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# Prescription in Arab Civil Codes and the Unidroit Principles of International Commercial Contracts of 2004: A Comparative Analysis

## **Abstract**

The Arab codes give the law of obligations the prominent place it occupies in the civil law system. These codes recognize (liberative or negative) prescription as a mode of barring claims as a result of inaction for a period of time. In addition, the UNIDROIT Principles of International Commercial Contracts of 2004 (PICC 2004) provides that prescription extinguishes an action to enforce a claim of right. The purpose of this article is to conduct a comparative exercise by analyzing similarities and differences between Arab civil codes and the PICC 2004. Arab civil codes and the PICC 2004 wrestle with the same concept, prescription, in more or less the same terms. However, the value of studying the PICC 2004 along with Arab civil codes is even greater because they do differ. The article concludes by arguing that certain prescription provisions in Arab civil codes are unclear and antiquated. Arab countries can reconcile their civil codes with more recent international legal instruments, such as the PICC 2004, without jeopardizing their own traditions and values.

## **Keywords**

Arab civil codes, law of obligations, prescription, UNIDROIT

# PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS OF 2004: A COMPARATIVE ANALYSIS

BASHAR H. MALKAWI\*

## 1 Introduction

The Arab codes give the law of obligations the prominent place it occupies in the civil law system. According to Sanhuri, obligations are to law what the backbone is to the human body.<sup>1</sup> Persons are originally free from obligation. To become bound by an obligation indicates a transition from that original state to one of legal subjection. Sources of obligations are contracts, torts, unjustified enrichment, and the law.<sup>2</sup> Hence, obligations may not arise from sources other than those contained in this exclusive list.

An obligation places the debtor under the duty to render a performance that must consist exactly of whatever he promised if the obligation results from a contract or any other source.<sup>3</sup> Once the debtor fulfils his duty he is restored to his original state of freedom from obligation. However, there are certain cases where an

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<sup>1</sup> See Abdel-Razzaq Al-Sanhuri, *The Concise Interpretation of the Civil Code*, Vol. I, 38 (1966).

<sup>2</sup> The questions clustered under the label sources of obligations are of significant practical relevance. For example, whether a defendant is bound because of a contract or of a quasi-delict to the obligation the plaintiff is seeking to enforce matters because different rules governing prescription and default will be accordingly applicable. See Hossam El-Ehwany & Nader M. Ibrahim, *Introduction to Law* 331 (2004).

<sup>3</sup> See Adnan Amkhan, 'Specific Performance in Arab Contract Law', 9.4 *Arab Law Quarterly* 324, 326 (1994) (it is a general principle of Arab contract law that a contract is concluded in the expectation that the obligor will fulfill his promise specifically and in good faith).

obligation can be extinguished. That may be so because of confusion, compensation, novation, release, or subrogation.<sup>4</sup> But there is one important mode of extinction which cannot be overlooked in the literature, viz., prescription. Hardly any comparative study had been conducted in the area of prescription between Arab civil codes and other international instruments.

The focus of this article will be on prescription rules in selected Arab civil codes as compared with the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts of 2004. This comparison might be surprising to an Arab lawyer's way of thinking where prescription rules belong to the law of obligations, as opposed to the law of commercial contracts. As far as general approach and manner of proceeding are concerned, the UNIDROIT Principles stand in similarity with Arab civil codes. Indeed, UNIDROIT Principles cover contractual claims within the entire field of obligations. Although the UNIDROIT Principles and Arab civil codes correspond in matters of principle, there are also a number of differences in detail.

The article will proceed in three sections. Section two provides historical background to UNIDROIT and its work on harmonizing legal rules worldwide, specially its project for the transnational

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<sup>4</sup> Confusion refers to the case where the attributes of the creditor and debtor are united in the same person. No one may be bound to render performance to himself when the creditor and debtor is the same person; thus the obligation no longer has a purpose and comes to an end. Compensation takes place when two persons owe each other reciprocally identical objects, that is, when each one is a creditor and debtor of the other and the object of the performance of each obligation is a thing of the same kind such as money. Novation is the extinguishment of an existing obligation by the substitution of a new one. By release is meant the gratuitous renunciation made by a creditor in favor of his debtor of the right to claim the whole or a part of the debt. There is no payment or substitution of a new debtor, there is simply an abandonment of the debt. Subrogation is the substitution of one person to the rights of another. See El-Ehwany & Ibrahim, *supra* note 2, at 332-349. See also Saul Litvinoff, 5 *Louisiana Civil Law Treatise: The Law of Obligations* 540-546, 579-582, 598, 633-635 (2d ed. 2001) (discussing the modes of extinguishing an obligation).

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

harmonization of contract law. Section three examines the definition of prescription and the different types of prescription. Moreover, it analyses in detail the similarities and differences between the UNIDROIT Principles and selected Arab civil codes concerning prescription. Finally, the article concludes by arguing that while prescription rules in Arab civil codes and the PICC 2004 correspond with regard to certain points, significant differences still exist. Arab countries may use the PICC 2004 as a benchmark for further change to existing texts without jeopardizing the fruits of many centuries of civil codes tradition.

## 2 UNIDROIT: Historical Background

UNIDROIT, the International Institute for the Unification of Private Law, had been founded in Rome in 1926 as an organ of the League of Nations. Since the Second World War, however, it has operated as an independent intergovernmental organization. Members of UNIDROIT number some sixty-one countries, including several Arab countries.<sup>5</sup> Its most important contribution in the field of private law, so far, was the preparation of Principles of International Commercial Contracts of 1994 (PICC 1994).<sup>6</sup> These Principles cover general provisions such as freedom of contract, binding character of contracts, and good faith.<sup>7</sup> In addition, these principles cover the topics of formation of contracts, validity, interpretation and content, performance, non-performance and remedies for non-performance. However, the PICC 1994's coverage of the law of contract was not comprehensive.

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<sup>5</sup> See UNIDROIT, Membership, available at <http://www.unidroit.org/english/members/main.htm> (last visited January 23, 2008).

<sup>6</sup> In 1980, the UNIDROIT Secretariat set up a working group to draft a set of principles on international commercial contracts. See Michael Joachim Bonell, *An International Restatement of Contract Law* 2-8 (3d ed. 2005).

<sup>7</sup> The text of each principle was followed by a commentary including illustrations. The structure of the publication was thus inspired by the American Restatements. See UNIDROIT, *Principles of International Commercial Contracts* (1994).

It was therefore only natural that UNIDROIT's Governing Council, in 1997, set up another working group, the primary task of which was to consider a number of additional topics. The UNIDROIT Principles of International Commercial Contracts of 2004 (PICC 2004) are the result of the deliberations of this second working group.<sup>8</sup> The PICC 2004 has now replaced the 1994 Principles. The PICC 2004 contains new topics such as plurality of parties, assignment, substitution of a new debtor, set-off, and prescription.

