D. Time-limits and limitations (prescription) in the field of international sale of goods.

*Report of the Working Group on time-limits and limitations (prescription), first session, 18-22 August 1969**

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* A/CN.9/30

INTRODUCTION

1. The Working Group, established by the United Nations Commission on International Trade Law at its second session, consists of the following seven members of the Commission: Argentina, Belgium, Czechoslovakia, Japan, Norway, United Arab Republic and the United Kingdom of Great Britain and Northern Ireland. The terms of reference of the Working Group are as follows:

"The Working Group shall:

"(*a*) Study the topic of time-limits and limitations (prescription) in the field of international sale of goods with a view to the preparation of a preliminary draft of an international convention;

"(*b*) Confine its work to consideration of the formulation of a general period of extinctive prescription by virtue of which the rights of a buyer or seller would be extinguished or become barred; the Working Group should not consider special time-limits by virtue of which particular rights of the buyer or seller might be abrogated (e.g. to reject the goods, to refuse to deliver the goods, or to claim damages for non-conformity with the terms of the contract of sale) since these could most conveniently be dealt with by the Working Group on the international sale of goods.

"The Working Group shall, in its work, pay special attention, *inter alia*, to the following points:

"(*a*) The moment from which time begins to run;

"(*b*) The duration of the period of prescription;

"(*c*) The circumstances in which the period may be suspended or interrupted;

"(*d*) The circumstances in which the period may be terminated;

"(*e*) To what extent, if any, the prescription period should be capable of variation by agreement of the parties;

"(*f*) Whether the issue of prescription should be raised by the court *suo officio* or only at the instance of the parties;

"(*g*) Whether the preliminary draft convention should take the form of a uniform or a model law;

"(*h*) Whether it would be necessary to state that the rules of the preliminary draft convention would take effect as rules of substance or procedure;

"(*i*) To what extent it would still be necessary to have regard to the rules of conflict of laws."[1]

2. The Working Group met at the United Nations Office at Geneva from 18 to 22 August 1969. All the members of the Working Group were represented. The meeting was attended also by observers from the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT).

3. The Working Group elected the following officers:

Chairman: Mr. Stein Rognlien (Norway);

Rapporteur: Mr. Ludvik Kopac (Czechoslovakia).

[1] See the report of the Commission on the work of its second session (A/7618), para. 46.

4. The Working Group had before it the studies submitted by Belgium, Czechoslovakia, Norway and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/16 and Add.1 and 2) and the comments thereon by Nigeria (A/CN.9/16/Add.3) and the International Institute for the Unification of Private Law (UNIDROIT) (A/CN.9/16/Add.4). The Working Group had also before it a secretariat note reproducing a working paper prepared by Professor John Honnold as consultant to the secretariat (A/CN.9/WG.1/CRD.1). In addition, the secretariat of the Council of Europe made available to the Working Group copies of the document entitled "Replies made by Governments of Member States to the Questionnaire on "Time-limits' " (European Committee on Legal Co-operation, Council of Europe, 1968), and of the secretariat memorandum on the proceedings of the fourth meeting of the Committee of Experts for the Standardization of the Concept of "Time-Limits" [EXP/Delai (69)3], held in Strassbourg in March 1969. The latter document contains (appendix I) the "Draft European Rules on Extinctive Prescription" which are referred to herein under that designation. The documents and working papers before the Working Group (including the documents produced in the course of the session, are listed in annex II. The list of participants is contained in annex I.

I. GENERAL DEBATE

5. The Working Group considered that the principles formulated should be certain, objective and, as far as possible, should be independent of the rules of any individual legal system. It was also pointed out that the law of limitation must, by its very nature, be definite in its operation, and the number of exceptions to the running of the prescription period should therefore be strictly limited for the sake of certainty and commercial convenience.

II. SCOPE OF THE CONVENTION

A. *Definition of international sale of goods*

6. The Commission requested the Working Group to study the topic of time-limits and limitations (prescription) in the field of international sale of goods. The Working Group considered, therefore, whether the draft convention[2] should contain a definition of the concept of international sale of goods.

7. Different views were expressed in this matter. One proposal was that the draft convention on prescription should incorporate the definition of international sale of goods in the Uniform Law on the International Sale of Goods (ULIS) annexed to the 1964 Hague Convention.

8. Another view was that the convention should follow the approach of article 1 of the 1955 Hague Con-

[2] The references to a draft "convention" are not intended to indicate any choice among alternative means for implementing uniform rules. For example, these references are not intended to indicate any position on the question mentioned in sub-paragraph (*g*) of the Commission's resolution, as to a choice between the use of a uniform or model law.

vention on the Law Applicable to the International Sale of Goods by providing that the convention shall apply to the international sale of goods (subject to the exclusion of certain items) without attempting to define that concept. Under this approach it would be left to the competent courts to determine whether a transaction constituted an international sale of goods within the scope of the draft convention. In further explanation of this approach, it was suggested that the convention should specifically exclude certain items (e.g. stocks, negotiable instruments or money, ships, electricity) which are excluded from the scope of application of ULIS (see article 5 of ULIS).

9. Some representatives objected to the adoption of the ULIS definition of international sale of goods on the ground that this definition was not satisfactory.

10. Other representatives pointed out that the present Working Group should not attempt to define the concept of international sale of goods as it would be more appropriate for this question to be considered by the Working Group on the International Sale of Goods established by the Commission at its second session. In this connexion, however, one representative referred to the difficulty of harmonizing definitions in texts of conventions which might not be concluded at the same time, especially if the text of a future convention should serve as a model for an earlier one. Even if the Working Group on Sales and UNCITRAL reached a provisional decision on a definition of international sale of goods, one could not be sure that this definition would eventually be incorporated in a future convention on that subject. This difficulty would arise if a convention on prescription is to be adopted and opened for signature and ratification before a convention on the sale of goods.

11. The Working Group reached the following decision:

(i) It would be desirable for a convention on prescription to contain the same definition of scope as a convention on the substantive law governing the international sale of goods;

(ii) The Group requests the Working Group on Sales and UNCITRAL to give priority attention to the definition of international sale of goods;

(iii) Pending such action by the Working Group on Sales and by UNCITRAL, the Working Group on Prescription would not attempt to draft a definition of the international sale of goods;

(iv) If it should not be possible promptly to reach a decision on this problem by means of a recommendation from the Working Group on Sales, in preparing a convention on prescription it would be necessary to decide whether a definition of the international sale of goods was needed and, if so, the terms of such a definition. In the meantime, for the purpose of defining the general nature of the problems it faced in drafting rules on prescription, the Working Group agreed that the field for its work would be the international sale of goods, without attempting a precise definition. The Group, however, agreed that the types of transactions excluded by article 5 of ULIS (e.g., stocks, shares, negotiable instruments, ships, electricity) would also be excluded from a draft convention on prescription. It was further agreed that sales of goods by means of documents (such as bills of lading) would be governed by the convention on prescription.

12. The representative of Japan reserved his Government's position with respect to the above decision in that it failed to implement its proposal expressed in paragraph 7 above. Under this proposal the convention on prescription would supplement the provisions of ULIS annexed to the 1964 Hague Conventions.

