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Limitations (Prescription) in
the International Sale of Goods
Third session
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AN 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

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INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its second session, established a Working Group on Time-limits and Limitations (Prescription), and requested it to study the subject of time-limits and limitations (prescription) in the field of the international sale of goods.[1/] The Working Group held its first session in August 1969 and submitted a report (A/CN.9/30) to the third session of the Commission. The Commission requested the Working Group to prepare a preliminary draft Convention, setting forth uniform rules on the subject, for submission to the fourth session.[2/] The Commission also decided that a questionnaire should be addressed to Governments and interested international organizations to obtain information and views regarding the length of the limitation period and other relevant issues.[3/] The Working Group held its second session in August 1970 and prepared a preliminary draft of a uniform law on prescription (limitation) in the international sale of goods (herein referred to as the preliminary draft). The report of the Working Group (A/CN.9/50) includes the preliminary draft of the uniform law (annex I), a commentary on the preliminary draft (herein cited commentary) (annex II), and the text of the questionnaire (annex III), which was addressed to Governments and to interested international organizations in September 1970.

1/ Report of the United Nations Commission on International Trade Law on the work of its second session, Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618) (hereinafter referred to as UNCITRAL, report on the second session (1969)), para. 46, United Nations Commission on International Trade Law, Yearbook, vol. I: 1968-1970, United Nations, New York 1971 (hereinafter referred to as Yearbook, vol. I), pp. 100-101.

2/ Report of the United Nations Commission on International Trade Law on the work of its third session, Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017) (hereinafter referred to as UNCITRAL, report on the third session (1970)), para. 97; Yearbook, vol. I, p. 140.

3/ UNCITRAL, report on the third session (1970), para. 89; Yearbook, vol. I, p. 139.

2. At the fourth session of the Commission, held in April 1971, the Commission considered the method and approach it should follow in examining the preliminary draft. The Commission concluded that the Working Group should consider the replies to the questionnaire prior to any decision concerning the length of the limitation period. It was also observed that several important questions dealt with in the preliminary draft were closely related to the length of the limitation period and that the report of the Working Group suggested alternative approaches to these questions pending a decision on the length of the period of limitation.[4/] To that end the Commission requested the Secretary-General to analyse the replies received to the questionnaire and to transmit this analysis to the members of the Working Group in advance of its third session, which meets on 30 August 1971.[5/]

3. As of the date of the preparation of this report, the following 29 States had replied to the questionnaire:[6/] Argentina, Australia, Austria, Bulgaria, Denmark, Finland, India, Italy, Jamaica, Japan, Kenya, Khmer Republic, Kuwait, Libya, Luxembourg, Madagascar, Malawi, Mexico, New Zealand, Norway, Portugal, South Africa, Sweden, Syria, Trinidad and Tobago, USSR, United Kingdom, United States and Venezuela. It will be noted that the respondents included States from each region.[7/]

4/ Report of the United Nations Commission on International Trade Law on the work of its fourth session, Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417) (hereinafter referred to as UNCITRAL, report on the fourth session (1971)), para. 110.

5/ UNCITRAL, report on fourth session (1971), para. 119.

6/ In addition to the 29 States, the Secretariat received a communication from the Council for Mutual Economic Assistance which referred to sections 92-103 (chap. XVI, Limitation of action) of the CMEA General Conditions of Delivery of Goods between Organizations of Member Countries. These rules are contained in United Nations Commission on International Trade Law, Register of Texts of Conventions and other Instruments concerning International Trade Law, vol. I, pp. 99-101, United Nations, New York, 1971. In this regard, see the suggestion by USSR in para. 65 of this report concerning the relationship between the uniform law on prescription and regional international agreements which establish different rules of prescription to regulate contracts of international sale of goods concluded between persons in those contracting States.

7/ Replies were received from States from the following regions: African, 5; Asian, 5; Eastern European, 2; Latin American, 5; Western European and others, 12.

4. The questions contained in part I of the questionnaire were primarily designed to obtain relevant information on the existing national rules. The questions in part II solicited opinion with respect to which uniform rules would be most appropriate. The analysis of the replies requested by the Commission is set out hereinafter.

5. At the fourth session of the Commission, the Commission also decided that views expressed by representatives with respect to the preliminary draft, as reflected in the summary records, should be taken into account by the Working Group in formulating a final draft of a uniform law.[8/] Because of the close relationship between the replies to the questionnaire and the views expressed at the fourth session of the Commission on the subject, this report will also refer to such views whenever deemed pertinent to the purpose of the analysis of the replies.

8/ UNCITRAL, report on fourth session (1971), para. 111.

I. LENGTH OF THE LIMITATION PERIOD

6. The questionnaire at part II, 1, directed the attention of Governments to article 6 of the preliminary draft, which is designed to state the general prescriptive period; the preliminary draft states two alternatives - three years and five years. The questionnaire inquired as to the choice between these alternatives, or whether some other period was preferred. Twenty-one States replied to this enquiry. Table A, below, analyses the replies. In the third column, following the name of each State, is the length of the period (in years) under the domestic law of that State, as supplied in response to the question in part I, 1.[9/]

Table A

Preferred length of the period	Number of States	States
5 years	10	(Finland (10), Italy (10), Jamaica (6), Japan (5), Kenya (6), Kuwait (15), Sweden (10), Trinidad and Tobago (4), United Kingdom (6 (England) 20 (Scotland)), Venezuela (10))
4 or 5 years	1	(Argentina (4))
4 years	2	(South Africa (3), United States (4))
3 years	6	(Austria (3), India (3), Khmer Republic, Madagascar (5), Mexico (10), Norway (3), USSR (3))
2 years	1	(Bulgaria (3))[10/]

9/ Several States indicated that the length of the period under domestic law varied depending upon the nature of claims or parties involved to the transactions. In such cases, however, the length of the period of general applicability most nearly comparable to the field covered by the Preliminary Draft was chosen. With regard to claims based on lack of conformity of goods, some States indicated the existence of special rules and those are treated separately in this report. See paras. 15 and 16, infra.

10/ Bulgaria's preference is affected by the fact that the CMEA General Conditions provides a two year period. Cf. the USSR proposal at para. 65 infra, concerning the relation of the uniform law to other regional international agreements on prescription.

7. At the fourth session of the Commission,[11] many representatives, whose Governments have not replied to the questionnaire, also expressed their preference as to the length of the period: a five-year period was preferred by six States;[12] a four-year period by one;[13] a three-year period by five;[14] and a shorter period by one.[15] Thus, these also may be taken into account in addition to the result in the preceding paragraph.

8. The questionnaire, at part II paragraph 1 (a), sought information concerning the frequency with which claims arising out of international sales of goods (or similar transactions) were brought to a tribunal after the expiration of (i) three (ii) four or (iii) five years. Many replies indicated that such data were not readily available. Six States, however, made general comments. Three States (whose length of the limitation period under their domestic rule is three years) stated that claims after three years were very rare[16] and indicated that their experience with the three-year period was satisfactory.[17] One State observed that proceedings were most frequently delayed until the last year before the expiry of the six-year period established under its domestic rule.[18] Two States (whose length of the limitation period under the domestic rules is 10 years) stated that claims were seldom brought to a tribunal more than five years after the delivery of goods,[19] one of these States reported that in most cases litigation was instituted within two or three years.[20]

11/ In this report, reference to the discussion at the fourth session of the Commission is based on the summary records of the meetings of the Commission. The Commission considered the subject of prescription at its 80th-83rd meetings on 13 and 14 April 1971. The summary records bear document numbers A/CN.9/SR.80-83 (herein cited SR.80-83; numbers following these symbols indicate pages).

