UNIDROIT 1999
Study L – Doc. 64
(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

(Draft and Explanatory Notes prepared by Professor P. Schlechtriem)

Rome, November 1999

Preliminary remarks

The following proposals are based on the decisions made by the Working Group for the preparation of Principles of International Commercial Contracts on its meeting in Bolzano on 22-26 February, 1999 in discussing the position paper of this author, and various materials considered by the author since the last meeting.

The following preliminary notes are a reminder of these decisions of the Working Group, supplemented by remarks of this author as to the consequences of the aforesaid decisions.

(a) The Working Group confirmed a decision already made on a former session to use the UN-Limitation Convention of 1974/1980 and its general four-year period as a model (see S.R.[1] no. 291). Therefore it was agreed to have a four-year period (see S.R. no. 297) as a centrepiece of the set of limitation rules.

(b) It was also agreed to draft a two-tier system (see S.R. no. 306) as a balance of interests between the creditor's/obligee's interest not to lose an asset, i.e. a »claim«, after a certain period of time without a chance of pursuing it on the one hand and the opposite interest of the debtor/obligor and society as well on the other hand to put to rest possible controversies and prevent litigation with an hazardous outcome because of fading evidence.[2] Therefore, the Group decided to have a shorter period of time commencing with actual or constructive knowledge (»the obligee knows or ought to know«) of the obligee of his claim and to combine it with a longer period commencing on accrual of the respective action.

Although this was decided, the reporter wants to direct the attention of the Group to the following points, which might be reconsidered:

(i) It was quite controversial, whether four years were adequate for the so-called shorter period (see S.R. no. 308 et passim). It has to be remembered, however, that the period of four years was proposed and agreed upon in principle on the basis of the UN-Limitation Convention, before the two-tier system was discussed and accepted. Since the UN-Limitation Convention does not have a two-tier system and lets the four-year period commence on accrual, thereby effectively cutting off most claims after four years since the conclusion of the contract, it might well be argued that a period commencing much later in many cases, i.e. on actual or constructive knowledge only, could be proposed as one considerably shorter without doing harm to the obligee/creditor. At least the Group should be aware of the fact that the foundation, on which the decision for a four-year period was based, was altered later by the introduction of the two-tier system. In this context, it should also be remembered that the four-year period in the UN-Limitation Convention was the result of a rather arbitrary compromise between several delegations, whose domestic

[1] S.R.= Summary Records of the meeting held in Bolzano/Bozen from 22-25 February, 1999, prepared by the secretariat of UNIDROIT.

[2] As to the basic considerations in regard to limitation rules see the position paper of this author, presented at the meeting in Bolzano, preliminary remarks no. 1 sub b).

legislations contained either longer or shorter periods of limitation.[3] And in the preparation of the UN-Limitation Convention there were also proposals for a two-tier system, providing for a two-year period for claims arising out of open defects (non-conformity) of goods and an eight-year period in case of hidden non-conformity.[4]

(ii) At the Bolzano meeting, attention was directed to the proposals for Draft Rules on the Law of Extinctive Prescription submitted by Prof. Zimmermann to the Lando Group. Although at first sight these proposals are based on a unitary period of prescription of three years in Art. 17:102, in fact Prof. Zimmermann has also proposed a two-tier system; the difference to this reporter's proposals being only a technical one. Prof. Zimmermann, although proposing a commencement of the limitation period at the time when the debtor has to effect performance, Art. 17: 103, provides in Art. 17:106 for a suspension in case of ignorance: As long as the creditor is unaware, without gross negligence, of the identity of his debtor and of the facts and the legal basis giving rise to his claim, in other words, before he knows or ought to know about his claim, the prescription is suspended until the maximum period of limitation of ten years, Art. 17:114. This means that a claim, the existence of which the obligee/creditor does not know or ought not have to know, will be barred only after ten years, while the shorter three-year period in fact (not as a matter of technical-juridical construction) begins only at the time of actual or constructive knowledge.

