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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 5th session held in Rome, 3-7 June 2002)

Rome, April 2003

Article 1
(Scope of the chapter)

(1) The exercise of rights governed by these Principles is barred by expiration of a period of time, referred to as “limitation period”, according to the rules of this chapter.

(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.

COMMENT

1. Notion of limitation period

All legal systems know the influence of passage of time on rights. There are two basic systems. Under one system, passage of time extinguishes rights and actions. Under the other system passage of time operates only as a defence to an action in court. In these Principles a lapse of time does not extinguish rights but operates only as a defence (see *infra* Art. 9).

The term “rights” is employed to make sure that not only the right to demand performance or the right to another remedy for breach can be barred but also the exercise of rights affecting a contract directly such as the right of termination under Art. 7.3.1 or a right of price reduction contractually agreed upon.

Illustrations

1. A sells a tanker to B to be delivered to the purchaser on 3 October. The sales contract lists equipment and spare parts, which, however, are missing when the ship is handed over. The purchaser notices this lack of conformity only in November 3 years later. The purchaser’s claim under Art. 7.2.2 is barred by Art. 2 .
2. The facts are the same as in illustration 1, the difference being that the contract between A and B contains a clause allowing B a price reduction up to 30% in case of missing equipment or spare parts. B’s right to price reduction is also barred .

2. Notice requirements and other prerequisites for enforcing rights

Rights can be lost under these 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, without undue delay, or within another fixed period of time. See Art. 2.1-2.2.2 (communications in the context of formation of contract), Art. 3.15 (avoidance of contract on account of defects of intent), Art. 6.2.3 (request for re-negotiation), Art. 7.2.2 lit. e (performance), Art. 7.3.2(2) (notice of termination). Although they serve a function similar to limitation periods, these special periods and their effects are not affected by the more general

periods of this Chapter because they are designed to meet special needs. Being generally much shorter than the periods provided for in this chapter, they take effect regardless of those periods. In the exceptional case that a “reasonable period of time” in the circumstances is longer than the applicable limitation period, the former should prevail.

Illustration

3. The facts are the same as in Illustration 1, the difference being that B realizes at the time of the delivery on October 3 that some parts are missing and sets an additional period of time of 30 days for the delivery of the missing parts. Two months after delivery date the parts are still missing and B sends notice of termination to A under Art. 7.3.2. B cannot rely on the three-year period of limitation, but has lost the right to terminate the contract because a reasonable time under Art. 7.3.2(2) has lapsed.

3. Mandatory rules of domestic law

Mandatory rules of national, international or supranational origin on limitation periods, including their length, suspension, and vulnerability to modification by the parties, may prevail under Art. 1.4. The same is true for any modification of periods of limitation by party agreement under Art. 3.

Illustration

4. Seller A in Ruritania sells and delivers component parts to car manufacturer B in Equatoria. Some of the parts are defective and in the year of delivery, the defects cause accidents, for which B has to pay damages. Four years later, B asks A to be indemnified for its costs. A refuses to pay. The contract provides for arbitration in Danubia with the *lex mercatoria* as the applicable law. In an arbitration commenced by B, A raises the defence of limitation under Art. 2 of these Principles as *lex mercatoria*. B responds that under Ruritanian law such actions for defective products are barred only after 5 years, and that this is a mandatory rule. This rule of Ruritanian law prevails.

Note of the reporter

Art. 1 (1) and (2) were agreed upon in Rome in 2001 (SR. No. 46); the drafting of para 1 was changed in Rome 2002 (S.R. 73) Also, the drafting of the comments was altered in Rome 2002 (S.R. 69, 71,72) and comment 3 was suggested to be necessary (S.R. 87-91).

2. Definitions of “legal proceedings”, “person” and “year” have been already deleted in Rome 2001(SR. 55, 56, 65).

3. Illustration 4 and comment thereto were added on request of the working group in Rome 2002.

Article 2
(Limitation Periods)

(1) 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 obligee's right can be exercised or the obligor's performance can be required.

(2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised or the obligor's performance can be required.

