I. COMMENTARY ON THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS, DONE AT NEW YORK, 14 JUNE 1974 (A/CONF.63/17)*

This commentary has been prepared pursuant to a request by the United Nations Conference on Prescription (Limitation) in the International Sale of Goods (New York, 20 May-14 June 1974) at which the Convention on the Limitation Period in the International Sale of Goods was adopted. It has been written under the responsibility of the United Nations Office of Legal Affairs by Professor Kazuaki Sono of Hokkaido University, Japan, who served as Secretary of the Drafting Committee of the Conference.

CONTENTS

* 27 June 1978.

CONTENTS (*continued*)

Preamble

The States Parties to the present Convention,

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Have agreed as follows:

Introduction: Objective of the Convention

1. This Convention is concerned with the period of time within which the parties to a contract of international sale of goods may commence legal proceedings for the exercise of claims arising from or relating to such contracts.

2. Differences in national laws governing the limitation of claims or the prescription of rights create serious practical difficulties. The prescription or limitation periods under national laws vary widely. Some periods seem too short (e.g. six months, one year) to meet the practical requirements of international sales transactions, in view of the time that may be needed for negotiations and then for the institution of legal proceedings in a foreign and, often, distant country. Other limitation periods (in some cases up to 30 years) are inappropriately long for transactions involving the international sale of goods and fail to provide the basic protection that limitation rules were intended to accord, such as protection from the uncertainty and threat to business stability posed by the delayed presentation of claims and from the loss or staleness of evidence pertaining to claims presented with undue delay.

3. National rules not only differ, but in many instances they are also difficult to apply to international sales transactions.[1] One difficulty arises from the fact that some national laws apply a single rule of prescrip-

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

tion or limitation 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 magnified for international transactions, since merchants and their lawyers will often be unfamiliar with the import of these general terms and with the techniques of interpretation used in a foreign legal system.

4. Perhaps even more serious is the uncertainty as to which national law will be applicable to an international sales transaction. Apart from the problems of choice of law that customarily arise in an international transaction, problems of prescription or limitation present a special difficulty of characterization or qualification: some legal systems consider these rules as "substantive" and therefore must decide which national law is applicable; other systems consider them as part of the "procedural" rules of the forum; still other legal systems follow a combination of the above approaches.[2]

5. In light of the difficulties mentioned in paragraphs 2-4 above, i.e. the differences in the time periods for bringing claims under various national laws, the problems in determining which national law is to apply and what effect it is to have, and the need to provide specific rules in this area adapted to the practical needs of international commerce, it was felt that the problems were sufficiently serious to justify the preparation of uniform rules on prescription or limitation of claims arising from the international sale of goods. In addition, substantive unification of the national laws on the prescription or limitation of claims would not only remove doubt and uncertainty in legal relations arising from the international sale of goods but would also serve the interests of justice and equity: under present conditions it is possible that an unexpected or severe application of a national rule on prescription or limitation of claims will prevent redress of a just claim, or that a lax application of such a rule will fail to provide adequate protection against claims that are stale or unfounded.

6. In view of the widely varying concepts and approaches prevailing under national laws with respect to the limitation of claims and the prescription of rights, it has been considered advisable to provide in a convention uniform rules that are as concrete and complete as possible. A brief and general uniform law (such as a law merely specifying the length of the prescription or limitation period) would do little in actual practice to achieve unification, since the divergent rules of national law would then be brought into play in "interpreting" such a brief and general provision. Since this Convention is confined to one type of transaction—the purchase and sale of goods—it is possible to state uniform rules for this type of transaction with a degree of concreteness and specificity that is not feasible in statutes that deal with many different types of transactions and claims. The loss of uniformity in the application of this Convention through the use of divergent rules and concepts of national law may not be wholly avoided, but this Convention seeks to minimize the danger by dealing with the problems that are inherent in this field as specifically as feasible within the scope of a convention of manageable length.[3]

[2] See para. 5 of commentary on art. 3.

Part I. Substantive provisions

SPHERE OF APPLICATION

Article 1

[*Introductory provisions: subject-matter and definitions*]*

1. This Convention shall determine when claims of a buyer and a seller against each other arising from a contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time. Such period of time is hereinafter referred to as "the limitation period".

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

3. In this Convention:

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

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

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

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

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

(*f*) "Persons" includes corporation, company, partnership, association or entity, whether private or public, which can sue or be sued;

(*g*) "Writing" includes telegram and telex;

(*h*) "Year" means a year according to the Gregorian calendar.

COMMENTARY

I. *The subject-matter covered by the Convention, paragraph (1)*

1. Under paragraph (1) of article 1, this Convention governs *the period* within which the parties to a contract of international sale of goods must exercise against each other any claim arising from or relating

* Captions are not contained in the Convention; they are added to this commentary only for ease of reference and should not be considered as forming part of the Convention.

[3] See also art. 7, on rules for interpretation and application of the provisions of this Convention.

to such contract or be time-barred from asserting it. The characterization of this period and the legal effect of its expiration on the rights or claims of the parties differ widely under the various national legal systems. In view of the international character of this Convention and in order to promote uniformity in its interpretation and application, the use of traditional terms, such as "prescription of rights", "limitation of claims" or "limitation of legal proceedings", having differing connotations in the various legal systems, was avoided in the Convention. Consequently, paragraph (1) employs the neutral expression "when claims . . . can no longer be exercised by reason of the expiration of a period of time" to denote the subject-matter covered by the Convention. Thus the Convention is applicable irrespective of the particular theoretical approach or terminology employed by the applicable national law, as long as the period of time in question performs the function described in the first sentence of article 1(1). The second sentence of paragraph (1) of this article provides that in the Convention such a time-period shall be called "the limitation period".

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

(a) *The parties*

3. Paragraph (1) of article 1 shows that this Convention is directed to claims arising from the relationship of *buyer and seller*. The terms "buyer", "seller" and "party", as defined in article 1 (3) (*a*), include the "successors to and assigns of their rights or obligations under the contract of sale". Thus the Convention also governs the limitation period for the assertion of rights and obligations which are acquired through succession by operation of law (as on death or bankruptcy) or through voluntary assignment or delegation by a party to an international sales contract. Other important "successors" include insurers who become subrogated to the rights of a party under a sales contract and the surviving company which results from a merger of companies or from a corporate reorganization.

4. It should be noted that, under article 1 (3) (*a*), to be a "buyer" or "seller" a person must "buy or sell, or agree to buy or sell, goods". Thus a party who has only the right (or "option") *to conclude* a sales contract is not a "buyer" or "seller" unless and until the sales contract is in fact concluded. Thus, rights under the option agreement (as contrasted with rights under a contract that may result from the exercise of the option) are not governed by the Convention.

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

5. Under article 1 (1), this Convention applies to "*claims . . . arising from* a contract of international sale of goods or *relating to* its breach, termination or invalidity". Article 2 determines whether a contract of sale of goods is "international"; article 3 details the circumstances under which a Contracting State must apply the rules of this Convention; and articles 4 through 6 exclude from the scope of the Convention certain defined types of sales, goods, claims and contracts.

6. Paragraph (1) of article 1 provides that this Convention governs claims "arising from a contract of international sale of goods" as well as claims "relating to its breach, termination or invalidity". The requirement that claims "arise from" a sales contract serves to exclude claims that arise independently of the contract, such as claims based on tort or *delict*. The language "relating to" the breach, termination or invalidity in article 1 (1) is broad enough to cover not only claims arising from but also claims "relating to" the breach, termination or invalidity of an international sales contract. For example, the buyer may have made an advance payment to the seller under a sales contract which the seller fails to perform alleging impossibility, government regulation or some similar supervening event. The seller might also claim that the contract was invalid for some other reasons. Whether these events 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 both for breach of contract and for restitution of the advance payment. Because of the frequent connexion, in practice, between these two types of claims, both are governed by this Convention.[4]

7. The references in article 1 (1) to the "contract" and to the relationship between "a buyer and a seller against each other" serve to exclude from the coverage of the Convention claims against a seller by a person who has purchased the goods from someone other than the seller. For example, where a manufacturer sells goods to a distributor who resells the goods to a subpurchaser, a claim by the subpurchaser against the manufacturer would not be governed by the Convention. See also paragraph 3, above. Nor does this Convention apply to claims of the buyer or seller against a person who is neither a "buyer" nor "seller", but who had guaranteed the performance by the buyer or seller of an obligation under the contract of sale.[5]

[4] The language "relating to" is also relevant where the applicable law of the contract requires that the invalidity of a contract must first be established by way of an *action for annulment*. In such a case, a mere assertion that a contract is terminated or invalid does not create a basis for the assertion of claims against the other party until the termination or invalidity itself has been established by the courts. Under the broad language of article 1 (1), the period for bringing such an action for annulment falls within the scope of this Convention. (As to the possibility of excluding actions for annulment from the application of this Convention by way of a reservation, see art. 35 and its accompanying commentary.) Of course, where the termination or invalidity need not first be established by an action for annulment, this Convention does not affect provisions in the applicable national law that may require the assertion of termination or invalidity against the other party by means other than the institution of legal proceedings within a fixed time-limit. See art. 1 (2) and para. 9 below.

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

II. *This Convention is not applicable to "time-limits" (déchéance), paragraph (2)*

8. Paragraph (2) of article 1 makes it clear that this Convention only governs *the limitation period* within which parties to a contract of international sale of goods must commence legal proceedings (as defined in article 1 (3) (*e*)) for the exercise of any claim arising from the contract or relating to its breach, termination or invalidity. Thus, the Convention has no effect on any rules under the applicable law concerning "time-limits" (*déchéance*), that make giving notice to the other party a prerequisite for the acquisition or exercise of a particular type of claim. Typical examples include the requirements that within a specified period of time the other party be given notice of the alleged defects in the goods delivered or of the refusal to accept such goods on grounds of non-conformity or defects. These notice requirements are designed to permit the parties to take prompt action in adjustment of their current performance under a sales transaction—e.g. making tests to ascertain the quality of goods on delivery, or retaking and salvaging rejected goods. In such cases, failure by a party to give notice as required may deprive that party of the right to assert claims based on the alleged defects or non-conformity of the goods.[6] A further example of such "time-limits" (*déchéance*), which are not governed by this Convention, is a requirement under the applicable law that notice of termination or rescission of a contract be given to the other party within a specified period of time.[7]

9. Paragraph (2) of article 1 also preserves the validity of "time-limits" under national laws within which one party is required, as a condition for the acquisition or exercise of his claim, to perform any act "other than the institution of legal proceedings". Thus, this paragraph preserves "time-limits" which, while variously expressed, are not comparable to the general limitation period governed by this Convention in that they are addressed to something "other than the institution of legal proceedings".[8] When the parties have stipulated in their sales contract a "time-limit" which is not directed at "the institution of legal proceedings", the question of the validity of this stipulation shall be determined by the applicable law.

III. *Definitions, paragraph (3)*

10. "Person" is defined in article 1 (3) (*f*) to include "corporation, company, partnership, association or entity, whether public or private, which can sue or be sued". This definition is intended to show that this Convention is applicable without regard to the form of the organization that enters into a contract of international sale of goods. "Public" entities often engage in commercial activities and it is important to make it clear that such entities are subject to this Convention in the same way as "private" entities. Furthermore, the term public entity covers not only governmental agencies but also States, to the extent that they can sue or be sued. (The question of the immunity of a Contracting State before its own or foreign courts is not affected by this Convention.) An organization need not be corporate to be a "person". A partnership, an association or an "entity" "which can sue or be sued" in its own name under the applicable national law, is a "person" for the purpose of this Convention.

11. Most of the other definitions of terms in paragraph (3) of article 1 can best be considered in connexion with the provisions in the Convention that employ the term in question. For example, the definition of "legal proceedings" in paragraph (3) (*c*) can best be considered in connexion with article 15; the definition of "breach of contract" in paragraph (3) (*d*) can best be considered in connexion with articles 10 (1) and 12 (2); and the definition of "year" in paragraph (3) (*h*) in connexion with articles 8 and 28.

12. Certain other terms used in this Convention (such as "claims" and "rights") are not defined, since their meaning can best be seen in the light of the context in which they are used and of the objectives of this Convention.[9] It is important to note that the construction of these terms by reference to the varying conceptions found in national laws would be inconsistent with the international character of the Convention and with its objective to promote uniformity in interpretation and application.[10]

Article 2

[*Definition of a contract of international sale*]

For the purposes of this Convention:

(*a*) A contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States;

(*b*) The fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(*c*) Where a party to a contract of sale of goods has places of business in more than one State, the

[6] For example, art. 39 (1) of the Uniform Law on the International Sale of Goods (ULIS), annexed to the Hague Convention of 1964, provides that "the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof *promptly* after he has discovered the lack of conformity or ought to have discovered it".

