

B. Convention on the Limitation Period in the International Sale of Goods (New York, 1974)^a: note by the Secretariat (A/CN.9/308) [Original: English]

INTRODUCTION

1. The Convention on the Limitation Period in the International Sale of Goods (New York, 1974) provides uniform international legal rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against the other party to assert a claim arising from the contract or relating to its breach, termination or invalidity. This period is referred to in the Convention as the "limitation period". The basic aims of the limitation period are to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost and to protect against the uncertainty and injustice that would result if a party were to remain exposed to unasserted claims for an extensive period of time.

2. The Limitation Convention grew out of the work of the United Nations Commission on International Trade Law (UNCITRAL) towards the harmonization and unification of international sales law, which also resulted in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereinafter referred to as the "United Nations Sales Convention"). During that work it was observed that, while most legal systems limited or prescribed a claim from being asserted after the lapse of a specified period of time, numerous disparities existed among legal systems with respect to the conceptual basis for doing so. As a result there were disparities in the length of the period and in the rules governing the limitation or prescription of claims after that period. Those disparities created difficulties in the enforcement of claims arising from international sales transactions, and thus burdened international trade.

3. In view of those problems UNCITRAL decided to prepare uniform international legal rules on the limitation period in the international sale of goods. On the basis of a draft Convention prepared by UNCITRAL, a diplomatic conference convened in New York by the General Assembly adopted the Limitation Convention on 14 June 1974. The Limitation Convention was amended by a Protocol adopted in 1980 by the diplomatic conference that adopted the United Nations Sales Convention, in order to harmonize the Limitation Convention with the latter Convention.

^aThis note has been prepared by the secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention. A commentary prepared at the request of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods appears in A/CONF.63/17 (reprinted in *Yearbook of The United Nations Commission on International Trade Law*, vol. X: 1979 (United Nations publication, Sales No. E.81.V.2), part three, chap. I and in *UNCITRAL: The United Nations Commission on International Trade Law* (United Nations publication, Sales No. E.86.V.8), annex II, B.

4. The Limitation Convention will enter into force on 1 August 1988 for the 10 States that have ratified or acceded to it thus far. Czechoslovakia, Dominican Republic, Ghana, Norway and Yugoslavia are parties to the unamended Convention. Argentina, Egypt, Hungary, Mexico and Zambia are parties to the Convention as amended by the 1980 Protocol.

I. Scope of application

5. The Convention applies to contracts for the sale of goods between parties whose places of business are in different States if both of those States are Contracting States. Under the 1980 Protocol the Convention also applies if the rules of private international law make the law of a Contracting State applicable to the contract. However, in becoming a party to the Protocol a State may declare that it will not be bound by that provision. Each Contracting State must apply the Convention to contracts concluded on or after the date of the entry into force of the Convention.

6. The application of the Convention is excluded in certain situations. First, the Convention will not apply if the parties to a sales contract expressly exclude its application. This provision gives effect to the basic principle of freedom of contract in the international sale of goods. Secondly, the Convention will not apply in certain cases where matters covered by the Convention are governed by other Conventions. Thirdly, Contracting States are permitted to deposit declarations or reservations excluding the application of the Convention in the following situations: two or more Contracting States may exclude the application of the Convention to contracts between parties having their places of business in those States when the States apply to those contracts the same or closely related legal rules. So far, one State has availed itself of that declaration. In addition, a State may exclude the application of the Convention to actions for annulment of the contract. No State has thus far availed itself of such a declaration.

7. Since the Convention applies only in respect of international sales contracts, it clarifies whether contracts involving certain services are covered. A contract for the supply of goods to be manufactured or produced is considered to be a sales contract unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production. Furthermore, when the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services, the Convention does not apply.

8. The Convention contains a list of types of sales that are excluded from the Convention, either because of the purpose of the sale (goods bought for personal, family

or household use (under the 1980 Protocol sales of those goods are covered by the Convention if the seller could not have known that they were bought for such use), the nature of the sale (sales by auction, on execution or otherwise by law) or the nature of the goods (stocks, shares, investment securities, negotiable instruments, money, ships, vessels, aircraft or electricity (the 1980 Protocol adds hovercraft)).

9. The Convention makes it clear that it applies only to the usual type of commercial claims based on contract. It specifically excludes claims based on death or personal injury; nuclear damage; a lien, mortgage or other security interest; a judicial judgement or award; a document on which direct enforcement or execution can be obtained; and a bill of exchange, cheque or promissory note. The limitation periods for those claims are generally subject to particular rules and it would not necessarily be appropriate to apply in respect of those claims the rules applicable to ordinary commercial contractual claims.

II. Duration and commencement of limitation period

10. The duration of the limitation period under the Convention is four years. The period cannot be modified by agreement of the parties, but it can be extended by a written declaration of the debtor during the running of the period. Also, the contract of sale may stipulate a shorter period for the commencement of arbitral proceedings, if the stipulation is valid under the law applicable to the contract. Rules are provided as to how the period should be calculated.

11. A limitation period of four years' duration was thought to accomplish the aims of the limitation period and yet to provide an adequate period of time to enable a party to an international sales contract to assert his claim against the other party. Circumstances where an extension or recommencement of the limitation period would be justified are dealt with in particular provisions of the Convention.

