

action *after* 1973. (The extent of delay allowed in asserting a set-off or counter-claim in a pending action would presumably be subject to local procedural rules.)

¹⁹⁹ WP.3.

It will be noted that this draft ¹⁹⁹ (unlike the other proposal ²⁰⁰) does not require that the opposing claims arise out of the same legal relationship.

²⁰⁰ Foot-note 196, *supra*.

2. Working Group on Time-limits and Limitations (Prescription); report on the work of the second session (including text of a preliminary draft of a uniform law on prescription and commentary thereon), 10-21 August 1970 (A/CN.9/50) *

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INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its second session, held in March 1969, established a Working Group of seven members of the Commission. This Working Group was requested to study the topic of time-limits and limitations (prescription) in the field of international sale of goods with a view to the preparation of a preliminary draft of an international convention.¹ The proposed convention would establish a general period of extinctive prescription by virtue of which claims arising from the international sale of goods would be extinguished or barred unless presented to a tribunal within a specified limitation period.

2. The Working Group held its first session in August 1969. At this session the Working Group analysed the basic issues involved in the preparation of a Uniform Law on this subject and prepared a report (A/CN.9/30)² which was considered by the Com-

mission at its third session in April 1970. The Commission requested the Working Group to hold a second meeting to prepare a tentative draft convention setting forth uniform rules on the subject for submission at its fourth session.³ The Commission also decided that a questionnaire should be addressed to Governments and to interested international organizations, in order particularly to ascertain the views of those engaged in business in relation to the length of the period of limitation and any other relevant issue.⁴

3. The Working Group held its second session at the United Nations Office at Geneva from 10 to 21 August 1970. The following members of the Working Group were represented: Argentina, Czechoslovakia, Japan, Norway, the United Arab Republic and the United Kingdom of Great Britain and Northern Ireland. The meeting was also attended by observers from the Council of Europe, the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT). The list of participants is contained in annex IV.

4. The Working Group had before it preliminary drafts of a uniform law submitted by Argentina, Czechoslovakia, and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.1, 3 and 6) and reports on specific subjects submitted by Belgium,

* 1 February 1971.

¹ Report of the United Nations Commission on International Trade Law on the work of its second session (1969) (herein cited UNCITRAL, report on second session (1969); all numbered references are to paragraphs), 46; *Yearbook of the United Nations Commission on International Trade Law* (hereafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, II, A.

² Report of the Working Group on Time-limits and Limitations. (Prescription) in the International Sale of Goods, on its session held at Geneva from 18 to 20 August 1969 (A/CN.9/30) (herein cited report of the Working Group on its first session (1969); all numbered references are to paragraphs); UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, D.

³ Report of the United Nations Commission on International Trade Law on the work of its third session, (1970), (herein cited UNCITRAL, report on third session (1970); all numbered references are to paragraphs), 97; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

⁴ *Ibid.*, 89.

Czechoslovakia, Japan, Norway, the United Arab Republic and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG1/WP.2, 4, 4/Add.1, 5, 7, 8 and 10). The Working Group had also before it a working paper by the Secretariat (A/CN.9/WG.1/WP.9). The document and working papers before the Working Group are listed in annex V.

5. The Working Group elected the following officers:

Chairman: Mr. Stein Rognlien (Norway).

Rapporteur: Mr. Ludvik Kopác (Czechoslovakia).

ACTION WITH RESPECT TO UNIFORM LAW

6. At this session, the Working Group prepared a Preliminary Draft of Uniform Law on Prescription (Limitation) in International Sale of Goods. The text of the Law is contained in annex I.

7. Instead of reporting in detail the progress of discussions during the session, the Working Group requested the Secretariat to prepare a Commentary on provisions of the Preliminary Draft. This Commentary was prepared by the Secretariat after the meeting, taking into consideration the discussion at the session, and was modified in response to suggestions received from a

member of the Working Group. The Commentary is contained in annex II.

8. As the title states, this is a Preliminary Draft; significant problems remain unsolved.⁵ In addition, problems of drafting and style will, of course, receive attention in the preparation of succeeding versions. However, the presentation of this draft for criticism and comments is a necessary step towards the improvement and perfection of the Uniform Law.

9. The Working Group also approved the substance of a questionnaire on the length of the prescriptive period and related matters. The questionnaire, which was addressed to Governments and to international organizations, is reproduced in annex III. Pending the receipt of the information requested in the questionnaire the length of the limitation period is stated in the alternative in the preliminary draft Law.⁶

⁵ See, e.g. commentary to article 1 at para. 15, comments following articles 3 and 4; commentary to article 5 at paras. 2 and 3, commentary to article 10 at para. 7, comment following article 14, commentary to article 18, at para. 3, and comment following article 25.

⁶ See art. 6. Also see comment following article 14 and commentary to article 18 at para. 3.

ANNEX I

Text of a preliminary draft of a Uniform Law on Prescription (Limitation) in International Sale of Goods (August 1970)

(Prepared by the UNCITRAL Working Group on Prescription at its second session held in Geneva, 10-21 August 1970)

SPHERE OF APPLICATION OF THE LAW

Article 1

(1) This Law shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller arising from a contract of international sale of goods as defined in article 4 of this Law or from a guarantee incidental to such a contract, or arising by reason of the breach, termination or invalidity of such a contract or guarantee.

(2) In this Law "the limitation period" means the period within which the rights of the parties may be enforced in legal proceedings or otherwise exercised.^a

(3) This Law shall not affect a rule of the applicable law providing a particular time-limit by reason of which the acquisition or continuance of a right is dependent upon one party giving notice to the other party [or upon the occurrence of an event] or upon the performance of an act other than the exercising of the right within a certain period of time.

(4) In this Law:

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

(b) "Party" and "parties" means the buyer and seller and persons who guarantee their performance;

(c) "Guarantee" means a personal guarantee given to secure

the performance by the buyer or seller of an obligation arising from the contract of sale;

(d) "Creditor" means a party seeking to enforce a right, whether or not such right is for a liquidated sum of money;

(e) "Debtor" means a party against whom the creditor seeks to enforce such a right;

(f) "Legal proceedings" includes judicial, administrative and arbitration proceedings;

(g) "Person" includes any corporation, company, or other legal entity;

(h) "Writing" includes telegram and telex.

Article 2

This Law shall not apply to rights based upon:

(a) Liability for the death of, or injury to the person of, the buyer;

(b) Liability for nuclear damage caused by the goods sold;

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

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

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

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

(g) A documentary letter of credit.

Article 3

[Conflict of Laws]

Article 4

[Definition of "a contract of international sale of goods" and related matters.]

^a RESERVATION IN CONVENTION

Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare that it will apply the Uniform Law only to the enforcement of rights asserted in legal proceedings and in consequence may delete the words "or otherwise exercised" in the definition of "the limitation period in article 1, paragraph 2 of the Uniform Law".

Article 5

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

THE LIMITATION PERIOD**Article 6**

The limitation period shall be [three] [five] years.

COMMENCEMENT OF THE LIMITATION PERIOD**Article 7**

(1) Subject to the provisions of paragraphs 3 to 6 of this article and to the provisions of article 9, the limitation period in respect of any right arising out of a breach of the contract of sale shall commence on the date on which such breach of contract occurred.

(2) Where one party is required as a condition for the acquisition or enforcement of such a right to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

(3) Subject to the provisions of paragraph 4 of this article, the limitation period in respect of a right arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are placed at the disposition of the buyer by the seller according to the contract of sale, irrespective of the date on which such defects or other lack of conformity are discovered or damage therefrom ensues.

(4) Where the contract of sale contemplates that the goods sold are at the time of the conclusion of the contract in the course of carriage, or will be carried, to the buyer by a carrier, the limitation period in respect of rights arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are duly placed at the disposition of the buyer by the carrier, or are handed over to the buyer, whichever is the earlier.

(5) Where, as a result of a breach by one party before performance is due, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any right arising out of such breach shall commence on the date on which such breach of contract occurred, irrespective of any subsequent failure by the party in default to perform on the date when performance is due; otherwise the limitation period shall commence on the date when performance is due.

(6) Where, as a result of a breach by one party of a contract for the delivery of or payment for goods by instalments, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any right arising out of such breach shall commence on the date on which breach of contract occurred, irrespective of any other breach of the contract in relation to prior or subsequent instalments; otherwise the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred.

Article 8

Subject to the provisions of article 9, where a right arises out of a contract of sale or a guarantee incidental thereto, or where a right arises by reason of termination or invalidity of such a contract or guarantee, but does not arise out of a breach of a contract, the limitation period shall commence on the date on which the right could first be exercised.

Article 9

Where the contract of sale contains an express undertaking on the part of the seller relating to the goods and such undertaking is stated to have effect for a period of time, whether

expressed in terms of a specific period of time or otherwise, the limitation period in respect of a right relating to any matter covered by the undertaking shall commence on the date on which the buyer first informed the seller of such right; provided that the limitation period shall in any event expire [three] [five] years after the expiration of the period of the undertaking.

**INTERRUPTION OF THE LIMITATION PERIOD:
LEGAL PROCEEDINGS; ACKNOWLEDGEMENT****Article 10**

(1) The limitation period shall cease to run when the creditor performs any act recognized under the law of the jurisdiction where such act is performed:

- (i) As instituting judicial proceedings for the purpose of obtaining satisfaction of his right; or
- (ii) If judicial proceedings have already been commenced by the creditor against the debtor in relation to another right, as invoking his right in the course of those proceedings for the purpose of obtaining satisfaction of that claim.

(2) For the purposes of this article, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the right against which the counterclaim is raised, provided that such counterclaim does not arise out of a different contract.

Article 11

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

(2) In the absence of any such provision, the request shall take effect on the date on which it is delivered at the habitual residence or place of business of the other party, or, if he has no such residence or place of business, then at his last known residence or place of business.

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

Article 12

(1) The provisions of this article shall apply where any legal proceedings are commenced upon the occurrence of any of the following events:

- (a) The death or incapacity of the debtor;
- (b) The bankruptcy or insolvency of the debtor;
- (c) Where the debtor is a corporation, company or other legal entity, the dissolution of such corporation, company or legal entity;
- (d) The seizure or transfer of the whole or part of the assets of the debtor.

(2) The limitation period shall cease to run when the creditor performs an act recognized under the law of the jurisdiction where such act is performed as the assertion of a right in those proceedings under that law for the purpose of obtaining satisfaction of his claim.

(3) Except as provided in this article, the limitation period shall not cease to run or in any other way be affected by the events referred to in paragraph 1 of this article.

Article 13

(1) Where the debtor acknowledges his obligation to the creditor, a new limitation period of [three] [five] years shall commence to run by reason of and from the date of such acknowledgement.

(2) The acknowledgement shall be evidenced in writing.

(3) Partial performance of an obligation by the debtor to the creditor shall have the same effect as an acknowledgement if it can reasonably be inferred from such performance that the debtor acknowledges that obligation.

(4) Payment of interest shall be treated as payment in respect of the principal debt.

(5) The provisions of this article shall apply whether or not the limitation period prescribed by articles 6 to 9 has expired.

EXTENSION OF THE LIMITATION PERIOD

Article 14

[If the creditor and the debtor have entered into negotiations on the merits of the claim [without reserving the right to invoke limitation], and if the fact of such negotiations is evidenced in writing, the limitation period shall not expire before the end of one year from the date on which such negotiations have been broken off or otherwise come to an end, but at the latest one year from the date on which the period would otherwise have expired according to articles 6 to 9.]

Article 15

Where, as a result of a circumstance which is not personal to the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, and provided that he has taken all reasonable measures with a view to preserving his right, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

Article 16

Where, by reason of the debtor's misstatement or concealment of his identity or address, the creditor is prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the creditor discovered the fact misstated or concealed, or could with reasonable diligence have discovered it.

Article 17

(1) Where the creditor has commenced judicial or arbitration proceedings in accordance with article 10 or 11, or has asserted his right in legal proceedings in accordance with article 12, but has subsequently discontinued the proceedings, or withdrawn his claim, the limitation period shall be deemed to have continued to run.

(2) Subject to the provisions of paragraph 1 of this article, if the court or arbitral tribunal has declared itself or been declared incompetent to adjudicate upon the claim of the creditor, or where any legal proceedings have ended without a definitive judgement, award or decision on the merits of the claim, the limitation period shall continue to run and shall be extended so as not to expire before the expiration of one year from the date on which such declaration was made, or, if no such declaration was made, from the date on which the proceedings ended.

(3) Where an arbitration has been commenced in accordance with article 11, but it has been ordered that the arbitration shall cease to have effect or that the award shall be set aside, the limitation period shall continue to run and shall be extended so as not to expire before the expiration of one year from the date on which such order was made.