[7] A number of articles of ULIS provide that a party may avoid the contract only if he has made a declaration to the other party of his intention to avoid the contract, under varying circumstances, "within a reasonable time" (arts. 26, 30, 62 (1)), or "promptly" (arts. 32, 43, 62 (2), 66 (2), 67, 75).

[8] See also art. 9 (2) (*a*) and accompanying commentary, para. 3.

[9] Representatives at the Diplomatic Conference which adopted this Convention were generally agreed that the term "goods" means tangible movables. The term, however, was not defined formally, partly because the use of the words *"objets mobiliers corporels"* in the French text of the Convention already implied this and partly because the exclusions from the scope of the Convention provided in arts. 4 through 6 also made this point clear.

[10] See art. 7 and accompanying commentary.

place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

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

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

COMMENTARY

1. This article deals with the degree of internationality that makes a contract of sale of goods an "international" one for the purposes of this Convention.

I. *The basic criteria, subparagraphs* (a) *and* (b)

2. Subparagraph (*a*) provides that for a contract of sale of goods to be considered international, the contract must satisfy the following three requirements: (i) *at the time of the conclusion of the contract,* (ii) the parties must have their *places of business* (and not simply centres of only formal significance, such as places of incorporation), (iii) *in different States* (whether these are Contracting or non-Contracting States). In short, the parties' places of business at the time of the conclusion of the contract may *not* be in the same State. The simplicity and clarity of these basic criteria will contribute to certainty in establishing whether a sale of goods is "international" for the purposes of this Convention.

3. The simplicity and clarity of the criteria contained in subparagraph (*a*) are further enhanced by subparagraph (*b*) of this article. Under subparagraph (*b*), the contract will not be considered "international", and hence the Convention will not govern, where one of the parties to the contract neither knew or had reason to know "at any time before or at the conclusion of the contract" that the place of business of the other party was in a different State. One example of such a situation is where one of the parties was acting as agent for a foreign undisclosed principal. Subparagraph (*b*) is designed to protect a party who enters into a contract of sale with another party, justifiably assuming that the places of both parties are in the same State, from finding out later to his surprise that he had entered into an international sales contract that is subject to this Convention.[11]

II. *Place of business, subparagraph* (c)

4. This subparagraph deals with the situation where one of the parties to a sales contract has more than one place of business. Characterizing the sales contract as "international" for purposes of article 2 (*a*) in cases where a party has a number of places of business, causes no problem where all the places of business of one party (X) are situated in States other than the one where the other party (Y) has his place of business; whichever place is designated as the relevant place of business of X, the places of business of X and Y will be in *different* States. The problem arises only when one of X's places of business is situated in the *same* State as the place of business of Y. In such a case it becomes crucial to determine which of the different places of business of X is the relevant place of business within the meaning of subparagraph (*a*) of this article.

5. Subparagraph (*c*) lays down the criterion for determining the relevant place of business for the purposes of this Convention where a party has more than one place of business: it is the place of business "which has the closest relationship to the contract and its performance". The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating to the offer and the acceptance as well as the performance of the contract. In determining the place of business which has the "closest relationship", subparagraph (*c*) states that regard shall be given to "the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". Circumstances that may not be known to one of the parties at the time of entering into the contract would include supervision over the making of the contract by a head office located in another State or the foreign origin or final destination of the goods When these circumstances are not known to or contemplated by both parties, they are not to be taken into consideration.

III. *Habitual residence, subparagraph* (d)

6. This subparagraph deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have an established "place of business" may enter into a contract of international sale of goods where the goods are intended for commercial purposes, and not simply for "personal, family or household use" within the meaning of article 4 of this Convention. The present provision provides that, in this situation, the reference shall be to the habitual residence of such a party.

IV. *Nationality of the parties; civil or commercial character of the parties or the contract, subparagraph* (e)

7. This paragraph provides that neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration for the purposes of this Convention. Classification of a contract of sale of goods as "international" under article 2 (*a*) depends primarily on a determination that "the seller and buyer have their places of business in different States". In defining "place of business" in article 2 (*c*) and in referring to "habitual residence" in article 2 (*d*) there are no references to the nationality,

[11] As to the possibility of making a reservation with respect to the definition of an international sale, see art. 38 and accompanying commentary.

place of incorporation or place of the head office of any party. Subparagraph (*e*) emphasizes this fact by providing specifically that the nationality of the parties shall not be taken into consideration.

8. In some legal systems the national law relating to contracts of sale of goods has different provisions for cases where the parties or the contract are classified as "commercial" than for cases where the parties or the contract are classified as "civil". In other legal systems the distinction between "civil" and "commercial" parties or contracts is not known. In order to avoid possible differences in interpretation by national courts applying this Convention, subparagraph (*e*) of article 2 provides that, for the purposes of this Convention, the *"commercial or civil character of the parties or of the contract"* under the applicable national law shall be disregarded.[12]

Article 3

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

1. This Convention shall apply only if, at the time of the conclusion of the contract the places of business of the parties to a contract of international sale of goods are in Contracting States.

2. Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

3. This Convention shall not apply when the parties have expressly excluded its application.

COMMENTARY

1. Paragraphs (1) and (2) of this article deal with the question: when must a Contracting State apply the rules of this Convention? Paragraph (3) deals with the freedom of the parties to exclude the application of the Convention.

I. *Application of the Convention, paragraph (1)*

2. Article 3 (1) provides that this Convention *must* be applied if, "at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in *Contracting* States". Thus, a Contracting State is *not bound* under this Convention to apply the rules of the Convention when one party has his relevant place of business in a non-Contracting State even if the sales contract in question falls within the definition of "a contract of international sale of goods" under article 2 (*a*). (See also art. 33.)

3. It must be emphasized in this connexion that the nationality of a party is not relevant for the purposes of the application of this Convention (art. 2 (*e*)). Thus, whether the place of incorporation or the head office of the parties is in a Contracting or a non-Contracting State is not relevant for determining the applicability of this Convention. The only relevant question is whether for each party the place of business having "the closest relationship to the contract and its performance" is located in a *Contracting State* (art. 2 (*c*)).[13]

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

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

5. If the applicability of this Convention were linked to the rules of private international law, special difficulties would have been presented because of the unusually divergent approaches in different legal systems to the characterization of the subject-matter of this Convention. For example, while most civil law systems characterize problems of prescription as substantive questions and apply the proper law of the contract *(lex causae contractus)* (and in some cases, the "proper law of prescription"), most common law jurisdictions characterize limitation problems as questions of procedure and, on this ground, apply the rules of the *forum (lex fori).* In some jurisdictions, a combination of the two characterizations may be possible. It has already been pointed out that this Convention governs regardless of the different theoretical approaches to the problem under national laws as long as the period in question has the function described under article 1 (1) and (2).[14] The combined effect of paragraphs (1) and (2) of article 3 is certainty and uniformity in the application of this Convention.

6. The opening phrase of the paragraph, "unless this Convention provides otherwise", is occasioned by specific provisions of the Convention which make room for national law to modify certain rules under the Convention. One such instance is paragraph (3) of article 22 which provides, *inter alia,* that the validity of a clause defined therein shall not be affected by the provisions in the other paragraphs of article 22, "provided that such clause is valid under the law applicable to the contract of sale". Another example is the last phrase of article 15, which provides that the rule under that article is "subject to the law governing the proceedings".

III. *Exclusion of the applicability of the Convention by agreement of the parties, paragraph (3)*

7. Paragraph (3) allows the parties to agree to exclude the application of the Convention, provided that this is done "expressly". Thus, for example, where the parties have chosen as "the law applicable *to the contract*" the law of a non-Contracting State, which treats the question of limitation as substantive, an implication

[12] See also para. 3 of commentary to art. 3.

[13] As to the possibility of further limiting the application of the Convention by way of reservation, see art. 34 and accompanying commentary. See also art. 37.

[14] See para. 1 of commentary on art. 1.

might arise that the parties have excluded the application of this Convention because of their implied choice of the prescription rules contained in the chosen national law. Such an interpretation is more likely to arise if the legal proceedings are brought in a form of one of those Contracting States which also characterizes the limitation question as substantive. However, in such a case this Convention still applies because the exclusion of the application of this Convention was not "express". Furthermore, permitting an implied exclusion of the application of this Convention would defeat the purpose of article 3 (2).[15]

8. There is no requirement as to the time and form in which the agreement of the parties for the exclusion of this Convention must be expressed. Where, under article 3 (3), the parties have expressly excluded the application of this Convention, their claims will be regulated according to the law deemed to be applicable under the rules of private international law of the forum (cf. art. 3 (2)).

Article 4

[*Exclusion of certain sales and types of goods*]

This Convention shall not apply to sales:

(*a*) Of goods bought for personal, family or household use;

(*b*) By auction;

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

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

(*e*) Of ships, vessels or aircraft;

(*f*) Of electricity.

COMMENTARY

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

1. Subparagraph (*a*) of this article excludes consumer sales from the scope of this Convention. A particular sale is outside the scope of this Convention if the goods are bought "for personal, family or household use". The usage of the word "personal" in conjunction with the words "family or household" indicates that the intended use must be non-commercial. Thus, for example, none of the following situations is excluded from the Convention: a camera bought by a professional photographer for use in his business, soap or other toiletries bought by a corporation for the personal use of its employees, and a single automobile bought by a car dealer for resale.

2. The rationale for excluding consumer sales from the Convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that questions of prescription or limitation relating to consumer sales should be excluded from this Convention. In addition, most consumer sales are domestic transactions and it was felt that the Convention should not apply to the relatively few cases where consumer sales were international transactions (e.g. because the buyer was a tourist with his habitual residence in another country).[16]

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

3. Subparagraph (*b*) of this article excludes from the scope of this Convention sales by auction. Because sales by auction are often subject to special rules under various national laws, it was considered desirable that they should in all respects remain subject to these special rules. In addition, the length of the limitation period should not be affected by the location of the place of business of the successful bidder at an auction since at the opening of the auction the seller could not know which buyer would make a particular purchase.

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

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

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

5. This subparagraph excludes sales of stocks, shares, investment securities, negotiable instruments and money.[17] Such transactions present problems that are different from the usual international sale of *goods* and, in addition, in many countries, are subject to special mandatory rules.

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

6. This subparagraph excludes from the scope of the Convention all sales of ships, vessels and aircraft, items which are often subject to different special rules under the various national legal systems. In some legal systems there may be a question whether such items are "goods". Under most national laws at least certain types of ships, vessels and aircraft are subject to special registration requirements. The rules under various national laws, specifying the ships, vessels and aircraft that must be registered, differ widely. Since the relevant place of registration, and therefore the law which would govern the registration, might not be known at the time of the sale, the sale of all ships, vessels and aircraft was excluded in order to make uniform the application of this Convention.

[15] See paras. 4 and 5, *supra*.

[16] See art. 2 (*b*)

[17] As to whether commercial paper of the type enumerated might be "goods", see foot-note 6 to commentary on art. 1.

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

7. This subparagraph excludes sales of electricity from the scope of the Convention on the ground that international sales of electricity present unique problems that are different from those presented by the usual international sale of goods.

Article 5

[*Exclusion of certain claims*]

This Convention shall not apply to claims based upon;

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

(*b*) Nuclear damage caused by the goods sold;

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

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

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

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

COMMENTARY

1. Subparagraph (*a*) excludes from the Convention claims based on the death of or personal injury to any person. If such a claim is based on tort (or *delict*), the claim would be excluded from this Convention by virtue of the provisions of article 1 (1).[18] However, under some circumstances, claims for liability for the death or personal injury of the buyer or of some other person might be based on the failure of the goods to comply with the contract; furthermore, a claim by the buyer against the seller for pecuniary loss or damage might arise because of personal injuries suffered by persons *other than himself* (including by a subpurchaser). While such claims based on personal injuries, under some legal systems, may be regarded as contractual, in other legal systems the characterization is in doubt and in still others all such claims may be regarded as delictual. Therefore, in order to avoid possible doubt and diversity in interpretation, this subparagraph excludes *all* claims based on "death of, or personal injury to, any person"; it would also be often inappropriate to subject such claims to the same limitation period as the one applicable to the usual type of commercial claims based on contract.

