An Economic Assessment of the Extinctive Prescription Rules in the Principles of European Contract Law

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I.

Law has its time dimension. The legal doctrine of extinctive prescription[1] would enable the debtor to refuse the performance demanded by the creditor as a result of lapse of time. The practice of this doctrine, especially concerning its scope of application and the length of prescription period, however, is widely various among legal systems. Under the promotion of European integration, the Commission on European Contract Law nevertheless has recently published a codified prescription regime in its Principles of European Contract Law Part III (hereinafter as the Principles).[2] Due to its comprehensive comparative law study and simplicity, the Principles has become the reference point if not the model for application or reform in individual legal systems. Germany's recent legal reform was just one example.[3] The

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[1] There are two kinds of prescription: Acquisitive and extinctive. The former would let a person get a positive right. In this paper, the term of prescription would only mean extinctive prescription unless explicitly meant otherwise. In common law and international conventions, prescription has been called limitation (period). Due to the fact that the discussion of limitation usually does not make such distinction and has seen limitation as a procedural rather than a substantive concept, the term prescription is used in this paper. This term is also adopted in Principles of European Contract Law (PECL). As Zimmermann pointed out, liberative prescription is a more accurate term than extinctive prescription. However, the former term has conventionally been accepted. See Ole Lando, Eric Clive, Andre Prum, and Reihard Zimmermann ed., Principles of European Contract Law Part III 157-209 (2003).

[2] See Ole Lando, Eric Clive, Andre Prum, and Reihard Zimmermann ed., Principles of European Contract Law Part III (2003).

[3] See Reinhard Zimmermann, The New German Law of Obligations: Historical and Comparative Perspective 122-158 (2005)

incorporation of the Principles into the Draft Common Frame of Reference (DCFR) submitted to the European Commission for sure would further its influence in Europe wide jurisdictions and beyond.[4] This is not to be surprised because the prescription rules of the Principles basically are sound and sensible. The underlying policy considerations put forward by the Principles, however, are imprecise and sometimes conflicting. There is a gap between theory and text. This paper, based on an economic analysis, would argue that countering the imbalance of depreciation rate of evidence between the debtor and the creditor is the *only* foundation of the doctrine of extinctive prescription.

The following section II would investigate the underlying policy considerations put forward by the Principles and demonstrate why they are irrelevant and why the foundation of the prescription doctrine should be imbalance of evidence, not something else. Based on this depreciation of evidence thesis, section III would discuss why extinctive prescription should not apply to claims in rem. Section IV would show why the subjective approach adopted by the Principles to determining the prescription period is doubtful. Section V would analyze the Principles' another innovation – allowing parties to modify prescription regime by agreement. Section VI would explain why the depreciation of evidence thesis is coherent with the weak effect of prescription while other thesis is inconsistent with the effect. Section VII is the conclusion.

II.

Under the heading "Underlying Policy Considerations", the Principles said:

[4] This prescription regime, with very minor addition, has been incorporated in Draft Common Frame of Reference (DCFR) Model Rules as III. – 7: 101 – III. 7: 601, see Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Outline Edition (2009).

> Prescription is based, especially, on three policy considerations. (1)Protection must be granted to a debtor who, in view of the "obfuscating power of time" (*Windcheid & Kipp* § 105 (p.544)), finds it increasingly difficult to defend an action. (2) Lapse of time demonstrates an indifference of the creditor towards the claim which, in turn, might engender a reasonable reliance in the debtor that no claim will be pursued. (3) Prescription prevents long drawn-out litigation about claims which have become stale. Thus, prescription aims, in a very special way, at legal certainty. [5]

To start with, legal certainty should not be used in this way. Legal certainty should refer that law once has been enacted or declared should enjoy authority and has binding force on judges and people even it is not a "good" law. So if there exists no legal doctrine of extinctive prescription, legal certainty still applies. Legal certainty would justify any law including the law without extinctive prescription. Furthermore, it is odd to say that a right to be cut short is a way to promote legal certainty. If this is so, anything goes for legal certainty. Indeed, the Principles continued to say:

> The need for legal certainty must, however, be balanced against the reasonable interests of the creditor. Since prescription can effectively amount to an act of expropriation, the creditor must have had a fair chance of pursuing the claim. This consideration is taken account of, particularly, by the suspension ground provided in Article 14:301.[6]

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[5] See Ole Lando, Eric Clive, Andre Prum, and Reihard Zimmermann ed. 159.

