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PROPOSALS AND OBSERVATIONS OF THE UNITED STATES OF AMERICA
on
the preliminary draft uniform law on prescription

INTRODUCTION

1. This memorandum is submitted by the United States of America in response to the invitation of the Commission (A/CN.9/IV/CRP.13/Add.3 of 19 April 1971) that members of the Commission submit to the Secretary-General any additional proposals or observations on the preliminary draft uniform law on time-limits and limitations (prescription) in the international sale of goods they might wish to make.
2. The United States has earlier submitted its answers to the questionnaire on the length of the prescriptive period and related matters (A/CN.9/WG.1/CRD II-2 of 10 August 1970). It refers to these answers with respect to matters not covered by this memorandum.

ARTICLES 1 AND 2

3. The comments of the United States on these articles are contained in its answer No. 1 to question 4 of part II of the questionnaire. The following additional comments may be appropriate.

4. It seems to be the intention of article 1 (1) to exclude from the coverage of the uniform law the rights of a buyer or seller against a person with whom there exists no privity of contract. In its present formulation, the draft may not achieve this result. When, in the United States, a buyer of goods asserts a claim based on a theory of manufacturer's liability against the purveyor of the person from whom he bought them, the rights of the buyer might well be regarded as arising from a sale. If this sale were an international sale, his rights as against his seller's purveyor might therefore be considered within the coverage of the draft, which speaks of rights of the buyer arising from an international contract of sale, even though they are not bottomed on privity of contract. It would seem desirable to eliminate this possible ambiguity.
5. The ambiguity described in the preceding paragraph becomes especially significant in view of the limited exclusion defined in article 2 (a). This provision excludes from the coverage of the law rights based on liability "for the death of, or injury to, the person of the buyer" /emphasis supplied7. Consequently, if the buyer, in order to recover for the death or injury of a member of his household or employee, were to sue a predecessor in the chain of manufacture and distribution with whom he does not stand in a relation of privity, the law might be considered applicable to his claim. If this result is not wanted, the draft should be amended by omission of the words "of the buyer".
6. This amendment would also eliminate the anomalous result, possible under the present version, of the law's not being applicable to a claim based on privity of contract for the death of, or injury to, the buyer, but its being applicable to a contract claim for the death of, or injury to, some other person, such as an employee, child, or other member of the buyer's household.
7. The United States has no objection to the exclusion in article 2 (a) of the applicability of the law to claims for death or injury. However, it believes that, if these claims are withdrawn from the coverage of the law, claims for damage to property other than the goods sold, which are also of a special nature, should similarly be excluded.
8. Claims for damage to property fall into two categories. They may be based on the contract of sale or they may rely on a theory of liability that requires no privity of contract.

9. In the latter category falls the leading case of Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y. 2d 5, N.E.2d 399 (1962), in which the New York Court of Appeals upheld a claim for damages to clothes manufactured by a manufacturer who had used cloth treated with faulty resin sold by the defendant to the person from whom the plaintiff had bought the cloth, even though the plaintiff asserted neither privity of contract nor negligence. Holdings such as this are generally regarded as an extension of the doctrine of manufacturer's liability for death or injury in the absence of privity. Since the law excludes claims based on the more conservative doctrine that permits recovery for death or injury, it should also exclude claims based on the more radical doctrine that permits recovery for damage to property other than the goods sold.
10. It may perhaps be argued that only few countries permit recovery for property damage on a warranty theory from a person with whom there is no privity of contract. But this does, of course, not satisfactorily settle the question for those countries that do.
11. Even if it is assumed that the draft covers only rights based on privity of contract, it would seem desirable to exclude claims for damage to property other than the goods sold along with claims for the death of, or injury to, persons. Once it is decided to include claims for damages suffered other than those to the goods sold, it is difficult, if not impossible, to defend on a rational basis exclusion of a claim for injury to a person but inclusion of a claim for injury to the property of a person. For example, if a purchaser of a boiler sued a manufacturer for a defect in the boiler that caused an explosion which injured him and damaged his house, it would seem difficult to advance a rational reason for having the law apply to his property claim but not to his claim for personal injury. Accordingly, the United States proposes exclusion of both types of claims.

ARTICLES 3 AND 4

12. At this time, the United States has no comments on these articles.

ARTICLE 5

13. The United States favours the present version.

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ARTICLE 6

14. Since various lengths for the limitation period ranging from three to five years have been suggested, it may be appropriate to select a four year period.

ARTICLES 7, 8 AND 9

15. The United States proposes the general rule that the prescription period commences upon the accrual of the right in lieu of the various more particular rules presently embodied in articles 7, 8 and 9.