COMMENT

1. No common solution

Although periods of limitation of rights and actions are common to all legal systems, they differ in length. They range from six months or one year in some countries for claims for 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 some claims. On the level of international unification of law, only the United Nations Convention on the Limitation Period in the International Sale of Goods of 1974 (as amended in 1980) offers guidance, but it is restricted to international sales of goods.

2. Relevant factors

The stated length of a period of limitation in itself does not always determine the time after which the exercise of rights is barred. That time may be affected by the prerequisites for commencement of the period and by circumstances affecting its running (see Arts. 4 - 9). It may also be affected by agreement of the parties (see Art. 3). Party autonomy in regard to limitation periods is of great practical importance, for periods either too long or too short may be tolerable if parties may modify them freely according to their needs.

3. Balance between interests of obligee and obligor

These Principles strike a balance between the conflicting interests of the owner of a right on the one side and the obligor of a dormant claim on the other side. Because an obligee should have a reasonable chance to pursue its right, it should not be barred by a lapse of time before it becomes due and can have been enforced. Furthermore, the obligee should know or at least have a chance to know about its right and the identity of the obligor. On the other hand, because the obligee should be able to close its files after some period of time regardless of the obligor's knowledge, a maximum period must be established. These Principles, therefore, do not follow systems such as the United Nations Convention that have only one absolute period beginning on accrual of an action. Instead, it provides for a two-tier system.

4. Basic structure of the limitation regime

The two-tier system implements the policy that the obligee should not be barred before having a real chance to pursue its right by having actual or constructive knowledge of the right. Paragraph 1, therefore, provides a rather short three-year period of limitation commencing from the time that the obligee knows or ought to know the facts on which its right is based. Paragraph 2 provides a longer ten-year maximum period, commencing at the time when the right came into existence, regardless of the obligee's actual or constructive knowledge.

5. Knowledge of the facts as distinguished from knowledge of law

The general three-year period of limitation commences on the day after the day "the obligee knows or ought to know the facts as a result of which the right could have been exercised or the obligor's performance could have been required". "Facts" within the meaning of this provision are the facts on which the right is based, such as formation of a contract, delivery of goods, undertaking of services, and non-performance. The facts indicating that a right or claim has fallen due, must be known or at least knowable by the obligee before the general limitation period commences. The identity of the obligor 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 obligee must know or have reason to know whom to sue before it can be blamed for not having pursued the right or claim. Actual or constructive knowledge of "facts", however, does not mean that the obligee must know the legal implications of the facts. If despite full knowledge of the facts the obligee is mistaken about its rights, the three-year period of limitation may nevertheless pass.

Illustrations

1. A designs and builds a bridge under a contract with county B. A's engineers make a mistake in calculating the strength of some steel girders, which the construction firm itself could discover. Four years later, the bridge collapses because of a combination of the weight of some heavy trucks and a storm. B's claims for damages are not barred, because the general period of limitation commenced only at the time of the collapse, when B should have known of A's breach.
2. The facts are the same as in Illustration 1, the difference being that the bridge collapses eleven years after its construction. B's claims are barred under the maximum period of limitation of Article 2 (2). Parties to such a contract are well advised to adjust the maximum period within the limits of Art. 3.
3. A sends B a notice under Article 7.3.2 terminating a sales contract between A and B, because B refuses to take delivery of goods tendered by A. Thirty-seven months after receipt of the note of termination, B demands return of an advance on the purchase price paid prior to the termination. B, asserting that by an error in its bookkeeping, it had overlooked its prior payment of the advance so that, therefore, it was only recently aware of its restitutionary claim under Art. 7.3.6(1). B's claim for restitution is barred by the three-year period of limitation, because B ought to have

known of its payment when the contract was terminated and the claim to repay the advance arose.

4. The facts are the same as in Illustration 1, the difference being that B asserts that it had not realised the legal effects of a notice of termination. B's claim for restitution is nevertheless barred. An error of law in regard to the legal effects of a notice of termination cannot absolve the obligee since "ought to know" includes seeking legal advice, where one is uncertain about the legal effects of the circumstances.

