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WORKING GROUP FOR THE PREPARATION OF
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Chapter […]

LIMITATION PERIODS

(Revised draft prepared by Professor P. Schlechtriem in the light of the discussions of the Working Group at its 4th session held in Rome, 4-7 June 2001)

Rome, December 2001

Article 1
(Scope of the chapter)

(1) Rights governed by these Principles cannot be exercised after expiration of a period of time, referred to as "limitation period".
(2) This chapter does not govern the time within which one party is required under these Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or perform any act other than the institution of legal proceedings.

COMMENT

1. All legal systems know the influence of time on rights; *Immanuel Kant* regarded this - i.e. prescription and limitation of actions - as institutions of the law of nature.[1] Roots and origins were, however, different in Roman Law and Common Law, where the institute of limitation of actions was developed in the medieval ages. In Roman Law on the one hand, the *actio* was regarded as everlasting, but the *praescriptio* could cause acquisition of title (and loss of ownership) by passing of time; this solution became influential for a number codifications in the eighteenth and nineteenth century in Europe. Common law, on the other hand, considered lapse of a certain period of time as a mere procedural bar to the enforcement of an action in court. Even nowadays, scholars steeped in Roman law tradition prefer to use the term «prescription».[2] Since it was decided that a lapse of time should not extinguish rights but only limit their enforcement (see infra Art. 12), the term *"limitation of rights"* instead *"prescription"* was used in the English version of these Principles as more appropriate in this chapter. This does not prevent the use of the term *préscription* in the translation into French or of equivalent terms in the translation into other languages, if they do not limit the meaning of the respective term to an extinction of rights.

The term "right" instead of (limitation of) actions was employed to make sure that not only the right to demand performance or damages etc. can be barred by a lapse of time

[1] Die Metaphysik der Sitten, Erster Theil. Metaphysische Anfangsgründe der Rechtslehre, Erster Theil, Episodischer Abschnitt, §§ 32, 33; see also *Spiro*, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Verteilfristen, 2 vol., Bern 1975, vol. 1, p. 19; *Vinding Kruse*, Das Eigentumsrecht, vol. 1 1931, p. 619: Common to all nations.

[2] For an extensive analysis of the difference between *prescription* as an acquisition and respective extinction of rights *ex lege* - or «positive» and «negative» prescription - and limitation of actions as a limitation of the enforcement of rights see *Danco*, Die Perspektiven der Anspruchsverjährung in Europa, 2001, p. 12 et passim.

but also the exercise of rights effecting a contract directly such as the right to terminate a contract or a right of price reduction.

Illustration

A has sold a tankship to B to be transferred to the purchaser on 3 October, 2001. The sales contract listed certain pieces of equipment and spare parts as included in the sale, which, however, were missing when the ship was handed over. The purchaser noticed this lack of conformity only in November 2004. His claim under Art. 7.2.2, which he raised only in November 2004 is barred by the Statute of Limitation. (Art. 2 of this draft).

2. Notice requirements and other prerequisites for enforcing rights

Rights could be lost under some UNIDROIT Principles, if the party entitled to acquire or exercise a right fails to give notice or perform an act within a reasonable period of time or without undue delay or within another fixed period of time, e.g. in regard to the time limits for communications in the context of formation of contract, Art. 2.1 - 2.22, avoidance of contract on account of mistake, Art. 3.15, the request for re-negotiation, Art. 6.2.3, or notice of termination, Art. 7.3.2 (2). Although serving a function similar to periods of limitation, these special periods and their effects are not affected by the more general periods of limitation of this chapter, because they are designed to meet special policy needs. Being in general much shorter than the periods of limitation provided for in this chapter, they take effect regardless of limitation periods. In the exceptional case that a "reasonable period of time" under the circumstances of the case might be longer than the respective limitation period, the provision on requiring the exercise of a right within a reasonable time should prevail.

Illustration

In the illustration above, A after having realized at the time of the delivery of the tankship that certain parts were missing set an additional period of time until 30 November, 2001 for the delivery of the missing parts by A. The parts were still missing by August 2002. B now sends notice of termination to A under Art. 7.3.2. B cannot rely on the three-year period of limitation, but has lost its right to terminate the contract because a reasonable time under Art. 7.3.2(2) has lapsed already.

3. Definitions

Most terms used in Art. 1 and the following articles are defined already elsewhere in the UNIDROIT Principles; e.g., the terms *obligee* and *obligor* are defined in Art. 1.10. Since the definition of "court" in Art. 1.10 might be adjusted to include judicial, arbitral or administrative proceedings, a definition of "legal proceedings" to this effect was not necessary in this chapter. The term 'year' means a year according to the Gregorian calendar. A definition of 'year' in the black letter rule - as in Art. 1(3)(h) of the UN-Limitation Convention - was regarded as not necessary, because the reference to the Gregorian calendar is the usual meaning of 'year' in international contracts, the more so since even

calendars deviating from the Gregorian calendar mostly have the same number of days in a year, so that they do not influence the length of the limitation periods. If the parties, however, want to base the meaning of the word 'year' in their contract on a calendar different from the Gregorian calendar, e.g. where they refer to certain dates of the year, such an agreement should be made clearly or derived from interpretation of the contract under Art. 4 of these Principles.

