

Contract of sale form between China and Viet-Nam	A/CN.9/R.6 —Annex H
General conditions of sale for imported goods (Chambre syndicale des négociants importateurs de matériel de travaux publics et de manutention)	A/CN.9/R.6 —Annex I
Conditions governing the trade in ships' stores, provisions and supplies (International Ship Suppliers Association)	A/CN.9/R.6 —Annex J
Contract form of the Foreign Transaction Company of Iran [Incomplete]	A/CN.9/R.6 —Annex K
Conditions of sale of f.o.b. contracts generally (Ceylon Chamber of Commerce)	A/CN.9/R.6 —Annex L

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

#### 1. Analysis of studies and proposals relating to a uniform law on limitation (prescription): working paper by the Secretariat (A/CN.9/WG.I/WP.9) \*

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## INTRODUCTION

1. At the third session of the United Nations Commission on International Trade Law (UNCITRAL), the Commission provided for a second session of the Working Group on Time-limits and Limitation (Prescription).<sup>1</sup> The Commission requested that a working paper be prepared for use at this session.

2. In response to this request, the present document seeks to co-ordinate the past discussion and action by the Working Group and by the Commission with the issues presented by the documents that have been prepared for this session by the members of the Working Group. These documents are as follows:

(a) *Preliminary drafts of a uniform law:*

- (i) Draft and explanatory text by Professor Gervasio R. Colombres, Representative of Argentina to UNCITRAL.<sup>2</sup>

- (ii) Draft by Professor Anthony Guest, Representa-

tative of the United Kingdom of Great Britain and Northern Ireland to UNCITRAL.<sup>3</sup>

- (iii) Draft by Dr. Ludvik Kopac, Representative of Czechoslovakia to UNCITRAL.<sup>4</sup>

(b) *Reports on specific subjects:*

- (i) Effects of prescription with respect to liens, guarantees and other security interests, by Professor Mohsen Chafik, Representative of the United Arab Republic to UNCITRAL.<sup>5</sup>

- (ii) Limitations and arbitration proceedings, by Professor Anthony Guest, Representative of the United Kingdom of Great Britain and Northern Ireland to UNCITRAL.<sup>6</sup>

- (iii) Judicial proceedings and interruption of prescription, by Professor Shinichiro Michida, Representative of Japan to UNCITRAL.<sup>7</sup>

- (iv) Impossibility to sue by reason of force majeure; conflicts of laws and the uniform rules, by Dr. Ludvik Kopac, Representative of Czechoslovakia to UNCITRAL.<sup>8</sup>

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its third session (1970) (herein cited as UNCITRAL report on the third session (1970), *United Nations Commission on International Trade Law, Yearbook, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71.V.) (hereinafter cited as *Yearbook*, vol. I), part two, chapter III, A, para. 97.

<sup>2</sup> A/CN.9/WG.1/WP.1 (herein cited as WP.1).

<sup>3</sup> A/CN.9/WG.1/WP.3 (herein cited as WP.3).

<sup>4</sup> A/CN.9/WG.1/WP.6 (herein cited as WP.6).

<sup>5</sup> A/CN.9/WG.1/WP.2 (herein cited as WP.2).

<sup>6</sup> A/CN.9/WG.1/WP.4 (herein cited as WP.4).

<sup>7</sup> A/CN.9/WG.1/WP.5 (herein cited as WP.5).

<sup>8</sup> A/CN.9/WG.1/WP.7 (herein cited as WP.7).

- (v) Report on the relationship between the uniform law on prescription and other conventions relating to international sale of goods, by Mr. Paul Jenard, Representative of Belgium to UNCITRAL.<sup>9</sup>

3. This working paper is organized on the basis of the principal divisions that appeared from the above three preliminary draft uniform laws. This system of organization does not imply that all of the issues can best be discussed in this order, or that all these issues are suitable for discussion at this session. Thus, the Working Group may conclude that some issues should be postponed until after action by the Working Group on Sales, and that others present problems of detail that are related to larger issues which should first be resolved by the Working Group. Nor does this present analysis purport to be exhaustive; the Working Group may well decide that it should examine problems other than those listed herein.

## I. SPHERE OF APPLICATION

### A. Definition of international sale

4. One draft uniform law<sup>10</sup> closely follows the definition set forth in article 1 of ULIS.<sup>11</sup> The other drafts<sup>12</sup> leave the definition open. The Commission at the third session approved the structure of article 1 of ULIS but referred certain drafting questions to the December 1970 meeting of the Working Group on Sales.<sup>13</sup> In view of this action, the Working Group may wish to postpone further work on this definition until after the review of this question by the Working Group on Sales.

### B. Types of commodities and transactions

5. One draft<sup>14</sup> sets forth two provisions on scope of application based on ULIS. Thus, the provision on goods to be manufactured<sup>15</sup> is based on article 6 of ULIS; exclusion of investment securities, ships, etc.<sup>16</sup> is based on article 5(1) of ULIS. The other drafts<sup>17</sup> do not include these provisions but do not suggest that they should be rejected. This Working Group at its first session agreed to follow the approach of article 5 of ULIS.<sup>18</sup> The group may wish to decide whether these sections of ULIS should be included, tentatively within the structure of the uniform law, subject to reconsideration if modifications should result from the recommendations of the Working Group on Sales.

<sup>9</sup> A/CN.9/WG.1/WP.8 (herein cited as WP.8).

<sup>10</sup> WP.1, art. 1.

<sup>11</sup> WP.1, chap. 1, para. 1.

<sup>12</sup> WP.3, art. 3; WP.6, art. 3.

<sup>13</sup> UNCITRAL report on the third session (1970), paras. 50-51 and 77-78 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>14</sup> WP.1.

<sup>15</sup> WP.1, art. 2.

<sup>16</sup> WP.1, art. 3.

<sup>17</sup> WP.3 and WP.6.

<sup>18</sup> A/CN.9/30, para. 11 (IV) (*Yearbook*, vol. I, part three, chapter I, D).

### C. Obligation to pay price embodied in certain instruments

6. One draft provides that the Law shall not apply to claims that arise "from any bill or exchange, cheque or promissory note".<sup>19</sup> This provision may be compared with article 5(1) of ULIS, which excludes "sales (a) of . . . negotiable instruments or money" (emphasis added). It will be noted that article 5(1) of ULIS excludes "sales" of such instruments; the draft provision would appear to exclude from the Law the enforcement of claims under "any bill of exchange, cheque or promissory note" when the instrument has been given in payment for an international sale of goods.<sup>20</sup> The two provisions thus appear to be distinct.<sup>21</sup> It will also be noted that ULIS article 5(1) refers to "negotiable" instruments whereas the draft provision<sup>22</sup> is not so qualified. The group may wish to consider whether the concept "promissory note" needs qualification or definition in view of the possibly broad scope of non-negotiable notes under some legal systems.

### D. Documents subject to immediate enforcement or execution

7. The same draft also provides for the exclusion of claims based on a "document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such judgement or execution is sought."<sup>23</sup> The other drafts do not contain an explicit provision on the matter.<sup>24</sup>

### E. Claims based on judgement or award made in legal proceedings

8. The same draft<sup>25</sup> also excludes the above claim. Another draft<sup>26</sup> sets forth no explicit provision on this matter.<sup>27</sup>

(a) The third draft<sup>28</sup> sets forth two alternatives: Alternative A provides: "If a right is granted in a final judgement or arbitral award the period of prescription is interrupted". (The question might arise as to whether this provision permits a second suit on the original claim within the prescriptive period, or whether the stated period is applied to enforcement of the judgement.) Alternative B sets forth a ten-year period for the enforcement of the judgement.

