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ARTICLE 10 AND INTERNATIONAL EFFECT OF INTERRUPTION BY LEGAL PROCEEDINGS INSTITUTED IN A FOREIGN STATE

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This article provides for interruption of the limitation period when the creditor performs an act recognized under the lex fori[1/] as "instituting judicial proceedings for the purpose of obtaining satisfaction of his right" or as "invoking his right" in the course of judicial proceedings instituted against the debtor "in relation to another right". The article also mentions acts performed "by way of counterclaim", which are deemed to have been performed at the same time as the act relating to the principal claim.

The question of limitation periods and grounds for interruption of the limitation period does not generally present any difficulties in municipal law.

The various ways in which a civil law limitation period may be interrupted are laid down by the national codes: generally, what is required is a procedural act or an unequivocal indication of the desire of the parties to exercise their rights or to discharge their obligations.

Thus, the Civil Code requires "a summons, a payment order or attachment, notified to the person whom the plaintiff wishes to prevent from availing himself of prescription". According to the Répertoire pratique du droit belge

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1/ It is the lex fori which is meant by the expression "the law of the jurisdiction where such act is performed".

(Prescription en matière civile, No. 253), "a summons is not only an order to appear before a particular court but any legal claim made during the course of proceedings already instituted, such as a motion introducing a counterclaim". What is required is that an action should be instituted during the course of proceedings and should constitute a manifestation of a desire not to lose the right of litigation.

However, while the interruptive effect of proceedings instituted before national courts raises few difficulties, it is quite a different matter when the judicial proceedings or acts are instituted before the courts or upon the intervention of the authorities of other countries.

Thus, the Civil Code merely stipulates that a summons, even to appear before a judge, who has no jurisdiction in the matter, interrupts the limitation period; it says nothing about a summons to appear before a foreign judge.

The rules of conflicts of law are not, as will be explained below, of great assistance. Even if it is possible to determine the law applicable to the methods by which the limitation period may be interrupted, either by making extinctive prescription subject to the lex fori or by applying the law under which the obligation or contract was entered into, one does not know what methods of interruption of the limitation period are accepted under that law and particularly whether it recognizes as "interruptive" any action instituted before a foreign judge or any act, judicial or extra-judicial, performed abroad.

This uncertainty concerning national legislations obviously gives the members of the UNCITRAL Working Group considerable opportunity for innovation and enables them to adopt very flexible rules, drafted or conceived broadly enough to allow a liberal interpretation.

1. Without exception, the legislations of civil law countries state that a summons has the effect of interrupting the limitation period, but they differ on points of detail.2/

The effects of the interruption of extinctive prescription are likewise regulated in different ways in the various civil law countries.

2/ See F. Kallmann's study, "L'effet sur la prescription libératoire des actes judiciaires intervenus en pays étranger", Revue Critique de Droit International Privé (1948), p. 1. See, for example, in Swiss law, article 135 of the Code of Obligations: an incidental plea before a tribunal or arbitrators; in French law, article 2244 of the Civil Code: summons, payment order or attachment.

The interruptive effect of a claim may continue for the whole duration of the proceedings up to the last procedural act after which the suit may lapse or be subject to limitation.

Sometimes a new limitation period commences after the interruption and, during the proceedings, after each legal act of the parties and each order or decision of the judge (Swiss Code of Obligations).

Alternatively, the interruption may last until the proceedings have been terminated by a judgement having the force of res judicata or in any other way (German Code of Civil Procedure, § 211).

The limitation periods are also different in the various legal systems.

Lastly, in most civil law countries, the character of prescription changes following a judgement in favour of the plaintiff: the statutory limitation period replaces a short limitation period, (inversion of prescription).

2. In international private law, what is the law applicable in the case of an action which is not purely national?

French courts have adopted widely varying solutions: the lex fori, the law of the domicile of the debtor, and even lex contractus. According to Kallmann, the legal precedents, which are already contradictory and unsatisfactory with regard to the law applicable to prescription, are totally inadequate on the subject of interruption of the limitation period by a summons or other foreign judicial acts.

On the current state of French international private law, see Batiffol, "Droit international privé, fourth edition, No. 615. After having long applied the law of the domicile of the debtor, France moved in the direction of the lex contractus, at least when the provisions of the latter are more favourable to the debtor than the law of his domicile (cf. Jurisclasseur de droit international, Fasc. 554, No. 182 et seq.). In France, the law of the domicile of the debtor had been applied since 1869, to determine the duration of extinctive prescription as well as its starting-point and grounds for interruption (Paris, 6 July 1937, Revue Critique de Droit International Privé, 1938, p. 280). However, French practice developed and a judgement of 28 March 1960 (Rev. Crit. 1960, 202, note by Batiffol) stated that the debtor had validly relied on the limitation period established by the lex contractus (see new edition, 8, 1970, No. 190 et seq.).

