

EXTINCTIVE PRESCRIPTION IN BELGIAN PRIVATE LAW - OLD QUESTIONS AND RECENT DEVELOPMENTS -

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Table of contents

Introduction.

1. INTRODUCTION

I. Qualification of extinctive prescription by its effects, domain of application of the rules on prescription, object of prescription, substantive or procedural character.

2. PRESENTATION OF THE QUESTION

3. VARIOUS OPINIONS

4. REBUTTAL OF THE PROCEDURAL QUALIFICATION

5. CONCLUSIONS ON THE OBJECT OF PRESCRIPTION

6. CONCORDANCE OF THIS OPINION WITH BELGIAN CASE LAW AND CONFLICT LAW

7. STRONG PRESCRIPTIONS

II. Qualification of extinctive prescription by its conditions - type of situations sanctioned by prescription.

8. PRESCRIPTION AS THE SANCTION OF ABSENCE OF EXERCISE OF THE CLAIM

9. INTERRUPTION BY EFFECTIVE EXERCISE OF THE CLAIM

10. INTERRUPTION BY RECOGNITION OF THE CLAIM OR WAIVER OF THE LAPSED PERIOD OF PRESCRIPTION

11. INTERRUPTION BY DECLARATION OF DAMAGE TO THE INSURER

12. EFFECT OF INTERRUPTION - EFFECT OF JUDGMENT

13. MODIFICATION BY AGREEMENT

14. EVALUATION AND ANOMALOUS EXCEPTIONS

15. EVALUATION OF THE FORMALISM OF INTERRUPTION - DELAY OF RESPITE

III. Commencement and normal duration of prescription - distinction between prescription periods and periods merely determining the object of an obligation.

16. PRESENTATION OF THE QUESTION AND BASIS FOR A SOLUTION

17. APPLICATION OF THE SOLUTION IN INSURANCE LAW

18. ART. 11 PRODUCT LIABILITY : EXAMPLE OF A CLASSICAL MISUNDERSTANDING

19. DURABILITY PERIODS ARE NO PRESCRIPTION OR REPOSE PERIODS

20. APPLICATIONS : PRODUCT LIABILITY

21. APPLICATIONS : CONSTRUCTION AND WORK ON BUILDINGS

22. APPLICATIONS : SALES AND OTHER CONTRACTS

23. CONCLUSIONS ON PERIODS OF DURABILITY; THEIR DETERMINATION BY THE PARTIES

24. GENERALISATION OF THE COMBINATION OF A PRESCRIPTION AND A REPOSE PERIOD

25. THE SUBSIDIARY APPLICATION OF THE 30 YEAR PERIOD IN COMBINATION WITH SHORT PRESCRIPTIONS

26. SETTING ASIDE SHORT REPOSE PERIODS

27. SUSPENSION OF REPOSE PERIODS BY FRAUD AND CONCEALMENT; DEGRESSIVE PRESCRIPTION

28. THE SHORTENING OF PRESCRIPTION BY THE DOCTRINE OF ESTOPPEL

29. CONCLUSIONS DE LEGE FERENDA

IV. Suspension or respite of prescription.

30. INTRODUCTION

31. SUSPENSION

32. SUSPENSION OR RESPITE

33. RESPITE AS A CONSEQUENCE OF ABUSE OF RIGHTS

V. The imperative character of rights derived from the rules on prescription.

34. INTRODUCTION

35. PROTECTION OF THE DEBTOR

36. PROTECTION OF THE CLAIMANT

Introduction.

(1. INTRODUCTION) As most systems of private law, at least those influenced by roman law, Belgian law knows a way of extinction of claims which is called - after its roman ancestor - "(extinctive) prescription" (bevrijdende verjaring / prescription extinctive ou libératoire). Besides extinctive prescription, Belgian law also has rules of "acquittive prescription", establishing merely a proof of payment (Art. 2271 and 2272 C.C.), rules which are not discussed in this report.

Since 1804, there have been many legislative interventions providing for many exceptional rules in specific cases; on the other hand, the general statutory rules on prescription have not been changed since then. Still, there is relatively recent decisive case law on the precise modalities and effects of extinctive prescription, which only shows, in my opinion, that there has been little reflection about the problems of prescription in that last one and a half century. Legal doctrine has not succeeded in managing the old nor the recent problems, which are encountered with a patchwork of often hastily enacted exceptional provisions, often on the demand of lobbying groups, without any global vision or system.

In view of the the forum of this report, it is not my intention to describe as faithfully as possible the current doctrines in Belgian law¹, but rather to show you how the existing system, imperfect though it is - and this is clearly and understatement - can function in an acceptable way and partly functions in an acceptable way in everyday practice. Intelligent readers - as you all are - will understand this equally as a hint towards the legislator to adapt or clarify the statutory rules in such a direction.

For those in a hurry, I can indicate part III on the commencement and duration of prescription as the most important one, and further maybe part IV on the lengthening of prescription and abuse of the exception of prescription.

I. Qualification of extinctive prescription by its effects, domain of application of the rules on prescription, object of prescription, substantive or procedural character.

(2. PRESENTATION OF THE QUESTION) Art. 2262 of the Civil code (inherited from Napoleon) qualifies prescription as a way of extinction of "actions", as well actions relating to property rights as actions relating to creditors' rights : "toutes les actions, tant réelles que personnelles, sont prescrites (...)". What is the meaning of actions and how has this to be understood today ?

The category of "actions" is clearly a more restricted one than the category of all (patrimonial) subjective rights, as e.g. ownership itself is not extinguished by prescription, except in case of acquisitive prescription or other way of acquisition by another person. Still, certain "actions" arising out of ownership prescribe, even if the right of ownership itself does not.

In the same way, in case of prescription of creditors' rights, the provisions of the Civil code clearly state that extinctive prescription causes a liberation of the debtor (e.g. Art. 2219 and 1234 C.C.). Still, the liberation of a debtor - or other person addressed - from his obligation - or other restraint - does not prevent the creditor - or other entitled party - from enjoying some right of a lesser intensity, namely an "exception". This "exception" is not subject to prescription, and does only

¹ As always in living law, official doctrines never get hold completely of the real decisions. In our System of cassation, the judge of the merits can thus avoid revision by shifting the motivation of his decisions (if the parties' pleadings allow such motivation), shifts which are in their turn fought by the controlling institutions (Legislator, Court of cassation) by reformulating their rules, but once more only until the moment the judge of the merits shifts his motivation again. Living law thus avoids control by continuous "displacement" (Verstellung). Comp. J. DEFOORT, "De simulatie voorbij", in *Liber amicorum Tiberghien*, 113 sq.

perish through other causes (waiver, estoppel, etc.). This is also known as the "weak effect" of prescription, in comparison with the "strong effect" of these other limitations of subjective rights (like waiver or estoppel). This so-called weak effect of prescription is summarized in the old maxim² : «*Quae temporalia sunt ad agendum, perpetua sunt ad excipiendum*».

We thus have to try to determine more precisely what disappears in case of prescription (and thus is subject to prescription) and what the other party is thus liberated from. Despite the "dogmatic" character of this discussion, the answer has practical consequences, e.g. for the determination of the applicable law in case of conflicts.

(3. VARIOUS OPINIONS) Despite the lack of precision in describing the object of prescription, it has in the past rarely been doubted that prescription is a matter of substantive law³, and not a mere procedural exception (an exception which would affect the procedural right to act in court, the "ius agendi")⁴. The substantive qualification is moreover clearly dominant in most countries of civil law (continental systems) (explicitly in the Italian C.C., Art. 2934, and Spanish C.C., Art. 1930, etc.).

During the last decades, however, there seems to be a certain tendency with Belgian authors to dispose of extinctive prescription as a purely procedural means of "irrecevability" of the demand, i.e. an argument that affects the procedural right to sue and be heard ("ius agendi")⁵. One could maybe read this tendency in the wording of the Judiciary Code of 1967, where the term "action" is - wrongly, in my opinion - used in the sense of a right to sue ("ius agendi"), thus presupposing probably that the term "action" as used in the Civil code has a purely procedural meaning.

The procedural qualification evidently proceeds from the assessment that there is "something" left after extinctive prescription - something which was called an "exceptio" in roman law -, but in my opinion, it has drawn from this assessment the wrong conclusions concerning the object and qualification of prescription in our (roman-law-based) legal system.

(4. REBUTTAL OF THE PROCEDURAL QUALIFICATION) The last named doctrine forgets namely that "modern civil law" (simply speaking at least from the 16th Century on) is based *inter alia* on the recognition of (the validity of) subjective rights prior to any judicial recognition of them, and the distinction between substantive subjective rights and procedural rights following from this. It forgets that modern civil law differs in this respect not only from the common law, but even more from roman law, where terms as "actio" and "exceptio" indifferently concerned the global set of conditions for legal protection, as well the substantive as the procedural conditions⁶, so that the

² Comp. H. DE PAGE & R. DEKKERS, *Traité élémentaire de droit civil belge*, VII, No. 1137 C, 3°; F. GLANSDORFF, "Du caractère imprescriptible des exceptions", *R.C.J.B. (Revue critique de jurisprudence Belge)*, 1991, 258 sq.

³ See e.g. W. DELVA, *Preadvies over de bevrijdende verjaring en de vervaltermijnen*, Vereniging voor de vergelijkende studie van het recht in België en Nederland, Tjeenk Willink Zwolle 1962.

⁴ Although this was the opinion of R.J. POTHIER, *Traité des obligations*, No. 679. It is, however, the question whether "the right to be heard in court" as understood by Pothier has much in common with the contemporary conceptions of such a procedural right (Cfr. *infra* in No. 4).

⁵ A. VAN OEVELEN, "Algemeen overzicht van de bevrijdende verjaring en de vervaltermijnen in het Belgisch privaatrecht", *TPR (Tijdschrift voor Privaatrecht)* 1987, (1755) No. 17; unclear J. LINSMEAU, "L'action en répétition d'une dette prescrite", *R.C.J.B.*, 1972, (5) 20-21 No. 15 : on the one hand she writes that prescription "fait disparaître l'action en justice attachée à ce droit", on the other hand she agrees with the opinion of H. DE PAGE & R. DEKKERS (*Traité*, VII, No. 1245 B-C) that prescription is not just a procedural exception, but "un moyen de défense au fond".

⁶ Comp. H. DE PAGE & R. DEKKERS, *Traité*, VII, No. 1245 B-C.

traditional use of the word "actio" or "exceptio" is never decisive for the - substantive or procedural - qualification of a legal concept.

Whether one acclaims this modern continental historical development or not⁷, continental law has indeed developed a notion of positive subjective rights recognized independently of any judicial procedure or recognition, by extending the roman law notion of action and emancipating it from civil procedure. Differing in this respect from the roman actions, these rights are no longer considered as a mere reflection of procedural law⁸. It was the great merit of B. WINDSCHEID (followed by others)⁹ to show that the *enforceability* of this - substantive - subjective right, too, had to be seen independently from judicial procedure and therefore better no longer be expressed by the roman term "actio", but by another - new - term, namely "Anspruch". A similar notion has been introduced in the English-speaking world by HOHFELD as "claim" or "demand right"¹⁰. I will therefore use the word claim in this report in the sense of demand right and not in the sense of factual demand, and use the word "demand" in the latter.

The defence of prescription can thus be compared perfectly with other defences on the merits such as the right to withhold performance, traditionally called "exceptio non adimpleti contractus", or other defences based on the fact that the obligation is not yet due.

