



UNITED NATIONS
GENERAL ASSEMBLY
LIBRARY



Distr.
RESTRICTED

A/CN.9/WG.1/WP.12
29 June 1971

ORIGINAL: ENGLISH

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

PROPOSALS AND COMMENTARIES CONCERNING
THE SCOPE OF APPLICATION OF THE UNIFORM
LAW ON PRESCRIPTION

Prepared by Mr. Jerzy Jakubowski,
representative of Poland

I

The proposals herein are based on provisions on the scope of application of the uniform law on sales adopted by the Working Group on Sales, assuming that the majority of members of the Commission were for the same or at least similar (if possible) determination of the scope of application of both the Uniform Law on Sales and the Uniform Law on Prescription and that, in principle, the determination of the scope of application proposed by the Working Group on Sales has found the approval of the majority of the members of the Commission.

In one point I try to comply with the wishes of the minority of the members of the Commission (i.e. of the representatives of Austria, Belgium, France, Ghana, India and United Arab Republic) who demanded to introduce the condition of carriage of goods from one State to another as premise of the application of the uniform law.

II

For the above-mentioned reasons I would like to propose the following formulation of the respective provisions:

Article 3

1. The present law shall apply to the limitation of legal proceedings and to the prescription of the rights as defined in articles 1 and 2 if the parties have their places of business in different States and if the goods, according to the contract, have to be carried from one State to another or before the conclusion of the contract have been carried for sale from one State to another.

2. For the purpose of the present law:

(a) the parties shall be considered not to have their places of business in different States if, at the time of the conclusion of the contract, one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State;

(b) where a party has places of business in more than one State, his place of business 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 concluding the contract;

(c) where a party does not have a place of business, reference shall be made to his habitual residence;

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

Article 4

1. The present law shall apply to the limitation of legal proceedings and to the prescription of the rights in the case of contracts defined in article 3:

(a) if the parties have so agreed or if they have submitted their contract to the law of a Contracting State, or

/...

(b) if according to the applicable rule on the conflict of laws the law of one of the contracting States is to apply.

2. The present law shall also apply in default of circumstances mentioned above in paragraph 1 if both parties have their places of business in the contracting States.

3. "Contracting State" means a State which is party to the convention dated... relating to....

4. Any two or more States shall not be considered to be different States if a declaration to that effect made under article... of the convention dated... relating to... is in force with respect to them.

Article 5

1. The present 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 knew that the goods were bought for a different use;

(b) by auction;

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

2. Neither shall the present law apply to sales:

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

(b) of any registered ship, vessel or aircraft.

Article 6

1. The present law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods.

2. Contracts for supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present 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.

III

It seems to me that a commentary is needed only with respect to article 3, paragraph 1, article 4, paragraph 1 and article 5, paragraph 2 (b).

Ad article 3, paragraph 1

Taking into consideration the suggestions made by some representatives, the test for the "internationality" of the sale, (in addition to the location of the parties' places of business in different States), includes the requirement of transportation of the goods from one State to another. To comply with the wish of the representative of the USSR, I have also included a modification recognizing as an international sale a sale of goods already carried from one State to another, e.g. goods held in stock or shown at a fair or exhibition. It seems to me that the requirement "for sale" provided in article 3, paragraph 1 is acceptable because usually the goods shown at exhibitions are sold after closing the exhibition. Doubts as to the fact whether the goods have been transported for sale don't exist in the case of sending the goods to show them on a fair or to keep them in stock.

Ad article 4, paragraph 1

Lawyers accustomed to regard prescription as a question of substantive law, do not doubt that the choice by the parties of the law governing their contract can be regarded as having as the consequence the application of the provisions of this law concerning prescription (article 4, paragraph 1). Such an approach to the said question can be of course doubtful for lawyers from the Common Law countries. It seems to me, however, that the latter jurists professing the tradition of respect toward the parties' autonomy, should be ready to recognize the need to insert in the uniform law a provision stipulating that in case the parties have chosen the law of a contracting State to govern their contract, the uniform law on prescription adopted by this State shall apply to this contract. It wouldn't, I suppose, be desirable to conclude that even though a contract is governed by the law of a contracting State, the non-unified internal rules on prescription of this State or rules on prescription of another State could be applied.

I suggest therefore the principle that in case the parties have chosen the law of a contracting State to govern their contract the Uniform Law on Prescription adopted by this State is automatically to be applied.

/...

On the other side there arises this question:

Should the uniform law on prescription apply in the case where the parties have so agreed but have not stipulated the law governing their contract to be the law of a contracting State? After some hesitation I decided to postulate the recognition of the legal efficacy of such an agreement. This problem would arise only in the case where no other premise exists for the application of the uniform law on prescription: i.e. where the application of the uniform law does not result from the fact that the parties have submitted their contract to the law of a contracting State or from the competent rule on the conflict of laws providing the law of a contracting State to be applied or from the fact that the parties have their places of business in the contracting States. My positive attitude toward the recognition of the legal efficacy of agreements of the parties according to which the uniform law on prescription shall apply is based on the assumption that the parties' will should be respected.

Accepting this assumption, I fall into an inconsistency, not foreseeing efficacy of the exclusion by the parties of the uniform law in the case where its application is resulting from the fact that the places of business of both parties are in the contracting States (article 4, paragraph 2) or from the fact that the competent rule on the conflict of laws provides the law of a contracting State to be applied (article 4, paragraph 1(b)). However, it seems to me, it is desirable to aim at applying the uniform law as frequently as possible and, therefore, not to allow the parties to exclude its application.

Ad article 5, paragraph 2 (b)

It seems to me that excluding the application of the uniform law to ships, vessels and aircraft under construction is not justified. I should like to propose, therefore, to limit this exclusion to ships, vessels and aircraft already registered.

IV

If the Working Group on Prescription would not share the views expressed in section III of this report, the text of the respective provisions would be as follows:

/...

Article 3

1. The present law shall apply to the limitation of legal proceedings and to the prescription of the rights as defined in articles 1 and 2 if both parties have their places of business in different Contracting States or if according to the applicable rule on conflict of laws the contract is governed by the law of one of the Contracting States.

2. The present law shall also apply if the parties have so agreed or if they have submitted their contract to the law of a Contracting State.

3. For the purpose of the present law:

(a) the parties shall be considered not to have their places of business in different States if, at the time of concluding the contract, one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State;

(b) where a party has places of business in more than one State, his place of business 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 concluding the contract;

(c) where a party does not have a place of business, reference shall be made to his habitual residence;

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

4. A "Contracting State" means a State which is Party to the Convention dated... relating to....

5. Any two or more States shall not be considered to be different States if a declaration to that effect made under article... of the Convention dated... relating to... is in force with respect to them.

Article 4

(as article 5 in section II of this report, with exception of paragraph 2 (b) which should be formulated as follows:

(b) of any ship, vessel or aircraft, which is or will be subject to registration.)

Article 5

(as article 6 in section II of this report.)
