

binding on the merits of the claim on 1. 1. 75. The applicable law permits A to commence proceedings for non-payment of the price against B in State Y despite this decision. The limitation period has expired on 1. 12. 74 (or will expire on 1. 2. 75). A is given a further period of one year from 1. 1. 75 to commence proceedings against B in State Y if he so desires.

No provision corresponding to this appears in the first draft and the provision is one on which there has been no consensus. The arguments in favour of such a provision appear to be the following :

- (a) A creditor, although he may get a decision in one State in his favour binding on the merits of the claim, may not be able to obtain satisfaction, because, for example, the debtor has disposed of his assets in that State. It is then fair to give him a second chance.
- (b) The remedies available in the second State, e.g. specific performance, which are not available in the first State, may also be required to secure justice for the creditor.

As against this, it may be argued that :

- (a) A creditor should select his forum with diligence, and should select that forum from which he can get maximum redress. If he is careless in his selection of the forum he should bear the consequences. He should also have taken the precaution of instituting parallel actions, if this was desirable.
- (b) It is undesirable to allow a debtor to be faced with successive actions, where the first has reached a decision on the merits.

Although a provision corresponding to 16.2 appeared in the earlier draft, there is still no consensus on it. On the one hand, it is regarded as desirable, because it would be unfair to deprive a creditor of the chance of instituting a second action when recognition or execution is thus refused. On the other hand, it is argued that the creditor should have exercised

diligence in selecting the forum most advantageous to him, where execution of the decision in that very forum would satisfy his claim. The present text attempts to find a *via media* by giving the creditor a second chance, but reducing the period available for commencing proceedings to one year (as against the earlier four years).

The following questions also may require consideration :—

- (1) Is it intended that Article 15 and Article 16.1 are to have mutually exclusive applications? Article 16.1 does not use the term '*final* decision', whereas Article 15 does. As a result, there appear to be cases to which both 15 and 16.1 may simultaneously apply. e.g.

A commences legal proceedings against B in State X. They end on 1.1.75 with a decision binding on the merits of the claim in State X, but which decision is not a *final* decision (because e.g. it is subject to review). The decision becomes final in State X on 1.2.77 (or does not become final at all for some reason independent of A's action). As at 1.1.75, do both 15 and 16.1. apply?

- (2) As at present drafted, under 16.1 a creditor gets a second chance of commencing proceedings irrespective of whether he loses or wins in the first proceedings on the merits of the claim. Is it desirable to give him the second chance when he loses? 16.2 only contemplates the case where he succeeds in his first proceeding.

- (3) If the additional one year granted under 16.1 and 16.2 are classified as within the meaning of the term "limitation period" some of the problems set out earlier arise. A large series of successive actions become possible. This period of one year its perhaps not intended to be so classified. Article 22 provides final cut-off periods of 8 years and 10 years beyond which no extension is possible. But no consensus was reached on Article 22.

Article 14 (A/CN. 9/70. Annex I)

The institution of judicial or arbitral proceedings against one debtor shall have effect in relation to any other person jointly and severally liable with him [or liable under a guarantee], provided that the creditor, before the expiration of the limitation period, informs such person in writing that the proceedings have been instituted.

Article 20 (A/CN. 9/70. Annex I)

[Where judicial or arbitral proceedings are instituted against the buyer within the limitation period prescribed by this Law either by a sub-purchaser or by a person jointly and severally liable with the buyer, the buyer shall be entitled to an additional period of one year from the date of the institution of such proceedings for the purpose of obtaining recognition or satisfaction of his claim against the seller].

Article 17 (Final draft)

1. Where legal proceedings have been commenced against one debtor within the limitation period prescribed by this Convention, the limitation period shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced.

2. Where legal proceedings have been commenced by a sub-purchaser against the buyer, the limitation period prescribed by this Convention shall cease to run in relation to the buyer's claim against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

3. In the circumstances mentioned in this article, the creditor or the buyer must institute legal proceedings against the party jointly or severally liable or against the seller, either within the limitation period otherwise provided by this Convention or within one year from the date on which the legal

proceedings referred to in paragraphs (1) and (2) commenced, whichever is the later.]

Commentary

No consensus was reached on this article. The provisions of Article 17.1 in regard to legal proceedings relating to debtors jointly and severally liable have been supported for the following reasons :

(1) Municipal legal systems vary in the effect they attribute to an action by a creditor against one such debtor. In some, the limitation period is interrupted, in others it is not. This provision provides a uniform rule.