Since their issuance, the UNIDROIT Principles have received considerable attention internationally. Specifically, they have generated a substantial amount of literature and have played a role in the drafting of international commercial contracts.<sup>9</sup> Additionally, the UNIDROIT Principles are increasingly used by arbitral tribunals and, occasionally, even by national courts.<sup>10</sup>

### 3 Prescription

According to the civilian tradition, prescription is a means of acquiring real rights or of losing certain rights as the result of the passage of time. There are several types of prescription according to their operation and effect. Traditionally, prescription has been divided into two categories: acquisitive or positive prescription, which is a mode of acquiring ownership through possession for a period of time, and liberative or negative prescription, which is a mode of resisting a claim by virtue of the claimant's inaction over an

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<sup>8</sup> For more details see Michael Joachim Bonell, UNIDROIT Principles 2004 - The New Edition of the Principles of International Commercial Contracts adopted for the International Institute for the Unification of Private Law, 9 *Uniform Law Review* 6 (2004).

<sup>9</sup> A comprehensive bibliography for the Principles in general can be found in Michael Joachim Bonell, *The UNIDROIT Principles in Practice: Case Law and Bibliography on the Principles of Commercial Contracts* (2002).

<sup>10</sup> See Charles N. Brower & Jeremy K. Sharpe, "The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective", 45 *Virginia Journal of International Law* 199, 205-220 (2004) (citing several arbitral tribunals that invoked the UNIDROIT Principles).

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

established period of time.<sup>11</sup> However, there could be a third kind of prescription; prescription of nonuse.<sup>12</sup>

Acquisitive prescription allows for the acquisition of ownership or other real rights such as usufruct by possession for a period of time. A person who has possession of a movable or immovable without being its owner, or of a real right over a movable or immovable without just title may acquire the ownership of the thing or title to the real right if his possession continues uninterrupted for fifteen years.<sup>13</sup> This is not the place for a full discussion of acquisitive prescription as it belongs to the law of property.<sup>14</sup>

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<sup>11</sup> In the French Code, these two kinds of prescription are treated in the same title because there are a number of rules which apply to both kinds of prescription. See G. Baudry-Lacantinerie & A. Tissier, *Traite Theorique Et Pratique De Droit Civil*, No. 24 (4th Ed. 1924), In 5 Civil Law Translations 14 (La. State L. Inst. trans. 1972). Arab civil codes have a different and more logical arrangement. Arab civil codes devote separate sections to liberative prescription in the chapter that numerates the various modes of extinguishing an obligation while deals with acquisitive prescription in another chapter as one of the modes of acquiring ownership or real rights. See George N. Sfeir, *Modernization Of The Law In Arab States: An Investigation Into Current Civil Criminal And Constitutional Law In The Arab World* 101-113 (1998).

<sup>12</sup> The prescription of nonuse differs from liberative prescription in that liberative prescription bars an action, whereas the prescription of nonuse extinguishes the underlying real right. However, like liberative and acquisitive prescription, the prescription of nonuse is susceptible of renunciation, interruption, and suspension. See Symeon Symeonides, 'One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription', 44 *Louisiana Law Review* 69, 116 (1983).

<sup>13</sup> See Egyptian Civil Code, art. 968; Libyan Civil Code, art. 972; Iraqi Civil Code, art. 1158; Jordanian Civil Code, art. 1181; and Syrian Civil Code, art. 917. See also Terenia Urban Guill, Palomeque v. Prudhomme: The Louisiana Supreme Court Rules on Acquisitive Prescription of Servitudes of Light and View, 70 *Tulane Law Review* 1675, 1681 (1996). (In the U.S., the Louisiana Supreme Court affirmed that servitudes of light and view may be acquired through acquisitive prescription, provided that the adverse possessor has just title and has possessed the uninterrupted right in good faith for ten years.)

<sup>14</sup> For more see Farhat J. Ziadeh, *Property Law in the Arab World* 36-60 (1979).

Liberative or negative prescription is a mode of barring of actions as a result of inaction for a period of time. Liberative prescription is not merely a mechanism for the release of debts; rather, it is a mode of extinction of claims. Thus, liberative prescription extinguishes the legal right of enforcement; it does not extinguish the underlying obligation.<sup>15</sup> When the action is barred by prescription, a natural obligation still subsists, although the civil obligation is extinguished. A natural obligation is binding on a party not by the force of law, but by the conscience of the individual who makes it.<sup>16</sup> The remaining natural obligation may form the basis of a new and legally enforceable contract, and any amounts paid by the obligor in satisfaction of this obligation may not be recovered as payment of a thing not due.

Civil law jurisdictions generally regard liberative prescription as a substantive issue.<sup>17</sup> On the other hand, the common law view is that liberative prescription is a procedural issue because it affects solely the nature of the remedy to be afforded.<sup>18</sup> However, this classification as substantive and procedural can be difficult because substance often gradually shades into procedure. Liberative prescription may be considered to have both 'substantive' and 'procedural' aspects.

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<sup>15</sup> Some schools of Sunni jurisprudence allow an action to enforce a claim of right to be barred by the passage of time. However, the Sharia does not recognise the legal notion of prescription as extinguishing any right. Thus even in those schools which time limitation bars a claim from being judicially heard and enforced the right of 'self-help or set-off' (*taqas*) can still be used as an extra-judicial remedy. This distinction between a legal right and its enforcement, which is cogent, has greatly influenced the laws of Arab countries. See Mahir Jalili, 'Time Bar Clauses in Saudi Arabian Contracts', 13 *International Construction Law Review* 488, 490-91 (1996).

<sup>16</sup> See David V. Snyder, 'A Symposium: The Case of Natural Obligations', 56 *Louisiana Law Review* 423, 425-428 (1995).

<sup>17</sup> See Conflict of Law: Statutes of Limitation in the Multistate Product Liability Case, 48 *Tulane Law Review* 1130, 1134 (1974).

<sup>18</sup> See Locke, 'Use of Foreign Statutes of Limitations in Illinois: An Analysis of Statutory and Judicial Technique', 34 *De Paul Law Review* 407, 413 (1985). See also 'Developments in the Law - Statutes of Limitation', 63 *Harvard Law Review* 1177 (1950).

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

The following parts will highlight the similarities and differences between the PICC 2004 and the civil codes of Arab countries with regard to the rules of liberative or negative prescription.

### 3.1 The Legal Policy Underlying Prescription

The prescription rules of both the PICC 2004 and the civil codes of Arab countries are founded upon the same considerations of public policy. For the sake of the general peace and to prevent dishonest actions, the law provides that after a certain length of time obligations shall not be enforceable if the objection is taken that the right has been prescribed.<sup>19</sup> Documents may be lost, witnesses may be dead, and the recollection of events long past may have become dim. It is for these reasons that the law comes to the help of the debtor by creating a presumption of payment. When the time fixed by law for prescription has expired a presumption of discharge is created. The legal policy underlying prescription can be said to illustrate the very broad rule that the law helps those who help themselves.

