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

Note by the Secretariat

Suggestions concerning alternative approaches for consideration of the Report of the Working Group

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I. INTRODUCTION

1. The Working Group on Time-Limits and Limitations (Prescription) in the international sale of goods met in Geneva from 18 to 22 August 1969. The report of the Working Group on this meeting appears in document A/CN.9/30 (hereinafter referred to as Report).

2. This Report contains a number of recommendations to the Commission and also summarizes preliminary discussion of several questions on which the Working Group recommended further study.

3. To facilitate the Commission's consideration of the Report, this note will invite attention to those recommendations of the Working Group that appear to be ready for action by the Commission. This note will then discuss alternative procedures for carrying out the further studies recommended by the Working Group, and also procedures for implementing the Working Group's recommendations concerning the programme for completion of the work. To facilitate reference to the Report of the Working Group, this note will follow the order of presentation and the headings employed in the Report.

II. SCOPE OF THE CONVENTION

A. Definition of international sale of goods (Report 6-12)*

4. The Working Group recommended that the convention on prescription should contain the same definition of scope as a convention on the substantive law on sales (Report 11 (i)). The Commission probably will wish to consider whether to approve this recommendation.

5. The Report also recommended that the Working Group on Sales and UNCITRAL give priority attention to the definition of international sale of goods. The Working Group on Sales, at the meeting in January 1970, gave attention to this question and its report (A/CN.9/35, herein referred to as the Sales Report) set forth its recommendations at paragraphs 30-44. (If the Commission follows the order suggested in the provisional agenda, it will have acted on the recommendations in the Sales Report before reaching the present agenda item. Thus, the Commission may have decided whether to accept the definition proposed by the

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* Numbers refer to paragraphs of the Report.

Working Group on Sales and, if not, what steps should be taken for revision of that definition.)

B. Types of transactions and claims (Report 13-16)

6. The Working Group's recommendation on the scope of the Convention appears in the Report at 13. The basic scope of the Convention affects various subsidiary questions of approach and drafting; therefore the Commission may wish to consider whether, in principle, it approves this recommendation. (The Commission presumably will find it appropriate to defer subsidiary drafting questions, mentioned in the Report, until after the further study which the Working Group proposes. Procedures for this further study will be considered in this note at paras. 29 to 34.)

III. COMMENCEMENT OF THE PERIOD OF PRESCRIPTION

A. The basic test governing the commencement of the period (Report 17-28)

7. The Working Group was unable to reach a decision on this question. Opinions were divided among three alternative approaches (Report 20-21); the Group concluded that further study was required (Report 28).

8. The underlying problems are technical and complex; successful resolution of the problem probably calls for the testing of various alternative approaches in the setting of a substantial number of concrete cases. Since it is difficult to do such technical work in the course of a session of the Commission, the Commission may wish to direct its attention primarily to procedures for further study of this and similar questions, as recommended by the Working Group (see paras. 29-34, infra).

B. Claims based on defects in delivered goods (Report 29-38)

9. This heading presents an issue of policy, as contrasted with the more technical problems of drafting posed by part A, supra. On this issue, the Working Group recommended an approach pointing to the date of delivery rather than the date when the defect is discovered or damage therefrom ensues (Report 32);

closely related is the decision of a majority of the Group (Report 35) not to make an exception for claims based on personal injury or property damage.

10. A decision on this question would be helpful in the consideration of other issues that have been postponed for further attention. Thus, the approach suggested by the Working Group in paragraphs 32 and 35 may militate against shortening the statutory period and may support suggestions for suspension of the period while legal action is difficult or impossible (cf. Report 49-54, 63-66). In addition, one representative suggested that the above approach recommended by the Working Group led to the conclusion that the convention should not govern claims within the field of "products liability" (Report 15, 36).

11. For these reasons, the Commission may wish to consider whether it can reach a decision on the above issues presented by the Working Group's recommendations at paragraphs 32 and 35 of the Report.

C. Effect of express guarantee (Report 37-40)

12. The Working Group made a recommendation on this question that appears at paragraph 37. The Commission may wish to consider whether it approves this approach in principle. On the other hand, the Commission may wish to defer consideration of drafting questions such as those presented at paragraph 38.

D. Commencement of the prescriptive period where the contract is cancelled prior to the promised date for performance (Report 41-44)

13. The Working Group was unable to reach a final decision on this question and recommended further study. The problem is of a technical character somewhat like the choice of alternative theories for commencement of the prescriptive period; the Commission may wish to defer consideration of this question until after the further studies recommended by the Working Group (see infra at 29-34).

