

UNIDROIT 2002  
Study L – Doc. 73  
(English only)

UNIDROIT

International Institute for the Unification of Private Law

=====

WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Chapter [...]

LIMITATION PERIODS

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

Rome, March 2002

## 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. Notion of Limitation Period

All legal systems know the influence of passage of time on rights. Two basic systems could be found: Under one system, passage of time extinguishes rights, under the other system passage of time operates only as a defense to the enforcement of an action in court. In these principles a lapse of time does not extinguish rights but only limits their enforcement (see *infra* Art. 9). The term “*limitation of rights*” instead “*prescription*” was used, therefore, in the English version of these Principles as more appropriate. 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. may be barred by a lapse of time but also the exercise of rights effecting a contract directly such as the right to terminate a contract or a right of price reduction, e.g. in case of contractually agreed rights to terminate or in case of applicability of domestic law, allowing, e.g., price reduction, besides these Principles.

#### Illustrations

1. A has sold a tankship to B to be transferred to the purchaser on 3 October. The sales contract listed certain parts 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 3 years later. Its claim under Art. 7.2.2, which it raised only in November 3 years later, is barred by Art. 2.
2. Under the contract in illustration 1, buyer B had the right to cancel the contract on October 5, if the seller had not fully complied with all terms of the contract. Although being aware of the missing of a spare rudder, it gave notice

of cancellation of the contract only 37 months later. The buyer's right to cancel was time-barred.

## **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, a 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

3. In the illustration 1 above, B after having realized at the time of the delivery of the tankship that certain parts were missing had 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 already lapsed.

## Article 2 *(Limitation periods)*

**(1) 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 obligee's right [could have been exercised or the obligor's performance could have been required], can be exercised or the obligor's performance can be required.**

**(2) In any event, the maximum limitation period is ten years beginning on the day after the day the right [could have been exercised or the obligor's performance could have been required], can be exercised or the obligor's performance can be required.**

## **I. General consideration**

### **1. No common solution**

Although periods of limitation or prescription of rights and actions are common to all legal systems, they differ in regard to the length of the period of time ranging from 6 months or 1 year 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. 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 is restricted to international sales.

### **2. Relevant factors**

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 Artt. 4 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. 3). 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.

### **3. Balance between interests of obligee and obligor**

These principles strike a balance between 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. At first, there is the following factor that must be put on the scale: An obligee must have had a reasonable chance to pursue its claim, meaning that a bar to the claim by a lapse of time must not occur before it became due and could have been enforced, and that the obligee also must have known or at least have had a chance to know about its right and the respective obligor. On the other hand the obligee should be able to close its files regardless of the obligors knowledge after a certain period of time, therefore a maximum period is established. These principles, therefore, do not follow systems which have only *one* absolute period beginning on accrual of an action as e.g. the UN-Convention, but have opted for a two-periods system.

*Note of the Rapporteur:*

*The system based on 2 periods of limitation was basically agreed upon in Cairo and confirmed in Rome (S.R. 89). The Rapporteur has replaced the words "has become due" with "can be exercised". The Rapporteur has also added in square brackets a proposal that he regards more adequate.*

## **II. Basic structure of the limitation regime**

### **1. Two-tier system**

The commandment that an obligee 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 its right, is accounted for by the two-tier system in Artt. 2 para (2), (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 came into existence and became due.

### **2. Knowledge of the facts as distinguished from knowledge of law**

The basic (“general”) period of limitation is three years, commencing on the day after the day “the obligee knows or ought to know the facts as a result of which the right could have been exercised or the obligor’s performance could have been required”. “Facts” in the meaning of this provision are 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.

The respective facts, i.e. the facts constituting the basis of a right or claim and its falling due, must be known or recognizable by the obligee 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 obligee must know or ought to have known whom to sue before it can be blamed for not having pursued the right or claim. Actual or constructive knowledge of “facts”, however, does not mean that the obligee must know the legal implications of the facts: If despite full knowledge of the facts the obligee is mistaken about its rights, the three-year period of limitation might nevertheless pass to its disadvantage.

#### Illustrations

1. A has sent a notice of termination of the contract between A and B to 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. It asserts that he had not realised the legal effects of a notice of termination. Its claim for restitution of the advance has expired.

2. The facts are the same as in illustration 1, but by an error in its bookkeeping the obligor B had overlooked that it had paid already in advance so that, therefore, it was not aware of its restitutionary claim under Art. 7.3.6(1) until recently. B’s claim for restitution is again barred by the three-year period of limitation. The obligor cannot rebut this defense because he ought to have known of his payment.

### **3. Day of commencement**

Since the obligor can perform its obligation normally, i.e. unless there is an 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

3. A is obligated to pay a sum of money on November 24. The period of limitation commences on November 25.

### **4. Right could be exercised**

A debt may exist but performance can not yet be required, e.g. under Art. 6.1.1(a): While, e.g., 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 demand 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 (valid) defence(s).