MODIFICATION OF THE LIMITATION PERIOD

Article 18

(1) The limitation period cannot be modified or affected by

any declaration or agreement between the parties, except in the cases provided for in paragraph 2 of this article.

(2) The debtor may, at any time [after the commencement of the limitation period prescribed in articles 7 to 9], by a declaration to the creditor extend the limitation period or declare that he will not invoke limitation as a defence in legal proceedings; but such declaration shall in no event have effect beyond the end of three years from the date on which the period would otherwise expire or have expired in accordance with articles 6 to 9.

(3) The declaration referred to in paragraph 2 of this article shall be evidenced in writing.

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

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 19

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

Article 20

(1) Subject to the provisions of paragraph 2 of this article and of article 19, no right which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.

(2) Notwithstanding the expiration of the limitation period, the creditor may rely on his right as a defence for the purpose of set-off against a right asserted by the other party:

(a) If both rights relate to the same contract; or

(b) In other cases, if the rights could have been set-off at any time before the date on which the limitation period expired.

Article 21

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

Article 22

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

CALCULATION OF THE PERIOD

Article 23

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

Article 24

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 10 or asserts a right as envisaged in article 12, the limitation period shall be extended so as not to expire until the end of

the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a right could be asserted in that jurisdiction.

jurisdiction shall be held to have been barred by reason of the operation of this Law if the limitation prescribed in articles 6 to 9 commenced to run before the commencement of this Law in that jurisdiction.

PRESERVATION OF EXISTING RIGHTS

Article 25

[(1) No right asserted in any legal proceedings in any

(2) Nothing in this Law shall revive any right barred before the commencement of this Law in the jurisdiction where such right is relied on except in so far as a right may be revived by an acknowledgement or part performance made in accordance with the provisions of article 13.]

ANNEX II

Commentary on preliminary draft of a Uniform Law on Prescription (Limitation) in International Sale of Goods

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Sphere of application of the Law

Article 1

[INTRODUCTORY PROVISIONS: DEFINITIONS] *

(1) This Law shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller arising from a contract of international sale of goods as defined in article 4 of this Law or from a guarantee incidental to such a contract, or arising by reason of the breach, termination or invalidity of such a contract or guarantee.

(2) In this Law "the limitation period" means the period within which the rights of the parties may be enforced in legal proceedings or otherwise exercised.^a

(3) This Law shall not affect a rule of the applicable law providing a particular time-limit by reason of which the acquisition or continuance of a right is dependent upon one party giving notice to the other party [or upon the occurrence of an event] or upon the performance of an act other than the exercising of this right within a certain period of time.

(4) In this Law:

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

(b) "Party" and "parties" means the buyer and seller and persons who guarantee their performance;

(c) "Guarantee" means a personal guarantee given to secure the performance by the buyer or seller of an obligation arising from the contract of sale;

(d) "Creditor" means a party seeking to enforce a right, whether or not such right is for a liquidated sum of money;

(e) "Debtor" means a party against whom the creditor seeks to enforce such a right;

(f) "Legal proceedings" includes judicial, administrative and arbitration proceedings;

(g) "Person" includes any corporation, company, or other legal entity;

(h) "Writing" includes telegram and telex.

COMMENTARY

I. *Basic scope and objective of the Uniform Law*

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

2. Divergencies in national rules governing the limitation of rights or claims create serious difficulties. Limitation periods under national laws vary widely. Some periods are short in relation to the practical requirements of international transactions, in view of the time that may be required for negotiations and for the institution of legal proceedings in a foreign and possibly distant country. Other periods are longer than are appropriate for transactions involving the international sale of goods—sometimes a consequence of the use of the same limitation period for a wide variety of differing transactions. Some of these periods fail to provide the essential protection that should be afforded by limitation rules. This includes protection from the loss of evidence necessary for the fair adjudication of claims and protection from the uncertainty and possible threat to solvency and to business stability from delayed settlement of disputed claims.

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

^a

RESERVATION IN CONVENTION

Any State may, at the time of the deposit of its instrument of ratification or accession to the present Convention, declare that it will apply the Uniform Law only to the enforcement of rights asserted in legal proceedings and in consequence may delete the words or otherwise exercised" in the definition of "the limitation period" in article 1, paragraph 2 of the Uniform Law.

* Captions were not drafted at the session of the Working Group but are inserted for the ease of reference and should not be considered as parts of the text of the preliminary draft.

4. Perhaps even more serious is the uncertainty as to which national law applies to an international sales transaction. Apart from the problems of choice of law that customarily arise in an international transaction, problems of limitation (or prescription) present a special difficulty of characterization or qualification: some legal systems consider these rules as "substantive" and therefore must decide which law is applicable; other systems consider them as part of the "procedural" rules of the *forum*; still other systems follow a combination of the above approaches.

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

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

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

(a) *The parties*

8. Paragraph 1 of article 1 shows that the Law is directed to the rights or claims arising from the relationship between the "buyer" and "seller". These terms, as defined in article 1 (4) (a), includes the "successors to and assigns of their rights or duties under the contract of sale". The Law would thus embrace the succession of right or duties by operation of law (as on death or bankruptcy) and the voluntary assignment by a party of his rights or duties under a sales contract. One important type of "successor" would be an insurer who becomes subrogated to rights under a sales contract.

9. Paragraph 1 of article 1 provides that the Law also applies to rights or claims arising under "a guarantee incidental to" a sales contract; under article 1 (4) (c), "guarantee" extends only to a "personal" guarantee—i.e., an *in personam* undertaking as contrasted to an *in rem* or property interest. (See also article 2 (c) providing that the Law shall not apply to rights based on "a lien, mortgage or other security interest in property".) The provision in article 1 (1) specifying that the guarantee must be "incidental to" the sales contract, and the definition of "guarantee" in article 1 (4) (c) makes it clear that the Law does not apply to an undertaking which is independent of the sales contract. This principle is illustrated by article 2 (g) which specifically excludes documentary letters of credit, since the obligation under such letters of credit arises on the presentation of specified documents and does not depend on proof of performance under the contract of sale.

(b) *Transactions subject to the Law: types of claims or rights*

10. The Law applies to a contract of international sale of goods and to a guarantee incidental to such a contract. The definition of "international sale of goods" will be set forth in article 4.

11. Paragraph 1 of article 1 provides that the Law shall apply to rights or claims "arising from a contract" of international

sale of goods. The Law does not apply to claims that arise independent of the contract, such as claims based on tort or *delict*. The references in article 1 (1) to the "contract" and to the relationship between the "buyer and seller" also exclude claims against a seller by a person who has purchased the goods from someone other than the seller. For example, where a manufacturer sold goods to a distributor who resold the goods to the consumer, a claim by the consumer against the manufacturer would not be governed by the Law.

12. The Law embraces two basic types of rights or claims between the seller and buyer. One type is for enforcement or other remedy arising from "breach" of the sales contract; a second type concerns rights or claims arising by reason of the "termination or invalidity" of such a contract (articles 1 (1)).¹ For example, the buyer may have made an advance payment under a contract to the seller which the seller fails to perform because of impossibility, government regulation or similar supervening event. Whether this event will constitute an excuse for the seller's failure to perform may often be in dispute. Hence, the buyer may need to bring an action against the seller presenting in the alternative claims for breach and for restitution of the advance payment. Because of this connexion between the two types of claims, both are governed by this Law.²

13. Paragraphs 2 and 3 of article 1 are designed, *inter alia*, to make clear that this Law has no effect on certain rules of local law involving "time-limits" (*déchéance*); typical examples are requirements that one party give notice to another party within limited periods of time describing defects in goods or stating that goods will not be accepted because of defects. These requirements of notice by one party to the other party are designed to permit the parties to take prompt action in adjusting current performance under a sales transaction—such as making prompt tests to preserve evidence as to the quality of goods or taking control over and salvaging rejected goods.

14. The periods of time for such action are usually very brief, and often are stated in flexible terms. For example, article 39 (1) of the Uniform Law on the International Sale of Goods (ULIS) attached to the Hague Convention of 1964 provides that "the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it". Other articles of ULIS provide that a party may avoid the contract if he makes such a declaration to the other party, under varying circumstances, "within a reasonable time" (articles 26, 30, 62 (1)) or "promptly" (articles 32, 43, 62 (2), 66 (2), 67, 75). These brief, flexible periods for special types of action by the parties are quite different from a general period of limitations.³ Consequently, paragraph 3 of article 1 states, in part, that this Law shall not affect "a rule of the applicable law providing a particular time-limit by reason of which the acquisition or continuance of a right is dependent upon one party giving notice to the other party..."⁴

¹ Here and at other points, the discussion does not take full account of guarantees, which also are included within the scope of this Law under paragraph 1 of article 1.

² With respect to the interpretation of such terms to achieve uniformity, see article 5, and the discussion herein in paragraphs 6 and 18. For other provisions relating to claims by reason of the breach, termination or invalidity of a contract, see articles 7 and 8.

³ Article 49 of ULIS provides: "The buyer shall lose his right to rely on lack of conformity with the contract at the expiration of a period of one year after he has given notice as provided in article 39, unless he had been prevented from exercising his right because of fraud on the part of the seller". Following suggestions that this provisions might be deemed not merely a "time-limit" but a limitation period, the Working Group recommended deletion of article 49 from the uniform rules on sales.

⁴ As to the effect of a contract clause establishing a time-limit, see article 18 (4) and accompanying commentary at paragraph 6. Also see article 7 (2).

15. Paragraph 3 of article 1 also preserves rules of applicable law providing "a particular time-limit" by reason of which the acquisition or continuance of a right is dependent "[upon the occurrence of an event]⁵ or upon the performance of an act other than the exercising of this right within a certain period of time". Thus, this paragraph would preserve various types of national rules which, while variously expressed, are not comparable to the general period of limitation governed by this Law.

16. The general definition of "limitation period" in paragraph 2 of article 1 is consistent with the more specific rules in paragraph 3. The reservation noted in foot-note ^a to article 1 (2) of the Uniform Law was inserted because of the

⁵ In the draft Law, the words "upon the occurrence of an event" are set in brackets to indicate doubts as to whether this phrase should be retained, in view of questions as to whether this expression could be clearly understood in the setting of some legal systems. Thus, this language might be read as contradicting the view that national law (rather than the Uniform Law) should govern "rights" whose creation is dependent upon a future event.

difficulty for some legal systems in applying the phrase "or otherwise exercised".

II. Definitions and undefined basic terms: uniform interpretation

17. The definitions of words contained in paragraph 4 of article 1 can best be considered in connexion with provisions that employ the word in question. For example, the definition of "legal proceedings" in paragraph 4 (f) can best be considered in connexion with articles 10 to 12.⁶

18. Certain other words used in this Law (such as "rights" and "claims") are not defined, since their meaning can best be seen in the light of the context in which they are used and the objectives of this Law. It is important to note that the construction of these words by reference to the varying conceptions of national law would be inconsistent with the international character of this Law and its objective to promote uniformity in interpretation and application.⁷

⁶ Also see commentary to article 12 at para. 1, *infra*.

⁷ See article 5 and accompanying commentary, *infra*.

Article 2

[EXCLUSIONS]

This Law shall not apply to rights based upon:

- (a) Liability for the death of, or injury to the person of, the buyer;
- (b) Liability for nuclear damage caused by goods sold;
- (c) A lien, mortgage or other security interest in property;
- (d) A judgement or award made in legal proceedings;
- (e) A document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought;
- (f) A bill of exchange, cheque, or promissory note;
- (g) A documentary letter of credit.

COMMENTARY

1. Paragraph (a) excludes from the Law rights or claims based on the death or injury to the person of the buyer. If such a claim is based on tort (or *delict*) rather than on a sales contract, the claim would, in any event, be excluded from this Law by virtue of the provisions of article 1 (1) that the Law applies to rights or claims "arising from a contract of international sale of goods".¹ Under some circumstances claims for liability for the death or personal injury of the buyer might be based on the failure of the goods to comply with the contract; however, it was thought inappropriate to subject such claims to the same period of limitations as would be applicable to the usual type of commercial claims.² Where a claim by the buyer against the seller arises from the contract and is based on pecuniary loss from personal injuries to persons *other than himself*, such claim is not excluded from this Uniform Law.³

2. Paragraph (b) excludes "nuclear damage caused by the goods sold". The effects of such damage may not appear until a long period after exposure to radioactive materials. In addition, special periods for the extinction of such actions are contained

in the Vienna Convention on Civil Liability for Nuclear Damages of 21 May 1963.⁴

3. Paragraph (c) excludes rights based on "a lien, mortgage or other security interest in property". This exclusion is consistent with the basic provisions of article 1 (1) that the Law applies to claims or rights "arising from a contract of international sale of goods"; the exclusion is also consistent with the further provisions that guarantees brought within the Law are limited to "personal" guarantees (article 1 (4) (c))—i.e. claims *in personam*, as contrasted with *in rem* claims against property.⁵ It will be noted that article 2 (c) excludes rights based not only on "lien" and "mortgage" but also "other security interest in property". This latter phrase is sufficiently broad to exclude rights asserted by a seller for the recovery of property sold under a "conditional sale" or similar arrangement designed to permit the seizure of property on default of payment. Of course, the expiration of the period of limitation applicable to a right or claim may have serious consequences with respect to the enforcement of a lien, mortgage or other interest securing that right or claim. However, for reasons given in connexion with article 20 (1) (commentary to article 20 at para. 2), this Law does not attempt to prescribe uniform rules with respect to such consequences, and leaves these questions to applicable national law; it may be expected that the tribunals of signatory States in solving these problems will give full effect to the basic policies of this Law with respect to the enforcement of stale claims.

