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## Convention on the Limitation Period in the International Sale of Goods

Steven C. Nelson

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# **SECTION RECOMMENDATIONS AND REPORTS**

## **American Bar Association Section of International Law and Practice Reports to the House of Delegates**

### **I. Convention on the Limitation Period in the International Sale of Goods\***

#### **RECOMMENDATION**

BE IT RESOLVED, That the American Bar Association supports accession by the United States to the 1974 Convention on the Limitation Period in the International Sale of Goods, as amended by the 1980 Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, subject to the reservation that the United States declare pursuant to Article XII of the 1980 Protocol that it will not be bound by Article I of the Protocol.

#### **REPORT**

##### **I. Introduction and Background**

U.S. exporters and importers are often uncertain about when legal claims from foreign transactions become unenforceable by the passage of time. The Convention on the Limitation Period in the International Sale of Goods

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\*This Report was approved by the House of Delegates at the Honolulu meeting in August 1989. The Report emanated from the Section's Committee on Private International Law. Professor John O. Honnold was primarily responsible.

(“Limitation Convention” or “Convention”)<sup>1</sup> addresses this uncertainty with respect to claims arising from international sales transactions. States that become parties to the Convention (“Contracting States”) substitute its uniform rules for the different national rules on limitation periods that might otherwise apply to these international sales claims.

There is no uniformity in how national legal systems treat “limitation periods.”

National limitation periods<sup>2</sup> range from six months to 30 years. Even as to basic concepts there is great diversity. Civil law jurisdictions, for example, usually treat limitations as an issue of substantive law and will enforce foreign substantive law applicable. Common law jurisdictions, on the other hand, traditionally classify limitation as a procedural issue governed by the law of the forum. Even when the limitations rules of two national legal systems are similar conceptually, the rules are very likely to differ on narrow but significant details, such as scope, length of the limitation period, the time when a claim accrues, and the effect of instituting legal proceedings.

These differences encourage “forum-shopping.” A party faced with a potential limitation problem will shop around to find a jurisdiction that has both a long limitation period and the view that the limitation period is “procedural.”

By replacing this diversity with uniform rules, the Limitation Convention provides the same type of uniformity in the international arena that section 2-725 (Statute of Limitations in Contracts for Sale) of the Uniform Commercial Code now provides within the United States. Both laws have the same basic objective: to provide a limitation period appropriate to commercial transactions and to provide uniformity among diverse legal rules. Thus, the rationale given by the sponsors of U.C.C. section 2-725 applies equally to the Limitation Convention:

[The purpose of § 2-725 is] [t]o introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

U.C.C. § 2-725, Official Comment.

The Limitation Convention entered into force on August 1, 1988. As of March 1, 1989, the Convention is in force in ten Contracting States: Argentina, Czechoslovakia, Dominican Republic, Egypt, Ghana, Hungary, Mexico, Norway, Yugoslavia,

1. The composite text of the 1974 Limitation Convention incorporating the recommended provisions of the 1980 Protocol is reproduced in the first appendix immediately following this report's conclusion. A second appendix with the Convention on the Limitation Period in the International Sale of Goods, General Assembly resolution 3317 (XXIX) of 14 December 1974, and the Protocol amending the Convention in the Limitation Period in the International Sale of Goods is reproduced in a second appendix with pages A-1 through A-55.

2. This report uses the neutral term, *limitation period*, rather than more culture-bound terms, such as *limitation of actions* or *prescription*. Not coincidentally, the international convention that is the subject of this report also uses *limitation period*.

and Zambia.<sup>3</sup> Note by the [United Nations] Secretariat, *Status of Conventions*, p. 2 (A/CN.9/304) (1988). Other States may accede to the Convention at any time and it will enter into force as to these States approximately six months after accession. Limitation Convention, art. 44(2). Ten additional States have formally indicated their interest by signing the Convention subject to ratification of their signature.<sup>4</sup> Limitation Convention, art. 41; see Note by the [United Nations] Secretariat, *Status of Conventions*, p. 2 (A/CN.9/304) (1988).

With the coming into force of the United Nations Convention on Contracts for the International Sale of Goods ("Sales Convention") in January, 1988, there is renewed interest in the Limitation Convention. This comes as no surprise because both conventions are the products of the U.N. Commission on International Trade Law ("UNCITRAL"), which deliberately coordinated the texts.

