

ANNEX II

List of participants

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ANNEX III

List of documents and working papers before
the Working Group

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**3. Commentary on the Draft Convention on Prescription (Limitation) in
the International Sale of Goods, May 1972 (A/CN.9/73)***

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* 6 November 1972. This commentary deals with the provisions of the Draft Convention on Prescription (Limitation) in the International Sale of Goods as approved by the Commission at its fifth session. It supersedes the previous commentary on the provisions of the Draft Convention as recommended by the Working Group on Time-Limits and Limitations (A/CN.9/70/Add.1). The present commentary has been prepared by the Secretariat, in consultation with the Rapporteur of the Commission, in conformity with the request made by the United Nations Commission on International Trade Law in the report on the work of its fifth session. *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 20. See above, first part, II, A.

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Introduction: objective of the Convention

1. This Convention is concerned essentially with the period of time within which parties may bring legal proceedings to exercise their rights or claims relating to a contract of international sale of goods.

2. Divergencies in national rules governing the prescription of rights or limitation of claims create serious difficulties. Limitation periods under national laws vary widely. Some periods are short (e.g. six months, one year) in relation to the practical requirements of international transactions, in view of the time that may be required for negotiations and for the institution of legal proceedings in a foreign and possibly distant country. Other periods (which in some cases are as long as 30 years) are longer than are appropriate for transactions involving the international sale of goods, and fail to provide the essential protection that should be afforded by limitation rules.¹ This includes protection from the loss of evidence necessary for the fair adjudication of claims and protection from the uncertainty and possible threat to solvency and to business stability from delayed settlement of disputed claims.

¹ See analysis of replies to the questionnaire and comments made at the fourth session of the Commission by Governments on the length of the prescriptive period and related matters: report of the Secretary-General (A/CN.9/70/Add.2, section 14) at paras. 6 and 16 (see above, I, B, 1).

3. National rules not only differ, but in many instances are difficult to apply to international sales transactions.² One difficulty arises from the fact that some national laws apply a single rule on limitations to a wide variety of transactions and relationships. As a result, the rules are expressed in general and sometimes vague terms that are difficult to apply to the specific problems of an international sale. This difficulty is further enhanced for international transactions, since merchants and lawyers will often be unfamiliar with the implication of the general concepts and with the techniques of interpretation used in a foreign legal system.

4. Perhaps even more serious is the uncertainty as to which national law applies to an international sales transaction. Apart from the problems of choice of law that customarily arise in an international transaction, problems of prescription (or limitation) present a special difficulty of characterization or qualification: some

² For some illustrations of difficulties, see R. Kuratowski, *Limitation of Actions Founded on Contract and Prescription of Contractual Obligations in Private International Law*, Estratto Paglivatti del Terzo Congresso di Diritto Comparato, vol. III—Paris IV, pp. 447-460; E. Harris, *Time Limits for Claims and Actions, in Unification of the Law Governing International Sale of Goods* (J. Honnold, ed. 1966), pp. 201-223. Also see H. Trammer, *Time Limits for Claims and Actions in International Trade*, *ibid.*, pp. 225-233.

legal systems consider these rules as "substantive" and therefore must decide which law is applicable; other systems consider them as part of the "procedural" rules of the *forum*; still other systems follow a combination of the above approaches.³

5. The result is an area of grave doubt in international legal relationships. The confusion involves more than the choice of the manner of approaching and describing a legal relationship. An unexpected or severe application of a rule of limitation may prevent any redress for a just claim; a lax rule of limitation may fail to provide adequate protection against stale claims that may be false or unfounded. The problems are sufficiently serious to justify the preparation of uniform rules for claims arising from the international sale of goods.

6. In view of the widely varying concepts and approaches prevailing under national laws with respect to the prescription of rights and the limitation of claims,

³ See para. 4 of commentary on art. 3.

it has been considered advisable to provide uniform rules in a convention that are as concrete and complete as possible. A brief and general uniform law (such as a law merely specifying the length of the period of limitation) would do little in actual practice to achieve unification, since the divergent rules of national law would then be brought into play in "interpreting" such a brief and general provision. Since this Convention is confined to one type of transaction—the purchase and sale of goods—it is possible to state uniform rules for this type of transaction with a degree of concreteness and specificity that is not feasible in statutes that deal with many different types of transactions and claims. The loss of uniformity through the use of divergent rules and concepts of national law cannot be wholly avoided, but this Convention seeks to minimize this danger by facing the problems that are inherent in this field as specifically as feasible within the scope of a convention of manageable length. See also article 7, on rules for interpreting and applying this Convention.

Part I: substantive provisions

SPHERE OF APPLICATION

Article 1

[Introductory provisions; definitions]*

(1) This Convention shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller against each other relating to a contract of international sale of goods.

(2) This Convention shall not affect a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of this claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

(3) In this Convention:

(a) "Buyer" and "seller", or "party", mean persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or duties under the contract of sale;

(b) "Creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money;

(c) "Debtor" means a party against whom the creditor asserts a claim;

(d) "Breach of contract" means the failure of a party to perform the contract or any performance not in conformity with the contract;

(e) "Legal proceedings" includes judicial, administrative and arbitral proceedings;

(f) "Person" includes corporation, company, association or entity, whether private or public;

(g) "Writing" includes telegram and telex.

COMMENTARY

I. Basic scope of the Convention, paragraph (1)

1. Under article 1 (1), this Convention applies both to the "limitations of legal proceedings" and to "the prescription of the rights" of the parties. These two forms of expression were employed since different legal systems employ varying terminology with respect to the effect of delay in bringing legal proceedings to exercise rights or claims. Consequently, it is important to make it clear that the rules of this Convention do not vary because of differing terminology of national law. This approach is vital in view of the international character of the Convention and its objective to promote uniformity in interpretation and application.

2. Specific aspects of the Convention's sphere of application will be discussed in relation to: (a) the parties governed by the Convention, and (b) the types of transactions and claims or rights that are subject to the limitation period.

(a) The parties

3. Paragraph (1) of article 1 shows that this Convention is directed to the rights or claims arising from the relationship of the "buyer and seller". The terms, as defined in article 1 (3) (a), include the "successors to and assigns of their rights or duties under the contract of sale". The Convention would thus embrace the succession of right or duties by operation of law (as on death or bankruptcy) and the voluntary assignment by a party of his rights or duties under a sales contract. One important type of "successor" could be an insurer who becomes subrogated to rights under a sales contract. Succession could also result from the merger of companies or from corporate reorganization.

* Captions were not drafted at the session of the Commission; they are added for ease of reference and should not be considered as parts of the text of the draft.

4. It will be noted that, under paragraph (3) (a), to become a "buyer" or "seller" a person must "buy or sell, or agree to buy or sell, goods". Thus a party who has only the right (or "option") to conclude a sales contract is not a "buyer" or "seller" unless and until the contract is concluded. Thus rights under the option agreement (as contrasted with rights under a contract that may result from the exercise of the option) are not governed by the Convention.

(b) *Transactions subject to the Convention; types of claims or rights*

5. Under article 1 (1), this Convention applies to "a contract of international sale of goods". Whether a sale is "international" is governed by article 2. Certain exclusions from the scope of the Convention are provided in articles 4 through 6.

6. Paragraph 1 of article 1 provides that this Convention shall apply to rights or claims "relating to a contract" of international sale of goods; the Convention is not intended to apply to claims that arise independent of the contract such as claims based on tort or *delict*. The references in article 1 (1) to the "contract" and to the relationship between the "buyer and seller against each other" also exclude claims against a seller by a person who has purchased the goods from someone other than the seller. For example, where a manufacturer sells goods to a distributor who resells the goods to the second buyer, a claim by the second buyer against the manufacturer would not be governed by the Convention (see also para. 3, above). Nor does this Convention apply to rights or claims of the buyer or seller against a person who is neither a "buyer" nor "seller" and who guarantees the performance by the buyer or seller of an obligation under the contract of sale.¹

7. The language "relating to a contract" contained in article 1 (1) is broad enough to include not only claims arising from breach of a sales contract but also claims relating to the termination or invalidity of such a contract.² For example, the buyer may have made an advance payment to the seller under a contract which the seller fails to perform because of impossibility, government regulation or similar supervening event. Whether this event will constitute an excuse for the seller's failure to perform may often be in dispute. Hence, the buyer may need to bring an action against the seller presenting, in the alternative, claims for breach and for restitution of the advance payment. Because of this connexion, in practice, between the two types of claims, both are governed by this Convention.

II. *The Convention not applicable to "time-limits" (délchéance), paragraph (2)*

8. Paragraph (2) of article 1 is designed, *inter alia*, to make clear that this Convention has no effect on certain rules of local law involving "time-limits" (*délchéance*); typical examples are requirements that one party give notice to the other party within limited periods of time describing defects in goods or stating that goods will not be accepted because of defects. These requirements of notice by one party to the other party are designed to permit the parties to take prompt action in adjusting current performance under a sales trans-

saction—action such as making prompt tests to preserve evidence as to the quality of goods or taking control over and salvaging rejected goods.

9. The periods of time for such action are usually very brief, and often are stated in flexible terms. For example, article 39 (1) of the Uniform Law on the International Sale of Goods (ULIS), annexed to The Hague Convention of 1964, provides that "the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it". Other articles of ULIS provide that a party may avoid the contract if he makes such a declaration to the other party, under varying circumstances, "within a reasonable time" (arts. 26, 30, 62 (1)) or "promptly" (arts. 32, 43, 62 (2), 66 (2), 67, 75). These brief, flexible periods for special types of parties' action "other than the institution of legal proceedings" are quite different from a general period of limitation. Consequently, paragraph (2) of article 1 states that this Convention shall not affect "a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party".³

10. Paragraph (2) of article 1 also preserves rules of applicable law providing "a particular time-limit" within which one party is required, as a condition for the acquisition or exercise of his claim, to "perform any act other than the institution of legal proceedings". Thus, this paragraph would preserve various types of national rules which, while variously expressed, are not comparable to the general period of limitation governed by this Convention.

III. *Definitions, paragraph (3)*

11. "Person" is defined in article 1 (3) (f) to include "corporation, company, association or other entity, whether public or private". This definition is intended to show that this Convention is applicable without regard to the form of organization that engages in contracts of sale. "Public" entities often engage in commercial activities and it is important to make it clear that such activities are subject to this Convention in the same way as "private" entities. An entity need not be corporate. An "association" such as a partnership which can sue or be sued in its own name under national law, is an "entity" and a "person" for the purpose of this Convention. The terms used in article 1 (3) (f) are, of course, illustrative only and not exclusive of others.

12. Most of the other definitions of words contained in paragraph (3) of article 1 can best be considered in connexion with provisions that employ the word in question. For example, the definition of "legal proceedings" in paragraph (3) (e) can best be considered in connexion with article 14, and the definition of "breach of contract" in paragraph (3) (d) can best be considered in connexion with articles 9 (3) and 11 (2).

13. Certain other words used in this Convention (such as "rights" and "claims") are not defined, since their meaning can best be seen in the light of the context in which they are used and the objectives of this Convention. It is important to note that the construction of these words by reference to the varying conceptions of national law would be inconsistent with the international character of the Convention and its objective to promote uniformity in interpretation and application.⁴

¹ For similar reasons, claims based upon a documentary letter of credit will not come within the scope of this Convention. The documentary letter of credit is an undertaking by banks independent of the underlying sales contract and is not the legal relationship of "the buyer and seller against each other".

² Opportunity for a reservation with respect to applicability of the Convention to actions for annulment of the contract is provided in article 34.

³ As to the effect of a contract clause establishing a time-limit, see art. 21 (3) and accompanying commentary, para. 5. Also see art. 9 (3).

⁴ See art. 7 and accompanying commentary. Also see para. 2 of commentary on art. 30.

Article 2

[Definition of a contract of international sale]

[(1) For the purposes of this Convention, a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.]

(2) Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph (1) of this article and of article 3 shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract.

(3) Where a party does not have a place of business, reference shall be made to his habitual residence.

(4) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

COMMENTARY

1. This article deals with the degree of internationality which brings a sale of goods within the scope of this Convention.

I. The basic criterion, paragraph (1)

2. This paragraph lays down the basic criterion for the definition of a contract of international sale of goods. The paragraph provides that for a contract of sale to be considered international, the contract must satisfy the following three requirements: (a) at the time of the conclusion of the contract, the parties must have their *places of business*, and not simply centres of only formal significance, such as places of incorporation, (b) in *different States* (whether these are contracting or non-contracting States). In short, the parties' places of business should *not* be in the same State.

3. Various additional qualifications for the definition of a contract of international sale of goods were considered: these related to international carriage of goods, offer and acceptance, and place of delivery. They were rejected, however, because of the serious practical difficulties of clarity in relation to these terms. The simplicity and clarity of this single basic criterion (i.e., that the parties have their place of business in different States) contributes to certainty in solving the question whether a sale of goods is "international".

4. Under paragraph (1) of this article, the contract of sale of goods is considered international, even though *at the time of the conclusion of the contract*, one of the parties neither knew nor had reason to know that the other's place of business was in a different State. One example is where one of the parties was acting as agent for a foreign undisclosed principal. Two reasons led to the decision not to require knowledge that the other party's place of business was in a different State. The first is that inclusion of subjective elements in article 2 (1) would raise difficult problems of proof. The second is that knowledge by the parties that, at the time of the conclusion of the contract, they have their places of business in different States was not considered necessary for the application of rules of prescription. When parties enter into a contract of sale, they contemplate performance and not the prescription of their claims. While they may need to know, at the time of contracting, which law defines their mutual obligations concerning performance, at this time there is little practical interest in knowing which prescription rules would apply to their legal actions in case of breach or other non-performance.

