[106] Art. 127 OR.

[107] See the discussion in Peters and Zimmermann (n. 10) 268f.; for all details, see Spiro (n. 10) §§ 263ff.

[108] Artt. 2946ff. *codice civile*.

[109] *Ontwerp voor een nieuw burgerlijk wetboek*, E. M. Meijers, Toelichting, Eerste Gedeelte (Boek 1–4) (1954), 301ff.

[110] See Art. 3:306 BW. The new Belgian law has a general prescription period of ten years (§ 2262bis (1) Belgian *code civil*).

set aside a contract for failure to perform or a right of action to correct such a failure). The South African Prescription Act 68 of 1969 lays down a general prescription period of three years,[111] the Prescription and Limitation (Scotland) Act of 1973 subjects the vast majority of claims within the law of obligations to a five-year period,[112] the Uncitral Convention of 1974 (which, however, deals only with claims arising from an international sale of goods!) contains a four-year period.[113] The Civil Code of the German Democratic Republic (1976) did not have a general prescription period; effectively, however, personal claims were subject to a period of either two or four years.[114] The English Limitation Act 1980 recognizes a period of six years for actions both on tort and on 'simple contract'.[115] There is no provision that would 'naturally apply'[116] to claims under the law of restitution but they are usually held to be covered by s. 5 (six years for an action founded on simple contract).[117] Belgium, after the reform legislation of 10 June 1998, has a general prescription period for all personal claims of ten years (Art. 2262bis § 1). The most radical proposal (two years) was advanced by Peters and Zimmermann (1981);[118] the German commission charged with reforming the law of obligations eventually recommended three years for the majority of cases.[119] In the new Russian Civil Code,[120] we find a general prescription period

[111] Section 11 (d). [112] Section 6 (with schedule 1). [113] Art. 8.
[114] § 474 1 nos. 2 and 3 ZGB (GDR).
[115] Sections 2 and 5. [116] *Law Commission Consultation Paper* (n. 7) 243.
[117] See the references in *Law Commission Consultation Paper* (n. 7) 86ff.
[118] Peters and Zimmermann (n. 10) 296ff. [119] §§ 195 1, 199 1, 201 BGB-KE.
[120] Part I entered into force on 1 January 1995, Part II on 1 March 1996. See, in this regard, Oleg Sadikov, 'Das neue Zivilgesetzbuch Rußlands', (1996) 4 *Zeitschrift für Europäisches Privatrecht* 258ff.; Sadikov, 'Das zweite Buch des neuen Zivilgesetzbuches Rußlands', (1999) 7 *Zeitschrift für Europäisches Privatrecht* 903ff. I have relied on the English translation by Peter B. Maggs

of three years (Art. 196), and exceptional periods of one year (liability for defects in contracts for work (exception: building contracts) and transportation contracts (Artt. 725 I, 797 III)) and ten years (Art. 181: claims arising from invalidity of contract). Québec (1994) now has a general three-year period for 'actions to enforce a personal right';[121] and the English Law Commission (1998) recommends a uniform limitation period of three years.[122]

2 *Uniform prescription periods*

Secondly, there is an equally clear tendency towards uniformity.[123] In Germany, the extraordinary degree of differentiation between the various periods prescribed in the code as well as by countless statutes outside the code has contributed, at least as much as the unsuitable length of a number of those periods, to a minefield of problems within the law of liberative prescription – and further afield.[124] Only somewhat less complex is the regulation in the Swiss code: ten years for specific performance of a contractual obligation and damages for non-performance[125] (though there is much criticism as to the latter proposition[126]), five years for

and A. N. Zhiltsov, *The Civil Code of the Russian Federation*, Parts I and II (1997). On the legal situation prior to new code's coming into force, see Peters and Zimmermann (n. 10) 278f.

[121] Art. 2925 *code civil du Québec*.

[122] *Law Commission Consultation Paper* (n. 7) 281ff., 403f., 408ff.

[123] See also Hondius (n. 22) 17.

[124] There is usually a great degree of differentiation in the prescription regimes of EU member states which are still based on pre-1900 codes and statutes. This is true, for instance, for France and Austria (for criticism, see Koziol and Welser I (n. 41) 185).

[125] Art. 127 OR; and see Werner Schwander, *Die Verjährung außervertraglicher und vertraglicher Schadensersatzforderungen* (1963), pp. 83ff., 135ff.

[126] See Schwander (n. 125) 135ff.

a number of specifically enumerated claims concerning, *inter alia*, payment for the delivery of certain goods and the rendering of certain services,[127] one year for delictual claims[128] (and possibly also damages for non-performance?[129]) as well as for unjustified enrichment claims,[130] one year or five years for warranty claims, depending on whether they are based on a contract of sale or contract for work and on whether the defect concerns a movable object or a piece of property, and in some cases even six months.[131] The Italian code, too, has a long list of individual types of claims, to which it applies periods of five, three and two years, one year and six months.[132] The Dutch code effectively establishes five years as the general prescription period for the law of obligations but does so in a number of specific provisions concerning individual types of claims.[133] The Scottish Act is similar in that it also provides a broad field of application for its five-year period but does so by way of a somewhat cumbersome enumeration of the relevant claims.[134] A three-year period applies to personal injuries actions and to actions for defamation.[135] The traditional six-year period in England today applies only to a minority of tort actions;[136] actions for personal injuries (three years), negligent latent damage (three years), product liability (three years) and defamation and malicious falsehood (one year) are subject to separate rules[137] – a state of affairs that has recently been criticized by the Law Commission. The German Democratic Republic

[127] Art. 128 OR. [128] Art. 60 OR. [129] See Spiro (n. 10) §§ 295ff.
[130] Art. 67 OR (this rule has been much criticized; but see Spiro (n. 10) §§ 291, 300ff.).
[131] Artt. 210 I, 219 III, 371 II, 315 OR. [132] Artt. 2947ff. *codice civile*.
[133] Artt. 3:307ff. BW; see pp. 87f.
[134] Prescription and Limitation (Scotland) Act 1973, s. 6 with schedule 1.
[135] Sections 17, 18 and 18 A.
[136] *Law Commission Consultation Paper* (n. 7) 241.
[137] Limitation Act 1980, ss. 4 A, 11, 11 A, 12, 14 A.

had periods of six months, two, four and ten years;[138] the new Russian Civil Code has periods of one, three and ten years.[139] The German Reform Commission recommends periods of three, five and ten years (essentially: three years for contractual and delictual claims; five years in disputes concerning defective buildings and the delivery of defective materials to be used for the erection of a building; ten years for unjustified enrichment).[140] The new Belgian law has five years for claims arising from extra-contractual liability and ten years for all other personal claims.[141] The most streamlined sets of rules (apart, of course, from the Uncitral Convention relating to the international sale of goods) are those proposed by Peters and Zimmermann (two years, applicable across the board, except for two situations where periods of one and five years are recommended)[142] and the English Law Commission (core regime of three years applicable, effectively, across the board),[143] and those enacted in South Africa (three years)[144] and Québec (three years, except with

[138] §§ 474, 480 ZGB (GDR).

[139] See above, text to n. 120. The general prescription period of three years has been welcomed by Mario Pellegrino, 'Übergang zur Marktwirtschaft und allgemeines Vertragsrecht im neuen russischen Zivilgesetzbuch', (1998) *Recht der Internationalen Wirtschaft* 506.

[140] §§ 195, 198, 199, 201 BGB-KE.

[141] Art. 2262bis (1) and (2) Belgian *code civil*; for criticism concerning their differentiation, see Claeys, (1998–9) *Rechtskundig Weekblad* 391ff. and Claessens and De Counye (n. 89). For penetrating criticism concerning the differentiation, for purposes of the law of prescription, between claims arising from contractual and delictual liability, see Claeys, (1998–9) *Rechtskundig Weekblad* 391ff. and Andrews, (1998) 57 *Cambridge Law Journal* 605ff.

[142] § 195 BGB-PZ; for motivation, see Peters and Zimmermann (n. 10) 292ff.

[143] *Law Commission Consultation Paper* (n. 7) 400ff. (general prescription period of three years).

[144] Prescription Act 68 of 1969, s. 11 (d); there are a few exceptional situations (most of them relating to debts owed to the state and placing the latter in a privileged position; on the reason for retaining these special periods, see

regard to actions for defamation, which are subject to a prescription period of one year).[145] A period of three years also appears to be emerging as a uniform limitation period in European Union legislation.[146]

3 *The discoverability criterion*

In the third place, and closely related to the general tendency towards shorter periods of prescription, the idea has been gaining ground that prescription should not run unless the creditor knew (or ought reasonably to have known) about his claim.[147] More precisely, there has been a trend towards (i) applying this subjective criterion to a growing range of claims while (ii) reducing its inherent potential to delay the commencement of prescription by moving from actual knowledge towards a test of discoverability. The German Civil Code recognizes the subjective criterion only with regard to delictual claims: the injured party has to have had knowledge of the injury and of the identity of the person bound to make compensation (§ 852 1 BGB).[148] While this rule is regarded widely as one of the more successful components of the German law relating to prescription, the requirement of 'knowledge' has caused certain difficulties and has been considerably watered down in practice.[149] Nevertheless, the

J. C. de Wet – the father of the South African act – *Opuscula Miscellanea* (1980), p. 111).

[145] Artt. 2925, 2929 *code civil du Québec*.

[146] Christian von Bar, *The Common European Law of Torts*, vol. 1 (1998), n. 395.

[147] For delict/tort, see the comparative overview by von Bar II (n. 6) nn. 554ff.

[148] The position in Greek law, insofar as discussed in the text, is identical to that in German law: Art. 937 *Astikos Kodikas*.

[149] For details, see Peters and Zimmermann (n. 10) 178; Zimmermann (n. 26) 174; Haug (n. 17) 144f.; Heinz Thomas in Palandt, *Bürgerliches Gesetzbuch* (59th edn, 2000), § 852, nn. 4ff.

scope of application of § 852 1 BGB has been extended both by the legislature and by the courts.[150] The courts have even, for some time, toyed with the idea of extending the subjective criterion to damages claims based on latent defects;[151] ultimately, however, they dropped it as being too blatantly *contra legem*.[152]

The Swiss code also requires knowledge but does not confine this criterion to the law of delict: it also applies to actions based on unjustified enrichment.[153] The Dutch code requires knowledge in the case of unjustified enrichment claims, claims for the recovery of damages (based on delict and on non-performance[154]), and claims 'to set aside a contract for failure to perform it or to correct such a failure'.[155] According to the English Limitation Act, knowledge is relevant as far as actions for personal injuries or death, for latent damage in the tort of negligence, and products liability are concerned.[156] The Scottish Act applies a discoverability test to latent damage and personal injuries and a knowledge test to actions for defamation.[157] Québec also requires knowledge in the case of defamation and for actions based on the invalidity of a contract[158] but has a discoverability

[150] For details, see Peters and Zimmermann (n. 10) 184; Zimmermann (n. 26) 174; *Palandt*/Thomas (n. 149) § 852, n. 1. In particular, most instances of strict liability are subject to the three-year period running from knowledge.

[151] Cf. BGH, (1973) *Neue Juristische Wochenschrift* 843 (at 845); BGH, (1978) *Neue Juristische Wochenschrift* 2241.

[152] BGHZ 77, 215ff.; for further literature, see the references in Zimmermann (n. 26) 170.

[153] Artt. 60 1, 67 1 OR. Similarly § 475 no. 2 ZGB (GDR).

[154] *Asser*/Hartkamp (n. 10) n. 674.

[155] Artt. 3:309, 310, 311 BW.

[156] See Limitation Act 1980, ss. 11, 11 A, 12, 14, 14 A. See also von Bar II (n. 6) n. 559.

[157] Prescription and Limitation (Scotland) Act 1973, ss. 11(3), 17, 18 and 18 A; see also Johnston (n. 3) 4.17ff.

[158] Artt. 2927, 2929 *code civil du Québec*.

test for actions arising 'from moral, corporal or material damage'.[159] According to the Russian Civil Code, the general prescription period in terms of Art. 196 starts to run when the creditor knew or should have known of the existence of the claim.[160] The most far-reaching proposals are those of Peters and Zimmermann (with regard to all claims covered by the regular prescription period,[161] prescription does not run for as long as the creditor, without being grossly negligent, is unaware of the identity of his debtor and of the object and the legal basis of his claim[162]) and by the English Law Commission (prescription begins to run from when the claimant knows, or ought reasonably to know, that he has a cause of action).[163] This approach was implemented in South Africa some time ago: prescription does not begin to run until the creditor acquires knowledge of the identity of the debtor and of the facts from which the debt arises, or could have acquired such knowledge by exercising reasonable care.[164] Originally, i.e. as from 1969, this provision was confined to non-contractual debts.[165] Following a recommendation by the South African

[159] Art. 2926 *code civil du Québec*; on which provision, see Deslauriers (n. 32) 299f.

[160] Art. 200 I Russian Civil Code. Exceptions appear in Artt. 181, 200 II, 725, 797 III Russian Civil Code.

[161] See n. 118. [162] § 199 BGB-PZ.

[163] *Law Commission Consultation Paper* (n. 7) 250ff. For details of what exactly the claimant ought to know, see p. 266. For criticism of these proposals, see Andrews, (1998) 57 *Cambridge Law Journal* 589ff.

[164] Section 12 (3) Prescription Act 68 of 1969. Where the debtor wilfully prevents the creditor from acquiring such knowledge, the prescription period does not commence to run while the creditor is ignorant of the debt. For commentary on the knowledge requirement, see Loubser (n. 10) 100ff. It should be noted that, technically, this approach is implemented by means of a legal fiction. For according to s. 12 (1) prescription commences to run when the debt is due. Section 12 (3) deems a debt not to be due until the creditor has knowledge of the identity of the debtor and of the fact from which the debt arises.

[165] On the concept of 'debt' in South African law, see Loubser (n. 10) 26ff.

Law Commission, it was amended in 1984 so as to refer also to debts arising from contract. The German Reform Commission, however, has shrunk back from accepting a uniform approach along these lines and proposes, essentially, to perpetuate the regime contained in the BGB (knowledge rather than discoverability; applicability confined to delictual claims).[166] Art. 10 of the Product Liability Directive of the European Union, on the other hand, provides that the three-year period has to begin to run from the day 'on which the plaintiff became aware, or should reasonably have become aware', of the damage, the defect and the identity of the producer. Generally speaking, discoverability may be regarded as the emerging general standard in European Community legislation, as far as prescription is concerned.[167]

Of considerable interest, in the present context, is also the emergence of the principle of discoverability in Canadian case law.[168] The most authoritative statement is that of the Supreme Court of Canada where it was held that 'a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence'.[169] In Belgium, two decisions by the Constitutional Court[170] are regarded by one commentator as 'the deathblow' for all rules providing for short prescription periods, 'unless prescription runs only from the moment of which the damage manifests itself'.[171]

[166] §§ 199, 201 BGB-KE.

[167] See von Bar 1 (n. 146) n. 395.

[168] See the discussion by Nathalie Des Rosiers, 'Canada', in Hondius (n. 22), pp. 101ff., who describes this as '[w]ithout question, the major development in the area of extinctive prescription in Canadian common law'.

[169] *Central Trustco v. Rafuse*, [1986] 2 SCR 147; 31 DLR (4th) 481.

[170] On which, see nn. 78–91.

[171] Storme, (1997) 5 *European Review of Private Law* 88; see also Claeys, (1998–9) *Rechtskundig Weekblad* 381. The new Belgian law of 10 June 1998

VII THE CORE REGIME

This overview confirms the policy-based considerations: there should be one period of prescription which should apply as widely as possible; this uniform period would have to be relatively short (somewhere between two and six years); and whether or not the period runs should depend on a test of discoverability. Taking account of the more recent proposals and enactments, three years would appear to be widely regarded as the most suitable general prescription period.[172] Leaving aside, for the moment, the question of claims established by legal proceedings,[173] it does not seem necessary to lay down any longer or shorter prescription periods for specific types of claims; not, at least, if we confine our attention to the law of obligations. For it is noticeable that special periods enacted or proposed within any one legal system are not normally deemed necessary in others. This observation lends support to the view that, while a regime tailored for specific types of claims may be more suitable for these claims in isolation, a uniform regime can provide, at least, a *satisfactory* solution while procuring all the additional advantages associated with uniformity. This applies, for instance, to the six-year period in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract provided in the South African Act,[174] or to the twelve-year period for an action upon a speciality of the

requires knowledge, as far as the five-year period for delictual claims is concerned: Art. 2262bis Belgian *code civil*; for discussion, see Claeys, (1998–9) *Rechtskundig Weekblad* 394ff.

[172] See also Andrews, (1998) 57 *Cambridge Law Journal* 592, at 597 who regards a three-year period as appropriate because it is 'long enough to allow the parties a good opportunity to collect their wits, review their finances, assess their chances and negotiate a settlement'.

[173] On which, see pp. 112ff.

[174] Section 11 (c) Prescription Act 68 of 1969.

English Act,[175] or to the special treatment provided for actions for defamation in England, Québec and Scotland (but, while in England and Québec the special period is one year, in Scotland it is three years!).[176] The German Reform Commission wants to subject unjustified enrichment claims to a ten-year period of prescription and claims arising in connection with defective buildings to a five-year period.[177] This is necessary only in view of the fact that the commission does not accept a discoverability test for the commencement of prescription. As soon as a person reasonably ought to know that he can reclaim what he has given without legal ground, or that he can sue the contractor for damages arising from a defect in his new house, a three-year period is quite adequate. In Switzerland even a one-year period is regarded as sufficient in the former case.[178]

This example demonstrates that there is a fundamental choice to be made. If discoverability applies across the board, a uniform three-year period is acceptable. If, however, the uncertainty necessarily associated with a discoverability criterion is regarded as sufficiently serious to tie

[175] Limitation Act 1980, s. 8; but see *Law Commission Consultation Paper* (n. 7) 325f.

[176] Limitation Act 1980, s. 4 A; Art. 2929 *code civil du Québec*; Prescription and Limitation (Scotland) Act 1973, s. 18 A. Andrews, (1998) 57 *Cambridge Law Journal* 596, argues in favour of retaining an exceptional shorter period for defamation. See also the two exceptions provided in the Peters and Zimmermann proposals, concerning claims for the return of property which has been handed over to another person (five years) and certain claims arising after the expiry of a contract of lease, or of a similar contract involving the return of a piece of property (one year). These exceptions are not found in other legal systems and have also not been supported by the German Reform Commission.