12. With respect to the time when the limitation period commences to run, basic rule is that it commences on the date on which the claim accrues. The Convention establishes when claims for breach of contract, for defects in the goods or other lack of conformity and for fraud are deemed to accrue. Special rules are provided for the commencement of the limitation period in two particular cases: where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods which is stated to have effect for a certain period of time, and where a party terminates the contract before the time for performance is due. Rules are also provided in respect of claims arising from the breach of an instalment contract and claims based on circumstances giving rise to a termination of such a contract.

III. Cessation and extension of limitation period

13. Having established the time of commencement and the length of the limitation period, the Convention

sets forth rules concerning the cessation of the period. The period ceases to run when the claimant commences judicial or arbitral proceedings against the debtor, or when he asserts his claim in existing proceedings. A counterclaim is deemed to have been asserted on the same date as the date when the proceedings in which the counterclaim is asserted were commenced, if the counterclaim and the claim against which it is raised relate to the same contract or to several contracts concluded in the course of the same transaction.

14. Judicial or arbitral proceedings commenced by a claimant within the limitation period might terminate without a binding decision on the merits of the claim; for example, because the court or arbitral tribunal lacks jurisdiction or because of a procedural defect. The creditor would normally be able to pursue his claim by commencing new proceedings. Thus, the Convention provides that if the original proceedings end without a binding decision on the merits the limitation period will be deemed to have continued to run. However, by the time the original proceedings have ended, the limitation period might have expired, or there might remain insufficient time for the claimant to commence new proceedings. To protect the claimant in those cases the Convention grants him an additional period of one year to commence new proceedings.

15. The Convention contains rules to resolve in a uniform manner questions concerning the running of the limitation period in two particular cases. First, it provides that where legal proceedings have been commenced against one party to the sales contract, the limitation period ceases to run against a person jointly and severally liable with him if the claimant informs that person in writing within the limitation period that the proceedings have been commenced. Secondly, it provides that where proceedings have been commenced against a buyer by a party who purchased the goods from him, the limitation period ceases to run in respect of the buyer's recourse claim against the seller if the buyer informs the seller in writing within the limitation period that the proceedings against the buyer have been commenced. Where the proceedings in either of those two cases have ended, the limitation period in respect of the claim against the jointly and severally liable person or against the seller will be deemed to have continued to run without interruption, but there will be an additional year to commence new proceedings if at that time the limitation period has expired or has less than a year to run.

16. One effect of the provision mentioned above relating to the buyer is to enable him to await the outcome of the claim against him before commencing an action against his seller. This enables the buyer to avoid the trouble and expense of instituting proceedings against the seller and the disruption of their good business relationship if it turns out that the claim against the buyer was not successful.

17. Under the Convention the limitation period recommences in two cases: if the creditor performs in the debtor's State an act that, under the law of that State,

has the effect of recommencing a limitation period, or if the debtor acknowledges in writing his obligation to the creditor or pays interest or partially performs the obligation from which his acknowledgement can be inferred.

18. The Convention protects a creditor who was prevented from taking the necessary acts to stop the running of the limitation period in extreme cases. It provides that when the creditor could not take those acts as a result of a circumstance beyond his control and which he could neither avoid nor overcome, the limitation period will be extended so as to expire one year after the date when the circumstance ceased to exist.

IV. Overall limit of limitation period

19. Since the limitation period may, under the circumstances noted above, be extended or recommence, the Convention establishes an overall time period of 10 years, from the date on which the limitation period originally commenced to run, beyond which no legal proceedings to assert the claim may be commenced under any circumstances. The theory behind that provision is that enabling proceedings to be brought after that time would be inconsistent with the aims of the Convention in providing a definite limitation period.

V. Consequences of expiration of limitation period

20. The principal consequence of the expiration of the limitation period is that no claim will be recognized or enforced in legal proceedings commenced thereafter. The expiration of the limitation period will not be taken into consideration in legal proceedings unless it is invoked by a party to the proceedings. However, in light of views expressed at the diplomatic conference that adopted the Convention that the limitation or prescription of actions was a matter of public policy and that a court should be able to take the expiration of the limitation period into account on its own initiative, a Contracting State is permitted to declare that it will not apply that provision. No State has thus far made such a declaration.

21. Even after the limitation period has expired a party can in certain situations raise his claim as a defence to or set-off against a claim asserted by the other party.

VI. Other provisions and final clauses

22. Other provisions of the Convention deal with implementation of the Convention in States having two or more territorial units where different legal systems exist. A series of provisions deals with declarations and reservations permitted under the Convention and with procedures for making and withdrawing them. The permitted declarations and reservations have been mentioned above; no others may be made under the Convention.

23. The final clauses contain the usual provisions relating to the Secretary-General of the United Nations as depositary of the Convention. The Convention is subject to ratification by States that signed the Convention by 31 December 1975 and for accession by States that did not do so. The Chinese, English, French, Russian and Spanish texts of the Convention are equally authentic.

24. The Secretary-General of the United Nations is also the depositary of the 1980 Protocol amending the Convention, which is open for accession by all States. Since the Protocol has already received the necessary number of accessions, the Convention as amended by the Protocol will enter into force on the same date as the unamended Convention, i.e. on 1 August 1988.

25. A State that ratifies or accedes to the Convention after the Convention and Protocol come into force will become a party to the Convention as amended by the Protocol if it notifies the depositary accordingly. The Convention as amended will enter into force for that State on the first day of the month following the expiration of 6 months after the date of deposit of its instrument of ratification or accession. Accession to the Protocol by a State that is not a Contracting Party to the Convention constitutes accession to the Convention as amended by the Protocol.