UNITED NATIONS

GENERAL ASSEMBLY

Distr.
RESTRICTED

A/CN.9/WG.1/WP.7
20 July 1970

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on time-limits and
limitations (prescription) in
the international sale of goods
Second session
Geneva, 10 August 1970

REPORTS ON IMPOSSIBILITY TO SUE BY REASON OF FORCE MAJEURE AND ON CONFLICTS OF LAWS AND THE UNIFORM RULES BY DR. LUDVIK KOPAC, REPRESENTATIVE OF CZECHOSLOVAKIA TO UNCITRAL

CONTENTS

Impossibility to sue by reason of force majeure

Suspension of terms of prescription is provided for in legal systems as the consequence of certain facts which form impediments for the creditor to interrupt prescription, in particular where the legal action against the debtor is prevented by specified circumstances. In some legal systems for these circumstances the term force majeure is used; however, this term is not adequate to the consequences connected with it. In some legal systems the use of the term force majeure is limited only to the circumstances exempting the debtor from the duty to pay damages. For these reasons it would be better to use the term "circumstances causing suspension of prescription". This term covers the cases where the period of prescription does not run for the period during which the specified impediment exists; after the impediment ceases to exist the course of the term of prescription continues to run so that even the time elapsed before the occurrence of the impediment is therein included.

Circumstances taken into consideration by States in this connexion may be characterized by the following legal rules:

Under the provisions of Soviet law, suspension is mainly caused by force majeure and by moratorium granted and declared by the respective authorities for the performance of obligations (see art. 85 of the Civil Code of the Russian Soviet Federal Republic). According to this legislation moratorium is not covered by force majeure. These impediments must occur in the course of the last six months of the period of prescription. The term is lengthened by six months running from the day on which the impediment has ceased to exist, but at the maximum by the time of duration of the period of prescription, if the same is shorter.

German law enumerates separate grounds for suspension (articles 202 to 207 of the Civil Code). The principal ground for suspension is the fact that moratorium has been granted, or that the obliged party is entitled to refuse to perform for a certain period of time. Further, suspension takes place if the right cannot be exercised owing to the suspension of activities of the respective court, or owing to force majeure, but only in such cases where such impediments exist in the course of the last six months of the period of prescription. The prescription continues against a person who does not possess the capacity to make

legal acts, even in such cases where such person has not a statutory representative; however, in this case the prescription may be terminated only after the lapse of six months running from the date on which the incapable person again acquired his capacity to make legal acts, or where a statutory representative has been appointed for him.

Under French law there is a series of grounds for the suspension of prescription and in particular the old principle is applied according to which the prescription shall not run against a person who does not possess the capacity to make legal acts.

In practice additional grounds for suspension have been adopted, as for example, the creditor's lack of knowledge of the existence of claims, for which the creditor is not responsible, impediments qualifying as force majeure, and the like.

Under English law it is mainly the incapacity to make legal acts which is considered to be grounds for suspension (art. 22 of the Limitation Act of 1939).

Under the provision of section 91 of the Czechoslovak International Trade Code the term of prescription is suspended during the time in which the entitled person could not assert his claim in court (before arbitrator) or during which he cannot continue in recovering his claim because of impediments supervening on the part of [attributable to] the obliged party which could not be prevented by the entitled person.

Under article 98 of the General Conditions of the Council for Mutual Economic Assistance the course of term of prescription is suspended if the filing of the action is hindered by an event having the character of force majeure which occurs or exercises its influence in the course of the term of prescription. The time during which the course of the term of prescription was suspended is not included in the term of prescription.

Many other cases for suspension are specified in various legal rules; however, most of them are not suitable for the purposes of international trade. On the other hand, impediments which are relevant to international trade (e.g. the interruption of payment or trade relations between the countries of the creditor and the debtor, influence of political events on the performance of international obligations) are mostly not reflected in municipal rules on suspension of prescription.

/...

In framing uniform rules, a sufficiently general formulation of circumstances causing suspension is needed so that such formulation may include heterogeneous impediments occurring in international trade. On the other hand, the concept of force majeure should not be used without defining it as it is too vague and interpreted in different ways in legal systems. The rule should use as its basis those impediments which the entitled person can neither prevent nor overcome.

It is necessary to inquire whether suspension should be applied in any stage of the term of prescription. (Here a disadvantage arises from certain doubts concerning the course and termination of the time period of prescription.) Or should suspension be applied only at a certain time prior to the termination of the term of prescription? (This disfavours the creditor who has in fact a shorter period within which the action may be filed.)