[6] See Ole Lando, Eric Clive, Andre Prum, and Reihard Zimmermann ed.159-60. European Court of Human Rights has adopted this interests-balancing approach to review whether or not the concerned rules of extinction prescription has violated the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See, for example, Phinikaridou v. Cyprus, no.

From this passage, it can be seen that the so-called legal certainty is not the criterion to determine when a prescription of the claim should occur. Rather, a balance of the interests of the creditor and the debtor is the criterion. Then the following question naturally arises: what interests of the creditor and the debtor would be affected if the law does not contain a doctrine of prescription?

For technical reason, the policy consideration (2) will first be investigated here. To say the "lapse of time demonstrates an indifference of the creditor towards the claim" (the indifference thesis) is an unreasonable assumption of the creditor because it assumes the creditor is not rational. The law indeed does not make that assumption. For example, the debtor is required by the law to take necessary steps to protect the creditor's interests if the creditor fails to accept the performance[7] which interpretatively includes the creditor's indifference to his right. But according to the law only when the creditor causes the debtor's non-performance would the debtor be relieved of his duty.[8] In the real world, some creditors might be indifferent to their rights, however, this cannot be generalized to lay the foundation of prescription. Most of the cases of lapse of time just do not fall into this category. The universal application of the rules of prescription based on this indifference thesis would render

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23890/02, §§ 64-65, ECHR judgment of 20 December 2007.

[7] See *Article 7: 110 PECL* (Property Not Accepted): (1) A party which is left in possession of tangible property other than money because of the other party's failure to accept or retake the property must take reasonable steps to protect and preserve the property. (2) The party left in possession may discharge its duty to deliver or return: (a) by depositing the property on reasonable terms with a third person to be held to the order of the other party, and notifying the other party of this; or (b) by selling the property on reasonable terms after notice to the other party, and paying the net proceeds to that party. (3) Where, however, the property is liable to rapid deterioration or its preservation is unreasonably expensive, the party must take reasonable steps to dispose of it. It may discharge its duty to deliver or return by paying the net proceeds to the other party. (4) The party left in possession is entitled to be reimbursed or to retain out of proceeds of sale any expenses reasonably incurred. *Article 7: 111 PECL* (Money not Accepted): Where a party fails to accept money properly tendered by the other party, that party may after notice to the first party discharges its obligation to pay by depositing the money to the order of the first party in accordance with the law of the place where payment is due.

[8] See *Article 8:101(3) PECL* (Remedies Available): A party may not resort to any of the remedies set out in chapter 9 to the extent that its own act caused the other party's non-performance.

law irrational. Furthermore, unlike the latter discussed consideration of obfuscating power of time which can be anchored in the imbalance of depreciation rate of evidence, it is very difficult to conceptualize a measurement to balance the interests of the creditor and the debtor under this indifference thesis. This would render a rational determination of the length of prescription period impossible. And this would violate the non-arbitrariness principle of the rule of law.

The policy consideration (3) also needs to be rethought. To begin with, the text does not specify what interests prescription would serve. It seems to say that the courts, from the perspective of public interests, should not involve in the long drawn out litigation. But what are the public interests? If this means that the courts' burden of resolving disputes would be lessened, some problems arise. First, prescription might not lessen the courts' burden because once the creditor knows he could not resort to the courts for demanding the debtor's performance thanks to prescription, he has incentive to bring suits in the courts before the expiry of prescription period. The volume of the suits in the courts would be the same in both cases. Or more probably, the volume of the law suits in the legal regime with prescription would be larger than the one without prescription because the creditor might just forget his right due to the passage of longer time. Second, to lessen the courts' burden *per se* cannot be the goal of any legal system, otherwise barring any suit in the courts is a much better means to achieve this end. Third, if the long drawn-out litigation is the concern, then starting the judicial process should not be a ground for suspending or interrupting the running of prescription period. But this rule is universal.[9] The actual direction of causation is reversal to the saying of the policy consideration of the Principles. As the latter

[9] See *Article 14:302 PECL* (Suspension in Case of Judicial and Other Proceedings): (1) The running of the period of prescription is suspended from the time when judicial proceedings on the claim are begun. (2) Suspension lasts until a decision has been made which has the effect of res judicata, or until the case has been otherwise disposed of. (3) These provisions apply, with appropriate adaptations, to arbitration proceedings and to all other proceedings initiated with the aim of obtaining an instrument which is enforceable as if it were a judgment.

discussion of the obfuscating power of time shows, the courts could dispose quickly the "stale" cases based on the allocation of the burden of proof. Therefore, it is the long drawn-out litigation which makes the claims stale, not the stale claims make the litigation long drawn-out. If this is so, it should be addressed by procedure law not prescription rules which are part of substantive law.