(2) If not for this rule, a creditor who is not certain whether one debtor can satisfy a judgement will have to sue both debtors lest the period of prescription were to expire and he be later precluded for suing the other debtor. Where the debtors are resident in two countries this will often entail considerable expense.

It has been criticised for the following reasons :—

- (1) It creates unnecessary complications.
- (2) It is unduly favourable to the creditor.

The further course of the interruption created by 17.1 is determined by 17.3. Assuming that the policy behind 17.1 is acceptable, the following matters require consideration :

(a) In its present draft, the time-limit given within which the creditor must notify the debtor not sued is the limitation period. Is this too long ? e. g.

A (having his place of business in State X) and B (having his place of business in State Y) are jointly and severally liable to C (having his place of business in State Z). The limitation period of four years commences to run on 1.1.74. C commences an action against A on 1.2.74. He

notifies B in writing of the action against A on 1.12.77. Such notification is within time. The limitation period (which has upto now been running as against B) now ceases to run with retrospective effect from 1.2.74 as against B. Upto 1.12.77, B may have been ignorant of C's action against A and may have destroyed the relevant evidence in his possession.

The insertion of a shorter period of time in which C must notify B (e. g. within two weeks of commencing legal proceedings against A) may be more equitable. It is assumed in the above example that the time from which the period ceases to run against B is the date of commencement of proceedings against A. If it is the date of notification in writing to B this should be made clear.

(b) The limitation period should cease to run against B only in respect of the particular claim asserted against A, and not any other claim. It may be considered whether a phrase such as "in respect of the claim asserted" should be inserted at an appropriate point.

Article 17.2 is intended to provide for the case where the buyer has a remedy against the seller only in the event of the sub-purchaser suing him, or where he may have a remedy in any event, but does not wish to press it unless the sub-purchaser sues him. In such a case if the sub-purchaser commences proceedings towards the very end of the limitation period, the buyer may, in the absence of such a provision, have insufficient time to commence proceedings against the seller. The arguments against this provision are that it complicates the Convention, and makes the period of limitation between buyer and seller depend on the actions of a third party.

In this situation, on certain facts, the time allotted to the buyer to give notice in writing appears to be too long, in others too short. Thus where the sub-purchaser commences proceedings immediately after the start of the limitation period the buyer has over three years to give notice to the seller. If,

however, the proceedings are commenced just before the period expires, he may have insufficient time to give notice.

Article 17.3 provides an extension of a possible maximum period of one year beyond the normal limitation period to the party in whose favour the limitation period ceased to run to commence legal proceedings (i.e. where the proceedings are instituted at the very end of the period of limitation).

Article 16 (A/CN. 9/70. Annex I)

Where the creditor performs any act, recognized under the Law of the jurisdiction where such act is performed as manifesting his desire to interrupt the limitation period, a new limitation period of four years shall commence on the date on which notice of this act is served on the debtor by a public authority.

Article 18 (Final draft)

1. Whether the creditor performs, in the State where the debtor has his place of business and before the expiration of the limitation period, any act, other than those acts prescribed in Articles 12, 13 and 14, which under the law of that State has the effect of recommencing the original limitation period, a new limitation period of four years shall commence on the date prescribed by that Law, provided that the limitation period shall not extend beyond the end of four years from the date on which the period would otherwise have expired in accordance with Articles 8 to 11.
2. If the debtor 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 reflects a decision of policy that a creditor should, under the draft Convention, be entitled to the advantage of any act which, under the law of the State where the debtor has his place of business, has the effect of recommencing the

running of the limitation period. However, it has been argued that the Convention alone should determine what acts recommence the running of the period; and that a provision such as this creates difficulty for businessmen who now have to find out the law of limitation in the State of the debtor's place of business.

Whether the act is sufficient to recommence the running of the period, and the date from which such recommencement is to operate, are determined by the law of the State of the debtor's place of business. However, the total length of the limitation period cannot extend beyond the end of four years from the date on which the period would otherwise have expired.

The new limitation period is always four years. This may be difficult to justify when the original period was shorter, e.g.

A (having his place of business in State X) sells to B (having his place of business in State Y) goods containing a defect which could be discovered when the goods are handed over. The limitation period in respect of a claim arising for such a defect is two years (Article 10). B performs an act in State X which has the effect of making the period of limitation recommence. Once it recommences, the new period of limitation is four years, and not two years.

The intention appears to be that this extended period cannot be further extended (e.g. by recourse to Articles 12, 13 or 14). This should perhaps be made more explicit.

