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TIME-LIMITS AND LIMITATIONS (PRESCRIPTION) IN THE FIELD OF INTERNATIONAL SALE OF GOODS

Note by the Secretary-General

CONTENTS

INTRODUCTION

1. The United Nations Commission on International Trade Law at its first session decided to include in its work programme, as a priority item, the subject "time-limits and limitations (prescription) in the field of international sale of goods."[1/]

2. The Commission decided also to request the Secretary-General, after appropriate consultation, to invite interested Governments of States members of the Commission to submit to the Secretary General studies on that subject.[2/]

3. Pursuant to the request of the Commission the Secretary-General conducted informal consultations with members of the Commission as a result of which he was informed that the Governments of Belgium, Czechoslovakia, Norway, the United Kingdom and the United States were interested in preparing studies on time-limits and limitations (prescription) in the field of international sale of goods. Accordingly the Secretary-General, by note verbale of 8 May 1968, invited the above-mentioned Governments to undertake to prepare such studies.

4. The Secretary-General has received studies from the Governments of Czechoslovakia, Norway and the United Kingdom. The text o these studies is reproduced below.

5. In connexion with this item the Commission may wish to take into account, inter alia, the work done by the Council of Europe on the subject of time-limits. In 1964 the European Committee on Legal Co-operation of the Council of Europe drew up a questionnaire on time-limits which was sent to the members of the Council of Europe. The replies received from the Governments of Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Sweden, Switzerland and the United Kingdom were published in 1968 in a document of the European Committee on Legal Co-operation entitled Replies Made by Governments of Member States to the Questionnaire on "Time-Limits". The replies describe the provisions of the laws of those countries concerning different aspects of time-limits and limitations (prescription) in general, and not limited to the international sale of goods.

1/ Report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly: Twenty-third Session, Supplement No. 16 (A/7216), paragraph 18 (iii).

2/ Ibid., paragraph 18.

6. By courtesy of the secretariat of the Council of Europe copies of the above-mentioned document will be available to members of the Commission during its second session.

STUDIES SUBMITTED BY GOVERNMENTS

CZECHOSLOVAKIA

[Original: English]
27 November 1968

TIME-LIMITS AND LIMITATIONS (PRESCRIPTION) IN THE FIELD OF INTERNATIONAL SALE OF GOODS

CONTENTS

CONTENTS (continued)

I

INTRODUCTION

1. In the course of discussion during the first session the United Nations Commission on International Trade Law (hereinafter sometimes called in abbreviation "UNCITRAL" and/or "Commission") decided that among the topics which should be primarily regulated by said Commission, also the problems connected with "Time-limits and limitation (prescription) in the field of international sale of goods" be included (see Report of the UNCITRAL on the work of its first session, page 17).

2. The putting of matters connected with time-limits and limitation (prescription) on the agenda of the Commission has been moved by several delegates, and this motion has been unanimously approved to be placed among the priority topics. In this case the problems are involved which in prevailing majority are of legal and technical nature, and certain common features exist in the laws of the individual States, so that it may be expected that within short at least partial results of unification can be attained. It should be stressed that at present the unification or at least a harmonization of the rules on limitation (prescription) and time-limits is of a great practical importance, since their consequences very intensively concern the proprietary position of the parties to the international trade, and the solution of these questions may, in an essential manner, strengthen the legal certainty in the international economical relations.

II

METHOD OF SOLUTION

3. By virtue of the resolution No. 2205 (XXI) which on 17 December 1966, has been adopted by the General Assembly of the United Nations, and by which the United Nations Commission on the International Trade Law has been established, the main task of this Commission is to co-ordinate and rush the unification and harmonizing of the international trade law. Both these methods strengthen the legal certainty of the international trade, since they help in making clear the legal position of the parties to international trade, regardless of that which court of law or tribunal (as e.g. arbitration) will consider the same.

4. However, there is a difference in quality of both said methods. As for the harmonizing only certain common principles are fixed, which however are identical only as far as the substance of the legal regulation is concerned, but as for the details of such questions these are solved by the States themselves, so that in this respect the individual legal systems may be different. But on the other hand, identical norms are adopted by more States if the unification takes place. There is no room left for a doubt that unification is a superior form of the development of the international trade, and it ought to enjoy priority over all topics which the Commission has to deal with, in so far as relevant obstacles would not be in the way.

5. Unification may only be limited to the consolidation of norms governing conflicts of laws, or it may consist in adopting of the identical norms of the substantive law. Unification of norms of the substantive law is, no doubt, a superior form of unification, and it should enjoy preference even while the regulation of matters concerning limitation and time-limit will take place. The unification of norms of the substantive law eliminates the conflicts of laws, and therefore it is why in such case, there is in principle no room for the solution of problems connected with conflicts of laws. However, this goal may be reached to a certain extent only, and even if the uniform rules of the substantive law are being practically applied, there will always exist different matters which furthermore will remain unsettled. In the rough features the following problems are involved:

6. (a) The extent of the uniform rules is limited to a certain framework which need not necessarily cover the question which is under consideration or discussion; it will be necessary in this connexion, i.e. while the limitation and time-limits will be regulated, to fix in a most accurate manner the terms which, within the framework of the domestic legal rules of the signatory States, shall be substituted by the uniform rules. Difficulties will probably arise, mainly in this respect, that different terms regulated in the individual legal systems cannot be classed either with terms of prescription or time-limits. It is, e.g. the French law which for the claims resulting from needs which concern the everyday life, adopted a presumption that after the lapse of a certain, short time, all such claims are to be considered as settled, but this

presumption may be refuted by the oath (see Article 2275 of the French Civil Code). Therefore, it ought to be evident - so far as it is possible - quite unambiguously from the adopted rules, whether or not even the terms of such kind shall be substituted by the uniform rules. As for the terms which do not fall under the uniform rules, it will be necessary to determine the question which law will govern said terms.

7. (b) The uniform rules may prove gaps in the law which will need to be overcome. For this purpose either the application of the law which would apply if the uniform rules did not exist, or overcoming of gaps in the law, in accordance with the principles stated directly in the uniform rules (so, e.g. Article 17 of the Uniform Law on International Sale of Goods pronounces the principle that any gaps in the law shall be settled in conformity with the general principles on which the present law is based), should be taken into consideration.

8. (c) In connexion with the uniform rules the preliminary and qualification questions arise (as e.g. legal notions applied for the uniform rules are not fully determined there and must be settled in conformity with a certain legal system).

9. Even though the unification of the law does in principle mean that conflicts of laws might be prevented, this aim may be reached to a certain extent only, and therefore the question must be examined whether for the solution of said problems the subsidiarily applicable law should not be fixed. The solution of questions concerning conflicts of laws is contained, e.g. in the General Conditions governing the delivery of goods among the organizations of foreign trade of the Member States of the Council for Mutual Economic Assistance (see Section 74 of said General Conditions). Similar solution would probably be instrumental for the proposed uniform rules.

10. As for the prescription and time-limits, there were probably not yet concluded any special conventions with a larger participation of the States, and nor international organizations which deal with the unification and harmonizing of the law have elaborated heretofore any motion for such rules. Outside the framework of them only two drafts have been submitted. The first is the preliminary draft of "Convention on Proper I[illegible] and Unification of Provisions concerning the Prescription in Connection with the Materialization

of the International Trade", which was prepared in 1961 within the framework of the Council for Mutual Economic Assistance, but has not entered in force, as yet (see Annex No. I). The second is the draft elaborated by the Polish professor H. Trammer (see Annex No. II). The Permanent Commission of the Council for Mutual Economic Assistance has approved on 1 June 1968 the new text of the "General Conditions governing the delivery of goods effected among the organizations of the foreign trade of the member States of the Council for Mutual Economic Assistance", which is to enter into force from 1 January 1969. Newly included in the said General Conditions are also several provisions concerning the prescription, in so far as the rights resulting from the contracts which are governed by these General Conditions (see Annex No. III) are involved. These rules (General Conditions) as well as the two above-mentioned drafts ought to be considered and appreciated within the scope of activities of the Commission, and at the same time it ought to be also examined whether the principles which are contained therein would not be suitable for the application to the legal regulation of the international trade.

11. From among the methods of activities of the Commission which are stated in the Resolution of the General Assembly of the United Nations No. 2205 (XXI) of 17 December 1966 it is the "Preparation of New International Conventions, Model or Uniform Laws" which should, in this state of affairs, be taken into consideration. By this occasion it must be seen to it that the provisions concerning prescriptions, so as the same are contained in all legal systems, are as a rule of mandatory nature, and that the domestic legal rules may be modified for the sphere of the international trade only in a form which is on the same level as the laws are.

12. As it already followed from the general discussion held in the course of the first session of the Commission, the form of multilateral conventions should have preference, since such conventions can, in the field of prescription and time-limits, reach at the best the goals aimed by the uniform rules, to the most possible extent. In this connexion regard must be paid to that the contents of the uniform rules be acceptable for the majority of States. For this purpose it is necessary to adapt both the contents of an eventual conventional regulation and the possibility of different conventional reservations. At the same time the unification activities (work) of the

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Commission must be understood as an organic whole, which should not be depreciated by accepting of differing compromises resulting from different comprehension of various legal questions, existing between the individual legal spheres and systems. True, a great generality of such rules or a very broad possibility of reservations in respect of such rules might facilitate the unification work, but its result for the practical application in the international trade would thereby be depreciated in a considerable manner.

13. Only in such event where the way of unification on the conventional basis were not negotiable, it would be convenient to try to elaborate, at least, a model Law. This form would of course be only a recommendation to the individual States to adopt in their domestic rules the Acts which would be in compliance with the model Law. Naturally, this might facilitate the enacting even of such Laws which might deviate from the fixed model Law, so that the unification might be attained to a more limited extent than in the case of a conventional form, and even a harmonizing of legal rules might only be involved.

III

UNIFICATION AND LAWS GOVERNING CONFLICTS OF LAWS

14. Even in the case where the uniform rules would be based on a convention, several solutions might be taken into consideration, which differ mainly in respect of relation to the norms governing conflicts of laws.

15. First of all, uniform legal rules which would be applicable to the relations between the parties to the international trade, who are subjects of the contracting States, might be taken into consideration. In such case either principle of nationality (citizenship), or a more modern criterion of domicile (seat) or place of business of the party to the international trade, might be taken as basis.

16. For the relations between such parties, the conventional rules would substitute the domestic rules of each individual State, since the provisions of the contracting States, whose law would be applicable to the solution of conflicts of laws, would be identical, the problems connected with conflicts of laws would be of secondary importance. However, the disadvantage of such solution is a proportionately great limitation in respect of application of the

uniform rules, since such rules would not apply to parties who are subjects of States not participating in the convention.

17. A contrary method of solution of this question is embodied in the Uniform Law on the International Sale of Goods; the provision of Article 2 contains the principle reading as follows: "Rules of private international law shall be excluded for the purposes of application of the present law, subject to any provisions to the contrary in the said law".

18. Thus, the provision of the cited Article does in principle fully exclude the application of the private international law, but at the same time the Uniform Law contains in its several Articles provisions concerning conflicts of laws (as e.g. Articles 3, 4, 5, 17, and 38). In principle, it follows from this regulation that only lex fori is to be applied, and this provision is imposed even on the parties of the States which have not adhered to the convention, even for such cases where under the rules of the private international law the law of the signatory State would not be applicable (e.g., under the rules governing conflicts of laws the law of the State which has not adhered to the convention ought to be applied). Even though the authors of the Uniform Law made evidently all their efforts to broaden to the greatest extent the application of the uniform rules, a question arises, i.e. whether the absolute denial of the international private law which is therein contained has not passed far above the appropriate limits.

19. It seems that such solution would be the most acceptable which would represent a certain compromise between the said extreme solutions. By this occasion the principle might be taken as basis, i.e. that the uniform rules ought to become an integral part of the law of the contracting States, and to be applied to cases where the law of these States would be the proper law of the contract. If in this respect the application of provisions of legal systems where the uniform rules have been enacted be involved, the need to regulate questions connected with conflicts of laws would in principle cease to exist. In relations between the parties of the third States (i.e. those which have not adhered to the uniform rules) the uniform rules governing prescription and time-limits would only be applied in such events where in conformity with the rules of the international private law, the law of any of the signatory State would be applicable.

20. In connexion with the solution of the questions connected with conflicts of laws the legal uncertainty in respect of the law to be applied would arise. It would therefore be convenient to complete the unification of norms of the substantive law by the uniform norms governing conflicts of laws, from which it would in principle follow when the uniform rules should be applied in relations between the States which are not signatories of the convention. While determining the principles of the uniform rules on conflicts of laws, the lex causae ought to be taken as the basis; this ought to be determined jointly with the prepared convention on the laws applicable to the international sale of goods (see Report of the UNCITRAL on the Work of its First Session 29 January-26 February 1968, pages 16 and 17).

IV

SUBJECT MATTER OF REGULATION

21. With a view to the competency of the Commission, i.e., to deal only with the unification and harmonizing of the law of international trade, it is necessary to exclude from the subject matter of the uniform regulation such legal relations which do not fall under this sphere. This required that the domestic rules concerning prescription shall not be affected, the same only being excluded from being applied to the international commercial relations. In favour of this solution speak not only the formal grounds but even the real ones, since the legal problems connected with the international trade are of a quite different character in comparison to the domestic relations, whose rules must be based on the needs of the national economy of the respective State, and also regard must be paid to the degree of its development.

22. This solution which has been adopted in the Hague Uniform Laws as well as in the Czechoslovak legislation, while the subject matter of provisions contained in the Czechoslovak International Trade Code was determined, presumes that the limits of applicability between the rules governing international commercial relations and the rules governing domestic relations (no matter whether commercial or civil relations) be determined, so far as possible in an unambiguous manner, all that in interest of legal certainty.

23. In the course of the first session of the Commission the principle has been adopted that the subject matter of the uniform rules should be "time-limits and limitations (prescription) in the field of the international sale of goods" (see Report of the UNCITRAL on the Work of its First Session 29 January-26 February 1968, pages 16 and 17).

24. In order to make quite clear the subject matter of this uniform regulation, there are first of all two questions which in this connexion are to be solved:

(a) To determine the notions of prescription and time-limits, the distinction between these notions and the difference between the same and the similar institutions, which similar institutions are not to be included in the uniform rules, and

(b) To determine the notion of the "international sale of goods" and to consider whether the uniform rules ought not to be limited only to the rights arising from the materializing of the international contract of sale or even to other rights accruing in the course of the international exchange of goods (e.g. in case of invalidity of a contract of sale, or even of other contracts, as e.g. the contract concerning transport, insurance contract, a.l.). First of all, it will be necessary to determine the difference between the "International" character of sale of goods - as distinct from the domestic sale - furthermore to exclude cases which even if possessing an international element, are not despite that of commercial character, and consequently cannot be considered as part of realization of the international trade. Herewith is, e.g., ranged the purchase of different articles taking place in connexion with the international tourism, and the like. Similar problems will arise not only in the course of determination of rules governing prescription and time-limits, but also during the solution of other questions which are to be dealt with by the Commission.

Notions of prescription and time-limits

25. The individual laws connect different consequences with the lapse of certain time. The most important of them are determined in connexion with the regulation of the so-called prescription and time-limit, which even for the legal regulation of the international trade play a significant role, since in this case the proprietary position of the parties to it is substantially modified.

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26. Both the conditions imposed for giving rise to the time-limit and prescription and the legal consequences which follow therefrom, are, as for the particulars, differently regulated in the individual legal systems. It is just this difference in the regulation and furthermore difficulties arising during the solution of the conflicts of laws, while the proper law for their settlement is determined, which are sources of a considerable legal uncertainty in the international trade. Nor the legal terminology is unified, but in spite of that common features may be found to a certain extent, which are illustrative of both the prescription and time-limits.

27. Both these institutions are in principle aimed at preventing the long lasting or even unlimited enforceability of rights and corresponding obligations. Both the prescription and time-limits protect the obliged person against the possibility of enforcement of performance of his obligations (no matter whether of an alleged or actual obligation). Thus, the prescription as well as time-limits differ from other legal institutions where after the lapse of a certain time only the means of evidence and the form of legal acts on which the alleged right is based are subject to stricter requirements, so that the entitled person can - if he has fulfilled the stricter conditions - obtain the enforcement of his right, even contrary to the will of the obliged party.

28. The existence of both the prescription and time-limits is based on the common grounds. As basis is taken the fact that after the lapse of a certain time it is much more difficult to ascertain and prove circumstances which are relevant for the rise, and on the contrary, for the extinction of rights (as e.g. the payment of debts). It is as well viewed from the technical point why it is unthinkable that the documents witnessing the performance of obligations be filed for an unlimited time. Therefore, the legal systems grant - after the lapse of a certain time - the protection to the obliged person against the claims based on the facts which had occurred long time ago.

