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N O T E

Prescription of recourse actions between parties to a contract of international sale of goods

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1. Recourse actions will be outside the scope of the present uniform rules unless the transaction in question is in itself an international sale of goods between parties covered by the rules.

In principle the prescription should be interrupted separately in the relations between each creditor and each debtor. However, if there are two or more joint debtors (codebtors) and an act of interruption is effected against one of them at a late stage of the period, the problem arises how to secure the recourse action which such a debtor may have towards the codebtor(s). He may need an additional period, either a new full period or a limited extension, to take care of his interest in getting satisfaction from the codebtor(s). To the extent that the legal relationship between the codebtors is not an international sale of goods, this problem is left to municipal law.

The present uniform rules will further not apply to recourse actions between a buyer or a seller on the one side and any third party on the other side being a codebtor with a party to the sale contract but not assimilated to such a party. The prescription of such recourse actions are left to municipal law, which may formulate rules to avoid hardships.

2. However, the obligations of a guarantor (whether being an insurer, a bank or another guarantor) towards a party granted rights under the guaranty in an international sale contract will be prescribed according to the present uniform rules, the guarantor being assimilated to a party to the sale contract.

Here, the question arises whether the creditor has to interrupt the period separately in relation to the debtor and his guarantor, or whether interruption in relation to one of these joint debtors automatically will have effect also in relation to the other codebtor. Further the question arises as to the effect of interruption of the principal debt in relation to a recourse claim between the codebtors. The municipal laws differ on these points. Some laws stick to the principle of separate interruption, supplemented with an extension of the period for recourse actions. Other laws, f.i. French law, let interruption towards one joint debtor have effect also in relation to the codebtor(s), as well as for the recourse actions between the codebtors (subrogation). The same applies to interruption of the principal obligation and the effects of such interruption in relation to the guarantor, but not vice versa.

Should the questions here mentioned be left to the applicable law, with obvious uncertainties ? Or should they be regulated in the uniform rules and, if so, what should be the rules ? It may prove difficult to agree on a uniform rule in these relations, which are not of central importance for the present law.

Where there is a guarantee for the seller's delivery, the buyer might be required to interrupt the prescription separately towards the seller and the seller's guarantor. If he does not, he would lose his right towards the party not interrupted. There seems to be no need for an additional period for the buyer relying either on the guarantee or on the obligation of the seller respectively after he has chosen to rely exclusively on one of them. Correspondingly, where there is a guarantee for the buyer's obligation to pay the price, the seller would have to interrupt separately or lose his right.

Recourse actions between the guarantor (not himself a seller or buyer) and the party whose obligation is guaranteed, is not a contract of sale and therefore left to municipal law. The same applies to the mutual relations between several guarantors not being sellers themselves.

3. The relations between buyers and sellers and their successors and assigns may be more complex.

The mutual relations between several cocreditors or codebtors not being internally engaged in an international seller-buyer relationship, is outside the scope of the present rules. F.i. between the heirs of the seller or the buyer.

On the other hand, the relations between one party in an international sale and the successors or assigns of the other party are within the scope of the rules to the extent that they arise from the contract of sale. As in the case of guarantee there seems to be no reasonable need for extensions in such relations.

A need may, however, present itself in the mutual relations between one party (a buyer B or a seller S) in an international sale and his consecutive successors or Assigns (A 1, A 2, etc.). Also the successions or assignments in question may themselves be based on a contract of international sale of goods, but such characterization seems irrelevant to our problem here. If f.i. the original buyer (B) is sued by a successive buyer (A 1) claiming damages based on lack of conformity, B may have a correspondent claim towards the original seller S, a claim which he may have vindicated (kept alive) by the notices etc. required in the uniform law on sales or other applicable law. This may be so regardless of whether A could have claimed S by a direct action (for instance where S has given a guarantee to the direct benefit of A). Provided that B has been sued (or another act of interruption has been effected) shortly before the expiration of the prescriptive period running in relation between B and S, the problem arises whether B's recourse action towards S should be kept alive for an additional period to give B a reasonable time for taking the necessary steps towards S. Even if such an extension (or interruption) of the period seems reasonable from the point of view of B, it may be disputed whether an extension or interruption will be justifiable in regard to the original seller S.