#### Illustrations

4. The loan agreement 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.

5. 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 ended by a cure of the malfunctions.

### **5. Maximum period**

The obligee loses its right ten years after it could have been exercised. This "absolute" period of ten years is necessary in order to facilitate the objectives of a limitation regime, namely to restore peace and to prevent aleatori litigation because of fading evidence.

## Illustration

6. B has borrowed money from A and has ordered his accountant to repay the loan in January X. 15 years later, a dispute arises, whether the loan was repaid fully or only partially, as A believes and claims. A's claim is barred by Art. 2 (2), because the maximum limitation period has run out.

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. 3.

## 6. Ancillary claims

The limitation rules of Arts. 2 (2) and (3) apply to all rights and claims. So-called "ancillary claims" are governed by the general rules of Art. 2. First of all, to cut off claims for interest, e.g., at the same date as the principle claim is barred, may cause hardship on the obligee, for a claim for interest on account of default of the obligor 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 period of limitation for the principle claim and would expire without a real chance for the obligee 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 obligor had promised a penalty for every month of delay in its performance, or if it 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.

## Illustrations

7. In a loan agreement, lender agreed to pay interest of 0,7 % per month if defaulting on the repayment claim. 35 month after the repayment claim has fallen due, the borrower repays the principal. The lender must not sue on all successive interest rates at once, but can allow the obligor up to 36 months for each rate before it is time-barred.

8. The construction firm of A has promised its contractual partner B to complete the construction by October 1, year X. It promises to pay 50.000 Euro for every month of delay of completion up to 2.5 mio Euro. Completion is delayed for 40 months. The claim for performance would be barred by the Statute of Limitation after 36 months from October 2nd, year X, on if it would expire at the same time as the principal. B's claims for the penalty would also be barred at the same time, forcing it to sue in order to prevent the running of the period of limitation not only for the principle, but for each penalty, too. Under these Principles, however, each claim arising monthly is barred only 36 months later.

*Note of the Rapporteur:*

*It was agreed to forego a rule on ancillary claim in Rome (S.R. no. 97).*

## **7. “Year”**

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 of 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.

### Article 3

*(Modification of Periods of Limitations by the Parties)*

**The parties may modify the limitation periods.  
However they may not**

**(a) shorten the general limitation period to less than  
one year and**

**(b) the maximum limitation period to less than 4 years;**

**(c) extend the maximum limitation period to more than  
15 years.**

#### COMMENT

### **1. Modification of Periods of Limitations by the Parties**

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 (subject to Art. 1.4) to calibrate the time limits for their rights and obligations according to their needs and the circumstances of the particular contract.

## 2. Limits of Modifications

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. 3, 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.

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.

## 3. Time of modification

The modification can be agreed upon before or after the commencement of a limitation period (see also *infra* comment 3 to Art. 4). A modification before or after the commencement of a limitation period has to be distinguished from an agreement concluded after the period of limitation has expired. Although this agreement is too late to modify the applicable period of limitation, it could have other legal consequences, e.g. as a waiver of the defense that the period of limitation has expired, or as a new promise of the obligor to perform a new and unilaterally incurred obligation of the debtor.

*Note of the Rapporteur:*

*Approved in substance at the meeting in Rome, drafting changes made by the Rapporteur.*

### Article 4

*(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 (1).**

## COMMENT

**1. Acknowledgement of rights**

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 period of limitation, i.e. cause a new limitation period to commence. Other acts or circumstances cause a “suspension” of the running of the period of limitation, i.e. the time of suspension is not counted in computing the period of limitation.

These principles regard acknowledgement of a right as causing an interruption (see Art. 20 UN-Limitation Convention).

**2. Commencement of a new general limitation period**

Since acknowledgement in most cases confirms, in other cases causes knowledge of the obligee, 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, who knows or gets to know about the right by the acknowledgement of the obligor, 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 (1).

## Illustration

1. A has malperformed a construction contract with B. B has notified A about certain non-conformities of the building constructed by A in October of the year X without any reaction by A. In 2002, B again approaches A, hinting to legal action or other remedies. A, in response, acknowledges the non-conformity on November 15, X + 2, 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.

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 (1) or during the maximum period of limitation under Art. 2 (2). While the maximum period of limitation under Art. 2 (2) 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 (1), if the obligor acknowledges later than 7 years and before the maximum period has run out.

### Illustration

2. B discovers defects in the construction work of A 9 years after completion of the work. It approaches A 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.

### **3. Novation etc. to be distinguished**

“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

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

If the parties want to undo or refute the effects of a completed period of limitation, they have to create a new obligation. 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. 2 (2)(see supra comment 3 to Art. 3).