B. *Types of transactions and claims*

13. The Working Group also considered the proposed convention's applicability to various types of claims and claimants related to an international sale of goods. After discussion, the matter was referred to the Drafting group. The Drafting Group prepared language to express the central idea that the convention's rules should apply only to the rights of the seller and the buyer arising from a contract for the international sale of goods. A draft provision to implement this view, as approved by the Working Group, was as follows:

> "This Convention shall apply to the prescription of the rights of the seller and the buyer arising from a contract for the international sale of goods.
>
> "The Convention shall govern the prescription of the rights and duties of the buyer and seller under such a contract, their successors and assigns, and persons who guarantee their performance. This Convention shall not apply to the rights and duties of other third persons."

14. It was suggested that the problem of the relationship of the convention to claims under invalid contracts might be subject to further consideration. For future work defining the scope of the convention, attention was directed to the Draft European Rules on Extinctive Prescription with special reference to Rule No. 15 (2).

15. One representative wanted either to exclude from the convention damage to the person or property of the buyer (other than the goods sold), his successors and assigns ("products liability"), or to provide an added prescriptive period for such cases, as is noted in paragraph 36, *infra*.

16. The question was raised whether the convention should cover recourse actions (i.e., actions between successive buyers and sellers). It was agreed that, in principle, such recourse actions should be outside the scope of the convention unless the transaction in question was also an international sale of goods. The Working Group was of the view that this problem should be studied further.

III. Commencement of the period of prescription

A. *The basic test governing the commencement of the period*

17. The Working Group recognized that in preparing a draft convention on prescription one of the important and difficult problems was the development of the basic

test to govern the commencement of the prescriptive period. Following general discussion, the Chairman appointed a Drafting Group which was requested to prepare a draft provision dealing with this problem. The Drafting Group consisted of the representatives of Czechoslovakia, United Kingdom of Great Britain and Northern Ireland and Argentina; the representative of Belgium was later added to the Group.

18. The Drafting Group met and discussed alternative approaches to the problem and prepared a report; this first report by the Drafting Group noted that its recommendations were influenced largely by these considerations:

"1. It seemed wise to set a starting point that would be as definite as possible; to this end the Group thought it important to avoid the use of events subject to conflicting evidence, such as the time when a party claimed that he learned of a defect.

"2. It seemed necessary to work from a basic concept that is sufficiently flexible to relate to varying circumstances — such as differing national laws defining the rights of the parties and the wide variety of requirements imposed by the terms of individual contracts. The Group was of the view that the concept of the date of 'breach of contract' was probably the most suitable for this purpose.

"3. The Group came to the view that although this concept provided a helpful starting point, this concept might not be applied to certain important specific situations in the same way by the courts of different States. Thus the mere use of a general formula might lead to unification in name only, without producing unification of result on the difficult, concrete problems that will arise in practice. Therefore, it was thought important to add to the basic formula certain important specific instances of its application."

The Drafting Group noted, however, that in the brief time available for its work, the Group could not be confident that it was able to envisage all of the important areas of divergency, that may arise under this basic formula, and recommended that continuing attention be given to this matter.

(i) *Alternative tests examined by the Working Group*

19. The attention of the Working Group was principally centred on three alternative approaches to the definition of the commencement of the period. Two of these were embodied in two reports of the Drafting Group. Under the first alternative, designated as alternative A, the period would commence on "the date on which the breach of contract occurred". Alternative B, also discussed in the report of the Drafting Group, proposed that the period should commence on the date "on which action could have been taken". Under a third proposal, designated as alternative C, the period would run "from the date on which the fulfilment of the obligation first became due", but subject to the added provision that "the obligation is deemed to have become due not later than the date on which the breach of contract occurred". These three basic tests, together with related qualifying provisions and the discussion of considerations relevant to the choice among the alternatives, appear in the following extracts from the second report of the Drafting Group, and a written proposal which a representative subsequently presented to the Working Group.

20. In paragraph 18 above, reference was made to the first report of the Drafting Group, and extracts from that report were quoted suggesting general considerations which should govern the selection of a general formula. Following general discussion in the Working Group the problem was recommitted to the Drafting Group so that the alternatives could be more fully developed. The second report of the Drafting Group contained the following proposed statutory text based on alternative A, together with illustrations and comments:

ALTERNATIVE A

Proposed statutory text

1. The period of limitation shall run from the date on which the breach of contract occurred.

2. Where defective goods are delivered, the period will run from the date of delivery without regard to the date on which the defect is discovered or damage therefrom ensues.

3. Where, as a result of a breach by one party before performance is due, the other party exercises his right to treat the contract as discharged, the period will run from the date of the first breach from which such right arises.

4. No account shall be taken of any period within which a notice of default may be required to be given by one party to the other.

5. Where the contract contains an express guarantee relating to the goods which is stated to be in force for a specific time, the period of limitation in respect of any action based on the guarantee shall expire one year after the expiration of such time or [3] [5] years after the delivery of the goods to the buyer, whichever shall be the later.

Illustrations

The following illustrations are given as examples of the application of the above text to particular circumstances:

(i) In the case of non-delivery or late delivery, the period will run from the date on which, under the terms of the contract, the goods ought to have been delivered;

(ii) In the case of non-acceptance or late acceptance, the period will run from the date on which, under the terms of the contract, the goods ought to have been accepted;

(iii) In the case of a failure by the buyer to pay the price, the period will run from the date on which payment of the price became due, but remained in whole or in part unpaid.

Comments

Breach *(inexécution du contrat)* is the most relevant factor from a legal and commercial point of view. All rights of action arising from the contract normally stem from breach of the contract. It is the breach which causes the businessman to seek a remedy in the courts. Breach contains within it the idea that performance is due, since (except in the case of anticipatory breach) there can be no breach until performance is due. It is also an objective factor, and does not depend (as would any test based on the ability to commence legal proceedings) upon the rules of the applicable law or of the *lex fori*.

21. There was support within the Drafting Group for alternative B, as outlined above (paragraph 19). The second report of the Drafting Group set forth the

following proposed statutory text and supporting comments:

ALTERNATIVE B

Proposed statutory text

The time-limit shall be reckoned as from the day on which action could first have been taken.

Comments

Alternative B has the following advantages:

(i) Since prescription is extinctive, reference to the day on which action could have been taken is the most logical approach;

(ii) There is need for a more abstract criterion than breach of contract, and therefore one which could more easily be accepted by the different legal systems;

(iii) Alternative B also has the advantage over breach of contract in providing a starting point not open to question; breach of contract implies the need for a previous judicial statement to deal with the contention that there had been no failure to carry out the contract and hence no commencement of the period;

(iv) This test is more appropriate than fixing a prescriptive period which would run from the day 'on which the performance of the obligation becomes due', for the reasons stated in document A/CN.9/WG.I/CRD.1, section III, 11, B;

(v) A similar solution has been adopted in article 4 of the draft on the subject prepared by the Council for Mutual Economic Assistance, which implies that there is a broad consensus on the subject;

(vi) Alternative B disposes of some of the problems connected with the calculation of time-limits dealt with in Council of Europe, annex II.

