

UNIDROIT 1999
Study L – Doc. 58
(English only)

UNIDROIT

International Institute for the Unification of Private Law

WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Chapter [...]

LIMITATION OF ACTIONS BY PRESCRIPTION

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Rome, January 1999

Position Paper

Limitation of Actions by Prescription

Preliminary Remarks

1. Limitation of actions by extinctive prescription of obligations after a certain time has found much interest on the international as well as on the national level. The XIVth Congress of the International Academy of Comparative Law in 1994 dealt with extinctive prescription in 17 national reports, the German Law Reform Commission in 1992 presented its final report on the reform of the law of obligations, a considerable part of which was devoted to limitation of actions. The English law commission presented a consultation paper "Limitation of Actions" in 1998,¹ and the literature on the subject matter, reaching from voluminous books² to thousands of monographs on the respective domestic legal systems can neither be analysed nor reported here. Of particular interest for the deliberations of the UNIDROIT working group are, of course, the provisions of the UN-Convention on the Limitation Period in the International Sale of Goods of 1974, amended in 1980. But despite the great diversity of proposals and the abundant variety of arguments for this or that solution, some basic policies are always cited and evaluated: On the one hand, extinctive prescription means a kind of expropriation of someone who has a right, a claim or an action, which may be extinguished or limited by the effects of a rule of prescription. On the other hand, there is not only the overriding commandment that peace under the law must be restored by finally cutting off the threat of litigation, but also the more practical consideration that by passing of time matters become obfuscated and the outcome of any litigation hazardous, because witnesses might have died, memories faded, documents destroyed etc. This, i.e. hazardous results of litigations, may in turn endanger the reputation and dignity of the judicial system in its entirety.

(b) Difficult as it seems to be to balance these conflicting interests of protecting the owner of a claim on the one side and the obligor of a dormant claim on the other side, which might "have more cruelty than justice in" (them)³ and seems to be impossible in abstracto, there is at least one factor that must be put on the scale and weighed heavily: An obligee/creditor must have had a reasonable chance to pursue his claim, meaning that extinctive prescription must not occur before a claim became due, and that the obligee/creditor, also must have known or at least have a chance to know about his claim and the respective obligor.

(c) Even then, it would be impossible to develop a system of rules and provisions for all kind of rights, claims and actions without resorting to dice throwing or - unconsciously - resorting to one's own legal system as a model. Our task, however, is much more limited and more concrete and therefore more manageable: We have to draft rules on limitations of claims and actions arising out of international commercial contracts either governed directly by the UNIDROIT-Principles of International Commercial Contracts or at least influenced by these principles by way of interpretation and gap-filling. Therefore, we not only can ignore claims rising out of family relations, successions, but also - though not entirely - tort claims. This

¹ Limitation of Actions, consultation paper no. 151, London, HMSO, 1998 (456 et seq.), main author being Prof *Burrows*.

² See *Spiro*, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalefristen, 2 Bände, 1975.

³ R.B.Policies at *Lloyd's v. Butler* [1950] 1 KB 76 (R2).

narrows the field considerably, and there seems to be more common ground on which to construct our edifice (see *infra* no. 3).

2. Claims on actions cannot only be barred by passing of a certain period of time laid down in a respective provision on extinctive prescription, but also by general equitable principles such as estoppel, laches, “Verwirkung”, “abus de droit” etc. These devices and the respective concepts cannot be dealt with here, because it would be preposterous to assume that general rules could be drafted which would override the respective rules of domestic laws, founded on conscience, morals and public policies. These are extraordinary defences and remedies for particular facts and cases, and they defy abstract unification.

3. As mentioned *supra* sub 1. (c), our task is limited to drafting rules for limitation of actions arising under the UNIDROIT-Principles, but at least two more general policies have to be considered and decided here beforehand, too:

(a) The working group has to decide whether it will strive for a uniform period of a limitation for all rights, claims, actions and remedies arising under the UNIDROIT-Principles,⁴ or whether it prefers to elaborate different limitation periods for different obligations and actions. This is a topic not only of the general law of prescription but in a restricted field such as ours, too. While advocates of a variety of limitation periods, each closely adjusted to the respective obligations and actions, seems to be very attractive, modern law reform proposals show a tendency to restrict the law of extinctive prescription to a few periods (and very few dates of commencement of these periods).⁵ It is easy to understand, why, and the German example shows the pitfalls of a differentiated system of limitation periods: A variety of limitation periods is an invitation for lawyers and judges to distort and bend the substantive law in order to “reach” a suitable period of limitation, so that - e.g. - actions for breach of warranties were framed as tort claims in order to avoid a short period of limitation for warranties, while on the other side the relation between a tortfeasor and his victim may be construed as a third party beneficiary contract in order to help the victim with the general thirty-year-period of limitation for contractual claims. Therefore, I am going to propose basically *one* period of time and shall try to adjust this basic rule to particular needs by varying the date of *commencement*.