Nevertheless, as to "persons" and "year" it should be decided by the plenary of the working group, whether definitions were really needed. In particular, the definition "year" seems to be necessary because in some cultures the year might have a different number of days; the prescription chapter of the European Principles of Contract Law also contains a definition of "year".

Since it should be decided by the plenary working group whether the definitions in para 3 are really needed, they are put in brackets here.

Article 2
(General Limitation Period)

The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the right has become due.

Article 3
(Maximum Limitation Period)

The maximum limitation period is ten years beginning on the day after the day the right became due.

I. General remarks to Arts. 2 and 3

1. Although periods of limitation or prescription of rights and actions are common to all legal systems, comparative law analysis does not offer much help in calibrating the length of the period of time, the lapse of which should limit or prescribe actions and rights. Numerous monographs and treatises have collected respective statutes and provisions, and even if the field is narrowed down to limitation and prescription periods for rights and actions based on contract or failed contracts, still a wide variety in prerequisites and lengths of periods can be reported, ranging from 6 months or 1 year in some countries for claims arising from breach of warranties in a number of states to 2, 3, 4, 5, 6 or 8 up to 10, 15, 20

or even 30 years in some countries for different claims respectively.[3] On the level of international unification of law, only the UN-Convention on the Limitation Period in the International Sale of Goods of 1974 (as amended in 1980) offers some guidance, but did obviously not contain a very convincing model, for the number of ratifying states so far is rather small (up to date: 25). Some authority might be conceded, however, to the draft of the Principles of European Contract Law, chapter 17, and its general limitation period of three years (Art. 17: 102).

2. At first sight it seems advisable to «tailor» the length of limitation periods to the respective claims, so that e.g. claims for breach of warranty might be barred after a shorter period of time in order to facilitate trade and bookkeeping for sellers, contractors etc., than claims for performance or restitution after avoidance of a contract. But experience - e.g. in Germany[4] - shows that such differentiation tends to influence and sometimes corrupt the substantive law, for lawyers and judges may try to circumvent a short period of limitation in a given case, where its results seem to be too harsh, by requalifying or recreating a barred right, action or remedy as some other right, action or remedy not falling under the short term limitation provision. Therefore, the working group has opted here for two uniform limitation periods in Arts 2 and 3.

3. The stated length of a period of limitation in itself, however, does not always indicate definitely the time, after which a right or an action ceases to be enforceable or even to exist, for equally important as the length are the prerequisites for commencement of this period and, whether and under what circumstances its course can be affected (see Arts 5 et passim). In addition, party autonomy in regard to limitation periods is of great practical importance, for periods either too long or too short may be regarded as tolerable if parties may calibrate them freely according to their needs (see Art. 4). In other words, the regime of provisions on limitation of rights and actions by lapse of time consists of various details which are interdependent and mutually influential, and in regard to which a wide variety of solutions could be found in a comparative analysis.

4. Although it is sometimes stated that the regulation of the issue of limitation or prescription of rights by lapse of time necessarily requires some arbitrary decisions[5] and might "have more cruelty than justice" (in them),[6] there are at least three factors narrowing down the policies to be weighed and evaluated in order to draft rules on limitation of rights:

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[3] See *Spiro*, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Verteilfristen, 2 vol., Bern 1975, vol. 1, § 260 et seq., p. 611 et passim; *Danco*, p. 64 et passim; *Peters/Zimmermann*, Verjährungsfristen, in: Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, Bundesminister der Justiz (ed.), vol. 1, Bonn 1981, p. 101, 267 et passim; see also see the 17 national reports presented by the International Academy of Comparative Law in 1994 on its XIVth Congress.

[4] See *Peters/Zimmermann, op.cit.* at p. 196 et seq.

[5] See *Spiro*, vol. 1 at p. 611, quoting *von Tuhr*, BGB, Leipzig 1910, § 91 III

[6] *R.B. Policies at Lloyd's v. Butler* [1950] 1 KB 76 (82)

a) Even if it were impossible to develop a satisfactory system of rules and provisions for all kinds of rights, claims and actions, the problem is more concrete and, therefore, solvable if one has to deal only with a certain group of rights and actions, i.e. those arising out of international commercial contracts either governed directly by the UNIDROIT Principles of International Commercial Contracts or at least influenced by these Principles by way of interpretation and gap filling.
b) A limitation of rights after a lapse of time unavoidably means a loss of a right whether the time bar operates as an extinction of the right by prescription or only as a defence against its enforcement as in the limitation of action model. The owner of the right thereby is kind of expropriated; he/she or it loses an asset. On the other hand, there is not only the commandment that peace under the law must be restored and a debtor, not pursued by the obligee, be allowed to regard his/her or its burden as no longer really existing by finally cutting off the threat of litigation after some time, but also the more practical consideration that by passing of time matters become obfuscated and the outcome of a litigation hazardous, because witnesses may have died, memories faded, documents be destroyed etc., a consequence, which may in turn endanger the reputation and dignity of the judicial system in its entirety.[7]
c) Difficult as it seems at first sight to balance the conflicting interests of protecting the owner of a right on the one side and the obligor of a dormant claim on the other side, there is at least one factor that must be put on the scale and weighted heavily: An obligee/creditor must have had a reasonable chance to pursue his claim, meaning that a bar to his claim by a lapse of time must not occur before a right became due and could have been enforced, and that the obligee/creditor also must have known or at least have had a chance to know about his right and the respective obligor. The following provisions take account of these factors and their policy weight.