5. Paragraph (1) of this article, however, was placed within square brackets so as to indicate that the scope of the Convention should be given further consideration. (Cf. art. 3 (1) and accompanying commentary, para. 2. Also cf. art. 36.)

II. Place of business, paragraph (2)

6. This paragraph deals with the situation where one of the parties to the contract has more than one place of business. For the purpose of characterizing a sale of goods as "international" no problem arises where all the places of business of one party (X) are situated in States other than the one where the other party (Y) has his place of business; whichever place is designated as the relevant place of business of X, the places of business of X and Y will be in *different States*. The problem arises only when one of X's places of business is situated in the *same State* as the place of business of Y. In such a case it becomes crucial to determine which of these different places of business is the relevant place of business within the meaning of paragraph (1) of this article.

7. Paragraph (2) lays down the criteria for determining the relevant place of business. This paragraph, as a general rule, points to the party's "principal place of business". Thus, where a party has his *principal* place of business in State A, and has branches in States B, C and D, that party's place of business for the purpose of this Convention is the place of business in State A.

8. Paragraph (2) of this article recognizes that in some cases a mere branch may have a closer relationship with the transaction than a principal place of business where such a branch is in the same State as the place of business of the other party, failure to take account of this fact would lead to excessive extension of the scope of this Convention. Therefore, paragraph (2) qualifies the general rule relating to the *principal* place of business, by the phrase "unless *another* place of business has a closer relationship to the contract and its performance". The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating to the offer and the acceptance as well as the performance of the contract. In determining this closer relationship, this paragraph states that regard shall be given to "the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". Factors that may not be known to one of the parties at the time of entering into the contract would include supervision over the making of the contract by another office or the foreign origin or final destination of the goods; when these factors are not known to or contemplated by the parties they are not to be taken into consideration.

III. Habitual residence, paragraph (3)

9. This paragraph deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have a "place of business" may enter into a contract of sale of goods that is intended for commercial purposes, and not simply for "personal, family or household use" within the meaning of article 4 of this Convention. The present provision provides a means of dealing with this situation.

IV. Civil or commercial character of the transaction, paragraph (4)

10. This paragraph deals with the classifications that some legal systems make in connexion with the applicability of different bodies of law. In order to avoid misinterpretations that might otherwise arise, the paragraph excludes reference to these classifications, whether they relate to the nationality of the parties, or to the "commercial or civil character of the parties or of the contract".

Article 3

[Application of the Convention; exclusion of the rules of private international law]

(1) This Convention shall apply only when, at the time of the conclusion of the contract, the seller and buyer have their places of business in different Contracting States.

(2) Unless otherwise provided herein, this Convention shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

(3) This Convention shall not apply when the parties have validly chosen the law of a non-Contracting State.

COMMENTARY

1. Paragraphs (1) and (2) of this article deal with these questions: When must a Contracting State apply the rules of this Convention? What contacts between an international sales transaction and a Contracting State (choice of law rules) are required for the application of the Convention? Paragraph (3) deals with the freedom of the parties to exclude the application of the Convention.

I. Application of the Convention, paragraph (1)

2. Paragraph (1) of this article provides that this Convention must be applied "only when, at the time of the conclusion of the contract, the seller and buyer have their place of business in different Contracting States". Thus, a Contracting State is not bound, by adhering to this Convention, to apply the rules of the Convention when one party has his place of business in a non-Contracting State. This restriction on the application of the Convention was considered necessary in view of the difficulty inherent in alternative tests for the application of the Convention. Consideration was given to the rule that the forum of a Contracting State should always apply the Convention to the international sale of goods; this was finally rejected because this would give excessive application to the Convention and might encourage forum shopping. General reference to the rules of private international law was found unsatisfactory because of the wide disparity among such rules. (Cf. art. 3 (2).)

II. Exclusion of the rules of private international law, paragraph (2)

3. Paragraph (2) of this article provides that, subject to any contrary provisions in this Convention, the Convention must be applied without regard to "the law which would otherwise be applicable by virtue of the rules of private international law". This language is designed to emphasize the fact that the applicability of this Convention depends on the basic test established in article 3 (1) above rather than the general rules of private international law.

4. If the applicability of this Convention were linked to the rules of private international law, special difficulties would have been presented because of unusually divergent approaches to the characterization of prescription problems that are followed in different legal systems. For example, while most Civil Law systems characterize limitations problems as substantive questions and apply the proper law of the contract (*lex causae contractus*) (and in some cases, the "proper law of prescription"), most Common Law jurisdictions characterize

limitations problems as questions of procedure and, on this ground, apply the rules of the *forum (lex fori)*. In yet other Common Law jurisdictions, a combination of the two characterizations is possible.¹ The Convention's establishment of its own rule for applicability in article 3 (1), therefore, makes certainty as well as simplicity of the Convention.²

5. The opening phrase of the paragraph, "unless otherwise provided herein", is occasioned by specific provisions of the Convention which refer to the rules of private international law. One such instance is paragraph (1) of article 13 which provides, *inter alia*, that in the absence of a provision in the arbitration agreement, the manner for commencing arbitration shall be determined "by the law applicable to that agreement" i.e., the law which, under conflict of law rules, governs the arbitration agreement. Another example is paragraph (3) of article 21 which provides, *inter alia*, that the validity of a certain clause defined therein shall not be affected by the provisions in the other paragraphs "provided that such clause is valid under the applicable law".

III. Effect of agreement by the parties, paragraph (3)

6. Paragraph (3) of this article deals with the extent to which the parties are free to exclude the application of the Convention. The State has an interest in preventing stale claims from crowding its courts and tribunals, and in reducing the presentation of false evidence. While the autonomy of the will of the parties is a cardinal principle in a régime of substantive rules on the international sale of goods, prescription rules may be considered to be of such a mandatory character as to justify restricting the freedom of choice of the parties. See, e.g., article 21. Thus, as the compromise accepted by all the members of the Commission, article 3 (3) sets forth the only situation in which the parties can, as a result of the exercise of their freedom of choice, exclude the application of the Convention; that situation is when the parties have "validly chosen the law of a non-Contracting State". For example, where parties to an international sale of goods have their place of business in different Contracting States, if the contract validly provides that the applicable law to the contract is the law of a State that has not adopted the Convention, the forum of a Contracting State would not apply the Convention. Whether the choice including its manner is "valid" is the question to be determined by the forum.

¹ The rules of English conflict of laws on this question may be illustrated by the following examples. Proceedings are instituted in an English court. The English limitation period (which is classified as procedural) is six years:

- (i) The applicable law is that of France, where the limitation period is 30 years and treated as a matter of substantive law; the English court will hold the claim to be barred after six years;
- (ii) The applicable law is that of Greece, where the limitation period is five years and is treated as a matter of substantive law; the English court will have regard to the applicable law and hold that the right itself under the claim has already been prescribed after five years;
- (iii) The applicable law is that of the State of X, where the limitation period is five years and is treated as a matter of *procedure*; the English court will not have regard to the limitation rules of State X (since these are procedural) and will hold the claim barred after six years.

² But see art. 36 and accompanying commentary.

Article 4

[Exclusion of certain sales and types of goods]

This Convention shall not apply to sales:

(a) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family or household use, unless the fact that the goods are bought for a different use appears from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(b) By auction;

(c) On execution or otherwise by authority of law;

(d) Of stocks, shares, investment securities, negotiable instruments or money;

(e) Of ships, vessels or aircraft;

(f) Of electricity.

COMMENTARY

I. *Exclusion of consumer sales, subparagraph (a)*

I. Subparagraph (a) of this article excludes consumer sales from the scope of this Convention. A consumer sale effected by a tourist in another country could conceivably be subject to the limitation rules of this Convention, but for the exclusion of such sales contained in subparagraph (a) of this article. In such transactions, however, the seller often does not know or cannot be aware of the fact that the other party has his place of business or habitual residence in another country. Such transactions are usually considered as domestic transactions and do not comprise a significant part of international trade. It is for this reason, among others, that this Convention excludes such sales from its scope of application.

2. Another reason for the exclusion of consumer sales from this Convention is that in a number of countries such sales are subject to various types of national laws that are designed to protect the consumer. To avoid any risk of impairing these rules, it is considered advisable that questions of limitations of actions or prescriptions of rights relating to such contracts should be excluded from this Convention.

3. The basic test used to categorize such sales is an objective one, namely, whether the goods are "of a kind and in a quantity *ordinarily* bought by an individual for personal, family, or household use". However, a sale of goods which is ordinarily bought for consumer purposes will not be excluded from the scope of the Convention when "the goods are bought for a different use". The test employed in determining whether the goods are bought for a different purpose is again an objective one: this fact must appear "from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;" the actual knowledge of the seller that the goods are bought for a different use is not important.

II. *Exclusion of sales by auction, subparagraph (b)*

4. Subparagraph (b) of this article excludes from the scope of this Convention sales by auction. Because sales by auction are often subject to special rules under the local law, it was concluded that they should remain in every aspect subject to the special rules of the local law. In addition, it was not considered proper that the length of the limitation period is affected by the location of the place of business of the successful bidder since at the opening of the auction the seller could not know which buyer would make the purchase.

III. *Exclusion of sales on execution or otherwise by authority of law, subparagraph (c)*

5. Subparagraph (c) of this article excludes sales on judicial or administrative execution or otherwise by authority of law, because such sales are usually governed by special rules in the State under whose authority the sale is made. Furthermore, such sales do not constitute a significant part of international trade and may safely be regarded as purely domestic operations.

IV. *Exclusion of sales of stocks, shares, investment securities, negotiable instruments or money, subparagraph (d)*

6. This subparagraph excludes sales of stocks, shares, investment securities, negotiable instruments and money. Such transactions present problems that are different from the usual international sale of goods and, in addition, in many countries, are subject to special mandatory rules. It was considered appropriate that prescription of claims relating to such sales should be outside the scope of this Convention.

V. *Exclusion of sales of ships, vessels or aircraft, subparagraph (e)*

7. This subparagraph excludes from the scope of the Convention sales of ships, vessels and aircraft which are also subject to special rules under national legal systems. This subparagraph does not require registration for ships, vessels or aircraft in order to exclude their sales from the scope of the Convention. The reason is to avoid problems that might arise in connexion with the definition of what amounts to "registration" under the Convention; various methods of registration are used by various legal systems. Furthermore, there could be uncertainty in deciding what law would govern registration, since the place of possible registration might not be known at the time of the sale.

VI. *Exclusion of sales of electricity, subparagraph (f)*

8. This subparagraph excludes sales of electricity from the scope of the Convention on the ground that international sales of electricity present problems that are different from those of the usual international sales.

Article 5

[Exclusion of certain claims]

This Convention shall not apply to claims based upon:

(a) Death of, or personal injury to, any person;

(b) Nuclear damage caused by the goods sold;

(c) A lien, mortgage or other security interest in property;

(d) A judgement or award made in legal proceedings;

(e) A document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

(f) A bill of exchange, cheque or promissory note.

COMMENTARY

1. Paragraph (a) excludes from the Convention claims based on the death or personal injury to any person. If such a claim is based on tort (or *delict*) and is not a claim "relating to a contract of international sale of goods", the claims would, of course, be excluded from this Convention by virtue of the provisions of article 1 (1).¹ But under some circumstances claims for liability for the death or personal injury of the buyer or other person might be based on the failure of the goods to comply with the contract; a claim by the buyer against the seller for pecuniary loss might be based on personal injuries to persons *other than himself*. While such claims based on bodily injuries, under some legal systems, may be regarded as contractual, in others the characterization is in doubt and in still others all such claims may be regarded as delictual. To avoid doubt and diversity if such claims are governed by this Convention, it was thought advisable to exclude all such claims; it would be also inappropriate to subject such claims to the same limitation period as would be applicable to the usual type of commercial claims.

2. Paragraph (b) excludes "nuclear damage caused by the goods sold". The effects of such damage may not appear until a long period after exposure to radioactive materials. In addition, special periods for the extinction of such actions are contained in the Vienna Convention on Civil Liability for Nuclear Damages of 21 May 1963.²

3. Paragraph (c) excludes claims based on "a lien, mortgage or other security interest in property". This exclusion is consistent with the basic provisions of article 1 (1) that this Convention applies to claims or rights "relating to a contract of international sale of goods". Moreover, liens, mortgages and other security interests involve rights *in rem* which traditionally have been governed by the *lex situs* and are enmeshed with a wide variety of rights affecting other creditors; attempts to expand the scope of the Convention to include such claims may impede the adoption of the Convention. It will be noted that article 5 (c) excludes rights based not only on lien and "mortgage" but also "other security interest in property". This latter phrase is sufficiently broad to exclude rights asserted by a seller for the recovery of property sold under a "conditional sale" or similar arrangement designed to permit the seizure of property on default of payment. Of course, the expiration of the limitation period applicable to a right or claim based on a sales contract may have serious consequences with respect to the enforcement of a lien, mortgage or other

interest securing that right or claim. However, for reasons given in connexion with article 24 (1) (para. 2 of commentary on art. 24), this Convention does not attempt to prescribe uniform rules with respect to such consequences, and leaves these questions to applicable national law. It may be expected that the tribunals of signatory States in solving these problems will give full effect to the basic policies of this Convention with respect to the enforcement of stale claims.