b) The working group has also to decide at the very beginning, whether it will invent totally new periods, motivated, of course, by convictions of justice and fairness, or whether we shall use an existing body of rules for international contracts, in particular the UN-Limitation Convention, as a model and guideline. Although this convention, ratified so far by 24 states,⁶ should not be regarded containing binding commandments for our work, it seems to be advisable not to ignore it altogether. First of all, the convention was based on comparative law research and tried to find a middle road between more or less extremely diverging domestic

⁴ The sweeping inclusion of rights, claims, actions and remedies consciously ignores technical meanings attached in this or that legal system with this or that term: Whether an obligation litigated becomes an action or a secondary obligation stemming from the breach of a primary obligation is regarded as a “remedy” can be left open at this stage and referred to a drafting committee later on.

⁵ See *Andrews*, Reform of Limitation of Actions: The Quest for Sound Policy, C.L.J. 1998, 589 et seq.; *Peters/Zimmermann*, Verjährungsfristen und der Einfluß von Fristen auf Schuldverhältnisse; Möglichkeiten der Vereinheitlichung von Verjährungsfristen, in: Bundesminister der Justiz (ed.), Gutachten und Vorschläge zur Überarbeitung des Schuldrechts. vol. 1, 1981, S. 101 ff. and the report of the German Law Reform Commission edited by »Bundesminister der Justiz«. Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts, 1992, pp . . . sq.

⁶ I have not distinguished between ratification of the 1974 and the 1980 version.

rules. Secondly, it seems to me to be unwise to create a body of rules on limitation periods which would deviate considerably from rules which govern international sales contracts, thereby forcing the parties either to abrogate the convention rules⁷ in favour of the UNIDROIT-Principles or ignore these principles in case of international sales transactions. Since the provisions of the Limitation Convention, in general, seem to be fairly balanced and well drafted, I suppose that the chances of UNIDROIT-Principles on limitation periods would be improved considerably, if they would not deviate too far from the convention rules. It is for these reasons that I have based the following proposals partially on the Limitation Convention.

4. UNIDROIT-Principles on limitation of actions have to face the problem of implementation. As was discussed many times, it would be desirable if the UNIDROIT-Principles could be characterized as equivalent to state law, so that they could be chosen by the parties under conflict of law rules based on party autonomy as a state law. Since this - desirable - result cannot yet be regarded as prevailing, the UNIDROIT-Principles can become binding for the parties only by an opting-in allowed under the domestic law applicable by way of conflict of law rules. In regard to limitation rules, this could pose problems, because domestic legal systems might qualify their provisions on limitation of actions either completely or partially as mandatory law, which cannot be abrogated or altered by the parties, Art. 1.4 UNIDROIT-Principles.⁸ In addition, arbitration tribunals might be free to disregard domestic provisions qualified as mandatory. It remains to be seen whether domestic courts may somewhat soften their opposition to modifying or abrogating domestic provisions on prescription in cases of international contracts, where the parties have chosen an “international” set of rules: It could well be argued that the strictness of respective domestic provisions could be upheld only in regard to domestic transactions, but not to international transactions, where the party could have chosen a different legal system altogether anyway, thereby circumventing domestic rules otherwise applicable, unless they are regarded as *ordre public* or “*droits d’application immediate*” under Art. 7 of the Rome Convention.⁹

5. Sphere of Application

The working group must decide whether the set of provisions on limitation of actions will be part of the UNIDROIT-Principles in general or a separate body of rules. Only in the latter case should there be a preamble like the one preceding the UNIDROIT-Principles and stating that these provisions on prescription “shall be applied, when the parties have agreed that their contract be governed by them”.

Regardless, however, whether the provisions of this draft will be made part of the existing UNIDROIT-Principles or presented as a separate body of rules, the working group has to consider whether certain topics should be excluded from the sphere of application in order to avoid the insoluble problem of concurring actions in tort and contract. Respective proposals can be found in modern drafts for statutes of limitation. E.g., the Limitation Convention excludes from its application claims based upon death or personal injury or nuclear damage caused by the goods sold, Art. 5 (a) and (b). Likewise, the proposal of the German Law Reform Commission had proposed a special provision for claims arising out of injury to life,

⁷ See Art. 3 (2) Limitation Convention.