[177] §§ 198, 195 II and III BGB-KE. According to the Russian Civil Code, on the other hand, an exceptional period of *three* years applies in the case of defective buildings (Art. 725 1) (as opposed to the one-year period in the case of other defective performances of work).

[178] Art. 67 OR; for comment, see Spiro (n. 10) §§ 300ff.

commencement of the period, as far as possible, to objective criteria only (such as due date, delivery, completion (of a building), breach of duty), the consequence is necessarily a differentiated system of prescription periods.[179] For the objective criteria most suited to individual types of claims will differ. Moreover, there is a very wide consensus that not all types of claims should be subjected to an objective regime: the prescription of delictual claims must depend on knowledge (or the reasonable possibility of acquiring knowledge).[180] It is, however, precisely with regard to delictual claims (and, more specifically, those arising from personal injury) that the knowledge/discoverability criterion is, practically, most important.[181] The other type of situation where a creditor will often be unaware of his claim is breach of contract. Delict and breach of contract are (or can be) closely related; the one claim is often an alternative for the other.[182] If it is unfair in the one case to deprive a creditor of his claim before he knew or reasonably could have known of it, it is equally unfair in the other. This is the very consideration that prompted the amendment of the South African Prescription

[179] This is the approach preferred by the German Reform Commission; the reasons are set out in *Abschlußbericht* (n. 10) 54ff. See also see Haug (n. 17) 44, 88ff., 150ff. (who regards the uncertainties connected with a subjective criterion as being intolerable); Unterrieder (n. 10) 271ff. For a principled and policy-based argument favouring retention of a differentiated system (though quite a different one from that proposed by the German Reform Commission), see Andrews, (1998) 57 *Cambridge Law Journal* 589ff. The point of departure, however, is the same: the starting date for prescription should not always be discoverability but one that is conceptually more precise and that gives rise to less evidential difficulty (i.e., for English law, accrual of the cause of action).

[180] This is even accepted by the legal systems, or law reform bodies, most sceptical towards the knowledge or discoverability criterion, particularly the German Reform Commission. See also the comparative analysis by von Bar II (n. 6) nn. 554ff.

[181] This is confirmed by Loubser (n. 10) 105ff.

[182] A prominent example is medical negligence.

Act in 1984.[183] Once, therefore, a legal system is prepared to swallow the subjective criterion with regard to damages claims, it might as well, in view of the interconnectedness of claims within the law of obligations,[184] accept it across the board. The price to be paid in terms of legal uncertainty is not considerable. For, to mention some prominent types of claims, the parties to a contract will normally know when their transaction has been concluded and when they are entitled to demand its (specific) performance. Also, they will usually be aware whether it has been avoided with the result that they may claim restitution of any benefit conferred, particularly under a system that makes avoidance for error, or *metus*, or *dolus* dependent on notice to the other party.[185] And, as far as restitution for wrongs is concerned, it is too close to delict to justify a different treatment.

VIII THE LONG-STOP PERIOD

Two additional points, however, still remain to be considered. The first is very widely recognized. If we have a core regime of a short period of prescription which decisively hinges on (reasonable) discoverability, it may happen that prescription is postponed for twenty or thirty years, or even longer. But prescription should not be deferred indefinitely; at some stage, the parties must be able to treat the incident as indubitably closed. This is why even the BGB in its § 852 provides for a long-stop period of thirty years (from the moment when the wrongful act was committed) beyond which no claim can be brought, regardless of the creditor's

[183] Loubser (n. 10) 102; see the text after n. 165. The new Belgian act, which perpetuates this distinction, is subject to severe criticism; see the references in n. 141. See also the critical remarks (concerning Swiss law) by Spiro (n. 10) § 295f.; and see Peters and Zimmermann (n. 10) 223f.

[184] See the text above nn. 89–95.

[185] Art. 4:112 PECL.

knowledge.[186] It is an approach which is increasingly gaining support[187] and it indeed appears necessary as a counterbalance to the discoverability principle. The question is how long the period[188] should be. Once again, we observe an international trend – though not an entirely unequivocal one – towards a shorter period. The Swiss code has ten years in the two situations where it requires knowledge,[189] the Dutch code[190] and the Scottish Act[191] have long-stops of twenty years, East Germany had ten years[192] and the English Act recognizes two exceptional long-stops of ten and fifteen years.[193] Peters and Zimmermann recommend a general long-stop of ten years.[194] The German Reform Commission, once again, is more cautious: they propose a period of thirty years for personal injury claims and ten years for other

[186] The Greek rule is the same except that the long-stop is twenty years (Art. 937 (1) *Astikos Kodikas*).

[187] See, for example, M. E. Storme, 'Belgium', in Hondius (n. 22), p. 58, who regards this as the only balanced solution; *Law Commission Consultation Paper* (n. 7) 284ff. (with references); Des Rosiers (n. 168) 106f.; see also the approach adopted in the Product Liability Directive, Artt. 10f. (three and ten years) and Art. 17 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (three and thirty years). On the other hand, neither the South African Prescription Act nor the *code civil du Québec* recognizes a long-stop; for discussion, see Loubser (n. 10) 37; Deslauriers (n. 32) 300.

[188] On its legal nature, see pp. 104, 106ff.; for the time being, I will use the term 'long-stop'.

[189] Art. 60 1, 67 1 OR. For comparative discussion (as per 1975), see Spiro (n. 10) § 42).

[190] Artt. 3:309, 310, 311 BW.

[191] The 'long negative prescription' of s. 7 of the Prescription and Limitation (Scotland) Act 1973 (on which see Johnston (n. 3) 7.01ff.) effectively acts as a long-stop: *Law Commission Consultation Paper* (n. 7) 185. It commences when the relevant obligation becomes enforceable.

[192] § 475 no. 2 ZGB (GDR).

[193] Sections 11 A and 14 A Limitation Act 1980, relating to actions for latent damage (in the tort of negligence) and product liability.

[194] § 208 BGB-PZ.

delictual claims.[195] The English Law Commission presents a solution based on a ten-year long-stop applicable to all actions other than those for personal injury for which thirty years are recommended.[196] The new Belgian law has a long-stop of twenty years (applicable to all delictual claims for damages).[197]

Once again, therefore, there appear to be two options: differentiation or uniformity. The main objection against a comparatively short long-stop period is that it may be considered inadequate for personal injury claims. This is obvious from both the German and the English reform proposals; but the concern is also shared by other systems. Most situations which have been specified as being particularly problematic (sexual abuse of children, asbestosis, environmental damages)[198] fall into the category of personal injury claims. The reasons for treating them differently are that there is often a long latency period[199] and that life, health and bodily integrity (and possibly also freedom)[200] are particularly valuable objects of legal protection:[201] personal injuries are generally regarded as more serious than property damage or economic harm.[202] For the latter, even a short long-stop of ten years is very widely regarded as sufficient. There should also be no objection to subjecting other types

[195] §§ 199, 201 BGB-KE.

[196] *Law Commission Consultation Paper* (n. 7) 284ff.

[197] Art. 2262bis § 1 al. 2 Belgian *code civil*. For details, see Claeys, (1998–9) *Rechtskundig Weekblad* 388ff.

[198] See, for example, Hondius (n. 22) 9ff.

[199] See, e.g., *Law Commission Consultation Paper* (n. 7) 290.

[200] Which is included in the proposal by the German commission on the ground that unlawful deprivation of liberty may lead to psychological damage which manifests itself only much later: *Abschlußbericht* (n. 10) 76.

[201] *Abschlußbericht* (n. 10) 75.

[202] For criticism of the differentiation between 'personal injury claims' and other claims, see Haug (n. 17) 39ff. and the references cited there; von Bar II (n. 6) n. 548 is also sceptical.

of claims (specific performance, unjustified enrichment, etc.) to a ten-year long-stop.[203]

Alternatively, one might try to find a compromise solution which accommodates both personal injury and other claims while not providing a perfect solution to either of them.[204] The arguments in favour of this option[205] may be listed as follows: (i) even a thirty-year period will not provide a perfect solution for personal injury claims since there will still be cases in which the creditor did not know about his claim.[206] (ii) It is easy to imagine that an incident causes both personal injury and damage to property. A defective machine explodes and damages the purchaser's health and property. Or asbestos is used in the process of renovating a house; after some years, the owner contracts asbestos-related cancer and has to undergo expensive treatment; at the same time the

[203] See the proposals by the English Law Commission and Peters and Zimmermann; the German Reform Commission even proposes a prescription period of three years (to be counted from due date, not from discoverability!) for contractual claims and ten years (also to be counted from due date, not from discoverability) for unjustified enrichment claims.

[204] This is the solution adopted, most recently, in Belgium (though only for delictual claims); see n. 197.

[205] Apart from the one based on general policy mentioned pp. 80f. See also the arguments advanced by Spiro (n. 10) § 42 in support of the ten-year period of Art. 60 1 OR, covering all delictual claims.

[206] See, e.g., the two English cases (one involving mesothelioma, the other asbestosis) mentioned in the *Law Commission Consultation Paper* (n. 7) 291. The Dutch Hoge Raad has decided in two recent pronouncements that the twenty-year long-stop laid down in Art. 3:310 BW can be set aside under exceptional circumstances: HR 28 April 2000, *Nederlandse Jurisprudentie* 430/431. Both cases concerned a special type of cancer caused by exposure to asbestos; the incubation period is normally between twenty and forty years. The court based its ruling on Art. 6:2 BW (according to which any rule of law, general usage or legal act is not applicable as far as it is, under the circumstances, inappropriate according to the precepts of good faith ('redelijkheid en billijkheid')). My thanks to Advocate General Jaap Spier and Professor Ewoud Hondius for referring me to these decisions.

house has to be pulled down. If it is possible, after all those years, to prove who was responsible for using asbestos, and that the presence of asbestos in the house has caused the owner's disease, it is hard to see why the owner should be able to pursue the claims arising from infringement of his health but not those based on damage to his property: if the one is established, so is the other. (iii) It is as difficult for the debtor to defend himself after twenty or thirty years in a personal injury action as it is in an action concerning damage to property. The obfuscating power of time does not distinguish between different types of claims. Witnesses die, the debtor's memory fades, vital documents are lost, etc. Once again, it must be remembered that we usually see only the hardship involved for a creditor who is barred by prescription although he has been able, even after the lapse of many years, to establish his claim; and that we tend to forget about the many cases in which a prescription regime prevents unjustified claims from being (successfully) pursued. (iv) Defective products are an important source of personal injury claims. Here we have a general long-stop (for personal injuries and damage to property) in our national legal systems as a result of the Product Liability Directive; and it was the relatively short period of ten years which was regarded as sufficient in this situation.[207]

On balance, therefore, it appears to be preferable to fix one long-stop period applicable for all claims. But how long should it be? The twenty-year period of the new Belgian act has to be evaluated against the background of a normal prescription period of five years for delictual claims and ten years for all other personal claims. It appears to be too long

[207] Art. 11 of the Directive concerning Liability for Defective Products. The period starts to run as soon as the producer has brought the defective product into circulation.

in relation to a general period of three years. The ten-year period of the Product Liability Directive, on the other hand, would not sufficiently express the compromise character of the solution required. Fifteen (or twelve) years (i.e., not more than four or five times the normal period) would seem to be more appropriate. It is readily acknowledged that this may cause hardship in a number of cases. But, as was pointed out already, even the traditional period of thirty years may cause hardship; and at a time characterized by vastly increased mobility and rapid change in the general conditions of life it appears quite incongruous to attempt to unravel incidents that have happened thirty years ago and thus to cling to a period that still dates from the time before the Industrial Revolution.

IX IMPLEMENTING THE CORE REGIME

The second point is this: it has been emphasized that prescription should not run while the creditor is unaware of his claim and cannot reasonably become aware of it. It still has to be decided how that policy should be implemented. At first blush it might appear natural to link the discoverability criterion to the commencement of prescription.[208] But there is an alternative: prescription is suspended as long as the creditor is unaware of his claim and cannot reasonably become aware of it. If one were to adopt this alternative approach, what would be the date of commencement of prescription?

[208] This is the approach adopted, for instance, in § 852 1 BGB; Artt. 60 1, 67 1 OR; Artt. 3:309, 310, 311 BW; Art. 2926 *code civil du Québec*; Art. 2262bis (2) Belgian *code civil* (on which see Claeys, (1998–9) *Rechtskundig Weekblad* 394ff.); and proposed by the English Law Commission (see *Consultation Paper* (n. 7) 250ff.).

1 *Commencement of prescription*

The English Limitation Act refers to the date of accrual of the cause of action.[209] But this is the language of the law of procedure, which is not appropriate with regard to a substantive prescription regime. Could one say accrual of the claim?[210] That would be a somewhat unusual phrase; moreover, it would also not be unambiguous. Thus, South African courts have been in doubt as to whether it refers to the date when performance by the debtor becomes due or whether accrual can actually occur before that date.[211] A second possible option would be to choose the very first moment in the life of a claim. This is the approach adopted by § 198 BGB: prescription begins to run from the moment when the claim comes into being. It is, however, very widely agreed that this is not what is meant and that § 198 BGB has to be taken to refer to the date when the claim becomes due.[212] This is indeed appropriate in view of the fact that prescription should run only against a creditor who has the possibility of interrupting, or at least suspending, it by enforcing his claim in court. Due date (which may be defined as the time when a party has to effect performance)[213] is a concept

[209] See, for instance, Limitation Act 1980, ss. 2 and 5. This is the moment 'when a potential plaintiff first has a right to succeed in an action against a potential defendant' (*Preston and Newsom on Limitation of Actions* (4th edn, ed. John Weeks, 1989), p. 8; see also Dannemann, Karatzenis and Thomas, (1991) 55 *RabelsZ* 702).

[210] This is done in Artt. 9 1, 10, of the Uncitral Convention.

[211] See Loubser (n. 10) 48f., 52.

[212] See Peters and Zimmermann (n. 10) 172ff.; *Staudinger*/Peters (n. 10) § 198, nn. 1ff. But cf. Unterrieder (n. 10) 299ff.

[213] This is the phrase used in Art. 7:102 PECL. Art. 7:102 provides a regulation only for contractual claims. Concerning claims *ex lege*, the general rule would appear to be that the debtor has to effect performance once all requirements for the creditor's claim have been met.

which is widely known and relevant in many other situations; and it is also used very widely, internationally, in the present context.[214] There are a number of reasons for relying on it also in the present set of principles and for thus relegating discoverability[215] to a ground for extension (in the form of suspension of prescription).[216]

2 *Maximum period of extension of prescription*

(i) Even if discoverability were to determine the commencement of prescription, it would also have to be required that the obligation has come into existence and that performance is due. This is either regarded as implicit in the notion of knowledge or discoverability,[217] or ensured by means of a somewhat artificial fiction.[218] (ii) That prescription should not run against a creditor who cannot reasonably become aware of his claim is one specific emanation of a much wider

[214] Prescription starts to run when the creditor's claim becomes enforceable, according to § 1478 ABGB; Art. 130 1 OR; Art. 2935 *codice civile*; s. 12 South African Prescription Act 68 of 1969; Claeys, (1998–9) *Rechtskundig Weekblad* 394 and Claessens and De Counye (n. 89) 84, concerning Belgian law; for Scotland, see Johnston (n. 3) 4.06ff.; § 196 BGB-KE; Peters and Zimmermann (n. 10) 302; Koopmann (n. 24) 45ff.; Loubser (n. 10) 48ff.; Spiro (n. 10) § 26. According to Art. 251 *Astikos Kodikas*, the claim must have come into being and have become enforceable.

[215] For the elements on which discoverability should focus, see pp. 148f.

[216] Practically, this means that normally prescription does not start to run until the moment of reasonable discoverability; it is, in other words, a care of an 'initial suspension'. The notion of a suspension affecting a period of prescription from the very moment when it would, but for the impediment suspending it, have started to run (and thus, effectively, suspending the commencement of prescription) is familiar in a number of countries; see § 204 BGB ('Anlaufhemmung') and Peters and Zimmermann (n. 10) 128; Art. 256 *Astikos Kodikas*; for Italy, see Art. 2941 (1) *codice civile*.

[217] See, for example, Arndt Teichmann, in Othmar Jauernig, *Bürgerliches Gesetzbuch* (9th edn, 1999), § 852, n. 6.

[218] This is the technique employed by the South African Prescription Act 68 of 1969: s. 12 (3).

idea: a claim must not prescribe if it is impossible for the creditor to pursue it (*agere non valenti non currit praescriptio*).[219] This is why prescription does not run in cases of *vis maior*,[220] and why completion is delayed if the creditor is legally incompetent and does not have a legal representative,[221] or if an estate is without a representative or heir.[222] All these impediments are taken into account by extending the period of prescription. Thus, it would appear to be systematically more satisfactory to deal with the discoverability issue under the heading of extension of prescription.

(iii) If a creditor brings an action against his debtor, he has to establish the requirements on which his claim is based. That his claim has not prescribed is not one of those requirements. Prescription is a defence.[223] If it is invoked by the debtor, it is he who has to establish the requirements of that defence. The central requirement, of course, is that the period of prescription applicable to this claim has elapsed. That depends on the date of commencement. If that were the date of discoverability, the debtor would, in many cases, face an unreasonably difficult task. For whether the damage to the creditor's house, the injury to his body, the consequences flowing from defective delivery, etc., were reasonably discoverable, or whether the creditor perhaps even had positive knowledge, are matters within the creditor's sphere and largely removed from the debtor's range of perception.[224]

[219] See pp. 132f. [220] See pp. 129ff. [221] See pp. 134ff.
[222] See p. 141. [223] See pp. 72ff.
[224] Peters and Zimmermann (n. 10) 248, 306. Cf. also Loubser (n. 10) 112; *Law Commission Consultation Paper* (n. 7) 398 ('The date of discoverability is concerned with the knowledge of the plaintiff rather than the defendant . . . In consequence it will commonly be more difficult and expensive for the defendant to provide evidence of the knowledge of the plaintiff at a particular date, than for the plaintiff to provide such evidence'); contra: Claeys, (1998–9) *Rechtskundig Weekblad* 396, according to whom, under Belgian law, the debtor has to prove knowledge on the part of the creditor (Claeys, however,

Also, by and large, and considering the full range of possible claims, the creditor will normally know about his claim at the time the latter falls due; at least he can reasonably be expected to know about it. That, exceptionally, he did not do so, is a matter to be raised, and established to the satisfaction of the court, by the creditor. This would come out more clearly if discoverability were not to be made a requirement for commencement of prescription but if the fact that the creditor could not reasonably be aware of his claim were to give rise to an extension of prescription: that prescription is suspended or otherwise extended must, according to general principle, normally be proved by the creditor.