22. One delegate offered a third alternative approach to defining the commencement of the period. This proposal (after later modification of the language in paragraph 6 below) was as follows:

ALTERNATIVE C

Article X (the period)

1. The period of limitation shall be [3] [5] years.

2. Subject to the provisions of paragraphs 3-6 of this article, the period shall run from the date on which the fulfilment of the obligation first became due. [The obligation is deemed to have become due not later than at the date on which the breach of contract occurred.]

3. When goods are delivered, the period for claims relying on a lack of conformity of the goods shall run from the date of delivery.

4. Where the contract contains an express guarantee relating to the goods and stated to be in force for a specified time, the period of limitation in respect of any action based on the guarantee shall not run out before one year after the expiration of such time, even if the period provided for in paragraph 3 of this article has expired.

5. When the fulfilment of the obligation is dependent upon the creditor giving notice to the debtor, the period shall run from the earliest day to which the creditor could have caused the obligation to become due; [except in cases provided for by paragraph 6 of this article].

6. Where as a result of a breach of contract by one party before performance is due, the other party exercises his right to treat the contract as discharged (cancelled), the period shall run from the date of the breach on which such right is based. If the right to treat the contract as discharged (cancelled) is exercised on the basis of a breach as to an instalment delivery or payment, the period shall run from the date of such breach, even in respect of any connected previous or subsequent instalment covered in the contract.

(ii) *Examination of the alternative tests on commencement of the period*

23. Some of the considerations relevant to the framing of a rule on the commencement of the period were mentioned in the first report of the Drafting Group, quoted at paragraph 18, *supra*, and in the second report of the Drafting Group, quoted in paragraphs 20 and 21, *supra*. These and other considerations were discussed by the Working Group.

24. With respect to alternative B based on "the day on which action could have been taken", the objection was raised that recourse to some system of law would be necessary to define whether the action could be brought. One suggestion to solve this problem would be to specify the applicable law — such as the *lex fori*. In reply it was noted that a plaintiff may choose the forum — and hence that law may not be known in advance.

25. In connexion with such formulae that referred to the existence of a right of recovery ("the day on which action could have been taken"; "breach of contract", etc.), it was noted that the basic function of a prescriptive period was to prevent litigation of the merits of the claim. In actual practice a plea based on prescription would be interposed before the merits of the case were decided, in response to the assertion of a claim; in practice, the crucial question would be whether the facts alleged as the basis for the plaintiff's claim occurred more than [e.g.] five years prior to the commencement of the action. To minimize problems of choice of law and increase definiteness, it was suggested that consideration be given to a test starting the prescriptive period on "the date of the occurrence of the events on which the claim is based".

26. In offering alternative C above, the representative suggested that this proposal was designed in part to overcome difficulties which, in his view, were presented by alternative A — the test using "breach of contract" as the starting point. Where a contract was invalid, "breach of contract" provided an inadequate formula since a claim for restitution of benefits conferred under the invalid contract could hardly be deemed a claim for "breach of contract".

27. As an objection to alternative C, the Drafting Group in its second report noted that it did not favour a test which referred to the date when the obligation "became due", in part because of problems arising from repudiation or cancellation in advance of the due date specified in the contract. In response to this objection, the representative who had introduced alternative C prepared a revised paragraph 6, in the form that appears in paragraph 22, *supra*.

28. At the conclusion of extended discussion, the members of the Working Group were unable to reach agreement on a formula to determine the commencement of the prescriptive period. Three delegates pre-

ferred a test based on breach of contract (see alternative A); three supported the formula that included the test relating to the date when "the fulfilment of the obligation became due" (see alternative C). One delegate preferred the test of alternative B — "the day on which action could have been taken"; this delegate noted that if he must choose between a test based on alternative A and one based on alternative C, he would prefer the latter. It was agreed that further study of the problem would be required.

B. *Claims based on defects in delivered goods*

(i) *The general rule*

29. The Working Group considered the proposal on the commencement of the period with respect to claims that goods were defective, as set forth in the second report of the Drafting Group (paragraph 20, *supra*). This proposal was as follows:

> "Where defective goods are delivered, the period will run from the date of delivery without regard to the date on which the defect is discovered or damage therefrom ensues."

30. The Working Group recalled the interest in definiteness in the starting of the prescriptive period which was developed in support of this provision in the first report of the Drafting Group, as quoted *supra* at paragraph 18 (sub-paragraph 1).

31. Some representatives thought that ambiguity might arise out of the concept of "delivery", and attention was given to the two closely related concepts in the ULIS: (*a*) delivery (*délivrance*) and (*b*) handing over (*remise*). Under ULIS, "delivery" may occur before receipt or the right to possession. To meet this problem, one delegate suggested that the concept of delivery might be defined as follows:

> "If the goods sold are to be shipped to the buyer, in the absence of agreement to the contrary 'delivery' takes place when the goods reach him."

It was agreed that this suggestion deserved consideration in the drafting process.

32. Minor drafting changes were made in paragraph 2. The provision was approved by the Working Group in the following form:

> "Where goods are delivered, the period for claims relying on a lack of conformity of the goods shall run from the date of delivery [without regard to the date on which the defect is discovered or damage therefrom ensues]."

33. The concluding phrase was enclosed in brackets to indicate that some representatives thought that the language duplicated the thought in the first part of the paragraph and therefore was unnecessary; other representatives thought that the concluding phrase might be useful as an aid to clarity.

(ii) *Proposed exception with respect to injury to person or property occurring subsequent to delivery (products liability)*

34. The Working Group considered whether the general rule quoted in paragraph 32 above, should be subject to an exception for claims based on physical injury to the buyer. It was proposed that the prescriptive period for such claims should commence on a date later than delivery of the goods, and more specifically at the time when injury was suffered. In support of such a rule, it was noted that the goods might cause physical injury to the buyer at a time when much (or possibly all) of the prescriptive period had run, and that in such cases it might be too harsh to apply the prescriptive period to claims for physical injury. It was suggested that the proposed exception might also apply where the goods caused damage to other property of the buyer.

35. The Working Group noted that it had not been inclined to make any exception for damage that occurs after delivery, even by the provision of a short supplementary period running from the time of such damage. A majority of the Group decided that to maintain the certainty and effectiveness of the general prescriptive period, special exceptions should not be made for claims because of personal injury or property damage. In taking this decision, the Working Group noted that prescriptive rules would govern only contractual claims between the seller and buyer in an international sale of goods; in view of the commercial character of most of these transactions, physical injury to the buyer would seldom arise. The Group noted further that since the convention would have no effect on subsequent purchasers (unless the resale was also an international sale), most claims for physical injury, including claims against remote suppliers (sometimes termed "products liability"), would not be governed by the convention.

36. One delegate reserved his position on this question and referred to the earlier discussion at paragraph 15 on whether the convention should govern products liability. If actions based on such liability are not to be excluded clearly and completely from the scope of the convention, a special provision should be included in the text to the effect that the period of prescription in respect of claims for damages for personal injuries should only commence to run from the date on which the damage occurred.

C. *Effect of express guarantee*

37. Related to the problems just discussed (paragraphs 29-36), with respect to the commencement of the period of prescription for claims based on defects in goods, was the effect of a claim for breach of an express guarantee. The Drafting Group's recommendation on the effect of guarantees was embodied in paragraph 5 of its second report, paragraph 20, *supra*). The proposal was for an exception from the basic rule on the commencement of the period, to read as follows:

> "Where the contract contains an express guarantee relating to the goods which is stated to be in force for a specified time, the period of limitation in respect of any action based on the guarantee shall expire one year after the expiration of such time or 3-5 years after the delivery of the goods to the buyer, whichever shall be the later."

