

‘Extinctive’ Prescription under the *Avant-projet*

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1. Introduction

In spite of its enormous practical significance, for a long time the law of (‘extinctive’) prescription (or: limitation periods)¹ has led a backyard existence. Neither has it

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¹ The choice of terminology is a difficult matter. The *Code civil*, in line with the tradition of the *ius commune*, uses the term ‘prescription’ in a wide sense, comprising (i) the acquisition of a right (especially the right of ownership) as a result of the lapse of time (*praescriptio acquisitiva*; *prescription acquisitive*; acquisitive prescription) and (ii) loss of the right to claim as a result of the lapse of time (*praescriptio extinctiva*, *prescription extinctive*, extinctive prescription). Scots law refers to negative and positive prescription. Most modern civilian systems, however, have abandoned the attempt doctrinally to integrate what they regard as two different legal institutions. Thus, for example, the Italian *Codice civile* of 1942 distinguishes between *prescrizione* (Arts. 2934 *et seq.*) and *usucapione* (Arts. 1158 *et seq.*); cf. also Arts. 300 *et seq.* as opposed to Arts. 1287 *et seq.* of the Portuguese *Código civil* of 1966. This is in line with the distinction, drawn in Swiss and German law, between *Verjährung* and *Ersitzung*; cf. also Arts. 3:306 *et seq.* as opposed to Arts. 3:99 *et seq.* BW (where, however, the separation of the two legal institutions, is inadequately reflected in the use of terms *bevrijdende* and *verkriggende verjaring*). English law also keeps apart acquisitive prescription (adverse possession) and extinctive prescription (limitation of actions). The present essay only deals with the second of the above-mentioned types of prescription, i.e. what French lawyers refer to as ‘extinctive prescription’. That term, however, is misleading in view of the fact that in most legal systems today the right to claim is not extinguished (see R. ZIMMERMANN, *Comparative Foundations of a European Law of Set-Off and Prescription*, 2002, 72 *et seq.*), not even in French law (according to French doctrine, a *naturalis obligatio* continues to exist: see M. FERID, H.-J. SONNENBERGER, *Das Französische Zivilrecht*, vol. I/1, 2nd ed., 1994, 1 C 194, 1 C 247 *et seq.* with references). Use of the term ‘limitation of actions’ is also inadvisable, because it refers to an institution which is procedural in nature: limitation, according to English laws, does not affect the right (i.e. the substantive cause of action), but merely the creditor’s ability to pursue that right in court. Characteristically, therefore, we find it discussed as part of the chapter on civil procedure in books such as P. BIRKS (ed.), *English Private Law*, 2000. That would not, however, correctly reflect the position that prevails in most continental legal systems today (including French law; see *Comparative Foundations*, 71 *et seq.*) and is increasingly recognized internationally: both the Principles of European Contract Law (PECL) and the Unidroit Principles of International Contracts (PICC) consider prescription/limitation to be a matter of substantive law, even if they differ in terminology (on the qualification in private international law, see *infra*, n. 45). Chapter 14 PECL refers to ‘prescription’, chapter 10 PICC (following, in this regard, the International Convention on Limitation Periods in the International Sale of Goods 1974, amended by the Protocol of 11 April 1980, see *infra*, n. 11) to ‘limitation periods’. The draftsmen of PICC thereby attempted to modify the English term in order to remove its procedural connotation. But ‘limitations periods’ is imprecise, for chapter 10 PICC does not only deal with the periods of prescription but also covers all the other rules of which a prescription regime is normally made up. The present essay, in line with the Principles of European Contract Law (and the more modern codifications of the ‘Romanistic’ legal family) refers to ‘prescription’ (even if that sounds odd to English ears: A. McGEE, England, in: E.H. HONDIUS (ed.), *Extinctive Prescription: On the Limitation of Actions*, 1995, 135) or ‘liberative prescription’ (in contradistinction to ‘acquisitive prescription’).

stimulated the imagination of legal writers nor has it caught the attention of law reformers. That has changed dramatically. The first comprehensive modern treatise appeared in 1975.² Since then, academic interest has picked up considerably.³ And it soon became apparent that the law of prescription in most countries was in a very bad shape. The pertinent rules, reflecting the somewhat haphazard history of the subject,⁴ often frustrated the very policy reasons which they were intended to serve, and sometimes even caused doctrinal havoc.⁵ Very quickly, therefore, the law of (liberative) prescription moved to a central position on the law reform agenda. Some countries (among them, most notably, the Netherlands) fundamentally reviewed their law of prescription in the process of a comprehensive recodification.⁶ Others, such as Belgium, enacted specific legislation amending their code.⁷ The English Law Commission issued a Consultation Paper in 1998;⁸ after completion of the consultation process, a revised draft was laid before Parliament and is now waiting to be implemented.⁹ In Germany, prescription was one of the key issues covered by the Modernization of the Law of Obligations Act of 26 November 2001 which brought about the most sweeping individual reform ever to have affected the German Civil Code (BGB) since it entered into force on 1 January 1900.¹⁰ On the international front we have a United Nations Convention on the Limitation Period in the International Sale of Goods which came into effect in 1988.¹¹ And we have two sets of model rules covering not only one particular type of claim (as does the United Nations Convention) but the law of prescription in general: chapter 14 of the

² K. SPIRO, *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen*, 2 vols., 1975.

³ See the references in *Comparative Foundations* (n. 1) 65 *et seq.* The most recent comprehensive monograph is A. PIEKENBROCK, *Befristung, Verjährung, Verschweigung und Verwirkung: Eine rechtsvergleichende Grundlagenstudie zu Rechtsänderungen durch Zeitablauf*, 2006.

⁴ On which see H. COING, *Europäisches Privatrecht*, vol. I, 1985, 183 *et seq.*; *idem*, *Europäisches Privatrecht*, vol. II, 1989, 280 *et seq.*; D. JOHNSTON, *Prescription and Limitation*, 1999, 1 *et seq.*; H.-G. HERMANN, in: M. SCHMOECKEL, J. RÜCKERT, R. ZIMMERMANN (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I, 2003, §§ 194–225. *Verjährung*, nn. 7 *et seq.*; PIEKENBROCK (n. 3) 30 *et seq.*; and see the references in *Comparative Foundations* (n. 1) 69 *et seq.*

⁵ This used to be true particularly of German law; see F. PETERS, R. ZIMMERMANN, *Verjährungsfristen*, in: Bundesminister der Justiz (Hg.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I, 1981, 77 *et seq.*

⁶ See *now* Art. 3:306 *et seq.* B.W. and A.S. HARTKAMP, Mr. C. Asser's *Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht*, Part I, 12th ed., 2004, nn. 648 *et seq.*

⁷ *Wet van 10 juni 1998 tot wijziging van sommige bepalingen betreffende de verjaring*. Arts. 2262, 2262bis and 2263 *Belgian Code civil* were inserted or amended by this statute. See I. CLAEYS, *De nieuwe verjaringswet: een inleidend onderzoek*, (1998–9) *Rechtskundig Weekblad* 377 *et seq.*

⁸ Consultation Paper No. 151 (*Limitation of Actions*), 1998.