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

¹ See commentary to article 1 at para. 11, *supra*.

² See article 7 (3) on the date of the commencement of the limitation period for rights or claims relying on defects in or other lack of conformity of the goods.

³ Alternative proposals by one delegate, related to the above provision are contained in appendix A to this annex. The first alternative would amend article 2 (a) by excluding claims in respect of physical damage or injury caused by the goods and other tangible property or to the person of the buyer or any other person. The second alternative would amend article 8 by providing a special rule on the commencement of the limitation period in such cases.

⁴ See article VI (basic periods of ten or twenty years, subject to certain adjustments); article 1 (1) (k) (definition of "nuclear damage").

⁵ See commentary to article 1 at para. 9, *supra*.

limitation period for such enforcement should be longer than that applicable to the underlying claim: consideration should be given to a period of ten years.)

5. Paragraph (e) excludes rights based on "a document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought". Such documents subject to immediate enforcement or execution are given different names and rules in various jurisdictions (e.g. the *titre exécutoire*), but they have an independent legal effect that differentiates them from claims that require proof of the breach of the contract of sale. On the problems of unification of enforcement actions under varying procedural systems, see the discussion of article 2 (d) (para. 4, *supra*). For the exclusion of rights based on documents having a legal identity distinct from the sales contract, see the discussion of article 2 (f) (para. 6, *infra*).

6. Paragraph (f) excludes rights based on "a bill of exchange, cheque or promissory note". This exclusion is significant for present purposes when such an instrument has been given (or

accepted) in connexion with the obligation to pay the price for goods sold in an international transaction subject to this Law. Such instruments are in many cases governed by international conventions or national laws that state special period of limitation. In addition, such instruments are often circulated among third persons who have no connexion with or knowledge of the underlying sales transaction; and, the obligation under the instrument is distinct (or "abstracted") from sales transaction from which the instrument originated.⁶ In view of these facts, rights under the instruments described in paragraph (f) are excluded from this Law. Contrast assignees of the sales contract (art. 1 (4) (a)).

7. Paragraph (g) excludes rights based on "a documentary letter of credit". The reason for this exclusion has been explained in the commentary to article 1 at paragraph 9, *supra*.

⁶ Cf. the discussion of articles 1 (1) and 1 (4) (c) and commentary to article 1 at para. 8, *supra* with respect to guarantees.

[Article 3]

[CONFLICT OF LAWS]

[No draft provision is proposed at this time to deal with the problems of the contact between an international sales transaction and a contracting State that is required for applicability of this Law (choice of law). In connexion with the proposed uniform rules of substantive law for the international sale of goods (ULIS), a draft provision was considered, and approved in substance, at the third session of UNCITRAL.¹ The Commission, however, requested the Working Group on Sales to re-examine this provision in the light of comments made at the third session. Pending this re-examination and action by the Commission at its fourth session, the Working Group on Prescription decided to defer action on this question. In preliminary consideration of this question it was noted that a general reference to rules on private international law (choice of law) could lead to confusion because of basic differences between the approaches of different legal systems concerning the characterization or qualification of problems of limitation (prescription). Thus, it was reported that, in common law legal systems, limitation is regarded primarily as a matter of procedure, so that the court of the forum will in any event apply its own domestic rules relating to limitation in any legal proceedings

instituted before it. In addition, in some common law systems, e.g. England, the court will also apply the limitation rules of the law applicable to the contract if the applicable law characterizes limitation as a matter of substance and not of procedure. Examples illustrating this point are set forth in the foot-note.² Some members of the Working Group were of the opinion that the rules on prescription might justify wider scope than the basic rules on sales, this question was left open for further consideration].

² Proceedings are instituted in an English court. The English limitation period (procedure) is six years:

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

For an indication that States with common law background may not always apply rigorously the view that limitations are "procedural", see, *Guaranty Trust Co. v. York*, 326, U.S. 99 (1945).

¹ UNCITRAL report on third session (1970), 26-29.

[Article 4]

[DEFINITION OF "A CONTRACT OF INTERNATIONAL SALE" AND RELATED MATTERS]

[The Working Group on Prescription at its first session concluded that certain rules on the scope of the uniform rules on prescription—the definition of international sale of goods and related matters—should, if possible, be the same as the comparable rules in the uniform rules on sales.¹ The Commission approved this approach and referred this question to the December 1970 meeting of the Working Group on Sales.² In view of this action, the Working Group on Prescription

postponed action with respect to the questions of sphere of application that are dealt with in the following articles of ULIS; article 1 (definition of the international sale of goods), article 5 (1) (exclusion of certain commodities and transactions); article 6 (contracts for the supply of goods to be manufactured or produced) and article 7 (civil or commercial character of the contract). The Working Group also reaffirmed the recommendation, made at its first session, that the Working Group on Sales and the Commission should give priority to these issues.]

¹ Report of the Working Group on its first session (1969) (A/CN.9/30), 11.

² UNCITRAL, report of third session (1970), 50-51, 77-78.

Article 5

[INTERPRETATION TO PROMOTE UNIFORMITY]

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

COMMENTARY

1. The desirability of conformity with the uniform rules on sales was noted under article 4 above. The Working Group on Prescription is of the view that conformity is also desirable with respect to principles of interpretation. At the same time, this Working Group believes it important for the present preliminary draft to emphasize principles of interpretation that would contribute to uniformity. National rules on prescription (limitation) are subject to sharp divergencies in approach and concept. It is especially important to avoid the construction of the provisions of this Law in terms of the varying concepts of national law.

2. To emphasize the importance of the uniformity of interpretation this preliminary draft includes the proposal set forth in article 5. This article is based on a proposal that received

substantial support at the third session of UNCITRAL.¹ It will be noted that the present article does not include the reference, contained in ULIS article 17, to "the general principles on which the present Law is based". Instead, article 5 refers to the international character of the Law and the need to promote uniformity in its interpretation and application. By its terms, this provision only applies to the interpretation and application of "the provisions of" this Law, and thus does not authorize the broadening of the scope of the Law.

3. The formulation of this article must, of course, be reconsidered in the light of the report of the Working Group on Sales and any action on this subject that may be taken by the Commission at its fourth session.

¹ Questions concerning the approach to the interpretation of uniform international legislation were considered by the Commission at its third session. The discussion centred on the provision of ULIS, art. 17. UNCITRAL report on third session (1970), 52-55. Suggestions for the revision of ULIS article 17 were referred to the Working Group on Sales. *Ibid.* 55.

The limitation period

Article 6

[LENGTH OF THE PERIOD]

The limitation period shall be [three] [five] years

COMMENTARY

1. The question of the length of the basic period of limitation was considered at the first session of the Working Group and at the third session of the Commission.¹ Most members of the Commission at the third session favoured a period within the

¹ Report of the Working Group on its first session (1969) (A/CN.9/30), 49-50; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, D. UNCITRAL report on the third session (1970), 85-89; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

range of three to five years.² However, in view of the difference of opinion as to a choice within this range, the Commission decided that a questionnaire on the length of the period and related matters should be addressed to Governments and interested international organizations.³ Consequently, pending the receipt of the information requested in the questionnaire the number of years is stated in the alternative in this preliminary draft.

² *Id.*, 85.

³ *Id.*, 89.

Commencement of the limitation period

Article 7

[BREACH OF CONTRACT]

(1) Subject to the provisions of paragraphs 3 to 6 of this article and to the provisions of article 9, the limitation period in respect of any right arising out of a breach of the contract of sale shall commence on the date on which such breach of contract occurred.

(2) Where one party is required as a condition for the acquisition or enforcement of such a right to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

(3) Subject to the provisions of paragraph 4 of this article, the limitation period in respect of a right arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are placed at the disposition of the buyer by the seller according to the contract of sale, irrespective of the date on which

such defects or other lack of conformity are discovered or damage therefrom ensues.

(4) Where the contract of sale contemplates that the goods sold are at the time of the conclusion of the contract in the course of carriage, or will be carried, to the buyer by a carrier, the limitation period in respect of rights arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are duly placed at the disposition of the buyer by the carrier, or are handed over to the buyer, whichever is the earlier.

(5) Where, as a result of a breach by one party before performance is due, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any right arising out of such breach shall commence on the date on

which such breach of contract occurred, irrespective of any subsequent failure by the party in default to perform on the date when performance is due; otherwise the limitation period shall commence on the date when performance is due.

(6) Where, as a result of a breach by one party of a contract for the delivery of or payment for goods by instalments, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any right arising out of such breach shall commence on the date on which such breach of contract occurred, irrespective of any other breach of contract in relation to prior or subsequent instalments; otherwise the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred.

COMMENTARY

I. Structure of the Law; basic rules

1. The present Law governs two types of claims: (a) those that arise from breach of contract and (b) those that arise from an event other than breach (i.e.: supervening invalidity of the contract may give rise to claims for restitution of advance payment).¹ The present article 7 deals with the commencement of the period of limitation with respect to the first of these two types of claims; article 8 deals with the second type.

2. With respect to claims arising out of breach of contract, article 7 (1) provides that the limitation period shall commence "on the date on which such breach of contract occurred". The application of this basic rule to certain special situations is provided in paragraphs 2 through 6 of article 7 and in article 9, *infra*.

II. Notices to the other party

3. The sole effect of article 7 (2) is to clarify the point in time for the commencement of the limitation period under this Law; this paragraph, of course, has no effect on rules of municipal law requiring such notices.² The breach of contract has occurred prior to such a notification; consequently, to delay the commencement of the period of limitation until the time of notification would be inconsistent with the basic approach adopted in article 7 (1) of the Law. Moreover, the time of notification may depend on the diligence with which the buyer inspects the goods and gives the notification. Consequently, it has been concluded that the commencement of the period would not be determined by the time of giving notice.³

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

4. Paragraphs 3 and 4 of article 7 are concerned with claims by buyers. To relate these provisions to the general structure of the Law, it may be helpful to consider the following two basic situations in which such claims by buyers may arise.

Example 7A: The sales contract required the seller to place goods at the buyer's disposition on 1 June 1970. The seller failed to supply or tender any goods in response to the contract on 1 June or on any subsequent date. The buyer asserts a right to enforce the contract or to recover damages for breach. When does the period of limitation commence?

On the above facts the basic rule of paragraph 1 of article 7 would determine the commencement of the period of limitation for the buyer's claim. Under paragraph 1, "the date on which [the] breach of contract occurred", in the above example, was 1 June, the date for performance required under the contract. (Cf. paras. 5 and 6 of art. 7, to be discussed, *infra*.)

Example 7B: On 1 June 1970 the seller placed goods at the disposition of the buyer. On 15 June the buyer notified the

seller that the goods were defective and that he rejected them. (In the alternative, on 15 June the buyer notified the seller that he accepted the goods but would hold the seller responsible for defects in the goods.) Under either alternative, a claim by the buyer against the seller "relying on defects in, or other lack of conformity" of the goods⁴ falls within paragraph 3 of article 7. Consequently, the limitation period for such a claim commenced on 1 June 1970, "the date on which the goods are placed at the disposition of the buyer the seller according to the contract of sale...".

5. This last phrase "according to the contract of sale" cannot refer to full compliance by the seller with the contract, since all the cases arising under this subparagraph involve claims by buyers that the goods are defective. Instead, this language was designed to respond to the decision of the Commission that the drafting should avoid the ambiguities that had been encountered in connexion with the legal concept of "delivery".⁵ ULIS article 19 (1) provides: "delivery consists in the handing over of goods which conform with the contract". As has been noted, all of the cases governed by this subparagraph involve claims which do not "conform with the contract". In addition, "handing over" would be inappropriate where the buyer refuses to receive the goods because of their defects or where he delays his receipt of the goods. For these reasons, article 7 (3) states that the period commences when the goods are placed "at the disposition of the buyer": the phrase, "according to the contract of sale" points to the circumstances which, under the contract, constitute placing the goods at the buyer's disposition.