(b) The report on judicial proceedings and interruption of prescription considers two alternatives:

<sup>19</sup> WP.3, art. I(3)(d).

<sup>20</sup> *Ibid.*

<sup>21</sup> See A/CN.9/16, para. 97.

<sup>22</sup> WP.3, art. 1(3)(d).

<sup>23</sup> WP.3, art. 1(3)(c).

<sup>24</sup> e.g., WP.1, art. 7 ("right to claim the performance of any obligations under a contract" which under art. 1(1) is a "contract of sale of goods"); WP.6, art. 2(1) (rights and duties "under the contract for international sale of goods") (emphasis added).

<sup>25</sup> WP.3, art. 1(3)(a).

<sup>26</sup> WP.1.

<sup>27</sup> Note the general language on scope in WP.1, art. 7, quoted in foot-note 24, *supra*.

<sup>28</sup> WP.6, art. 12.

A, exclusion of judgements; B, the establishment of a ten-year period.<sup>29</sup> This report suggests reasons for preferring alternative B.

9. Closely related issues are presented by the provision for exclusion in one draft.<sup>30</sup>

F. *Applicability of law to third persons: successors, assigns, guarantors*

10. Draft provisions on this matter are contained in all three proposals.<sup>31</sup> In addition, the subject is analysed in the report on liens, guarantees and other security interests.<sup>32</sup>

11. This Working Group at its first session proposed a draft provision<sup>33</sup> on the question which the Commission approved in principle.<sup>34</sup>

12. The language proposed by the first session of the Working Group and by the current drafts would apply the prescriptive period to third persons closely related to the parties.<sup>35</sup>

13. The report on liens, guarantees and other security interests concludes that the uniform law should not govern the question of the effect of prescription on the various types of securities and guarantors.<sup>36</sup> This study, *inter alia*, examine rules regarding (i) guarantors and sureties<sup>37</sup> and (ii) documentary credits (letters of credit).<sup>38</sup>

14. The foregoing proposals may lead to the following questions:

(a) Would the extension of the prescriptive period to persons who "guarantee the performance" of the parties cover the undertaking by a bank under a letter of credit?<sup>39</sup>

(b) The report on liens, guarantees and other security interests indicates that a personal guaranty is incidental to the debt so that when the debt is barred

the guaranty is necessarily barred.<sup>40</sup> Is this view sufficiently universal to make it unnecessary to have an explicit provision extending the uniform rules on prescription to the guarantor? If so, is it equally clear that relations between the creditor and the guarantor would automatically be subject to the uniform rules on commencement of the period, on interruption (acknowledgement, part payment) and on extension?

G. *Civil or commercial character: personal injury*

15. One draft<sup>41</sup> preserves ULIS article 7, making the law applicable without regard to "the civil or commercial character of the parties or of the contracts". The other drafts do not reproduce this provision.

16. Questions with respect to this and related provisions have been raised in the first session of the Working Group<sup>42</sup> and in the third session of the Commission.<sup>43</sup> At the third session of the Commission, the representative of Norway circulated to the members of this Working Group the following proposal:

"The Convention shall not apply to any personal injury or to physical damage caused to property belonging to any other person than the parties to the contract of sale, their successors and assigns, regardless of whether the rights and duties arising from such injury or damage may be qualified as being contractual or delictual."

The representative of Norway has also submitted a memorandum on a related question for consideration at the December meeting of the Working Group on Sales. Therefore, this present Working Group may wish to defer action on this question.

17. For similar reasons, it may be advisable to defer action on the proposed provision that the law "shall not apply to personal injury or physical damage caused by the goods sold".<sup>44</sup>

H. *Principles on choice of law: applicability of the rules to parties and suits in non-contracting States*

18. Attention is directed to the draft proposed for uniform rules on international sales, the substance of which had been approved by most representatives at the third session of the Commission.<sup>45</sup>

19. The above approach is followed in two of the drafts.<sup>46</sup> A different approach is followed in the third draft.<sup>47</sup>

<sup>29</sup> WP.5, part IV.

<sup>30</sup> WP.3, art. 1(3)(b) (compromise or settlement in the course of legal proceedings).

<sup>31</sup> WP.1, art. 5; WP.3, arts. 1(2) and 4(2) (definition of "buyer" and "seller"); and WP.6, art. 2, art. 6(4) (sureties and guarantors) and art. 6(5) (change in persons affected by prescription).

<sup>32</sup> WP.2, paras. 23-37, 44-45 and 47.

<sup>33</sup> A/CN.9/30, para. 13 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>34</sup> UNCITRAL report on the third session (1970), para. 80 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>35</sup> The following minor variations in drafting may be noted: (i) A/CN.9/30, para. 13 (*Yearbook*, vol. I, part three, chapter I, D): "successors and assigns and persons who guarantee their performance"; accord: WP.3, art. 4(2).

(ii) WP.1, art. 5: "successors and guarantors".

(iii) WP.6, art. 2(1): "successors and assigns and persons who guarantee their performance". Art. 2(2) (relating to "damages"): extends only to "successors and assigns". Art. 6(4): claims against "surety or other persons who guarantee a performance" not to be prescribed before the prescription of the right against the debtor.

<sup>36</sup> WP.2, para. 47.

<sup>37</sup> WP.2, paras. 23-26.

<sup>38</sup> WP.2, paras. 27-37.

<sup>39</sup> See WP.2, para. 30, noting that the bank's undertaking is independent from the sales contract.

<sup>40</sup> WP.2, paras. 24-26.

<sup>41</sup> WP.1, art. 4.

<sup>42</sup> A/CN.9/30, para. 36 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>43</sup> UNCITRAL report on the third session (1970), paras. 79 and 80 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>44</sup> WP.1, art. 5; also see WP.3, art. 1(2) and WP.6, art. 2(2).

<sup>45</sup> See UNCITRAL report on the third session (1970), paras. 22-32 (especially 26 and 29) (*Yearbook*, vol. I, part two, chapter III, A).

<sup>46</sup> WP.1, art. 6 (explanatory note in chapter I at para. 2(c)), and WP.6, art. 1. Also see WP.7.

<sup>47</sup> WP.3, art. 2 (para. 2: "Rules of private international law shall be excluded...").

20. The above provisions present the following questions:

(a) Which approach to choice of law should be the basis for further work for the purpose of the present law?

(b) If the Working Group should decide to follow the proposal of the Working Party presented at the third session of the Commission, should the present Working Group deal with the problems of drafting,<sup>48</sup> or should these matters be left to the December meeting of the Working Group on Sales?

#### I. *Applicability to claims other than for breach of contract; restitution*

21. At the first session of the Working Group, it was suggested that consideration be given to the applicability of the convention to claims under invalid sales contracts.<sup>49</sup> The following question might arise: if a sales contract is invalid or otherwise unenforceable, would the convention's period of prescription apply to claims for restitution of benefits conferred, such as return of a down-payment or compensation for the value of goods retained by the buyer? In this connexion, it might be noted that the question of validity of the contract may often be in dispute. Therefore, the question of validity might be settled only at the conclusion of litigation in which the plaintiff presents alternative claims (1) for breach of a contract which the plaintiff contends is valid and enforceable, and (2) (in the alternative) for restitution of benefits conferred.