It is a pity that this terminology did not become too common in Belgium - although it is used by the authoritative "Algemeen deel" (General part) of W. van GERVEN¹¹ -, because the discussion about the qualification of prescription would otherwise have passed away since long. Indeed, it is precisely this substantive "claim" (Anspruch) which forms the object of extinctive prescription. The confusion is probably caused in part by the fact that, once WINDSCHEID had coined the term Anspruch / claim for the enforceable substantive right, others have used the - now "unemployed" - term "action" to express a completely different idea, namely the right to sue ("ius agendi"), a procedural right to pursue a procedure of a specific kind, independent of the merits of

⁷ This "emancipation" is rejected by authors as J. BINDER, *Prozeß und Recht. Ein Beitrag zur Lehre vom Rechtsschutzanspruch*, Leipzig 1927, A. PEKELIS, *Nuovo Digesto italiano*, V° "Azione", No. 26-27, SAUER, *Allgemeine Prozeßrechtslehre*, 1957, 1, or S. SATTA, *Diritto processuale civile*, Padova (9) 1981, No. 73, who defend the unity of procedural and substantive law (comp. also J. EGGENS, *N.K.F. Lands Verklaring van het burgerlijk wetboek VI (bewijsrecht)*, Bohn, Haarlem 1933, 6 sq.; J. DARBELLAY, "Le droit d'être entendu", 98. *Referate und Mitteilungen des schweizerischen Juristenvereins* 1964, Helbing und Lichtenhahn, Basel, IV, 427 : "La procédure conditionne la saisie du droit au fond, la perception et la délimitation du droit matériel comme la lumière conditionne la perception des couleurs"; H.M. PAWLOWSKI, "Aufgabe des Zivilprozesses", 80. *ZJP* 1967, (345) 361 sq.). But their unity is situated on a different - nearly philosophical - level. PEKELIS and SATTA e.g. reject the idea of "subjective rights" and only accept factual "demands" (pretensions). These ideas are very attractive, but as long as we use the notion of subjective rights, it is necessary to distinguish substantive and procedural rights.

⁸ See for this history R. ORESTANO, *Azione, diritti soggettivi, persone giuridiche*, Bologna 1978 (earlier in *Enciclopedia del diritto*, IV, 1959 V° "Azione"); H. COING, "Zur Geschichte des Begriffs 'subjektives Recht' ", in *Das subjektive Recht und der Idee der Rechtsschutz der Persönlichkeit*, Frankfurt a.M. - Berlin 1959.

⁹ B. WINDSCHEID, *Die actio des römischen Civilrechts vom Standpunkte des heutigen Rechts*, Düsseldorf 1856; B. WINDSCHEID by Th. KIPP, *Lehrbuch des Pandektenrechts*, I, § 43 sq., in (8) 1900, 122 note 6, in (9) 1906, 182 sq.; J. UNGER, *System des österreichischen allgemeinen Privatrechts*, Leipzig 1856, (4) 1876, § 108 and 113 p. 354; G. CHIOVENDA, "L'azione nel sistema dei diritti", *Saggi di diritto processuale civile*, Bologna 1904, I, 44 sq.

¹⁰ HOHFELD, *Some fundamental legal conceptions as applied in judicial reasoning*, 1913.

¹¹ W. VAN GERVEN, *Beginselen van Belgisch privaatrecht I, Algemeen deel*, Standaard Antwerpen - Utrecht 1973, 91-92 No. 31; W. VAN GERVEN, "Een nieuwe analyse van het begrip Recht. De "Juristic Conceptions"-theorie", *R.W. (Rechtskundig Weekblad)*, 1961-62, 2041 sq.

the demand. Such a concept was unknown to Roman law, and has only been developed by XIXth century German (and French) proceduralists - namely by systematizing a certain number of procedural rules and thus by emancipating in a certain sense procedural law from substantive law¹². Just like substantive claims are recognized independent of factual judicial recognition, this "ius agendi" has to be recognized as a right to be heard, independent of the recognition of a claim, and thus totally independent from the question whether the claim becomes prescribed or not. It is this "ius agendi" which is described in Art. 17 of the Belgian Judiciary Code with the term "action"¹³. The unlucky result is that the word "action" is used in a very different sense in the Civil Code on the one hand and the Judiciary Code on the other.

Anyway, subject to prescription is not the "action" in the sense of "ius agendi", but the "action" in the sense of the C.C., i.e. the "claim"¹⁴. "Claim" is indeed the other side of a legal duty (civil obligation), as opposed to a merely "natural" obligation or moral duty. This notion of "claim" does not only concern the power a demand by way of judicial recognition in a judgment, but the power to enforce his right with all lawful means, by legal process or otherwise outside the courts¹⁵, such as e.g. by retention, compensation, or selling off assets pledged or mortgaged, by annulment, defeasance, rescission, or termination without court intervention, etc.¹⁶. These powers form the essence of those subjective rights we call "claims", and can thus not be reduced to some merely procedural form. They constitute, on the contrary, this subjective right in the plenitude of its powers. It is rather the so-called demand right ("vorderingsrecht") - lacking these powers which are summarized in the notion of "claim" or "action" - which only constitutes a lesser form of subjective right. Subjective rights in general can indeed be described as a "bundle" of prerogatives: some of them are hit by prescription, others not. Those hit by prescription are summarized in the notion of "claim".

(5. CONCLUSIONS ON THE OBJECT OF PRESCRIPTION). We conclude that, in continental civil law, prescription has a substantive and not a procedural character, except maybe in the sense in which any legal rule or concept has a procedural character, and that the object of extinctive prescription is - on the side of the party against whom it is invoked - a "claim", understood as the bundle of powers providing the possibility of enforcing in or outside court. This claim corresponds to a "duty" on the side of the other party - the party who invokes prescription -.

Other types of subjective rights, such as faculties, immunities, and other types of powers are not subject to prescription. Their exercise can be limited in time, but such limitations differ from prescription in many ways. One of the differences concerns precisely the question what's left after expiration of the time fixed.

¹² Although some ideas can already be found in MÜLLER, *Zur Lehre von der römischen Actio*, 1857, 39-40, this has especially been done by O. VON BÜLOW, *Die Lehre von den Proceßinreden und die Proceßvoraussetzungen*, Giessen 1868, who therefore is rightly considered the founder of modern procedural law. The modern notion of "ius agendi", however, was only developed by H. DEGENKOLB, *Einlassungszwang und Urteilsnorm, Beiträge zur materiellen Theorie der Klagen, insbesondere der Anerkennungsklagen*, Leipzig 1877 and S. PLÓSZ, *Beiträge zur Theorie des Klagerechts*, Budapest 1876, Leipzig 1880.

¹³ For more details, see my "De eigendom van het wild en de jachtvergunning. Of het onderscheid tussen rechtsvordering en recht om te procederen", in *Te PAS. Opstellen aangeboden aan prof. mr. P.A. Stein*, Kluwer Deventer / Tjeenk Willink Zwolle 1992, 253-271.

¹⁴ Comp. already B. WINDSCHEID, *Die actio des römischen Civilrechts*, 37 sq. § 7.

¹⁵ Comp. the Dutch author H.G. VAN DER WERF, *Procederen of schikken? Aspecten van het geldend maken van civiele rechten en bevoegdheden naar huidig en toekomstig recht*, Arnhem 1984, 52.

¹⁶ This is stated a contrario in the Dutch NBW, Articles 3:92, lid 3 (reservation of title), 3:323 (pledge and mortgage) and 3:52, lid 2 (annulment by extrajudicial declaration).

An illustration can be found in the right of ownership. In case of violation of ownership, specific claims (restoration, etc...) arise, which are subject to prescription. Ownership itself, however, and its other side, namely the disability of others to dispose of its object and their being bound by the acts of the owner, and thus the possibility that new claims of the owner may arise, is normally not subject to prescription¹⁷. Ownership itself can, however, be limited in time (this is especially the case with other types of property rights but ownership). In such cases, there is no right at all anymore (not even by way of defence).

In case of prescription, on the contrary, a lesser subjective right - a right of lesser intensity - remains, a right without the powers summarized in the notion of "claim", and traditionally worded in the term "exception" (defence) : «*Quae temporalia sunt ad agendum, perpetua sunt ad excipiendum*»¹⁸. This lesser right will only perish in case of waiver or estoppel¹⁹.

I will not enter into details concerning the precise distinction of both categories of prerogatives, which may seem quite delicate e.g. in the field of retention of goods^{20, 21}. But in general, the preservation of "exceptions" is justified precisely because it is generally accepted that somebody who still has to perform himself must not always act as quickly in exercising one's rights as somebody without such means of pressure ("quieta non movere")²².

(6. CONCORDANCE OF THIS OPINION WITH BELGIAN AND EUROPEAN CASE LAW AND CONFLICT LAW) Such conclusions are wholly in accordance with Belgian case law. Indeed, the Hof van Cassatie has decided literally that "prescription is a means of liberating oneself from an obligation, which does not affect the existence of the debt, but its claimability"²³. The Court thus distinguishes debt (including non-claimable debts) and obligation (including only claimable debts or

¹⁷ Comp., with other examples, A. KLUYSKENS, *De verbintenissen*, No. 247. As to limited property rights but ownership, they are considered to be subject to prescription of 30 years, but any use of the right does interrupt prescription.

¹⁸ See Cass. 22-10-1987, Abeille-Paix, ABB v. Marler c.s., *Pas. (Pasicrisie belge)*, I, 204, *R.C.J.B.*, 1991, 258 note F. GLANSDORFF, "Du caractère imprescriptible des exceptions"; H. DE PAGE & R. DEKKERS, *Traité*, VII No. 1137 C, 3° and also II No. 784. Comp. K. SPIRO, *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalefristen*, Stämpfli Bern 1975, §§ 240 sq., esp. § 244 p. 579.

¹⁹ Comp. Cass. 16-6-1910, *Pas.*, I, 347; H. DE PAGE & R. DEKKERS, *Traité*, II, No. 784, D; F. GLANSDORFF, *R.C.J.B.*, 1991, (258) 273-278, Nos. 5-7.

²⁰ Simplified, one could say that such retention is only an exception in cases where the delivery of goods is only due in consideration of the prescribed right to a counterperformance in the strict sense of the word, whereas it should be equated with an attachment and thus an enforcement in cases where the goods have to be handed in because they have been received from the other party and, although their retention is normally - i.e. before prescription - allowed because they are linked with a claim against the other party. For this distinction (better known in e.g. the German BGB and Dutch NBW), see my article "De exceptio non adimpleti contractus, als uitlegvraag. Uitwerking van enkele aspecten in de verhouding tussen partijen, meer bepaald evenredigheid en volgorde van de prestaties", *R.W.*, 1989-90, p. 313. See also F. GLANSDORFF, *R.C.J.B.*, 1991, (258) 278 sq., Nos. 8-12.

²¹ For the discussion on the effects of prescription on such prerogatives, as well as the selling off or other use of real securities after prescription, see F. PETERS & R. ZIMMERMANN, in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, ed. Bundesminister der Justiz, I, 1981, p. 264 sq., 310 sq., 323; K. SPIRO, "Zur Reform der Verjährungsbestimmungen", *Festschrift für Wolfram Müller-Freienfels*, eds. A. Dieckmann, R. Frank, H. Hanisch, S. Simitis, Nomos Baden-Baden, p. (617) 626 sq.