6. The concluding phrase of article 7 (3), "irrespective of the date on which such defect or other lack of conformity is discovered or damage therefrom ensues", makes it clear that in cases like examples 7A and 7B, above, the period of limitation commences to run on the date the goods are placed at the disposition of the buyer (1 June 1970, in the above examples) even though the buyer does not discover the defect, or the defect does not result in damage to the buyer, until a later date. This provision reflects a significant choice of policy. The Working Group, at the first session, considered that "the law of limitation must, by its very nature, be definite in operation".⁶ If the discovery of defects should start the running of a new limitation period for claims based on such defects, doubt could arise as to the commencement of the period: only the buyer would be in control of the evidence concerning his discovery of the defect and difficult questions of fact could arise as to when he first discovered (or should have discovered) the defect. In addition, claims might be pressed at such a late date that it would be difficult to produce trustworthy evidence on the true condition of the goods at the time they were first received by the buyer.

7. The rule of article 7 (3) can produce harsh results in some circumstances. But the over-all fairness of the Law needs to be considered in the light of the following factors: (a) the length of the basic period of prescription (article 6, *supra*)—yet to be finally decided; (b) exclusion from the Law (article 2 (a), *supra*) of rights based on "the death of, or injury to the person of the buyer"; (c) confining the Law's scope to rights based on contract—thereby excluding rights based on tort or *delict*. (Article 1, *supra*); (d) the special provisions (article 9, *infra*) for rights based on an express undertaking by the seller which is stated to have effect for a period of time.⁷

⁴ The phrase "claims relying on defects in, or other lack of conformity of the goods" includes any respect in which the goods fail to comply with the requirements of the contract and this would include defects as to quality, quantity and the like.

⁵ UNCITRAL report on third session (1970), 84; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

⁶ Report of the Working Group on its first session (1969) (A/CN.9/30) 5; *op. cit.*, *supra*, note 3.

⁷ For a proposal for amendment to other provisions of the Law related to the instant problem see commentary to article 8 at para. 3, *infra*, and appendix A to this annex.

¹ See the discussion in commentary to article 1 at para. 12, *supra*.

² Also article 1 (3) and its accompanying commentary paras. 13 and 14, article 18 (4) and its accompanying commentary para. 6.

³ See report of the Working Group on its first session (1969) (A/CN.9/30) 46-47; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, D.

8. Paragraph 4 of article 7 provides for the application of the principle of paragraph 3 to a specific situation—contracts contemplating the carriage of goods. The basic policy of paragraph 4 is to postpone the starting of the period until the end of the carriage contemplated by the contract—i.e., the “date on which the goods are duly placed at the disposition of the buyer by the carrier”. The next phrase (“or are handed over to the buyer, whichever is the earlier”) deals with the possibility that the goods may be handed over to the buyer in a manner, or at a place or date other than that contemplated by the contract and therefore the goods would not be “duly placed at the disposition of the buyer”.

Example 7C: Seller in Santiago agreed to ship goods to the buyer in Bombay: the terms of shipment were “f.o.b. Santiago”. Pursuant to the contract, the seller loaded the goods on board a ship in Santiago on 1 June 1970. The goods reached Bombay on 1 August 1970, and on the same date the carrier notified the buyer that he could take possession of the goods. On 15 August the buyer took possession of the goods and on 20 August he discovered that the goods were defective and notified the seller of that fact.

Under these facts, the limitation period for the buyer's claim commenced to run on 1 August 1970, since that is the date on which the goods were “placed at the disposition of the buyer by the carrier”. This result is not affected by the fact that under the terms of the contract the risk of loss during the ocean voyage rested on the buyer. Nor is this result affected by the fact that, under some legal systems, it might be concluded that “title” or “ownership” in the goods passed to the buyer when the goods were loaded on the ship in Santiago. Alternative forms of price quotation (f.o.b. Seller's city, f.o.b. Buyer's city; f.a.s.; c.i.f. and the like) have significance in relation to possible changes in freight rates and the manner of arranging for insurance, but they have no significance in relationship to the commencement of the period of limitation. Where the contract contemplates that the goods will be carried to the buyer by a carrier, paragraph 4 of article 7 reflects the general policy that the limitation period in respect of rights arising from defects in or other lack of conformity of the goods should not start to run during the course of carriage. Of course, where the buyer takes effective control over the goods in the seller's city and thereafter ships the goods, neither the policy nor the provisions of this paragraph will apply to delay the commencement of the period of limitation.

IV. Breach before performance is due

9. Both paragraphs 5 and 6 deal with problems that arise when a breach of contract by one party affects future performance under the contract. Paragraph 5 establishes the basic general rule; paragraph 6 deals with the special problems that arise when a contract calls for the delivery of goods, or the payment for goods, in instalments.

(a) Paragraph 5: the basic rule

10. The basic rule of paragraph 5 may be illustrated by the following:

Example 7D. A contract of sale made on 1 June 1970 calls for the seller to deliver the goods on 1 December. On 1 July the seller (without excuse) notifies the buyer that he will not deliver the goods required by the contract. On 15 July the buyer notifies the seller that in view of the seller's repudiation the contract is terminated.

11. In this example, the limitation period for the buyer's claim might conceivably commence on one of the following three events: (a) the breach (1 July); (b) the notification of termination (15 July); (c) the date for final performance (1 December).

12. On the stated facts the Law chooses alternative (a).⁸

⁸ This assumes that under the applicable law the seller's action on 1 July (statement of non-performance) constitutes a breach.

Under article 7 (5), where a party “becomes entitled to and does elect to treat the contract as terminated”, the limitation period runs from “the date on which such *breach of contract occurred*”—1 July in the foregoing example.

13. It will be noted that under paragraph 5, the above result depends on a decision to “elect to treat the contract as terminated”. If, in the above instances such an election (e.g., by the notification of termination made on 15 July) had not occurred, the “limitation period shall commence on the date when *performance is due*”—1 December in the above example. The Law, however, does not provide any rule governing the time within which the right to elect the contract as terminated must be exercised. The solution to the question is left to the applicable law. Therefore, under some rules, it may be possible to elect the contract as terminated even if notification to this effect is made after the date when performance became due. In such a case, to the extent that the plaintiff elects to base his claim on the first breach, the limitation period for this claim arising out of such breach shall commence on the date of such breach.

14. In the interest of definiteness and uniformity the period will commence on the earlier (1 July) date only when a party positively “elects” to treat the contract as terminated. Thus, termination resulting from a rule of applicable law that on breach the contract shall be automatically (or *ipso facto*) terminated is not termination resulting from an “election” by a party within the meaning of paragraph 5.

(b) Paragraph 6: instalment contracts

15. The rules of paragraph 6 may be clarified by the following example:

Example 7E. A contract of sale made on 1 June 1970 requires the seller to sell the buyer 4 000 cwt. of sugar, with deliveries of 1 000 cwt. on 1 July, 1 August, 1 September and 1 October. The second instalment, delivered on 1 August, was so seriously defective that the buyer rightfully took two steps: he rejected the defective instalment and he notified the seller that the contract was terminated as to *future* instalments.

16. For the purposes of paragraph 6, the relevant action by the buyer was the buyer's election “to treat the contract as terminated” as to future instalments. Paragraph 6 provides that in this case “the limitation period in respect of any right arising out of such breach” shall commence “on the date on which such breach of contract occurred”—1 August in the above example. The provision adds that this rule applies “irrespective of any other breach of contract in relation to prior or subsequent instalments”. Thus, the failure of the seller to deliver sugar on 1 September and 1 October does not start periods of prescription running from those dates: a single period for the August, September and October instalments commences on the date of the breach that entitled the other party to terminate the contract.

17. Paragraph 6, like paragraph 5, leads to a different result when the innocent party does not elect to terminate the contract.

Example 7F. The contract is the same as in 7E, above. Each of the four deliveries is defective. The buyer complains to the seller of these defects but does not elect to terminate the contract.

18. On such facts, paragraph 6 provides that “the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred”. Thus, separate periods of limitation would run from the deliveries on 1 July, 1 August, 1 September and 1 October.

19. A proposal for the revision and consolidation of paragraphs 5 and 6 of this article is annexed to appendix B to this annex. Also see commentary to article 8 at para. 3, *infra*.

Article 8

[RIGHTS NOT ARISING OUT OF BREACH OF CONTRACT]

Subject to the provisions of article 9 where a right arises out of a contract of sale or a guarantee incidental thereto, or where a right arises by reason of termination or invalidity of such a contract or guarantee, but does not arise out of a breach of a contract, the limitation period shall commence on the date on which the right could first be exercised.

COMMENTARY

1. The relationship between the scope of articles 7 and 8 has been introduced in the commentary to article 7 at paragraph 1, *supra*, and in the commentary to article 1 at paragraph 12, *supra*. As has been noted, "breach of contract" cannot be used as a starting point for certain types of claims. One such claim is for restitution of advance payments where the performance of the agreed exchange is excused under the applicable law because of impossibility of performance, *force majeure*, and the like. For such claims, article 8 provides that the limitation period shall commence on the date "on which the right could first be exercised".¹

2. Whether such rights exist and what events will create a substantive right which can be exercised must, of course, be decided under the applicable rules of national law.

3. A proposal for an amendment to deal with physical damage caused by the goods sold to other tangible property, submitted by one delegate, is contained in appendix A to this annex. It is proposed that the period in respect of liability for such damage shall commence from the date on which the damage occurred.

4. One delegate proposed that the problem dealt with in paragraphs 5 and 6 of article 7 should be treated in a more general way. An explanation of the view, and a proposed article 8A dealing more generally with questions of anticipatory breach, instalment sales, and related matters is contained in appendix B to this annex.

¹ One representative proposed that this article provide that "the period shall run from the earliest day to which the creditor could have caused the obligation to become due". Also see report of the working group on its second session (1969) (A/CN.9/30) 22, Alt. C (5); UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, D.

Article 9

[EXPRESS UNDERTAKINGS FOR A PERIOD OF TIME]

Where the contract of sale contains an express undertaking on the part of the seller relating to the goods and such undertaking is stated to have effect for a period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of a right relating to any matter covered by the undertaking shall commence on the date on which the buyer first informed the seller of such right, provided that the limitation period shall in any event expire [three] [five] years after the expiration of the period of the undertaking.

COMMENTARY

1. Article 9 provides an exception from the basic rules on commencement of the period contained in article 7, particularly the rule of article 7 (3) providing that the limitation period for claims relying on non-conformity of the goods shall commence on the date on which the goods are placed at the disposition of the buyer.¹ Under article 7 (3), the date on which non-conformity is discovered and the date on which damage occurs are both irrelevant. However, this approach has been considered inappropriate where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods, which is stated to have effect for a period of time.²

2. Consideration was given to a rule that would assure the buyer of a period of one year after the expiration of the time specified in the express undertaking.³ Further consideration indicated that this period might be inadequate when the defect

appeared towards the end of the guarantee period; on the other hand, the period seemed excessive when the defect appeared shortly after the buyer received the goods. The rule of article 9 was designed to meet both objections.

3. Under this article, the basic prescriptive period of [3] [5] years commences to run on the date on which the buyer first informs the seller of his claim. The time of such notice was selected in the interest of definiteness. Consideration was given to the possible objection that any delay by the buyer in informing the seller would extend the buyer's period for bringing action, and alternative ways of dealing with the problem were considered. It was concluded, however, that in the setting of claims under express undertakings, such as warranties or guarantees, there was not practical likelihood that buyers would abuse this provision. The buyer's desire for prompt adjustment of his claim would lead to prompt notification; certainly no buyer would delay his opportunity for an adjustment in order to obtain the remote and speculative advantage of an extended period of limitation. It was also noted that applicable law or the provisions of the express warranty may prevent excessive delay in giving notice (*cf.* ULIS article 39). In addition, article 9 provides a final cut-off date that is applicable regardless of the date of notification: "the limitation period shall in any event expire [three] [five] years after the expiration of the period of the undertaking".

first session. Report of the Working Group on its first session (1969) (A/CN.9/30) 37.

² "Where the contract contains an express guarantee relating to the goods which is stated to be in force for a specified time, the period of limitation in respect of any action based on the guarantee shall expire one year after the expiration of such time or [3] [5] years after the delivery of the goods to the buyer, whichever shall be the later."

¹ See commentary to article 7 at para. 4, *supra*.

² See report of the Working Group on its first session (1969) (A/CN.9/30) 37-40; UNCITRAL report on third session (1970) 93.