2. Subparagraph (*b*) excludes claims based on "nuclear damage caused by the goods sold". The effects of such damage may not appear until a long period after exposure to radio-active materials. In addition, special periods for the extinction of actions based on nuclear damage are contained in the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963.[19]

3. Subparagraph (*c*) excludes claims based on "a lien, mortgage or other security interest in property". It should be noted that this subparagraph excludes rights based not only on "lien" and "mortgage" but also rights based on "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. Liens, mortgages and other security interests involve rights *in rem* which traditionally have been governed by the *lex situs* and are enmeshed with a wide variety of rights affecting other creditors; expanding the scope of the Convention to include such claims would have impeded the adoption of the Convention.

4. Of course, the expiration of the limitation period applicable to a claim based on a sales contract may have serious consequences with respect to the enforcement of a lien, mortgage or other interest securing that claim. However, for the reasons given in connexion with article 25 (1) (para. 2 of commentary on art. 25), this Convention does not attempt to prescribe uniform rules with respect to such consequences, and leaves these questions to the applicable national law. It may be expected that the tribunals of Contracting States in solving these problems will give full effect to the basic policies of this Convention with respect to the institution of legal proceedings for the enforcement of stale claims.

5. Under subparagraph (*d*), claims based on "a judgement or award made in legal proceedings" are excluded even though the judgement or award may have resulted from a claim arising from an international sale. This exclusion is consistent with the purpose of this Convention to regulate the period within which the parties to a contract of international sale of goods must *bring legal proceedings* for the exercise of any claims arising under that contract.[20] Moreover, in actions to enforce a judgement or award, it may be difficult to ascertain whether the underlying claim arose from an international sale of goods and satisfied the other requirements for the applicability of this Convention. In addition, the enforcement of a judgement or award involves the procedural rules of the forum (including rules concerning "merger" of the claim in the judgement) and thus would be difficult to subject to a uniform rule limited to claims derived from the international sale of goods.

6. Subparagraph (*e*) excludes claims based on "a document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought". Such documents are given different names and rules in various national jurisdictions (e.g. *titre exécutoire*), but they have an independent legal effect that differentiates them from claims that must first be established by way of legal proceedings in which the breach of the contract of sale must be proved. In addition, these documents present some of the problems mentioned with respect to subparagraph (*d*) (para. 5, above). (Subparagraph (*e*) is also analo-

[18] See para. 6 of commentary on art. 1.

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

[20] See para. 1 of commentary on art. 1.

gous to the exclusion under subparagraph (*f*) of claims based on documents having a legal identity distinct from the sales contract.)

7. Subparagraph (*f*) excludes claims based on "a bill of exchange, cheque or promissory note". Such an instrument may be given (or accepted) in connexion with the obligation to pay for goods sold in an international transaction subject to this Convention. Such instruments are in many cases governed by international conventions or national laws that state special periods of limitation. In addition, such instruments are often circulated among third persons who have no connexion with or knowledge of the underlying sales transactions; moreover, the obligation under the instrument may be distinct (or "abstracted") from the sales transaction that occasioned the issuance of the instrument. In view of these facts, claims under the instruments described in subparagraph (*f*) are excluded from this Convention.[21]

Article 6

[*Mixed contracts*]

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

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

COMMENTARY

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

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

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

3. It is important to note that this paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two contracts. Thus, the question whether the seller's obligations relating to the sale of goods and those relating to the supply of labour or other services can be considered as two separate contracts (under what is sometimes called the doctrine of "severability" of contracts) will be resolved in accordance with the applicable national law.

[21] Contrast the treatment of assignees of rights under the sales contract (art. 1 (3) (*a*)).

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

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

5. However, the concluding phrase in this paragraph, "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production", is designed to exclude from the scope of this Convention those contracts under which *the buyer undertakes to supply the seller* (the manufacturer) with a *substantial* part of the necessary materials from which the goods are to be manufactured or produced. Since such contracts are more akin to contracts for the supply of services or labour than to contracts for sale of goods, they are excluded from the scope of this Convention in line with the basic rule of paragraph (1).

Article 7

[*Interpretation to promote uniformity*]

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

COMMENTARY

National rules on limitation (prescription) are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the varying concepts of the particular national law that it was applying. To this end, article 7 emphasizes the importance, in interpreting and applying the provisions of the Convention, of having due regard for the international character of the Convention and the need to promote uniformity. Illustrations of the application of this article may be found elsewhere in the commentary, e.g. in article 1 at paragraphs 10-12; article 14, foot-note 1; and article 22, foot-note 1.

THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8

[*Length of the period*]

The limitation period shall be four years.

COMMENTARY

1. Establishing the length of the limitation period required the reconciliation of various conflicting considerations. On the one hand, the limitation period must be adequate for the investigation of claims, negotiation for possible settlements making the arrangements necessary for bringing legal proceedings. In assessing the time required, consideration was given to the special problems resulting from the distance that often separates

the parties to an international sale and the complications resulting from differences in language and legal systems. On the other hand, the limitation period should not be so long as to fail to provide protection against the dangers of uncertainty and injustice that would result from the extended passage of time without the resolution of disputed claims. (These dangers include the loss of evidence and the possible threat to business stability or solvency resulting from extended delays.)

2. In the course of drafting this Convention, it was generally considered that a limitation period within the range of three to five years would be appropriate.[22] The limitation period of four years established in this article is a product of compromise. In reaching this decision, account was taken of other provisions in this Convention affecting the running of the limitation period. These provisions include articles 9 to 12 (rules relating to the commencement of the running of the period), article 19 (a new period commences to run afresh when the creditor performs an act which has the effect of recommencing the original limitation period in a given jurisdiction), article 20 (a new period commences to run when the debt is acknowledged by the debtor), articles 17, 18 and 21 (rules extending the limitation period), and article 22 (modification of the period by the parties).

Article 9

[*Basic rule on commencement of the period*]

1. Subject to the provisions of articles 10, 11 and 12, the limitation period shall commence on the date on which the claim accrues.

2. The commencement of the limitation period shall not be postponed by:

(*a*) A requirement that the party be given a notice as described in paragraph 2 of article 1, or

(*b*) A provision in an arbitration agreement that no right shall arise until an arbitration award has been made.

COMMENTARY

1. Articles 9 to 12 govern the point in time at which the limitation period starts to run with regard to all claims covered by this Convention. Article 9 (1) provides the basic rule as to the commencement of the period: the limitation period commences to run "on the date on which the claim accrues". Article 10 provides special rules for the purpose of the application of the basic rule provided in article 9 (1) with regard to claims arising from breach, non-conformity of goods, and fraud. Article 11 deals with the situation where the seller gives an express undertaking relating to the goods. Article 12 covers the cases where the contract was terminated before the time when the performance would have become due.

2. While many claims will be governed by the rules under article 10, claims may also arise without breach or fraud. One example is a claim for the restitution of advance payments where the performance under the contract is excused under the applicable national law because of impossibility of performance, *force majeure,* and the like.[23] Such claims will be governed by the basic rule provided in article 9 (1). Whether such a claim exists and, if it does, when it accrues, is not governed by this Convention and must be decided under the applicable national law.

3. Article 9 (2) (*a*) was designed to eliminate any difference in the starting point of the running of the limitation period under the Convention where under the applicable national law one party is required, as a prerequisite for the acquisition or exercise of his claim, to give notice to the other party, or where the parties agreed, validly under the applicable national law, that notice be given to the other party of any claim within a specified period of time. Where such notice is required, either by statute or by contract, the time when a claim is considered to "accrue" may be determined in a number of ways. Thus, under some national laws, such claims "accrue" when the necessary notice is given; under other national laws claims may "accrue" before the notice, provided the notice is then in fact given within a prescribed period. Under article 9 (2) (*a*) the commencement of the limitation period "shall not be postponed" by the requirement of such notices.[24]

4. Article 9 (2) (*b*) deals with the effect of a provision in an arbitration agreement stating that "no right shall *arise* until an arbitration award has been made". Under article 9 (2) (*b*) such a contractual provision will be disregarded for the purpose of determining the starting point for the running of the limitation period under the Convention. The reason behind this provision is similar to that behind the rule in article 9 (2) (*a*). (See para. 3, above.)

Article 10

[*Special rules: breach; defect or non-conformity of the goods; fraud*]

1. A claim arising from a breach of contract shall accrue on the date on which such breach occurs.

2. A claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.

3. A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered.

[22] To help resolve the question of the length of the limitation period and other relevant issues, a questionnaire was addressed to Governments and interested international organizations, and the replies, reporting national rules and suggestions from each region, were analysed in a report of the Secretary-General (A/CN.9/70/Add.2, sect.14; Yearbook . . . 1972, part two, I, B, 1).

[23] As to other examples of such claims, see para. 6 of commentary on art. 1.

[24] This rule, of course, has no effect on the rules of the applicable national law requiring notice. See art. 1 (2) and accompanying commentary, paras. 8 and 9.

COMMENTARY

1. The basic rule as to the commencement of the limitation period is provided in article 9 (1): "The limitation period shall commence on the date on which the claim *accrues*". Article 10 is designed to eliminate difficulties in determining when a claim "accrues" by providing specific rules as to the time when a claim arising from a breach of contract, from a defect or other lack of conformity, or based on fraud, should be deemed to have "accrued".

I. *Breach of contract, paragraph (1)*

2. With respect to a claim arising from breach of contract, article 10 (1) provides that the claim "shall accrue on the date on which such breach occurs".[25] "Breach of contract" is defined in article 1 (3) (*d*) to mean "the failure of a party to perform the contract or any performance not in conformity with the contract". The application of this rule may be illustrated by the following examples:

Example 10A: The sales contract required the seller to place goods at the buyer's disposal on 1 June. The seller failed to supply or tender any goods under the contract on 1 June or on any subsequent date. The limitation period for bringing any legal proceedings by the buyer in respect of the breach of the contract commences to run on the date on which the breach of contract occurred, i.e., in this example, on 1 June, the date for performance required under the contract.

Example 10B: The sales contract required the seller to place goods at the buyer's disposal on 1 June. The seller failed to supply or tender any goods under the contract on 1 June. However, a few weeks thereafter the buyer agreed to the extension of the time for delivery until 1 December. On 1 December, the seller again failed to perform. If the above extension of the time for delivery was valid, the limitation period commences to run on 1 December, the date of "breach" of the contract.

Example 10C: The sales contract provided that the buyer may pay the price at the time of delivery of the goods and obtain a 2 per cent discount. The contract also provided that the buyer must, at the latest, pay within 60 days of the delivery. The buyer did not pay on delivery of the goods. The limitation period does not commence to run until the end of the 60-day period because there was no "breach" of contract by the buyer until the time for his performance expired.

Example 10D: The sales contract provided that the goods should be shipped in a specified year on a date to be named by the buyer. The buyer might have requested shipment in January, but he only requested shipment on 30 December of that year. The seller did not perform. The limitation period with respect to this failure to perform did not commence until 30 December since, under the terms of the contract, there was no "breach" of the contract until the date specified by the buyer for shipment had arrived.

[25] Art. 10 (2) contains a special rule applicable to those breaches of contract that take the form of a defect or lack of conformity of the goods.

II. *Claims by buyers relying on non-conformity of the goods, paragraph (2)*

3. With regard to a claim by the buyer of a breach of contract "arising from a defect or other lack of conformity" of the delivered goods, article 10 (2) provides a special rule: the claim "shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer". The phrase "a claim arising from a defect or other lack of conformity" of the goods is sufficiently broad to include any respect in which the goods may fail to comply with the requirements of the contract.

4. The phrase "the goods are actually handed over to . . . the buyer" refers to the existence of circumstances which constitute placing the goods under the buyer's "actual" control regardless of whether or not this occurs on the due date or at the place contemplated by the contract.[26] Unless the goods have reached the stage where "actual" inspection of the goods by the buyer is possible, the goods cannot be regarded to have been "actually handed over to . . . the buyer".

Example 10E: Seller in Santiago agreed to ship goods to a 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. The goods reached Bombay on 1 August, and on the same date the carrier notified the buyer that he could take possession of the goods. On 15 August the buyer took possession of the goods. Under these facts, the goods are "actually handed over" to the buyer on 15 August.

