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REPORT OF THE WORKING GROUP ON TIME-LIMITS AND LIMITATIONS (PRESCRIPTION) IN THE INTERNATIONAL SALE OF GOODS, ON ITS THIRD SESSION HELD AT NEW YORK FROM 30 AUGUST TO 10 SEPTEMBER 1971

Addendum

ANNEX IV

COMMENTARY ON THE DRAFT CONVENTION ON PRESCRIPTION (LIMITATION) IN THE FIELD OF INTERNATIONAL SALE OF GOODS (SEPTEMBER 1971)

In conformity with the request by the Working Group on Prescription at its third session (A/CN.9/70, para. 9), this commentary has been prepared by the Secretariat to assist in the discussion on the draft Convention at the fifth session of the United Nations Commission on International Trade Law.

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DRAFT CONVENTION ON PRESCRIPTION (LIMITATION) IN THE FIELD OF INTERNATIONAL SALE OF GOODS (SEPTEMBER 1971)

/OPENING CLAUSES/*

The States Parties to this Convention,

Desiring to establish a uniform law on prescription (limitation) in the field of international sale of goods,

Have resolved to conclude a convention to this effect and have agreed as follows:

COMMENTARY

Introduction: objective of the Uniform Law

1. This Uniform Law is concerned essentially with the period of time within which parties may bring legal proceedings to exercise their rights or claims relating to a contract of international sale of goods.

2. Divergencies in national rules governing the prescription of rights or limitation of claims create serious difficulties. Limitation periods under national laws vary widely. Some periods are short (e.g. six months, one year) in relation to the practical requirements of international transactions, in view of the time that may be required for negotiations and for the institution of legal proceedings in a foreign and possibly distant country. Other periods (which in some cases are as long as 30 years) are longer than are appropriate for transactions involving the international sale of goods; these extended periods are sometimes a consequence of the use of the same limitation period for a wide variety of differing transactions. 1/ Some of these periods fail to provide the essential protection that should be afforded by limitation rules. This includes protection from the loss of evidence necessary for the fair adjudication of claims and protection from the uncertainty and possible threat to solvency and to business stability from delayed settlement of disputed claims.

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* Captions were not drafted at the session of the Working Group but are inserted for ease of reference and should not be considered as parts of the text of the draft.

1/ See Analysis of replies to the questionnaire and comments made at the fourth session of the Commission by Governments on the length of the prescriptive period and related matters: report of the Secretary-General (A/CN.9/WG.1/WP.24), at paras. 6 and 16, which is attached to the present report (A/CN.9/70) as a part of Addendum 2.

3. National rules not only differ, but in many instances are difficult to apply to international sales transactions. 2/ One difficulty arises from the fact, mentioned above, that some national laws apply a single rule on limitations to a wide variety of transactions and relationships. As a result, the rules are expressed in general and sometimes vague terms that are difficult to apply to the specific problems of an international sale. This difficulty is further enhanced for international transactions, since merchants and lawyers will often be unfamiliar with the implication of the general concepts and with the techniques of interpretation used in a foreign legal system.

4. Perhaps even more serious is the uncertainty as to which national law applies to an international sales transaction. Apart from the problems of choice of law that customarily arise in an international transaction, problems of prescription (or limitation) present a special difficulty of characterization or qualification: some legal systems consider these rules as "substantive" and therefore must decide which law is applicable; other systems consider them as part of the "procedural" rules of the forum; still other systems follow a combination of the above approaches.

5. The result is an area of grave doubt in international legal relationships. The confusion involves more than the choice of the manner of approaching and describing a legal relationship. An unexpected or severe application of a rule of limitation may prevent any redress for a just claim; a lax rule of limitation may fail to provide adequate protection against stale claims that may be false or unfounded. The problems are sufficiently serious to justify the preparation of uniform rules for claims arising from the international sale of goods.

6. In view of the widely varying concepts and approaches prevailing under national laws with respect to the prescription of rights and the limitation of claims, it has been considered advisable to make the rules of the Uniform Law as concrete and complete as possible. A brief and general Uniform Law (such as a Law merely specifying the length of the period of limitation) would do little in actual practice to achieve unification, since the divergent rules of national law would then be brought into play in "interpreting" such a brief and general provision. Since this Uniform Law is confined to one type of transaction - the purchase and sale of goods - it is possible to state uniform rules for this type of transaction with a degree of concreteness and specificity that is not feasible in statutes that deal with many different types of transactions and claims. The loss of uniformity through the use of divergent rules and concepts of national law cannot be wholly avoided, but the present Uniform Law seeks to minimize this danger by facing the problems that are inherent in this field as specifically as feasible within the scope of a Uniform Law of manageable length. See also article 7, on rules for interpreting and applying the Uniform Law.

2/ For some illustrations of difficulties, see R. Kuratowski, Limitation of Actions Founded on Contract and Prescription of Contractual Obligations in Private International Law, Estratto Paglivatti del Terzo Congresso di Diritto Comparato, Vol. III - Paris IV, pp. 447-460; E. Harris, Time Limits for Claims and Actions, in Unification of the Law Governing International Sale of Goods (J. Honnold, ed. 1966), pp. 201-223. Also see H. Trammer, Time Limits for Claims and Actions in International Trade, ibid., pp. 225-233.

PART I: UNIFORM LAW

SPHERE OF APPLICATION OF THE LAW

ARTICLE 1

/Introductory provisions; definitions/

(1) This Uniform Law shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller relating to a contract of international sale of goods /or to a guarantee incidental to such a contract/.

(2) This Law shall not affect a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

(3) In this Law:

(a) "buyer" and "seller" means persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or duties under the contract of sale;

(b) "party" and "parties" means the buyer and seller /and persons who guarantee their performance/;

(c) /"guarantee" means a personal guarantee given to secure the performance by the buyer or seller of an obligation arising from the contract of sale/;

(d) "creditor" means a party seeking to exercise a claim, whether or not such a claim is for a sum of money;

(e) "debtor" means a party against whom the creditor seeks to exercise such a claim;

(f) "legal proceedings" includes judicial, administrative and arbitral proceedings;

(g) "person" includes any corporation, company, or other legal entity, whether private or public;

(h) "writing" includes telegram and telex.

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COMMENTARY

I. Basic scope of the Uniform Law

1. Under article 1 (1), the Law applies both to the "limitations of legal proceedings" and to "the prescription of the rights" of the parties. These two forms of expression were employed since different legal systems employ varying terminology with respect to the effect of delay in bringing legal proceedings to exercise rights or claims. Consequently, it is important to make it clear that the rules of this Law do not vary because of differing terminology of national law. This approach is vital in view of the international character of the Law and its objective to promote uniformity in interpretation and application.

2. Specific aspects of the Law's sphere of application will be discussed in relation to: (a) the parties governed by the Law; (b) the types of transactions and claims or rights that are subject to the period of prescription.

(a) The parties

3. Paragraph 1 of article 1 shows that the Law is directed to the rights or claims arising from the relationship between the "buyer" and "seller". These terms, as defined in article 1(3)(a), include the "successors to and assigns of their rights or duties under the contract of sale". The Law would thus embrace the succession of right or duties by operation of law (as on death or bankruptcy) and the voluntary assignment by a party of his rights or duties under a sales contract. One important type of "successor" could be an insurer who becomes subrogated to rights under a sales contract. Succession could also result from the merger of companies or from corporate reorganization.

4. It will be noted that, under paragraph (3)(a), to become a "buyer" or "seller" a person must "buy or sell or agree to buy or sell" goods. Thus a party who has only the right (or "option") to conclude a sales contract is not a "buyer" or "seller" unless and until the contract is concluded. Thus rights under the option agreement (as contrasted with rights under a contract that may result from the exercise of the option) are not governed by the Law.

(b) Transactions subject to the Law; types of claims or rights

5. Under article 1(1), the Law applies to "a contract of international sale of goods /and to a guarantee incidental to such a contract/". Whether a sale is "international" is governed by article 3. Certain exclusions from the scope of the Uniform Law are provided in articles 4 through 6.

6. Paragraph 1 of article 1 provides that the Law shall apply to rights or claims "relating to a contract" of international sale of goods; the Law does not apply to claims that arise independent of the contract such as claims based on tort or delict. The references in article 1(1) to the "contract" and to the relationship between the "buyer and seller" also exclude claims against

a seller by a person who has purchased the goods from someone other than the seller. For example, where a manufacturer sells goods to a distributor who resells the goods to the consumer, a claim by the consumer against the manufacturer would not be governed by the Law.

7. The language "relating to a contract" contained in article 1(1) is broad enough to include not only claims arising from breach of a sales contract but also claims arising by reason of the termination or invalidity of such a contract. For example, the buyer may have made an advance payment to the seller under a contract which the seller fails to perform because of impossibility, government regulation or similar supervening event. Whether this event will constitute an excuse for the seller's failure to perform may often be in dispute. Hence, the buyer may need to bring an action against the seller presenting, in the alternative, claims for breach and for restitution of the advance payment. Because of this connexion, in practice, between the two types of claims, both are governed by this Law. 1/

8. Claims based on guarantee: It will be noted that paragraph 1 of article 1 includes a bracketed provision that the Law also applies to rights or claims of the buyer or seller relating to "a guarantee incidental to" a sales contract; the brackets indicate doubt as to whether the scope of the Law should extend to guarantees.

9. The majority of the Working Group was of the view that the Law should not include the language within the brackets. It was noted that guarantees may take many forms, and create a complex body of relationships that would be difficult to take into account in the present Law. In addition, it was thought that a rule on guarantees in the Law was unnecessary, since national rules adequately deal with the effect of the prescription of a principal obligation on the obligations of a guarantor.

10. On the other hand, it was suggested that if the bracketed language were not included, there was a possibility that claims based on the guarantee could be enforced even after the principal obligation is prescribed. For example, it was suggested that the length of the limitation period under national laws governing the claim against the guarantor may be different from the length of the period under the Uniform Law, and the national law may not refuse to enforce the claim against the guarantor on the ground that the obligation of the principal debtor is barred by prescription. Under this view the bracketed language should be included in the interest of uniformity and to protect the guarantor where the limitation period applicable to the claim against the guarantor is longer than that applicable to the principal debtor, and to protect the creditor where the period applicable to the guarantor is shorter than the period applicable to the principal debt.

1/ An opportunity to make a declaration for the exclusion of "actions for annulment of the contract" is provided in article 32.

11. The majority of the Working Group, while agreeing with the objective that the limitation period for the debtor and the guarantor should expire at the same time, concluded that this objective was difficult to achieve in practice. Thus, under the contract of guaranty, it may not be possible to "exercise" the claim against the guarantor within the meaning of article 10 until after the period of limitation against the debtor has commenced to run under article 9.

12. The bracketed language in article 1(1) specifies that the guarantee must be "incidental to" the sales contract, in any event the definition of "guarantee" in article 1(3)(c) is intended to make it clear that, the Uniform Law would not apply to an undertaking which is independent of the sales contract. This principle is illustrated by article 6(g), which specifically excludes documentary letters of credit, on the ground that the obligation under such letters of credit arises on the presentation of specified documents and does not depend on proof of performance under the contract of sale. It will also be noted that, under article 1(3)(c), "guarantee" extends only to a "personal" guarantee - i.e., an in personam undertaking as contrasted to an in rem or property interest. This is consistent with the more specific provision of article 6(c) which excludes claims based on "a lien, mortgage or other security interest in property" from the scope of the Uniform Law.

13. It will be noted that a decision on whether guarantees should be included within the Uniform Law will affect the bracketed language in articles 1(1), 1(3)(b), 1(3)(c), 10, and 14.

II. The Uniform Law not applicable to "time-limits" (déchéance)

14. Paragraph 2 of article 1 is designed, inter alia, to make clear that this Law has no effect on certain rules of local law involving "time-limits" (déchéance); typical examples are requirements that one party give notice to the other party within limited periods of time describing defects in goods or stating that goods will not be accepted because of defects. These requirements of notice by one party to the other party are designed to permit the parties to take prompt action in adjusting current performance under a sales transaction - action such as making prompt tests to preserve evidence as to the quality of goods or taking control over and salvaging rejected goods.

15. The periods of time for such action are usually very brief, and often are stated in flexible terms. For example, article 39(1) of the Uniform Law on the International Sale of Goods (ULIS), annexed to the Hague Convention of 1964, provides that "the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it". Other articles of ULIS provide that a party may avoid the contract if he makes such a declaration to the other party, under varying circumstances, "within a reasonable time" (arts. 26, 30, 62(1)) or "promptly" (arts. 32, 43, 62(2), 66(2), 67, 75). These brief, flexible periods for special types of parties' action "other than the

institution of legal proceedings" are quite different from a general period of limitation. Consequently, paragraph 2 of article 1 states, in part, that this Law shall not affect "a rule of the applicable law providing a particular time-limit within which one party is required, as a condition or exercise of his claim, to give notice to the other party". 2/

16. Paragraph 2 of article 1 also preserves rules of applicable law providing "a particular time-limit" within which one party is required, as a condition for the acquisition or exercise of his claim, to "perform any act other than the institution of legal proceedings". Thus, this paragraph would preserve various types of national rules which, while variously expressed, are not comparable to the general period of limitation governed by this Law.

III. Definitions and undefined basic terms; uniform interpretation

17. "Person" is defined in article 1(3)(f) to include "any corporation company, or other legal entity, whether public or private" is intended to show that the Law is applicable without regard to the form of organization that engages in contracts of sale. Most of the definitions of words contained in paragraph 3 of article 1 can best be considered in connexion with provisions that employ the word in question. For example, the definition of "legal proceedings" in paragraph 3(f) can best be considered in connexion with article 15. 3/

18. Certain other words used in this Law (such as "rights" and "claims") are not defined, since their meaning can best be seen in the light of the context in which they are used and the objectives of this Law. It is important to note that the construction of these words by reference to the varying conceptions of national law would be inconsistent with the international character of this Law and its objective to promote uniformity in interpretation and application. 4/

ARTICLE 2

/Exclusion of the rules of private international law/

(1) Unless otherwise provided herein, this Law shall apply without regard to the rules of private international law.

/(2) Notwithstanding the provisions in paragraph 1 of this article, this Law shall not apply when the parties have expressly chosen the Law of a non-Contracting State as the applicable law./

2/ As to the effect of a contract clause establishing a time-limit, see art. 22(3) and its accompanying commentary at para. 5. Also see art. 9(2).

3/ See e.g., commentary to article 15 at para. 1, infra.

4/ See article 7 and accompanying commentary, infra. Also see commentary to article 29.

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COMMENTARY

1. This article deals with the contacts between an international sales transaction and a Contracting State (choice of law rules) required for the application of the Uniform Law. It also deals with the freedom of the parties to exclude the application of the Uniform Law.

I. Paragraph (1): applicability without regard to rules of private international law

2. Paragraph (1) of this article provides that, subject to any contrary provisions in the Uniform Law, the Uniform Law shall apply without reference to the rules of conflict of laws. As a general rule, therefore, no special relationship between the parties to an international sales transaction, (or the parties thereto) and a Contracting State is required for the applicability of this Law. Thus, once the forum of a Contracting State is seized of a claim relating to an international contract of sale, as defined in article 3, prescription questions relating to that claim will be governed by the Uniform Law regardless of whether either party has his place of business in a Contracting State and regardless of whether other aspects of the sales transaction (e.g., the place of contracting, shipment, delivery, payment, etc.) have a connexion with a Contracting State.

3. The general exclusion of the rules of private international law, pursuant to paragraph (1) of this article, does not, of course, render a purely domestic sales transaction subject to the provisions of this Law. Paragraph (1) of this article is subject to the provision in paragraph (1) of article 1 which expressly states that the Uniform Law shall apply to a contract of international sale of goods. The basic definition of such a contract is contained in article 3 of the Uniform Law, that is, the parties must have their places of business in "different States". Although it is immaterial whether these States are Contracting or non-Contracting States, it is essential that the parties' places of business should be in different States. Thus, a foreign element is always required for the sales contract to be subject to the provisions of this Law.

4. The opening phrase of the paragraph, "unless otherwise provided herein", is occasioned by specific provisions of the Uniform Law which refer to the rules of private international law. One such instance is paragraph (1) of article 13 which provides, inter alia, that in the absence of a provision in the arbitration agreement, the procedure for referring a dispute to arbitration shall be determined "by the law applicable to that agreement" i.e., the law which, under conflict of law rules, governs the arbitration agreement. Another example is paragraph (3) of article 22 which provides, inter alia, that the validity of a certain clause defined therein shall not be affected by the provisions in the other paragraphs "provided such clause is valid under the applicable law".