22. The scope of two of the drafts<sup>50</sup> might not extend to such claims for restitution.

23. The scope of the other draft is considerably broader.<sup>51</sup>

24. If claims for restitution or other claims in connexion with the transaction should be included, it may be necessary to supplement the present drafts on the commencement of the period. One draft contains a provision which seems to be addressed to this problem.<sup>52</sup>

#### J. *Other problems concerning sphere of application*

25. The Working Group may wish to consider whether claims arising in connexion with an international sale are covered when the plaintiff (a buyer) includes in his case evidence that a defect in goods resulted from careless manufacture. (Under some legal

rules, this questions may be relevant to the amount of damages allowed for breach of contract.)

26. The Working Group may also wish to bear in mind the conclusion at its first session that sales of goods by documents (such as bills of lading) should be governed.<sup>53</sup>

### II. COMMENCEMENT OF THE PERIOD OF PRESCRIPTION

#### A. *Theory for commencement*

27. The Working Group at its first session considered three alternative formulas for the commencement of the period.<sup>54</sup> The Commission did not consider this problem.

28. The basic formula used in all three drafts is the date of the breach of contract.<sup>55</sup> The Working Group may wish to decide:

(a) Whether to use the date of the breach of contract as a basis for further drafting.

(b) Whether to adopt the qualification of commencement at end of year, as proposed by one draft.<sup>56</sup>

(c) If the Working Group agrees on the general approach, it may wish to designate a small drafting party to reconcile the minor stylistic differences among the three drafts.

29. With respect to the effect of the time of giving notice, the Working Group may wish to recall the proposal that "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."<sup>57</sup> Although 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.<sup>58</sup> The above proposal is embodied in two drafts<sup>59</sup> (no explicit provision appears in the other draft.)<sup>60</sup> If the Working Group decides to continue the above approach, it may wish to request a small drafting party to prepare a single text.

#### B. *Specific rules for claims based on defects in delivered goods*

30. The Commission considered the following proposal:

<sup>48</sup> A/CN.9/30, para 11 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>49</sup> *Ibid.*, paras. 17-22.

<sup>50</sup> WP.1, art. 9 and explanatory note, chapter III, para. 1; WP.3 art. 6(1); and WP.6, art. 5(1) ("end of the calendar year in which the breach of contract occurred").

<sup>51</sup> WP.6, art. 5(1) (commencement at the end of the calendar year in which the breach of contract occurred). Also see A/CN.9/16, para. 81; not reproduced in this volume.

<sup>52</sup> A/CN.9/30, para. 46 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>53</sup> *Ibid.*, para. 47.

<sup>54</sup> WP.1, art. 10, and WP.3, art. 6(2).

<sup>55</sup> WP.6.

<sup>48</sup> The problems of drafting are summarized in UNCITRAL report on the third session (1970), para. 31 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>49</sup> A/CN.9/30, para. 14 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>50</sup> WP.1, art. 7 (rights "under a contract") and WP.6, art. 5(1) ("breach of contract") (emphasis added).

<sup>51</sup> WP.3, art. 1(1) (or arising in connexion with the conclusion of, or failure to conclude, such a contract) (emphasis added) and art. 4(3) (even though one of the parties alleges that no contract exists or that the contract is void or otherwise unenforceable). Query: Does this provision apply where both parties agree that the contract is invalid?

<sup>52</sup> WP.3, art. 7.

"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]."<sup>61</sup>

Opinion was divided as to whether this special rule should be included in the interest of definiteness, or whether the approach would be unfair to buyers who could not discover the defect until after delivery. (A possible intermediate position might be the provision for a brief additional period following discovery of the defect.)<sup>62</sup> The Commission finally postponed action so that attention could first be given to the length of the period.<sup>63</sup>

31. Two drafts<sup>64</sup> follow the general approach approved above.<sup>65</sup> On the other hand, the other draft follows a different approach for claims for compensation of "damages": the period runs from the date the party "learns or could learn of the whole damage caused to him".<sup>66</sup> Relevant to this provision are questions with respect to the applicability of the convention to injury to the person or to other property of the buyer, and the applicability of the convention to sales to consumers.<sup>67</sup>

32. The Commission approved the recommendation of the Working Group that if such a special rule should be employed, the drafting should avoid a legal concept of delivery (*délivrance*) and instead should refer to a physical event.<sup>68</sup> All of the drafts have followed the drafting approach approved by the Commission, but with somewhat different language.<sup>69</sup>

33. If (subject to later action concerning the scope of this convention) the Working Group should decide to continue the approach recommended at the first session,<sup>70</sup> a small drafting party might be requested to prepare a single draft.

### C. Effects of express guarantee

34. The recommendation of the Working Group at its first session<sup>71</sup> was accepted in substance by most representatives at the Commission's third session.<sup>72</sup>

<sup>61</sup> A/CN.9/30, paras. 29-33 (see draft approved at para. 32) (*Yearbook*, vol. I, part three, chapter I, D).

<sup>62</sup> Cf. WP.6, art. 6(2).

<sup>63</sup> UNCITRAL report on the third session (1970), paras. 81-84 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>64</sup> WP.1, art. 12; WP.3, art. 6(3) and (4). Cf. WP.6, art. 5(2).

<sup>65</sup> Para. 30, *supra*.

<sup>66</sup> WP.6, art. 6(2).

<sup>67</sup> See paras. 15-17, *supra*.

<sup>68</sup> A/CN.9/30, para. 31 (*Yearbook*, vol. I, part three, chapter I, D). UNCITRAL report on the third session (1970), para. 84 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>69</sup> WP.1, art. 12 ("physical delivery"); WP.3, art. 6(3) (reference to the time when goods are "at the disposition of the buyer"). Cf. art. 6(4) (in cases of carriage, reference to the time when "goods are handed over to the buyer by the carrier"). WP.6, art. 5(2) (when the goods "arrive at the place of destination agreed upon or are handed over by the seller to the buyer").

<sup>70</sup> A/CN.9/30, paras. 29-33 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>71</sup> *Ibid.*, paras. 37-40.

35. All three drafts contain provisions based on the above recommendation:<sup>73</sup>

(a) The provisions of the three drafts are similar except with respect to the starting point of the period related to a guarantee.<sup>74</sup>

(b) At the third session of the Commission, the representative of Norway circulated to members of the Working Group the following proposal:

"However, if the contract contains an *express guarantee* relating to the state of the goods for a particular period, specified by time or otherwise, the period of limitation in respect of any claim [based on] arising out of the guarantee shall run from the date when the buyer discovered or ought to have discovered the fact on which the claim is based, but shall at the latest expire 3(5) years after the expiration of the period of guarantee." (emphasis added).

36. Two drafts provide alternative periods of one or two years<sup>75</sup> and three or five years.<sup>76</sup> The Working Group may wish to include a question relevant to this issue in the questionnaire on the length of the period. If so, the Working Group may wish to postpone action on the length of the period, and consider only the drafting of a provision on this question subject to later insertion on the period of years.

### D. Cancellation ("rescission") with respect to future performance: anticipatory breach; instalment contracts

37. For clarity in analysing these problems, some of the typical factual situations may be identified as follows: (All contracts are made on 1 January 1970.)