²² Comp. F. GLANSDORFF, *R.C.J.B.*, 1991, (258) 270-271, Nos. 3; K. SPIRO, *Die Begrenzung privater Rechte* § 47 sq.; C.A. STREEFKERK, *Opschortingsrechten en schuldeisersverzuim*, Kluwer Deventer 1987, 23.

²³ Cass. 25-9-1970, Min. of Finance (Director of Income Tax) v. Van de Mosselaer, *Pas.*, I, 67, *R.C.J.B.*, 1972, 5 note J. LINSMEAU; Cass., 22-9-1986, *J.T.T. (Journal des tribunaux du travail)*, 42.

claims). One of the consequences of this distinction is that after prescription, a debt of a certain kind, but not an obligation, is preserved; although this debt is often described as a "natural obligation"²⁴, it is according to Belgian law more than just a natural obligation. Like a natural obligation, its voluntary payment or performance is not "undue" - and the prescribed claim can thus be invoked by way of exception against a demand in restitution or based on unjust enrichment -. But in case of natural obligations, this payment can be avoided - and thus reclaimed - for error, which is not possible in case of prescribed debts (in precisely the same way as it is not possible to reclaim payments made before they were due)²⁵.

The qualification of extinctive prescription as substantive is also wholly in accordance with Belgian and European international private law (law of conflicts). Art. 10 (1) d) of the European Convention on the law applicable to contractual obligations explicitly provides the application of the "lex causae" - and not the "lex fori" as in all matters of procedure - as to prescription and other types of limitation of actions. The same rule was already generally accepted in Belgian law²⁶. It is true that Belgian Courts will always apply at least a thirty years prescription, but the reason is that such a prescription is considered to be a rule of our international public order.

The "lex causae" will thus also govern the causes of interruption or suspension of prescription.

Finally, some indications can be found in the case law of the Court of Justice of the European Community relating to the liability of the Community on the basis of art. 215 EC, which considers a claim based on art. 215 EC already "admissible" as soon as the claimed damage is imminent and to be expected with sufficient certainty, whereas prescription only starts when the damage has materialized²⁷.

(7. STRONG PRESCRIPTIONS). Belgian law also knows a number of limitation periods which have a "strong" instead of a weak effect, i.e. which extinguish all aspects of a subjective right, or at least more than the common form of extinctive prescription (the "weak" prescription) does. They exclude especially the use of an *exceptio non adimpleti contractus* and similar defences on the merits. This effect is traditionally attributed i.a. to the following limitations :

- prescription of claims based on hidden defects of the goods sold (Art. 1648 C.C.),
- prescription of claims arising out of insurance contracts.

In some of these cases, legal authors - and sometimes even case law - tend to qualify these periods not as prescription periods, but as another type of limitation, namely as "fatal periods" (*vervaltermijnen*). This is due to the fact that the doctrine on the different types of limitations is underdeveloped, so that authors tend to put together all limitations, which do not obey to all the classical rules on prescription, in the hotch-potch category of "fatal periods". In the abovementioned cases, this is incorrect, because these periods can be interrupted and suspended according to the normal rules (and sometimes even in a larger number of cases)²⁸, which is normally not the case with so-called "fatal periods". We therefore better use the term "strong prescription".

²⁴ E.g. recently by Cass., 14-5-1992, *Simon v. Collignon, Arr. (Arresten van het Hof van Cassatie)*, No. 479.

²⁵ See Cass. 25-9-1970, *Min. of Finance (Director of Income Tax) v. Van de Mosselaer, Pas.*, I, 67, *R.C.J.B.*, 1972, 5 note J. LINSMEAU and more explicitly W. WILMS, "De betaling van een verjaarde schuld", *T.B.B.R. (Tijdschrift voor Belgisch Burgerlijk Recht - Revue générale de droit civil belge)*, 1988, 56 sq.

²⁶ Cass. 14-7-1898, *Pas.*, 1898, I, 271; G. VAN HECKE & K. LENAERTS, *Internationaal privaatrecht*, Story Brussel (2nd ed.) 1989, No. 686.

²⁷ See the analysis of T. HEUKELS, "De niet-contractuele aansprakelijkheid van de Gemeenschap ex art. 215, lid 2 EEG : Dynamiek en continuïteit (1983-1991)", *SEW* 1992, (151) 167.

²⁸ See esp. Art. 35 Land Insurance Contracts Act of 25 June 1992.

II. Qualification of extinctive prescription by its conditions - type of situations sanctioned by prescription.

(8. PRESCRIPTION AS THE SANCTION OF ABSENCE OF EXERCISE OF THE CLAIM) Before dealing with the prescription periods - the general period is 30 years in Belgian law -, it could be useful to qualify prescription, as a sanction of a certain type, from the perspective of the conditions required for prescription (or inversely the conditions under which prescription can be avoided). Indeed, an evaluation of prescription periods makes no sense if one does not take into account also the possibilities to interrupt or lengthen such periods : the easier they can be interrupted or lengthened, the shorter they may be.

In his great work *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalefristen*, K. SPIRO came to the conclusion that extinctive prescription is only a species of a broader category of limitations striking (the exercise of) claims²⁹. Other species of this category are various forms of "estoppel periods" (Verwirkungsfriste) and "fatal periods" (Fatalefriste). These different species of limitations should be distinguished by the acts through which they are stopped or at least interrupted³⁰ - , and thus by the "burden" (Obliegenheit) of which non-compliance does cause the loss of the claim or right (except maybe in case of fraud of the liable party or at least his knowledge of the claim). A prescription period is therefore a period which can be interrupted by the acts which by virtue of the law interrupt prescription.

Such an analysis shows that it is wrong to define prescription as a sanction of mere inactivity (and deduce from such a definition that inactivity could not be sanctioned before the prescription period has lapsed). Mere inactivity is often sanctioned by shorter periods of time, such as estoppel periods (Verwirkungsfriste, esp. Rügefriste - protesttermijnen). Prescription is not excluded even if the claimant is not silent, as long as he does not exercise his claim in the form required for interruption of prescription.

Now comparative law could be very destructive in respect of such an analysis of prescription: we could infer from it that there are as many types of limitation periods as there are different rules on interruption of prescription, and that limitations called prescription in one country come closer to limitations with another name than to the so-called prescription in other countries (an example can be found in those legislations where prescription can be interrupted by a mere formal notice to the debtor, as in Italian law and for certain actions in Dutch law). Anyway, the other species of limitations of claims are often even more heterogeneous than the different types of prescription, where we find at least a rather uniform type of rules and terminology. Although there certainly is some variation in prescription rules, it is, however, still possible to get hold of a common core of the rules on prescription : if prescription stops the effective exercise of rights (claims) by the creditor (...) and if prescription periods are thus periods for such effective exercise, where the use of force can be used, then it is conversely nearly logical that the already expired part of a period is annulled, i.e. that prescription is interrupted, whenever an effective exercise takes place. On the other side, interruption of prescription could also be seen as merely a means of notification of the claim to the debtor, in which case it is precisely the ascertained knowledge of the debtor which prevents prescription. Interruption of prescription is indeed generally linked with some knowledge by the debtor, whether by notification of the (exercise of the) claim, or through an act of the debtor from

²⁹ See esp. K. SPIRO, *Die Begrenzung privater Rechte*, §§ 371-376. Comp. A. PITLO, *Bewijs en verjaring naar het Nederlands burgerlijk wetboek*, Tjeen Willink Haarlem (5) 1968, p. 198; my *De invloed van de goede trouw op de kontraktuele schuldvorderingen*, Story Brussel 1990, Nos. 345-346.

³⁰ Vgl. K. SPIRO, *Die Begrenzung privater Rechte*, § 376-377. Comp. also H.J. WIELING, "Venire contra factum proprium und Verschulden gegen sich selbst", *AcP (Archiv für die civilistische Praxis)*, 1976, 347.

which interruption (notification) appears to be superfluous - namely a recognition of the claim or waiver of the already lapsed part of the prescription period. These two types of interruption will be dealt with in the following paragraphs.

(9. INTERRUPTION BY EFFECTIVE EXERCISE OF THE CLAIM) In Belgian law, extinctive prescription is interrupted by bringing before a judge a demand of which the claim is the subject-matter. The demand has to be brought before court in the forms required by law (Art. 2247 C.C. provides that a demand served in an invalid form does not interrupt prescription)³¹ by a person satisfying the requirements of "admissibility" of the demand, such as legal capacity, actual and personal interest in having his demand been tried by court, and especially the necessary quality (*locus standi*) to act on behalf of the person entitled to the pretended claim (the necessity of meeting these requirements also follows from Art. 2247, 3 C.C.³²). Bringing a demand before court can be done in any form accepted by procedural law³³, including the service of a writ by a bailiff (*betekening van een dagvaarding* - *signification d'une citation*), filing an application (*requête* - *verzoekschrift*) in cases provided by the law or in case of arbitration, declaration of claims at the Commercial Court in case of bankruptcy of the debtor, etc. When the demand is brought before a court, the prescription is interrupted at the moment at which the demand has been registered by the (Registrar of the) court, except in case of service of a writ, where the - earlier - date of service counts³⁴. Prescription is also interrupted by formulating a demand in written pleadings (*conclusies* - *conclusions*) in the course of a pending lawsuit, in those cases where demands can be introduced or extended in this way³⁵. Whether the Court (or arbitrator) has jurisdiction over the case, is irrelevant for interruption (Art. 2246 C.C.), as long as the addressed person or institution is considered as a Court or Arbitrator³⁶ (and unless interruption is awarded by specific statutory Acts or Regulations).

Introducing a demand interrupts prescription for all claims actually or virtually implied in the demand³⁷. However, if the subject-matter of the demand is not a claim to be judged, but some other measure linked with a claim, no interruption takes place³⁸. An application for legal aid, for an evidentiary measure or for any other conservatory or provisional³⁹ measure (as in *référé*) does in itself therefore not interrupt prescription. Even if a demand could have been introduced - according

³¹ "Si l'assignation est nulle par défaut de forme, l'interruption est regardée comme non avenue".

³² Art. 2247, 3 C.C. provides that "interruption is considered inexistent if the claim is dismissed", which is generally understood to include also dismissal for inadmissibility (lack of *ius agendi*).

³³ See for details W. WILMS, *Dagvaarding en verjaring*, Maklu Antwerpen - Apeldoorn 1990, No. 3

³⁴ W. WILMS, *Dagvaarding en verjaring*, No. 57 sq.; Cass. 4--1994, *R.W.*, 1994-95, 93.

³⁵ Cass. 19-6-1924, *Pas.*, 1924, I, 411.

³⁶ Application for an advisory proceeding, complaints even regulated by law, and even applications for binding third party decisions (*bindende derdenbeslissing* - *terce-décision obligatoire*) thus as a rule do not interrupt prescription, because they can not lead to a judicial decision. In the case of binding third party decisions, this is unsatisfactory and an interruption under certain conditions is to be preferred. See e.g. Art. 3:316, para 3 Dutch NBW.

³⁷ Cass. 9-4-1981, *R.W.*, 1981-82, 2489, *Arr.*, 1980-81, 912; Cass. 29-3-1984, *Pas.*, I, 908; Cass., 29-12-1986, *Pas.*, 1987, I, 523; Cass. 7-4-1987, *Pas.*, I, 935; Cass. 4-5-1990, *Pas.*, I, 1015; Cass. 29-11-1990, *Pas.*, I, 321, *R.W.*, 1990-91, 1201; Cass. 3-6-1991, *Pas.*, I, 866 concl. LECLERCQ; Cass. 24-4-1992, *Arr.* No. 447, *R.W.*, 1992-93, 236.

