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REPORT ON JUDICIAL PROCEEDINGS AND INTERRUPTION
OF PRESCRIPTION BY PROFESSOR SHINICHIRO MICHIDA,
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I. INTERRUPTION

The prescription period shall be interrupted by any action or act recognized, under the law of the jurisdiction where such action or act takes place, as constituting legal grounds for the purposes of interruption.

Note

Reference should be made to paragraphs 82-88 of the report of the Working Group on Prescription (A/CN.9/30) of 3 November 1969 (hereinafter referred to as the Report).

Comments

1. At the first meeting of the Working Group, consideration was given to the Draft European Rules on Extinctive Prescription, rule No. 7 (see Report, para. 85), and one delegate suggested the following text for future consideration: "The period shall be interrupted by the creditor performing any action recognized, under the law of the jurisdiction where such performance takes place, as instituting legal proceedings for the purpose of obtaining satisfaction of the right" (Report, para. 87).

At the third session of UNCITRAL, which met from 6 to 30 April 1970, only the distinguished delegate of Italy could find the opportunity to make a comment specifically upon the above formulation noted in paragraph 87. The view was expressed that "the solution ... was too narrow and might prompt parties to institute unnecessary actions at law" and a "clear indication of intention should be considered sufficient" (20 April 1970, A/CN.9/C.1/SR.19, page 3). This is certainly a point which requires further consideration by the Working Group.

As to the formulation set forth in paragraph 87 of the Report, the requirement of "instituting legal proceedings for the purpose of obtaining satisfaction of the right" (emphasis added) is vague, uncertain and ultimately must be determined in accordance with "the law of the jurisdiction where such performance takes place". Therefore, it is proposed to adopt the wording " ... recognized, under the law of the jurisdiction where such action or act takes place, as constituting legal grounds for the purpose of interruption".

2. As to the formulation set forth in paragraph 87 of the Report, there is a question of interpretation of the meanings of "action" and "legal proceedings" and of relation between the two concepts. Should "action" be limited to "legal proceedings"? It is thought better to leave the question to the law of forum and to prevent any misunderstanding and misapplication.

3. Paragraph 88 of the Report notes discussion of whether and at which point the prescriptive period should be interrupted in case of bankruptcy proceedings against the debtor, proceedings for corporate reorganization or other insolvency proceedings. One representative proposed "the filing of a claim in the insolvency proceedings" and another representative proposed "the commencement of insolvency proceedings". No decision was reached by the Working Group on this point. This question is to be solved, under the above proposed formulation, in accordance with "the law of jurisdiction where such action or act takes place, as constituting legal grounds for the purpose of interruption".

II. NEGOTIATION AND SUSPENSION

Where a creditor has made a demand of performance without taking an action or act recognized, under the law of the jurisdiction where such action or act is to take place, as constituting legal grounds for the purpose of interruption, prescription shall be regarded as having been suspended if the creditor should take the action or act recognized as constituting legal grounds for the purpose of interruption within a period of one year from the day on which the latest demand was made.

Comments

1. This is a new proposal. The law of prescription is a harsh one and so is the Convention. As commented by the distinguished Delegate of Italy at the third session of UNCITRAL (see comment 1 to I. INTERRUPTION, supra), any solution which requires legal action or suit for the purpose of interruption "might prompt parties to institute unnecessary actions at law". This is not a desirable situation, but also it is very harsh to the creditor (buyer or seller) who has worked friendly and in good faith to settle his claim against the other party (seller or buyer) if the elusive attitude of the other party has led to the loss of the creditor's right by virtue of prescription. International transactions differ from domestic transactions in the sense that the suit in a foreign country is, to most traders or merchants, a formidable thing to undertake. There are language barriers, differences in legal procedures, difficulty in getting appropriate lawyers and expenses of the suit in a foreign country. A foreign State is a "sanctuary" for the debtor unless the creditor dares raise suit in the State. Under the proposed formulation above, if the creditor (buyer or seller) should institute the suit against the other party "within a period of one year from the day on which the latest demand was made", prescription shall be regarded as having been suspended. With this rule, the creditor (buyer or seller) can safely negotiate with the other party over his claims, expecting a right answer from the other party. If the right answer has not come at the very end of the prescription period, the party can utilize the grace period of one year in finding an appropriate lawyer in the foreign country and in giving the lawyer sufficient time for preparation of the case to be filed before the court.