5. The Law's basic rule is sometimes called the "universalist" approach. This is the approach adopted in original ULIS, article 2 of which excludes the rules of private international law for the purpose of its application.

6. It will be noted that the Working Group on the International Sale of Goods, at its second session, rejected the universalist approach embodied in original ULIS, and recommended a text that would make the Uniform Law on Sales applicable (a) when the parties have their places of business in different Contracting States, or (b) when the rules of private international law lead to the application of the law of a Contracting State. 1/

7. Consideration has been given to the view that since both the Uniform Law on Prescription and the text recommended by the Working Group on Sales deal with the international sale of goods, and are drafted by the same agency, the sphere of application in both Uniform Laws should be the same. It was concluded, however, that the advantage of such symmetry would be more apparent than real. In the first place, the subject-matter of the two uniform laws is not the same; the Uniform Law on Sales deals with substantive rules defining the obligations of the seller and the buyer, while the Uniform Law on Prescription deals with the limitation of their legal actions and the prescription of their claims. The interests that are protected in the two uniform laws are different.

8. Determining the scope of applicability of this Law by reference to the rules of private international law presents special difficulties because of the unusually divergent approaches to the characterization of prescription problems that are followed in different legal systems. Thus, while most Civil Law systems characterize limitations problems as substantive questions and apply the proper law of the contract (the lex causae contractus), most Common Law jurisdictions characterize them as questions of procedure and, on this ground, apply the rules of the forum (lex fori). In yet other Common Law jurisdictions, a combination of the two characterizations is possible. 2/ Exclusion of the rules of private

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1/ Working Group on the International Sale of Goods, report on the second session: Geneva, 7 to 18 December 1970 (hereinafter referred to as Report of the Working Group on Sales) (A/CN.9/52), art. 1-1(a), para. 13.

2/ The rules of English conflict of laws on this question may be illustrated by the following examples: Proceedings are instituted in an English court. The English limitation period (which is classified as procedural) is six years:

(i) the applicable law is that of France, where the limitation period is 30 years and treated as a matter of substantive law; the English court will hold the claim to be barred after six years;

(ii) the applicable law is that of Greece, where the limitation period is five years and is treated as a matter of substantive law; the English court will have regard to the applicable law and hold the claim to be barred after five years;

(iii) the applicable law is that of the State of X, where the limitation period is five years and is treated as a matter of procedure; the English court will not have regard to the limitation rules of State X (since these are procedural) and will hold the claim barred after six years.

For an indication that States with common law background may not always apply rigorously the view that limitations are "procedural", see, Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

international law, therefore, makes for certainty as well as simplicity of the Uniform Law. 3/

9. States may have the opportunity, in ratifying this Uniform Law, to provide for a different approach to applicability than that provided in article 2(1). Thus, article 34 allows a State which has previously ratified or acceded to one or more Conventions on the conflict of laws affecting limitations in respect of the international sale of goods, to enter a reservation to the effect that it will apply the Uniform Law only if that previous Convention itself leads to the application of the Uniform Law.

II. Paragraph (2): the autonomy of the will of the parties

10. Paragraph (2) of this article deals with the extent to which the parties are free to exclude the application of the Uniform Law. The paragraph sets forth the only situation in which the parties can, as a result of the exercise of their freedom of choice, exclude the application of the Uniform Law; that situation is when the parties expressly, and not impliedly, have chosen "the law of a non-Contracting State as the applicable law". The provision is placed between square brackets to indicate that the Working Group on Limitations was divided as to whether this provision should be included in the Uniform Law.

11. It will be noted that this paragraph does not allow the parties to choose the domestic prescription rules of a Contracting State. In addition, the reference in the paragraph to the choice of "the law of a non-Contracting State as the applicable law" is intended to give effect only to the choice of the law of a non-Contracting State as the law governing the contract as a whole, i.e., the lex contractus. "Thus, only when the parties have expressly chosen the law of a non-Contracting State as the lex contractus, and intend thereby also to refer to the rules on prescription of that State, would the provisions of the Uniform Law be excluded. Even in such cases, paragraph (2) simply provides that 'this Law shall not apply'; the provision does not require the application of the prescription rules of the chosen law of the non-Contracting State; whether effect will be given to such an agreement depends on the conflict rules of the forum."

3/ One member of the Working Group on Limitations, while supporting the universalist approach, expressed the opinion that the only alternative to this approach was the text proposed by the Working Group on Sales which is contained in article 1-1(a) and (b) of revised ULIS. He further proposed that if this alternative was acceptable, paragraph 2 of article 1 of this Uniform Law should read as follows:

> "2. This Law shall also apply where it has been chosen as the applicable law by the parties, to the extent that this does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the present Law."

12. To the extent that the parties cannot directly exclude the application of this law, the Uniform Law is different from original ULIS as well as from the revised text recommended by the Working Group on Sales. Both contain provisions which allow the parties to exclude application of the Sales Law either wholly or partially. 4/

13. This Uniform Law does not contain a provision allowing the parties to choose to apply its limitation rules to their contract, if the Uniform Law, by its very terms, is not otherwise applicable to that contract, as for instance, where the parties have their places of business in the same state. Both ULIS and the revised text recommended by the Working Group on Sales contain provisions which permit the parties to apply the rules of the Uniform Law on Sales to their contract, if they so choose, whether those rules are otherwise applicable to that contract or not. 5/ In this respect the scope given to choice by the parties is narrower than under original ULIS and the revised text.

14. Some members of the Working Group supported the objective of paragraph (2) since it gave some effect to choice by the will of the parties; in the absence of paragraph (2) there might be no opportunity for such choice. It may also be noted that paragraph (2), to some extent, limits the universalist principle set forth in paragraph (1). For example, if neither party to an international sale has a place of business in a Contracting State, and the contract explicitly provides that the applicable law to the contract is the law of a State that has not adopted the Uniform Law, the forum of a Contracting State would not apply the Uniform Law.

15. Other members of the Working Group, however, concluded that while the autonomy of the will of the parties is a cardinal principle in a régime of substantive rules on the international sale of goods, such a doctrine has little or no significance in a uniform law on prescription. When parties enter into a contract of sale, they contemplate performance and not litigation. At the time of the conclusion of the contract, the parties may wish to choose the law that will define their obligations relating to performance, but are unlikely to have an interest in choosing the law that will govern the limitation of their legal actions. Furthermore, the State may have an interest in preventing stale claims from crowding its law courts and tribunals, and in reducing the presentation of false evidence. For this reason, prescription rules may be considered to be of such a mandatory character as to justify restricting the freedom of choice of the parties. Consequently, these members of the Working Group were opposed to the inclusion of paragraph (2) in the Uniform Law.

4/ Art. 3 of original ULIS; art. 3 of revised ULIS. See Report of the Working Group on Sales (A/CN.9/52), paras. 43 and 44.

5/ Art. 4 of original ULIS; art. 1-2 of revised ULIS.

ARTICLE 3

/Definition of a contract of international sale/

(1) For the purposes of this Law a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.

(2) Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph 1 of this article shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract.

(3) Where a party does not have a place of business, reference shall be made to his habitual residence.

(4) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

COMMENTARY

1. This article deals with the degree of internationality which subjects a sale of goods to the limitation rules contained in the Uniform Law.

I. Paragraph (1): the basic criterion

2. This paragraph lays down the basic criterion for the definition of a contract of international sale of goods. The paragraph provides that for a contract of sale to be considered international, the contract must satisfy the following three requirements: (a) at the time of the conclusion of the contract, and not at any prior or subsequent date, (b) the parties must have their places of business, and not simply centres of only formal significance, such as places of incorporation, (c) in different States (as we have seen in article 2, above, it is immaterial whether these are contracting or non-contracting States).

3. It will be noted that the above definition of a contract of international sale of goods is the same as the definition recommended by the Working Group on Sales for revised ULIS. 1/ Both uniform laws employ one basic test for the definition of an international contract of sale of goods, that is, the parties' places of business should not be in the same State.

1/ Although revised ULIS does not contain a separate article dealing with the definition of a contract of international sale of goods, such definition is included in the opening phrase of article 1, para. (1), which deals with the sphere of application of the law. The difference, therefore, is only one of formal arrangement. See A/CN.9/52, para. 13.

4. It was proposed that the above basic criterion for the definition of a contract of international sale of goods, which is based solely on the fact that the parties have their places of business in different States, should be qualified by an additional requirement of international carriage of the goods. This proposal was rejected by the Working Group on Prescription for the same reasons given by the Working Group on Sales. As stated in the report of the Working Group on Sales, serious problems might arise in connexion with such a proposal because of the difficulty in defining the relationship between the obligations of the contract and the movement of the goods across national frontiers. 2/ The report of the Working Group on Sales explains this point as follows:

> "In many cases the contract will clearly require international carriage of the goods, but in many other cases this matter will be left in doubt. The buyer often will not be directly concerned with the point of origin of the goods; his principal interest is in receiving goods of a specified quantity and quality. In other cases, the buyer may provide transportation in trucks or in ships he dispatches to the seller's place of business or to a nearby shipping-point; such arrangements may be made under quotations like 'Ex Works' or 'F.O.B.' at the seller's factory or at a dock in the seller's country. In such cases the seller is not concerned with the destination of the goods; his concern is with receiving the price. Plans about the origin or destination may not be required or even mentioned in the contract. Even if the contract refers to plans for the international movement of goods, such a reference may not be part of the obligation of the contract; frequently plans for shipment will be developed informally after the conclusion of the contract in the form of shipping instructions." 3/

5. It was also proposed that the basic criterion employed in paragraph (2) of this article should be qualified by the three requirements contained in subparagraphs 1(a), 1(b) and 1(c) of article 1 of original ULIS. These requirements relate to international carriage of goods, offer and acceptance, and place of delivery. This proposal was also rejected by the Working Group on Prescription for the same reasons given by the Working Group on Sales. The reasons for the rejection of a qualification relating to international carriage are already noted above. With respect to the reasons given by the Working Group on Sales for the rejection of the other two suggested qualifications (paras. 1(b) and 1(c) of art. 1 of original ULIS), the report of the Working Group on Sales states:

> "Paragraph 1(b) of article 1 of ULIS lays down a test dependent on whether 'the acts constituting the offer and acceptance have been effected in the territories of different States'. Under this test, the offer (and acceptance) may be a communication that is dispatched in one State and received in another; this problem is dealt with in paragraph 4 of article 1. The more serious problem is that, in the course of negotiation, a series of communications may gradually ripen into agreement, and the agreement may be

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2/ Report of the Working Group on Sales (A/CN.9/52), para. 16.

3/ Ibid., para. 17.

wholly or partially embodied in a document executed by the parties in one State. In such cases it will be difficult to know when the stage of negotiation has ended, or which are the communications, under articles 1-4, 'which contain' the 'offer' and 'acceptance'.

"Paragraph 1(c) of article 1 of ULIS provides a third test that combines the place of 'delivery' of the goods with the place of 'offer' and 'acceptance'. This test involves some of the same problems of application that have been outlined above." 4/

6. Thus the rejection of the suggested qualifications to the basic criterion for the definition of a contract of international sale of goods employed in paragraph (1) of this article contributes to simplicity and clarity.

7. Another justification for not including in this Uniform Law the suggested qualifications to the single basic criterion (i.e., that the parties have their place of business in different States) is that these qualifications would unjustifiably narrow the scope of application of this Uniform Law. As was pointed out above, the scope of application of this Uniform Law need not be the same as the scope of application of ULIS. While a wide scope of application may make ULIS unacceptable to a number of States, the same may not be true in the case of the Uniform Law on Prescription. This is due to the basic difference in the nature of the rules contained in the two uniform laws.

8. It was recognized that States that have ratified or acceded to original ULIS may wish to employ ULIS's criteria of an international sale in the Uniform Law on Prescription. Consequently, a reservation clause is made available under paragraph (1) of article 33 of the Uniform Law which makes this possible. See the Commentary to article 33, infra.

9. Under paragraph (1) of this article, the contract of sale of goods is considered international, even though at the time of the conclusion of the contract, one of the parties neither knew nor had reason to know that the other's place of business was in a different State. One example is where one of the parties was acting as agent for a foreign undisclosed principal. Under article 2(a) of revised ULIS, lack of such knowledge by either party would render the recommended text inapplicable to that contract. 5/ Two reasons may be given for not employing the rule of article 2(a) of revised ULIS in this Uniform Law. The first is that this article included subjective elements that would raise difficult problems of proof (knew or had reason to know). The second is that knowledge by the parties that, at the time of the conclusion of the contract, they have their places of business in different States is not considered necessary for the application of a uniform law on prescription. As stated earlier, when parties enter into a contract of sale, they contemplate performance and not the prescription of their claims. While they may need to know, at the time of

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4/ Ibid., paras. 19 and 20.

5/ Ibid., para. 13.

contracting, which law defines their mutual obligations concerning performance, at this time there is little practical interest in knowing which prescription rules would apply to their legal actions in case of breach.

II. Paragraph (2): place of business

10. This paragraph deals with the situation where one of the parties to the contract has more than one place of business. For the purpose of the applicability of this Uniform Law no problem arises where places of business of one party (X) are situated in States other than the one where the other Party (Y) has his place of business; whichever place is designated as the relevant place of business of X, the places of business of X and Y will be in different States. The problem arises only when one of X's places of business is situated in the same State as the place of business of Y. In such a case it becomes crucial to determine which of these different places of business is the relevant place of business within the meaning of paragraph (1) of this article.

11. Paragraph (2) lays down the criteria for determining the relevant place of business. This paragraph, as a general rule, points to the party's "principal place of business". Thus, where a party has his principal place of business in State A, and has branches in States B, C and D, that Party's place of business for the purpose of the applicability of this Law is the place of business in State A.

12. Paragraph (2) of this article recognizes that in some cases a mere branch may have a closer relationship with the transaction than a principal place of business; where such a branch is in the same State as the place of business of the other party, failure to take account of this fact would lead to excessive extension of the scope of this Law. Therefore, paragraph (2) qualifies the general rule relating to the principal place of business, by the phrase "unless another place of business has a closer relationship to the contract and its performance". The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating not only to the offer and the acceptance, but also to the performance of the contract. In determining this closer relationship, this paragraph states that regard shall be given to "the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". Factors that may not be known to one of the parties at the time of entering into the contract could include supervision over the making of the contract by another office or the foreign origin or final destination of the goods; when these factors are not known to or contemplated by the parties they are not to be taken into consideration.

13. It should be noted that paragraph (2) of this article is identical to the text recommended by the Working Group on Sales for revised ULIS and which is contained in paragraph (b) of article 2 therein.

III. Paragraph (3): habitual residence

14. This paragraph deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have a "place of business" may enter into a contract of sale of goods that is intended for commercial purposes, and not simply for "personal, family, household or similar use" within the meaning of article 5 of the Uniform Law. The present provision provides a means of dealing with this situation.

15. The provision contained in paragraph (3) above is also contained in paragraph 2 of article 1 of original ULIS, and in article 2(c) of the text recommended by the Working Group on Sales.

IV. Paragraph (4): civil or commercial character of the transaction

16. This paragraph deals with the classifications that some legal systems make in connexion with the applicability of different bodies of law. In order to avoid misinterpretations that might otherwise arise, the paragraph excludes reference to these classifications, whether they relate to the nationality of the parties, or to the "commercial or civil character of the parties or of the contract".

17. The provision in this paragraph is contained both in ULIS and in the text recommended by the Working Group on Sales. 6/

ARTICLE 4

/Mixed contracts/

(1) This Law shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of this Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

COMMENTARY

1. This article deals with two different situations relating to mixed contracts.

6/ See arts. 1-3 and 7 of original ULIS; see also art. 2(d) of revised ULIS.

I. Paragraph (1): sale of goods and supply of labour or other services by the seller

2. This paragraph deals with contracts under which the seller undertakes to sell goods as well as to supply labour or other services. An example of such a contract is where the seller agrees to sell plant and machinery and undertakes to set it up as a going concern or to supervise its installation or setting up. In such cases, paragraph (1) provides that where the "preponderant part" of the obligation of the seller consists in the supply of labour or other services, the contract is not subject to the provisions of this Uniform Law.