E. Effect of required notices to the other party on the commencement of the period (Report 45-58)

14. The Working Group made a recommendation on this question: Report 46. The Commission may wish to consider whether it approves this recommendation in principle, since this issue presents certain basic questions concerning the

relationship between uniform rules on prescription and on the substantive rules on sales, cf. art. 49-1 of the Uniform Law on Sales accompanying the 1964 Hague Convention (ULIS). (The most difficult problem of reconciling the approach of the two conventions may have been removed if the Commission has accepted the recommendation of the Working Group on Sales (Sales Report 51-52) that article 49 of ULIS be deleted.) The Commission may wish to defer the Working Group's suggestions for attention to certain drafting questions (Report 47-48) until after further study.

IV. LENGTH OF THE PRESCRIPTIVE PERIOD

A. The number of years (Report 49-54)

15. The Working Group noted that nearly all delegates favoured a prescriptive period within the range of three to five years, with opinion about equally divided between these two periods (Report 50). The Group discussed the conflicting considerations bearing on a final choice, and referred the question to the Commission (Report 51-54).

16. The Commission may wish to consider first whether it has the information necessary for a decision on this question. One representative stressed the need for further information concerning commercial practices (Report 53). Thus, the Commission may wish to consider whether groups affected by this proposal have had an opportunity to express their opinion as to which of the proposed alternatives is more consistent with commercial practices. In the light of this consideration, it might be useful for the Commission to ascertain whether there is now a consensus as to the proper length of the prescriptive period.

B. Calculation of time (Report 55-59)

17. The Working Group's recommendation concerning the initial day appears at paragraphs 56-57, and the recommendation concerning holidays appears at 58-59. The Commission may wish to consider whether it approves these recommendations in principle.

C. Applicability of prescriptive period to enforcement of claims established by judgement (Report 60-62)

18. The Commission may wish to decide whether to approve in principle the Working Group's recommendation that the convention should not apply to actions to enforce judgements (Report 62). The preliminary view, expressed at the end of paragraph 62, to exclude "documents on which immediate enforcement can be obtained" presumably calls for further study so that the nature of such documents can be defined with more precision; pending this study, it might be preferable to defer a decision by the Commission. The preliminary suggestion to exclude "settlements in court" may call for further study to ascertain whether such settlements may be subsumed under the above-mentioned recommendation with respect to claims "established by judgement" and, if so, how the result can be most clearly expressed.

V. SUSPENSION OR PROLONGATION OF THE PRESCRIPTIVE PERIOD

A. Impossibility to sue by reason of external circumstances (force majeure) (Report 63-66)

19. The Commission may wish to consider the Working Group's recommendation as to a general approach to this problem (Report 63). This recommendation, it will be noted, concerns only the general objective of a provision dealing with the effect of conditions preventing legal action; the Working Group "agreed that further study would be necessary before it would be possible to draft an acceptable statutory provision on this problem" (Report 66). The Commission may, therefore, wish to confine its consideration to the general objective proposed by the Working Group, and defer action on details of drafting until after the above-requested study and its consideration by a Working Group.

F. Fraud (Report 67-79)

20. The Working Group recommended (Report 68) that a claim that the seller knew the goods were defective should not extend the period. The Commission might wish to consider whether it approves this recommendation.

21. The Working Group also recommended tentative statutory language on the problem of concealment by a debtor of his identity, capacity or address (Report 70). The Commission might wish to consider whether to approve this approach in principle.

C. Other possible bases for suspension (Report 71); D. Proceedings that fail to reach decision on the merits (Report 72-73)

22. The Commission might consider whether it is in a position to decide the matters discussed briefly under these two headings. If not, these problems could be taken up after the opportunity for further study (Report 73) and a more definitive recommendation by a Working Group.

VI. INTERRUPTION OF THE PERIOD

A. Acknowledgement of the debt (Report 74-81)

23. The Commission may wish to consider whether to approve the Working Group's recommendation (Report 74) on the general approach that should be followed with respect to the effect of an acknowledgement of the debt.

24. A majority of the Working Group recommended (Report 77) that only acknowledgements in writing should be effective. The Commission may wish to consider whether it is in a position now to act on this recommendation, or whether it should defer a decision until after further study of this question and of certain related questions: e.g., the definiteness required for an effective acknowledgement (Report 76), the effectiveness of an acknowledgement after the running of the period (Report 78-80) and the circumstances in which part payment would have the effect of an acknowledgement (Report 81).