(iv) This way of proceeding would also considerably simplify the structure of the proposed prescription regime, for we would then not need a separate long-stop period running from a date different to that of the 'normal' period of prescription and subject to specific regulation concerning extension, renewal etc. The three-year period could simply be regarded as the one and only general period of prescription with due date as the general date of commencement; in addition, it could simply be laid down that prescription is not to be extended for more than fifteen[225] years. This latter rule, while not necessarily applying to all grounds for suspension (in particular, suspension in case of legal proceedings), would certainly cover suspension in case of ignorance

also refers to the contrary view adopted in France). Generally on onus of proof concerning prescription requirements, see also Spiro (n. 10) §§ 359f., who states that the creditor will have to prove the special circumstances based on his person or his specific situation which he adduces in order to invoke suspension of prescription. Also, according to Spiro, the creditor will have to establish why he may have been unable to pursue his claim once it came into existence. Somewhat inconsequentially, however, he then asserts that knowledge, on the part of the creditor, will 'probably' have to be proved by the debtor.

[225] See p. 104.

and also a number or other grounds for extension.[226] The long-stop is thus turned into a maximum period of extension. This scheme would, once again, promote certainty and uniformity.

3 *Claims for damages*

There is only one situation which requires special consideration. Due date is clearly inappropriate as a point of reference for any long-stop (whether enacted by way of a separate period or by way of placing a ceiling upon extensions of the 'regular' period) concerning claims for damages.[227] For it is specifically the 'latent damages' problem that can lead to a long delay of prescription. A claim for damages in delict is generally due as soon as it comes into being. But it comes into being only when all requirements of the rule imposing liability have been met. One of them will often be the occurrence of damages;[228] and damages will sometimes only occur many years after the act giving rise to liability (infringement of somebody else's personal integrity or property etc.) was committed. If a legal system accommodates the reasonable interests of the creditor by suspending prescription as long as the damage is not discoverable, it cannot sensibly operate with a long-stop period running from the moment when the damage occurs. This would be a long-stop that does not bite: occurrence of the damage (a moment which may be

[226] See pp. 147f. On the terminology adopted here (suspension and delay of completion of prescription as the two ways of extending prescription), see p. 139.

[227] As far as both delictual and contractual damages are concerned; see, for the Dutch provision of Art. 3:310, *Asser*/Hartkamp (n. 10) n. 674.

[228] But this can be subject to dispute and may sometimes depend on the way in which the liability rule is drafted; see, for example, *Staudinger*/Peters (n. 10) § 198, nn. 21ff.; Loubser (n. 10) 79ff.

very difficult to determine, particularly in cases of patrimonial loss)[229] and discoverability are often closely related. A long-stop counting from the act giving rise to liability would, therefore, clearly be desirable.[230] It counterbalances both the emphasis on the creditor's interest and the uncertainty inherent in the discoverability criterion. If, however, the long-stop counts from the act giving rise to liability rather than due date, the same regime can quite safely be applied to the normal, three-year period of prescription. For the suspension rule outlined above, focusing on the moment of discoverability, ensures that prescription does not run before the damage has occurred.

Prescription should, therefore, begin to run when all the other requirements for a claim for damages have been met, i.e., at the moment when the unlawful act has been committed (or at the moment when the breach of contract has occurred).

One can, therefore, envisage a general rule to the effect that prescription begins to run from the time when the debtor has to effect performance or, in the case of a claim for damages, from the date of the act which gives rise to the claim. In the case of delict/tort, this would be the moment when the unlawful act was committed; prescription of a claim for damages for non-performance runs from the date of non-performance,[231] prescription of a claim for *culpa in*

[229] See the example discussed by *Staudinger*/Peters (n. 10) n. 22. Also see von Bar II (n. 6) n. 551.

[230] The comparative evidence, in this regard, is quite clear; see, for example, § 852 I BGB; Art. 60 I OR; Art. 3:310 BW; *Law Commission Consultation Paper* (n. 7) 288f.; for the new Belgian law, see Art. 2262bis Belgian *code civil* and Claeys, (1998–9) *Rechtskundig Weekblad* 394; cf. also Art. 2947 *codice civile* ('dal giorno in cui il fatto si è verificato'; this relates to the five-year prescription period for claims in delict); Art. 10(1) Unidroit Convention (relating, of course, only to breach of contract).

[231] See Artt. 8:101, 8:108, 9:501ff. PECL.

contrahendo from the moment when the other party breaks off negotiations contrary to good faith and fair dealing.[232] This solution has the additional advantage of avoiding any doctrinal dispute as to whether (and under which circumstances) a claim for damages can be taken to exist, under general principles, only when damages have occurred.[233]

[232] See Art. 2:301 (2) PECL.

[233] See, as far as the discussion in German law is concerned, the references in *Staudinger*/Peters (n. 10) § 198, nn. 17ff.; Ursula Stein, in *Münchener Kommentar* (n. 76) § 852, n. 63. For comparative observations, see Spiro (n. 10) § 42.

3

LIBERATIVE PRESCRIPTION II: ADDITIONAL ISSUES

I PRESCRIPTION OF A CLAIM ESTABLISHED BY LEGAL PROCEEDINGS

In most codifications and reform proposals we find a special rule concerning prescription of a claim established by legal proceedings. The period provided in these rules is normally a long one: thirty years according to § 218 I BGB, § 205 I BGB-KE[1] and s. 11 (a) (ii) (South African) Prescription Act 89 of 1969; twenty years according to Art. 268 *Astikos Kodikas*, Art. 3:324 BW and s. 7 read in conjunction with schedule 1, (2) (a) Prescription and Limitation (Scotland) Act 1973; and ten years according to Art. 137 II OR, Art. 2953 *codice civile*, § 480 I ZGB (GDR), § 197 BGB-PZ, Art. 2924 *code civil du Québec* and according to the new Belgian law.[2] Only the (English) Limitation Act 1980 recognizes a shorter period (six years, according to s. 24 of the act) and the Law Commission in their consultation paper even recommend applying the 'core regime' (i.e., essentially, a three-year period).[3] The Uncitral Convention on Limitation

[1] The same rule applies in Austrian law; see Helmut Koziol and Rudolf Welser, *Grundriß des bürgerlichen Rechts*, vol. I (10th edn, 1995), 187.

[2] For the latter, see Bart Claessens and Delphine Counye, 'De repercussies van de Wet van 10 juni 1998 op de structuur van het gemeenrechtelijke verjaringsregime', in Hubert Bocken et al. (eds.), *De herziening van de bevrijdende verjaring door de Wet van 10 juni 1998* (1999), 80.

[3] *Consultation Paper* No. 151 ('Limitation of Actions') by the English Law Commission (1998), 370.

does not deal with the matter.[4] Obviously, in a number of systems (particularly in Germany, Switzerland, Italy and the Netherlands), the period chosen for the prescription of claims established by legal proceedings is the general prescription period; but in other systems (notably South Africa and the two German reform drafts) the long period has been enacted, or proposed, as an exception to much shorter general prescription periods.

The specific thrust of the respective provisions in the former legal systems is to cut off any doctrinal discussion as to the effect of the judgment on the original claim (does it continue to exist, or is it substituted by a new claim?[5]): the general prescription period applies even if a shorter period would have applied to the original claim on which the creditor has brought his action.[6] But there are also good policy reasons to subject claims established by a judgment to a fairly long prescription period. We merely have to look back at the basic policy considerations underlying the law of prescription.[7] A claim established by judgment is as firmly and securely established as is possible and is thus affected by the 'obfuscating power of time' to a very much lesser extent than other claims.[8] Moreover, the creditor has made it abundantly clear that he is serious about pursuing his claim; the

[4] Art. 5 (d) Uncitral Convention; and see the commentary in (1979) 10 *Uncitral Yearbook* 153.

[5] For the pre-codification *ius commune*, see Bernhard Windscheid and Theodor Kipp, *Lehrbuch des Pandektenrechts* (9th edn, 1906), § 129, n. 3; for echoes of this debate in South Africa and Scotland, see Max Loubser, *Extinctive Prescription* (1996), 39; David Johnston, *Prescription and Limitation* (1999), 6.43ff.; and see Karl Spiro, *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen*, vol. 1 (1975), § 162.

[6] See the wording of § 218 1 BGB which clearly brings out this point. Before the enactment of the BGB the question was disputed; see 'Motive', in Benno Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol. 1 (1899), 538 with references to pre-1900 legislation.

[7] See pp. 63f. [8] See also 'Motive' (n. 6) 538; Spiro (n. 5) § 162.

debtor cannot, therefore, be under any illusion that he might not, one day, have to pay. And, thirdly, the legal dispute between the parties has now been resolved. It does not create a source of uncertainty or a danger to the public interest. To the contrary: it would create unnecessary costs, and thus be more injurious to the public interest, if a short prescription period were to force the creditor in regular intervals to attempt an act of execution which, in view of the debtor's financial position, he knows to be futile.[9] The law of prescription here, as always, should prevent, not encourage or even engender, litigation.

As always, of course, there is something arbitrary in fixing a specific period. But ten years would appear to be a reasonable choice in view of the fact that (i) it is the period most frequently found, or proposed, in modern legislation, and (ii) it strikes a reasonable balance between the two extremes of thirty years (German law) and six (or even three) years (English law and Law Commission proposal, respectively). Admittedly, the introduction of a special period for claims established by judgment would be in conflict with the general quest for uniformity. But we are dealing here with a clearly distinguishable type of claim that does not interfere with any others. The general reasons militating against a differentiated regime do not apply in this specific situation.

German law recognizes one exception to the long prescription period for claims established by judgment: it applies a short period of four years when the claim in question relates to periodic payments falling due only in the future.[10]

[9] See, e.g., Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992), 79.

[10] § 218 II BGB; for Austria, see Koziol and Welser (n. 1) 187.

The German Commission proposes to retain this rule.[11] It is a rule intended to protect the debtor: it might be unduly burdensome for him if he would have to be prepared for thirty years (from due date) to prove that he had paid.[12] But, on the one hand, it must be remembered that the period proposed here is ten, not thirty years. On the other hand, it may be argued that a rule like § 218 II BGB pays insufficient attention to the reasonable interests of the creditor. Not rarely does it happen that a person liable to pay maintenance makes off and remains untraceable for a long time. The creditor is normally unable, under these circumstances, to effect a renewal of prescription by means of an act of execution. German courts have thus allowed him once again to bring an action against his debtor (which may be served upon him by public notification):[13] a highly unsatisfactory emergency solution in view of the fact that the matter is *res judicata* and should not normally, for a second time, be the object of litigation. That a maintenance debtor may have to keep, for a long time, his receipts for payments made on a claim established by judgment does not distinguish him from other debtors under a claim established by judgment.

[11] § 205 III BGB-KE. The Dutch code has a rule according to which 'payments to be made annually or more frequently pursuant to a decision are prescribed in five years': Art. 3:324 (3) BW. See also Spiro (n. 5) § 164 with references to Swiss case law and literature. Spiro regards a rule like the one contained in § 218 II BGB as following from general principles. This does not appear to be correct: if a claim for maintenance has been established, the mere fact that individual amounts fall due only at a later stage does not change the fact that the claim has been established by judgment.

[12] Frank Peters and Reinhard Zimmermann, 'Verjährungsfristen', in Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I (1981), 125.

[13] See Börries von Feldmann, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I (3rd edn, 1993), § 219, n. 11 with references to German case law.

It is the consequence of the long prescription period for this type of claim.[14]

The ten-year period proposed is a normal prescription period which is subject to the general rules. The one issue that merits special consideration is when it starts to run. The choice would seem to be between the date of judgment and the date when that judgment becomes final (i.e., when an appeal is not, or no longer, possible). The second of these alternatives is the one more often found in existing legislation;[15] it commends itself for reasons which will become apparent when we look at the closely related question of the effect of legal proceedings upon a period of prescription.[16] A declaratory judgment is sufficient for the application of the ten-year period, as long as it establishes the claim and not merely one of its prerequisites.[17]

It cannot be specified exactly which other instrument obtained by the creditor can have the effect of triggering the ten-year period. The relevant criterion will have to be whether

[14] See Peters and Zimmermann (n. 12) 263, 320.

[15] Date of judgment: Switzerland (Spiro (n. 5) § 162); the Netherlands (Art. 3:324 (1) BW). Date when judgment becomes final: Germany (§ 218 I BGB); Greece (Art. 268 *Astikos Kodikas*); Italy (Art. 2953 *codice civile*); § 197 I BGB-PZ; § 205 I BGB-KE. According to s. 24(1) of the English Limitation Act 1980 (cf. also *Law Commission Consultation Paper* (n. 3) 370), the limitation period applicable to actions on a judgment starts to run from the date on which the judgment becomes enforceable. This appears to be too restrictive since it excludes declaratory judgments which, though not enforceable, still establish the claim sufficiently firmly to warrant application of the special regime for claims established by judgment; see Spiro (n. 5) § 133; Frank Peters, in J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (13th edn, 1995), §§ 164–240, § 218, n. 5. This point has also been recognized in South African case law (see Loubser (n. 5) 135) in spite of s. 15(4) Prescription Act 68 of 1969.

[16] See pp. 117ff.

[17] If a judgment establishes a duty, on the part of the debtor, to make periodic payments in the future, prescription concerning each of these payments, in accordance with general principles, starts to run only when it falls due.

it is regarded as enforceable as if it were a judgment.[18] A court-approved settlement of the claim between the parties presents an obvious example. Arbitral awards present another.

II THE EFFECT OF JUDICIAL PROCEEDINGS ON THE PERIOD OF PRESCRIPTION

1 *The options*

If the creditor institutes an action on his claim, he does what the law of prescription expects him to do, both in the public interest and in the interest of his debtor: he takes the initiative to bring about an authoritative decision on the dispute. It would be manifestly unfair if prescription continued to run whilst judicial proceedings are pending.[19] The debtor is now able to raise whatever other defence he may have; he can be under no illusion that his creditor may wish to treat the incident as closed; and the proceedings prevent the claim from becoming stale.[20] In this situation a legal system can do one of three things. It can determine that the period of prescription ceases to run (i); that it is 'interrupted', with the effect that it starts to run afresh, once the act of interruption has taken place, or ended (ii); or that it is suspended as long as legal proceedings are pending (iii). (i) is the consequence following most naturally from a concept of a limitation of *actions* and is thus applicable in England;[21] however, it is

[18] For Germany, see §§ 218–220 BGB; § 197 BGB-PZ; § 205 BGB-KE.

[19] Cf., e.g., Spiro (n. 5) § 128 and *Abschlußbericht* (n. 9) 84 (the creditor has to be protected against the possibility that his claim prescribes in the course of the legal proceedings aimed at its enforcement).

[20] See the policy considerations pp. 63f.

[21] Andrew McGee, *Limitation Periods* (3rd edn, 1998), paras. 2.001ff.; *Law Commission Consultation Paper* (n. 3) 164. However, it may be equally possible for a legal system endorsing the concept of a limitation of *actions* to

also the approach adopted by the Uncitral Convention.[22] It does not commend itself for present purposes for either it leaves open the question of what happens when the legal proceedings have ended without a decision on the merits of the claim,[23] or it has to deal with this question by way of a somewhat artificial fiction.[24]

attribute no effect at all to the initiation of legal proceedings on the running of the period. This appears to be the US approach: Hans Smit, 'The Convention on the Limitation Period in the International Sale of Goods: Uncitral's First-Born', (1975) 23 *American Journal of Comparative Law* 342. The action, after all, has been brought in time (i.e., before the period of limitation has run out) and the substantive right remains unaffected. The main effect of holding that the period continues to run is that it precludes a claimant from indefinitely suspending it by bringing successive actions (Smit 342). Also, in the situation where the action is dismissed because of an abuse of process (see *Grovit v. Doctor*, [1997] 1 WLR 640 (HL)) the claimant may now be barred from bringing another action because the limitation period has run out. The statement both in McGee and the *Law Commission Consultation Paper*, quoted above, is incidentally in strange contrast to a statement by the House of Lords in *Birkett v. James*, [1978] AC 287 (HL), where it was held that an action will not normally be dismissed for want of prosecution where it appears that the claimant could simply issue a new writ and commence legal proceedings again. According to McGee (n. 21) 22.036, this 'will almost always be the position where the primary limitation period has not expired'. This appears to indicate that, in England also, the limitation period continues to run.

[22] Art. 13.

[23] If, on the other hand, the limitation period is held to continue to run its course (with the consequences sketched above n. 21), this can easily lead to situations of hardship. Due to differences in civil procedure, court structure and legal profession, this may not be as obvious in English or US law as it is in at least some continental countries. Thus, in Germany it can easily happen that the action is brought before a court which does not have jurisdiction to hear the case (local court, as opposed to regional court, etc.). The action is then dismissed as being inadmissible rather than unfounded and the claimant will have to bring his action before the proper court.