38. Drafting problems were discussed with respect to the provision on guarantees. They included: (*a*) the nature of the promise that might be termed an "express guarantee"; (*b*) the effect of guarantees relating

to amount of performance rather than time; e.g. mileage of an automobile.

39. In response to an inquiry whether there was empirical justification for the one-year period, it was noted that the draft was a tentative hypothesis that could lead to comments and counter-proposals. The representative of Japan noted his reservations with respect to selecting the period.

40. The proposal quoted in paragraph 37, *supra*, was given further examination, and was approved by the Working Group.

D. *Commencement of the prescriptive period where the contracts is cancelled prior to the promised date for performance*

41. The Working Group considered whether the various basic formulae on the commencement of the prescriptive period might call for a supplementary provision to avoid ambiguity where further performance under the contract is cancelled (or discharged) in advance of the date specified in the contract.

42. Examples considered as illustrative of the problem included the following: A contract made in January calls for the seller to ship in June. In February the seller informs the buyer that he will not perform the contract. In March the buyer notifies the seller that because of this repudiation, the contract is cancelled. Does the prescriptive period start to run in February, in March or in June? It was suggested that similar problems of dating the commencement might arise when seriously defective deliveries at early stages of a long-term contract led the buyer to notify the seller that the buyer would not accept future deliveries.

43. Attention was given to paragraph 3 proposed by the Drafting Group in alternative A at paragraph 20, *supra*. This proposal was as follows:

> "Where, as a result of a breach by one party before performance is due, the other party exercises his right to treat the contract as discharged, the period will run from the date of the first breach from which such right arises."

44. Suggestions were made for improving this language. One delegate proposed the following:

> "If the obligation [or a part of it] is deemed to have become due before the time otherwise provided for, because of a breach of contract on the part of the debtor, the period shall run not earlier than from the date on which the creditor has given notice to the debtor that the exercises his right."

This proposal was not approved, but the Group recommended that further attention be given the drafting of paragraph 3. For this purpose on representative referred to his proposal set forth under alternative C (paragraph 22, *supra* — see part 6). The language, including a formula to take care of the problem of instalment deliveries, provided:

> "Where, as a result on a breach of contract by one party before performance is due, the other party exercises his right to treat the contract as discharged (cancelled), the period shall run from the date of the breach on which such right is based. If the right to treat the contract as discharged (cancelled) is exercised on the basis of a breach as to an instalment delivery or payment, the period shall run from the date of such breach, even in respect of any connected previous or subsequent instalment covered in the contract."

No final decision was reached concerning these alternative approaches and it was agreed that the problem required further study.

E. *Effect of required notices to the other party on the commencement of the period*

45. The Working Group considered the need for a special provision to avoid ambiguity in the light of substantive rules under some legal systems that the success of a claim is dependent on the plaintiff's having given prior notice to the other party. See, e.g., ULIS articles 26, 30, 39. It was suggested that under some of the alternative formulae on commencements of the period, it might be concluded that the period of prescription did not run until notice had been given. *Cf.* ULIS 49-1. On the other hand, it could be argued that notice might have been given immediately in many cases, and that a party's prescriptive period should not be extended by his own delay.

46. Consideration was given to the following proposal on the point contained in the second report of the Drafting Group, quoted at paragraph 20, *supra*:

> "4. No account shall be taken of any period within which a notice of default may be required to be given by one party to another."

47. The substance of the above proposal was approved. It was suggested, that in later drafting it be made clear that the "no account shall be taken" phrase will be understood as providing that the running of the prescriptive period would not be affected by the time of giving notice.

48. The Working Group also considered Rule No. 3 of the Draft European Rules on Extinctive Prescription. Rule No. 3 provides:

> "If the performance of the obligation is dependent upon the creditor giving notice to the debtor, the prescriptive period shall run from the earliest day on which such notice could have taken effect."

The Working Group was of the opinion that this provision presented drafting difficulties, and should be studied further.

IV. Length of the prescriptive period

A. *The number of years*

49. The Working Group considered the appropriate length for the prescriptive period. There was general support for the view that the convention should set a single basic period governing all claims by both parties to an international sales contract — subject only to the possibility of limited exceptions for special problems.

50. Nearly all delegates favoured a period within the range of three to five years, with opinion about equally divided between these two periods.

51. Those inclined to favour three years called attention to the relatively short periods in the Warsaw Convention of 1924 on International Carriage by Air, the International Convention concerning the Transport of Goods by Rail (Berne, 1924; revised in Rome, 1933), the Geneva Convention of 1956 on International Carriage of Goods by Road, and the Geneva Convention of 1930 providing a Uniform Law for Bills of Exchange and Promissory Notes. It was also observed that the Draft European Rules on Extinctive Prescription sets a basic three-year period. See Rule No. 4(1). Further it was pointed out that the rules on prescription should serve as a pressure for timely fulfilment or settlement of matured claims, whether substantiated or unfounded, before available evidence is lost. In general, speedy settlement would be in the interest of both parties, buyers as well as sellers. Attention was also called to the relations between prescription rules and the rules on notification in ULIS, which often require speedy action to avoid the loss of rights (see, e.g., ULIS articles 39 and 49).

52. Those inclined to the shorter period noted, however, that holding to this view depended on whether the convention would have adequate provision for suspension or interruption of the period when it would be impossible to bring legal action, and reserved their final view until the provisions of the convention could be considered as a whole.

53. Those who favoured the longer period stressed the difficulty of negotiating across the great distances that may be involved in international trade, and also the difficulty and time that may be involved in securing an attorney in remote areas. One representative stressed the need for further study about commercial practices, with special reference to the terms of standard contracts.

54. The Working Group agreed to refer the matter to UNCITRAL for consideration at the forthcoming session.

B. *Calculation of time*

55. The Working Group gave preliminary consideration to the detailed rules contained in the Draft European Agreement on the Calculation of Time-Limits (Council of Europe 1969).[3] The extent to which such rules were needed in the proposed convention on prescription was referred to the Drafting Group.

(i) *The initial day*

56. The Drafting Group was of the opinion that it would be useful to specify whether the prescriptive period should commence on the day of the event instituting the period or on the day following this event. The second report of the Drafting Group recommended the following provision:

> "For the purpose of computing, the day of the event instituting the prescriptive period shall not be counted."

57. The Working Group approved this recommendation.

(ii) *Holidays*

58. On the question whether the convention should include a provision with respect to the effect of holidays on the calculation of the prescriptive period, the Drafting Group reported as follows:

> "The Group considered whether a rule was needed on prescriptive periods ending on a holiday. The Group agreed that in view of the length of the proposed periods of prescription, it was not necessary to extend the prescriptive period by a day or two to avoid hardship. The only possible need was to contribute to precision.
>
> "If a provision was needed for the purpose of precision, the Group preferred not to extend the prescriptive period. The Group did not think that such a provision was important, but thought that it might be advisable to reconsider the matter after considering a possible general provision on the extent to which the uniform law would supersede local law."