29. However, this common result is obtained by legal means which differ on the one hand in the case of prescription and on the other hand in the case of time-limits. On the basis of a comparative criterion the difference between the time-limits and prescription may be summarized in the following items:

(a) if the time-limit is involved the right becomes directly extinct, while in the case of the prescription the possibility to claim it in the court

(before arbitrators or other competent tribunal) is restricted (or lost). In practice this distinction is important mainly in cases where the prescribed or limited claim has been fulfilled. In the case of time-limit the performance may be claimed back (since no legal grounds for performance existed), whereas in the case of prescription the performance is effected as good in law (the obligation to perform lasts, it is only the enforceability of performance which is impossible, and sometimes such obligations are called moral /natural/ obligations) so that the restitution cannot be claimed;

(b) In the case of time-limit the court of law (arbitrator or another deciding tribunal) is bound to take it into consideration on its own initiative, whereas the prescription is taken into consideration only in the case where the obliged person invokes the prescription;

(c) The period of time-limit runs uninterruptedly, whereas the period of prescription is, due to different grounds sometimes interrupted (which means that the already elapsed period of prescription loses its effects and the new period of prescription begins to run afresh, no matter whether of the same duration or of the longer duration) or is suspended (i.e. the period of prescription does not continue to run, but after the obstacle has ceased to exist, the original period of prescription shall continue to run);

(d) All the proprietary rights are in a general manner regulated by the prescription (or eventually different categories of rights are as well subject to different duration of period of prescription), and only certain rights, depending on their nature, are excluded from being prescribed (as e.g. the right of ownership which however under different laws is lost through the acquisitive prescription); on the other hand, the time-limit takes place only in such event if it has been so agreed expressly when a certain right was regulated (as e.g. if the complaint to the defects of the goods (non-conformity) has not been notified in due time); as a rule the duration of time-limits is shorter than of those which concern the prescription;

(e) Prescription takes place if a certain right has not been claimed within the fixed term, whereas the time-limit may be based on other grounds (if a certain legal act has been missed, as e.g. the notification of the defects of goods (non-conformity) not made within the definite term, and the like).

30. However, deviations and exceptions may be found in different legal systems from this comparative scheme so that some effects are connected with the prescription which otherwise are symptomatic of time-limits (e.g. under the provisions of article 82 of the Russian Soviet Federal Socialist Republic Civil Code the courts take into consideration the prescription on their own initiative) and vice versa.

31. Therefore, the uniform rules should define the notions of prescription or those of time-limits, so that it may be clear which domestic rules contained in the individual legal systems are being substituted by the uniform rules. As a difference in notions may be considered that which has been mentioned under (a). Within the meaning of uniform rules the ground for the time-limit should be deemed to be the lapse of a term wherewith the extinction of a right is connected, and for the prescription the lapse of term with which the extinction of the mere enforceability of a right is connected, no matter whether absolute (i.e., on the initiative of the deciding tribunal) or relative (upon the objection raised by the obliged party).

32. The basic difference in the conception of prescription is on the one hand between the sphere of the Common Law, and on the other hand the sphere of the Civil Law. The Common Law upholds the principle that the prescription is an institution of the law of procedure, which only concerns the possibility to claim the judicial aid for the protection of rights (affects the remedy only).[1/] It follows from the prescription seen from the point of its procedural nature that the English Law attaches to the prescription a territorial character and applies lex fori for its regulation.

33. On the other hand, in the legal sphere of the Civil Law (sometimes called Continental Law) the character of the substantive law is attached to the prescription. While solving the questions connected with conflicts of laws the Civil Law takes therefore as a rule as the basis the lex causae. This different

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1/ The procedural conception of prescription upheld by the Common Law is probably the result of influence of the Roman Law (comp. e.g. Holdsworth, A History of English Law, Boston, 1938, vol. VIII, page 65), which connected prescription with an action. Thus, the Roman Law has exceptionally influenced in this respect the development of the English Law which otherwise resisted to the reception of the Roman Law and retained its independent legal development.

conception of prescription and time-limits may - apart from the solution of questions concerning conflicts of laws - be of further importance, i.e. in the distinction of means of appeal applicable in cases where the substantive law and the law of procedure have been infringed.

34. The unification of rules on prescription should facilitate the overcoming of these different conceptions or at least to limit to maximum the practical consequences while the matters connected with the international trade will be regulated. At the same time it must be taken into consideration that the conception of prescription, viewed from the procedural point, brings about a certain legal insecurity in the legal regulation of the international trade, since the appreciation of questions connected with the prescription will entirely be dependent on the court which will decide on the respective right, so that the entitled person will not be in a position - prior to the acceptance of action for the decision - to consider which term of prescription will be decisive for him. But even if the prescription is considered as an institution of the substantive law, a certain insecurity in respect of the applicability of the law will arise, but only to such extent to which there will exist doubts as for the determination of the lex causae.

The extent of prescribed (limited) rights

35. While the rights to which the prepared rules on prescription or eventually on time-limits should relate are determined, the notion "international sale of goods" is taken as the basis. This notion is of fundamental importance for the determination of the subject-matter of the work of the Commission, since this notion is employed even in connexion with further suggestions concerning the contemplated regulation. While determining this notion it will be necessary to take as the basis the fact that this notion is aimed at helping in separating the prepared rules from the application of the domestic rules, whose application - without the framework of the contemplated rules - will evidently not be affected.

36. While looking for the determination of the notion of the "international sale of goods", it is necessary to take as the basis the competence of the Commission, as provided for in the resolution of the General Assembly of the

United Nations dated 17 December 1966, from which it follows that the Commission is to assist in a progressive harmonizing and unification of the law of international trade. It would surpass the framework of this treatise if efforts be made to try to define the notion of the law of international trade, and moreover, there might be a reason for a doubt whether an abstract definition would be instrumental just at the beginning of the work of this Commission, in view of the fact that no sufficient experience for the solution of the given problems is at disposal as yet. It follows from the course of the first session of the Commission that it is instrumental to determine the subject-matter of the regulation always in connexion with the solution of the individual matters which are dealt with simultaneously. However, it is quite clear that under the notion of relations in international trade only such relations may fall which, on the one hand are of international character, and on the other hand those which may be considered as the commercial relations (as distinct from other international relations which do not come in the sphere of trade).

37. The determination of the notion "international sale of goods" is contained in the Uniform Law on International Sale Contract and Uniform Law on Conclusion of International Contract of Sale, which have been adopted at The Hague in 1964. The notion of "international sale" is identical in both Conventions and it may be characterized by the following features which determine its international nature:

(a) subjective factor: the rules concern the relations between the parties whose places of business (l'établissement) are in the territories of different States;

(b) objective factor:

(1) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

(2) where the acts constituting the offer and the acceptance have been effected in the territory of different States;

(3) where delivery of the goods is to be made in the territory of the State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

38. Under the said Uniform Laws the notion "international sale of goods" only includes such contracts where the subjective factor as well as any of the above-mentioned objective factors is contained.

39. Apart from the said features which constitute the international character of sale of goods, the Uniform Laws do not expressly define the commercial character of such sale. Within the framework of the subjective factor the place of business is taken as the basis, which however is not defined in a more specified manner, and therefore it is evident that a businessman is to be involved. However, the Uniform Laws contain provision (article I, para. 2) to that effect that where a party to the contract does not have a place of business, reference shall be made to his habitual residence (résidence habituelle). Of course, it is thereby admitted that the Laws may be applied, if other conditions are met - even to the arrangement of relations where a doubt may arise whether commercial relations are involved.

40. Since the legal regulation which is to be proposed by the Commission should only cover the relations in the international trade, it must be considered how to exclude from it the international relations which lack a commercial character. Apart from this formal criterion, it must be taken into account the fact that the prepared rules on prescription and time-limits would probably not be appropriate for the relations which are not the commercial ones, since these rules will have to be based on the needs of the rapdily developing international trade, where probably shorter terms are fixed than those which are applicable to the civil legal relations. This practice of legislation exists even in such States where apart from civil codes also trade codes are in force, and as a rule the terms of prescription under trade codes are much shorter.

41. While determining the extent of applicability of the commercial law the legal systems where trade codes exist take, in prevailing majority, as the basis either the subjective or objective criteria. The subjective criterion is symptomatic mainly of the German law whose basis is the notion "businessman" (Kaufmann), but this notion uses to be qualified with considerable difficulties (some legal systems do not know this notion).

42. In the sphere of the French law the objective determination of the trade law enjoys preference which means that certain legal acts (contracts) are declared

to be the commercial ones, either by reason of their form (bills of exchange) or of their contents (as e.g. the sale of food and goods destined for resale or where use is granted for a valuable consideration in accordance with the provision of article 632 of the French Trade Code), and finally all acts which are effected by the businessmen by occasion of their undertaking (toutes les opérations que fait un commerçant à l'occasion de son commerce - see article 632 of the French Trade Code).

43. Under the provisions of the Czechoslovak law (see section 2, para. 1 (a) of the Czechoslovak International Trade Code) is considered as a relation arising in international trade - inter alia - a proprietary relation under which a transfer of a right in rem, in personam or other right of economic value for any valuable consideration taken or is to take place between persons that do not have their seat (domicile) in the territory of the same country. The commercial character of these international, proprietary relations is determined in a negative manner, i.e. the Act excludes from its applicability such proprietary relations where at the moment of their creation it is known beyond any doubt that they are being entered into for the purpose of satisfying in the territory of the Czechoslovak Socialist Republic the personal needs of private use or other needs of personal use of at least one of the parties (see section 2, para. 2 of the International Trade Code).

44. The determination of both the international and commercial character of the relations which are to be governed by the prepared rules is first of all dependent on the reply to the question, i.e. whether the Commission should limit its work only to rights arising from contract of sale, or whether the notion "international sale of goods" should be understood in a broader meaning (e.g. even for regulation of rights which have arisen as a result of the invalidity of a contract of sale, or for other types of contracts which are economically closely linked to the sale of goods, as e.g. insurance contract, carriage of goods contract, forwarding contract, and the like). Should the rules be based on a broader conception, it would be convenient to adapt even their terminology to another concept of the notion, since the notion "international sale of goods" is used in the Hague Uniform Laws for the contract of sale only. Uniform terminology might as well be used for the work of the Commission.

45. The wording of the report of the Commission on its first session, read as a whole, may lead at the conclusion that the idea of the Commission was to limit the matters governing the prescription to the international contract of sale. Similarly, the draft elaborated by professor Trammer as well as the said draft of conventional regulation of prescription elaborated within the framework of the Council for Mutual Economic Assistance and also the general conditions of the Council for Mutual Economic Assistance, which contain provisions on prescription, are only restricted to the contract of sale, or even to contract for work. It is first of all the simplification of the discussed problems which speaks in favour of such restriction, so that in this manner the concrete results might be more easily obtained.

46. However, on the other hand the regulation of prescription or time-limits concerning one type of contracts is connected with regulation of this matter for other types of contracts, and it would be in keeping with the needs of the international trade if the duration of terms and their course were unified to the broadest extent. Nevertheless, it might probably be more convenient to limit for the time being the work in this respect that only drafts concerning contracts of sale be elaborated, and to consider then - in the later stage - whether it would be possible to enlarge it for other types of contracts.

47. Furthermore, it must be considered whether the regulation should be limited only to rights arising from a valid contract of sale, or whether it should as well comprise the rights arising in connexion with the contract of sale (e.g. as a result of its invalidity, breach of duties stated therein, securing of its performance, as e.g. suretyship or extinction, as the claims in restitution of performance in cases of subsequent impossibility of performance). Practical needs of the international trade probably give reasons for such a broader conception, since otherwise the adopted rules might be considerably depreciated. This broader conception proved instrumental even in the legal regulation adopted by the Czechoslovak Socialist Republic where not only the relations cited in the International Trade Code are governed by its provisions, but also other legal relations connected with them, particularly those resulting from modification or extinction or in view of the nullity of the act which was to create them, or from the voidability of legal acts causing detriment to the parties to such

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relations, or arising in connexion with the guaranteeing such relations and in connexion with performance or breach of obligations stated therein (see section 2, para. 1 (1) of the International Trade Code).

48. If the legal regulation be limited only to rules governing prescription and time-limits in cases of the contract of sale, or to rights arising in connexion with the contract of sale, the determination of the international and commercial character of sale of goods would be simplified. The international character is probably best grasped by the subjective criterion, i.e. the criterion concerning the parties, whereby it is more convenient to take as the basis their domicile (place of business) rather than the principle of nationality (mainly with a view to the fact that difficulties often arise while the nationality of bodies corporate is to be determined). Both the Hague Conventions on Uniform Law on the International Sale of Goods and the Czechoslovak International Trade Code have adopted the said principle. However, in the Hague Conventions the extent of this subjective determination is limited, since apart from it, it is required that any of the following conditions be fulfilled:

(a) the subject-matter of sale are the goods which are at time of the conclusion of the contract in the course of carriage, or will be carried from the territory of one State to the territory of another;

(b) legal acts constituting the offer and the acceptance have been effected in the territories of different States;

(c) the delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

49. The determination of this notion of international sale resulted from long-lasting discussions, and it must be admitted that it has been very well thought out. The advantage of said notion is as well the fact that at the same time the most typical cases of the international non-commercial relations are thereby indirectly excluded, as e.g. the purchase of articles in a foreign country by a tourist. It is however, necessary to examine at the same time whether this regulation excludes all other non-commercial relations, whether the subject-matter of regulation to this extent would not be very limited in some respects, and whether the fixed criteria are unambiguous to such extent that no room will be left for a doubt as for the limits of application of the adopted rules.

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50. It should be stressed that cases may occur in the practice where the conditions mentioned under (a) to (c) will be met, although the commercial relations will not be involved, if e.g. a tourist buys certain articles for his personal needs and these articles will have to be carried to his country. Also doubts may arise whether different trades are not to fall under the uniform rules, in spite of their not having met any condition stated under (a) to (c). It is, e.g. the sale of goods where the payment is to be effected on the international scale which may give rise to a series of questions which are not settled in the domestic legislation, and whose solution would be instrumental within the framework of the prepared rules.

51. It is even the interpretation of the wording of article 1, para. 1 of the Hague Uniform Laws which may cause certain difficulties. So, e.g. the condition that the international carriage of goods will be effected may give rise to certain doubts at the time of the conclusion of the contract, whether actually such carriage will be effected, or on the contrary whether all parties are aware that such carriage is to be effected. As for the condition mentioned under (c) a doubt may arise in respect of the law under which the place of delivery is to be considered, in such cases where this place is not fixed in the contract and must be derived from the law (ex lege).

52. The Czechoslovak International Trade Code determines the subject-matter of its regulation with a view to the applicability of the other Czechoslovak codes which govern the proprietary relations, and is adapted to the domestic character of this Code, and consequently its method cannot be applied for the international (interstate) regulation which is aimed at the unification. While determining the subject-matter of the rules of the Czechoslovak International Trade Code, the Czechoslovak law solves similar problems in such a manner that the knowledge of the parties of the aim of the arising legal relation, no matter whether the knowledge objectively presumable by the law or actual knowledge, is accentuated, regardless of that whether or not this aim will actually be attained at a later time.

53. It would be worth while to examine whether the subjective criterion might be put together, i.e. the condition that the parties have their domicile or place of business (whose legal interpretation may cause difficulties) in the

territories of different States, with a certain objective criterion. As the basis might, e.g, be taken the objective determination of the commercial character which is applied by the French law to the contract of sale and to adapt the same to the requirement of needs of the maximum legal certainty in the international trade, and to enlarge its application to cases which are closely linked to the contract of sale. It is essential in the practice that a party to a contract be sure of the time of duration and course of terms of prescription just at the time when the legal relation arises, i.e. at the time of the conclusion of the contract, as well as of instances where the contract becomes void or where its validity is extinguished, or where its breach is committed.

54. In consideration of all that the rights arising from the international sale of goods might, in rough features, be defined as rights arising from the conclusion, breach or invalidity (both the initial and subsequent invalidity) of the contract of sale concluded between the parties having their domicile (place of business) in the territory of the same State, if they were or must have been aware at the time of the conclusion of the contract, that the purchased goods are destined for further sale or for other business forms exercised by the buyer (e.g. for the equipment of his manufacturing work and the like).