4. Under paragraph (d), claims based on "a judgement or award made in legal proceedings" are excluded even though the judgement or award results from a claim arising from an international sale. In actions to enforce a judgement it may be difficult to ascertain whether the underlying claim arose from an international sale of goods and satisfied the other requirements for the applicability of this Convention. In addition, the enforcement of a judgement or award involves local procedural rules (including rules concerning "merger" of the claim in the judgement) and thus would be difficult to subject to a uniform rule limited to the international sale of goods.

5. Paragraph (e) excludes claims based on "a document on which enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought". Such documents subject to direct enforcement or execution are given different names and rules in various jurisdictions (e.g. the *titre exécutoire*), but they have an independent legal effect that differentiates them from claims that require proof of the breach of the contract of sale. In addition, these documents present some of the problems of unification of enforcement of actions mentioned with respect to paragraph (d) (para. 4, above). (Paragraph (e) is also somewhat analogous to the exclusion under paragraph (f) of claims based on documents having a legal identity distinct from the sales contract; compare the discussion in para. 6, below.)

6. Paragraph (f) excludes claims based on "a bill of exchange, cheque or promissory note". This exclusion is significant for present purposes when such an instrument has been given (or accepted) in connexion with the obligation to pay the price for goods sold in an international transaction subject to this Convention. Such instruments are in many cases governed by international conventions or national laws that state special periods of limitation. In addition, such instruments are often circulated among third persons who have no connexion with or knowledge of the underlying sales transaction; moreover the obligation under the instrument may be distinct (or "abstracted") from sales transaction from which the instrument originated. In view of the facts, claims under the instruments described in paragraph (f) are excluded from this Convention. Contrast assignees of the rights under the sales contract (art. 1 (3) (a)).

¹ See para. 6 of commentary on art. 1, *supra*.

² See art. VI (basic periods of 10 or 20 years, subject to certain adjustments); art. I (1) (k) (definition of "nuclear damage").

Article 6

[Mixed contracts]

(1) This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of this Convention, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

COMMENTARY

1. This article deals with two different situations relating to mixed contracts.

I. Sale of goods and supply of labour or other services by the seller, paragraph (1)

2. This paragraph deals with contracts under which the seller undertakes to sell goods as well as to supply labour or other services. An example of such a contract is where the seller agrees to sell plant and machinery and undertakes to set up the plant as a going concern or to supervise its installation or setting up. In such cases, paragraph (1) provides that where the "preponderant part" of the obligation of the seller consists in the supply of labour or other services, the contract is not subject to the provisions of this Convention.

3. It is important to note that this paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two

contracts. Thus, the question whether the seller's obligations relating to the sale of goods and to the supply of labour or other services, can be treated as constituting two separate contracts (under what is sometimes known as the doctrine of "severability" of the contract), is to be decided by national courts in accordance with the applicable law.

II. Supply of materials by the buyer, paragraph (2)

4. The opening phrase of paragraph (2) of this article provides that the sale of goods to be manufactured by the seller to the buyer's order is as much subject to the provisions of this Convention as the sale of ready-made goods.

5. The concluding phrase in this paragraph "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production" is intended to exclude from the scope of this Convention contracts for the sale of goods to be manufactured or produced *when the buyer undertakes to supply the seller* (the manufacturer) of the goods with a *substantial* part of the raw materials from which the goods are to be manufactured or produced. Since such a contract is more akin to a contract of service or labour than to a contract of sale of goods, it is excluded from the scope of this Convention.

Article 7

[Interpretation to promote uniformity]

In interpreting and applying the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application.

COMMENTARY

1. National rules on prescription (limitation) are subject to sharp divergencies in approach and concept. Thus, it is

especially important to avoid construction of the provisions of this Convention in terms of the varying concepts of national law. To this end, article 7 emphasizes the importance, in interpreting and applying the provisions of the Convention, of regard for the international character of the Convention and the need to promote uniformity. Illustrations of the application of this article may be found elsewhere in the commentary, e.g. in art. 1 at paras. 11-13; art. 13, foot-note 1.

THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8

[Length of the period]

Subject to the provisions of article 10, the limitation period shall be four years.

COMMENTARY

1. Establishing the length of the limitation period has required the reconciliation of various conflicting considerations. On the one hand, the limitation period must be adequate for investigation, negotiation for a settlement and making the arrangements necessary for bringing legal proceedings. In assessing the time required, consideration has been given to the special problems resulting from the distance that often separates the parties to an international sale and the complications resulting from differences in language and legal systems. On the other hand, the limitation period should not be so long as to fail to provide protection against the dangers of uncertainty and injustice that result from the passage of time without the restitution of disputed claims. These include the loss of evidence and the possible threat to business stability or solvency resulting from extended delays.

2. In the course of preparing the draft, it was generally considered that a limitation period within the range of three to five years would be appropriate. To help resolve the

question of the length of the limitation period, and other relevant issues, a questionnaire was addressed to Governments and interested international organizations. The replies, reporting national rules and suggestions from each region, were analysed in a report of the Secretary-General.¹ Aided by these replies, it was concluded that an appropriate limitation period is four years. In reaching this decision, account was taken of article 10 which provides a special shorter period of two years for claims arising from a defect or lack of conformity of the goods and other provisions in this Convention affecting the running of the limitation period. These include article 18 (a new period commences to run afresh when the creditor performs an act which has the effect of recommencing the original limitation period under a given jurisdiction), article 19 (a new period commences to run afresh when the debt is acknowledged by the debtor), articles 15, 16, 17 and 20 (rules extending the limitation period) and article 21 (modification of the period by the parties).

¹ This report (A/CN.9/WG.1/WP.24) appears in addendum 2 to the report of the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods on the work of its third session (A/CN.9/70).

Article 9

[Basic rule on commencement of the period]

(1) Subject to the provisions of articles 10 and 11, the limitation period shall commence on the date on which the claim becomes due.

(2) In respect of a claim based on fraud committed before or at the time of the conclusion of the contract, the claim shall, for the purpose of paragraph (1) of

this article, be deemed to become due on the date on which the fraud was or reasonably could have been discovered.

(3) In respect of a claim arising from a breach of the contract, the claim shall, for the purpose of paragraph (1) of this article, be deemed to become due on the date on which such breach occurs. Where one party is required, as a condition for the acquisition or exercise of such a claim, to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

COMMENTARY

I. Structure of the Convention: basic rule

1. Articles 9 to 11 govern the starting point in time of the limitation period with regard to all types of claims covered by this Convention. Article 9 provides the general rule as to the commencement of the period: the limitation period commences to run "on the date on which the claim becomes due". Article 10 provides special rules, including a shorter period of two years, for claims arising from a defect or other lack of conformity of the goods. Article 10 (3) also deals with the situation where the seller gives an express undertaking relating to the goods. Article 11 covers the situations where the contract has been terminated before performance is due.

2. As described above, article 9 (1) states the basic rule that the limitation period commences to run on the date when "the claim becomes due". Paragraphs (2) and (3) of this article provide specific rules as to when the claim should be regarded to have become "due" for the purpose of the application of the basic rule provided in article 9 (1); these situations are (a) where claims arise because of fraud committed in the process of the conclusion of the contract (para. (2)) and (b) where claims arise from breach of contract (para. (3)). The application of this basic rule to typical situations is explained below.¹

II. Fraud during the formation process of the contract

3. Where fraud was committed while contract was being negotiated or at the time of the conclusion of the contract, various claims may arise under the applicable law. The defrauded party may be entitled to damages resulting from the fraud; he may even be entitled to avoid the contract.² If the contract is avoided, the defrauded party may want to claim for the restitution of advance payments, if any. For all these claims, article 9 (2) provides the following test: the limitation period commences to run "on the date on which the fraud was or reasonably could have been discovered".³

III. Breach of contract

4. With respect of a claim arising from breach of contract, article 9 (3) provides that the claim shall be deemed to have become due "on the date on which such breach occurs".

¹ Some representatives objected to article 9 because in their view the rules contained therein are inconsistent with each other.

² But see art. 34 and accompanying commentary.

³ It may be noted that article 9 (2) concerns only with the fraud committed "before or at the time of the conclusion of the contract;" the effect of fraud committed after the conclusion of the contract is governed by article 20 (see accompanying commentary, para. 1).

The "breach of contract" is defined in article 1 (3) to mean "the failure of a party to perform the contract or any performance not in conformity with the contract". The application of this rule may be illustrated by the following examples:

Example 9 A: The sales contract required the seller to place goods at the buyer's disposition on 1 June 1972. The seller failed to supply or tender any goods in response to the contract on 1 June or on any subsequent date. The limitation period for any legal proceedings by the buyer (and the prescription of the buyer's rights) in respect of a breach of the contract of sale commences to run on the date on which the breach of contract occurred, i.e. in this example, 1 June, the date for performance required under the contract.

Example 9 B: The sales contract required the seller to place goods at the buyer's disposition on 1 June 1972. The seller failed to supply or tender any goods in response to the contract on 1 June. But a few weeks thereafter the buyer agreed for the extension of the time for delivery until 1 December 1972. On 1 December, the seller again failed to perform. If the above extension of the time for delivery was valid, the limitation period commences to run on the date of "breach" of the contract on 1 December 1972.

Example 9 C: The sales contract provided that the buyer may pay the price at the time of delivery of the goods and obtain a 2 per cent discount. The contract also provided that the buyer must, at the latest, pay in 60 days. The buyer did not pay on delivery of the goods. The limitation period does not commence to run until the end of the 60 day period because there was no "breach" of contract by the buyer until the time for his performance expired.

Example 9 D: The sales contract provided that the goods shall be shipped at a date in 1972 to be named by the buyer. The buyer might have requested shipment in January 1972 but he requested shipment on 30 December 1972. The seller does not perform. The limitation period with respect to this failure to perform did not commence until after 30 December, since, under the terms of the contract, there was no "breach" of contract until after the date specified by the buyer.

5. The second sentence of article 9 (3) is designed to clarify the point in time for the commencement of the limitation period where the applicable law requires one party to give a notice to the other party. The breach of contract has occurred prior to such a notification; consequently, to delay the commencement of the limitation period until the time of notification would be inconsistent with the approach adopted in the first sentence of article 9 (3). Moreover, the time of notification may depend on the diligence with which the buyer inspects the goods and gives the notification. Consequently, this paragraph makes it clear that the commencement of the period would not be determined by the time of giving notice.⁴

IV. Other claims not arising out of breach

6. Some claims may arise without breach or fraud. One example is provided by claims for the restitution of advance payments where the performance of the agreed exchange is excused under the applicable law because of impossibility of performance, *force majeure*, and the like. For such claims, the basic rule provided in article 9 (1) will govern. Whether such claim exists and when the claim becomes due must, of course, be decided under the applicable rules of national law.

⁴ This rule, of course, has no effect on rules of municipal law requiring notice. Also see art. 1 (2) and accompanying commentary, paras. 8 and 9; art. 21 (3) and accompanying commentary, para. 5.

Article 10

[Claims based on non-conformity of the goods; express undertaking]

(1) The limitation period in respect of a claim arising from a defect or lack of conformity which could be discovered when the goods are handed over to the buyer shall be two years from the date on which the goods are actually handed over to him.

(2) The limitation period in respect of a claim arising from a defect or lack of conformity which could not be discovered when the goods are handed over to the buyer shall be two years from the date on which the defect or lack of conformity is or could reasonably be discovered, provided that the limitation period shall not extend beyond eight years from the date on which the goods are actually handed over to the buyer.

(3) If the seller gives an express undertaking relating to the goods, which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period, in respect of any claim arising from the undertaking, shall commence on the date on which the buyer discovers or ought to discover the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

COMMENTARY

1. *Claims by buyers relying on non-conformity of the goods*

1. As noted earlier (para. 1 of commentary on art. 9) paragraphs (1) and (2) of article 10 provide special rules with reference to articles 8 and 9 with regard to buyer's "claim arising from a defect or lack of conformity" of the delivered goods. The phrase "a claim arising from a defect or lack of conformity" of the goods is sufficiently broad to include any respect in which the goods fail to comply with the requirements of the contract. These special rules are regarded as necessary because the basic test provided in article 9 may often be difficult to apply to concrete cases particularly where defects in goods could not be discovered until sometime after the handing over of the goods and because of divergent rules under applicable laws concerning the time when such claims become "due". Paragraph (1) of article 10 deals with claims arising from non-conformity "which could be discovered when the goods are handed over to the buyer" and paragraph (2) deals with claims arising from non-conformity "which could not be discovered when the goods are handed over to the buyer".

2. The rule adopted by article 10 is that, until defects could reasonably be discovered, the limitation period should not start to run for these claims; otherwise, harsh results for buyers may result in some circumstances when defects are of such a nature as to prevent the discovery of the defects until long after the handing over of the goods to the buyer.¹ On the other hand, the Convention takes account of the needs of the seller of the goods by reducing the length of the limitation period to two years (cf. art. 8). This shortening of the period was thought important because, particularly in case of defects in goods, the seller would need to resolve the dispute while trustworthy evidence on the true condition of the goods are still available; the period of two years would

be appropriate for this purpose.² An over-all cut-off point against prolonging disputes due to late discovery of defects is also provided in article 10 (2) for claims based on defects which could not be discovered when the goods are handed over to the buyer. Regardless of the discovery of defects, "the limitation period shall not extend beyond eight years from the date on which the goods are actually handed over to the buyer".