Article 17 (A/CN. 9/70. Annex I)

(1) Where the debtor acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run by reason of and from the date of such acknowledgement.

(2) Partial performance of an obligation by the debtor to the creditor shall have the same effect as an acknowledge-

ment if it can reasonably be inferred from such performance that the debtor acknowledges that obligation.

(3) Payment of interest shall be treated as payment in respect of the principal debt.

[(4) The provisions of this article shall apply whether or not the limitation period prescribed by Articles 8 to 11 has expired.]

Article 19 (Final draft)

1. Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement.

2. Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgement under paragraph(1) of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

Commentary

It has been said that "the basic purposes of prescription are to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree of certainty in legal relationship" (A/C N. 9/70/Add. 2). As a corollary, it follows that when events occur after prescription has commenced to run which provide reliable evidence, or provide anew the required certainty, there is no reason why the period should not recommence running. Article 19 deals with specific events within this class which are in many legal systems regarded as sufficient to make the period recommence.

Article 19.1 provides for the case where the debtor "acknowledges in writing his obligation to the creditor". Whether any particular writing would be an acknowledgement of the obligation would be a matter of interpretation. The requirement of writing has been introduced in the interests of certainty.

The acknowledgement must be made "before the expiration of the limitation period". This requirement did not exist under the first draft (vide 17.4 of A/C N. 9/70. Annex I). But at the debates at the fifth session a consensus emerged in favour of the view that once the prescription period has elapsed, the claim should be regarded as incapable of revival. In some civil law systems, the passing of the prescription period has the effect of extinguishing the right. A theory of revival by acknowledgement, therefore, encounters theoretical difficulties in these systems.

Whether the writing in question constitutes an acknowledgement in writing by the debtor of his obligation (which would invoke the operation of 19.1), or constitutes the creation of a new obligation (sometimes called a "novation") which would be outside the ambit of 19.1, may often be a question of real difficulty. The tribunal dealing with the matter will have to classify the writing in question.

Under 19.2, where an acknowledgment can reasonably be inferred from payment of interest or partial performance, this has the same effect as under 19.1. The new limitation period will presumably commence from the date of payment or partial performance. It is not explicit whether the payment of interest or partial performance should take place before the expiration of the limitation period. However, since 19.2 appears merely to give two special cases of acknowledgement which are not in writing, the limitations contained in 19.1 are probably intended to apply to 19.2 as well. Thus, the payment of interest or partial performance are probably intended to have effect only if done before the expiration of the limitation period.

A question which may require consideration is whether the new limitation period created by the operation of Article 19 should be four years where the original limitation period was only two years (e. g. under Article 10 — vide commentary on Article 18).

Under Article 17 (3) of A/CN. 9/70. Annex I, it is clear that 'payment of interest' refers to interest paid in respect of

the principal debt. Article 19.2 lacks this clarity. The insertion of the words 'in respect of the principal obligation' after the word 'interest' may be considered.

The question is sometimes debated whether the obligation to pay interest is or is not independent of the principal obligation. If it is held to be independent, payment of interest may be construed as an acknowledgment only of obligation to pay interest — ("that obligation"). But acknowledgment that interest is due will in turn almost always be an acknowledgment that the principal obligation is due.

Successive extensions are possible under this article, e. g.

A (the buyer) owes B (the seller) the purchase price, together with interest thereon. The limitation period has commenced to run on 1.1.73. On 1.3.73 A pays the interest due, on 1.10.73 he pays part of the principal, and on 1.1.74 he acknowledges in writing the amount outstanding. Each of these acts will successively start a new four year period of limitation. However, the extensions will be subject to the overall limitation imposed by Article 22. However, there has been consensus on that article.

Article 19 (A/CN. 9/70. Annex I)

Where, as a result of a circumstance which is not personal to the creditor and which he could neither overcome, the creditor has been prevented from causing the limitation period to cease to run, and provided that he has taken all reasonable measures with a view to preserving his claim, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist. The limitation period shall in no event be extended beyond 10 years from the date on which the period would otherwise expire in accordance with Articles 8 to 11.

Article 20 (Final draft)

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither

avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist. The limitation period shall in no event be extended beyond 4 years from the date on which the period would otherwise expire in accordance with Articles 8 to 11.