Now we can consider the policy consideration (1). This "obfuscating power of time" argument for protecting the debtor is not so obvious. The question is why the "obfuscating power of time" would only work on the debtor? If the power of time works on both the creditor and the debtor, as always it does, does it still need a prescription law to protect the debtor? The answer tends to be no because the creditor universally is disadvantaged by bearing the burden of proving the existence of the right to performance.[10] The debtor can do nothing but still win the case if the creditor cannot meet the requirements of the proof. The "obfuscating power of time" means that the probity of the evidence put forward by the creditor would decline as time passes. In this case, the "obfuscating power of time" would naturally protect the debtor. Consequently, either the debtor would win the case if the creditor brings the suit in the court late or the creditor would bring the suit in the court as soon as possible. In both cases, prescription is meaningless. Only in the case in which the depreciation rate of evidence for the creditor is slower than the one for the debtor does the "obfuscating power of time" become relevant. The following table 1 would illustrate this.

In the table, assume at t1, the time when the debtor has to effect his performance, the probity of evidence for the creditor and the debtor is the same at 75%. In the first two columns, the creditor (C1) and the debtor (D1) have the same depreciation rate of

[10] See Bruce L. Hay and Kathryn E. Spier, Burdens of Proof in Civil Litigation: An Economic Perspective, 26 J. Legal Stud. 413 (1997).

evidence, 5%. As the column C1 shows, based on more likely than not standard, i.e., the probity of the evidence is more than 50%,[11] the creditor has to bring the suit no later than at t5, otherwise he cannot prove the existence of his right to the debtor's performance. He cannot win the case, however, if the debtor has done his performance. The column D1 shows the debtor would defeat the claim brought by the creditor before and including the time, t5. This shows that the obfuscating power of time would not in any manner disadvantage the debtor because the debtor would defeat the creditor's claim before t5 and the creditor could not prove the existence of claim after t5.

Table 1.

p	C1	D1	C2	D2	C3	D3	C4	D4
r / t	5%	5%	10%	5%	5%	10%	5%	15%
1	75	75	75	75	75	75	75	75
2	70	70	65	70	70	65	70	$\boxed{60}$
3	65	65	$\boxed{55}$	65	65	$\boxed{55}$	65	45
4	60	60	45	60	60	45	60	30
5	$\boxed{55}$	$\boxed{55}$	35	$\boxed{55}$	$\boxed{55}$	35	$\boxed{55}$	15
6	50	50	25	50	50	25	50	0
7	45	45	15	45	45	15	45	0

The columns C2 and D2 show that the depreciation rate of evidence for the

[11] See David Kaye, The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation, 1982 Am. B. Found. Res. J. 487-516 (1982). Even the standard of proof in the civil law countries might be stricter, such as 75% level of confidence, than here's assumption, only the numbers should be changed and the reasoning would be no different. See Kelvin M. Clermont and Emily Sherwin, A Comparative View of Standards of Proof, 50 Am. J. Comp. L. 243 (2002).

creditor is faster than the one for the creditor. The creditor has depreciation rate of 10% and the debtor 5%. The creditor has to bring the suit no later than t3, sooner than t5 , the latest time the creditor can bring the suit in the case that the creditor and the debtor has the same depreciation rate 5%. Needless to say, this would not disadvantage the debtor. The reverse is true.

As the columns C3 and D3 show, the faster depreciation rate of evidence for the debtor would render the debtor in a disadvantaged position. At the usual depreciation rate of 5% for the creditor, the creditor still cannot bring the suit later than t5, however, he can bring the suit later than t3 but no later than t5 and still win the case because during this period the probity of evidence for the debtor is less than 50% resulting from the faster depreciation rate of evidence, 10%, for the debtor. As the columns C4 and D4 show, when the depreciation rate of evidence for the debtor accelerating to 15%, the debtor would be further disadvantaged to the position in which he will lose the case if the creditor brings the suit later than t2, a time before t3 the disadvantaged position he stands in the case of depreciation rate of 10%.

To remedy the debtor’s disadvantage, as the case of C3 v. D3 shows, requiring the creditor to bring the suit no later than t3 would restore the debtor to his original position in the case of C1 v. D1. In the case of C4 v. D4, however, the creditor has to be required bringing the suit no later than t2 if the debtor is to be restored to his original position in the case of C1 v. D1. This shows that the greater the imbalance of depreciation rate of evidence between the creditor and the debtor, the sooner the creditor has to be required bringing the suit. In other words, the greater the imbalance of depreciation rate of evidence between the creditor and the debtor, the shorter the prescription period should be.