6. Day of commencement

Since, absent agreement to the contrary, the obligor can generally perform its obligation during the whole day of the debt's maturity, the limitation period should not commence on that very day but on the next day only.

Illustration

5. A is obliged to pay a sum of money on November 24. The period of limitation commences on November 25.

7. Right must be exercisable

A debt may exist although performance can not yet be required (see, e.g., Art. 6.1.1(a)). While a creditor's claim to repayment of a loan is founded on the contract and therefore may arise at the time of the conclusion of the contract or of payment of the loan to the debtor, the repayment claim will usually fall due much later. Furthermore, a right may not be enforceable if the obligor has a defence.

Illustrations

6. A loan agreement obliges the borrower to repay the loan on November 15. The lender grants an extension of the date of repayment until December 15. The period of limitation commences on December 16.

7. A contracts to build a fertilizer plant for B. The price is to be paid in three instalments, the last instalment being due four weeks after completion of the work as certified by an engineering firm. After certification there are still malfunctions of the plant. B is entitled to withhold performance of the last instalment under Art. 7.1.3(2), Art. 7.1.4(4). The commencement of the limitation period for the claim for payment does not begin until the right to withhold payment is extinguished by cure of the malfunctions.

8. Maximum period

Under Paragraph 2 the obligee is barred from exercising its right ten years after it could have been exercised. This maximum period of ten years furthers the objectives of restoring peace and preventing speculative litigation where evidence has faded.

Illustration

8. B borrows money from A and orders B's accountant to repay the loan when due in January. Fifteen years later, a dispute arises over whether the loan was repaid fully, or only partially as A claims. A's asserted claim is barred by Art.2 (2), because the maximum limitation period has expired.

9. Ancillary claims

Art. 2 applies to all rights including so-called "ancillary claims".

Illustrations

9. In a loan agreement, borrower agrees to pay interest of 0.7 % per month if there is default in repayment. Thirty-five months after repayment is due, the borrower repays the principal. The lender need not sue for all successive instalments of interest at once, but can wait up to thirty-six months for each instalment before it is barred.

10. Under builder's A contract with owner B, A agrees to complete construction by October 1, 50.000 Euro to be paid for every month of delay up to 2.5 million Euro. Completion is delayed for 40 months. Damage claims for non-performance or delay are barred after 36 months from October 2on. The claim for the penalty for each month of delay is barred 36 months after it arises.

10. "Year"

A definition of "year" is not included, because the reference to the Gregorian calendar is the usual meaning of "year" in international contracts, see Art. 1(3)(h) of the United Nations Limitation Convention. In any case, mostly calendars deviating from the Gregorian calendar have the same number of days of the year, so that they do not influence the length of a limitation period. A different meaning of "year" can be agreed upon by the parties under Article 4 of these Principles; such an agreement may be explicit or derived from interpretation of the contract.

Note of the reporter:

Art. 2 and 3 were adopted in Rome 2001 (SR. No. 89); the term "due" was accepted there after lengthy discussions (SR. No. 73 et seq.)

The merging of the former Arts. 2 and 3 into Art. 2 (1) and (2), the final wording of this Article, the structure and details of the comments were discussed and decided in Rome 2002 (S.R. 74 et passim), and the reporter has tried to follow sensible suggestions such as adding more illustrations not decided by formal votes. The omission of most of the comments on ancillary claims as requested by the Working Group required an adjustment of the Illustrations, too.

Article 3

(Modification of Limitation Periods by the Parties)

- (1) The parties may modify the limitation periods.**
- (2) However they may not**
 - (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

1. Basic decision: Modifications possible

In some legal systems the power of the parties to modify periods of limitation and their effects is restricted out of concern for weaker parties, in particular consumers. A distinction is sometimes made between very short limitation periods, which can be prolonged, and other limitation periods, which cannot be modified or can only be shortened. These Principles apply to participants in international trade, who can be regarded as experienced and knowledgeable persons who do not need these kinds of protection by such severe restrictions of autonomy. These Principles, therefore, leave it largely to the parties (subject to Art. 1.4) to adjust the time limits for their rights and obligations according to their needs and the circumstances of the particular contract.