3. It is important to note that this paragraph does not attempt to determine whether combined obligations created by one instrument or transaction comprise essentially one or two contracts. Thus, the question whether the seller's obligations relating to the sale of goods and to the supply of labour or other services, can be treated as constituting two separate contracts (under what is sometimes known as the doctrine of "severability" of the contract), is outside the scope of this Uniform Law and thus is to be decided by national courts in accordance with the applicable law.

4. It is worth mentioning that a provision comparable to paragraph (1) of this article was recommended by the Working Group on Sales to be added to article 6 of original ULIS, which does not include such a provision. 1/ The text recommended by the Working Group on Sales has been slightly redrafted.

II. Paragraph (2): supply of materials by the buyer

5. The opening phrase of paragraph (2) of this article provides that the sale of goods to be manufactured by the seller to the buyer's order is as much subject to the provisions of this Uniform Law as the sale of ready-made goods.

6. The concluding phrase in this paragraph "unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production" is intended to exclude from the scope of the Uniform Law contracts for the sale of goods to be manufactured or produced when the buyer undertakes to supply the seller (the manufacturer) of the goods with an essential and substantial part of the raw materials from which the goods are to be manufactured or produced. Since such a contract is more akin to a contract of service or labour than to a contract of sale of goods, it is excluded from the scope of this Uniform Law.

7. This paragraph is contained in both original and revised ULIS. 2/

1/ Report of the Working Group on Sales (A/CN.9/52), paras. 61 to 67.

2/ Art. 6 of original ULIS; art. 6 of revised ULIS.

ARTICLE 5

/Exclusion of certain sales and types of goods/

This Law shall not apply to sales:

(a) of goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use, unless the seller at the time of the conclusion of the contract knows that the goods are bought for a different use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels or aircraft;

(f) of electricity.

COMMENTARY

I. Subparagraph (a): exclusion of consumer sales

1. Subparagraph (a) of this article excludes from the scope of the Law sales "of goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use".

2. A consumer sale effected by a tourist in another country could conceivably be subject to the limitation rules of this Uniform Law, but for the exclusion of such sales contained in subparagraph (a) of this article. Such transactions are usually considered as domestic transactions and do not comprise a significant part of international trade. It is for this reason, among others, that the Working Group on Sales recommended that such sales be excluded from the scope of revised ULIS. 1/

3. Another reason for the exclusion of consumer sales from this Uniform Law is that in a number of countries such sales are subject to various types of national laws that are designed to protect the consumer. Although such national rules ordinarily relate to the substantive rules defining the obligations of the parties under the contract of sale, it is considered advisable that questions of limitations of actions or prescriptions of rights relating to such contracts should be excluded from this Uniform Law.

1/ Report of the Working Group on Sales (A/CN.9/52), paras. 22 and 57.

4. It will be noted that the basic test used in this paragraph for the exclusion of consumer sales is an objective one, namely, whether the goods are "of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use". However, such sales are not excluded if "the seller at the time of the conclusion of the contract knows that the goods are bought for a different use". Thus, in order to bring what is ordinarily considered a consumer sale within the scope of this Uniform Law, the seller must have actual knowledge that "the goods are bought for a different use".

II. Subparagraph (b): exclusion of sales by auction.

5. Subparagraph (b) of this article excludes from the scope of the Uniform Law sales by public auction. Exclusion of such sales from the scope of ULIS was also recommended by the Working Group on Sales. 2/ The reason given for the recommendation of the Working Group on Sales was that, "at auctions, buyers may not be identified. But even if the place of business of the successful bidder should be known to the seller, the applicable law could not depend on that circumstance since at the opening of the auction the seller could not know which buyer would make the purchase and hence could not know whether ULIS would apply". Although this consideration is less important for the present Law than for ULIS, the exception is retained in the interest of conformity with the Sales Law where feasible, and because sales by public auction are subject to special rules under the applicable law; it would be advisable that they should remain in every aspect subject to the special rules of the applicable law.

III. Subparagraph (c): exclusion of sales on execution or otherwise by authority of law

6. Subparagraph (c) of this article excludes sales on judicial execution or otherwise by authority of law, because such sales are usually governed by special rules in the State under whose authority the sale is made. Furthermore, such sales do not constitute a significant part of international trade and may safely be regarded as purely domestic operations. These sales are also excluded in ULIS and in the text recommended by the Working Group on Sales. 3/

IV. Subparagraph (d): exclusion of sales of stock, shares, investment securities, negotiable instruments and money

7. This subparagraph excludes sales of stock, shares, investment securities, negotiable instruments and money. Such transactions present problems that are different from the usual international sale of goods and, in addition, in many countries, are subject to special mandatory rules. It is considered appropriate that prescription of claims relating to such sales, should be outside the scope

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2/ Report of the Working Group on Sales (A/CN.9/52), para. 51.

3/ Art. 5-1(d) of original ULIS; art. 5-1(b) of revised ULIS; ibid.

of this Uniform Law, so that they may be governed by the applicable law. These sales are also excluded in both ULIS and the text recommended by the Working Group on Sales. 4/

V. Subparagraph (e): exclusion of sales of ships, vessels or aircraft

8. This subparagraph excludes from the scope of the Uniform Law sales of ships, vessels and aircrafts which are also subject to special rules under national legal systems. The same are excluded from the scope of application of ULIS and the recommended text except that original ULIS provides that the ship, vessel or aircraft, "is or will be subject to registration". This phrase is placed between square brackets in the recommended text, to indicate that the Working Group on Sales has not reached a final decision on the requirement of registration.

9. This subparagraph does not require registration for ships, vessels or aircraft in order to exclude their sales from the scope of the Uniform Law. The reason is to avoid problems that might arise in connexion with the definition of what amounts to "registration" under the Uniform Law; various methods of registration are used by various legal systems.

VI. Subparagraph (f): exclusion of sales of electricity

10. This subparagraph excludes sales of electricity from the scope of the Uniform Law. The same exclusion is provided for in ULIS and the newly recommended text. 5/ International sales of electricity present problems that are different from those of the usual international sales and, in addition, are usually made under contracts which are sufficiently detailed as to minimize the need for supplementary legislation.

ARTICLE 6

/Exclusion of certain claims/

This Law shall not apply to claims based upon:

(a) liability for the death of, or injury to the person of, the buyer /or other person/;

(b) liability for nuclear damage caused by goods sold;

(c) a lien, mortgage or other security interest in property;

(d) a judgement or award made in legal proceedings;

4/ Art. 5-1(a) of original ULIS; art. 5-2(a) of revised ULIS; ibid.

5/ Art. 5-1(c) of original ULIS; art. 5-2(c) of revised ULIS; ibid.

(e) a document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought;

(f) a bill of exchange, cheque, or promissory note;

(g) a documentary letter of credit.

COMMENTARY

1. Paragraph (a) excludes from the Law claims based on the death or injury to the person of the buyer. If such a claim is based on tort (or delict) and is not a claim "relating to a contract of international sale of goods", 1/ the claims would be excluded from this Law by virtue of the provisions of article 1(1). Under some circumstances claims for liability for the death or personal injury of the buyer might be based on the failure of the goods to comply with the contract; however, it was thought inappropriate to subject such claims to the same limitation period as would be applicable to the usual type of commercial claims. 2/

2. The words in brackets ("or other person") in article 6(a) would also exclude liability based on the death or personal injury of persons other than the buyer. The issue presented by the language in brackets is posed by a claim by the buyer against the seller which arises from the contract and is based on pecuniary loss from personal injuries to persons other than himself. In the absence of the bracketed language, this type of claim would be governed by the Uniform Law. The inclusion of the bracketed language, removing such claims from the scope of the Law, was based, in part, on the view that claims based on bodily injuries, under some legal systems, are regarded as contractual, in others were regarded as delictual and in still others the characterization is in doubt. To avoid doubt and diversity if such claims are governed by this Law, it was thought advisable to exclude all such claims. On the other hand, the bracketed language was opposed on the ground that claims for pecuniary loss related to a sales contract between the parties should be governed by the Law regardless of the cause of such pecuniary loss. Thus, whether the bracketed language should be included in the Law is referred to the Commission for decision.

3. Paragraph (b) excludes "nuclear damage caused by the goods sold". The effects of such damage may not appear until a long period after exposure to radioactive materials. In addition, special periods for the extinction of such actions are contained in the Vienna Convention on Civil Liability for Nuclear Damages of 21 May 1963. 3/

1/ See commentary to article 1 at para. 6, supra.

2/ See article 9(3) on the date of the commencement of the limitation period for rights or claims relying on defects in or other lack of conformity of the goods.

3/ See article VI (basic periods of 10 or 20 years, subject to certain adjustments); article 1(1)(k) (definition of "nuclear damage").

4. Paragraph (c) excludes claims based on "a lien, mortgage or other security interest in property". This exclusion is consistent with the basic provisions of article 1(1) that the Law applies to claims or rights "relating to a contract of international sale of goods". Moreover, liens, mortgages and other security interests involve rights in rem which traditionally have been governed by the lex situs and are enmeshed with a wide variety of rights affecting other creditors; attempts to expand the scope of the Uniform Law to include such claims may impede the adoption of the Uniform Law. It will be noted that article 6 (c) excludes rights based not only on lien and "mortgage" but also "other security interest in property". This latter phrase is sufficiently broad to exclude rights asserted by a seller for the recovery of property sold under a "conditional sale" or similar arrangement designed to permit the seizure of property on default of payment. Of course, the expiration of the limitation period applicable to a right or claim based on a sales contract may have serious consequences with respect to the enforcement of a lien, mortgage or other interest securing that right or claim. However, for reasons given in connexion with article 24(1) (commentary to article 24 at para. 2), this Law does not attempt to prescribe uniform rules with respect to such consequences, and leaves these questions to applicable national law. It may be expected that the tribunals of signatory States in solving these problems will give full effect to the basic policies of this Law with respect to the enforcement of stale claims.

5. Under paragraph (d), claims based on "a judgement or award made in legal proceedings" are excluded even though the judgement or award results from a claim arising from an international sale. In actions to enforce a judgement it may be difficult to ascertain whether the underlying claim arose from an international sale of goods and satisfied the other requirements for the applicability of this Law. In addition, the enforcement of a judgement or award involves local procedural rules (including rules concerning "merger" of the claim in the judgement) and thus would be difficult to subject to a uniform rule limited to the international sale of goods.

6. Paragraph (e) excludes claims based on "a document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought". Such documents subject to immediate enforcement or execution are given different names and rules in various jurisdictions (e.g. the titre exécutoire), but they have an independent legal effect that differentiates them from claims that require proof of the breach of the contract of sale. In addition, these documents present some of the problems of unification of enforcement of actions mentioned with respect to paragraph (d) (para. 5, supra.). (Paragraph (e) is also somewhat analogous to the exclusion under paragraph (f) of claims based on documents having a legal identity distinct from the sales contract; compare the discussion in para. 7, infra.)

7. Paragraph (f) excludes claims based on "a bill of exchange, cheque or promissory note". This exclusion is significant for present purposes when such an instrument has been given (or accepted) in connexion with the obligation to pay the price for goods sold in an international transaction subject to this Law.

Such instruments are in many cases governed by international conventions or national laws that state special periods of limitation. In addition, such instruments are often circulated among third persons who have no connexion with or knowledge of the underlying sales transaction; moreover the obligation under the instrument may be distinct (or "abstracted") from sales transaction from which the instrument originated. In view of these facts, claims under the instruments described in paragraph (f) are excluded from this Law. Contrast assignees of the sales contract (art. 1(3)(a)).

8. Paragraph (g) excludes claims based on "a documentary letter of credit". This exclusion is based in part on the fact that the undertaking under documentary letters of credit is normally independent of the underlying sales contract: the obligation under such letters of credit arises on the presentation of specified documents and does not depend on proof of performance under the contract of sale.

ARTICLE 7

/Interpretation to promote uniformity/

In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application.

COMMENTARY

1. National rules on prescription (limitation) are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid the construction of the provisions of this Law in terms of the varying concepts of national law. To this end, article 7 emphasizes the importance, in interpreting and applying the provisions of the Law, of regard for the international character of the Law and the need to promote uniformity. Illustrations of the application of this article may be found elsewhere in the commentary, e.g. article 1 at paragraph 17; article 13 of foot-note 1. Also see commentary to article 29.

THE LIMITATION PERIOD

ARTICLE 8

/Length of the period/

The limitation period shall be four years.

COMMENTARY

1. Establishing the length of the limitation period has required the reconciliation of various conflicting considerations. On the one hand, the limitation period must be adequate for investigation, negotiation for a settlement and making the arrangements necessary for bringing legal proceedings. In assessing the time required, consideration has been given to the special problems resulting from the distance that often separates the parties to an international sale and the complications resulting from differences in language and legal systems. On the other hand, the limitation period should not be so long as to fail to provide protection against the dangers of injustice that result from the passage of time. These include the loss of evidence and the possible threat to solvency and business stability resulting from extended delays in the resolution of disputed claims.

2. In the course of preparing the draft, it was generally considered that a limitation period within the range of three to five years would be appropriate. To help resolve the question of the length of the limitation period, and other relevant issues, a questionnaire was addressed to Governments and interested international organizations. The replies, reporting national rules and suggestions from each region, were analysed in a Report of the Secretary-General 1/. Aided by these replies, it was concluded that an appropriate limitation period is four years. In reaching this decision, account was taken of other provisions in the Uniform Law affecting the running of the limitation period. These include article 16 (a new period commences to run afresh when interrupted by demand served on the debtor), article 17 (a new period commences to run afresh when the debt is acknowledged by the debtor), articles 18 to 21 (rules extending the limitation period) and article 22 (modification of the period by the parties).

COMMENCEMENT OF THE LIMITATION PERIOD

ARTICLE 9

/Breach of Contract/

(1) Subject to the provisions of paragraphs 3 to 6 of this article and to the provisions of article 11, the limitation period in respect of a breach of the contract of sale shall commence on the date on which such breach of contract occurred.

1/ This report (A/CN.9/WG.1/WP.24) appears as annex V (Addendum 2) to this report.

(2) Where one party is required as a condition for the acquisition or exercise of claim to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

(3) Subject to the provisions of paragraph 4 of this article, the limitation period in respect of a claim arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are placed at the disposition of the buyer by the seller according to the contract of sale, irrespective of the time at which such defects or other lack of conformity are discovered or damage therefrom ensues.

(4) Where the contract of sale contemplates that the goods sold are at the time of the conclusion of the contract in the course of carriage, or will be carried, to the buyer by a carrier, the limitation period in respect of claims arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are duly placed at the disposition of the buyer by the carrier, or are handed over to the buyer, whichever is the earlier.

(5) Where, as a result of a breach of contract by one party before performance is due, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any claim arising out of such breach shall commence on the date on which such breach occurred. If the contract is not treated as terminated, the limitation period shall commence on the date when performance is due.

(6) Where, as a result of a breach by one party of a contract for the delivery of or payment for goods by instalments, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any claim arising out of the contract shall commence on the date on which such breach of contract occurred, irrespective of any other breach of contract in relation to prior or subsequent instalments. If the contract is not treated as terminated, the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred.

COMMENTARY

I. Structure of the Law; basic rule as to "breach of contract"

1. The present Law governs two types of claims: (a) those that arise from breach of contract and (b) those that arise from an event other than breach (e.g.: supervening invalidity of the contract may give rise to claims for restitution of advance payment) 1/. The present article 9 deals with the commencement of the limitation period with respect to the first of these two types of claims; article 10 deals with the second type.

1/ See the discussion in commentary to article 1 at para. 7, supra.

2. With respect to claims arising from breach of contract, article 9(1) provides that the limitation period shall commence "on the date on which such breach of contract occurred 2/ The application of this provision may be illustrated by the following examples:

Example 9 A: The sales contract required the seller to place goods at the buyer's disposition on 1 June 1972. The seller failed to supply or tender any goods in response to the contract on 1 June or on any subsequent date. The limitation period for any legal proceedings by the buyer (and the prescription of the buyer's rights) in respect of a breach of the contract of sale commences to run on "the date on which /the/ breach of contract occurred", i.e. in this example, 1 June, the date for performance required under the contract.

Example 9 B: The sales contract provided that the buyer may pay the price at the time of delivery of the goods and obtain a 2 per cent discount. The contract also provided that the buyer must, at the latest, pay in 60 days. The buyer did not pay on delivery of the goods. The limitation period does not commence to run until the end of the 60 day period because there was no "breach of contract" by the buyer until the time for his performance expired.

