

PART II IMPLEMENTATION

Article 29 (A/CN. 9/70. Annex I)

- (1) Each contracting State shall, in accordance with its constitutional procedure, give to the provisions of Part I of this Convention the force of law, not later than the date of the entry into force of this Convention in respect of that State.
- (2) Each contracting State shall communicate to the Secretary-General of the United Nations the text whereby it has given effect to this Convention.

Article 30 (Final Draft)

Subject to the provisions of Article 31, each contracting State shall take such steps as may be necessary under its constitution or law to give the provisions of Part I of this Convention the force of law not later than the date of the entry into force of this Convention in respect of that State]

Commentary

This article has been one on which no consensus was reached.

Under the constitutional law of certain States a treaty acquires municipal legal effect *ipso facto* when it is entered into. In other States, municipal legislation is required to achieve this effect. The phrase "such steps as *may* be necessary" is designed to accommodate both systems of law. The requirement that such steps, where necessary, should be taken by a State before the entry into force of the Convention in respect of that State is desirable from a practical point of view.

The article is also affirmation of the intention that the Convention is to apply as municipal law. The scope of applicability as municipal law depends on other provisions

Since the draft Convention is intended to secure uniformity, it is intended that Part I is to become operative as municipal

law without modification. Permissible reservations are set out in Part III. It is not very clear why no consensus was reached on this provision. If the reason is that some States desire to enact Part I of the Convention, not in the identical form drafted, but in a modified form, this will seriously detract from the uniformity sought to be achieved by the Convention, and would not be desirable.

Article 31 (Final draft)

[In the case of a federal or non-unitary State, the following provisions shall apply :

- (a) With respect to those articles of this Convention that come within the legislative-jurisdiction of the federal authority, the obligations of the Federal Government shall to this extent be the same as those of contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;
- (c) A federal State party to this Convention shall, at the request of any other contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.]

Commentary

This article is designed to secure the objects of Article 30 in relation to a federal or non-unitary State. It provides for the

case where legislative competence on the subject-matter of the Convention is divided, and the treaty making authority does not have the necessary competence. There was no corresponding provision to provide for a federal State in the earlier draft, and this article is an attempt to fill the lacuna.

On this article also there has been no consensus.

Article 30 (A/CN. 9/70, Annex I)

Each contracting State shall apply the provisions of the Uniform Law to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

Article 32 (Final draft)

Each contracting State shall apply the provisions of this Convention to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

Commentary

The point of time when a contracting State is to apply the provisions of the Convention has to be clearly fixed. The starting point selected avoids possible problems concerning retrospective operation.

PART III. DECLARATIONS AND RESERVATIONS

Article 31 (A/CN. 9/70, Annex I)

- (1) Two or more contracting States may at any time declare that any contract of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be considered international within the meaning of Article 3 of this Convention, because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention.
- (2) Any contracting State may at any time declare with reference to such State and one or more non-contracting States that a contract of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be considered international within the meaning of Article 3 of this Convention because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention.
- (3) If a State which is the object of a declaration made under paragraph 2 of this article subsequently ratified or accedes to this Convention, the declaration shall not remain in effect unless the ratifying or acceding State declares that it will accept it.

Article 33 (Final draft)

1. Two or more contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and buyer having a place of business in another of these States shall not be considered international within the meaning of Article 2 of this Convention, because they apply the same or closely related legal rules which in the absence of such a declaration would be governed by this Convention.

2. If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of Article 2 shall apply.

Commentary

The purpose of this Article is to enable contracting States which had already achieved regional unification in regard to their laws on limitation to continue to have the advantages of such unification and also to become parties to the Convention. The question of excluding the operation of the Convention in contracts with parties having their places of business in non-contracting States (Article 31 (2) of the earlier draft) no longer arises since such contracts are already excluded from the ambit of the Convention under the present Article 3.

Article 32 (A/CN. 9/70. Annex I)

A contracting State may declare, at the time of the time of the deposit of its instrument of ratification or accession, that it will not apply the provisions of the Uniform Law to actions for annulment of the contract.

Article 34 (Final draft)

A contracting State may declare, at the time of deposit of its instrument of ratification or accession, that it will not apply the provisions of this Convention to actions for annulment of the contract.