⁸ This reporter was already confronted with an objection against the project of drafting UNIDROIT limitation principles with the argument that the respective rules could never be implemented merely by agreement of the parties.

⁹ EEC-Convention on the law applicable on contractual obligations of 19 June, 1980.

limb and freedom.¹⁰ A similar provision can be found in the draft of an Estonian Civil Code. I would propose, therefore, that the working group considers a comparable provision excluding claims based upon death, personal injury to any person and injury to property other than property being the object of the respective contract from the sphere of its application.¹¹

The working group also should consider, whether it is necessary to exempt consumer transactions from the sphere of application, which seems to be unnecessary taking account of the ambit of the principles, i.e. to regulate international *commercial* transactions.

6. Modus operandi

The rather technical distinction between full extinction after a period of limitation has run out, and the lesser effect of creating a defence to the obligor which he must raise, unless it will be disregarded, must also be considered by the working group.

7. Order of Topics

The following topics have - in my opinion¹² - to be addressed by the working group:

- a) Length of the period of time (or periods of time) in general.
- b) Commencement of the limitation period(s).
- c) Cessations and calculation of the limitation period.
- d) Party autonomy (can the parties modify the respective UNIDROIT-rules?).
- e) Modus operandi.
- f) (Perhaps) the effect of extinctive prescription on collateral securities.

I. Duration and Commencement of Limitation Periods

1. As stated in the preliminary remarks and is confirmed by recent reform projects and respective scholarly contributions, the question of duration is intimately interwoven with the question of commencement of the respective limitation period: While a clear-cut period of x years beginning with the accrual of the action seems to be most attractive, if a period of time

¹⁰ While § 200 of the draft states that generally the period of limitation for contractual claims should be applicable to tort claims based on the same facts, too. § 201 regulates an exception for injury to life, limb and freedom, which should be barred regardless of the respective course of action after 3 years of discoverability or - at the latest - after 30 years from the accrual of action.

¹¹ The exclusion of claims based upon injury to property other than property being the object of the contract is intended to exempt the core of court liability from the application of the UNIDROIT limitation rules.

¹² Not only in *my* opinion, see *Hondius* (ed.), *Extinctive Prescription, On the Limitation of Actions*, XIVth Congress of Comparative Law, Kluwer 1995, p. 8 (citing the English reporter): "... the whole of the (...) law of limitation of actions may be encapsulated in the answers to five questions: When does time start to run? Can the running of time be suspended? How long is the limitation period? What happens when time expires? Can the limitation period be overridden?"

could be found that is fair to both parties, there is always the problem of claims the accrual of which could not be discovered before the limitation period has run out. In commercial transactions, the most prominent example of these cases are the “latent damages” situations, which are rather frequent in construction contracts where defects become discoverable only after many years. It is, therefore, not surprising that the reform proposals try to take account of these cases to do justice to the “victims” of latent damages, who would never had a chance to pursue their claims if they were cut off after a short period of limitation which began at the undiscoverable accrual of the respective action.

To cope with this problem, there are two basic solutions imaginable:

- a) A legislator or a drafter of rules can provide two limitation periods, namely
 - aa) a rather short limitation period beginning at the time the accrual of an action became known or was discoverable for the claimant, and
 - bb) a rather lengthy limitation period which commences upon accrual regardless of knowledge and discoverability.

This two-tier model is used or proposed quite often in the field of tort actions for bodily injury and harm to property, e.g. in the EC directive on products liability (the respective limitation periods being three years on discoverability of the injury and the tortfeasor, and ten years regardless of discoverability from the time when the product was brought into the stream of commerce).

b) Another solution would be to stick with *one* general limitation period, but provide certain exceptions for particular cases of latent damages such as defective construction.

c) In weighing the options a) and b), regard is also to be had to the question whether the parties are free to deviate from the provisions of the UNIDROIT-Principles. If this is the case - and it must be the case, since the application of the principles itself is based on party autonomy -, then the latent damages cases could be left in commercial transactions to respective agreements of the parties. Commercial parties entering into construction contracts, e.g., are well aware of the risks of latent defects and can modify the respective limitation periods. Likewise, clients of international consulting and law firms, of engineering enterprises and other professionals offering and selling their intellectual products may and will negotiate for limitation periods adjusted to the object of the contract and the particular risks of malperformance.

d) Nevertheless, there is one group of situations which deserves special attention. Fraud committed before or at the time of the conclusion of the contract or in the course of its performance must be treated separately because the person committing a fraud deserves a lesser protection by a limitation period than a “normal” obligor. In regard to the troubling cases of latent defects in buildings and professional services, which are very often the cause of special rules on limitation periods or respective proposals, one could also help with the exception proposed here for cases of fraud by stating an additional rule like: “The concealment of defects or non-conformity of the performance rendered by an obligor who knew or should have known of latent defects of his performance, is regarded as fraud”.