(a) Delivery of the goods is due on 1 December 1970. On 1 February 1970, the seller notifies the buyer that unless the buyer agrees to pay a higher price, the seller will not perform the contract. On 1 March 1970, the buyer refuses to pay a higher price and states that he is going to hold the seller responsible in damages for his refusal to deliver. (Conversely: on 1 February 1970, the buyer notifies the seller that unless the seller reduces the price, the buyer will not accept the goods. The seller refuses to do so, and the buyer states that he will not accept the goods.)

(b) The contract calls for the buyer to establish a letter of credit on 1 February 1970, to assure payment for a machine that the seller was to manufacture and deliver on 1 December 1970. The buyer establishes a letter of credit on 1 February, but the seller contends that its provisions are inadequate. The buyer does not

<sup>72</sup> UNCITRAL report on the third session (1970), para. 93 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>73</sup> WP.1, art. 8; WP.3, art. 6(7); and WP.6, art. 5(3).

<sup>74</sup> (i) WP.1 and WP.6—the expiration of the time specified in the guarantee;

(ii) WP.3—the date the buyer first notified the seller of the claim. (This approach would tend to shorten the period when the buyer notifies the seller of a claim early in the period covered by the guarantee. Presumably, delay in giving notice could lead to loss of the claim under the applicable substantive law of sales. Cf. ULIS, art. 39.)

<sup>75</sup> WP.1.

<sup>76</sup> WP.3.

agree. On 1 March 1970, the seller notifies the buyer that he will not manufacture or deliver the machine. (Conversely: The seller agreed to provide a working model on 1 February. The buyer notifies the seller that the model so provided was inadequate, but the seller does not agree. On 1 March, the buyer notifies the seller that he will not accept the machine to be manufactured by the seller.)

(c) The contract calls for delivery of part of the goods on 1 February 1970, and the remainder on 1 December 1970. The buyer claims that the goods delivered in February are seriously defective. The seller does not agree. On 1 March 1970, the buyer declares that he will not accept the December delivery. (Conversely: The seller claims that the buyer's payment for the February shipment was late. The buyer does not agree. On 1 March, the seller notifies the buyer that he will not make the December delivery.)

38. It will be noted that in each of the above cases, a dispute developed before the time for final performance. The basic problem is whether the prescriptive period for either (or both) parties should start to run at the time of the event that precipitated the dispute (1 February), the time of notification of cancellation (1 March), or the time agreed for performance (1 December).

39. Provisions dealing with these questions were prepared at the first session of the Working Group.<sup>77</sup> The Commission did not consider those questions.

40. One draft provision follows Alternative A suggested at the first session of the Working Group.<sup>78</sup> Substantially the same provision appears in another draft,<sup>79</sup> in addition, that draft also contains a provision,<sup>80</sup> on instalment sales similar to a section of Alternative C suggested at the first session of the Working Group.<sup>81</sup> At the third session of the Commission, the representative of Norway circulated to members of the Working Group the following proposal:

"Where as a result of a breach of contract by one party before performance (in whole or part of it) is due, the other party exercises his right to treat the contract as discharged (cancelled), or to regard the obligation as having become due, the prescription period shall run from the date of the breach on which such right is based. If such right is not exercised, the breach of contract mentioned shall be disregarded for the purpose of determining the commencement of the prescription period. 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 a breach, even in respect of any con-

nected previous or subsequent instalment covered in the contract."

41. All drafts reflect a policy to start the running of the period at the time of the event or that led to the cancellation (1 February), rather than at the later date for performance set in the contract (1 December).

42. These drafts apply only where the notice of cancellation was *rightful*.<sup>82</sup> The Working Group may wish to consider whether this approach may lead to difficulties in application. As the above examples indicate, the rightfulness of the cancellation will often be disputed by the other party. In such cases, the pending drafts might require a decision on the merits of the claim.

43. One draft contains a provision on the effect of breach of the obligation to pay an instalment.<sup>83</sup> In light of the explanatory note contained in that draft,<sup>84</sup> it appears that this provision deals with a more specialized problem than that of cancellation of future performance, which has just been discussed. The situation in question may be presented by the following facts:

(a) In a sale made on 1 January 1970, the buyer agrees to pay the price in twelve monthly instalments. The buyer fails to pay the instalment due on 1 February.

(b) Under the draft, the period of prescription starts to run on 1 February. In considering the problem, the following questions might be considered:

(i) When does the period start running with respect to the instalments due in succeeding months? Does the period start to run regardless of whether the contract provides that failure to pay one instalment makes the later instalments due at once, and regardless of whether the seller notifies the buyer that all instalments are due?

(ii) Should there be a provision dealing with the failure of the buyer to pay an instalment of the price separately from the failure of the seller to deliver an instalment of the goods?

### III. LENGTH OF THE PERIOD

#### A. *The number of years*

44. This question has already been discussed at length.<sup>85</sup> Provisions concerning the number of years appear in each of the three drafts.<sup>86</sup>

45. In view of the decision to issue a questionnaire concerning this problem, the Working Group probably will wish to postpone discussion as to the number of years. The Working Group may, however, wish to

<sup>77</sup> A/CN.9/30, para. 20, alternative A, sub-para. 3, and para. 22, alternative C, sub-para. 6 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>78</sup> WP.1, art. 11. See foot-note 77, *supra*.

<sup>79</sup> WP.3, art. 6(5).

<sup>80</sup> WP.3, art. 6(6).

<sup>81</sup> A/CN.9/30, para. 22, alternative C, sub-para. 6, second sentence (*Yearbook*, vol. I, part three, chapter I, D).

<sup>82</sup> WP.1, art. 11 ("exercises his *right* to treat the contract as discharged") (emphasis added); WP.3, art. 6(5) and (6) ("becomes entitled to").

<sup>83</sup> WP.1, art. 13.

<sup>84</sup> WP.1, explanatory note, chapter III, para. 5.

<sup>85</sup> A/CN.9/30, paras. 49-54 (*Yearbook*, vol. I, part three, chapter I, D). UNCITRAL report on the third session (1970), paras. 85-89 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>86</sup> WP.1, art. 7; WP.3, art. 5(1); and WP.6, art. 6(1). Cf. WP.6, art. 6(3) (claims secured by mortgage—10 years) and art. 12 (Alternative B) (final judgement or award—10 years).

include in its draft a basic provision with the number of years blank. For this purpose, drafting might be facilitated by the use of language that does not imply answers to difficult questions, covered elsewhere in the draft, concerning the legal effect of the running of the period.<sup>87</sup> Neutral forms of expression in connexion with the length of the period may be found in two of the drafts.<sup>88</sup>

B. *Method of computation: first and last days; holidays*

46. This Working Group at its first session approved the recommendation that the day of the event instituting the prescriptive period shall not be counted.<sup>89</sup> The proposed drafts deal with the problem of computation as follows:

(a) One draft implements the substance of the recommendation by providing that (in the absence of interruption or suspension) the period expires "at midnight on the day corresponding to the date of the breach of contract".<sup>90</sup> Thus, if the breach occurred on 9 February 1970, a five-year period would expire at midnight on 9 February 1975. Other articles of that draft determine the computation where there has been interruption or suspension.<sup>91</sup>

(b) Another draft contains a provision excluding the first day and including the last.<sup>92</sup>

(c) The other draft avoids the counting of the first and last days by making the period run in terms of calendar years following the year in which the breach occurred.<sup>93</sup>