⁹ The Law Commission, *Limitation of Actions*, Law Com No. 270, 2001.

¹⁰ On the new German prescription regime, see R. ZIMMERMANN, *The New German Law of Obligations: Historical and Comparative Perspectives*, 2005, 122 *et seq.*

¹¹ The text of the Convention is easily accessible in O. RADLEY-GARDNER, H. BEALE, R. ZIMMERMANN and R. SCHULZE (eds), *Fundamental Texts on European Private Law*, 2003, 269 *et seq.*

Principles of European Contract Law, published in 2003¹² and chapter 10 of the Unidroit Principles of International Commercial Contracts in their 2004 version.¹³ Though displaying a number of differences in detail, the latter two instruments are characterized by a far-reaching correspondence in matters of principle and therefore carry considerable persuasive authority.¹⁴ Now France has also launched a major reform initiative: an *Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)*¹⁵ was submitted to the French Minister of Justice in September 2005. It is highly significant that, just as in Germany, the law of prescription is the only topic to be covered by the reform that does not constitute a part of the law of obligations. The problems with the present law of prescription in France are essentially the same as in many other countries, most notably perhaps Germany before the reform:¹⁶ the general period of prescription (30 years) may have been suitable in the days of sailing boats and mail coaches but is hardly appropriate in an age marked by electronic communication; a multiplicity of special, shorter periods of prescription introduces an unnecessary degree of complexity; and the individual components of the prescription regime are ill-adjusted to each other. Traditional distinctions and outdated concepts have been perpetuated, difficult problems of delimitation had to be resolved in a more or less satisfactory manner, and legal certainty has been jeopardized. Thus, it is hardly surprising that Alain Bénabent in a famous essay described the French law of prescription as constituting a chaos;¹⁷ and the author of the new draft on prescription, Philippe Malaurie, points out that the law of prescription, rather than

¹² O. LANDO, E. CLIVE, A. PRÜM, R. ZIMMERMANN (eds), *Principles of European Contract Law*, Part III, 2003.

¹³ Unidroit (ed.), *Principles of International Commercial Contracts* 2004, 2004.

¹⁴ For a comparative evaluation, see R. ZIMMERMANN, *The Unidroit Principles of International Commercial Contracts 2004 in Comparative Perspective*, (2006) 21 *Tulane European and Civil Law Forum* 1 *et seq.*, 8 *et seq.*

¹⁵ Rapport à Monsieur Pascal Clément Garde des Sceaux, Ministre de la Justice, 22 Septembre 2005. For general introductions, see H.-J. SONNENBERGER, *Der Vorentwurf der Reform des Schuldrechts und des Verjährungsrechts des Code Civil*, and Bénédicte Fauvarque-Cosson, *Towards a New French Law of Obligations and Prescription? About the 'Avant-projet de réforme du droit des obligations et de la prescription'*, both in *ZEUP* 15 (2007) 2nd issue.

¹⁶ See *supra*, n. 5; but cf. also Law Commission Consultation Paper (n. 8) 241 (where the English law of limitation of actions is described as incoherent, complex, outdated, uncertain, unfair and wasting costs).

¹⁷ A. BENABENT, *Le chaos du droit de la prescription extinctive*, in: *Mélanges dédiés à L. BOYER*, 1996, 123 *et seq.*; cf. also the contributions to P. COURBE (ed.), *Les désordres de la prescription*, 2000; B. FAUVARQUE-COSSON, *Variations sur le processus d'harmonisation du droit à travers l'exemple du droit de la prescription extinctive*, *Revue des contrats* 2004, 801 *et seq.*; V. LASERRE-KIESOW, *La prescription, les lois et la faux du temps*, *Jurisclasseur périodique (édition notariale)* 2004, 1225 *et seq.*; D. MAZEAUD, *Prescription et contrat au XXIème siècle: florilège positif et prospectif*, . . .

constituting an element of pacification in human relations, has become an abundant source of litigation.¹⁸

The present essay attempts to assess the proposed new rules on prescription in the French civil code from a comparative perspective. It cannot, however, discuss every question of detail, nor can it comprehensively take account of all European (or possibly even non-European) legal systems. It will focus on what I consider the essential components of a prescription system, and it will use mainly the Principles of European Contract Law, which are based on international collaboration and comparative scholarship, as a point of reference.¹⁹

2. The General Framework

2.1 Convergence

The development of the law of prescription over the past hundred years has been marked by a number of characteristic trends. All of them are reflected in the *Avant-projet*. In the first place there is a clear tendency towards uniform periods of prescription.²⁰ The *Avant-projet* makes a considerable effort to cut down the number of special periods. Commendably, for instance, it proposes to abolish the brief periods contained in Arts. 2271-2273 *Code civil*, the lapse of which merely leads to a presumption that payment has been made (*préscription présumptive*).²¹ Secondly, the regular period of prescription has to be fixed somewhere between two and five years; a period of three years appears to be increasingly regarded as reasonable internationally.²² We find it in Art. 14:201 PECL, Art. 10.2 (1) PICC, § 195 BGB, and also now Art. 2274 *Avant-projet*. In the third place, it is generally acknowledged that the running of a general period of three years cannot be tied to an objective criterion, such as due date, accrual of the claim, delivery, acceptance, completion (of a building) etc.: it has to depend on whether the creditor has a fair chance of pursuing his claim.²³ Anything else would amount to an unjustifiable act of expropriation.²⁴ The

¹⁸ P. MALAURIE, Exposé des motifs, in: *Avant-projet* (n. 15) 172.

¹⁹ On the relevance of the Principles of European Law, in this respect, see R. ZIMMERMANN, The Principles of European Contract Law: Contemporary Manifestation of the Old, and Possible Foundation for a New, European Scholarship of Private Law, in: F. FAUST, G. THÜSING (Hg.), *Beyond Borders: Perspectives on International and Comparative Law*, 2006, 111 *et seq.*, 141 *et seq.*

²⁰ For details, see *Comparative Foundations* (n. 1) 89 *et seq.*

²¹ For criticism, see *Comparative Foundations* (n. 1) 72 with references.