II. Basic structure of the limitation regime

1. The commandment that the obligee/creditor must not lose its right before there was a chance to enforce it, is taken account of by the regulation of the commencement of the period of time in Arts 2 and 3 – i.e. the day after the day the right became due – by the obligee's/creditor's possibilities of interfering with the running of the limitation period under Art. 6 and by provisions on suspension for situations where enforcement of the right was not possible (Arts 7-11). Since the obligor/debtor can perform its obligation normally, i.e. unless there is no explicit agreement to the contrary, during the whole day of the debt's maturity, the limitation period should not commence on this very day, but on the next day only.

Illustration

Debtor A has to pay a sum of money on November 24 in the year X. Since he can pay at one a.m. and must pay only until 12.00 p.m., it would be awkward to

[7] As to details of these conflicting interests see *Danco*, p. 50 et passim; *Spiro*, vol. 1, §§ 3-15, p. 7-23.

have this day already as the first day for the commencement of the period of limitation. It commences, therefore, on November 25.

2. The commandment in particular that an obligee/creditor should not only not lose the right before it became due and enforceable, but also not before the obligee had a real chance to pursue the right, i.e. after having actual or constructive knowledge of his/her or its right, was accounted for by the two-tier system in Arts 2 and 3, providing a rather short (three year) period of limitation commencing from the time that the obligee knows or ought to know the facts on which his right is based, and a longer ten-year period, commencing regardless of the obligee's actual or constructive knowledge at the time when the right became due.

3. This two-tier system follows a model to be found in some national codes (in particular in regard to tort claims) and reform projects such as the UCC reform draft (one and 4 years), but also - and more important on the international level - in the EC-Directive on Products Liability of July, 25, 1985 (Art. 10, 11). The draft proposal for provisions on prescription in the European Principles of Contract Law, part III, is based on the same solution, although there is a slight technical difference in so far as there is only *one* period of three years, but its commencement is dependant on actual or constructive knowledge, i.e. suspended until the obligor has (acquired) actual or constructive knowledge, and the suspension is limited by a ten-year cut-off period; the practical results are identical to those of the provisions herein.

4. The basic ("general") period of limitation is three years, commencing on the day after the day "the obligee knows or ought the know the facts as a result of which the right has become due". "Facts" in the meaning of this provision are first of all the facts on which the right is based such as formation of a contract, delivery of goods, undertaking of services, non-conformity of performance at the decisive date, etc.

5. The respective facts, i.e. the facts constituting the claim and its falling due, must be known or recognizable by the debtor before the short limitation period commences. The identity of the debtor may be in doubt too, e.g., in cases of agency, transfer of debts or entire contracts, dissolution of companies or unclear third-party beneficiary contracts; in these cases, the creditor must know or ought to have known whom to sue before he/she or it can be blamed for not having pursued the right or claim. Actual or constructive knowledge of "facts", however, does not mean that the creditor must know the right as such. If despite full knowledge of the facts the obligee is mistaken about his/her or its rights, *error iuris nocet* and the three-year period of limitation might pass to his/her or its disadvantage.

Illustration

A has sent a notice of termination of the contract between A and B, because B had refused to take delivery of goods tendered by A. 37 months after receipt of the note of termination - Art. 7.3.2 -, B reclaims an advance of the purchase price paid prior to the termination of the contract. He asserts that
(a) he had not realised the legal effects of a notice of termination, and

(b) by an error in his bookkeeping had overlooked that he had paid already in advance so that, therefore, he was not aware of his restitutionary claim under Art. 7.3.6(1) until recently.

B's claim for restitution is barred by the three-year limitation period. He cannot rebut A's defense by relying on his error in bookkeeping because he ought to have known of his payment. As to his error of law in regard to the legal effects of a notice of termination, this, too, cannot absolve him since "ought to know" includes seeking legal advice, where one is uncertain about the legal effects of certain circumstances, acts, declarations etc.

6. To become due, facts additional to the mere creation of the claim or right, e.g. by formation of contract, may be necessary, however. While the claim of the creditor to repayment of a credit is founded on the contract and, therefore may arise with the conclusion of the contract or paying out of the loan to the debtor, the repayment claim may and will usually fall due much later either on a fixed date or by a respective notice of termination of one of the parties or on account of other circumstances. Or, a claim may not (yet) be enforceable on account of the obligor's defence(s).

7. The words "the right has become due" include the notion of enforceability regardless of the technical-dogmatic explanation of the obligor's defences in domestic legal systems: If the obligor/debtor has a defence, which may defeat the obligee's/creditor's claim, the claim is not yet due regardless of whether the defence has to be raised in court or takes effect *ipso iure*. If the obligee/creditor in case that the obligor/debtor has invoked the defence of limitation, tries to rebut this defence by invoking (temporary) unenforceability of the claim because of a respective defence of the obligor/debtor and, therefore, a later commencement of the period of limitation then asserted by the obligor/debtor, he/she or it has to show that and why he could not enforce the right earlier.

8. Other legal systems may use another technical tool to reach the same effect. They may provide for suspension of the commencement of the period(s) of limitation during a period in which the obligee/debtor could raise a defence. The term "due" here, however, means "enforceability", whatever the additional requirements of enforceability might be. Unless a claim can be enforced, it is not regarded as "due" in the context of these Statute of Limitation articles, and the period of limitation shall not commence.