3. The phrase "the goods are actually handed over to the buyer" points to the circumstances which constitute placing the goods under the buyer's "actual" control regardless of whether this occurs on the due place or date contemplated by the contract or otherwise.³ Unless the goods have reached the stage where "actual" inspection of the goods by the buyers becomes possible, the goods cannot be regarded to have been "actually handed over to the buyer".

Example 10 A: Seller in Santiago agreed to ship goods to the buyer in Bombay: the terms of shipment were "f.o.b. Santiago". Pursuant to the contract, the seller loaded the goods on board a ship in Santiago on 1 June 1972. The goods reached Bombay on 1 August 1972, and on the same date the carrier notified the buyer that he could take possession of the goods. On 15 August the buyer took possession of the goods. Under these facts, the goods are "actually handed over" to the buyer on 15 August.

This result is not affected by the fact that under the terms of the contract the risk of loss during the ocean voyage rested on the buyer. Nor is this result affected by the fact that, under some legal systems, it might be concluded that "title" or "ownership" in the goods passed to the buyer when the goods were loaded on the ship in Santiago. Alternative forms of price quotation (f.o.b. seller's city; f.o.b. buyer's city; f.a.s.; c.i.f. and the like) have significance in relation to possible changes in freight rates and the manner of arranging for insurance, but they have no significance in relationship to the time when the goods were "actually" handed over to the buyer.⁴

II. *Express undertaking for a period of time*

4. Paragraph (3) of article 10 provides an exception to the rules of paragraphs (1) and (2) of the article for cases

² It may be noted that the period for claims arising from defects commences to run from the date on which the defects could reasonably be discovered even if damages do not immediately ensue from such defects. However, the over-all fairness of the Convention needs to be considered in the light of the following factors: (a) exclusion from the Convention (art. 5 (a)) of claims based on "death of, or personal injury to, any person"; (b) confining the scope of this Convention to claims that arise in relation to a *contract*—thereby excluding claims based on tort or *delict* (see discussion in para. 6 of commentary on art. 1); (c) exclusion of consumer sales from the Convention (art. 4 (a)); (d) the special provisions (art. 10 (3)) for claims based on an express undertaking by the seller which is stated to have effect for a period of time.

³ The term "delivery" was intentionally avoided because of the ambiguities in the legal concept. E.g. ULIS article 19 (1) provides: "delivery consists in the handing over of goods which conform with the contract".

⁴ Of course, where the buyer takes effective physical control over the goods in the seller's city and thereafter ships the goods, then the goods would be regarded to have been actually handed over to the buyer. It may also be noted that goods may be handed over to the agents or assigns of the buyer. Cf. art. 1 (3) (a). For purpose of illustration, suppose the buyer in example 10 A, above, resells the goods to C during the transit of the goods and transfers the bills of lading to C. The goods are handed over to the "buyer" when C actually takes possession of the goods.

¹ Discoverability of the defects must be tested in the light of the methods contemplated by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.

where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods, which is stated to have effect for a certain period of time. The approach for the commencement of the period for claims arising from the undertaking is the same as the preceding paragraphs of the article: the limitation period commences "on the date on which the buyer discovers or ought to discover the fact on which the claims is based". But the overall cut-off date provided in paragraph (2) of the article ("eight years from the date on which the goods are actually handed over to the buyer") cannot be used where the undertaking is expressed in terms of a certain period of time.

Thus, article 10 (3) provides that the limitation period shall in any event commence "not later than on the date of the expiration of the period of the undertaking".⁵

5. Article 10 (3) does not specify when the seller's "express undertaking" must be given. Under the working of this provision, the seller, after delivering the goods, might adjust certain components of the goods and in this connexion might give an express warranty which would be governed by this article.

⁵ One representative expressed a serious doubt as to whether paragraphs (2) and (3) of article 10 were fairly balanced.

Article 11

[Termination before performance is due; instalment contracts]

(1) If, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due.

(2) The limitation period in respect of a claim arising out of a breach by one party of a contract for the delivery of or payment for goods by instalments shall, in relation to each separate instalment, commence on the date on which the particular breach occurs. If, under the law applicable to the contract, one party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant instalments shall commence on the date on which the declaration is made to the other party.

entitled to declare the contract terminated "exercises this right," the limitation period runs from "the date on which the declaration is made to the other party". On the stated facts in the above example, this date is 15 July.

4. It will be noted that under paragraph (1), the above result depends on a decision by the party to elect to declare the contract terminated. If, in the above instances, such an election (i.e., by the notification of termination made on 15 July) had not taken place, "the limitation period shall commence on the date on which performance is due"—1 December in the above example.¹

5. In the interest of definiteness and uniformity the period will commence on the earlier date (15 July) only when a party positively "declares" the contract terminated. Thus, termination resulting from a rule of applicable law that in certain circumstances the contract shall be automatically terminated is not termination resulting from "declaration" by a party within the meaning of paragraph (1). It will also be noted that article 11 does not govern the situation, under some legal systems, whereby circumstances such as repudiation, bankruptcy and the like before performance is due entitles one party to declare the performance immediately due. However, the result may be similar, since an action based upon failure to perform at such accelerated date would be governed by article 9.

COMMENTARY

1. Both paragraphs (1) and (2) of article 11 deal with problems that arise when a party is entitled to terminate the contract in certain circumstances occurring before performance is due. Paragraph (1) establishes the basic general rule; paragraph (2) deals with the special problems that arise when a contract calls for the delivery of goods, or the payment for goods in instalments.

I. Basic rule, paragraph (1)

2. The basic rule of paragraph (1) may be illustrated by the following:

Example 11 A: A contract of sale made on 1 June 1972 calls for the seller to deliver the goods on 1 December. On 1 July the seller (without excuse) notifies the buyer that he will not deliver the goods required by the contract. On 15 July the buyer declares to the seller that in view of the seller's repudiation the contract is terminated.

3. Under some legal systems, the notification on 1 July of refusal to perform in the future is regarded to be an anticipatory breach upon which an election to terminate and a legal action may be based. In some legal systems, circumstances such as bankruptcy or other events manifesting an inability to perform may also become grounds upon which one party may terminate the contract before the performance is due. In such circumstances, where one party who is

II. Instalment contracts, paragraph (2)

6. For claims arising out of a breach of instalment contracts for the delivery of or payment for goods, article 11 (2) follows the same approach as article 9 (3). The limitation period "shall, in relation to each separate instalment, commence on the date on which the particular breach occurs". This rule will minimize difficulties which might be encountered by theoretical problems whether a particular instalment contract should be regarded as a set of several contracts or not. The application of article 11 (2) may be illustrated by the following example:

Example 11 B: A contract of sale made on 1 June 1972 required the seller to sell the buyer 4,000 cwt. of sugar, with deliveries of 1,000 cwt. on 1 July, 1 August, 1 September and 1 October. Each of the four instalments were delivered late. The buyer complained to the seller of these late deliveries but did not elect to terminate the contract although he was entitled to do so under the applicable law to the contract if he wished. Under these facts, separate periods of limitation would apply to the July, August, September and October deliveries.

¹ This Convention does not, of course, specify the time when a notification of termination must be given except that paragraph (1) of article 11 restricts the application of the rule to those instances where declaration to terminate the contract was made "before performance becomes due".

7. However, when one party does terminate the contract, article 11 (2) provides that "the limitation period in respect of all relevant instalments" commences when such declaration was made. This rule may be illustrated as follows:

Example 11 C: The contract is the same as in 11 B above. The first instalment, delivered on 1 July, proved on examination to be so seriously defective that the buyer rightfully took steps: he rejected the defective instalment and he notified the seller on 5 July that the contract was terminated as to future instalments.

8. For the purpose of paragraph (2), the relevant conduct by the buyer was the buyer's election to "declare the contract terminated" as to future instalments. Once termination is effected, a single period for claims arising from all relevant instalments (i.e., July, August, September and October instalments) commences on the date of the declaration that the contract is terminated—5 July in the above example. The term "all relevant instalments" embraces all instalments, whether previous or subsequent, covered by or affected by the termination of the contract.

CESSATION AND EXTENSION OF THE LIMITATION PERIOD

Article 12

[Judicial proceedings]

(1) The limitation period shall cease to run when the creditor performs any act which, under the law of the jurisdiction where such act is performed, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

(2) For the purposes of this article, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised. However, both the claim and counterclaim shall relate to a contract or contracts concluded in the course of the same transaction.

COMMENTARY

1. As was noted earlier (introduction, para. 1), this Convention is essentially concerned with the time within which the parties to an international sale of goods may bring legal proceedings to exercise claims or rights. Article 8 states the length of the limitation period. Articles 23 to 26 state the effects of the expiration of the period; these include the rule (art. 24 (1)) that no claim for which the limitation period has expired "shall be recognized or enforced in any legal proceedings". To round out this structure, the present article 12 provides that the "limitation period shall cease to run" when the creditor commences judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim (provision for "legal" proceedings other than "judicial" proceedings—e.g., arbitration and various type of administrative proceedings—is made in articles 13 and 14). The net effect of these rules is substantially the same as providing that a proceeding for enforcement may only be brought before the limitation period has expired. However, the approach of this Convention, in stating that the limitation period shall "cease to run" when the proceeding is instituted, provides a basis for dealing with problems that arise when the proceeding fails to result in a decision on the merits or is otherwise abortive (see art. 15).

2. The central problem of article 12 is to define the stage which judicial proceedings must reach before the expiration of the limitation period. In different jurisdictions proceedings may be commenced in different ways. In some jurisdictions a claim may be filed or pleaded in court only after the plaintiff has taken certain preliminary steps (such as the service of a "summons" or "complaint"). In some jurisdictions, these preliminary steps may be taken out of court by the parties (or their attorney); nevertheless these steps are governed by the State's rules on procedure, and may be regarded as commencing a judicial proceeding for the purpose of satisfying the

State's rules on prescription or limitation. In other States, this consequence occurs at various later stages in the proceeding.

3. For these reasons it was not feasible to refer specifically to the procedural steps that would meet the purposes of this article. Instead, paragraph (1) refers to the performance by the creditor of any act recognized "*under the law of the jurisdiction where such act is performed*" as commencing judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim.¹ Initiation by the creditor against the debtor of a criminal proceeding for criminal fraud would qualify under this article to stop the period only if, under the local law, this is also an institution of a proceeding "for the purpose of obtaining satisfaction or recognition of his claim".

4. Paragraph (1) also applies where the creditor adds a claim to a proceeding he has already instituted against the debtor.² The step in that proceeding that stops the running of the limitation period depends on when, under the law of the jurisdiction where the proceeding is brought, the creditor has performed an act "asserting his claim" in the pending proceeding.

5. Paragraph (2) of this article deals with the point in time when a counterclaim³ is deemed to be instituted. Its provisions may be examined in terms of the following example:

Example 12 A: The seller commenced suit against the buyer on 1 March 1970. In this proceeding, the buyer interposed a counterclaim on 1 December 1970. The limitation period governing the buyer's counterclaim would, in normal course, have expired on 1 June 1970.

6. In the above example, the crucial question is whether the buyer's counterclaim shall be deemed to be instituted (a) on 1 March, the time when the seller's suit was commenced or (b) on 1 December 1970, when the buyer's counterclaim was in fact interposed in the pending action.

7. Under paragraph (2) of article 12, alternative (a) was chosen. This result is adopted to promote efficiency and economy in litigation by encouraging consolidation of actions rather than the hasty bringing of separate actions.

¹ One representative was of the view that the approach of article 12 (1) may make it difficult to ascertain the exact time when the limitation period ceased to run. Cf. art. 29.

² The permissibility of amendment of claims in a pending proceeding and its effect are the questions left to the law of the forum.

³ The meaning of "counterclaim" in paragraph (2) may be drawn from the reference in paragraph (1) to "judicial proceedings" employed for the purpose of obtaining satisfaction or recognition of a claim. Such a judicial proceeding by counterclaim can lead to affirmative recovery by the defendant against the plaintiff; the use of a claim "as a defence or for the purpose of set-off", after the limitation period for that claim has expired, is governed by article 24 (2). The question whether a counterclaim is acceptable procedure is, of course, left to the rules of the forum.

8. The above rule applies when the seller's claim and the buyer's counterclaim relate to the same contract or to contracts concluded in the course of the same transaction.⁴ The

⁴ For example, where the plaintiff brings a suit on the basis of a distributorship agreement, while the defendant counterclaims on an agreement to sell related to the distributorship agreement, these claims might be regarded as arising "in the course of the same transaction".

same benefit is not given to the buyer when his claim against the seller arises from a different transaction than that which provided the basis for seller's claim against the buyer; in this event, the buyer must actually institute his counterclaim before the expiration of the limitation period. The act which is regarded as instituting this counterclaim is determined under the approach employed in article 12 (1), discussed at paragraphs 3 and 4, above.

Article 13

[Arbitration]

(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to that agreement.

(2) In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party or, if he has no such residence or place of business, then at his last known residence or place of business.

(3) The provisions of this article shall apply notwithstanding any term in the arbitration agreement to the effect that no right shall arise until an arbitration award has been made.

COMMENTARY

1. Article 13 applies to arbitration based on an agreement to submit to arbitration.¹ Article 12 relies on national law to define the point in the commencement of judicial proceedings when the limitation period shall cease to run. The same

¹ Article 13 applies only where the parties "have agreed to submit to arbitration". Obligatory "arbitration" not based on an agreement would be characterized as "judicial proceedings" for the purpose of the Convention. See arts. 1 (3) (3), and 12. On construction of this Convention to promote uniformity, as contrasted with the application of local terminology, see art. 7 and accompanying commentary.

approach cannot be used in relation to arbitral proceedings under article 13 since in many jurisdictions the manner for commencing such proceedings is left to the agreement of the parties. Thus, article 13 (1) provides that any question as to what acts constitute the commencement of arbitral proceedings is to be answered under "the arbitration agreement or by the law applicable to that agreement".