12/ Australia (SR.81, 10-11), Ghana (SR.83, 2), Nigeria (SR.81, 6), Poland (SR.81, 9), Tanzania (SR.81, 2), United Arab Republic (SR.82, 2).

13/ Chile (SR.82, 4).

14/ Belgium (SR.81, 4), Hungary (SR.82, 12), Iran (SR.83, 15), Romania (SR.83, 14), Spain (SR.83, 11).

15/ Singapore (SR.82, 9).

16/ Austria, USSR.

17/ Norway.

18/ United Kingdom.

19/ Finland, Sweden.

20/ Sweden.

II. COMMENCEMENT OF THE LIMITATION PERIOD

A. The basic rule: article 7 (1)

9. Article 7 (1) of the preliminary draft provides the basic rule on commencement of the period with respect to claims arising from breach of contract: the limitation period shall commence "on the date on which such breach of contract occurred". The questionnaire, at part I paragraph 2 (a), asked whether the commencement of the period was governed, under national law, by a general rule or principle (e.g., the time when action could be brought, the time when the performance had become due, the time of breach, or some other general rule) and inquired concerning the character of any such general rule or principle.

10. The following shows the result of the replies on the time when the limitation period commences to run under the national laws:

(a) From the time when the cause of action accrued (Jamaica, Kenya, Malawi, New Zealand, Trinidad and Tobago, United Kingdom, United States);

(b) From the day when the right to sue accrued (USSR);[21/]

(c) From the time when the action could be brought (Mexico);

(d) From the date of the objective possibility of a judicial complaint (Austria);[22/]

(e) From the date of exigibility of the obligation (Luxembourg, Madagascar, Bulgaria);

(f) From the time when the performance became due (Denmark, Libya, Norway, South Africa);

(g) From the time when the debt becomes payable (Kuwait);

(h) From the time when the right can be exercised (Italy, Japan, Portugal);

(i) From the date when action could legally be brought or the right exercised (Venezuela);

21/ The right to sue accrued from the day the person learned or should have learned of the infringement of his right.

22/ The reply explains this rule to mean: (a) if a fulfilment date has been agreed upon, the period of limitation begins from that date; (b) in the absence of such an agreement and if the fulfilment date is to be set by the creditor, the limitation period begins from the date set by the creditor; (c) the period of prescription for the payment of the purchase price starts in any case only with the delivery of the goods; and (d) the knowledge of the creditor that it is possible to assert a claim or to proceed with a judicial complaint is irrelevant.

(j) From the date when the breach of contract takes place or the cause of action arises (India);

(k) From the date when the contract was entered into (regardless of when the right becomes due) (Finland, Sweden);

(l) From the date of presentation of the relevant bill of sale, which, in case of doubt, shall be deemed to have been presented on the date appearing on it (Argentina).

11. It should be noted that rules that seem to be similar or identical may lead to entirely different results when applied to concrete cases. This is mainly because of differences in the underlying rules of substance which control the accrual of the cause of action, the time the obligation becomes due, or the like. For example, one reply[23/] indicated that the right to sue accrued from the day the person learned or should have learned of the infringement of his right. This may not be so under the rules of substance of other States which stated a similar rule that the limitation period commenced from the time when the cause of action accrued.[24/] Another reply,[25/] which stated that the period commenced to run from the time when the right could be exercised, indicated that, if a notice was required, the period started to run after a stated time of receiving notice. One reply,[26/] which stated that the period commenced from the date of exigibility of the obligation, and another reply,[27/] which stated that the period commenced from the time when the performance had become due, indicated the existence of a special rule under their domestic rules stating that, where maturity of claims depended on a previous notice (or demand) from the creditor, the period started to run from the time when the right could first be exercised. No other replies referred to the existence of such

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23/ USSR.

24/ Cf., for example, the text accompanying foot-note 43 and foot-note 125. Also see the view of Sweden expressed in the text at foot-note 30/.

25/ Portugal.

26/ Bulgaria.

27/ Norway.

a special rule.[28] Still another reply,[29] while explaining its rule that the period commenced to run from the date of the objective possibility of a judicial complaint, stated that knowledge by the creditor that it was possible to assert a claim or to proceed with a judicial complaint was irrelevant.

12. Thus, without knowing the contents of the domestic rules of substance of each of those States, it seems difficult to categorize the replies and to draw conclusions as to which is the prevailing approach.

13. Related to the divergencies in the substantive law is the comment that the concept of "breach of contract" in article 7 (1) of the preliminary draft must be defined to avoid divergent interpretations.[30]

14. At the fourth session of the Commission, the representatives of six States[31] expressed approval of the approach of article 7 (1). However, one representative opposed this approach on the ground that the moment at which the breach of contract had occurred was difficult to determine, and proposed that the limitation period should commence from the moment when the creditor could demand the performance of the other party's obligation.[32]

B. Special rules for rights or claims based on lack of conformity of the goods:

(a) Special rules under domestic law

15. The questionnaire, at part I, 2 (b), with respect to rights or claims by buyers based on non-conformity of the goods, asked if the commencement of the period

28/ The reply of the United States, commenting on article 8 of the preliminary draft, stated that the test employed in article 8 may bring uncertain results since it could be argued that a person can hardly exercise a right before he knows of its having accrued and that, therefore, the date of his discovery of the accrual of the right is decisive. The reply also stated that the possibility of relying on force majeure or incompetence may also introduce uncertainty. (It may be observed that the latter point is regulated by arts. 15 and 16. but see the view of the United States on these articles at paras. 57 and 58, infra.) At the fourth session of the Commission the representatives of the following States expressed general approval of article 8: Mexico (SR.83, 8), Poland (SR.81, 9), Romania (SR. 83, 14), United Arab Republic (SR.82, 2), USSR (SR.81, 6).

29/ Austria.

30/ Sweden.

31/ Ghana (SR.83, 2), India (SR.82, 4), Poland (SR.81, 9), Romania (SR.83, 14), United Arab Republic (SR.82, 2), USSR (SR.81, 6).

32/ Austria (SR.83, 3). Also see Austria's written proposal (A/CN.9(IV)/CRP.2) circulated at the fourth session of the Commission. This document is reproduced as a working paper for the Working Group under the document number A/CN.9/WG.1/WP.18.

governing such claims was governed by the same rule as other claims arising from sales transactions or by a special rule. The questionnaire also asked if the prescriptive period for such claims started to run from the shipment of the goods; placing the goods at the disposition of the buyer; receipt of the goods; discovery of the defect; the occurrence of the damage, or some other point.