[24] Art. 17 (1) Uncitral Convention ('the limitation period shall be deemed to have continued to run' where such legal proceedings have ended without a decision binding on the merits of the claim). But in terms of Art. 17 (2), the creditor is entitled to an extra period of one year if, at the time such legal proceedings ended, the limitation period has expired or has less than one year

(ii) is the solution traditionally adopted in Roman law-based legal systems; we find it, for example, in Art. 2244 *code civil*, § 1497 ABGB, § 209 BGB, Art. 138 OR, Art. 261 *Astikos Kodikas*, Art. 2943 *codice civile*, Art. 3:316 BW, s. 15 (South African) Prescription Act 68 of 1969, Art. 2892 *code civil du Québec* and also in Scots law.[25] There is, however, something odd in the idea that the bringing of an action should interrupt rather than merely suspend prescription.[26] For by instituting his action the claimant sets in motion the court proceedings which last until a decision is given or until the case has been otherwise disposed of. Thus, we are not, as in other cases of interruption, dealing with a momentary event which could not sensibly extend the original prescription period, but with a continuing process.[27] At the end of this process, there is normally clarity about the merits of the claim. And if there is not, there is no reason to have the entire period of prescription run afresh. Those legal systems subscribing to this approach either tend to specify how long the 'interruption' lasts,[28] or they regard every act by any of the parties to the proceedings, and by the court, as a new cause of interruption.[29] Both constructions

to run. For criticism, see Smit, (1975) 23 *American Journal of Comparative Law* 342ff.

[25] As to the latter, see Prescription and Limitation (Scotland) Act 1973, ss. 6, 7 and 9, and Johnston (n. 5) 5.04ff.

[26] Peters and Zimmermann (n. 12) 260ff.; *Abschlußbericht* (n. 9) 84f.; Johnston (n. 5) 5.43.

[27] For the difference between interruption and suspension, see Spiro (n. 5) §§ 127, 160.

[28] See, e.g., § 211 BGB, Art. 261 *Astikos Kodikas*, Art. 2945 *codice civile*, Art. 2896 *code civil du Québec*. According to § 1497 ABGB, interruption lasts as long as the judicial proceedings are 'properly continued'.

[29] Art. 138 OR (cf. also Spiro (n. 5) §§ 147ff.); for Scots law, see Johnston (n. 5) 5.40.

are unsatisfactory. In particular, they lead to unnecessary complexities as well as undesirable practical consequences in cases where the proceedings have ended without a decision on the merits of the claim. Even an action that is dismissed without consideration about the merits of the claim (because it has been brought before a court lacking jurisdiction or because it is procedurally defective in other ways) has to have some effect on the running of the period of prescription because: (a) the creditor cannot always avoid the defect; (b) it would be impracticable to investigate in every individual case whether he can be blamed for proceeding as he did; and (c) he has, after all, demonstrated his determination to pursue his claim.[30] Legal systems subscribing to

[30] See Spiro (n. 5) § 139; Peters and Zimmermann (n. 12) 262, 309. According to § 1497, 2 ABGB, only an action that meets all procedural requirements has the effect of interrupting prescription. In nineteenth-century German law, even procedurally defective actions were regarded as sufficient, though not an action that was dismissed for lack of jurisdiction of the court. The position in French law is exactly the other way round (Art. 2246 *code civil*). According to Art. 2943 (3) *codice civile*, interruption is effective even if the judge to whom the action is submitted lacks jurisdiction; the same applies to an action which is otherwise defective as long as it can be regarded as an act placing the debtor in default. According to § 212 I, II BGB, if the proceedings end with a decision not turning on the merits of the claim, commencement of the proceedings is not to be treated as an interruption; however, the creditor is given the opportunity to retain the effects of interruption by instituting another action within six months after the end of the first proceedings: prescription is then deemed to have been interrupted by the first action. Thus, we are dealing here with a double fiction. The same regime applies if the claimant subsequently withdraws the action he has brought. Cf. also Art. 263 *Astikos Kodikas*, Art. 3:316 (2) BW. As in Germany, Greece and the Netherlands, an action that is subsequently withdrawn is usually treated in the same way as a procedurally defective action; see Spiro (n. 5) § 142 with references. Swiss law attributes the effect of interruption only to actions which result in a decision on the merits of the case (see Spiro (n. 5) §§ 139ff. for a detailed discussion; procedurally defective actions effectively lead only to a suspension of the claim in that, according to Art. 139 OR, the creditor is granted a minimum period of six months for reattempting to interrupt prescription after his first action

option (ii) can come to only one of two conclusions in these cases: prescription is interrupted (this would go too far); or it is not interrupted, after all (this does not only entail a clumsy fiction but is also practically unsatisfactory for the reasons just mentioned).

3 *Suspension of prescription*

The preferable solution, and one providing a *via media* between the first two solutions, is (iii): prescription is suspended while the legal proceedings last. If these proceedings lead to a judgment on the merits of the claim, there are two possibilities. Either the claimant succeeds, in which case his claim is now established by legal proceedings and thus subject to the prescription period for claims based on a judgment.[31] Or the action is dismissed and it is now authoritatively settled that there is no claim that could be subject to prescription. Where the proceedings end without a decision on the merits of the claim (because the action is procedurally defective, or because it has subsequently been withdrawn), the creditor merely has what remains of the old period of prescription to renew his action. This is exactly what is required. In particular, no certainty as to the substance of the claim has been

has been dismissed) and gets into difficulties where the claimant withdraws the action he has brought (the question is consequently disputed; see the discussion by Spiro (n. 5) §§ 139ff. If the action which is now withdrawn would have led to a decision on the merits of the case, it would have interrupted prescription; otherwise it would not have done so. But it is both awkward and inefficient to investigate the – by now purely hypothetical – question of whether an action would have led to a decision on the merits of the case merely in order to sort out prescription matters). These problems are largely obviated by 'downgrading' the effects of judicial proceedings from interruption to suspension.

[31] See pp. 112ff.

achieved which might justify the setting in motion of a new period of prescription under headings (i) and (iii) of our policy considerations.[32]

Special attention may have to be paid to the claimant whose action is dismissed, for procedural reasons, at a time when only very little of the old period of prescription is left. Here it is often regarded as reasonable to fix a minimum period which he should have at his disposal after suspension has ended. The period regarded as appropriate is sixty days in Switzerland,[33] three months in Québec,[34] six months in Germany,[35] in Greece[36] and in the Netherlands,[37] and one year according to the Uncitral Convention.[38] The German Reform Commission, however, does not recommend any extra time since, convincingly, they see no reason to place the

[32] See pp. 63f.; and see the arguments advanced by Peters and Zimmermann (n. 12) 262. Some codes specifically deal with the case that the legal proceedings remain in abeyance because the claimant fails to pursue them further; see § 211 II BGB ('interruption ends with the last step in the proceedings taken by the parties or the Court'); Art. 261 *Astikos Kodikas*; Art. 2945 (3) *codice civile* ('the interruption is unaffected, and the new prescription period begins to run from the date which caused the interruption'); in Swiss law, the problem is taken care of by Art. 139 I OR; see also the comparative discussion by Spiro (n. 5) § 147. However, a regulation of this situation appears to be dispensable since, if the claimant fails to take any steps to advance the proceedings, it may normally be expected of the defendant to take whatever steps are necessary to have the action dismissed. See Peters and Zimmermann (n. 12) 261, 325 and also Spiro (n. 5) § 147 (n. 16); contra: *Abschlußbericht* (n. 9) 86. Details, of course, depend on the law of civil procedure applicable to the suit. For the consequences of procedural delays according to English law, see McGee (n. 21) 22.001ff. and *Grovit v. Doctor*, [1997] 1 WLR 640 (HL) ('for a claimant to commence and to continue litigation which he had no intention to bring to a conclusion [can] amount to an abuse of process' with the result that the action may be dismissed).

[33] Art. 139 OR. [34] Art. 2895 *code civil du Québec*.

[35] § 212 II BGB; cf. also § 206 II BGB-PZ.

[36] Art. 263 (2) *Astikos Kodikas*. [37] Art. 3:316 (2) BW.

[38] Art. 17 (2) Uncitral Convention.

creditor in a better position than if he had not brought an action in the first place.[39]

When does prescription cease to run in case of legal proceedings? This depends on what is regarded, under the applicable law, as an appropriate act to commence a lawsuit.[40] Suspension lasts until a decision has been passed which is final – i.e., against which an appeal is not permissible[41] – or until the case has been otherwise disposed of. Conveniently then, if the judgment has been in favour of the claimant, prescription of his claim based upon the judgment should also start only at that moment and not already when judgment is given.[42] The latter approach[43] would appear to be related to the view, rejected above, that every event within the legal proceedings, including the judgment itself, constitutes a cause of interruption.

Normally, the claimant will bring an action with the aim of obtaining a title to start execution. However, an application for a declaratory judgment establishing the claim is sufficient for the purposes of suspending prescription:[44] just as the declaratory judgment itself is sufficient to warrant application of the special regime discussed above, sub 1.

[39] *Abschlußbericht* (n. 9) 86.

[40] See the comparative observations in (1979) 10 *Uncitral Yearbook* 159. According to English law, the claimant has to issue proceedings against the defendant; see the discussion in *Law Commission Consultation Paper* (n. 3) 391f. In Germany, the statement of claim must have been served (§ 253 ZPO; *Staudinger*/Peters (n. 15) § 209, nn. 36ff.).

[41] See § 211 1 BGB, § 206 1 BGB-PZ, § 209 1 BGB-KE, Art. 2945 *codice civile*, Art. 2896 *code civil du Québec*.

[42] See above, p. 116.

[43] As adopted, particularly, in Switzerland: see Spiro (n. 5) § 162; but cf. also Art. 3:324 BW.

[44] § 209 BGB; § 205 BGB-PZ; § 208 BGB-KE; Spiro (n. 5) § 133; Loubser (n. 5) 135; comparative: Spiro (n. 5) § 133.

The rules applicable to judicial proceedings also apply to other proceedings, as long as these proceedings aim at procuring an instrument which is enforceable. Details depend on the applicable law.[45]

III RENEWAL OF PRESCRIPTION

1 *Terminology I*

Civilian legal systems traditionally distinguish between 'interruption' and 'suspension' of prescription. If prescription is interrupted, the time which has elapsed before the interrupting event is not taken into account; prescription begins to run afresh. Suspension of prescription, on the other hand, has the effect that the period during which prescription is suspended is not counted in calculating the period of prescription; when the cause of suspension ends, it is therefore the old prescription period that continues to run its course (unless the period of prescription had not even started to run in which case it starts to run only after the cause of suspension has ended).[46] In spite of its near universal acceptance, the term

[45] It is widely recognized that prescription is suspended or interrupted while arbitration proceedings are pending: § 220 BGB; Art. 135 II OR; Art. 269 *Astikos Kodikas*; Art. 2943 (4) *codice civile*; Johnston (n. 5) 5.07f.; Loubser (n. 5) 125; Art. 14 Uncitral Convention; § 217 BGB-KE. Concerning commencement of suspension in this case, see §§ 220 II BGB and 217 BGB-KE. The principle has to be that the creditor has to have done everything in his power to start arbitration proceedings.

[46] For statutory definitions of interruption and suspension along these lines, see, e.g., §§ 205, 217 BGB; Artt. 257, 270 *Astikos Kodikas*; §§ 1494ff. ABGB; generally, see Windscheid and Kipp (n. 5) § 108f.; Spiro (n. 5) §§ 69ff., 127ff.; Peters and Zimmermann (n. 12) 124ff. English law, traditionally, subscribes to the principle that once time has started to run it cannot be suspended. It recognizes only certain situations in which the commencement of a limitation period may be delayed or where the period may start again (i.e., where

'interruption'[47] (based on the *interruptio temporis* of the Roman sources[48]) is awkward and perhaps even slightly misleading; it should be replaced by the more descriptive term 'renewal'.[49]

Obviously, renewal is the more radical interference with prescription. It is justified only in two cases: acknowledgement of the claim by the debtor and acts of execution effected by, or at the application of, the creditor.

2 *Acts of execution*

If the creditor has obtained a judgment that has become enforceable, or any instrument which is enforceable under the law under which it was made, his claim based on such a judgment, or other instrument, is also subject to prescription, though the period applicable is the long one discussed above, sub 1. As a result, his claim can, once again, be threatened by prescription. The only way for the creditor to prevent this from happening (apart from extracting an acknowledgement from the debtor) is to attempt an act of execution. Such an act of execution will normally be of a momentary character and cannot, therefore, if it is to have any beneficial effect for the creditor, merely constitute a ground for suspension (or delay of completion) of prescription. Also, the creditor

'the clock is reset'). The latter alternative corresponds to what is called 'interruption' in the civilian tradition and what will be referred to as 'renewal' in the present essay. That 'interruption' sometimes takes the protection of a claimant too far comes out clearly in *Sheldon v. RHM Outhwaite (Underwriting Agencies) Ltd.* [1996] AC 102, a case of subsequent concealment, where suspension would have been the most logical result. See, e.g., the *Law Commission Consultation Paper* (n. 3) 149ff.; and see the remarks p. 129, n. 69.

47 French: 'interruption'; Italian: 'interruzione'; German: 'Unterbrechung'; Dutch: 'stuiting'.

48 See Windscheid and Kipp (n. 5) § 108, n. 1 a.

49 Peters and Zimmermann (n. 12) 310; accepted by *Abschlußbericht* (n. 9) 81.

has formally made clear that he insists on his claim. His act of execution therefore has to have the effect of a renewal of prescription.[50]

Normally, the attempt of execution will be effected at the application of the creditor by a court or public official. It is then sufficient for renewal of prescription that the creditor has made the application, as long as the application is not invalid or is not withdrawn before the act of execution has been attempted.[51]

3 *Acknowledgement*

If the debtor acknowledges the claim against him, he does not require the protection granted to him by the defence of prescription. Protection must, in turn, be granted to the creditor who may rely on his debtor's declaration and refrain from instituting an action against him. The creditor's earlier silence no longer carries the same weight, particularly not as far as the debtor's expectation of being able to treat the incident as closed is concerned.[52] Also, the debtor's acknowledgement removes, to a considerable extent, uncertainty surrounding the claim. It is therefore generally recognized that such an acknowledgement has to affect the running of the period of prescription.[53] The only sensible way

[50] See § 209 II no. 5 BGB; § 197 II BGB-PZ; § 207 BGB-KE; Art. 135 II OR; Art. 264 *Astikos Kodikas*; Art. 2943 *codice civile*; Art. 2244 *code civil*; Johnston (n. 5) 5.55; implicitly also Art. 3:316 BW and many other laws. See generally Spiro (n. 5) § 134; *Abschlußbericht* (n. 9) 80ff.

[51] On acts of execution which are invalid for lack of one of their general requirements, and withdrawal of the application for execution, see § 216 BGB; § 207 II BGB-KE; generally, see Spiro (n. 5) §§ 134, 139ff.

[52] Spiro (n. 5) § 150; *Abschlußbericht* (n. 9) 81.

[53] The question was disputed under the *ius commune*; see the references in Peters and Zimmermann (n. 12) 130. For critical comment today, see *Staudinger*/Peters (n. 15) § 208, nn. 3f.

in which the law can take account of the matter is by way of a renewal of prescription. This, too, appears to be generally accepted.[54]

English law and the Uncitral Convention[55] require the acknowledgement to be in writing. The argument for recognizing only written acknowledgements is that they promote legal certainty.[56] Most European codifications, however, and also the laws of Québec and South Africa regard as sufficient an informal acknowledgement, which may be either express or implied.[57] Of course, it may sometimes be difficult to interpret the debtor's conduct but these difficulties can be resolved, as with all declarations or other conduct which may have legal relevance, by having recourse to the general rules of interpretation.[58] Moreover, even a written statement by the debtor will often be open to various interpretations. The general trend in contract law has certainly been towards informality[59] and though we are not dealing here with a contractual declaration[60] there is no reason to regard an acknowledgement as sufficiently serious, or special,

[54] Art. 2248 *code civil*; § 1497 ABGB; § 208 BGB; Art. 260 *Astikos Kodikas*; Art. 135 I OR; Art. 2944 *codice civile*; Art. 3:318 BW; s. 14 (1) (South African) Prescription Act 68 of 1969; Johnston (n. 5) 5.66ff.; Art. 20 Uncitral Convention; English Limitation Act 1980, ss. 29ff. (though not for all claims); § 198 BGB-PZ; § 206 BGB-KE; Art. 2898 *code civil du Québec*; *Law Commission Consultation Paper* (n. 3) 308ff. (recommending an extension of the present regime to all claims).

[55] See the references in n. 54. The *Law Commission Consultation Paper* (n. 3) 317f. recommends retention of this requirement.

[56] *Law Commission Consultation Paper* (n. 3) 317.

[57] See, specifically, § 1497 ABGB and s. 14 (1) (South African) Prescription Act 68 of 1969.

[58] For details, see Spiro (n. 5) §§ 154f.; for the German case law, see *Staudinger*/Peters (n. 15) § 208, nn. 10ff.

[59] See generally Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, paperback edn 1996), pp. 85ff.

[60] The legal nature of an acknowledgement is explored by Spiro (n. 5) §§ 151ff.; *Staudinger*/Peters (n. 15) § 208, nn. 5ff.

or inherently precarious, to warrant the introduction of a form requirement. In none of the countries just mentioned has the position been regarded as unsatisfactory[61] and the German reform proposals, for example, do not even contemplate a change in this regard.

Legal certainty is safeguarded sufficiently if the law requires, as indeed it widely does,[62] acknowledgement of the claim vis-à-vis the creditor. The latter cannot reasonably rely on an acknowledgement of which he merely hears through a third party; it is often based on considerations arising from the relationship between debtor and third party and is not sufficient evidence of any clear appreciation, on the part of the debtor, of being bound towards the creditor.[63]

Obvious examples of legal acts implying an acknowledgement are part payment, payment of interest and the giving of security.[64] The Uncitral Convention recognizes an exception from the form requirement in cases of payment of interest or part payment 'if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation';[65] English and Scots law put part payment on a par with an acknowledgement in writing.[66]

[61] For Germany, see Peters and Zimmermann (n. 12) 254.

[62] § 208 BGB; § 198 BGB-PZ; § 206 BGB-KE. The same is recognized, though not specifically stated in the codes and statutes, in Switzerland (Spiro (n. 5) § 153), the Netherlands (A. S. Hartkamp, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht*, Deel I (10th edn, 1996), n. 680) and South Africa (Loubser (n. 5) 139). English law, Scots law and the Uncitral Convention also require acknowledgement 'to the creditor'.

[63] For a detailed analysis along these lines, see Spiro (n. 5) § 153.

[64] § 208 BGB; Art. 135 1 OR; *Asser*/Hartkamp (n. 62) n. 680; Loubser (n. 5) 125, 139; § 198 BGB-PZ; § 206 BGB-KE; Patrice Deslauriers, 'Québec', in Ewoud Hondius (ed.), *Extinctive Prescription* (1995), p. 302.