2. Limits of modifications

Nevertheless the possibility remains that a party with superior bargaining power or better information may take advantage of the other party by either unduly shortening or lengthening the period of limitation. Art. 3, therefore, limits the power to shorten the general period of limitation to less than one year commencing upon actual or constructive knowledge, and shorten the maximum period to less than four years. The maximum limitation period, and necessarily, the general period cannot exceed fifteen years.

Illustrations

1. The facts are the same as in Illustration 2 to Art. 2, the difference being that the parties provide in their contract that the maximum period of limitation for all claims based on hidden defects is fifteen years. B's claim for damages is not yet barred.
2. The facts are the same as in Illustration 2 to Art. 2, the difference being that the parties in their contract provide that the maximum period of limitation for all claims based on hidden defects is twenty-five years and the bridge collapsed after sixteen years. B's claim for damages is barred, because the maximum period can be extended to fifteen years only.

3. The facts are the same as in Illustration 2 to Art. 2, the difference being that the parties provide in their contract that the general period of limitation in case of damages for non-conformity of the bridge commences only upon submission of a written report of experts of an independent engineering firm. After the collapse of the bridge, it is uncertain what its causes were, and it takes two years for the engineering firm to submit its report. The general limitation period begins to run only from the day after the day on which the report was submitted.

3. Time of modification

A modification can be agreed upon before or after the commencement of a limitation period. A modification before or after the commencement of a limitation period differs from an agreement concluded after the period of limitation has expired. Such an agreement, although too late to modify the applicable period of limitation, can have legal consequences either as a waiver of the defence that the period of limitation has expired or as a new promise by the obligor.

Note of the reporter:

Changes in the wording of the Article and the comments were made according to proposals in Rome 2002; also illustrations were added here and to Art. 1 (S.R. 85-91).

Article 4

(New Limitation Period by Acknowledgement)

(1) Where the obligor, before the expiration of the general limitation period, acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement.

(2) The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Art. 2 (1).

COMMENT

1. Acknowledgement of rights

Most legal systems allow for an alteration of the course of the period of limitation by acts of the parties or other circumstances. Two technical concepts are employed for this purpose. Sometimes acts of the parties or other circumstances “interrupt” the running of the period of limitation so that a new limitation period commences. Sometimes acts or other circumstances cause a “suspension” of the running of the period of limitation, so that the time of suspension is not counted in computing the

period of limitation. These Principles treat acknowledgement of a right as causing an interruption (see United Nations Limitation Convention, Art. 20).

2. Commencement of a new general limitation period

The new limitation period that commences on acknowledgement is the general limitation period, because the obligee will necessarily have the knowledge required for commencement under Art. 2 (1). There is no need to protect the obligee, who knows or learns about the right by the acknowledgement by granting a new maximum period of limitation.

Illustration

1. A defectively performs a construction contract with B and B tells A about non-conformities in October without any response by A. Two years later B again approaches A, hinting legal action or other recourse. On November 15 of that year A, in response, acknowledges the non-conformity and promises to cure the non-conformity. A new general period of limitation commences to run on B's claim on November, 16 (Art. 7.2.3).

The commencement of a new general period of limitation on acknowledgement can take place either during the general period of limitation under Art. 2 (1) or during the maximum period of limitation under Art. 2 (2). While the maximum period of limitation under Art.2 (2) in itself will not begin again, the new general period of limitation under Art. 2 (1) may exceed the maximum period up to three years, if the obligor acknowledges after more than 7 years but before the maximum period has already run out.

Illustration

2. B discovers defects in the construction work of A only 9 years after completion of the work. The defects could not have been discovered earlier. B threatens to instigate legal action, and A acknowledges the defects. A new general period of limitation begins to run on acknowledgement, so that altogether the period of limitation amounts to 12 years.

3. Novation etc. to be distinguished

Acknowledgement does not create a new obligation by a unilateral legal act or a novation of a barred right, but only interrupts the running of the limitation period. Accessory rights are therefore not extinguished. Consequently, if the limitation period has ended already, a mere acknowledgement under this article does not remove or invalidate the limitation defence retroactively.