³ The following was the rule proposed by the Working Group at its

Interruption of the limitation period: legal proceedings; acknowledgement

Article 10

[JUDICIAL PROCEEDINGS]

(1) The limitation period shall cease to run when the creditor performs any act recognized under the law of the jurisdiction where such act is performed:

- (i) As instituting judicial proceedings for the purpose of obtaining satisfaction of his right; or
- (ii) If judicial proceedings have already been commenced by the creditor against the debtor in relation to another right, as invoking his right in the course of those proceedings for the purpose of obtaining satisfaction of that claim.

(2) For the purposes of this article, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the right against which the counterclaim is raised, provided that such counterclaim does not arise out of a different contract.

COMMENTARY

1. The general heading "Interruption of the limitation period" applicable to articles 10 to 13 is intended only to indicate the general character of the problem. The reference to "interruption" does not imply that the consequences of "interruption" under various national legal systems are imported into this Law. In some legal systems "interruption" implies renewal of the period; in other systems the results are different. The consequences under this Law are those specifically stated in each article under this title. Thus, the effect of instituting legal proceedings is that "the limitation period shall cease to run". (Articles 10, 11 and 12) (*cf.* article 13 [effect of acknowledgement]).

2. As was noted earlier (commentary to article 1 at para. 1), the Law is essentially concerned with the time within which the parties to an international sale of goods may bring actions for the redress of claims or rights. Article 6 states the length of the basic limitation period. Articles 19 to 22 state the effects of the expiration of the period; these include the rule (article 20 (1)) that no right for which the limitation period has expired "shall be recognized or enforced in any legal proceedings". To round out this structure, article 10 provides that the "limitation period shall cease to run" when a creditor institutes legal proceedings for the purpose of obtaining satisfaction of his claim. The net effect of these rules is substantially the same as providing that a legal proceeding for enforcement may only be brought before the limitation period has expired. However, the approach of this draft, in stating that the limitation period shall "cease to run" when legal action is instituted, provides a basis for dealing with problems that arise when the legal action fails to result in a decision on the merits or is otherwise abortive. See article 17.

3. The central problem of article 10 is to define the stage which judicial proceedings must reach before the expiration of the limitation period. In different jurisdictions, proceedings are instituted in different ways. In some jurisdictions a claim may be filed or pleaded in court only after the plaintiff has taken certain preliminary steps (such as the service of a "summons" or "complaint"). In some jurisdictions, these preliminary steps may be taken out of court by the parties (or their attorney); nevertheless these steps are governed by the State's rules on procedure, and may be regarded as instituting a legal action for the purpose of satisfying the State's rules on prescription or limitation. In other States, this consequence occurs at various later stages in the proceeding.

4. For these reasons it was not feasible to refer specifically to the procedural steps that would meet the purposes of this

article. Instead, paragraph 1 (i) refers to the performance by the creditor of "any act recognized under the law of the jurisdiction where such act is performed: (i) as instituting judicial proceedings for the purpose of obtaining satisfaction of his right". In the phrase "for the purpose of obtaining satisfaction of his right", the broad term "satisfaction" is employed in order to accommodate legal actions, permitted under some legal systems, for a declaratory judgement or similar judgement recognizing or establishing the right asserted by the plaintiff. Initiation by the creditor against the debtor of a criminal proceeding for criminal fraud would qualify under this article to stop the period only if, under the local law, this is regarded also as an institution of a proceeding "for the purpose of obtaining satisfaction of his right".

5. Paragraph 1 (ii) applies where the creditor adds a claim to a proceeding he has already instituted against the debtor. Here, as under paragraph 1 (i), the step in that proceeding that qualifies to stop the running of the limitation period depends on the law of the jurisdiction where the proceeding is brought. Under paragraph 1 (ii) the test is not when the proceeding has been instituted but when the creditor has performed an act recognized under the law of the *forum* as "invoking his right" in the pending proceedings.

6. While this Uniform Law gives great weight to procedural rules of the *forum*, does not go so far as to give effect to any act that is sufficient to satisfy local rules on limitation or prescription. For instance, under some legal systems a demand for payment sent by the creditor to the debtor may satisfy the applicable rule on limitations even though the demand does not institute judicial proceeding. In the interest of uniformity, this Law requires that the act be recognized as "instituting judicial proceedings" or as invoking a right in the course of "judicial proceedings" that have already been commenced.

7. One representative suggested that a special provision should deal with situations like the following: (a) *A* sells goods to *B* who resells the goods to *C*. *C* institutes proceedings against *B* on the ground that the goods are defective. In such a case, recovery on *C*'s claim against *B* may give rise to a recourse claim by *B* against *A*. (b) A similar situation can arise where *A* and *B* are jointly responsible on a sales contract to *C* and *C* sues only *B*. Here, also, *B* may have a recourse action against *A*. The suggestion dealt with the possibility that during the proceedings of *C* against *B*, *B* would notify *A* of these proceedings and that this notice (*litis denunciatio* or "vouching in the warranty") would have certain legal effects under the law of the jurisdiction where the proceedings took place. It was proposed that, under specified circumstances, such a notice would interrupt the running of the period of limitation for *B*'s claim against *A*.¹ It was suggested that in the absence of such a provision *B* would be compelled to institute formal judicial proceedings for the redress of the recourse claim against *A*, while the necessity for such redress is uncertain; this would not be in the interest of any party. The majority of the Working Group was not prepared to approve a special provision designed to deal with this situation, but considered that the problem should be given further consideration.

¹ The following was the text of this proposal:

The limitation period shall cease to run in respect of a recourse claim which a joint debtor may have against a co-debtor, provided that such joint debtor during proceedings in which he is a defendant, before the expiry of the limitation period for such recourse claim, has given the co-debtor due notice of the proceedings in accordance with the requirements under the law of the jurisdiction where the proceedings take place (*litis denunciatio*).

8. Paragraph 2 of this article deals with the point in time when a counter-claim² is deemed to be instituted. Its provisions may be examined in terms of the following example:

Example 10-A. The seller instituted suit against the buyer on 1 March 1970. In this proceeding, the buyer interposed a counter-claim on 1 December 1970. The prescriptive period governing the buyer's counter-claim would, in normal course, have expired on 1 June 1970.

9. In the above example, the crucial question is whether the buyer's counter-claim shall be deemed to be instituted (a) on

² The meaning of "counter-claim" in paragraph 2, may be drawn from the reference in paragraph 1 (i) to "judicial proceedings" employed for the purpose of obtaining satisfaction of a right. Such judicial proceedings could lead to affirmative recovery by the defendant against the plaintiff as well as total or partial extinguishment of the plaintiff's claim. The question whether a counter-claim is acceptable procedure is, of course, left to the rules of the forum. The use of a claim "as a defence for the purpose of set-off" after the limitation period for that claim expired is governed by article 20 (2), *infra*.

1 March, the time when the seller's action was instituted or (b) on 1 December 1970, when the buyer's counter-claim was in fact interposed in the pending action.

10. Under paragraph 2 of article 10, alternative (a) is chosen when the buyer's counter-claim arises out of the same contract as the seller's action. This result is adopted as the rule of this Law because it will promote efficiency and economy in litigation by encouraging consolidation of actions and avoid the hasty bringing of separate actions.

11. On the facts of the above example, the same benefit is not given to the buyer when his claim against the seller arises from a different contract than that which provided the basis for seller's claim against the buyer; in this event, the buyer must actually institute his counter-claim before the expiration of the period of limitation. The act which is regarded as instituting this counter-claim is determined under the approach employed in article 10 (1), discussed at paragraphs 4 and 5, *supra*.

Article 11

[ARBITRATION]

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

(2) In the absence of any such provision, the request shall take effect on the date on which it is delivered at the habitual residence or place of business of the other party, or, if he has no such residence or place of business, then at his last known residence or place of business.

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

COMMENTARY

1. Article 11 applies to arbitration based on an agreement to submit to arbitration.¹ Article 10 relies on national law to define the point in the institution of judicial proceedings when the limitation period shall cease to run. The same approach cannot be used in relation to arbitration proceedings under article 11 since in many jurisdictions the manner for instituting such proceedings is left to the agreement of the parties. Hence it is necessary for the Law to designate a stage of the proceed-

ings which would be compatible with normal arbitration practices; the stage so designated in paragraph 1 is the act of a party "requesting that the right in dispute be referred to arbitration..."

2. Any question as to what acts constitute such a request are to be answered under "the arbitration agreement or by the law applicable to that agreement" (para. 1). This provision that the request be made in the manner provided for by the agreement or applicable law refers, *inter alia*, to the person or institution to whom the request is to be made and the nature of the communication that constitutes such a request. If the agreement or the applicable law does not prescribe the manner of making such a request, under paragraph 2 the decisive point is the date on which the request is delivered at the habitual residence or place of business of the other party; if he has no such residence or place of business the request may be delivered at his last-known residence or place of business. Under paragraph 2, the request must be "delivered" at the designated place. Thus, risks during transmission fall on the sender of the request, but the sender need not establish that the request came into the hands of the other party.

3. Paragraph 3 deals with the effect of a term in the arbitration agreement that "no right shall arise until an arbitration award has been made". Under paragraph 3, such a contract term does not prevent the application of this article to the agreement; such a contract provision has no effect to suspend the running of the period of limitation or to determine the act that stops the running of the period under this Law. On the other hand, paragraph 3 does not indicate any rule of this Law concerning the validity of such agreements under national law.

¹ Article 11 deals with only voluntary (optional) arbitration. If a State provides for obligatory "arbitration" not based on an agreement, such proceedings would be characterized as "judicial" for the purpose of the Uniform Law. See articles 1 (4) (f) and 10. On construction of this Law to promote uniformity, as contrasted with the application of local terminology, see article 5 and accompanying commentary.

Article 12

[LEGAL PROCEEDINGS ARISING FROM DEATH, BANKRUPTCY, OR THE LIKE]

(1) The provisions of this article shall apply where any legal proceedings are commenced upon the occurrence of any of the following events:

- (a) The death or incapacity of the debtor;
- (b) The bankruptcy or insolvency of the debtor;
- (c) Where the debtor is a corporation, company or other legal

entity, the dissolution of such corporation, company or legal entity;

- (d) The seizure or transfer of the whole or part of the assets of the debtor.

(2) The limitation period shall cease to run when the creditor performs an act recognized under the law of the jurisdiction where

such act is performed as the assertion of a right in those proceedings under that law for the purpose of obtaining satisfaction of his claim.

(3) Except as provided in this article, the limitation period shall not cease to run or in any other way be affected by the events referred to in paragraph 1 of this article.

COMMENTARY

1. This article recognizes that in the situations described in paragraph 1, slightly different problems may arise¹ than in connexion with the commencement of judicial proceedings. For example, the proceedings for the distribution of assets on death, bankruptcy or the dissolution of a legal entity, may not be instituted by an individual creditor. Instead, creditors may have

an opportunity to file claims in existing proceedings.¹ Consequently, for the types of proceedings listed in paragraph 1, a generalized test for commencement is provided in paragraph 2. The approach is similar to that employed in article 10, discussed in commentary to that article at paragraph 4, *supra*.

2. As has been noted (commentary to article 1 at para. 8, *supra*), this Law applies only to the prescription of rights or claims between the parties to an international sale. In the types of proceedings specified in this article involving the distribution of assets (as in bankruptcy) prescription may effect the rights of third parties. The nature of such effect, if any, is not regulated by this Law and is left to applicable national law.

¹ Under some legal systems, such proceedings might be "administrative" rather than "judicial". See article 1 (4) (f).

Article 13

[ACKNOWLEDGEMENT BY DEBTOR]

(1) Where the debtor acknowledges his obligation to the creditor, a new limitation period of [three] [five] years shall commence to run by reason of and from the date of such acknowledgement.

(2) The acknowledgement shall be evidenced in writing.

(3) Partial performance of an obligation by the debtor to the creditor shall have the same effect as an acknowledgement if it can reasonably be inferred from such performance that the debtor acknowledges that obligation.

(4) Payment of interest shall be treated as payment in respect of the principal debt.

(5) The provisions of this article shall apply whether or not the limitation period prescribed by articles 6 to 9 has expired.

COMMENTARY

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

2. Recommencing the period of limitation may have significant impact on the debtor's rights; consequently, paragraph 2 requires that the acknowledgement be evidenced in writing.¹ A writing by a debtor confirming an earlier oral acknowledgement would, of course, satisfy this requirement. The requirement of a "writing" is defined in article 1 (4) (h).

¹ One representative expressed doubt as to the suitability or efficiency of this requirement in view of the difficulty of defining the difference between an acknowledgement in the sense of the present Law and the creation of a new independent contractual obligation ("novation") which, in his view, is outside the Law and which under the applicable law often may be established by a simple oral statement.