The new solution ("Application of the law of the contract to extinctive prescription") was applied to the grounds for interruption by the Nîmes decision of

7 December 1949. (Rev. Crit. 1950, 620). Commenting on this decision, Mr. Loussouarn criticizes the method of comparing different laws in order to ascertain which is most favourable to the debtor, as a pragmatic method which may produce arbitrary decisions.

The law applicable to the grounds for interruption of the limitation period should, according to Mr. Loussouarn, be the same as the law applicable to the limitation period, "because this is the only way to ensure a uniform system of prescription" (cf. Batiffol, Conflits de lois en matière de contrats, No. 582).

The application of the law of the obligation or contract to extinctive prescription is the system followed by the majority of continental countries, according to the Jurisclasseur de droit international; it is followed in Germany, Austria, Switzerland, Italy and Belgium (Order of the Court of Cassation of 14 July 1898, Pasicrisie 1898 I 275).3/

The application of the lex fori is generally accepted in Anglo-American law, which regards prescription as a rule of procedure. In this connexion, Batiffol observed (op. cit. No. 615): "The lex fori, which is applied with some reluctance in the Anglo-Saxon countries, further increases the uncertainty (resulting from the application of the law of the country of domicile) to the possible detriment of the debtor." Elsewhere, it is the law governing the obligation which is generally applied: this is the case in Germany, Italy, Switzerland, Belgium (see the order of 6 December 1958, Pasicrisie 1959 II 60), Austria, Czechoslovakia (act of 4 December 1963, article 13) and Poland (act of 12 November 1965, article 13).

3. With regard to the grounds for interruption of the limitation period, according to Kallmann "the few Swiss decisions on the subject of prescription are not concerned with the question of interruption of the limitation period by a summons issued abroad or a foreign judgement". According to the Zurich Higher Court and the Basel Court of Appeals, a summons under § 209 of the German Code of Civil Procedure is not exclusively a summons to appear before a German court. However, it is the lex fori - the law of the judge who will decide the dispute - which will determine the nature of the act performed before him, regardless of whether it is a summons or not. It is likewise the lex fori which is referred to in article 10 of

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3/ See, however, civ. Antwerp 28 September 1931 and Comm. Antwerp 19 October 1932. Journal de Droit International 1934, p. 451, for the application of the lex fori.

the preliminary draft on prescription, since only an act recognized "under the law of the jurisdiction where such act is performed" as instituting judicial proceedings can be one of the grounds for interruption of the limitation period.

In Italian law, the grounds for interruption of the limitation period are determined "by the law applicable to the obligation" but the author cited (Kallmann) did not find any decision relating to the effect of a summons issued abroad. (He states that in Austria and Beligum legal precedents likewise favour the law of the obligation.)

From the aforegoing it may be concluded that, in private international law, the law applicable to extinctive prescription is generally the law applicable to the substance, the "lex causae", the law of the contract or obligation, where the obligation arises from a contract.

In Anglo-Saxon countries, on the other hand, prescription is part of the rules of procedure and the lex fori is applied. However, there are scarely any instructions about the methods of interrupting the limitation period or the effects of "proceedings" instituted abroad.

4. The problem sometimes appears to be linked to the possible effects, in a country where prescription is invoked, of a judgement handed down in another country as a result of a suit brought by the creditor. Is it necessary for such a judgement to be admissible and enforceable abroad?

It seems excessive to make such a demand: it is not always required, for there to be grounds for interruption, that the creditor appeal to a court. A declaration by the parties, even out of court, or an acknowledgement of debt may sometimes suffice. Why then should the creditor be required to obtain an enforceable judgement?

5. Theories concerning grounds for interruption of the limitation period.

The dominant theory in France is that the law applicable to prescription is the law of the contract (lex contractus, lex causae). Valéry says that the law which is applicable to prescription also determines the grounds for interruption or suspension of the limitation period.

Nevertheless, such grounds must be recognized by French law: only a summons, payment order or attachment can have the effect of interrupting the limitation period, even if a foreign law is applicable to the substance. Swiss doctrine has

little to say concerning the effects on the limitation period of a summons issued abroad or a foreign summons judgement, according to Kallmann (op. cit., p. 13). One problem is whether the interruption of the limitation period resulting from a summons issued abroad depends on the competence of the court from the international viewpoint (cf. French Civil Code, art. 2246). According to one Swiss writer, this depends on whether the foreign judgement is eligible to receive an exequatur - a very questionable solution.