Work on the Limitation Convention began within UNCITRAL in 1969 after most member States identified non-uniform limitations rules as a high priority issue.<sup>5</sup> In 1974 the Commission submitted a draft text to a diplomatic conference convened by the U.N. General Assembly. The 1974 conference approved the UNCITRAL text with some revisions. The 1974 official text was amended at a second diplomatic conference convened in 1980. This latter conference amended the 1974 text to bring it into conformity with the newly approved sales convention also drafted within UNCITRAL. These amendments are set out in a protocol ("Protocol") to the Limitation Convention.<sup>6</sup>

There are four parts to the Limitation Convention. Part I (arts. 1–30) sets out the substantive provisions, while Parts II–IV (arts. 31–46) deal with implementation, declarations and reservations, and ministerial details. The Protocol amends articles 3, 4, 31, 37 and 40 of the 1974 text. Protocol, arts. I–IV. The remainder of the protocol (arts. VII–XIV) sets out the necessary provision on implementation.

This report examines the 1974 Limitation Convention and the 1980 Protocol with a view to recommending whether or not the United States should accede to the Convention. The report focuses on the Convention's general concepts, some

3. Current information about the status of the Limitation Convention may be obtained from the Treaty Section of the Office of Legal Affairs, United Nations, New York, N.Y. 10017 (tel. 212 963-3918).

4. These States include Brazil, Bulgaria, Byelorussia SSR, Costa Rica, German Democratic Republic, Nicaragua, Poland, Ukrainian SSR, and USSR.

5. It is difficult to assess the extent to which nonuniform limitation rules are a barrier to the growth of international trade. With the help of computer data bases it is relatively easy to identify reported U.S. appellate court opinions addressing the issue of limitations in the context of an international sale of goods. It is much more difficult, however, to ascertain the extent to which claims by U.S. parties are discouraged by short time limits (e.g., six months to one year) of some foreign systems.

Among the U.S. cases involving limitations of actions, see *Johansen v. E.I. Du Pont de Nemours & Co.*, 810 F.2d 1377, 3 U.C.C. Rep. Serv. 2d (Callaghan) 142 (5th Cir. 1987) (warranty action to recover for personal injury so would be outside the scope of the Limitation Convention, art. 5(a)); *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261, 36 U.C.C. Rep. Serv. (Callaghan) 1222 (D. Del. 1983); *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 33 U.C.C. Rep. Serv. (Callaghan) 298 (S.D.N.Y. 1982).

6. The text of the 1980 Protocol is reproduced in the Second Appendix to this report at pages A-52 through A-55. An unofficial text of the 1974 Convention, as amended by the 1980 Protocol, appears in the Appendix I.

specific problems raised by its text, and a comparison of its text with the U.S. law on the limitations of actions.<sup>7</sup> Section II of the report studies the Convention's substantive provisions, while Section III examines the provisions on implementation of the Convention. Section IV addresses issues of federalism. The report's conclusions are then summarized in Section V.

Summary and analysis of the Limitation Convention is greatly facilitated by a thirty-seven-page commentary prepared by Professor Kazuaki Sono of Hokkaido University, Japan. While the commentary ("Commentary") has no official status, it was prepared at the request of the 1974 diplomatic conference, it has been published by UNCITRAL, and it is widely cited. *Commentary on the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/17) (1978)*, reprinted in [1978] X *UNCITRAL Yearbook* 145 (New York: United Nations, 1981). As this report frequently refers to the Commentary, it is reproduced in the Appendix.<sup>8</sup>

## II. Substantive Provisions (Arts. 1–30)

This section of the report examines the Convention's sphere of application and basic concepts. As noted earlier, the following discussion relies on but does not duplicate Professor Sono's detailed Commentary. Where appropriate, the report will also refer to the existing English-language articles analyzing the Limitation Convention.<sup>9</sup>

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7. In most cases the relevant U.S. law will be Section 2-725 of the Uniform Commercial Code. This section provides:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) 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, unless the termination resulted from voluntary discontinuance or from dismissal for failure to neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective. All jurisdictions, except Florida and Louisiana, have adopted Section 2-725, although fourteen states have amended the uniform text.