5. The result in example 10E is not affected by the fact that under the terms of the contract the risk of loss during the ocean voyage rested on the buyer. Nor is this result affected by the fact that, under some legal systems, it might be concluded that "title" or "ownership" in the goods passed to the buyer when the goods were loaded on the ship in Santiago. Alternative forms of price quotation (F.O.B. seller's city; F.O.B. buyer's city; F.A.S.; C.I.F. and the like) have significance in relation to possible changes in freight rates and the manner of arranging for insurance, but they have no significance in relationship to the time when the goods were "actually" handed over to the buyer.[27]

6. In a case where the buyer refuses to accept the goods although the seller placed them at his disposal, there is no date on which the goods are *"actually handed over"* to the buyer. For this reason, article 10 (2) contains an alternative rule which provides that where the

[26] The term "delivery" was intentionally avoided because of the differences in the definition of this legal concept in various legal systems, particularly where there was purported "delivery" of non-conforming goods.

[27] Of course, if the buyer takes effective physical control over the goods in the seller's city and thereafter ships the goods, then the goods would have been actually handed over to the buyer in the seller's city. It may also be noted that goods may be handed over to agents or assigns of the buyer who are authorized to receive them. Cf. art. 1 (3) (*a*). For the purpose of illustration, assume that the buyer in example 10E, above, resells the goods to C during the transit of the goods and transfers the bill of lading to C. The goods are handed over to the "buyer" when C actually takes possession of the goods.

that in view of the seller's repudiaton the contract is terminated.

3. Under some legal systems, notification, in advance of refusal to perform an obligation that will be due in the future is regarded as an anticipatory breach upon which both an election to terminate and a legal action for breach may be based. Circumstances such as bankruptcy or other events manifesting an inability to perform may also become grounds upon which one party *may* terminate the contract before the performance is due under the contract. In such circumstances, where a party who is entitled to declare the contract terminated "exercises this right", the limitation period runs from "the date on which the declaration is made to the other party". On the facts in the above example, this date is 15 July.

4. It will be noted that paragraph (1) is only applicable in cases where a party elects to exercise his right to declare the contract terminated. If in the above case, such an election (i.e., by the notification of termination made on 15 July) had not taken place, "the limitation period shall commence on the date on which performance is due", 1 December in the above example.[32] This result is in conformity with the general rule of article 10 (1) concerning the point of time at which a claim for breach of contract "accrues".[33]

5. In the interest of definiteness and uniformity, under this paragraph the period commences on the earlier date (15 July) only when a party affirmatively "declares" the contract terminated. Thus, termination resulting from a rule of the applicable national law to the effect that in certain circumstances the contract shall be automatically considered as terminated is not termination resulting from a "declaration" by a party within the meaning of paragraph (1). It should also be noted that article 12 does not govern the situation, existing under some legal systems, whereby circumstances such as repudiation or bankruptcy prior to the time performance is due entitle one party to declare that the performance is *due immediately*.[34]

II. *Instalment contracts, paragraph (2)*

6. For claims arising out of breaches of instalment contracts for the delivery of or payment for goods, article 12 (2) follows the same approach as article 10 (1). The limitation period "shall, in relation to each separate instalment, commence on the date on which the particular *breach occurs*".[35] This rule will minimize the theoretical difficulties as to whether a particular instalment contract should be regarded as a set of several contracts or as a single contract. The application of article 12 (2) may be illustrated by the following example:

Example 12B: A contract of sale made on 1 June required the seller to sell the buyer 4,000 kg of sugar, with deliveries of 1,000 kg on 1 July, 1 August, 1 September and 1 October. Each of the four instalments was delivered late. The buyer, while he complained to the seller of these late deliveries, did not elect to terminate the contract although he was entitled to do so under the national law applicable to the contract. Under these facts, the limitation period would be applied separately to each claim arising from the late delivery in July, August, September, and October.

7. However, if one party does exercise his right to declare the instalment contract terminated by reason of such breach, article 12 (2) provides that "the limitation period in respect of all relevant instalments" commences when such declaration was made. This rule may be illustrated as follows:

Example 12C: The contract is the same as in Example 12B above. The first instalment, delivered on 1 July, proved on examination to be so seriously defective that the buyer rightfully took two steps: he rejected the defective instalment and he notified the seller on 5 July that the contract was terminated as to future instalments. Once termination is thus effected, the single limitation period for claims arising from all relevant instalments (i.e., here the July, August, September, and October instalments) commences on the date of the declaration that the contract is terminated, i.e., 5 July.

8. For the purpose of paragraph (2), the determining factor is the buyer's election to "declare the contract terminated" as to future instalments. The term "all relevant instalments" embraces all instalments, whether preceding or subsequent to the event giving rise to the declaration of the termination of the instalment contract, which are covered by or affected by the termination of the contract. This approach reflects the fact that the right to terminate the contract may arise from the cumulative effect of breaches in the performance of a number of instalments.

CESSATION AND EXTENSION OF THE LIMITATION PERIOD

Article 13

[*Judicial proceedings*]

The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recog-

[32] This Convention does not specify the time when a notification of termination must be given. However, the second sentence of paragraph (1) of article 12 restricts the application of this rule to those instances where the declaration to terminate the contract is made "before performance becomes due".

[33] While the second sentence of article 12 (1) is intended to attain the same result as under article 10 (1), the expression "the date on which *performance is due*" was employed in article 12 (1) rather than the words "breach occurs" to avoid possible confusion, particularly in a jurisdiction where "anticipatory *breach*" is a recognized legal concept.

[34] Under these circumstances, where a party validly declares that performance is due immediately and the other party then does not perform, the acceleration of the "due date" will lead to a "breach" at an earlier date, and hence to the earlier commencement of the running of the limitation period.

[35] The reference to "breach" in the first sentence of art. 12 (2) does not preclude the application of art. 10 (2) for determining the date on which the breach occurred, in cases where the breach consisted of non-conformity of the goods; art. 10 (2) is a special rule while art. 10 (1) deals with breach in general. See also art. 1 (3) (*d*).

buyer refuses to accept the tendered goods, the claim shall accrue on the date on which the *tender* of the goods *was refused* by the buyer. The commencement of the limitation period will not be affected, once the buyer refused to accept the tendered goods, by the buyer thereafter taking possession of the goods under the contract.[28]

III. *Claims based on fraud, paragraph (3)*

7. Fraud committed while the contract was being negotiated or at the time of the conclusion of the contract or during its performance may give rise to various claims. Where a claim based on fraud arises in tort (or *delict*), it is, of course, outside the scope of this Convention.[29] However, the defrauded party may be entitled to avoid or rescind the contract under the applicable national law. If the contract is avoided, the defrauded party may want to ask for the restitution of advance payments, if any. This claim for restitution of any advance payments falls within the scope of this Convention.[30] For such a claim, article 10 (3) provides that it should be deemed to have accrued "on the date on which the fraud was or reasonably could have been discovered".

Article 11

[*Express undertaking*]

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

COMMENTARY

1. Article 11 provides a special rule for cases where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods, which is stated to have effect for a certain period of time. This period may be expressed in terms of a specific period of time or otherwise, such as in terms of an amount of performance. Under this article if the notice is given before the expiration of the period of the undertaking, the commencement of the limitation period for claims arising from the undertaking is from "the date on which the buyer notifies the seller of the fact on which the claim is based". Where the notice has not been given before the expiration of the period of the undertaking, article 11 provides that the limitation period shall commence "on the date of the expiration of the period of the undertaking".[31]

2. Article 11 does not specify when the seller's "express undertaking" must be given. The seller, after delivering the goods, might adjust certain components and in this connexion might give an express warranty at that time. Such an express undertaking, although given after the delivery of the goods, would be governed by this article.

Article 12

[*Termination before performance is due; instalment contracts*]

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

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

COMMENTARY

1. Both paragraphs (1) and (2) of article 12 deal with problems that arise when a party is entitled to terminate the contract before performance is due. Paragraph (1) establishes the basic general rule; paragraph (2) deals with the special problems that arise when a contract calls for the delivery of goods, or the payment for goods, in instalments.

I. *Basic rule, paragraph (1)*

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

Example 12A: Under a contract of sale made on 1 June the seller is to deliver the goods on 1 December. On 1 July the seller (without a valid excuse) notifies the buyer that he will not deliver the goods required by the contract. On 15 July the buyer declares to the seller

[28] The over-all fairness of the rules contained in arts. 9 and 10 needs to be considered in the light of the following factors: (*a*) exclusion from the Convention (art. 5 (*a*)) of claims based on "death of, or personal injury to, any person"; (*b*) confining the scope of this Convention to claims that arise in relation to a *contract*—thereby excluding claims based on tort or *delict* (see discussion in para. 6 of commentary on art. (1)); (*c*) exclusion of consumer sales from the Convention (art. 4 (*a*)); (*d*) the special provisions for claims based on an express undertaking given by the seller which is stated to have effect for a period of time (art. 11).

[29] See para. 6 of commentary on art. 1.

[30] See para. 6 of commentary on art. 1.

[31] This article does not affect the time-limit within which such notice must be given for the exercise of a claim under the undertaking. See art. 1 (2) and para. 8 of accompanying commentary.

nized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

COMMENTARY

1. As was noted earlier (introduction, para. 1), this Convention is essentially concerned with the time within which the parties to a contract for the international sale of goods may bring legal proceedings to exercise claims arising from such contract. Article 8 states the length of the limitation period. Articles 24 to 27 state the consequences of the expiration of the period; these include the rule (art. 25 (1)) that no claim for which the limitation period has expired "shall be recognized or enforced in any legal proceedings". To complete this structure, article 13 provides that the "limitation period shall cease to run" when the creditor commences judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim (provision for "legal" proceedings other than "judicial" proceedings —e.g., arbitral and administrative proceedings—is made in arts. 14 and 15). The net effect of these rules is substantially the same as providing that a proceeding for the enforcement of claims may only be brought before the limitation period has expired. However, the approach of this Convention, in stating that the limitation period shall "cease to run" when the proceeding is instituted, provides a basis for dealing with problems that arise when such proceeding fails to result in a decision on the merits or is otherwise abortive (see art. 17).

2. Article 13 is designed to identify the stage which the judicial proceedings must reach in order to halt the running of the limitation period. Under the various legal systems judicial proceedings may be started in different ways. Under some national laws a claim may be filed or pleaded in court only after the plaintiff has taken certain preliminary steps (e.g., service of a "summons" or "complaint"). In some national jurisdictions these preliminary steps may be taken by the parties or their attorneys without resort to a court; nevertheless, these steps are regarded as commencing the judicial proceedings. In some other national jurisdictions judicial proceedings are considered to commence only at some later stage in the proceedings. For this reason, article 13 refers to the creditor's performance of "any act which, *under the law of the court where the proceedings are instituted,* is recognized as commencing judicial proceedings", rather than to any particular procedural steps that must be taken by the creditor. The limitation period ceases to run if the creditor performs any act recognized by the law of the forum as commencing judicial proceedings against the debtor for the purpose of satisfying the creditor's claim.[36]

3. This article also covers the case where the creditor *adds* a claim to a judicial proceeding he had instituted earlier against the debtor. In such a case, the procedural step that stops the running of the limitation period depends on when, under the law of the forum, the creditor is regarded to have performed the act of "asserting his claim" in the pending proceeding.[37]

Article 14

[*Arbitration*]

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

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

COMMENTARY

1. Article 14 applies to arbitration based on an actual agreement of the parties to submit certain disputes to arbitration.[38] Article 13 relies on the law of the judicial forum to determine the point in the judicial proceedings at which the limitation period shall cease to run. The same approach cannot be used in relation to arbitral proceedings since under many national laws the manner of commencing arbitral proceedings is left to the agreement of the parties. Thus, article 14 (1) provides that any question as to what acts constitute the commencement of arbitral proceedings is to be answered by "the arbitration agreement or by the law applicable to such proceedings".

2. If the arbitration agreement or the applicable law does not regulate the manner of commencing arbitral proceedings, under paragraph (2) the decisive point is the date on which "a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party"; if he has no such residence or place of business, the request may be delivered at his last-known residence or place of business. Under paragraph (2), the request for arbitration must be "delivered" at the designated place. Thus, the risk of a failure or error in transmission falls on the sender of the request to arbitrate, but the sender need not establish that it actually came into the hands of the other party in view of the practical difficulties involved in

[36] Initiation by the creditor against the debtor of a criminal proceeding for fraud or active participation by the creditor in state-initiated criminal proceedings against the debtor, under some legal systems, would stop the running of the limitation period under this Convention if, under the local law, the creditor's act constitutes institution of a proceeding "for the purpose of obtaining satisfaction or recognition of his claim".