### 3.2 Terminology

The PICC 2004 and Arab civil codes use a different terminology when referring to prescription. The PICC 2004 employs the term 'limitation periods' while Arab civil codes generally use the term 'prescription'.<sup>20</sup> However, the only Arab country to use the term 'limitation of actions' is Sudan as it is influenced by common law.<sup>21</sup> At common law, the term 'prescription' refers to the process by which limited rights of use over another's land, such as easements,

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<sup>19</sup> See Reinhard Zimmermann, *Comparative Foundations of the Law on Set-Off and Prescription* 76 (2002). See also H S Shaaban, 'Commercial Transactions in the Middle East: What Law Governs?' 31 *Law & Policy in International Business* 157, 164-165 (1999).

<sup>20</sup> See UNIDROIT, *Principles of International Commercial Contracts*, art. 10.1 (2004). See also Hisham R. Hashem, *The Jordan Civil Code of Moslem Jurisprudence* 63 (1990) (article 449 of the Jordanian civil code carries the heading 'prescription' when discussing extinguishment of claims).

<sup>21</sup> Zaki Mustafa, *The Common Law In The Sudan: An Account Of The Justice, Equity, And Good Conscience Provision* 168 (1971).

may be acquired.<sup>22</sup> When talking about 'prescription' in the sense used in Arab civil codes, common law countries such as the U.S. refer to 'statute of limitations'.

The difference in terminology is practically irrelevant. Whether the term 'prescription' or 'limitation period' is used, it produces the same effect. Prescription does not affect the right (i.e., the substantive cause of action), but merely the obligee or creditor's ability to pursue that right in court.<sup>23</sup> In other words, prescription forms a bar that restricts the time within which legal proceedings may be brought.

### 3.3 Periods of Prescription

Under Arab civil codes, there is a general fifteen-year period of prescription, known as long prescription.<sup>24</sup> The public policy here is mainly to prevent contests which arise long after the obligation was formed. The creditor who has remained inactive for so long is regarded as having lost his right of action and there is a presumption of payment.

The general prescription period fixed in Arab civil codes is longer than the period of the PICC 2004. Under article 10.2 of the PICC 2004, the general period of prescription is three years. However, the general period of prescription provided in the PICC 2004 is accompanied by a maximum period of ten years.<sup>25</sup> In comparison to the single period of prescription in the PICC 2004, Arab civil codes contain several prescription periods for particular cases.

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<sup>22</sup> See Barry J. Kusnitz, 'Adverse Possession and Easements', 47 *Rhode Island Bar Journal* 5 (1999).

<sup>23</sup> See Mohammad Sewar, *General Trends In The United Arab Emirates' Civil Transactions Law As Compared With Other Arab Civil Codes* 214 (1989).

<sup>24</sup> See Egyptian Civil Code, art. 374; Iraqi Civil Code, art. 429; Jordanian Civil Code, art. 449; Kuwaiti Civil Code, art. 438; Moroccan Civil Code, art. 387; Syrian Civil Code, art. 372; and United Arab Emirates Civil Code, art. 473.

<sup>25</sup> See UNIDROIT, *supra* note 20, at art. 10.2 (2).

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

In Arab civil codes, the term of prescription for rent, instalments, allowances for maintenance, and payments for hire is five years.<sup>26</sup> In order for this prescription rules to apply, courts insist on two qualities; regularity and periodicity.<sup>27</sup> In general, the prescription period for any sum payable by the year or at shorter recurring intervals is five years. The motive of public policy, which underlies prescription of five years, is not quite the same as in the long prescription. It is based not so much upon the presumption of payment as upon the principle that periodical payments of this kind are expected to be met out of revenue. If the creditor is so negligent as not to sue for his right within five years it would not be fair to compel that debtor to pay what might be a large capital sum. Thus, the public policy is not so much that the law presumes the creditor has been paid as that it punishes him for his negligence.

The term of prescription is five years for sums due to physicians, lawyers, engineers, pharmacists, experts, teachers, brokers, and professors in return for services they have performed and for expenses they have incurred.<sup>28</sup> The prescription here is based upon presumption of payment. Arab civil codes limit the five-year prescription period to these professionals. Thus, accountants, translators, or artists are excluded from its coverage. In addition, the

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<sup>26</sup> See Egyptian Civil Code, art. 375; Jordanian Civil Code, art. 450; Kuwaiti Civil Code, art. 439; Moroccan Civil Code, art. 391; and Syrian Civil Code, art. 373.

<sup>27</sup> See Case No. 234, Egyptian Court of Cassation, Vol. 30, 270 (May 5, 1979). See Case No. 130, Egyptian Court of Cassation, Vol. 31, 130 (March 1, 1980). See Court of Cassation Case No. 124/1999, *Journal of Jordanian Bar Association* 2439 (2000).

<sup>28</sup> See Egyptian Civil Code, art. 376; Iraqi Civil Code, art. 431; Jordanian Civil Code, art. 451; Syrian Civil Code, art. 373; and United Arab Emirates Civil Code, art. 475. Arab civil codes class together 'physicians, lawyers, engineers, professors, and teachers'. It might be argued that there is a good reason for putting these professionals in the same class as they are engaged to perform not a single act but a series of acts. The question that arises whether, for purposes of prescription, to treat each visit of a physician, each piece of work of an engineer, each litigation of a lawyer as creating a separate debt, or to treat their services as a lump sum when the whole activity is completed. This issue is by no means free from difficulty.

scope of coverage for this prescription is limited to services performed and expenses incurred as a result of their works. Any other service and expense falls outside the scope of coverage.

The term of prescription is two years for sums due to merchants and artisans for things they have supplied to persons who do not trade therein, and the rights of hotel and restaurant owners for the accommodations and price of food, and the right of workers and servants.<sup>29</sup> The category of workers and servants include cooks, drivers, and plumbers.<sup>30</sup> In order for the two-year prescription period to apply, the rights of merchants and artisans must result from supply of things to other persons who do not trade therein. If those persons to whom things are supplied trade in these things, the debt becomes commercial and thus subject to commercial law.<sup>31</sup> Like the five-year prescription period, the two-year prescription discussed here is based upon presumption of payment.

The way of proceeding adopted by the PICC 2004 considerably simplifies the structure of the prescription period. According to the PICC 2004, there is always only one period of prescription. As a rule, there is the three-year period which can be extended to no more than ten years. On the other hand, Arab civil codes set a general long prescription period; fifteen-year prescription period. In addition, Arab civil codes numerate several cases where the prescription period can be either two or five years, depending on the categories of individuals concerned. The PICC 2004 scheme appears to promote more clarity and uniformity in prescription periods compared with Arab civil codes.

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<sup>29</sup> See Jordanian Civil Code, art. 452; and United Arab Emirates Civil Code, art. 476. However, the prescription period for these categories of individuals is one year in the Egyptian, Iraqi, Kuwaiti, and Syrian civil codes. See Egyptian Civil Code, art. 378; Iraqi Civil Code, art. 431; Kuwaiti Civil Code, art. 442; and Syrian Civil Code, art. 375.

<sup>30</sup> See Court of Cassation, Case No. 496/91, *Journal of Jordanian Bar Association* 1813 (1992).

