

Commentary

Article 24.1 lays down the basic purpose of the law of limitation. A claim would become barred by limitation after the expiration of the applicable limitation period for that claim. This is nowhere explicitly stated, but can be clearly gathered from the articles considered together. Since Article 24.1 is, *inter alia*, made subject to Article 23, the result is that if a party does not raise the question of limitation, the claim can be recognized or enforced in legal proceedings (since expiration of the limitation period is not taken into consideration). A claim which is not recognized presumably cannot be enforced and a claim which is enforced must presumably be recognized. Perhaps both words are used out of an abundance of caution.

24.2 deals with the situation where a party makes a claim within the limitation period, but the party against whom this claim is made also has a claim which he wishes to use as a defence or set-off. The latter party is permitted to do this unconditionally even after the expiration of the limitation period in respect of his claim, where he seeks to rely on the claim *as a defence*. The basis of this rule is that the considerations of public policy which operate in favour of preventing the agitation of stale claims are outweighed by the unfairness to a debtor who will suffer loss by being unable to interpose a possible valid defence merely because of the expiration of time. Since this Convention only applies to an international contract of sale which conforms to certain conditions, clearly the claim which is raised as a defence must also relate to such a contract. But it does not appear to be necessary that the claim *by way of defence* (as opposed to a claim by way of set-off) and the claim by way of attack should relate to contracts concluded in the course of the same transaction.

e.g. A and B enter into an international contract of sale, and a claim becomes due to B against A on this contract on 1.1.73. They enter into a second independent international contract of sale on 1.2.77, and a claim becomes due to A against B on the second contract on 1.6.77. A commences legal proceedings against B on the second

contract on 1.1.80. If the applicable law permits this, B can on 1.2.80 rely on his claim as a defence, though the limitation period in regard to this claim expired by 1.1.77.

The ability to use a claim as a defence, therefore, can continue under 24.2 despite the expiration of the limitation period, subject to the limitation laid down by Article 22. However, as has been noted, no consensus was reached on that article.

Where the claim is relied on *as a set-off*, certain conditions have to be satisfied. These are set out in 24.2 (a) and 24.2 (b). Two examples may be given clarifying the different situations to which (a) and (b) apply.

- (i) A and B enter into two international contracts of sale in the course of the same transaction. A claim becomes due to B against A on 1.1.73 on the first contract. The limitation period on this expires on 1.1.77. A claim becomes due to A against B on 1.3.77 on the second contract. B can under 24.2 (a) use his claim under the first contract as a set-off in proceedings instituted by A against him on the second contract. But 24.2 (b) is not applicable as the claims could not have been set-off before 1.1.77.
- (ii) A and B enter into two international contracts of sale but not in the course of the same transaction. A claim accrues to B against A under the first contract on 1.1.73. This claim is prescribed on 1.1.77. A claim accrues to A against B on 1.1.75. A commences legal proceedings against B on 1.1.78. B can rely on his claim as a set-off under 24 (b) because the respective claims could have been set off between 1.1.75 and 1.1.77. But 24.2 (a) has no application because the contracts were not concluded in the course of the same transaction.

A claim to set-off would be a species of defence, but claims may be relied on as defence without invoking set-off, e.g. a claim for rectification of the contract.

Where a single contract is involved, it is clear that the claim by way of attack and the claim by way of defence or set-off must relate to a contract of international sale of goods. Otherwise, the draft Convention will not apply. Where, however, 24.2 is sought to be applied to several contracts, the question arises whether all such contracts must be international contracts of sale. The question can be illustrated as follows :—

- (a) A and B enter into two contracts not in the course of the same transaction. The first is not an international contract of sale, but the second is. A claim falls due to B against A on the international contract, which is prescribed by 1.1.75. A claim falls due to A against B on the other contract on 1.2.75, and A institutes legal proceedings. If the applicable law permits this, can B rely on his claim *as a defence* in this action, even though the claim by way of attack is not based on an international contract ?
- (b) A and B enter into two contracts in the course of the same transaction. The first is not an international contract of sale, but the second is. A claim arises to B against A on the international contract, which is prescribed by 1.1.75. A claim arises to A against B on the other contract on 1.2.75, and A institutes legal proceedings. If the applicable law permits this, can B rely on his claim *by way of set-off* in this action, even though the claim by way of attack is not based on an international contract ?