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A lawyer who is capable of dealing with international litigations is usually a busy person. The length of grace period (one year) is proposed in consideration of two factors: first, time to find a right lawyer and to make a retaining agreement; and secondly, time to collect evidence, to draft the complaint and to have consultations with the lawyer.

2. Rule No. 17 (2) of the Draft European Rules provides that "for the purpose of negotiations in case of a dispute between them ..., the creditor and the debtor may agree upon a longer prescription period ..." (quoted in Report, para. 105). However, if one of the parties refuses prolongation, rule No. 17 (2) would not work at all. Unfortunately, this could easily occur in international transactions and negotiations. At the first meeting, the Working Group on Prescription agreed that "a provision dealing with this general problem would be useful" (see Report, para. 107). The proposed rule above is a new formulation to cope with this general problem effectively in realistic terms of international transactions and negotiations. With this rule, the Convention can be adopted more widely all over the world.

III. FAILURE OF LEGAL ACTIONS AND PRESCRIPTION

Where an action or act recognized, under the law of the jurisdiction where such action or act takes place, as constituting legal grounds for the purpose of interruption, has not resulted in a final and conclusive judgement of any court upon which immediate enforcement can be effected, prescription shall not be regarded as having interrupted but, except in the case of withdrawal, shall not take effect before the expiry of a period of six months from the day on which the action ended.

Where such action or act has successively been rejected by courts on the ground of lack of jurisdiction, suspension of prescription provided under the preceding paragraph shall not be counted and cumulated more than one year.

Note

The above rule is based upon rule No. 11 (2) of the Draft European Rules and the views expressed by the Working Group on Prescription (Report, paras. 72-73).

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IV. ENFORCEMENT OF JUDGEMENT

Alternative A

This Convention shall not apply to the prescription of the rights of the seller and the buyer to enforce claims established by a final and conclusive judgement of any court upon which immediate enforcement can be effected.

Notes

1. Paragraphs 62 and 92 of the Report state that the UNCITRAL Convention should not apply its limitation period to actions to enforce judgements and the question lies outside the scope of the proposed convention.

2. However, it should be recalled that the meeting which produced the Report was the first one and its duration was extremely short (five days). Paragraph 62 of the Report notes that "one member reserved his position on this issue" and "others wished to have the issue studied further at a later stage". Thus, paragraph 125 of the Report states that "even the conclusions reached should be regarded as provisional and incomplete, and will require further study".

3. The third session of UNCITRAL, which met from 6 to 30 April 1970, could briefly discuss the Report in three days, namely, on 16, 17 and 20 April, but could not discuss at all this particular question or paragraphs 60-62 and 92 of the Report.

Alternative B

In respect of rights established by a final and conclusive judgement of any court upon which immediate enforcement can be effected, the period of prescription shall be ten years.

Note

The foregoing rule will be provided in the appropriate part of the Convention. Rule 4 (2) of the Draft European Rules of Extinctive Prescription sets a ten-year prescriptive period for claims established by "a final and conclusive judgement, by an arbitral award and by any other document on which immediate enforcement can be obtained".

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Comments

Paragraph 61 of the Report, setting forth the reasons why the question should be left outside the scope of the Convention, notes that "the time for enforcement of a judgement was a procedural matter for the forum" (emphasis added). But the matter is certainly something on which unification can be contemplated and it is not quite agreeable to describe it simply as "a procedural matter for the forum". The same paragraph also notes "it might be difficult to justify a different prescriptive period for suits on judgements arising from international sale of goods than for judgements arising from other transactions". But few would disagree that it is better to set forth even a different uniform period on the matter than to leave things as they are, if the members of UNCITRAL could come into some agreed rule. It is proposed that the Working Group consider the question and attempt to bring it within the scope of the Convention.