47. A majority of Working Group representatives approved the view that the period should not be extended because of holidays.<sup>94</sup> The current drafts approach the problem as follows:

(a) One draft provides no extension for holidays.<sup>95</sup>

(b) Another draft extends the period when the last day falls on a "public holiday or other *dies non*..."<sup>96</sup>

(c) In the other draft, the computation in terms of calendar years provides no extension for holidays.<sup>97</sup>

IV. THE LEGAL ACTION NECESSARY TO SATISFY ("INTERRUPT") THE PERIOD OF PRESCRIPTION

A. *Nature of the problem*

48. The proposed convention is concerned with the time within which a legal action may be brought for

the enforcement or redress of a claim: If the action is brought too late, the running of the prescriptive period may be invoked to defeat or bar the action. Under this approach, it would be possible to state the issue (and draft the controlling rule) in relatively simple terms: Has the legal action in question been instituted within the stated prescriptive period?<sup>98</sup>

49. It has been noted that legal actions may be instituted in different ways, and may be brought to court only after a series of preliminary steps, some of which may not require judicial action. For example, the first step in an action may be the serving of a formal notice (or "summons") which need not set forth the claim and which, in some jurisdictions, may be served on the defendant by the plaintiff or (in actual practice) by his attorney. In some of these jurisdictions the documents may not be filed in court until after the plaintiff has served on the defendant a formal legal document (a "complaint" or "declaration") stating the claim, and the defendant has served on the plaintiff his formal answer. Although these exchanges of documents may occur without the intervention of the court, these proceedings are regulated by the State's rules of civil procedure, and are regarded as instituting a legal action for the purpose of satisfying the State's statute of limitations. In other jurisdictions, satisfaction of the statute of limitations occurs only when the plaintiff has filed his claim in court. Consequently, the Working Group has been concerned with this question: What test should determine whether a legal action has been instituted before the expiration of the period?

B. *The test determining whether a legal action has been instituted within the prescriptive period*

50. The above question was considered at the first session of this Working Group. Most members supported the conclusion that, in view of variations in local procedure, the convention should refer to the rules of the *forum* in which the action was brought and in which the prescriptive period was invoked.<sup>99</sup>

51. The three draft uniform laws in some situations prescribe the stage the proceedings must reach, and in others refer to local procedural rules.<sup>100</sup>

<sup>98</sup> In some of the discussions and in some of the drafts the issue has often been stated in broader terms: What legal action is necessary to "interrupt" (*i.e.*, recommence) the running of the period? Some of the questions presented by this approach (dismissal of actions; the bringing of successive actions after the running of the initial period) are discussed in paras. 56-57, *infra*. Only the narrower issue, stated above, will be discussed at this point.

<sup>99</sup> A/CN.9/30, paras. 82-89 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>100</sup> (i) WP.1, art. 16(c): "*pleads his right or invokes it as a defense...*" (emphasis added); for other actions, reference is made to the law of the jurisdiction where such action takes place. (*Cf.* art. 20, which suspends the period in certain arbitration proceedings. See explanatory note, chap. VI.)

(ii) WP.3, art. 8(1): for judicial or administrative proceedings, reference is made to local law; art. 9: for arbitration proceedings, the steps necessary for interruption are defined. The reasons for the latter provision are set forth in the report on limitation and arbitration proceedings (WP.4).

(iii) WP.6, art. 10(1): "*asserts his claim in court*"; "*assertion of a right in arbitration proceedings*" (emphasis added).

<sup>87</sup> See WP.1, explanatory note, chapter II, first paragraph.

<sup>88</sup> WP.3, art. 5(1) and WP.6, art. 6(1).

<sup>89</sup> A/CN.9/30, paras. 56-57 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>90</sup> WP.1, art. 25 and explanatory note, chapter X, situation (a).

<sup>91</sup> WP.1, arts. 26-28.

<sup>92</sup> WP.3, art. 5(2).

<sup>93</sup> WP.6, art. 5(1).

<sup>94</sup> A/CN.9/30, paras. 58-59 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>95</sup> WP.1, art. 27 ("In the calculation of the period, holidays shall be taken into account").

<sup>96</sup> WP.3, art. 11.

<sup>97</sup> WP.6, art. 5(1).



52. The problem is discussed in the report on judicial proceedings and interruption.<sup>101</sup> This report proposes that the convention should provide that its period of prescription would be satisfied by "any action or act recognized, under the law of the jurisdiction where such action or act takes place, as constituting legal grounds for the purpose of interruption". The report suggests that this test should apply to all types of proceedings, including bankruptcy, corporate reorganization or other insolvency proceedings.<sup>102</sup>

C. *Dismissal of legal action because of lack of jurisdiction or other procedural grounds*

(a) *Lack of jurisdiction*

53. At the first session of the Working Group, the prevailing view was that if a tribunal ultimately decided that it was without jurisdiction to decide the merits of the claim, suspension of the period would be warranted.<sup>103</sup> The approach of the current drafts is as follows:

(1) One draft<sup>104</sup> sets forth no explicit provision on this problem. Under one article, however, it might be concluded that where the obligee "*pleads his right or invokes it as a defense*" (emphasis added), even in a tribunal that lacks jurisdiction, the period is interrupted so that the period begins to run afresh. On the other hand, if the tribunal lacks jurisdiction it might be contended that this action was not brought "before a judicial authority".<sup>105</sup>

(2) Under another proposal,<sup>106</sup> where the tribunal is incompetent to adjudicate, the period is extended to one year from the date of the declaration of incompetency.<sup>107</sup>

(3) The other draft is similar to the preceding proposal, except that the extended period is six months rather than one year.<sup>108</sup> The proposed rule on this matter in the report on judicial proceedings and interruption of prescription is in accord with the extended period of six months.<sup>109</sup>

(b) *Other ground for dismissal*

54. Questions may arise when an action to enforce a claim fails to reach a decision on the merits for reasons other than the incompetency of the tribunal. Under some legal systems, a court that is "competent" may

decline to exercise jurisdiction on grounds such as *forum non conveniens* or the selection of an inappropriate venue. In addition, actions may be dismissed because of procedural difficulties such as a flaw in the service of legal process, the attempt to sue a business unit that lacks the legal capacity to be sued, and the like. The Working Group may wish to consider whether some provision, such as suspension or extension of the period, would be appropriate for actions that fail to lead to a decision on the merits because of procedural barriers.<sup>110</sup>

(c) *Voluntary withdrawal*

55. One draft specifically provides that no "interruption" occurs if the claimant withdraws his claim or discontinues the proceedings.<sup>111</sup> In accord is the proposal contained in the report on judicial proceedings and interruption.<sup>112</sup> Another draft may reach a similar result because of the requirement that the obligee "*continues the commenced proceedings*" (emphasis added).<sup>113</sup> If no interruption or suspension is intended in cases of voluntary withdrawal, it may be necessary to make specific provision to that effect in any draft that provides for "interruption" from "instituting" proceedings.<sup>114</sup>

(d) *Consequences of "interruption" by bringing action*

56. Providing that the institution of legal action starts the prescriptive period running afresh ("interruption"), literally construed, might raise questions such as these:

(1) If the obligee sues in the last year of the prescriptive period and prevails, may he sue on the *original* claim (not by way of enforcement of the judgement) within [five] years later? Would there be any limit to the number of such suits, if each "interrupts" the period? Is the doctrine of "merger" of a claim in the judgement sufficiently established in all jurisdictions to avoid such problems?