Illustration

a) The loan agreement between A and B obliged the borrower to repay the credit on November 15 of the year X. The lender granted an extension of the date of repayment until December 15. The period of limitation commenced (only) on December 16 of the year X.

b) A had contracted to deliver and build a fertilizer plant for B. The price was to be paid in 3 instalments, the last instalment being due four weeks after the work was completed and completion certified by a respective expertise of an international engineering firm. After this expertise was submitted to the parties, there were still malfunctions of the plant. B was entitled to withhold performance of the last instalment under Art. 7.1.3(2), Art. 7.1.4(4). The commencement of the limitation

period for the claim for payment does not begin until the right to withhold payment is extinguished by a cure of the malfunctions.

6. The obligee/creditor loses its right ten years after it has become due, i.e. became enforceable. This «absolute» period of ten years is necessary (and its length in conformity with modern developments such as the PECL and the EC- Products Liability Directive) in order to facilitate the objectives of a limitation regime, namely to restore peace and to prevent litigation aleatori because of fading evidence.

Illustration

B has borrowed money from A and has ordered his accountant to repay the loan in 1995. 15 years later a dispute arises as to whether the loan was repaid fully or only partially, as A believes and claims. B, on the other hand, has destroyed all documents, receipts etc. concerning business transactions older than 10 years; his accountant because of failing mental health cannot clearly remember whether and when exactly he repaid the sum. A's claim is barred by Art. 3, because the maximum limitation period has run out.

7. The harshness of this cut-off period is somewhat mitigated by the following rules on interruption and suspension and by the right of the parties to deviate from this period by agreement, i.e. to prolong the period of limitation to - at the most - 15 years under Art. 4.

8. The limitation rules of Arts 2 and 3 apply to all rights and claims. So-called "ancillary claims" are governed by the general rules of Arts 2 and 3. Although many legal systems, but also PECL in Art. 17.114 adopt the solution that the period of limitation should expire not later than the period for the principle claim, the arguments for not distinguishing between several types of claims were more convincing. Although it was conceded that one of the main objectives of periods of limitation, i.e. to have matters settled after a certain period of time, could be thwarted, if only the principle claim has expired but ancillary claims such as interest etc. could be litigated later on, the arguments for not distinguishing outweigh these considerations. First of all, to cut off claims for interest, e.g. at the same date as the principle claim is barred, may cause hardship to the obligee, for a claim for interest on account of default of the debtor in repaying the principle sum may be barred after a very short period of time. Since interest for the default of the principle claim - or respective claims for damages for default - arise continually, the last instalments of these claims arise only towards the very end of the limitation period for the principle claim and would expire without a real chance for the creditor to pursue them. Secondly, the very nature of «ancillary claims» defied a concretisation and clear definition so that uncertainties and vagaries might arise in regard to certain claims and their expiration. If, e.g., instead of interest the debtor had promised a penalty for every month of delay in his performance, or if he furnishes a guarantee of five years for the conformity of goods, claims arising out of a breach to perform in time or in conformity with the contract should be governed by the general rules on limitation of action whether they could be classified as ancillary or not.

Illustration

(a) The construction firm of A has promised its contractual partner B to complete the construction by October 1, 2000. In case of delay, it promises to pay 50.000 Euro for every month of delay up to 2.5 million Euro in case of delay of the completion. Completion is delayed for 40 months. The claim for performance would be barred by the Statute of Limitation after 36 months from .... 2000 on. B's claims for the penalty would be barred at the same time, forcing him to sue in order to prevent the running of the limitation period not only for the principal, but for each penalty, too.

(b) A has bought a machine from B, which does not function properly. While B is trying to cure the defects for 5 months, A suffers losses of 5.000 Euro per month. In the end, B no longer pursues his claims arising from non-conformity of the machine, which are barred 3 years later. His claims for damages, however, which have arisen only month by month, are barred later, namely 3 years after they have consecutively arisen, regardless, of whether they could be characterized as ancillary or not.

Article 4
(Modification of Periods of Limitations by the Parties)

The parties may modify the limitation periods.
(a) They may not shorten the general limitation period to less than one year and
(b) the maximum limitation period to less than 4 years;
(c) they can extend the maximum limitation period to not more than 15 years.

COMMENT

1. While in some legal systems the party autonomy to modify periods of limitation and their effects is more or less severely restricted out of concern for weaker parties, in particular consumers, and other legal systems distinguish between very short limitation periods, which could be prolonged as an exception, and other limitation periods, which cannot be modified or only shortened, the addressees of the UNIDROIT Principles, participants in international trade, could be regarded as experienced and knowledgeable persons who do not need protection by restricting their party autonomy to severely. Therefore, it should be left basically to the parties to calibrate the time limits for their rights and obligations according to their needs and the circumstances of the particular contract.

2. Nevertheless one has to reckon that parties with superior bargaining power or better information may take advantage by either shortening the length of time for their own obligation or lengthening their right in time too much. Art. 4, therefore, limits the autonomy

to shorten the periods of limitation to less than one year for the general period of limitation commencing upon actual or constructive knowledge, and, respectively, to less than four years for the maximum period; extension of the maximum limitation period - and thereby, necessarily, the general period of limitation - should not exceed 15 years. These limits on party autonomy also took into account that, in contrast to contracts on the European level, where the EC-directive on Unfair Contract Terms may be used as an instrument to reign in abuses of contracting power, there is no such restriction on party autonomy available on the international (transeuropean) level. Fairness and balance of the party's rights, therefore, must be achieved by the UNIDROIT Principles themselves.