16. Three replies[33/] indicated that such claims would be prescribed one year from the receipt of the goods. One of them[34/] noted an exception to the rule if the seller had given a warranty for a longer period of time or had acted fraudulently. One reply[35/] stated that a one-year prescriptive period was applicable from the time of delivery for claims based on "guarantee" /by virtue of law/ against defects in the goods. Another reply[36/] indicated that claims based on non-conformity, other than those claims based on "guarantee" /by virtue of law/ against deficiencies of the merchandise,[37/] lapsed three years from the time when the buyer had become aware of the damage and of its author; in any case such claims lapsed after thirty years. One reply[38/] seemed to indicate the existence of a six-month period from the time of delivery of the goods; on the other hand, a three-year period applied if the seller hid the defects. Two replies referred to rules in which the time-limit within which notice of defects was required was closely combined with the rule of prescription. According to one of these replies,[39/] the right of action lapsed either (i) on expiration of the period for giving notice (six months) if the buyer had not given notice; or (ii) six months from the date on which the notice was given. According to the other reply,[40/] a six-month

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33/ Denmark, Khmer Republic, Kuwait. The Khmer Republic did not indicate the existence of a general rule.

34/ Denmark.

35/ Italy.

36/ Austria.

37/ With respect to claims based on "guarantee" /by virtue of law/ against deficiencies of the merchandise, the reply referred to the existence of a short notice rule and stated that because of an over-all short time-limit (six months), the prescription rule would have no practical significance in respect to these claims. Cf. para. 19 (b), infra.

38/ Bulgaria.

39/ Portugal.

40/ USSR.

prescriptive period started to run from the date of notice; if no notice of the defects was given, or if it was impossible to determine the date of giving notice, a six-month prescriptive period started to run from the date of the expiry of the period for notice (six months). Six replies[41/] indicated that the general prescriptive period applied to such claims and that the period was calculated from the time of delivery irrespective of the discovery of the non-conformity. One reply[42/] indicated that the general prescriptive period commenced to run from the time when the title to the goods passed to the buyer.[43/]

(b) Acceptability of the provisions of the preliminary draft: article 7(3)(4)

17. The questionnaire, at part II.2, noted that article 7, paragraphs 3 and 4 of the preliminary draft stated rules with respect to rights or claims relying on lack of conformity of the goods, and asked whether these proposed rules were satisfactory. Nineteen States answered this question. (a) Eight replies indicated unconditional approval.[44/] (b) Two replies indicated approval, subject to certain

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41/ India, Jamaica, New Zealand, Norway, United Kingdom, United States. The reply of Norway noted this rule reflected accepted doctrine in Norway. The reply, however, also noted the existence of a Supreme Court decision of 1928 which presumed that the period commenced to run after the notice of non-conformity had been given. The reply of New Zealand noted the existence of a two-year special prescriptive period from the time of accrual of cause of action with regard to claims based on personal injuries arising from the sale of goods. However, in such cases, where the court considered that the delay in bringing the action was occasioned by mistake of fact or law or by any other reasonable cause, or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay, the court might if it thought it just, grant leave to bring such an action at any time within six years after the date on which the cause of action accrued. The court might also impose any conditions it thought just upon bringing such an action. Cf. article 2(a) of the Preliminary Draft and paras. 50 and 51, infra.

42/ Malawi.

43/ Several replies referred to their domestic rules concerning the time-limit within which notice of the defects must be given. However, since these notice rules are outside the scope of the uniform law (see art.1 (3) of the Preliminary Draft), these are not included in the analysis. One reply (Sweden) noted that its time-limit for notice (one year) had been described also as a rule of prescription by a legal doctrine. Also see para. 19 (b), infra and foot-note 112 and its accompanying text, infra.

44/ Argentina, Jamaica, Khmer, Madagascar, Norway, Trinidad and Tobago, United Kingdom, Venezuela. Portugal referred only to article 7(4) and stated that the rule met its domestic rule.

qualifications. One of these suggested an exception for damage claims arising from defects due to the seller's fault - and emphasized the possibility that damage resulting from gross negligence or even deliberate intent might occur at a late date.[45/] The other reply suggested an exception where the seller intentionally hid defects or non-conformity.[46/] (c) Two replies[47/], while expressing approval of article 7(3) and (4), mentioned that the passing of the risk of loss might be used as a test for commencement of the period rather than the test employed in article 7(3) and (4). One of these[48/] suggested that in some situations the date when the goods were placed "at the disposition of the buyer" might be difficult to ascertain (e.g. as in a sale of equipment to be installed at the buyer's factory); since a contract of international sale normally contained a clause concerning the time for passage of the risk of loss, this time could be more easily determined. The reply also made reference to article 35 of ULIS wherein it is provided that the condition of the goods at the time when the risk passes is decisive for the question whether or not the goods are in conformity with the contract. It was noted that under the suggested formula the limitation period may start to commence earlier than under article 7(3) and (4); it was suggested, however, that the difference between the two approaches usually would not exceed two months while the limitation period under the proposed uniform rules would be at least three years.[49/] (d) One reply[50/] stated that article 7(4) was superfluous because, in its view, it was already covered by article 7(3) or, in any event, could be covered by slight change in the wording of article 7(3). (e) Still another reply[51/] indicated that the rules of article 7(3) and (4) should bring out the point that the period of limitation would not run until a reasonable time was allowed for inspection of the goods by the buyer or his agents, if no time was prescribed in the contract.[52/]

45/ Austria.

46/ Kuwait.

47/ Finland and Sweden.

48/ Sweden.

49/ Cf. the domestic rule of Malawi described in para. 16 at fn. 42.

50/ USSR. Compare the comment at the fourth session of the Commission (SR.81, 6).

51/ India.

52/ The representative of India, at the fourth session of the Commission, noted that, in the case of machinery, for example, latent defects might not be discovered until long after the delivery date; reference was made to buyers in developing countries: in order to safeguard the interests of developing countries, article 7(3) should be amended to provide that the limitation period should commence at least one year after the date of the discovery of the defects (SR.82, 5).

18. The remaining four replies objected to article 7(3) and (4) of the preliminary draft. (a) One reply[53/], preferred a rule in which the limitation period would commence to run from the date on which defects or lack of conformity were discovered or could reasonably have been discovered. (b) Another reply[54/] also preferred a rule similar to the above ("from the time when the buyer becomes aware of defects of goods received"). A supporting reason for this proposal was that the text of article 7(3) ("placed at the disposition of the buyer") was ambiguous. It also referred to articles 38 and 41 of ULIS, in which it is provided that prompt examination after receipt of the goods is necessary in order to preserve remedies for non-conformity. The reply suggested that the provisions of the draft should be examined to ascertain whether they conformed to the provisions of ULIS. (c) One reply[55/] recommended adoption of a rule similar to article 94(2) of CMEA General Conditions which (in brief) relates the beginning of the period to the time of the seller's answer to the buyer's claim.[56/] (d) One reply[57/] was of the view that the allowance of three to five years after delivery of the goods for claims based on lack of conformity of the goods was excessive.

19. In addition to the above, at the fourth session of the Commission, (a) the representatives of three States[58/] expressed general approval for the rules contained in article 7(3) and (4); (b) one of them[59/] however, commenting on

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53/ Kenya.

54/ Japan.

55/ Bulgaria.

56/ Under Article 94(2) of CMEA General Conditions, the special limitation period of one year begins to run from the day following the day of receipt by the buyer of the seller's answer on the substance of the claim, and, if an answer is not given by the seller within the times mentioned in subparagraph 1 or 5 of article 76, from the day following the day of expiry of the aforesaid period for giving an answer on the substance of the claim. Unless the seller's contains a settlement of the substance of the claim, the period of limitation shall run from the day following the day of expiry of the period for giving an answer on the substance of the claim.

