

UNITED NATIONS

GENERAL  
ASSEMBLY



Distr.  
RESTRICTED

A/CN.9/WG.1/WP.11  
16 June 1971  
ENGLISH  
ORIGINAL: FRENCH

UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW

Working Group on Time-limits  
and Limitations (Prescription)  
in the International Sale  
of Goods

Third session  
New York, 30 August 1971

REPORT ON ACKNOWLEDGEMENT BY DEBTOR AND NOVATION

Prepared by Mr. Mohsen Chafik (United Arab Republic)

1. According to paragraph 1 of article 13, where the debtor acknowledges his obligation to the creditor, the limitation period is interrupted and a new limitation period of the same type (three or five years) commences to run from the date of such acknowledgement.

Paragraph 2 adds that in order to produce this interruptory effect the acknowledgement must be evidenced in writing.

2. During the Commission's debate on paragraph 2, one representative "expressed doubt as to the suitability or efficiency of this requirement in view of the difficulty of defining the difference between an acknowledgement in the sense of the present Law and the creation of a new independent contractual obligation ("novation") which, in his view, is outside the Law and which under the applicable law often may be established by a simple oral statement" (report of the Working Group on Prescription, document A/CN.9/50, Annex II, p.35, foot-note 1).

3. It is clear that this observation raises a question of capital importance, because if the act emanating from the will of the parties were not just a simple acknowledgement of the debt but also the substitution of a new obligation for the former one, the new debt having a cause different from that of the former debt, could not be subject to the limitation peculiar to the contract of international sale but only to the limitation provided for by the applicable law.

If, on the contrary, the acknowledgement did not entail novation, the debt, since it would retain its original cause, would be subject to a new limitation period of the same type as the first, i.e. a period of three or five years.

4. Everything depends, therefore, on the content of the acknowledgement of the debt. If it is an acknowledgement entailing novation, the nature of the limitation will be altered and it will be necessary to have recourse to the applicable law. If, on the contrary, it is a simple acknowledgement without any intention to novate, the same debt resulting from the contract of international sale will remain in existence and the new limitation period to run will be that prescribed by the Uniform Law.

5. What then should be the criterion for distinguishing between simple acknowledgement and acknowledgement entailing novation? Would it be sufficient for an acknowledgement to be evidenced in writing in order for it to entail novation automatically?

/...

6. Let us first define the concept of novation and then see under what circumstances an acknowledgement of debt evidenced in writing may entail novation.

7. Novation occurs when an existing obligation is extinguished by the creation of a new obligation intended to replace it.

In order for such a succession of obligations to take effect, two essential conditions must be present:

(a) The new obligation must be differentiated from the original obligation by a new element. This element may be a change of creditor, of debtor, or of the debt itself by modification of the nature of its object or by transformation of its cause.

(b) The "animus novandi", i.e. the intention to effect novation, is also necessary. This intention cannot be presumed but must emerge clearly from the factual circumstances.

8. It is obvious that an acknowledgement, even in writing, does not necessarily comprise an intention to novate. It may be merely a simple evidencing of the existence of the debt, and in that case it would interrupt the limitation period without changing its nature.

A written acknowledgement may, however, also comprise an intention to novate, in which case it will interrupt the limitation period and change its nature. The new limitation period which will commence to run will not be that prescribed by the Uniform Law but that prescribed by the applicable law.

9. However, the writing acknowledging the debt can effect novation only if it meets the two following conditions:

(a) It must be a "separate instrument", i.e. independent of the contract of sale.

(b) The separate instrument must be complete and self-contained, obviating the need to refer back to the original document which it replaces, so that the debtor may be regarded as bound exclusively by the terms of the new instrument.

These two conditions constitute the criterion which should be applied for the purpose of differentiating between simple acknowledgement and acknowledgement entailing novation.

10. If applied to the debt in respect of the price, for example, this criterion would entail recognition of novation and, hence, recourse to the applicable law in such cases as the following:

- Where the buyer agrees that the amount of the price shall be entered in his current account with the seller.<sup>1/</sup>

- Where the buyer agrees to consolidate all his debts to the seller (including the price) and constitutes himself, by a separate act, debtor in respect of the total amount of these debts.

- Where the buyer, in an inventory drawn up after the death of the seller, makes a statement acknowledging that he has not paid the price.

11. On the other hand, applying the same criterion, acknowledgement of the debt in respect of the price will be a simple acknowledgement which does not entail novation and hence leaves the new limitation period still governed by the Uniform Law in such cases as the following:

- If the acknowledgement is evidenced by a note written and signed by the buyer in the margin of the contract of sale.

- If it is expressed in a letter in which the buyer asks the seller to postpone the date on which the price is payable or to make the amount payable by instalments.

- If it is made in a letter in which the buyer thanks the seller for the terms of payment which he has allowed him.

12. It remains to be seen whether the text of article 13 should be changed in order to introduce the two principles which we have just defined, namely:

(a) The new limitation period will not be that prescribed by the Uniform Law (three or five years) unless the acknowledgement in writing does not entail novation of the debt.

(b) The writing evidencing acknowledgement of the debt cannot effect novation unless it is separate from the contract of sale and itself establishes a complete and independent obligation.

13. We believe that such a change is not absolutely necessary, since the two principles in question are of a purely theoretical nature. It is preferable to leave them to be dealt with by legal theory and judicial practice. At most, they might be mentioned in the explanatory note to the Law or in a commentary. The actual text of the Law is not, however, the proper place for them.

---

<sup>1/</sup> In this case novation has the special characteristic that although the original debt ceases to exist upon its entry in the account, the new debt will not appear until the account is made up.

14. Nevertheless, if such a change were considered necessary, we would suggest that the first two paragraphs of article 13 be merged to form a single text making a reservation in respect of cases where the acknowledgement of debt entails novation. In view of the highly theoretical character of the second principle concerning the criterion for differentiating between the two types of acknowledgement, we maintain that it should be left out of the text.

15. The text as redrafted would thus read:

"Where the debtor acknowledges in writing his obligation to the creditor, a new limitation period of three or five years shall commence to run by reason of and from the date of such acknowledgement, unless the latter entails novation of the debt."

16. One last point remains to be clarified. Whereas, under article 13, acknowledgement of the debt cannot interrupt the limitation period unless it is evidenced in writing, novation, on the other hand, may be effected, under some national legislations, by a simple oral statement. Uncertainty might arise if a creditor whose right had been made subject to limitation were to avail himself of an oral acknowledgement of debt made by the debtor before the expiry of the limitation period to assert that that act constituted novation creating a new debt not affected by the limitation.

17. It is obvious that this problem has no bearing on article 13, because the two operations involved (oral acknowledgement and novation) lie outside the scope of the text. Any attempt to revise the text to cover such cases should therefore be avoided.

18. It should nevertheless be noted that this problem raises a question of definition, which the judge of the substantive question must resolve on the basis of the principle that novation implies the creation of a new obligation which differs from the extinguished obligation by reason of an essential element, such as a change of debtor, of creditor, of the object of the obligation or of its cause.

It follows that if the oral statement does not entail such a change, it is in that case a simple oral acknowledgement which cannot, under article 13, interrupt the limitation period. If, on the contrary, it effects a change in the actual existence of the debt it constitutes novation, an operation which lies outside the scope of the Uniform Law.