2. If the agreement or the applicable law does not prescribe the manner of commencement of arbitral proceedings, under paragraph (2) the decisive point is the date on which "a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party"; if he has no such residence or place of business, the request may be delivered at his last-known residence or place of business. Under paragraph (2), the request must be "delivered" at the designated place. Thus, risks during transmission fall on the sender at the request, but the sender need not establish that the request came into the hands of the other party in view of the practical difficulties involved in proving receipt of the request by a designated person following delivery of the request at the specific place.

3. Paragraph (3) of this article deals with the effect of a term in the arbitration agreement that "no right shall arise until an arbitration award has been made". Under paragraph (3), such a contract term does not prevent the application of this article to the agreement; such a contract provision has no effect to suspend the running of the limitation period or to determine the act that stops the running of the period under this Convention. On the other hand, paragraph (3) does not take any position concerning the validity of such agreements under national law. (Cf. art. 21 (3) and accompanying commentary, paras. 5 and 6.)

Article 14

[Legal proceedings arising from death, bankruptcy or the like]

In any legal proceedings other than those mentioned in articles 12 and 13, including legal proceedings commenced upon the occurrence of:

- (a) The death or incapacity of the debtor,
- (b) The bankruptcy or insolvency of the debtor, or
- (c) The dissolution or liquidation of a corporation, company, association or entity,

the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, unless the law governing the proceedings provides otherwise.

COMMENTARY

1. Article 14 governs all the other legal proceedings than those mentioned in articles 12 and 13. Such proceedings will include, *inter alia*, proceedings for the distribution of assets on death, bankruptcy or the dissolution or liquidation of a corporation as illustrated in (a) through (c) of article 14. It will be noted that these illustrations set forth in paragraphs (a) through (c) do not limit the scope of the article, which applies to "any legal proceedings other than those mentioned in articles 12 and 13". Thus, it would appear that receivership proceedings or the re-organization of a corporation could come within this article. These proceedings are often different from ordinary judicial or arbitral proceedings in that the proceedings may not be instituted by an individual creditor; instead, creditors may have an opportunity to file claims in

existing proceedings. Consequently, article 14 provides that the limitation period ceases to run "when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim". However, this rule is subjected to a proviso: "unless the law governing the proceedings provides otherwise". This modification is considered necessary because creditors may often rely on the national rules governing those proceedings such as rules specifying the period during which claims may be filed. Unless such local

rules are honoured, the creditors could be misled as to their rights.

2. As has been noted (para. 3 of commentary on art. 1), this Convention applies only to the prescription of rights or claims as between the parties to an international sale. In the types of proceedings illustrated in this article involving the distribution of assets (as in bankruptcy), prescription may affect the rights of third parties. The nature of such effect, if any, is not regulated by this Convention and is left to applicable national law.

Article 15

[Proceedings not resulting in a decision on the merits of the claim]

(1) Where a claim has been asserted in legal proceedings within the limitation period in accordance with articles 12, 13 or 14 but such legal proceedings have ended without a final decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

(2) If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended, unless they have ended because the creditor has discontinued them or allowed them to lapse.

COMMENTARY

1. Article 15 is addressed to problems that arise when legal proceedings in which a creditor asserts his claim ends without an adjudication on the merits of his claim. Under articles 12 (1), 13 (1) and 14, when a creditor asserts his claim in legal proceedings for the purpose of satisfying his claim, the limitation period "shall cease to run"; when a creditor asserts his claim in legal proceedings before the expiration of the limitation period, in the absence of further provision, the limitation period would never expire. Supplementary rules are consequently required when such a proceeding does not lead to an adjudication on the merits of the claim. Legal proceedings may end without a final decision binding on the merits of the claim from various reasons. A proceeding may be dismissed because it is brought in a tribunal without jurisdiction over the case or because of procedural defects preventing adjudication on the merits; a higher authority within the same jurisdiction may declare that the lower court lacked competency to handle the case; arbitration may be stayed or set aside by judicial authority within the same jurisdiction; moreover, a proceeding may not result in a decision binding on the merits of the claim because the creditor discontinues the proceeding or withdraws his claim. Article 15 covers these and other instances wherever "such legal proceedings have ended without a final decision binding on the merits of the claim". The rule is that "the limitation period shall be deemed to have continued to run"; cessation of the period, as provided under articles 12, 13 or 14, will be rendered inapplicable.

2. This article, however, takes account of the possibility that, a substantial period of time after the creditor commences a legal proceeding, the proceeding may be brought to an end without a final decision on the merits because of the lack of jurisdiction or procedural defect. If this occurs after

the expiration of the limitation period, the creditor might have no opportunity thereafter to institute a new legal proceeding; if this is established shortly before the expiration of the period the creditor may have insufficient time to institute a new legal proceeding.¹ To meet these problems, article 15 (2) provides: "If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended."

3. The extension of the limitation period, however, should not be left within the control of one of the parties and a creditor who voluntarily discontinues legal proceedings should not be given special treatment. Thus, article 15 (2) also provides that the extension will not be granted when proceedings have "ended because the creditor has discontinued them or allowed them to lapse".²

4. The application of this exception to the rule may be clarified by an example:

Example 15 A: A's claim against B arose and the limitation period commenced to run on 1 June 1970. A instituted legal proceedings against B on 1 June 1972. A discontinued the legal proceedings or withdrew his claim on 1 June 1973.

In such case, A has until 1 June 1974 to institute a second legal proceeding. (If A had discontinued his action subsequent to 1 June 1974, his claim would already have been barred and no further legal proceedings would be possible.)

5. The denial of the extension is intended to affect not only explicit discontinuance or withdrawal of the legal proceeding but also such a failure to pursue the proceeding that the plaintiff has "allowed" the proceedings "to lapse". Under this language, an extension may not be available when, because of failure to continue the proceedings, the proceedings are automatically terminated by virtue of the procedural rules of the forum. In general, the extension is not available when the proceedings came to an end because of the choice of the creditor not to pursue them.

¹ The question whether a second proceeding on the same claim is permissible procedure is, of course, left to the procedural law of the forum.

² The few members of the Commission were of the view that the extension under article 15 (2) should not be granted unless the creditor acted in good faith and had instituted the proceedings with due diligence. But others thought that the danger of the abuse of the extension granted under article 15 (2) would be mostly speculative because of high costs usually involved in such proceedings; further the danger of the abuse would be counterbalanced by the certainty of the rule which was attained by avoiding difficult problems of proof concerning "good faith".

Article 16

[Proceedings in a different jurisdiction; extension where foreign judgement is not recognized]

[(1) Where a creditor has asserted his claim in legal proceedings within the limitation period in accordance with articles 12, 13 or 14 and has obtained a decision binding on the merits of his claim in one State, and where, under the applicable law, he is not precluded by this decision from asserting his original claim in legal proceedings in another State, the limitation period in respect of this claim shall be deemed not to have ceased running by virtue of articles 12, 13 or 14, and the creditor shall, in any event, be entitled to an additional period of one year from the date of the decision.]

(2) If recognition or execution of a decision given in one State is refused in another State, the limitation period in respect of the creditor's original claim shall be deemed not to have ceased running by virtue of articles 12, 13 or 14, and the creditor shall, in any event, be entitled to an additional period of one year from the date of the refusal.]

COMMENTARY

1. This article is concerned with the situations where the creditor has obtained a decision on the merits of his claim in one State and seeks to assert his original claim afresh in legal proceedings (paragraph (1)) or to enforce the decision (paragraph (2)) in another State. Difficult problems arise because of the limited recognition and enforcement which decision in one State is given in other States.

I. Institution of a fresh legal proceeding in another State, paragraph (1)

2. When the refusal of recognition or execution of the decision in one State is expected in another State, the creditor will have to bring a legal proceeding in that State based on the original claim. The creditor may also find it easier to sue again on the original claim in lieu of involving himself in a complicated process of proving the validity of the first decision. The creditor who was rendered an unfavourable decision on the merits of his claim may also consider having his claim tried again in another State if he is not precluded from asserting his original claim afresh in legal proceedings in that State. Legal rules variously termed such as *res judicata*, "merger" of the claim in the judgement, or the like, may prevent the assertion of the original claim after the decision on the merits of the claim even if rendered in another State. While such legal rules may be clear within a single jurisdiction, their operation may be unclear on the international level.

3. Paragraph (1) of article 16 provides that where the creditor is not precluded from asserting his original claim afresh in legal proceedings in another State, "the limitation period in respect of this claim shall be deemed not to have ceased running by virtue of articles 12, 13 or 14," and the creditor shall be entitled to an additional period of one year from the date of the original decision in the first State for the purpose of instituting a fresh legal proceeding in the second State.

4. As already explained, under articles 12 (1), 13 (1) and 14 of this Convention, when a creditor asserts his claim in legal proceedings, the limitation period "shall cease to run"; when a creditor asserts his claim in legal proceedings in one State before the expiration of the limitation period, in the absence of further provision, the limitation period would never expire even in other States. See article 29 and its accompanying commentary. Therefore, the phrase "shall be deemed not to have ceased running" was employed in article 16 (1) to provide a basis to bring the limitation period to an end. This provision also prescribes an additional period (i.e. one year from the date of the decision in the first State) within which the creditor must bring a new legal proceeding in the second State. The net effect of article 16 (1) is that the creditor is entitled to institute a new legal proceeding only within one year after the decision in the first State.

5. It will be noted that under article 16 (1) the State which rendered the original decision need not be a Contracting State.

II. Extension where recognition or enforcement of foreign judgement is refused, paragraph (2)

6. Where the creditor has obtained a final decision on the merits of his claim in one State, but recognition or enforcement of such judgement or award is refused in another State, paragraph (2) of article 16 grants the creditor a period of "one year from the date of the refusal" to institute legal proceedings in the second State to contest the merits of his claim.¹ The rule of article 16 (2) applies to all cases where the recognition or enforcement of the final decision "is refused" in another State. The grounds for such refusal to recognize the final decision rendered in another jurisdiction may vary. One important ground is the lack of agreement between the States concerned calling for the recognition of judgements or awards.

7. It will be noted that, as under article 16 (1), the State which rendered the original decision need not be a Contracting State for the application of the rule of article 16 (2).

8. Article 16 is placed in square brackets to indicate that the Commission could not reach consensus in approving the provisions.²

¹ One representative objected to the allowance of one year "from the date of the refusal" because of the fear that this might unduly prolong the total period since "the date of the refusal" might be after a substantially long period after the original decision contradictory to the purpose of the prescription. In his view, at least a certain maximum cut-off point would be necessary if this rule is to be retained. But see article 22 and its accompanying commentary. Also see footnote 2, *infra*. Another representative noted that an additional period of four years from the date of the original decision would be preferable but accepted the present formula in a spirit of compromise.

² Several representatives preferred deletion of article 16 (1); a few representatives also suggested deletion of article 16 (2). One representative thought that the following provision should be added at the beginning of article 16 (cf. art. 5 (d)):

"Where a decision on the merits has been made in legal proceedings, the limitation of any claim based on such a decision shall be governed by the law applicable to such limitation."

Article 17

[Joint debtors; recourse actions]

[(1) Where legal proceedings have been commenced against one debtor within the limitation period pre-

scribed by this Convention, the limitation period shall cease to run against any other party jointly and

severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced.

(2) Where legal proceedings have been commenced by a subpurchaser against the buyer, the limitation period prescribed by this Convention shall cease to run in relation to the buyer's claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

(3) In the circumstances mentioned in this article, the creditor or the buyer must institute legal proceedings against the party jointly or severally liable or against the seller, either within the limitation period otherwise provided by this Convention or within one year from the date on which the legal proceedings referred to in paragraphs (1) and (2) commenced, whichever is the later.]

COMMENTARY

I. Effect of the institution of legal proceedings against a joint debtor, paragraph (1)

1. The purpose of paragraph (1) of this article is to provide answers to questions that may arise in the following situation. Two persons (*A* and *B*) are jointly and severally responsible for performance of a sales transaction. The other party (*P*) commences a legal proceeding against *A* within the limitation period. What is the effect of the legal proceeding commenced by *P* against *A* on the limitation period applicable to *P*'s claim against *B*?

2. Under some legal systems the institution of a legal proceeding against *A* also satisfies the limitation period applicable to *P*'s claim against *B*. Under other legal systems institution of legal proceedings against *A* has no effect on the running of the limitation period with regard to *B*. Consequently, the stating of a uniform rule on this issue is desirable. The rule that the institution of legal proceedings against *A* has no effect on the running of the period against *B* involves certain practical difficulties. Such a rule makes it advisable for the creditor (*P*) to institute legal proceedings against both *A* and *B* within the limitation period—at least in cases where there is doubt concerning the financial ability of *A* to satisfy a judgement. Where *A* and *B* are in different jurisdictions it would not be feasible to institute a single proceeding against them both, and instituting separate proceedings in different jurisdictions, merely to prevent the running of the limitation period against the second debtor (*B*), involves expense that would be needless when *A* is able to satisfy the judgement.