Although the asymmetry of the value of the claim between the creditor and the debtor would affect the optimal length of prescription period, this is usually not assumed in private law which is based on equality of parties in legal relations. The affected interests of the creditor resulting from a shortening period for bringing the suit is the value of the claim multiplied by his decreasing chance to win the case while the affected interests of the debtor resulting from a lengthening period for responding to the suit is the value of the claim multiplied by his increasing chance to lose the case. When the creditor's affected interests equals to the debtor's affected interests, this is the time at which the prescription period should be set. On the assumption of equal value of the claim both to the creditor and the debtor, the increased chance to win for the creditor or the increased chance to lose, i.e., the imbalance of depreciation rate of evidence between the creditor and the debtor, is the only factor determining the length of prescription period. Sometimes, the law, however, would make value judgment to assign more value to the creditor, such as the claim arising from personable injuries[12], and thus grant him a longer prescription period than usual.

III.

After the above theoretical investigation, the following would assess the rules of prescription in the Principles. The first rule should be whether extinctive prescription should also apply to the claims in rem. Contrary to many legal systems,[13] the Principles says no. Its reasons are:

If they [absolute rights] were subject to prescription, this would entail a

[12] For example, *Article 14:307 PECL* (Maximum Length of Period): The Period of Prescription cannot be extended, by suspension of its running or postponement of its expiry under these Principles, to more than ten years or, in case of claims for personal injuries, to more than thirty years. This does not apply to suspension under Article 14:302.

[13] See German Civil Code §197 I (1). French Civil Code Article 2227; Cass. civ. 3e, 22 juin 1983, RTDCiv. 1984, 744, obs. Giverdon; Cass. civ. 1re, 2 juin 1993, D. 1994, 593, note Fauvarque-Cosson. For Taiwan's law, see See Interpretations Nos. 107 & 164, Constitutional Court, Judicial Yuan, The Republic of China (Taiwan) http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=107; http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=164。

> considerable, and arguably unjustifiable, qualification of the absolute right. Thus, it may be maintained that claims arising from absolute rights should only perish with the absolute right itself. Also, within the law of property there will have to be a careful co-ordination with the law of acquisitive prescription.[14]

If extinctive prescription can apply to claims in rem, indeed, it would mess up with acquisitive prescription (adverse possession) which has different function. Usually the periods of extinctive prescription and acquisitive prescription are different. In the case in which the period of extinctive prescription is longer than the one of acquisitive prescription, the extinctive prescription would be useless because the adverse possessor has already become the owner and thus can exercise his right to exclude. In the other case in which the period of extinctive prescription is shorter than the one of acquisitive prescription, the extinctive prescription would *de facto* cut short the period of acquisitive prescription. This is problematic because the function of acquisitive prescription is either protecting the adverse possessor's investment or clearing the titles to facilitate transactions[15]and none of which could be attached to extinctive prescription. There is no debtor's investment to protect in the obligation, obviously. Also, obligation is not an asset and thus no body would buy it. Thus, there is no transaction to facilitate. But the most important difference between claims in rem and claims in personam is that the former do not involve the passage of time. By definition, the pleading of the claims in rem is that the respondent is interfering with the claimant's right now or is going to interfere with it in the near future. No passage

[14] See Ole Lando, Eric Clive, Andre Prum, and Reihard Zimmermann ed., supra note 2, 159.
[15] See Jeffry M. Netter, adverse possession, in The New Palgrave Dictionary of Economics and the Law I 18-21 (2002); Boudewijn Bouchaert and Ben W. F. Depoorter, Adverse Possession – Title Systems, in Boudewijn Bouchaert and Gerrit De Geest ed., Encyclopedia of Law and Economics § 1200 (2000).

of time, no concern of imbalance of depreciation rate of evidence would arise! This reasoning is the same as why right to withhold performance or right to reduce price is not subject to prescription.[16]

IV.

The most dramatic characteristic of the Principles is to propose a discoverability standard to calculate the prescription period. The Principles provides a very short general prescription period of three years.[17] Although the commencement of period is still an objective one,[18] it is suspended by the creditor's subjective ignorance. Article 14:301 of the Principles provides:

> The running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably know of:
>
> (a) the identity of the debtor; or
>
> (b) the facts giving rise to the claim including, in the case of a right to damages, the type of damage.

