UNIDROIT 2001
Study L – Doc. 68
(English only)

UNIDROIT

International Institute for the Unification of Private Law

WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Chapter […]

# LIMITATION PERIODS

(Revised draft prepared by Professor P. Schlechtriem in the light of the discussions of the Working Group at its 3rd session held in Cairo, 24-27 January 2000)

Rome, April 2001

CHAPTER [...]

# LIMITATION PERIODS

## Article 1
(*Scope of the chapter*)

**(1) Rights governed by these Principles cannot be exercised after expiration of a period of time, referred to as »limitation period«.**
**(2) This chapter does not govern the time within which one party is required under these Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or perform any act other than the institution of legal proceedings.**
**(3) In these rules**
**a) [«legal proceedings« includes judicial, arbitral and administrative proceedings]**
**b) [»person« includes corporation, company, partnership, association or entity, whether private or public, which can sue or can be sued;]**
**c) [»year« means a year according to the Gregorian calender.]**

### COMMENT

1. General remarks

All legal systems know the influence of time on rights; *Immanuel Kant* regarded this - i.e. prescription and limitation of actions - as institutions of the law of nature.[1] Roots and origins were, however, different in Roman Law and Common Law, where the institute of limitation of actions was developed in the medieval ages. In Roman Law on the one hand, the *actio* was regarded as everlasting, but the *praescriptio* could cause acquisition of title (and loss of

[1] Die Metaphysik der Sitten, Erster Theil. Metaphysische Anfangsgründe der Rechtslehre, Erster Theil, Episodischer Abschnitt, §§ 32, 33; see also *Spiro*, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Verteilfristen, 2 vol., Bern 1975, vol. 1, p. 19; *Vinding Kruse*, Das Eigentumsrecht, vol. 1 1931, p. 619: Common to all nations.

ownership) by passing of time; this solution became influential for a number codifications in the eighteenth and nineteenth century in Europe. Common law, on the other hand, considered lapse of a certain period of time as a mere procedural bar to the enforcement of an action in court. Even nowadays, scholars steeped in Roman law tradition prefer to use the term «prescription».[2] Since it was decided that a lapse of time should not extinguish rights but only limit their enforcement (see infra Art. 12), the term *»limitation of rights«* instead *»prescription«* was used as more appropriate in this chapter.

The term »right« instead of (limitation of) actions was employed to make sure that not only the right to demand performance or damages etc. can be barred by a lapse of time but also the exercise of rights effecting a contract directly such as the right to terminate a contract or a right of price reduction.

2. Notice requirements and other prerequisites for enforcing rights

Rights could be lost under some UNIDROIT Principles, if the party entitled to acquire or exercise a right fails to give notice or perform an act within a reasonable period of time or without undue delay or within another fixed period of time, e.g. in regard to the time limits for communications in the context of formation of contract, Art. 2.1 - 2.22, avoidance of contract on account of mistake, Art. 3.15, the request for re-negotiation, Art. 6.2.3, or notice of termination, Art. 7.3.2 (2). Although serving a function similar to periods of limitation, these special periods and their effects are not affected by the more general periods of limitation of this chapter, because they are designed to meet special policy needs. Being in general much shorter than the periods of limitation provided for in this chapter, they take effect regardless of limitation periods. In the exceptional case that a »reasonable period of time« under the circumstances of the case might be longer than the respective limitation period, the provision on requiring the exercise of a right within a reasonable time should prevail.

3. Definitions

Most terms used in Art. 1 and the following articles are defined already elsewhere in the UNIDROIT Principles: The terms *obligee* and *obligor*, e.g., are defined in Art. 1.10. Since the definition of »court« in Art. 1.10 might be adjusted to include judicial, arbitral or administrative proceedings, a definition of »legal proceedings« to this effect would not be necessary in this chapter. Although the definition in Art. 1.10 of an »obligee« does not explicitly state that the performance to which the party is entitled includes claims for a sum of money besides non-monetary claims, it seems clear enough that monetary and non-monetary claims are both covered.

[2] For an extensive analysis of the difference between *prescription* as an acquisition and respective extinction of rights *ex lege* - or «positive» and «negative» prescription - and limitation of actions as a limitation of the enforcement of rights see *Danco*, Die Perspektiven der Anspruchsverjährung in Europa, 2001, p. 12 et passim.