57/ Mexico. At the fourth session of the Commission, however, the representative of Mexico expressed general approval to article 7(3) and (4) (SR.83, 8).

58/ Poland (SR.81, 9), Romania (SR.83, 14), United Arab Republic (SR.82, 2).

59/ Poland (SR.81, 9).

articles 7 and 9 of the preliminary draft, stated that it would be necessary to regulate within the framework of the same legislative texts, the problem of the so-called "déchéance", which the Commission had already decided should be settled solely by ULIS. Another State[60] also suggested that it would be necessary to take into account the comparatively short time-limits specified for notifications and complaints in national legislations and also in article 39 of ULIS; it would be illogical to lay down a long limitation period if the rights of the plaintiff had already lapsed because of the expiry of the time-limit specified for notification. Still another State[61] thought that for claims based on non-conformity of the goods, even three years after the delivery seemed unduly long.[62] (c) Another State[63] suggested that the word "last" should be inserted before "carrier" in Article 7(4). In its view, since placing the goods at the disposition of the buyer was the relevant act, it was important to refer to the "last" carrier.

C. Express undertaking for a period of time: article 9

20. One reply[64] commented on the rule of article 9 as follows: (a) Although the principle upon which article 9 is based was not objectionable, it would often be difficult to ascertain the day when "the buyer first informed the seller of /his/ right"; even if the buyer's communication was in writing, it might sometimes be regarded as a mere communication of facts and not as invoking a right based on the seller's undertaking. Therefore, the time when the seller's undertaking expired should be treated as the starting point[65]; (b) The seller, after delivering the

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60/ Norway (SR.83, 17).

61/ Austria. The representative stated that in Austria such claims lapsed after six months (SR.83, 4).

62/ See foot-note 112 and its accompanying text on the relationship between the rules on time-limits for notice (e.g. art. 39(1) of ULIS) and the uniform law on prescription.

63/ Hungary (SR.82, 13).

64/ Sweden.

65/ The rule proposed by the Working Group on Prescription at its first session contained such a rule. References to the prior draft and the reasons for the change to the present article 9 of the preliminary draft appear in the commentary to art. 9 in A/CN.9/50.

goods, might adjust certain components of the goods and in this connexion might expressly extend the period applicable to those parts; therefore the provision of article 9 that the undertaking must be contained in the contract of sale should be deleted. Another State[66/] was also of the view that the limitation period should commence from the expiration of the period of the express undertaking. One reply[67/] noted its domestic rule that claims based on guarantee of good working order were subject to the prescriptive period of six months from the time of discovery of the operational defects.

21. At the fourth session of the Commission, the representatives of seven States[68/] indicated that the rule contained in article 9 was acceptable to them. One of them,[69/] however, suggested the following stylistic changes: The term "guarantee" was preferable to the term "undertaking" because the latter was vague, at least in normal commercial usage; and the words "the buyer first informed the seller of such right" should be replaced by the words "the buyer first informed the seller of a claim to such a right". This representative also suggested that the concluding provision of article 9 was obscure, but noted that he generally agreed with its intention.

22. Two replies suggested that the structure of articles 7 to 9 concerning the commencement of the limitation period was too complex. One reply[70/] stated that these provisions should be consolidated into a simpler test such as "the time at which the right can first be exercised". The other suggested that consideration should be given to the relatively simple provisions of article 2-725 of the (USA) Uniform Commercial Code.[71/]

23. At the fourth session of the Commission, one State[72/] was also of the view that articles 7 to 9 were complex and expressed its preference for the rules contained in the Austrian proposal submitted at the fourth session.[73/]

66/ India.

67/ Italy.

68/ Argentina (SR.82, 7), Ghana (SR.83, 3), Mexico (SR.83, 8), Poland (SR.81, 9), Romania (SR.83, 14), United Arab Republic (SR.82, 2), USSR (SR.81, 6).

69/ Ghana (SR.83, 3).

70/ Italy

71/ United States.

72/ Belgium (SR.81, 5).

73/ A/CN.9(IV)/CRP.2. This document is reproduced as a working paper for the third session of the Working Group on Prescription as A/CN.9/WG.1/WP.18.

III. MODIFICATION OF THE LIMITATION PERIOD

A. Rules under national laws

24. Article 18 of the preliminary draft deals with the power of the parties to modify the limitation period. To help evaluate the rules contained in article 18, the questionnaire, at part I, 3, asked whether the prescriptive period could be varied by agreement of the parties under national laws.

25. Table B, below, summarizes the replies.[74/] The number given in parentheses after the name of a State indicates the length of the basic limitation period (in years) under its domestic law.

Table B

(1)	Can the parties extend the period?		
	(a) Yes	5	(Australia (6), 75/ Kenya (6), Luxembourg (30), 76/ New Zealand (6), 77/ United Kingdom (England (6), Scotland (20)) 78/)
	(b) No 79/	15	(Austria (6), Denmark (5), 80/ Finland (10), India (3), Italy (10), Japan (5), Kuwait (15), Libya (15), Madagascar (5), Malawi (6), Mexico (10), Norway (3), Portugal (20), USSR (3), 81/ United States (4))
(2)	Can the parties shorten the period? 82/		
	(a) Yes	8	(Austria (3), Finland (10), Japan (5), Luxembourg (30), Madagascar (5), 83/ New Zealand (6), United States (4), 84/ United Kingdom (England (6), Scotland (20)), 85/)
	(b) No	8	(India (3), Kuwait (15), Libya (15), Malawi (6), Mexico (10), Norway (3), 86/ Portugal (20), USSR (3))

(Foot-notes on following page)

74/ Domestic rules that were reported to be unclear or unsettled are not included in the table.

(Foot-notes to Table B)

75/ Except in New South Wales.

76/ Possible only after the commencement of the period.

77/ The reply indicated that the rule would be probably the same as the English law described in foot-note 78, infra.

78/ The reply included the following: technically, the parties were not free to vary the limitation period in English law, but the parties might agree expressly to waive the limitation period and the contract not to rely upon the Limitation Act was probably enforceable by action. The reply indicated that the rule under the Scottish law was unclear on this point but that a recent recommendation for revision allowed no modification.

79/ This group included Austria, Italy and Madagascar, which allowed renunciation or waiver of the effect of prescription but only after the expiry of the period.

80/ The reply, however, stated that an agreement to extend the period subsequent to the underlying contract, although invalid as such, would normally entail an acknowledgement of the obligation.

81/ The reply indicated, however, that the expired period might be reinstated by the tribunal if there was a valid reason for the delay in bringing action.

82/ The replies of Australia, Denmark, Italy and Kenya explained their rules concerning extension but did not make reference to shortening. These States are not, therefore, included in the following analysis.

83/ The reply stated that the period could probably be shortened.

84/ The Uniform Commercial Code, Section 2-725 (1) provides that by the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

85/ The reply indicated as follows: technically, the parties were not free to vary the limitation period in English law, but the parties might agree that no claim should arise unless a notice thereof was given within some period which was shorter than the limitation period. The reply referred to the existence of such practice where contracts contained arbitration clauses. The reply, however, indicated that the courts might extend the period provided for in such a contract clause if "undue hardship would result".

86/ It is reported that extension was not allowed but no provision was made for shortening.