55. In this connexion even the determination of the notion of a contract of sale in relation to similar types of contracts, which will be excluded from the regulation, will be necessary. Especially complicated problems arise in this connexion in cases of contracts, under the terms whereof the goods are first to be manufactured. The demarcation between a contract of sale, on the one hand, and the other types of contracts (in particular the contract for work), on the other hand is often disputable. Under the provisions of article 6 of the Hague Uniform Law are considered to be sales contracts for the supply of the goods to be manufactured or produced, unless the party who orders the goods undertakes to supply an essential or substantial part of materials necessary for such manufacture or production. Since a disputable demarcation may exist between the essential and non-essential part of such materials, the Czechoslovak International Trade Code has adopted the principle according to which also a contract whose subject-matter are the goods which are to be manufactured or produced

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is deemed to be a contract of sale, if the things intended for processing in the course of production of such goods are to be procured by the seller (see section 277 of the International Trade Code).

56. Similar demarcation of a contract of sale is as well embodied in the draft convention concerning prescription which has been elaborated by professor Trammer. Thus, in comparison with the Hague Uniform Law the notion of the contract of sale is narrower, but it seems that this tendency of limitation is justified by the fact that the duty of the ordering party to supply things for processing considerably modifies the position of the parties in comparison with the position of the seller and buyer who is free of this duty. In connexion with regulation of matters concerning prescription it would be rather instrumental to further the extent of regulation even to all other contracts under the terms whereof the goods are first to be manufactured or produced, since in the sphere of prescription or time-limits, these contracts need not be differentiated from the contracts under the terms whereof the goods which have been produced are already sold. This broad conception found e.g. its expression in the draft convention concerning prescription which was elaborated in 1961 within the framework of the Council for Mutual Economic Aid (see article 1 of said draft).

V.

LEGAL CHARACTER OF PRESCRIPTION AND TIME-LIMITS

57. In principle the rules on prescription which are contained in all legal systems are of mandatory nature, but the rate of this cogency of these rules is not the same in all cases.[1/]

(i) Soviet law: Article 18 of the Civil Code of the Russian Federal Soviet Socialist Republic absolutely prohibits such contractual agreement where the terms of prescription or the manner of its counting would be modified. The deciding tribunal (court of law or arbitrators) may however grant the

1/ In the further part of this treatise regard will be paid primarily to the provisions of the French, Soviet, German and English laws, which laws represent the main legal spheres of the world, as well as to the Czechoslovak law, which is the only law which contains special domestic rules on propretary relations in the international trade.

enforceability even in cases where such right is involved in respect whereof, due to important reasons the term of prescription has been missed (see article 87, para. 2 of the Civil Code of the Russian Federal Soviet Socialist Republic).

(ii) German law: Under the provisions of the German law the terms of prescription cannot be lengthened by an agreement of the parties, but they can be shortened (see section 225 of Civil Code). On these grounds neither an agreement of the parties, according to which the commencement of the term of prescription could be postponed at a later time than provided for by the law, is allowed.

(iii) French law: In the sphere of the French law there were no uniform opinions in respect of possibility of a contractual regulation of prescription. Under article 2220 of the Civil Code it is impossible to abandon in advance the right of prescription. It has been deduced from the said provision that under the conditions of a contract neither the commencement of the period of prescription can be postponed contrary to the provisions of law, and as it follows from the judicature any agreement of the parties concerning the lengthening of the term of prescription has been considered as void, however the shortening has been admitted in the judicature (subject to some exception as e.g., in cases of insurance contracts).

(iv) English law: Under the provisions of the English law any agreement by virtue of which the debtor abandons in advance his right to object the prescription is void; however, when the prescription takes place the debtor is free to waive validly his right to object to the prescription.

(v) Czechoslovak law: Under the provisions of the Czechoslovak law there is far more freedom in matters of the prescription for the sphere of the international trade. The parties are free to agree upon in writing longer or shorter terms of prescription than those which are provided for by the law; however they are not free to waive in advance their right to object to the prescription, and the whole duration of the period of prescription agreed upon together with that which is provided for by the law (statutory period of prescription) must not exceed the period of fifteen years (see section 88 of the International Trade Code). Within this framework even the lengthening of the period of prescription is allowed; it is even allowed to abandon the period of

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prescription already elapsed (a new course of the period of prescription takes place as well if the debt has been acknowledged in writing).

(vi) It is as well the draft elaborated in 1961 within the framework of the Council for Mutual Economic Assistance where the agreement on a shorter or longer term of prescription is allowed than that which is provided for therein; but also in this case the written form is required (see article 9 of said draft). Similar regulation is as well suggested in the draft of professor Trammer (see article 9 of his draft). Article 102 of the general conditions of the Council for Mutual Economic Assistance does not allow the parties to agree upon the term of prescription other than provided for under said general conditions.

58. The rules of said laws indicated by exemplification result in certain common features; symptomatic of these common features is a certain limitation of the autonomy of contract between the parties in the interest of legal certainty. On the other hand, the terms concerning time-limits show a very heterogeneous regulation. Some legal systems admit not only the shortening and lengthening of time-limits under the terms of the contract (e.g. in case of responsibility for defects [non-conformity] of the goods), and moreover, the parties are free to exclude time-limits under their contract. However, even the rights which can be subject to time-limits, are in this case governed by the provisions regulating the prescription so that unless the right has become extinct through the lapse of a shorter time-limit, it shall nevertheless be prescribed after the lapse of time fixed for the prescription. Several legal systems do not allow any contractual deviation from the rules governing time-limits.

59. It is symptomatic of the law governing international trade that a much broader autonomy of contract is applied in comparison with the law governing domestic relations. However, it is evidently in the interest of legal certainty why the parties cannot be free to exclude the prescription under their contracts or to lengthen its time of duration for a very long time (which practically would bring about the same effects).

60. As it is proven by the practice of many States the agreements on shorter terms of prescription do not cause any difficulties, since the deterioration of the debtor's position is not thereby caused. On the contrary, the character of different duties which are embodied in the contracts connected with the

international trade, requires that any disputes concerning these duties be settled as speedily as possible. This result may be obtained by the shortening of the contractual terms of prescription.

61. The possibility to agree upon the lengthening of the time of duration of prescription will probably be dependent on the duration of the general, statutory term of prescription. In so far as these terms are shorter (which is symptomatic of commercial relations in comparison to civil relations) it would be worth while to admit the possibility of lengthening of terms of prescription, but within a certain limit only, so that the maximum whole of time of duration of prescription would be the total of the statutory term and the term agreed upon. The prepared rules ought to facilitate the parties to lengthen the terms of prescription just at the time of the conclusion of the contract in all cases where the character of the contracted duties will so require; apart from that, the parties ought to be free to lengthen the terms of prescription even at a later time, if they intend to settle the arisen dispute in an amicable manner, and if at the same time the claim is threatened by the prescription. Where the parties are not free to lengthen under their contract the terms of prescription, the entitled person will be, as a rule, obliged to file, prior to the expiration of the period of prescription - so as to preserve the right to claim his right - the action, in order to bring about the interruption of the period of prescription. However, unnecessary judicial fees are thereby connected and also an amicable settlement of disputes is thereby made more difficult. Several facts which otherwise actually have the effect of lengthening of the terms of prescription, as e.g. the interruption of the term of prescription, are as a rule connected with further consequences qhich are in disfavour of the debtor (as e.g. in the case of acknowledgement of debt the existence of the right is presumed), or the time of duration of prescription is lengthened over and above the limit acceptable for the debtor (as in the case of abandonment of the period of prescription which has already elapsed).

VI.

EFFECTS OF PRESCRIPTION AND TIME-LIMITS

62. As it already has been mentioned above the difference in notions concerning prescription and time-limits consists primarily of the legal effects which are

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therewith connected. In the case of time-limit the right becomes extinct, whereas in the case of prescription the possibility of claiming the right is excluded. Thus, the effects of time-limits result in a more ponderous interference with the position of a creditor. Therefore, the provisions of legal systems governing the time-limits are first of all aimed at moving the creditor to effect certain duties (as e.g. to perform certain legal acts) or to claim his right in due time. The aim of the time-limits is to prevent the deterioration of the debtor's position (mainly owing to difficulties connected with the ascertainment of the actual state of things, which is decisive for the consideration of the legal position of the parties). The most symptomatic case of the time-limit, as adopted by the majority of legal systems, is the loss of the buyer's right to complain about the defects of the goods (non-conformity), naturally in such case where he failed to notify regarding the defects (non-conformity) in due time. The provisions concerning time-limits are aimed at moving the buyer to inspect the goods in due time and at preventing him from transferring to the seller the economic consequences resulting from damage to or destruction of the goods which had occurred already at the time when the risks have passed on to the buyer. The time-limits are similarly applied in cases of other legal relations, where similar risks threaten (e.g. as a sanction for failure to notify in due time the damage suffered by the insured things).

63. In principle the extinction of a limited claim means that the law grants the debtor protection, even contrary to his will, and does not enable him to fulfil his duty which has become extinct as a result of the time-limit, since otherwise a non-existing debt would be settled, which constitutes the right to the restitution of performance.

64. Further effect of extinction of a limited right consists of that the creditor can use neither the legal means securing the performance of the limited duty (e.g. rights arising from suretyship, banking guarantees, mortgage, and the like), which as a rule become extinct as a result of the so-called accessority together with the extinction of the secured right, at the latest. Besides, in cases of time-limits no regard is as a rule paid to the impediments which prevent the entitled person from claiming his right or from his effecting the fixed legal act.

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65. The strict effects of the time-limits and the determination of their conditions are closely linked to the rules of the substantive law whose part they are, mainly to the disadvantageous effects, which in the case of non-performance of duties constituting the time-limit, affect the debtor. Thus, a basic question arises which should be dealt with by the Commission, viz. whether it is instrumental to regulate the time-limits in a general manner without taking into account their connexion with the regulation of rights and duties of the parties to the contract, and whether it would not be more useful to leave the regulation of said terms for the individual types of contracts. So, e.g. the term within which the defects of the goods (non-conformity) are to be complained, and the effects of non-performance of this duty are regulated in article 39 of the Uniform Law on International Sale of Goods, since they are an integral part of the complaints examining procedure. With a view to the diversity of cases where the legal systems apply the time-limits and to the need of differentiated rules, it will be very difficult to unify the provisions governing time-limits, unless at the same time the provisions governing legal acts wherewith the time-limits are connected, are as well unified.

66. Apart from that, even a fundamental question arises, i.e. whether the institution of time-limits is at all appropriate for the legal regulation of the international trade whose symptomatic feature is a very broad autonomy of contract and formal and legal equality of the parties. Therefore, it is why in this sphere the prescription better complies with interests of the parties rather than time-limits. The following reasons speak in favour of this opinion:

67. (a) Through the extinction of rights of any of the parties the principle of equivalence and reciprocity of rights and duties of the parties is infringed, since one of the parties is thereby enriched and the other damaged.

68. (b) The terms of time-limits considerably restrict the autonomous will of the parties, since they do not enable the debtor to consider whether or not he intends to fulfil his duty, even after the expiration of the given term, or whether or not he intends to raise the objection to the claim of the other party. If the principle of extinction of right be strictly observed the other party would not be allowed to meet the requirement of his partner, nor in such event where the misusing of his right is not involved, and where no room is left for a doubt

as to the existence of such right (e.g. a belated notification of defects of the goods, which apparently have been caused in the course of the manufacture, and the like).

69. Consequently, it would be worthwhile that, while the individual types of contracts will be regulated, the Commission might consider, whether the non-observance of terms should necessarily be connected with the very extinction of the respective right. It will be sufficient in the overwhelming majority of cases if the debtor is granted protection against claiming the rights after the lapse of the fixed term and it will be left at his discretion to take or not to take the advantage of such protection. Therefore, it would be more instrumental to substitute time limits by the prescription always where it is possible, and in such events where the Commission arrives at the conclusion that time limits are necessary, to regulate the same within the framework of provisions to be adopted in connection with the rules on the individual types of contracts.

70. Nor the effects of prescription are regulated in all legal systems in the same manner. After the prescription took place, it is as a rule impossible to claim the prescribed right in the court of law (or before arbitrators) if the obliged party invokes the prescription. Thus, it is entirely at his discretion whether or not he intends to take advantage of his protection, i.e. to object prescription. Some laws, connect however, the prescription with an absolute impossibility to claim the right in the court of law (or before arbitrators), so that the court shall take into account the prescription on his own initiative (ex officio) even if the respondent does not invoke the prescription. As example of such regulation may serve the Soviet Law (see Article 82 of the Civil Code of the Russian Soviet Federal Socialist Republic).

71. If the court of law takes into account the prescription ex officio, it will be impossible to obtain the adjudication of the prescribed right, nor in such case where the respondent had no intention to invoke the prescription. Even in such cases where the respondent is interested that the real state of things be ascertained, the court may facilitate its tasks in such a manner that it may motivate the rejection of the action on the basis of prescription. Consequently, even the draft elaborated in 1961 by the Council for the Mutual Economic Assistance states that the prescription shall be taken into consideration in such

case only where the debtor has - in the course of judicial or arbitration proceedings - referred to the prescription (see Article 7 of said draft). Article 95 of the new General Conditions of the Council for the Mutual Economic Assistance provides as well that prescription shall be taken into consideration only if the debtor claims so.

72. A very important question which appears in the practice is whether the prescribed debt may be used for set-off. In this connexion it will be necessary to consider first of all whether the question of possibility of set-off against a proscribed debt may be at all be included in the rules concerning prescription. The practical importance of this matter speaks in favour of a positive answer, however a certain close connexion of this question with the regulation of the unilateral set-off contained in the individual legal systems, represents a disadvantage. In the individual legal systems the conditions for set-off are regulated in a different manner, and a different conception is first of all upheld in the sphere of the Continental Law which qualifies the set-off as an institution of the substantive law, whereas in the sphere of the Anglo-Saxon Law the set-off is considered as an institution of the procedural law.

73. The major legal systems exclude the possibility of set-off of a prescribed right against a debt which has not been prescribed (so it is as well in the draft of professor Trammer - Article 2 in fine). However, it will be necessary to consider whether it would be in keeping with the needs of the international trade to exclude absolutely such possibility, i.e. that a prescribed debt may be used as a defence against another debt which has not been prescribed. It must be taken into consideration that the position of the entitled party who claims his right in a foreign country is more difficult, and further it is as well the need that the international commercial relations be deprived of all unnecessary formalities, which in this connexion is important. Sometimes, the formal declaration in respect of set-off of the mutual debts, which declaration is under the provisions of some laws condition for set-off, does not take place.

74. While appreciating these problems the Czechoslovak International Trade Code stated in Section 266 that debts which cannot be claimed in courts are not susceptible of being unilaterally set off (which means also the prescribed debts), but there is no bar for set-off if the debt cannot thus be claimed for

reasons of prescription which came into effect only after the debts had become susceptible of being set off. Thus, it is possible to use for unilateral set-off a prescribed debt against a debt which has not been prescribed, if in the past such set-off has been possible (e.g. in case where at the time of rise of the asserted claim the counter-claim has not yet been prescribed) and the set-off has not been realised only due to the fact that prior to the prescription the will to set off the debts had not been manifested.

VII.

BEGINNING OF TERMS OF PRESCRIPTION

75. As a rule the legal systems connect the beginning of prescription with the moment when "actio est nata", even although the different rules express it by different expressions. In cases of debts this moment is as a rule identical with the date on which the debt falls due (upon its maturity).

76. In the comprehension of the principle of prescription there is a basic difference between the sphere of the Anglo-American Law where the prescription directly affects the possibility to file the action and the sphere of the Continental Law where the prescription affects directly the right. But even within the sphere of the Continental Law there exist certain differences in theoretical comprehending of the prescription. Under German Law the subject matter of prescription is a legal claim which is put between the very procedural right of action and the subjective, substantive law. Under the provisions of the Soviet Law the prescription is construed as the prescription of an actionable substantive right which by reason of its character is placed between the formal right of action and the subjective, substantive right. In France such opinions exist according to which the prescription is considered as the extinction of the right of action.

77. However, these theoretical differences cannot in principle - constitute for the unification of rules on prescription and fixing its terms such obstacles which could not be overcome. Since there are in principle concordant opinions, i.e. that the prescription only affects the claimability of rights, the subject matter of prescription may be only such rights which can be claimed (however with a

certain limitation which mainly concerns the very personal rights which are not susceptible of being prescribed), so that the prescription cannot in principle affect the rights which can be exercised, depending on their nature, even without the co-operation of courts (however, such rights may be subject matter of time limit), as e.g. the right to withdraw from the contract, unless such rights must be claimed by an action.