As to »persons« and »year« it should be decided by the working group, whether definitions were really needed. In particular, the definition »year« seems to be necessary because in some cultures the year might have a different number of days; the prescription chapter of the European Principles of Contract Law also contains a definition of »year«.

Since it should be decided by the working group whether the definitions in para 3 are really needed, they are put in brackets here.

Article 2
(*General Limitation Period*)

**The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the right has become due.**

Article 3
(*Maximum Limitation Period*)

**The maximum limitation period is ten years beginning on the day after the day the right became due.**

Article 4
(*Ancillary claims*)

**[The limitation periods in Articles 2 and 3 also apply to ancillary claims such as claims for interest or costs.]**

Article 5
(*Modification of Periods of Limitations by the Parties*)

**(1) The parties can modify the periods of limitation.**
**(2) However the parties cannot**
**(a) shorten the general limitation period to less than one year;**
**(b) shorten the maximum limitation period to less than 4 years;**

**(c) extend the maximum limitation period to more than 15 years.**

COMMENT

I. General remarks to Artt. 2-5

1. Although periods of limitation or prescriptions of rights and actions are common to all legal systems, comparative law analysis does not offer much help in calibrating the length of the period of time, the lapse of which should limit or prescribe actions and rights. Numerous monographs and treatises have collected respective statutes and provisions, and even if the field is narrowed to limitation and prescription periods for rights and actions based on contract or failed contracts, still a wide variety in prerequisites and lengths of periods can be reported, ranging from 6 months or 1 year in some countries for claims arising from breach of warranties in a number of states to 2, 3, 4, 5, 6 or 8 up to 10, 15, 20 or even 30 years in some countries for different claims respectively.[3] On the level of international unification of law, only the UN-Convention on the Limitation Period in the International Sale of Goods of 1974 (as amended in 1980) offers some guidance, but did obviously not contain a very convincing model, for the number of ratifying states so far is rather small (up to date: 25). Some authority might be conceded, however, to the draft of the Principles of European Contract Law, chapter 17, and its general limitation period of three years (Art. 17: 102).

2. At first sight it seems advisable to «tailor» the length of limitation periods to the respective claims, so that e.g. claims for breach of warranty might be barred after a shorter period of time in order to facilitate trade and bookkeeping for sellers, contractors etc., than claims for performance or restitution after avoidance of a contract. But experience - e.g. in Germany[4] - shows that such differentiation tends to influence and sometimes corrupt the substantive law, for lawyers and judges may try to circumvent a short period of limitation in a given case, where its results seem to be too harsh, by requalifying or recreating a barred right, action or remedy as some other right, action or remedy not falling under the short term limitation provision. Thus - and in conformity with the UN-Limitation Convention - the working group has opted here for two uniform limitation periods in Artt. 2 and 3.

---

[3] See *Spiro*, Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Verteilfristen, 2 vol., Bern 1975, vol. 1, § 260 et seq., p. 611 et passim; *Danco*, p. 64 et passim; *Peters/Zimmermann*, Verjährungsfristen, in: Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, Bundesminister der Justiz (ed.), vol. 1, Bonn 1981, p. 101, 267 et passim; see also see the 17 national reports presented by the International Academy of Comparative Law in 1994 on its XIV$^{th}$ Congress.

[4] See *Peters/Zimmermann, op.cit.* at p. 196 et seq.

3. The stated length of a period of limitation in itself, however, does not always indicate definitely the time, after which a right or an action ceases to be enforceable or even to exist, for equally important as the length are the prerequisites for commencement of this period and, whether and under what circumstances its course can be affected. In addition, party autonomy in regard to limitation periods is of great practical importance, for periods either too long or too short may be regarded as tolerable if parties may calibrate them freely according to their needs. In other words, the regime of provisions on limitation of rights and actions by lapse of time consists of various details which are interdependent and mutually influential, and in regard to which a wide variety of solutions could be found in a comparative analysis.