In considering the following draft, the Working Group should realize with satisfaction that both proposals - the proposal of Prof. Zimmermann and that of the Working Group - are, in fact, very close, since both are based on a two-tier system. The only important question is the same as already raised sub 1., namely, whether the shorter period should stand at four years or should be shortened to three years, as some members of the Working Group have proposed in Bolzano. It could also be considered, whether the technical construction of the two-tier system by Prof. Zimmermann, namely achieving the interplay of a shorter and a longer period by the technical concept of suspension, is to be preferred. This reporter would like to recommend to stick with the decision of the Working Group, because it follows traditional models of such two-tier systems as, e.g., in the European directive on products liability, in the German Civil Code in regard to the limitation of tort claims and in the new Civil Code of the Netherlands.

(c) The Working Group has decided that except for the two-tier system, the limitation period should follow uniform rules. No special rules for certain types of claims and actions are to be proposed, as could be found quite often in domestic systems and causing much complexity and many problems (i.e. as to warranty claims for non-conformity and their relation to general claims for breach of contract). In the discussions of the Working Group, there were proposals, however, to calibrate the limitation periods

---

[3] Mathematical compromise between proposals of a five-year period, promulgated among others by the U.K., and a three-year period by other western states; details see *Schlechtriem/Müller-Chen*, Kommentar zum Einheitlichen Kaufrecht, 3. Aufl. 2000, Art. 8 Verjährungsabkommen, Rn. 1 with numerous references to periods of limitation in domestic legal systems.

[4] Details see *Schlechtriem/Müller-Chen* aaO, Rn. 2.

according to types of claims (see S.R. no. 315), and it was emphasized that the existing Principles already provide time limits for specific remedies such as avoidance of contract or a claim for specific performance. The respective interventions are mixing up, however, two entirely different problems: As to an additional limitation of rights, actions and claims by requiring that they must be exercised in a reasonable time after actual or constructive knowledge - as, e.g., in Art. 3.15 in regard to avoidance -, this is only at first sight related the question of general and uniform limitation periods, because, in addition to a loss of claims by prescription, rights and claims can be lost by not exercising them within a reasonable time, by omission of timely notice or by general Principles such as estoppel, abus de droit, Rechtsverwirkung, venire contra factum proprium, etc. This reporter has tried to clarify this issue by draft Art. A (2). The only question to be considered perhaps, and, if at all, at the very end of our work is whether the right of avoidance is not only limited by the reasonable time stated in Art. 3.15, but in addition by the longer period of limitation to be proposed by this group, so that the right of avoidance might be lost after ten years even if the avoiding party did not know or could not know of the relevant facts, etc.

It is another question, however, whether the system of periods of limitation should be more differentiated according to different types of claims as proposed by one member of the group. This reporter, considering his experience with respective systems, has to warn against such a system. As the experience in Germany, but also, e.g., in France, shows, different periods of limitation will inevitably lead, in the practice of the courts, to a bending and distorting of substantive law in order to find the period of limitation which seems fitting to the case at hand. Thereby, *vice caché* become *non-conformité* in order to avoid a provision on *bref délai*, defects of goods become an *aliud*, i.e. goods are categorized as something entirely different, in order to avoid a short period for warranty claims, etc.

(d) Related to the topic no. 3 is the question what range of claims, actions and rights should be covered. In this context there was concern about consumer transactions[5] and personal injuries, on which tort claims could be based.[6] Having in mind the Preamble of the Principles, it seems to be clear that the limitation rules should apply only to claims and actions arising out of international commercial contracts. This, a priori, excludes tort claims from the ambit of the Principles, and it should also exclude consumer transactions. If a purchase by a consumer, however, would be covered by the Principles, a special legislation for the protection of the consumer, e.g. the new EC directives on consumer sales, certainly would take precedence as *loi d'application* immediate over the Principles, Art. 1.4 Principles. This Group, therefore, needs not draw the borderline between commercial transactions and contracts involving consumers. As to tort claims, there was perhaps some misunderstanding in the discussion at the last meeting: If personal injuries arise as consequential damages out of a non-performance of obligations governed by the Principles and, therefore, a claim for damages under the Principles might arise, it should, as a matter of course, be governed by our rules on limitation.[7] In

[5] S.R. no. 299 et seq., 303.