<sup>31</sup> In commercial matters, the prescription period is ten years. See Jordanian Court of Cassation Case No. 2209/2003, Adaleh Center Publications (November 17, 2003).

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

### **3.4 Commencement of the Prescription Period**

The period of prescription runs from the beginning of the first complete day after the day upon which possession has been acquired in the case of acquisitive prescription, or after the day upon which the obligation has matured in the case of liberative prescription.<sup>32</sup> The period of prescription is calculated by days.<sup>33</sup> Thus, the period cannot be calculated by hours or minutes, as it is easy to preserve evidence of the date of the transaction. However, if it were necessary to prove the hour of the day for purposes of prescription, innumerable difficulties would arise from the variations of local times in different countries.

A further consequence of the rule that time is reckoned by days is that the prescription period does not expire until the last moment of the last day of the term. Accordingly, if the right of action has been acquired on the July 20, 1994, prescription does not begin to run until the first minute of July 21, 1994, and if the prescription is fifteen years, it will not be complete until the last minute of July 21, 2009. If the last day falls on a legal holiday, prescription accrues on the expiration of the next day that is not a legal holiday.

In Arab countries two calendars are in use; the Arab calendar and the Gregorian calendar. Under the Arab Calendar, the year is shorter than it is in the Gregorian calendar. The question that arises next is according to which calendar the prescription period is calculated? In the past, there has been much doubt upon this point. Arab civil codes are silent on this point.<sup>34</sup> One reason that could offer an explanation for use of the Gregorian calendar is the fact that Arab codes mention the Arab calendar in few instances. Seeing that codes rarely mention the Arab calendar one must conclude that, when they are silent as to which calendar is to be applied, they must

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<sup>32</sup> See Egyptian Civil Code, art. 381; Jordanian Civil Code, art. 454; Syrian Civil Code, art. 378; and United Arab Emirates Civil Code, art. 478.

<sup>33</sup> See Egyptian Civil Code, art. 380; Jordanian Civil Code, art. 456; Syrian Civil Code, art. 377; and United Arab Emirates Civil Code, art. 480.

<sup>34</sup> The Yemeni Civil Code is the only code that explicitly refers to the issue of calendar use. The period of prescription is calculated according to the Arab calendar and its equivalent in the Gregorian calendar. See Yemeni Civil Code, art. 457.

mean the Gregorian calendar. This is an application of the rule *expressio unius*.<sup>35</sup> But this argument is not enough to justify the conclusion that the Gregorian calendar is intended because it may not be true that the mere express conferral of a right in one situation implies the denial of the equivalent right in other situations. Other reasons that could support the view that the Gregorian calendar is intended include court jurisprudence. Courts have held that in case of prescription the period should be computed according to the Gregorian calendar.<sup>36</sup> The law, probably, is now settled with regard to which calendar to use and it is taken for granted that the Gregorian calendar is intended.

Arab civil codes do not address the case where the law is changed after prescription begins to run. The change in law may cause the suit to be barred.<sup>37</sup> However, in order to avoid this scenario, courts could use parts of the time which elapsed under the old and new laws. In other words, the time the plaintiff has in which to sue is determined by forming a part of the new time to the old and multiplying that fraction by the amount of time remaining under the old prescriptive period at the effective date of the new period. The formula advanced above applies equally well to laws that lengthen or shorten the prescriptive period.

According to the PICC 2004, the period of prescription begins to run on the day after the day the creditor knows or ought to know the facts as a result of which the creditor's right can be exercised.<sup>38</sup> The criterion of 'knowledge' should be raised and established by the creditor. On the other hand, Arab civil codes permit the period of prescription to run from the day when the obligation becomes due for fulfilment. The way prescription in Arab civil codes commences

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<sup>35</sup> The rule *expressio unius*, a Latin maxim, is a canon of statutory interpretation which states that to express or include one thing implies the exclusion of the other, or of the alternative. See Reed Dickerson, *The Interpretation and Application of Statutes* 234-235 (1975).

<sup>36</sup> See for example Court of Cassation, Case No. 205/80, *Journal of Jordanian Bar Association* 337 (1991).

<sup>37</sup> For example, if, at the inception of the plaintiff's cause of action, the applicable prescriptive period is two years and, one year after the cause of action has arisen, the law reduces the period to one year, arguably the plaintiff's action has been prescribed.

<sup>38</sup> See UNIDROIT, *supra* note 20, at art. 10.2 (1).

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

is simpler than the PICC 2004. Arab civil codes do not indulge in the discussion whether the creditor has knowledge or not of his right. The start of the prescription period is not tied to discoverability by the creditor.

The PICC 2004 does not state whether the period of prescription can be expressed in hours. Furthermore, when compared with Arab civil codes, the PICC 2004 lacks a general provision for calculating a time period. For example, prescription in Arab civil codes does not begin to run until the first minute of the next day upon which the right of action has accrued and will not be completed until the last minute of the last day. The availability of such a provision in the PICC 2004 would have been just as appropriate as it is in the Arab civil codes.

### 3.5 Suspension of Prescription

According to Arab civil codes, the presence of lawful excuse suspends the running of prescription.<sup>39</sup> More specifically, Arab civil codes enumerate several cases of suspension: absence of creditor, incapacity such as minority, *force majeure*, and relationships between spouses and parents and their children.<sup>40</sup> However, the Jordanian civil code is the only Arab civil code that does not list the cases of suspension.<sup>41</sup> Thus, the Jordanian civil code adopts a flexible approach by requiring the presence of 'lawful excuse' without further elaboration.

Absence of creditor means that he is away, but still alive, from his country or place of residence.<sup>42</sup> Minority refers to a person not attaining the age of majority or legal age, generally set as eighteen

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<sup>39</sup> See Egyptian Civil Code, art. 382; Jordanian Civil Code, art. 457; Kuwaiti Civil Code, art. 446; Moroccan Civil Code art. 379; and Yemeni Civil Code, art. 450.

<sup>40</sup> Ibid.

<sup>41</sup> See Jordanian Civil Code, art. 457. See also Court of Cassation, Case No. 933/1990, *Journal of Jordanian Bar Association* 1945 (1991) (the Jordanian civil code stated 'lawful excuse' in an open manner so as to include any excuse that suspends prescription).

<sup>42</sup> See Egyptian Civil Code, art. 382; Kuwaiti Civil Code, art. 446; and Moroccan Civil Code, art. 380.

years in Arab civil codes.<sup>43</sup> Minority is considered valid excuse for suspending prescription provided that a representative for the minor has not been appointed.<sup>44</sup> However, the minor does not appear to be sufficiently protected in cases where the representative fails to pursue his claim before the period of prescription has elapsed. Arab civil codes should provide for an extension by way of postponement of expiry of the period of prescription not only with regard to claims held by or against a minor who is without a representative, but also with regard to claims between a minor and his representative. *Force majeure* denotes the occurrence of an unexpected event beyond the creditor's control and which the creditor could not avoid or prevent. Examples of *force majeure* include earthquakes, volcanoes, floods, and storms. These three cases of suspension are fact-based. Courts in Arab countries will determine whether these cases meet the 'lawful excuse' bar on a case-by-case basis.