Illustration

3. The facts are the same as in illustration 2., the difference being that B knows or ought to know of A's defective construction at the time of completion. B approaches A only 7 years later, and A acknowledges the defective performance.

B's claim is, nevertheless, already barred under Art. 2 (1) and is not revived by A's acknowledgement.

If the parties agree to undo the effects of a completed period of limitation, they can create a new obligation or waive the defence of the expiration of a limitation period. The parties can also prolong the duration of the obligee's right beyond the end of the maximum period of limitation under Art. 2 (2) .

Illustrations

4. The facts are the same as in Illustration 3, the difference being that A in order to maintain a profitable business relation not only acknowledges the defective performance, but promises to cure the defects regardless of any question of A's liability. This agreement creates a new obligation of A, which is barred only 3 three years later.

5. B discovers defects in A's construction work, which could not have been discovered earlier, only 9 years after completion. On notice to A, A responds that it will investigate the causes of the defects and, therefore, will not invoke the period of limitation until six months after the experts investigating the defects submit their report. The report is submitted twelve months later, confirming B's notice of defects. When B asks A to cure the defects, A invokes Art. 2(2) claiming that the maximum period has lapsed. A's argument will be rejected if B abstained from commencing judicial proceedings on account of A's waiver.

4. Interruption of periods of limitation modified by the parties

To the extent that the parties have modified the general period of limitation under Art. 2 (1), acknowledgement and the commencement of a new period of limitation affects the general period as modified. If, for example, the parties have shortened the general period of limitation to one year, acknowledgement causes a new one-year period to run.

Illustration

6. A and B have agreed to shorten to two years the period of limitation for claims arising from non-conformity of A's performance. After 9 ½ years B discovers defects in A's performance, and A acknowledges its obligation to cure. B has another two years to pursue its claim before it is barred under Art. 2 (1).

Since the obligor can acknowledge more than once, the limited effect of an acknowledgement in causing only the general period of limitation to commence again, can be overcome by a later repetition of the acknowledgement.

Illustration

7. A delivers non-conforming goods to B in November. B suffers losses from the non-conformity because its customers complain and return the goods. Since

two years later the amount of losses altogether is not yet clear, B pressures A to acknowledge its liability and A complies with B's request in December of that year. Two years after that, there are still uncertainties about the exact extent of B's obligations towards his customers, some of whom have sued for consequential damages allegedly caused by the goods. B, therefore, turns to A again, who acknowledges its obligation to compensate B should the claims of B's customers be well-founded. B has three more years more before its claims against A are barred.

Article 5

(Suspension by Judicial Proceedings)

(1) The running of the limitation period is suspended

(a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor;

(b) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings;
or

(c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.

(2) Suspension lasts until a final decision has been issued or until the case has been otherwise disposed of.

COMMENT

1. Judicial proceedings

Judicial proceedings affect the running of a period of limitation in all legal systems. The effect can take two forms. A judicial proceeding can cause an interruption of the period of limitation, so that a new period of limitation begins at the time the judicial proceeding ends. Or a judicial proceeding can cause a suspension only, so that a period that has already lapsed before the judicial proceeding begun will be deducted from the applicable period, the remaining period commencing at the end of the judicial procedure. This model of suspension is followed by the United Nations Limitation Convention Art.13.

2. Commencement of proceedings

The requirements for a commencement of a judicial proceedings are determined by the procedural law of the court where the proceedings are instituted. The text of Art. 5, therefore, refers to the local law of procedure in this regard. The local law of procedure also determines whether the raising of counter claims amounts to an institution of judicial proceedings in regard to these claims: Where the counter claims

raised as a defence are treated as if brought in separate proceeding, raising them has the same effect on the period of limitation as if they were filed independently.