Example 9 C: The sales contract provided that the goods shall be shipped at a date in 1972 to be named by the buyer. The buyer might have requested shipment in January 1972 but he requested shipment on 30 December 1972. The seller does not perform. The limitation period with respect to this failure to perform did not commence until after December 30, since, under the terms of the contract, there was no "breach of contract" until after the date specified by the buyer.

The application of basic rule of paragraph 1 of article 9 to certain special situations is provided in paragraphs 2 through 6 of article 9 and in article 11, infra.

II. Notices to the other party

3. Article 9(2) is designed to clarify the point in time for the commencement of the limitation period under this Law where the applicable law requires one party

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2/ The French language version of article 9(1) of the Uniform Law offers two alternative modes of expressing the test for the commencement of the period: /l'obligation n'a pas été exécutée/ and /l'exécution de l'obligation devient exigible/. The first alternative is designed to correspond as closely as possible to the English expression "breach of contract"; the second alternative has been suggested as a more appropriate rendition in the French language of the objective intended by this portion of the Law.

to give a notice to the other party. 3/ The breach of contract has occurred prior to such a notification; consequently, to delay the commencement of the limitation period until the time of notification would be inconsistent with the basic approach adopted in article 9(1) of the Law. Moreover, the time of notification may depend on the diligence with which the buyer inspects the goods and gives the notification. Consequently, this paragraph makes it clear that the commencement of the period would not be determined by the time of giving notice.

III. Claims by buyers relying on non-conformity of the goods

4. Paragraphs 3 and 4 of article 9 are concerned with claims by buyers relying on non-conformity of the delivered goods. To relate these provisions to the general structure of the Law, it may be helpful to compare Example 9 A, above, with the following basic situation in which such claims by buyers may arise:

Example 9 D: As in Example 9 A above, the sales contract required the seller to place goods at the buyer's disposition on 1 June 1972. On that date, the seller placed goods at the disposition of the buyer. On 5 June the buyer notified the seller that the goods were defective and that he rejected them. (In the alternative on 5 June the seller notified the seller that he accepted the goods but would hold the seller responsible for defects in the goods.)

Under either alternative, a claim by the buyer against the seller (arising from defects in, or other lack of conformity" of the goods 4/ falls within paragraph 3 of article 7. Consequently, the limitation period for such a claim commenced on 1 June 1972, "the date on which the goods are placed at the disposition of the buyer by the seller according to the contract of sale".

5. This last phrase "according to the contract of sale" cannot refer to full compliance by the seller with the contract, since all the cases arising under this paragraph involve claims by buyers that the goods are defective. Instead, this language was designed to respond to the decision of the Commission that the drafting should avoid the ambiguities that had been encountered in connexion with the legal concept of "delivery". 5/ ULIS art. 19 (1) provides: "delivery consists in the handing over of goods which conform with the contract". In addition, "handing over" would be inappropriate where the buyer refuses to receive the goods because of their defects or where he delays his receipt of the goods. For these reasons, article 9 (3) states that the period commences when the goods are placed "at the disposition of the buyer": the phrase, "according to the contract of sale" points to the circumstances which, under the contract, constitute placing the goods at the buyer's disposition, whether placed on the due date contemplated by the contract or otherwise.

3/ This paragraph, of course, has no effect on rules of municipal law requiring notice. Also see article 1 (2) and its accompanying commentary at paras. 14 and 15, article 22 (3) and commentary at para. 5.

4/ The phrase "claims arising from defects in, or other lack of conformity of the goods" includes any respect in which the goods fail to comply with the requirements of the contract and this would include defects as to quality, quantity and the like.

5/ UNCITRAL, Report on third session (1970), 84.

6. The concluding phrase of article 9 (3), "irrespective of the time at which such defects or other lack of conformity are discovered or damage therefrom ensues", makes it clear that in cases like Example 9 D, above, the period of limitation commences to run on the date the goods are placed at the disposition of the buyer (1 June 1972) even though the buyer does not discover the defect, or the defect does not result in damage to the buyer, until a later date. This provision reflects a significant choice of policy. Wherever possible the drafting attempts to effectuate the policy that "the law of limitation must, by its nature, be definite in operation". 6/ If the discovery of defects should start the running of a new limitation period for claims based on such defects, doubt could arise as to the commencement of the period: only the buyer would be in control of the evidence concerning his discovery of the defect and difficult questions of fact could arise as to when he first discovered (or should have discovered) the defect. In addition, claims might be pressed at such a late date that it would be difficult to produce trustworthy evidence on the true condition of the goods at the time they were first received by the buyer.

7. The rule of article 9 (3) can produce harsh results in some circumstances. But the over-all fairness of the Law needs to be considered in the light of the following factors: (a) the length of the basic period of prescription (art. 8, supra.); (b) exclusion from the Law (art. 6 (a), supra.) of claims based on "the death of, or injury to the person of, the buyer /or other person/"; (c) confining the Law's scope to claims that arise in relation to a contract - thereby excluding claims based on tort or delict. (See discussion in commentary to article 1, at para. 6, supra.); (d) exclusion of consumer sales from the Law (article 5 (a), supra.); (e) the special provisions (art. 11, infra.) for claims based on an express undertaking by the seller which is stated to have effect for a period of time. 7/

8. Paragraph 4 of article 9 provides for the application of the principle of paragraph 3 to a specific situation - contracts contemplating the carriage of goods. The basic policy of paragraph 4 is to postpone the starting of the period until the end of the carriage - i.e. "the date on which the goods are duly placed at the disposition of the buyer by the carrier". The next phrase ("or are handed over to the buyer, whichever is the earlier") deals with the possibility that the goods may be handed over to the buyer in a manner, or at a place or date other than that contemplated by the contract.

6/ Report of the Working Group on its first session (1969) (A/CN.9/30) 5.

7/ It has been suggested that the passing of the risk of loss might be used alternatively as a test for commencement of the period. However, this approach was not adopted because national rules are divergent as to the point the risk passes to the buyer and because in many of the international transactions the risk would pass to the buyer during the shipment of the goods before the buyer has opportunity to inspect the goods. See art. 9 (4) and para. 8, infra.

Example 9 E: Seller in Santiago agreed to ship goods to the buyer in Bombay: the terms of shipment were "F.O.B. Santiago". Pursuant to the contract, the seller loaded the goods on board a ship in Santiago on 1 June 1970. The goods reached Bombay on 1 August 1970, and on the same date the carrier notified the buyer that he could take possession of the goods. On 15 August the buyer took possession of the goods and on 20 August he discovered that the goods were defective and notified the seller of that fact.

Under these facts, the limitation period for the buyer's claim commenced to run on 1 August 1970, since that is the date on which the goods were "placed at the disposition of the buyer by the carrier". This result is not affected by the fact that under the terms of the contract the risk of loss during the ocean voyage rested on the buyer. 8/ Nor is this result affected by the fact that, under some legal systems, it might be concluded that "title" or "ownership" in the goods passed to the buyer when the goods were loaded on the ship in Santiago. Alternative forms of price quotation (F.O.B. Seller's city: F.O.B. Buyer's city: F.A.S.: C.I.F. and the like) have significance in relation to possible changes in freight rates and the manner of arranging for insurance, but they have no significance in relationship to the commencement of the limitation period. Where the contract contemplates that the goods will be carried to the buyer by a carrier, paragraph 4 of article 9 reflects the general policy that the limitation period in respect of claims arising from defects in or other lack of conformity of the goods should not start to run during the course of carriage. Of course, where the buyer takes effective control over the goods in the seller's city and thereafter ships the goods, neither the policy nor the provisions of this paragraph will apply to delay the commencement of the limitation period. It may also be noted that goods may be placed at the disposition of or handed over to the agents or assigns of the buyer. Cf. art. 1(3)(a). For purpose of illustration, suppose the buyer in Example 9 E, above, resells the goods to C during the transit of the goods and transfers the bill of lading to C. If the goods prove to be defective, the buyer's limitation period commences to run when the goods are placed at the disposition of C by the carrier.

IV. Breach before performance is due

9. Both paragraphs 5 and 6 of article 9 deal with problems that arise when a breach of contract by one party affects future performance under the contract. Paragraph 5 establishes the basic general rule; paragraph 6 deals with the special problems that arise when a contract calls for the delivery of goods, or the payment for goods, in instalments.

(a) Paragraph 5: the basic rule

10. The basic rule of paragraph 5 may be illustrated by the following:

Example 9 F: A contract of sale made on 1 June 1970 calls for the seller to deliver the goods on 1 December. On 1 July the seller (without excuse) notifies

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8/ See foot-note 7, supra.

the buyer that he will not deliver the goods required by the contract. On 15 July the buyer notifies the seller that in view of the seller's repudiation the contract is terminated.

11. Under some legal systems, the notification on 1 July of refusal to perform in the future constitutes a "breach" upon which an election to terminate and a legal action may be based. In this example, the limitation period for the buyer's claim for damages might conceivably commence on one of the following three events: (a) seller's notification that he will not perform (1 July); (b) the notification of termination (15 July); (c) the date for final performance (1 December).

12. On the stated facts the Law chooses alternative (a). Under article 9(5), where a party "becomes entitled to and does elect to treat the contract as terminated", the limitation period runs from "the date on which such breach occurred" - 1 July in the foregoing example.

13. It will be noted that under paragraph 5, the above result depends on a decision to "elect to treat the contract as terminated". If, in the above instances such an election (i.e., by the notification of termination made on 15 July) had not taken place, the "limitation period shall commence on the date when performance is due" - 1 December in the above example. 9/

14. In the interest of definiteness and uniformity the period will commence on the earlier (1 July) date only when a party positively "elects" to treat the contract as terminated. Thus, termination resulting from a rule of applicable law that on breach the contract shall be automatically terminated is not termination resulting from an "election" by a party within the meaning of paragraph 5. Claims arising from such automatic termination resulting from "a breach of the contract of sale" are governed by the general provision of article 9(1). 10/

9/ The present Uniform Law does not, of course, specify the time when a notification of termination must be given.

10/ One representative proposed the following alternative provision for article 9(5):

> "Where, as a result of a breach of contract or another circumstance occurring before performance is due, one party thereby becomes entitled to and does elect to treat the contract as terminated or due, the limitation period in respect of any right based on such circumstance shall commence on the date on which the circumstance occurred. If not relied upon, such circumstance shall be disregarded and the limitation period shall commence on the date when the claim otherwise could first be exercised." A/CN.9/WG.1/WP.21, art. 8(1). (This document is reproduced in Annex V of this report (add.2)).

It will be noted that this provision would provide parallel treatment for (a) the approach of some legal systems that regard anticipatory repudiation as "breach" justifying "termination", and (b) the approach of other legal systems under which circumstances such as repudiation, bankruptcy and the like may be grounds for treating the performance as immediately "due".

(b) Paragraph 6: instalment contracts

15. The rules of paragraph 6 may be illustrated by the following example:

Example 9 G: A contract of sale made on 1 June 1970 requires the seller to sell the buyer 4,000 cwt. of sugar, with deliveries of 1,000 cwt. on 1 July, 1 August, 1 September and 1 October. The first instalment was defective; when the buyer complained the seller assured him that the future delivery should be satisfactory. The second instalment, delivered on 1 August was so seriously defective that the buyer rightfully took two steps: he rejected the defective instalment and he notified the seller that the contract was terminated as to future instalments.

16. For the purposes of paragraph 6, the relevant conduct by the buyer was the buyer's election "to treat the contract as terminated" as to future instalments. Paragraph 6 provides that in this case "the limitation period in respect of any claim arising out of the contract" shall commence "on the date on which such breach of contract occurred" - 1 August in the above example. The provision adds that this rule applies "irrespective of any other breach of contract in relation to prior or subsequent instalments". Thus, the limitation period for the buyer's claim for damages, if any, based on the defect in the July delivery in the above example, would recommence on 1 August by virtue of this clause. This clause also makes it clear that, once termination is effected, the failure of the seller to deliver sugar on 1 September and 1 October does not start periods of prescription running from those dates. The overall effect is that a single period for claims relating to the July, August, September and October instalments commences on the date of the breach that entitled the other party to terminate the contract.

17. The application of paragraph 6, when the innocent party does not elect to terminate the contract may be illustrated as follows:

Example 9 H: The contract is the same as in 9G above. Each of the four deliveries is defective. The buyer complains to the seller of these defects but does not elect to terminate the contract.

Where, as in the above example, the "contract is not treated as terminated", paragraph 6 provides that "the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred". Thus, separate periods of limitation would apply to the July, August, September and October deliveries. 11/

11/ The delegate who proposed the alternative provision for art. 9(5) (see foot-note 10, supra.) also proposed the following alternative provision for article 9(6):

> "If in case of a contract for the delivery of or payment for goods by instalments, one party becomes entitled to and does elect to treat the contract as terminated or due as a result of a breach of a contract or circumstance in relation to an instalment, the limitation period in respect of

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ARTICLE 10

/Claims not arising out of breach of contract/

Subject to the provisions of article 11, where a claim arises in relation to a contract of sale /or from a guarantee incidental thereto/, and not from a breach of the contract of sale, the limitation period shall commence on the date on which the claim could first be exercised.

COMMENTARY

1. The relationship between the scope of article 9 and 10 has already been mentioned; see the commentary to article 9 at paragraph 1, supra, and the commentary to article 1 at paragraph 7, supra. Thus, the commencement of the limitations period "in respect of a breach of contract" is governed by article 9; the commencement of the period for other claims within the scope of this Law is governed by the present article 10. As has been noted, "breach of contract" cannot be used as a starting point for certain types of claims. One example is provided by claims for the restitution of advance payments where the performance of the agreed exchange is excused under the applicable law because of impossibility of performance, force majeure, and the like. For such claims, article 10 provides that the limitation period shall commence on the date "on which the claim could first be exercised". For example, suppose that on 1 January, when a sales contract is signed, the buyer makes an advance payment of the price; the agreed date for performance is 1 December. On 1 February, performance by the seller (without his fault) becomes impossible and on that date the buyer, under the applicable law, may recover the advance payment but may not recover for "breach". The limitation period for the recovery of the advance payment commences on 1 February.

2. Whether such claim or right exists and what events will make it exercisable must, of course, be decided under the applicable rules of national law. 1/

(foot-note 11 continued)

any claim based on such circumstance shall commence on the date on which the circumstance occurred, even in respect of any previous or subsequent instalments covered by the contract. If not relied upon, such circumstance shall be disregarded, and the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred, or, otherwise, when the claim could first be exercised." (A/CN.9/WG.1/WP.21, art. 8(2)). (This document is reproduced in Annex V of this report (add.2)).

1/ One representative proposed that this article should be treated as the general rule governing the commencement of the limitation period and therefore should be placed before the present article 9. The same representative was also of the view that paragraphs 5 and 6 of article 9 must be grouped under a separate article and must be placed after the present article 9. Concerning his proposal to amend the present article 9(5) and (6), see commentary to article 9 at foot-notes 10 and 11.

3. The reason for keeping in bracket the words relating to a claim arising from a guarantee has been explained in the commentary to article 1 at paragraphs 8-13, supra.

ARTICLE 11

/Express undertakings for a period of time/

If the seller gives an express undertaking relating to the goods, which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period, in respect of any claim arising from the undertaking, shall commence on the date on which the buyer first informs the seller that he intends to assert a claim based on the undertaking, but not later than on the date of the expiration of the period of the undertaking.

COMMENTARY

1. Article 11 provides an exception from the basic rules on commencement of the period contained in article 9, particularly the rule of article 9(3) providing that the limitation period for claims relying on non-conformity of the goods shall commence on the date on which the goods are placed at the disposition of the buyer. 1/ Under article 9(3), the date on which non-conformity is discovered and the date on which damage occurs are both irrelevant. However, this approach is inappropriate where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods, which is stated to have effect for a certain period of time.

2. Under this article, the basic limitation period of four years commences to run "on the date on which the buyer first informs the seller that he intends to assert a claim based on the undertaking". The time of such notice was selected in the interest of definiteness. Consideration was given to the possible objection that any delay by the buyer in informing the seller would extend the buyer's period for bringing legal proceedings, and alternative ways of dealing with the problem were considered. It was concluded, however, that in the setting of claims under express undertakings, such as warranties or guarantees, there was little likelihood that buyers would abuse this provision. The buyer's desire for prompt adjustment of his claim would lead to prompt notification; certainly no buyer would delay his opportunity for an adjustment in order to obtain the remote and speculative advantage of an extended limitation period. It was also noted that applicable law or the provisions of the express warranty may prevent excessive delay in giving notice (cf. ULIS art. 39). In addition, article 11 provides a final cut-off date that is applicable regardless of the date of notification: the limitation period shall in any event commence "not later than on the expiration of the period of the

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1/ See commentary to article 9 at para. 4, supra.

undertaking". Of course, the question whether the buyer can give such a notice even after the expiration of the undertaking is dependent upon the terms of the undertaking and the rules of applicable law. But the last phrase of article 11 makes the limitation period commence on the expiration of the period of undertaking even if the notice was given after the expiration of that period.