2. Taking into account the points considered sub II.1., I would propose first of all a general limitation period of four years. This period I have chosen in order to be in conformity with the

UN-limitation period and to avoid discrepancies in contracts falling under the CISG and the limitation period of the Limitation Convention on the one hand, and other international commercial transactions on the other hand.

This limitation period should apply to all actions and remedies arising under the UNIDROIT Principles, that is

- a) claims for specific performance;
- b) actions for damages;
- c) requests to re-negotiate a contract because of hardship - Art. 6.2.3 UNIDROIT-Principles -;
- d) rights to avoid the contract for mistake, fraud, threat or gross disparity (Artt. 3.5-3.10 UNIDROIT-Principles);
- e) any remedy for price reduction;
- f) rights to terminate the contract (Art. 7.3.1 UNIDROIT-Principles).

It is obvious that in many situations the prescription period will be of only theoretical importance: Where as in the cases of avoidance or termination of contracts, these rights have to be exercised within a reasonable period of time (see Artt. 3.15 as to avoidance and 7.3.2 (2) UNIDROIT-Principles as to termination) after discoverability, the period of limitation is of minor importance.

3. The limitation period shall commence on the date on which the right or claim accrues regardless of its discoverability, unless a right or claim of the obligee is based on fraud of the obligor in the conclusion or performance of the contract. Details:

- a) The claim for specific performance of the primary obligations of the contract accrues at the time of the conclusion of the contract.
- b) All rights, claims and remedies caused by breach of contract of the other party accrue at the date on which such breach occurs. A breach occurs
 - aa) in cases of non-performance (non-delivery, non-acceptance, non-payment etc.) at the date when performance was due;
 - bb) likewise, in case of delayed performance, the breach occurs at the date, when performance was due;
 - cc) in case of malperformance such as non-conformity of goods or services, the breach occurs when the obligation is performed, i.e. in case of delivery of goods, the goods are actually handed over or their tender is refused by the buyer, in case of other services at the time when they were rendered.
- c) In case of fraud committed by a contractual partner in the course of the formation of the contract or during its performance, the breach occurs at the date on which the fraud was or

reasonably could have been discovered. Regardless of discovery or discoverability, a respective right or claim should be extinguished after ten years from the time of its committal.

4. As mentioned above, the principles should make clear that the parties can abrogate the respective provisions on limitation periods and agree on different periods, may they be shorter or longer. Three issues have to be considered in this context:

a) Should the principles provide a maximum period of limitation, which cannot even be prolonged by agreement of the parties? My proposal would be not to regulate this problem. Although one must be aware that stronger parties could subjugate weaker parties to their terms, such cases should be left to instruments and legal provisions aimed to control unfair contract terms.

b) If the parties have agreed upon some express undertaking in regard to the obligor's performance to have effect for a certain period of time such as a guarantee of durability etc., the principles should state a rule of interpretation for such terms. Art. 11 of the Limitation Convention states that in these cases the limitation period in respect of any claim arising from such an undertaking shall commence on the date on which the buyer notifies the seller of the fact on which his claim is based, but not later than on the date of the expiration of the period of the undertaking. Likewise, I would propose a provision that such a term should be interpreted that the undertaking or obligation of the party proposing a period of guarantee and the like shall commence only on notice of the obligee that the performance was non-conforming to the undertaking. Without notice, it shall commence in any event at the end of the period of guarantee.

c) Claims arising out of the termination or avoidance of a contract, in particular claims for restitution, shall commence on the date on which the declaration of avoidance or termination becomes effective.

d) In case of instalment contracts or contracts where performance is to be extended over a period of time, the claims for breach of contract by non-performance or malperformance accrue accordingly at the time when each instalment or divisible part of the performance was due or - in case of malperformance - was performed (supra at lit. 3.b)cc)).