²² For details, see *Comparative Foundations* (n. 1) 86 *et seq.* The more recent history of the law of prescription is, essentially, the history of a shortening of the periods of prescription; cf. also FAUVARQUE-COSSON, *Revue des contrats* 2004, 805. On the phenomenon of an 'acceleration' of time see, in this context, HKK/HERMANN (n. 4) §§ 194-225, *Verjährung*, n. 41.

²³ For the balance of interests on the basis of which prescription rules have to be devised, see *Comparative Foundations* (n. 1) 76 *et seq.*

²⁴ See, in this context, the discussion in Belgium surrounding the conformity of short prescription periods with the Constitution: *Comparative Foundations* (n. 1) 79 and the references provided there.

creditor, however, cannot be taken to have a fair chance of pursuing a claim of which he was unaware. That is why prescription is suspended according to Art. 2264 (2) *Avant-projet*, as long as the creditor does not know of the existence or the extent of his claim.²⁵ The rule is based on the same policy as Art. 14:301 PECL, Art. 10.2 (1) PICC and § 199 I BGB.²⁶ Fourthly, prescription must not be deferred indefinitely; at some stage, the parties have to be able to treat an incidence as indubitably closed. That is why a relative period (the running of which depends on the creditor's knowledge) has to be supplemented by a maximum period ('long stop'), tied to an objective criterion, at the expiry of which a claim must be barred regardless of the creditor's knowledge. For that long stop a distinction between thirty years (for personal injury claims) and ten years (for all other claims) is drawn by Art. 14:307 PECL and § 199 II-IV BGB.²⁷ Art. 2278 *Avant-projet* corresponds to these provisions. Finally, it is internationally widely recognized that prescription should only be taken into account if the matter is raised by the debtor:²⁸ Art. 14:501 (1) PECL, Art. 10.9 (2) PICC, § 214 (1) BGB. For France, this is explicitly stated in Art. 2238 *Avant-projet* (which is largely identical to Art. 2223 *Code civil*).

2.2 Differences

2.2.1 Ten-year Periods

If, therefore, a number of key decisions underlying the proposed law of prescription of the *Avant-projet* are in line with the international development of this area of the law, and deserve to be supported, there are also important differences. Thus, the general period of three years does not apply as widely as it could (and should). There is a ten-year period applicable to claims based on 'civil liability' for bodily injury or damage suffered as the result of an 'act of barbarism'.²⁹ Of course, life, health and bodily integrity are particularly valuable objects of legal protection, and personal injuries are generally regarded as more serious than property damage or economic harm. Also, there is often a considerable latency period. Nevertheless, there is no need at all for a special ten-year period. Provided prescription does not run as long as the creditor is unaware of the existence or the extent of his claim, he is sufficiently protected by being granted the regular three-year period. The ten-year period also applies to 'les actions en nullité absolue',³⁰ i.e. the possibility for a party to a contract

²⁵ Art. 2264 II *Avant-projet* actually refers to the debtor but that, I presume, is a drafting mistake.

²⁶ For details of the underlying policy, see Comparative Foundations (n. 1) 92 *et seq.*

²⁷ See generally Comparative Foundations (n. 1) 99 *et seq.* But see Art. 10.2 (2) PICC (uniform maximum period of ten years); for comment, see (2006) 21 Tulane European and Civil Law Forum 14 *et seq.*

²⁸ Prescription, in other words, constitutes a defence which the debtor may or may not choose to raise; for details, see Comparative Foundations (n. 1) 72 *et seq.*; for historical background, see HKK/HERMANN (n. 4) §§ 194–225, Verjährung, nn. 21 *et seq.*

²⁹ Art. 2275 No. 1 *Avant-projet*.

³⁰ Art. 2275 No. 2 *Avant-projet*.

to assert that that contract is void for a reason affecting the public interest.³¹ Again, however, this rule is unnecessary. It affects claims for the restitution of benefits transferred on the basis of contracts *contra bonos mores*, or against public policy. All those, however, who have a legitimate interest in the enforcement of such claims, would be sufficiently protected by Art. 2274 in conjunction with Art. 2264 (2) *Avant-projet*. And as far as the enforcement of performances based on objectionable contracts of this kind is concerned, the defendant can still raise the *exception de nullité* after three, and even after ten or thirty years; since, according to the old maxim *quae temporalia sunt ad agendum, perpetua sunt ad excipiendum*, defences are not subject to prescription according to French law,³² whether under the *Code civil* as it exists at the moment, or, presumably, in terms of the *Avant-projet*. Equally unnecessary is the ten-year period for claims concerning liability or warranty of building contractors under Arts. 1792-1792-2³³ (even if German law also has a special rule for these cases, albeit a very different one).³⁴ The only type of claim for which the ten-year period appears to be justifiable (and indeed necessary) is the one that has been established by judgment or another enforceable instrument: Art. 2275 No. 3 *Avant-projet*; this is in line with Art. 14:202 PECL.³⁵

2.2.2 Implementing the Subjective System

Another difference relates to the way in which the subjective system concerning the general period of prescription has been implemented. While Art. 2264 (2) *Avant-projet* requires knowledge (about the existence or the extent of the claim) on the part of the creditor, Art. 14:301 PECL employs the criterion of reasonable discoverability.³⁶ German law and the Unidroit Principles of International

³¹ At present, Art. 1304 *Code civil* recognizes a five-year period in cases of *nullité relative*. The *Cour de cassation* was recently called upon to decide whether the regular thirty-year period of Art. 2262 *Code civil* could be applied in cases where the five-year period of Art. 1304 *Code civil* had not yet elapsed (a situation that can occur in view of the different dates of commencement of the two periods). The *Cour de cassation* has rejected that proposition: see Civ. (1), 24 January 2006, Recueil Dalloz 2006, p. 626 annotated by R. WINTGEN; Jurisclasseur périodique (édition générale) 2006, II, 10035, annotated by M. MEKKI; D. MAZEAUD, *Revue des contrats* 2006, 708.

³² Generally, see Comparative Foundations (n. 1) 161 *et seq.* with references; Art. 10.9 (3) PICC; LANDO/CLIVE/PRÜM/ZIMMERMANN (n. 12) 158, 160; for France see, e.g., FERID/SONNENBERGER (n. 1) 1 C 249.