3. Article 11 does not require that the seller's express undertaking be contained in the contract of sale. The seller, after delivering the goods, might adjust certain components of the goods and in this connexion might give an express warranty. Such an undertaking is governed by this article.

INTERRUPTION OF THE LIMITATION PERIOD:
LEGAL PROCEEDINGS; ACKNOWLEDGEMENT

ARTICLE 12

/Judicial proceedings/

(1) The limitation period shall cease to run when the creditor performs any act recognized under the law of the jurisdiction where such act is performed:

(i) as instituting judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim; or

(ii) as invoking his claim for the purpose of obtaining satisfaction or recognition thereof in the course of judicial proceedings which he has commenced against the debtor in relation to another claim.

(2) For the purposes of this article, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that such counterclaim does not arise out of a different contract.

COMMENTARY

1. The general heading, "Interruption of the Limitation Period", applicable to articles 12 to 17, is intended only to indicate the general character of the problem with which these articles are concerned. The reference in the heading to "interruption" does not imply that the consequences of "interruption" under various national legal systems are imported into this Law. In some legal systems "interruption" implies renewal of the period; in other systems the results are different. The consequences under this Law are those specifically stated in each article under this title. Thus, the effect of instituting legal proceedings is that "the limitation period shall cease to run" (arts. 12, 13 and 15) (cf. art. 16 (effect of acknowledgement)).

2. As was noted earlier (commentary to Introduction, para. 1), the Law is essentially concerned with the time within which the parties to an international sale of goods may bring legal proceedings to exercise claims or rights. Article 8 states the length of the basic limitation period. Articles 23 to 26 state the effects of the expiration of the period; these include the rule (art. 24(1)) that no claim for thich the limitation period has expired "shall be recognized or enforced in any legal proceedings". To round out this structure, the present article 12 provides that the "limitation period shall cease to run" when the creditor institutes judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim. (Provision for "legal" proceedings other than "judicial" proceedings -- e.g., arbitration and various type of administrative proceedings -- is made in articles 13 and 15). The net effect of these rules is substantially the same as providing that a proceeding

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for enforcement may only br brought before the limitation period has expired. However, the approach of this draft, in stating that the limitation period shall "cease to run" when the proceeding is instituted, provides a basis for dealing with problems that arise when the proceeding fails to result in a decision on the merits or is otherwise abortive. (See art. 18.)

3. The central problem of article 12 is to define the stage which judicial proceedings must reach before the expiration of the limitation period. In different jurisdictions proceedings may be instituted in different ways. In some jurisdictions a claim may be filed or pleaded in court only after the plaintiff has taken certain preliminary steps (such as the service of a "summons" or "complaint"). In some jurisdictions, these preliminary steps may be taken out of court by the parties (or their attorney); nevertheless these steps are governed by the State's rules on procedure, and may be regarded as instituting a judicial proceeding for the purpose of satisfying the State's rules on prescription or limitation. In other States, this consequence occurs at various later stages in the proceeding.

4. For these reasons it was not feasible to refer specifically to the procedural steps that would meet the purposes of this article. Instead, paragraph 1 refers to the performance by the creditor of "any act recognized under the law of the jurisdiction where such act is performed: (a) as instituting judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim". Initiation by the creditor against the debtor of a criminal proceeding for criminal fraud would qualify under this article to stop the period only if, under the local law, this is also an institution of a proceeding "for the purpose of obtaining satisfaction or recognition of his claim".

5. Paragraph 1 (b) applies where the creditor adds a claim to a proceeding he has already instituted against the debtor. Here, as under paragraph 1 (a), the step in that proceeding that stops the running of the limitation period depends on the law of the jurisdiction where the proceeding is brought. Under paragraph 1 (b) the test is not when the proceeding has been instituted but when the creditor has performed an act recognized under the law of the forum as "invoking his claim" in the pending proceedings.

6. Paragraph 2 of this article deals with the point in time when a counter claim 1/ is deemed to be instituted. Its provisions may be examined in terms of the following example:

1/ The meaning of "counterclaim" in paragraph 2, may be drawn from the reference in paragraph 1 (a) to "judicial proceedings" employed for the purpose of obtaining satisfaction or recognition of a claim. Such a judicial proceeding by counterclaim can lead to affirmative recovery by the defendant against the plaintiff; the use of a claim "as a defence for the purpose of set-off", after the limitation period for that claim has expired, is governed by article 24(2), infra. The question whether a counterclaim is acceptable procedure is, of course, left to the rules of the forum.

Example 12 A: The seller instituted suit against the buyer on 1 March 1970. In this proceeding, the buyer interposed a counterclaim on 1 December 1970. The limitation period governing the buyer's counterclaim would, in normal course, have expired on 1 June 1970.

7. In the above example, the crucial question is whether the buyer's counterclaim shall be deemed to be instituted (a) on 1 March, the time when the seller's suit was instituted or (b) on 1 December 1970, when the buyer's counterclaim was in fact interposed in the pending action.

8. Under paragraph 2 of article 12, alternative (a) as chosen when the counterclaim arises out of the same contract as the seller's suit. This result is adopted to promote efficiency and economy in litigation by encouraging consolidation of actions rather than the hasty bringing of separate actions.

9. On the facts of the above example, the same benefit is not given to the buyer when his claim against the seller arises from a different contract than that which provided the basis for seller's claim against the buyer; 2/ in this event, the buyer must actually institute his counterclaim before the expiration of the limitation period. The act which is regarded as instituting this counterclaim is determined under the approach employed in article 12(1), discussed at paragraphs 4 and 5, supra.

ARTICLE 13

/Arbitration/

(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings by requesting that the claim in dispute be referred to arbitration in the manner provided for in the arbitration agreement or by the law applicable to that agreement.

(2) In the absence of any such provision, the request shall take effect on the date on which it is delivered at the habitual residence or place of business of the other party, or, if he has no such residence or place of business, then at his last known residence or place of business.

(3) The provisions of this article shall apply notwithstanding any term in the arbitration agreement to the effect that no right shall arise until an arbitration award has been made.

2/ Reference to "contract" does not depend on formalities such as whether the contract is stated in one or two documents. For example, suppose the plaintiff brings a suit on the basis of a distributorship agreement, while the defendant counterclaims on an agreement to sell. If these agreements were negotiated at the same time and as a part of a package deal, courts might regard these claims to arise from the same contract.

COMMENTARY

1. Article 13 applies to arbitration based on an agreement to submit to arbitration. 1/ Article 12 relies on national law to define the point in the institution of judicial proceedings when the limitation period shall cease to run. The same approach cannot be used in relation to arbitration proceedings under article 13 since in many jurisdictions the manner for instituting such proceedings is left to the agreement of the parties. Hence it is necessary for the Law to designate a stage of the proceedings which is compatible with normal arbitration practice; the stage so designated in paragraph 1 is the act of a party "requesting that the claim in dispute be referred to arbitration...".

2. Any question as to what acts constitute such a request is to be answered under "the arbitration agreement or by the law applicable to that agreement" (para. 1). This provision that the request be made in the manner provided for by the agreement or applicable law refers, inter alia, to the person or institution to whom the request is to be made and the nature of the communication that constitutes such a request. If the agreement or the applicable law does not prescribe the manner of making such a request, under paragraph 2 the decisive point is the date on which the request is delivered at the habitual residence or place of business of the other party; if he has no such residence or place of business the request may be delivered at his last-known residence or place of business. Under paragraph 2, the request must be "delivered" at the designated place. Thus, risks during transmission fall on the sender of the request, but the sender need not establish that the request came into the hands of the other party in view of the practical difficulties involved in proving receipt of the request by a designated person following delivery of the request at the specified place.

3. Paragraph 3 deals with the effect of a term in the arbitration agreement that "no right shall arise until an arbitration award has been made". Under paragraph 3, such a contract term does not prevent the application of this article to the agreement; such a contract provision has no effect to suspend the running of the limitation period or to determine the act that stops the running of the period under this Law. On the other hand, paragraph 3 does not take any position concerning the validity of such agreements under national law. (Cf. art. 22(3) and its accompanying commentary at paras. 5 and 6.)

1/ Article 13 applies only where the parties "have agreed to submit to arbitration". Obligatory "arbitration" not based on an agreement would be characterized as "judicial proceedings" for the purpose of the Uniform Law. See arts. 1 (3) (f), and 12. On construction of this Law to promote uniformity, as contrasted with the application of local terminology, see art. 7 and accompanying commentary.

ARTICLE 14

/Interruption in regard to joint debtor/

The institution of judicial or arbitral proceedings against one debtor shall have effect in relation to any other person jointly and severally liable with him /or liable under a guarantee/, provided that the creditor, before the expiration of the limitation period, informs such person in writing that the proceedings have been instituted.

COMMENTARY

1. The purpose of this article it to provide answers to questions that may arise in the following situation: Two persons (A and B) are jointly and severally responsible for performance of a sales transaction. The other party (P) institutes a legal proceeding against A. What is the effect of the legal proceeding instituted by P against A on the limitation period applicable to P's claim against B?

2. Under some legal systems the institution of a proceeding aginst A also interrupts the running of the limitation period applicable to P's claim against B. Under other legal systems institution of proceedings against A has no effect on the running of the limitation period with regard to B. Consequently, the stating of a uniform rule on this issue is desirable.

3. The rule that the institution of proceedings against A has no effect on the running of the period against B involves certain practical difficulties. Such a rule makes it advisable for the creditor (P) to institute proceedings against both A and B within the limitation period - at least in cases where there is doubt concerning the financial ability of A to satisfy a judgement. Where A and B are in different jurisdictions it would not be feasible to institute a single proceeding against them both, and instituting separate proceedings in different jurisdictions, merely to prevent the running of the limitation period against the second debtor (B), involves expense that would be needless when A is able to satisfy the judgement.

4. It will be noted that article 14 is operative only when "the creditor, before the expiration of the limitation period, informs /B/ in writing that the proceeding /against A/ have been instituted". This written notice may give B the opportunity, if he chooses, to intervene in or participate in the proceedings against A.

5. Under article 14, the "effect" of the institution of the proceedings is, of course, limited to the rules of this Law with respect to the running of the limitation period; this Law does not purport to state whether the proceeding against A will have substantive binding effect on B as res judicata or otherwise. More specifically, when judicial proceedings (article 12) or arbitral proceedings (article 13) are instituted against A the limitation period "shall cease to run" not only with respect to A but also with respect to B (provided, of course, that written notice is given B as required in article 14). Similarly, if P should discontinue the proceeding against A or if the proceedings against A should end without a decision on the merits of the claim, the consequences specified in articles 18(1)(a) and (b) are applicable not only to A but also to B.

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ARTICLE 15

/Legal proceedings arising from death, bankruptcy or the like/

Where any legal proceedings are commenced upon the occurrence of:

(a) the death or incapacity of the debtor;

(b) the bankruptcy or insolvency of the debtor;

(c) the dissolution of a corporation, company or other legal entity;

(d) the seizure or transfer of the whole or part of the assets of the debtor,

the limitation period shall cease to run only if the creditor performs an act recognized under the law applicable to those proceedings for the purpose of obtaining satisfaction or recognition of his claim. Such act may be performed before the expiration of any further period as may be provided for under that law.

COMMENTARY

1. In the situations described in this article slightly different problems may arise than in connexion with the commencement of judicial proceedings. For example, proceedings for the distribution of assets on death, bankruptcy or the dissolution or proceedings for the liquidation of a legal entity, may not be instituted by an individual creditor. Instead, creditors may have an opportunity to file claims in existing proceedings. 1/ Consequently, for the types of proceedings listed in this article, the limitation period ceases to run on the performance of "an act recognized under the law applicable to those proceedings" for obtaining satisfaction or recognition of his claim. 2/ The last sentence of article 15 deals with the situation where a period provided under the law applicable to these proceedings may extend beyond the length of the limitation period provided in this Uniform Law. For example, the law applicable to the proceedings may specify the period within which creditors may file claims in these proceedings; creditors may rely on this specified period. Unless this additional period is honoured for creditors who

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1/ Under some legal systems, such proceedings might be "administrative" rather than "judicial". However, regardless of such difference among national laws in the characterization of each proceeding, the Uniform Law treats the types of proceedings listed in this article in the same way because of the characteristic common to them. See art. 1(3)(f) as to the definition of "legal proceedings". Also see art. 7.

2/ The approach is similar to that employed in article 12, discussed in the commentary to that article at para. 4, supra.

relied on the period specified in the applicable law (which may be emboied in a notice to all such creditors), the creditors could be misled as to their rights.

2. As has been noted (commentary to article 1 at para. 3, supra), this Law applies only to the prescription of rights or claims as between the parties to an international sale. In the types of proceedings specified in this article involving the distribution of assets (as in bankruptcy) prescription may affect the rights of third parties. The nature of such effect, if any, is not regulated by this Law and is left to applicable national law. Also see article 35, infra.

ARTICLE 16

/Interruption by service of notice/

Where the creditor perfoms any act, recognized under the law of the jurisdiction where such act is performed as manifesting his desire to interrupt the limitation period, a new limitation period of four years shall commence on the date on which notice of this act is served on the debtor by a public authority.

COMMENTARY

1. Under some legal systems a demand for performance by the creditor to the debtor may satisfy the applicable rule on limitations even though the demand is not linked to the institution of legal proceedings and is not served on the debtor by a public official (i.e. a letter or even a verbal demand may suffice). In other legal systems, the only way for a creditor to comply with the limitation period is by bringing legal proceedings. Article 16 is a compromise between these two approaches. To some extent, this article responds to the view that the institution of legal proceedings may be too rigid and burdensome to satisfy the policies of the limitation period. On the other hand, this article does not give effect to an informal letter or a verbal demand by the creditor. A notice must be "served on the debtor by a public authority"; and this notice must relate to an act that is "recognized under the law of the jurisdiction where the act is performed as manifesting /the creditor's/ desire to interrupt the limitation period". And presumably the law of that jurisdiction must not only recognize that the act manifests a "desire" to interrupt the limitation period, but also gives legal effect to this manifestation of desire.

2. The effect given to such act under article 16 is that "a new limitation period of four years" commences to run afresh after notice of this act is served on the debtor. It will be noted that this consequence is different from the institution

of legal proceedings (articles 12, 13 and 15); on the institution of legal proceedings the period will "cease to run" subject to the adjustments provided in article 18. 1/

ARTICLE 17

/Acknowledgement by debtor/

(1) Where the debtor acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run by reason of and from the date of such acknowledgement.

(2) Partial performance of an obligation by the debtor to the creditor shall have the same effect as an acknowledgement if it can reasonably be inferred from such performance that the debtor acknowledges that obligation.

(3) Payment of interest shall be treated as payment in respect of the principal debt.

/(4) The provisions of this article shall apply whether or not the limitation period prescribed by articles 8 to 11 has expired./

1/ The preliminary draft (August 1970) did not have a provision similar to article 16. Instead it contained an article (article 14) which allowed extension during negotiations. That article (which was set within brackets to indicate doubt as to whether it should be recommended) was as follows:

> /If the creditor and the debtor have entered into negotiations on the merits of the claim /without reserving the right to invoke limitation/, and if the fact of such negotiations is evidence in writing, the limitation period shall not expire before the end of one year from the date on which such negotiations have been broken off or otherwise come to an end, but at the latest one year from the date on which the period would otherwise have expired according to articles 6 to 9/.

This provision was considered favourably by some because it encouraged negotiation without forcing parties to unnecessary proceedings toward the end of the limitation period. However, the Working Group concluded that this rule should not be recommended for inclusion in the Uniform Law because it employed several tests ("negotiations", "on the merits", "broken off or otherwise come to an end") that would be difficult to apply to concrete situations. In addition, other provisions in the draft Uniform Law are available to avoid the hasty institution of legal proceedings: e.g., article 8 (four years as the length of the limitation period), article 22 (allowance of modification of the period by agreement of parties).