It should finally be considered whether suspension may be applied for an unlimited period of time. In the alternative, should it not be admitted, in the interest of legal security and stabilization, that after the lapse of a sufficiently long period of time the prescription is to be considered as effective under all circumstances?

The rules governing suspension of the prescriptive period should cover misconduct of the debtor preventing the creditor from exercising his rights (para. 67 of the report of the Working Group, document A/CN.9/30 of 3 November 1969). This is suggested since the concept of fraud is not uniformly accepted by legal systems and its contents may be interpreted in different ways. In addition, rules on suspension should cover cases where the debtor conceals his identity, his address or his relationship to the transaction in such a way as to prevent suit by the creditor. The Working Group, during its first session, tentatively approved the following language:

> "Where one party has been prevented from exercising his rights by the other party's intentional misrepresentation for concealemnt of his identity (capacity) or address, prescription shall in any case take effect earlier than one year after the other party knew or reasonably should have known the concealed fact."

It may be useful to try to cover these cases by a sufficiently wide concept of force majeure as there are some common features for these impediments, e.g. the impossibility of the creditor to prevent or overcome them.

/...

As a basis for discussion, the following wording may be used:

"Where a creditor has been prevented from exercising his rights owing to an impediment not supervening on his part [not attributable to him] which he could neither avoid nor overcome, the prescription shall not take effect before the expiry of one year from the date on which the relevant impediment ceased to exist or could be overcome." [Art. 8 of the Czechoslovak draft Convention]

According to this wording, only circumstances on the part of [attributable to the] creditor (such as lack of money to start judicial proceedings etc.) would be excluded. So-called external circumstances as well as the impediments on the part of [attributable to] the debtor would be included, provided that they cannot be prevented or overcome by the creditor. This wording would cover the intentional misrepresentation or concealment of identity or address of the debtor, as well as the impossibility to start judicial or arbitration proceedings against the debtor owing to lack of knowledge of his address, which he may have changed. The concept of intention should not be accepted as it is very difficult to prove it.

The condition that the creditor has taken all appropriate measures with a view to preserving his rights is not expressly included but this principle is covered by the text "he could neither avoid nor overcome".

This rule would cover the cases of lack of capacity to make legal acts, too.

Conflicts of laws and the uniform rules

(1) The relation between the unified rules and the norms covering conflicts of laws may be solved in several ways:

(a) The first solution: This would be based on the principle that the rules of private international law shall be excluded for the purpose of the uniform regulation of prescription. It follows from this principle, accepted by the Hague Uniform Laws on International Sales of Goods, that only lex fori is to be applied and the uniform rules are imposed even on parties whose States have not adhered to the convention, even for such cases where under the rules of private international law the law of the signatory State would not be applicable (i.e. under the governing conflict rules the law of the State which has not adhered to the convention ought to be applied).

(b) A second solution: The system whereby the uniform rules on prescription would be applied only when the places of business of both parties are in the territories of Contracting States.

(c) A third solution: The application of the uniform rules is dependent on the solution of conflicts of laws.

(2) These principles were discussed during the third session of the Commission in connexion with the international sale of goods and the following revision of article 2 of ULIS was recommended:

> "The present Law is applicable
>
> "(a) irrespective of any rules of private international law when the place of business of each of the contracting parties is in the territory of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract;
>
> "(b) when the rules of private international law indicate that the applicable law is the law of a Contracting State which has adopted the present law without any reservation which would preclude its application to the contract". (UNICTRAL III/CRP/16/Add.1, para. 10)

It was agreed that the substance of the proposed wording should be the basis for further work by the Working Group on Sales.

(3) It may be useful to accept the same solution for the convention on prescription, subject to a necessary modification.

> "The present Law is applicable to extensive prescription concerning international sale of goods.
>
> "(a) irrespective of any rules of private international law when the place of business of the seller and the place of business of the buyer are in the territories of Contracting States which have adopted the present Law without any reservation which would preclude its application to the prescription;
>
> "(b) when the rules of private international law indicate that the applicable law is the law of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the prescription." /Art. 1 of the Czechoslovak draft Convention/

It may be useful to discuss the question whether a conflict rule solving the question of applicable law according to sub-paragraph (b) should not be included in the law. The conflict problem of prescription should be solved on the basis of lex causae.