59. A majority of representatives approved this view. Three had reservations and recommended further study; one of these mentioned the problem of leap years. Reference was also made to the Draft European Agreement on the Calculation of Time-Limits, articles 3, 4 (*c*) and 5. One representative expressed the view that the main purpose for having a provision on periods ending on a holiday was to protect the creditor from being trapped because of lack of knowledge of national holidays in a foreign country. He thought that the problems arising from the observance of different holidays in different countries could be solved by referring to the holidays observed at the place where the act of interruption was to be performed.

C. *Applicability of prescriptive period to enforcement of claims established by judgement*

60. In connexion with the discussion of the appropriate length of the prescriptive period, attention was called to Rule 4(2) of the Draft European Rules of Extinctive Prescription which sets a ten-year prescriptive period for claims established by a "final and conclusive judgement, by an arbitral award and by any other document on which immediate enforcement can be obtained".

61. The view was presented that the time for enforcement of a judgement was a procedural matter for the forum. Special problems arose in the case of arbitral awards (see paragraph 124 (*a*) *infra*). It was also noted that it might be difficult to justify a different prescriptive period for suits on judgements arising from international sale of goods than for judgements arising from other transactions.

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[3] The Draft European Agreement on the Calculation of Time-Limits appears as appendix II to the document entitled, "Committee of Experts for the Standardization of the Concept of 'Time-Limits' " (Council of Europe EXP (Delai (69) 3). This Draft European Agreement is designed (see article 1) to solve problems of interpreting time-limits set by laws, by tribunals and by the parties. This Draft Agreement is thus very different from the Draft European Rules on Extinctive Prescription, which appear in appendix I to the above document.

62. The Working Group came to the conclusion that the UNCITRAL convention should not apply its limitation period to actions to enforce judgements. It was also agreed that the draft convention should clearly state that this matter is outside the scope of the convention (see part II (B), *supra*, at paragraphs 11 to 16, dealing with other problems of the scope of the convention, e.g., paragraph 11: the exclusion of claims based on negotiable instruments for the payment of money). One member reserved his position on this issue. Others wished to have the issue studied further at a later stage. A preliminary view was expressed that the convention should, in general, exclude (*a*) documents on which immediate enforcement can be obtained and (*b*) settlements in court.

V. Suspension or prolongation of the prescriptive period

A. *Impossibility to sue by reason of external circumstances* (force majeure)

63. The Working Group considered whether the prescriptive period should be suspended or prolonged during various circumstances that make it impossible for the creditor to bring his claim to court. A majority of the Group agreed that provision should be made for suspension or prolongation during certain conditions where legal action is prevented by external circumstances, such as war, interruption of communication or moratoria. It was also agreed that the proposed rule on suspension should not extend to circumstances peculiar to the parties, such as death. It was further agreed that effect should be given only to events occurring towards the end of the prescriptive period by giving assurance of specified time for suit (like one year) following the end of the events preventing access to the courts.

64. The Working Group considered the provision on this problem contained in the Draft European Rules on Extinctive Prescription; Rule No. 7(1) provides:

> "Where, due to circumstances which he could neither take into account nor avoid nor overcome, the creditor has been unable to interrupt prescription, and provided that he has taken all appropriate measures with a view to preserving his right, prescription shall not take effect before the expiry of a period of one year from the date on which the relevant circumstances ceased to exist."

65. Certain representatives expressed the view that this draft rule was acceptable. They noted, however, that this proposed rule did not appear to be limited to impossibility based on external factors of the sort mentioned above. Consideration was given to inserting a qualifying phrase such as "due to circumstances of external *force majeure*". It was noted, however, that the concept of *force majeure* was unknown in some legal systems and could not be readily translated or defined. One delegate considered the above-quoted Rule No. 7 to be unacceptably wide.

66. It was further suggested that the grounds for suspension should be put in specific terms, such as the closing of the courts, the closing of the frontier, or circumstances preventing communication between the parties. In response it was noted that itemizing circumstances might overlook important causes for interruption. And one delegate noted that wide grounds for interruption should be provided to meet the problems of trade with remote regions. The Working Group agreed that further study would be necessary before it would be possible to draft an acceptable statutory provision on this problem.

B. *Fraud*

67. The Working Group examined problems presented by misconduct of the debtor preventing the creditor from exercising his rights.

68. The Working Group gave attention to a relevant provision of the Uniform Law on the International Sale of Goods (ULIS). The one-year prescriptive period prescribed in ULIS article 49-1 is subject to a general exception where the buyer "has been prevented from exercising his right because of fraud on the part of the seller". The Group was in doubt about the meaning of this language. In any event, the Group was agreed that the prescriptive period should not be subject to suspension on the basis of a claim by the buyer that the seller knew that the goods were defective; such claims may readily be made in doubtful cases and could undercut the prescriptive period (compare part III (B) of this report at paragraphs 29-33).

69. The Working Group also considered Rule No. 7 (2) of the Draft European Rules on Extinctive Prescription. This rule provides for suspension "where the creditor does not know of the existence of his right . . . or the debtor's identity. . . ". The Group was of the view that this language was too vague and loose for a prescriptive period governing international sales.

70. The Working Group gave attention to the special problem where a debtor conceals his identity or address or his relationship to the transaction in such a way as to prevent suit by the creditor. A majority of the Group was of the view that this problem was sufficiently serious to justify an exception, and tentatively approved the following language:

> "Where one party has been prevented from exercising his rights by the other party's intentional misrepresentation or concealment of his identity, [capacity] or address, prescription shall not in any case take effect earlier than one year after the other party knew or reasonably should have known the concealed fact."

The Group decided to place brackets about the word "capacity" in the above draft to indicate hesitation about the implications of this concept.

C. *Other possible bases for suspension*

71. The Working Group then examined the provisions on the effect of criminal proceedings contained in Rule No. 5 of the Draft European Rules on Extinctive Prescription and Rule No. 6 on dealings between a person under legal disability and his legal representative, between spouses, between parents and their children and between a corporate body and its managing staff. The

Group agreed that these provisions were not necessary for a convention limited to international sales of goods. The Working Group also considered Rule No. 7(3) prolonging the prescriptive period "when the parties are engaged in negotiations with a view to reaching a settlement". The Group was of the view that this provision could lead to too much uncertainty, and decided not to recommend such a rule. Reference should also be made to the decision on agreements to extend the period after breach or like event mentioned in paragraphs 105-107, *infra.*

D. *Proceedings that fail to reach decision on the merits*

72. The Working Group considered the clause of Rule No. 11(2) of the Council of Europe's draft providing that when judicial, administrative or arbitration proceedings "have not resulted in a final and conclusive judgement or an arbitral award establishing the creditor's right, prescription shall not be regarded as having been interrupted but shall not take effect before the expiry of a period of six months from the day on which the proceedings ended". It was observed that the expression "final and conclusive judgement" was open to different interpretations.