(2) Suppose the obligee loses. May he sue on the *original* claim in a different state within [five] years because the prescriptive period was "interrupted" by the first suit? Can the obligor rely on *res judicata* in all jurisdictions to block such action?

(3) While the original suit is pending, can the obligee institute a second suit in another jurisdiction after the initial prescriptive period has expired, on the ground that the bringing of the first action started the period running afresh? Should the convention on prescription provide a bar to bringing a series of such actions? Are local procedural rules adequate to cope with the problem?

57. The above complications lead to the question whether the concept of "interruption" needs to be employed in connexion with the bringing of action on a claim. Thus, consideration might be given to the

<sup>101</sup> WP.5, part I.

<sup>102</sup> WP.5, part I, para. 3. Also see WP.3, art. 10.

<sup>103</sup> A/CN.9/30, para. 73, vol. I, part three, chapter I, D).

<sup>104</sup> WP.1.

<sup>105</sup> WP.1, art. 16(c).

<sup>106</sup> WP.3, art. 14.

<sup>107</sup> Under WP.3, art. 14(1), extension is provided when the court or administrative tribunal "has declared itself or been declared incompetent" (emphasis added). The question might arise as to whether the underscored phrase refers to a declaration (a) by a tribunal within the same judicial system or (b) a tribunal in a different state where enforcement of the judgment is sought. Presumably the former interpretation is intended in view of the complications that could arise from determinations of incompetency by tribunals that would lack final authority to determine the question.

<sup>108</sup> WP.6, art. 10(2).

<sup>109</sup> WP.5, part III.

<sup>110</sup> See draft proposed by WP.5, part III.

<sup>111</sup> WP.1, art. 16(c), last sentence.

<sup>112</sup> WP.5, part III, first paragraph.

<sup>113</sup> WP.6, art. 10(1).

<sup>114</sup> Cf. WP.3, art. 8(1).

adequacy of stating the basic rule in the simpler terms suggested above:<sup>115</sup> Has the action to enforce a claim been instituted within the stated prescriptive period? If not, the bar of prescription may be invoked in that action.

#### V. SUSPENSION OR PROLONGATION OF THE PERIOD BECAUSE OF IMPOSSIBILITY TO INSTITUTE ACTION

##### A. *External circumstances preventing legal action* (force majeure)

58. This problem was examined at the first session of this Working Group; certain basic questions of approach were decided but no statutory language was drafted.<sup>116</sup>

59. The report on impossibility to sue by reason of *force majeure* sets forth a draft text, with reasons for the provisions adopted.<sup>117</sup> Provisions on this subject also appear in all three drafts.<sup>118</sup>

60. One question of approach is whether the statute should (a) employ a brief, general formula<sup>119</sup> or (b) include specific instances to illustrate and make more definite the contours of the general rule.<sup>120</sup>

61. Related to the above question of technique is the question of the breadth of grounds for suspension.

(a) Under one approach, only impediments of a widespread and drastic character would justify suspension.<sup>121</sup> A second approach is drafted in terms of the ability of the individual obligee to take legal action.<sup>122</sup>

(b) An intermediate position provides a general formula that excludes impediments that are individual or peculiar to the obligee.<sup>123</sup>

62. It has been suggested that suspension should be limited to impediments that persist during the latter part of the period. All three drafts give effect to this view by providing that the period should not expire before the expiration of one year from the date on which the relevant impediment ceased to exist.<sup>124</sup>

##### B. *Legal action prevented by misconduct of obligor; concealment*

63. A majority of the Working Group at the first session tentatively approved a draft dealing with this question.<sup>125</sup>

64. The drafts presented to the Working Group illustrate two approaches:

(a) A single provision designed to include both (i) problems considered under A, *supra* (e.g., *force majeure*) and (ii) misconduct of the obligor preventing legal action.<sup>126</sup>

(b) A separate provision on specified misconduct by the obligor that delays action.<sup>127</sup>

#### VI. MODIFICATION OF THE PERIOD BY AGREEMENT OF THE PARTIES AND RELATED PROBLEMS

##### A. *The general power to modify by agreement*

65. The problem was discussed by the Working Group<sup>128</sup> and by the Commission at its third session.<sup>129</sup> Divergent views have been expressed, particularly on whether the parties should have the power to shorten the period. Some expressed the view that the solution should depend upon the length of the basic period. Most members agreed at the first session of the Working Group that any modification to be effective must be in writing.

66. Solutions proposed by the drafts:

(a) *Can the period be extended?*

All three drafts permit extension;<sup>130</sup> however, one of the drafts limits the extension to the maximum of two years in addition to the statutory period.<sup>131</sup>

(b) *Can the period be shortened?*

One draft forbids,<sup>132</sup> but another draft permits<sup>133</sup> the period to be shortened by agreement. The other draft<sup>134</sup> makes such an agreement null and void.<sup>135</sup>

(c) *Formality, need the agreement be in writing?*

Only one draft calls for writing.<sup>136</sup> Another draft states that "such an agreement need not be evidenced by writing" and further provides that it "shall not be subject to any other requirements as to form".<sup>137</sup>

67. The Working Group may also wish to consider whether the parties can agree outside the court not to invoke the prescriptive period (as contrasted with an

<sup>115</sup> Para. 48, *supra*.

<sup>116</sup> A/CN.9/30, paras. 63-66 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>117</sup> WP.7, first part.

<sup>118</sup> WP.1, art. 17 and explanatory note, chapter VI; WP.3, art. 12; and WP.6, art. 8 (as explained in WP.7, first part).

<sup>119</sup> WP.1, art. 17, and WP.6, art. 8.

<sup>120</sup> WP.3, art. 12(2).

<sup>121</sup> Cf. WP.3, art. 12(2).

<sup>122</sup> WP.1, art. 17. Cf. art. 19 on moratorium.

<sup>123</sup> WP.6, art. 8.

<sup>124</sup> WP.1, art. 17; WP.3, art. 12(1); and WP.6, art. 8.

<sup>125</sup> A/CN.9/30, para. 70 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>126</sup> WP.6, art. 8, as explained in WP.7, first part.

<sup>127</sup> WP.1, art. 18, and WP.3, art. 13, both of which closely follow A/CN.9/30, para. 70 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>128</sup> A/CN.9/30, paras. 93-107 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>129</sup> UNCITRAL report on the third session (1970), paras. 87-88 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>130</sup> WP.1, art. 14; WP.3, art. 16(1); and WP.6, art. 7.

<sup>131</sup> WP.6, art. 7.

<sup>132</sup> WP.1, art. 15.

<sup>133</sup> WP.3, art. 16(1).

<sup>134</sup> WP.6, art. 7.

<sup>135</sup> But see A/CN.9/30, paras. 96 and 98 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>136</sup> WP.6, art. 7.

<sup>137</sup> WP.3, art. 16(1); cf. WP.3, art. 16(2).

agreement to extend the period) and whether the court must honour such an agreement when the obligor ignores it and asserts the expiration of the prescriptive period. This question is distinct, although closely related in effect, from the question of the parties' general power to modify the prescriptive period by agreement. In this connexion, it may be noted that one draft provides that the obligor may at any time *declare to the obligee* that he will not invoke prescription.<sup>138</sup>

68. Representatives have noted that the solution to these problems may be affected by the length of the basic period of prescription. The Working Group consequently may wish to postpone its action on this issue until the replies to the questionnaire have been received.

