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COMMENTS ON ARTICLES 10 TO 12 OF  
THE PRELIMINARY DRAFT

Submitted by the United States

I. When are judicial proceedings instituted: article 10 (1) (i)

1. The principle underlying article 10 is that this question must be resolved by reference to the law of the place where the proceedings are brought. However, the textual elaboration on this principle would seem to create problems. In the first place, under article 10, only an act performed by the creditor can be regarded as institution of legal proceedings. However, in many countries proceedings are instituted when the process server, rather than the creditor, serves the summons. This problem can be resolved by adding the words "or someone acting on his behalf or at his request" after "creditor".
2. A more important objection is that only judicial proceedings brought by the creditor that seek "satisfaction of his right" interrupt the period. The quoted words may be ambiguous. Do they embrace an action for declaratory relief, for a prohibitory injunction, for an accounting, or for a substitute remedy such as damages rather than for specific relief? The legislative intent, which presumably favours an affirmative answer, is not clearly expressed.
3. These problems could be avoided by substitution of the simpler rule that the limitation period in regard to a right is interrupted upon the assertion of a claim in legal proceedings seeking relief premised on that right and that whether and when such proceedings have been instituted must be determined by reference to the law of the place where they are brought.

II. The relation back of amendments: article 10 (1) (ii)

4. The formulation proposed would also cover the relation back problem arising in regard to rights asserted for the first time by amendment of the document that effectuated the institution of proceedings. The present text does not seem to address itself to this problem, which, to judge by the frequency of the cases dealing with it, is of no negligible importance in the United States. The present text of article 10 (1) (ii), which deals with invoking rights in proceedings commenced for the purpose of vindicating other rights, would appear to make the time of actual assertion of the right the decisive one. Applied to a case of amendment, it would therefore mark the time of interposition of the amendment, rather than that of interposition of the original document, as determinative of the commencement of the interruption. Consequently, if the amendment were interposed after the statute had run, it would come too late. Whatever else may

be decided in regard to article 10, it would appear that the relation back problem should be considered and resolved by the draft. The United States recommends in this connexion a provision similar to rule 15 (c) of the Federal Rules of Civil Procedure, which reads as follows:

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading..."

III. The relation back of counterclaims: article 10 (2)

5. A litigant generally cannot complain of being visited with stale claims if he himself, by asserting a claim arising from the same event or transaction, disturbed the tranquillity sought to be safeguarded by the statute of limitations. This basic notion is embraced by many legal systems which permit the assertion of a counterclaim after the statute has run. Article 10 (2) limits the permissibility of asserting a counterclaim after the statute has run to counterclaims arising from the same contract from which the plaintiff's claim arises. Since the draft deals only with contract claims, this limitation might appear unobjectionable. However, the plaintiff's claim may be based on a contract different from that on which the defendant bases his counterclaim. For example, the plaintiff may sue on the basis of a distributorship agreement, while the defendant counterclaims on a sale contract. In such case, if the claims arise from the same transaction - for example, because they were negotiated at the same time and as part of a package deal - it would seem appropriate to permit the defendant to interpose the counterclaim even though the statute has run and his claim does not arise from the same contract. A broader formulation permitting assertion of all counterclaims affected by the law and arising from the same transaction would therefore seem preferable.

IV. The commencement of arbitration proceedings: article 11

6. Article 11 of the draft gives its own definition of when arbitration proceedings are commenced so as to interrupt the limitation period. The Secretariat's commentary on the draft gives as the reason for this approach that the determination of the commencement of arbitration proceedings cannot be left to national law, as the draft does in the case of judicial proceedings, because the

manner for instituting such proceedings is often left to the agreement of the parties. The explanation seems unsatisfactory, since in the cases in which the agreement of the parties determines the manner for instituting such proceedings, the time of commencement of the arbitration proceedings could be determined by reference to the contract. In any event, the language of article 11 is unnecessarily prolix.

7. The United States is inclined to favour a rule providing that the submission of a claim to arbitration in accordance with the arbitration agreement or the applicable law interrupts the limitation period in regard to the right on which the claim is based, and then to leave it to the body adjudicating the controversy to determine when the submission actually took place. Furthermore, it might well be asked if even this simpler provision would be necessary if the general rule defining the commencement of "legal" proceedings (a term that encompasses arbitration proceedings) were made sufficiently comprehensive.

8. A more general provision, either in article 10 or in article 11, would also avoid the possible objection to both paragraph (1) and paragraph (2) of article 11 that they presuppose that arbitration proceedings are set in motion by a request to the contract partner that the dispute be submitted to arbitration. In actual fact, such a request may never be issued when arbitration proceedings can be commenced in some other manner - for example, by submitting a claim for relief to the arbitrators designated by the agreement. It would further avoid the difficulty that arises from the assumption of paragraph (2) that the request to which it refers will always be delivered to the other party rather than, for example, to the arbitrators or to a body that will appoint the arbitrators.

V. The special rule for other "legal" proceedings: article 12

9. Article 1 (4) (b) defines "legal proceedings" as including "judicial, administrative and arbitration proceedings." Articles 10 and 11 deal with judicial and arbitration proceedings respectively, while article 12 deals with legal proceedings. However, no particular significance should be attached to the shift in terminology in article 12, since there appears to be no intention to deal only with administrative proceedings. On the contrary, the proceedings mentioned are in most countries typically judicial proceedings. The usage of the different term in article 12 merely stresses the desirability of more deliberate use of language.

10. It is not clear why the special rule of article 12 relating to bankruptcy, dissolution, assignment for the benefit of creditors and similar circumstances was thought necessary. The explanation may be that article 10 deals only with proceedings instituted by the creditor to obtain satisfaction of this right, and that, since the proceedings mentioned in article 12 may or may not fall within this category, an additional provision became necessary.

11. The United States would prefer a more flexible rule in article 10, which would also encompass the assertion of a claim in the proceedings mentioned in article 12, and believes that the rule suggested in the discussion of article 10 would serve this purpose.

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