³³ Art. 2275 No. 4 *Avant-projet*.

³⁴ § 634 a BGB; on which, see New German Law of Obligations (n. 10) 136 *et seq.*

³⁵ But see § 197 I No. 3 BGB (30 years); PECL do not contain a corresponding provision. For comment, see Comparative Foundations (n. 1) 112 *et seq.*; (2006) 21 Tulane European and Civil Law Forum 15 *et seq.*

³⁶ For background and comparative evaluation, see Comparative Foundations (n. 1) 92 *et seq.*; New German Law of Obligations (n. 10) 140; cf. also, for example, C. VON BAR, *Gemeineuropäisches Deliktsrecht*, vol. I, 1996, n. 395. The knowledge-requirement that used to be contained in § 852 I BGB (old version) had caused certain difficulties and had been considerably watered down in practice; for details, see PETERS/ZIMMERMANN (n. 5) 178; R. ZIMMERMANN, *Extinctive Prescription in*

Commercial Contracts also, sensibly, in my view, attempt to reduce the potential inherent in the subjective system for delaying the commencement of prescription by focusing on the moment when the creditor ought to have known the facts as a result of which his right can be exercised, or relying upon a test of gross negligence. Policy-wise, therefore, PECL, PICC and German law agree, even if the exact criterion chosen in each of these systems is not identical. There is, however, a more important difference between PICC and German law on the one hand, and PECL on the other. For while according to Art. 10.2 (1) PICC and § 199 I No. 2 BGB whether the creditor knows, or ought to have known, determines the commencement of prescription, lack of reasonable discoverability of the facts giving rise to the claim under Art. 14.301 PECL constitutes a ground for suspending the running of the period of prescription. Elsewhere, I have argued that the latter solution is preferable because, *inter alia*, it leads to an equitable distribution of the *onus* of proof.³⁷ Art. 2264 (2) *Avant-projet* attempts to sit on the fence by stating that the period of prescription ‘does not commence to run, or is suspended’, as long as the creditor does not know about the existence, or extent, of his claim. That is hardly satisfactory, particularly in view of the fact that the moment when the claim comes into existence will normally be the time when the creditor does not know about the existence, or extent, of his claim; and that, accordingly, Art. 2264 (2) *Avant-projet* normally appears to fix the relevant date for the commencement of prescription.

2.2.3 One Period or Two?

That has consequences for the structure of the prescription regime, particularly for the long-stop of ten or thirty years (Art. 2278 *Avant-projet*). For the *Avant-projet* appears to regard this long-stop not really as a maximum period for extinctive prescription (as the heading of Section 3 of Chapter 5 - *Du delai maximum des prescriptions extinctives* - appears to suggest) but as another period of prescription, starting from a different date, which runs alongside the general period of prescription. That is, essentially, the system also followed by the Unidroit Principles and German law. According to the European Principles, on the other hand, there is always *one* period of prescription. It runs from due date but can be extended (by way of suspension of the running of the period or by a postponement of its expiry) to no more than ten (or thirty) years. The long-stop is thus turned into a maximum period for extension. This is a scheme that would appear to promote clarity and uniformity in prescription matters.³⁸

German Law, in: E. JAYME (Hg.), German National Reports in Civil Law Matters for the XIVth Congress of Comparative Law in Athens, 1994, 174.

³⁷ Comparative Foundations (n. 1) 106 *et seq.*; New German Law of Obligations (n. 10) 138 *et seq.*; cf. also LANDO/CLIVE/PRÜM/ZIMMERMANN (n. 12) 177 *et seq.*

³⁸ Cf. also (2006) 21 Tulane European and Civil Law Forum 13 *et seq.*

2.2.4 The Effect of Prescription

According to Art. 2238 *Avant-projet*, as has been pointed out above,³⁹ prescription cannot be taken into account by the judge, unless the debtor has raised the matter in court. Prescription thus constitutes a defence. This, as has also been stated above, is in line with what is widely recognized internationally, and it appears indeed to be appropriate; for there is no reason why a legal system should foist its protection upon a debtor who is willing to pay and who can thus be taken to acknowledge that he is under an obligation to do so. Also, the public interest (*ut sit finis litium*)⁴⁰ does not appear to be adversely affected if a debtor is allowed to pay even after the period of prescription has run out. Nevertheless, the *Avant-projet* perpetuates certain traditional features of its prescription regime which appear not to be quite in tune with these considerations and ill-adjusted to each other. Art. 1218 *Avant-projet* continues to count prescription among the grounds for extinguishing an obligation;⁴¹ Title XX of the *Avant-projet* also makes use of the term ‘extinctive prescription’ on two occasions;⁴² and the draftsman of this part of the *Avant-projet*, Philippe Malaurie, specifically states that liberative prescription essentially has ‘an extinctive effect’.⁴³ This is odd in that a debtor would not normally have to plead in court that he is no longer under any obligation; yet, Art. 2238 states that a judge is not allowed, *proprio motu*, to supply the defence of prescription. Also it does not really tally with the definition provided in Art. 2234 *Avant-projet* (and taken over *verbatim* from Art. 2219 *Code civil*), where prescription is regarded as a means ‘to liberate oneself’, as a result of the lapse of a certain period, from an obligation. But the extinctive effect also does not fit in with the fact that the object of prescription still appears to be the action, i.e. the remedy rather than the right, and that Art. 2238 presupposes the raising of a defence in court. Thus, in the *Avant-projet*, we still find the unresolved tension between two different perspectives: the one conceptualising prescription as an institution of substantive law, the other regarding it as a procedural device. This has been the cause of dispute under the present law⁴⁴ and will continue to be controversial once the *Avant-projet* has come into force.⁴⁵ It is a pity that the chance has not been taken to follow the lead of the two international instruments and openly and clearly to attribute a

³⁹ *Supra*, at n. 28.

⁴⁰ On the policy considerations underlying a prescription regime, see Comparative Foundations (n. 1) 63 *et seq.*

⁴¹ See, today, Art. 1234 *Code civil*.

⁴² Art. 2235 (2) *Avant-projet*; heading of section 3, chapter 5 of title XX.

⁴³ MALAURIE (n. 18) 178.

