UNITED NATIONS
GENERAL ASSEMBLY

Distr.
RESTRICTED

A/CN.9/WG.1/WP.4
2 July 1970

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on time-limits and
limitations (prescription) in
the international sale of goods
Second session
Geneva, 10 August 1970

REPORT ON LIMIATION AND ARBITRATION PROCEEDINGS BY PROFESSOR ANTHONY G. GUEST, REPRESENTATIVE OF THE UNITED KINGDOM TO UNCITRAL

It may be appropriate to start this note by commenting upon the relative roles of arbitration and legal proceedings in the settlement of disputes arising in connexion with international sales of goods.

Clearly there can be no resort to arbitration unless the parties agree to arbitration; in the absence of any agreement to arbitrate any dispute can only be resolved by legal proceedings. Arbitration clauses are, however, very commonly employed in international trade and their efficacy is much enhanced by certain international conventions, in particular by the 1923 "Geneva" Protocol on Arbitration Clauses, the 1930 "Geneva" Convention on the Enforcement of Foreign Arbitral Awards and the 1958 "New York" Convention on the Registration and Enforcement of Foreign Arbitral Awards. The fact that the 1930 and 1958 Conventions make it easier in many cases to enforce an arbitration award abroad than to enforce a legal judgement, while important, does not have much direct relevance to the subject matter of this note. But it is submitted that the practical effect of the 1923 Protocol and article II of the 1958 Convention (which both deal with the recognition of arbitration clauses) is of considerable relevance. Their effect is to bar recourse to the courts in cases where there is an agreement to arbitrate to which the relevant international instrument

applies and to force the parties to abide by their chosen alternative of arbitration. Both the international instruments have been very widely accepted so that the provisions in question are applicable to a considerable proportion of international commerce. Consequently, it can properly be said that in relation to many international transactions arbitration is substituted for legal proceedings as the means of settling disputes.

In these circumstances, it is thought that the appropriate basic principle to be adopted in the Convention is that the running of time should have the same effect in relation to the institution of arbitration proceedings as it does in relation to legal proceedings and, conversely, that the institution of arbitration proceedings should affect the running of time in the same manner as the institution of legal proceedings. This is the principle adopted in the United Kingdom draft Convention.

It is, however, for consideration whether divergencies between the law and practice applicable to arbitration proceedings and the law and practice applicable to legal proceedings call for some special provisions in relation to arbitration.

In this connexion the Group may wish to consider whether problems arise:

(a) From the freedom parties enjoy in framing arbitration agreements;

(b) From the private character of arbitration.

(a) Problems arising from the freedom parties enjoy in framing arbitration agreements

As to (a), it is well known that the contractual provision made as respects the settlement of disputes by arbitration varies widely. For example, the arbitration clause in one contract may simply state that "all differences arising out of the contract shall be submitted to arbitration", another contract may incorporate by reference or set out expressly detailed rules governing any arbitration proceedings which may be occasioned by a dispute over the contract, while a third may nominate the arbitrators without particularizing as to the procedure. The net result is that the steps to be taken to get an arbitration under way may vary from case to case. This situation is likely to cause difficulty if there is occasion (as seems very likely) to refer in the Convention to the institution of arbitration proceedings. It is suggested that there will be

need to define the event or events which are to constitute the institution of such proceedings for the purposes of the Convention. No comparable difficulty arises in relation to the institution of legal proceedings as there is normally a standard procedure in every jurisdiction for instituting legal proceedings and the actual step which is relevant in relation to the running of time is generally already settled as a matter of domestic law. The existence of divergencies in the legal procedures applicable in different jurisdictions and in the acts which affect the running of time must, it is thought, be accepted for the purposes of the Convention: but there seems no reason why a uniform rule should not apply to define the action towards settlement by arbitration which is to be significant in relation to the running of time. Articles 9.2, 9.3 and 9.4 of the United Kingdom draft Convention select certain acts by the claimant which are obvious and are all directed towards the defendant (and not, for example, the arbitrator). They take account of possible variations in the provision made on the original contract and seek to uphold any provision made by the parties. They take account of the possibility that the defendant has disappeared or that any notice sent by post may be delayed in transit. It may also be noted that basically the rules proposed in the United Kingdom draft also aim at a result which it is thought must be secured, namely, that a claimant must always be able to do some act which interrupts or suspends the running of time notwithstanding that the arbitration agreement is such that there is no arbitrator, the claimant is unable to appoint one without the concurrence of the other party and the defendant cannot be traced. It would be unthinkable if a prospective defendant could in such circumstances disappear for a short while with a view to availing himself of a plea that the claim was time barred.

The Group will no doubt consider whether the United Kingdom draft reflects the appropriate procedure in all jurisdictions when, for example, no arbitrator is appointed by the initial agreement. If the appropriate procedure is, for example, to call upon the court to appoint without the concurrence of the other party, some redrafting may be called for.

A second difficulty which arises in connexion with limitation and arbitration in England, if not generally, stems from the use of a form of arbitration clause which postpones all legal clauses until such time as an

arbitration award has been made. The type of clause is normally referred to as a "Scott v Avery clause". The occasion for such clauses, which can obviously have an impact in relation to the running of time, is a rule that one cannot oust the jurisdiction of the courts by agreement. In short, a clause providing that no legal proceedings shall be brought in respect of any dispute arising under a contract but that all such disputes shall be settled by arbitration does not serve to prevent one of the parties suing or to prevent the courts from instituting legal proceedings. The English courts are free to ignore arbitration clauses (except clauses fully within the 1923 Geneva Protocol to which the United Kingdom is party) and do from time to time ignore them when they consider that it would be better if the dispute was settled by the court because, for example, the case involves very complicated questions of law or allegations of fraud.

A clause postponing all legal claims until such time as an arbitration award has been made is, however, generally valid and is sometimes employed.

It is thought that it would be appropriate to provide in any Convention that clauses of this type are not to affect the application of the rules of the Convention in relation to the running of time, e.g. that there should be no question of the commencement of the limitation period being deferred until an arbitration award was secured. The United Kingdom draft Convention does this (article 9.5).

Yet a third question for consideration under the heading arises from the form of clause barring all legal claims unless arbitration proceedings are instituted within a specific period following a particular contractual event, e.g. within three months of delivery of the goods. One actual example of this type of claim occurs in the internationally employed Centrocon form of charter-party.

This type of clause is in effect no more than a particular example of the shortening of the limitation period of agreement. The United Kingdom draft Convention maintains the right of the parties to shorten the limitation period by agreement. Accordingly no express provision is made to qualify the type of clauses of this type. In domestic law, English courts enjoy a discretion to extend the period for instituting arbitration proceedings if undue hardship

would otherwise result. It is not thought that a discretionary provision of this type is at all appropriate for an international convention.

(b) Problems arising from the private character of arbitration

An arbitration award is not normally enforceable except after some form of judicial examination. In some countries parties to arbitration proceedings may ask the courts to supervise the proceedings at any stage or may ask the courts to set aside awards in cases where the machinery of private justice has failed or proved inadequate or defective.

There seems no need to examine all these various possibilities in detail for present purposes. It is thought that it will suffice simply to take account of the fact that there is a much higher risk that arbitration proceedings will ultimately prove abortive than that legal proceedings will do so. There is therefore an argument that the Convention should take account of the possibility and that provision should be made whereby time spent in abortive arbitration proceedings is disregarded in computing the limitation period, whether as respects the institution of further arbitration proceedings or of legal proceedings.

Article 14.2 of the United Kingdom draft Convention covers this point by providing that the period shall not expire before a date one year after the relevant court order was made.