II. Recommencement, Cessation and Calculation of the Limitation Period

1. Recommencement.

a) Judgements

Most legal systems provide that in case of a judgement or other award made in a legal proceeding the claim (as) finally adjudicated is subject to a special period of limitation or to the general period of limitation for obligations. The same may be the case in regard to claims finally stated in an arbitration award or a procedural settlement or any other judicial or quasi-judicial act having the same effects as a final judgement. Principles for the limitation of actions elaborated by UNIDROIT should leave these consequences to the domestic laws of civil procedure and their respective provisions on limitation of action. The limitation convention, too, excludes claims based upon a judgement or award made in legal proceedings from the ambit of the convention.

If the working group, however, considers to propose a provision of its own, then the next question to answer would be whether the general period of limitation of four years commences again with finality of the judgement or comparable award, or whether a special period of limitation for claims based upon judgements etc. should be stated.

a) Acknowledgement

Most legal systems to which I had access provide for a recommencement in case of acknowledgement of the claim by the obligor. There are differences, however, how specific and formal the acknowledgement must be. While, e.g., the limitation convention requires acknowledgement “in writing”, German law (§ 208 BGB and the respective proposal of the Law Reform Commission, § 206-KE) provides for recommencement by acknowledgement of the obligor by part payment, payment of interest, adequate assurance of performance or in any other conclusive expression of acknowledgement; the commentaries report many cases deciding what amounts to an informal acknowledgement. The number of cases is proof that an all too vague provision or the term “acknowledgement” in itself may provoke litigation, so that it seems to be recommendable to define the threshold for recommencement as clear as possible. Therefore, first of all, an acknowledgement in writing should be required, but the working group should consider whether part payment or providing a collateral on a respective command of the obligee should be equivalent to a written acknowledgement.

Art. 19 of the Limitation Convention states a kind of safety valve by providing that any act performed by the creditor in the state in which the debtor has his place of business, which under the law of that state has the effect of recommencing a limitation period, should have the same effect - i.e. starting a new limitation period of four years - in cases to which the convention applies. This seems to be a wise recognition of domestic rules, and the insertion of a similar clause should be considered by the working group, too.

2. Cessation

Cessation of a limitation period means an interruption, so that - contrary to recommencement - the period of time already lapsed at the time of interruption has to be counted and added if the cause of interruption ends and the running of time is resumed. There are certain causes for this interruption (cessation), which seem to be common in many legal systems and should be considered in the working group, too. They are

a) Commencement of judicial proceedings or introducing a claim in judicial proceedings already instituted between the parties (see Art. 13 Limitation Convention). In addition, it should be considered, whether and under what circumstances commencement of legal proceedings may have effect on third parties jointly or severally liable with defendant, if those parties are informed by the obligee in writing and may join the litigation under the procedural law of the *lex fori* (compare Art. 18 Limitation Convention).

b) Cessation must also take place in case of arbitration. Therefore, the working group should consider a rule comparable to Art. 14 of the Limitation Convention, stating that where the parties have agreed to submit their dispute 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, and that, in the absence of

any such provision, an arbitral proceeding shall be deemed to commence on the date of the respective request of the applicant (see Art. 14 (2) for details of such a provision).

c) The domestic legal systems usually take account of situations where the debtor/defendant is unable to maintain his/her defence in court for reasons such as death or incapacity, bankruptcy or other instances of insolvency effecting the defendant's capacity to dispose of his property, or in case of corporations, companies etc. their dissolution or liquidation (see Art. 15 Limitation Convention). It seems to be recommendable to consider such a provision in the respective UNIDROIT-Principles, too.

d) Where the obligee/creditor is unable to bring his claims to court or submit it to arbitration because of force majeure, i.e. "circumstances beyond the control which he could neither avoid nor overcome" (see Art. 21 Limitation Convention) such as a complete breakdown of the judicial system because of civil unrest, war, natural disasters or the like, a cessation of the limitation period seems to be advisable and can be found in most legal systems to which I had access.

3. Calculation

a) As to the calculation of the date of commencement and expiration, first of all it has to be considered and decided, whether the limitation period should commence exactly on the date on which the respective right, claim, remedy etc. accrues (supra at 1.3.), or whether the four year period should commence only on the 31st of December of the year when the right, claim or remedy accrued. The latter solution, which could be found in the German Civil Code for shorter periods of limitation, has the great advantage for obligees/creditors that they have to check their accounts and receivables to be aware of the danger of limitation periods running out only once a year and not continuously. This solution, of course, means that for a claim arising on 2nd of January, the period of limitation is almost five years.