⁴⁴ FERID/SONNENBERGER (n. 1) 1 C 245 *et seq.*; Comparative Foundations (n. 1) 71 *et seq.* (with references); FAUVARQUE-COSSON, *Revue des contrats* 2004, 803. On the transition from *Klagenverjährung* to *Anspruchsverjährung* in Germany, see PIEKENBROCK (n. 3) 143 *et seq.*

⁴⁵ It is clear today that for purposes of private international law prescription has to be qualified as a matter of substantive law; see B. FAUVARQUE-COSSON, *La prescription au droit international privé*, in: *Travaux du comité français de droit international privé*, 2005, 235 *et seq.*; *eadem*, *Revue des contrats* 2004, 804 *et seq.* That is in line with international instruments such as Art. 10 (1) d) of the (Rome) Convention on the law applicable to Contractual Obligations.

‘weak’ substantive effect to prescription: after expiry of the period of prescription, the debtor is entitled to refuse performance.⁴⁶ Prescription, in other words, constitutes a peremptory defence on the level of substantive law. It does not only limit the right to bring an action but bars the actual right to receive performance. On the other hand, it does not extinguish the relevant obligation. No reason has been given why this simple and convenient model has not been followed which also, incidentally, provides the most straightforward solution to the problems concerning restitution;⁴⁷ these have traditionally been dealt with in France in a somewhat contorted manner and on the basis of an ‘obligation naturelle renforcée’.⁴⁸ Professor Malaurie thus proposes the addition of a new paragraph to Art. 1235 *Code civil* in order to clarify the position: if a debtor has paid in spite of prescription having occurred, he is unable to recover.⁴⁹ That proposal does not appear to have found its way into the *Avant-projet*.⁵⁰ Also, incidentally, it does not quite accurately convey what it presumably intends to state: whatever has been performed in order to discharge a claim may not be reclaimed merely because the period of prescription has expired.

3. Individual Features of the Prescription Regime

3.1 Commencement of Prescription

So much for the general framework of the prescription regime according to the *Avant-projet*. We will now turn our attention to some of its other components. Prescription begins to run from the day on which the creditor can bring an action (Art. 2262 *Avant-projet*). This is tantamount to the rule stated in Art. 14:203 (1) PECL (due date) and in line with the general policy consideration that the period of prescription should only run against a creditor who has the possibility of enforcing his claim in court (or of starting arbitration proceedings). A claim can, however, only be pursued in court, or before an arbitration tribunal, when it has become due, i.e., when the debtor has to effect performance. Art. 2278 *Avant-projet* introduces an unnecessary and, remembering the policy considerations just stated, unfair complication in that the commencement date for the long-stop is different: the ten- (or thirty-)year period runs from the moment when the claim has come into existence, i.e. the date of nativity of the claim.⁵¹

⁴⁶ Art. 14:501 PECL; Art. 10.9 (1) and (2) PICC; cf. also § 214 I BGB. On ‘weak’ and ‘strong’ effect of prescription, in general, see Comparative Foundations (n. 1) 72 *et seq.*; M.J. BONELL, Limitation Periods, in: A. HARTKAMP, M. HESSELINK et al. (Hg.), *Towards a European Civil Code*, 3rd ed., 2004, 527 *et seq.* FERID/SONNENBERGER (n. 1) 1 C 246 correctly point out that in its practical results French law comes very close to German law.

⁴⁷ Art. 14:501 (2) PECL; Art. 10.11 PICC.

⁴⁸ FERID/SONNENBERGER (n. 1) 1 C 247 *et seq.*; cf. also Comparative Foundations (n. 1) 74.

⁴⁹ MALAURIE (n. 18) 178.

⁵⁰ Art. 1220 *Avant-projet* merely restates Art. 1235 *Code civil*.

⁵¹ On the question of commencement of prescription (due date or date of nativity of the claim?), see Comparative Foundations (n. 1) 105 *et seq.*; cf. also Art. 10.2 (2) PICC. But see now § 199 I No. 1 BGB; for criticism, cf. *New German Law of Obligations* (n. 10) 141 *et seq.*

3.2 'Interruption'

The most radical interference with the running of a period of prescription is what is traditionally referred to as 'interruption'. It is justified only in two cases: acknowledgment of the claim on the part of the debtor and acts of execution affected by, or at the application of the creditor. This is recognized by the Principles of European Contract Law⁵² as well as under the new German law;⁵³ and it is also recognized by the *Avant-projet* (Arts. 2259, 2260 *Avant-projet*). Two points may be made, however. An acknowledgment on the part of the debtor sets in motion a new period of the same length as the old one (Art. 2259 read in conjunction with Art. 2261 *Avant-projet*). This means, for instance, that for personal injuries claims the ten-year period of Art. 2275 No. 1 *Avant-projet* would start all over again. Of course, the creditor may rely on the debtor's acknowledgment and refrain from instituting an action. Also, the acknowledgement reduces any uncertainty surrounding the creditor's claim. In both respects, however, the creditor's legal position does not differ according to the nature of the claim to which the acknowledgment relates. It is the acknowledgment, and no longer the original claim, which should determine the appropriate legal regulation. That is why a role along the lines of Art. 14:401 (2) PECL appears to be preferable. The second point is of a merely terminological nature. In spite of its near universal acceptance, the term 'interruption' (based on the *interruptio temporis* of the Roman sources) is awkward and perhaps even slightly misleading. This is why it has been replaced in German law as well as in the European Principles by the more descriptive term 'renewal'.⁵⁴

3.3 Suspension

3.3.1 Convergence

Suspension is a doctrinal device, well-known to civilian jurisdictions,⁵⁵ which has a much less dramatic effect on the running of a period of prescription: 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.⁵⁶ Suspension thus merely extends a given

⁵² Art. 14:401 and 14:402 PECL; the Principles of International Commercial Contracts only recognize that an acknowledgement resets the clock (Art. 10.4 PICC); they lack a provision corresponding to Art. 14:402 PECL.

⁵³ § 212 BGB.

⁵⁴ Based, ultimately, on PETERS/ZIMMERMANN (n. 5) 310. The *Avant-projet*, on the other hand, proposes to perpetuate the traditional terminology; Art. 2257 *Avant-projet* (opening section 1, chapter 4) is identical to Art. 2242 *Code civil* (as is the heading of that section: *Des causes qui interrompent la prescription*).

⁵⁵ See, for example, Arts. 2251 *et seq. Code civil*; §§ 1494 *et seq. ABGB*; §§ 202 *et seq. BGB* (old version); Arts. 2941 *et seq. Codice civile*. Under the *ius commune* it used to be said that prescription was dormant (*praescriptio dormit*): B. WINDSCHEID, T. KIPP, *Lehrbuch des Pandektenrechts*, 9th ed., 1906, § 109.