In my opinion an extension should be admitted at least in cases where (the creditor in succession), A, could have sued S by direct action; in other words, where S and B are joined codebtors. A provision prescribing either a full interruption or a limited extension is probably in accord with general principles in most national laws on prescription of recourse actions between joint debtors and will therefore be difficult to dispense with in a special field. The question whether

the parties are joint debtors (codebtors) has to be left to municipal law. As this may give rise to uncertainties and difficulties in practice, it might be considered whether B could be admitted an extension even in cases where he alone has a claim towards S.

4. I suggest the following alternative provisions:

Alternative A

1. "Where the creditor has several joint debtors (codebtors) under a contract of international sale of goods as defined in this law, the period of limitation has to be interrupted separately in relation to each codebtor. The same applies to the interruption of the principal obligation and of a guarantee for such obligation, subject however to the rules of the applicable [municipal] law regarding the effects in relation to an accessory guarantee [a collateral security].

2. If the prescription of an obligation, for which there are more than one debtor, has been interrupted in relation to one of the joined debtors (codebtors) by any act to that effect in accordance with the applicable law, and if such a codebtor on account of the fulfilment of such obligation may have a recourse action against another codebtor under a contract of international sale of goods as defined in this law,¹⁾ the limitation period of a claim by such recourse action shall be extended so as not to expire before the expiration of one/three/ year(s) from the date of the act of interruption mentioned, provided that such act was performed in the course of the last 6 months of what would otherwise have been the limitation period for such claim [recourse action]."

Alternative B

1. "Where the creditor has several joint debtors (codebtors) under a contract of international sale of goods as defined in this law, the period of limitation has to be interrupted separately in relation to each codebtor. The same applies to the interruption of the principal obligation and of a guarantee for such obligation, subject however to the rules of the applicable [municipal] law regarding the effects in relation to an accessory guarantee [a collateral security].

1) This may apply to successive sellers or buyers, but not to a guarantor which is not himself a buyer or seller.

2. If the prescription of an obligation has been interrupted in relation to any one party by any act to that effect in accordance with the applicable law, and if such a party on account of the fulfilment of such obligation or of its factual basis may have a recourse action against another party under a contract of international sale of goods as defined in this law,²⁾ the limitation period of a claim by such recourse action shall be extended so as not to expire before the expiration of one /three/ year(s) from the date of the act of interruption mentioned, provided that such act was performed in the course of the last 6 months of what would otherwise have been the limitation period for such claim [recourse action]."

To meet the underlying needs and for reasons of simplicity paragraphs 2 of these texts have been so widely drafted that they cover recourse actions under a contract of international sale irrespective of whether also the claim giving rise to the recourse action is based on a contract of international sale.

3. Warning notices ("litis denunciatio") in successive sales etc. are mentioned in the report A/CN.9/30 para. 90-91. It was agreed that the availability and effect of such notices (i.e. whether they have any interrupting effect etc.) should be left to the law of the jurisdiction where the relevant proceedings take place. But the period of extension to be granted seems a matter to be regulated in the uniform rules. I therefore propose to add the following alternative provisions in the article on failing proceedings:

Alternative Z

"The extension shall further apply correspondingly in respect of a recourse claim which a joint debtor may have against a codebtor, provided that such joint debtor during proceedings in which he is a defendant, before expiry of the limitation period for such recourse claim, has given the codebtor due notice of the proceedings in accordance with the requirements under the law of the jurisdiction where the proceedings take place (litis denunciatio)."

Alternative Y

"The extension shall further apply correspondingly in respect of a recourse claim which a joint debtor may have against a codebtor, provided that such joint debtor during proceedings in which he is a defendant, has given the codebtor due and prompt notice of the proceedings in accordance with the requirements under the law of the jurisdiction where the proceedings take place (litis denunciatio), and further provided that the proceedings were instituted against the debtor before expiry of the limitation period for such recourse claim".

2) See note to alt. A.