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

[38] Art. 14 applies only where the parties "*have agreed* to submit to arbitration". Obligatory "arbitration" not based on an agreement of the parties would be characterized as "judicial proceedings" for the purpose of the Convention. See arts. 1 (3) (*e*), and 13.

proving receipt by a designated person following delivery of the request at the place specified in the article.

Article 15

[*Legal proceedings arising from death, bankruptcy or a similar occurrence*]

In any legal proceedings other than those mentioned in articles 13 and 14, including legal proceedings commenced upon the occurrence of:

(*a*) The death or incapacity of the debtor,

(*b*) The bankruptcy or any state of insolvency affecting the whole of the property of the debtor, or

(*c*) The dissolution or liquidation of a corporation, company, partnership, association or entity when it is the debtor,

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

COMMENTARY

1. Article 15 governs the effect of commencing legal proceedings other than those mentioned in articles 13 and 14. Such proceedings include, *inter alia,* proceedings for the distribution of assets on death, bankruptcy, and the dissolution or liquidation of a corporation, as illustrated in subparagraphs (*a*) through (*c*) of article 15. It should be noted that the illustrations set forth in subparagraphs (*a*) through (*c*) do not limit the scope of the article, since it applies to "any legal proceedings other than those mentioned in articles 13 and 14". Thus, receivership proceedings or the re-organization of a corporation are also covered by this article. These proceedings often differ from ordinary judicial or arbitral proceedings in that they are not instituted by individual creditors; instead, creditors are given the opportunity to file claims in existing proceedings. Consequently, article 15 provides that the limitation period ceases to run "when the creditor *asserts* his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim".

2. However, the rule of article 15 that the limitation period ceases to run when the creditor first asserts his claim in a legal proceeding covered by that article is "subject to the law governing the proceedings". As noted previously (para. 1 of the commentary to art. 13), the net effect in articles 13, 14 and 15, that the limitation period "shall cease to run" in the cases covered by these articles, is substantially the same as providing that claims may be exercised through legal proceedings if such proceedings are commenced before the limitation period established under this Convention has expired. Because of the peculiarly local nature and importance of the proceedings covered by article 15, it is necessary to respect fully the municipal law governing these proceedings. Creditors will often rely on that municipal law, particularly as to the time when claims should be filed, and might be misled if such law were not honoured. For this reason, the concluding phrase of this article provides that if the municipal law governing the proceedings prescribes different rules with regard to the necessary timing of claims for admissibility, these rules will prevail over this Convention.[39] This may be illustrated by the following examples:

Example 15A: The law of a forum requires that a claim be filed within a short specified period of time after the commencement of a bankruptcy proceeding and provides that the claim is barred after the expiration of that period. If the creditor does not assert his claim within the specified period, he cannot assert his claim in that bankruptcy proceeding or otherwise even if the limitation period under this Convention has not expired.

Example 15B: The law of a forum directs the trustee in bankruptcy to recognize claims against the bankrupt which were enforceable at the time of the commencement of the bankruptcy proceedings. If the limitation period under this Convention had not expired at the time of the commencement of the bankruptcy proceeding, the creditor's claim is not time-barred even if the limitation period under this Convention already expired at the time he actually asserts his claim in the bankruptcy proceeding.

Example 15C: The law of a forum provides that the commencement of a bankruptcy proceeding shall suspend (cease) the running of the limitation period with regard to all claims which may be asserted in that proceeding. The net effect of this suspension is the same as the provision mentioned in Example 15C. Thus, if the limitation period under this Convention had not expired at the time of the commencement of the bankruptcy proceeding, the creditor's claim is not time-barred even if the limitation period under this Convention already expired at the time he actually asserts his claim in the bankruptcy proceeding.

Article 16

[*Counterclaims*]

For the purposes of articles 13, 14 and 15, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that both the claim and the counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.

[39] As has been noted (para. 3 of commentary on art. 1), this Convention applies only to the limitation period for claims between parties to a contract for the international sale of goods. In the proceedings covered by this article involving the distribution of assets (as in bankruptcy), the limitation period may affect the rights of third parties. The effect of the expiration of the limitation period established under this Convention on the rights of third parties is not regulated by this Convention but is left to the applicable national law.

COMMENTARY

1. This article deals with the point in time when a counterclaim[40] is deemed to have been instituted for the purposes of articles 13, 14 and 15. This provision may be examined in terms of the following example:

Example 16A: The seller asserted his claim in a legal proceeding against the buyer on 1 March. In that same legal proceeding, the buyer interposed a counterclaim on 1 December. The limitation period governing the buyer's counterclaim would, in normal course, have expired on 1 June.

2. In the above example, the crucial question is whether the buyer's counterclaim shall be deemed to be instituted (*a*) on 1 March, the time when the seller asserted his claim or (*b*) on 1 December 1975, when the buyer's counterclaim was in fact interposed in the pending legal proceeding. Article 16 chooses alternative (*a*).

3. Article 16 applies when the seller's claim and the buyer's counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.[41] The same benefit is not given to the buyer when his claim against the seller arises from a different transaction than the one which provided the basis for the seller's claim against the buyer; in this latter case, the buyer must actually interpose his counterclaim before the expiration of the limitation period.

Article 17

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

1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with articles 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

2. If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended.

COMMENTARY

1. Article 17 is addressed to the problems that arise when the legal proceedings in which a creditor asserted his claim end without an adjudication on the merits of the claim. Under articles 13, 14 (1) and 15, when a creditor asserts his claim in legal proceedings for the purpose of satisfying his claim, the limitation period "shall cease to run"; when a creditor asserts his claim in legal proceedings before the expiration of the limitation period, in the absence of some further provision, the limitation period would never expire. Consequently, supplementary rules are required when such a proceeding does not lead to an adjudication on the merits of the claim. Legal proceedings may end without a decision binding on the merits of the claim for various reasons. A proceeding may be dismissed because it was brought in a tribunal lacking competence over the case; procedural defects may prevent adjudication on the merits; a higher authority within the same jurisdiction may declare that the lower court lacked competence to handle the case; arbitration may be stayed or the arbitral award may be set aside by a judicial authority within the same jurisdiction; moreover, a proceeding may not result in a decision binding on the merits of the claim because the creditor discontinues the proceedings or withdraws his claim. Article 17 covers all such instances where the "legal proceedings have ended without a decision binding on the merits of the claim". The general rule under paragraph 1 is that "the limitation period shall be deemed to have continued to run" and the cessation of the running of the limitation period under articles 13, 14, 15 or 16 is rendered inapplicable when such proceedings ended without a binding decision on the merits.

2. Paragraph 2 of this article, however, takes account of the possibility that, a substantial period of time after the creditor asserted his claim in a legal proceeding, that proceeding may be brought to an end without a decision on the merits because of lack of jurisdiction, a procedural defect, or some other reason. If this occurs after the expiration of the limitation period, the creditor would have no opportunity to institute a new legal proceeding; if this occurs shortly before the expiration of the limitation period the creditor may have insufficient time to institute a new legal proceeding.[42] To meet these problems, article 17 (2) provides that "If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended".

Article 18

[*Joint debtors: recourse actions*]

1. Where legal proceedings have been commenced against one debtor, the limitation period prescribed in this Convention shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs

[40] The meaning of "counterclaim" in this article may be derived from the reference in arts. 13 and 15 to proceedings employed "for the purpose of obtaining satisfaction or recognition" of a claim. A counterclaim can lead to affirmative recovery by the defendant against the plaintiff; the use of a claim "as a defence or for the purpose of set-off", after the limitation period for that claim has expired, is governed by art. 25 (2). (See para. 3 of commentary on art. 25.) The question whether a counterclaim is admissible on procedural grounds is, of course, left to the procedural rules of the forum.

[41] For example, if the plaintiff asserts a claim on the basis of a distributorship agreement and the defendant counterclaims based on an agreement to sell related to the distributorship agreement, these two claims might be regarded as arising "in the course of the same transaction".

[42] The question whether a second legal proceeding pertaining to the same claim is admissible is, of course, left to the procedural law of the forum.

such party in writing within that period that the proceedings have been commenced.

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

3. Where the legal proceedings referred to in paragraphs 1 and 2 of this article have ended, the limitation period in respect of the claim of the creditor or the buyer against the party jointly and severally liable or against the seller shall be deemed not to have ceased running by virtue of paragraphs 1 and 2 of this article, but the creditor or the buyer shall be entitled to an additional year from the date on which the legal proceedings ended, if at that time the limitation period had expired or had less than one year to run.

COMMENTARY

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

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

2. Under some national laws the institution of legal proceedings against A also stops the running of the limitation period applicable to P's claim against B. Under some other national laws the institution of legal proceedings against A has no effect on the running of the limitation period with regard to B. Consequently, the formulation of a uniform rule on this issue was considered desirable. A rule to the effect that the institution of legal proceedings against A has no effect on the running of the period against B would involve certain practical difficulties. Such a rule would make it advisable for the creditor (P) to institute legal proceedings against both A and B within the limitation period—at least in cases where there is some doubt concerning the financial ability of A to satisfy a judgement. Where A and B are in different jurisdictions, it may not be feasible to institute a single proceeding against them both, and instituting separate proceedings in different jurisdictions, merely to prevent the running of the limitation period against the second debtor (B), would involve expenses that turn out to have been incurred needlessly in all cases where A can and does satisfy the judgement.

3. Under article 18 (1), where legal proceedings have been commenced against A, the limitation period "shall cease to run" not only with respect to A but also with respect to B, the party jointly and severally liable with A. It will be noted that article 18 (1) becomes applicable only when the creditor informs B in writing within the limitation period that legal proceedings have been instituted against A. This written notice gives B the opportunity, if he chooses, to intervene or participate in the proceedings against A, provided such intervention by B is allowed under the procedural law of the forum. Whether or not B may intervene, the limitation period for the creditor's claim against joint debtor B ceases to run when the creditor institutes legal proceedings against joint debtor A, provided that the creditor gives the required notice to B.

II. *Recourse actions, paragraph (2)*

4. Paragraph (2) of this article deals with the following situation: A sells goods to B who resells the goods to a subpurchaser C. C commences legal proceedings against B on the ground that the goods are defective. In such a case, recovery on C's claim against B may give rise to a claim by B against A for indemnification.

5. If C commences the legal proceedings against B only toward the end of the limitation period applicable to B's possible claim against A, B may not have sufficient time to institute legal proceedings against A, particularly if B wants to await the final adjudication of C's claim against him before commencing an action against A. In the absence of a rule in this Convention protecting B in such a case, B will be compelled to immediately institute legal proceedings against A, even though the need for indemnification is at that point speculative, and will arise only if C prevails in his claim against B. For this reason, article 18 (2) provides that where the subpurchaser C has commenced legal proceedings against the buyer B, the limitation period "shall cease to run" with respect to B's claim against the seller A.

6. It should be noted, however, that the limitation period applicable to B's claim against A shall "cease to run" only if B "informs [A] in writing within that period that the proceedings have been commenced". Hence, if C only commenced the legal proceedings against B[43] after the expiration of the limitation period applicable to B's claim against A under this Convention, B will not be protected under article 18 (2). It was felt necessary to so limit the operation of article 18 (2) in order to safeguard the original seller from being exposed, subsequent to the expiration of the limitation period provided under this Convention for claims against him, to possible claims that may arise as a consequence of a resale of the goods by the original buyer.[44]

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

[44] In any case, claims based on the death or personal injury of any person, including the subpurchaser, are not covered by the Convention (see art. 5 (*a*) and accompanying commentary, para. 1).

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

7. Paragraph (3) completes article 18 the same way as article 17 completes the operation of articles 13, 14, 15 and 16 where the legal proceedings covered by those articles ended without a decision binding on the merits of the claim. In the absence of paragraph (3), the limitation period for the claims referred to in paragraphs (1) and (2) of article 18 would never expire since they provide that "the limitation period prescribed in this Convention shall cease to run". Therefore, under paragraph (3) of article 18, where the legal proceedings referred to in paragraphs (1) and (2) of that article have *ended,* the limitation period for any claims by the creditor against other persons jointly and severally liable or by the buyer against the seller "shall be deemed not to have ceased running" at the time such legal proceedings were commenced. However, if at the time these legal proceedings ended, the limitation period for the claims referred to in paragraphs (1) and (2) had already expired or had less than one year to run, paragraph (3) provides an additional period (i.e., one year from the date on which those legal proceedings ended) within which the creditor or the buyer may institute legal proceedings.[45]

Article 19

[*Recommencement of the period by service of notice*]

Where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, other than the acts described in articles 13, 14, 15 and 16, which under the law of that State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by that law.