78. (i) Under the provisions of the Czechoslovak Law the term of prescription begins to run from the date on which the claim may be asserted in the court (see Section 78 of the International Trade Code). If a claim resulting from contracts is involved the term of prescription begins to run from the day on which the obligation had to be fulfilled. If the obligation provides for performance by instalments the terms of prescription begin to run independently for each partial performance. When the whole obligation falls due because of the failure to perform one of the instalments, the term of prescription runs from the date of maturity of the instalment which has not been performed (see Section 79 of the International Trade Code). The term of prescription concerning claims for compensation of damages (the three years term) begins to run as of the day on which the injured person learned or could have learnt of the whole damage and of the person obliged to provide compensation, the term of prescription shall, however, end not later than after the expiration of the longer term (i.e. ten years term) running from the day on which the event causing the damage had occurred (see Section 83 of the International Trade Code).

(ii) Under the provisions of the French Law the term of prescription is counted from the time when the right is claimable; in cases of rights arising from the illicit acts the term of prescription begins to run from the time when the event causing damage had occurred.

(iii) The Soviet Law provides (see Article 83 of the Civil Code of the Russian Soviet Federal Socialist Republic) that the term of prescription begins to run from the day on which the right of action has accrued, i.e. from the date on which the entitled person learned or could have learned of the infringement of his right.

(iv) Under the provisions of the Anglo-American Law the term of prescription begins to run from the day when the motive for the action has arisen, in cases

of claims resulting from illicit acts from the day on which such acts have been committed.

(v) The German Law (see Article 198 of the Civil Code) connects the commencement of the period of prescription with the rise of the claim, i.e. in principle with the time when the right has become claimable. If a default is involved the commencement of the period is placed at the time when, contrary to the duty, the act aiming at non facere has been made. A speciality of the German Law is the provision (see Article 201 of the Civil Code) according to which the commencement of prescription in the case where a claim of everyday needs (life) is concerned, as well as a claim concerning a repeated performance is involved, is counted only from the end of the year in which these claims have fallen due. The subjective knowledge of the entitled person of the existence of the right is important only in cases of claims in damages, where on the knowledge of the damage occurred the duration of term of prescription is dependent (the three years or thirty years term of prescription).

79. In principle similar rules exist in other legal systems. It follows from this comparative review that the commencement of the period of prescription is to be connected with the beginning of the period when the right may be claimed in the judicial or arbitration proceedings. This regulation is as well in keeping with the basic aim of prescription which has to prevent the entitled person from his unnecessary delay in asserting of his claim, so that the commencement of the period of prescription is to be counted as of the date on which he firstly was in a position to assert this right.

80. While the commencement of the period of prescription is determined the objective criterion is in principle taken as basis in majority of cases, and the subjective factors are not important (as e.g. whether the entitled person has knowledge of his right, its extent or of person against whom he may assert it). Exception of this principle is contained in some legal systems (e.g. in the Czechoslovak and German Laws) in cases of claims in damages, but to a limited extent only. The general term is counted from the date when he knows of his claim in damages (which is decisive in this connexion it is on the one hand the extent of claim and on the other hand the determination of the injurer), but the longer term is counted from the date of the event which caused the damage, so that in

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this case also the objective criterion is taken as the basis. This special regulation is, no doubt, instrumental, since the whole damage need not to occur immediately, but it may arise successively, so that if the general provisions concerning prescription were applied, the terms of prescription for the individual parts of damage would run separately and the successively arising claims in damages might be asserted for an unlimited time.

81. While determing the commencement of the term of prescription different legal systems try to eliminate difficulties in such a manner that the term of prescription is counted only from the end of the calendar year in which the right has become claimable, or from the beginning of the next calendar year. The advantage of such regulation is a more unambiguous counting of terms of prescription in such cases where the event establishing the accruing of the claim cannot be fixed just by a day, while the disadvantage is the different duration of the term of prescription which is dependent on the fact whether it has been possible to claim the right already at the beginning or by the end of the calendar year.

82. While the commencement of terms of prescription can in the whole be determined without difficulties, it is very difficult to determine, in a general manner, the beginning of time limits. It should be mentioned that the time limit is not only connected with the fact that certain right has not been claimed in due time, but the right may become extinct even in such cases where the other legal acts have not been done in due time by the entitled person (e.g. the notice to the seller concerning the delivered goods, notification of the insured event to the insurance company and the like).

83. Should the prepared rules concern the rights arising from the international sale of goods within a broader conception, then the rules on prescription (time limits) would comprise the following rights:

84. (a) The right to the delivery of goods: the term of prescription ought to run from the date fixed for delivery, which may be fixed either directly in the contract or subsidiarily ex lege. If the term of delivery is fixed by a definite period the term of prescription ought to run from the end of this period, with exception of cases where the buyer was entitled to fix within the framework of such period the definite term of delivery (the so-called delivery on call).

In such cases the term of prescription would run from the date of delivery which has been concretized in this manner. As for deliveries by instalments, the term of prescription ought probably to be counted separately for each instalment, since a considerable space of time may elapse between the individual instalments.

85. (b) Claims arising from defects of the goods (legal as well as actual defects); some legal systems provide in this connexion for terms of prescription, whereas the others take as the basis the time-limits.

86. The time-limit is first of all connected with the fact that the buyer failed to notify in due time the defects of the goods. The commencement of the time-limit is closely linked to the provisions concerning the complaints examining procedure, in particular to the determination of the buyer's duty to notify the defects of the goods within a certain time. In so far as in connexion with the rules governing the international contract of sale the extinction of claims should be linked to the breach of the duty to notify in due time the defects of the goods (see Article 39 of The Hague Uniform Law on International Sale of Goods), it would be convenient - based on the above grounds - that the provisions governing time-limits be excluded from the prepared uniform rules and that the time-limits be regulated as part of the provisions governing the complaints examining procedure, within the framework of Convention on International Sale of Goods. So far the said grounds which speak in favour of adoption of terms of prescription rather than of the time-limits would be taken into consideration, the effects of breach of duties to notify the defects of the goods within the fixed time might be included in the prepared rules. In this case the term of prescription ought probably be counted from the day on which (under the provisions of the unified or applicable law) the handing over of the goods has been effected, or in the case where the carriage of goods has been secured by the seller, from the day on which the goods have arrived at the place of destination.

87. (c) Claiming of rights resulting from complaints: various legal systems connect different legal effects with the failure to claim the rights resulting from complaints within a fixed term. Some legal systems uphold the principle that the right becomes extinct and the others provide that only the claimability of rights is extinct. It is the transitory character between the prescription

and time-limit which is very symptomatic of this term. So, e.g. it is provided under the rules of the Czechoslovak Law (see Section 313 of the International Trade Code) that if the buyer fails to assert in a court his claim arisen from the seller's liability for defective goods within six months running from the date on which the notice of defects has been given, the claim shall no longer be enforceable in courts, unless the seller had known of the defects in the goods at the time of their handing over. In fact this term possesses the character of prescription, but in some respect it differs from the prescription in this regard that the recognition of obligations resulting from the responsibility for defects does not influence upon the course of the term of prescription. This is aimed at preventing the entitled person from his interpreting the contents of correspondence connected with the execution of the complaint, in which case the seller does not take - as a rule - owing to commercial reasons negative standpoint in respect of the complaint, since he is not in details acquainted with the actual state of things immediately after the defects have been notified, as recognition of debts and extension of time for lodging the complaint. It is quite natural that the parties are free to extend this term to the maximum in their contracts, but within the framework of the term fixed by the law.

88. While determining the counting of time the Hague Uniform Law takes as basis the date of the notification (comp. Article 49), but its expiration evidently brings about the extinction of the right of complaint. This however is not in conformity with the regulation which admits that the rights resulting from complaint may be set off against the seller's counterclaim for payment of the purchase price even after the expiration of this term. It is as well professor Trammer who takes as the basis, while counting the term, the date on which the defects have been notified (see Article 3 of his draft).

89. The General Conditions of the Council for the Mutual Economic Assistance (see Article 94, para. 2 (a)) state that the terms of prescription in cases of actions relating to the quality and quantity of the goods are counted from the day on which the buyer has received the seller's reply on merits of the complaint, or in case where such reply has not arrived, from the end of the period within which it ought to be sent, i.e. within the term provided for under the contract, otherwise within sixty days (in cases of complete plant equipments within ninety days) after the date on which the complaint has arrived. This regulation is

closely connected with the technics of complaints, as provided for by the General Conditions of the Council for the Mutual Economic Assistance.

90. While counting the term for filing the action the legal systems very often take as the basis the time of delivery. There exist, however even such rules which connect the commencement of the term of prescription with discovery of defects in the goods (e.g. Articles 1495 and 1597 of the Italian Civil Code). However, this solution is disadvantageous, since it is difficult to ascertain when the defects have been discovered. In this regard the time of delivery is more accurate, but the shortening of the term for filing the action is a disadvantage in cases where latent defects have been discovered long time after the handing over of the goods had been effected. It seems therefore that the most instrumental is the solution which has been adopted in the Hague Uniform Laws and in the Czechoslovak International Trade Code, i.e. to take as the basis the date on which the defects have been notified. However, the condition for such regulation is that the time limits for or prescription of claims resulting from complaints be fixed for such events where the defects of the goods have not been notified within the fixed time (otherwise the term fixed for the assertion of claims would be prolonged, or such term would not begin to run).

91. The term fixed for filing the action for claims resulting from complaints to the goods - as contained in different legal systems - is not of the same character. However, it is as a rule admitted that these claims may be set off even after the termination of the period within which the action is to be filed, against the seller's counter-claim in payment of the purchase price for the defective goods, no matter whether the same or other goods. Viewed from the practical point this regulation is very instrumental, and as for its application it is essential to preserve the right resulting from the defects of the goods, at least in the natural form, since it is illogical to facilitate the set-off against a right which does not exist.

92. It will be necessary that the terms for assertion of claims resulting from complaints be co-ordinated with the rules governing the contract of international sale of goods, and mainly with the principles which will be adopted therein in respect of discovery and notice of the defects of the goods.

93. (d) Payment of purchase price: similar problems as in the case of determination of the commencement of terms of prescription connected with the delivery of the goods are involved; there is no room left for a doubt that the term must be counted as of the date on which the purchase price has fallen due, which term will in normal cases follow from the respective contract, and in exceptional cases from the law which is applicable.

94. (e) Damages: in connexion with the international contract of sale the obligation to compensate damages may arise from:

(1) Breach of the contractual duties stipulated either directly in the contract or resulting from the statutory rules of the law applicable to the relations between the parties.

(2) Initial invalidity of the contract of sale (e.g. due to the lack of authority to make legal act, due to the breach of foreign currency or licence regulations etc.).

(3) Subsequent extinction of the contract due to the impossibility of performance.

95. The conditions for the rise of such claim in damages will follow from the applicable law or from the contractual agreement. It would be worth while to determine special provisions in the uniform rules according to which the commencement of the term of prescription would be counted on the one hand from the date on which the event causing damage has occurred (a longer term), and on the other hand from the date on which the injured person knew or could have known of the extent of the whole damage, as well as of the person who is obliged to give compensation for damages (a shorter term).

96. (f) Restitution of performance: it must be considered whether the prepared rules should englobe even the rules concerning the prescription of rights to the restitution of the effected performance (i.e. the restitution of the already paid purchase price or of the delivered goods) in cases where the performance has been effected on the basis of an invalid contract, or on the basis of a contract which has become void, without however the counter-performance having been made (e.g. in the case of withdrawal from contract if the performance is impossible etc.). Such regulation would be useful, since it would increase the legal certainty, as the applicable legal regulation would not be dependent

on the solution of questions connected with conflicts of laws whose solution is often disputable. The term of prescription would be counted from the date on which the legal ground for performance has become extinct, or in the case where such ground never existed, from the date on which their performance has been effected.

97. (g) Rights guaranteeing the performance of contract of sale: the rights of the buyer or seller are secured in different manner, as e.g. by penalty, mortgage, surety and the like. Sometimes agreements concerning such security from integral part of the contract of sale (e.g. the penalty), in other cases the performance is secured by an independent legal act, mainly if the security is given by a person other than any of the parties to the contract of sale. It will be necessary to consider to which of the said rights the prepared rules should eventually relate. The rights toward third parties should probably be excluded. The rights resulting from bills of exchange and cheques should as well be excluded from the proposed rules even in such cases where they might concern the guaranteeing of duties resulting from the contract of sale.

VIII.

TIME OF DURATION OF TERMS OF PRESCRIPTION

98. While in the rules of the different legal systems governing the conditions and effects of prescription, or time-limits, certain identical features may be found, it is not so in cases of duration of terms of prescription (time-limits) which are stated therein in a very different manner. These terms lie within the space of time of several months till several decades (e.g. France, Belgium, Bolivia, Brazil, Indonesia and Austria have terms of prescription amounting to thirty years, and Scotland even to forty years). Very long terms of prescription do not contribute to the legal certainty of the trade and it is why the legal systems with very long terms of prescription fix, as a rule, much shorter terms which are applicable to the commercial relations (mainly in cases where a special trade code forms part of the law). The general terms of prescription applicable to commercial relations lies in the prevailing majority between two

to six years. Apart from that, shorter terms are fixed for the assertion of rights resulting from the defects of the goods, and longer terms mainly in cases of claims (obligations) secured by the rights inrem (e.g. by the mortgage), or if a qualified acknowledgement of debts by the obliged party, in substance and in amount, is involved. So, for instance the Czechoslovak International Trade Code provides for general term of prescription amounting to three years which is lengthened to ten years term if the obliged person has recognized the right of the entitled person, determined both in its substance and in amount (see Section 94, para. 3 of the International Trade Code); the right of the mortgagee in recovery of the debt secured by the mortgage is under the provisions of the Czechoslovak Trade Code prescribed within the period of ten years.

99. The mostly applied term of prescription amounting to three years might be an appropriate general term of prescription. Such term is as well suggested by professor Trammer (comp. Article 2 of his draft) and such term is also contained in the draft of the Council for the Mutual Economic Assistance of 1961 (see Article 4 of said draft). On the other hand the newly adopted General Conditions of the Council for the Mutual Economic Assistance provide for two years period of prescription (see Article 93 of General Conditions).

100. The advantage which is given by a shorter term of prescription is a certain pressure on the parties to clear up their mutual claims within a shortest time. This is important for proving the claim (by the lapse of time the evidence is depreciated, in particular the depositions of witnesses whose memory plays important role). Apart from that, it is as well because of the legal certainty in the international trade, viewed from the point of consideration of the proprietary position of the parties, why the determination of a shorter period of prescription would be convenient. The effects of the proprietary consequences resulting from commercial relations (e.g. damages) from whose origin a considerable period of time has already elapsed, and which the debtor no longer takes into account, may in a relevent manner exercise influence on his proprietary position, cause his insolvency, and thus bring a considerable legal uncertainty in the international trade.

101. On the other hand, very short terms of prescription compel the parties to a speedy assertion of their claims in courts (which in the international trade is

as a rule more difficult and more expensive than in cases of the internal trade), even in such events where there is a hope that the given dispute will be settled amicably within a longer period of time. These negative effects of shorter terms of prescription may however be restricted to a considerable extent so that the parties would be free to prolong to a certain extent under their contract the term of prescription, and furthermore by fixing a suitable regulation of cases in which the terms of prescription are suspended or interrupted.

102. Beside the general terms of prescription it will probably be necessary to fix for some rights shorter terms which would be applicable mainly to the following instances:

103. (a) The term (of prescription or time-limit) for notification of the defects of the goods: on the one hand it will probably be necessary to prevent the buyer from his fixing a shorter period and from his shifting the consequences of damage suffered by the goods which had occurred after the risks have already passed onto the buyer, and which are to be borne by the latter, and on the other hand regard should be paid to the fact that all defects cannot be discovered just at the time when the goods are handed over. In practice difference is made between apparent defects (which must be notified within a certain short time after the arrival of the goods) and latent defects (which must be notified within a certain time after their having been discovered). This term is fixed in a flexible manner (e.g. the Hague Uniform Law provides under Article 39 "dans un bref délai" or "promptly", Section 304 of the Czechoslovak International Trade Code "without undue delay" or by a precisely calculated term (e.g. in Brazil fifteen days, Italy eight days, etc.). For the purposes of the international trade it is this more flexible manner which probably is more instrumental with view to the considerable difference in distances between the place of dispatch and that of destination.