Arab civil codes suspend prescription as between: the spouses during marriage, parents and children during minority, tutors and minors during tutorship, and curators and interdicts during interdiction.<sup>45</sup> The suspension is made necessary as a matter of fairness and to maintain stability. As between spouses and as between parents and their children, the provision encourages harmony between the members of these special relationships.<sup>46</sup> The

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<sup>43</sup> See S. E. Rayner, *The Theory of Contracts In Islamic Law: A Comparative Analysis With Particular Reference to the Modern Legislation in Kuwait, Bahrain, and the United Arab Emirates* 121-124 (1991) (modern legal systems designate a specific age of majority. For example, the age of majority in the Kuwaiti civil code is eighteen years while it is twenty-one years in the United Arab Emirates civil code. On the other hand, the Bahraini law of contract does not define the age of majority).

<sup>44</sup> See Egyptian Civil Code, art. 382; Kuwaiti Civil Code, art. 446; and Moroccan Civil Code, art. 379; and Yemeni Civil Code, art. 450.

<sup>45</sup> See Egyptian Civil Code, art. 382; Iraqi Civil Code, art. 435; Kuwait Civil Code, art. 336; Moroccan Civil Code, art. 378; and Yemeni Civil Code, art. 452. See also Court of Cassation, Case No. 934/1990, *Journal of Jordanian Bar Association* 1974 (1991).

<sup>46</sup> Those parties are prevented from suing each other except for a few enumerated causes. For example, spouses may sue each for divorce and causes of action pertaining to the custody of a child or alimony for his support.

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

suspensions as between tutors and minors during tutorship and as between curators and interdicts during interdiction reflect the legally unequal positions in which these parties stand in their relationships.

The suspension of prescription in Arab civil codes presupposes that the period has already begun to run but an excuse appeared that prevents its continuation. Furthermore, the suspension of prescription presupposes that the period has not been completed, otherwise there is no suspension. The period of prescription remains suspended as long as there is absence of creditor, minority, or *force majeure*. Once the lawful excuse ceases to exist, the period of prescription begins to run again by adding the previous period to the new one.<sup>47</sup> In other words, the time during which the lawful excuse existed does not count for the computation of the prescription period.

The PICC 2004 recognizes three grounds of suspension: *force majeure*, death, and incapacity.<sup>48</sup> In a manner similar to Arab civil codes, *force majeure* refers to an impediment which is beyond the creditor's control and which the creditor could neither avoid nor overcome. However, the impact of this cause of suspension is determined differently in the PICC 2004 from that in the Arab civil codes. The PICC 2004 provides that the period of prescription is suspended so as not to expire before one year after the relevant impediment has ceased to exist. The PICC 2004 tries to mitigate the influence of this cause for suspension on the running of the period of prescription for, as a result of the PICC 2004 language, only impediments that have occurred within the last year of the period of prescription are taken into account. To put it differently, there is no reason to take into account events which have arisen, and fallen away, well before the end of the period of prescription, i.e., at a time when the creditor still had ample time to pursue his claim. Otherwise, the computation of periods of prescriptions would be rendered unreasonably difficult. Moreover, it appears unnecessary to accord to the creditor the full year after the impediment has

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<sup>47</sup> See Jordanian Civil Code, art. 457 (2).

<sup>48</sup> See UNIDROIT, *supra* note 20, at art. 10.8 (1).

ceased to exist as most of the impediments covered by the PICC 2004 last only for a short period of time.

The PICC 2004 also considers incapacity and death as other causes for suspension.<sup>49</sup> The same rules of *force majeure* apply in these two causes. Similarly, the additional one-year period in case of *force majeure* applies. The only special rule which applies to the cases of incapacity and death concerning the end of the suspension whereby a representative for the incapacitated or deceased party or its estate has been appointed; or a successor has inherited the respective party's position. However, the PICC 2004 does not address the issue when the incapacity ends without a representative having been appointed.

The rules of Arab civil codes concerning *force majeure* and incapacity seem similar to the rules of the PICC 2004. For example, Arab civil codes and the PICC 2004 use the term 'incapacity' in a broader manner to include not only minority but also insanity, negligence, prodigal spendthrift, physical disability, and death sickness.

### 3.6 Interruption of Prescription

While there are cases that suspend prescription, there are other cases that lead to the interruption of the prescription period.<sup>50</sup> Admission of debt on the part of the debtor and instituting of

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<sup>49</sup> Ibid, art. 10.8 (2).

<sup>50</sup> The Book of Rules of Justice, known in Arabic as Majalla, influenced the drafting of Arab civil codes. Chapter 2 of the Book of Rules of Justice deals with the causes for interruption of the period of limitation. For example, if a court action is brought, the period is interrupted. See *Law in the Middle East: Origin and Development of Islamic Law* 292-296, 305-305 (Majid Khadduri & Herbert J. Liebesny eds., 1955) (The Book of Rules of Justice was a product of the Ottoman reform movement and was based on the Hanafi school of law. It codified the Islamic principles which served as the civil law of the Ottoman Empire and then the Arab countries). See Court of Cassation, Case No. 325/1972, *Journal of Jordanian Bar Association* 1527 (1972) (According to articles 1660, 1663, and 1666 of the Majalla, causes of suspension of prescription are: minority, insanity, absence, negligence, and force majeure. On the other hand, causes of interruption are: admission of the debt and commencing of legal proceedings). See also Court of Cassation, Case No. 340/1972, *Journal of Jordanian Bar Association* 1549 (1972).

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

judicial proceedings on the part of the creditor interrupt the running of the prescription period. The difference between suspension and interruption of prescription is in computing the prescription period. In case of suspension, once the lawful excuse for suspension ceases to exist, the period of prescription begins to run again by adding the previous period to the new one. In case of interruption, the previous period of prescription will not be taken into account when calculating time.<sup>51</sup> Rather, the period of prescription will be renewed as if the previous period had never existed.

Arab civil codes provide that the debtor's explicit or implicit admission of the right of the creditor interrupts the prescription period.<sup>52</sup> The texts of Arab civil codes did not condition the admission of the debt on the occurrence of a certain event or passage of time. To the contrary, admission of the right of the creditor was used in absolute terms. Hence, admission of the debt can be made by the debtor at any time and during any stage of court action. Once the debtor acknowledges the right of the creditor willingly, he cannot withdraw his acknowledgement. Acknowledgement of the debt interrupts the period of prescription and a new period will commence.

Explicit or implicit admission of the right of the creditor can be expressed by any mode. The court will determine whether there is an explicit or implicit admission of debt based on the facts of the case in question. For instance, courts have found that the debtor could admit a debt by writing a statement to that effect, acknowledging the debt orally, presenting a surety or mortgage, partially paying the debt, and invoking a set-off.<sup>53</sup> However, court

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<sup>51</sup> See Jordanian Court of Cassation Case No. 2365/2005, Adaleh Center Publications (April 2, 2006).