73. The Working Group considered the desirability of providing for suspension of the prescription while a claim is pending before a tribunal if the tribunal ultimately decides it was without jurisdiction to decide the merits of the claim. The prevailing view was that while in sush circumstances a suspension would be warranted, care should be taken to avoid successive suspensions while a claim is brought before a series of incompetent tribunals. Accordingly, there was support for the view that in such and similar cases the prescriptive period should be suspended, but for not more than one additional year from the institution [conclusion] of the first proceeding. It was agreed, however, that the scope and formulation of such a rule called for further study.

VI. Interruption of the period

A. *Acknowledgement of the debt*

(i) *Effectiveness to interrupt the period*

74. Consideration was given to the effect of an acknowledgement by the debtor that he owed a debt or other obligation. It was agreed that, in general, such an acknowledgement would interrupt the period of prescription — i.e., the portion of the period that had run prior to the acknowledgement would be cancelled and the prescriptive period would commence to run afresh from the date of the acknowledgement.

(ii) *Definiteness and form*

75. The Working Group considered the definiteness and completeness that would be required of an acknowledgement that would interrupt the period of prescription. Thus, the Group considered whether giving effect to an "acknowledgement of the debt" was sufficiently definite, or whether a provision should be added requiring that the acknowledgement specify the amount agreed to be due (working paper, paragraph 14).

76. One delegate suggested that the convention require that the acknowledgement specify the amount, although this amount could be ascertained by reference to other documents. Others thought that such a provision in the convention would involve unnecessary detail in drafting, and that sufficient definiteness would result from a provison giving effect to "acknowledgement of the obligation". It was assumed that under such language, the obligation in question must be definitely identified. The Group further concluded that the problems of definiteness could be solved at the drafting stage.

77. A majority of the Working Group was of the view that only acknowledgements in writing should be effective to interruption of the prescriptive period, and that telex and telegraphic communications should be deemed to be in writing for the purpose of this provision. One representative referred to Rule No. 9 *(a)* of the Draft European Rules on Extinctive Prescription. Under this Rule, interruption of the period results if the debtor acknowledges, expressly or impliedly, the right of the creditor; the rule states no requirement of a writing.

(iii) *Acknowledgements after the running of the period*

78. Some representatives supported the inclusion of a specific provision that an acknowledgement shall be effective regardless of whether the prescriptive period has expired at the time of the acknowledgement. Another representative suggested an analogy to article 96 of the CMFA General Conditions (annex III to A/CN. 9/16) giving effect to payment after the running of the period; it was suggested that this supported the proposed provision with respect to an acknowledgement after the end of the period. Attention was also directed to section 94 (2) of the Czechoslovak International Trade Code, which also supports the effectiveness of a late acknowledgement.

79. Some representatives objected to allowing an acknowledgement to revive the old obligation after it was barred. On the other hand, another delegate expressed the view that acknowledgement ought to be the cause of interruption even if it does not involve novation of the claim. The observer from the Hague Conference noted that there was a relationship between the revival of barred claims and the question whether the issue was deemed one of substance or procedure, with bearing on private international law.

80. A majority seemed to favour giving effect to an acknowledgement that occurred after the expiration of the period of prescription. As a matter of drafting, however, there was doubt as to whether an acknowledgement after the expiration of the period could be deemed an "interruption". In any event, it was noted that any alternative formulation (such as one stating that the claim revived) should not affect domestic rules on the discharge of claims in bankruptcy or rules on incompetency.

(iv) *Part payment*

81. The Working Group was agreed that the convention should provide that part payment of the principal or payment of interest could serve as an acknowledgement. It was noted that a payment would not always constitute an acknowledgement that a balance was still

owing. The Group agreed that in drafting it should be provided, in substance, that an acknowledgement of a claim could be effected by a payment stated as a part payment of a larger obligation.

B. *The legal action necessary to interrupt (or satisfy) the prescriptive period*

82. The Working Group considered whether the convention should specify the stage a legal proceeding must reach in order to satisfy the prescriptive period. See the working paper (A/CN.9/WG.I/CRD.1) at paragraph 16.

83. There was support for the position that it would be impractical and unnecessary to define the stage of the proceedings under varying procedural systems: the question should be left to the law of the forum.

84. One delegate observed that it might be necessary to decide whether starting a legal proceeding merely suspends the running of the period — with final interruption only on a final decision. In response, it was noted that the answer to this question depends on the way the basic prescriptive rule is framed: whether the specified period of years must be satisfied by instituting a legal proceeding, or by securing a decision on the merits (subject to suspension during court proceedings). The Working Group decided that the question of terminology should be considered a problem of drafting.

85. The suggestion was made that consideration be given to the Draft European Rules on Extinctive Prescription, Rule No. 7, which provides that interruption of prescription may be effected "by the creditor pleading his right or invoking it as a defence before a judicial or administrative authority or in arbitration proceedings, for the purpose of obtaining satisfaction of the right".

86. There was general satisfaction with the concluding phrase "for the purpose of obtaining satisfaction of the right". It was suggested that the earlier part of the English text, however, in referring to "pleading" a right, might undermine the Working Group's decision to refer to local law the question of the matter of the necessary stage of the legal proceeding; it was thought preferable to refer to commencement of the action. It was noted that the French text also needed attention; reference was made to the possible use of the phrase "*intenter l'action*".

87. One delegate suggested the following text for future consideration:

> "The period shall be interrupted by the creditor performing any action recognized, under the law of the jurisdiction where such performance takes place, as instituting legal proceedings for the purpose of obtaining satisfaction of the right."

88. There was also discussion of whether and at which point the prescriptive period should be interrupted in case of bankruptcy proceedings against the debtor, proceedings for corporate reorganization or other insolvency proceedings. One representative proposed that the prescriptive period should be interrupted "by the filing of a claim in the insolvency proceedings". Another representative proposed that the interruption would be brought about "by the commencement of insolvency proceedings in relation to the debtor". No decision was reached by the Working Group on this point.

89. The Working Group also considered whether a special provision was needed with respect to interruption of the period by an action in one country whose jurisdiction or judgements, etc., would not be recognized in a second country in which the claim is pressed [relied upon?]. It was agreed that this matter should be left for consideration at a later session.

C. *Warning notices* ("litis denunciatio") *in successive sales, etc.*

90. The Working Group considered the problem posed by this example: A sells to B and B sells to C; C sues B to recover for defects in the goods. If B gives notice to his supplier, A, that he should watch the suit, should this extend the prescriptive period for B *versus* A? One delegate reported that such provision was made in his legal system.

91. It was agreed that the effect of such a notice of warning should be left to the law of the forum of the first suit (i.e., C *versus* B) — as in the case of other poblems as to the character of legal proceeding necessary to interrupt prescription.

D. *Effects of interruption: applicability of convention to delay in enforcing judgements*

92. The question arose as to whether the convention should prescribe the length of a prescriptive period after the initial prescriptive period has been interrupted. The Group recalled that it had agreed to provide for extension of the period for not more than one year if the initial proceeding does not lead to a decision on the merits (see part V (C), *supra*, at paragraphs 72-73). Thus, the problem essentially was whether a prescriptive period should be established following a decision on the merits. The Commission reaffirmed its earlier view that the law relating to actions to enforce judgements involved local procedural problems which lay outside the scope of the proposed convention (see part IV (C), *supra*, at paragraphs 60-62; as regards interruption by acknowledgement, see paragraph 74).