16. If necessary to avoid the problem contemplated by article 9, a special provision like that of U.C.C. (Uniform Commercial Code) §2-725 (2) could be formulated to give the courts guidance in determining when a claim accrues in the situation envisaged by this article.

17. In addition, a special provision might be considered necessary in regard to claims based on fraud. It might therefore be provided that a claim based on fraud accrues only when it is or should be discovered.

18. For more elaborate comments on these articles, see the answers of the United States to part I, question 2 and part II, question 2 of the questionnaire.

ARTICLES 10, 11 AND 12

19. The United States proposes elimination of articles 10 (1), 11, and 12 and substitution of a provision to the effect: (1) that the limitation period in regard to a right is interrupted upon the assertion of a claim in legal proceedings seeking relief premised on that right, and (2) that whether and when such proceedings have been instituted shall be determined by reference to the law of the place where they are brought.

20. The United States further proposes that article 10 (2) be broadened to make provision for the relation back of all counterclaims that arise from the same transaction, occurrence, or event from which the principal claim arose.

21. Finally, the United States proposes that provision be made for the relation back of amendments under the same conditions.

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22. For a more elaborate statement of these proposals and comments, see answer No. 2 (a)-(f) of the United States to question 4 of part II of the questionnaire.

ARTICLE 13

23. The United States agrees that a written acknowledgement should stop the prescriptive period from running. However, it believes that the consequence of a written acknowledgement should be the same as that of a written declaration within the meaning of article 18 (2). It therefore recommends that these consequences be made the same.

24. The grounds for this recommendation are stated more fully in answer No. 2 (g) of the United States to question 4 of part II of the questionnaire.

ARTICLE 14

25. For reasons stated more fully in its answer No. 3 (a) to question 4 of part II of the questionnaire, the United States proposes elimination of article 14.

ARTICLE 15

26. The United States proposes that the circumstances that have the effect described in article 15 be stated with particularity and that they include act of God, and insanity, incompetence, and death of the creditor.

27. For further comments on the present version of article 15, see answer No. 3 (b) of the United States to question 4 of part II of the questionnaire.

ARTICLE 16

28. The United States suggests that article 16, which may render the length of the prescriptive period rather uncertain, might well be omitted.

29. The United States further suggests that the draft address itself to the related problem that arises when the creditor, whether or not as a result of misrepresentation, is in fact misinformed about who his debtor actually is. To cover that situation, the United States proposes a provision that would permit an amendment substituting the proper debtor to relate back to the time of commencement of the suit if the proper debtor had notice of the suit before the period expired.

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30. For a more detailed discussion of these suggestions, see answer No. 3 (c) of the United States to question 4 of part II of the questionnaire.

ARTICLE 17

31. The United States believes that the present version of article 17 could be simplified by substitution of a provision granting an additional period whenever an action commenced before expiration of the prescriptive period is terminated on a ground not relating to the merits.

32. The United States also proposes that this additional time be given irrespective of the reasons for the termination as long as the decision is not on the merits.

33. The United States submits for possible adoption, with such changes as may be required by the different terminology and breadth of the draft, the language of section 2-725 (3) of the Uniform Commercial Code, which reads as follows:

"Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action...."

34. For additional comments and information on United States practice, see the answer of the United States to question 4 of part I of the questionnaire.

ARTICLE 18

35. The United States is inclined to prefer a provision that would prohibit extension of the period, but permit reduction to a period of not less than 2 years.

36. For further comments on this article, see the answers of the United States to question 3 of parts I and II of the questionnaire.

ARTICLE 19

37. The United States has no comments on this article at this time.

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ARTICLE 20

38. Article 20 (1) states the general rule that no right barred by prescription shall be recognized or enforced in any legal proceedings. It mentions as qualifications on this general rule only article 19 and article 20 (2). It would seem, however, that article 10 (2) also contains an exception. Although cast in the form of a fiction, the real effect of article 10 (2) is to permit assertion of a counterclaim after the prescriptive period has expired. If the proposal of the United States to provide for relation back of amendments to pleadings is accepted, the same would be true of a provision providing for such relation back. A more general qualification, such as "Unless provided otherwise in this Law," would therefore seem preferable.

39. The United States would prefer article 20 (2) to permit set-off after expiration of the prescriptive period in an even broader range of cases than allowed by the present article 20 (2) (a) and, specifically, to permit it not only when both rights relate to the same contract but whenever both rights arise out of the same transaction, occurrence or event.

40. The reasons for this preference are stated more fully in answer 4 of the United States to question 4 of part II of the questionnaire.

ARTICLES 21, 22, 23, 24 AND 25

41. The United States has no comments on these articles at this time.