Commentary

There was a difference of view as to whether actions for annulment of the contract should or should not be governed by the Convention. This article is intended for those States who are of the view that such actions should be excluded.

Article 35 (Final draft)

Any state may declare, at the time of the deposit of its instrument of ratification or accession to this Convention, that it shall not be compelled to apply the provisions of Article 23 of this Convention.

Commentary

This article is intended to provide for the difference of opinion existing in regard to Article 23. One view is that it is desirable that the question of limitation or prescription should be raised by a tribunal *ex mero motu* even if the parties have not raised the question. States which hold this view can make a reservation under this article. The arguments for and against Article 23 have been discussed under that article.

Article 33 (A/CN. 9/70. Annex I)

Any State which has ratified the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964, or which has acceded to that Convention, may at any time declare :

- (a) that, by way of derogation from Article 3, paragraph 1, of this Convention, it will apply the provisions of Article 1, paragraph 1, of the Uniform Law annexed to the Convention of 1 July 1964 ;
- (b) that, in the event of conflict between the provisions of the Uniform Law annexed to the Convention of 1 July 1964, and the provisions of this Convention, it will apply the provisions of the Uniform Law annexed to the Convention of 1 July 1964.

Article 34 (A/CN. 9/70. Annex I)

(1) Any State which has previously ratified or acceded to one or more conventions on the conflict of laws affecting limitation in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification or accession to the present convention, declare that it will apply the Uniform Law in cases governed by one of those previous conventions only if that convention itself leads to the application of the Uniform Law.

(2) Any State which makes a declaration under paragraph (1) of this article should specify the conventions referred to in that declaration.

Article 36 (Final draft)

1. This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning limitation of legal proceedings or prescription of rights in respect of international sales, provided that the seller and buyer have their places of business in States parties to such a Convention.
2. If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of Article 2 shall apply.

Commentary

This article is necessitated by the fact that there are at present three texts which must be reconciled as far as possible :-

- (1) The present draft Convention.
- (2) The annex to the Convention relating to a Uniform Law on the International Sale of Goods done at the Hague, 1 July 1964 (ULIS).
- (3) The revision of that annex presently undertaken by UNCITRAL (Revised ULIS).

At least two possible conflicts arise in relation to these texts. It has been suggested that Article 49 of ULIS deals with the subject of limitation and conflicts with the provisions of the present draft Convention. Further, both Conventions do not apply in identical circumstances to an international [contract of sale. The result is that where a State has ratified or acceded to ULIS, an international sale which comes within the ambit of ULIS may fail to be governed by this draft Convention.

Under the present article, this draft Convention gives way to other conventions containing provisions relating to limitation or prescription, provided that the seller and buyer have their places of business in States parties to the other conventions. The result is that this draft Convention gives way only in a narrow class of case, e.g.,

A (the buyer) has his place of business at the time of conclusion of the contract in State X, and B (the seller) in State Y. If State X and State Y are both parties to this draft Convention, and to another Convention dealing with limitation or prescription, this Convention gives way. If either State is not a party to this Convention, this Convention will not apply and no conflict can arise. If either State is not a party to the other Convention, this article will not operate and this Convention will prevail.

It may be considered whether the proviso should not be made more definite by specifying the time at which the seller and buyer must have their places of business in States parties to a different Convention. For example,

A (the buyer) has his place of business in State X, and B (the seller) in State Y. At the time of the conclusion of the contract both States are parties to this Convention which therefore applies. However, only State X is a party to another Convention which also deals with limitation. At the time of legal proceedings, however, State Y has also acceded to the other Convention.

Formal and final clauses of the Final Draft were not considered by the Commission and it was agreed that they should be submitted for consideration to the Conference of Plenipotentiaries. Hence, the texts of these articles have not been reproduced here.

(iii) REPORT OF THE STANDING SUB-COMMITTEE ON INTERNATIONAL SALE OF GOODS ON THE WORK DONE BY IT DURING THE FOURTEENTH SESSION

1. The Standing Sub-Committee on International Sale of Goods composed of Egypt, Ghana, India, Japan, Nigeria, Pakistan and Sri Lanka held its first meeting on the 10th of January 1973. In the absence of the representative of Pakistan, the representative of Japan, Dr. K. Nishimura acted as Chairman. The representative of Nigeria, Mr. K. B. Olukolu acted as Rapporteur.