⁵⁶ For statutory definitions (which are in line with the notion of suspension in both sets of international Principles), see § 209 BGB; Art. 2265 *Avant-projet*.

period of prescription. The causes of suspension listed in Arts. 2264 *et seq.* *Avant-projet* are familiar to those who have studied the international development of the law of prescription: judicial proceedings, *force majeure*, negotiations, lack of capacity, close personal ties. In some respects, the *Avant-projet* thus attempts to modernize French law *vis-à-vis* the present *Code civil* and to bring it into line with what is more and more widely recognized internationally. Thus, under Art. 2244 *Code civil* the commencement of legal proceedings has the effect of *interrupting* the running of the period of prescription for the relevant claim. That is unsatisfactory for a number of reasons⁵⁷ and thus the downgrading of that event to a ground for suspending prescription appears to be entirely appropriate.⁵⁸ Equally to be welcomed is the express recognition of negotiations between the parties as a ground for suspension.⁵⁹ Such negotiations should neither be carried out under the pressure of an impending prescription of the claim, nor should they be allowed to constitute a trap for the creditor. *Force majeure* is recognized by the French courts as a ground of suspension on the basis of the old *ius commune* maxim *agere non valenti non currit praescriptio* (in spite of the fact that the draftsmen of the *Code civil* had wanted to abolish it!).⁶⁰ Art. 2266 (1) *Avant-projet* now specifically endorses this piece of judicial development of the law. However, just as § 206 BGB and Art. 14:303 PECL, Art. 2266 (2) *Avant-projet* attempts to limit the impact of this rule on the running of the period of prescription by taking into consideration only events that have intervened within the last six months of the period of prescription.⁶¹ And, indeed, 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 that period: the creditor, under these circumstances, still has ample time to pursue his claim.⁶²

3.3.2 Differences

But in a number of respects, the proposed new provisions on suspension of prescription continue to reflect traditional thinking patterns which do not even appear to have been questioned. At least, no reasons are given why they have been perpetuated in spite of the criticism raised against them. The *Avant-projet*, for instance, still does not

⁵⁷ For details, see Comparative Foundations (n. 1) 117 *et seq.*; LANDO/CLIVE/PRÜM/ZIMMERMANN (n. 12) 179 *et seq.*

⁵⁸ Art. 2267 *Avant-projet*, in line with § 204 BGB; Art. 13:302 PECL; Art. 10.5 PICC.

⁵⁹ Art. 2264 (1) *Avant-projet*; in line with 203 BGB; Art. 14:304 PECL; Comparative Foundations (n. 1) 142 *et seq.*; but see Unidroit Principles 2004 (n. 13) 328; BONELL (n. 46) 526; for comment, see (2006) 21 Tulane European and Civil Law Forum 17 *et seq.*

⁶⁰ FERID/SONNENBERGER (n. 1) 1 C 224; Comparative Foundations (n. 1) 133 (with references); cf. also FAUVARQUE-COSSON, *Revue des contrats* 2004, 809; MALAURIE (n. 18) 176 *et seq.* - Generally on *contra valentem* see, most recently, M. TESCARO, *Decorrenza della prescrizione e autoresponsabilità: La rilevanza civilistica del principio contra non valentem agere non currit praescriptio*, 2006.

⁶¹ Cf. also Art. 10.8 (1) PICC; for a comparative evaluation, see (2006) 21 Tulane European and Civil Law Forum 18 *et seq.*

⁶² Comparative Foundations (n. 1) 131 f.; LANDO/CLIVE/PRÜM/ZIMMERMANN (n. 12) 184 *et seq.*

recognize that prescription may be suspended for claims by and against an estate, as far as there is no heir, or personal representative.⁶³ And yet, the position is very similar to that of a person subject to an incapacity, and so is the underlying rationale: *agere non valenti non currit praescriptio*. The close personal ties existing between spouses, on the other hand, are regarded as a valid reason to suspend prescription: Art. 2269 *Avant-projet*, which is in line with Art. 2253 *Code civil* and similar provisions in a number of other codes. But in spite of the preponderance of opinion in favour of such rule, it hardly appears defensible today.⁶⁴ 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 them with 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. If, on the other hand, one were to regard the rationale underlying suspension concerning claims between spouses 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.⁶⁵ Concerning the rule proposed in Art. 2268 *Avant-projet* (which merely restates what is presently provided in Art. 2252 *Code civil*) it might well have been asked whether the protection granted to persons subject to an incapacity does not overshoot the mark; the Principles of European Contract Law, for instance, confine their suspension rule to situations where such person, for some or other reason, is without a representative.⁶⁶ Finally, the French legislator does not appear to have taken note of the device of postponement of expiry of a period of prescription. Just as suspension, it has the effect of extending a given period of prescription, though in a different way: the period of prescription has run its course but is only completed after the expiry of a certain extra period.⁶⁷ Postponement of expiry is of more recent origin than the time-honoured device of suspension but has increasingly gained ground internationally as a milder form of interference with prescription. In Germany it is known as *Ablaufhemmung*;⁶⁸ in the Dutch Code, under the label of *verlenging van de verjaring*, it has completely replaced the traditional concept of suspension (*schorsing*).⁶⁹ Even if the Principles of European Contract Law do not go that far, they still

⁶³ See § 211 BGB; Art. 14:306 PECL; Art. 10.8 (2) PICC; Comparative Foundations (n. 1) 141. But see Art. 2271 (1) *Avant-projet*, restating Art. 2258 (2) *Code civil*.

⁶⁴ Comparative Foundations (n. 1) 139 *et seq.* (with references); LANDO/CLIVE/PRŮM/ZIMMERMANN (n. 12) 190.

⁶⁵ K. SPIRO, *Verjährung und Hausgemeinschaft*, in: *Festschrift für Friedrich Wilhelm Bosch*, 1976, 975 *et seq.*

⁶⁶ Art. 14:305 (1) PECL; Comparative Foundations (n. 1) 134 *et seq.*; § 210 BGB; cf. also Art. 10.8 (2) PICC and the comparative evaluation in (2006) 21 *Tulane European and Civil Law Forum* 19 *et seq.*

⁶⁷ Comparative Foundations (n. 1) 138 *et seq.*; cf. also the terminological clarification in LANDO/CLIVE/PRŮM/ZIMMERMANN (n. 12) 174.