<sup>52</sup> See Egyptian Civil Code, art. 384; Iraqi Civil Code, art. 438; Jordanian Civil Code, art. 459; Kuwaiti Civil Code, art. 449; Moroccan Civil Code, art. 382; Syrian Civil Code, art. 381; United Arab Emirates Civil Code, art. 483; and Yemeni Civil Code, art. 453.

<sup>53</sup> For examples on the jurisprudence of Jordanian courts see Court of Cassation, Case No. 236/82, *Journal of Jordanian Bar Association* 996 (1982), Court of Cassation, Case No. 811/90, *Journal of Jordanian Bar*

cases have not addressed whether a settlement offer is sufficient to acknowledge a debt, and thus interrupts prescription.

The PICC 2004 also provides that an acknowledgement of the right of the creditor on the part of the debtor interrupts prescription.<sup>54</sup> The acknowledgement of the right of the creditor leads to renewal of the period of prescription. In other words, any previous prescription period will not be counted in case of interruption.

In addition to admission of debt on the part of the debtor, Arab civil codes provide that instituting a 'judicial action' or any 'judicial measure' leads to the interruption of the prescription period.<sup>55</sup> Prescription is interrupted when the creditor commences an action against the debtor in a court. According to Arab civil codes, the action that interrupts prescription is judicial action only. Claims made out of court do not constitute an interruption.<sup>56</sup> Although not defined, any 'judicial measure' may include the service of process. For example, if action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period.

The position of Arab civil codes should be clarified with respect to the duration of interruption of prescription while an action is pending before the court. Arab civil codes should provide that interruption of prescription resulting from the filing of a suit in court continues as long as the suit is pending. When a suit filed within the prescriptive period is dismissed on grounds other than lack of jurisdiction, the filing acts as a continuous interruption until

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*Association 896 (1992), Court of Cassation, Case No. 1730/1994, Journal of Jordanian Bar Association 2776 (1996), Jordanian Court of Cassation Case No. 273/2000, Adaleh Center Publications (October 26, 2000), and Jordanian Court of Cassation Case No. 3058/2006, Adaleh Center Publications (February 2, 2007).*

<sup>54</sup> See UNIDROIT, *supra* note 20, at art. 10.4 (1).

<sup>55</sup> See Egyptian Civil Code, art. 383; Iraqi Civil Code, art. 437; Jordanian Civil Code, art. 460; Kuwaiti Civil Code, art. 448; Moroccan Civil Code, art. 381; Syrian Civil Code, art. 380; United Arab Emirates Civil Code, art. 484; and Yemeni Civil Code, art. 453.

<sup>56</sup> However, the Moroccan civil code is the only code that allows claims to be made out of court. See Moroccan Civil Code, art. 381. Thus, according to the Moroccan civil code, an act of mediation through a third party interrupts prescription.

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

the suit is dismissed. Upon dismissal a new prescriptive period begins to run. A different situation obtains, however, when a plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit at the trial. In any of these instances, interruption should be considered as never occurred. The terms 'abandonment' and 'failure' have not been defined by the codes or courts jurisprudence.

In a manner similar to Arab civil codes, the PICC 2004 provides that the commencement of legal proceedings interrupts the running of the period of prescription.<sup>57</sup> Nonetheless, in comparison with Arab civil codes, the PICC 2004 allows insolvency proceedings and, where the debtor is an entity that is in the course of being dissolved, dissolution proceedings to interrupt prescription.<sup>58</sup> Additionally, the PICC 2004 contains a detailed provision on the effect of arbitral proceedings on the running of prescription which is very closely modelled on the one concerning judicial proceedings.<sup>59</sup> Alternative dispute resolution mechanisms, also, have the effect of interrupting prescription.<sup>60</sup> The rules of judicial proceedings and arbitral proceedings are applicable *mutatis mutandis* to alternative dispute resolution.

In contrast with the PICC 2004, Arab civil codes do not cover arbitration proceedings and alternative dispute resolution proceedings. The reason for this state of affair could be that, at the time Arab civil codes were written, arbitration and other dispute resolution mechanisms did not take ground on a large scale.<sup>61</sup> In

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<sup>57</sup> See UNIDROIT, *supra* note 20, at art. 10.5 (1) (a).

<sup>58</sup> *Ibid*, art. 10.5 (1) (b) & (c).

<sup>59</sup> *Ibid*, art. 10.6.

<sup>60</sup> *Ibid*, art. 10.7.

<sup>61</sup> See Charles N. Brower & Jeremy K. Sharpe, 'International Arbitration and the Islamic World: The Third Phase', 97 *American Journal of International Law* 643, 644-648 (2003) (In much of the Arab region, arbitration has long been viewed with scepticism, if not with hostility. In many Islamic states, laws were similarly nonexistent or deficient with respect to enforcement of arbitral awards). See also Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration', 28 *Loyola of Los Angeles international & Comparative Law Review* 565, 592 (2006) (alienation and distrust of arbitration were reinforced by several 1960s international arbitration decisions).

sum, the PICC 2004 provides much more comprehensive interruption provisions.

### 3.7 Miscellaneous Provisions

There are several points of departure between Arab civil codes and the PICC 2004. These points concern pleading of prescription, renunciation of prescription, retroactive effect of prescription and accessory claims, and modification of the prescription period.

#### 3.7.1 *Prescription May Be Pleaded At Any Stage of the Proceedings*

Arab civil codes contains an article which declares that the plea of prescription maybe set up at any stage of the judicial proceedings and may even be pleaded for the first time in the court of appeal.<sup>62</sup> Justification for this rule can be based on the fact that prescription is in its nature a peremptory exception and can be made at any stage of the proceedings. But a party will not be allowed to plead liberative prescription when the circumstances clearly show that he has renounced that plea.<sup>63</sup> There is no corresponding article in the PICC 2004.

#### 3.7.2 *The Court Cannot Ex Officio Give Effect to Prescription*

Considering that the rules of prescription are based upon public order, it might appear at first sight that courts ought to be entitled to find that a right had been lost by the expiration of the legal period, although this was not pleaded by the party who would benefit by the prescription. But further consideration shows that

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<sup>62</sup> See Egyptian Civil Code, art. 387; Iraqi Civil Code, art. 442; Jordanian Civil Code, art. 464; Kuwaiti Civil Code, art. 452; Moroccan Civil Code, art. 372; Syrian Civil Code, art. 384; United Arab Emirates Civil Code, art. 488; and Yemeni Civil Code, art. 455. The Court of Cassation in Jordan declared that prescription cannot be pleaded before the Court for the first time. Prescription must be pleaded first before the Court of First Instance or the Court of Appeal, and only then it can be pleaded before the Court of Cassation. See Court of Cassation, Case No. 456/1994, *Journal of Jordanian Bar Association* 1948 (1995).

<sup>63</sup> See Egyptian Civil Code, art. 387; Iraqi Civil Code, art. 442; Jordanian Civil Code, art. 464; Kuwaiti Civil Code, art. 452; Moroccan Civil Code, art. 372; Syrian Civil Code, art. 384; United Arab Emirates Civil Code, art. 488; and Yemeni Civil Code, art. 455.