³⁸ W. WILMS, *Dagvaarding en verjaring*, No. 5; A. VAN OEVELEN, *TPR*, 1987, (1755) No. 48.

³⁹ Some authors accept interruption if the object of the provisional measure is the same as the object of the claim, although only demanded provisionally in summary proceedings, anticipating a later procedure on the merits. Comp. e.g. G. DE LEVAL, "Le référé en droit judiciaire privé", *Actualités du droit*, 1992, (855) 863; J. LINSMEAU, "Le référé. Fragments d'un discours critique", *Revue de droit ULB*, 1993, (7) No. 12-13.

to the rules on civil procedure - by simply formulating it in written pleadings - which is the case whenever the demand can be based on the same fact or document as the original demand, however qualified differently -, prescription is only interrupted when the demand is actually formulated in pleadings, unless it is accepted to have been "virtually" implied in the original demand. Indeed, whereas a demand can be formulated in written pleadings as long as it can be based on the same fact or document as the original demand, however qualified differently, it is only considered to be virtually implied in the original demand as long as the object and the cause (i.e. the legal qualification given by the parties) remain the same⁴⁰. Only in some specific cases provided by the law, the interrupting force of a demand is extended beyond these limits, e.g. in case of Labour Accidents (Art. 70 Labour Accidents Act of 10-4-1971).

Besides the introduction of a demand, other acts of effective exercise, as specified in Art. 2244 C.C., also interrupt prescription : a formal "command" (summons) to pay an executory judgment or deed (preceding seizure) and a seizure, whether executory or only conservatory. But besides conservatory seizures, other conservatory measures do not interrupt prescription. This is especially the case for any other form of summons or notice for non-performance.

In certain cases, however, especially in those cases where the time period for prescription is not fixed by law, but to be judged in concreto by the judge (e.g. Art. 1648 C.C.), conservatory measures, and esp. an investigation by an expert witness, in fact interrupt prescription.

Interruption is annulled retroactively if the claimant waives the procedure started (Art. 2247 C.C.), unless such a waiver is based on the absence of jurisdiction of the court and the intention to bring the demand before another court is simultaneously indicated⁴¹.

(10. INTERRUPTION BY RECOGNITION OF THE CLAIM OR WAIVER OF THE LAPSED PERIOD OF PRESCRIPTION) Extinctive prescription is also interrupted by recognition by the other party (debtor) of the claim which is subject to prescription (Art. 2248 C.C.) and by waiver of the acquired prescription (Art. 2220 C.C.) or of the already lapsed part of the prescription period⁴². Recognition interrupts prescription, even if the claim is not recognized in its totality⁴³ or with reservations.

(11. INTERRUPTION BY DECLARATION OF DAMAGE TO THE INSURER) An important extension of the possibility of prescription can be found in Art. 35 § 3 of the Land Insurance Contracts Act of June 25, 1992 (and the analogous Art. 15 of the Motor Car Insurance Act of Nov 21, 1989). According to this provision, submission of an insurance claim does interrupt prescription of the claim against the insurer, if such declaration was submitted in time (i.e. according to Art. 19 of the same Act, as soon as reasonably possible). Interruption concerns all claims arising out of the declared accident. Prescription of "direct claims" of third parties against the insurer (which exist, according to Art. 86 of the same act, in all liability or third party insurance contracts) are interrupted as soon as the insurer knows about the intention of the third party to be compensated (Art. 35 § 4 of the same Act), irrespective whether he learns it from the third party itself, or in another way, esp. from the first party held liable.

⁴⁰ Comp. J. LINSMEAU, *Revue de droit ULB*, 1993, (7) No. 10.

⁴¹ Art. 826, para 2 Judiciary Code.

⁴² Cass., 23-10-1986, *T.B.B.R.*, 1988, 209 note A. VAN OEVELEN, "Het afstand doen van het reeds verkregen gedeelte van een lopende verjaring".

⁴³ Cass. 18-5-1961, *Pas.*, I, 1003; Cass., 28-3-1963, *Pas.*, I, 822; Cass., 10-11-1966, *Pas.*, I, 336, *R.W.*, 1966-66, 1803.

Starting serious negotiations (a concept not as broad as the situation of Art. 35 § 3 Land Insurance Contracts Act) is in my opinion only a form of waiver of the already lapsed part of the prescription period, or at least an apparent waiver, and thus has to be accepted generally as a cause of interruption of prescription⁴⁴, and not as a cause of suspension only, as is sometimes taught. Another reason for this is that it makes no sense at all to let the time remaining after negotiations be determined by the period already lapsed before they started. In international conventions, usually only suspension of prescription is provided explicitly - not only in case of serious negotiations, but already in case of written submission of a claim -, the question of interruption, however, being left to the applicable national law (e.g. Art. 55 § 4 C.I.V, Art. 58 § 4 C.I.M. or Art. 32, 2 CMR).

(12. EFFECT OF INTERRUPTION - EFFECT OF JUDGMENT) In case of interruption, the prescription period just starts again. The new period is as long as the old one. Sometimes, a short prescription period is substituted by another, longer one, but that is not so much a result of interruption as of the fact that some causes of interruption, esp. some cases of recognition of debt, give rise to a new claim, usually subject to the common prescription period (of 30 years)⁴⁵.

Some authors have argued that the new period should be a shorter one; this is undesirable, because it would lead to inappropriate differences between factually very analogous situations. Our law of prescription needs no further differentiation, but on the contrary more uniformization.

Unlike other acts of interruption, a favourable judgment does not just interrupt prescription by opening up a new prescription period. The judgment is namely a new "title" - and normally an executory one - substituting the old claim by a new one arising out of the judgement ("actio judicati"), subject to the thirty year prescription irrespective of the prescription period to which the original claim was subject. The original claim is, however, not substituted in all respects, as the creditor continues to enjoy the accessories (security rights, etc.) of the old claim.

An important specific rule is found in Art. 27, 2 Introductory Title of the Code on Criminal Procedure, as modified in 1961 : a judgment by a criminal court recognizing a reservation for compensation of damages arising out of a penal act, also substitutes the old claim for compensation by such a new one, arising out of the judgement ("actio judicati"), and subject to the thirty year prescription, even if only a demand for such a reservation, and not the claim itself had been formulated in court. This compensates for the limited possibilities of action of victims of penal acts as long as criminal proceedings are running (according to the principle "le criminel tient le civil en état", civil proceedings are suspended as long as criminal proceedings are running).

(13. MODIFICATION BY AGREEMENT) Although prescription periods as such cannot validly be lengthened by the parties in advance, they can agree on additional causes of interruption (Comp., *infra*, No. 35). This principle is in accordance with the possibility of interrupting prescription by recognition of the debtor or waiver of the acquired or already lapsed part of prescription.

An agreement or clause to deprive, in advance, the legal causes of interruption of their interrupting effect, however, is in my opinion invalid. It is undoubtedly not valid in many specifically regulated cases, such as Insurance Contracts (Art. 3 Land Insurance Contracts Act). But more generally, persons entitled to claims would be deprived of fundamental guarantees for legal protection if the interrupting effect of the introduction of a demand before court could be set aside. As to the interrupting effect of the recognition of a debt, it is simply impossible in our legal system not to give it an interrupting effect, as recognition of an existing debt constitutes in itself a sufficient title.

⁴⁴ Comp. the case of Cass., 27-10-1978, *T. Aann. (Tijdschrift voor aannemingsrecht - L'entreprise et le droit*, 1980, 314; Appeal Brussels 23-3-1983, *R.W.*, 1983-84, 681; Appeal Brussels, 22-1-1986, *R.W.*, 1987-88, 1036.

⁴⁵ See e.g. Cass., 11-3-1976, *R.W.*, 1976-77, 77.

(14. EVALUATION AND ANOMALOUS EXCEPTIONS) Although interruption can be renewed unlimitedly⁴⁶, the abovementioned rules do, in my opinion, offer sufficient guarantees for the debtor. Indeed, in all cases of interruption of prescription, the debtor knows or must know about the claim and thus has the possibility to prepare his defence and to take the necessary conservatory measures (evidence, etc.). The existence of possibilities of interruption without instituting proceedings in court is moreover in the interest of debtors, as it gives creditors the possibility of according an extension of payment without standing a chance of prescription.

Despite this, a number of claims in private law are subject to limitation periods which are usually considered un-interruptable. The qualification of the limitation period as un-interruptable - and thus not a normal prescription period - is in all cases of purely patrimonial claims highly criticable, the more because such qualification is in most cases not dictated by the text of the statutory provisions. If the qualification of limitation periods for claims arising out of public law or of family law as "fatal" periods can be acceptable, and so also the limitation of the exercise of certain powers by a strict time limit, there is no sensible reason for such a qualification in case of purely patrimonial claims. This is e.g. the case for such claims as the claims based on the liability of constructors or architects for work on buildings (maximum 10 years, interpretation of Articles 1792 and 2270 C.C.), or the claim for rescision of a sale of real property for gross disparity (2 years, interpretation of Art. 1676 C.C.), or the claim for compensation of the ejected shopkeeping tenant (max. 1 year, interpretation of Art. 28 Shoprenting Act, inserted in the C.C.), or claims based on product liability (Art. 11 of the EC-Directive on Product liability, providing for no other interruption than the commencement of a judicial procedure). Rejecting the other abovementioned possibilities of interruption is unjustified in these cases⁴⁷.

The most important exception, which is in my opinion at least as criticable, although there may be some good arguments in favour of it, is the prescription of any civil claim ("burgerlijke vordering", "action civile") based on facts which at the same moment constitute a punishable (penal) act⁴⁸. Such claims are subject to a prescription period of five years (Art. 26, 1 Introductory Title of the Code on Criminal Procedure, as modified in 1961), except where the prescription of the penal action has not been completed (this can lead to a longer prescription period in case of intermediate or heavy crime, as the prescription period in such cases is 5 c.q. 10 years and can be interrupted during this first period; it can however not be interrupted once the first prescription period has lapsed, and is never suspended). Problematic are, however, not these rules, but the current opinion, according to which this prescription can not be interrupted nor suspended, except for suspension of prescription by the introduction of a demand for compensation (Art. 27, 1 Introductory Title of the Code on Criminal Procedure, as modified in 1961; see also supra Art. 27, 2). Since long, the Royal Commission for the Review of Criminal Procedure has proposed, in its final Report, to abolish the specific regime of prescription of "civil" claims based on penal act, but their report has remained in the drawers since nearly 15 years now.

(15. EVALUATION OF THE FORMALISM OF INTERRUPTION - DELAY OF RESPITE) Given the fact that the abovementioned rules on interruption do in all cases - except maybe in case of lengthening of prescription by interruption of the penal action - offer sufficient guarantees for the debtor, one could rather ask whether the possibility of interruption should not be simplified, e.g. by attributing

⁴⁶ H. DE PAGE & R. DEKKERS, *Traité*, VII, No. 1198; W. WILMS, *Dagvaarding en verjaring*, No. 69 sq.

⁴⁷ Comp. K. SPIRO, *Die Begrenzung privater Rechte*, § 399; VOIRIN, note under Nancy 17-2-1934, *Dalloz*, II 33, and under Trib. Senlis 26-6-1946, *D.* 1948, 76. Various Belgian authors have also criticized several of these qualifications, e.g. F. GLANSDORFF, *R.C.J.B.*, 1991, (258), Nos. 11.