[6] S.R. no. 302.

[7] The adverse provision in the UN-Limitation Convention, brought to the attention of this

particular, if a party to a transaction governed by the Principles is liable for personal injuries or death of a third party because of a non-performance or malperformance of the contract governed by the Principles (e.g. goods or services under the Principles cause damages to third parties, for which one party to the contract is liable), this might give rise to claims for damages under the Principles and should be governed by our limitation rules. It is an entirely different question, whether besides claims under the Principles and their limitation domestic laws provide for tort claims, what period of limitation are applicable to these tort claims, and whether in case of such a concurrence of actions the limitation period of the Principles should or could influence the limitation period for tort claims under domestic law. This, I am afraid, has to be left to the respective domestic law under which tort claims may arise.

(e) It was the prevailing opinion in the Working Group that party autonomy could at least partially prevail over limitation rules. An abuse of party autonomy in this regard could be controlled by the general instruments to reign in unfair contract terms. Both issues - party autonomy in regard to limitation periods and control of its abuse - should not be regulated and laid down in a special provision in the context of our limitation rules.[8] The Working Group did, however, not take a clear stand on all questions of party autonomy in regard to the length of the periods of limitation, for there was a tendency to allow a lengthening of the period of limitation, but also to have a minimum period which could not be shortened even more by party agreement (see S.R. no. 342).

(f) The Working Group devoted some time to words and phrases, i.e. to the questions whether the words limitation or prescription were adequate and how the distinction to forfeiture of rights could be drawn (see S.R. no. 119), whether limitation was meant to limit claims or actions or even rights (such as the right to avoid the contract), what the correct terms for interruption of a period or for its suspension were, etc. The following proposals are based on the understanding that the Group will first decide on the substantive matters and questions and settle on the adequate words and phrases at the very end with the help of native speakers. This reporter in his use of words and phrases follows mostly the UN-Limitation Convention.

On the basis of the policy considerations and decisions of the Working Group stated in these preliminary remarks, this reporter proposes the following provisions.

Group by the reporter at the meeting in Bolzano, has its raison d'être in Art. 5 CISG, excluding claims for personal injuries or death from the ambit of the Sales Convention. Since the UN-Limitation Convention is a kind of appendix to the Sales Convention, it was only consequent to exclude such claims from the scope of its application.

[8] The adverse rule in the UN-Limitation Convention, brought to the attention of this Group at Bolzano, can be explained by the differences in the legal basis for application of these and our rules: While the UN-Limitation Convention has to be implemented (ratified, accepted, etc.) by domestic legislators as state law, the PRINCIPLES basically are applied as rules chosen by the parties; they are, in other words, based on party autonomy. Consequently, they must be open for alterations and modifications by the parties who have opted for their application altogether.

A. Definitions and Periods of Limitation

Art. 1
(Definitions)

(1) Claims or rights of parties arising from a contract governed by these Principles or relating to its breach, termination or invalidity, can no longer be exercised by reason of the expiration of a period of time. Such a period of time is hereinafter referred to as "limitation period".

The definition is mainly based on Art. 1 of the UN-Limitation Convention. The wording of the Zimmermann-draft seems to be too narrow, because one can hardly call the termination of a contract as a reaction of its breach a »right to demand ... performance« or »claim«. Since termination is just one remedy among others, however, it cannot be treated differently from a claim for performance or damages in regard to the respective limitation period.

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

This para. is mainly based on Art. 1 (2) UN-Limitation Convention and takes care of the concerns in regard to time-limits such as Art. 3.15 Principles (see preliminary remarks sub 3.). In particular, it should cover the situation, where one party may terminate a contract and has to do so within a reasonable time, Art. 7.3.2(2) Principles (see intervention Bonell S.R. no. 318).