3. Parties' autonomy may be restricted even further by mandatory rules of national, international or supra-national origin, which are applicable on account of private international law, Art. 1.4.

Illustration

In Germany A has sold chain saws to B in Switzerland; the parties have agreed to submit any disputes to arbitration and have chosen the UNIDROIT-Principles as applicable law. They have further agreed that claims for non-conformity should be barred two years from the time the purchaser has notified the seller of any non-conformity of the goods.

The buyer resells the chain saws to his customers, some of whom are entrepreneurs, others consumers. After his/her purchasers complain about defects of the chain saws, B turns against his supplier A. Since more than two years have lapsed after the goods were delivered by A to B, A invokes the limitation period shortened to two years by the agreement between A and B. In so far as B has resold the chain saws to consumers, he is protected under the mandatory rules of §§ 478, 479 BGB, which were implemented on account of the EC Directive on Consumer Sales, Art. 4, and prohibit any modification of the limitation period, which would expose the last seller to his customers' claims while his claims for indemnity against his supplier would or could be barred by a modified (shortened) limitation period.

4. The modification can be agreed upon before or after the commencement of a limitation period (see also infra Comment 4 to Art. 7). A modification before or after the commencement of a limitation period has to be distinguished from an agreement concluded after the limitation period has expired. Although this agreement is too late to modify the applicable limitation period, it could have legal consequences either as a waiver of the defense that the limitation period has expired, or as a new promise of the debtor to perform a new and unilaterally incurred obligation of the debtor, unless such a unilateral promise is not valid under domestic laws or dependent on additional requirements such as a consideration. Problems of creating obligations unilaterally are, however, beyond the realm of rules on limitation and are governed by chapter 2.

Article 5
(New Limitation Period by Acknowledgement)

Where the obligor, before the expiration of the limitation period, acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement. The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Art. 2.

COMMENT

1. Most legal systems allow for an alteration of the course of the period of limitation by certain acts of the parties or other circumstances. Two technical concepts are employed to encode these influences. Some acts of the parties or other circumstances can «interrupt» the running of the limitation period, i.e. cause a new limitation period to commence. Other acts or circumstances cause a «suspension» of the running of the limitation period, i.e. the time of suspension is not counted in computing the limitation period. Since the effects of «interruption» or «suspension» are clearly stated in the respective articles, it seemed superfluous to define them (likewise: UN-Limitation Convention, Arts 13-21; PECL, Arts 17:105-17:111).

2. Acknowledgement in most legal systems causes an «interruption», i.e. a new commencement of the limitation period affected by the acknowledgement (see Art. 17:105 PECL; Art. 20 UN-Limitation Convention). Interruption of a period of limitation by acknowledgement of the obligee's right by the obligor can be found in many domestic legal systems.[8]

3. Since acknowledgement in most cases confirms, in other cases causes knowledge of the obligee/creditor, the new period of limitation commencing on acknowledgement can only be, under the policy principles on which the two-tier system of limitation is based (supra Art. 2 comment II. 1.), the general period of limitation. There is no need to protect the obligee/creditor, who knows or gets to know about the right by the acknowledgement of the obligor/debtor, even more by granting a new maximum period of limitation. Acknowledgement, therefore, causes the commencement (only) of a new general period of limitation of three years under Art. 2 (see also the following number).

Illustration

A has malperformed a construction contract with B. B has notified A about certain non-conformities of the building constructed by A in October 2000 without any reaction by A. In 2002, B again approaches A, hinting at legal action or other remedies. A, in response, acknowledges the non-conformity on November 15,

[8] Cf. *Spiro*, vol. 1, § 150, p. 348 et passim.

2002, and promises to cure the non-conformity. A new general period of limitation commences to run on November, 16, 2002 on B's claim under Art. 7.2.3.

4. The commencement of a new general period of limitation on acknowledgement can take place either during the running of the general period of limitation under Art. 2 or during the maximum period of limitation under Art. 3. If, e.g., the obligee/creditor had knowledge of the relevant facts from the very first moment on, and the obligor "acknowledges" the respective obligation after two years, the new general limitation period will also run from the date of acknowledgement on, so that altogether the obligee's/creditor's claim will be barred in this case only after five years. While the maximum period of limitation under Art. 3 in itself will not begin again on account of the acknowledgement, it may be exceeded by up to three years under the general period of limitation of Art. 2, if the obligor acknowledges later than 7 years and before the ten-year period has run out, provided that the obligee did not yet have actual or constructive knowledge of his claim earlier and the general period of three years under Art. 2 has already run out.

Illustration

B discovers defects in the construction work of A only 9 years after completion of the work. He threatens to instigate legal action, and A acknowledges the defects. A new general period of limitation begins to run on acknowledgement, so that altogether the period of limitation amounts to 12 years.

5. The interruption, i.e. the commencement of a new three-year period of limitation presupposes, however, that the right was still enforceable. »Acknowledgement« is not the creation of a new obligation by a uni-lateral legal act or a novation (recreation) of a time-barred right, but (only) an interruption of the running of the limitation period. Therefore, if the limitation period has ended already, a mere »acknowledgement« under this article does not remove or invalidate the limitation defence retroactively.