COMMENTARY

1. Under some national laws certain acts by the creditor such as a demand for performance may have the effect of recommencing the limitation period which is provided under the local law, even though these acts are not linked to the institution of legal proceedings. (In some jurisdictions a letter or even a verbal demand may suffice.) In other legal systems, such acts by the creditor would not recommence the limitation period, and the creditor would have to institute legal proceedings in order to stop the running of the period. Article 19 is a compromise between these two approaches. This article permits continued reliance on the special local procedure to which parties in some jurisdictions may have become accustomed; on the other hand, it assures that the creditor will not be allowed to take advantage of a local procedure for recommencing the limitation period with which the debtor may not be familiar. Thus, article 19 is applicable only when the creditor performs such act, pursuant to the special local procedure on recommencing the limitation period, "in the State in which the debtor has his place of business" before the expiration of the limitation period provided under this Convention. It may be noted that article 19 is applicable only if the act performed by the creditor would (in the absence of this Convention) have "the effect of *recommencing*" the local limitation period under the law of the State of the debtor. If the local rule only provides an additional shorter period after such act rather than "recommencing" the original limitation period, such local rule would not have the effect of bringing article 19 into operation.[46]

2. The effect given to such act under article 19 is that "a new limitation period of four years" commences to run afresh from the date on which the local limitation period would otherwise have recommenced in the absence of this Convention. It should be noted that this consequence differs from the effect of the institution of legal proceedings (arts. 13, 14, 15 and 16); on the institution of legal proceedings the period "shall cease to run" subject to the adjustments provided in articles 17 and 18.

Article 20

[*Acknowledgement by debtor*]

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

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

COMMENTARY

1. The basic aims of the limitation period under this Convention are both to prevent the institution of legal proceedings at such a late date that the evidence is likely to be unreliable and to provide a degree of certainty in the legal relationships covered. An extension of the limitation period where the debtor acknowledges his obligation to the creditor before the expiration of the original limitation period is consistent with these aims. Consequently, under paragraph (1) of this article, when such acknowledgement occurs, a new limitation period of four years from the date of the acknowledgement will begin to run.

[45] See also art. 23 for the over-all limitation for instituting legal proceedings.

[46] If, under the local law, "the effect of recommencing a limitation period" is given subject to certain conditions, the existence of such conditions under the local law will not interfere with the application of article 19.

2. In view of the significant impact which this rule may have on the debtor's obligations, paragraph (1) requires that the acknowledgement be in writing. A writing by a debtor confirming an earlier oral acknowledgement becomes an "acknowledgement" within the meaning of this article when the confirmation in writing is made.[47] The "acknowledgement" of the original debt will sometimes be similar to a transaction creating a new debt (sometimes called a "novation") which, under the applicable national law, may be deemed to be independent of the original obligation; in such cases the original transaction need not be proved to justify recovery under the new obligation. Applicable national law may not require that the "novation" be effected in writing. The rule of paragraph (1) of article 20, that an "acknowledgement" must be in writing, is not intended to interfere with the rules of the applicable national law on "novation".

3. Paragraph (2) deals with "payment of interest or partial performance of an obligation" when these acts imply an acknowledgement of the debt. In both cases, the new limitation period will commence to run afresh only with respect to the particular obligation acknowledged by such act. Partial payment of a debt is the typical instance of such partial performance, but the language of paragraph (2) is sufficiently broad to include other types of partial performance such as the partial repair by a seller of a defective machine. Whether there was an implied acknowledgement under the particular circumstances and if there was, the extent of the obligation so acknowledged, are questions that must be resolved on the basis of all relevant facts concerning the obligation and the act "acknowledging" the existence of the obligation.

Article 21

[*Extension where institution of legal proceedings prevented*]

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

COMMENTARY

1. This article provides for a limited extension of the limitation period when circumstances beyond the creditor's control prevent him from instituting legal proceedings.[48] This problem is often considered under the heading of *"force majeure"* or impossibility; however, this article does not employ those terms since they have different connotations in different legal systems. Instead, the basic test is whether the creditor "has been prevented" from taking appropriate action so as to stop the running of the limitation period. To avoid excessive liberality, no extension is permitted unless: (1) the preventing circumstance was "beyond the control of the creditor", and (2) the creditor could not have avoided or overcome the occurrence of such circumstance.[49] There are many types of preventing circumstances that are *"beyond the control of the creditor"* and which therefore might provide a basis for an extension under this article. These may include: a state of war or the interruption of communications; the death or incapacity of the debtor where an administrator of the debtor's assets has not yet been appointed (cf. art. 15); the debtor's misstatement or concealment of his identity or address which prevents the creditor from instituting legal proceedings; fraudulent concealment by the debtor of defects in the goods.[50]

2. There is no justification for extending the limitation period when the circumstance that prevented the institution of legal proceedings ceased to exist a substantial period in advance of the end of the normal limitation period under the Convention. Nor is there reason to extend the period for a longer period than is needed to institute legal proceedings to obtain satisfaction or recognition of the claim. For these reasons, the limitation period is extended only for one year from the date on which the preventing circumstance is removed. Thus, if, at the time the preventing circumstance ceased to exist, the limitation period had expired or had less than one year to run, the creditor is given one year from the date on which the preventing circumstance ceased to exist.[51]

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 22

[*Modification by the parties*]

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

2. The debtor may at any time during the running of the limitation period extend the period by a

[47] The term "writing" is defined in art. 1 (3) (*g*) of this Convention.

[48] Under arts. 13, 14, 15 and 16, it is provided that the limitation period shall "cease to run" when a creditor asserts his claim in legal proceedings. The present article, in referring to circumstances preventing the creditor "from causing the limitation period to cease to run", refers to the actions described under those articles.

[49] It should be noted that even if these requirements were met with regard to a particular circumstance, if, in fact, the creditor had not been "prevented" from taking other appropriate action that would have stopped the running of the limitation period, this article would not permit the extension. Whether the creditor has been "prevented" from taking any action to stop the running of the limitation period is a question to be determined in the light of all the relevant facts surrounding the relationship between the creditor and the debtor. See art. 30 and accompanying commentary.

[50] As to the time when the limitation period commences to run with regard to claims based on fraud, see art. 10 (3).

[51] See also art. 23 on the over-all limitation for commencing legal proceedings.

declaration in writing to the creditor. This declaration may be renewed.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale which stipulates that arbitral proceedings shall be commenced within a shorter period of limitation than that prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale.

COMMENTARY

1. Paragraph (1) of article 22 establishes the general rule that this Convention does not allow parties to modify the limitation period. Exceptions to this rule, provided in paragraphs (2) and (3) of the article are explained below.

I. *Extension of the limitation period*

2. Paragraph (2) permits the debtor to extend the limitation period "by a declaration in writing to the creditor". While such an extension can be renewed by the debtor, the total period of permissible extension is subject to the over-all limitation provided under article 23. The extension can be accomplished by a unilateral declaration by the debtor; more often, the declaration by the debtor will be part of a wider agreement by the parties. As extension of the limitation period may have important consequences on the rights of the parties, only a declaration in writing can extend the period.

3. Under paragraph (2), a declaration by the debtor extending the limitation period is effective only if made "during the running of the limitation period". This restriction in the Convention would deny effect to possible attempts to extend the period by a declaration made at the time of contracting or at some other time before the claim accrues or the breach occurs.[52] Without this restriction a party with stronger bargaining power might impose such extensions at the time of contracting; in addition, a clause extending the limitation period might be a part of a form contract to which the other party might not give sufficient attention. Similarly, a declaration by a debtor made after the expiration of the limitation period under this Convention will not be given effect, since it was not made "during the running of the limitation period".

4. Allowance of extension after the commencement of the limitation period, on the other hand, may be useful to prevent the hasty institution of legal proceedings close to the end of the period when the parties are still negotiating or are awaiting the outcome of similar proceedings in other forums.[53]

[52] Under arts. 9 through 12, the limitation period does not commence to run unless the claim has accrued or the breach has occurred.

[53] It may be noted that paragraph (1) of this article also precludes arrangements which would "affect" the limitation period. Thus, the effect of an agreement by the parties not to invoke prescription or limitation as a defence in legal proceedings is also regulated by this article because its effect of not allowing the assertion of the expiration of the limitation period is practically the same as extending the period. Cf. art. 24.

II. *Arbitration*

5. In order to give effect to contract clauses, often used in commodity trading, which provide that any dispute must be submitted to arbitration within a short period (e.g. within six months), paragraph (3) of article 22 makes an exception to the general rule of paragraph (1) by stating that this Convention does not render such clauses invalid. And, to guard against the possible abuse of such a provision, paragraph (3) concludes with the proviso that such clause must be valid under the law applicable to the sales contract. For example, the applicable national law may give courts the power, on the grounds of hardship to a party, to extend the short period provided for in the contract for the submission of disputes to arbitration; this Convention does not interfere with the continued exercise of this power by a court.

GENERAL LIMIT OF THE LIMITATION PERIOD

Article 23

[*Over-all limitation for bringing legal proceedings*]

Notwithstanding the provisions of this Convention, a limitation period shall in any event expire not later than 10 years from the date on which it commenced to run under articles 9, 10, 11 and 12 of this Convention.

COMMENTARY

As already noted, this Convention contains provisions which permit the limitation period to be extended or modified in various situations (arts. 17 to 22). Thus, it is possible that the period will be extended, in some cases, for such a substantially prolonged period that the institution of the legal proceedings toward the end of that extended period would be no longer compatible with the purpose of this Convention of providing a definite limitation period. Moreover, as explained above (para. 1 of commentary on art. 17), under articles 13, 14, 15 and 16 of this Convention, when a creditor asserts his claim in legal proceedings, the limitation period "shall cease to run"; when a creditor asserts his claim in legal proceedings in one State before the expiration of the limitation period, in the absence of further provision,[54] the limitation period would never expire in that State or in other States. (See art. 30 and its accompanying commentary.) This article, therefore, sets forth an over-all cut-off point beyond which no legal proceedings may be instituted under any circumstance. This cut-off point is the expiration of 10 years from the date on which the limitation period commenced to run under articles 9, 10, 11 and 12.[55]

[54] E.g., see arts. 17 (1) and 18 (3).

[55] It may be noted that, under arts. 19 and 20, "a new limitation period" commences to run afresh under the circumstances specified in those articles. Such a new limitation period is technically not the same period which had commenced to run under art. 9, 10, 11 or 12. However, the over-all limitation provided under art. 23 is intended to apply to all forms of prolongation of the original limitation period, including the creation of a "new limitation period" under art. 19 or 20.

CONSEQUENCES OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 24

[*Who can invoke limitation*]

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

COMMENTARY

1. Article 24 is addressed to the following question: if none of the parties to the legal proceedings chooses to assert that the claim is barred by the expiration of the limitation period under this Convention, may the tribunal hearing the claim raise the issue on its own (*suo officio*)? This article answers the above question in the negative: expiration of the limitation period is to be considered by a tribunal "only if invoked by a party to such proceedings". It may be stated in support of this result that many of the facts relevant to determining when the limitation period runs, ceases to run or expires, will be known only to the parties and will not ordinarily be disclosed when evidence is presented pertaining to the substance of the claim (e.g., facts relevant to possible prolongation of the limitation period under arts. 20 and 22). Under some legal systems, it would be deemed a departure from the customary neutral role of judges to require or even authorize them on their own to raise the issue and search out the facts relating to expiration of the limitation period. Moreover, this question is not of great practical importance because a party entitled to interpose this defence to the claim will rarely fail to do so. In addition, article 24 does not bar a tribunal from drawing the attention of the parties to the time that elapsed between the accrual of the claim and the commencement of the legal proceeding and from inquiring whether one of the parties wishes that the issue of the expiration of the limitation period be taken into consideration.[56] There may also be instances where a debtor prefers not to invoke the expiration of the limitation period as a defence because of his special business relationship with the creditor, while wanting an adjudication on the merits of the creditor's claim. For these reasons, article 24 provides that a tribunal shall consider the issue of expiration of the limitation period "only if invoked by a party to such proceedings".