A letter dated the 4th of January 1973 from the Legal Counsel of the United Nations to the Secretary-General informing the Committee of a resolution of the General Assembly of the United Nations, No. 2929 (XXVII), to convene the United Nations Conference on Prescription (Limitation) in the International Sale of Goods in 1974 was brought to the notice of the Sub-Committee. The letter also called for comments and proposals from the Committee on the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods, and requested that these should reach the United Nations Secretariat not later than the 30th of June 1973.

The Sub-Committee at its subsequent meetings held on the 13th, 15th and 17th January examined the provisions of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods. Professor K. Sono, of the Secretariat of UNCITRAL, first introduced the Draft Convention to the Sub-Committee by explaining the reasons for its drafting, the structure of the Convention, and the meaning of its provisions. The commentary prepared by the UNCITRAL Secretariat on the Draft Convention (A/CN.9/73) was also placed before the Sub-Committee.

The Sub-Committee expressed its appreciation for the active participation of Professor K. Sono of UNCITRAL and Dr. Mario Matteucci of UNIDROIT and the preparation of the

comments on the Draft Convention by the Secretariat of the Committee which provided a useful basis for the discussion, making it possible for the Sub-Committee to make a close examination of the Draft Convention in the short period at its disposal. The Sub-Committee appreciated the effort of the UNCITRAL to unify and harmonize various national rules of prescription (limitations) which presently constitute obstacles to the development of international trade because of conflicts and divergencies among such existing rules. The Sub-Committee examined the Draft Convention carefully within the time assigned to it and generally approved the approach of the Draft Convention as a workable compromise. However, the Sub-Committee was of the view that the following points needed to be considered at the United Nations Conference.

Article 1

In regard to Article 1 (1), it was considered that the words "the rights of the buyer and seller against each other relating to a contract of international sale of goods" were of such wide application that they were capable of being interpreted to include certain types of claims in tort or delict as between the buyer and the seller concerning the contract. It was considered that since claims in delict or tort based upon death of, or personal injury to, any person, and certain other claims are excluded by Article 5 from the sphere of the Convention, actions in tort or delict relating to a contract of international sale of goods may be permitted to come within the sphere of the Convention without any difficulties arising (cf. A/CN.9/73, para. 6 of commentary to Art. 1).

It is also considered that there is some uncertainty in the definition of the word 'person' contained in Article 1 (3) (f). The Sub-Committee is of the view that this may be clarified by adding certain words contained in the commentary (A/CN.9/73, para. 11 of commentary to Art 1). The definition would then read as follows :—

"1 (3) (f) "Person" includes corporation, company, association, or entity, whether private or public, which can sue or be sued in its own name under its national law".

Articles 2 and 3

(a) It is considered that if the restricted sphere of application of the Draft Convention is to be maintained, it would be more logical if the limitation in regard to different contracting States contained in Article 3 (1) should be imposed in Article 2 (1). Article 2 (1) would then read :

“2 (1) For the purposes of this Convention, a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different contracting States”. (Article 3 (1) could, then, be deleted).

(b) However, the possibility of a wider application of the Draft Convention may be considered desirable. Thus, where the rules of the forum permit, it may not conflict with the purpose of the Convention to allow that forum to apply the Convention to govern a contract of international sale of goods even when one or both parties do not have their place or places of business in a contracting State. To achieve this purpose, the Sub-Committee is of the view that the word ‘only’ in Article 3 (1) should be deleted.

(c) It is also suggested that Article 2 (2) may be simplified. In a case where a party has places of business in more than one State, the present draft states that his principal place of business is to be regarded as his place of business. But if he has another place of business which has a closer relationship to the contract and its performance than the principal place of business, such a place of business is said to prevail over the principal place of business and is regarded as his place of business. Further, different interpretations are possible of the phrase “principal place of business”, and it appears that what is ultimately regarded as his place of business is that place of business which has the closest relationship to the contract. For these reasons the Sub-Committee suggests that the article should be amended to read as follows :

“2 (2) Where a party to a contract of sale has places of business in more than one State, his place of business for the purposes of paragraph (1) of the article

and of Article 3 shall be that place of business which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract”.