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

such a conclusion would be highly inequitable. The debtor may not wish to evade paying his debt though he has a legal excuse and the law quite rightly respects this scruple. Arab civil codes provide that courts cannot *ex officio* give effect to prescription.<sup>64</sup> Liberative prescription extinguishes the obligation if the debtor or any other interested party invokes prescription. A surety or a co-debtor, for example, may plead the prescription. The benefit of prescription exists in favour of these persons each of whom has a proper right of his own, distinct from the right of the principal debtor or of the co-debtor respectively.

### *3.7.3 Renunciation of Prescription*

Arab civil codes contain several articles on the matter of renunciation of prescription while the PICC 2004 has no equivalents. Arab civil codes deal more fully with this matter compared with the PICC 2004. From the outset, it must be remembered that acknowledgment differs from renunciation both in substance and in effect. An acknowledgment interrupts prescription and eradicates the time that has accrued, so that a new prescriptive period begins to run. Renunciation, on the other hand, is made after the prescription has accrued, and obliterates the effect of the prescription that has accrued. For this reason, the rules relative to renunciation are more stringent than those relative to acknowledgment.

According to Arab civil codes, no one can renounce by anticipation his right to claim by prescription.<sup>65</sup> A person may renounce a right to claim by prescription after it has been acquired. As has been explained, the rules of prescription are based upon considerations of public policy. It is in the public interest to fix a period within which actions may be brought and to declare that if no action is brought within the stated period all rights shall then be definitely determined. This purpose of the law would be defeated if persons

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<sup>64</sup> Ibid.

<sup>65</sup> See Egyptian Civil Code, art. 388; Iraqi Civil Code, art. 443; Jordanian Civil Code, art. 463; Kuwaiti Civil Code, art. 453; Moroccan Civil Code, art. 373; Syrian Civil Code, art. 385; United Arab Emirates Civil Code, art. 487; and Yemeni Civil Code, art. 456.

were allowed to deprive themselves by agreement of the right to claim the benefit of prescription. It would become common for creditors to insert conditions that their rights of action should not be prescribed at all.

The renunciation of prescription is either express or tacit.<sup>66</sup> The law does not mandate that renunciation shall be made in any particular form, and, therefore, according to the general principles, it may be inferred from any conduct on the part of the person entitled to claim prescription, which clearly indicates his intention to renounce the benefit of the prescription which has been acquired in his favour. But there is always a presumption of fact against a man gratuitously abandoning a right, and, therefore, the court will not be entitled to find that there has been a tacit renunciation unless this is the only reasonable inference which can be drawn from the facts proved. If his conduct, although suggestive of renunciation, is, nevertheless, reasonably capable of another explanation, he should have the benefit of the doubt.

It is not possible to lay down the general rules as to what will amount to tacit renunciation. The question is one which depends upon the facts of each particular case. Among the facts to be considered will be the pleadings in the action, but, as stated earlier, the plea of prescription does not need to be set up at first, and the fact that the defendant first pleads other defences, such as the non-existence of the debt, does not in itself amount to a tacit renunciation of the right to plead prescription at a later stage. The debtor may not have known that he was entitled to the plea of prescription, or he may have had conscientious scruples against relying upon a technical rule of law so long as he thought that he might succeed upon other grounds.<sup>67</sup> At any rates, the facts relied

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<sup>66</sup> See Jordanian Civil Code, art. 464; and United Arab Emirates Civil Code, art. 488.

<sup>67</sup> The following are examples of facts from which tacit renunciation may be inferred. The payment of a debt, which is prescribed, raises a strong presumption of renunciation of the prescription. Additionally, a payment on account is a tacit renunciation of prescription of the whole debt, unless the debtor declares at the same time that he only admits liability to the extent of the amount, which he pays. An acknowledgment of the liability, a promise to pay the debt, a request to be allowed time, the giving or offering of a security, a claim that the

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

upon must be subsequent to the date when prescription was acquired, for, otherwise, they would be unavailing. They might amount to a renunciation of the period of prescription, which had already run, but no more.

Renunciation is the voluntary abandonment of a right, and a person cannot renounce a right unless he knows that it exists.<sup>68</sup> However, it does not follow from this that a debtor who has paid a debt against which he might have pleaded prescription, can recover what he has paid by proving that he was ignorant of his right to claim prescription. The debtor has made a voluntary payment in discharge of an obligation, and what the creditor has received was legally due to him. The debt was not extinguished *ipso jure* by the lapse of the prescriptive period; it might have been extinguished if the debtor had invoked prescription, but as he did not do so, there was a subsisting debt, not a natural debt but a civil debt, and the payment accordingly was not a case of payment of something not due, nor was it a payment in error of a natural obligation. The right of repetition, therefore, does not exist.

Renunciation of prescription is a unilateral act which does not require acceptance to be effective. From this principle it follows that the renunciation of the claim does not constitute alienation. Although the renunciation is not, strictly speaking, an alienation, it is a dangerous act. If it does not make the person poorer, it prevents him from becoming richer, as he would have been if he had availed himself of his right to claim the prescription. Accordingly, the right to renounce is given only to persons having capacity to alienate.<sup>69</sup> So, in Arab law, minors and interdicted persons, or their tutors acting alone, cannot renounce a prescription.

The renunciation of liberative prescription does not have effect against the creditors of a person bound by an obligation, if such

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debt has been paid by compensation, an agreement to submit to a compromise, are facts from which renunciation will be inferred unless the debtor reserved his rights.

<sup>68</sup> See Jordanian Civil Code, art. 463.

<sup>69</sup> *Ibid.*

renunciation has been made to prejudice their rights.<sup>70</sup> There is a question which may arise in regard to the right of creditors. Do creditors need to prove that the renunciation by their debtor was in fraud of their rights? Or is it sufficient to prove that the renunciation was to their prejudice? The renunciation of prescription is a special kind of abandonment of a right as to which the creditors must prove both facts, viz., that it was to their prejudice, and that it was in fraud of their rights. If the debtor renounces the benefit in good faith and honestly, his creditors have no remedy. However, according to Arab law, creditors do not need to prove fraud, but they must prove that the renunciation caused a prejudice. It will generally be easy for them to prove prejudice rather than fraud.

#### *3.7.4 Retroactive Effect of Prescription and Accessory Claims*

Prescription rules are remedial in nature and as such are generally accorded retroactive application. Arab laws presume that the debt was discharged at the date when prescription began to run. The presumption of retroactivity is judicially created; it is not based on a legislative provisions. Indeed, retroactivity seems contrary to the rule which provides that no legal provision has retroactive application unless it is expressly so stated.<sup>71</sup> At any rate, prescription has a retroactive effect in favour of the persons benefited by the expiration of a prescriptive period.

Furthermore, in the case of liberative prescription, the debtor is not only freed from the obligation to pay the capital sum but also from that to pay the interest, and other claims of an accessory nature, which had been running.<sup>72</sup> This provision is based on the fact that the policy objectives pursued by the law of prescription would be undermined if the creditor could still demand payment of interest

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<sup>70</sup> Ibid.