4. Although it is sometimes stated that the regulation of the issue of limitation or prescription of rights by lapse of time necessarily requires some arbitrary decisions[5] and might »have more cruelty than justice» (in them),[6] there are at least three factors narrowing down the policies to be weighted and evaluated in order to draft rules on limitation of rights:

a) Even if it were impossible to develop a satisfactory system of rules and provisions for all kinds of rights, claims and actions, the problem is more concrete and, therefore, solvable if one has to deal only with a certain group of rights and actions, i.e. those 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.

b) A limitation of rights after a lapse of time unavoidably means a loss of a right whether the time bar operates as an extinction of the right by prescription or only as a defence against its enforcement as in the limitation of action model. The owner of the right thereby is kind of expropriated; he/she or it loses an asset. On the other hand, there is not only the commandment that peace under the law must be restored and a debtor, not pursued by the obligee, be allowed to regard his/her or its burden as no longer really existing by finally cutting off the threat of litigation after some time, but also the more practical consideration that by passing of time matters become obfuscated and the outcome of a litigation hazardous, because witnesses may have died, memories faded, documents be destroyed etc., a consequence, which may in turn endanger the reputation and dignity of the judicial system in its entirety.[7]

c) Difficult as it seems at first sight to balance the conflicting interests of protecting the owner of a right on the one side and the obligor of a dormant claim on the other side, there is at least one factor that must be put on the scale and

---

[5] See *Spiro*, vol. 1 at p. 611, quoting *von Tuhr*, BGB, Leipzig 1910, § 91 III

[6] *R.B. Policies at Lloyd's v. Butler* [1950] 1 KB 76 (82)

[7] As to details of these conflicting interests see *Danco*, p. 50 et passim; *Spiro*, vol. 1, §§ 3-15, p. 7-23.

weighted heavily: And obligee/creditor must have had a reasonable chance to pursue his claim, meaning that bar to his claim by a lapse of time must not occur before a right became due and could have been enforced, and that the obligee/creditor also must have known or at least have had a chance to know about his right and the respective obligor. The following provisions take account of these factors and their policy weight.

II. Basic structure of the limitation regime

1. The commandment that the obligee/creditor must not lose his right before he had a chance to enforce it, is taken account of by the regulation of the commencement of the period of time in Artt. 2 and 3 - i.e. the day after the day the right became due -, and by provisions on suspension for situations where enforcement of the right was not possible (Artt. 7-11).
The second commandment that an obligee/creditor should not only not lose the right before it became due and enforceable, but also not before the obligee had a real chance to pursue the right, i.e. after having actual or constructive knowledge of his/her or its right, was accounted for by the two-tier system in Artt. 2 and 3, providing a rather short (three year) period of limitation commencing from the time that the obligee knows or ought to know the facts on which his right is based, and a longer ten-year period, commencing regardless of the obligee's actual or constructive knowledge at the time when the right became due.

This two-tier system follows a model to be found in some national codes (in particular in regard to tort claims) and reform projects such as the UCC reform draft (one and 4 years), but also - and more important on the international level - in the EC-Directive on Products Liability of July, 25, 1985 (Art. 10, 11). The draft proposal for provisions on prescription in the European Principles of Contract Law, part III, is based on the same solution, although there is a slight technical difference in so far as there is only *one* period of three years, but its commencement is dependant on actual or constructive knowledge, i.e. suspended until the obligor has (acquired) actual or constructive knowledge, and the suspension is limited by a ten-year cut-off period; the practical results are identical to those of the provisions herein.

2. The basic («general») period of limitation is three years, commencing on the day after the day »the obligee knows or ought the know the facts as a result of which the right has become due«. »Facts« in the meaning of this provision are first of all the facts on which the right is based such as formation of a contract, delivery of goods, undertaking of services, non-conformity of performance at the decisive date, etc.

The respective facts, i.e. the facts constituting the claim and its falling due, must be known or recognizable by the debtor before the short limitation period commences. The identity of the debtor may be in doubt, too, e.g., in cases of agency, transfer of debts or entire contracts, dissolution of companies or unclear third-party beneficiary contracts; in these cases, the creditor must know or ought to have known whom to sue before he/she or it can be blamed for not having pursued the right or claim. Actual or constructive knowledge of »facts«, however,

does not mean that the creditor must know the right as such: If despite full knowledge of the facts the obligee is mistaken about his/her or its rights, *error iuris nocet* and the three-year period of limitation might pass to his/her or its disadvantage.

To become due, facts additional to the mere creation of the claim or right, e.g. by formation of contract, may be necessary, however: While the claim of the creditor to repayment of a credit is founded on the contract and, therefore may arise with the conclusion of the contract or paying out of the loan to the debtor, the repayment claim may and will usually fall due much later either on a fixed date or by a respective notice of termination of one of the parties or on account of other circumstances. Or, a claim may not (yet) be enforceable on account of the obligor's defence(s).