⁶⁸ SPIRO I (n. 2) 191 *et seq.*

⁶⁹ See Art. 3:320 *et seq.* BW; ASSER/HARTKAMP (n. 6) nn. 682 *et seq.*

attempt to interfere with the running of a period of prescription only to the extent that it is absolutely necessary for the protection of the creditor. In case of doubt, therefore, they prefer the device of postponement of expiry to that of suspension. This appears to be particularly appropriate in the case of negotiations (Art. 14:304 PECL)⁷⁰ and incapacity (Art. 14:305 PECL).⁷¹ It is not clear why the *Avant-projet* has decided to stick to suspension.

3.4 Modification by Agreement

Another major issue concerning the prescription regime is the question to what extent it can be modified by agreement. Here the *Avant-projet*, following the lead of German law and the European Principles, proposes a liberalization, at least as far as agreements extending the period of prescription are concerned. However, according to Art. 2235 (2) *Avant-projet* the period cannot, by agreement between the parties, be extended to more than ten years. Though the introduction of a ceiling appears to be sensible, a period of ten years seems to be too short.⁷² Agreements shortening the period of prescription have been recognized by French courts unless the period agreed upon is *infine*.⁷³ Art. 2235 (2) *Avant-projet* now proposes a minimum of one year.⁷⁴ This, I think, is to be regretted. Agreements facilitating prescription are much more widely recognized in the existing national legal systems than those rendering prescription more difficult.⁷⁵ Moreover, they do not conflict with the public policy-based concerns underlying the law of prescription⁷⁶ (nor, of course, with the policy considerations concerning the protection of the debtor). The autonomy of the parties would be curtailed much too severely, and without any good reason, if they were not allowed, by way of individually negotiated agreement, to fix a prescription period of six months, or less.⁷⁷

4. Structural Concerns

One final point that should at least be mentioned (even if it is of a largely theoretical nature) relates to the concept of prescription, both under the *Code civil* and the

⁷⁰ But see § 203 BGB; for critical comment, see New German Law of Obligations (n. 10) 147.

⁷¹ Cf. also § 210 BGB; but see § 207 BGB and the comment in New German Law of Obligations (n. 10) 148 *et seq.* On Art. 10.8 (2) PICC, see (2006) 21 Tulane European and Civil Law Forum 19 *et seq.*

⁷² § 202 II BGB (30 years); Art. 14:601 (2) PECL (30 years); Art. 10.3 (2) (c) (15 years); Comparative Foundations (n. 1) 166.

⁷³ See FERID/SONNENBERGER (n. 1) 1 C 256.

⁷⁴ This is in line with Art. 14:601 (2) PECL and Art. 10.3 (2) (a) PICC. § 202 BGB knows no such restriction.

⁷⁵ Comparative Foundations (n. 1) 163; LANDO/CLIVE/PRÜM/ZIMMERMANN (n. 12) 209.

⁷⁶ See, for example, ASSER/HARTKAMP (n. 6) n. 678.

⁷⁷ Standard contract terms interfering with the prescription regime must, of course, be carefully scrutinized. The Unfair Terms in Consumer Contracts Directive and the national legislation implementing it provides the necessary tool.

Avant-projet. As has been pointed out earlier,⁷⁸ French law perpetuates a tradition, reaching back to the days of the Glossators, of conceptualizing *praescriptio extinctiva* and *praescriptio acquisitiva* as two manifestations of one and the same legal doctrine.⁷⁹ One does not have to reject this view with as much indignation as Savigny did,⁸⁰ nor does one have to subscribe to the very pointed statement of Pothier that acquisitive and extinctive prescription ‘n’[ont] rien de commun que le nom’,⁸¹ in order to find the gathering together of the two types of prescription under one doctrinal umbrella, and consequently their regulation in one and the same place within the *Code civil*, both odd and outdated. It constitutes a systematic idiosyncrasy of French law. Following Savigny, civilian legal doctrine rejected the older view,⁸² and, as a result, all codifications in Switzerland and Germany from the civil codes of Zurich (1853-1855) and Saxony (1863) to the BGB, the ZGB and the revised *Obligationenrecht* abandoned the unitary concept of prescription and provided for two different sets of rules:⁸³ the one as part of the law of property, the other either as part of the law of obligations or of the ‘general part’. The codifications in Italy (1942) and Portugal (1966) have followed suit.⁸⁴ Via the textbooks of Zachariä and Aubry/Rau this view also gained ground in French doctrine⁸⁵ with the effect that both institutions are today dealt with in different systematic contexts: as part and parcel of the law of obligations and property law respectively.⁸⁶ The modern view appears to be based on good reasons. For while it is true that both *prescription acquisitive* and *extinctive* deal with the legal consequences of a person’s failure to assert a right within a certain period of time and that, therefore, they share a number of individual rules,⁸⁷ it is equally true that they are different in some respects: most importantly perhaps,

⁷⁸ *Supra*, n. 1.

⁷⁹ The same is true of the two other important codifications of the age of the Law of Reason, the Prussian *Allgemeines Landrecht* (§§ 500 *et seq.* I 9) and the Austrian ABGB (§§ 1451 *et seq.*); and it is true of many of the codifications based on the *Code civil* (such as the BW of 1837, or the Codice civile of 1865).

⁸⁰ F.C. VON SAVIGNY, *System des heutigen Römischen Rechts*, vol. V, 1841, 266 *et seq.* (‘totally reprehensible’, ‘dangerous’, ‘erroneous’, etc.).

⁸¹ R.J. POTIER, *Traité de la Prescription qui résulte de la Possession*, in: *Traité sur Différentes Matières de Droit Civil*, 2nd ed., vol. IV, Paris/Orleans, 1781, n. 1.

⁸² See the references in Coing, EP II (n. 4) 281.

⁸³ See the references in PIEKENBROCK (n. 3) 141 *et seq.* For a thorough discussion of the issue, see A. GEBHARD (draftsman of the preliminary draft of the general part of the BGB), in: W. SCHUBERT, *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuchs, Allgemeiner Teil 2*, 1981, 306 *et seq.*

⁸⁴ *Supra* n. 1; the same is true (though not in terminology) of the new Dutch BW.

⁸⁵ See the references in COING, EP II (n. 4) 282; PIEKENBROCK () 139.

⁸⁶ See FERID/SONNENBERGER (n. 1) 1 C 191 (‘... modern French doctrine has given up this unhappy amalgamation of both institutes’); concerning prescription acquisitive, see M. FERID, H.-J. SONNENBERGER, *Das Französische Zivilrecht*, vol. II, 2nd ed., 1986, 3 C 318.