104. However, legal rules provide for a maximum term within which the defects must be notified (e.g. Article 39 of the Hague Uniform Law provides for two years, Section 304 of the Czechoslovak International Trade Code six months, etc.). The fixing of such maximum term for the notification of defects of the goods is very instrumental, since particularly in cases of some defects of the goods it is very difficult to ascertain after the lapse of a longer time which was the

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actual condition of the goods at the time of their handing over. It will therefore be very difficult to fix a uniform term which would be in keeping with needs of trade on all kinds of goods. Where the subject matter of trade are goods which are rapidly perishable a shorter period is more convenient, but on the contrary if the subject matter of trade are another goods (e.g. machinery equipment) a longer period is more suitable. Since these longer periods for assertion of claims resulting from the defects of the goods are as a rule secured in the form of guarantee for the quality of the goods, it would be better to take as basis shorter terms and to leave it at the discretion of the parties to agree upon the duration of the terms, with view to the nature of the sold goods. Subsidiarily, the uniform rules might provide for a term of one year.

105. (b) The term for filing action for assertion of claims resulting from the defects of goods: Whereas the observance of the term mentioned sub (a) is to protect the seller against the damage to the goods which have occurred after the risks have passed, this term is aimed at facilitating in the course of the judicial proceedings an easier ascertainment of the actual condition of the goods. The means of evidence witnessing the defects of the goods are depreciated sooner than in cases of other rights, and it is therefore instrumental to fix a shorter term for filing the action. The duration of this term must be linked up to the term stated under (a) and must facilitate the seller to make himself sure of whether the claim of the buyer is goods in law or not. In this connexion regard must be paid to the fact that international economical relations are involved, from which even in this sphere certain peculiarities follow. Article 49 of the Hague Uniform Law provides in this connexion for one year term, which however shall not apply to cases where the buyer has been prevented from asserting his right owing to the fraud committed by the seller. Section 313 of the Czechoslovak International Trade Code provides for six months period for assertion of rights resulting from complaints (i.e. from the defects of the goods) and one year term for assertion of claims in damages, suffered as result of the defects of the goods, in the courts (before arbitrators) and excludes this limitation of time for cases where the seller knew the defects of the goods just at the time of their handing over (the Czechoslovak rules are avoiding to use the nation of the penal law "fraud" which might, dependent on the qualification made

by the courts of different States, be construed in various manner); for such cases the three years term of prescription is fixed (which otherwise is identical with the gernal term of prescription).

106. It will be necessary to consider whether a shorter term, similar as in cases of claims resulting from defects of the goods, should not be fixed even for cases of damages suffered as result of the defects of the goods (and not by non-performance of the contract), where similar problems exist as in cases of defects of the goods.

107. Difficulties connected with the determination of terms for filing the action, such which would be in keeping with the needs of trade in all kinds of goods, are similar as in cases of terms provided for notification of the defects of the goods. The contracting parties ought to be free to fix in their contracts the duration of this term and with view to the importance of this question, written form for such agreement should probably be required. Subsidiarily the term for filing the action should be fixed from six to twelve months, whereby this limitation should not apply to cases where the seller knew just at the time of handing over the defects of the goods.

IX.

SUSPENSION AND INTERRUPTION OF TERMS

108. The legal systems connect with certain legal facts the suspension and interruption of terms of prescription.

109. If the suspension is involved the term of prescription does run for the period during which the impediment provided for by the law exist and after its having ceased to exist the ccurse of the term of prescription will continue to run, so that even the time elapsed before the rise of the impediment is therein included. If the impediment exists at the time when otherwise the term of prescription would begin to run, the commencement of the term of prescription shall be postponed until the time when the impediment had ceased to exist.

110. If the interruption is involved the heretofore elapsed time of prescription becomes extinct, and after the impediment has ceased to exist, or after the event provided for by the law has occurred, a new term of prescription begins to

run, so that the already elapsed period becomes extinct. The new term of prescription may, as to its duration, be the same as the preceding one, but in certain cases even longer terms are provided for by the different laws.

(a) Suspension

111. (i) Under the provisions of the Soviet Law the suspension is mainly caused by vis major and by moratorium granted and declared by the respective agencies for the performance of obligations (see Article 85 of the Civil Code of the Russian Soviet Federal Socialist Republic). However, 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.

(ii) German Law individually enumerates the grounds for the suspension (see Sections 202 to 207 of the Civil Code). The ground for suspension is primarily 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, the suspension takes place if the right cannot be exercised owing to the suspension of activities of the respective court, or owing to vis major, but only in such cases where such impediments began to exist in the course of the last six months of the period of prescription. The prescription shall continue 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.

(iii) Under the French Law there is a series of grounds for the suspension of prescription, and in particular the old principle has been applied, i.e. that the prescription shall not run against a person who does not possess the capacity to make legal acts. Under the provisions of Article 2252 of the Civil Code the suspension of prescription is excluded for cases of shorter terms concerning the claims resulting from the everyday life where after the lapse of a certain period of time it is presumed that payment has been effected, unless this has been

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refuted by an oath. By virtue of the Article 2257 of the Civil Code it is provided that in cases of obligations which are conditional or provided with time clause, the term of prescription shall begin to run only after the fulfilment of the condition or after the lapse of time. In the practice further different grounds for suspension have been adopted, as e.g. the lack of knowledge of the creditor, for which he is not guilty, of the existence of claims, impediments qualified as vis major, and the like.

(iv) Under the provisions of the English Law, it is mainly the incapacity to make legal acts which is considered to be the ground for the suspension (see Article 22 of the Limitation Act of 1939).

(v) Under the provision of Section 91 of the Czechoslovak International Trade Code is not included in the term of prescription the time during which the entitled person could not assert his claim in court (before arbitrators) or continue in recovering his claim for impediments supervening on the part of the obliged party, or such which could not be prevented by the entitled person.

(vi) Under Article 98 of the new General Conditions of the Council for the Mutual Economic Assistance the course of term of prescription is suspended, if the filing of the action was hindered by the event having the character of vis major which has occurred or exercised its influence in the course of the term of prescription. The time during which the course of the term of prescription was suspended shall not be included in the term of prescription.

(vii) According to the draft of professor Trammer the running of the time period in respect of the claim pursued shall be suspended if and while the action is properly pursued (see Article 5 of his draft). It is similarly provided for in Article 6 of the draft elaborated in 1961 by the Council for the Mutual Economic Assistance that the running of time period of prescription shall be suspended if the action has been filed in the court (before arbitrators) in so far as the applicant duly pursues his action.

112. If the legal rules which are not specially destined for the purposes of the international trade are appreciated as a whole, the conclusion can be drawn that many provisions (e.g. suspension of prescription between spouses and between a guardian and a ward) are not suitable for the purposes of the Interational

trade. On the other hand, the impediments which are symptomatic of the international trade (e.g., the interruption of payment relations between the countries of the creditor and debtor, influence of political events on the performance of the international obligations) are not in these rules reflected.

113. Further difficulties arise in connexion with the complicated problems concerning the jurisdiction. In many cases an action although filed in due time is purposeless only due to the fact that the respective court has pronounced its lack of jurisdiction. It is therefore stated under section 92, paragraph 2 of the Czechoslovak International Trade Code that it shall be considered as continuance of the commenced proceedings if the claim has been asserted in the competent court within thirty days following the day on which the entitled person was served with a final judicial judgement stating lack of competence, or on which an arbitrator declines to render award on the ground of lack of validity of the arbitration agreement.

114. While stipulating the uniform rules a sufficiently general formulation will be necessary so that such formulation may include heterogeneous impediments occurring in the international trade whereby the requirement that the impediments which are in the way for assertion of claims must be of such nature which the entitled person can neither prevent nor overcome, should in principle be taken as the basis.

115. It is necessary to examine whether the suspension should be applied in any stage of the term of prescription (the disadvantage rests on that there is a certain doubt as for the course and termination of the time period of prescription), or only at a certain time prior to the termination of the term of prescription (this is in disfavour of the creditor who is thereby to a certain extent damaged).

116. It should finally be as well considered whether the suspension may be applied for an unlimited period of time, or whether it should not be admitted, in the interest of legal certainty or stabilization, that after the lapse of a sufficiently long period of time the prescription ought not to be terminated, even if such impediments existed which might otherwise give rise to the suspension of prescription.

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(b) Interruption of prescription

117. The conditions required for the interruption of prescription are as well regulated in a different manner in the legal systems.

(i) Under the rules of the French Law the interruption takes place upon service of the action and as a result of similar legal acts, e.g., the summons of the debtor before the court (citation en justice) or citation to take part on the conciliation procedure. The acknowledgement of a debt has as well the effect of interruption of the time period of prescription, whereby the time of duration of prescription which will run afresh is thirty years. In conformity with the French judicature (i.e., the decision of the Court of Appeal in Rennes of 1960) the terms provided for by the Act (Article 2244 of the Civil Code) are stated by detailed enumeration, so that e.g., the reminders or summons of the creditor have not the effect of interruption. Where shorter terms of prescription are involved (as contained in Articles 2271 to 2273 of the Civil Code) the principle applies that interruption may only be entailed by an express acknowledgement of the debt, but not by an implied act. If the interruption takes place on the basis of the acknowledgement, there is no room left for a presumption that debts concerning everyday needs have been paid, and instead of this term the normal, general term of prescription shall be applied.

(ii) Under the provisions of the German Law the interruption of prescription takes place if the claim which is under prescription has been asserted in courts, or if the acts which are equivalent to an action have been effected. It is as well the acknowledgement made by the debtor which interrupts the prescription, whereby this acknowledgement need not be express; it will, e.g., be sufficient the payment of an instalment, interest or deposition of security.

(iii) The English Law connects as well the interruption with the acknowledgement of debt. From the time of the acknowledgement a new term of prescription begins to run, even in such cases where at the time of recognition the debt has already been prescribed. Apart from the acknowledgement it is as well the partial payment of debt which brings about the interruption. On the other hand this effect does not take place in the case where the action has been filed, but the debtor can no longer object to the prescription which took place in the interim, i.e., between the time of filing the action and rendering of the

judgement. It has been decided expressly that reminders sent to the debtor do not exercise any influence upon the course of the term of prescription.

(iv) In the sphere of the international trade there are two grounds for the interruption of prescription which are known in the Czechoslovak Law, i.e., judicial decision (arbitral award) and the acknowledgement of the obliged party. If a right has been granted in a final judicial judgement (or arbitral award), the claim based on such right shall become prescribed within ten years from the day on which the obligation should have been performed under the respective judgement (see section 93 of the International Trade Code). If the obliged party recognizes in any way his obligation to the entitled party before the expiration of the time period of prescription, the period of prescription shall commence to run afresh (see section 94 of the Czechoslovak International Trade Code). The payment of an instalment or interest or any other conduct of the obliged person which indicates that he does not contest his obligation, shall be considered as recognition. In the case of a prescribed right, a new term of prescription shall run, if the obliged person has recognized his obligation to the creditor in writing. If the recognition is made only in respect of a part of a prescribed right, the term of prescription shall run afresh only with respect to such part. If the obliged person recognizes to the entitled person his right determined as to its substance and amount, the term of prescription shall be ten years running from the date on which the performance in accordance with the contents of said recognition should have taken place; in cases where this does not follow from its contents, the new term of prescription shall run as of the day on which such recognition is made. If only a part of right is thus recognized, such effects shall take place only with respect to the recognized part (see section 94, paragraph 3 of the Czechoslovak International Trade Code).

(v) In the draft of Professor Trammer (see Article 4, paragraph 2 of his draft) the prescription is connected with the written acknowledgement, which acknowledgement must indicate that the creditor's claim is well founded both in substance and in amount. The new time period shall run from the date of such acknowledgement. Besides, Professor Trammer recognizes that judicial judgement or arbitral award (Article 5, paragraph 2) have as well the effects of interruption, whereby the new ten years term begins to run from the date on which such judgement or award have become enforceable.

(vi) Article 99 of the new General Conditions of the Council for the Mutual Assistance states that the running of the time period of prescription is interrupted by filing the action and by written acknowledgement of debts made by the obliged party. If the claimant has withdrawn his action, the running of the term of prescription is not considered to be interrupted.

118. While comparing the above-mentioned rules it may be seen that the legal rules uphold, in the whole, a concordant principle, i.e., that the interruption is connected with the acknowledgement of the debtor and with the judicial proceedings. However, there are differing provisions as for the form of the acknowledgement, and further, whether the interruption takes already place at the time of the opening of the judicial (arbitration) proceedings, or only after the judgement (award) has been rendered. In this second case it is provided for that during the time of the judicial proceedings the time period of prescription is suspended. Nor is the commencement of the course of a new term of prescription regulated in a uniform manner.

119. In the interest of the international trade the prepared rules should be cleared of unnecessary formalities on the one hand, and on the other hand the uniformity of rules should however be observed in the interest of the legal certainty.

120. These aims would be met by such rules which would allow the course of a new admissible term of prescription on the basis of the right which has not been prescribed, in any form (even implied by conduct), but in the case of a prescribed right only in a qualified form (e.g., in writing). The commencement of the running of a new term, should as for the time period, be linked to the possibility of the entitled person to claim the performance of the obligations on the basis of facts causing the interruption (i.e., the acknowledgement or decision).

X.

PRINCIPLES SUGGESTED FOR THE FUTURE PROCEDURE

121. On the basis of the submitted materials and comments which have been brought forward the Commission will, no doubt consider which would be the most convenient way to be followed while the matters governing the prescription and time-limits

in the field of the international trade will be solved and regulated. In this connexion it will be necessary to consider both the organizational forms of the further work and the principles which should be taken as the basis for the future work of the Commission.

122. The Commission will have to determine the main principles of the prepared draft rules on matters relating to prescription and time limits in the field of the international sale of goods. In this connexion mainly the following questions should be solved:

A. Form of legal regulation

123. ALTERNATIVE No. 1: the form of international contract, which would regulate the international commercial relations between the persons (bodies corporate or natural persons) who are subjects of the signatory States, whereby as the basis the principle of domicile (seat) or place of business, should be taken into consideration.

ALTERNATIVE No. 2: the form of uniform law under which the signatory States would assume the contractual duty to enact the same in their national laws, so that they would thereby substitute - for the purposes of the international trade - the general provisions governing the prescription and time limits, contained first of all in their Civil and Trade Code.

ALTERNATIVE No. 3: the form of model law which would be recommended to the States as model for the legislative regulation of their laws, whereby the deviations would be possible.

ALTERNATIVE No. 4: to join the rules governing the prescription and time limits together with rules governing the conclusion of contracts concerning international sale of goods and to determine the rights and obligations which would follow therefrom. (Remark: It follows from the above considerations that the ALTERNATIVE No. 2 seems to be the most appropriate.)

B. The manner of regulation and relation to norms governing conflicts of law

124. ALTERNATIVE No. 1: the uniform rules would comprise norms of the substantive law regulating the prescription and time limits, whereby the principle would be expressly fixed that the norms governing conflicts of laws shall not be applied

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the courts of the contracting parties would always apply the uniform regulations as lex fori. So far the legal notions should not be determined in the uniform regulation, they would as well be qualified in accordance with lex fori. Similar principle would apply in cases of eventual gaps in the law, for the solution whereof even the principle adopted by the Hague Uniform Law could be applied, i.e. that the gaps in law should be solved on the basis of principles which are as well based on the uniform rules.

ALTERNATIVE No. 2: The uniform rules would contain the norms of the substantive law which should also be completed by the norms governing conflicts of laws. The function of the norms governing conflicts of laws would consist of:

(a) Determination of the extent of application of the uniform rules; these rules would be applicable in cases where on the basis of the uniform norms governing conflicts of laws, such legal system would be applicable whose integral part the uniform rules have become. Thus, also the non-contracting States would have to take into consideration the uniform rules, if on the basis of their norms on the international private law the proper law for the consideration of matters of prescription or time-limits would be the law of any of the contracting States.

(b) Solution of matters connected with the qualification of notions used in the uniform rules which have not been defined there, and furthermore the solution of anticipatory questions and gaps in the law.

ALTERNATIVE No. 3: the uniform rules should only be limited to the unification of norms governing conflicts of laws, on the basis of which the law of the respective State would be applicable (the uniform rules would substitute only the norms governing conflicts of laws of the contracting States, but not their norms of the substantive law).

(Remark: it follows from the preceding appreciation that the most convenient would be the ALTERNATIVE No. 2.)

C. Extent of rights subjected to the regulation

125. ALTERNATIVE No. 1: The regulation would relate to the rights accruing to the buyer and the seller (and not to other persons who are not parties to the contract) from the international sale of goods, i.e.

(a) the right to claim the delivery of the goods,

(b) the rights resulting from the defects of the goods (reduction of the purchase price and elimination of the defects),

(c) the right to claim the payment of the purchase price, and

(d) the right to claim the performance of other duties stipulated under the contract of sale (as e.g. handing over the technical documentation, providing for the transport of the sold goods, the duty to have the goods, the duty to have the goods insured and the like).