### **4. Interruption of periods of limitation modified by the parties**

If and in so far as the parties have modified the general period of limitation under Art. 2 (1), 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

4. A and B have agreed that the general 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 (1) by the running out of the general period of limitation.

Since the obligor 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 acknowledgement(s).

#### Illustration

5. A has delivered non-conforming goods to B in November. B suffers losses from the non-conformity, because his customers complain and return the goods. Since 2 years later, the amount of losses altogether is not yet clear, B asks A to acknowledge its liability, who complies with B's request. Two additional years later, there are still uncertainties about the exact extent of B's obligations towards its 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 5

##### *(Suspension by Judicial Proceedings)*

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

**a) 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;**

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

**c) 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.**

#### COMMENT

##### **1. Effect of proceedings**

Judicial proceedings effect the running of a period of limitation in all legal systems considered. 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«).

## **2. Commencement of proceedings**

The exact requirements of a commencement of a judicial proceedings must be determined by the procedural law of the court, where these proceedings are instigated; therefore, the text of Art. 5 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 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.

### **Illustrations**

1. A has purchased from B a truck, 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 period of limitation 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.
2. A has raised its 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 it 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 its counter-claim or a settlement or a withdrawal of his defence.

## **3. Suspension by bankruptcy or insolvency or dissolution proceedings**

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, Art. 5 lit b) and c). In regard to these proceedings and their commencement as well as their ending, the respective domestic law has to be applied to determine the respective dates.

*Note of the Rapporteur:*

*This Article was agreed upon after redrafting in Rome (S.R. 175, 176).*

#### **4. Definitions**

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 here.

*Note of the Rapporteur:*

*This Article - formerly Art. 6 – has been redrafted.*

#### Article 6

*(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. Arbitral proceedings**

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. 6 (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 exchanged 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.

### Article 7

#### *(Alternative Dispute Resolution)*

**The provisions of Arts. 5 and 6 apply with appropriate modifications to other proceedings whereby parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.**

## COMMENT

### **1. Alternative dispute resolution**

In addition to or before litigation in a court or a arbitration tribunal any dispute resolution and other methods of solving disputes instead of or before going to court as ADR, conciliation, mediation, where the third party only assist, 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 rule on the suspension by negotiation, 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. Absence of statutory regulations**

Since only a few countries have enacted statutes on alternative dispute resolution and similar ways of mediating 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. 6 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. 5 and 6 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 and suppliers of hospital equipment and medications on the other side over prices have to be submitted to a board of mediation. 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, which 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.

#### *Note of the Rapporteur:*

*The Article was adopted in substance in Rome (S.R. no. 180).*

#### Article 8

*(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. Effects of impediments**

Impediments which prevent the obligee to pursue its rights in court are taken into account by all legal systems; the UN Limitation Convention (Art. 21) contain similar rules. They are based on the basic policy notion that the obligee must have had a chance to have pursued its rights before it can be deprived of them by a lapse of time. Practical examples are war or natural disasters preventing the obligee to reach a competent court and other cases of force majeure preventing the pursuance of a right and to effect at least a suspension of the limitation period. The impediment must have been beyond the obligee'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 convicted criminal could not invoke this provision.

## Illustration

1. A has prepared a complaint against B, an engineering firm, for asserted professional malpractice of B's employees. The period of limitation 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. Additional period of deliberation**

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.

**3. Incapacity and Death**

Incapacity or death of the obligee 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

2. 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 is appointed by a court, who has authority to 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 period of limitation expires.

*Note of the Rapporteur:*

*The Article was adopted in substance in Cairo (S.R. no. 183).*

### Article 9

*(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.**

### COMMENT

Arts. 9-11 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. 9-11 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 in any legal proceeding initiated by the obligee (Art. 9). 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 its obligation despite the lapse of time, it can relinquish this defence by not raising it, and it 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. 11).

### Illustration

A has purchased goods from B. Part of the purchase price, being due on April 1st in the year X, has not been paid. 38 months later, B files complaint against A, starting the facts including the relevant dates. A does neither answer nor

appear in court, and B moves for a default judgement. Judgement will be in favour of B, for A did not raise the period of limitation as a defence.

Article 10  
*(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.]**

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. 10 -, 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 it can raise a right of retention as defence, this must have consequences for the commencement of the limitation period.

Illustration

The city of A has borrowed money from bank B, but failed to repay the loan in time. The repayment claim expired 3 years after it had become due. 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 period of limitation, but it could be used for set-off and the respective defence.

*Note of the Rapporteur:*

*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. 10 has, therefore, been deferred.*

Article 11  
(*Restitution*)

**Where there was performance in order to discharge an obligation, there is no right to restitution merely because the period of limitation had expired.**

As another consequence of the basic decision that an expiration of the period of limitation does not extinguish the right or claim of the obligee, 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. For some 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.