⁸⁷ See, as far as German law is concerned, the references in §§ 939, 941, 2 BGB to §§ 203 - 207 and 212 II, III BGB and the provision of §§ 941, 1 BGB with its parallel in § 212 I No. 2 BGB).

the one involves an element of usurpation which the other does not.⁸⁸ Compared with the position prevailing at present, the *Avant-projet* further dissociates the two institutions by providing very different periods: three, as opposed to ten or twenty years.⁸⁹ None the less, the draftsman of the new rules blandly states: ‘ . . . il convient de conserver . . . l’unité des prescriptions’.⁹⁰ No reasons are given. It must be the force of tradition that has prevailed: obviously, the structure of the code was to be affected as little as possible by the reform.⁹¹ As a result, prescription (including extinctive prescription!) continues to be regarded as a way of acquiring ownership (because it continues to be dealt with in title XX of book III of the *Code civil*). The internal structure of that title has also very largely been retained, and so we still have a chapter on possession thrown in immediately after a chapter with general provisions on prescription; and we learn about the general period of prescription and when it commences to run, only after we have been informed when that period can be ‘interrupted’ or suspended. Some of the new elements have been introduced in a somewhat awkward manner. Thus, one of the crucial features of the new regime is tucked away in Art. 2264 (2) *Avant-projet*. And we have an accumulation of 48 rules⁹² of which some only refer to *prescription acquisitive*, others only to *prescription extinctive*, and yet others to both types of prescription. While a French lawyer may find it easy to determine which rule falls into which category, foreign lawyers (as well as students) may experience some difficulty. At any rate, the structure of the new law is neither user-friendly (a lawyer is normally faced with the problem either of extinctive, or of acquisitive, prescription and will therefore prefer all the rules applicable to the one institution to be clearly spelt out rather than mixed up with those relating to the other), nor is it likely to attract much enthusiasm outside of France. And it will certainly not advance the chances for French law to serve as a model for the emerging European private law⁹³ – whatever form the latter may take.

⁸⁸ For a detailed discussion of the similarities and differences, see Spiro II (n. 2) 1349 *et seq.*, particularly 1357 *et seq.*

⁸⁹ See Art. 2274 as opposed to Art. 2276 *Avant-projet*. Professor Malaurie specifically notes this point in his comments (n. 18) 173: ‘ . . . qui [i.e. the period for prescription extinctive] la dissocierait donc de la prescription acquisitive’.

⁹⁰ MALAURIE (n. 18) 172.

⁹¹ See generally, P. CATALA, *Présentation générale de l’Avant-projet*, in: Rapport (n. 15) 4 (‘ . . . l’*Avant-projet* ne propose pas un code de rupture, mais d’ajustement’); Bénédicte FAUVARQUE-COSSON, *Towards a New French Law of Obligations and Prescription?*, ZEuP 15 (2007) 447 (‘Notwithstanding some bold innovations, great tribute is paid to tradition’; adding the following comment: ‘The extent of the tribute paid to tradition by the *Avant-projet* may well be one of its flaws’).

⁹² A considerable reduction, compared to the 65 rules in the present *Code civil*.

⁹³ This appears to have been one of the motivations for the reform of the *Code civil* – just as it was in the case of the legislation ‘modernizing’ the German law of obligations.

5. Concluding Observations

‘The final evaluation has to be ambivalent. The new law of prescription is considerably better than the old law. The general direction is right. But can that be sufficient for such an ambitious and centrally important reform project?’⁹⁴ That has been said about the new German law of prescription, and the same would appear to be true for the law of prescription in the *Avant-projet*. The *Avant-projet* will bring French law considerably closer to international thinking patterns prevailing in the field of (liberative) prescription. It confirms a number of characteristic lines of convergence. Both the relevant part of the Principles of European Contract Law and the new German law of prescription are repeatedly referred to by the draftsman responsible for this part of the *Avant-projet*.⁹⁵ It is all the more surprising that this has not been done more comprehensively. And it is disappointing that, as a rule, no reasons have been given for retaining certain features of the old law, or for adopting a solution which differs from established comparative wisdom.⁹⁶ To be sure: established comparative wisdom, whether it is to be found in legal literature or in international restatements, may be based on mistaken assumptions, it may be favouring an inappropriate solution, or it may be questionable for other reasons.⁹⁷ But if French law is to be propelled again to a pre-eminent place within the debates about the future direction of private law in Europe,⁹⁸ one should expect a reasoned motivation for the solutions adopted in the *Avant-projet*, and a critical reflection of other views. In all too many respects this has not happened, be it for lack of time or because of the unquestioned force of tradition. The authors of the *Avant-projet* have thereby reduced the potential influence of French law. For such influence should be based on the persuasive power of the better argument rather than the fading prestige historically associated with the *Code civil*.

⁹⁴ New German Law of Obligations (n. 10) 157.

⁹⁵ MALAURIE (n. 18) 173 (No. 6), 173 *et seq.* (No. 6), 175 (No. 10), 175 (No. 11), 177 (No. 14). Of considerable importance has probably been the article by B. FAUVARQUE-COSSON, *Revue des contrats* 2004, 810 *et seq.* (outlining ‘[l]es grandes tendances internationales’); cf. also eadem, *Aspects de droit comparé de la prescription*, in: COURBE (n. 17) 67 *et seq.*

⁹⁶ The *exposé des motifs* often merely restates the present law, or contains assertions rather than arguments.’

⁹⁷ See, concerning the Principles of European Contract Law, ZIMMERMANN, Symposium Kötz (n. 19) 144: ‘In the first place, . . . it is the task of legal scholarship to take note of the Principles, to provide critical comment and discussion, and intellectually relate them to the various national legal systems. This does not have to be, and indeed should not be, a one-way process. For as much as national legal developments have to be evaluated against the yardstick provided by the Principles, the Principles may not pass muster when they are evaluated against the background of national legal experiences which have been gathered over a long period and by sophisticated courts and legal writers’.

⁹⁸ For the 19th century see, e.g., K. ZWEIGERT, H. KÖTZ, *Introduction to Comparative Law*, 3rd ed., 1998, 98 *et seq.*; R. SCHULZE (ed.), *Französisches Zivilrecht in Europa während des 19. Jahrhunderts*, 1994; idem (ed.), *Rheinisches Recht und Europäische Rechtsgeschichte*, 1998; E. WADLE, *Französisches Recht in Deutschland*, 2002.