Article 7

Article 7 provides a principle to be applied in interpreting and applying the provisions of the Convention. It is considered that some principle should be provided for a case which arises in regard to which no provision has been made in the Convention or can be inferred therefrom. The Sub-Committee proposes that where such a case occurs, the judge shall be under a duty to decide in accordance with a principle such as justice, equity and good conscience.

Article 10

The Sub-Committee is of the view that the provisions of Article 10 (1) and 10 (2) could be amalgamated and simplified without changing their effect. Further, the starting point mentioned in Article 10 (1) (i. e. the date on which the goods are actually handed over to the buyer) may be difficult to apply in a case where the buyer refuses to accept the goods although the seller had placed the goods at the disposition of the buyer. Therefore, the Sub-committee is of the view that the words ‘placed at the disposition of the buyer’ should be substituted for the words “actually handed over to the buyer”. The amalgamated Article 10 (1) and 10 (2) would then read as follows :—

“10 (1) The limitation period in respect of a claim arising from a defect or lack of uniformity shall be two years from the date on which the defect or lack of conformity is or could reasonably be discovered, whichever is the earlier, provided that the limitation period shall not exceed beyond eight years from the date on which the goods are placed at the disposition of the buyer.” (Article 10 (2) could then be deleted).

Article 11

Article 11 (1) is not intended to govern the situation, under some legal systems, whereby circumstances such as repu-

diation, bankruptcy and the like make the contract automatically terminate before performance is due. However, the present wording may be construed as including such a case. In order to make the intention clear, the wording may be changed as follows :-

“11 (1) If, in circumstances provided for by the law applicable to the contract, it is *lawfully terminated by virtue of a declaration made by one party* before the performance is due, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party. If the contract is not terminated by virtue of such a declaration before performance becomes due, the limitation period shall commence on the date on which performance is due”.

Article 12

The Sub-Committee is of the view that the United Nations Conference on Prescription should give further consideration to the effect of Article 12 (2) on other provisions, particularly in relation to the approaches adopted in Article 10 with regard to claims arising from non-conformity of the goods. The problems could best be illustrated by the following examples :-

- (1) A, the seller on 1st January 1974 hands over to B, the buyer, goods containing defects which can be discovered when the goods are handed over. B does not pay the price, neither does he assert a claim against A in respect of the defects. On 1st December 1975 A brings an action for the price. B makes a counterclaim in this action on 1st January 1977. Is B's claim out of time by reason of Article 10(1) because it is brought more than two years after the goods have been handed over) or within time by reason of Article 12(2) (because it is deemed to have been performed on 1st December 1975, within two years) ?
- (ii) A, the seller, sells and hands over goods to B' the buyer, on 1st January 1973. The goods contain

defects which cannot be discovered at the time of handing over. B does not pay the price, and A institutes proceedings for the price on 30th December 1976. B discovers the defects on 1st October 1977 and makes a counter-claim. Does B's counter-claim relate back to 30th December 1976 by reason of Article 12(2) ? If it does, it will relate back to a point of time before the claim fell due.

- (iii) A, the seller, sells and hands over goods to B, the buyer on 1st January 1973. The goods contain defects which cannot be discovered at the time of handing over. B does not pay the price, and A institutes proceedings for the price on 30th December 1976. The proceedings are protracted and on 1st December 1980, B discovers the defects. He makes a counter-claim on 1st February 1981. Is the claim out of time by reason of the proviso of Article 10(2), (because more than eight years have elapsed from the date the goods were handed over) or within time by the operation of Article 12(2) (because it relates back to 30th December 1976).

Articles 15 and 16

(a) There are various articles in the Draft Convention which provide for the cessation, extension and calculation of the limitation period. It is not clear whether the periods of one year referred to in Articles 15(2) and 16(1) are to be classified as 'the limitation period' so as to attract these provisions, although the intention of the draftsman was probably in the affirmative. This may be clarified by describing these periods as "an additional limitation period of one year".

(b) Article 15(1) deals with a case where the legal proceedings have ended "without a final decision binding on the merits of the claim". However, Article 16 (1), applies to a case where legal proceedings have ended with "a decision binding on the merits of his claim", the word 'final' being omitted. Perhaps this was an inadvertent omission. It is the view of the