In Italy, Morelli holds that a judicial act may interrupt the limitation period where the law applicable to the substance (the lex contractus) so provides.

The same opinion is found in Germany, where it is held that the law of the obligation determines not only the limitation period but also the grounds for its interruption and suspension.

A foreign (judicial) act interrupts the limitation period if it can be considered "equivalent" to a procedural act having such effect in domestic law; apparently this is to be determined by the law of the court hearing the case.

Is there not a contradiction here between the theory that the law applicable to the grounds for interruption of the limitation period is the lex contractus and the courts' discretion to determine whether an act performed abroad has the effect of interruption by comparison with similar acts performed in their own country (the system followed in article 10 of the preliminary draft, which makes the lex fori applicable).

As a general rule, German writers contend that a summons issued abroad interrupts the limitation period only if the foreign proceedings can result in a judgement enforceable in the country whose law is applicable to the substance: the term "equivalence of foreign proceedings" is used when the judgement is eligible to receive an exequatur in the country whose law is applicable to the prescription of the obligation. Some writers maintain, however, that a foreign judgement interrupts the limitation period even if it could not receive an exequatur. One such writer holds the view that a summons issued abroad should be regarded in the light of the rule "locus rogit actum".

It would then be sufficient to have observed the formalities prescribed by the law of the country in which an act intended to interrupt the limitation period is performed.

In conclusion, it may be noted that, in most civil law countries where prescription is a matter of substantive law, "a summons and other judicial acts interrupt the limitation period and a judgement in favour of the creditor has the effect either of initiating a new limitation period or of substituting the statutory limitation period for a shorter limitation period".

Above all, the interruption of the limitation period must not be linked to any conditions of "effectiveness" of the judgement handed down abroad (for example, the condition that the judgement must be eligible to receive an exequatur). It would be equally regrettable for prescription to be made subject to all the conditions governing recognition of foreign judgements, such as reciprocity, international jurisdiction and summons in due form, which would make it impossible to predict whether a foreign judicial act could interrupt the limitation period. For example, the condition relating to the exequatur, which confers the authority of res judicata upon a foreign judgement, has nothing to do with the substance of the matter and concerns only procedural law. The interruption or inversion of the limitation period by a summons or judgement issued abroad cannot be made dependent on this condition. Such an interruptive effect would be "independent" of procedural law and belong instead to the domain of civil law.

The principal requirement for interruption is that the judicial act should constitute a clear indication of the desire of the parties, and especially that of the creditor, to prevent extinction of the right through prescription. It is reasonable to admit that the limitation period is interrupted as soon as the creditor institutes proceedings or serves a summons on his debtor in such a way that the latter is no longer left in any doubt that he is being asked to discharge his obligation. It is true that certain formalities should be observed, in order to avoid any disagreement concerning the actual question whether the creditor "claimed" his rights in this way - for example, concerning proof that he tried to obtain payment within a certain period. It would however be arbitrary to make the interruption of the limitation period subject to observance of certain rules of procedure or of competence whose sole purpose is to enable the creditor to obtain an enforceable instrument. Interruption of the limitation period is essentially a conservatory measure, for which the same guarantees should not be

required as are required for the enforcement of a foreign judgement against a debtor.[4/] It is sufficient for the creditor to comply with the provisions defining the conditions of validity of judicial or extra-judicial acts (formal notice, acknowledgement of debt) which are contained in the domestic law of the country in which he performs an act interrupting the limitation period.

To sum up, interruption of the limitation period will result from a foreign summons, judgement or judicial act (attachment) which is in due form and is notified to the debtor in such a way that he cannot plead ignorance of it. No more should be required, and the creditor should not necessarily have to apply to a court or authority whose jurisdiction is recognized in the country whose law governs the substance (lex contractus or lex causae).

The only risk of abuse arises from the fact that certain rules of procedure presume that a debtor has been "duly notified" of the proceedings instituted against him, even in cases where he has not been personally notified or summoned to appear. Concern for the protection of the debtor should not, however, be carried so far as to make interruption of the limitation period impossible, which would be the case if the debtor placed himself out of reach of any personal notification, or if he were allowed to contest the validity of any action instituted against him on grounds of lack of jurisdiction.

4/ This principle seems to be followed in the draft, since the mere fact that the parties have entered into negotiations, provided that this is evidenced in writing, has the effect of extending the limitation period.