3. A declaration made either before or after the expiration of limitation period (see article 13 (5) and para. 6, *infra*) can be an "acknowledgement" for the purpose of the Uniform Law. Under paragraph 2 of this article, such an acknowledgement will be subject to the requirement of a writing.

4. Paragraph 3 deals with "partial performance of an obligation" that has the same effect as an acknowledgement. The partial payment of a debt is the most typical instance, but the language is sufficiently broad to include partial performance of other obligations, such as the partial repair by a seller of a defective machine.

5. Acknowledgement (para. 1) and partial performance (para. 3, including the payment of interest [para. 4]) recommence the running of the period of the limitation only with respect to the obligation acknowledged by such action. Whether there was an acknowledgement and if so, the extent of the obligation so acknowledged are questions calling for the determination of the relevant facts in the light of the basic standard set forth in this article.

6. In view of the policies for prescription indicated in paragraph 1, *supra*, an acknowledgement made after the running of the period should be given the same effect as an acknowledgement made prior to the running of the period, and paragraph 5 of this article so provides. Of course, the rule of this Law that a claim is not barred by prescription, whether this result occurs before or after the claim is once barred, is not intended to affect rules under national law, such as taxation, bankruptcy or the like.

7. The majority of the Working Group was also of the view that the question of whether acknowledgement by the debtor binds joint debtors or guarantors should be left to the applicable law. One reason for not attempting to draft a uniform rule on this question was the danger of over-simplification; a single rule probably could not be adapted to the many and varied types of debtors and the relationships between debtors sharing an obligation.

Extension of the limitation period

[Article 14]

[EXTENSION DURING NEGOTIATIONS]

[If the creditor and the debtor have entered into negotiations on the merits of the claim [without reserving the right to invoke limitation], and if the fact of such negotiations is evidenced in writing, the limitation period shall not expire before the end of one year from the date on which such negotiations have been broken off or otherwise come to an end, but at the latest one year from the date on which the period would otherwise have expired according to articles 6 to 9.]

This article is in square brackets because it was drafted on the assumption that the limitation period might be three years—a matter to be decided after the receipt of answers to the questionnaires. The majority of the Working Group was not

prepared to support the inclusion of such a provision if the limitation period was five years. The words “without reserving the right to invoke limitation” are placed in square brackets to indicate a difference of opinion concerning the appropriateness of this language. One member opposed the inclusion of the rule stated in article 14 regardless of the period. It was agreed that, should UNCITRAL accept in principle the approach expressed in article 14, consideration should be given, *inter alia*, to the clarity of the phrases “negotiations on the merits of the claim”, “evidenced in writing”, and the reference to the date on which negotiations have “broken off or otherwise come to an end”.]

Article 15

[EXTENSION WHERE INSTITUTION OF LEGAL PROCEEDINGS PREVENTED]

Where, as a result of a circumstance which is not personal to the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, and provided that he has taken all reasonable measures with a view to preserving his right, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

COMMENTARY

1. This article provides for limited extension of the period of limitation when circumstances prevent a creditor from instituting legal proceedings. This problem is often considered under the heading of “*force majeure*” or impossibility; however, this article does not employ these terms since they are used with different meanings in different legal systems. Instead, the basic test is whether the creditor “has been prevented” from taking appropriate action.¹ To avoid excessive liberality, no extension is permitted when any one of the following restric-

¹ Under articles 10, 11 and 12, it is provided that the limitation period shall “cease to run” when legal proceedings are instituted. The present article in referring to facts preventing the creditor “from causing the limitation period to cease to run” refers to the actions described under articles 10 to 12.

tions is applicable: (1) the preventing circumstances may not be personal to the creditor”—i.e., a condition that affects only this individual creditor, such as illness, death, or the like; (2) the creditor could have avoided or overcome the occurrence of such circumstance; (3) the creditor has not taken reasonable measures with a view to preserving his right.

2. There is no reason to extend the limitation period when the circumstance preventing action ceased to exist a substantial period (e.g., a year) in advance of the end of the period. Nor is there reason to extend the period for a longer period than is needed to institute action to obtain satisfaction of the right. For these reasons, the limitation period is extended so as not to expire before the expiration of one year from the date on which the preventing circumstance is removed. For example, a preventing circumstance existing only in the first year of the prescriptive period would not lead to an extension. On the other hand, if a preventing circumstance exists during any part of the last year of the basic period, the limitation period would be extended. However, where a preventing circumstance ceases to exist before the end of the basic limitation period the availability of the extension of the period may depend upon whether the creditor could have taken “reasonable measures with a view to preserving his right” within the remaining period.

Article 16

[MIS-STATEMENT OR CONCEALMENT BY DEBTOR]

Where, by reason of the debtor’s mis-statement or concealment of his identity or address, the creditor is prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the creditor discovered the fact mis-stated or concealed, or could with reasonable diligence have discovered it.

COMMENTARY

1. This article is concerned with one specific circumstance that prevents the creditor from instituting legal or arbitration

proceedings to secure satisfaction of his claim: “the debtor’s misstatement or concealment of his identity or address”. “Misstatement” does not require a dishonest or fraudulent intent. Regardless of intent (which would in any event be difficult to prove) the debtor has prevented action by the creditor and should not be permitted to take advantage of this fact. In this circumstance, the article provides for extension of the period. The rules governing the length of the extension are similar to those of article 15.¹

¹ See commentary to article 15 at para. 2, *supra*.

Article 17

[DISCONTINUANCE OR DISMISSAL OF PROCEEDINGS]

(1) Where the creditor has commenced judicial or arbitration proceedings in accordance with article 10 or 11, or has asserted his right in legal proceedings in accordance with article 12, but has subsequently discontinued the proceedings, or withdrawn his claim, the limitation period shall be deemed to have continued to run.

(2) Subject to the provisions of paragraph 1 of this article, if the court or arbitral tribunal has declared itself or been declared incompetent to adjudicate upon the claim of the creditor, or where any legal proceedings have ended without a definitive judgement, award or decision on the merits of the claim, the limitation period shall continue to run and shall be extended so as not to expire before the expiration of one year from the date on which such declaration was made, or, if no such declaration was made, from the date on which the proceedings ended.

(3) When an arbitration has been commenced in accordance with article 11, but it has been ordered that the arbitration shall cease to have effect or that the award shall be set aside, the limitation period shall continue to run and shall be extended so as not to expire before the expiration of one year from the date on which such order was made.

COMMENTARY

1. Article 17 is addressed to problems that arise when a creditor institutes legal proceedings that fail to secure an adjudication on the merits of his claim. Under articles 10, (1), 11 (1) and 12 (2), when a creditor institutes legal proceedings for the purpose of satisfying his claim, the limitation period "shall cease to run"; in the absence of further provision, when a creditor institutes proceedings before the expiration of the limitation period, the limitation period would never expire. Supplementary rules are consequently required when such a proceeding does not lead to an adjudication on the merits of the claim. Paragraph 1 of article 17 deals with problems that arise when the creditor discontinues the proceedings or withdraws his claim. Paragraphs 2 and 3 deal with problems that arise when the failure to secure adjudication on the merits results from action by a tribunal.

1. Discontinuance or withdrawal by the creditor

2. As was noted above, the rules of articles 10 (1), 11 (1) and 12 (2) which stop the running of the period, need to be supplemented where the creditor voluntarily discontinues the legal proceedings or withdraws his claim. For this situation, paragraph 1 of article 17 provides that the institution of the legal proceedings shall have no effect to stop the running of the period or to extend the length of the period; to produce this result, paragraph 1 provides that "the limitation period shall be deemed to have continued to run". This rule resulted from the view that the extension of the limitation period should not be left within the control of one of the parties and that a creditor who voluntarily discontinues legal proceedings should not be given special treatment.

3. The application of the rule may be clarified by an example (the limitation period is assumed to be four years):

Example 17A. A's claim against B arose and the limitation period commenced to run on 1 June 1970. A instituted legal proceedings against B on 1 June 1972. A discontinued the legal proceedings or withdrew his claim on 1 June 1973.

Under the rule of article 17 (1), A has until 1 June 1974 to institute a second action. (If A had discontinued his action subsequent to 1 June 1974, his claim would already have been barred and no further legal proceedings would be possible.)

4. As has been noted, paragraph 1, is applicable when the creditor has "discontinued the proceedings, or withdrawn his claim". This rule is intended to include not only explicit discontinuance or withdrawal of the action but also such a failure to pursue the action that the court dismisses the action. Similarly, the provision is applicable when, because of failure to continue the proceedings, the action is automatically terminated by virtue of the procedural rules of the *forum*. In these situations, the proceedings terminated because of the choice of the creditor not to pursue the action; the rule of paragraph 1 consequently is applicable.

II. Proceedings brought in a tribunal without jurisdiction; procedural defects preventing adjudication on the merits

5. As we have seen, paragraph 1 of article 17 deals primarily with the effect of voluntary action by the creditor—his discontinuance of legal proceedings or withdrawal of his claim. Paragraph 2 deals with the failure of legal proceedings to lead to a definitive decision on the merits of the claim when that failure results from the ruling of a tribunal. Paragraph 2 specifically refers to instances in which a court or arbitral tribunal has declared itself or been declared incompetent to adjudicate the creditor's claim. In addition, the paragraph also applies generally wherever "any legal proceedings have ended without a definitive judgement, award or decision on the merits of the claim". This language applies, *inter alia*, to instances in which the legal proceedings are terminated as a result of some other flaw or defect in the proceedings under circumstances that would not bar a second action on the same claim.¹

6. Under paragraph 2 (as under paragraph 1) the limitation period is deemed to have continued to run. However, the article takes account of the possibility that the lack of jurisdiction or the procedural defect might be finally established a substantial period of time after the creditor instituted the legal proceedings. If this flaw is established after the running of the period of limitation, the creditor, in the absence of further provisions, would have no opportunity thereafter to institute a new action; if the flaw is established shortly before the expiration of the period the creditor may have insufficient time to institute a new action. To meet these problems, paragraph 2 further provides that the limitation period "shall be extended so as not to expire before the expiration of one year from the date on which such declaration was made, or, if no such declaration was made, from the date on which the proceedings ended".

7. The application of this rule may be illustrated by the following examples (The limitation period is assumed to be four years.):

Example 17B. A's claim against B arose and the limitation period started to run on 1 June 1970. A instituted legal proceedings against B on 1 June 1973. On 1 June 1975 the court in which A instituted the action held that it had no jurisdiction. A did not take an appeal.

On these facts under article 17, the period of limitation is extended until 1 June 1976.

Example 17C. The facts are the same as in Example 17B, except that following the 1 June 1975 decision of the lower court, A takes an appeal. On 1 June 1976 the decision of the appellate court sustaining the decision of lower court becomes definitive.

¹ Termination resulting from voluntary discontinuance or withdrawal is covered by paragraph 1.

On these facts, under article 17, the period of limitation is extended until 1 June 1977.

8. The extension of the period provided in article 17 (2) applies when the court or arbitral tribunal "has declared itself or been declared incompetent" to adjudicate upon the claims of the creditor. The expression "been declared" refers to declarations by tribunals within the same jurisdiction, and has special reference to review by a tribunal of higher authority within that jurisdiction. This language was not intended to refusals by courts in other jurisdictions to recognize or enforce a judgement or award. The problem or recognition of foreign judgements or awards is the subject of separate rules for which international conventions have been prepared, e.g., the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.²

9. The point may be illustrated by the following example:

² The Commission, at its second session, expressed the opinion that this Convention should be adhered to by the largest possible number of States. UNCITRAL report on second session (1969) 112; UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A. This opinion was reaffirmed at its third session. UNCITRAL report on third session (1970) 156; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

Example 17D. States X and Y are both signatories of the convention implementing the present Law. A claim by A against B arose on 1 June 1970. On 1 June 1972 A brought an action in State X and on 1 June 1974 secured judgement on the merits of his claim. On 1 July 1974 A brought an action in State Y to enforce the judgement obtained in State X. The courts of State Y on 1 August 1974 refused to enforce this judgement on the ground that the court in State X was without jurisdiction.

On these facts, the ruling in State Y is not a ground to extend the period for A to institute a new action, even though Y is a signatory to the convention. It is true that if A needs to reach assets of B in States other than X, and these States do not recognize judgements of X, it may be necessary for A to institute parallel actions. This, however, is a problem that is more appropriately solved by national laws or by international conventions providing rules on recognition or enforcement of foreign judgements or awards.

10. Paragraph 3 of article 17 provides for extension similar to that of paragraph 2 when higher authority within the same jurisdiction (such as a court) orders that arbitration shall cease to have effect or that an arbitral award shall be set aside.