⁴⁸ W. WILMS, *De verjaring van de burgerlijke vordering voortspruitend uit een misdrijf*, Kluwer Antwerpen, 1987.

such effect to any written notice or summons or non-performance. This would, however, in many cases not offer the same guarantees to the debtor, and must therefore not interrupt prescription in the strict sense of the word (i.e. starting the same prescription period again).

A well-balanced solution would be to organise a postponement or "respite" of imminent prescription during a relatively short period, e.g. 6 months or 1 year, to be calculated from the day of notice or summons. A more or less comparable rule (although formulated in other terms) can be found in some other legal systems, such as Art. 3:317, lid 2 Dutch NBW.

Formally, Belgian law has no such rules, but there are some comparable rules in specific cases, such as Art. 1728 quater C.C. : claims by tenants for restitution of rent paid unduly (because the charged rent was too high, esp. the charged increase of rent) must be noticed to the landlord within 5 years. The claim becomes prescribed within 1 year after such notice. Similar rules can be found in international sales law (Art. 49 LUVI, Annex II CISG, comp. 7:23 Dutch NBW) and also in other legal systems, such as Art. 1669 Italian Civil code (defective work on buildings must be denounced within 10 years; from denunciation on, a 1 year prescription period runs). Technically speaking, such rules are different from the former one, because the effect of interruption differs : if the first period is considered to be a period for prescription, which can however be postponed a short time ("respite" in case of imminent prescription), a formal interruption will restart the original prescription period. If however, the first period is considered as a period of a different kind (estoppel period, Verwirkungsfrist), and the second one, starting from the notice, is a prescription period, interruption of this prescription will restart the second period. The system thus seems to be more fit in case the first period is shorter than the second one (which is not the case in Art. 1728 quater Belgian C.C.).

The examples show, on the other hand, that prescription cannot be studied meaningfully without having regard to other periods, esp. estoppel periods (Verwirkungsfriste) which may be combined, cumulated, etc. with prescription.

Although postponement or "respite" of imminent prescription is not formally known in Belgian law, the same result is reached by the application of the doctrine of abuse of rights (or exercise contrary to good faith) to the right to invoke prescription, i.e. the defence of prescription. This will be studied *infra*, in Part IV.

III. Commencement and normal duration of prescription - distinction between prescription periods and periods merely determining the object of an obligation.

(16. PRESENTATION OF THE QUESTION AND BASIS FOR A SOLUTION) The most delicate question is the determination of the periods during which prescription runs or does not run. In my opinion, this question is even more important than the question of the duration of prescription periods. Traditionally, this question is dealt under two different headings : 1° the commencement of prescription, and 2° the suspension of prescription. Although both concern the same question, namely whether prescription runs or not, there are some reasons to give a different treatment to the causes once prescription has started to run. They will therefore be dealt with in Part. IV.

It is a delicate question, because there are a number of situations where balancing the interests cannot lead to a clear, simple decision in favour of suspending (commencement of) prescription or not. This is the case where, on the one hand, the creditor has no reasonable possibility to exercise his claim (including cases where he does not know nor shouldn't know his claim), but, on the other hand, the debtor does not know and should not know of this impossibility, and must therefore not take any measures to preserve his interests and/or prepare their defence, as he may not be

prepared for a suspension of commencement of prescription⁴⁹.

No general theory for the solution of this question has been developed in Belgium⁵⁰, but there are sufficient elements in positive law to construct one. In my opinion, there is only one balanced solution for this problem, namely the combination or cumulation of two prescription periods : a shorter one, which is suspended (as to its commencement) by any reasonable impossibility to act on the side of the creditor, ("prescription" s.s.) and a longer one, suspended (as to its commencement) only by those causes for suspension for which the debtor must be prepared ("repose")⁵¹.

Before turning to the possible analysis of the common rules on prescription, I'd like to present some specific cases where different periods are combined or cumulated.

(17. APPLICATION OF THE SOLUTION IN INSURANCE LAW) In Belgium, the proposed solution forms the basic rule in Insurance Law, since the Reform of 1992.

Art. 34 § 1 of the 1992 Land Insurance Contracts Law provides indeed for a prescription and a repose period for claims arising out of first party insurance contracts :

- a) a three year period running from the moment the claimant knows of the event which gives rise to the claim, to be combined with
- b) a five year period running from the moment of the event which gives rise to the claim, unless this event has been hidden to the other party by fraud.

The situation is somewhat more complex in third party insurance contracts (liability insurance). For the exercise of the direct claim of the victim against the insurer of the person liable for the damages, a similar distinction between a prescription and a repose period is provided by Art. 34 § 2 of the same Act :

- a) a five year period running from the moment the claimant knows of the event which gives rise to the claim, to be combined with
- b) a ten year period running from the moment of the event which gives rise to the claim, except fraud (ulent concealment of the event).

The system is, however, complicated by the fact that the claim of the insured party itself against his insurer becomes prescribed 3 years after the introduction of a claim against him by the victim (Art. 34 § 1, 3). If the claim of the victim only becomes prescribed after 30 years - which is often still the case - the insurer could theoretically be sued up to 33 years after the accident. The recourse of the insurer against the insured becomes prescribed after 3 years from the moment the insurer pays the victim, except in case of fraud by the insured party (3 years from the moment the fraud was discovered).

Besides the burden to exercise formally the claim, there is also an obligation (or rather burden) to give notice of the damaging event to the insurer as soon as reasonably possible (Art. 19 Land

⁴⁹ See, more generally, J.A. JOLOWICZ, "Procedural questions", in *International encyclopedia of comparative law XI. Torts*, Chapter 13, Mohr Tübingen 1972, Nos. 64-68; K. SPIRO, *Die Begrenzung privater Rechte*, § 2-20, and in *Festschrift für Wolfram Müller-Freienfels*, p. (617) ; G. DANNEMANN, F. KARATZENIS & G.V. THOMAS, "Reform des Verjährungsrechts aus rechtsvergleichender Sicht", 55. *RabelsZ* 1991, 697.

⁵⁰ Except partly by Th. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Maklu, Antwerpen 1992, Nos. 1194 sq. and 1206.

⁵¹ Statute of repose is the american term used to distinguish this from the statute of limitations, governed by the "discovery rule". J.G.A. LINNSEN & A.C. VAN SCHAICK, "Van nieuw BW naar BW. VI. Rechtsvorderingen en bevrijdende verjaring; slapende honden", *Advocatenblad* 1992, (317) 318, use the words "absolute" v. "relative" prescription.

Insurance Contracts Act); traditionally, however, no link is made between this notice and prescription.

Summarizing, one could say that both limitation periods do not run as long as the damages have not been caused yet, and as long as the event giving rise to the claim is fraudulently hidden. Except in case of fraud, the event which gives rise to the claim does start at least the - longer - period of repose (5 .q. 10 years), even in case of ignorance, and the knowledge of the creditor does also start the - shorter - period of prescription (3 c.q. 5 years); whether ignorance by negligence does still suspend this shorter period, still has to be discussed more in general (infra). Such a system is in my opinion very satisfactory, except maybe for the relatively short period of repose in the first party insurance (only five years, where ten years should be preferred).

The balance could be disturbed in liability insurance contracts if use were made of the possibility given by Art. 78 § 2 Land Insurance Contracts Act (inserted by an Act of 16 March 1994) to allow the insurers to limit the coverage to cases where the damage becomes known during or within 3 years after expiration of the insurance contract. As such limitation is, however, rather a limitation of the contents of the obligation of the insurer itself than a prescription or repose period, and as it has also been distinguished clearly from such periods by the legislator, this possibility is only mentioned and not discussed any further here.

(18. ART. 11 PRODUCT LIABILITY : EXAMPLE OF A CLASSICAL MISUNDERSTANDING) At first sight, a similar system has been chosen in the EC-Directive on Product liability, implemented in Belgium by the Act of February 25, 1991. Indeed, Art. 10 and 11 of the Directive (Art. 12 of the Belgian Act) provide for a double period of limitation :

- a prescription period of 3 years running from the moment at which the claimant knew or should have known the damages, the defect and the identity of the producer, to be combined with
- a period of repose of 10 years, running from the moment the defendant (debtor) put the product into circulation.

There is, however, an important distinction between this period of repose and a "normal" period of repose in a well-balanced solution, namely that a "normal" period of repose, according to a balance of interests, can only start to run from the moment the event which gives rise to the claim materializes, i.e. the damages (irrespective of the knowledge or ignorance of the creditor). There are good reasons for having also a period of ten years starting at the moment the debtor put the product into circulation, - they are given in the 11th "Recital" of the Directive - but only for the limitation of the notion of defect, and not for limitation of (the exercise of) claims - just like there may be reasons to limit the coverage in certain insurance contracts in the way indicated by Art. 78 § 2 Land Insurance Contracts Act (supra) -. The 10 year period of Art. 11 of the EC-Directive, on the contrary, is the defective product of a mixture of two types of periods. The same is also true for the interpretation given by case law to the 10 year period claims based on the liability of constructors or architects for work on buildings (interpretation of Articles 1792 and 2270 C.C.), which should also be considered as a limitation of the notion of defective work, and not as a limitation of (the exercise of) claims.

(19. DURABILITY PERIODS ARE NO PRESCRIPTION OR REPOSE PERIODS) Prescription and repose periods - which are both *periods for the exercise of a claim* - namely have to be distinguished clearly from periods expressing only the contents of creditor's rights and other rights (such as limited property rights) or their reverse, i.e. debts or liabilities. In some cases, this distinction is evident, e.g. limited property rights established for a limited period of time (usufruct or leasehold for a number of years) or creditor's rights granted for a certain period (lease or rent for a certain time, insurance coverage for a year or number of days, etc.). Nobody will confuse such periods, which evidently "limit" the rights of creditor or proprietor in time, with a prescription or repose period, which limits the exercise of a claim for non-performance or other types of violation of such

rights. Nobody will ever let the prescription or repose period for claiming rent start from the first day of the contractual period instead of the day the rent becomes due. Nobody will ever let prescription or repose periods for the claim of an insured party against the insurer start from the first day of the police, instead of the moment of the event. It is the more astonishing that in other types of contracts or torts, such periods - only determining the contents of a debt or liability - are frequently confused with prescription or repose periods. This is mainly the case in the field of defective performance, especially in the case of so-called warranties, and product liability.

Indeed, in those cases, the first thing one should find out is what are the contents of the performance promised, and more specifically which *degree of durability* or keeping quality the product, work or service supplied must have according to the (express or implied terms of the) contract⁵². A period of time expressing this required durability, i.e. the period of time during which a product, work or service must function, keep quality and / or remain fit and safe (without defects) is indeed something totally different from a period of time during which a claim for non-performance or defective performance must be exercised formally. It is not a time limit for instituting legal proceedings, but a time limit for a defect to appear in order to be considered a defect. Periods which start irrespective of whether any claim is due can therefore not be considered as prescription or repose periods and may therefore not exclude a later introduction of the claim, provided the real prescription and repose periods are respected.