VII. General problems

A. *Modification of the period by agreement of the parties*

(i) *The general power to modify by agreement*

93. The Working Group considered the question whether prescriptive periods may be modified by agreement of the parties (see working paper A/CN.9/WG.I/CRD.1 at paragraph 17).

94. One representative suggested that the parties should have the power to extend the period; but some specific outside limit should be set for extensions.

95. This representative noted that allowing for the shortening of the period was more questionable. Other representatives objected to agreements shortening the period, and mentioned the special needs of buyers in developing countries who might be subject to pressure to agree to unreasonably short periods. It was also sug-

gested that further study of the problem was necessary, especially in view of the use of printed forms; pending such a study, no decision should be reached.

96. Another representative supported a wide range of freedom of contract both to extend and shorten the period, with the possible provision for a lower limit such as one year. This delegate emphasized that agreements for arbitration often require that such proceedings be commenced within a short period. If the convention governs arbitration proceedings, the inability to shorten the period could raise serious problems.

97. It was suggested that attention be given to the relationship between the proposed convention on prescription and ULIS attached to the Hague Conventions of 1964. It was noted that article 49 of ULIS prescribes a one-year prescriptive period for certain types of claims by buyers and that ULIS does not limit the parties' freedom to modify this or other provisions of the Uniform Law.

98. Most delegates agreed that any modification to be effective must be in writing. Some delegates thought that if shortening should be permissible, an attempt to shorten the period for only one party should either (*a*) extend the same right to the other party, or (*b*) nullify the clause attempting to shorten the provision.

99. The question was raised as to whether the practices of organized commodity markets, in honouring oral agreements, might be disrupted by the requirement that provisions be in writing. In that connexion it was observed that the disciplinary powers of organized markets might hold the parties to their oral agreements.

100. In conclusion as to shortening, five delegates opposed the power to shorten the period of prescription by agreement (one of these reserved his position if the period is five years). One favoured the power to shorten. One delegate reserved his position pending further study.

101. Various means to regulate the power to shorten the period were mentioned. In addition to the above-mentioned possibilities — the setting of a lower limit, the requirement of a writing, and the restriction on unilateral clauses — it was suggested that courts should be empowered to invalidate unreasonable clauses.

102. As to the power to extend, one delegate developed reasons for the power to extend the period; these included the possibility of extended negotiations and of the late appearance of defects in the case of complex machinery. Another delegate suggested that in any case an outer limit on extension should be specified; he drew attention to the draft of Professor Trammer on the point (see article 4 of the Trammer draft in appendix II, A/CN.9/16).

103. In conclusion, four delegates were opposed to prolongation; doubt was expressed concerning the need for prolongation. One delegate noted that his view might be different if the period is three years.

104. Reference was made to the tentative decision that the period for claims with respect to defects in goods should run from the date of delivery without regard to the time when defects appear (see paragraph 32, *supra*). It was suggested that difficulty might arise with respect to complex machinery unless the parties may agree to extend the period. It was noted, however, that if the contract includes an express guarantee as to the time for performance, our proposed draft would extend the prescriptive period (see paragraph 37, *supra*).

(ii) *Prolongation during negotiation*

105. Reference was made to Rule No. 17 (2) of the Draft European Rules on Extinctive Prescription which provides:

> "For the purpose of negotiations in case of a dispute between them concerning the existence or extent of the creditor's right, the creditor and the debtor may agree upon a longer prescription period than that provided for by Rules Nos. 4 or 5, provided that the prescription period is not thereby prolonged by more than [three] years."

106. Attention was directed to the phrase "for the purpose of negotiations". It was suggested that this language would be difficult to apply, and that consideration should be given to other formulae on the situations in which such agreements would be allowed. Suggested alternative formulae included reference to the period (*a*) after breach or (*b*) after a claim has arisen or (*c*) after the prescriptive period has started to run.

107. The Working Group agreed that a provision dealing with this general problem would be useful. It was further agreed that such agreements extending the period should be in writing. Other aspects of a proposed rule on this matter were left for further study.

B. *Relation of the convention to conflict of laws*

108. The decision by UNCITRAL establishing the present Working Group requested the Group to consider, *inter alia*, "to what extent it would still be necessary to have regard to the rules of conflict of laws" under a convention on prescription.

109. As an aid in analysing the problem, reference was made to article 7 in the Trammer draft, which provides:

> "1. The provisions of articles 1 to 6 of the present Convention shall replace, regarding the matters governed thereby, the municipal laws of the signatory States with respect to the limitation of actions (discharge of rights of action arising from contract by the lapse of time).
>
> "2. In the territories of the signatory States, the provisions of articles 1 to 6 of the present Convention shall be applied by the tribunal (whether judicial or arbitral) before which the action is brought. This shall apply equally to cases in which in accordance with the private international law of the jurisdiction in which the action is brought, the law applicable to the contract of sale in question would be neither the municipal law of the forum nor the municipal law of any signatory State."

110. Some delegates supported the position of the Trammer draft. However, it was suggested that reservations be allowed along the lines of articles III and IV

of the Hague Conventions of 1964. It was agreed that the specific problems posed by these various provisions should be given further consideration.

C. *Whether the prescriptive rules should have the effect of substance or procedure*

111. The Commission's resolution asked the Working Group to consider "whether it would be necessary to state that the rules of the. . . convention would take effect as rules of substance or procedure".

112. Some representatives called attention to the approach of article 7 in Professor Trammer's draft, quoted above in paragraph 109.

113. It was suggested that the problem might be omitted from the draft. In support of this suggestion it was noted that there had been disagreement over the attempt to deal with this problem in the Uniform Law on the International Sale of Goods annexed to the 1964 Hague Conventions; the attempt to deal with this provision might impede accession to the convention on prescription.

114. In view of these suggestions, it was decided that further study should be given to whether the uniform rules should be applicable only to transactions among parties in States that agree to the convention, or whether the *fora* of such States should be directed to apply the rules to all international sales transactions.

D. *Characterizing the effect of expiration of the period*

115. The Working Group considered whether the convention should attempt to lay down a general rule on the effect of the running of the period — i.e., does prescription cancel the right. It was suggested that it would be unwise to attempt a general formula; what is needed is to set forth the specific consequences of prescription, such as the recovery of late payments, the opportunity to set off a barred claim in defence to an action, and the appropriation of payments belonging to a party against whom a claim is barred. On the consequences of prescription, and related matters, reference was made to Rule 13 (1) of the Draft European Rules on Extinctive Prescription and to section 76 (2) of the International Trade Code of Czechoslovakia. There was general agreement that the approach of these provisions would be useful in drafting the convention.

E. *Recourse to barred claims by counter-claims or set-off*

116. The Working Group considered this question: May a claim barred by prescription be used as the basis for a counter-claim — i.e., a cross-action by a defendant against the plaintiff. The Working Group agreed that the use of claims barred by prescription to establish affirmative recovery against the other party should not be permitted.

117. The Working Group was of the view that a different problem was posed by set-off — whereby claims by two parties against each other might be deemed to have cancelled each other or whereby the smaller claim might be deemed to have reduced the larger opposing claim.