[65] Art. 20 11.

[66] *Law Commission Consultation Paper* (n. 3) 308ff.; Johnston (n. 5) 5.68ff.

IV SUSPENSION IN CASES OF AN IMPEDIMENT BEYOND THE CREDITOR'S CONTROL

Two particularly important grounds for suspension of prescription have already been discussed: prescription is suspended as long as the creditor does not know, and could not reasonably know, of his claim;[67] and it is suspended while judicial or arbitration proceedings on the claim are pending.[68] A number of legal systems also suspend prescription in cases where it is factually impossible for the creditor to exercise his right.[69] Even though the range of situations considered under this heading is no longer as strictly confined as among nineteenth-century pandectist scholars – incursion of enemies and schism (the latter concerning only claims of the Church)[70] – it is also not extended as liberally

[67] See pp. 104 and 106ff. [68] See pp. 117ff.

[69] English law does not, not even in the case of *Prideaux v. Webber*, (1661) 1 Lev 31, 83 ER 282 (concerning suspension of the King's law during the period of the Commonwealth): see McGee (n. 21) 2.010. It must be remembered, however, that even in contract law the doctrine of frustration started to gain ground only in the second half of the nineteenth century (see *Taylor v. Caldwell*, (1863) 3 B & S 826, 122 ER 300 concerning what a German lawyer would refer to as supervening impossibility). Moreover, it must also be kept in mind that under the Limitation Act 1980 the courts are given discretion to disapply the limitation period in certain situations. For adverse comment, see *Law Commission Consultation Paper* (n. 3) 319ff.; N. H. Andrews, 'Reform of Limitation of Actions: The Quest for Sound Legal Policy', (1998) 57 *Cambridge Law Journal* 607f. (who uses strong language: 'scandalous and disastrous').

[70] Windscheid and Kipp (n. 5) § 109, 3. However, this restrictive approach applied only to long prescription periods, particularly the regular period of thirty years. Prescription periods of one year, and less, were regarded as *tempus utile* where only those days were counted during which the person affected by it was able to do what was required of him: see Windscheid and Kipp (n. 5) § 104. The enactment of § 203 BGB, therefore, can be seen as a compromise solution in order to streamline the law of prescription: the distinction between *tempus utile* and other periods was abandoned.

as under the Prussian code.[71] According to § 203 II BGB, the creditor must not have been prevented from exercising his right as a result of *vis maior* ('höhere Gewalt'), and § 203 I BGB even specifies 'cessation of the administration of justice' as an example.[72] The operative words in the South African Prescription Act are 'prevented by superior force';[73] the Uncitral Convention takes account of 'a circumstance which is beyond the control of the creditor and which he could neither avoid or overcome'.[74] Peters and Zimmermann propose a more liberal rule ('prevented from pursuing his right through no fault of his own'),[75] a suggestion which has been supported by Spiro[76] but rejected by the German Reform Commission.[77] The *code civil du Québec* includes every case of 'impossibilité en fait d'agir'.[78]

In spite of the fact that a number of legal systems do not have any equivalent rule at all[79] or only one which covers a very special situation[80] (and presumably have to take

[71] §§ 516ff. I 9 PrALR; for other pre-1900 legislation, see Peters and Zimmermann (n. 12) 127.

[72] Art. 255, 1 *Astikos Kodikas* is virtually identical. [73] Section 13 (1) (a).

[74] Art. 21. The Convention avoids the terms 'force majeure' or 'impossibility' in view of the fact that 'they have different connotations in different legal systems'. For comment, see (1979) 10 *Uncitral Yearbook* 164 and Smit, (1975) 23 *American Journal of Comparative Law* 345.

[75] § 201 BGB-PZ; and see the comments on pp. 252, 308.

[76] Karl Spiro, 'Zur Reform der Verjährungsbestimmungen', in *Festschrift für Wolfram Müller-Freienfels* (1986), p. 624.

[77] *Abschlußbericht* (n. 9) 89. The commission proposes, essentially, to retain the present rule.

[78] Art. 2904. The Swiss code has a rule (Art. 134 VI OR) according to which prescription is suspended as long as a claim cannot be asserted before a Swiss court. The interpretation of this rule is disputed: see Spiro (n. 5) § 72; Peters and Zimmermann (n. 12) 271.

[79] For the Netherlands, see *Asser*/Hartkamp (n. 62) n. 684.

[80] Art. 2942 *codice civile*: claims against members of the armed forces, and related persons, in times of war.

recourse to the *exceptio doli* or comparable devices in appropriate cases[81]), it is submitted that the general policy of the rule is sound. The creditor must have a fair chance of pursuing his claim; otherwise prescription would hit him unduly harshly. He can hardly be said to be acting against the precepts of good faith[82] if he *does not* pursue a claim which he *cannot* pursue.[83] Also, it must be remembered that, while the short general period of prescription proposed in the previous chapter accommodates the reasonable interests of the debtor, the rules concerning commencement and suspension of prescription have to be tilted in favour of the creditor.[84] Moreover, it would seem incongruous to protect a creditor who does not know about his claim and not the one who is unable to pursue it.[85] At the same time, it may be possible to limit the impact of a suspension rule concerning cases of factual impossibility not only by choosing a restrictive formula for defining its range of application:[86] for there is no compelling reason to extend the period of prescription if the impediment preventing the bringing of an action has ceased to exist well before the end of the prescription period. This is why the Uncitral Convention determines that the prescription period 'shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased

[81] See Spiro (n. 76) 624. [82] See p. 78.

[83] Inherent in prescription is thus always an element of 'Verwirkung'; on which see, in the present context, *Staudinger*/Peters, Vorbem. zu §§ 194ff. nn. 17ff.; and see pp. 78 and 156f.

[84] See p. 76.

[85] This would appear to be the consequence of the recommendations of the English Law Commission.

[86] Such as: 'prevented from enforcing his claim by an impediment which is beyond his control and which he could not reasonably have been expected to avoid or overcome'. It would tie in with Art. 8:108 PECL and comes close to Art. 21 Uncitral Convention.

to exist'.[87] Effectively, therefore, the creditor is granted a minimum period of one year during which he must be able to pursue his claim. But this solution also goes beyond what is necessary to protect the reasonable interest of the creditor. On the one hand, one year appears to be somewhat long.[88] On the other hand, it would be quite sufficient to extend the period of prescription by the amount of time for which the creditor was prevented, within the last six months of the prescription period, from pursuing his claim.[89]

The suspension ground just discussed is an emanation of the general principle 'agere non valenti non currit praescriptio': prescription does not run against a person who is unable to bring an action. It was coined or, at any rate,

[87] Art. 21. See also the comment in (1979) 10 *Uncitral Yearbook* 164. And see s. 13 (1) (i) (South African) Prescription Act 68 of 1969 and the explanation by Loubser (n. 5) 117.

[88] Most impediments covered by this rule will last for only a short while. It appears to be disproportionate to grant the creditor a full period of one year after the impediment has fallen away. But see also s. 13 (1) (i) South African Prescription Act 68/1969.

[89] The rule might read as follows: 'Prescription is suspended as long as the creditor is prevented from initiating his claim by an impediment which is beyond his control and which he could not reasonably have been expected to avoid or overcome. This applies only if the impediment arises, or subsists, within the last six months of the prescription period.' In other words: when the impediment arises, the period of prescription stops running (as long as the impediment arises, or subsists, within the last six months of the prescription period). Whatever is left of the original period of prescription is available to the creditor from the moment when the impediment falls away (i.e., when suspension ends), no matter whether this also happened within the last six months of the original prescription period, or thereafter. This is not the mechanism adopted in German and Greek law (§ 203 BGB, § 212 BGB-KE; Art. 255, 1 *Astikos Kodikas*) where the period of prescription is suspended for only as long as the creditor is prevented by an impediment happening within the last six months of the period from pursuing his claim. Thus, the maximum period for which prescription may be suspended is six months (see *Staudinger*/Peters (n. 15) § 203, n. 2).

authoritatively established by Bartolus[90] and reasserted itself even where a code decided to turn its face against it.[91] Thus, the draftsmen of the *code civil* did not suspend prescription where the creditor is prevented from exercising his right and, moreover, made it very clear that the suspension grounds provided in the code were to be taken as conclusive.[92] None the less, the courts have drawn upon the old maxim of the Roman–canon common law (which was supposed to have been abolished) in order to establish suspension of prescription in cases of 'impossibilité absolue d'agir'.[93] The French experience may thus be taken to support our assertion that the general policy of the rule discussed in this section is sound.

[90] For details, see Karl Spiro, 'Zur neueren Geschichte des Satzes "Agere non valenti non currit praescriptio"', in *Festschrift für Hans Lewald* (1953), pp. 585ff., 588; see also Detlef Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* (6th edn, 1998), p. 32.

[91] According to Spiro (n. 90) 593f., the natural law codifications refrained from laying down the general principle since (i) its application in practice had previously, under the *usus modernus pandectarum*, turned out to be too uncertain and (ii) it appeared unnecessary in view of the fact that the prescription periods tended to be very long anyway. Instead, the draftsmen of the codes adopted only some of the more specific grounds for suspension, partly based on this general principle. Pandectist scholars tended to brush aside the principle (see, e.g., Windscheid and Kipp (n. 5) § 109, n. 2) as not having been recognized in the Roman sources.

[92] Art. 2251 *code civil*.

[93] See Murad Ferid and Hans-Jürgen Sonnenberger, *Das französische Zivilrecht*, vol. 1/1 (2nd edn, 1994), 1 C 224 (who comment that the courts have decided essentially *contra legem*; the same view is expressed by François Terré, Philippe Simler and Yves Lequette, *Droit Civil: Les Obligations* (7th edn, 1999), n. 1396). Generally on the phenomenon of legal continuity, based on Roman law, in spite of codification, see Reinhard Zimmermann, 'Civil Code and Civil Law', (1994/5) 1 *Columbia Journal of European Law* 89ff. Concerning France and the Netherlands, see Hendrik Kooiker, *Lex Scripta Abrogata: De derde renaissance van het Romeinse recht* (1996), and the comments by Reinhard Zimmermann, 'Heutiges Recht, römisches Recht, heutiges römisches Recht', in Reinhard Zimmermann, Rolf Knütel and Jens Peter Meincke (eds.), *Rechtsgeschichte und Privatrechtsdogmatik* (2000), 2ff.

V EXTENSION IN CASES OF INCAPACITY

1 *The basic options*

'Agere non valenti non currit praescriptio' also requires prescription not to run against a creditor who is subject to an incapacity. The paradigmatic example is the minor.[94] He is unable to pursue his claim in court. Some legal systems, therefore, have indeed established a general rule to the effect that prescription does not run against him; France and England provide the most prominent examples.[95] Arguably, however, it overshoots the mark. For a minor normally has a representative adult (such as a parent or guardian) capable of bringing proceedings on his behalf. Thus, it may be contended that the minor requires protection only in cases where, for some or other reason, he is without such a representative. This is the solution favoured, e.g., in German, Austrian, Greek and Italian law.[96]

The choice between these two approaches is not an easy one. On balance, however, commercial certainty would appear to be too gravely jeopardized if whoever is exposed to a claim by a minor would have to wait at least until the minor has reached the age of majority plus three years.[97] This is particularly obvious where we are dealing with claims other than those for personal injuries, such as contractual claims. If the adult representative fails to act

[94] The following remarks apply, *mutatis mutandis*, to persons who lack the capacity to enter legal relations because they are of unsound mind.

[95] Art. 2252 first part *code civil* ('La prescription ne court pas contre les mineurs non émancipés et les majeurs en tutelle'); English Limitation Act 1980, s. 28. For Scotland, see Prescription and Limitation (Scotland) Act 1973, s. 6 (4) (b) and Johnston (n. 5) 6.130ff.

[96] See § 206 BGB; § 1494 ABGB; Art. 258 (2) *Astikos Kodikas*; Art. 2942 *codice civile*.

[97] The problems are illustrated by the case of *Headford v. Bristol and District Health Authority*, [1995] PIQR 180 (Court of Appeal).

in the appropriate manner, this is a risk that falls within the sphere of the minor for whom the representative acts. Moreover, the minor can be protected at least to the extent that prescription of his claims *against the representative adult* is suspended until he reaches the age of majority.[98] Such a right of action against the parent may be 'a poor substitute'[99] for the child's own claim against the third party. But the interest of the minor cannot in this respect prevail against those of the third party, since the legal system may reasonably proceed from the assumption that the parent or guardian will normally look after the interests of the minor. In view of these considerations, it is interesting to note a general and long-standing shift within the continental legal development from taking account of the incapacity as such towards balancing the interests of the minor against the interests of his debtor,[100] a shift which is in line with the more general trend towards shortening the periods of prescription as far as reasonably possible. Significantly, also, neither in France nor in England is the general rule about when prescription does not run against persons subject to an incapacity carried through without exception,[101] and the

[98] This is indeed what § 1495 ABGB; § 204 BGB; Art. 2941 (2–4) *codice civile*; and Art. 256 *Astikos Kodikas* provide. For similar rules, see Art. 134 I and II OR and Art. 3:321 (1) (b) BW. Generally, see Spiro (n. 5) §§ 75f.

[99] See Twentieth Report of the (English) Law Reform Committee, as quoted in *Law Commission Consultation Paper* (n. 3) 298.

[100] See 'Motive' (n. 6) 528; Peters and Zimmermann (n. 12) 128. In Switzerland and in the Netherlands this has even led to a situation where the code does not contain any provision suspending the prescription of a minor's claims (except insofar as they are directed against the representative). In Switzerland, courts and legal writers, therefore, in order to grant protection to a minor who lacks a representative, had to have recourse to general principles (abuse of right, *boni mores*); for details, see Spiro (n. 5) §§ 95ff., 106.

[101] Art. 2252, second part *code civil* (on which see Ferid and Sonnenberger (n. 93) 1 C 223); and see the complex regulation in Limitation Act 1980, ss. 28, 28 A, and the discussion in *Law Commission Consultation Paper* (n. 3) 142ff.

English Law Commission has recently left open the question whether it should be retained.[102]

2 *Details of implementation*

To summarize, and specify: (i) if a person subject to an incapacity is without a representative, prescription for or against him does not occur before one year has passed after either the disability or the lack of representation has been removed. Two additional notes are apposite. (a) Protection of the person subject to an incapacity appears to be necessary only if the lack of representation existed within the last year of the prescription period, as long as the law makes sure that a reasonable period is available after either the incapacity or the lack of representation has been removed.[103] Strictly speaking, therefore, lack of representation does not suspend the running of the prescription period but merely delays completion of prescription. (b) The rule works both ways, i.e., it also affects claims *against* the person under disability.[104] Though not impossible, it is not at all easy for the creditor of a person under disability who lacks a representative to pursue his claim.[105] Thus, it appears to be equitable to grant

[102] *Law Commission Consultation Paper* (n. 3) 297ff.

[103] This is (with one exception: a period not of one year but only of six months) the regime applicable according to § 206 BGB and supported both by Peters and Zimmermann (n. 12) § 203 BGB-PZ and by the German Reform Commission; see § 214 BGB-KE. Cf. also Art. 258 II *Astikos Kodikas*. The Italian rule is different in that prescription is suspended for the period during which the person subject to an incapacity lacks a representative and for six months following the appointment of such a representative or the termination of the disability: Art. 2942 *codice civile*.

[104] This is contrary to § 206 BGB (and also Art. 2942 *codice civile*) but reform has been advocated by Peters and Zimmermann (n. 12) 251f., 321 and the German Reform Commission; see *Abschlußbericht* (n. 9) 90f.

[105] In Germany, for example, he has to get a special representative appointed in terms of § 57 of the Code of Civil Procedure. This is often difficult in view of

him the same protection that is granted to the person under disability himself.

(ii) Prescription of claims between a person subject to an incapacity and his representative does not occur before one year has passed after either the incapacity has been removed or a new representative has been appointed. If, as far as third parties are concerned, the minor has to bear the consequences of his representative's failure to act, he must at least be able to sue his representative for damages. This he can do only if he has attained the age of majority. Once again, however, it is unnecessary to suspend prescription.[106] It is sufficient that a reasonable period is available to the creditor for bringing his action after he has reached the age of majority. Once again, also, it is equitable to make the rule work both ways.

(iii) In some countries, sexual abuse of children has given rise to litigation.[107] Where the person abusing the child is an unrelated stranger, the law may arguably rely on the representative adult to take whatever action is appropriate. Where the person abusing the child is the parent himself, suspension of all claims between child and parent during minority would

the fact that it may be doubtful whether the debtor lacks capacity to contract. Also, before the action is brought, nobody is available to whom the creditor may turn to attempt to achieve a settlement out of court. Thus, a rule like § 206 BGB at present engenders rather than prevents lawsuits: Peters and Zimmermann (n. 12) 252.

[106] However, this is the regime normally adopted: see § 1495 ABGB; § 204 BGB; Art. 134 1 and 11 OR; Art. 2941 (2–4) *codice civile*; § 202 BGB-PZ; § 213 BGB-KE. But cf. Art. 3:321 (1) (b) BW and *Staudinger*/Peters (n. 15) § 204, n. 3.

[107] See Ewoud Hondius, 'General Report', in Hondius (n. 64) 9f.; *Law Commission Consultation Paper* (n. 3) 294f. For the Netherlands, see HR 23 October 1998 and 25 June 1999, (2000) *Nederlandse Jurisprudentie* 15/16 (extending the five-year period of Art. 3:310 (1) in situations where the injured party was prevented from instituting his claim because of circumstances attributable to the debtor, particularly psychological superiority; this extension is based on good faith and equity). I am grateful to Professors Arthur Hartkamp and Ewoud Hondius for bringing these decisions to my attention.

help, at least to a certain extent. However, the minor will often have repressed the traumatic childhood experience and may need considerable time to break down the psychological barriers preventing him from acknowledging what has happened. Thus, it may be more appropriate in these cases to suspend, rather than to delay completion of prescription. Moreover, there have been cases where the child is abused by another family member with whom the parent connives or whom he does not want to sue for other reasons. Here it would seem to be necessary to introduce a rule suspending prescription – either of the claims against the third parties or at least against the parent.