Commentary

The purpose of this article is to give further time to a creditor when, through no fault of his, he has been prevented from causing the limitation period to cease to run. The phraseology of the two drafts is different. The conditions to be satisfied under the final draft are :

- (1) the circumstances must be beyond the control of the creditor. This points to the fact that the circumstance must have been caused by factors beyond the control of the creditor.
- (2) the circumstance must be one which he could neither avoid nor overcome.

The first condition is perhaps intended to point to the relationship of the creditor to the occurrence of the circumstance, and the second to his relationship to the continuance of the circumstance. However, the distinction is not explicitly drawn, and it may be suggested that the two conditions overlap, e. g. if a circumstance is beyond the control of the creditor, he cannot overcome it. However, circumstances can be imagined where one condition is satisfied but the other is not, e. g.

A travels through a plague stricken area, and falls ill despite his taking preventive medicines. As a result he is unable to commence proceedings which would interrupt the running of the prescription period. Here it might be argued that while his falling ill was beyond his control, he could have avoided it by not going through the plague stricken area.

The phrase (a circumstance) "which is not personal to the creditor" in the first draft has been deleted, and the phrase (a circumstance) "which is beyond the control of the creditor" has been substituted in the final draft. Thus cases of personal disability such as lunacy, are now sufficient circumstances, though they would not have been sufficient under the earlier draft.

It is sufficient for the application of Article 20 that the circumstance must have prevented the creditor from causing the limitation period to cease to run for any part of the limitation period. The fact that it did not prevent the creditor from causing the limitation period to cease to run for another part of the limitation period is irrelevant, e. g.

The limitation period of four years is due to expire on 1.1.74. On 24.12.73 an insurrection breaks out in State X which prevents A, the creditor, from commencing legal proceedings before 1.1.74. Conditions return to normal on 8.1.74. The period of limitation is extended by one year from 8.1.74. The fact that A was not prevented from commencing proceedings up to 24.12.73 is irrelevant.

The last sentence places a maximum on the possible extension of the period. Up to this maximum, the one year period of extension can itself be extended by circumstances which again invoke the application of this article.

MODIFICATION OF THE LIMITATION PERIOD

Article 22 (A/CN. 9/70, Annex I)

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph 2 of this article.
2. The debtor may, at any time after the commencement of the limitation period prescribed in Articles 9 to 11, extend the limitation period by a declaration in writing to the creditor, provided that such declara-

tion shall in no event have effect beyond the end of 10 years from the date on which the period would otherwise expire or have expired in accordance with Articles 8 to 11.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law.

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 21 (Final draft)

1. The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article.

2. The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed. In no event shall the period of limitation be extended beyond the end of four years from the date on which it would otherwise have expired in accordance with the provisions of this Convention.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law.

Commentary

Article 21.1 is prompted by two considerations. Since the limitation period is regarded as a matter of public policy, it is undesirable that parties should be permitted to modify it. Further, if the power to modify were granted, it would enable the stronger party to modify the period to his own benefit.

The exception provided in Article 21.2 is made with two cases in mind. The first is where the parties are in negotiation over a dispute towards the end of the limitation period, and they wish to continue negotiations without prejudice to their legal rights. The second is where the resolution of a dispute between the parties may depend on some external event (e. g. the decision of a 'test case') and it is desired that the legal *status quo* be preserved until the happening of this event. If not for this provision, parties placed in these situations would be forced into litigation.

The limitation period can only be extended after it has commenced to run, i. e. the contract has not only been concluded, but a claim has also fallen due. At this stage the stronger party would not be in a position to coerce the weaker party. If power to modify before this time was permitted, the stronger party could coerce the weaker party. The requirement that the declaration should be in writing has been made in the interests of certainty.

The maximum period beyond which the extension cannot be extended is specified. But there is nothing to prevent the extension from being for a lesser period.

The extension will normally take place from the date of the declaration, though presumably it is open to the debtor to fix any date for the extension, provided such date is within the period of limitation, e. g. A, the debtor, by declaration dated 1.1.74, declares that the limitation period which would otherwise expire on 1.1.75, is extended for one year from that date. The extension will take effect from that date and not from 1.1.74.

The parties cannot by agreement shorten the period of limitation. There has been support for the view that this should be permitted after the period of limitation has commenced running, at which stage it is felt that the stronger party will not be able to coerce the weaker party.