Illustration

In the illustration above, B knew or ought to have known of A's defective construction at the time of completion. He approaches A only 7 years later, and A acknowledges his malperformance. B's claim is, nevertheless, time-barred under Art. 2 and not revived (alone) by A' acknowledgment.

If the parties want to undo or refute the effects of a completed limitation period, they have to create a new obligation by "novation" under the respective rules for the creation of obligations by legal acts on the basis of party autonomy. The same applies, where the parties want to prolong the "lifespan" of the obligee's right beyond the approaching end term of the maximum period of limitation under Art. 3, 5 (c) (see supra Comment 4. to Art. 4).

6. If and in so far as the parties have modified the general limitation period under Art. 2, acknowledgement and the commencement of a new period of limitation refers to the general period as modified by the parties. If, e.g., the parties have shortened the general period of limitation to one year, acknowledgement causes a new one-year period to run.

Illustration

A and B have agreed that the period of limitation for claims arising from non-conformity of A's performance should be shortened to two years. B discovers only after 9 ½ years certain defects in A's performance, and A acknowledges his obligation to cure. B has another two years to pursue his claim, before it is barred under Art. 2 by the running out of the general limitation period.

7. Since the obligor/debtor can acknowledge more than once, the effect of the acknowledgement that it causes only a general period of limitation shortened by the parties to commence again, can be off-set by a later repetition of acknowledgements.

Illustration

A has delivered non-conforming goods to B in November 2000. B suffers losses from the non-conformity because his customers complain and return the goods. Since in 2002 the amount of losses altogether is not yet clear, B pressures A to acknowledge his liability, who complies with B's request in December 2002. Two years later, there are still uncertainties about the exact extent of B's obligations towards his customers, for some of them have sued for consequential damages allegedly caused by the goods. B, therefore, turns to A again, who acknowledges to be bound to indemnify B should the claims of B's customers be well-founded. B, therefore, has another three years for his claims against A.

Article 6
(Suspension by Judicial Proceedings)

(1) The running of the limitation period shall be suspended

(1.1.) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor;

(1.2) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings; or

(1.3.) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.

(2) Suspension lasts until a final decision has been issued or until the case has been otherwise disposed of.

Article 7
(Suspension by Arbitral Proceedings)

(1) The running of the limitation period shall be suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the absence of regulations for an arbitral proceeding or provisions determining the exact date of the commencement of an arbitral proceeding, proceeding shall be deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.

(2) Suspension lasts until a binding decision has been issued or until the case has been otherwise disposed of.

COMMENT

1. Judicial and arbitral proceedings effect the running of a period of limitation in all legal systems considered.[9] The United Nation Limitation Convention also recognizes the effect of a commencement of judicial proceedings on the running of a period of time in Art. 13 and likewise for arbitration in Art. 14. The effect can take two forms: A judicial proceeding can cause an interruption of the period of limitation, i.e. a commencement of a new period of limitation from the time of the judicial proceeding has begun. Judicial proceedings can also and alternatively cause a »suspension« only, i.e. a discounting of the time of the judicial proceeding in the computation of the period of limitation, so that a period that has already lapsed before the judicial proceeding began will be counted and added to the time running after the judicial proceeding has ended. This model of "suspension" is followed by the United Nation Limitation Convention (despite the use of the word »interruption«) and in Art. 17:107 of the European Principles on Contract Law Draft, and it is the basic solution of Arts 6 and 7 here.

2. The exact requirements of a commencement of a judicial proceedings must be determined by the procedural law of court, where these proceedings are instigated; therefore, the text of Art. 6 refers to the local law of procedure in regard to this point. It has also to be decided under the local law of procedure whether the raising of counter claims amounts to an instigation of judicial proceedings in regard to these counter claims: Where the raising of counter claims as a defence means that these counter claims will be

[9] See *Spiro*, vol. I, §§ 130-149, pp. 289 et passim.

litigated as if brought in separate proceeding, their raising has the same effect on the period of limitation as if they were filed in court independently.

Illustration a)

A has purchased a truck from B, which turns out to be defective. A notifies B of the defects, but because of other pending contracts between A and B, A does not press the matter for 24 months. Finally, negotiations between A and B on other contracts having broken down, B turns down a request by A to cure the defects asserting that the defects were caused by A's mishandling of the truck. A, after a futile letter, serves a writ of complaint addressed to B by depositing this brief with the clerk of a competent court. Under the procedural law of country X, this is sufficient to commence a litigation about the respective claim(s) of A. The running of the limitation period is suspended, until a final decision has been handed down, i.e. not only a decision of the court of first instance, but also, if allowed, an appeal to a higher court was pursued and finally decided, or the parties have reached a settlement or the plaintiff has withdrawn his complaint, if this, under the respective domestic procedural law, is regarded as an end of the litigation.

Illustration b)

A has raised his claims under an asserted warranty either as a counter-claim or by way of set-off against B's claim for the purchase price, which B has sued for in a litigation commenced by him by filing a complaint in the manner required by the procedural law of the respective country of the competent court. The period of limitation for A's warranty claims is suspended until there is a final decision on his counter-claim or a settlement or a withdrawal of his defence.