3 *Terminology II*

At this stage, another brief note on terminology may be in order. The period of prescription, as has been mentioned earlier,[108] may be renewed ('interrupted') or suspended. Suspension extends a given period of prescription: the period during which prescription is suspended is not counted in calculating the period of prescription.[109] But there is also another device that has the effect of extending the period of prescription: delay of completion of prescription. Here the period of prescription runs its course but it is completed only after the expiry of a certain extra period. While suspension of prescription is a device well known in European civil codes,[110] delay of completion is of more recent vintage (we find it first in §§ 512ff. I 9 of the Prussian code of 1794) but has increasingly gained ground internationally as a milder form of interference with prescription. The

[108] See pp. 124f. [109] See p. 124.

[110] See, e.g., Artt. 2251ff. *code civil*; §§ 1494ff. ABGB; §§ 202ff. BGB; Artt. 255ff. *Astikos Kodikas*; Artt. 2941f. *codice civile*.

German term is 'Ablaufhemmung';[111] the Dutch equivalent is 'verlenging van de verjaring', a concept which in the new BW has completely replaced the traditional concept of suspension ('schorsing').[112] The systematic exposition proposed in the present chapter is therefore as follows: the period of prescription may be (i) renewed or (ii) extended. An extension may occur either by way of (a) suspension or (b) delay of completion of prescription.

VI CLOSE PERSONAL TIES AS GROUNDS FOR EXTENSION?

Claims between children and their representatives are merely one particularly important group of claims covered by § 204 BGB and the equivalent rules in other countries. The same rule is often applied to claims between spouses: prescription is suspended as long as the marriage persists.[113] The common denominator is the family tie which constitutes, in the old-fashioned language of the draftsmen of the BGB, 'a relationship of piety requiring utmost care and protection'.[114] Prescription of claims between spouses is also suspended in France,[115] Switzerland,[116] Italy,[117] the Netherlands,[118] South Africa[119] and Québec[120] but not in England or Scotland. In

[111] See 'Motive' (n. 6) 528; Spiro (n. 5) §§ 87ff.

[112] See Artt. 3:320f. BW; *Asser*/Hartkamp (n. 62) n. 682; M. W. E. Koopmann, *Bevrijdende verjaring* (1993), pp. 83ff.

[113] § 204 BGB.

[114] 'Rücksicht auf das der Schonung dringend bedürftige Pietätsverhältniß, das zwischen diesen Personen besteht': 'Motive' (n. 6) 531.

[115] Art. 2253 *code civil*. [116] Art. 134 III OR.

[117] Art. 2941 (1) *codice civile*. [118] Art. 3:321 (1) (a) BW.

[119] Section 13 (1) (c) Prescription Act 68 of 1969.

[120] Art. 2906 *code civil du Québec*. Cf. also, e.g., § 1495 ABGB; Art. 256 *Astikos Kodikas*; and, generally, Spiro (n. 5) § 74. However, prescription is not always suspended as long as the marriage persists; cf., e.g., Art. 2906 *code civil*

spite of the preponderance of opinion in favour of the rule, it hardly appears defensible today.[121] It leads to problems being swept under the carpet rather than solved. The death of one of the spouses should not enable the other to surprise disagreeable heirs by presenting claims which would normally have prescribed many years ago. Nor should divorce provide the trigger for settling old scores. Marriage would then have had the effect of removing protection against stale claims: a result which may well be regarded as discriminatory.[122] If, on the other hand, one were to regard the rationale underlying § 204 BGB (and equivalent rules in other legal systems) as sound, it is difficult to see why the rule should not be generalized so as to cover other, closely related persons living in a common household.[123] However, delimitation of its range of application would then become an intricate exercise which would inevitably jeopardize legal certainty.[124] The only special rule that is required is the one concerning claims between persons subject to an incapacity and their representatives[125] and it is based on a different rationale: not on the close personal ties existing between these persons but because it is

du Québec ('La prescription ne court point entre les époux pendant la vie commune').

[121] For what follows, see the spirited attack in *Staudinger*/Peters (n. 15) § 204, n. 2.

[122] *Staudinger*/Peters (n. 15) § 204, n. 2 (who argues that Art. 6 of the Basic Law may be infringed).

[123] This was indeed proposed by Peters and Zimmermann (n. 12) 249f., 316, 321, approved by Spiro (n. 76) 624, but rejected by the German Reform Commission; see *Abschlußbericht* (n. 9) 90. Generally, see Karl Spiro, 'Verjährung und Hausgemeinschaft', in *Festschrift für Friedrich Wilhelm Bosch* (1976), pp. 975ff. The Swiss code contains a rule according to which prescription of the claims of an employee, who lives in a common household with his employer, against that employer is suspended as long as the employment relationship lasts; for details, see Spiro (n. 5) § 77.

[124] See *Abschlußbericht* (n. 9) 90.

[125] See pp. 135, 136.

impossible for the person subject to an incapacity to act on his own.

VII PRESCRIPTION OF CLAIMS BY OR AGAINST AN ESTATE

Another situation, in some respects, is very similar to the one where a person subject to an incapacity is without a representative. When a person has died it can happen, at least under some succession regimes prevailing in Europe, that his estate is temporarily without a personal representative, or heir, who may be sued by creditors of the estate and who can pursue the claims belonging to the estate. The draftsmen of the BGB regarded it as equitable to provide for a delay of completion of prescription on the model established for persons subject to an incapacity.[126] The situations are very similar and so is the underlying rationale: 'agere non valenti non currit praescriptio'. The rule has not given rise to any problems and its wisdom has never been questioned.[127] Few other legal systems, however, contain a similar rule[128] and some even specifically state that prescription is not suspended.[129]

[126] Prescription of a claim belonging to the creditor's estate or directed against the debtor's estate does not occur before six months have passed after the claim can be enforced by or against an heir, or by or against a representative of the estate. See § 207 BGB and 'Motive' (n. 6) 530. Unlike § 206 BGB (see n. 107), § 207 BGB works both ways.

[127] Its retention is advocated by Peters and Zimmermann (n. 12) § 204 BGB-PZ and by the German Reform Commission; see *Abschlußbericht* (n. 9) 91.

[128] But see Art. 259 *Astikos Kodikas* and s. 13 (1) (h) (South African) Prescription Act 68 of 1969. In Switzerland, the general provision of Art. 134 VI OR (concerning claims which the creditor is unable to pursue before a Swiss court) appears to be applied in appropriate cases; see Spiro (n. 5) § 72 (pp. 158f.).

[129] Art. 2258 (2) *code civil* ('[La prescription] court contre une succession vacante, quoique non pourvue de curateur').

VIII EXTENSION AS A RESULT OF NEGOTIATIONS

Another ground for suspension has gained considerable support in Germany in recent years: negotiations pending among the parties about the claim, or about circumstances from which a claim might arise. In 1977, Parliament introduced a rule into the code relating to negotiations about compensation to be rendered and suspending prescription of claims in delict.[130] It is based on the consideration that negotiations to reach a settlement out of court deserve to be encouraged. Thus, they should not have to be carried out under the pressure of an impending prescription of the claim. Nor should negotiations be allowed to constitute a trap for the creditor. A debtor who starts negotiating about a claim and who thus prevents the creditor from bringing an action should not later be allowed to refuse to satisfy the claim by invoking the time that has elapsed during those negotiations.[131] Ultimately, therefore, § 852 II BGB has to be regarded as a special manifestation of the principle of good faith as contained in § 242 BGB.[132] It is widely recognized that it is much too narrowly confined. The rule has been applied, *per analogiam*, to certain

[130] § 852 II BGB. A number of provisions in special statutes refer to this rule; cf. §§ 14 StVG (Road Traffic Act), 39 LuftVG (Air Traffic Law), 11 HaftpflG (Legal Liability Law), 32 AtomG (Atomic Energy Law), 3 n. 3 PflVersG (Compulsory Insurance Law). Two other rules contained in the BGB are based on similar considerations: § 651 g II 2 (concerning claims arising from deficient package tours) and § 639 II BGB (concerning claims based on defects under a contract of *locatio conductio operis*). Somewhat irritatingly, however, all these provisions diverge as regards the details of implementing this policy.

[131] Peters and Zimmermann (n. 12) 250; *Abschlußbericht* (n. 9) 91.

[132] Under this doctrinal umbrella the rule was recognized by the courts before its enactment. § 852 II BGB has, therefore, not reformed but merely clarified the law. See Ursula Stein, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. V (3rd edn, 1997), § 852, n. 67; Karl Schäfer, in J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (12th edn, 1986), §§ 833–53, § 852, nn. 116ff.

contractual damages claims;[133] in other cases, the courts still have to fall back directly on § 242 BGB[134] (the appropriate doctrinal pigeonhole being 'unzulässige Rechtsausübung' (inadmissible exercise of a right)).[135] Both German reform proposals therefore recommend a generalized rule along the lines of § 852 II BGB.[136]

At the same time, however, it must be noted that hardly any other legal system appears to have a provision of this kind. But only very few of them are happy to allow the debtor 'to negotiate himself into prescription'.[137] Most of them, in some way or other, want to help the creditor. As far as Switzerland is concerned, Spiro takes prescription to be suspended during negotiations even without a statutory basis.[138] In other countries we find a very extended interpretation of the notions of acknowledgement and waiver; yet others rely on equitable doctrines like promissory *estoppel* or personal bar, or they resort to the general notion of good faith, to the doctrine of abuse of right or to the *exceptio doli*.[139]

[133] BGHZ 93, 64 (68f.); and see the references in *Münchener Kommentar*/Stein (n. 132) § 852, n. 67.

[134] See the references in *Münchener Kommentar*/von Feldmann (n. 13) § 194, n. 16; *Münchener Kommentar*/Stein (n. 132) § 852, n. 67; and *Abschlußbericht* (n. 9) 92.

[135] Generally on the meaning and application of good faith in German law, see Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape', in Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000), pp. 18ff. and (concerning prescription) case study 20, German report (pp. 493f.).

[136] § 200 BGB-PZ; § 216 BGB-KE. See also Frank Peters, 'Vergleichsverhandlungen und Verjährung', (1982) *Neue Juristische Wochenschrift* 1857ff. The German Federal Supreme Court regards § 852 II BGB as 'an expression of a general legal principle' (BGHZ 93, 64 (69)).

[137] See the Norwegian report to case study 20 (Prescription I) in Zimmermann and Whittaker (n. 135) 504.

[138] Spiro (n. 5) § 108.

[139] For details, see the country reports for Greece, Austria, France, Belgium, Spain, Italy, the Netherlands, England, Ireland, Scotland and the Nordic

The one argument against a rule suspending prescription in case of negotiations is that it would lead to uncertainty. At what precise moment does suspension start and when does it end?[140] But the alternative, at least for most legal systems,[141] is to grant protection by means of much more general, and even vaguer, doctrines or by a somewhat contorted construction of the parties' actions. The German Federal Supreme Court must be right when it states that application of § 852 II BGB is preferable in comparison with § 242 BGB: the former rule, at least, makes clear within which period after negotiations have ended the creditor has to bring an action.[142] A generalized rule on the model of § 852 II BGB would therefore contribute to, rather than detract from, legal certainty.[143]

countries to case 20, as well as the comparative observations at the end of case 21, in Zimmermann and Whittaker (n. 135) 493ff., 530f. In those legal systems which allow the parties to contract out of the prescription regime and to agree, for example, to suspend prescription while they negotiate (as is the position in English law; see p. 163), the problem is of less practical relevance than in others.

[140] See Twenty-First Report of the (English) Law Reform Committee, as quoted in *Preston and Newsom on Limitation of Actions* (4th edn, 1989) by John Weeks, 146 (nn. 2.60f. of the Report).

[141] And, presumably, also under the Principles of European Contract Law in view of Art. 1:201 (1): 'Each party must act in accordance with good faith and fair dealing.'

[142] BGHZ 93, 64 (69). It is generally recognized in German law that the term 'negotiation' has to be interpreted widely: any exchange of opinion is covered which may reasonably lead the creditor to believe that his claim has not been finally rejected by the other party; see, e.g., *Münchener Kommentar*/Stein (n. 132) § 852, n. 68; generally Spiro (n. 5) § 108.

[143] Once again, it appears to be sufficient to delay completion of prescription rather than to suspend it. Once negotiations have failed, the creditor does not need more than a reasonable minimum period to make up his mind whether to pursue his claim in court. Thus, the rule could read as follows: 'If the parties negotiate about the claim, or about circumstances from which a claim might arise, prescription does not occur before one year has passed after one of the parties has refused to continue negotiations.' Such a minimum period would probably also have to be available if negotiations were regarded as a ground for suspension, in cases where they start only shortly before completion of

In addition, it may appear expedient to introduce a form requirement: suspension begins if one of the parties requests negotiations in writing, and it ends if one of them refuses, in writing, to continue to negotiate.[144] The German Reform Commission, however, has argued against such an approach: it is contrary to general usage and would, moreover, place the party that is less skilful and less experienced at a disadvantage.[145] Also, it is probably too restrictive and would thus, once again, leave too much scope for general good faith considerations.

IX *FRAUS OMNIA CORRUMPIT*?

In a number of countries we find a general rule in terms of which prescription is suspended if the debtor fraudulently (or deliberately) conceals the existence of the claim.[146] Such

prescription; see § 216 I 2 BGB-KE ('Pending negotiations about the claim, or about circumstances from which a claim might arise, prescription is suspended until one of the parties refuses to continue negotiations. However, prescription does not occur before two months have passed after the end of the suspension').

144 This is the proposal by Peters and Zimmermann (n. 12) 320f.

145 *Abschlußbericht* (n. 9) 94.

146 Art. 2941 (8) *codice civile*. For similar rules, see Art. 255, 2 *Astikos Kodikas* (debtor 'fraudulently dissuading' his creditor from pursuing his claim); Art. 3:321 (1) (f) BW ('between the creditor and a debtor who deliberately hides the existence of the debt or its exigibility'); s. 32 (1) (b) Limitation Act 1980 (postponement where 'any fact relevant to the claimant's right of action has been deliberately concealed from him by the defendant'); s. 6 (4) (a) (i) Prescription and Limitation (Scotland) Act (suspension for any period 'during which by reason of fraud on the part of the debtor . . . the creditor was induced to refrain from making a relevant claim in relation to the obligation'); and see s. 12 (2) (South African) Prescription Act 68 of 1969 ('If the debtor wilfully prevents the creditor from coming to know of the existence of the debt'). Most other codes (e.g., the ones in France, Austria, Germany, Switzerland and Québec) do not contain this kind of rule. The German code, however, exempts the creditor from the short prescription periods (six months, one year, five years) for claims based on defective buildings and defective goods

a rule, however, appears to be unnecessary in view of the fact that prescription is suspended anyway, as long as the creditor does not know about his claim.[147] Of practical relevance is only the question whether fraud (as opposed to mere ignorance) should override the long-stop (i.e., within the present framework, whether there has to be an exception to the maximum period of extension).[148] But even in this respect a special rule would do more harm than good.[149] For whether the debtor, under certain circumstances, may be barred from raising the defence of prescription is a question of a general and complex nature that defies any reduction to a simple and straightforward formula. A legal system that recognizes an overriding duty of good faith will not in principle deny such a possibility.[150] Raising a defence of prescription is a legal act which is, like any other legal act, subject to the requirements of good faith. Of course, it must be taken into account that prescription rules are geared, specifically, towards bringing about a state of legal certainty (even at the expense of individual justice) and therefore must not be interfered with lightly. Moreover, even here the lapse of time cannot be considered entirely irrelevant since it becomes increasingly odious and difficult to argue about whether there has been fraudulent concealment or not. Still, however, the good faith issue can arise. But if it does, it does not do so only

sold in cases of fraud: §§ 477 1, 638 1 BGB. For comparative observations, see also Spiro (n. 5) 82.

147 See also the comment in the *Law Commission Consultation Paper* (n. 3) 304: 'Indeed it is a further advantage of the general discoverability test that it largely obviates the need for "exceptions" in the case of mistake, fraud and deliberate concealment.'

148 See the discussion in *Law Commission Consultation Paper* (n. 3) 304ff.

149 This is also the conclusion by Claeys, (1998–9) *Rechtskundig Weekblad* 397ff., who discusses the question extensively from the point of view of Belgian law.

150 See pp. 155f.

in a clearly definable category of cases *sub voce* fraudulent concealment of the claim. Force and fear can be equally relevant.[151] And even in cases where there has been neither fraud, nor force, nor fear, a debtor may in certain situations be barred from invoking prescription: particularly where he has promised not to do so.[152] Thus, it is preferable to leave the matter to the application of the general provision in Art. 1:201 PECL.

X SOME DETAILS CONCERNING EXTENSION AND COMMENCEMENT

1 *Range of application of maximum period for suspension*

A number of details concerning extension and commencement of prescription remain to be considered very briefly. We have a general period of prescription of three years which can be extended by means of suspension, or delay of completion. But we also have a long-stop period of fifteen years which, at any rate, applies to suspension in case of ignorance.[153] If we keep in mind the special need for legal certainty in this field of law,[154] the long-stop should apply as broadly as possible. Only reasons inherent in the nature of things should override this final date. Such reasons are apparent in only two situations. The most obvious of them is suspension in case of legal proceedings.[155] One cannot expect more of the creditor than to attempt to establish his claim by judicial proceedings. How long the legal proceedings take

[151] See the discussion in Spiro (n. 5) § 82.

[152] See case studies 20 and 21 in Zimmermann and Whittaker (n. 135) 493ff., 508ff.

[153] See pp. 99ff., 106ff. [154] See pp. 65, 85. [155] See pp. 117ff.

is very largely a matter he cannot control. Everything is now under way to remove the existing uncertainty and it would clearly be inequitable if the creditor were trapped by prescription in this situation. The other situation is delay of completion of prescription between a person subject to an incapacity and his representative;[156] after all, the claim may arise when the minor is only one or two years old; yet, before he attains the age of majority, more than fifteen years will have passed. Of course, even outside this narrow group of situations there may be exceptional circumstances which may prompt a judge to reject the defence of prescription as being against good faith. But these rare cases defy general definition.