B. The legal action necessary to interrupt (or satisfy) the prescriptive period (Report 82-89); C. Warning notices ("litis denunciatio") in successive sales, etc. (Report 90-91); D. Effects of interruption: applicability of convention to delay in enforcing judgements (Report 92)

25. Under these headings, the Working Group gave preliminary consideration to certain other problems of interruption of the prescriptive period. Since there

is no final recommendation with respect to provisions governing these questions, the Commission may wish to take no action until there has been the opportunity for further study and a definitive recommendation by the Working Group.

VII. GENERAL PROBLEMS

A. Modification of the period by agreement (Report 93-107)

26. A majority of the Working Group was opposed to the power of the parties by agreement either to shorten or to extend the statutory period (Report 100, 103). The Report discloses that this general problem was related to various other questions: e.g., should upper and lower statutory limits be prescribed within which agreements would be effective (Report 96)? Must such agreements be in writing (Report 98)? Should there be a special provision allowing extension by the parties for the purpose of negotiation (Report 105-107)? The Commission may wish to consider whether a decision in this general area should be postponed until after more thorough study of the problem in relationship to the above-mentioned related questions.

B. Relation of the convention to conflict of laws (Report 108-110); C. Whether the prescriptive rules should have the effect of substance or procedure (Report 111-114); D. Characterizing the effect of expiration of the period (Report 115); E. Recourse to barred claims by counter-claims or set-off (Report 116-118); F. Voluntary payment (or other fulfilment) of barred claims (Report 119-121)

27. The Working Group gave preliminary consideration to these problems. On certain aspects the Working Group indicated a point of departure (e.g., Report 116) but for the most part did not make recommendations other than the need for further study. The Commission may wish to consider whether its examination of these problems should be delayed until after recommendations have been more fully developed.

G. Whether the issue of prescription should be raised by the court suo officio or only at the instance of the parties (Report 122-123)

28. A recommendation was made as to general policy on this question (Report 122). The Commission might consider whether it approves this recommendation in principle.

VIII. PROGRAMME FOR COMPLETION OF THE WORK

29. The Working Group recommended that the Commission arrange for the preparation of a tentative draft of a convention, which would be considered at a session of the Working Group to be held in the second half of 1970 (Report 126). This recommendation did not specify the procedures for the preparation of the draft; the Commission will wish to examine the considerations that bear on the choice of alternative procedures for the necessary further work.

30. As we have seen, the Working Group found that further material was needed for adequate consideration of several important and difficult questions, and recommended to the Commission that provision be made for the further study of these questions (Report 16, 28, 31, 44, 48, 66, 70, 73, 76, 106-107, 110, 114, 118, 124). Some of these questions call for careful study of the approaches of different legal systems and varying local practices. Notable among these problems are: impossibility (or force majeure) that justifies extension (Report 63-66); the effect of proceedings that fail to reach decision on the merits (Report 72-73); the effect of various types of agreements shortening and lengthening the period (Report 93-107); various problems relating to choice of law - including the question whether a prescriptive limit would be deemed to extinguish the substantive right or would be considered merely as a procedural rule for the forum (Report 108-115); the applicability of prescriptive rules to arbitration (Report 124 (a)); the effect of the prescription of an obligation on liens or other security interests given to secure the obligation (Report 124 (d)).

31. The Commission may wish to consider whether drafting with respect to several of these questions would be aided by a comparative study of national approaches to these problems. Thus, the Commission might consider the desirability of requesting the Secretariat to prepare such a study in connexion with the development of proposals for consideration by a Working Group. It would facilitate this work if members of the Commission would provide information on the approach of their national system to specified problems which prove troublesome.

32. The experience of the Working Group may suggest that the preparation and distribution of preliminary draft provisions in advance of the session of the Working Group would facilitate the deliberations of the Working Group.

33. The Commission may also wish to consider what general principles should govern the decision as to when a specific problem is ripe for statutory drafting. Thus, it may be deemed expedient to study the alternative approaches under various national laws, to analyse the competing policy considerations, and to articulate the desired results in non-statutory form prior to the attempt to draft an applicable statutory provision; an apparent loss of speed from this approach may well be compensated in the soundness and acceptability of the final result. Under this approach, some issues would be ready for the preparation of a statutory draft prior to the next meeting of a Working Group; on other issues it might be preferable to submit to the Working Group the results of background studies which would include the identification of the crucial issues, and possibly the statement of typical model factual situations so that the Working Group could consider in concrete form the results which should be achieved under alternative preliminary drafts or in later stages of the drafting process. Any guidance the Commission might care to provide with respect to these questions of approach would be helpful for any preparatory work needed to assist future sessions of a Working Group and of the Commission.