(3) In these rules

a) an »obligee« means a party who asserts or may assert a claim, whether or not such a claim is for a sum of money or any other performance, or who may exercise any other right under a contract;

b) an»obligor« means a party against whom an obligee asserts or may assert a claim or a right;

c) »legal proceedings« includes judicial, arbitral and administrative proceedings;

d) »person« includes corporation, company, partnership, association or entity, wether private or public, which can sue or be sued;

e) »year« means a year according to the Gregorian calender.

The definitions are partly based on Art. 1 (3) UN-Limitation Convention and should be taken up at the very end as a drafting matter.

Art. 2
(Periods of limitation)

(1) The regular period of limitation is four years. It begins to run from the moment when the obligee knows or ought to know of his claim or right, in particular of the facts on which it may be based.

(2) Unless para. (1) applies, the period of limitation is 10 years. This period of limitation commences at the moment when the claim or right of the obligee accrues [has become due].

(3) The limitation period in para. 1 also applies to ancillary claims such as claims for interest, emoluments or costs.

The commencement of the claim or right for the ten-year period is based on the words of UN-Limitation Convention, Art. 9. The UN-Limitation Convention goes on in Art. 10-12 to state special rules to define the accrual of claims and rights. The Working Group should consider, whether respective rules should be included in the black-letter text or could be left to the commentary. It is the opinion of this reporter that the respective explanations could be given in the commentary, because the phrase »accrual of a claim or a right« seems to be sufficient for the black-letter text: It goes without saying that a claim arising from a breach of contract accrues only on the date on which such breach occurs (Art. 10(1) UN-Limitation Convention). As to the accrual of claims for lack of conformity of goods or services, this can only be considered after special rules for these claims in regard to special types of contracts have been considered (as to Art. 10 (2) UN-Limitation Convention). In regard to the accrual of claims based on fraud (Art. 10 (3) UN-Limitation Convention), a similar concern was raised in the discussions of the Working Group in Bolzano. It was taken care of by the regular period of time under our two-tier system, under which a claim based on fraud commences only upon actual or constructive knowledge of the fraud. The only question to be reconsidered is, whether the maximum period of 10 years could and should bar such a claim.

As to express undertakings in regard to the quality of goods or services for a certain period of time, there seems to be no need for a special rule such as in Art. 11 UN-Limitation Convention, because the regular limitation period commences only at the moment when a breach of this undertaking becomes known or could have become known to the obligee.

Art. 12 of the UN-Limitation Convention and its underlying policies should also be covered by the two-tier system chosen by the Working Group, because in cases of termination for anticipatory breach or breach in case of instalments, the claims and rights of the obligee accrue at the time of the respective breaches, but the regular period of limitation commences only on knowledge or constructive knowledge, so that the obligee cannot lose his claims or rights by limitation before the maximum period of 10 years has lapsed.

As to para (3): Contrary to the Zimmermann-proposal (Art. 17:119) the beginning and end of the limitation period for each ancillary claim should be determined independently

of the main claim or right, because otherwise (as under the Zimmermann-proposal) interest, which becomes due only shortly before the limitation period for the main claim runs out, would or could be prescribed within a few weeks or months. And if, e.g., a debtor is in default in repaying his loan, the period of limitation for the creditors repayment claim would commence at the date when repayment was due, it would be absurd if the creditor's claims for default interest on the outstanding loan would be prescribed four years after repayment of the principle was due - if such interest accrues after four years, the restrictive claim would be prescribed before it arose!

If a provision in regard to party autonomy (see preliminary remarks at no. 5) should be included, this reporter proposes to add as para. (4):

> **(4) The parties can modify the periods of limitation in para. 1, but cannot shorten it to less than one year from the time on the obligee knew or ought to have known of his claim.**

B. Suspension and interruption of the limitation periods

General remarks

(a) Legal systems to which the reporter has access distinguish between two types of events with different consequences for the running of a period of limitation: One set of events cause a »renewal« (in the words of the Zimmermann-proposal) of the limitation period, meaning that it begins to run again in full length. The Working Group has used the word »interruption« to describe these effects of certain events. In contrast, other events may cause (only) a »suspension« of the running of the period of limitation, meaning that a time already lapsed will be counted after the suspending event ends, so that the suspension causes an extension only for the length of time during which the suspending event is »active«. In the following proposals this reporter will use the terms »interruption« for events causing the period of limitation to commence again, and »suspension« for events that keep the running of the period of time »stalled«.