ALTERNATIVE No. 2: Besides the rights comprised in the alternative No. 1, the regulation would as well comprise the rights:

(a) in damages in case of invalidity (initial or subsequent of the contract of sale, and

(b) in restitution of the performance granted on the basis of a contract which was from its very beginning or has subsequently become invalid or which has been rescinded through the withdrawal from the contract.

ALTERNATIVE No. 3: To include as subject matter of regulation also other types of contracts which are similar to the contract of sale (e.g. contract for work) or which are, viewed from the economical point, closely linked to the materialization of the contract of sale (e.g. contracts of carriage, insurance contracts) where there is an immediate interest that the terms of prescription of time-limits be co-ordinated with similar terms fixed for the contract of sale.

ALTERNATIVE No. 4: To include in the regulation also the rights of third parties who are not parties to the contract of international sale of goods, in so far as they do thereby exceptionally acquire direct rights (or assume direct duties) resulting from the breach of duties assumed under the respective contract.

(Remark: the most appropriate would probably be the ALTERNATIVE No. 2, whereby it ought to be considered whether the contract for work should not be included in the subject matter of the regulation. The adoption of ALTERNATIVE No. 4 would complicate the legal problems of the uniform rules.)

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D. Determination of notions of the international sale of goods which should be the subject matter of the regulation (in case ALTERNATIVE No. 4 (a) should not be adopted)

126. ALTERNATIVE No. 1: As for the notion of the international sale of goods reference should be made to the rules governing the rights and duties resulting from such sale or to define it identically with this regulation.

ALTERNATIVE No. 2: To define separately the subject matter of the regulation with a view to the serviceability of it to a broader extent (see C), ALTERNATIVE No. 2, whereby the following criteria should be taken as the basis:

I. International character of sale of goods which makes itself felt in that

ALTERNATIVE (a): the domicile (seat) or place of business of the parties are nc in the territory of the same State;

ALTERNATIVE (b): the parties are not subjects of the same State; and

ALTERNATIVE (c): the alternatives (a) and (b) should be completed by the further objective factors:

- carriage of the sold goods (actual or contemplated carriage) to a foreign country
- the manner of conclusion of the contract (offer and its acceptance are not effected in the territory of the same State)
- the place of delivery of the goods which is effected in the territory of a State where neither of the parties has the domicile (seat) or place of business, or in the territory of the State other than that in which the offer and its acceptance have been effected.

II. Commercial character of sale: to consider whether it will be sufficient for the determination of the commercial character of sale to mention the criteria under I., or whether further conditions will be necessary. To appreciate in this case the subjective criterion adopted by the German Law (the notion businessman) and the objective criterion adopted by the French Law under which certain contracts are declared to be trades.

(Remark: as it follows from the preceding reasoning, it would be most convenient to complete the determination of the international character of sale by determining its commercial character. In this connexion it should be considered whether the subject matter of the prescription and time-limits ought not to be limited to rights arising from the conclusion, breach or invalidity

(no matter whether initial or subsequent) of the contract of sale concluded between the parties whose domicile (seat) or places of business are not in the territory of the same State, if they knew or must have known at the date of the conclusion of the contract that the purchased goods are destined for further sale or for another business form of the buyer (e.g. for the equipment of his enterprise, and the like). As contract of sale should be deemed such a contract according to which the goods for a definite price are to be delivered, regardless of that whether such goods exist already at the date of the conclusion of the contract or whether the same are first to be manufactured or produced, and regardless of that who is bound to provide the things necessary for the manufacture.)

E. Determination of notions of prescription and time-limits and the application of the same

127. (1) Difference of notions in respect of prescription and time-limits on the one hand and between the other institutions on the other hand:

ALTERNATIVE (a): to take as the basis the legal effects resulting from prescription and time-limits which do not allow that the performance of a duty be enforced against the will of the obliged person (e.g. in case where the prescription has been pleaded) or without his will (e.g. where the court takes regard to prescription ex officio);

ALTERNATIVE (b): to fix another principle for this distinction.

(2) Distinction between the notions of prescription and time-limits:

ALTERNATIVE (a): to fix as the feature of notion "time-limit" the extinction of the right, and in the case of prescription the extinction of the mere claimability;

ALTERNATIVE (b): to fix another feature for notion of such distinction.

(3) To appreciate advantages and disadvantages of the time-limits and consider whether the same should be included in the prepared rules.

ALTERNATIVE (a): to fix the principle that all terms should in fact possess the character of prescription, i.e. even such terms which in domestic relations have the character of time-limits (e.g. the terms for the notification of the defects of the goods).

/...

ALTERNATIVE (b): to exclude time-limits from the subject matter of regulation and leave the same to be made within the framework of unification of rights and obligations resulting from the contract of the international sale of goods (e.g. in connexion with notification of the defects of goods and with assertion or rights arising therefrom);

ALTERNATIVE (c): to regulate both the prescription and time-limits, and to fix to which terms either of said institution relates, which is its time of duration, course and effects.

F. Autonomy of contract in matters of prescription and time-limits

128. (1) Freedom of the parties to shorten by their agreement the time of duration of prescription;

(2) Freedom of the parties to lengthen the time of duration of prescription.

ALTERNATIVE (a): not to allow the lengthening of the time of duration of terms of prescription;

ALTERNATIVE (b): to allow only the waiver of the already elapsed time period of prescription and in other respects to exclude the possibility of lengthening;

ALTERNATIVE (c): to enable the parties to lengthen the terms of prescription up to a certain whole term, and to waive the already elapsed term, and

ALTERNATIVE (d): to enable the parties to agree at their discretion upon the terms of prescription without any restriction or to exclude the prescription.

(3) Freedom of the parties to modify the commencement of the term of prescription.

(4) Freedom of the parties to modify by an agreement the course of the terms of prescription.

(5) Freedom of the parties to modify by an agreement the effects of prescription.

(6) To appreciate the form in which the agreement on prescription should be reduced.

(7) The question of the autonomy of contracts between the parties in respect of time-limits (similarly as under the preceding points (1) to (6)).

G. Commencement and time of duration of terms of prescription (time-limits)

129. (1) While determining the commencement of the terms of prescription, it should be taken as the basis:

ALTERNATIVE (a): the objective criterion, i.e. the prescription should run as from the date on which "actio est nata", i.e. from the date on which it has objectively been possible to claim the right in the court;

ALTERNATIVE (b): the subjective criterion, i.e. the term of prescription should commence to run from the date on which the entitled person knew, or at least could have known of the infringement of his right;

ALTERNATIVE (c): to take in principle as the basis the objective criterion, but to join, in some cases, this objective criterion together with the subjective criterion (e.g. to count in cases of damages a longer term from the origin of the damage, and shorter term from the date on which the injured person knew or could have known of the damage);

ALTERNATIVE (d): to count the term from the end of the year (month) in which the event, with which the commencement of prescription is connected, has occurred.

(2) To fix the commencement of time-limits, for such case where the same should be included in the prepared regulation (e.g. the terms for the notification of the defects of goods.

(3) Duration of time period of prescription:

(a) the time of duration of the general term of prescription, fixed for all rights included in the regulation, except cases where for such rights a differing term will be fixed, will be:

ALTERNATIVE (aa): time of duration from two to three years;

ALTERNATIVE (bb): time of duration from four to five years;

ALTERNATIVE (cc): longer time of duration (e.g. six years).

(b) special terms of prescription:

(aa) shorter time of duration, e.g. in cases of claiming rights arising from the defect of goods,

(bb) longer time of duration, e.g. in cases of security by mortage, acknowledgement of obligation, or if the right has been adjudicated by the judicial judgement (arbitral award).

/...

(4) Time of duration of time-limits, so far as the same will be included in the regulation.

H. The course of terms of prescription

130. (1) Suspension of the term of prescription:

(a) circumstances causing suspension of prescription, as e.g.

(aa) impediments preventing the entitled person from asserting his claims in courts or from his continuing the pursuance of his claims owing to impediments which have occurred on the part of the obliged party or due to the impediments which could not be prevented by the entitled party,

(bb) the judicial proceedings where the prescribed rights are claimed.

(b) effects of prescription: the term of prescription will not begin to run or will not continue to run during the existence of the impediment, and after its having ceased to exist, even the time already elapsed prior to the suspension will be included in the term,

(c) the time at which the suspension can take place:

ALTERNATIVE (a): at any time in the course of the term of prescription, and

ALTERNATIVE (b): only at a certain time prior to its termination.

(2) Interruption of terms of prescription:

(a) circumstances having the effect of interruption:

(aa) acknowledgement of debts and of their accessories, and

(bb) adjudication of the right by the judicial judgement (arbitral award), and

(cc) assertion of the right in court or before arbitrators (see ALTERNATIVE concerning suspension of prescription during the course of the judicial proceedings).

(b) effects of interruption: the elapsed term of prescription becomes extinct and a new term of prescription begins to run afresh,

(c) the date from which the new term of prescription is counted (e.g. in case of acknowledgement from the date on which the acknowledgement has arrived or from the date on which the performance has been promised therein; in case of the judicial decision from the date on which the same has been rendered, the date on which it has acquired the force of res judicata, or from the date when in conformity with its contents the adjudicated right had to be performed).

(d) possibility of the beginning of the course of the new term of prescription if a right which has already been prescribed is involved (e.g., in cases of acknowledgement or judicial judgement).

I. Effects of prescription

131. (1) Extent of extinction of claimability of the right:

ALTERNATIVE (a): regard is taken to prescription ex officio.

ALTERNATIVE (b): regard is taken to prescription only if the obliged person claims so.

(2) The effects in cases where the prescribed right has been performed: the performance of the prescribed right cannot be claimed back (as distinct from the time-limits).

(3) The possibility to use the prescribed right for set-off (to consider whether it would be convenient to regulate it within the framework of provisions governing prescription).

ALTERNATIVE (a): an absolute impossibility to use the prescribed right for set-off.

ALTERNATIVE (b): possibility to use the prescribed right for set-off, in so far as both debts being set-off have arisen from the same legal relation (e.g., the purchase price may be set off against the claim in reduction of the same as result of the defects of the goods).

ALTERNATIVE (c): possibility of set-off of a prescribed right against a claim, in so far as both the right and the claim were in the past susceptible of being set-off (in order to exclude formal features from the international business connexions).

J. The time when the uniform rules should become effective

132. The provisions of these rules ought probably to be applicable to rights which have arisen after the date on which the rules had entered into effect, so that any retroactive effects will be excluded. The determination of such time will follow from the adopted form of rules (i.e., after the international convention has become effective) or from the adoption of the uniform law in the individual contracting States.

133. Organizational forms for further, future work: with a view to a considerable number of Member States represented in the Commission, it would be difficult that the discussions on a concrete draft of the prepared rules on prescription (time-limits) be realized in the plenary sessions of the Commission. The Commission ought to consider on which principles the rules should be based, but the very elaboration of a concrete draft should be entrusted to a working group where at the maximum, seven to nine Member States would be represented. On the basis of the conclusions and principles adopted during the second session of the Commission this working group would prepare a draft of rules so that the same may be discussed during the third session of the Commission. In the working group the representatives of all legal spheres should take part, whereby the States which would form the working group would appoint their representatives from circles of experts, for discussion on a concrete draft.

ANNEX I

PRELIMINARY DRAFT CONVENTION ON THE PROPER LAW AND UNIFICATION OF PROVISIONS CONCERNING PRESCRIPTION IN CONNEXION WITH MATERIALIZATION OF THE INTERNATIONAL TRADE*

The States signatory to this Convention

Desiring to contribute to the further development of the international trade and

Intending to establish a reliable basis for the legal regulation of the mutual business connexions

Have decided to conclude the present Convention on the Proper Law and Unification of Provisions concerning Prescription in connexion with the Materialization of the International Trade and have appointed their representatives _____, who, after having duly submitted their powers have agreed upon the following provisions:

I. BASIC PROVISIONS

Article 1

The legal relations arising from the conclusion and performance of contracts of sale of the goods and from contracts for work in the course of international trade among the organizations of foreign trade of the signatory States shall be governed by the following provisions.

II. PROPER SUBSTANTIVE LAW

Article 2

The legal relations mentioned in article 1 shall be governed by the substantive law of the State, which has been expressly fixed in the contract, except matters concerning prescription.

Article 3

If the proper law has not been determined in accordance with the provisions of article 2, the legal relations mentioned in article 1 shall be governed by the

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* Prepared in 1961 within the framework of the Council for Mutual Economic Assistance.

substantive law of the State in whose territory the seller or the organization performing the work have their seat, except the matters concerning prescription.

III. PRESCRIPTION

Article 4

The right of action resulting from the legal relations mentioned in article 1 or the right to assert the claim by the counteraction shall be prescribed upon the lapse of the period of three years.

The time period of prescription shall run as of the day on which the right of action has accrued.

Article 5

The claims resulting from the responsibility for the defects of the goods or those resulting from a guarantee shall be prescribed upon the lapse of the period of six months running from the day on which the notification of the defects has been dispatched. If the defects have not been notified within the period fixed for this purpose, it shall be held that no defects exist.

Article 6

If the debtor has acknowledged in writing his obligation both as to its substance and amount, the course of the time period of prescription shall be interrupted and the new time period of prescription begins to run from the day of the acknowledgement. Where the claims based on a decision which is to be enforced are to be asserted, the time period of three years shall apply.

If the claim has been asserted in arbitration or judicial proceedings the prescription shall be suspended while the applicant duly pursues his action.

Article 7

No regard shall be taken to prescription, if the debtor does not claim so in the arbitration or judicial proceedings.

Article 8

If the debtor has fulfilled his obligation after the expiration of the period of prescription, he shall not be entitled to claim back the performance thus effected, nor in such cases where he did not know at the date of his performance that the period of prescription had elapsed.

The prescribed debt is not susceptible of being set off.

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Article 9

The agreement on a shorter or longer period of prescription other than that which is provided for under this Convention shall be made in writing.

IV. INTERIM AND FINAL PROVISIONS

Article 10

If under the provisions of the substantive law which govern the legal relation or under the terms of an agreement a longer term of prescription than that which is mentioned in articles 4 or 5 is provided for, such claims where the period of prescription began to run prior to the effectiveness of this Convention shall be prescribed upon the lapse of this term, however, at the latest upon the expiration of the period stated in articles 4 or 5, running as of the day on which this Convention has become effective.

Article 11

This Convention is subject to the ratification and the respective instruments shall be depositied with the Government of the Union of the Soviet Socialist Republics.

This Convention shall become effective within three months after the last instrument of ratification of all States which are signatories of this Convention and which are indicated in its Preamble has been deposited. The Government of the Union of the Soviet Socialist Republics shall notify the other States which are signatories of this Convention of the date on which the individual instrument of ratification has been deposited.

Article 12

This Convention shall remain in force for the time period of _____ years.

For the signatory States who have not submitted to the Government of the Union of the Soviet Socialist Republics the notice of this Convention within one year prior to the expiration of the time of its validity, the validity of the present Convention shall be prolonged by further five-year periods.

Made out in_____ on this _____ day of_____, 19__ in_____ languages in one issue whereby all the wording is of the same validity.

The certified copies of the present Convention shall be submitted by the Government of_____to all other signatories of the Convention.

In witness whereof the representatives have signed this Convention and attached the seals thereto.

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ANNEX II

PRELIMINARY DRAFT CONVENTION ON THE UNIFORM EFFECT OF THE LAPSE OF TIME ON INTERNATIONAL SALES OF TANGIBLE MOVABLES*

The States signatory to the present Convention

Desiring to establish common rules with respect to the lapse of time upon the international sale of tangible movables

Have resolved to conclude a Convention to that effect and have agreed upon the following provisions:

Article 1

1. The present Convention shall apply to sales of an international character of tangible movables. It shall also apply to sales on documents;

2. Sales within the meaning of the terms of the present Convention shall include delivery contracts with respect to tangible movables to be manufactured or produced, if it is incumbent upon the delivering party to furnish the raw materials required for such manufacture or production;

3. The present Convention shall not apply to sales

(a) of stocks, shares or currency;

(b) of ships, vessels for inland navigation and registered aircraft;

(c) by authority of law or in execution of judgement.

Article 2

1. Without prejudice to the provisions of paragraph 1 of article 3, each party to the contract of sale shall institute proceedings arising out of that contract or arising in connexion with the conclusion of, or failure to conclude, the contract within a period of three years from the date on which the claim in question could first be pursued, except in the case where adherence to this time-limit was prevented as a result of fraud by the second party;

2. After expiration of the time-limit specified above, the party to the contract may not pursue its claims, even in defence against an action.