It would appear that the ability to use a claim by way of defence or set-off should be permitted only where the contracts involved are all international contracts. Otherwise two different regimes of limitation would apply within the same action. The desired result can perhaps be achieved by inserting the words "relating to an international contract of sale" between the words "claim" and "asserted" in the body of 24.2.

Article 25 (A/CN. 9/70. Annex I)

Where the debtor performs his obligation after the expiration of the limitation period, he shall not thereby be

entitled to recover or in any way claim restitution of the performance thus made even if he did not know at the time of such performance that the limitation period had expired.

Article 25 (Final draft)

Where the debtor performs his obligation after the expiration of the limitation period, he shall not thereby be entitled to recover or in any way claim restitution of the performance thus made even if he did not know at the time of such performance that the limitation period had expired.

Commentary

It has been said that this article "was addressed to a situation where a party performed a contract after the expiry of the limitation period-and then realized that there was no legal requirement for him to do what he had done, with the result that he sued for restitution. Article 25 was not designed to have any effect on claims for restitution based on other grounds, such as, that performance had been obtained by fraud". The intention is to prevent a restitutionary claim *based solely* on the ground that, unknown to the performer, performance was not due because the limitation period had expired. It may be considered whether the substitution of other words for "thereby" (e.g. "on that account alone") may not make this intention clearer.

The phrase "even if he did not know" suggests that *a fortiori* if he did know he cannot recover.

Article 26 (A/CN. 9/70. Annex I)

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

Article 26 (Final draft)

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Commentary

The object of this article is to avoid possible divergent interpretations on the question whether the obligation to pay interest on the principal debt is an independent obligation and, therefore outside the scope of the draft Convention. It would, therefore, appear that even if the obligation to pay interest was undertaken in an independent contract, the draft Convention would apply.

CALCULATION OF THE PERIOD

Article 27 (A/CN. 9/70. Annex I)

The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last calendar month.

CALCULATION OF THE PERIOD

Article 27 (Final Draft)

1. The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last calendar month of the limitation period.
2. The limitation period shall be calculated by reference to the calendar of the place where the legal proceedings are instituted.

Commentary

The precise point of time when the limitation period expires can be very important. It will depend on the point of commencement of the period, the duration of the period, and the method of calculating the duration. The present article does not define the method of calculation, but states the result of the

method, leaving the method to be inferred. Taking a simple case :—

- (1) A claim becomes due on 1.1.74. Article 9 applies to the claim, and the limitation period commences on that day.
- (2) The limitation period applicable is four years (Article 8). This would be calculated at the rate of 365 days as constituting an year, or 366 days in a leap year.
- (3) If Articles 8 and 9 only were applied, the claim would appear to be barred by limitation at the end of 31.12.78.
- (4) By reason of this Article, however, it expires at the end of 1.1.79, i.e. four years and one day after it commenced to run.

The method of calculation which would achieve this result would be to leave out of account the first day on which the period commenced to run, and this appears to be what is intended by the present article (A/C N. 9/70/Add. 1, p. 63). However, this may be construed as at variance with Article 9.

It may be asked whether Article 27 applies to the calculation of all periods of time specified in the draft Convention for the commencement of legal proceedings (e.g. to the periods of one year specified in Articles 15, 16 and 17). This would depend upon whether such periods are included within the phrase "the limitation period" as used in the draft Convention. In some contexts it is clear that the extended or new period is to be classified as a "limitation period" (e.g. Articles 18 and 19, "new limitation period"; Articles 20 and 21 - extended limitation period), but in others (e.g. Articles 15, 16 and 17) it is not. It may be desirable that the matter should be put beyond doubt. However, it is probable that the periods of one year are intended to be included within the term. The result would be that if a period of one year commenced on, e.g. 1.1.74, it would end at the end of 1.1.75.

Article 27.2 appears to be an attempt to provide a solution to a difficult problem which occurs when a particular time