The words »the right has become due« include the notion of enforceability regardless of the technical-dogmatic explanation of the obligor's defences in domestic legal systems: If the obligor/debtor has a defence, which may defeat the obligee's/creditor's claim, the claim is not yet due regardless of whether the defence has to be raised in court or takes effect *ipso iure*. If the obligee/creditor in case that the obligor/debtor has invoked the defence of limitation, tries to rebut this defence by invoking (temporary) unenforceability of the claim because of a respective defence of the obligor/debtor and, therefore, a later commencement of the period of limitation than asserted by the obligor/debtor, he/she or it has to show that and why he could not enforce the right earlier.

The obligee/creditor loses his right ten years after it has become due, i.e. became enforceable. The harshness of this cut-off period is somewhat mitigated by the following rules on interruption and suspension and by the right of the parties to deviate from this period by agreement, i.e. to prolong the period of limitation to - at the most - 15 years under Art. 5.

3. A right of an obligee/creditor or its violation might spawn other rights and claims such as claims for interest, penalties, liquidated damages, costs of enforcement etc. Two issues have to be considered by the working group:

a) As a primary policy question it has to be decided whether such »ancillary« claims should be cut off at the same time as the main right from which they result, or whether they should be regulated under the limitation regime independently, i.e. as independant claims, so that the three or ten-year period of time and its prerequisites for commencement are applicable to them as well. The draft on prescription rules for the European Principles on Contract Law has opted for the harsh solution of cutting off all ancillary claims at the same time as the main right from which they stem. That means, e.g., that in case of default of repayment of a loan, which under domestic legislations or the EC-directive on default in payment creates claims for interest, the cut-off date for the payment claim will also cut off the interest instalments which have arisen and become due only shortly, perhaps a month or a quarter of a year, before that date. Likewise, penalties or liquidated damages arising successively for a default in, e.g. timely construction, will be barred at the same time that the claim for performance is cut off. At first right, this solution seems to have the advantage of achieving exactly one principle goal of statutes of limitation, namely laying to rest all disputes

arising from a certain contract at the same determinable date. It also seems to have the advantage that the next question, namely, what is an «ancillary» claim, becomes partially mute. But both goals are achieved not fully by the solution of a uniform rule, though: If a claim created by contractual agreement to arise in case of non-performance of a party is characterized not as an ancillary but as an independent claim, it must be regarded as being subject to a limitation period of its own, (therefore) lasting longer than the limitation period for the obligation the breach of which created this claim. The problem thrown out through the front door by a general cut-off of all ancillary claims may well creep in through the back door as the question: What is an ancillary claim (cut off with the main claim)?

b) If one opts for an independent regime of limitation for these rights and claims, i.e. independent from the bar to the main right, the next question seems again to be: what are »ancillary« claims, and should they all be treated alike? This, however, would now be only a theoretical question, for it would not matter: All claims would be subject to the limitation rules of Art. 2 and 3 regardless of their qualification as «main« or «ancillary« rights, and would have their own limitation «fate» in regard to commencement, interruption and commencement.

4. While in some legal systems the party autonomy to modify periods of limitation and their effects is more or less severely restricted out of concern for weaker parties, in particular consumers, and other legal systems distinguish between very short limitation periods, which could be prolonged as an exception, and other limitation periods, which cannot be modified or only shortened, the addressees of the UNIDROIT Principles, participants in international trade, could be regarded as experienced and knowledgeable persons who do not need protection by restricting their party autonomy to severely. Therefore, it should be left basically to the parties to calibrate the time limits for their rights and obligations according to their needs and the circumstances of the particular contract. Nevertheless one has to reckon that parties with superior bargaining power or better information may take advantage by either shortening the length of time for their own obligation or lengthening their right in time too much. Art. 5, therefore, limits the autonomy to shorten the periods of limitation to less than one year for the general period of limitation commencing upon actual or constructive knowledge, and, respectively, to less than four years the maximum period; extension of the maximum limitation period - and thereby, necessarily, the general period of limitation - should not exceed 15 years. These limits on party autonomy also took into account that, in contrast to contracts on the European level, where the EC-directive on Unfair Contract Terms may be used as an instrument to reign in abuses of contracting power, there is no such restriction on party autonomy available on the international (transeuropean) level. Fairness and balance of the party's rights, therefore, must be achieved by the UNIDROIT Principles themselves.

The modification can be agreed upon before or after the commencement of a limitation period (see also infra comment 4 to Art. 7).