(b) What events should have suspending or interrupting effects, depends, first of all, on the basic concepts for the limitation system. If the Group had opted for a uniform period of limitation, the number of suspending events would have been considerably greater in order to meet policy commandments for a variety of situations. As the Zimmerman-proposal shows, a suspension must be provided for cases where the obligee did not know of his claim or right, while this problem has been taken care of by our two-tier system and the commencement of the regular four-year period only at the time of actual or constructive knowledge (see supra preliminary remarks before Art. 1 at no. 2).

(c) Nevertheless, interruption and suspension are, as a matter of policy, necessary in situations where the obligee, despite being fully aware of his claim or right, is not able to pursue it effectively. It was not yet discussed in depth, however, whether the suspension or interruption rules should apply only to the shorter four-year period or generally (or in part) also to the maximum period of limitation of ten years. This reporter, needing

further guidance by the Working Group, submits the following draft rules only as proposals for discussion.

Many legal systems have special rules for the limitation or prescription of adjudicated claims. While some systems see adjudication as a case of interruption, others provide for entirely new and particular periods of limitation for claims arising out of judgements. Since these periods are very often closely entangled with and connected to procedural matters, it was the opinion of the Working Group that we should not formulate a special limitation rule for adjudicated claims.[9]

Art. 3

(Suspension and interruption of limitation periods)

The limitation periods under Article 2 can be suspended or interrupted. A »suspension« of the limitation period means that during a suspension the limitation period ceases to run for the time of the existence of the event causing suspension, while »interruption« causes the limitation period to begin again at the time stated in the special provisions on interruption.

Art. 4

(Acknowledgement)

(1) Where the obligor, before the expiration of the limitation period, acknowledges his obligation to the obligee, a new limitation period shall commence to run from the date of such acknowledgement.

(2) The obligor can acknowledge expressly or by conduct. Express acknowledgement can be orally or in writing. Acknowledgement by conduct can be done by part-performance, payment of interest, by providing of adequate security or in any other manner.

The draft provision is based on the Working Group's opinion, see S.R. no. 323.

The basic effect of acknowledgement is »interruption« in the sense of Art. 3 and in so far in conformity with Art. 20 UN-Limitation Convention, the Zimmermann-draft and some domestic legal systems. Beginning of a new limitation period theoretically applies to both periods under Art. 2, practically, however, in many cases only to the shorter limitation period of four years, since the acknowledgement should always cause actual or at least constructive knowledge of the obligee in regard to his claim or right. It must be decided, whether an interruption of the four-year period may cause an extension of the ten-year period, too, or whether the maximum period should be an absolute bar.

[9] See S.R. no. 321; contrary *Zimmermann*, who proposes a special ten-year period of limitation for claims established by legally enforcable judgements.

Art. 5
(Commencement of legal proceedings)

(1) The limitation period shall cease to run from the moment on, when the obligee commences legal proceedings against the obligor with the aim of obtaining satisfaction or of asserting his claim. The exact date of the commencement of judicial proceeding is determined according to the law of the court where the proceedings are instituted.

(2) Where the parties have agreed to submit to arbitration, para. 1 applies accordingly; the exact date of commencement of the arbitral proceedings is determined by the applicable rules of arbitration.

(3) In the absence of regulations for an arbitral proceeding or provisions determining the exact date of the commencement of an judicial or arbitral proceeding, proceedings shall be deemed to commence on the date on which a request that the claim in dispute should be adjudicated 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.

(4) Suspension under para. 1 or 2 lasts until a final decision or award has been issued by the court or arbitration tribunal, or until the case has been otherwise disposed of, e.g. by settlement or by withdrawal of a complaint or an application for an award.