118. It was agreed that there should be some opportunity for set-off, but that this opportunity should be limited. To this end, it was suggested that set-off might be available only if the opportunity to use a claim for set-off arose before that claim was barred by prescription. One delegate called attention to the Draft European Rules on Extinctive Prescription. Rule No. 14 provides:

> "1. Notwithstanding that prescription has taken effect, the creditor may invoke his right as a defence for the purpose of set-off or counter-claim, provided that the right had not become time-barred when the claim brought against him became due.
>
> "2. Any member State may by national legislation provide that paragraph 1:
>
> "(*a*) Shall not apply to specified categories of rights;
>
> "(*b*) Shall apply only on condition that the claim invoked as a defence arises out of the same legal relationship as the claim brought against the creditor;
>
> "(*c*) Shall apply only on condition that the right which is invoked for the purpose of set-off or counter-claim had not become time-barred when the creditor acquired it."

It was agreed that Rule No. 14 should be given further attention in further work on this problem.

F. *Voluntary payment (or other fulfilment) of barred claims*

119. It was suggested that a payment (or other fulfilment) of a barred claim should not be subject to recovery on the ground that claim had been barred by prescription. Attention was drawn to the CMFA General Conditions (annex III to A/CN.9/16). Article 96 provides:

> "If the debtor has fulfilled his obligation after the expiration of the time period of prescription, he shall not be entitled to claim back the performance, even if he knew at the date of his performance that the time period of prescription has elapsed."

120. One delegate thought it should be specifically provided that only voluntary payments should be subject to recovery. Another delegate thought that this provision would inject an unnecessary complication. To deal with this question, it was suggested that the draft might provide that a payment could not be recovered on the ground that the claim was barred at the time of payment. Under such a rule, municipal law would still be effective with respect to other grounds for recovering payment, such as the use of fraud to secure payment. It was suggested that this was the approach taken in Rule 13 (3) of the Draft European Rules on Extinctive Prescription, which provides:

> "(3) A debtor who had performed an obligation after prescription has taken effect cannot invoke this prescription to justify an action for restitution."

121. The question was raised whether the convention should set forth a general characterization as to the nature of voluntary payment of barred claims as by stating that such payments constituted a gift. It was suggested that such a general rule might affect results

in bankruptcy, taxation and other municipal arrangements. Such a general characterization as this might create difficulties and, in any event, would not be necessary. Reference was made to the objection to the attempt to provide a general characterization of the effect of prescription (*supra* at paragraph 115) and the caution that describing the effect of an acknowledgement should not affect municipal rules on discharge in bankruptcy (*supra* at paragraph 80).

G. *Whether the issue of prescription should be raised by the court* suo officio *or only at the instance of the parties*

122. There was general agreement that prescription should be invoked by the party concerned (including a guarantor) and the court should not be authorized to raise it *suo officio* in the course of a judicial proceeding. One representative, however, expressed the view that in case of default proceedings, a court should be authorized to raise the issue of prescription on behalf of an absent defendant.

123. It was noted that in drafting a provision dealing with this problem attention might be given to Rule No. 16 of the Draft European Rules on Extinctive Prescription. This Rule provides:

> "The debtor may, expressly or impliedly, refrain from invoking the prescription which has taken effect in his favour. Prescription may not be invoked by the court on its own initiative."

H. *Matters deferred for later attention*

124. The Working Group noted that among the problems it had not been able to consider at this session, and which should receive attention at a later date, were the following:

(*a*) Arbitration: It was noted that a convention on prescription would raise complex problems with respect to arbitration proceedings. It was agreed that the applicability of the convention to arbitration would be deferred to a later stage.

(*b*) The question posed by the Commission's decision at paragraph 3 (*g*): "Whether the preliminary draft convention should take the form of a uniform or model law".

(*c*) The effect of prescription of the principal obligation on the obligation to pay interest (see the Draft European Rules on Extinctive Prescription, Rule 13 (2)).

(*d*) The effect of the prescription of an obligation on liens or other security interests given to secure that obligation.

I. *Programme for completion of the work*

125. The Working Group noted the statement contained in the Commission's report (A/7618, paragraph 46 (4)) envisaging that "a preliminary draft of a convention can be completed in 1970 or 1971". However, in view of the short duration of this first meeting (five days) and the technically complex nature of the subject, the Working Group did not at this stage attempt to formulate its conclusions in terms that would be suitable for inclusion in a preliminary draft convention. On many points the Working Group was not able to reach conclusions; even the conclusions reached should be regarded as provisional and incomplete, and will require further study.

126. Accordingly, in order to carry out the work within the time mentioned in the Commission's report, the Working Group recommends that after the Commission considers the present report at the third session in April 1970, the Commission should arrange for the preparation of a tentative draft; this tentative draft would take into account the present report and the comments thereon made at the third session of the Commission. It is also recommended that a second session of the Working Group be held in the second half of 1970 to consider the above-mentioned draft.

ANNEX I

List of participants

MEMBERS

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Mr. Mario MATTEUCCI, Secretary-General.

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Mr. M. H. VAN HOOGSTRATEN, Secretary-General.

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Mr. Paolo CONTINI, Secretary of the Working Group;

Mr. John HONNOLD, Consultant;

Miss J. HATFIELD and Miss T. REASON, Secretaries.

ANNEX II

List of documents and working papers before the Working Group

A/CN.9/WG.1/1	Provisional agenda
A/CN.9/WG.1/2 and Add.1-4	Working Group on time-limits and limitations (prescription) in the international sale of goods: draft report
A/CN.9/WG.1/CRD.1	Working paper produced by special consultant to the secretariat
A/CN.9/WG.1/CRD.2 and CRD.3	Report of Drafting Group on the commencement of the period of prescription
A/CN.9/WG.1/CRD.4	Second report of the Drafting Group
A/CN.9/WG.1/CRD.5	Third report of the Drafting Group
A/CN.9/WG.1/CRD.6	Proposal by Norway
A/CN.9/WG.1/CRD.7	Recommendation by the Chairman for completion of the work

E. List of relevant documents not reproduced in the present volume

Title or description	*Document reference*
Replies and comments by States concerning the Hague Conventions of 1964: note by the Secretary-General	A/CN.9/11, Corr. 1, Add.1,2
Replies and comments by States concerning the Hague Convention of 1955 on the law applicable to international sale of goods: note by the Secretary-General	A/CN.9/12, Add.1,2,3
Incoterms and other trade terms: report of the Secretary-General	A/CN.9/14
Time-limits and limitations (prescription) in the field of international sale of goods: note by the Secretary-General	A/CN.9/16, Add.1,2
International sale of goods, the Hague Conventions of 1964: analysis of replies and studies received from governments: report of the Secretary-General	A/CN.9/17
General conditions of sale and standard contracts: proposal by the United States of America concerning the role of the United Nations Commission on International Trade Law (UNCITRAL) in furthering the use of general conditions, standard contracts, uniform trade terms or aids to uniformity	A/CN.9/L.8
The Hague Conventions of 1964: proposal by the delegation of the Union of Soviet Socialist Republics concerning the unification of rules of law regulating the international sale of goods	A/CN.9/L.9
Time-limits and limitations (prescription) in the field of international sale of goods: note by the Secretariat. (Suggestions concerning alternative approaches for consideration of the report of the Working Group)	A/CN.9/R.1
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