Article 6
(*Definitions*)

**[The limitation periods under Articles 2 and 3 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 or up to a certain date, while »interruption« causes the limitation period to begin again at the time stated in the special provision on interruption.]**

COMMENT:

1. Technical instruments to adjust limitation periods to the occurence of special events or circumstances are

a) a new commencement of the period of limitation, herein called »interruption«, and

b) a discounting of a certain period of time for the computation of the limitation period, herein called suspension. «Suspension», besides discounting of a certain period of time, can also cause the final date of the limitation period to be postponed (so-called «Ablaufhemmung»).

2. The question whether these definitions were needed at all, should be decided by the working group. It should take into account that the terms »interruption« and «suspension» not only appear in the black letter rules and their headings, where they could be replaced, perhaps, by a different phrasing of the rules, but also in the comments, where they are useful shorthand expressions, and could be replaced only by rather pedestrian circumscription.

3. »Interruption« is provided for in Art. 7, »suspension« in Artt. 8-11.

Article 7
(*New Limitation Period by Acknowledgement*)

**Where the obligor, before the expiration of the limitation period, acknowledges expressly or impliedly the right of the obligee, a new general limitation period begins on the date of the acknowledgement but the maximum limitation period is not affected.**

COMMENT:

1. Interruption of a period of limitation by acknowledgement of the obligee's right by the obligor can be found in many legal systems.[8]

2. Since acknowledgement in most cases confirms, in other cases causes knowledge of the obligee/creditor, the new period of limitation commencing on acknowledgement can only be, under the policy principles on which the two-tier system of limitation is based (supra Art. 2 comment II. 1.) the general period of limitation. There is no need to protect the obligee/creditor, who knows or gets to know about the right by the acknowledgement of the obligor/debtor, even more by granting a new maximum period of limitation.

3. The commencement of a new general period of limitation on acknowledgement can take place either during the running of the general period of limitation under Art. 2 or during the maximum period of limitation under Art. 3. If, e.g., the obligee/creditor learns about the facts as a result of which the right has become due, only after nine years after they came into existence, the acknowledgement causes a new period of limitation under Art. 2 to commence, but will not exceed the maximum period of Art. 3; if the parties want to prolong the period of limitation even further, they can do so (only) by agreement under Art. 5. If, on the other hand, the obligee/creditor had knowledge of the relevant facts from the very first moment on, and the obligor »acknowledges« the respective obligation after two years, the new general limitation period will also run from the date of acknowledgement on, so that altogether the obligee's/creditor's claim will be barred only after five years.

4. The interruption, i.e. the commencement of a new three-year period of limitation presupposes, however, that the right was still enforceable. »Acknowledgement« is not the creation of a new obligation by a uni-lateral legal act or a novation (recreation) of a time-barred right, but (only) an interruption of the running of the limitation period. Therefore, if the limitation period has ended already, a mere »acknowledgement« under this article does not remove or invalidate the limitation defence retroactively. If the parties want to refute the effects of a completed period of limitation, they have to create a new obligation by «novation» under the respective rules for the creation of obligations by legal acts on the basis of party autonomy. The same applies, where the parties want to prolong, the «lifespan» of the obligee’s right beyond the approaching end term of the maximum period of limitation under Art. 3, 5 (c).

5. If and insofar as the parties have modified the general period of limitation under Art. 2, acknowledgement and the commencement of a new period of limitation refers to the general period as modified by the parties. If, e.g., the parties have shortened the general period of limitation to one year, acknowledgement causes a new one-year period to run.

[8] Cf. *Spiro*, vol. 1, § 150, p. 348 et passim.

Since the obligor/debtor can acknowledge more than once, the effect of the acknowledgement that it causes only a general period of limitation shortened by the parties to commence again, can be off-set by a later repetition of acknowledgements.

Article 8
(*Suspension by Judicial Proceedings*)

**(1) A limitation period ceases to run when the obligee performs any act that is recognized under the law of the court where the proceedings are instituted, as commencing judicial proceedings against the obligor or as asserting the obligee's right in such proceedings already instituted against the obligor, for the purpose of obtaining satisfaction or recognition of the obligee's right. Suspension lasts until a final decision has been issued or until the case has been otherwise disposed off.**
**(2) In case of the obligor's insolvency or dissolution, the running of the limitation period shall be suspended when the obligee has asserted the right in the insolvency or dissolution proceedings for the purpose of obtaining satisfaction or recognition. Para. (1) s. 2 applies in regard to the end of the suspension respectively.**

Article 9
(*Suspension by Arbitral Proceedings*)

**Where the parties have agreed to submit to arbitration, Art. 8 applies with appropriate adaptions. In the absence of regulations for an arbitral proceeding or provisions determining the exact date of the commencement of an arbitral proceeding, proceeding shall be deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor. Suspension lasts until a final award has been issued by the arbitration tribunal or until the case has been otherwise disposed of**.