2. However, it was noted by several representatives at the Conference which adopted this Convention that limitation is a matter of public policy and should not be subjected to the parties' discretion; according to these representatives the tribunal should take the expiration of the limitation period into account *suo officio*. The tribunal can obtain the relevant facts from the parties without having to burden itself with the collection of evidence, and in any event the question of who has the burden of collecting evidence should not affect the issue of who may *invoke* limitation. Article 36 reflects this view by permitting a State to declare at the time of its ratification or accession to this Convention "that it shall not be compelled to apply the provisions of article 24 of this Convention".

[56] Whether this would be proper judicial practice is a matter for decision under the procedural laws of the forum.

Article 25

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

1. Subject to the provisions of paragraph (2) of this article and of article 24, no claim shall be recognized or enforced in any legal proceedings commenced after the expiration of the limitation period.

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

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

(*b*) If the claims could have been set-off at any time before the expiration of the limitation period.

COMMENTARY

I. *Effect of expiration of the period, paragraph (1)*

1. Paragraph (1) of article 25 emphasizes this Convention's basic aim of providing a limitation period within which the parties must commence legal proceedings for the exercise of their claims. (See para. 1 of commentary on art. 1.) Once the limitation period has expired, the claims can no longer be recognized or enforced in any legal proceedings.

2. It should be noted that paragraph (1) of this article is only concerned with the recognition or enforcement of claims "in any legal proceedings". This Convention does not attempt to resolve all possible questions that might be raised with respect to the effect of the expiration of the limitation period. For example, if collateral of the debtor remains in the possession of the creditor after the expiration of the period, questions may arise as to the right of the creditor to continue in possession of the collateral or to liquidate the collateral through sale. These issues may arise in a wide variety of factual settings and the results may vary due to differences in the security arrangements and in the national laws applicable to those arrangements. It may be expected, however, that the tribunals of Contracting States, when dealing with these problems, will give full effect to the basic policy of this Convention incorporated in article 25, which states that claims shall not be recognized or enforced in legal proceedings commenced after the expiration of the limitation period.[57]

II. *Claim used as a defence or for the purpose of set-off, paragraph (2)*

3. The rules of paragraph (2) can be illustrated by the following examples:

[57] See also art. 5 (*c*). As to the effect of voluntary performance of an obligation after the expiration of the limitation period, see art. 26 and accompanying commentary.

Example 25A: An international sales contract required A to deliver specified goods to B on 1 June of each year from 1975 through 1980. B claimed that the goods delivered in 1975 were defective. B did not pay for the goods delivered in 1980, and A instituted legal proceedings in 1981 to recover the price.

On these facts B may use his claim against A, based on defects of the goods delivered in 1975, as a set-off against A's claim. Such set-off is permitted under subparagraph (a) of article 25 (2), since both claims relate to the same contract;[58] the set-off by B is not barred even though the limitation period for B's claim expired in 1979, i.e. prior to his assertion of the claim in the legal proceedings and also prior to the accrual of the claim by A against B for the price of the goods delivered in 1980. It should also be noted that under article 25 (2), B may rely on this claim "for the purpose of set-off". Thus, if A's claim is for $1,000 and B's claim is for $2,000, B's claim may extinguish A's claim but it may not be used as a basis for affirmative recovery against A for $1,000.[59]

Example 25B: On 1 June 1975, A delivered goods to B based on a contract of international sale of goods; B claimed the goods were defective. On 1 June 1978, under a different contract, B delivered goods to A; A claimed these goods were defective and in 1980 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 1975—more than four years prior to the time when the claim was asserted in court as a set-off to A's claim. Under subparagraph (*b*) of article 25 (2), the claims "could have been set-off" before the date when the limitation period on B's claim expired—i.e. between 1 June 1978, the date on which A's claim accrued against B, and 1 June 1979.[60]

Article 26

[*Restitution of performance after the expiration of the period*]

Where the debtor performs his obligation after the expiration of the limitation period, he shall not on that ground be entitled in any way to claim restitution even if he did not know at the time when he performed his obligation that the limitation period had expired.

COMMENTARY

1. As has been noted above (para. 1 of commentary on art. 25), expiration of the limitation period precludes the recognition or enforcement of the claims *in legal proceedings*. If a party obtains satisfaction of his claim in a manner other than through legal proceedings, this consequence is not initially the concern of the Convention. However, due to the existence of differences in theoretical approaches as to the nature of prescription or limitation under various national laws,[61] differing consequences may be attributed to an act by the debtor whereby he voluntarily performed his obligation only learning later that the limitation period for the creditor's claim against him had already expired. Article 26 aims to provide a uniform result where the debtor voluntarily performed his obligation after the expiration of the limitation period. Article 26 is included in the Convention not because this Convention adopts any particular theory as to the character of the limitation but because providing an answer to the problem will assist in eliminating unnecessary disputes and divergencies in interpretation.

2. The basic aims of the limitation period, i.e. to prevent the institution of legal proceedings at such a late date that the evidence is unreliable and to provide a degree of certainty in legal relationships, are not violated where the debtor voluntarily performs his obligation after the expiration of the limitation period. Article 26 accordingly provides that the debtor cannot claim restitution for any performance of his obligation to the creditor which he has voluntarily performed "even if he did not know" at the time of such performance that the limitation period had expired. It should be noted that 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.[62]

Article 27

[*Interest*]

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

COMMENTARY

To avoid divergent interpretations involving the theoretical question whether an obligation to pay interest is "independent" from the obligation to pay the principal debt, article 27 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". (Cf. art. 20 (2).)

[58] For an example where claims relate "to several contracts concluded in the course of the same transaction", see foot-note 2 in the commentary to art. 16.

[59] As to legal proceedings permitting affirmative recovery by the defendant against the plaintiff (i.e. counterclaims), see art. 16 and its accompanying commentary.

[60] This example assumes that the two claims could have been set-off *under the applicable national* law. This Convention does not affect the applicable law which regulates the permissibility of set-offs; the Convention only governs the limitation period for asserting claims, including claims asserted as set-offs.

[61] E.g., whether the claim itself is extinguished (prescription), or whether it is only the assertion of the claim in legal proceedings that is barred because of the expiry of the limitation period while the claim itself still exists. It has already been pointed out that this Convention governs limitation of legal proceedings regardless of the theoretical approach to the problem under national laws. See para. 1 of commentary on art. 1 and para. 5 of commentary on art. 3.

[62] Art. 26 does not deal with the question whether the creditor is entitled to apply a debtor's payment to the satisfaction of a time-barred claim where the creditor has many claims against the debtor some of which are time-barred and the debtor neither expressly nor impliedly indicated that the payment is for satisfaction of a particular debt. Solution of this question is left to the applicable national law.

CALCULATION OF THE PERIOD

Article 28

[*Basic rule*]

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

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

COMMENTARY

1. One traditional formula for the calculation of the limitation period is to exclude the first day of the period and to include the last day. The concept of "inclusion" and "exclusion" of days, however, may be misunderstood by those who are not familiar with the application of this rule. For this reason, article 28 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 28 (1) covers the situation which may occur in a leap year. (Thus, when the initial day is 29 February of a leap year, and the later year is not a leap year, the date on which the limitation period expires is "the last day of the last month of the limitation period", i.e., 28 February of the later year.)

2. Paragraph (2) of article 28 is designed to overcome problems that may be encountered because of the existence of the international date line. If the date in State X is a day ahead of the date in State Y, the limitation period, which would commence on 1 May according to the date in State Y, will commence on 2 May in State X; therefore if the legal proceedings are instituted in State X, the last day for its commencement is 2 May in the relevant later year.

3. Since a number of different calendars are used in different States, for uniformity "year" is defined to mean a year according to the Gregorian calendar for the purpose of this Convention (art. 1 (3) (*h*)). Under article 28, therefore, years shall always be calculated according to the Gregorian calendar, even if the place where the legal proceedings are instituted uses a different calendar.

Article 29

[*Effect of holiday*]

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes legal proceedings or asserts a claim as envisaged in article 13, 14 or 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

COMMENTARY

1. This article deals with the problem that arises when the limitation period would end on a day when the courts and other tribunals are closed so that the creditor cannot take the steps prescribed in article 13, 14 or 15 to commence legal proceedings. This article provides for such cases by extending the limitation period "until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction".

2. It is recognized that the curtailment of the period that might result from the fact that the last day of the limitation period is a holiday is minor in relation to the total limitation period calculated in terms of years. However in many legal systems, such an extension is provided and local attorneys may rely on it. In addition, attorneys in one country might not know the legal holidays or "other *dies non juridicus*" in another country. The limited extension provided for in this article will avoid such difficulties.

3. It may be noted that the extension granted under this article is operative only in the jurisdiction where timely institution of legal proceedings was precluded due to such "official holiday or other *dies non juridicus*" (cf. art. 30).

INTERNATIONAL EFFECT

Article 30

[*Acts or circumstances to be given international effect*]

The acts and circumstances referred to in articles 13 through 19 which have taken place in one Contracting State shall have effect for the purposes of this Convention in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

COMMENTARY

1. Article 30 refers to the effect which Contracting States must give to "acts or circumstances" referred to in articles 13 through 19 that had taken place in other Contracting States. Those articles deal with the point which various types of legal proceedings must reach in order to extend the limitation period or to stop it from running. The purpose of article 30 is to ensure that the acts and circumstances referred to in articles 13 through 19, when occurring in one Contracting State, will be given the same effect of stopping or extending the limitation period in any other Contracting State. The problems to which this article is addressed may be illustrated by the following examples:

Example 30A: Buyer's claim against Seller arising from an international sale of goods accrued in 1975. In 1978 Buyer instituted a legal proceeding against Seller in Contracting State X. In 1981 the proceeding in State X led to a decision on the merits of the claim in favour of Buyer and in 1982 Buyer sought its execution in Contracting State Y. Enforcement of the decision is refused by State Y. Since Buyer's claim accrued more than four

years prior to 1981, Buyer's claim would be barred if he wished to institute a new legal proceeding in State Y *unless* the limitation period is regarded to have "ceased to run" also in State Y by virtue of the institution in 1978 of the legal proceeding in State X. Under article 30, stopping of the running of the period by the institution of a legal proceeding in State X has the same effect in State Y and Buyer may institute a new legal proceeding in State Y, subject to the over-all limitation under article 23 for bringing legal proceedings.

Example 30B: Buyer's claim against Seller arising from an international sale of goods accrued in 1975. In 1978 Buyer instituted a legal proceeding against Seller in Contracting State X. In 1981 the proceeding in State X led to a decision on the merits of the claim in favour of Buyer. Seller's assets are in Contracting State Y. State Y would recognize and enforce the decision of State X but the law of State Y does not preclude Buyer from asserting his original claim afresh in legal proceedings in State Y, provided that the limitation period with regard to the original claim had not expired. Buyer, finding it easier to sue again on the original claim than to involve himself in a complicated process of proving the validity of the first decision for its enforcement in State Y, decides to institute a new legal proceeding in State Y. Under article 30, stopping of the running of the limitation period by the institution of the legal proceeding in State X has the same effect in State Y and Buyer may institute a new legal proceeding in State Y, subject to the over-all limitation under article 23 for bringing legal proceedings.[63]

Example 30C: Buyer's claim against Seller arising from an international sale of goods accrued in 1975. In 1978 Buyer instituted a legal proceeding against Seller in Contracting State X. In 1980, while the proceeding in State X was still pending, Buyer instituted a legal proceeding in Contracting State Y based on the same claim. Since Buyer's claim arose more than four years prior to the institution of the proceeding in State Y, that proceeding would be barred unless the limitation period "ceased to run" when the legal proceeding was commenced in State X. Under article 30, Buyer's legal proceeding in State Y is not time-barred because State Y must recognize the cessation of the running of the limitation period that had taken place in State X by virtue of the institution of the legal proceeding in State X within the limitation period.[64]

2. Article 30 also refers to article 17, which deals with the effect on the running of the period of a legal proceeding that ends without a decision on the merits of the claim. To afford the creditor an opportunity to institute a further legal proceeding, in such cases the creditor is assured of a period of one year from the date on which the proceedings ended. Thus, in example 30C, if the proceeding in State X ended on 1 February 1980 without a decision on the merits of the claim, the limitation period "shall be deemed to have continued to run" but the period is extended to 1 February 1981.[65] Under article 30, if State X is a Contracting State, these events in State X must be given "international" effect in Contracting State Y and a legal proceeding may be brought in State Y until 1 February 1981.[66]

3. Article 30 also prescribes the "international" effect of the recommencement of the limitation period which, under article 19, may occur in some jurisdictions as a result of acts such as the service of a demand notice. Attention is also drawn to the rules of article 18 concerning recourse actions and the effect of the institution of legal proceedings against a joint debtor. Under article 30, the effect given to the circumstances mentioned in articles 18 and 19 must also be given by other Contracting States.