At first glance, this makes sense. The creditor's ignorance of such facts means in no circumstance can the creditor prove the existence of the obligation in the court. In such case, it is impossible for the creditor, compared with the debtor, to have any advantage of depreciation rate of evidence. As the function of prescription is to

[16] See Ole Lando, Eric Clive, Andre Prum, and Reihard Zimmermann ed., supra note 2, 158

[17] *Article 14:201 PECL* (General Period): The general period of prescription is three years.

[18] *Article 14:203 PECL* (Commencement): (1) The General period of prescription begins to run from the time when the debtor has to effect performance or, in the case of a right to damages, from the time of the act which gives rise to the claim. (2) Where the debtor is under a continuing obligation to do or refrain from doing something, the general period of prescription begins to run with each breach of the obligation. (3) The period of prescription set out in Article 14:202 begins to run from the time when judgment or arbitral award obtains the effect of res judicata, or the other instrument becomes enforceable, though not before the debtor has to effect performance.

remedy the debtor’s disadvantage resulting from his faster depreciation rate of evidence, logically prescription shall not apply here.[19] However, there is flipside of this rule. Firstly, it might not help the creditor when the creditor knows the facts too late or it might even hurt the creditor from shorter prescription period adjusted for this subjective approach. Secondly, it might hurt the debtor in the case that the evidence of the debtor has already depreciated so much that the debtor cannot bear his burden of proof. This will be demonstrated by table 2.

Table 2.

p	C1	D1	C2	D2	C3	D3	C4	D4
t \ r	5%	5%	10%	5%	5%	10%	5%	15%
1	75	75	75	75	75	75	75	75
2	70	70	65	70	70	65	70	$\boxed{60}$
3	65	65	$\boxed{55}$	65	65	$\boxed{55}$	65	45
4	$\underline{60}$	60	$\underline{45}$	60	$\underline{60}$	45	$\underline{60}$	30
5	$\boxed{55}$	$\boxed{55}$	35	$\boxed{55}$	$\boxed{55}$	35	$\boxed{55}$	15
6	50	50	25	50	50	25	50	0
7	45	45	15	45	45	15	45	0

Table 2 is the same as table 1 except that we assume the creditor knows the facts at t2 and the prescription period expires at t4. As column C1 shows, this would hurt the creditor because he can sue and win the case no later than t5 under objective approach while he would lose the case if he sues at t5 under new subjective approach.

[19] In a recent judgment of Phinikaridou v. Cyprus, European Court of Human Rights declared a prescription rule taking no consideration of the claimant’s knowledge of the identity of the debtor might violate the European Convention for Protection of Human Rights and Fundamental Freedoms. See supra note 6.

Column C2 shows if the creditor ‘s depreciation rate of evidence is so large that this new prescription period would not enable the creditor to win the case if he sues at t4 at that time his probity power of evidence has already depreciated below 50%. The law is not helpful. Furthermore, as both cases of C3 v. D3 and C4 v. D4 show, the debtor would be disadvantaged once the creditor sues at t4 when the debtor’s depreciation rate of evidence is large .

The Principles, trying to protect the debtor under subjective approach, provides a short general prescription period of three years and a maximum period of ten years from objective starting point. This might lead to a combination of worst results from both approaches. When the ignorance of the creditor is not a dominant phenomenon, a shorter prescription period would deprive the creditor of his right to claim; when the debtor’s depreciation rate of evidence is large, a long maximum period would put the debtor in helpless position. In other words, the approach adopted by the Principles is only suitable for the cases in which both the ignorance of the creditor is prevalent and the debtor’s depreciation rate of evidence is small. In the public law, the people’s claims against the state such as tax-return fit this. In the claims between private parties, however, this is usually not the case. Although whether the three years and the ten years respectively provided by the Principles is too short or too long are empirical questions, its unsound underlining policy considerations make it suspiciously so.

It is also doubtful that the Principles provides that a claim established by legal proceedings shall have a longer prescription period.[20] A claim established by legal proceedings only means that there did exist an obligation owed by the debtor to the creditor. If there is a second suit, the creditor would meet his burden of proof based on the first judgment or award. But the first judgment or award does not change the

[20] *Article 14:202 PECL* (Period for a Claim Established by Legal Proceeding): (1)The period of prescription for a claim established by judgment is ten years. (2) The same applies to a claim established by an arbitral award or other instruments which is enforceable as if it were a judgment.

condition that the debtor has a faster depreciation rate of evidence concerning his tender of performance if there is one. If the creditor brings the second suit late, the debtor would be disadvantaged if he has already tendered his performance after the judgment but cannot prove it due to the faster depreciation rate of evidence.