The question of whether commencement of legal or arbitral proceedings should suspend or interrupt the period of limitation was left undecided at the last meeting, see S.R. no. 327 et seq., and this reporter was charged with drafting a proposal (see S.R. no. 331). Although some legal systems such as the German Civil Code treat the commencement of legal proceedings as a cause for interruption, this reporter has opted for the solutions of the UN-Limitation Convention, i.e. the suspension model (accord: Zimmermann draft Art. 17:112).

The tricky question what constitutes a commencement of legal proceedings must, in general, be left to the respective lex fori. Therefore, it did not seem to be necessary to draft elaborate provisions (as, e.g., in the German Civil Code, to which Prof. Kronke referred at the last meeting); the same applies in regard to arbitral proceedings, where the respective arbitration rules have to decide what constitutes a commencement of an arbitral proceeding. That arbitration proceedings should be included was agreed so at the last meeting, see S.R. no. 332.

If, however, no domestic regulations for the date of the commencement of a court action or - respectively - arbitration are existent, a fall-back provision such as Art. 11 II UN-Limitation Convention should be considered; par. (3) is based on this provision.

The suspension by judicial or arbitral proceeding must, as a matter of course, end with a final decision or award. The consequences of a judicial decision or arbitration award, in particular the judicial or arbitral granting of the claim raised by the plaintiff or applicant, is beyond the competence of the Working Group (see supra at preliminary remarks no. 4).

Therefore, it was decided not to deal with the question whether an adjudicated claim is subject to a new limitation period under domestic law or these Principles, for this question is dependent on procedural rules of the lex fori as to the effects of judgement and arbitration awards: If a judgment granting a claim is characterized as a new creation of that claim, the lex fori has also to decide on the length of a period of limitation for the adjudicated claim. Regardless of the characterization of special provision for periods of limitation for adjudicated claims as matters of procedural or substantive law, it seems to be reasonable not to draft an express rule on the limitation of adjudicated claims, because the respective provisions of domestic law might be regarded if not as procedural law then as part of the ordre public or at least mandatory law not to be superseded by the Principles.

If, however, no special rules for adjudicated claims exist, or if the judicial or arbitral proceeding is discontinued without a final decision or award, the period of limitation has to continue, and the period up to the commencement of the proceeding must be counted.

Art. 6

(Suspension in case of subjective or objective obstacles to the commencement of proceedings)

(1) Where, as a result of circumstances which are beyond the control of the obligee and which he could neither avoid nor overcome, the obligee has been prevented from pursuing his claim or right by commencing judicial or arbitral proceedings, the limitation period is suspended until the relevant circumstances have ceased to exist, and extended further for another year in addition to the normal period of limitation suspended by these circumstances.

(2) Para. (1) also applies to cases where the claim or right of the obligee could not be pursued because of incapacity or death of the obligee. The suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or an successor inherited his position; the additional one-year period under para. (1) applies respectively.

(3) Para. (1) and (2) apply respectively in cases of death or incapacity of the obligor for the time, when the obligee is effectively prevented from pursuing his claim.

(4) In case of bankruptcy of the obligor, the dissolution or liquidation of a corporation, company, partnership, association or entity when it is the obligor, the running of the limitation period shall be suspended when the obligee has asserted his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, subject to the law governing the proceedings; the suspension ends with a final decision or award in these proceedings.

In the Working Group it was proposed that force majeure preventing the obligee from

pursuing his claim should be a cause of suspension, too; the proposal did not meet any objection and therefore was taken up here as para. 1. The wording is based on Art. 21 UN-Limitation Convention. There is, however, an important amendment to the usual effects of suspension in so far as an additional year is added to the remaining period after the obstacle has ceased to exist. This should give the obligee time to consider his next steps and get respective legal advice in cases where almost all of the limitation period has already run out when the obstacle preventing the commencement of legal litigation has ceased to exist, so that only a very short period of time is left. The same idea underlies the Zimmermann-proposal in cases of death of the obligor or obligee (claims belonging to an estate or directed against an estate) where 6 months are added to the limitation period, Art. 17:111.