(20. APPLICATIONS : PRODUCT LIABILITY) There is nothing against the limitation to ten years of the period during which products must offer the necessary safety once they have been put into circulation (see the 11th Recital of the EC-Directive on product liability, 1st sentence). In many cases, this requirement would be even too strict. But a repose period - i.e. period for instituting judicial proceedings - may only start when liability becomes actual. It would e.g. by absurd to require a bottle of milk to keep quality (and thus safety) for ten years, instead of e.g. 1 month (or any other date indicated on the container), but it is as much absurd to say that the date indicated on the container is the date before which proceedings must be instituted. The same applies to pharmaceutical, maintenance, cleansing and many other products.

(21. APPLICATIONS : CONSTRUCTION AND WORK ON BUILDINGS) In a similar way, there is no fundamental objection against a limitation of the warranty period in construction contracts to a certain number of years, although in our age it is a shame to require buildings to be safe only for 10 years (and not at least 20 or 30 years), as does Belgian law (Art. 1792 and 2270 concerning the liability for gross defects as interpreted by case law; for small defects, there is no period determined by law; some other legal systems are even more disgraceful, such as the 5 year period of German law) - the consequence is that on a very large scale building societies do construct buildings which are meant to last only little more than 10 years. But there is a fundamental objection against the commencement of periods for instituting legal proceedings (prescription and/or repose periods) before the defect was known or could have been known or even before the safety or fitness of the building or other construction is actually affected. If we absolutely want to start prescription before the damages occur - I'm not convinced that this should be so in case of gross defects in work on buildings -, the only correct solution is the system of Art. 1169 of the Italian Civil code, clearly distinguishing three periods : 1° a period of durability, during which the building must remain solid, starting when the work is finished (in casu 10 years, which is in my

⁵² One of the rare articles where this distinction has been developed in a clear manner - at least for sales law - is H. GROSS & F.J. WITTMANN, "Technischer Zuverlässigkeit als Gegenstand kaufvertraglicher Regelung", *BB (Betriebsberater)*, 1988, 1126 sq. The distinction is also clearly made by J. GHESTIN, "Harmonisation des droits nationaux en matière de conformité et de garantie", rapport de synthèse au 1^{er} colloque de la FIEDA, Aix-en-Provence 7-8 maart 1980, in *Les ventes internationales de marchandises*, Economica, Paris 1981, (369) 387 No. 40. See also my *De invloed van de goede trouw op de kontraktuele schuldvorderingen*, Nos. 167 and 504-506.

opinion too short); 2° a period to give notice of the defect to the other party, starting when the defect is discovered (or should have been discovered) (in casu 1 year); and 3° a prescription period of one year, starting from the notice. The prevailing⁵³ interpretation of the warranty period of 10 years as a period for instituting judicial proceedings thus has to be rejected. Moreover, it is a shame that Belgian doctrine and case law usually⁵⁴ consider that the 10 year period may not even be lengthened by the parties, with the fallacy that the period is dictated by public order (general interest); evidently, only the fact that buildings must remain solid for at least 10 years is in the general interest, not the fact that they may not be guaranteed for more than 10 years ! Strangely enough, a more correct interpretation prevails in case the claim of the owner against the constructor only introduces him in a lawsuit instituted by a third party against the owner⁵⁵.

(22. APPLICATIONS : SALES AND OTHER CONTRACTS) Except for the 10 year periods in product liability and liability for gross defects in work on buildings, Belgian law is generally in conformity with this idea. Thus the short prescription period for claims based on other types of non-performance in construction contracts or sales contracts arising after receipt of the work, goods or services (Art. 1648 Belgian C.C. in sales contracts and analogous case law in other contracts) only starts when the defect comes to light⁵⁶. As to the period of durability, Belgian law has no legislative fixation, as this is generally considered to be varying from good to good and from service to service⁵⁷; determination is rightly considered to be a question of interpretation of the contract, supplemented by standards of reasonableness and usages. It is also true that Belgian doctrine, as the doctrine in most other countries, has usually considered the notion of "defect" as an "instant-notion", whereas reliability of a product cannot be measured in one moment, but only over a certain period of time⁵⁸. But there would probably be no fundamental objection against a rule along the lines of Art. 39 CISG, which would provide that after delivery, a buyer may rely on non-conformity of goods only during a period of two years, unless this period is incompatible with a contractual warranty, or along the lines of Art. 1792, 3 of the French C.C., establishing a period of two years of "garantie de bon fonctionnement" in construction contracts (since the "loi-Spinetta"). For the sake of understanding the extent to which such a period would be incompatible with a contractual warranty, one should also take into account the fact that information given by the supplier or producer about the quality or use of goods or services, when marketing or advertising them, is to be treated as a contractual warranty.

(23. CONCLUSIONS ON PERIODS OF DURABILITY; THEIR DETERMINATION BY THE PARTIES) Summarizing, I'd like to state that it is important to distinguish prescription and repose periods from periods expressing warranties, durability or keeping quality or safety of products or services. Prescription and repose periods should never start before the event giving rise to the claim has materialised, with the understanding that, in principle, no non-performance or breach can be relied upon when this event materializes only after expiration of the period of durability. With some anomalous exceptions (some of them caused by EC-Directives), Belgian law has no prescription or repose periods - except maybe the period of 30 years (see infra No. 25) - which are contrary to

⁵³ Cass. 18-11-1983, *R.W.*, 1984-85, 47 note G. BAERT.

⁵⁴ Except S. DE COSTER, "De aansprakelijkheid na oplevering voor (lichte) verborgen gebreken. Grondslag en toepassingsvoorwaarden", *T. Aann.*, 1989, 333 sq., and maybe F. LAURENT, *Principes de droit civil*, XXVI nr. 57-58 and H. DE PAGE & R. DEKKERS, *Traité*, IV nr. 898 B.

⁵⁵ Cass. 18-5-1961, *Pas.*, I, 1006; Cass. 5-2-1981, *Arr.*, 632.

⁵⁶ Cass. 4-5-1939, *Ateliers du Kremlin v. Ingersoll Rand*, *Pas.*, I, 223; Cass. 11-10-1979, *Entreprises générales A. Lapage v. Piron*, *Arr.*, 106.

⁵⁷ Comp. C. JASSOGNE, "La garantie découlant des contrats d'entreprise", *Ann. Lg. (Annales de la Faculté de droit de Liège)*, 1988, 268 No. 5.

⁵⁸ Comp. the criticism made by H. GROSS & F.J. WITTMANN, *BB*, 1988, 1128.

this principle, although the authors are usually rather confused on this⁵⁹. On the other hand, it has not developed many cases of legal determination of the period of durability, but, in my opinion, this is rather an advantage than a disadvantage, as the durability which may be expected from products or services is varying from product to product and from service to service, and should thus be determined according to the normal rules for interpreting and determining the contents of contracts.

As a matter of principle, determination of such period of durability by the parties is valid, unless it would affect the essence of the obligation of the supplier or seller, in which case it has to be considered as an illicit exemption clause. However, this principle has been set aside to a large extent by a stricter one : in the field of product liability, producers cannot limit their liability in regard to the statutory one (Art. 12 EC-Directive on product liability), except by taking care that "one" (the public) is not entitled to expect from the product more safety than it offers (thus escaping from the definition of defective in Art. 6). A very comparable system applies in most of Belgian sales law, and by analogy in other contracts for the supply of goods and services : professional sellers cannot limit their liability in regard to the statutory one (similar to the degree of liability in the Directive on product liability, esp. by permitting the seller to prove that it was impossible for him to detect the defective character of the goods), except by indicating to the buyer, before or at the conclusion of the contract, that the goods have specific defects or lack certain expected qualities⁶⁰. This rule follows from the traditional - but not inserted in the Code - equation of the breach of the professional seller's duty to examine the goods with all possible means - in itself a rule based on tradition⁶¹ and not inserted in the Code - with bad faith of the seller⁶². Further, constructors cannot limit their liability for gross defects in buildings to a period of less than 10 years; as this liability is imposed in the interest of public security, one cannot even escape this liability by indicating expressly that certain constructions will not last 10 years (this could only lead to contributory negligence on the other side, comp. Art. 8, 2 EC-Directive on product liability). Similarly, in insurance contracts, too, the statutory description of the (period of) coverage cannot be limited by agreement but in the cases and within the limits determined by law (See Art. 78 § 2 Land Insurance Contracts Act).

(24. GENERALISATION OF THE COMBINATION OF A PRESCRIPTION AND A REPOSE PERIOD) What is more unfortunate is that except for insurance law, Belgian law has not sufficiently developed the proposed distinction between prescription and repose periods (typically, even in insurance law, both are considered to be prescription periods).

Certainly, there is little necessity for a repose period for claims for performance (monetary or other debts) as well as any claims based on a *purely* contractual liability, such as repair or replacement of goods or work, or damages compensating such non-performance. In case of purely contractual

⁵⁹ Authors thus often confuse contractual warranty periods with prescription periods (e.g. H. de PAGE & R. DEKKERS, *Traité*, IV, No. 183). The distinction is clearly made by others, as e.g. C. JASSOGNE, "La garantie découlant de la vente", *Ann. Lg.*, 1988, 447.

⁶⁰ Comp. my *De invloed van de goede trouw op de kontraktuele schuldvorderingen*, No. 175 and 183. However, Cass. 6-2-1975, *Arr.* 638, has considered a rather general warning for defects or limits of the product as sufficient (in casu the sale of a second hand laundry).

⁶¹ See Cass 4-5-1939, *Ateliers du Kremlin v. Ingersoll-Rand*, *Pas.* I, 223; Cass 6-5-1977, *Cras v. Lamoral*, *Arr.*, 915, *R.C.J.B.* 1979, 162 note M. FALLON, "La Cour de cassation et la responsabilité liée aux biens de consommation", esp. No. 10.

⁶² For such equation, see Cass. 21-4-1988, s.p.r.l. Garage Bernard v. J. Lentini, R.G. No. 7844; M. FALLON, "Observations à propos de la garantie conventionnelle des vices dans la fourniture des biens de consommation", *J.T. (Journal des Tribunaux - belge)*, 1981, 242; B. DUBUISSON, "Quelques réflexions sur la présomption de mauvaise foi du vendeur professionnel", *Ann. Lv. (Annales de droit de Louvain)*, 1988, (177) 184 sq., 192 sq.

losses, there is little chance that they arise without being reasonably knowable to the claimant shortly after the moment the defect in performance materialises. The prescription in the strict sense of the word (short prescription) will thus start during the warranty or durability period. Similarly, the repose period of 10 years in liability insurance contracts is probably of little importance where the coverage itself is limited to damages becoming known within a certain period after expiration of the contract (except for long term insurance contracts).

The same does, however, not hold for not purely contractual damages⁶³, whether caused by defective performance of contractual duties or other. Many types of such damages will sometimes appear only many years after the damaging act. Meanwhile, prescription in the strict sense cannot start, as the victim should not reasonably know of the damages and maybe has not even suffered them yet ("discovery rule")⁶⁴. But on the other side, anyone who could be held liable should meanwhile be able to know after which period of time they do not have to be prepared anymore to defend themselves against claims for damages, unless he prolongates his fault (e.g. by concealment).

At first sight, besides insurance law, and some cases of strict liability, claims under Belgian law are subject to only one type of limitation : in most cases a "prescription" of thirty years, which has to be considered, in my opinion, as a repose period, but should be supplemented with a short prescription in the strict sense of the word, in many specific cases on the contrary a "short" prescription starting from the moment the claim could have been exercised⁶⁵, which should reversely be supplemented by a long repose period. Finally, in some other cases, there is a rather short repose period - the main example being the so-called prescription of any claim based on facts which at the same moment constitute a punishable (penal) act (supra).