3. Under article 17 (1), when legal proceedings are commenced against *A* the limitation period "shall cease to run" not only with respect to *A* but also with respect to *B*. It will be noted that the rule of article 17 (1) is operative only when the creditor informs *B* in writing within the limitation period that the proceedings against *A* have been instituted. This written notice may give *B* the opportunity, if he chooses, to intervene in or participate in the proceedings against *A*.¹

"Article 28 *A*. In the absence of any other provision to the contrary, any notice, request or writing to be served on any person pursuant to any provision in part I of this Convention shall be deemed to be served for the purposes of part I of this Convention when left at a place of business of that person or if he has none at his habitual residence or, if he has neither, at his last known place of business or residence."

II. Recourse actions, paragraph (2)

4. Paragraph (2) of this article deals with situations like the following: *A* sells goods to *B* who resells the goods to a

subpurchaser *C*. *C* commences legal proceedings against *B* on the ground that the goods are defective. In such a case, recovery on *C*'s claim against *B* may give rise to a recourse claim by *B* against *A*.

5. If *C* commences legal proceedings against *B* toward the end of the limitation period applicable to *B*'s claim against *A*, *B* may not have enough time to prepare for the institution of legal proceedings against *A*; unless *B* is properly protected in such situations, *B* may be compelled to institute formal legal proceedings for the redress of the recourse claim against *A*, even though the necessity for such redress is speculative. Thus, article 17 (2) provides that when the subpurchaser *C* commences legal proceedings against *B*, the limitation period "shall cease to run" with respect to *B*'s claim against *A*.²

6. It will be noted, however, that the limitation period applicable to *B*'s claim against *A* "ceases to run" only if *B* "informs [*A*] in writing within that period that the proceedings have been commenced".³ Hence, if *C* commenced a legal proceeding against *B*⁴ after the expiration of the limitation period applicable to *B*'s claim against *A* under this Convention, *B* will no longer be protected under article 17 (2).⁵ This result is supported because the original seller should not be exposed indefinitely to claims arising from resale by the buyer after the expiration of the limitation period. Moreover, where such risk presented a problem, they could be covered by insurance.

III. Time-limit for commencing legal proceedings against joint debtors or against the seller, paragraph (3)

7. The effect of paragraphs (1) and (2) of this article ("cease to run") is subject to the additional important restriction provided under paragraph (3): In order for the creditor or the buyer to be entitled to the protection under article 17 (1) or (2), he *must* institute legal proceedings against the joint debtor or against the seller, "either within the limitation period otherwise provided by this Convention or within one year from the date on which the legal proceedings referred to in paragraphs (1) and (2) commenced, whichever is the later". Thus, to take the example from paragraph 1, above, if *P* commences legal proceedings against *A*, in the last year of the limitation period, *P* must institute legal proceedings against *B* within one year from the date of the commencement of his action against *A*; on the other hand, if *P*'s action against *A* was instituted before the last year of the limitation period, the protection provided under article 17 (1) and (2) will be of no importance since *P*'s action against *B* is, in any event, subject to the same "limitation period otherwise provided by this Convention".⁶

8. The rules of article 17, particularly the rule contained in paragraphs (2) and (3) of the article, are products of compromises between sharply conflicting views. Questions remained as to the necessity for such provisions. For these reasons, the Commission decided to place this article in brackets.

² A few representatives considered that the introduction of subpurchaser's claims into the article was contradictory to the purpose of the Convention particularly with regard to the scope of the Convention.

³ See foot-note 1, *supra*.

⁴ In many cases the sale by *B* to *C* will be a domestic sale for which no limitation period is prescribed by this Convention.

⁵ Recourse claims may often arise substantially later than the time of the original sale between *A* and *B*. In view of the length of the limitation period provided under this Convention for claims arising from a defect or lack of conformity of the goods, the protection afforded by article 17 (2) for recourse actions may be of limited utility.

⁶ One representative suggested that the additional period of one year must be granted to the buyer even where subpurchasers instituted legal proceedings against the buyer within two years of the expiration of the limitation period under this Convention. The reason for this suggestion was that subpurchasers are likely to institute legal proceedings a substantial period after the original sales particularly where national laws provide longer limitation period for domestic sales transaction.

¹ One representative considered that a general provision concerning notices for the purpose of part I of this Convention was desirable. He proposed the following provision to be added after article 28.

Article 18

[Recommencement of the period by service of notice]

(1) Where the creditor performs, in the State where the debtor has his place of business and before the expiration of the limitation period, any act, other than those acts prescribed in articles 12, 13 and 14, which under the law of that State has the effect of recommencing the original limitation period, a new limitation period of four years shall commence on the date prescribed by that law, provided that the limitation period shall not extend beyond the end of four years from the date on which the period would otherwise have expired in accordance with articles 8 to 11.

(2) If the debtor has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

COMMENTARY

1. Under some legal systems certain acts by the debtor such as a demand for performance may satisfy the applicable rule on limitations and may have the effect of recommencing the limitation period which is provided under the local law, even though these acts are not linked to the institution of legal proceedings. Under some legal systems a letter or even a verbal demand may suffice. In other legal systems, the only way for a creditor to comply with the limitation period is by bringing legal proceedings. Article 18 is a compromise between these two approaches. To some extent, this article provides a concession for the continuation of the procedure to which parties in some legal systems have accustomed. On the other hand, this article takes the view that the creditor should not be allowed to take advantage of a local procedure for satisfying the rule of limitation with which the debtor may not be familiar. Thus, article 18 is made applicable only

when the creditor performs such act "in the State where the debtor has his place of business" before the expiration of the limitation period provided under this Convention.¹ It may be noted that article 18 is applicable only if the act performed by the creditor would (in the absence of this Convention) have "the effect of *recommencing*" the local limitation period. Thus, if the local rule only provides for an additional shorter period after such act rather than "recommencing the original limitation period," such local rule would not be honoured under article 18.²

2. The effect given to such act under article 16 is that "a new limitation period of four years" commences to run afresh from the date on which the local limitation period would otherwise have been recommenced in the absence of this Convention. The proviso to article 18 (1) places an overall limit beyond which no extension of the limitation period would be given effect. It will be noted that this consequence is different from the institution of legal proceedings (arts. 12, 13 and 14); on the institution of legal proceedings the period will "cease to run" subject to the adjustments provided in articles 15 to 17.

3. Paragraph (2) of article 18 refers to the provisions of article 2 (2), (3) of this Convention for instances where the debtor has places of business in more than one State or no place of business.

¹ A few representatives opposed article 18 because the article brings in an element not consistent with uniformity. According to one representative, at least article 18 should spell out what these acts were which were contemplated by this provision.

² If "the effect of recommencing the original limitation period" is given under the local law but is subject to certain conditions which have been fulfilled, it has been assumed that such conditions under the local law would not interfere with the application of article 18.

Article 19

[Acknowledgement by debtor]

(1) Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement.

(2) Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgement under paragraph (1) of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

COMMENTARY

1. The basic purposes of prescription are to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree of certainty in legal relationships. An extension of the limitation period when a debtor acknowledges his obligation to the creditor before the expiration of the original limitation period is consistent with the above purposes. Consequently, under paragraph (1) of this article, when such acknowledgement occurs, a limitation period of four years will begin to run afresh by reason of such acknowledgement.

2. This new limitation period may have significant impact on the debtor's rights; consequently, paragraph (1) requires

that the acknowledgement must be in writing. A writing by a debtor confirming an earlier oral acknowledgement would become an "acknowledgement" within the meaning of this article when the written confirmation was made. The requirement of a "writing" is defined in article 1 (3) (g). Of course, the "acknowledgement" of the original debt may be somewhat similar to a transaction creating a new debt (sometimes called a "novation") which, under applicable law, may be independent of the original obligation—so that the original transaction need not be proved to justify recovery under the new obligation. Applicable law may not require this "novation" to be effected in writing; the rule of article 19 that an "acknowledgement" must be in writing is not intended to interfere with the rules of the applicable law on "novation".

3. Paragraph (2) deals with payment of interest and "partial performance of an obligation" when these acts imply an acknowledgement of the debt. In both cases, the new limitation period will commence to run afresh only with respect to the obligation acknowledged by such action. The partial payment of a debt is the most typical instance of partial performance, but the language of paragraph (2) is sufficiently broad to include other types of partial performance such as the partial repair by a seller of a defective machine. Of course, whether there is an acknowledgement under the circumstance and if so, the extent of the obligation so acknowledged are questions calling for the determination of the relevant facts in the light of the basic standard set forth in this article.

Article 20

[Extension where institution of legal proceedings prevented]

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist. The limitation period shall in no event be extended beyond four years from the date on which the period would otherwise expire in accordance with articles 8 to 11.

COMMENTARY

1. This article provides for limited extension of the limitation period when circumstances not imputable to a creditor prevent him from instituting legal proceedings. This problem is often considered under the heading of "*force majeure*" or impossibility; however, this article does not employ these terms since they are used with different meanings in different legal systems. Instead, the basic test is whether the creditor "has been prevented" from taking appropriate action.¹ To avoid excessive liberality, no extension is permitted when any one of the following restrictions is applicable: (1) the preventing circumstances must be "beyond control of the creditor"; (2) the

creditor could neither have avoided nor overcome the occurrence of such circumstance. There are many types of preventing circumstances that are "*beyond the control of the creditor*" and which therefore might provide a basis for an extension. These might include: a state of war or the interruption of communication; the death or incapacity of the debtor where an administrator of the debtor's assets has not yet been appointed (Cf. art. 14); the debtor's misstatement or concealment of his identity or address which prevents the creditor from instituting legal proceedings; fraud committed by the debtor after the conclusion of the contract such as concealment of defects in the goods.²

2. There is no reason to extend the limitation period when the circumstance preventing institution of legal proceedings ceased to exist a substantial period in advance of the end of the period. Nor is there reason to extend the period for a longer period than is needed to institute legal proceedings to obtain satisfaction or recognition of the claim. For these reasons, the limitation period is extended one year from the date on which the preventing circumstance is removed. Thus, if, at the time such preventing circumstance ceased to exist, the limitation period has expired or has less than one year to run, the creditor will be entitled to a period of one year from the date on which the preventing circumstance ceased to exist.

3. The last sentence of article 20 places an over-all limit beyond which no extension would be given under any circumstance.

² As to the effect of fraud committed before or at the time of the conclusion of the contract on the commencement of the limitation period, see art. 9 (2).

¹ Under articles 12, 13 and 14, it is provided that the limitation period shall "cease to run" when a creditor asserts his claim in legal proceedings. The present article, in referring to facts preventing the creditor "from causing the limitation period to cease to run", refers to the actions described under articles 12, 13 and 14.

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 21

[Modification by the parties]

(1) The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article.

(2) The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed. In no event shall the period of limitation be extended beyond the end of four years from the date on which it would otherwise have expired in accordance with the provisions of this Convention.

(3) The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law.

COMMENTARY

1. Paragraph (1) of article 21 declares a general rule that this Convention does not allow parties to modify the limitation period. Exceptions to this rule provided in paragraphs (2) and (3) are explained below.

1. Extension of the limitation period

2. Paragraph (2) permits the parties to extend the limitation period to the maximum of four years from the date when the limitation period would otherwise have expired according to the other provisions of this Convention. The extension can be accomplished by a unilateral declaration by the debtor; an effective declaration may, of course, be a part of an agreement by the parties. Extension of the limitation period can have important consequences for the rights of the parties. An oral extension could be claimed in doubtful circumstances or on the basis of fraudulent testimony. Therefore, only a declaration in writing can extend the period.

3. Under paragraph (2), declaration is effective only when it is made "during the running of the limitation period". This restriction in the Convention would deny effect to attempts to extend the period made at early stages of the transaction; e.g., at the time of contracting and thereafter until the claim becomes due or the breach occurs at which time the limitation period commences to run under articles 9 to 11. It was considered that without this restriction a party with stronger bargaining power might impose extensions at the time of contracting; in addition, a clause extending the limitation period might be a part of a form contract to which the other party might not give sufficient attention.

4. Allowance of extension after the commencement of the limitation period, on the other hand, may be useful to prevent

the hasty institution of a legal proceeding close to the end of the period when the parties are still negotiating or are awaiting the outcome of similar proceedings in other fora.¹

II. Notices to other party; arbitration

5. One of the purposes of paragraph (3) of article 21 is to make clear that this article has nothing to do with the validity of a contract clause concerning a time-limit by reason of which the acquisition or exercise of a claim is dependent upon one party giving notice to the other party. A typical example would be modification of the length of period provided in the national law applicable to the contract of sales within which the buyer must give notice to the seller in order to preserve his rights when goods are defective. Article 21 (3) makes it clear that this Convention does not interfere with applicable rules which allow such contractual stipulations for notices.²

¹ One representative, supported by a few others, proposed the following for article 21 (2):

"(2) The debtor may, at any time during the running of the limitation period, by a declaration in writing to the creditor, extend the limitation period for a new period of time. Such a declaration shall in no event have effect beyond the end of four years, from the date of the declaration or from the date on which the period would otherwise expire, whichever is the later. The debtor may renew the effect of the declaration for a further period, provided however that the prescription period shall in no event by reason of declarations under this article be extended beyond eight years from the date on which the period would otherwise expire in accordance with this Convention.