3. Arbitration must have the same effect as judicial proceedings and, therefore, the commencement of an arbitral proceeding must have the same suspensive effect as a judicial proceeding. In general, the decision on the date of commencement could be referred to the applicable arbitration rules, so that the starting point of the suspension by commencement of the arbitral proceeding is also determined by these rules. Since, however, the domestic rules on arbitration might not always determine the decisive date of commencement of the proceeding exactly, Art. 7 (1) s. 2 provides a necessary fall-back line.

Illustration

A has cancelled a distributorship contract with B claiming that B has defaulted with payments due for A's delivery of goods to B, which B had sold in accordance with the agreement with A. B now is counter-claiming damages for lost profits, but since B has changed the law firm representing him, almost 30 months have passed since the termination of the agreement. Since the agreement contains an arbitration clause, providing that all disputes and claims "shall be settled under the rules of Conciliation and Arbitration of the International Chamber of Commerce, France, by three arbitrators appointed in accordance with the ICC-rules", B submits a request for arbitration under Art. 4 ICC-rules to the secretariat of the International Court of Arbitration in Paris. Under Art. 4 (2) the date of receipt of this request is regarded «for all purposes» as the date of the commencement of

the arbitral proceedings, causing a suspension until a final award is reached or the case otherwise disposed of.

4. While the UN Limitation Convention in Art. 15 address the bankruptcy or insolvency situation in a special provision, the respective proceedings can be regarded as just another kind of judicial proceeding in a wider sense and could be seen, therefore, as regulated by the norm on judicial proceedings. In regard to insolvency proceedings and their commencement as well as their ending, the respective domestic law has to be applied to determine the respective dates.

Article 8
(Alternative Dispute Resolution)

The provisions of Arts. 8 and 9 apply with appropriate modifications to other proceedings to which the parties have agreed and which are initiated based on an agreement by the parties with the aim of resolving their dispute.

COMMENT

1. Alternative dispute resolution and other modes of solving disputes instead of or before going to court must be taken into account as having effect on periods of limitation. If there were a general provision on negotiations between the parties as having a suspensive effect on the limitation period, alternative dispute resolution and the like probably would be covered by such a norm. In the absence of a general suspension provision for cases of negotiations, a special provision dealing with alternative dispute resolution, mediation and similar proceedings had to be inserted in order not to discourage parties from using these methods fearing that limitation periods will run out and deprive them of their disputed right.

2. Since only a few countries have enacted statutes on alternative dispute resolution and similar ways of mediating, and the respective UNCITRAL project has not yet worked out a final solution and definite rules for these proceedings and their commencements, no clear and reliable legal data exist as to the commencement and the ending of these procedures of dispute resolution and, consequently, as to the beginning and the end of the suspension of a limitation period. A provision taking account of these methods, therefore, can only refer to the respective provisions on judicial and arbitral proceedings, which have to be applied with "appropriate modifications". This means, i.e., that as for the commencement of a procedure of dispute resolution, in the absence of a respective legal regulation the fall-back provision of Art. 7 para. 1 s. 2 applies and the dispute resolution shall be deemed to have commenced on the date on which the request of one party to have such a dispute resolution has reached the other party. Since the end of a dispute resolution

procedure very often may be uncertain, the reference to Artt. 6 and 7 and in particular to the phrase »until the case has been otherwise disposed of« must be applied with appropriate modification, too, meaning that a unilateral termination of the dispute resolution procedure by one of the parties must suffice to terminate the suspension. The problem of a unilateral termination which is unjustified and declared in bad faith could be coped with by denying effect under Art. 1.7 of these Principles.

Illustration

Under the domestic law of country X aimed at cost cutting in the medical sector, disputes between hospitals on the one side suppliers of hospital equipment and medications on the other side over prices have to be submitted to a board of mediation comprised of representatives of the respective association of suppliers, the association of hospitals and a representative of a consumer protection agency. Under the respective rules a review of this board - and thereby the respective procedure of mediation - commences at the date when a party submits a complaint about claimed or refused prices to the other party, who then has to initiate the procedure of inviting the board to review the case; the mediation ends under the respective rules, when either the board decides on the claim or there is a settlement between the parties or the claimant's request is withdrawn regardless of whether it reserves its right to go to court or not.

Article 9
(Suspension in case of force majeure, death or incapacity)

(1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding articles, the limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

(2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor inherited the respective party's position; the additional one-year period under para 1 applies respectively.

COMMENT

1. Impediments which prevent the obligee/creditor to pursue his/her or its rights in court are taken into account by all legal systems analysed here[10]; the UN Limitation Convention (Art. 21) as well as the European Principles Draft (Art. 17:108) contain similar rules. They are based on the basic policy notion that the obligee/creditor must have had a chance to have pursued his rights (supra Art. 2, 3 comments I. 4. c) and II. 1.) before he can be deprived of them by a lapse of time. Practical examples are war or natural disasters preventing the obligee/creditor to reach a competent court and other cases of force majeure preventing the pursuance of a right and to effect at least suspension of the limitation period. The impediment must have been beyond the obligee's/creditor's control; imprisonment, therefore, is an impediment suspending the limitation period only in cases where it could not have been avoided such as being taken prisoner of war, while a criminal could not invoke this provision.