B. Preferred rule of modification: Acceptability of article 18

(a) Extension

26. The questionnaire, at part II, 3, directed attention to article 18 (2) of the preliminary draft, which permits the parties to extend the limitation period to the maximum of three years from the date of expiration of the limitation period. Article 18 (2) placed in brackets the phrase "after the commencement of the limitation period..." as to the time when parties could agree on extension. Inclusion of the bracketed language would, inter alia, deny effect to extensions in the original sales contract. The questionnaire asked whether the bracketed language should be included.

27. Five replies[87/] preferred inclusion of the language in brackets. The reasons supporting this preference included the following: (a) there was danger of abuse of such provisions in form contracts; (b) to allow modification at the time of contract contradicted the function of the statutory limitation period; and (c) no economic grounds normally existed for such an extension at the time of entering a contract. Two replies[88/] preferred deletion of the language in brackets. One reply[89/] indicated that either alternative was acceptable if the period was three years, but it preferred to have the language in brackets if the period was five years. Another reply[90/] stated that either alternative was acceptable.

28., The questionnaire, at part II, 3, asked whether a rule different from that set forth in article 18 was preferred, and, if so, what rule should be provided. Of the twenty replies, five[91/] gave general approval to article 18 (2). Three replies[92/] indicated a preference between the two alternatives and did not state that they preferred a different rule. Seven replies[93/] stated that no extension should be allowed. One of these[94/] stated the following: article 18 (2) deviated

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87/ Austria, Italy, South Africa, United Kingdom, Venezuela.

88/ Mexico, Sweden.

89/ Norway.

90/ Trinidad and Tobago.

91/ Austria, Jamaica, Khmer Republic, Mexico, Norway.

92/ South Africa, United Kingdom, Venezuela.

93/ Argentina, Bulgaria, India, Italy, Madagascar, United States, USSR. The representative of Argentina, however, expressed his warm support for the provisions of article 18.

94/ USSR.

substantially from the sound basic principle laid down in article 18 (1): moreover, the three-year extension was excessive because the total of the period would then exceed even five years which was the longest period that had been proposed. If some extension should be permitted to give opportunity for amicable settlement, only a one-year extension beyond the basic three-year period should be permitted. Two replies[95/] stated that more freedom was desirable. One reply[96/] stated that, if the three-year period is to be chosen, the rule on modification should be more flexible. One reply[97/] advocated provision for successive extensions of three years at one time to a total maximum period of ten years. This reply also stated that if the length of the basic limitation period was to be three years, greater freedom should be allowed for modification. One reply[98/] noted that an agreement extending the period should be allowed where it was made after the conclusion of the contract.

29. In addition to the above, at the fourth session of the Commission the representatives of three States[99/] gave general approval to article 18. The representatives of two States[100/] stated that article 18 (2) should retain the language in brackets. One of them[101/] however, stated that possible extension should be two years rather than three. The representatives of three States[102/] opposed extension. One of them[103/] stated that allowing such agreements would inject a subjective element; the rule of limitation should be objective. One representative[104/] noted that the provisions of article 18 were difficult to reconcile with those of article 20 (1), which stated that "no right which has become barred by reason of limitation shall be recognized or enforced in any legal

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95/ Kuwait, Trinidad and Tobago.

96/ Finland. Finland preferred five years for the basic limitation period.

97/ Sweden.

98/ Japan.

99/ Chile (SR.82, 4), Ghana (SR.83, 2), Singapore (SR.82, 5).

100/ Poland (SR.81, 9), Spain (SR.82, 11).

101/ Spain (SR.82, 11).

102/ Nigeria (SR.81, 7), Tanzania (SR.81, 2), United Arab Republic (SR.82, 2).

103/ Nigeria (SR.81, 7).

104/ India (SR.82, 6).

proceedings". Still another representative[105/] stated that the text was not absolutely clear as to when an extension of the period was permissible. One representative suggested alternatives based on the principle that the shorter the period the more exceptions and extensions would have to be admitted, while the contrary would be true if the period were longer.[106/]

(b) Shortening: exception for arbitration

30. Only three replies[107/] made reference to the shortening of the limitation period. Two replies[108/] indicated that shortening of the limitation period should be permitted. One of these[109/] approved the power to shorten to a period of not less than two years.[110/] The other called attention to the rule of article 18 (4), according to which a contract clause "whereby the acquisition or enforcement or continuance of a right is dependent upon" a party giving notice to the other party within a certain period of time is valid. This reply noted that under the rules contained in the preliminary draft the parties could, in effect, shorten the period by the use of such a contract clause.

31. In addition, one reply[111/] referred to the provision in article 18 (4) with respect to contract clauses shortening the period for submitting a claim to arbitration. This reply noted that such a clause would have no effect under its domestic law.

32. At the fourth session of the Commission, the view was expressed that article 18 (4) was not clear; in this connexion it was also suggested that if it was not possible to prescribe a very short limitation or prescription period,

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105/ Spain (SR.82, 11).

106/ Hungary (SR.82, 12-13).

107/ Italy, Sweden, United States.

108/ Sweden, United States.

109/ United States.

110/ The Uniform Commercial Code, Section 2-725 (1), allows shortening of the period to not less than one year. A minimum of two years should be applicable to the international sale of goods since "normally, more time is needed for the verification and assertion of claims than in a national transactions".

111/ Malawi.

provision should at least be made for a very short time-limit in which to make a claim for lack of conformity, as was laid down in ULIS.112/

112/ Austria (SR.83, 4). This discussion may have reflected a possible conflict between: (a) the provision in article 1 (2) that the Law governs the period within which the rights of the parties may be enforced in legal proceedings "or otherwise exercised" and, (b) the provision of article 1 (3) excluding from the Law's scope rules with respect to the time for giving notice to the other party. Cf. article 18 (4). In view of the specific provision of article 1 (3), the phrase "or otherwise exercised" in article 1 (2) can hardly refer to the giving of notice to the other party with respect to defect or the assertion of a claim. Moreover, article 1 (3), in excluding from the scope of the Law rules on the time for giving notice to the other party, does not differentiate between rules requiring notice to the other party within a period that is described in general terms (e.g. "promptly") and rules requiring notice to the other party that is described in specific terms (e.g. "within six months after the delivery" or the like). Thus, a rule of national law like ULIS article 39 (1) that requires that notice to the other party be given "promptly" but in no event later than "a period of two years from the date on which the goods were handed over" would not be affected by the Uniform Law on Prescription. However, what conduct is covered by the phrase "or otherwise exercised" in article 1 (2) may not be free from doubt. Presumably, the impact of the Univorm Law on Prescription on national rules would be determined by reference to the actual operative effect of the rules in question under the national law rather than by the way the rule is described. Thus, if a rule of national law specifying a period within which "rights shall be exercised" is applied to require notice to the other party, that application would be outside the scope of the Uniform Law on Prescription and would not be disturbed by the Uniform Law. Also see para. 19, supra.