COMMENT:

1. Judicial and arbitral proceedings effect the running a period of limitation in all legal systems considered.[9] The United Nation Limitation Convention also recognizes the effect of a commencement of judicial proceedings on the running of a period of time in Art. 13 and arbitration in Art. 14. The effect can take two forms: A judicial proceeding can cause an interruption of the period of limitation, i.e. a commencement of a new period of limitation from the time on the judicial proceeding has ended. Judicial proceedings can also and alternatively cause »suspension« only, i.e. a discounting of the time of the judicial proceeding in the computation of the period of limitation, so that a period that has already lapsed before the judicial proceeding began will be counted and added to the time running after the judicial proceeding has ended. This model of »suspension« is followed by the United Nation Limitation Convention (despite the use of the word »interruption«) and in Art. 17:107 of the European Principles on Contract Law Draft.

2. The exact requirements of a commencement of judicial proceedings must be determined by the procedural law of court, where these proceedings are instituted; therefore, the text of Art. 8 refers to the local law of procedure as to this point. It has also to be decided under the local law of procedure whether the raising of counter claims amounts to an institution of judicial proceedings in regard to these counter claims: Where the raising of counter claims as a defence means that these counter claims will be litigated as if brought in separate proceeding, their raising has the same effect on the period of time as if they were filed in court independently.

3. Arbitration must have the same effect as judicial proceedings and, therefore, the commencement of an arbitral proceeding must have the same suspensive effect as a judicial proceeding. In general, it could be referred to the applicable arbitration rules in regard to the starting point of the suspension by commencement of the arbitral proceeding. Since, however, the domestic rules on arbitration might not always determine the decisive date of commencement of the proceeding, Art. 8 s. 2 provides a fall-back line.

4. While the UN Limitation Convention in Art. 15 address the bankruptcy or insolvency situation in a special provision, the respective proceedings can be regarded as just another kind of judicial proceeding in a wider sense and could be seen as regulated by the norm on judicial proceedings. In regard to insolvency proceedings and their commencement as well as their ending, the respective domestic law has to be applied to determine the respective dates.

[9] See *Spiro*, vol. I, §§ 130-149, pp. 289 et passim.

## Article 10
(*Alternative Dispute Resolution*)

**The provisions of Articles 8 and 9 apply with appropriate modifications to other proceedings to which the parties have agreed with the aim of resolving their dispute.**

COMMENT:

1. Alternative dispute resolution and other modes of solving disputes instead of or before going to court must be taken into account as having effect on periods of limitation. If there were a general provision on negotiations between the parties as having a suspensive effect on the limitation period, alternative dispute resolution and the like probably would be covered by such a norm. In the absence of a general suspension provision for cases of negotiations, a special provision dealing with alternative dispute resolution, mediation and the like had to be inserted in order to discourage parties from using these methods out of fear that limitation periods will run out and deprive them of their disputed right.

2. Since only a few countries have enacted statutes on alternative dispute resolution and similar ways of mediating, no clear and reliable legal data exist as to the commencement and the ending of these procedures of dispute resolution and, consequently, the beginning and the end of the suspension of a limitation period. A provision taking account of these methods, therefore, can only refer to the respective provisions on judicial and arbitral proceedings, which have to be applied with »appropriate modifications«. This means, i.e., that as for the commencement of a procedure of dispute resolution, in the absence of a respective legal regulation the fall-back provision of Art. 9 s. 2 applies and the dispute resolution shall be deemed to have commenced on the date on which the request of one party to have such a dispute resolution has reached the other party. Since the end of a dispute resolution procedure very often may be uncertain, the reference to Artt. 8 and 9 and in particular to the phrase »until the case has been otherwise disposed of« must be applied with appropriate modification, meaning that a unilateral termination of the dispute resolution procedure by one of the parties must suffice to terminate the suspension. The problem of a unilateral termination which is unjustified and declared in bad faith could be coped with by denying effect under Art. 1.7 of these Principles.