Illustrations

1. A purchases from B a truck that turns out to be defective. A notifies B of the defects but, because of other pending contracts between A and B, A does not press the matter for 24 months. When negotiations between A and B on those contracts break down, B turns down a request by A to cure the defects, asserting that the defects were caused by A's mishandling of the truck. A files a law suit against B by depositing it with the clerk of a competent court. Under the procedural law applicable in that court, this is sufficient to commence a litigation with respect to A's claims. The running of the period of limitation is suspended, until a final decision is handed down. This includes not only a decision of the court of first instance but also, if allowed, that of a higher court on any available appeal. If the parties reach a settlement or the plaintiff withdraws its complaint, this ends the litigation if it is so regarded under the applicable domestic procedural law.

2. B commences litigation for the purchase price of goods by filing a complaint as required by the procedural law of the country of the competent court. A raises claims under an asserted warranty either as counter-claims or by way of set-off. The period of limitation for A's warranty claims is suspended until there is a final decision on the counter-claims or a settlement or a withdrawal of A's counterclaims.

3. Suspension by bankruptcy or insolvency or dissolution proceedings

Bankruptcy or insolvency proceedings can be regarded as another kind of judicial proceedings. They could be seen, therefore, as regulated by the rule on judicial proceedings (Art. 5(1)(b) and (c)). In regard to these proceedings and their commencement as well as their ending, the applicable domestic law has to be applied to determine the dates.

Note of the reporter:

This Article was agreed upon after redrafting in Rome 2001 (S.R. 175, 176); in Rome 2002, no amendments or changes were made.

Article 6

(Suspension by Arbitral Proceedings)

(1) The running of the limitation period is suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the

absence of regulations for an arbitral proceeding or provisions determining the exact date of the commencement of an arbitral proceeding, the proceeding is deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.

(2) Suspension lasts until a binding decision has been issued or until the case has been otherwise disposed of.

COMMENT

1. Arbitral proceedings

Arbitration has the same effect as judicial proceedings and, therefore, the commencement of an arbitral proceeding has the same suspensive effect as a judicial proceeding. In general, the date of commencement is determined by the applicable arbitration rules, and the starting point of suspension is also determined by these rules. If the rules on arbitration do not determine the date of commencement of the proceeding exactly, the second sentence of Art.6 (1) provides a default rule.

Illustration

A cancels a distributorship contract with B, claiming that B has defaulted payments due for A's delivery of goods to B. B counter-claims damages for lost profits, but B changes its law firm and allows almost 30 months to pass since the termination of the agreement. The agreement contains an arbitration clause, providing that all disputes and claims "shall be settled under the rules of Conciliation and Arbitration of the International Chamber of Commerce", and B submits a request for arbitration under those rules. The rules provide that the date of receipt of this request is regarded "for all purposes" as the date of the commencement of the arbitral proceedings. The running of the period of limitation is suspended until a final award is reached or the case is otherwise disposed of.

Article 7

(Alternative Dispute Resolution)

The provisions of Arts. 5 and 6 apply with appropriate modifications to other proceedings whereby parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.

COMMENT

1. Alternative dispute resolution

Before resorting to litigation in a court or proceedings in an arbitration tribunal, parties may agree on conciliation, mediation, or other types of alternative dispute resolution. Because there is no general suspension provision for cases of negotiations, this special provision dealing with alternative dispute resolution is inserted so that parties will not be discouraged from using such proceedings out of fear that limitation periods will run out.

2. Absence of statutory regulations

Because only a few countries have enacted statutes on alternative dispute resolution and rules for such proceedings are relatively rare, this Article refers to the respective provisions on judicial and arbitral proceedings, which have to be applied with “appropriate modifications”. This means that the commencement of proceedings of alternative dispute resolution, in the absence of an applicable legal regulation, is governed by the default provision of Art. 6 (1), sentence 2, and the proceedings commence on the date on which one party’s request to have such proceedings reaches the other party. Since the end of a dispute resolution procedure will very often be uncertain, the reference to Arts. 5 and 6 and in particular to the phrase »until the case has been otherwise disposed of« is to be applied with appropriate modification too. Thus a unilateral termination of the dispute resolution procedure by one of the parties will suffice to terminate the suspension. A unilateral termination that is in bad faith is subject to Art. 1.7.