In practice, however, various constructions and interpretations lead towards a system not very different from the proposed one, except by its unclarity. I will indicate first the constructions which supplement short prescriptions by a long repose period (infra No. 25), then the constructions which set aside too short repose periods by granting a supplementary claim to the victim (infra No. 26), and finally the constructions which supplement the thirty years repose period with something comparable to a short prescription (infra No. 28).

(25. THE SUBSIDIARY APPLICATION OF THE 30 YEAR PERIOD IN COMBINATION WITH SHORT PRESCRIPTIONS) Although in theory, the 30 year period is generally considered to be a prescription period - which would invalidate our construction -, this is only due to the fact that it can be interrupted (and suspended) according to the general rules of the Code. If, however, we limit the use of the term prescription to those periods which start according to the discovery rule, i.e. depending on the knowledge of (or reasonable knowability to) the creditor, this period is not a prescription period, contrary to at least some of the shorter periods. This appears e.g. each time when objections are raised against the doctrine that the short prescription periods in case of defective performance only start when the defect comes to light : such objection is then countered with the argument that there is evidently still the 30 years limit, thus implying that this period runs although the defect was not known to the creditor. Lawyers are exempted of their liability by way of

⁶³ This does not only concern extracontractual actions (tort actions), as under Belgian law, as under French law, a contractual relationship between the parties as a matter of principle excludes claims based on tort law for any damages which can or could have been claimed on the basis of the contract - even if independently from the contract, a violation of an extracontractual duty can be put forward (unless it is also the violation of a penally sanctioned duty).

⁶⁴ Comp. abroad BGB § 852; Art. 3:310 Dutch NBW; case law of the CJEC, e.g. Case No. 145/83 (1985) Adams I and Case No. 208/90 (25-7-1991), Theresa Emmott.

⁶⁵ E.g., Articles 2273, 2276, 2277 C.C.; Art. 15 Labour Contracts Act of July 3, 1978.

prescription after a period of five years from completion of their task (Art. 2276 bis C.C.); this does not seem to exclude that they are anyway exempted of their liability - unless prescription is interrupted - 30 years after the act of negligence, even if their task would not yet be completed at that moment. Landlords' claims for payment of the amount of rent corresponding to the annual adaptation of rent to the costs of living become prescribed in 1 year (Art. 2273, 1 C.C.); this does not prevent the landlord to calculate the rent of the next year as if it had been adapted the year before, too, but a landlord can certainly not go back more than thirty years for such recalculation of rents. Other examples could be added⁶⁶. The 30 year period is moreover in Belgian international private law a rule of "international public order", thus setting aside longer foreign prescription periods. And although this is not generally accepted, there certainly is a tendency to start the 30 year prescription in tort cases at the moment the tortious act has been committed, even if damages appear only years later.

(26. SETTING ASIDE SHORT REPOSE PERIODS) The main problem, however, in tort cases, is precisely the opposite one : the abovementioned prescription periods for claims based on facts which at the same moment constitute a punishable (penal) act are generally considered too short, precisely because they start at the moment of the punishable act, irrespective of the knowledge of the victim. It is interesting to see how practice sometimes avoids this prescription, namely by basing the claim simply on other facts, which do not constitute a punishable act, often a secondary negligence, such as the omission of examining the possibility of damage and of informing the victim of one's own mistake or fault⁶⁷.

(27. SUSPENSION OF REPOSE PERIODS BY FRAUD AND CONCEALMENT; DEGRESSIVE PRESCRIPTION) This solution is connected with another principle, which is not always explicit, but anyway present in Belgian law, namely the principle that neither prescription nor repose periods start as long as the claim is fraudulently hidden by the debtor. The rule is explicit in Art. 34 of the Land Insurance Contracts Act, but has also been applied in various other matters⁶⁸. A similar rule can be found e.g. in Art. 194, 4 Companies Act. Application of this rule to all repose and prescription periods would in any case be in conformity with the general principle in Belgian law that a fraudulent party may not rely on the error, mistake or negligence caused by ignorance of the other party, even if such ignorance is grossly negligent⁶⁹. The result would be that prescription and repose only start when the claimant effectively knows the elements necessary for the exercise of his claim, by information from the other party or otherwise.

⁶⁶ Comp. comparatively F. PETERS & R. ZIMMERMANN, in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, I, 222 sq.

⁶⁷ Cass. 23-4-1969, *Arr.*, 797, *Pas.*, I, 747, *R.W.*, 1980-81, 456 note P. DEPUYDT, *R.G.A.R.* (*Revue générale des assurances et de la responsabilité*), No. 8294; Appeal Antwerpen 19-5-1980, *VI. T. Gez.* (*Vlaams Tijdschrift Gezondheidsrecht*), 1981, 39, note R. KRUIHOF; Th. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, No. 1178, with further references; R. HEYLEN, "Welke fouten van een geneesheer geven aanleiding tot een dertigjarige verjaringstermijn", note under Appeal Brussels 19-3-1991, *VI. T. Gez.*, 1992, 222 sq. See also in Germany R. ZIMMERMANN, "Sekundäre und tertiäre Schadensersatzansprüche gegen den Rechtsanwalt", *NJW*, 1989, 2081 sq.; J. TAUPITZ, Die zivilrechtliche Pflicht zur unaufgeforderten Offenbarung eigenen Fehlverhaltens, 1989, -, "Aufklärung über Behandlungsfehler : Rechtspflicht gegenüber dem Patienten oder ärztliche Ehrenpflicht ?", *NJW*, 1992, (713) 714.

⁶⁸ A well-known case is the French Cass. 23-7-1986, *Rev. dr. imm.* 1987, 62, *T. Aann.*, 1988, 325, concerning the starting point of the ten year repose period in construction contracts.

⁶⁹ See Cass. 23-9-1977, Noordermeer, Lodewikus v. Van Loo, *Arr.*, 107, *R.W.* 1977-78, 933, *J.T.*, 1978, 362, *R.C.J.B.* 1980, 59 Note J. MATTHIJS, "De l'effet de la négligence ou de l'imprudence de la victime du dol"; W. DE BONDT, "de invloed van de nalatigheid van de bedrogene op de vordering tot nietigverklaring en/of de vordering tot schadeloosstelling", *TPR*, 1986, 1183 sq.; W. WILMS, "Het recht op informatie in het verbintenissenrecht", *R.W.*, 1980-81, (489) 494.

The field of application of the rule suspending commencement of prescription and repose periods in case of fraud could be very large, if the traditional equation of the breach of the professional's duty to inform with bad faith of the professional (comp. supra No. 23) would also be applied here, which is not excluded. Such an application would, however, certainly go too far and some distinctions are necessary.

In certain cases, esp. relationships of trust or confidence, prescription cannot run before the future claimant is given account or gets the information becomes prescribed by the law⁷⁰. Similarly, prescription of claims based on liability of lawyers do not run until they have closed off the file and sent their final statement of costs (Art. 2277bis C.C.). But apart from such cases, commencement of prescription is not subjected to the debtor's giving of information concerning the elements of possible claims. It is sufficient that these were apparent or should have been known by the claimant.

In other cases the fact that the debtor could have known the defect, non-performance or damage, does not prevent prescription to start, unless these elements are fraudulently concealed. Breach of a duty to inform could, however, give rise to a separate claim. This is especially the case when a duty to inform is a species of the obligation to mitigate damages (which lays on both parties). If damages increase because of such failure to inform, the debtor will be liable for the amount of damage caused by this failure, even if the original claim would have prescribed (compare supra No. 26). The compensation will normally not amount to full damages, but only to the increase of damages. One could even try to make a parallel between this result and the idea of a degressive prescription, advanced by some authors in tax law⁷¹

(28. THE SHORTENING OF PRESCRIPTION BY THE DOCTRINE OF ESTOPPEL) In those cases where no short prescription period (less than 30 years) is provided, there is another tendency, namely to apply the short prescription period from sales law by analogy, or, where this is not possible, to use the doctrine of estoppel to sanction claimants who didn't exercise their rights sufficiently fast. The case law of the Court of cassation is quite contradictory in this regard. On the one hand, it has accepted that an action for defective performance must be introduced within a short period even if Art. 1648 C.C. (sales law) does not apply⁷²; on the other hand, it has rejected the doctrine of estoppel several times with the fallacy that the existence of long prescription periods precisely proves that creditors do not have to exercise their rights quickly⁷³. The last reasoning is a fallacy, because the existence of prescription periods does not exclude a prior loss of rights by estoppel in case of lack of notice of the defect by the claimant (comp., supra, No. 8), as is evident from the many cases where such rule is recognized, as well in internal law as in International Treaties⁷⁴.

(29. CONCLUSIONS DE LEGE FERENDA) As appears from these considerations, the system of prescription and repose of Belgian insurance law should in my opinion be generalised, keeping,

⁷⁰ See for this problem my "Kontraktuele kontrolerechten en bewijsovereenkomsten", in *De behoorlijke beëindiging van overeenkomsten - La fin du contrat*, Jeune Barreau/Vlaams Pleitgenootschap /B.V.B.J., Brussels 1993, p. 57 sq.

⁷¹ R. DEBLAUWE, "Voor een degressieve verjaring", *De Standaard* 21-10-1993, 20.

⁷² Cass. 8-4-1988, Arr., No. 482.

⁷³ Cass. 17-5-1990, J.T., 1990, 442, R.C.J.B., 1990, 595.

⁷⁴ For more details, see my *De invloed van de goede trouw*, Nos. 462, 467, 475, 481 sq., 487, 491-492 and more generally Nos. 345 sq., and "Rechtsverwerking na de cassatie-arresten van 17 mei 1990 en 16 november 1990 : springlevend", *R.W.*, 1990-91, 1073 sq.

however, a repose period of 30 years⁷⁵ (instead of 10 years), and generalizing a preferably uniform shortened prescription period of something like 3 or 5 years. A repose period is useless only where the content of the obligation is itself limited in time as in some cases of strict liability. Reasonable limitations of this kind can be appropriate, except in case of fraud or fraudulent concealment of the illicit act. The rare cases of damages becoming known only after the expiration of long repose periods have to be dealt with as a collective risk, to be compensated by social security systems.

Commencement of both periods must remain suspended as long as appearance of these elements is fraudulently hidden.

The prescription period in the strict sense should not start before the moment the creditor knows or should have known about the elements of his claim (the moment these elements "appear") ("discovery rule"). In order to promote legal certainty about the prescription period in the strict sense, it would even be advisable to start prescription period at the moment of notice given by the claimant to the debtor, provided this notice did take place as soon as reasonably possible. This would lead to a combination of a duty to notify within a short period (actually recognized in a number of specific contracts, e.g. in sales contracts, contracts for work or services, insurance contracts, etc.) - which implies an estoppel period which could be called a notice period - and a uniform prescription period.

IV. Suspension or respite of prescription.

(30. INTRODUCTION) Completion of prescription is traditionally not only determined by the period, its starting point, and the possibilities of interruption, but also by the possibilities of lengthening the period by a) suspension and b) postponement or respite of prescription (the last possibility being in Belgian law mainly the result of the doctrine of abuse of rights).

Both possibilities are traditionally based on grounds which make it unreasonable to expect an exercise of the claim by the claimant, such as reasonable impossibility to do so or to perform an act of interruption. The problem arising in this respect is very analogous to the problem analysed supra, Part III : in some situations, it is reasonable in regard to the claimant to suspend or lengthen prescription, but the other party should not necessarily know of these reasons and should therefore not be obliged preserve his interests and/or prepare their defence. One could thus imagine a solution comparable to the solution in Part III.