² It may be noted that this Convention has no effect on

6. Paragraph (3) of article 21 is also relevant to clauses in sales contract requiring that controversies under the contract be submitted to arbitration within a limited time. The paragraph refers to clauses in the sales contract "whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act *other than* the institution of *judicial* proceedings within a certain period of time". Attention is directed to the phrase "*judicial* proceedings". "*Legal* proceedings", as defined in article 1 (3) (e), "includes judicial, administrative and arbitral proceedings"; "*judicial* proceedings" is narrower in scope. As a result, the provisions of article 21 will not affect the validity of a clause in the contract of sale "whereby the acquisition or exercise of a claim" is dependent upon the act of one party submitting the controversy to arbitration within a certain period of time. This adjustment was considered advisable to accommodate contracts, often used in commodity markets, providing that any dispute must be submitted to arbitration within a short period—e.g. within six months. With respect to the possible abuse of such a provision, paragraph (3) concludes with the proviso that such clause must be valid under the applicable law. For example, the applicable law may give the court the power, because of hardship to a party, to extend the period which was provided for in the contract; this Convention does not interfere with the continued exercise of this power.

rules of local law involving "time-limit" (*déchéance*) within which one party is required to give notice to the other party concerning defects in goods (e.g., ULIS, art. 39 (1)). See article 1 (2) and accompanying commentary paras. 8 and 9. One representative was of the view that the rule of article 21 (3) should be incorporated in article 1 (2).

[LIMIT OF EXTENSION AND MODIFICATION OF THE LIMITATION PERIOD]

Article 22

[Over-all limitation for bringing legal proceedings]

[Notwithstanding the provisions of articles 12 to 21 of this Convention, no legal proceedings shall in any event be brought after the expiration of 10 years from the date on which the limitation period commences to run under articles 9 and 11, or after the expiration of eight years from the date on which the limitation period commences to run under article 10.]

COMMENTARY

1. As already noted, this Convention contains provisions which permit the limitation period to be extended or modified in various situations (arts. 15 to 21). Some of those provisions specify overriding limits for such extensions of the period (e.g., arts. 18 and 20); these overriding limits are applicable only to the operation of specific provisions. Thus, it is possible that the period may be extended, in some cases, for such a

substantially prolonged period that the institution of the legal proceedings toward the end of that extended period would be no longer compatible with the purpose of prescription. This article, therefore, sets forth an over-all cut-off point beyond which no legal proceedings may be instituted under any circumstance. Such cut-off point is "the expiration of 10 years from the date on which the limitation period commences to run under articles 9 and 11," or "the expiration of eight years from the date on which the limitation period commences to run under article 10".

2. This provision was proposed, at a late stage of the drafting, to take account of the inclusion of other provisions extending the limitation period. Most representatives who spoke on the provision were in favour of the inclusion in principle of the present article. However, this provision is placed in square brackets because most representatives did not have time to evaluate the effect of the provision in the context of the Convention as a whole.

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 23

[Who can invoke limitation]

Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings.

COMMENTARY

1. The principal question to which article 23 is addressed is the following: if a party to legal proceedings does not

assert that the action is barred by expiration of the limitation period, may the tribunal raise this issue of its own motion (*suo officio*)? This Convention answers this question in the negative: expiration of the period shall be taken into consideration "only at the request of a party" to legal proceedings. One consideration supporting this result is that many of the facts relevant to the running of the period will be known only to the parties and ordinarily will not be apparent from the evidence presenting the substance of the claim; for instance, this may be true with respect to possible extensions of the limitation period (e.g., arts. 19 and 21). Under the traditions of some legal systems, if a judge must search for such facts, he may have to involve himself in the case as to depart from the judges' usual role of neutrality. Moreover, the question, although answered differently in different legal systems, is not of large practical importance; a party who may interpose this defence will rarely fail to do so. Indeed, this provision does not prohibit a tribunal from drawing attention to the lapse of time, and inquiring whether the party wishes this issue to be taken into consideration. (Whether such is proper judicial practice is, of course, a matter for the rules of the forum.) There may be also instances where a creditor does not

wish to invoke prescription because of a special business relationship with the debtor while disagreeing on the substance of the pending dispute. Hence, this article provides that prescription of rights or limitation on legal proceedings due to the expiration of the limitation period may only be invoked if a party requests.

2. However, it has been noted by several representatives in the Commission that prescription is a matter of public policy and that the matter should not be subjected to the parties' disposal. According to them the tribunal should take the expiration of the limitation period into account unless parties agreed to the modification of the period under article 21 of this Convention. Tribunals can obtain facts from parties without burdening themselves by collection of evidence; the question of who should have the burden of collecting evidence should not affect the issue of who should invoke prescription. This Convention in article 35 takes account of this view by permitting States to make reservation at the time of ratification or accession to this Convention "that it shall not be compelled to apply the provisions of article 23 of this Convention".

Article 24

[Effect of expiration of the period; set-off]

(1) Subject to the provisions of paragraph (2) of this article and of article 23, no claim which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.

(2) Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

(a) If both claims relate to a contract or contracts concluded in the course of the same transaction; or

(b) If the claims could have been set-off at any time before the date on which the limitation period expired.

COMMENTARY

I. Effect of expiration of the period

1. Paragraph (1) of article 24 emphasizes this Convention's basic purpose to provide a limitation period within which the claims of the parties must be submitted to a tribunal. See article 1 (1). Once the limitation period expires, the claim can no longer be recognized or exercised in any legal proceedings.

2. It will be noted that paragraph (1) is concerned with the recognition or enforcement of claims "in any legal proceedings". This Convention does not attempt to solve all the questions, many of a theoretical nature, that might be raised with respect to the effect of the running of the limitation period. For example, if collateral of the debtor remains in the possession of the creditor after the expiration of the period of limitation, questions may arise as to the right of the creditor to continue in possession of the collateral or to liquidate the collateral through sale. These problems may arise in a wide variety of settings and the results may vary as a result of differences in the security arrangements and in the laws governing those arrangements. Consequently, these problems are to be left to the applicable rules apart from this Convention. It may be expected, however, that the tribunal of signatory States in solving these problems will give full effect to the basic policy of this Convention with respect to the enforcement of rights or claims barred by limitation. See also article 5 (c). As to the effect of voluntary performance of an obligation

after the expiration of the limitation period, see article 25 and accompanying commentary.

II. Claim used as a defence or for the purpose of set-off
3. The rules of paragraph (2) can be illustrated by the following examples.

Example 24 A. An international sales contract required *A* to deliver specified goods to *B* on 1 June of each year from 1970 through 1975. *B* claimed that the goods delivered in 1970 were defective. *B* did not pay for the goods delivered in 1975, and *A* instituted legal proceedings in 1976 to recover the price.

On these facts *B* may set-off his claim against *A* based on defects of the goods delivered in 1970. Such set-off is permitted under paragraph (a) of article 24 (2), since both claims relate to the same transaction;¹ *B*'s set-off is not barred even though the limitation period for his claim expired in 1974, prior to his assertion of the claim in the legal proceedings and also prior to the creation of the claim by *A* against *B* for the price of the goods delivered in 1975. It will also be noted that under article 24 (2), *B* may rely on this claim "for the purpose of set-off". Thus, if *A*'s claim is \$1,000 and *B*'s claim is \$2,000, *B*'s claim may extinguish *A*'s claim but it may not be used as a basis for affirmative recovery against *A*.²

Example 24 B. On 1 June 1970, *A* delivered goods to *B* based on a contract of international sale of goods; *B* claimed the goods were defective. On 1 June 1973, under a different contract, *B* delivered goods to *A*; *A* claimed these goods were defective and in 1975 instituted legal proceedings against *B* based on this claim.

In these proceedings *B* may rely on his claim against *A* for the purpose of set-off even though *B*'s claim arose in 1970—more than four years prior to the time when the claim was asserted in court. Under paragraph (b) of article 24 (2), the claims "could have been set-off" before the date when the limitation period on *B*'s claim expired—i.e. between 1 June 1973 and 1 June 1974.

¹ As to another example where claims arise from "a contract or contracts concluded in the course of the same transaction," see foot-note 4 in the commentary on art. 12.

² On legal proceedings calling for affirmative recovery by the defendant against the plaintiff, see art. 12 (2). See also para. 5 of the commentary on that article and its accompanying footnote.

Article 25

[Restitution of performance after prescription]

Where the debtor performs his obligation after the expiration of the limitation period, he shall not thereby be entitled to recover or in any way claim restitution of the performance thus made even if he did not know at the time of such performance that the limitation period had expired.

COMMENTARY

As has already been noted (para. 1 of commentary on art. 24), expiration of the limitation period precludes the exercise or recognition of the claims of the parties in legal

proceedings (see art. 24 (1)). This is due to the basic purpose of prescription to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree of certainty in legal relationships. These policies are not violated where the debtor voluntarily performs his obligation after the expiration of the limitation period. Article 25 accordingly provides that the debtor cannot claim restitution of the performance which he has voluntarily performed "even if he did not know at the time of such performance that the limitation period had expired". Of course, this provision deals only with the effectiveness of claims for restitution based on the contention that the performance could not have been required because the limitation period had run.

Article 26

[Interest]

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

COMMENTARY

To avoid divergent interpretations involving the theoretical question whether an obligation to pay interest is "independent" from the obligation to pay the principal debt, article 26 provides a uniform rule that "the expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt".

CALCULATION OF THE PERIOD

Article 27

[Basic rule]

(1) The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last calendar month of the limitation period.

(2) The limitation period shall be calculated by reference to the calendar of the place where the legal proceedings are instituted.

COMMENTARY

1. One traditional formula for the calculation of a limitation period is to exclude the first day of the period and include the last. The concepts of "inclusion" and "exclusion"

of days, however, can be misunderstood by those who are not familiar with the application of this rule. Therefore, for the sake of clarity, article 27 adopts a different formula to reach the same result. Under this article, where a limitation period begins on 1 June, the day when the period expires is the corresponding day of the later year, i.e. 1 June. The second sentence of article 27 (1) covers a situation which may occur in a leap year. That is, when the initial day is 29 February of a leap year, and the later year is not a leap year, the date on which the limitation period expires is "the last day of the last calendar month of the limitation period", i.e., 28 February of the later year.

2. Since different calendar systems are used in different States, paragraph (2) of article 27 provides that "the calendar of the place where the legal proceedings are instituted" must be used in calculating the period.

Article 28

[Effect of holiday]

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 12 or asserts a claim as envisaged in article 14,

the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

COMMENTARY

1. This article deals with the problem that arises when the limitation period ends on a day when the courts and other tribunals are closed so that it is not possible to take the steps to commence legal proceedings as prescribed in articles 12 or 14. For this reason, the article makes special provisions "where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction" where the creditor asserts his claim. In such cases, the limitation period is ex-

tended "until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction".

2. It is recognized that the curtailment of the total period that might result from a holiday is minor in relation to a period calculated in years. However, in many legal systems, an extension is provided and may be relied on by attorneys. In addition, attorneys in one country might not be in a position to anticipate holidays in another country. The limited extension set forth in this article will avoid such difficulties.

INTERNATIONAL EFFECT

Article 29

[Acts or circumstances to be given international effect]

A Contracting State shall give effect to acts or circumstances referred to in articles 12, 13, 14, 15, 17 and 18 which take place in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

COMMENTARY

1. This article is concerned with a group of problems illustrated by the following situation. Buyer has a claim against Seller arising from an international sale of goods. The claim arose in 1970. In 1973 Buyer instituted a legal proceeding against Seller in State X. In 1975, while the proceeding in State X is still pending, Buyer instituted a legal proceeding in State Y based on the same claim. (State Y has adopted the Convention.) Since Buyer's claim arose more than four years prior to the institution of the proceeding in State Y, that proceeding would be barred unless the limitation period "ceased to run" when the legal proceeding was commenced in State X.

2. Article 29 refers to the effect which Contracting States shall give to "acts or circumstances referred to in articles 12, 13, 14, 15, 17 and 18". Most of these articles deal with the point which various types of legal proceedings must reach in order to stop the running of the limitation period (arts. 12, 13 and 14; cf. arts. 17 and 18). Article 15, to which article 29 also refers, deals with the effect on the running of the period when the proceeding ends without a final decision on the merits of the claim to afford the creditor an opportunity to institute a further legal proceeding: in such cases the creditor is assured of a period of one year from the date on which the proceedings ended, unless the proceedings have ended because the creditor has discontinued the proceedings or allowed them to lapse. Thus, there is a close relationship between the provisions of the Convention that the limitation period "ceases to run" on the institution of legal proceedings (i.e., arts. 12 (1), 13 (1), and 14), and the rules of article 15 concerning the effect of proceedings not resulting in a decision on the merits of the claim.¹ To return to the above example, if the proceedings in State X ended on 1 February 1975 without a final decision on the merits of the claim for a reason other than the discontinuance or withdrawal of the proceeding, the limitation period "shall be deemed to have continued to run" but the period is extended to 1 February 1976. The above rules, however, do not take up the question of the effect of proceedings in one State (X) on the running of the period in a second State (Y)—the problem to which the present article is addressed.

3. Under article 29, if State X is a Contracting State these events in State X would be given "international" effect in State Y and an action brought in State Y until 1 February 1976 would not be barred by limitation.²

4. By the terms of article 29, a Contracting State (State Y) "shall give" the prescribed effect when the first action (in State X) is in a Contracting State. This language was not intended to forbid a Contracting State from giving comparable effect to acts occurring in non-Contracting States; but any such effect is not compelled by the Convention.