COMMENTARY

1. The basic purposes of prescription are to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree of certainty in legal relationships. An extension of the limitation period when a debtor acknowledges his obligation to the creditor is consistent with the above purposes. Consequently, under paragraph 1 of the article, when such acknowledgement occurs, the limitation period will begin to run afresh by reason of such acknowledgement.

2. Recommencing the period of limitation may have significant impact on the debtor's rights; consequently, paragraph 1 requires that the acknowledgement must be in writing. A writing by a debtor confirming an earlier oral acknowledgement would become an "acknowledgement" within the meaning of this article when the written confirmation was made. The requirement of a "writing" is defined in article 1(3)(h). Of course, the "acknowledgement" of the original debt may be somewhat similar to a transaction creating a new debt (sometimes called a "novation") which, under applicable law, may be independent of the original obligation - so that the original transaction need not be proved to justify recovery under the new obligation. Applicable law may not require this "novation" to be effected in writing; the rule of Article 17 that an "acknowledgement" must be in writing is not intended to interfere with the rules of the applicable law on "novation".

3. Paragraph 2 deals with "partial performance of an obligation" and paragraph 3 with the payment of interest then these acts imply an acknowledgement of the debt. Both recommence the running of the limitation period anew only with respect to the obligation acknowledged by such action. The partial payment of a debt is the most typical instance of partial performance, but the language of paragraph 2 is sufficiently broad to include partial performance of other obligations, such as the partial repair by a seller of a defective machine. Of course, whether there is an acknowledgement under the circumstance and if so, the extent of the obligation so acknowledged are questions calling for the determination of the relevant facts in the light of the basic standard set forth in this article.

4. Paragraph 4 provides that there can be an "acknowledgement" for the purpose of the Uniform Law even after the expiration of the limitation period. On one hand, it appeared that giving effect to acknowledgement after the expiration of the limitation period satisfies the policies with respect to prescription indicated in paragraph 1, supra. This provision would also make it possible to avoid disputes regarding the exact time when acknowledgement had taken place and when the limitation period had expired. On the other hand, doubt was expressed as to the appropriateness of permitting a barred claim to be revived by an acknowledgement. In view of this doubt, paragraph (4) is enclosed in brackets. Cf. arts. 23 and 25. In any event, the rule of article 17 that a claim is not barred by prescription, whether this result occurs before or after the claim is once barred, is not intended to affect rules under national law, such as taxation, bankruptcy or the like.

EXTENSION OF THE LIMITATION PERIOD

ARTICLE 18

/Discontinuance or dismissal of proceedings/

(1) Where the creditor has commenced legal proceedings in accordance with articles 12, 13 or 15:

(a) the limitation period shall be deemed to have continued to run if the creditor subsequently discontinues the proceedings or withdraws his claim;

(b) where the court or arbitral tribunal has declared itself or been declared incompetent, or where the legal proceedings have ended without a judgement, award or decision on the merits of the claim, the limitation period shall be deemed to have continued to run and shall be extended for one year respectively from the date on which such declaration was made or from the date on which the proceedings ended.

(2) When an arbitration has been commenced in accordance with article 13, but such arbitration has been stayed or set aside by judicial decision, the limitation period shall be deemed to have continued to run and shall be extended for one year from the date of such decision.

COMMENTARY

1. Article 18 is addressed to problems that arise when a creditor institutes legal proceedings that fail to secure an adjudication on the merits of his claim. Under articles 12 (1), 13 (1) and 15, when a creditor institutes legal proceedings for the purpose of satisfying his claim, the limitation period "shall cease to run"; when a creditor institutes proceedings before the expiration of the limitation period, in the absence of further provision, the limitation period would never expire. Supplementary rules are consequently required when such a proceeding does not lead to an adjudication on the merits of the claim. Subparagraph (a) of paragraph 1 of article 18 deals with problems that arise when the creditor discontinues the proceedings or withdraws his claim. Subparagraph (b) of paragraph 1 and paragraph 2 deal with problems that arise when the failure to secure adjudication on the merits results from action by a tribunal.

I. Discontinuance or withdrawal by the creditor

2. As was noted above, the rules of articles 12 (1), 13 (1) and 15, since they stop the running of the period, need to be supplemented where the creditor voluntarily discontinues the legal proceedings or withdraws his claim. Consequently, subparagraph (a) of paragraph 1 of article 17 provides that in the event of such discontinuance or withdrawal the institution of the legal proceedings shall have no effect to stop the running of the period or to extend the length of the period; to produce this result, subparagraph (a) provides that "the limitation period shall be deemed to have continued to run". This rule resulted from the view that

the extension of the limitation period should not be left within the control of one of the parties and that a creditor who voluntarily discontinues legal proceedings should not be given special treatment. 1/

3. The application of the rule may be clarified by an example:

Example 18A. A's claim against B arose and the limitation period commenced to run on 1 June 1970. A instituted legal proceedings against B on 1 June 1972. A discontinued the legal proceedings or withdrew his claim on 1 June 1973.

Under the rule of article 18 (1) (a), A has until 1 June 1974 to institute a second legal proceeding. (If A had discontinued his action subsequent to 1 June 1974, his claim would already have been barred and no further legal proceedings would be possible.)

4. As has been noted, article 18 (1) (a) is applicable when the creditor "discontinues the proceedings or withdraws his claim". This rule is intended to include not only explicit discontinuance or withdrawal of the legal proceeding but also such a failure to pursue the proceeding that the tribunal dismisses the proceeding. Similarly, the provision is applicable when, because of failure to continue the proceedings, the proceedings are automatically terminated by virtue of the procedural rules of the forum. In these situations, the proceedings came to an end because of the choice of the creditor not to pursue them; the rule of article 18 (1) (a) consequently is applicable.

II. Proceedings brought in a tribunal without jurisdiction; procedural defects preventing adjudication on the merits

5. As we have seen, subparagraph (a) of paragraph 1 of article 18 deals primarily with the effect of voluntary action by the creditor - his discontinuance of legal proceedings or withdrawal of his claim. Subparagraph (b) deals with failure of legal proceedings to lead to a decision on the merits of the claim when that failure results from the ruling of a tribunal. Subparagraph (b) specifically refers to instances in which a court or arbitral tribunal is declared incompetent to adjudicate the creditor's claim. In addition, the paragraph also applies generally wherever "the legal proceedings have ended without a judgement, award or decision

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1/ One member of the Working Group was of the view that the limitation period must be suspended at least during the period while the party pursued the legal proceeding before voluntary discontinuance or withdrawal of legal proceedings. It was suggested that reasons for voluntary discontinuance or withdrawal of legal proceedings may vary; a party might discontinue the proceeding for the purpose of negotiation and the law should not treat such discontinuance unfavourably.

on the merits of the claim". This language applies, inter alia, to instances in which the legal proceedings are terminated as a result of some flaw or defect in the proceedings under circumstances that would not bar a second proceeding on the same claim. 2/

6. Under subparagraph (b) (as under subparagraph (a)) the limitation period is deemed to have continued to run. However, the article takes account of the possibility that the lack of jurisdiction or the procedural defect might be finally established a substantial period of time after the creditor instituted the legal proceedings. If this flaw is established after the running of the limitation period, the creditor, in the absence of further provisions, would have no opportunity thereafter to institute a new legal proceeding; if the flaw is established shortly before the expiration of the period the creditor may have insufficient time to institute a new legal proceeding. To meet these problems, article 18 (1) (b) further provides that the limitation period "shall be extended for one year respectively from the date on which such declaration was made or from the date on which the proceedings ended".

7. The application of this rule may be illustrated by the following examples:

Example 18 B. A's claim against B arose and the limitation period started to run on 1 June 1970. A instituted legal proceedings against B on 1 June 1973. On 1 June 1975 the court in which A instituted the action held that it had no jurisdiction. A did not take an appeal.

On these facts, under article 18 the limitation period is extended until 1 June 1976.

Example 18 C. The facts are the same as in Example 18 B, except that following the 1 June 1975 decision of the lower court, A takes an appeal. On 1 June 1976 the decision of the appellate court sustaining the decision of lower court becomes definitive.

On these facts, under article 18 the limitation period is extended until 1 June 1977.

8. The extension of the period provided in article 18 (1) (b) applies when the tribunal "has declared itself or been declared incompetent" to adjudicate upon the claims of the creditor. The expression "been declared" refers to declarations by tribunals within the same jurisdiction, and has special reference to review by a tribunal of higher authority within that jurisdiction. 3/ Paragraph 2 of article 18 provides for extension similar to that of paragraph 1 (b) when judicial authority within the same jurisdiction stays or sets aside the arbitration.

2/ Termination resulting from voluntary discontinuance or withdrawal is covered by article 18 (1) (a).

3/ Where a final decision or award is not recognized in another jurisdiction, an extension of the period is provided by article 21.

ARTICLE 19

/Extension where institution of legal proceedings prevented/

Where, as a result of a circumstance which is not personal to the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, and provided that he has taken all reasonable measures with a view to preserving his claim, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist. The limitation period shall in no event be extended beyond ten years from the date on which the period would otherwise expire in accordance with articles 8 to 11.

COMMENTARY

1. This article provides for limited extension of the limitation period when circumstances prevent a creditor from instituting legal proceedings. This problem is often considered under the heading of "force majeure" or impossibility; however, this article does not employ these terms since they are used with different meanings in different legal systems. Instead, the basic test is whether the creditor "has been prevented" from taking appropriate action. 1/ To avoid excessive liberality, no extension is permitted when any one of the following restrictions is applicable: (1) the preventing circumstances may not be "personal to the creditor" - i.e. a condition that affects only this individual creditor, such as illness, death, or the like; (2) the creditor could have avoided or overcome the occurence of such circumstance; (3) the creditor has not taken reasonable measures with a view to preserving his claim. There are many types of preventing circumstances that are "not personal to the creditor" and which therefore might provide a basis for an extension. These might include: the death or incapacity of the debtor where no administrator of the debtors' assets has not yet been appointed (Cf. art. 15); the debtor's misstatement or concealment of his identity or address which prevents the creditor from instituting legal proceedings.

2. There is no reason to extend the limitation period when the circumstance preventing institution of legal proceedings ceased to exist a substantial period (e.g. a year) in advance of the end of the period. Nor is there reason to extend the period for a longer period than is needed to institute legal proceedings to obtain satisfaction or recognition of the claim. For these reasons, the limitation period is extended so as not to expire before the expiration of one year from the date on which the preventing circumstance is removed. For example, a preventing

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1/ Under articles 12, 13 and 15, it is provided that the limitation period shall "cease to run" when legal proceedings are instituted. The present article in referring to facts preventing the creditor "from causing the limitation period to cease to run" refers to the actions described under articles 12, 13 and 15.

circumstance existing only in the first year of the prescriptive period would not lead to an extension. On the other hand, if a preventing circumstance exists during any part of the last year of the basic period, the limitation period would be extended. However, where a preventing circumstance ceases to exist before the end of the basic limitation period the availability of the extension of the period may depend upon whether the creditor could have taken "reasonable measures with a view to preserving his claim" within the remaining period.

3. The last sentence of article 19 places an overall limit beyond which no extension would be given under any circumstance.

ARTICLE 20

/Recourse actions/

/Where judicial or arbitral proceedings are instituted against the buyer within the limitatiion period prescribed by this Law either by a subpurchaser or by a person jointly and severally liable with the buyer, the buyer shall be entitled to an additional period of one year from the date of the institution of such proceedings for the purpose of obtaining recognition or satisfaction of his claim against the seller./

COMMENTARY

1. This article deals with situations like the following: (a) A sells goods to B who resells the goods to C. C institutes proceedings against B on the ground that the goods are defective. In such a case, recovery on C's claim against B may give rise to a recourse claim by B against A. (b) A similar situation can arise where B^1 and B^2 are jointly responsible on a sales contract to C and B^2 sues B^1 for contribution after paying C the full amount for damages. Here also, B^1 may have a recourse action against A. (If B^2 also claims recourse against A, this would fall within the type (a) situation, above.)

2. The application of the rule of this article may be clarified by an example:

Example 20: Suppose (see situation (a), above) A sold and placed goods at B's disposition on 1 June 1970 and B resold the goods to C on 1 June 1971. C institutes a proceeding against B on 1 May 1974. The limitation period governing the claim of B against A would ordinarily expire on 1 June 1974 (arts. 8, 9 (3), and 27). Article 20 entitled B "to an additional period of one year from the date of the institution of /the/proceedings" by C against B. Thus, the period would be extended until 1 May 1975.

3. It may be noted that the phrase in article 20 "within the limitation period prescribed by this Law" presents the question: Does the language refer to the period applicable to the claim of B against A or the claim of C against B? The language is intended to refer to the limitation period applicable to the claim of B against A, and not to the claim of C against B. In many cases the sale by B to C

will be a domestic sale for which no limitation perid is "prescribed by this law"; in addition, if the claim of C against B is an international sale and proceedings are not brought within the limitation period prescribed by the law, such a claim would be barred by prescription and would present no problem. Hence, it must be concluded that this article applies only when proceedings are instituted by B against C within four years after the claim of B against A arose: normally, this would be a period of four years after the goods were placed at the disposition of B by A. As a consequence, the extension provided by article 20 is of limited duration, and may be very brief. 1/

4. Recourse claims may arise substantially later than the time of the original sale between A and B. The limited extension permitted under article 20 may be illustrated by the following: (a) Suppose B in England buys from A in France a quantity of wine. B puts the wine in a warehouse for five years, and then resells to C in England. C sues and recovers from B on a ground that the wine was defective. Since four years had already expired after B's purchase of the wine when C sued B, this article would provide no extension of the period applicable to B's claim against A. (b) Suppose A in Norway sells goods to B in England. B resells to C in England. Assume further that for domestic transactions the limitation period is six years under the English law. After five years C sues B and recovers because of defects in the goods. Since four years had already expired after B's purchase of the goods when C sued B, this article would provide no extension of the period applicable to B's claim against A.

5. The majority of the Working Group concluded that these results were normal commercial risks for international buyers and that the original seller should not be exposed indefinitely to claims arising from resale by the buyer after the expiration of the limitation period. Moreover, where such risks presented a problem they could be covered by insurance.

6. On the other hand other members pointed out in modern trade intermediaries frequently resell packaged goods without inspection; the recourse claims of these intermediaries should be protected. The fear of indefinite delays in the institution of legal proceedings may be mitigated because applicable laws on sales often required notice of defects within a relatively short period. It was suggested that, unless the buyer is property protected in such situations, the buyer would be compelled to institute formal legal proceedings for the redress of the recourse claim against the seller, even though the necessity for such redress is speculative.

7. The rule of article 20, as explained in paragraphs 1 through 4, supra, is a product of the compromise between these conflicting views. Thus, the Working Group decided to report article 20 in brackets for decision by the Commission.

1/ Of course, this requirement is not intended to affect the local rule governing C's claim against B.

ARTICLE 21

/Extension where foreign judgement not recognized/

Where the creditor has obtained a final judgement or award on his claim in judicial or arbitral proceedings, but such judgement or award is not recognized in another jurisdiction, he shall be entitled, within a period of four years from the date of such final judgement or award, to institute legal proceedings in that jurisdiction for the purpose of obtaining satisfaction or recognition of his claim.

COMMENTARY

1. The principal question to which article 21 is addressed may be illustrated by the following example:

Example 21 A. A claim by A against B arose on 1 June 1970. On 1 June 1972 A instituted a legal proceeding in State X and on 1 June 1974 secured a final judgement on the merits of his claim. The courts of State Y will not recognize this judgement.

On these facts, article 21 grants A the additional period of four years from the date (1 June 1974) of the final judgement in State X to institute legal proceedings in State Y for the purpose of obtaining satisfaction or recognition of his claim. Thus, the limitation period would not expire until 1 June 1978 in State Y. This article applies to all cases where the final judgement or award "is not recognized" in another jurisdiction. The grounds for such refusal to recognize the final judgement rendered in another jurisdiction may vary. One important ground is the lack of agreement between the States concerned calling for the recognition of judgements. 1/

1/ With regard to the situation where the tribunal has been declared incompetent to adjudicate upon the claims of the creditor by a tribunal of higher authority within the same jurisdiction, see article 18 (1) (b) and its accompanying Commentary at para. 8.

MODIFICATION OF THE LIMITATION PERIOD

ARTICLE 22

/Modification by the parties/

(1) The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph 2 of this article.

(2) The debtor may, at any time after the commencement of the limitation period prescribed in articles 9 to 11, extend the limitation period by a declaration in writing to the creditor, provided that such declaration shall in no event have effect beyond the end of ten years from the date on which the period would otherwise expire or have expired in accordance with articles 8 to 11.