<sup>71</sup> See El-Ehwany & Ibrahim, *supra* note 2, at 25-27.

<sup>72</sup> The non-hearing of the case for a right due to prescription shall result in the non-hearing of a case for its 'accessories' even if the period of prescription precluding the hearing of the case for these accessories be not complete. See Egyptian Civil Code, art. 386; Iraqi Civil Code, art. 441; Jordanian Civil Code, art. 462; Kuwaiti Civil Code, art. 451; Moroccan Civil Code, art. 376; Syrian Civil Code, art. 383; and United Arab Emirates Civil Code, art. 486.

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

and any other accessory or ancillary claims that may have become due on a claim for which the period of prescription has run out; for the debtor, in order to defend himself, might then be forced to go into the merits of the principal claim itself.

There is no corresponding article to accessory claims in the PICC 2004. However, the PICC 2004 deal with the prescription of accessory claims in the commentary on article 10.2.<sup>73</sup> There is no obvious reason as to why the draftsmen of the PICC 2004 did not write a specific and separate provision on accessory claims.

### *3.7.5 Modification of the Prescription Period*

Modification of the legal period of prescription is expressly prohibited by Arab civil codes.<sup>74</sup> As such, an agreement that the right of action shall prescribe in ten years instead of fifteen years will be null and void. The prohibition against modifying the period of prescription extends to prolongation as well as abridgement of the period.

The provisions of the Arab civil codes, which lay down the periods of prescription, are undoubtedly based upon public policy. But although public policy requires that the right of action shall expire within a certain period, it is not equally clear that public policy requires that a creditor shall enjoy a right of action for the normal period. If the creditor chooses to agree that unless he brings his action within a certain period, which is shorter than the delay to which he would otherwise be entitled, there is nothing in this which is contrary to public policy. There are certain cases in which an agreement to prolong the prescriptive period ought to be sustained. If a contractor, for example, agrees that instead of being liable for ten years he will be liable for twenty years for defects in the building, this is surely in the interest of public policy.

The PICC 2004 is not the same as Arab laws. The PICC 2004 has an express declaration allowing modification of the prescription

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<sup>73</sup> UNIDROIT, *Principles Of International Commercial Contracts* 320-322 (2004).

<sup>74</sup> See Jordanian Civil Code, art. 463. See also Court of Cassation, Case No. 182/1984, *Journal of Jordanian Bar Association* 1380 (1984).

period.<sup>75</sup> Parties can agree to extend the prescription period to a maximum of fifteen years.<sup>76</sup> In other word, it is permissible to extend the period of prescription provided that it does not exceed the maximum limit set as fifteen years. Parties can also agree to shorten the prescription period to no less than one year or four years.<sup>77</sup> These limitations on the maximum prolongation and minimum abridgement provide parameters within which parties can manoeuvre. Arab civil codes should follow the example of the PICC 2004 in setting parameters for prolongation and abridgement instead of outright prohibition. By setting such parameters, Arab civil codes grant freedom to the parties if there is any reason to give longer or shorter delay and by the same token the codes achieve the public policy goals intended.

#### **4 Conclusion**

The concept of prescription had been recognised by statutes in Arab countries. Parties cannot contract out of this by denying the lapse of a period of time. Courts would invalidate such a provision on the grounds that it contravenes public policy. Also, the PICC 2004 rules recognised prescription as a mode of extinguishing an action to enforce a claim of right. As a matter of fact, prescription (chapter 10) has been added to the existing chapters of the UNIDROIT Principles 1994.

As far as the general principles contained in Arab civil codes and the PICC 2004 are concerned, there is a considerable degree of similarity. For example, the prescription rules of both the PICC 2004 and the civil codes of Arab countries are founded upon the same considerations of public policy. Sometimes the same concept is implemented by means of a different technique. Some provisions in the PICC 2004 find equivalents in Arab civil codes; and even where there are differences they are, predominantly, of a technical nature. For instance, the PICC 2004 employs the term 'limitation periods' while Arab civil codes generally use the term 'prescription'. The difference in terminology is practically irrelevant.

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<sup>75</sup> See UNIDROIT, *supra* note 20, at art. 10.3 (1).

<sup>76</sup> *Ibid*, art. 10.3 (2) (c).

<sup>77</sup> *Ibid*, art. 10.3 (2) (a) & (b).

PRESCRIPTION IN ARAB CIVIL CODES AND THE UNIDROIT  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS  
OF 2004: A COMPARATIVE ANALYSIS

Arab civil codes cover the general law of contract and obligations while the PICC 2004 relate only to commercial contracts. Considering their different natures, thus herein lies significant differences between the two instruments. Depending on the transaction giving rise to the claim, a claim in Arab civil codes can be barred after anywhere between one and fifteen years. On the other hand, prescription periods in the PICC 2004 run between three years and ten years. In addition, the way prescription in Arab civil codes runs is simpler than the PICC 2004. Arab civil codes do not indulge in the discussion whether the creditor has knowledge or not of his right. The start of the prescription period is not tied to discoverability by the creditor. Moreover, the rules of Arab civil codes concerning cases of suspension are different. For example, when compared with the PICC 2004, Arab civil codes do not address death as a cause of suspension.

The PICC 2004 has no provisions corresponding to the provisions in Arab civil codes which relate to pleading and renunciation of prescription. The PICC 2004 is not the same as Arab laws concerning modification of the prescription period. In an express manner, the PICC 2004 permits modification of the prescription period. On the other hand, Arab civil codes prohibit such a modification.

The purpose of the comparative exercise done in this article was to provide feedback as to where prescription rules found in Arab civil codes stand in comparison with recent and important international legal instruments. As explained earlier, Arab civil codes and the PICC 2004 wrestle with the same concept, prescription, in more or less the same terms. However, the value of studying the PICC 2004 along with Arab civil codes was even greater because they do differ. When one confronts a solution to a legal issue, he has a tendency to assume it is the right one. However, when he is confronted with two solutions, he finds that these two solutions can complement each other.

Certain prescription provisions in Arab civil codes are unclear and antiquated. It is not proposed here that prescription laws in Arab countries be the same as in the PICC 2004. Rather, the law of prescription in the PICC 2004 can act as a reference for Arab civil

codes. For example, one matter that requires change in Arab civil codes is the multiplicity of prescription periods. Arab civil codes can adopt the single period system found in the PICC 2004. The law should be clarified with respect to the duration of interruption of prescription while an action is pending before the court. Besides judicial proceedings, arbitral proceedings and other alternative dispute resolution mechanisms should have the effect of interrupting prescription. Moreover, Arab civil codes could be modified to provide flexibility by permitting modification of the prescription period by the agreement of the creditor and debtor. The revisions address the demands of a modern society with vastly improved means of communications. Arab countries can reconcile between their civil codes and more recent international legal instruments, such as the PICC 2004, without jeopardising their own traditions and values.