5. The analysis of the references in article 29 to articles 12, 13 and 14 and article 15 showed that article 29 is primarily addressed to problems of limitation that arise when an initial proceeding (e.g., in State X) ends *without* a final decision on the merits of the claim. When that proceeding (in State X) *does* lead to a decision on the merits of the claim, the international effect of that decision (in State Y) is specified in article 16. For example, when the decision on the merits in State X is not recognized in State Y, article 16 assures the creditor of a limited additional period to bring an action on the original claim in State Y.³

6. Article 29 also prescribes the international effect of the recommencement of the limitation period which, under article 18, may occur in some jurisdictions as a result of acts such as the service of a demand notice. Attention is also drawn to the rules of article 17 concerning recourse actions and the effect of the institution of legal proceedings against a joint debtor. If these provisions (now set in square brackets) should be adopted, under article 29 the effect given to the circumstances mentioned in article 17 should be also honoured by other Contracting States.

7. An important requirement for international effect under article 29 is that the creditor take "all reasonable steps to ensure that the debtor is informed of the relevant act or cir-

² If the buyer, after instituting the judicial proceeding in 1973 in State X, in 1974 discontinues the proceeding or withdraws his claim, under article 16 the result is somewhat different: in such cases, the limitation period "shall be deemed to have continued to run" and no extension is granted. As a result, the bringing of the action in State X becomes irrelevant with respect to the running of the period, and the action instituted in State Y would be barred by the four-year period established by this Convention. This footnote does not discuss the situation that would result if the creditor discontinues the proceeding in State X subsequent to the bringing of the proceeding in State Y.

³ When the decision in State X is recognized and is enforceable in State Y, any further proceeding in State Y would normally be based on the judgement rendered in State X. The period for bringing "claims based upon . . . a judgement or award made in legal proceedings" is not governed by this Convention. See art. 5 (d) and accompanying commentary.

¹ This relationship is discussed more fully in the commentary on art. 15.

cumstances as soon as possible".⁴ While in most cases commencement of a proceeding will require notification to the defendant-debtor, under some procedural system, this may not be assured. Hence, this requirement was considered necessary.⁵

⁴ See foot-note 1 of the commentary on art. 17.

⁵ Two representatives opposed to the rule of article 29 for the reason that it is not realistic to ask a State to recognize the effect of institution of legal proceedings in a far-distant State whose procedural rules for the institution of the legal proceedings may often be difficult to ascertain (*Cf.* art. 12 and accompanying commentary, paras. 2 and 3); moreover, under articles 15 and 29 the period would be extended even if a suit was brought in an incompetent court in another Contracting State. In their view, should article 29 be retained,

8. The limitation on the effect of acts in one State (State X) in a second State (State Y) applies only with respect to those articles listed in article 29; thus, article 29 is primarily concerned only with the international effect of the institution of legal proceedings. It may also be noted that the effectiveness of certain other acts does not depend on where they take place: e.g., acknowledgement of the debt (art. 19) and a declaration or agreement modifying the period (art. 21) have the effect prescribed in those articles without regard to the place where the acknowledgement, declaration or agreement occurs.

Contracting States must be permitted to make a reservation limiting the effect in such States of legal proceedings in other States.

Part II: implementation

Article 30

[Implementing legislation]

[Subject to the provisions of article 31, each Contracting State shall take such steps as may be necessary under its constitution or law to give the provisions of part I of this Convention the force of law not later than the date of the entry into force of this Convention in respect of that State.]

COMMENTARY

1. This article deals with the obligation of a Contracting State to take implementing steps that would give the provisions of part I of this Convention the force of law within the territorial jurisdiction of that State. The special problems that may be presented in a federal or non-unitary State are dealt with in article 31.

2. This article does not spell out the manner in which a Contracting State should give the provisions of part I "the force of law". This is left entirely for each Contracting State to take such steps "as may be necessary" under its constitu-

tional rules. Thus, the ratification of or accession to this Convention by a State may be sufficient "under its constitution or law" to give the provisions of part I "the force of law" and no additional steps would be required; in other States, implementing domestic legislation may be required to give such effect to the provisions of part I. Where such implementing process is required after ratification or accession, the Contracting State is bound to take such necessary steps "not later than the date of the entry into force of this Convention in respect of that State"; that date is specified in article 42 of this Convention. It will be noted that under article 30, the Contracting State shall give to "the provisions of" part I the force of law; as a consequence, a Contracting State may not introduce changes that modify the intended meaning of those provisions: part I is not a "model law".

3. This provision is kept in square brackets because the Commission was of the view that the final drafting of this provision may require further attention by the international conference of plenipotentiaries.

Article 31

[Implementing process in a federal State]

[In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations,

supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.]

COMMENTARY

1. Where a Contracting State to this Convention is a federal or non-unitary State, the federal authority may not have power to effect certain provisions of this Convention in its constituent States or provinces because those provisions may relate to the matters which are within the legislative jurisdiction of each of such constituent States or provinces. Consequently, rule supplementing article 30 may be needed for a Contracting State which is a federal State. Article 31 provides the process required for such a federal State in order to fulfil the obligation to implement the provisions of this Convention. This provision is kept in square brackets for the same reason as indicated for article 30.

Article 32*[Non-applicability as to prior contracts]*

Each Contracting State shall apply the provisions of this Convention to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

COMMENTARY

1. This article sets forth a definite time as the starting point for the taking of effect of the provisions of this Convention with respect to contracts: a Contracting State is bound

to apply the provisions of the Convention only to contracts that are concluded on or after the date of the entry into force of this Convention in respect of that State. This starting point was preferred to other dates (e.g., the date the breach is committed or the date the claim arises) because it is more definite and because it avoids difficult problems of retroactivity.

2. The date of the entry into force of this Convention in respect of each Contracting State is dealt with in article 42 of the Convention.

Part III: declarations and reservations**Article 33***[Declarations limiting the application of the Convention]*

(1) Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be considered international within the meaning of article 2 of this Convention, because they apply the same or closely related legal rules which in the absence of such a declaration would be governed by this Convention.

(2) If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

COMMENTARY

1. Some States, in the absence of this Convention, apply the same or closely related rules to sales. These States should

be permitted, if they choose, to continue to apply their present rules to transaction involving such States, and at the same time adhere to the Convention. The present article makes this possible.

2. Paragraph (1) of this article enables any two or more Contracting States to make a joint declaration, *at any time*, to the effect that contracts of sale entered into by a seller having a place of business in one of these States and a buyer having a place of business in another of these States, "*shall not be considered international within the meaning of article 2 of this Convention*". Since under paragraph (1) of article 1 of this Convention, the provisions of the Convention are applicable to contracts of international sale of goods as defined in article 2, the effect of the declaration under paragraph (1) of this article is to exclude such contracts from the scope of application of the Convention.

3. Paragraph (1) uses the term "place of business"; paragraph (2) provides a rule which is in line with the rules of article 2 of this Convention.

Article 34*[Reservation with respect to actions for annulment of the contract]*

A Contracting State may declare, at the time of the deposit of its instrument of ratification or accession, that it will not apply the provisions of this Convention to actions for annulment of the contract.

COMMENTARY

In some legal systems where actions for annulment, as for incapacity, duress or fraud (*dol*), is required to establish nullity of the contract, the period of limitation for bringing

such actions may be treated differently from the period governing the general limitation for the exercise of claims arising from the contract. For example, in such actions the point for the commencement and the length of the period may be different from those rules provided under this Convention (e.g., art. 9 (2)). This article permits a State to declare that it will not apply the provisions of this Convention to actions for annulment of the contract. Thus, the State which has made a reservation under this article may continue to apply its local rules (including the rules of private international law) to the actions for annulment of contract.

Article 35*[Reservation with respect to who can invoke limitation]*

Any State may declare, at the time of the deposit of its instrument of ratification or accession to this Convention, that it shall not be compelled to apply the provisions of article 23 of this Convention.

COMMENTARY

This article permits a Contracting State to make reservation with regard to the application of the rule of article 23 which provides that prescription of rights or limitation of legal proceedings due to the expiration of the limitation may only be invoked by a party. The reason for the necessity to allow this reservation has already been explained in para. 2 of commentary on art. 23.

Article 36

[Relationship with conventions containing limitation provisions in respect of international sale of goods]

(1) This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning limitation of legal proceedings or prescription of rights in respect of international sales, provided that the seller and buyer have their places of business in States parties to such a convention.

(2) If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

COMMENTARY

1. Paragraph (1) of this article provides that present and future conventions which contain provisions concerning limitation in respect of the international sale of goods shall, in case of conflict, prevail over this Convention.

2. Such situations could occur in those conventions that deal with international sales of a particular commodity, or

a special group of commodities. In addition, it has been suggested that article 49 of the 1964 ULIS conflicts with some of the provisions of part I of this Convention. Article 36 permits such a conflicting provision to be applied in relations between the parties whose places of business are in States which ratified such a convention. The same could be true with respect to a conflicting provision in a convention concluded at the regional level such as the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance, 1968.¹

3. The rule stated above is applicable only when the seller and buyer have their places of business in States parties to such a conflicting convention. Paragraph (2) of article 36 provides the rule for applying this provision where a party has places of business in more than one State or where he has no place of business.

¹ The question has also been raised as to whether the 1955 Hague Convention on the Law Applicable to International Sale of Goods includes prescription within its scope.

FORMAL AND FINAL CLAUSES NOT CONSIDERED
BY THE COMMISSION

The following articles were not considered by the Commission and it was agreed that they should be submitted for consideration to the proposed International Conference of Plenipotentiaries.

Article 37

No reservation other than those made in accordance with articles 33 to 35 shall be permitted.

Article 38

1. Declarations made under articles 33 to 35 of this Convention shall be addressed to the Secretary-General of the United Nations. They shall take effect [three months] after the date of their receipt by the Secretary-General or, if at the end of this period this Convention has not yet entered into force in respect of the State concerned, at the date of such entry into force.

2. Any State which has made a declaration under articles 33 to 35 of this Convention may withdraw it

at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect [three months] after the date of the receipt of the notification by the Secretary-General. In the case of a declaration made under paragraph (1) of article 33 of this Convention, such withdrawal shall also render inoperative, as from the date when the withdrawal takes effect, any reciprocal declaration made by another State under that paragraph.

Part IV: final clauses**Article 39**

[Signature]¹

This Convention shall be open until [] for signature by [].

Article 40

[Ratification]²

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 41

[Accession]³

This Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 39. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 42

[Entry into force]⁴

1. This Convention shall enter into force [six months] after the date of the deposit of the [] instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the [] instrument of ratification or accession, this Convention shall enter into force [six months] after the date of the deposit of its instrument of ratification or accession.

Article 43

[Denunciation]⁵

1. Any Contracting State may denounce this Convention by notifying the Secretary-General of the United Nations to that effect.

2. The denunciation shall take effect [12 months] after receipt of the notification by the Secretary-General of the United Nations.

¹ Based on the Vienna Convention on the Law of Treaties (United Nations publication, Sales No.: E.70.V.5), document A/CONF.39/27, art. 81.

² *Ibid.*, art. 82.

³ *Ibid.*, art. 83.

⁴ *Ibid.*, art. 84.

⁵ Based on article XII of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods, herein cited as "The Hague Sales Convention".

Article 44

[Declaration on territorial application]

ALTERNATIVE A⁶

1. Any State may, at the time of the deposit of its instrument of ratification or accession or at any time

thereafter, declare, by means of a notification addressed to the Secretary-General of the United Nations, that this Convention shall be applicable to all or any of the territories for whose international relations it is responsible. Such a declaration shall take effect [six months]

⁶ Based on article XIII of The Hague Sales Convention.

after the date of receipt of the notification by the Secretary-General of the United Nations, or, if at the end of that period this Convention has not yet come into force, from the date of its entry into force.

2. Any Contracting State which has made a declaration pursuant to paragraph (1) of this article may, in accordance with article 43, denounce this Convention in respect of all or any of the territories concerned.

ALTERNATIVE B⁷

This Convention shall apply to all non-metropolitan territories for the international relations of which any

⁷ Based on article 27 of the Convention on Psychotropic Substances, 1971.

Party is responsible except where the previous consent of such a territory is required by the Constitution of the Party or of the territory concerned, or required by custom. In such a case, the Party shall endeavour to secure the needed consent of the territory within the shortest period possible and, when the consent is obtained, the Party shall notify the Secretary-General. This Convention shall apply to the territory or territories named in such a notification from the date of its receipt by the Secretary-General. In those cases where the previous consent of the non-metropolitan territory is not required, the Party concerned shall, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which this Convention applies.

Article 45

[Notification]⁸

The Secretary-General of the United Nations shall notify the Signatory and Acceding States of:

- (a) The declarations and notifications made in accordance with article 38;
- (b) The ratifications and accessions deposited in accordance with articles 40 and 41;
- (c) The dates on which this Convention will come into force in accordance with article 42;
- (d) The denunciations received in accordance with article 43;
- (e) The notifications received in accordance with article 44.

⁸ Based on article XV of The Hague Sales Convention.

Article 46

[Deposit of the original]

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at [place], [date].

4. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Report on acknowledgement by debtor and novation, prepared by Mr. Mohsen Chafik (United Arab Republic)	A/CN.9/WG.1/WP.11*
Proposals and commentaries concerning the scope of application of the uniform law on prescription, prepared by Mr. Jerzy Jakubowski (Poland)	A/CN.9/WG.1/WP.12*
Suggestions for articles 3 and 4 of the draft uniform law by Mr. A. G. Guest (United Kingdom)	A/CN.9/WG.1/WP.13*
Report on the international effect of interruption by legal proceedings instituted in a foreign State, prepared by Mr. A. G. Guest (United Kingdom)	A/CN.9/WG.1/WP.14*

*These documents have been re-issued together in document A/CN.9/70/Add.2.