Article 11
(*Suspension in case of force majeure, death or incapacity*)

**(1) Where the obligee has been prevented by an impediment that is beyond its control and that it could not reasonably be expected to have avoided or overcome, from causing a limitation period to cease to run under the preceding articles, the limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.**
**(2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor inherited the respective party's position; the additional one-year period under para 1 applies respectively.**

COMMENT:

1. Impediments which prevent the obligee/creditor to pursue his/her or its rights in court are taken into account by all legal systems analysed here[10]; the UN Limitation Convention (Art. 21) as well as the European Principles Draft (Art. 17:108) contain similar rules. They are based on the basic policy notion that the obligee/creditor must have had a chance to have pursued his rights (supra Art. 2-5 comment II.) before he can be deprived of them by a lapse of time. Practical examples are war or natural disasters preventing the obligee/creditor to reach a competent court and other cases of force majeure hindering the pursuance of a right and to effect at least suspension of the limitation period. The impediment must have been beyond the obligee's/creditor's control; imprisonment, therefore, is an impediment suspending the limitation period only in cases where it could not have been avoided such as being taken prisoner of war, while a criminal could not invoke this provision.

2. a) Since the impediments beyond control of the obligee may occur and cease to exist towards the end of the limitation period, so that after the termination of the respective impediment only a very short or no time at all might be left for the obligee to decide what to do, this article provides for an additional one-year period of time from the date on which the impediment ceases to exist in order to enable the obligee to decide whether to sue or what other cause of action to take.

b) Incapacity or death of the obligee/obligor are but special examples of impediments to an effective pursuance of the obligor's right. The same

[10] See *Spiro*, vol. I, §§ 87 et passim, p. 191 et passim.

consideration and, consequently, the same solution as in case of general impediments must apply and are provided for in para 2.

Article 12
(*Effect of Expiration of a Limitation Period*)

**Expiration of the limitation period entitles the obligor to invoke this expiration in any legal proceeding as a defence.**

Article 13
(*Set Off After Expiration of the Limitation Period*)

**[Notwithstanding the expiration of the limitation period for a right, a party may rely on this right as a defence or for the purpose of set off against a claim asserted by the other party.]**

Article 14
(*Restitution*)

**Where a right is performed after the expiration of the limitation period for the right, the obligor or another performing party shall not on that ground alone be entitled to claim restitution even if the performing party did not know at the time of performance that the limitation period had expired.**

COMMENT:

1. Artt. 12-14 deal with the effects of the lapse of the respective period of time. Choosing between the model of extinctive prescription and a mere limitation of enforceability, the Principles have opted for the latter model. Artt. 12-14 are a consequence of this basic decision: The right of the obligee is not extinguished by a lapse of the respective limitation period, but has become unenforceable. As a consequence, the completion of a limitation period can be raised as a defence by the obligor/debtor in any legal proceeding initiated by the obligee (Art. 12). It also follows from this basic decision that the obligee must raise this defence in order to

be heard. If - as happens among honourable merchants - the obligor wants to honour the obligation despite the lapse of time, he can relinquish this defence by not raising it, and he can also pay with the consequence that this payment is *with cause*, i.e. performance of a valid obligation, and cannot be recovered under restitutionary or unjust enrichment principles (Art. 14).

2. The basic decision against extinction of the right despite expiration of a limitation period also necessitates that it could be used for set off, provided that set off is generally given retro-active effect. Since the provisions on set off and the details of its effects have not yet been decided by the working group, the respective consequences for a right limited by an expiration of a limitation period had to be postponed until the final decisions on set off have been made. In the context of set off - and the comments to the respective Art. 13 - to the influence of a right of retention of the obligee and its effect on the limitation period has to be (re)considered. A right of retention resembles a right to set off, but has to be distinguished by its minor consequences: While the obligee by set off may extinguish his obligation, a retention right is merely a temporary defence, leaving the obligation basically intact. Since the obligee cannot be forced to perform, if he/she or it can raise a right of retention as defence, this must have consequences for the commencement of the limitation period. It must suffice, as supposed here (Art. 2 comment II.2.), to read the term »due« in Art. 2 as the decisive factor for the commencement of the limitation period as meaning »enforceable«, so that the right has not yet become due, as long as a retention right (or other defence) exists. This, however, has to be considered and decided by the working group. If the working group opts for an express solution of a right-of-retention question, a respective provision should either be added to Art. 2 or Art. 13.