2 *What must the debtor's ignorance relate to?*

Practically the most important ground for extending the period of prescription is lack of knowledge on the part of the creditor.[157] What, precisely, must his (lack of) knowledge relate to? It seems to be widely agreed that the facts giving rise to his claim and the identity of his debtor are the two key issues.[158] In addition, a significance test is sometimes laid down or recommended. Thus, in England, the rules on personal injury provide that the three-year period will not start to run until the claimant knows that

[156] See pp. 135ff. [157] See pp. 106ff.

[158] See s. 12(3) (South African) Prescription Act 68 of 1969; § 199 BGB-PZ (in addition, knowledge about the legal basis of the claim is required; for the reasons see Peters and Zimmermann (n. 12) 247f.); *Law Commission Consultation Paper* (n. 3) 261f. In a number of legal systems the knowledge requirement relates only to specific types of claims, most often delictual ones. Here the codes tend to require knowledge of the damage and the identity of the debtor: see, e.g., § 852 1 BGB; Art. 60 OR; Art. 3:310 BW; §§ 199, 201 BGB-KE; and see Spiro (n. 5) § 85.

his injury is significant.[159] The Law Commission recommends that discoverability should focus on the three elements: (a) that the claimant has a cause of action (b) against the defendant which is (c) significant.[160] What this test wants to prevent is that an apparently trivial injury should trigger the prescription period for unexpected, serious consequences arising from the injury at a later stage. Even though this test does not appear in statutory form in any of the civil law jurisdictions, the underlying concern has been accommodated, at least in Germany, by the way in which the courts have interpreted the knowledge requirement concerning claims for damages.[161] Of course, the significance test introduces an element of uncertainty, but the German experience seems to suggest that this is unavoidable.

3 *Suspension of prescription 'on legal grounds'?*

Obviously, the parties are free to determine at what time the debtor has to render performance. If they agree, when they conclude their contract, that the debtor may perform at a later date than he would normally have to (see Art. 7:102 (1) PECL) they effectively postpone the due date.[162] Prescription, according to the general principle stated above,[163] begins to run only at that later date. If the parties subsequently,

[159] Limitation Act 1980, s. 14 (1); similarly for latent damage: Limitation Act 1980, s. 14 A (7).

[160] *Law Commission Consultation Paper* (n. 3) 262ff. (with an overview of similar recommendations of other law reform bodies in the common law world).

[161] See, e.g., the discussion and references in *Münchener Kommentar*/Stein (n. 132) § 852, n. 22.

[162] For subtle doctrinal distinctions, in this respect, see *Münchener Kommentar*/von Feldmann (n. 13) § 202, n. 4.

[163] See pp. 105f.

i.e., after prescription has already stated to run, agree on a postponement of the time when the debtor has to effect performance, such an agreement usually entails an acknowledgement of the claim on the part of the debtor.[164] The consequence is a renewal of prescription.[165] Where the parties merely agree that the creditor may bring his action at a later date (*pactum de non petendo*)[166] and where the debtor cannot, therefore, normally be taken to acknowledge the claim, we have an agreement suspending prescription which is effective according to what will be said below.[167] As a result, a rule along the lines of § 202 BGB[168] appears to be unnecessary.[169]

4 *Duties to refrain from doing something*

Prescription relates to rights to demand payment or any other performance. This also covers cases where the debtor is under a duty to refrain from doing something. When does prescription begin to run in these cases? The due date cannot be the appropriate moment since the creditor's claim is due

[164] Peters and Zimmermann (n. 12) 253. [165] See pp. 126ff.

[166] For details, see *Staudinger*/Peters (n. 15) § 202, nn. 14ff.

[167] See pp. 162ff.

[168] 'Prescription is suspended for as long as the performance is deferred or the debtor is temporarily entitled on any other ground to refuse to make performance.' The second subsection provides for a number of very important exceptions to this rule in practice.

[169] Peters and Zimmermann (n. 12) 253f. (who point out that the complex regulation contained in § 202 BGB is not only unnecessary but has also given rise to problems). The details were much disputed at the time when the rule was drafted (see Peters and Zimmermann (n. 12) 125f.). Other codifications do not usually regulate the problem. The German Commission recommends a rule suspending prescription as long as the debtor, on account of an agreement with the creditor, is temporarily entitled to refuse performance: § 211 BGB-KE and *Abschlußbericht* (n. 9) 88. For comparative discussion, see Spiro (n. 5) § 30.

even before the debtor has infringed his duty.[170] Yet, before such an infringement has occurred, the creditor does not normally have any reason to sue his debtor so as to stop prescription from running. Hence the need for a special rule focusing on contravention.[171] However, two different situations have to be distinguished. Where a debtor is under a duty to refrain from acting in a particular way at a particular moment, no prescription problems can arise: until the debtor infringes that duty, prescription cannot start; if he has infringed it, compliance has become impossible and the creditor can claim only damages. Thus, the only situation that has to be taken care of is the one where the debtor's duty extends over some period of time, i.e., the situation of a continuing duty to refrain from doing something. Here it appears to be appropriate not to let prescription commence, once and for all, with the first act of contravention but with each new act of contravention.[172]

[170] See, e.g., *Abschlußbericht* (n. 9) 57f.

[171] See § 198, 2 BGB and the discussion by Peters and Zimmermann (n. 12) 303f.; *Staudinger*/Peters (n. 15) § 198, nn. 33ff. Other codifications do not usually have a specific rule but argue from general principles; see, e.g., Spiro (n. 5) §§ 48f.; *Asser*/Hartkamp (n. 62) n. 664.

[172] See, for details, Peters and Zimmermann (n. 12) 304; *Abschlußbericht* (n. 9) 58; *Staudinger*/Peters (n. 15) § 198, nn. 33ff. The following example may illustrate the point. A is a former employee of B, an insurance company in Hamburg. He is under a duty not to sell any insurance policies on his own account for the next three years in Hamburg. On 10 March, he sells some policies in a small suburb still belonging to the state of Hamburg. On 10 October, however, he sets up his own insurance agency right in the centre of Hamburg. Concerning the infringement on 10 March, prescription begins to run on that day; concerning the one on 10 October, a new period begins to run on 10 October. This is justified in view of the fact that B may have refrained from taking steps which would have had the effect of extending or even renewing prescription, not because he wanted to condone any infringement of A's duty, but merely because the first infringement was not sufficiently serious to warrant the cost and trouble of taking such steps.

5 *Claims concerning payments for services rendered and goods delivered*

According to § 201 BGB, the prescription period for a whole range of claims concerning payment for services rendered and goods delivered[173] begins to run only from the end of the year in which they have become enforceable. This is a peculiarity of German law that does not appear to have found much favour in other jurisdictions.[174] The draftsmen of this provision wanted to spare the merchants and manufacturers covered by it the inconvenience of having to bear in mind as many different prescription periods running against their claims for payment as they had delivered goods or performed services within any one year.[175] The provision would enable them to check their files only once a year for items still to be collected. These advantages, however, are outweighed by the disadvantages associated with any differentiation in prescription matters.[176] The rule of § 201 BGB is unsatisfactory in a number of respects[177] and any attempt to isolate the

[173] They are clumsily enumerated in §§ 196f. BGB; for an overview in English, see Reinhard Zimmermann, 'Extinctive Prescription in German Law', in Erik Jayme (ed.), *German National Reports in Civil Law Matters for the XIVth Congress of Comparative Law in Athens 1994* (1994), pp. 159ff. The draftsmen of the BGB referred to 'Geschäfte des täglichen Verkehrs' (transactions of daily life).

[174] But see Art. 253 *Astikos Kodikas*.

[175] 'Motive' (n. 6) 522f. But this rationale becomes somewhat questionable if one takes account of the many 'irregular' claims falling under §§ 196f. BGB (see Zimmermann (n. 173) 159ff.).

[176] See pp. 79ff.

[177] Thus, it has the consequence that the prescription period for claims of the same kind may differ for up to one year. For criticism, see Peters and Zimmermann (n. 12) 247; Spiro (n. 5) § 125. The rule, however, is defended by the German Reform Commission (n. 9) 58f. One of the principal arguments of the commission for retaining it is that small and medium-sized enterprises in Germany have become accustomed to it. This argument, of course, does not apply on a European level.

relevant claims in a different way would run the danger either of leading to equally inconvenient problems of delimitation or of including a large number of claims to which the rationale underlying the provision would not apply.[178]

6 Presentation of an invoice

The German Reform Commission proposes to regulate the situation where the debtor has to effect performance only after the presentation of an invoice: prescription begins to run when creditor can present the invoice.[179] This proposal is based on the desire to preempt disputes about whether the debtor *has to effect performance* only after presentation of the invoice;[180] and on the fear that, if presentation of the invoice does indeed affect the due date, the creditor may be tempted to manipulate prescription in his favour.[181] There is, however, no comparative evidence supporting the desirability of, or perhaps even the need for, a reform along these lines. It will have to be determined by the general rules of interpretation whether the due date is postponed until presentation of the invoice; occasionally, this is provided by statute.

7 Notice of termination

In some countries we find a rule dealing with the situation where a person may not demand performance until

[178] The latter objection may be raised against the generalized proposal submitted by the German Reform Commission: § 196 II 1 BGB-KE (all contractual remuneration claims; the rule proposed by the commission would, therefore, also cover all occasional sales by private persons).

[179] § 196 II 2 BGB-KE.

[180] For discussion, see *Staudinger*/Peters (n. 15) § 198, nn. 7ff.

[181] *Abschlußbericht* (n. 9) 59f.

he has given notice of termination to the other party:[182] prescription begins to run from the moment when notice can first be given.[183] It is based on a similar fear that the commencement of prescription might otherwise be manipulated in these cases. This fear, however, hardly appears to be justified, for creditors do not normally make their business decisions dependent on how to obtain the benefit of a long prescription period.[184] Moreover, it is difficult to see why comparable cases are not treated alike;[185] indeed, the very fact that they are not, and apparently without any adverse consequences, confirms the view that a regulation is dispensable.

XI EFFECTS OF PRESCRIPTION

1 *Introduction*

The most important effect of prescription has already been discussed: after expiry of the period of prescription the debtor is entitled to refuse performance.[186] He has a defence which he has to invoke if prescription of the claim is to be taken into consideration. The claim as such is not extinguished. Consequently, whatever has been performed in

[182] A common example would be a loan repayable upon notice given by the creditor (see § 609 BGB).

[183] See § 199 BGB; Art. 130 II OR; Art. 252 *Astikos Kodikas*. For comparative discussion, see Spiro (n. 5) § 35; Loubser (n. 5) 54ff.

[184] For criticism, see Peters and Zimmermann (n. 12) 245f.; *Abschlußbericht* (n. 9) 65; *Staudinger*/Peters (n. 15) § 199, n. 1. The rule is defended by Spiro (n. 5) § 33 (who, however, also refers to prominent critics like Savigny, Dernburg, Unger and Vangerow).

[185] § 200 BGB deals with the situation where a claim comes into existence only once the creditor has availed himself of a right of rescission. But it does not, for example, cover the case where the creditor has to exercise a right of withdrawal from the contract.

[186] See pp. 72ff.

order to discharge that claim may not be reclaimed merely because the period of prescription had expired.[187] In civilian terminology, performance has not been made 'without legal ground' in this situation. This applies, as some codifications specifically clarify, whether the debtor knew that he could have raised the defence of prescription or not.[188] Five further matters deserve attention.

2 *Waiver*

As has been pointed out already, raising the defence of prescription can, under certain circumstances, be inadmissible because it constitutes an infringement of the precepts of good faith.[189] This is the case, for instance, where the debtor has prevented the creditor from pursuing his claim in good time, particularly where he has waived his right to raise the defence of prescription. The question is of considerable practical relevance for those legal systems which prohibit agreements rendering prescription more difficult: since they consequently also usually regard a unilateral waiver as invalid, they can help the creditor only by taking recourse to the general good faith provision.[190] In view of the more

[187] It may be reclaimed for other reasons, for example, if the debtor has performed under the reservation that the claim had not prescribed or if the creditor had fraudulently induced him to believe that the claim had not prescribed.

[188] § 222 II BGB; § 221 II BGB-KE; Art. 26 Unidroit Convention; and see Spiro (n. 5) § 233. See also p. 73.

[189] See pp. 146f.

[190] For the effect of good faith on the application of the prescription regime and, particularly, on the way in which a waiver is taken into consideration which the debtor has declared before prescription has run out, see Spiro (n. 5) § 343; *Staudinger*/Peters (n. 15) § 222, nn. 17ff., 20ff.; and the country reports for Germany, Greece, Austria, France, Belgium, Spain, Italy, the Netherlands, England, Ireland, Scotland, Denmark, Sweden and Finland to case study 21 (Prescription I) in Zimmermann and Whittaker (n. 135) 508ff. Cf. also Matthias E. Storme, 'Belgium', in Hondius (n. 64) 44, at 70f.

liberal regime advocated here[191] the problem is largely obviated: a waiver is no longer objectionable merely on account of the fact that the parties would not have been allowed to render prescription more difficult. Moreover, it is reasonable to assume that there will usually have been a tacit agreement. Nevertheless, the problem can still arise, particularly in cases where the debtor waives his right to invoke prescription shortly before the end of the maximum periods of fifteen or thirty years envisaged in chapter 2, sub IX.2 and the present chapter, sub XII.2. Here the debtor will be barred from invoking the defence of prescription for the period that he has delayed enforcement of the claim (Art. 1:201 PECL).

After prescription has occurred, the debtor is entitled to waive his right of invoking the defence of prescription, either by way of agreement with his creditor or unilaterally:[192] after all, the claim still exists and the waiver merely has the effect of removing the possibility of preventing it from being enforced.

3 '*Verwirkung*'

The principles of good faith and fair dealing may not only prevent the debtor from invoking the defence of prescription; they may also prevent the creditor from bringing a claim even before the period of prescription has run out. This may be the case if he has engendered reasonable reliance on the part of the debtor that he would no longer pursue his claim.[193]

[191] See pp. 162ff.

[192] See Art. 2220 *code civil*; Art. 276 *Astikos Kodikas*; Art. 2937 *codice civile*; *Staudinger*/Peters (n. 15) § 222, nn. 28ff.; Art. 322 (2) BW; *Asser*/Hartkamp (n. 62) nn. 659ff.; Koopmann (n. 112) 95ff.; Spiro (n. 5) § 343; Loubser (n. 5) 150ff.

[193] All legal systems possess mechanisms for the protection of the reasonable reliance of a debtor in situations where the creditor has failed to bring a claim

However, under a prescription regime with a short regular prescription period (like the one proposed here), this situation will be practically much less relevant than it is in legal systems with a very long period.

4 *Ancillary claims*

Prescription occurs 'ut sit finis litium'. The law wants to prevent litigation about stale claims, both in the public interest and in order to protect the debtor.[194] This policy would be undermined if the creditor could still sue his debtor for interest that may have become due on a claim for which the period of prescription has run out; for the debtor, in order to defend himself, might then be forced to go into the merits of the principal claim itself. The same considerations apply to other claims of an ancillary nature, such as those for emoluments and costs.[195] Hence the need for a rule that such claims prescribe with the principal claim,

for some time. At the same time, however, it is generally agreed that sitting on one's right as such, i.e., mere inactivity on the part of the creditor, does not lead to a loss of right. In German law, the doctrine of 'Verwirkung' has been developed to deal with this situation; it is a specific emanation of the principle of good faith. See, e.g., Max Vollkommer, in Jauernig, *Bürgerliches Gesetzbuch* (8th edn, 1997), § 242, nn. 53ff.; Gerhard Kegel, 'Verwirkung, Vertrag und Vertrauen', in *Festschrift für Klemens Pleyer* (1986), pp. 513ff.; Filippo Ranieri, 'Bonne foi et exercice du droit dans la tradition du civil law', (1998) *Revue internationale de droit comparé* 1066ff. The notion of 'Verwirkung' has been received in a number of countries; for Spain, see Antoni Vaquer Aloy, 'Importing Foreign Doctrines: Yet Another Approach to the Unification of European Private Law? Incorporation of the Verwirkung Doctrine into Spanish Case Law', (2000) 8 *Zeitschrift für Europäisches Privatrecht* 301ff. For a comparative analysis, see case study 22 in Zimmermann and Whittaker (n. 135) 515ff. (with country reports for Germany, Greece, Austria, France, Belgium, Spain, Italy, the Netherlands, England, Ireland, Scotland, Denmark, Norway, Sweden and Finland).

[194] See pp. 63f.

[195] For details, see *Staudinger*/Peters (n. 15) § 224, nn. 5ff.

even if the prescription period applicable to them has not yet expired.[196]

5 *Real securities*

Somewhat different considerations apply when it comes to determining the effect of prescription on real security[197] provided by the debtor or a third party. Here, too, the policy of the prescription rules is arguably compromised if the creditor may sell what has been given to him by way of pledge[198] even though the claim which the pledge was intended to secure has prescribed. For where the pledge was given by the debtor himself, he will now have to raise the question whether that claim was, or still is, well-founded; and, where a third party has given the pledge, the debtor will now have to fear the third party's right of recourse.[199] On the other hand, however, it may also be argued that this risk was inherent in the transaction from the beginning and could be taken into consideration by the debtor.[200] Moreover, legal certainty would also be adversely affected if the creditor were not allowed to retain what he had received by way of security: 'quieta non movere' not only requires that the debtor may not reclaim

[196] § 224 BGB; Art. 133 OR; Art. 274 *Astikos Kodikas*; Johnston (n. 5) 4.101 (3); s. 10 (2) (South African) Prescription Act 68 of 1969; § 211 BGB-PZ; § 224 BGB-KE; Art. 27 Uncitral Convention (confined to interest); cf. also Art. 3:312 BW; Spiro (n. 5) §§ 59, 236 (who asserts that this is 'generally recognized today'). For the *ius commune*, see Peters and Zimmermann (n. 12) 140.

[197] The effect of prescription of the main claim on the claim against a surety is traditionally a matter of suretyship law: see § 768 BGB; Art. 502 OR; Art. 7:852 BW.

[198] The following discussion focuses on security rights in movables; the conclusions reached, however, apply with even greater force to security rights over immovables.

[199] See Peters and Zimmermann (n. 12) 264f. See also *Asser*/Hartkamp (n. 62) n. 658 ('aangezien de schuldenaar anders aan de verjaring weinig zou hebben').