Incapacity of the obligee as well as the death of obligor or obligee should also suspend the period of time, for they are also obstacles in preventing judicial or arbitral actions until someone representing the incapacitated or dead party or its estate has been appointed.

In cases of bankruptcy or comparable proceedings, the suspension of a limitation period is justified only if the obligor takes the necessary steps to have his claims or rights considered in the respective proceedings; the suspension ends with these proceedings, when and if the obligee is again free to pursue them against the obligor.

3. Effect of Limitation

Art. 7
(Effect of limitation)

(1) The expiration of a period of limitation entitles the obligor to refuse performance.

The Working Group has discussed what effects the expiration of a period of limitation should have. Two models were considered: Under one model the expiration of the limitation period cuts off the claims or rights of the obligee ipso iure, an effect which the courts or arbitration tribunals have to take into account ex officio, so that they must, therefore, dismiss a respective complaint even if the defendant does not raise the defence of prescription. Under the alternative model, the effects of an expiration of the period of time are only regarded by courts and tribunals if the defendant raises this point as a defence. The majority of the Working Group was in favour of the later model, see S.R. no. 338 (accord: Zimmermann-draft, Art. 17:116).

It was neither discussed nor decided what the consequences of a performance despite expiration of the limitation period should be, i.e., whether the obligor can claim restitution of his performance because his obligation could no longer be enforced against him at the time of performance. Zimmermann has proposed an additional rule to the effect that no claim (based on unjust enrichment or other legal grounds) could be raised against the recipient in such a case, because otherwise the effects of prescription could always be attacked and sometimes reversed by restitutionary claims. This reporter has abstained from proposing a respective rule because it seems to be intricately interwoven with general questions of unjust

enrichment and restitution under domestic law. If, however, the Working Group decides this issue, the reporter would propose a rule similar to the Zimmermann-draft:

Whatever has been given in order to perform an obligation which could not have been enforced because the period of limitation has run out may not be reclaimed under domestic law.

* * *

Final remarks

A number of issues which are addressed in the UN-Limitation Convention and/or the Zimmermann-proposal have not been taken up here, because the Working Group abstained from deciding the respective issues or on the policies which should guide this reporter. They are mentioned here for reconsideration:

(a) An obligee might have several concurring causes of actions, but bases his complaint only on one of them. This was discussed (see S.R. no. 326) in the Working Group and is dealt with in the Zimmermann-proposal (Art. 17:115). While Zimmermann wants to extend the effects of suspension and interruption to claims which the obligee may have brought alternatively, it was pointed out in the Working Group that some legal systems restrict the effects of suspension to the claim or right, which was brought forward in the complaint as the cause of action. This reporter still is of the opinion that this is a matter of procedural law of the lex fori, where the judicial proceeding is commenced: Some legal systems under the maxim »iura novit curia« let it suffice that the plaintiff states the facts and his aim, so that all legal grounds and claims are merged in his judicial cause of action. Other procedural systems restrict the competence of the court to the exact legal claim brought forward in the complaint, so that consequently the effects of suspension can only apply to that claim. It is, however, beyond the competence of the Working Group to deal with these matters largely concerning procedural law of the respective fora.

(b) The Working Group did abstain from dealing with the effects of prescriptions on collaterals (S.R. no. 337). This decision should be kept up, for the issue cannot be decided without going deeply into the law of secured transactions.

(c) The question of set-off and its effects was postponed until rules for set-off were drafted.

(d) The Working Group discussed whether negotiations between the parties should suspend the period of limitation (see S.R. no. 334); it was agreed to omit negotiations as a cause for suspension. This should not exclude - in the opinion of this reporter - that later on in the drafting of rules for special types of contracts, negotiations could be reconsidered as a cause for suspension for certain claims out of these particular contracts, e.g. construction contracts when the parties are negotiating about the cure of defects, etc. In addition, the expression of willingness to enter negotiations could be interpreted in the light of further circumstances as an acknowledgement under Art. 4.