#### B. Prolongation during negotiation

69. 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.<sup>139</sup> The third session of the Commission did not take a decision on this issue and impliedly left the issue to the questionnaire.<sup>140</sup>

70. The three drafts do not specifically refer to prolongation during negotiation. But their provisions on the general power to modify the period by agreement<sup>141</sup> would enable the parties to agree to prolong (extend) the period during negotiation. All three drafts permit such extension.<sup>142</sup>

71. A different approach is followed in the report on judicial proceedings and interruption of prescription.<sup>143</sup> This report proposes a one-year automatic suspension [extension] from the day on which the latest demand was made [within the statutory prescriptive period]. Under this formula, the existence of the *agreement* by the parties to extend the period would not be necessary.

72. The foregoing may lead to the following questions:

(a) Whether the provision on the general power to extend the period by agreement<sup>144</sup> will be sufficiently broad to cope with the "negotiation" situation, or

(b) Whether the approach proposed by the report on judicial proceedings and interruption of prescription<sup>145</sup> is needed, in addition to the general power to extend the period by agreements, in order to facilitate negotiation when the parties cannot reach an agreement to extend the period.

73. For the reasons indicated in paragraph 68, *supra*, the Working Group may wish to refer action on

this issue until the replies to the questionnaire are received.

#### C. Whether the issue of prescription should be raised by the Court suo officio or only at the instance of the parties

74. At the first session of the Working Group, there was general agreement that prescription may be invoked only by a party concerned (including a guarantor); *i.e.*, the court should not be authorized to raise it *suo officio* in the course of a judicial proceedings.<sup>146</sup> The Commission did not consider this issue.

75. The three proposed drafts differ on this point:

(a) Under one draft,<sup>147</sup> the prescription shall be applied *suo officio* by court when the place of business of the parties to the contract is in the territory of a Contracting State; otherwise, obligor must invoke.<sup>148</sup> Under this draft, however, obligor must always invoke prescription in case of arbitration proceedings.<sup>149</sup>

(b) Under the other two drafts:<sup>150</sup> obligor must invoke.

76. As to who can invoke prescription, two proposals<sup>151</sup> mention only "debtor", while the other draft<sup>152</sup> has a broader provision ("any other person having a legally recognized interest therein").<sup>153</sup>

### VII. ACKNOWLEDGEMENT OF THE OBLIGATION; PART PERFORMANCE

#### A. Acknowledgement

77. The Commission accepted in principle the Working Group's recommendation that if the debtor acknowledges the debt the prescriptive period would start to run afresh from the date of acknowledgement.<sup>154</sup> All three drafts give acknowledgement to the effect of interruption as described above.<sup>155</sup> However, the drafts differ with respect to certain aspects of the problem.

##### (a) The requirement of a writing

78. A majority of the Working Group at the first session was of the view that only acknowledgements in writing should be effective.<sup>156</sup> Two drafts follow this

<sup>138</sup> WP.3, art. 16(2) (writing and signature required); *cf.* WP.3, art. 16(1).

<sup>139</sup> See A/CN.9/30, paras. 105-107, especially rule 17(2) of the Draft European Rules quoted in para. 105 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>140</sup> UNCITRAL report on the third session (1970), paras. 87 and 88 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>141</sup> See paras. 65-68, *supra*.

<sup>142</sup> WP.1, art. 14; WP.3, art. 16(1); and WP.6, art. 7.

<sup>143</sup> WP.5, paras. 3 and 4.

<sup>144</sup> Paras. 65-68, *supra*.

<sup>145</sup> WP.5.

<sup>146</sup> A/CN.9/30, paras. 122-123 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>147</sup> WP.1.

<sup>148</sup> WP.1, art. 23.

<sup>149</sup> WP.1, art. 23. See WP.1, explanatory note, chapter IX.

<sup>150</sup> WP.3, art. 17(1) and WP.6, art. 4.

<sup>151</sup> WP.1, arts. 23-24, and WP.3, art. 17(1).

<sup>152</sup> WP.6, art. 4.

<sup>153</sup> See A/CN.9/30, para. 122 (to be invoked by the party concerned (including a guarantor) (*Yearbook*, vol. I, part three, chapter I, D).

<sup>154</sup> *Ibid.*, paras. 74-77; and UNCITRAL report the third session (1970), para. 94 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>155</sup> WP.1, art. 16(a); WP.23, art. 15; and WP.6, art. 11(1).

<sup>156</sup> A/CN.9/30, para. 77 (*Yearbook*, vol. I, part three, chapter I, D).

view.<sup>157</sup> In contrast, the other draft states that "before the expiration of the period", there is interruption "if the debtor recognizes in any way his obligation to the creditor...";<sup>158</sup> however, the same draft requires a "writing" for an acknowledgement "of a prescribed right".<sup>159</sup> (Emphasis added.)

79. If the Working Group decides that a "writing" is required, it may wish to consider whether the term "writing" requires a definition.<sup>160</sup> Thus, questions may arise with respect to telex and telegraphic communications and with respect to the requirement of a signature.

(b) *Clarity of the identification of obligation and the amount still due*

80. The drafts differ in their approach to this problem:

- (i) One draft states a brief general rule: "acknowledgement in writing of the obligation" (emphasis added).<sup>161</sup>
- (ii) Another draft requires that the debtor acknowledge that the claim is "well founded in substance and in amount".<sup>162</sup>
- (iii) The other draft contains the language, "recognizes in any way his obligation" (emphasis added).<sup>163</sup> Another part of the draft provides that if only a part of a right is recognized [acknowledged], the interruption shall take effect only with respect to that part.<sup>164</sup>

81. The Working Group may wish to ascertain whether these differences in the wording would produce different results.<sup>165</sup> In this connexion it might be considered whether one draft ("well founded... in amount") might exclude certain<sup>166</sup> types of acknowledgement by the seller, such as an acknowledgement of an obligation to repair a defective machine. After preliminary discussion of questions of policy, the Working Group may wish to establish a small Drafting Group to reconcile stylistic differences among the three drafts.

B. *Part performance*

(a) *Part payment*

82. The Working Group at its first session agreed on the general proposition that an acknowledgement of a claim could be effected by a payment stated as a part payment of a larger obligation [the obligation in question].<sup>167</sup>

83. Two drafts follow this approach.<sup>168</sup> The other draft provides that "the payment of an instalment or interest or any other conduct of the debtor which indicates that he does not contest his obligation", shall be considered as acknowledgement.<sup>169</sup>

84. The Working Group may wish to consider whether the amount of total debt must be stated or identifiable in connexion with the part payment.

(b) *Payment of interest*

85. The Working Group may wish to consider the effect of the payment of interest under the current drafts:

- (i) One draft does not specifically refer to payment of interest.<sup>170</sup>
- (ii) Another draft provides that payment of interest shall be treated as "payment in respect of the principal debt";<sup>171</sup> the basic rule for the part payment of a principal debt is provided elsewhere in the same article.<sup>172</sup>
- (iii) The other draft provides that payment of interest is a recognition of the obligation.<sup>173</sup>

(c) *Part performance other than payment (e.g., part performance by the seller as acknowledgement)*

86. One draft treats "part performance of a larger obligation (emphasis added) as a cause of interruption."<sup>174</sup> This could include part performance other than part payment; thus, part performance of both the seller and buyer are treated equally. Another draft would also include the seller's part performance.<sup>175</sup> It would be more difficult to reach this construction under the other draft.<sup>176</sup>

87. The Working Group at its first session concentrated its discussion on part payment but there was no indication that part performance by the seller should not be given similar effect.<sup>177</sup> The Working Group may wish to consider whether the rule on part performance should be sufficiently broad to include conduct such as the seller's attempt to repair a defective machine.