(31. SUSPENSION) The civil code rules on suspension, however, show no such tendency. Prescription is suspended mainly a) in favour of persons without legal capacity to exercise their rights (such as minors) - but surprisingly enough this rule applies for prescriptions of 30 years and not for many shorter prescriptions and b) between spouses. Case law has added, as a matter of principle, all cases where one is prevented by law to exercise one's rights, but not those where one is prevented in fact (See No. 32)⁷⁶. Although these rules are not unreasonable on the basis of the considerations we have made, the idea of suspension itself is quite obsolete. It makes no sense to let the remaining period for prescription after suspension depend on the period already lapsed

⁷⁵ 30 years is not by accident the duration of a generation. It is interesting to see that the Dutch legislator, after having reduced the general prescription (repose) period from 30 to 20 years, has in extremis reverted to the 30 years period at least for certain types of liability, esp. for environmental damages (Art. 3:310, 2 NBW). A 30 years repose period is also found in Art. 10 of the proposed EC-Directive on waste products liability d.d. 28-6-1991, *O.J.*, 23-7-1991, C. 192 / 6.

⁷⁶ See Cass. 2-1-1969, *Kimpe v. Fournier, Libert, R.C.J.B.*, 1969, 91 note J. DABIN, "Sur l'adage «Contra non valentem agere non currit praescriptio»", esp. p. 102-103.

before suspension⁷⁷. More modern codifications (e.g. Art. 3:320 Dutch NBW) have therefore replaced suspension often by a postponement of prescription, providing that the claimant can anyway still exercise his rights during a short period (e.g. 6 months or 1 year) after the reason for such a respite has fallen away.

Such criticism does not apply to cases where suspension is combined with interruption, such as the instituting of judicial proceedings or the starting of serious negotiations. In such cases, prescription cannot restart before the judicial proceedings are closed off or the negotiations finished (or broken off). An exception is only made in case of absence of any procedural act during 30 years.

The choice of the grounds for suspension can equally be criticized, esp. the suspension in favour of persons without legal capacity, as they are represented by a legal representative (parents, tutor, curator etc.)

(32. SUSPENSION OR RESPITE) Respite in stead of suspension is a technique generally used in procedural law (e.g. Art. 53, para 2 Judiciary Code and Art. 751 § 1, para 5 Judiciary Code concerning timer periods ending on a Saturday or Sunday c.q. during judicial holidays) Other statutory or judge-made rules on the lengthening of prescription could often be interpreted already in the sense of a postponement or respite. Art. 35 § 2 Land Insurance Contracts Act, e.g., speaks about a suspension of prescription in case of force majeure of the claimant. It seems, however, that these terms have to be understood rather in the sense of a postponement or respite of prescription. In other cases, too, case law has recognized that prescription is "suspended" in case of force majeure or impossibility to exercise the claim, but a closer analysis shows that, in reality, no suspension, but a respite is meant : the so-called suspension is only granted if there was an impossibility during the last part of the prescription period. This is also the case of the application of the old maxim «contra non valentem agere non currit praescriptio», which outside the statutory cases of suspension (supra, No. 31) does not lead to a full suspension of prescription, although a respite is not excluded⁷⁸. Another example of respite is the period of 1 year conceded to heirs for the exercise of certain rights, esp. of avoidance (e.g. avoidance in the cases of Art. 224 § 2 or 1423, par 2 Civil Code; see also Art. 488bis j, para 3 C.C.).

(33. RESPITE AS A CONSEQUENCE OF ABUSE OF RIGHTS) Postponement or "respite" of imminent prescription is further also the practical result of the application of the doctrine of abuse of rights (or exercise contrary to good faith) to the right to invoke prescription, i.e. the defence of prescription. It is indeed, accepted, that this right, as any other one, cannot be exercised in a manner manifestly exceeding the limits of normal use by a reasonable person (this is the standard formulation of the doctrine of abuse of rights)⁷⁹. This could precisely be the case if the creditors' failure to interrupt prescription is caused by the debtor himself⁸⁰. The sanction of such an abuse is

⁷⁷ Comp. more generally K. SPIRO, *Die Begrenzung privater Rechte*, §§ 69, 83 and 127.

⁷⁸ J. DABIN, "Sur l'adage «Contra non valentem agere non currit praescriptio»", *R.C.J.B.*, 1969, (91) esp. p. 106. Comp. also J. CARBONNIER, "Notes sur la prescription extinctive", *Revue trimestrielle de droit civil*, 1952, p. (171) 174; K. SPIRO, "Zur neueren Geschichte des Satzes «agere non valenti non currit praescriptio»", *Festschrift für Hans Lewald bei Vollendung des 40. Amtsjahres als ordentlicher Professor im Oktober 1953*, Helbing & Lichtenhahn, Basel 1953; F. RANIERI, "Exceptio temporis e replicatio doli", *Riv. dir. civ. (Rivista di diritto civile)*, 1971 I, (253) 290 sq., and - "Suspensione della prescrizione ed exceptio pacti sive doli", *Riv. dir. civ.*, 1971, II, 11.

⁷⁹ At least since Cass. 10-9-1971, *R.C.J.B.*, 1976, 300.

⁸⁰ Comp. Cass. fr. 3-10-1956, *Gaz. Pal.* II, 323, and J. CARBONNIER, *R.Trim.Dr.Civ.*, 1957, 141; Cass. fr. 28-10-1991, *Bull. civ.* I, n° 282; the articles by H. MERZ, "Auslegung, Lückenfüllung und Normberichtigung dargestellt an den Beispielen der unzulässigen Berufung auf Formungültigkeit und des Mißbrauchs der

simply limiting the right to its normal use. In case of abuse of prescription, this means that the other party must still get a chance to interrupt prescription during a short period from the moment the cause of his negligence - i.e. the behaviour of the other party - has stopped.

Typical cases of such abuse, leading towards a respite of prescription, could be the withholding of documents or other elements of proof, keeping the claimant dangling "up in the air"⁸¹, negotiations not serious enough to imply a waiver of the already lapsed part of the period of prescription, and all cases where the claimant is prevented by the other party to exercise his rights in time⁸².

As indicated supra, insurance law goes further by considering that prescription is interrupted as soon as the claimant gives notice of the damages or asks for compensation, and remains suspended as long as the insurer has not given a final written answer (Art. 35 § 3 Land Insurance Contracts Act). Respite of e.g. 1 year would have been sufficient in this case, but the prescription period in insurance law is anyhow rather short.

V. The imperative character of rights derived from the rules on prescription.

(34. INTRODUCTION) Traditionally the "institution" of prescription is qualified as a matter of "public order"⁸³, although this is incompatible with the precise rules on this question. Certainly, the existence of an institution like extinctive prescription is in the general interest, but the same is true for nearly any other legal institution. The existence of the institution of contract is evidently also in the general interest, but this does not prompt any author to qualify contracts as a matter of "public order".

The truth is that some rights, defences or remedies derived from the rules on extinctive prescription are imperative, and can therefore not be waived for the future, but only for the past. We try to distinguish them and to indicate the appropriate consequences.

(35. PROTECTION OF THE DEBTOR) First of all, on the side of the debtor, is is not the right to be liberated after the legal period of time which is imperative (see Articles 2220 and 2223 C.C.), but the right to know at each moment how long one has to remain prepared for certain claims (exception : between spouses). This implies the right to be liberated after a certain period of time, which can, in principle, not be suspended or restarted without the knowledge of the debtor. This right can not be relied upon in case of fraud.

As a consequence, the parties can agree at any moment to interrupt and thus restart prescription or repose (cfr. supra). They can agree on additional, more flexible, methods of interruption. They can even agree on additional grounds for suspension, provided their duration is determined or they

Verjährungseinrede", 163. *AcP*, 1963, (305) esp. 312 sq., and F. RANIERI, "Exceptio temporis e replicatio doli nel diritto dell' Europa continentale", *Riv. dir. civ.*, 1971 I, 253 sq. and compare J. LIMPENS & R. KRUIHOF, "Rechtsvergelijkende aantekeningen bij het begrip rechtsmisbruik", *Recht in beweging, Opstellen aangeboden aan prof. mr. René ridder Victor*, Kluwer Antwerpen 1973, I, p. (655) 669.

⁸¹ See Appeal Gent 8-4-1982, and Cass. 8-4-1988, Modest Neirynek v. Verstraete, Kleiwarenfabriek Eurogas Arr. No. 482. Comp. also Appeal Brussels, 14-6-1993, IBO v. Regie der gebouwen, 1st Ch., R.G. No. 140/91 (procedure in cassation pending).

⁸² Comp. J. CARBONNIER, "La règle «contra non valentem agere non currit praescriptio»", *Rev. crit. lég. jur.* 1937, 158 sq.; K. SPIRO, *Die Begrenzung privater Rechte*, § 95, 106-110. Much more conservative J. DABIN, *R.C.J.B.* 1969, 101 v.; H. DE PAGE & R. DEKKERS, *Traité*, VIII nr. 1238 B - but their refusal is directed specifically against a "suspension", and not necessarily against a short respite.

⁸³ E.g. W. DELVA, *Preadvies over de bevrijdende verjaring en de vervaltermijnen*, p. 280; A. VAN OEVELEN, *TPR* 1987, No. 15.

leave the debtor the possibility to end suspension at any time⁸⁴. It would be logical to allow them to agree also on a longer prescription or repose period than the one prescribed by law, provided its duration is determined or to allow them at least to do so once the claim has come into existence (as e.g. in Art. 3, 6°, al. 4 of the Treaty on Bills of Lading, forming Art. 91 of the Belgian Shipping Act) - but this is generally not accepted. All these possibilities can only be excluded in those cases where the extinction of the specific claim is in itself in the general interest - which is very rarely the case (in private law, this should concern only some claims in family law and the obsolete rule of prescription of civil claims arising out of punishable acts, as described *supra*) - and even then the debtor could still grant the claimant a new, different title by promising compensation or payment.

(36. PROTECTION OF THE CLAIMANT) On the side of the claimant, it is not the right to exercise his claim during the full statutory period of prescription *c.q.* repose which is imperative, but the right not to lose one's claim by simple ignorance not caused by negligence, unless after the lapse of the statutory repose period.

Therefore, prescription periods in the strict sense can be shortened by the parties⁸⁵, unless exercise of the right would be rendered impossible, and reservation made for legislation on unfair clauses. But the legal causes for interruption and suspension (including postponement of commencement of prescription as long as the claimant should not know about his claim) cannot be excluded on beforehand (*comp.*, *supra*, No. 13), nor the possibility of respite, except in the context of a licit exemption clause.

⁸⁴ *Comp. Cass.* 4-10-1894, *Pas.*, I, 291.

⁸⁵ See *Cass.* 5-6-1941, *Bull. Ass.*, 745; *Cass.* 25-1-1968, *de Vrede v. Cordier*, *Arr.*, 702, *J.T.*, 185; *Appeal Brussels* 22-2-1979, *J.T.*, 555; A. VAN OEVELEN, *TPR* 1987, (1755) 1763 No. 10; M. REGOUT-MASSON, "La prescription", in *Unité et diversité de droit privé*, Centre de droit privé et de droit économique, ULB 1983, (408) 422 No. 26 sq.