Modification of the limitation period

Article 18

[MODIFICATION BY THE PARTIES]

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

(2) The debtor may, at any time [after the commencement of the limitation period prescribed in articles 7 to 9], by a declaration to the creditor extend the limitation period or declare that he will not invoke limitation as a defence in legal proceedings; but such declaration shall in no event have effect beyond the end of three years from the date on which the period would otherwise expire or have expired in accordance with articles 6 to 9.

(3) The declaration referred to in paragraph 2 of this article shall be evidenced in writing.

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

COMMENTARY

1. Paragraph 1 of article 18 declares a general rule that this Uniform Law does not allow parties to modify the limitation period. Exceptions to this rule, provided in paragraphs 2 and 4, are explained below.

I. Extension of the limitation period

2. Paragraph 2 permits the parties to extend the limitation period to the maximum of three years from the date of expiration of the limitation period prescribed under articles 6 to 9. Such an extension of the period may be effected either before or after the expiration of the statutory period. The extension can be accomplished by a unilateral declaration by the debtor; an effective declaration may, of course, be part of an agreement by the parties.

3. As to the time when the debtor could make such a declaration, paragraph 2 places brackets around the words

"after the commencement of the limitation period prescribed in articles 7 to 9". The inclusion of this bracketed language in the statute would deny effect to attempts to extend the period made at early stages of the transaction; e.g., at the time of contracting and thereafter until the breach of contract or other event which under articles 7 to 9 commences the running of the limitation period. All members of the Working Group took the view that the words in brackets should be included if the statutory period is five years. This was based on the view that the five-year period provided sufficient time to institute a legal proceeding. In addition, it was considered that extensions at the time of contracting might be imposed by a party with stronger bargaining power or might be a part of a form contract to which the other party might not give sufficient attention. Allowance of extension after the commencement of the limitation period, on the other hand, may be useful to prevent the hasty institution of a legal proceeding close to the end of the period when the parties are still negotiating. A majority was also of the opinion that the words in brackets should be in the text even if the statutory period is three years. A minority was of the view that these words should be deleted if the statutory period is three years.¹

4. It will be noted that, under paragraph 2, a debtor's declaration extending the period and a declaration that he will not invoke limitation as a defence are given the same legal effect. Consequently, any theoretical differences between the two forms of expression are unimportant; both are subject to the three-year limit set forth at the end of the paragraph.

II. Formality required for extension

5. Extension of the limitation period can have important consequences for the rights of the parties. An oral extension could be claimed in doubtful circumstances or on the basis of

¹ The position of the minority is indicated here in view of the interest shown in this issue at the third session of the Commission. UNCITRAL report on third session (1970) 88; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

fraudulent testimony. Therefore, under paragraph 3, the declaration to extend the limitation period must be evidenced in writing. The use of the expression "evidenced" makes it clear that an oral declaration to extend the period will be effective if later confirmed in writing.

III. Notices to other party; arbitration

6. One of the purposes of paragraph 4 of article 18 is to make clear that this article has nothing to do with the validity of a contract clause concerning a "time-limit by reason of which the acquisition or enforcement or continuance of a right is dependent upon one party giving notice to the other party".² A typical example would be modification of the length of period within which the buyer must give notice to the seller in order to preserve his rights when goods are defective.

7. Paragraph 4 of article 18 is also relevant to clauses in sales contract requiring that controversies under the contract be submitted to arbitration within a limited time. The paragraph refers to clauses in the sales contract "whereby the acquisition

or enforcement or continuance of a right is dependent upon the performance by one party of an act other than the institution of *judicial* proceedings within a certain period of time". Attention is directed to the phrase "*judicial* proceedings". "*Legal* proceedings", as defined in article 1 (4) (f), "includes judicial, administrative and arbitration proceedings"; "*judicial* proceedings" is narrower in scope. As a result, the provisions of article 18 are inapplicable to clauses in a contract of sale "whereby the acquisition or enforcement or continuance of a right" is dependent upon the act of one party submitting the controversy to arbitration within a certain period of time. This adjustment was considered advisable to accommodate contracts, often used in commodity markets, providing that any dispute must be submitted to arbitration within a short period—e.g. within six months. With respect to the possible abuse of such a clause, paragraph 4 concludes with the proviso that such clause must be valid under the applicable law.³

³ One member of the Working Group reserved his position with respect to paragraph 4 because of doubts concerning the justification for a distinction between judicial and arbitration proceedings with respect to the effects of modification of the limitation period by the parties.

² See article 1 (3) and accompanying commentary at paras. 13 to 16.

Effects of the expiration of the limitation period

Article 19

[WHO CAN INVOKE LIMITATION]

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

COMMENTARY

1. The principal question to which article 19 is addressed is the following: If a party to legal proceedings does not assert that the action is barred by expiration of the period of limitation, may the tribunal raise this issue of its own motion (*suo officio*)? This Law answers this question in the negative: expiration of the period shall be taken into consideration "only

at the request of a party" to legal proceedings. The question, although answered differently in different legal systems, is not of large practical importance; a party who may interpose this defence will rarely fail to do so. Indeed, this provision does not prohibit a tribunal from drawing attention to the lapse of time, and inquiring whether the party wishes this issue to be taken into consideration. (Whether such is proper judicial practice is, of course, a matter for the rules of the *forum*.) In any event, the rules on limitation may only be invoked if a party requests. As to the effect of the parties' agreement or declaration not to invoke the limitation, see article 18 (2) and accompanying commentary at paragraph 4, *supra*.

Article 20

[EFFECT OF EXPIRATION OF THE PERIOD; SET-OFF]

(1) Subject to the provisions of paragraph 2 of this article and of article 19, no right which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.

(2) Notwithstanding the expiration of the limitation period, the creditor may rely on his right as a defence for the purpose of set-off against a right asserted by the other party:

- (a) If both rights relate to the same contract, or,
- (b) In other cases, if the rights could have been set-off at any time before the date on which the limitation period expired.

COMMENTARY

1. Effect of expiration of the period

1. Paragraph 1 of article 20 emphasizes the Law's basic purpose to provide a limitation period within which the rights of the parties must be submitted to a tribunal. See article 1 (1). Once the limitation period expires, the right can no longer be recognized or exercised in any legal proceedings.

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

an obligation after the expiration of the limitation period, *see* article 21 and accompanying commentary at paragraph 1, *infra*.

II. Set-off

3. The rules of paragraph 2 can be illustrated by the following examples. (The period of limitation is assumed to be four years.)

Example 20A. An international sales contract required *A* to deliver specified goods to *B* on 1 June of each year from 1970 through 1975. *B* claimed that the goods delivered in 1970 were defective. *B* did not pay for the goods delivered in 1975, and *A* instituted legal proceedings in 1976 to recover the price.

On these facts *B* may set-off his claim against *A* based on defects of the goods delivered in 1970. Such set-off is permitted under paragraph (a) of article 20 (2), since "both rights relate to the same contract"; *B*'s set-off is not barred even though the limitation period for his claim expired in 1974, prior to his assertion of the claim in the legal proceedings and also prior to the creation of the claim by *A* against *B* for the price of the goods delivered in 1975. It will also be noted that under article 20 (2), *B* may rely on this right "as a defence". Thus, if *A*'s claim is \$1 000 and *B*'s claim is \$2 000, *B*'s claim may

extinguish *A*'s claim but it may not be used as a basis for affirmative recovery against *A*.¹

Example 20B. On 1 June 1970, *A* delivered goods to *B* based on a contract of international sale of goods; *B* claimed the goods were defective. On 1 June 1973, under a different contract, *B* delivered goods to *A*; *A* claimed these goods were defective and in 1975 instituted legal proceedings against *B* based on this claim.

In these proceedings *B* may rely on his claim against *A* for the purpose of set-off even though *B*'s claim arose in 1970—more than four years prior to the time when the claim was asserted in court. Under paragraph (b) of article 20, the rights "could have been set-off" before the date when the limitation period on *B*'s claim expired—i.e. between 1 June 1973 and 1 June 1974. (As was noted in connexion with the preceding example, the set-off is available "as a defence"; *B*'s claim may extinguish *A*'s claim, but may not be used as a basis for affirmative recovery.)

¹ On legal proceedings calling for affirmative recovery by the defendant against the plaintiff, *see* article 10 (2). *See also* commentary to that article at paragraph 8 and its accompanying foot-note.

Article 21

[RESTITUTION OF PERFORMANCE AFTER PRESCRIPTION]

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

COMMENTARY

1. As has already been noted (commentary to article 20 at paragraph 2), expiration of the limitation period precludes the exercise or recognition of the rights of the parties in legal proceedings. Article 20 (1). This is due to the basic purpose of prescription to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree of

certainty in legal relationships. These policies are not violated where the debtor voluntarily performs his obligation after the expiration of the limitation period. Article 21 accordingly provides that the debtor cannot claim restitution of the performance which he has voluntarily performed "even if he did not know at the time of such performance that the limitation period had expired". Of course, this provision deals only with the effectiveness of claims for restitution based on the contention that the performance could not have been required because the limitation period had run. The Uniform Law follows a similar approach with regard to the effect of acknowledgement by the debtor of his debt subsequent to the expiration of the limitation period. *See* article 13 (5).

Article 22

[INTEREST]

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

COMMENTARY

1. To avoid divergent interpretations involving the theoretical

question whether an obligation to pay interest is "independent" from the obligation to pay the principal debt, article 22 provides a uniform rule that "the expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt".

Calculation of the period

Article 23

[BASIC RULE]

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

COMMENTARY

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

however, can be misunderstood by those who are not familiar with the application of this rule. Therefore, for the sake of clarity, article 23 adopts a different formula to reach the same result. Under this article, where a limitation period begins on 1 June, the day when the period expires is the corresponding day of the later year, i.e. 1 June. The second sentence of article 23 covers a situation which may occur in a leap year. That is, when the initial day is 29 February of a leap year, and the later year is not a leap year, the date on which the limitation period expires is 28 February of the later year.

2. Careful consideration was given to a proposal that the limitation period should be calculated in terms of calendar

years following the end of the year in which the breach occurred. For example, if a breach occurred in June of 1970 (or on any other date in 1970), assuming a basic four-year period is chosen, the limitation period would expire on 31 December 1974. The Working Group recognized that this approach would have the merit of avoiding many questions as to the precise day on which the period commenced. See articles 7, 8 and 9. But this approach gives claims arising early in the year a substantially longer period than claims arising late in the year. In addition, this approach is different from what is employed in most legal systems. Consequently, in spite of the gain in certainty, this approach was rejected because of possibility that it might interfere with adoption of the Law.

Article 24

[EFFECT OF HOLIDAY]

Where the last day of the limitation period falls on an official holiday or other "*dies non juridicus*" in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 10 or asserts a right as envisaged in article 12, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or "*dies non juridicus*" on which such proceedings could be instituted or on which such a right could be asserted in that jurisdiction.

COMMENTARY

1. This article deals with the problem that arises when the limitation period ends on a day when the courts and other tribunals are closed so that it is not possible to take the steps to commence legal proceedings as prescribed in articles 10 to 12. For this reason, the article makes special provisions "where

the last day of the limitation period falls on an official holiday or other *dies non juridicus* in the jurisdiction where the creditor institutes judicial proceedings". In such cases, the limitation period is extended "until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a right could be asserted in that jurisdiction".

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

Preservation of existing rights

[Article 25]

[(1) No right asserted in any legal proceedings in any jurisdiction shall be held to have been barred by reason of the operation of this Law if the limitation prescribed in articles 6 to 9 commenced to run before the commencement of this Law in that jurisdiction.]

(2) Nothing in this Law shall revive any right barred before the commencement of this Law in the jurisdiction where such right is relied on except in so far as a right may be revived by an acknowledgement or part performance made in accordance with the provisions of article 13.]

[This article deals with the time when the Law becomes operative with respect to rights or claims that arose before the

adoption of the Law. The current draft of article 25 is placed in square brackets because there are alternative formulations which the Working Group did not have time to consider at its second session. Further consideration should also be given to whether such a provision should be in the text of the Convention, as contrasted with the Uniform Law; the majority tentatively was of the view that inclusion in the Uniform Law was preferable. It was also suggested that the problem should be dealt with by a provision in the Convention that the Uniform Law should not become effective until [three]-[five] years after the Convention receives a specified number of ratifications or accessions.]

APPENDIX A

Proposal by Norway for portion of report on products liability

For the purpose of the report, the Norwegian representative submits the following:

1. With regard to claims for compensation of *damage caused by the goods sold* to tangible property outside the goods ("products liability"), one representative stated that, in many cases, it may be disputable whether a claim for such com-

pensation should be deemed to be contractual or extra-contractual. The qualification would also be different according to different national laws. It would be inconvenient for some States to adopt rules that would make it necessary for them to introduce distinctions in this field and to have different limitations according to whether the claim for damages was qualified as being in contract or in tort.