88. If the Working Group should decide to give effect to part performance other than part payment, it may also wish to consider whether this approach presents problems of identification of the larger obligation.

<sup>157</sup> WP.1, art. 16(a) and WP.3, art. 15.

<sup>158</sup> WP.6, art. 11(1).

<sup>159</sup> WP.6, art. 11(2).

<sup>160</sup> See A/CN.9/30, para. 77 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>161</sup> WP.1, art. 16(a). See A/CN.9/30, para. 76, second sentence (*Yearbook*, vol. I, part three, chapter I, D).

<sup>162</sup> WP.3, art. 15(1).

<sup>163</sup> WP.6, art. 11.

<sup>164</sup> WP.6, art. 11(1), last sentence.

<sup>165</sup> Cf. A/CN.9/30, para. 76 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>166</sup> WP.3, art. 15(1).

<sup>167</sup> A/CN.9/30, para. 81 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>168</sup> WP.1, art. 16(b) and WP.3, art. 15(2).

<sup>169</sup> WP.6, art. 11(1).

<sup>170</sup> WP.1. Cf. art. 16 (b): "Performance stated as part performance of a larger obligation" (emphasis added).

<sup>171</sup> WP.3, art. 15(3).

<sup>172</sup> WP.3, art. 15(2).

<sup>173</sup> WP.6, art. 11(1), second sentence.

<sup>174</sup> WP.1, art. 16(b).

<sup>175</sup> WP.6, art. 11(1), second sentence ("any other conduct...").

<sup>176</sup> WP.3, art. 15(2): "part payment of a debt" (emphasis added).

<sup>177</sup> A/CN.9/30, para. 81 (*Yearbook*, vol. I, part three, chapter I, D).

### C. Acknowledgement or performance after expiration of the prescriptive period

#### (a) Acknowledgement

89. At the first session of the Working Group, a majority supported the view that an acknowledgement subsequent to the expiration of the prescriptive period would be effective.<sup>178</sup>

90. Two drafts set forth a specific rule implementing this view.<sup>179</sup> The unqualified language of the other draft<sup>180</sup> could also support the same rule.<sup>181</sup>

#### (b) Performance after expiration of the period; restitution

91. Two drafts deal specifically with performance of an obligation after expiration of the prescriptive period; both deny restitution or recovery of the performance even if the obligor did not know at the time of performance that the prescriptive period had expired.<sup>182</sup> This issue was considered at the first session of the Working Group but consensus was not reached.<sup>183</sup> The Commission did not discuss the issue.

92. The Working Group may conclude that its approach to the effect of acknowledgement subsequent to the expiration of the period would be relevant to the present issue of the effect of performance subsequent to the expiration of the period.

## VIII. RECOURSE TO BARRED CLAIMS BY COUNTER-CLAIM OR SET-OFF

### A. Counter-claims: cross action

93. The Working Group at its first session agreed that the use of claims barred by prescription to establish *affirmative recovery* against the other party should not be permitted.<sup>184</sup> This result would probably be reached under two of the drafts.<sup>185</sup> The other draft is to the same effect where a counter-claim is based on a claim on which the prescriptive period has already expired;<sup>186</sup> the draft treats counter-claim in the same way as the recourse to barred claims by set-off.<sup>187</sup>

### B. Set-off

94. At the first session of the Working Group, set-off was understood to be such a situation where claims by two parties against each other might be deemed to have cancelled each other or where the

smaller claim might be deemed to have reduced the larger opposing claim.<sup>188</sup> (The term "set-off" may have a narrower meaning in some legal systems.) On the question whether recourse to set-off should be allowed for barred claims, it was agreed that there should be some opportunity, but that this opportunity should be limited.<sup>189</sup> The Working Group, however, did not reach consensus on the detailed implementation of this general position. The Commission did not consider the question.

95. Two of the drafts follow different approaches,<sup>190</sup> while the other is silent on this issue.<sup>191</sup>

(a) Under one draft, (i) the claim used for set-off must have arisen out of "the same legal relationship", and (ii) the opportunity to use the claim for set-off must have arisen before that claim was barred by prescription.<sup>192</sup>

(b) Under the other draft, the claim made by way of set-off is deemed to be a separate claim and consequently must be asserted before the expiration of the prescriptive period in respect of that claim.<sup>193</sup> (The claim used for set-off is, however, deemed to have been asserted on the same date the suit was brought against one who is asserting the set-off.)<sup>194</sup>

96. A difference between the approaches of the two drafts<sup>195</sup> may be illustrated by the following example: Assume the prescriptive period is five years. A's claim against B arises in 1970 and B's claim against A arises in 1968. A institutes an action against B in 1974.

(a) Under one draft,<sup>196</sup> the two rights had automatically cancelled each other before 1973. Consequently, in spite of the fact that five years had expired with regard to B's claim at the time A brought suit in 1974, B may use his claim to diminish or extinguish A's recovery. However, an important limitation to the availability of the set-off under this proposal is that the claims used for set-off must have arisen out of "the same legal relationship". (Query: Would this be construed as referring to the legal relationship resulting from a single sale? Or would the relationship from a series of sales be included?)

(b) Under the other draft,<sup>197</sup> the two claims are "separate", and, therefore, B's claim may not be asserted by way of set-off. However, if A institutes an action against B *before* 1973, by virtue of a separate article of the proposal,<sup>198</sup> B may assert his claim in this

<sup>178</sup> *Ibid.*, paras. 78-80.

<sup>179</sup> WP.3, art. 15(6) and WP.6, art. 11(2).

<sup>180</sup> WP.1, art. 16(a).

<sup>181</sup> But *cf.* WP.1, art. 7 (the right is "extinguished").

<sup>182</sup> WP.1, art. 21 and WP.3, art. 18(1).

<sup>183</sup> A/CN.9/30, paras. 119-121 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>184</sup> *Ibid.*, paras. 116-118.

<sup>185</sup> WP.6 (no specific provision), and WP.1, art. 22 (reference only to set-off).

<sup>186</sup> WP.3, art. 17(3); for a minor variation, *cf.* WP.3, art. 8(2).

<sup>187</sup> See paras. 95-96.

<sup>188</sup> A/CN.9/30, para. 117 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>189</sup> *Ibid.*, para. 118.

<sup>190</sup> WP.1 and WP.3.

<sup>191</sup> WP.6.

<sup>192</sup> WP.1, art. 22. See WP.1, explanatory note, chapter VIII (the wording of art. 22, if literally construed, may lead to a different conclusion).

<sup>193</sup> WP.3, art. 17(3).

<sup>194</sup> WP.3, art. 8(2).

<sup>195</sup> WP.1 and WP.3.

<sup>196</sup> WP.1, art. 22.

<sup>197</sup> WP.3, art. 17(3).

<sup>198</sup> WP.3, art. 8(2).