Illustration

The parties, a hospital and a supplier of hospital equipment, agree to submit disputes over prices to a board of mediation. Under the applicable rules a review by this board - commences on the date when a party submits a complaint to the other party, who then has to invite the board to review the case. The mediation ends under the applicable rules, when either the board decides on the claim, there is a settlement between the parties, or the claimant’s request is withdrawn.

Note of the reporter:

The Article was adopted in Rome 2001 (S.R. no. 180); in Rome 2002 only changes in the illustration were proposed (S.R. 123).

Article 8

(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 neither avoid nor 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 paragraph 1 applies respectively.

COMMENT

1. Effects of impediments

All legal systems, including the United Nations Limitation Convention, take into account impediments that prevent the obligee from pursuing its rights in court. It is a basic policy notion that the obligee must have a chance to pursue its rights before it can be deprived of them by a lapse of time. Practical examples of impediments include war and natural disasters that prevent the obligee from reaching a competent court. Other cases of force majeure may also prevent the pursuance of a right and cause at least suspension of the limitation period. The impediment must be beyond the obligee's control. Imprisonment, therefore, would suspend the limitation period only where it could not have been avoided, such as in the case of a prisoner of war but not of a criminal.

Illustration

1. A's lawyer plans to file a complaint against B, an engineering firm, for alleged professional malpractice by B's employees. The period of limitation will expire on December 1, and A's lawyer has completed the complaint on November 25, intending to file it by express mail or in person with the clerk of the competent court. On November 24, terrorists attack A's country with biological weapons of mass destruction, causing all traffic, mail service, and other social services to be completely stopped, preventing timely filing of A's complaint. The period of limitation ceases to run and will not expire until one year after some means of communication have been restored in A's country.

2. Additional period of deliberation

Since impediments beyond control of the obligee may occur and cease to exist towards the end of the limitation period, it is possible that after the termination of the respective impediment only a very short time 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 what course of action to take.

3. Incapacity and death

Incapacity and death of the obligee or of the obligor are but special examples of impediments to an effective pursuance of the obligee's right. The same solution as in case of general impediments is provided for in para 2.

Illustration

2. A lends money to B due to be repaid on January 1. A does not seek repayment for a long time and dies thirty-five months after the date for repayment. The law of succession applicable to A's estate requires that a court appointed administrator administers the estate and collect outstanding debts. Since the docket of the competent court is overcrowded, it takes two and a half years until an administrator is appointed. The administrator has one month left of the three-year general limitation period plus an additional one-year period to pursue the deceased party's claim against B before the period of limitation expires.

Note of the reporter:

The Article was already adopted in substance in Cairo (S.R. 183).

Article 9

(Effect of Expiration of a Limitation Period)

For the expiration of the limitation period to have effect, the obligor must assert it as a defence.

COMMENT

1. No extinction of the right

The expiration of a period of limitation does not extinguish the obligor's right, but only bars its enforcement.

2. Expiration of a limitation period must be raised as a defence

The effects of an expiration of a limitation period do not occur automatically, but only if the obligor raises the expiration as a defence. This can be done in any proceeding and also outside of a proceeding, as by refusing a request of the obligee to perform. The existence of the defence can also be the subject of a declaratory judgement.

Illustration

A purchases goods from B. Part of the purchase price is due on April 1 and is not paid. Thirty-eight months later, B files a complaint against A. A does not invoke the expiration of the limitation period nor appear in court, and B moves for a default judgment. Judgment will be for B, since A did not raise the expiration of the limitation period as a defence.

Note of the reporter:

The wording of this Article was agreed upon in Rome 2002 (.S.R. 126), and the comments were broadened following suggestions in Rome 2002 (S.R. 128).

Article 10

(Reliance on Right as a Defence and Set Off after Expiration of the Limitation Period)

(1) Notwithstanding the expiration of the limitation period for a right, the obligee may rely on its right as a defence.

(2) The obligee may exercise the right of set off, unless the obligor has asserted the expiration of the limitation period as a defence.