This representative therefore preferred to *exclude* from the scope of the present Uniform Law all claims for compensation of physical damage caused by the goods sold, whether or not such claims arise by way of contract or tort or by the application of any law or legal principle, and regardless of whether the debtor is a third person or a buyer or another party to the sales contract. This would be an extension of the solution adopted in article 2 (a) regarding personal injury.

2. If, nevertheless, the damage caused by the goods is to be included in the Uniform Law, this representative would *propose* that the prescriptive period should commence to run on the date when the damage occurred, this being also the first date on which the debtor could exercise his right to claim damages. This

proposal could therefore fit into article 8 as a new second full stop sentence, drafted as follows:

"The same rule shall apply to any claim for compensation of physical damage caused by the goods sold to other tangible property."

3. This representative would not object to supplementing the proposed rule with a provision to the effect that the limitation period in any event shall expire a certain period of time, for instance ten years, after the dates indicated in article 7, paragraphs 3 and 4, subject, however, to the special provision adopted for cases where a claim is based on an express guarantee on the part of the seller, article 9.

APPENDIX B

Proposal by Norway for portion of report on termination, etc., or other circumstance occurring before, performance is due

For the purpose of the report the Norwegian representative submits the following:

1. In article 7, paragraphs 5 and 6, the problem of *anticipatory breach* is regulated in relation to the period running from the date on which the breach of contract occurred (para. 1).

2. However, in the opinion of this representative, this problem is a more general one, which should be sought solved also in relation to cases where there is no breach of contract; see article 8.

3. It may be that certain events, according to the contract or the applicable law, will entitle the creditor to treat the contract or an obligation under the contract as terminated or as due and to exercise his right before the time which was originally fixed. One possibility is that such event will give the creditor an *option* in this respect. Another possibility is that such an event *automatically* will cause the obligation to become due or terminated, but that the parties nevertheless disregard this effect, which often may be more or less a void formula to be applied only in more extreme circumstances. It seems desirable to state more precisely and specifically in the Uniform Law when the limitation shall commence to run in such situations. Examples may be mentioned: the bankruptcy or other circumstances of financial importance, the death, illness, removal, emigration or any altered situation for one party or a third person. The event may sometimes be deemed to be an anticipatory breach, at other times not.

4. In the circumstances mentioned under the preceding paragraph 3, the creditor would, according to the contract or the applicable law, be entitled to exercise his right as soon as the relevant event occurred. This would mean that the limitation period, according to article 8, would commence to run at such premature time, even if the creditor did not avail himself of the right to treat the obligation as due or terminated (and neither the debtor regarded the situation to be such). Such a rule is as unreasonable in relation to article 8 as to article 7.

5. In the case where the creditor has an *option*, it might

perhaps be argued by analogy from the situation where a consequential obligation has not come into actual existence until the option has been exercised. This view would lead to the conclusion that in the meantime there would run a limitation period only in respect of the option, not in respect of the eventual claim based on the option when such option was to be exercised. This result is reasonable, but it should be confirmed by a precise provision in the Law. It would hardly follow from the present text, in the contemplated situations, where there already is an obligation in existence with a fixed time for performance, but where some event may give the creditor an option to claim advanced performance or to terminate the contract.

6. In order to solve the problem mentioned, this representative proposed to make the provisions on anticipatory breach and instalment sales more general and give them place in a separate article between the present articles 8 and 9. He suggested the following text:

Proposed article 8 A

(1) Where, as a result of a breach of contract or another circumstance occurring before performance is due, one party thereby becomes entitled to and does elect to treat the contract as terminated or due, the limitation period in respect of any claim based on such circumstance shall commence on the date on which the circumstance occurred. If not relied upon, such circumstance shall be disregarded, and the limitation period in respect of any other right shall commence on the date on which such right otherwise could first be exercised.

(2) If in case of a contract for the delivery of or payment for goods by instalments, one party becomes entitled to and does elect to treat the contract as terminated or due as a result of a breach of contract or other circumstance in relation to an instalment, the limitation period in respect of any right based on such circumstance shall commence on the date on which the circumstance occurred, even in respect of any connected previous or subsequent instalment covered by the contract. Otherwise, the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred.

ANNEX III

Questionnaire on the length of the prescriptive period and related matters

The United Nations Commission on International Trade Law (UNCITRAL) at its second session, held in March 1969, established a Working Group of seven members of the Commission. This Working Group was requested to study the topic of time-limits and limitations (prescription) in the field of international sale of goods with a view to the preparation of a preliminary draft of an international convention.¹ The proposed convention would establish a general period of extinctive prescription by virtue of which claims would be extinguished or barred unless presented to a tribunal within the specified period.

The Working Group met in August 1969 and prepared a report (A/CN.9/30) which was considered by the Commission at its third session in April 1970. The Commission's action with respect to the question of the length of the prescriptive period included the following:²

"(e) Length of the prescriptive period: the basic rule

85. Consideration was given to the recommendation of the Working Group in its Report that a single basic period should govern the claims by both parties to the contract, and that the period should be within the range of three to five years (paras. 49-50).

86. Nearly all of the representatives favoured a period within the range of three to five years. Many representatives favoured the three-year period partly to promote the settlement of disputes promptly and before the loss of evidence, and partly to protect a seller from late claims after his right to recover from his supplier had been barred by a shorter period under domestic law. Many other representatives expressed the view that a five-year period was preferable in view of the time required for investigation, negotiation and arrangements for bringing legal action, possibly in a distant State.

87. Several of the representatives indicated that their initial preference would be affected by future decisions with respect to other provisions of the convention. Such provisions included the ability of the parties to extend the period to permit further negotiation and extensions of the period while suit was impossible or was prevented by the other party.

88. In view of the varying views on the length of the period, many representatives suggested that a questionnaire be addressed to Governments and to interested international organizations, which should include a question as to whether the period of limitation could be extended or shortened [by agreement]; in other words, if the period of limitation be three years, whether it could be extended up to five years and conversely, if the period of limitation be five years, whether it could be shortened to three years. Some representatives suggested that it would be appropriate to set a period that could be extended by agreement but could not be reduced by agreement.

89. *The Commission decided* that a draft questionnaire on the length of the period and other problems should be prepared for consideration by the Working Group on Prescription at its next session, and should thereafter be addressed to Governments and interested international organ-

izations, in order particularly to ascertain the views of those engaged in business in relation to this and any other relevant issues, in accordance with the final instructions by the Working Group. The Commission consequently postponed its decision with respect to the length of the prescriptive period."

The Working Group at its second session, held in August 1970, approved the substance of the questionnaire which follows. The Working Group also prepared a preliminary draft of a uniform law on this subject. This preliminary draft is annexed to show the setting in which specific questions arise and to provide an opportunity for any other comments which respondents may wish to submit.

This questionnaire consists of two parts. The questions contained in part I are primarily designed to obtain information on the existing national rules with respect to prescriptive limitations applicable to rights or claims arising from sales transactions. The questions in part II solicit opinions with respect to the uniform rules that would be most appropriate in the field of the international sale of goods. Thus, it is hoped that in part II the respondents will take account any special problems inherent in the international sale of goods and will express their opinions concerning the rules that would be most suitable for international trade.

QUESTIONNAIRE

PART I

Note: The questions in part I request information of respondents concerning the rules of their national law governing the time within which claims arising out of a sale of goods must be presented to a tribunal. (If the national law provides special rules applicable to international sales of goods, it is requested that the replies so state, and respond in terms of such rules.)

1. *What is the length of the prescriptive period within which buyers and sellers of goods must submit their claims to a tribunal or otherwise exercise their rights? If different periods are applicable to different types of rights or claims, please state the governing rules.*

2. *With respect to the point in time at which the prescriptive period starts:*

(a) *Is the commencement of the period governed by a general rule or principle (e.g., the time when action could be brought, the time when the performance has become due, the time of breach, or some other general rule)? If so, what is the applicable general rule or principle?*

(b) *With respect to rights or claims by buyers based on defects in, or other lack of conformity of goods, is the commencement of the period governed by the same rule as other rights or claims arising from sales transactions or is a special rule applicable? For such rights or claims, does the prescriptive period start to run from the time of shipment of the goods, placing the goods at the disposition of the buyer, receipt of the goods, discovery of the defect, the occurrence of damage, or some other point?*

3. *Can the length of the prescriptive period be varied by agreement of the parties?*

(a) *If so, please indicate whether there is any limit on the extent to which the parties can (i) extend or (ii) shorten the period.*

¹ Report of the United Nations Commission on International Trade Law on the work of its second session, 1969; *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), para. 46; UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

² Report of the United Nations Commission on International Trade Law on the work of its third session, 1970; *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17* (A/8017), paras. 85-89; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

(b) Also please indicate any difference in the parties' power to modify the period (i) by a provision in the contract of sale, as compared with (ii) an agreement subsequent to the making of the contract.

4. Assume that a right or claim has been asserted in a tribunal within the prescriptive period and the proceeding has been dismissed without reaching a decision on the merits. In such a case, is there any rule that suspends, extends or otherwise modifies the basic period, where the proceeding was dismissed:

(a) Because the tribunal was not competent to hear the case?

(b) Because of procedural defect or irregularity in the bringing or prosecution of the action?

(c) Because the proceeding for any other reason proves abortive and thereby fails to reach a decision on the merits?

5. What is the length of the period within which rights established by a final judgement or award can be enforced? If different periods are applicable to the enforcement of different types of judgements or awards, please state the governing rules.

PART II

1. Attention is directed to article 6 of the preliminary draft of a uniform law which is annexed hereto. This article states a general prescriptive period, in the alternative, of three or five years. Which alternative do you prefer? If you prefer a

period other than the alternatives stated in the preliminary draft, please state the period which you prefer and the reasons therefor.

(a) If the information is readily available, please indicate or estimate the frequency with which claims arising out of international sales of goods (or similar transactions) are brought to a tribunal after the expiration of (i) three (ii) four or (iii) five years.

2. Articles 7 to 9 of the preliminary draft sets forth proposed provisions on the commencement of the period of prescription; article 7, paragraphs 3 and 4 state proposed rules with respect to rights or claims relying on lack of conformity of the goods. Do you approve of these proposed provisions? If a rule different from that set forth in the preliminary draft is preferred, please state the preferred rule and supporting reasons therefor.

3. Attention is directed to article 18 of the preliminary draft with respect to modification of the limitation period. In paragraph 2, language in brackets reflects two alternative views concerning the time when a declaration extending the period may be effective. Which alternative do you prefer? If a rule different from that set forth in article 18 is preferred, please state the preferred rule and the supporting reasons therefor.

4. Is there any provision of the preliminary draft which is not well adapted to the circumstances and needs applicable to international sales of goods, or which would interfere with adoption of a convention implementing the draft? If so, please state an alternative provision and supporting reasons therefor.

ANNEX IV

List of participants

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Argentina

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ANNEX V

List of documents and working papers before the Working Group

[Not reproduced in the present volume]

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

<i>Title or description</i>	<i>Document reference</i>
Preliminary draft of a uniform law on prescription (limitation) and explanatory text: by Mr. R. Colombres, representative of Argentina to UNCITRAL	A/CN.9/WG.1/ WP.1
Report on effects of prescription with respect to liens, guarantees and other security interests: by Mr. Mohsen Chafik, representative of the United Arab Republic (Arab Republic of Egypt) to UNCITRAL	A/CN.9/WG.1/ WP.2
Preliminary draft of a uniform law on prescription (limitation): by Mr. Anthony Guest, representative of the United Kingdom of Great Britain and Northern Ireland to UNCITRAL	A/CN.9/WG.1/ WP.3
Report on limitation and arbitration proceedings: by Mr. Anthony G. Guest, representative of the United Kingdom to UNCITRAL	A/CN.9/WG.1/ WP.4
Report on judicial proceedings and interruption of prescription: by Mr. Shinichiro Michida, representative of Japan to UNCITRAL	A/CN.9/WG.1/ WP.5
Preliminary draft of a uniform law on prescription (limitation): by Mr. Ludvik Kopac, representative of Czechoslovakia to UNCITRAL	A/CN.9/WG.1/ WP.6
Report on impossibility to sue by reason of <i>force majeure</i> and on conflicts of laws and the uniform rules: by Mr. Ludvik Kopac, representative of Czechoslovakia to UNCITRAL	A/CN.9/WG.1/ WP.7
Report on the relationship between the uniform law on limitation (prescription) and other conventions relating to international sale of goods: by Mr. Paul Jenard, representative of Belgium to UNCITRAL	A/CN.9/WG.1/ WP.8
Prescription of recourse actions between parties to a contract of international sale of goods; note by Mr. Stein Rognlien, representative of Norway to UNCITRAL	A/CN.9/WG.1/ WP.10