21.3 is intended to provide for two situations. Firstly, certain contracts of sale provide that the exercise of a claim

depends upon the performance by one party of an act other than the institution of judicial proceedings within a period of time, e. g. that the buyer can only make a claim in respect of defective goods if he gives notice of such a claim to the other party within two weeks of discovery of the defect. Provided such a clause is valid under the applicable law, its validity is not affected by this article. The intention here appears to be that the debtor cannot by declaration under 21.2 alter the duration of such a period. This is perhaps inserted out of an abundance of caution, since such a period would not normally be construed as "the limitation period" within the meaning of 21.2. Secondly, certain contracts contain a clause that the acquisition or enforcement of a right is dependent upon the act of one party submitting the controversy to arbitration within a certain period of time. The validity of such a clause is not to be affected by this article.

An alternative version of 21.3 which may be considered would be :

- "3. No declaration under sub-paragraph 2 shall have any effect upon a clause in the contract of sale whereby the acquisition or exercise of a claim is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law."

LIMIT OF EXTENSION AND MODIFICATION OF THE LIMITATION PERIOD

Article 22 (Final draft)

[Notwithstanding the provisions of Articles 12 to 21 of this Convention, no legal proceedings shall in any event be brought after the expiration of ten years from the date on which the limitation period commences to run under Articles 9 and 11, or after the expiration of eight years from the date on which the limitation period commences to run under Article 10]

Commentary

This article provides that one important objective of a limitation law, namely, the achievement of finality in legal relations, ultimately prevails over considerations which have been invoked to give a party an extension of the original period in other articles. Some of these articles contain their own overall maximum, and these will normally operate. But where the maximum possible under those articles is greater than the maximum fixed by this article the latter maximum will prevail. Such a provision was not included in the earlier draft.

This provision is one on which no consensus has been reached. Since overall maximum periods have been provided in Articles 18, 20 and 21 on which a consensus has been reached, the difference of opinion appears to relate to possibilities of indefinite extension contained in other articles. While in particular cases the extension provided for is desirable, it is doubtful whether the possibility of indefinite extension is desirable. This article may, therefore, be acceptable.

The fact that the overall limitation is *ten* years in respect of Articles 9 and 11, and *eight* years in respect of Article 10, is probably a concession to the view expressed by some representatives during the debates that in the case of claims arising out of defects or lack of conformity a period of limitation shorter than in other cases was desirable.

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 23 (A/CN. 9/70. Annex I)

Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings.

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 23 (Final draft)

Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings.

Commentary

During the course of the debates at the fifth session there was a divergence of view on the desirability of this article. There are two possible views :—

- (a) That the article should remain.
- (b) That the article should be deleted and replaced by one which empowers (or casts a duty on) the tribunal to raise the question of its own motion, when the parties did not do so.

In favour of (a) it has been argued that by laying down some rule it creates uniformity; at present municipal legal systems vary on the question. Again, although the limitation of stale claims is a matter of public policy, a debtor to whom a plea of prescription is available will almost always raise it, and the requirements of public policy will be satisfied. Also, the alternative contained in (b) has disadvantages (these will be considered below). As against (a) it is argued that it stultifies public policy by permitting the parties to agitate stale claims. The policy contained in Article 24 which in general does not allow the limitation period to be modified is also negated by this provision. Further, national laws may differ as to the stage at which a request for consideration that the limitation period has expired can be made. If it is possible to make the request at a late stage of the proceedings, this will introduce an element of uncertainty.

In favour of (b) it is argued that this promotes public policy by always limiting stale claims, and that it is undesirable to permit the parties to impose on a tribunal the burden of investigating such claims. Against (b) it is argued that it would impose on the tribunal the difficult task of investigating a claim which neither party wishes to be investigated.

The final decision has been to retain Article 23, but to permit a reservation under Article 35 that a State shall not be compelled to apply the provisions of Article 23. The possibility of many reservations will detract from the uniformity sought to

be achieved by the Convention, and an attempt to reach consensus on this matter is desirable.

Article 24 (A/CN. 9/70. Annex I)

- (1) Subject to the provisions of paragraph 2 of this article and of Article 23, no claim which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.
- (2) Notwithstanding the expiration of the limitation period, the creditor may rely on his claim as a defence for the purpose of set-off against a claim asserted by the other party :
 - (a) if both claims relate to the same contract ; or
 - (b) if the claims could have been set-off at any time before the date on which the limitation period expired.

Article 24 (Final draft)

- 1. Subject to the provisions of Article 23 and of paragraph (2) of this article, no claim which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.
- 2. Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done :
 - (a) If both claims relate to a contract or contracts concluded in the course of the same transaction ; or
 - (b) If the claims could have been set-off at any time before the date on which the limitation period expired.