If the working group decides that the period of limitation shall commence exactly on the date on which the right, claim or remedy accrues then a provision like Art. 28 of the Limitation Convention should be considered.¹³ It has also be taken into account that the last day of the limitation period may fall on an official holiday or a *dies non juridicus* (see Art. 29) and it should be provided that in such a case the limitation period shall not expire before the end of the following day.

Similar provisions regulating the details of calculation in case of cessation, its commencement and expiration should be considered.

III. Other Issues

1. The working group should decide whether securities such as liens, mortgages, other security interests in property, guarantees and suretyships should be considered. Two questions have to be distinguished:

¹³ Art. 28 (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.

a) If the debtor/obligor has provided collateral security for his obligation - let it be a guarantee or suretyship by a third party or a security interest in his own or a third party's property - the effect of the prescription on the collateral, i.e. whether it could still be enforced, is at issue. This reporter supposes that these questions have to be left to the respective domestic laws on collateral securities and the respective agreements between the parties,

b) It is another issue whether the obligation of a surety or guarantor himself/herself will be prescribed in the same period of time as obligations from commercial transactions, to which the UNIDROIT-Principles apply. If and in so far as the collateral consists of a personal obligation (of a surety, a guarantor or a co-debtor), I would tentatively propose that their obligation is subject to the same rules on prescription as other obligations from international commercial transactions. In regard to security interests in property, however, I would propose to follow Art. 5 lit. (c) of the Limitation Convention, exempting the right of a creditor to get satisfaction from security interests in property from the application of UNIDROIT-Principles on prescription, because the great variety of such security interests and their very diverging regulations in domestic law could create problems if principles and provisions drafted for purely personal obligations were to be applied to such property or quasi-property rights.

2. Restitution of Performances Despite Prescription

If a debtor/obligor performs his/her obligation unaware and despite of a period of limitation that has run out, it may be asked whether he could demand restitution under unjust enrichment principles. Although I think that he/she should not, this question should be left to the domestic laws of restitution and unjust enrichment, for they might contain special exceptions to the general rule favoured here.

3. Operation of the Prescription

a) If a period of limitation has run out, this could extinguish the obligation *ipso iure*, or it could give rise to a defence of the obligor/debtor and defendant, which will be taken into account only if it is raised by the obligor in a litigation. The underlying dogmatic foundation of the latter solution is an assumption that prescription does not distinguish the obligation altogether but makes it unenforceable; it stays alive as a kind of natural obligation. This not only has consequences for the question of restitution and unjust enrichment in case of performance despite prescription, the prescribed obligation being valid as a *causa* for any performance brought about by the debtor/obligor despite the prescription, but also has consequences for other issues and the theoretical explanation of their solution.

b) If the debtor/obligor was prescribed by the limitation period, he may still retain his performance or set off his counter claim, if he could have done so before the limitation period run out (compare Art. 25 (2) Limitation Convention); the working group has to consider whether there must be a special relationship between claim and counter-claim, an issue to be discussed in the context of set-offs.

c) The working group has to decide the fate of claims for interest in case that the main obligation is prescribed by the running out of a period of limitation. While German law, e.g. (§ 224 BGB) provides that "Nebenansprüche", i.e. obligations to pay interest, to deliver products of the object of the obligation, should be barred with the main obligation, it could well be argued that for all these ancillary obligations individual periods of time are running

from their accrual on. Again, it seems to be a decision between the greatest possible justice and fairness which would require individual periods of limitation for every ancillary obligation, and practicability, which advocates for submitting them to the period of limitation of the main obligation.

3. Party Autonomy

While Art. 22 of the Limitation Convention prohibits any modification or abrogation of the statutory limitation period by agreement of the parties, except that the debtor may extend the period by a declaration in writing to the creditor (para 2), this reporter would favour - as already mentioned supra at I.1.c) - full party autonomy. Since the UNIDROIT-Principles itself can be implemented only on the basis of party autonomy, it would be difficult to accept that the parties should only have the choice of take it or leave it. Therefore, I would propose to include a provision saying that the parties may modify or exclude some of these provisions or vary their effect by agreement.

The problem that strong parties may abuse their negotiating power to impose unfavourable modifications of these provisions on the other party must be controlled by rules on unfair contract terms. Thus, under the German Standard Contract Forms Act, § 9, the UNCITRAL Provisions on prescription in case of contracts falling under the UNIDROIT-Principles in general, would be used as a yardstick to measure the fairness or unfairness of respective terms, thereby giving the UNCITRAL Provisions on prescription priority over one-sided (ab)use of freedom of contract.