IV. EXTENSION DURING NEGOTIATION: ARTICLE 14

33. Eight replies referred to the rules contained in article 14. One reply[113] implied that its preference for three years as the basic limitation period was affected by the premise that the rules of article 14 and 18 (2) were in the uniform law. Another reply,[114] in connexion with the suggestion that more freedom should be provided to modify the period,[115] indicated that in article 14 an extension of three years (not one year as in the Preliminary Draft) should be allowed if the basic limitation period of three years is to be adopted. The other six replies[116] preferred the deletion of article 14 from the Uniform Law. These replies included the comment that while such a rule might seem to meet a real need, in practice article 14 could give rise to disputes about the time at which negotiations were broken off; it was further suggested that other tests contained in the proposed rule also were difficult to apply. Further, one reply[117] stated that experience suggested that sometimes it was only after legal proceedings were instituted that real negotiations to settle their dispute got going; there was no need, therefore, to provide for the extension of the limitation period on account of negotiations.

34. In addition to the above, further views were expressed at the fourth session of the Commission. The representatives of five States[118] commented favourably on article 14. Two of them,[119] however, thought that the words in brackets should be deleted and a third[120] thought that simpler and more precise language should be

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113/ Norway.

114/ Sweden.

115/ See the text accompanying foot-note 97.

116/ India, Italy, USSR, United Kingdom, United States. Madagascar stated that article 14 was contrary to its national law.

117/ India.

118/ Austria (SR.83, 5), Mexico (SR.83, 8), Poland (SR.83, 10), Romania (SR.83, 14), United Arab Republic (SR.82, 2).

119/ Austria (SR.83, 5), Poland (SR.83, 10).

120/ Mexico (SR.83, 8).

found. Another representative[121/] stated that the words "on the merits of" should be deleted and it was of the opinion that article 14 should be deleted if the basic period was to be five years. The representatives of three States[122/] opposed the inclusion of article 14. In their view, article 14 introduces an element of uncertainty; parties acting in bad faith might prolong the negotiations in order to extend the limitation period; without article 14, the parties would have an incentive for serious negotiations in order to arrive at a settlement; it would be the reverse if article 14 was retained.

121/ Hungary (SR.82, 12).

122/ Argentina (SR.82, 7), Ghana (SR.83, 2), Singapore (SR.82, 9).

V. EFFECT OF DISCONTINUANCE OR DISMISSAL OF PROCEEDINGS: ARTICLE 17

35. Part I, 4 of the questionnaire made the following inquiry concerning existing national rules:

> "Assume that a right or claim has been asserted in a tribunal within the prescriptive period and the proceeding has been dismissed without reaching a decision on the merits. In such a case, is there any rule that suspends, extends or otherwise modifies the basic period, where the proceeding was dismissed:
>
> "(a) because the tribunal was not competent to hear the case?
>
> "(b) becuase of procedural defect or irregularity in the bringing or prosecution of the action?
>
> "(c) because the proceeding for any other reason prove abortive and thereby fails to reach a decision on the merits?"

36. Twenty-six States replied to this question. Table C, below, summarizes the result of the replies:

Table C

(1)	Dismissal has no effect on running of the period and no extension is provided:		
	(a) in all cases	11	(Australia, Austria, Jamaica, Japan, Kenya, Malawi, 123/ Medico, 124/ New Zealand, 125/ South Africa, Trinidad and Tobago, USSR 126/)
	(b) in all cases except where arbitration is abortive	1	(United Kingdom 127/)
	(c) in all cases except where the action is dismissed because the court is not competent	3	(India, 128/ Luxembourg, Venezuela 129/)
	(d) only where dismissed because of procedural defects or irregularities	1	(Kuwait 130/)
	Total	16	
(2)	Period is		
	(a) interrupted by bringing action (regardless whether later discontinued or dismissed) 131/	7	(Argentina, Finland, Italy, 132/ Libya, Madagascar, Portugal, 133/ Sweden)
	(b) extended in all cases:	3	(Denmark, 134/ Norway, 135/ United States 136/)
	Total	10	

(Foot-notes on following page)

(Foot-notes to Table C)

123/ The reply noted that no provision was made for extending the period in these cases.

124/ In case of credit instruments such as bills of exchange, promissory notes and cheques, a special provision existed that the limitation period was interrupted by presentation of claims even if the judge was incompetent. Such a rule seems to li outside the scope of the uniform law. See art. 2(f) of the preliminary draft.

125/ The reply noted that the general rule was applicable only where a cause of action had once accrued and the statute had begun to run. And, according to the reply, a cause of action arises at the moment when a state of facts occurs which gives a potential plaintiff a right to succeed in an action against a potential defendant; therefore there must be a plaintiff who can succeed and a defendant against whom he can succeed. Thus, the reply stated that, if, for example, the tribunal was not competent to hear the case because the prospective defendant was protected by diplomatic immunity, the principle prevented a cause of action from even having arisen. No other State referred to the question of diplomatic immunity.

126/ However, note that it was provided that, if a tribunal found that the reason for the delay in bringing an action after the expiry of the prescriptive period was valid, the infringed right would be subject to protection, i.e. the expired prescriptive period might be reinstated by the tribunal (including arbitral tribunal or mediation board). A similar rule authorizing the tribunal to reinstate the expired period was observed in New Zealand concerning claims for damages arising from personal injuries. See foot-note 41, supra.

127/ Where arbitration proceedings prove to be abortive, the court could extend the limitation period so as to allow the claimant to start a new arbitration or to institute legal proceedings.

128/ The time which a plaintiff had spent prosecuting with due diligence and in good faith, but in ignorance of the lack of competency of the court or any similar problem, should be excluded in calculating the running of the period.

129/ The prescriptive period is interrupted "by virtue of an action brought before the courts, even if heard by a judge who is not competent".

130/ In all other cases including dismissals because of incompetency of the court, a new period commenced to run from the date of last procedure of the previous action.

131/ Sometimes what was meant by "interruption" was not clear. Usually it may be assumed from the replies that "interruption" started the running of a new period.

132/ According to the reply, the general rule was that the limitation period was interrupted by bringing an action and the new period started to run after the final judgement was rendered, including cases where the action was dismissed because the court was not competent. In other cases of dismissal, the new period commenced to run from the time when the action was instituted.

(Foot-notes continued on following page)

37. It will be noted that categories 1 (c) and 1 (d) above are comparable to that of the preliminary draft. States falling in categories 1 (a) and 1 (b) are more strict than the preliminary draft in dealing with a plaintiff whose action has been dismissed, while the States in categories 2 (a) and 2 (b) are, in general, somewhat more liberal.

38. One reply[137/] proposed that additional time should be given when an action was dismissed or discontinued on any ground other than on the merits. The reply was of the view that a litigant who voluntarily discontinued an action that was defective (for a reason not relating to the merits), should be given at least as favourable treatment as a litigant who awaited the initiative of his adversary in moving for dismissal.[138/]

(Foot-notes to Table C (continued))

133/ Portugal has a rule similar to Italy. See foot-note 132 supra. In addition, if an action was dismissed for a procedural reason not attributable to the creditor, an extension of two months from the day of dismissal was also provided.

134/ No express provisions existed. But it had been held by legal theory and practice that the basic period was extended to allow the plaintiff to bring another action without undue delay.

135/ The period was extended for three months after the plaintiff was notified of the decision to dismiss the proceeding. However, if the dismissal was caused by an intentional fault of the plaintiff, no such extension would be granted.