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* Prepared by Professor H. Trammer.

Article 3

1. The buyer must institute proceedings with respect to the lack of conformance of the goods to the contract of sale within one year from the date provided for notification under the terms of paragraph 2 of the present article, except in the case where adherence to this time-limit was prevented as a result of fraud by the seller.

Upon expiration of this time-limit, the buyer may not pursue a claim resting on the lack of conformance of the goods with the contract of sale, even in defence against an action; the buyer may, however, enter a request for the reduction of the price as a defence against an action for payment, provided that he has not previously paid for the goods and that he has served notice of the lack of conformance;

2. The buyer shall forfeit the right of recourse to a claim of non-conformance of the goods to the contract of sale if he has not served notice upon the seller within a time-limit agreed upon by the parties, or, in the absence of agreement upon this matter, within a limit of thirty days from the date of receipt of the goods. Where such notice was served by registered letter, telegram or other appropriate means, the sender may rely upon such service notwithstanding any delay or non-delivery at the destination of such notice.

3. The seller shall not rely upon the time-limit set forth in paragraph 2 of the present article when lack of conformance is due to circumstances which he has failed to disclose in bad faith.

Article 4

1. The parties may stipulate time-limits, in advance and in writing, with respect to the institution of proceedings that exceed those which are set forth in paragraph 1 of article 3, and in article 2; if, however, the time-limits so agreed upon exceed the time-limits provided under the terms of the present Convention by more than one half they shall have no effect with respect to that period of time in excess of the above-specified limit. A contractual shortening of the said time-limits shall remain without effect;

2. If the debtor has acknowledged in writing that the creditor's claim is well-founded in substance and in amount, the right to institute action on the basis of the claim thus admitted shall be deemed to accrue from the date of such acknowledgement.

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Article 5

1. If action is brought before a court of law or submitted to arbitration prior to the expiration of the time-limit granted with respect to the institution of such action, the running of the time period in respect of the claim thus pursued shall be suspended if and while such action is properly pursued;

2. The compulsory execution of claims arising out of a contract of sale or arising in respect of the conclusion of, or failure to conclude, a contract under a judicial judgement or arbitral award may be instituted within a period of ten years from the date that such judgement or award becomes enforceable.

Article 6

1. Expiration of the period for the institution of proceedings shall only be taken into consideration by the court, the arbitrators or the executive authorities at the request of the debtor;

2. The debtor who voluntarily discharges his obligation may not subsequently demand the restitution of the amount paid on the ground that the period for instituting action against him had expired at the time of such discharge;

3. The creditor's claim against the debtor, which is not admissible as a result of the expiration of the period for the institution of proceedings, may be offset against the debtor's counter-claim against the creditor, provided that such settlement had been possible prior to the expiration of this period.

Article 7

1. The provisions of articles 1 to 6 of the present Convention shall replace, regarding the matters governed thereby, the municipal laws of the signatory States with respect to the limitation of actions (discharge of rights of action arising from contract by the lapse of time).

2. In the territories of the signatory States, the provisions of articles 1 to 6 of the present Convention shall be applied by the tribunal (whether judicial or arbitral) before which the action is brought. This shall apply equally to cases in which in accordance with the private international law of the jurisdiction in which the action is brought, the law applicable to the contract of sale in question would be neither the municipal law of the forum nor the municipal law of any signatory State.

ANNEX III

ABSTRACT OF THE GENERAL CONDITIONS GOVERNING DELIVERY OF GOODS EFFECTED AMONG THE ORGANIZATIONS OF FOREIGN TRADE OF THE MEMBER STATES OF THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE

CHAPTER XVI

Prescription

Article 92

The claims resulting from the relations regulated by these General Conditions of Delivery are governed by the provisions concerning prescription which are contained in this chapter.

Article 93

1. The general term of duration of prescription is two years.

2. The special term of duration of prescription of one year applies to:

(a) actions based on the claims resulting from the quality and quantity of goods (articles 31, 33, 71, 75, 77 and 80 to 82);

(b) actions based on claims in payment of penalty.

Article 94

1. The general term of prescription to be counted as from the day on which the claim has arisen.

2. The special term of prescription to be counted in cases of:

(a) actions which are based on claims accrued in connexion with the quality and quantity of goods - the term of prescription runs from the day following the day on which the buyer has received from the seller the reply on merits of his complaint, and in cases where the seller has not replied within the terms stated in paragraph 1 or paragraph 5 of article 76, from the day following the day on which the term within which the reply on merits of the complaint had to be made, has expired. If the seller's reply does not contain the decision on merits of the complaint, the term of prescription begins to run from the day following the day on

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which the period within which the reply on merits of the complaint was to be made, has expired;

(b) actions which are based on claims in payment of penalty - the period begins to run from the day following the day on which the buyer has received the reply concerning his claim, and in cases where the seller has made no reply on merits of claim as provided for under article 87 - from the day following the day on which the period within which the reply had to be made, has expired.

Article 95

Arbitrator(s) shall take regard to the prescription only in cases where the debtor claims so.

Article 96

If the debtor has fulfilled his obligation after the expiration of the time period of prescription, he shall not be entitled to claim back the performance, even if he knew at the date of his performance that the time period of prescription has elapsed.

Article 97

Claims which have been prescribed can be set off if the parties so agree.

Article 98

The course of the period of prescription shall be suspended if the action could not be filed due to grounds qualified as vis major, which has arisen or has been effective during the period of prescription. The time for which the running of the term of prescription is suspended shall not be included in the time period of prescription.

Article 99

1. The course of the period of prescription shall be interrupted in cases where the action has been filed or if the obliged party has acknowledged his debt.

2. After the interruption has ceased to exist the term of prescription shall run afresh.

3. If the claimant has withdrawn his motion for arbitration, the running of the period of prescription shall not be deemed to be interrupted.

Article 100

If the period of prescription in respect of the principal claim has expired, it shall be deemed that the period of prescription in respect of ancillary claim has as well expired.

Article 101

Shall be considered as the date of the filing the action the date on which the action has been served on the arbitration court, or in cases where the action is sent by mail, it is the date of postmark at the time when the post office has accepted the registered letter for its being dispatched.

Article 102

Any deviation from the provisions contained in this chapter shall not be allowed.

Article 103

The provisions of this chapter shall apply to obligations which have arisen out of contracts which are governed by the present General Conditions of Delivery.

NORWAY

[Original: English]
8 October 1968

TIME-LIMITS AND LIMITATIONS (PRESCRIPTION) IN THE FIELD OF INTERNATIONAL SALE OF GOODS

I. Introduction

The purpose of this exposé is to present some ideas as to a possible reform and harmonization of the law on prescription in the field of sale of goods. As a background is given a brief summary of the existing rules on prescription in the Nordic and some Germanic legal systems limited to claims arising out of contracts on sale of movable goods. Much of what is said is, however, equally valid with regard to prescription of other claims than those mentioned above.

This document deals only with the internal rules on prescription and will not take up questions regarding conflict of laws, such as the choice of applicable law or the designation of competent courts.

In addition to the rules of prescription in the strict sense will be mentioned some time-limits in the law on sales which, if disregarded, may ensue loss of certain rights.

II. The present law in Nordic and Germanic legal systems

1. The starting-point and length of the periods of prescription

(a) In the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) there are differences as well regarding the time when the prescription period begins as regarding the length of the period. In Denmark, Iceland and Norway the general rule (with regard to sales) is that the prescription runs from the time when the claim is due. (There is, however, in Norwegian law an exception to this principle with regard to claims whose maturity depends on a previous notice from the creditor.) In Finland and Sweden the prescription runs from the date on which the claim accrued. A claim may thus be extinguished even though it has never become due.

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The length of the prescription period is ten years in Finland and Sweden, five years in Denmark and Iceland and three years in Norway.

(b) In Germany the general period of prescription is thirty years, counted from the day when the claim accrued. There are, however, numerous exceptions from this general rule. For th most common claims arising out of everyday life the period of prescription is two years; this applies to many claims in the field of sale. A prescription period of four years applies, however, to certain claims. For these short time periods the prescription starts at the end of the year in which the claim accrued.

(c) In Austria the general period of prescription is thirty years from the time when the creditor may exercise his right, a rule to which there exist numerous exceptions. Many claims of everyday life prescribe in a period of three years; this applies among others to many claims in the field of sale.

(d) The general period of prescription in Switzerland is ten years from the day on in which the claim may be exercised (has become due). For some claims arising out of contracts on sales the period is five years.

2. Interruption and suspension of prescription

In the countries mentioned there are considerable differences as to how the prescription may be interrupted. But in all countries the creditor may interrupt the prescription by bringing a legal action against the debtor before the court or by obtaining the debtor's acknowledgement of his debt. Such acknowledgement the debtor may give expressly or impliedly, f.i., by paying instalments or interests. In Swedish and Finnish law, the creditor may also interrupt the prescription by reminding the debtor of his debt or by demanding payment. This does not suffice in any of the other countries.

With regard to suspension it may be mentioned that the prescription in Danish and Icelandic law is suspended when the creditor is inexcusable ignorance of his claim or of the debtor's place of residence. The other Nordic countries have no corresponding rule of suspension, but suspension is provided for in some special relations. Germany has a general rule of suspension in cases of force majeure. In Switzerland, prescription is suspended when it is impossible to pursue the claim before Swiss courts. In Austria, prescription is suspended if there is a total stand-still of the administration of justice.

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3. Agreements on prescription

The general principle seems to be that the parties may not make an agreement to the effect that there shall be no prescription at all or that the period of prescription shall be longer than that stipulated in the law. If such an agreement is concluded in advance, it will have no effect whatsoever. If the prescription is running at the time of agreement, an acknowledgement of the debt may be inherent in the agreement, which thus may interrupt the prescription. A shorter period of prescription than that stipulated in the law may generally be agreed upon. However, this is not possible under Swiss law.

4. Effects of prescription

The effects of prescription are generally much the same, even though there are some differences in terminology. There are nevertheless also some differences in substance. A common principle in all countries mentioned above is that the creditor loses his right to enforce payment through legal measures. In Finland and Sweden, however, the creditor may use a prescribed claim to compensate a debt he owes his debtor, provided that the creditor acquired the claim before prescription occurred and provided that his debt had accrued before the same time. According to Norwegian law prescribed claims may also to a considerable extent be used for compensation. In Danish law, however, this is not possible. In Germany, Austria and Switzerland the prescribed claim can be used for compensation provided that compensation became possible before the prescription period had run out.

If the creditor has a mortgage as security for the fulfilment of his claim, he may, with some exceptions, according to the law of all the countries mentioned, realize the mortgage even though the claim is prescribed.

Payment of a prescribed debt may generally not be recovered. Such payment is, moreover, usually not considered to be a gift.

Prescription is in all the countries mentioned considered as part of the substantive law.

5. Other time-limits in the codes on sale (notification of lack of conformity, etc.)

In addition to the rules of prescription in the strict sense may be mentioned the provisions on notification in the codes on sale, which, if disregarded, entail

loss of certain rights, as for instance the right to insist upon delivery when the goods are delayed, or the right to rely on lack of conformity with the contract. These rules are parctically identical in Denmark, Iceland, Norway and Sweden.

The time-limits mentioned above are generally not fixed in days, weeks or months, but are of a more indefinite character, such as "promptly", "as soon as possible" or "without undue delay". One fixed last time-limit does nevertheless exist: the buyer will in any event lose the right to rely on lack of conformity of the goods if he has not given notice thereof to the seller within a period of one year from the date on which the goods were handed over to him, unless the seller has guaranteed the goods for a longer period or has acted fraudulently.

When the buyer has given due notice of lack of conformity in accordance with the provisions mentioned, his right to rely on the lack of conformity will be prescribed in accordance with the general rules of prescription of his claim. There is no special rule of extinction of such right (cp. the provisions in article 49 of the Uniform Law on the International Sale of Goods, The Hague, April 1964).

The rules in the codes on sale yield in principle to the agreement of the parties and to customary law.

In Switzerland the rules on notification regarding lack of conformity are in principle the same as in the Nordic countries. When the goods are not delivered in time, the buyer must promptly notify the seller in order to keep his right to insist upon delivery. This rule, however, is only applicable as between professionals.

In Germany and Austria, rules on notification in cases of non-conformity are applicable only if both parties to the contract are professionals (Handelskauf). Notification must then be made promptly. Furthermore, in these two countries, the right to declare the contract avoided or to obtain damages or reduction of the price must be legally pursued within six months from delivery when movables are concerned (in Austria six weeks regarding sale of animals) and one year for Germany and three years for Austria when immovables are concerned. These time-limits apply whether the contract is between professionals or not.

III. Ideas to a reform and harmonization of the law on prescription

1. The available information shows that there are considerable differences in the law of prescription in the different countries. This is true as well with regard

to the starting-point of prescription as to the interruption of the prescription and the length of the period. In some countries the prescription starts from the time when the claim accrues, in other countries from the time when the claim is due. In some legal systems the prescription may be interrupted by a simple reminder from the creditor to his debtor. In other systems the creditor - in order to interrupt the prescription - must bring a legal action before the court if the debtor does not acknowledge the debt. The length of the prescription period also differs greatly.

It seems obvious that there are scarcely rational reasons for maintaining different rules on prescription to the extent mentioned. It is surprising that, even in countries with rather homogeneous legal systems there are considerable differences in this field of law. These differences seem more to be the result of historic and accidental causes than founded on rational grounds. It should be possible to obtain much more homogeneous rules.

Any legal rules on prescription should be constructed so as to serve in the most efficient way possible the facilitating of commercial and other economic transactions, to reduce litigation and to safeguard and strengthen legal security. Two opposing interests should be weighed against one another: on the one side the creditor's interest in not losing his economic right or being charged with too heavy burdens for preserving his right. On the other hand the debtor's interest in not being forced to live for indefinite or too long periods in a state of uncertainty with regard to his economic situation. Exaggerated regard only to one or the other of these interests will entail disturbances in economic life and prevent transactions which, from a purely economic point of view, would appear desirable. It is thus a question of striking a proper balance between the two interests, proper in the sense that one obtains at the same time a maximum of legal security and a minimum of hampering effects on economic life.

2. In order to decide upon the question of what rules ought to be applied, it is advisable to look into the fundamental purposes of the rules of prescription. Among these purposes may be mentioned considerations on problems as to available evidence and a wish to limit or reduce litigation. When a considerable time has elapsed since a disputed claim accrued or became due, it may be difficult to prove whether it still exists or not. The claim may furthermore have been fulfilled, but the receipt or other evidence has not been kept. It is therefore a legal

interest that an absolute time-limit be established after which the question whether the claim exists may no longer be raised. Such rules of prescription will clarify the question, and thus make unnecessary the uncertain appraisal of questions of evidence. Another purpose behind the rules of prescription is that the debtor, when the claim is becoming old, may more and more adapt himself to the thought that an uncertain debt never will be collected.

The most important reason behind the rules of prescription seems, however, to be what may be characterized as the element of fulfilment and settlement: claims are, according to their own nature, intended to be temporary. By being fulfilled they shall cease to exist. Rules on prescription serve as a pressure for fulfilment or settlement. If the creditor does not get payment, or at least an acknowledgement of the debt from the debtor, he will lose his claim because of prescription provided legal action is not taken in time.

3. The purpose of promoting fulfilment or settlement clearly indicates that the prescription period should be counted from the time when the claim is due. Before this moment the creditor may not demand fulfilment. But when the claim has become due, the prescription period should not be too long, as there are scarcely any important reasons for keeping a mature claim alive indefinitely or for a long period without settlement either by decision in court or by agreement.

The element of fulfilment indicates moreover that the prescription should not be interrupted only by a simple reminder from the creditor to the debtor. If so, it would be too easy to keep a (disputed) claim alive for an indefinite period. In order to interrupt the prescription the creditor should be required to bring legal proceedings before the court, if the debtor does not acknowledge his debt.

This leads to the conclusion that in the law of prescription the most important consideration is to have a short period of prescription counted from the day when the claim is due, a period which may only be interrupted by acknowledgement or by proceedings before the court. At least this seems to be a sound conclusion in the field of international sale of goods.

How long should the period be? Of course opinion may differ on this point. The period should be such as to afford the creditor ample time for taking up negotiations with the debtor and, if these do not lead to a satisfactory result, to decide on what other action he should take. From these points of view a period

of for instance ten years, seems in general to be unnecessarily long. Bearing in mind the communication facilities afforded in a modern society, it does not seem reasonable to argue in favour of periods longer than a few years. Any choice between two and five years will be more or less arbitrary, but a period of three years would seemingly be appropriate for most normal cases. It may, however, be advisable to provide for a longer period with regard to claims which have been established by a final judgement rendered by a court. For these claims a period of about ten years might be appropriate.