(3) The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law.

COMMENTARY

1. Paragraph 1 of article 22 declares a general rule that this Uniform Law does not allow parties to modify the limitation period. Exceptions to this rule, provided in paragraphs 2 and 3 are explained below.

I. Extension of the limitation period

2. Paragraph 2 permits the parties to extend the limitation period to the maximum of ten years from the date of expiration of the limitation period prescribed under articles 8 to 11. The extension can be accomplished by a unilateral declaration by the debtor; an effective declaration may, of course, be a part of an agreement by the parties. Extension of the limitation period can have important consequences for the rights of the parties. An oral extension could be claimed in doubtful circumstances or on the basis of fraudulent testimony. Therefore, only a declaration in writing can extend the period.

3. As to the time when the debtor can make such a declaration, paragraph 2 allows extension only "after the commencement of the limitation period prescribed in articles 9 to 11". It was considered that without this restriction a party with stronger bargaining power might impose extensions at the time of contracting; in addition, a clause extending the limitation period might be a part of a form contract to which the other party might not give sufficient attention. This restriction in the statute would deny effect to attempts to extend the period made at early stages of the transaction; e.g., at the time of contracting and

thereafter until the breach of contract or other event which under articles 9 to 11 commences the running of the limitation.

4. Allowance of extension after the commencement of the limitation period, on the other hand, may be useful to prevent the hasty institution of a legal proceeding close to the end of the period when the parties are still negotiating or are awaiting the outcome of similar proceedings in other fora.

II. Notices to other party; arbitration

5. One of the purposes of paragraph 3 of article 22 is to make clear that this article has nothing to do with the validity of a contract clause concerning a time-limit by reason of which the acquisition or exercise of a claim is dependent upon one party giving notice to the other party. A typical example would be modification of the length of period provided in the national law applicable to the contract of sales within which the buyer must give notice to the seller in order to preserve his rights when goods are defective. The provision of article 22 (3) is appropriate to accommodate those States which allow such contractual stipulations for notices. It may be noted that the Uniform Law has no effect on rules of local law involving "time-limit" (décheance) within which one party is required to give notice to the other party concerning defects in goods (e.g. ULIS, art. 39 (1)). 1/

6. Paragraph 3 of article 22 is also relevant to clauses in sales contract requiring that controversies under the contract be submitted to arbitration within a limited time. The paragraph refers to clauses in the sales contract "whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time". Attention is directed to the phrase "judicial proceedings". "Legal proceedings", as defined in article 1 (3) (f), "includes judicial, administrative and arbitral proceedings"; "judicial proceedings" is narrower in scope. As a result, the provisions of article 22 are inapplicable to clauses in a contract of sale "whereby the acquisition or exercise of a claim" is dependent upon the act of one party submitting the controversy to arbitration within a certain period of time. This adjustment was considered advisable to accommodate contracts, often used in commodity markets, providing that any dispute must be submitted to arbitration within a short period - e.g. within six months. 2/ With respect to the possible abuse of such a provision, paragraph 3 concludes with the proviso that such clause must be valid under the applicable law. For example, the applicable law may give the court the power, because of hardship to a party, to extend the period which was provided for in the contract; this Uniform Law does not interfere with the continued exercise of this power.

1/ See article 1 (2) and accompanying commentary at paras. 14 and 15.

2/ One member of the Working Group reserved his position with respect to paragraph 3 because of doubts concerning the justification for a distinction between judicial and arbitral proceedings with respect to the effects of modification to the limitation period by the parties.

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

ARTICLE 23

/Who can invoke limitation/

Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings.

COMMENTARY

1. The principal question to which article 23 is addressed is the following: If a party to legal proceedings does not assert that the action is barred by expiration of the limitation period, may the tribunal raise this issue of its own motion (suo officio)? This Law answers this question in the negative: expiration of the period shall be taken into consideration "only at the request of a party" to legal proceedings. The question, although answered differently in different legal systems, is not of large practical importance: a party who may interpose this defence will rarely fail to do so. Indeed, this provision does not prohibit a tribunal from drawing attention to the lapse of time, and inquiring whether the party wishes this issue to be taken into consideration. (Whether such is proper judicial practice is, of course, a matter for the rules of the forum.) In any event, the rules on limitation may only be invoked if a party requests.

ARTICLE 24

/Effect of expiration of the period; set-off/

(1) Subject to the provisions of paragraph 2 of this article and of article 23, no claim which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.

(2) Notwithstanding the expiration of the limitation period, the creditor may rely on his claim as a defence for the purpose of set-off against a claim asserted by the other party:

(a) if both claims relate to the same contract; or

(b) if the claims could have been set-off at any time before the date on which the limitation period expired.

COMMENTARY

I. Effect of expiration of the period

1. Paragraph 1 of article 24 emphasizes the Law's basic purpose to provide a limitation period within which the claims of the parties must be submitted to a

tribunal. See article 1 (1). Once the limitation period expires, the claim can no longer be recognized or exercised in any legal proceedings.

2. It will be noted that paragraph 1 is concerned with the recognition or enforcement of claims "in any legal proceedings". This Law does not attempt to solve all the questions, many of a theoretical nature, that might be raised with respect to the effect of the running of the limitation period. For example, if collateral of the debtor remains in the possession of the creditor after the expiration of the period of limitation, questions may arise as to right of the creditor to continue in possession of the collateral or to liquidate the collateral through sale. These problems may arise in a wide variety of settings and the results may vary as a result of differences in the security arrangements and in the laws governing those arrangements. Consequently, these problems are to be left to the applicable rules apart from this Law. It may be expected, however, that the tribunal of signatory States in solving these problems will give full effect to the basic policy of this Law with respect to the enforcement of rights or claims barred by limitation. See also article 6 (c). As to the effect of voluntary performance of an obligation after the expiration of the limitation period, see article 25 and accompanying commentary.

II. Set-off

3. The rules of paragraph 2 can be illustrated by the following examples.

Example 24 A. An international sales contract required A to deliver specified goods to B on 1 June of each year from 1970 through 1975. B claimed that the goods delivered in 1970 were defective. B did not pay for the goods delivered in 1975, and A instituted legal proceedings in 1976 to recover the price.

On these facts B may set-off his claim against A based on defects of the goods delivered in 1970. Such set-off is permitted under paragraph (a) of article 24 (2), since "both claims relate to the same contract"; B's set-off is not barred even though the limitation period for his claim expired in 1974, prior to his assertion of the claim in the legal proceedings and also prior to the creation of the claim by A against B for the price of the goods delivered in 1975. It will also be noted that under article 24 (2), B may rely on this claim "as a defence". Thus, if A's claim is $1,000 and B's claim is $2,000, B's claim may extinguish A's claim but it may not be used as a basis for affirmative recovery against A. 1/

Example 24 B. On 1 June 1970, A delivered goods to B based on a contract of international sale of goods; B claimed the goods were defective. On 1 June 1973, under a different contract, B delivered goods to A; A claimed these goods were defective and in 1975 instituted legal proceedings against B based on this claim.

1/ On legal proceedings calling for affirmative recovery by the defendant against the plaintiff, see article 12 (2). See also commentary to that article at paragraph 6 and its accompanying footnote.

In these proceedings B may rely on his claim against A for the purpose of set-off even though B's claim arose in 1970 - more than four years prior to the time when the claim was asserted in court. Under paragraph (b) of article 24 (2), the claims "could have been set-off" before the date when the limitation period on B's claim expired - i.e. between 1 June 1973 and 1 June 1974. (As was noted in connexion with the preceding example, the set-off is available "as a defence". B's claim may extinguish A's claim, but may not be used as a basis for affirmative recovery.)

ARTICLE 25

/Restitution of performance after prescription/

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

1. As has already been noted (commentary to article 24 at paragraph 2), expiration of the limitation period precludes the exercise or recognition of the claims of the parties in legal proceedings (See article 24 (1)). This is due to the basic purpose of prescription to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree of certainty in legal relationships. These policies are not violated where the debtor voluntarily performs his obligation after the expiration of the limitation period. Article 25 accordingly provides that the debtor cannot claim restitution of the performance which he has voluntarily performed "even if he did not know at the time of such performance that the limitation period had expired". Of course, this provision deals only with the effectiveness of claims for restitution based on the contention that the performance could not have been required because the limitation period had run. (The Uniform Law follows a similar approach with regard to the effect of acknowledgement by the debtor of his debt subsequent to the expiration of the limitation period. See article 17 (4).)

ARTICLE 26

/Interest/

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.

COMMENTARY

1. To avoid divergent interpretations involving the theoretical question whether an obligation to pay interest is "independent" from the obligation to pay the principal debt, article 26 provides a uniform rule that "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".

CALCULATION OF THE PERIOD

ARTICLE 27

/Basic rule/

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.

COMMENTARY

1. One traditional formula for the calculation of a limitation period is to exclude the first day of the period and include the last. The concepts of "inclusion" and "exclusion" of days, however, can be misunderstood by those who are not familiar with the application of this rule. Therefore, for the sake of clarity, article 27 adopts a different formula to reach the same result. Under this article, where a limitation period begins on 1 June, the day when the period expires is the corresponding day of the later year, i.e. 1 June. The second sentence of article 27 covers a situation which may occur in a leap year. That is, when the initial day is 29 February of a leap year, and the later year is not a leap year, the date on which the limitation period expires is 28 February of the later year.

2. Careful consideration was given to a proposal that the limitation period should be calculated in terms of calendar years following the end of the year in which the breach occurred. For example, if a breach occurred in June of 1970 (or on any other date in 1970), assuming a basic four-year period is chosen, the limitation period would expire on 31 December 1974. The Working Group recognized that this approach would have the merit of avoiding many questions as to the precise day on which the period commenced. See articles 9, 10 and 11. But this approach gives claims arising early in the year a substantially longer period than claims arising late in the year. In addition, this approach is different from what is employed in most legal systems. Consequently, in spite of the gain in certainty, this approach was rejected because of possibility that it might interfere with adoption of the law.

ARTICLE 28

/Effect of holiday/

Where the last day of the limitation period falls on an official holiday or other dies non juridicus precluding the appropriate legal action in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 12 or asserts a claim as envisaged in article 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or dies non juridicus on which

/...

such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

COMMENTARY

1. This article deals with the problem that arises when the limitation period ends on a day when the courts and other tribunals are closed so that it is not possible to take the steps to commence legal proceedings as prescribed in articles 12 or 15. For this reason, the article makes special provisions "where the last day of the limitation period falls on an official holiday or other dies non juridicus precluding the appropriate legal action in the jurisdiction where the creditor institutes judicial proceedings". In such cases, the limitation period is extended "until the end of the first day following that official holiday or dies non juridicus on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction".

2. It is recognized that the curtailment of the total period that might result from a holiday is minor in relation to a period calculated in years. However, in many legal systems, an extension is provided and may be relied on by attorneys. In addition, attorneys in one country might not be in a position to anticipate holidays in another country. The limited extension set forth in this article will avoid such difficulties.

PART II: IMPLEMENTATION

ARTICLE 29

/Implementing legislation/

(1) Each Contracting State shall, in accordance with its constitutional procedure, give to the provisions of Part I of this Convention the force of law, not later than the date of the entry into force of this Convention in respect of that State.

(2) Each Contracting State shall communicate to the Secretary-General of the United Nations the text whereby it has given effect to this Convention.

COMMENTARY

1. This article deals with the obligation of a Contracting State to adopt, in accordance with its constitutional law and practice, the necessary implementing legislation that would give the provisions of the Uniform Law the force of law within the territorial jurisdiction of that State.

2. It will be noted that the Uniform Law contained in Part I of this Convention is an integral part of the Convention itself and is not a separate instrument. It is considered that this arrangement will emphasize the international origin of the legislation and thereby promote uniformity in its interpretation and application. Also see article 7 and its accompanying commentary.

3. Paragraph (1) of this article does not spell out the manner in which a Contracting State should give the Uniform Law "the force of law". This is left to each Contracting State to decide according to its constitutional and legislative practice. However, this Uniform Law is not a "model law". It will be noted that under paragraph (1) the Contracting State shall give to "the provisions of" Part I the force of law; as a consequence, a Contracting State may not introduce changes that modify the intended meaning of those provisions.

4. When a Contracting State gives to the provisions of Part I of this Convention the force of law, the Uniform Law would, for the purpose of the conflict of law rules of a non-Contracting State, become part of the "national" law of that Contracting State. Consequently, when the parties have their places of business in different States, and the rules of private international law of the forum of a non-Contracting State point to the law of a State which has given the provisions of the Uniform Law the force of law, the applicable prescription rules are those of the Uniform Law and not the rules applicable to domestic transactions.

5. Paragraph (1) lays down a time-limit within which a Contracting State is bound to give the provisions of the Uniform Law the force of law, "not later than the date of the entry into force of this Convention in respect of that State"; that date is specified in article 42 of this Convention.

6. Paragraph (2) sets forth the obligation of each Contracting State to transmit to the Secretary-General the text of the Uniform Law which gives effect to the Convention.

ARTICLE 30

/Non-applicability as to prior contracts/

Each Contracting State shall apply the provisions of the Uniform Law to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

COMMENTARY

1. This article sets forth a definite time as the starting point for the taking of effect of the provisions of the Uniform Law with respect to contracts. It lays down that a Contracting State is bound to apply the Uniform Law only to contracts that are concluded on or after the date of the entry into force of this Convention in respect of that State. This starting point was preferred to other dates (e.g., the date the breach is committed or the date the claim arises) because it is more definite and because it avoids difficult problems of retroactivity.

2. The date of the entry into force of this Convention in respect of each Contracting State is dealt with, as pointed out above, in article 42 of the Convention.

PART III: DECLARATIONS AND RESERVATIONS

ARTICLE 31

/Declarations limiting the application of the Uniform Law/

(1) Two or more Contracting States may at any time declare that any contract of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States, shall not be considered international within the meaning of article 3 of this Convention, because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention.

(2) Any Contracting State may at any time declare with reference to such State and one or more non-Contracting States that a contract of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be considered international within the meaning of article 3 of this Convention because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention.

(3) If a State which is the object of a declaration made under paragraph 2 of this article subsequently ratifies or accedes to this Convention, the declaration shall not remain in effect unless the ratifying or acceding State declares that it will accept it.

COMMENTARY

1. Some States, in the absence of the present Uniform Law, apply the same or closely related rules to sales. These States should be permitted, if they choose, to continue to apply their present rules to transaction involving such States, and at the same time adhere to the Convention. The present article makes this possible.

I. Paragraph (1): Joint declaration by Contracting States

2. This paragraph enables any two or more Contracting States to make a joint declaration, at any time, to the effect that contracts of sale entered into by a seller having a place of business in one of these States and a buyer having a place of business in another of these States, "shall not be considered international within the meaning of article 3 of this Convention". Since under paragraph (1) of article 1 of this Convention the Uniform Law is applicable to contracts of international sale of goods as defined in article 3, the effect of the declaration under paragraph (1) of this article is to exclude such contracts from the scope of application of the Uniform Law.

3. The phrase "because they apply the same or closely related legal rules" is not intended to set a legal standard that would limit the power of Contracting States

to make such a declaration. In other words, once two or more Contracting States make the declaration set forth in paragraph (1) of this article, it will not be open to parties in litigation to assert that the declaration is not valid because the Contracting States concerned do not in fact apply the same or related legal rules.

II. Paragraphs (2) and (3): declaration by a Contracting State with respect to non-Contracting States

4. Paragraph (2) of this article is similar to paragraph (1) except that under paragraph (2), the declaration may be made unilaterally by any Contracting State with respect to non-Contracting States. Paragraph (3) provides that if a non-Contracting State which is the object of a unilateral declaration made by a Contracting State under paragraph (2) of this article, subsequently ratifies or accedes to this Convention, the validity of the declaration shall cease unless the ratifying or acceding State declares that it agrees to remain the object of that declaration.

ARTICLE 32

/Reservation with respect to actions for annulment of the contract/

A Contracting State may declare, at the time of the deposit of its instrument of ratification or accession, that it will not apply the provisions of the Uniform Law to actions for annulment of the contract.

COMMENTARY

1. In some legal systems where actions for annulment, as for fraud (dol), is required to establish nullity of the contract, the period of limitation for bringing such actions may be treated differently from the period governing the general limitation for the exercise of claims arising from the contract. For example, in such actions a different point from the point prescribed under this Law for the commencement of the period of limitation may be appropriate. Consequently, this article permits a State to declare that it will not apply the provisions of the Uniform Law to actions for annulment of the contract. Thus, the State which has made a reservation under this article may continue to apply its local rules (including the rules of private international law) to the actions for annulment of contract.