136/ The reply noted that the rule generally embodied in state statutes on the subject was that a creditor, when he had asserted a right in a proceeding that did not lead to a disposition on the merits, had a specified time - normally six months to a year - within which to assert his claim in another proceeding. Under the applicable state law, the availability of this privilege might depend on the reasons for which the proceedings were dismissed. Most state statutes provided it irrespective of the reasons for dismissal. Others did so only if the dismissal was neither voluntary nor for failure to prosecute. In relation to contracts of sale, section 2-725(3) of the Uniform Commercial Code provides that the additional time is given only if the termination of the first action did not result from voluntary discontinuance or from dismissal for failure or neglect to prosecute. It provides: "Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

137/ United States.

138/ Cf. with the domestic rule of the United States at foot-note 136.

39. At the fourth session of the Commission, the representatives of two States,[139] referring to article 17 (2), supported extension of the limitation period only in the case of bona fide action before a court without jurisdiction; if a claimant knowingly initiated proceedings in the wrong court, no extension of the limitation period should be available. One representative[140] stated that article 17 was absolutely necessary.

139/ India (SR.82, 6), Singapore (SR.82, 9).

140/ Argentina (SR.82, 7).

VI. RIGHTS BASED UPON A JUDGEMENT OR AWARD

40. Under article 2 (d) of the preliminary draft, the uniform law does not apply to rights based upon "a judgement or award made in legal proceedings" even though the judgement or award results from a claim arising from an international sale. At the second session of the Working Group, the view was expressed that if the enforcement of judgements should be included within the uniform law at a later stage of drafting, the limitation period for such enforcement should be longer than that applicable to the underlying claim: consideration should be given to a period of ten years.[141/] To obtain background information to meet this contingency, the questionnaire (part I, 5) inquired concerning the length of the period within which rights established by a final judgement or award could be enforced under the national law.

41. Twenty-five States responded to this inquiry. All the States except one indicated the length of such period to be ten years or more. Table D summarizes the replies:

Table D

3 years	1	(USSR 142/)
10 years	7	(Argentina, Finland, Italy, Japan, Mexico, Norway, Sweden)
12 years	8	(Australia, 143/ India 144/ Jamaica, Kenya, 145/ Malawi, 146/ New Zealand, 147/ Trinidad and Tobago, United Kingdom 148/)
15 years	2	(Kuwait, Libya)
20 years	3	(Denmark, Portugal, Venezuela) 149/
30 years	4	(Austria, 150/ Khmer Republic, Luxembourg, South Africa)

141/ See paragraph 4 of commentary to article 2 in A/CN.9/50.

142/ If no citizen is involved in the underlying transaction, the period was one year. Foreign judgements or arbitral awards must be submitted for execution within three years.

(Foot-notes continued on following page)

(Foot-notes to Table D) (continued)

143/ The reply stated that the period differed from state to state and ranged from 12 to 20 years.

144/ But an award could be enforced only by filing a suit for its enforcement in a court within a period of three years from the date of the award.

145/ The reply noted that the interest claim on a judgement debt was subject to the six year limitation period from the date on which the interest became due.

146/ In addition to a rule similar to Kenya concerning interest claims (see foot-note 145, supra.), the reply noted that, since the warrant of execution was valid only for 12 months, in practice application must be made every 12 months to keep a judgement or award alive.

147/ The reply noted that the interest claim on a judgement debt was subject to the six year limitation period from the date on which the interest became due; actions founded on a foreign judgements or any arbitration awards were also subject to the six-year limitation period.

148/ The reply stated that the length of the period in Scotland was 20 years. The reply also noted that, if an arbitration agreement was not under seal and the award was not registered, it would be necessary to enforce the award as a contract between the parties; hence the period was six years. Foreign judgements were treated in the same manner as contractual rights and the limitation period was six years.

149/ In addition to these States, Australia and the United Kingdom may be included here. See foot-note 143 and foot-note 148.

150/ If the creditor was a corporation, the period was 40 years.

VII. OTHER COMMENTS

42. The questionnaire (part II, 4) asked Governments if there was any provision in the preliminary draft which was not well adapted to the circumstances and needs applicable to international sale of goods, or which would interfere with adoption of a convention implementing the draft. Several States submitted comments pursuant to this enquiry. These comments will be discussed in the order of the provisions in the preliminary draft.

A. Sphere of application of the uniform law: articles 1-15

(a) Exclusion of the rights of the guarantor: articles 1-15

43. One reply[151/] stated that the proposed treatment of the legal relationship arising from a guarantee was one-sided because article 1 (1) included within its scope only the rights of the buyer and seller arising from a guarantee and excluded the rights of the guarantor against the parties to the contract of sale. In the opinion of that reply both should be included.

44. One reply[152/] stated that under its domestic law the length of the prescriptive period applicable to the rights based on a personal guarantee was the same as that provided for the rights which were guaranteed by such a guarantee; consequently, the rights against a guarantor could not be enforced when the principal obligation had been prescribed. The preliminary draft has no such specific rule on the relationship between the prescriptive periods applicable to claims against the debtor and guarantor. It could be contended that the rules of the preliminary draft did not prevent the continued application of specialized rules on the relationship between the principal debt and a claim against the guarantor. It might be noted that whether the prescriptive period applicable to both claims started on the same date (and therefore expired on the same date) would depend (inter alia) on whether the reference in article 7 (1) to "any right arising out of a breach of the contract of sale" meant that the period applicable

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151/ United States.

152/ Norway.

to the claim against the guarantor would necessarily start on the date of the breach by the seller or whether the period might start on the date of the breach by the guarantor which might in some cases relate to a date subsequent to that of the breach by the seller.

(b) Ambiguity in article 1 (1) (2)

45. One reply[153/] stated that the phrase "or otherwise exercised" in article 1 (2) is unclear. In its view, although the draft provided that any State might, upon ratification, declare that it would delete the words "or otherwise exercised", this provision did not in itself clarify the question.[154/]

46. The same reply also called attention to various terms in article 1 (1) relative to the application of the uniform law. These include the following terms: (a) contract of sale (or a guarantee), (b) "breach", (c) "termination", or (d) "invalidity" of the contract (or guarantee). It was suggested that these terms were not differentiated clearly enough in the text of the draft and that their theoretical formulation was tentative and vague.

(c) Repetition of provisions relating to notice: article 1 (3)

47. One reply[155/] was of the view that the idea expressed in article 1 (3) is largely repeated in article 7 (2) and article 18 (4).[156/]

(d) The terms "creditor" and "debtor": article 1 (4) (d) (e)

48. A reply[157/] suggested replacing the words "creditor" and "debtor" by the words "claimant" and "respondent". At the fourth session of the Commission, the same view[158/] was expressed. In this connexion it was noted that the terms "creditor" and "debtor" would imply that rights had already been adjudicated.

153/ USSR.

154/ Cf. foot-note 112.

155/ USSR.

156/ Cf. the text accompanying foot-notes 39 and 40, supra.

157/ South Africa.