Illustration

A has prepared a complaint against B, an engineering firm, for asserted professional malpractice of B's employees. The limitation period would run out on December 1 of the year X, and A's lawyer has completed his writ of complaint on November 25, X, intending to file it by express mail or in person with the clerk of the competent court. On November 24, X, terrorists attack A's country with biological weapons of mass destruction, causing all traffic, mail service and other social services to be stopped completely. This interruption of all means of communication, amounting to force majeure, prevents timely commencement of A's action by filing a complaint, but the period of limitation ceases to run and will not expire one year after some means of communication have been restored in A's country.

2. a) Since the impediments beyond control of the obligee may occur and cease to exist towards the end of the limitation period, so that after the termination of the respective impediment only a very short or no time at all might be left for the obligee to decide what to do, this article provides for an additional one-year period of time from the date on which the impediment ceases to exist in order to enable the obligee to decide whether to sue or what other cause of action to take.

b) Incapacity or death of the obligee/obligor are but special examples of impediments to an effective pursuance of the obligor's right. The same consideration and, consequently, the same solution as in case of general impediments must apply and are provided for in para 2.

Illustration

A has lent money to B due to be repaid on January 1 of the year X. A does not pursue his claim for a long time, but before finally taking steps to do so, he dies 35 months after January 1 of the year X. The law of succession applicable to A's estate requires that an administrator be appointed by a court which has authority to

[10] See *Spiro*, vol. I, §§ 87 et passim, p. 191 et passim.

administer the estate, in particular to collect outstanding debts etc. Since the docket of the competent court in the country of the deceased is overcrowded, it takes 2½ years until finally an administrator is appointed by the court. The administrator has still one month plus an additional one-year period to pursue the deceased party's claim against B before the limitation period expires.

Article 10
(Effect of Expiration of a Limitation Period)

Expiration of the limitation period entitles the obligor to invoke this expiration in any judicial, arbitral or administrative proceeding as a defence.

Article 11
(Set Off After Expiration of the Limitation Period)

[Notwithstanding the expiration of the limitation period for a right, a party may rely on this right as a defence or for the purpose of set off against a claim asserted by the other party.]

Article 12
(Restitution)

Where there was performance in order to discharge an obligation, there will be no claim for restitution merely because the period of limitation had expired.

COMMENT

1. Arts 10-12 deal with the effects of the lapse of the respective period of time. Choosing between the model of extinctive prescription and a mere limitation of enforceability, the Principles have opted for the latter model. Arts 10-12 regulate consequences of this basic decision: The right of the obligee is not extinguished by a lapse of the respective limitation period, but has become unenforceable. As a consequence, the completion of a limitation period can be raised as a defence by the obligor/debtor in any legal proceeding initiated by the obligee (Art. 10). It also follows from this basic decision that the obligee must raise this defence in order to be heard. If - as is supposed to happen

among honourable merchants - the obligor wants to honour the obligation despite the lapse of time, he can relinquish this defence by not raising it, and he can also pay with the consequence that this payment is *with cause*, i.e. performance of a valid obligation, which cannot be recovered under restitutionary or unjust enrichment principles (Art. 12).

Illustration

The city of A has borrowed money from bank B, but failed to repay the loan on time. B, being sued by the city of A for arrears in certain city taxes, raises its claim for repayment as a counter-claim. This counter-claim must be denied because of the expiration of the limitation period.

[Whether B could raise the defence of set-off by invoking its repayment claim, depends on the final decisions on the rules on set-off; a final decision on Art. 11 has been deferred.]

[2. The basic decision against extinction of the right despite expiration of a limitation period also necessitates that it could be used for set off, provided that set off is generally given retroactive effect. Since the provisions on set off and the details of its effects have not yet been decided by the plenary working group, the respective consequences for a right limited by an expiration of a limitation period had to be postponed until the final decisions on set off have been made. In the context of set off - and the comments to the respective Art. 11 - the influence of a right of retention of the obligee and its effect on the limitation period, too, has to be (re)considered. A right of retention resembles a right to set off, but has to be distinguished by its minor consequences: While the obligee by set off may extinguish his obligation, a retention right is merely a temporary defence, leaving the obligation basically intact. Since the obligee cannot be forced to perform, if he/she or it can raise a right of retention as defence, this must have consequences for the commencement of the limitation period. It must suffice, as supposed here (Art. 2 comment II.6,7.), to read the term »due« in Art. 2 as the decisive factor for the commencement of the limitation period as meaning »enforceable«, so that the right has not yet become due, as long as a retention right (or another defence) exists. This, however, has to be considered and decided by the plenary. If the plenary opts for an express solution of a right-of-retention question, a respective provision should either be added to Art. 2 or Art. 11.]

3. As another consequence of the basic decision that an expiration of the limitation period does not extinguish the obligee's right or claim, but can only be invoked as a defence against a claim for performance follows that if the obligor performs despite his defence, he performs on a *cause* still effective as a legal basis for retaining the performance. Mere expiration of a period of limitation in itself cannot be used as grounds for an action to reclaim the performance under restitutionary or unjust enrichment principles.

Illustration

Bank B has lent money to borrower A, who does not repay on the date stated in the loan agreement. On account of a book-keeping error in the bank's books, B's debt gets lost and forgotten. Four years later, the bank discovers its errors and sends a notice to B, claiming repayment of the loan. B complies with this request, but later learns from his lawyer that he could have refused repayment on account of the expiration of the period of limitation. He cannot reclaim his money as unjust enrichment from the bank.

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