4. It may be mentioned that revision and harmonization of the general rules on prescription outlined above recently have been discussed between the Nordic countries. The idea is, moreover, for the time being presented by the Swedish representatives in an expert committee under the Council of Europe, which deals with time-limits in general.

UNITED KINGDOM

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TIME-LIMITS, LIMITATION AND PRESCRIPTION IN CONNEXION WITH THE INTERNATIONAL SALE OF GOODS

I. Introduction

1. This study is submitted by the United Kingdom Government at the request of the United Nations Secretariat following the decision of the United Nations Commission on International Trade Law (UNCITRAL) to include the subject among the priority topics of the Commission's work programme.

2. The United Kingdom Government feel that it may be of assistance to the Commission to have a paper which

(a) describes and explores some of the problems which may face the Commission in connexion with their work on this topic and suggests certain lines of approach which may prove fruitful; and

(b) gives some account of

(i) the relevant rules of English domestic law;

(ii) the relevant English conflict of law rules.

II. The problems which may face the Commission and possible lines of work

3. The discussion which took place during the first session of the Commission regarding the actual description of this topic in the Commission's work programme suggests that the Commission may find it desirable to devote their attention initially to two matters:

(i) the establishment of a uniform terminology;

(ii) a more precise definition of the scope of the subject.

4. It is thought that lawyers of different disciplines may well describe rather different types of legal rules by the same terms. For example, English lawyers tend to use the term "limitation" in relation to rules of law whose sole effect is to bar by the effluxion of time the right to institute legal proceedings and the term "prescription" to describe rules under which the effluxion of time confers rights

e.g., a rule whereby undisturbed enjoyment of an article for a specified period gives one ownership: but it does not follow that lawyers familiar with other legal systems use these concepts in the same sense. In the course of studies in the Council of Europe the terms "extinctive prescription" and "acquisitive prescription" have been employed to describe the two different types of rule. They are not, of course, mutually exclusive concepts.

5. The Commission may think that it would be useful to establish a simple glossary of terms for the purpose of eliminating misunderstandings.

6. The United Kingdom Government would suggest that the Commission ought also to seek to settle more exactly the field which it proposes to examine in connexion with its work on this topic. One matter which merits some attention in this connexion is the question whether the study is to be restricted to time bars as they affect the institution of legal proceedings or whether it is to extend to time bars so far as they effect other remedies e.g. a right to repossess goods if a buyer fails to make payment or a right to reject goods as not being of the contract quality. The Commission may also wish to consider whether they wish to regard as within the scope of their enquiry rules of law (which it is thought are common to most legal systems) under which rights are extinguished or acquired if a person fails to act in some way within a reasonable time (as opposed to a fixed period). They may also wish to consider whether their study should be restricted to time-limits so far as they affect relationships between a buyer and seller under an international contract of sale or whether they wish to consider also the position in relation to situations involving third parties, e.g., the right of an owner to recover from a buyer goods sold by a vendor who has no title.

7. It is thought that there are probably considerable advantages in initiating work in the first place over a narrow field and extending the field later if this is thought necessary.

8. In defining the exact field of their study the Commission may find it helpful to consider how far, in practice, the lack of harmony between the laws of States upon this topic occasions difficulty in connexion with international trade, and in which particular matters the lack of harmony is most marked. For example, it may be pertinent to ascertain to what extent the laws of different States require that a domestic law imposing a time-bar on the institution of legal proceedings is

always applicable in relation to proceedings before its courts (or local arbitration proceedings) irrespective of the international character of the dispute. For example, it will be seen from the latter part of this study that the rules of English private international law (as recorded in the decisions of the English courts) lay down that the domestic rules of law of the forum are to be applied as respects procedural matters. The English Limitation Act (which generally precludes the institution of legal or arbitration proceedings after the expiry of six years) is characterized by the English courts as procedural in nature. Accordingly, a defendant in legal proceedings in England can successfully plead that the proceedings are time-barred after six years notwithstanding that he and the prospective plaintiff may be foreign or that the dispute concerns a contract for the international sale of goods and that the contract is expressed to be subject to the law of a foreign State. The foreign element is immaterial. Conversely, of course, the rule that procedural matters are regulated by the domestic law of the forum serves to preclude the defendant from defeating the plaintiff's case by reference to any rules of foreign law (e.g., the rules of the proper law) which the English courts regard as of a procedural nature and which specify a shorter period of limitation than that laid down by English domestic law.

9. These examples indicate one obvious way in which differences in the laws of States as regards time-limits may produce anomalies. If the laws of different States both

(a) provide that procedural matters are regulated by the local domestic law; and

(b) have rules which the courts of both States would regard as procedural and which specify time-bars of different duration,

a situation will prevail in which it is always possible at some period to institute proceedings in the one country when the right to sue in the other is time-barred. Thus a situation is produced in which a plaintiff may be able, if the defendant is subject to the jurisdiction of more than one State, to institute proceedings successfully in one State at a time when they are time-barred in another.

10. This situation may of course prevail by reason of other factors. For example, different legal systems may apply different conflict of law rules; or they may apply the same rules but interpret them differently. For example, two countries

may adopt the same conflict of law rules as the English ones described in the latter part of this paper in the sense that they distinguish procedural and substantive rules and, in relation to disputes concerning international contracts of sale, apply the procedural rules of the forum and the substantive rules of the law which is the proper law of the contract: but if different tests are applied to characterize laws anomalies may still result. It is thought, however, that this problem is to some extent reduced by the fact that divergences tend to be self-cancelling in certain situations. For example, A and B make a contract subject to the law of country C, and B brings proceedings against A in country D.

11. If the courts of country D treat a rule of law of country C as substantive when the courts of C would regard it as procedural, the same net result will apply whether B sues in country C or country D, namely, the courts of both countries will apply the rule (although for different reasons).

12. Another possible source of lack of harmony arises, of course, from variations in the domestic rules of States as to the rules for counting the running of time in relation to procedural rules barring rights by the effluxion of time. Thus, the fact that the domestic laws of two countries apparently provide a uniform period of limitation may not mean that the application of those rules will result in the period expiring on the same day in both cases.

13. An analysis of the reported decisions of English courts would suggest that, in practice, divergences in national laws in relation to time-limits do not occasion much practical difficulty. As will be seen from the latter part of this study the rules of English law involving time-bars are few and the private international law rules simple. It must be admitted, of course, that the records of judicial decisions are not altogether decisive. The application of a time-limit may be so apparent as to dissuade a party from instituting legal proceedings so that an obvious anomaly may never become the subject of judicial examination.

14. It is thought that it would not be premature to venture some comments upon the solutions which the Commission might adopt were they to decide that it is desirable to seek to achieve a greater degree of uniformity in the laws of States regarding time-limits. First, it is thought that any attempt to produce a greater harmony in the substantive rules of laws regarding time-limits (as they affect the exercise of rights between the parties to international contracts of sale) by the

preparation of uniform laws would involve problems of very great difficulty and could involve an overlap with the provision already made by The Hague Uniform Laws on the International Sale of Goods (see, e.g., article 39). A major source of difficulty could be the fact that different legal systems may employ different remedial concepts. It is easy enough to deal with a situation where the law of one country allows a buyer to reject goods within a limited period because of some defect and the law of another country gives him a similar right, exercisable within a different period. But what does one do if the laws of two countries afford entirely different systems of remedies as well as providing different time-limits, e.g., one requires notice of rejection to be given on the good returned within a limited period while the other requires that legal proceedings be instituted within a certain period? It is accordingly suggested that the only practical solution in relation to difficulties involving substantive rules is to seek to harmonize conflict of law rules so that the courts of different States

(a) adopt uniform tests to characterize rules of law as substantive (uniform rules of classification); and

(b) apply the same laws when applying substantive laws (uniform choice of law rules).

15. Conversely, and rather obviously, it is thought that any effort by the Commission to harmonize procedural rules must be directed either towards the preparation of uniform laws or towards the adoption of private international law rules which allow the courts of the forum to take account of procedural rules other than their domestic procedural rules (to the extent that the foreign rules involve a more rapid loss or acquisition of rights than the domestic law of the forum). It is thought that it would probably be easier (and more desirable) to seek a solution in the first of these directions. The second course has two clear disadvantages:

(i) it would not, in any event, simplify legal proceedings in connexion with international disputes because it would still be necessary to examine the procedural rules of more than one system of law;

(ii) considerable difficulties would arise in deciding exactly which foreign laws were to be taken into account. For example, where a seller who carries on business in three different countries (by no means an unlikely situation) sells goods to a buyer in a fourth under a contract subject to

the law of the fourth country, it would seem essential in order to avoid any anomaly to consider the procedural time-limits applied in all three countries where the seller carries on business (and in any other country to whose jurisdiction he may be subject) because it would probably be open to the buyer to sue in any one of those countries.

16. On the other hand, purely procedural rules regarding the institution of proceedings lend themselves to unification fairly easily because differences between the procedural rules of legal systems regarding the institution of legal proceedings tend to be of a superficial nature. For example, most legal systems accept the idea that there should be some limit on the institution of proceedings and that the period should be fixed. They differ only by providing different answers to the questions, e.g., how long should the period be? Should one count public holidays? Should one count a part of the day as a whole day or ignore it? What circumstances interrupt the running of time and how do they affect the situation?

III. The rules of English law

17. For the purposes of private international law English law treats any law other than that applying in England as foreign. Thus Scottish, Australian and German laws are all foreign. English courts do not normally take "judicial notice" of the foreign aspect of any case which comes before them, that is to say, a court does not of its own motion inquire into the question whether it should apply the rules of any foreign system of law but assumes that the issues before it are to be decided entirely by English law unless and until one or more of the parties to the proceedings raises the point that a foreign law is relevant and provides evidence as to what that law is.

18. In this survey the term "goods" does not include ships, to which special rules apply in English law, especially in relation to admiralty actions.

1. Private international law

19. The general rule is that procedural matters are governed by the lex fori, so that in any action brought in England all procedure is governed by the English rules of procedure. A rule which extinguishes a remedy, as opposed to a substantial right, is classified as procedural. The effect of the English domestic law of

limitation (the Limitation Act described below) as it applies to the right to sue on a contract is merely to extinguish the remedy of the would-be plaintiff. The plaintiff may still have other ways of enforcing his rights which the Limitation Act does not affect, e.g., if a debtor sends money to a creditor to whom he owes several debts without indicating that it is sent in payment of a particular debt the creditor may appropriate it to the payment of a debt for which he cannot sue because the action is time-barred. The Act is, therefore, regarded as procedural in character and English courts will apply it to all actions brought in England, even though the proper law of the contract is foreign and even though that foreign law may impose a different period of limitation from English law.

20. Conversely English law will apply the substantive rules of a foreign law if that law is relevant because, e.g., an action is being brought for breach of contract and that law is the proper law of contract. It may be that the rules of limitation of the applicable foreign law are regarded as substantive. They would then apply in addition to the English rules. Whether a foreign rule is procedural or substantive is a question of fact to be determined on expert evidence (that of a person expert in the law in question). Obviously, the question of applying a foreign rule in addition to the English rule arises only if the foreign law prescribes a shorter period than the English rule.

21. Thus:

(a) The English limitation period (usually six years) will apply to any action on an international sale of goods contract brought in England, whatever the proper law of the contract.

(b) The English rules will apply even though a foreign court has already declared the action time-barred if the foreign court has done so on procedural grounds.

(c) Where a substantive rule of the proper law of the contract bars the action, that rule will be applied by an English court so as to shorten the period within which an action may be brought if the period laid down by the proper law is in fact shorter than the English period.

2. The English domestic law as to limitation of actions

22. The rules are mainly statutory and are to be found for the most part in the 1939 Limitation Act. The main provisions affecting contracts are:

(a) The limitation period is generally six years. For contracts made by deed the period is twelve years, but contracts for the sale of goods are unlikely to be so made. For any claim for damages in respect of personal injuries the limitation period is three years. (Where there is a claim for breach of contract causing both personal injuries and other types of damage, the latter claim may be pursued by itself even though the personal injuries claim is statute-barred because the three-year period has expired.)

(b) Exceptions to the six-year period have been made in connexion with certain international conventions relating to carriage. In the case of contracts for the carriage of goods by sea to which The Hague Rules apply, the limitation period for a claim in respect of damage to the goods is one year from the date of delivery. A two-year period of limitation applies in relation to actions arising from the carriage of goods by air. This rule is applied in implementation of the Warsaw Convention, as amended at The Hague in 1955. Periods of one year, or three years in the case of wilful misconduct, apply in relation to actions on contracts for the international carriage of goods by road. The relevant rules of English law implement, in this case, the 1956 Convention on the International Carriage of Goods by Road.

(c) Except in the cases described in paragraph (b) above and certain other cases where fraud or mistake is involved, time begins to run from the date when the cause of action arises, i.e., from the date when a breach of contract occurs. Where, however, an action is based on fraud or the existence of a cause of action is fraudulently concealed or where an action is brought for relief from the consequences of a mistake, time runs from the moment the claimant discovers the existence of his right of action or from the time when he ought, with due diligence, to have discovered it.

(d) Time runs continuously. Time ceases to run and begins to run again if the person to be sued acknowledges the claim in writing to the party who has a right to sue.

(e) The court does not apply limitation rules automatically, e.g., if a party wishes to rely on the Limitation Act, he must raise the matter expressly. Conversely a party may waive his right to have a claim dismissed as time-barred, and the court will hear the case as if the limitation period had not expired.

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(This is one reason why the English law rule bars only the right to sue and does not extinguish the substantive right.) The parties may also make a contract under which one of them agrees to extend the limitation period or not to rely on the Limitation Act in relation to an existing claim. Such a contract is enforceable.

(f) The parties to a contract may provide for a period of limitation which is shorter than the six years laid down by law. In that case the contract period, not the statutory period, applies. The agreed period may relate to any action arising under the contract or to particular types of claim. Thus there may, e.g., be an agreed period for the instituting of proceedings relating to the quality of goods.

(g) The Crown and public authorities are in the same position as other persons as far as limitation affecting sale of goods contracts is concerned.

3. Arbitration

23. The statutory limitation periods apply to arbitration proceedings. The right to have a dispute arbitrated is lost six years after the right to go to arbitration arises, i.e., six years from the date of the breach of the contract.

4. The extinction of contravtual remedies through the passing of time

24. Unlike some legal systems, English law does not lay down different time-limits for the exercise of different contractual rights and obligations. The six-year period applies to the enforcement by legal action of all contractual rights. But there are certain remedies available to buyers or sellers of goods which will be lost if they are not exercised within a reasonable time. What constitutes a reasonable time depends on the circumstances of each case, but in practice it will be a much shorter period than six years. The remedies are:

(a) The rescinding of the contract

A party who wishes to rescind the contract (e.g., because of a breach of condition by the other party) must act reasonably promptly. The right may also be lost for other reasons than the passing of time (even if the person in question acts quickly), e.g., because it is not possible to restore the parties to the position they were in before the contract was made.

/...

(b) Specific performance

A court order compelling a party to perform a contract for the sale of goods (an alternative to an award of damages) may be granted if applied for with reasonable speed. But this remedy is very rarely granted in the case of a sale of goods, and is a matter entirely within the court's discretion.

(c) Rejecting goods for lack of conformity or late delivery

Here again there are reasons apart from the passing of time why the right may be lost, e.g., the property may have passed to the buyer, or he may have accepted them without reserving his right to reject.

25. These rules will be applied by an English court when the proper law of the contract is English. The situation where the proper law is not English is less clear, however, because of the lack of cases in which the matter has come before the courts. The text book authorities suggest that English courts would recognize the availability of and grant similar remedies if the proper law of the contract was a foreign law and that law provided for such remedies but that the English rules as to the time in which they must be exercised would not be disregarded.

5. The sale of goods acquired by prescriptive title

26. In English law title to goods is extinguished after six years adverse possession. The right is barred, and not merely the remedy. The rules of prescription in connexion with goods would therefore appear to be substantive and not procedural.

27. English law generally recognizes a title or claim to possession of goods acquired under the law of the place where the goods were situated at the relevant time. The only cases which have arisen in English courts have concerned transfer of title for other reasons than the passing of time, (e.g., by public sale) but there is no reason to suppose that similar considerations would not apply to cases involving limitation. In view of the lack of English authority on the point, American cases, which deal with such problems more often, might well have some persuasive authority in English courts.