158/ Singapore (SR.82, 8)

(e) Applicability with respect to proceedings to establish invalidity of the contract:

49. At the fourth session of the Commission, one representative[159/] suggested that legal proceedings to establish the invalidity of the contract were within the scope of the preliminary draft whereas ULIS dealt only with the obligations of the seller and buyer arising from the contract of sale. He doubted that this approach of the preliminary draft was wise and suggested that the uniform law on prescription should be confined to actions arising from the failure by either the seller or the buyer to perform his obligations; it would be unwise to venture into the involved and so far comparatively unexplored field of formation of the contract and defects that might affect the contract itself. The observer of UNIDROIT also thought that the preliminary draft covered the question of the invalidity of the contract. He was of the view that the question of the invalidity of the contract raised specific problems of a completely different character from those connected with non-performance or defective performance of a contract.[160/]

(f) Exclusion of rights based on bodily injury: article 2 (a)

50. One reply[161/] stated that it had no objection to the exclusion from the scope of the application of the uniform law of rights based on liability for the death of, or personal injury to the parties,[162/] but suggested that, if such claims were excluded, claims for damage to property other than the goods sold should also be excluded. A similar view was also proposed by a member of the Working Group on Prescription at its second session.[163/]

51. The same reply was of the view that all personal injury and wrongful death claims should be excluded; therefore, the reference to "buyer" in subparagraph (a) of article 2 should be deleted.

159/ France (SR.83, 7).

160/ See SR.83, 10-11.

161/ United States.

162/ Cf. fn. 41, supra, explaining the unique rule of prescription in New Zealand concerning claims for damages arising from personal injuries.

163/ See appendix A to annex II of A/CN.9/50.

B. Interruption of the limitation period: articles 10-13

(a) Proposal to simplify and improve the provisions of articles 10-12

52. One reply[164/] was of the view that the present texts of articles 10 to 12 were unnecessarily prolix; a more straightforward approach should be adopted, probably by way of consolidating the rules in these articles into a simpler rule. This reply also made several comments on details of the rules contained in these articles. Because of the detailed and interrelated character of these comments, they are presented as a working paper (A/CN.9/WG.1/WP.20).

53. At the fourth session of the Commission, one representative[165/] stated that the phrase "provided that such counterclaim does not arise out of a different contract", was too general and that the concept of counterclaim as contemplated in article 10 (2) could encourage the lodging of complaints which bore no relation to the original claim.[166/] Another representative[167/] was of the view that article 12 was difficult to understand and should be revised.

(b) Acknowledgement by partial performance: article 13 (3)

54. At the fourth session of the Commission, one representative[168/] stated the following: according to paragraph 4 of the commentary to article 13 (A/CN.9/50, annex II), "the partial repair by a seller of a defective machine" could be regarded as acknowledgement by the debtor which would cause the limitation period to start afresh. Such an important rule should be expressly stated in the uniform law, particularly since article 13 was linked with article 9, which dealt with the case of express undertakings - and also with article 42 of ULIS.

(c) Acknowledgement after the expiration of the period: article 13 (5)

55. One reply[169/] was of the view that acknowledgement after expiration of the limitation period should not be given effect and consequently objected to the rule

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164/ United States.

165/ USSR (SR.81, 5).

166/ But cf. fn. 2 to the commentary to article 10 (in A/CN.9/50) where it is stated that the question of the extent to which counterclaim can be filed is to be determined by the procedural rules of the forum.

167/ Belgium (SR.81, 5).

168/ Hungary (SR.82, 13).

169/ Libya.

of article 13 (5). Another reply[170/] also proposed the deletion of article 13 (5); under this view, whether an acknowledgement after the expiration of the limitation period or payment of instalments or interests after the period constitutes a new obligation ought to be left to applicable national law.

56. At the fourth session of the Commission, a representative[171/] also opposed the rule of article 13 (5). Another representative[172/] stated that he could accept the doctrine of article 13 although he felt that such acknowledgement should take place before the expiry of the limitation period.

C. Extension where institution of legal proceedings prevented; misstatement or concealment by debtor: articles 15 and 16

57. Two replies[173/] were of the view that the rules set forth in article 15 are very difficult to apply and might lead to divergent interpretations and applications; uncertainty should be avoided by specifying the circumstances justifying an extension. One[174/] of these replies also indicated that its domestic rules contained a provision suspending the running of the limitation period while the creditor was insane, a minor, or otherwise incompetent, although these were peculiarly "personal" to the creditor. In its view, a broader formula was desirable since the limitation period probably should not run whenever the creditor could not be reproached for not asserting his rights.[175/]

58. Two replies[176/] foresaw uncertainties in the application of the rule of article 16 on the time from which the period recommenced, and recommended reformulation of the article. One[177/] of these replies suggested that article 16 gave undue protection to a creditor who did not find out the identity of the debtor within the basic limitation period.

170/ Sweden.

171/ USSR (SR.81, 5).

172/ India (SR.82, 5).

173/ Italy, United States.

174/ United States.

175/ The reply of New Zealand indicated that periods of disability such as infancy or lunacy were generally excluded from the limitation period under its domestic law.

176/ Italy, United States.

177/ United States.

59. According to one reply,[178] article 16 was largely covered by the more general and adequate formulation of article 15.

60. At the fourth session of the Commission, two representatives[179] stated that articles 15 and 16 were acceptable. One representative[180] was of the view that the the scope of article 15 was not clear. Another representative[181] stated that the grounds for extension should be kept at a minimum or even eliminated so as to avoid difficulties of application arising from divergent court practice in the various countries and expressed its preference for laying down a comparatively long limitation period.

D. Who can invoke limitation: article 19

61. One reply[182] objected to article 19 since it contradicted a rule of public policy whereby judges should be able to invoke the limitation period. Another reply[183] reserved its position with regard to the provisions of article 19.

62. At the fourth session of the Commission, three representatives referred to article 19. One[184] opposed article 19, another[185] favoured it, and the third[186] suggested that the Working Group might reconsider the question.

E. Set-off: article 20 (2)

63. One reply[187] indicated that set-off should be permitted even if the claim in question did not arise from the same contract but arose from the same

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178/ USSR.

179/ Argentina (SR.82, 7), Mexico (SR.83, 8).

180/ India (SR.82, 5).

181/ France (SR.83, 6).

182/ Madagascar.

183/ India.

184/ United Republic of Tanzania (SR.81, 2).

185/ Argentina (SR.82, 8).

186/ Nigeria (SR.81, 7).

187/ United States.

transaction, occurrence, or event; the factual interrelationship of the claims rather than their formal legal basis should be decisive. At the fourth session of the Commission, one representative[188/] supported the approach of article 20 (2) concerning set-off. Another[189/] thought that the requirement of article 20 (2) (a) was not necessary.

F. Preservation of existing rights: article 25

64. In lieu of the rule contained in article 25 (1), one reply[190/] suggested that all rights or claims arising from contracts of sale entered into before the operative date of the uniform law should be governed by the law applicable at that time, and not by the uniform law.

G. Relation of the uniform law to other regional international agreements on prescription; e.g. CMEA General Condition

65. One reply[191/] was of the view that it would be necessary to have the Convention implementing the uniform law stipulate that the Convention would not be applied to contracts of international sale of goods concluded between persons whose States had established or would establish other rules concerning the prescriptive period by concluding international agreements.[192/]

H. Relation of the uniform law to ULIS

66. One reply[193/] was of the view that it was desirable that the length of the limitation period, and the rules on modification, commencement, extension or shortening of the period be examined in relation to the substantive rules of ULIS; this examination was important because of the connexion between the rules concerning extinctive prescription and the substantive rights arising out of the contract of sale of goods.[194/]

188/ Argentina (SR.82, 8).

189/ Austria (SR.83, 5).

190/ Trinidad and Tobago.

191/ USSR.

192/ See, e.g. fn. 6, supra.

193/ Japan.

194/ See, e.g. para. 18 (b), supra.