V.

Another significant feature of the Principles is that it allows the parties to modify requirements for prescription by agreement.[21] Viewed from the depreciation of evidence thesis developed in this paper, it is not refutable to the Principles' argument that party autonomy should prevail because public interest has been rarely sacrificed here.[22] An interesting argument in the Principles, however, is worthy of notice. The Principles said:

> Party autonomy provides the necessary counterbalance to (i) the short general prescription period of three years and (ii) the uniformity of the regime in general.[23]

This is a punitive default rule argument.[24] The parties are given incentive to modify the inefficient rules provided by law. This argument as a support to the short general prescription period of three years, however, is problematic. This punitive default rule argument could also apply to a long general prescription period. When the period is short, it is the creditor who would initiate to modify it; when the period is long, it is

[21] *Article 14:601 PECL* (Agreements Concerning Prescription): (1) The requirements for prescription may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription; (2) The Period of prescription may not, however, be reduced to less than one set out in Article 14:203.
[22] See Ole Lando, Eric Clive, Andre Prum, and Reihard Zimmermann ed., supra note 2, 207-8.
[23] See Ole Lando, Eric Clive, Andre Prum, and Reihard Zimmermann ed., supra note 2, 208.
[24] See Ian Ayres and Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L. J. 87 (1989).

the debtor who would initiate to modify it. In private law, a faster or slower depreciation rate of evidence does not imply the party vis-à-vis the other party has a weaker or stronger bargaining position in making the contract. A default rule of a short prescription period, thus, should not be necessarily preferred to a default rule of a long prescription period. There is also a problem for a default rule of a short prescription period as in the Principles, if it causes loss of some interests. This loss cannot be totally eliminated by the agreement of the parties because those non-contractual obligations by definition are beyond the reach of the agreement of the parties.

VI.

The depreciation of evidence thesis would also better explain weak effect of prescription as adopted in the Principles. Article 14:501 of the Principles provides:

(1) After expiry of the period of prescription the debtor is entitled to refuse performance.
(2) Whatever has been performed in order to discharge a claim may not be reclaimed merely because the period of prescription had expired.

Firstly, the indifference thesis of the policy consideration (2) cannot fit in with this rule. Conceptually if not logically, the indifference thesis would render the claim valid no more once for all. Secondly, the public interest thesis of the policy consideration (3) cannot fit in, either. Either the debtor can or cannot reclaim would not increase the burden of courts if the legal consequence is certain. The debtor would not bring suits in the courts if the law explicitly provides he cannot reclaim. Similarly, the creditor would not dispute the debtor's reclaim if the law provides his right to the debtor's performance is no more valid once the prescription period expires. Thus, it is unnecessary for the debtor to bring suit to reclaim his performance back. It is legal uncertainty, not the effect of prescription, either weak or strong, which increases the burden of the courts. On the contrary, the depreciation of evidence thesis perfectly explains this rule. The imbalance of depreciation rate of evidence only occurred in the litigating process, prescription has nothing to do with the validity of the claim in substantive law. If the debtor tenders its performance after expiry of prescription period, this means the debtor does not dispute the validity of the claim. To reclaim the performance by the debtor is out of the function of prescription.

The Principles also contains provision concerning the effect of prescription on set-off. Article 14:503 of the Principles provides:

> A claim in relation to which the period of prescription has expired may nonetheless be set-off, unless the debtor has invoked prescription previously or does so within two months of notification of set-off.

If the claim is still valid in substantive law, then no question the claim can be set-off. However, to prevent the creditor from taking advantage of the debtor by passing the litigation process which would confirm the debtor's discharge of his performance if he really did it, thus the debtor should have veto power. This is why the set-off will not be valid if the debtor has invoked prescription previously or within two months after receiving the notice of set-off.

VII.

The extinction prescription rules in the Principles of European Contract Law are a marvelous product of comparative law studies. The underlying policy considerations as said by the Principles, however, do not fit in with the rules. An economic analysis fills the gap. This paper shows that to remedy the imbalance of depreciation rate of evidence between the creditor and the debtor is the only foundation of extinctive prescription. On positive side, it explains better the rules concerning the doctrine's narrow scope of application, default nature and weak effects. On normative side, it suggests the subjective discoverability rule is doubtful and it's unnecessary for setting a special long prescription period for claims established by legal proceedings.