[200] *Abschlußbericht* (n. 9) 106.

what he has given in order to discharge a claim that has prescribed, but also that he may not reclaim an object given as security at a time when the claim had not prescribed. The creditor obtains possession of the object for the purpose, as the draftsmen of the BGB saw it, 'to obtain satisfaction from that object in all circumstances up to the value of the object pledged'.[201] These considerations have prompted the draftsmen of the Dutch code to differentiate between possessory and non-possessory securities.[202] However, discrimination of the non-possessory security, under the auspices of the law of prescription, appears to be problematic in view both of its overwhelming practical importance, and of the considerable differences in legal regulations existing in Europe today.[203] Some countries have effective mechanisms substituting for the transfer of possession;[204] and these non-possessory security rights clearly have to be treated, as far as the prescription rule under consideration is concerned, like the traditional pledge. Both in Switzerland[205] and in Germany[206] it has been found desirable, or necessary, to subject even the transfer of ownership by way of security to the same regime.[207] Thus, if a distinction is to be drawn it should be,

[201] See the reference in Peters and Zimmermann (n. 12) 137.

[202] Art. 323 (1) and (2) BW; Koopmann (n. 112) 14. See also *Asser*/Hartkamp (n. 62) n. 658 arguing that possession of the pledge on the part of the creditor creates a presumption that the debt has not been discharged.

[203] See Ulrich Drobnig, 'Security Rights in Movables', in Arthur Hartkamp, Martijn Hesselink et al. (eds.), *Towards a European Civil Code* (2nd edn, 1998), pp. 511ff.

[204] See Drobnig (n. 203) 517.

[205] Spiro (n. 5) 223 (on the basis of Art. 140 OR which was originally intended to cover the pledge with possession).

[206] § 223 II BGB. For England, see Preston and Newsom (n. 140) 12 ('A security may be enforceable even if given for a statute-barred debt and if the creditor has any lien or charge for his debt he can enforce the lien or charge after the debt is barred').

[207] This regime has not given rise to problems; see *Abschlußbericht* (n. 9) 105.

rather, between accessory and non-accessory securities.[208] On the other hand, however, it may be premature to attempt to deal with the matter before a set of European principles on security rights has been drafted.

6 Set-off

A claim that has prescribed can no longer be enforced. But it may still provide a valid basis for a right of set-off. A number of codifications contain rules to the effect that the right of set-off is not excluded by the prescription of the cross-claim, provided it could have been set off against the principal claim at a time when it had not prescribed.[209] The policy of these rules is to preserve a right of set-off that has once accrued, even though set-off has not been declared at that stage.[210] It does not, however, fit in well with the policy considerations underlying the law of prescription.[211] The 'obfuscating power of time'[212] affects the creditor's claim in the same way, no matter whether it is pursued by way of action or used in

[208] This is the proposal submitted by Peters and Zimmermann (n. 12) 310. For a discussion of the principle of accessoriness, in the context of the development of European private law, see Mathias Habersack, 'Die Akzessorietät: Strukturprinzip der europäischen Zivilrechte und eines künftigen europäischen Grundpfandrechts', (1997) *Juristenzeitung* 857ff. (862ff.).

[209] See § 390, 2 BGB; Art. 443 *Astikos Kodikas*; Art. 120 III OR and Spiro (n. 5) § 216; Art. 131 (1) BW; Koziol and Welser (n. 1) 281; Johnston (n. 5) 4.101; Art. 25 (2) Uncitral Convention.

[210] The rule tries to take account of the retroactive effect of the declaration of set-off; see pp. 36ff. Obviously, it is unnecessary in a legal system (like the French one) where set-off operates *ipso iure*. But cf. for Italy Art. 1242 *codice civile* which specifically spells out that set-off is excluded only if prescription was completed on the date on which the debts began to coexist.

[211] See Peters and Zimmermann (n. 12) 266; Peter Bydlinski, 'Die Aufrechnung mit verjährten Forderungen: Wirklich kein Änderungsbedarf?', (1996) *Archiv für die Civilistische Praxis* 293ff.

[212] See p. 64, n. 9.

order to give notice of set-off. In both cases the debtor needs protection; in both cases, too, it would run counter to the public interest if a stale claim could become the object of litigation. Set-off, according to what has been set out above,[213] should no longer have *ex tunc* effect. This simplifies matters, for we merely have to look at the moment when set-off is declared. Obviously, considering the policy of the law of prescription, it cannot be declared where the debtor (of the cross-claim) has previously invoked prescription. But since he has no reason to invoke prescription unless the creditor asserts a claim against him (whether by way of bringing an action or by declaring set-off), he will have to be granted a reasonable period, after he has received notice of set-off, to raise the defence of prescription. If he fails to do so, the set-off is effective: after all, the claim continues to exist in spite of the prescription period having run out.

7 *Defences*

Prescription of defences raises difficult problems doctrinally. Under the *ius commune*, defences were widely regarded as not being subject to prescription: 'quae ad agendum sunt temporalia, ad excipiendum sunt perpetua'. This principle is still accepted in a number of jurisdictions.[214] Most legal systems, however, do not have a general rule. But a number of them have specific provisions in terms of which defences may, under certain circumstances, survive prescription of the claim on which they are based. Whether these provisions are

[213] See pp. 39ff.

[214] See, for France, Ferid and Sonnenberger (n. 93) 1 C 249; for Belgium, Storme (n. 190); for Greece, Art. 273 *Astikos Kodikas*; for South Africa Loubser (n. 5) 7f. The position is essentially the same in English law as a result of the fact that only the remedy and not the right is barred.

expressions of, or exceptions to, a general rule is disputed.[215] The matter appears to be relevant in practice only as far as rights to withhold performance (like the one provided in Art. 9:201 PECL) are concerned.[216] According to the prevailing opinion in Germany, such rights can still be used as a shield, even if the claim on which they are based can no longer be used as a sword.[217] This appears to be right since a regime under which one party to a contract would still be able to enforce performance whereas the other would effectively have lost its claim would be unacceptably hard for the latter.[218]

XII AGREEMENTS CONCERNING PRESCRIPTION

1 *Agreements rendering prescription more difficult*

There is a considerable divergence of views as to whether it is possible for parties to contract out of the prescription

[215] See Spiro (n. 5) § 215; Peters and Zimmermann (n. 12) 266. Sometimes a distinction is drawn between 'independent' defences and defences based upon a claim; 'independent' defences are not subject to prescription, others are: see *Münchener Kommentar*/von Feldmann (n. 13) § 194, n. 23. The distinction goes back to pandectist scholarship (see Windscheid and Kipp (n. 5) § 112), but it has always been regarded as problematic (see Windscheid and Kipp (n. 5) § 112, n. 8).

[216] See Peters and Zimmermann (n. 12) 266.

[217] See *Staudinger*/Peters (n. 15) § 222, n. 37; Art. 6:56 BW. Cf. also § 212 BGB-PZ and § 222 BGB-KE and, generally on prescription defences (and the effect of prescription of claims on defences), Spiro (n. 5) §§ 215f., 540.

[218] A has sold a car to B. The car has to be delivered on 10 October 1996, the purchase price has to be paid on 10 December of the same year. The prescription period for both claims is three years. After three years B has still not received the car. If he sues A for the car after 10 October, A can raise the defence of prescription. If A, in turn, sues B for the purchase price on 10 November, B may exercise his right to withhold performance in terms of Art. 9:201 PECL; it remains unaffected by the prescription of his own claim against A. After 10 December, B can raise the defence of prescription against A's claim.

regime by lengthening or shortening the prescription period, by providing for different starting dates, by introducing additional, or opting out of existing, grounds for suspension, etc. Swiss, Greek and Italian law are particularly strict in this regard: they prohibit agreements either way.[219] The Uncitral Convention, too, regards its prescription regime as mandatory.[220] A number of legal systems allow the parties to facilitate prescription, especially by providing for a period that is shorter than the statutory one, while they refuse to recognize agreements rendering prescription more difficult, especially by extending the statutory period.[221] In these countries, the prescription regime is thus of a unilaterally mandatory character. Finally, the German Reform Commission and the English Law Commission recommend recognition, in principle, of agreements both ways.[222] This seems to tie in with the legal position prevailing in England today.[223]

The prohibition of agreements rendering prescription more difficult is often justified with reference to the public

[219] Art. 129 OR; Art. 275 *Astikos Kodikas*; Art. 2936 *codice civile* ('È nullo ogni patto diretto a modificare la disciplina legal della prescrizione'). Cf. also, most recently, Art. 2884 *code civil du Québec* (on which, see Deslauriers (n. 64) 314).

[220] Art. 22 ('The limitation period cannot be modified or affected by any declaration or agreement between the parties.' There are two exceptions, the one permitting the debtor at any time during the running of the period to extend it by a declaration in writing to the creditor; the other sanctioning, under certain circumstances, a clause in the contract of sale, in terms of which arbitral proceedings are to be commenced within a shorter period of limitation than that prescribed by the Convention).

[221] § 1502 ABGB and Koziol and Welser (n. 1) 189; § 225 BGB; for the Netherlands, see *Asser*/Hartkamp (n. 62) n. 678; for France, see Ferid and Sonnenberger (n. 93) 1 C 254ff.

[222] § 220 BGB-KE (and see *Abschlußbericht* (n. 9) 97ff.); *Law Commission Consultation Paper* (n. 3) 389ff. For criticism, see Andrews, (1998) 57 *Cambridge Law Journal* 602f., 610.

[223] See *Law Commission Consultation Paper* (n. 3) 389; Gerhard Dannemann, Fotios Karatzenis and Geoffrey V. Thomas, 'Reform des Verjährungsrechts aus rechtsvergleichender Sicht', (1991) 55 *RabelsZ* 705.

interest which the prescription of claims is intended to serve.[224] It must, however, be remembered that the prescription of claims predominantly serves to protect the debtor;[225] and that, where he renounces such protection, the exercise of his private autonomy may well be seen to prevail over the public interest. Also, the general prescription periods applying in countries objecting to agreements rendering prescription more difficult are comparatively long (ten, twenty or thirty years) so that a further lengthening may indeed be problematic – much more problematic, at any rate, than where we have a short general prescription period. Widely, therefore, agreements lengthening the period are specifically admitted, where the period is, exceptionally, a short one.[226] Contractual warranties concerning latent defects in buildings or goods are thus permitted even if they have, as they often do, the effect of lengthening the period of prescription.[227] Equally, it tends to be accepted that the prohibition does not affect agreements which indirectly render prescription more difficult, such as agreements postponing the due date of a claim, or *pacta de non petendo*.[228] However, it is not easy to see why the parties should not be able to postpone the commencement of prescription as such if they *can* postpone the due date for the claim. Moreover, these subtle distinctions provide ample opportunity for effectively circumventing the

[224] See, e.g., *Münchener Kommentar*/von Feldmann (n. 13) § 225, n. 1; and see the references in Peters and Zimmermann (n. 12) 141. But cf. also Spiro (n. 5) § 343 read with § 15; *Staudinger*/Peters (n. 15) § 225, n. 3.

[225] See pp. 63f.

[226] For Germany, see §§ 477 (1) 2, 480 (1) 2, 490 (1) 2, 638 (2) BGB, §§ 414 (1) 2, 423, 439 HGB; for Switzerland, see Spiro (n. 5) § 345.

[227] See, e.g., Harm Peter Westermann, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. III (3rd edn, 1995), § 477, nn. 21ff.; Spiro (n. 5) § 346.

[228] For details, see *Staudinger*/Peters (n. 15) § 225, nn. 7ff.; Spiro (n. 5) § 344.

prohibition.[229] These problems would be obviated by abandoning the prohibition.

This appears all the more desirable under a system such as the one proposed in this and the previous chapter. Party autonomy provides the necessary counterbalance to (i) the short general prescription period of three years and (ii) the uniformity of the regime in general.[230] Neither the three-year period nor a number of the other rules fit all types of claims and all imaginable situations equally well. The parties must be free to devise a more appropriate regime, as long as they observe the general limitations placed on freedom of contract. Thus, for instance, the draftsmen of the Uncitral Convention obviously regard four years as the most appropriate period for claims arising from an international sale of goods[231] and there is no reason why the parties to a contract of sale should not be allowed to adopt this period for their contract. The Dutch code specifies a period of five years for claims for damages.[232] Again, it can hardly be regarded as objectionable if two parties want their damages claims to be subject to a five- rather than a three-year period. And more generally it must be kept in mind that the system proposed in this essay rests on a delicate act of balancing of interests,[233] and that a reasonable balance can conceivably be achieved in quite a different way.[234] The parties to a contract may quite reasonably regard suspension of prescription in case of ignorance as a source of uncertainty and they may wish to counterbalance the exclusion of this rule by providing for a longer period.

[229] *Staudinger*/Peters (n. 15) § 225, n. 2, pointedly maintains that the parties do not meet insurmountable obstacles if they wish to extend the period of prescription.

[230] See pp. 79ff., 89ff. [231] Art. 8 Uncitral Convention.

[232] Art. 3:310 BW. [233] See pp. 87, 93.

[234] As is demonstrated, for example, by Andrews, (1998) 57 *Cambridge Law Journal* 593ff.

2 *Restrictions*

Two provisos have to be made, however. (i) Standard contract terms interfering with the prescription regime must be scrutinized particularly carefully.[235] The Unfair Contract Terms Directive provides the necessary tool.[236] (ii) Public interest does not require a prescription regime to be mandatory: party autonomy may, to a large extent, prevail. The public interest is not adversely affected if a claim prescribes in seven rather than three years – not sufficiently adversely affected, at any rate, to override the decision of a debtor to waive his protection by agreement with his creditor. The debtor should not, however, be able to agree upon a period of, say, fifty years since that would effectively exclude the claims against him from prescription. This is why the German Commission proposes a limit of thirty years (calculated from the statutory date of commencement of prescription).[237] The Law Commission's *Consultation Paper* suggests that the long-stop period as well as the date triggering it might become mandatory.[238] If it is taken into account that a thirty-year period, at present, is still applicable for a variety of claims in some of the member states of the EU, the borderline for party autonomy should certainly not be fixed below this level.

3 *Agreements facilitating prescription*

What has been said above applies with even greater force to agreements facilitating prescription, especially by shortening the period. They are much more widely recognized

[235] For the reasons, see *Staudinger*/Peters (n. 15) § 225, n. 21.
[236] See *Abschlußbericht* (n. 9) 100. Cf. also Art. 4:110 PECL.
[237] § 220, 3 BGB-KE.
[238] *Law Commission Consultation Paper* (n. 3) 390.

even today;[239] moreover, they do not conflict with the public interest-based policy underlying the law of prescription.[240]

XIII SUMMARY

In summary, a set of European principles governing liberative prescription could look as follows. (i) The right to demand payment or any other performance ('claim') is subject to prescription. (ii) The general period of prescription is three years. (iii) The period of prescription for a claim established by judgment is ten years. The same applies to a claim established by an arbitral award or other instrument which is enforceable as if it were a judgment. (iv) Prescription begins to run from the time when the debtor has to effect performance or, in the case of a claim for damages, from the date of the act which gives rise to the claim. The period of prescription for a claim established by legal proceedings begins to run from the moment when the judgment becomes final, though not before the debtor has to effect performance. Where the debtor is under a continuing duty to refrain from doing something, prescription begins to run with each act of non-compliance. (v) If the debtor acknowledges the claim, vis-à-vis the creditor, by part payment, payment of interest, giving of security, or in any other manner, prescription begins to run again.[241] The ten-year period of prescription for a claim established by

[239] See p. 163.

[240] They promote these policy considerations even more effectively than the normal regime; see, e.g., Zimmermann (n. 173) 188; *Asser*/Hartkamp (n. 62) n. 678. Even agreements such as these are regarded as undesirable by Spiro (n. 5) §§ 347ff. (who, however, also points out that the parties are free to limit their claims in other ways; considerable problems of delimitation can ensue).

[241] The period of prescription will have to be the general period of prescription; in cases of prescription of a claim established by legal proceedings, this should not, however, operate to the prejudice of the ten-year period.

legal proceedings begins to run again with each reasonable attempt of execution undertaken by, or at the application of, the creditor. (vi) Prescription is suspended as long as the creditor does not know, and cannot reasonably know, of the facts giving rise to his claim, of the identity of his debtor and that his claim is not insignificant. (vii) Prescription is suspended from the moment when judicial proceedings on the claim are begun. Suspension lasts until a decision has been passed which is final, or until the case has been otherwise disposed of. The same applies, *mutatis mutandis*, to arbitration proceedings and to all other proceedings initiated with the aim of obtaining an instrument which is enforceable as if it were a judgment. (viii) Prescription is suspended as long as the creditor is prevented from enforcing his claim by an impediment which is beyond his control and which he could not reasonably have been expected to avoid or overcome. This applies only if the impediment arises, or subsists, within the last six months of the prescription period. (ix) If the parties negotiate about the claim, or about circumstances from which a claim might arise, prescription does not occur before one year has passed since the last communication made in the negotiations. (x) If a person subject to an incapacity is without a representative, prescription for or against him does not occur before one year has passed after either the incapacity or the lack of representation has been removed. Prescription of claims between a person subject to an incapacity and his representative does not occur before one year has passed after the incapacity has been removed. (xi) Where the creditor or debtor has died, prescription of a claim by the creditor's estate or against the debtor's estate does not occur before one year has passed after the claim can be enforced by or against an heir, or by or against a representative of the estate. (xii) Prescription cannot be extended, on account of the grounds of extension previously mentioned, to more than

fifteen years. This does not apply to suspension of prescription on account of judicial or other proceedings and to delay of completion in cases of incapacity. (xiii) After expiry of the period of prescription the debtor is entitled to refuse performance. Whatever has been performed in order to discharge a claim may not be reclaimed merely because the period of prescription had expired. (xiv) The period of prescription for claims for interest, and other claims of an ancillary nature, expires not later than the period for the principal claim. (xv) A claim in relation to which the period of prescription has expired may none the less be set off, unless the debtor has invoked prescription previously or does so within two months of receiving notice of set-off. (xvi) Prescription may be facilitated, especially by shortening the period of prescription, by agreement between the parties. The parties may also agree to render prescription more difficult, especially by extending the period of prescription, up to a maximum of thirty years.

INDEX