4. The "international" effect of acts in one Contracting State (State X) in a second Contracting State (State Y) applies only with respect to acts covered by the articles listed in article 30. It may be noted that under this Convention the effectiveness of certain other acts does not depend on where they take place: e.g., acknowledgement of the debt (art. 20) and a declaration or agreement modifying the limitation period (art. 22) have the effect prescribed in those articles without regard to the place where the acknowledgement, declaration or agreement takes place.

5. An important requirement for the applicability of article 30 is that the creditor must take "all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible". While in most instances commencement of a legal proceeding will require notification to the defendant-debtor, under some procedural rules this may not be necessary in certain cases. The above requirement was added to ensure that all reasonable steps were taken to apprise the debtor of the fact that due to certain acts of circumstances in one Contracting State, the limitation period has also been stopped or extended in all other Contracting States.

Part II. Implementation

Article 31

[Federal State; non-unitary State]

1. If a Contracting State has two or more territorial units in which, according to its constitution,

[63] A creditor who received an unfavourable decision on the merits of his claim may also consider having his claim re-tried in another State provided that he is not precluded from asserting his original claim afresh in legal proceedings in that State. Legal rules such as *res judicata*, "merger" of the claim in the judgement, or the like, may prevent the assertion of the original claim after a decision on the merits of the claim in another State. This is a question to be answered according to the procedural law of the forum and is not covered by this Convention.

[64] Whether a legal proceeding may be instituted on a claim while another legal proceeding is pending in another State concerning the same claim will be resolved by the procedural law of the forum and is not covered by this Convention.

[65] The close relationship between the provisions of this Convention as to the circumstances when the limitation period "ceases to run" on the institution of legal proceedings (i.e., arts. 13, 14, 15 and 16) and the rules of art. 17 concerning the effect of proceedings not resulting in a decision on the merits of the claim is discussed in the commentary on art. 17.

[66] Art. 30 does not bar a Contracting State from giving comparable effect to acts occurring in non-Contracting States; but this Convention does not require that such "international" effect be given to circumstances that took place in non-Contracting States.

different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

3. If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

COMMENTARY

1. Where a Contracting State to this Convention is a federal or non-unitary State, the federal authority may not have the power to implement certain provisions of this Convention in its constituent states or provinces because those provisions may relate to matters that are within the legislative jurisdiction of such constituent states or provinces. On the other hand, adoption by a State of this Convention obligates that State to take the necessary implementing steps that would give the provisions of part 1 of this Convention (subject to the reservations permitted under part III) the force of law within that State. Yet, a federal or non-unitary State may not be able to so implement this Convention unless each of its constituent states or provinces passes appropriate legislation. Article 31 is designed to enable a federal or non-unitary State to adopt this Convention even if that State could not absolutely ensure that *all* of its constituent states or provinces will take the legislative steps necessary to implement the provisions of this Convention. Thus, under article 31 (1), a federal or non-unitary State may, "at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them". Under article 31 (2), a State making such a declaration must state "expressly the territorial units to which the Convention applies" at the time of the notification of the declaration to the Secretary-General of the United Nations. The important qualification under article 31 (1) is that the different systems of law applicable in the various territorial units must be *based on the constitution* of the federal or non-unitary State making such a declaration.

2. It may be noted that article 31 (1) further provides that the declaration thereunder may be amended *at any time* by submitting another declaration. Such an amendment should technically be regarded as a combination of a new declaration and a withdrawal of the original declaration; article 40 governs the point in time when such an amended declaration will take effect.

3. Paragraph (3) of article 31 reflects the *basic* obligation of a State adopting this Convention to implement the provisions of the Convention within the whole territory of that State: in the absence of any declaration permitted under this article "at the time of signature, ratification or accession" by a federal or non-unitary State, this Convention shall have effect "within *all* territorial units of that State".

Article 32

[*Determination of the proper law when federal or a non-unitary State is involved*]

Where in this Convention reference is made to the law of a State in which different systems of law apply such reference shall be construed to mean the law of the particular legal system concerned.

COMMENTARY

In this Convention, several references have been made to the law of a State. For example, articles 12 and 22 (3) refer to "the law *applicable* to the contract"; article 14 (1) refers to "the law *applicable* to [arbitral] proceedings"; and article 15 refers to "the law *governing* the proceedings". In such cases, the determination as to the proper law to govern each situation will be made in accordance with the private international law rules of the forum. Article 32 is intended to clarify that the same approach should be pursued in arriving at the proper law where different systems of law exist in the State whose law is chosen as applicable by the conflict-of-laws rules of the forum.[67]

Article 33

[*Non-applicability to prior contracts*]

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

COMMENTARY

1. This article serves to clarify the application of the principle prescribed in article 3 (1) by providing a definite rule as to the contracts to which this Convention applies: a Contracting State is bound to apply the provisions of the Convention to contracts that are concluded on or *after* the date of *the entry into force* of this Convention in the State concerned.

2. The date of the entry into force of this Convention is dealt with in article 44 of this Convention (see also art. 3 (3)).

Part III. Declarations and reservations

Article 34

[*Declarations limiting the application of the Convention*]

Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States

[67] Cf. art. 13, where the reference is to "the law of the court".

shall not be governed by this Convention, because they apply to the matters governed by this Convention the same or closely related legal rules.

COMMENTARY

1. Some States, in the absence of this Convention, apply the same or closely related rules to the subject-matter governed by this Convention, *i.e.,* limitation (prescription) of claims based on a contract of international sale of goods. Under article 34 these States are permitted, if they so choose, to apply their common or closely related rules to claims arising from transaction involving buyers and sellers in such States, and yet adhere to the Convention.

2. This article enables two or more Contracting States to make a joint declaration, *at any time,* that contracts of sale entered into by a seller having a place of business in one of these States and a buyer having a place of business in another of these States, "*shall not be governed by this Convention*". The over-all effect is that such contracts are *excluded from the scope* of application of the Convention by virtue of such a declaration. It should be noted that a declaration under article 34 may be made well after the time these States have ratified this Convention. (See also art. 40 and accompanying commentary, para. 2.)[68]

Article 35

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

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

COMMENTARY

As has already been noted, this Convention governs the limitation period for bringing an "action for annulment" in those legal systems which require that the nullity of a contract be first established by way of a legal proceeding instituted for that purpose.[69] However, in the States which require an initial judicial determination of the contract's invalidity, the limitation period for bringing such actions may be different from the normal period for the exercise of claims based on the contract. This article permits a State to declare that it will not apply the provisions of this Convention to actions for annulment of the contract. Consequently, the State which has made a reservation under this article may continue to apply its particular local rules (including its rules of private international law) to actions for annulment of contracts. It may be noted that reservations under this article may also be made by States which adhere to legal systems where termination or invalidity of a contract need not first be established by way of a legal proceeding brought for this purpose.

Article 36

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

Any State may declare, at the time of the deposit of its instrument of ratification or accession, that it shall not be compelled to apply the provisions of article 24 of this Convention.

COMMENTARY

This article permits a Contracting State to make a reservation with regard to the application of the rule of article 24 which provides that a tribunal shall take into consideration the expiration of the limitation period only if a party invokes it. (The need for this reservation has already been noted in para. 2 of commentary on art. 24.)

Article 37

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

This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention.

COMMENTARY

1. This article provides that this Convention shall not prevail over present or future conventions which contain provisions concerning the limitation or prescription of claims based on the international sale of goods. In case of conflict, therefore, the rules of those other conventions shall be applied to the limitation or prescription of claims, rather than the rules of this Convention.

2. Such situations could occur in regard to conventions that deal with the international sale of a particular commodity, or a special group of commodities. In addition, it has been suggested that article 49 of the 1964 ULIS may conflict with some of the provisions of part I of this Convention. A conflicting provision may also be contained in conventions concluded on the regional level, such as the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance, 1968. Article 37 permits States parties to such a convention to apply its conflicting provision only when both the seller and the buyer have their places of business in States which have ratified that convention.

3. It may be noted that the rule in this article operates automatically, without requiring any advance declaration by the States who are parties to the convention containing a conflicting provision as to the limitation or prescription of claims (cf. art. 34).

[68] As to the situations where the same limitation rules are applied among several States because these States are parties to conventions containing limitation provisions in respect of international sales, see art. 37.

[69] See foot-note 4 in commentary on art. 1 and its accompanying text.

Article 38

[*Reservations with respect to the definition of a contract of international sale*]

1. A Contracting State which is a party to an existing convention relating to the international sale of goods may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply this Convention exclusively to contracts of international sale of goods as defined in such existing convention.

2. Such declaration shall cease to be effective on the first day of the month following the expiration of 12 months after a new convention on the international sale of goods, concluded under the auspices of the United Nations, shall have entered into force.

COMMENTARY

1. Article 2 of this Convention deals with the degree of internationality which makes a contract for sale of goods an "international" one for the purposes of this Convention. Article 3 (1) sets the obligation of Contracting States to apply the provisions of this Convention to contracts of international sale of goods. Article 38 is designed to facilitate adoption of this Convention by States which are already parties to an existing convention on the international sale of goods (such as ULIS) which contains a definition of "international" sale different from article 2 of this Convention. Article 38 permits such a State to exclude the application of article 2 with regard to the definition of "international" sale by making a declaration that it will apply this Convention only to international sales of goods as defined in such an existing convention. The net effect of such a declaration is to obligate the declaring State to apply the provisions of this Convention *only* to those contracts which fall within *the definition* of a contract of international sale of goods *under the other existing convention* when a legal proceeding is commenced within the jurisdiction of that State.[70]

2. Article 38 (2), however, makes it clear that reservations permitted under article 38 (1) is a temporary expedient; it also reflects the general expectations of the Conference which adopted this Convention that the definition of "international" sale of goods be ultimately brought into line with the definition in a new convention on the international sale of goods the draft of which is presently under study by the United Nations Commission on International Trade Law.

Article 39

[*No other reservations permitted*]

No reservation other than those made in accordance with articles 34, 35, 36, and 38 shall be permitted.

COMMENTARY

This article provides a basis for uniformity in application of the Convention by prohibiting Contracting States from making any reservation other than those specifically permitted under this Convention.[71]

Article 40

[*When declarations and reservations take effect; withdrawal*]

1. Declarations made under this Convention shall be addressed to the Secretary-General of the United Nations and shall take effect simultaneously with the entry of this Convention into force in respect of the State concerned, except declarations made thereafter. The latter declarations shall take effect on the first day of the month following the expiration of six months after the date of their receipt by the Secretary-General of the United Nations.

2. Any State which has made a declaration under this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the Secretary-General of the United Nations. In the case of a declaration made under article 34 of this Convention, such withdrawal shall also render inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

COMMENTARY

1. Paragraph (1) of this article provides the manner in which declarations under articles 31, 34, 35, 36 and 38 must be made and specifies the point in time when such declarations take effect. Article 40 (2) permits withdrawal of such declarations and provides both the manner in which such withdrawal may be made and the point in time when it becomes effective.

2. It may be noted that, under the last sentence of article 40 (2), a joint declaration made under article 34 becomes inoperative when one of the parties to that joint declaration withdraws therefrom. Even where a joint declaration has been made by *more than two* States, a notification of withdrawal to the Secretary-General of the United Nations by one of those States will render the joint declaration inoperative in respect of the remaining States on the first day of the month following the expiration of six months after that notification. Thus, if the other remaining States still wish to maintain the joint declaration under article 34 among themselves, they will have to make a new declaration in accordance with article 40 (1).

[70] See e.g., ULIS art. 1. It is expected, however, that the difference in the applicable scope, because of a reservation under art. 38, will not be so great as might first appear from the comparison of art. 1 of ULIS and art. 2 of this Convention. Cf. art. 2 (*b*) (*c*).

[71] The 1969 Vienna Convention on the Law of Treaties provides, *inter alia*, that a State may make a reservation, when ratifying or acceding to a Convention, unless the treaty provides that only specified reservations, which do not include the reservation in question, may be made (art. 19).

Part IV. Final clauses

Article 41

This Convention shall be open until 31 December 1975 for signature by all States at the Headquarters of the United Nations.

Article 42

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

Article 43

This Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 44

1. This Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the tenth instrument of ratification or accession, this Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification or accession.

Article 45

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

2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after receipt of the notification by the Secretary-General of the United Nations.

Article 46

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