ARTICLE 33

/Declarations providing for sphere of application of ULIS/

Any State which has ratified the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964, or which has acceded to that Convention, may at any time declare:

(a) that, by way of derogation from article 3, paragraph 1, of this Convention, it will apply the provisions of article 1, paragraph 1, of the Uniform Law annexed to the Convention of 1 July 1964;

(b) that, in the event of conflict between the provisions of the Uniform Law annexed to the Convention of 1 July 1964 and the provisions of this Convention, it will apply the provisions of the Uniform Law annexed to the Convention of 1 July 1964.

COMMENTARY

1. It is recognized that a Contracting State which has ratified ULIS or has acceded to it, may wish to employ in the Uniform Law on Prescription the criteria used in ULIS for the definition of a contract of international sale. It is also recognized that such a State may wish to apply the provisions of ULIS in case they conflict with the Uniform Law on Prescription. This article is intended to enable such a State to achieve these purposes by way of reservation.

2. Subparagraph (a) enables a State that has ratified ULIS or has subsequently acceded to it to make a declaration that would in effect substitute article 1, paragraph 1 of ULIS for article 3, paragraph 1, of the Uniform Law on Prescription. Since this declaration may be made "at any time" the adoption of ULIS need not precede the adoption of the present Law.

3. As pointed out earlier, article 3, paragraph 1 of the Uniform Law employs one basic criterion for the definition of a contract of international sale of goods, namely, the parties must have their places of business in different States. Under article 1, paragraph 1, of ULIS this single criterion is insufficient; the transaction must also satisfy one of the three requirements relating to international carriage of the goods, offer and acceptance in different States, and delivery of the goods in a State other than the State in which the offer and acceptance were effected. See commentary to article 3 at para. 8.

4. Subparagraph (b) entitles a Contracting State that has ratified or subsequently acceded to ULIS to declare, at any time, that in the event of conflict between the provisions of ULIS and the provisions of the Uniform Law on Prescription, it will apply the provisions of ULIS. In this connexion, it has been suggested that article 49 of ULIS conflicts with some of the provisions of the Uniform Law on Prescription. 1/

1/ See foot-note 4 to commentary on the preliminary draft article 1 in A/CN.9/50, annex II.

ARTICLE 34

/Declarations regarding Conventions on the conflict of laws affecting limitation/

(1) Any State which has previously ratified or acceded to one or more Conventions on the conflict of laws affecting limitation in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification or accession to the present Convention, declare that it will apply the Uniform Law in cases governed by one of those previous Conventions only if that Convention itself leads to the application of the Uniform Law.

(2) Any State which makes a declaration under paragraph 1 of this article shall specify the Conventions referred to in that declaration.

COMMENTARY

1. Some States have ratified or acceded to one or more Conventions on the conflict of laws which include provisions on choice of law rules that might obligate them to apply national rules of law to cases which would otherwise be governed by the Uniform Law. 1/

2. It has been concluded that it should be made possible for these States to be parties to this Convention while remaining bound by such earlier Conventions. To this end, paragraph (1) of the present article provides that such a State may enter, at the time of the deposit of its instrument of ratification or accession to this Convention, a reservation to the effect that in "cases governed by" one of those previous Conventions on the conflict of laws, it would apply the provisions of the Uniform Law only "if that Convention itself leads to the application of the Uniform Law". See commentary to article 2 at para. 9.

3. Paragraph (2) provides that a State which enters such a reservation shall specify the Convention of Conventions on the conflict of laws to which it refers in its declaration.

ARTICLE 35

/Reservation to exclude international effect of interruption/

(1) Any State may declare, at the time of the deposit of its instrument of ratification or accession to the present Convention, that it shall not be compelled to apply the provisions of articles 12, 14, 15, 16 or 18 (1) (b) of this Convention where the relevant acts or circumstances took place outside the jurisdiction of that State.

1/ E.g., the question has been raised as to whether the 1955 Hague Convention on the Law Applicable to International Sale of Goods includes prescription within its scope.

(2) Any State which has not made a declaration under paragraph 1 of this article may at any time declare that it will not be compelled to apply the provisions of the articles referred to in that paragraph where the relevant acts or circumstances took place within the jurisdiction of a State which has made a declaration under that paragraph.

(3) Any State which makes a declaration under paragraph 1 or 2 of this Article shall specify the particular article or articles of this Convention in respect of which the declaration is made.

COMMENTARY

1. This article is concerned with a group of problems related to the following situation: Buyer has a claim against Seller arising from an international sale of goods. The claim arose in 1970. In 1973 Buyer instituted a judicial proceeding against Seller in State X. In 1975, Buyer instituted a judicial proceeding in State Y based on the same claim. (State Y has adopted the Uniform Law.) Since Buyer's claim arose more than four years prior to the institution of the proceeding in State Y, that proceeding would be barred unless the limitation period "ceased to run" (or was otherwise interrupted) when the legal proceeding was instituted in State X.

2. Article 35 permits States that adopt the Uniform Law (e.g., State Y) to make a declaration limiting the effect in such States of proceedings in other States (e.g., State X). Before examining the provisions of this article, it may be useful to consider some of the rules of the Uniform Law as they would apply to the above example in the absence of a declaration under article 35.

3. Article 12(1) provides that the limitation period shall cease to run when the creditor (Buyer, in the above example) performs any act recognized as instituting judicial proceedings "under the law of the jurisdiction where such act is performed". Thus, to return to the above example, when the judicial proceedings was instituted in State X, the limitation period "ceased to run" in all States that have adopted the Uniform Law.

4. There is a close relationship between the rules of the Uniform Law that the limitation period "cease to run" on the institution of legal proceedings (e.g., articles 12, 13 and 15), and the rules of article 18. Particularly relevant are the rules of article 18 on voluntary discontinuance of a proceeding or withdrawal of a claim (art. 18(1)(a)) and the further rules of article 18 on other disposition of the proceedings which prevent a decision on the merits of the claim (art. 18(1)(b) and (2)). (This relationship has been introduced in the commentary to article 18.) To return to the above example: If the Buyer, after instituting the judicial proceeding in 1973 in State X, in 1974 discontinues the proceeding or withdraws his claim, under article 18(1)(a) the limitation period "shall be deemed to have continued to run". As a result, the bringing of the action in State X becomes irrelevant with respect to the running of the period, and the action instituted in State Y in 1975 would be barred by the four-year period established

by the Uniform Law. 1/ If the court in State X "has declared itself or is declared incompetent, or where the legal proceedings have ended without a judgement, award or decision on the merits of the claim", under article 18(1)(b) the result is somewhat different: in such cases, "the limitation period shall be deemed to have continued to run and shall be extended for one year respectively from the date on which such declaration was made or from the date on which the proceedings ended". Thus, in the above example, if the court in State X declared itself incompetent on 1 February 1975, the limitation period would be extended to 1 February 1976. In the absence of a declaration under article 35, these events in State X would be given effect in State Y and an action brought in State Y until 1 February 1976 would not be barred by limitation.

5. It will be noted that article 18 deals with the effect of proceedings which, for various specified reasons, do not reach a decision on the merits. Where "the creditor has obtained a final judgement or award on his claim in judicial or arbitral proceedings", article 21 affords the creditor a period of four years from "such final judgement or award" for the institution of legal proceedings in a jurisdiction where such judgement or award "is not recognized". Article 21 thus provides that proceedings in one jurisdiction (State X, in the above example) have a specified "international" effect in jurisdictions that have adopted the Uniform Law (e.g., State Y) where the judgement or award in State X "is not recognized" in State Y. It will be noted that the four-year period provided by article 21 is substantially longer than the one-year period provided by article 18(1)(b) where the legal proceedings (as in State X) end without a decision on the merits.

6. Where the creditor has obtained a final judgement or award on his claim in State X, and this judgement or award is recognized in State Y, articles 18 and 21 do not provide a means to bring the limitation period to an end in State Y and in other States that have adopted the Uniform Law. (It will be noted that the limitation period "ceased to run" when the proceeding was instituted in State X.) 2/

7. Article 35 has been included in the Convention because of the view that adherence to the Convention by some States would be facilitated if they could, by declaration, limit the "international effect" that results from certain of the articles of the Uniform Law.

8. To this end, paragraph (1) of article 35 is intended to allow a State to restrict the applicability of articles 12, 14, 15, 16 or 18(1)(b) to relevant acts

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1/ As will be seen, the result would be the same if State Y has made the declaration permitted in article 35 and does not give effect to the institution of legal proceedings "outside the jurisdiction of that State". This commentary does not discuss the situation that would result if the creditor discontinues the proceeding in State X subsequent to the bringing of the proceeding in State Y.

2/ In this situation, where the judgement or award in State X is recognized in State Y, the draft Uniform Law may be premised on the view that legal rules outside the Uniform Law (variously termed res judicata, "merger" of the claim in the judgement, or the like) will prevent the assertion in State Y of the claim that culminated in a decision on the merits in State X. The full effectiveness of this approach would depend on the conclusion that the phrase in article 21, "the creditor has obtained a final judgement or award on his claim" is not limited to a judgement on the merits in favour of the creditor's claim.

or circumstances which take place within its own jurisdiction. Thus, any State making the reservation under this provision will not be compelled to give effect to the "interruption" of the limitation period which took place outside its jurisdiction under articles 12, 14, 15 or 16, nor will it be required to give effect to the one-year extension under article 18(1)(b) when legal proceeding in a foreign jurisdiction prove to be abortive. This reservation can be made by a State "at the time of deposit of its instrument of ratification or accession to the present Convention", by declaring that "it shall not be compelled to apply the provisions of articles 12, 14, 15, 16 or 18(1)(b) of this Convention where the relevant acts or circumstances took place outside the jurisdiction of that State". The phrase "shall not be compelled" is designed to make it clear that the giving of international effect to proceedings in another State is not prohibited by the making of the declaration permitted by article 35.

9. Paragraph (2) of article 35 is provided to encourage adoption of the Convention by States which may find it difficult to ratify or accede to the Convention without knowing in advance which States are going to make a reservation under article 35(1). Thus, under article 35(2), any State which has not made a reservation under article 35(1) is permitted to declare "at any time" that it will not be compelled to apply the provisions of articles 12, 14, 15, 16 or 18(1)(b) where the acts or circumstances referred to in those articles take place within the jurisdiction of a State which has made the reservation under article 35(1). 3/

10. Under paragraph (3) of article 35, any State making a reservation under article 35(1) or (2) must specify in respect of which article or articles that State is making a reservation. It may be assumed that a State that considers making a reservation limited to specific articles will give consideration to the close relationship, noted above in paragraph 4, between article 18(1)(b) and articles 12, 14 and 15.

ARTICLE 36

/Relationship with Conventions containing limitation provisions in respect of international sale of goods in special fields/

This Convention shall not prevail over conventions, already entered into or which may be entered into, and which contain provisions concerning limitation in respect of the international sale of goods in special fields.

3/ One delegate expressed doubt as to the usefulness of introducing this "reciprocity" approach on the ground that reciprocity is concerned with the legal relationships between States, while this Convention is concerned with the legal relationships between merchants. In the view of some delegates, however, paragraph (2) is necessary to provide equal treatment to the parties to the international sale of goods. Other delegates also raised the question whether the "reciprocity" approach should be extended to relations with a non-contracting State.

COMMENTARY

1. This article provides that present and future Conventions which contain provisions concerning limitation in respect of the international sale of goods in special fields, shall, in case of conflict, prevail over this Convention.

2. The phrase "in special fields" is intended to indicate that only those Conventions that deal with international sales of a particular commodity, or a special group of commodities, rather than international sale of goods in general, shall prevail over the provisions of this Convention.

ARTICLE 37

/Prohibition of any other reservation/

No reservation other than those made in accordance with articles 31 to 35 shall be permitted.

COMMENTARY

1. To retain uniformity in result from the application of the Uniform Law, this article makes clear that no reservation should be permitted other than those expressly allowed in part III of the Convention.

ARTICLE 38

/Communication and withdrawal of declarations/

(1) Declarations made under articles 31 to 35 of this Convention shall be addressed to the Secretary-General of the United Nations. They shall take effect /three months/ after the date of their receipt by the Secretary-General or, if at the end of this period the present Convention has not yet entered into force in respect of the State concerned, at the date of such entry into force.

(2) Any State which has made a declaration under articles 31 to 35 of this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect /three months/ after the date of the receipt of the notification by the Secretary-General. In the case of a declaration made under article 31, paragraph 1, of this Convention, such withdrawal shall also render inoperative, as from the date when the withdrawal takes effect, any reciprocal declaration made by another State under that paragraph.

COMMENTARY

1. This article sets forth the procedures to be followed with respect to the making or withdrawal of declarations provided for in articles 31 to 35 of the Convention. The three-month period that is required for the declaration or its withdrawal to take effect is placed between square brackets to indicate that no final decision was taken by the Working Group on Prescription as to the suitability of the length of this period.

2. The provision in the last sentence of paragraph (2) is consistent with the policy expressed in article 31(3) favouring reciprocal effect with respect to such declarations.

PART IV: FINAL CLAUSES

/The provisions of this part were not considered by the Working Group/

ARTICLE 39

/Signature/[1]

The present Convention shall be open until [ ] for signature by [ ].

ARTICLE 40

/Ratification/[2]

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE 41

/Accession/[3]

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 39. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE 42

/Entry into force/[4]

(1) The present Convention shall enter into force /six months/ after the date of the deposit of the [ ] instrument of ratification or accession.

(2) For each State ratifying or acceding to the present Convention after the deposit of the [ ] instrument of ratification or

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1/ Based on article 81 of the Vienna Convention on the Law of Treaties.

2/ Based on article 82 of the Vienna Convention on the Law of Treaties.

3/ Based on article 83 of the Vienna Convention on the Law of Treaties.

4/ Based on article 84 of the Vienna Convention on the Law of Treaties.

accession, the Convention shall enter into force /six months/ after the date of the deposit of its instrument of ratification or accession.

ARTICLE 43

/Denunciation/[5]

(1) Any Contracting State may denounce the present Convention by notifying the Secretary General of the United Nations to that effect.

(2) The denunciation shall take effect /twelve months/ after receipt of the notification by the Secretary-General of the United Nations.

ARTICLE 44

/Declaration on territorial application/

Alternative A[6]

(1) Any State may, at the time of the deposit of its instrument of ratification or accession or at any time thereafter, declare, by means of a notification addressed to the Secretary-General of the United Nations, that the present Convention shall be applicable to all or any of the territories for whose international relations it is responsible. Such a declaration shall take effect /six months/ after the date of receipt of the notification by the Secretary-General of the United Nations, or, if at the end of that period the Convention has not yet come into force, from the date of its entry into force.

(2) Any Contracting State which has made a declaration pursuant to paragraph 1 of this article may, in accordance with article 43, denounce the Convention in respect of all or any of the territories concerned.

Alternative B[7]

The present Convention shall apply to all non-metropolitan territories for the international relations of which any Party is responsible except where the previous consent of such a territory is required by the Constitution of the Party or of the territory concerned, or required by custom. In such a case the Party shall endeavour to secure the needed consent of the

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5/ Based on article XII of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods, herein cited as the "Hague Sales Convention".

6/ Based on article XIII of the Hague Sales Convention.

7/ Based on article 27 of the Convention on Psychotropic Substances, 1971.

territory within the shortest period possible, and when the consent is obtained the Party shall notify the Secretary-General. The Convention shall apply to the territory or territories named in such a notification from the date of its receipt by the Secretary-General. In those cases where the previous consent of the non-metropolitan territory is not required, the Party concerned shall, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which this Convention applies.

ARTICLE 45

/Notifications/[8]

The Secretary-General of the United Nations shall notify the Signatory and Acceding States of:

(a) the declarations and notifications made in accordance with article 38;

(b) the ratifications and accessions deposited in accordance with articles 40 and 41;

(c) the dates on which the present Convention will come into force in accordance with article 42;

(d) the denunciations received in accordance with article 43;

(e) the notifications received in accordance with article 44.

ARTICLE 46

/Deposit of the original/

The original of the present Convention shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention in the Chinese, English, French, Russian and Spanish texts, all of which are equally authentic.

DONE at /place/, /date/.

8/ Based on article XV of the Hague Sales Convention.