COMMENT

1. Use of a time-barred right as a defence

Under these Principles expiration of period of limitation does not extinguish the right but gives only a defence that must be invoked by the obligor (Art. 9). It follows that the obligee's right still exists, although a claim for its performance may be barred by the obligor's invocation of the expiration of the limitation period. It can, therefore, be used as a defence, e.g. as a ground for retention of performance owed by the obligee.

Illustration

1. A leases a printing press to B for ten years. Under the contract A is obliged to maintain the press in working condition and to undertake repairs, unless a defect is caused by B's negligence in operating the machine. The machine breaks down, but A refuses to do the necessary repairs. B, after futile requests and negotiations with A, has the repair done by another firm and asks A to pay the necessary costs. A does not react, and B does not pursue the matter. Five years later, at the end of the lease, B again requests payment of the costs of repair. A refuses to pay and invokes Article 2 (1), requesting return of the

printing press. B is entitled to damages for breach of contract and to withhold delivery of the press.

2. Set off in case of time-barred right

Because the obligee's right continues to exist it can be used for set off, if the prerequisites of set off under Art. XXX are met.

Illustration

2. The facts are the same as in illustration 1, the difference being that A not only asks for return of the press, but also for payment of rent unpaid. B is entitled to set off its counterclaim for damages against this money claim despite the expiration of the limitation period.

Although the expiration of the period of limitation does not in itself extinguish the right of the obligee, the situation changes when the obligor invokes the time bar as a defence by asserting it against the obligor. By doing so, the obligor makes the limitation effective, so that the right can no longer be enforced. Since set off is a kind of self-enforcement of a right, it is not available after the defence of expiration of the limitation period has been invoked.

Illustration

3. The facts are the same as in illustration 2, the difference being that B requests payment of the damages and threatens to sue four years after having the repairs were done. A objects asserting that the machine broke down due to B's fault. Since this is hard to prove, A in a letter to B also invokes the time bar under Art. 2 (1). B can no longer set off its claim for damages.

Note of the reporter:

At the meeting held in Rome in June 2002, it was decided in the discussion of the set off articles that set off should not have retroactive effects (S.R. 336). While the decision on set off after expiration of the period of limitation had been shelved until the discussion of the set off Articles (S.R. 134), the decision for ex nunc effects of set off now requires that the obligations used for set off must still be enforceable at the time of set off. If one of the obligations is time barred and this time bar has become effective by being invoked by the respective obligor, the respective obligation can (only then, i.e. after expiration of the limitation period having been invoked) no longer be enforced in a court nor by set off (para 2).

The consequences of expiration of the period of limitation on retention rights and other rights to withhold has not yet been discussed at all; para 1 is based on the decision in Art. 9.

Article 11
(*Restitution*)

Where there was performance in order to discharge an obligation, there is no right of restitution merely because the period of limitation has expired.

COMMENT

1. Time-barred claim as valid basis for performance

It follows from the rule that expiration of the period of limitation does not extinguish the right of the obligee but can be invoked only as a defence that if the obligor performs despite its defence, the obligation it performs is still effective as a legal basis for the obligee's retaining the performance. Mere expiration of a period of limitation cannot be used as grounds for an action to reclaim the performance under restitutionary or unjust enrichment principles.

2. Restitutionary claims based on other grounds

A restitutionary claim can be based, however, on other grounds than performance despite the lapse of a period of limitation, e.g., where a payor claims to have paid a non-existing debt under mistake.

Illustrations

1. Bank B lends money to borrower A, who does not repay on the date stated in the loan agreement. A's debt is overlooked and forgotten because of a book-keeping error of B. Four years later, B discovers its error and sends a notice to A claiming repayment. A complies with this request but later learns from a lawyer that A could have refused repayment on account of the expiration of the period of limitation. A cannot reclaim the payment as unjust enrichment from B.
2. The facts are the same as in Illustration 1, the difference being that A has in fact repaid the loan, but both sides were unaware of this. Four years later, B erroneously requests payment from A, and A complies. A can recover the second payment, because A had paid a debt extinguished by full performance.