8. The text of the commentary is reproduced in the Appendix to this report at pp. A-9 through A-52. The postconference Commentary has added weight in view of the fact that it was based on a 1972 Commentary requested by UNCITRAL after its approval of the draft Convention. [1972] III *UNCITRAL Yearbook* 115–140. The Commission distributed this 1972 Commentary to States for consideration in advance of the 1974 diplomatic conference. The Commentary was one of the documents before the 1974 conference. United Nations Conference on Prescription (Limitation) in the International Sale of Goods, *Official Records* 10–32 (A/CONF.63/16) (1974) (U.N. Publication Sales No. E.74.V.8).

9. The principal works are: Krapp, *The Limitation Convention for International Sale of Goods*, 19 J. WORLD TR. L. 343 (1985); Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL'S First Born*, 23 AM. J. COMP. L. 337 (1975); Sono, *Unification of* VOL. 24, NO. 2

## A. BASIC APPROACH

The Limitation Convention sets out, within a text of manageable length, uniform rules that are as specific, concrete, and complete as possible. Commentary, *Introduction* (para. 6).

When the uniform rules are applicable they replace the non-uniform national laws on limitation period. The Convention's application, however, is limited. It only governs claims arising from international sales transactions, and not all these claims fall within the Convention's coverage. Even if the Convention would otherwise be applicable, the seller and the buyer may agree to exclude its application.

To protect the uniform rules from diverse applications derived from domestic laws, the Convention adopts its own self-contained conceptual framework with its own terminology. It avoids characterizing the limitation period as substantive or procedural. It minimizes choice-of-law problems by prescribing when the Convention "shall apply" (art. 3). Divergent national rules on the consequences of instituting a legal proceeding give way to uniform international rules (arts. 13–18). Readers are directed to interpret and apply these provisions without reference to domestic limitations rules, but to consider instead the Convention's "international" character and the need to promote uniformity. Limitation Convention, art. 7.

Article 3(1) of the 1974 text of the Limitation Convention provides that "the Convention *shall apply only if* . . . the places of business of the parties . . . are in Contracting States." In the interest of certainty and uniformity, Article 3(2) should take the place of the diverse and uncertain domestic rules of conflict of laws (private international law). This was made explicit by Article 3(2): "Unless this Convention provides otherwise, it shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law."

The 1980 Protocol repeals this paragraph of Article 3 and makes the Convention applicable either (1) in circumstances specified in Article 3(1) *supra*, or (2) when conflict of laws rules point to the law of a Contracting State. Protocol, art. I(1), (2). However, the Protocol permits the States to retain the 1974 text on this point. Protocol, art. XII. As will be discussed below, this report recommends that the United States exercise this option if it accedes to the Convention.

## B. SPHERE OF APPLICATION (ARTS. 1–7)

Articles 1 through 7 define the Limitation Convention's sphere of application. Many of these provisions are similar to, if not identical with, the scope

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*Limitation Period in the International Sale of Goods*, 35 LA. L. REV. 1127 (1975); Sumulong, *International Trade Law and the United Nations Convention on the Limitation Period in the International Sale of Goods*, 50 PHILIPPINE L.J. 318 (1975).

provisions of the Sales Convention. The 1980 diplomatic conference amended articles 3 and 4 but left unamended several other, less important parallel provisions. Protocol, arts. I, II.

1. *Basic Scope.* Article 1(1) provides in part: This Convention shall determine when claims of a buyer and seller against each other arising from a contract of international sale of goods or relating to its breach, termination or invalidity can no longer be exercised by reason of the expiration of a period of time. . . .

Only claims between the immediate parties to a sales contract fall within the Convention's scope. The immediate parties include not only the original seller and buyer but also assignees from these original parties. Limitation Convention, art. 1(3)(a). Claims, however, against other persons in the distribution chain such as claims by the ultimate consumer against the manufacturer, are excluded. *But see* Limitation Convention, art. 18(2), (3) (extension of limitation period governing buyer's claim against seller when buyer's subpurchaser makes claim against buyer).

Claims of invalidity are within the Convention's scope.<sup>10</sup> A claim that a contract is invalid may be grounded on the incapacity of a party, duress, fraud, unconscionability, illegality, or some other ground. Some of these grounds, such as fraud, may also be the basis for independent tort claims. When these tort claims arise independently of the contract the Convention does not cover them. Commentary, *Article 1* (para. 6). The alleged fraud may also, however, be the basis of a claim that a contract is invalid. The Convention *does* cover these claims. *See* Limitation Convention, arts. 1(1), 10(3).

The general reference in article 1(1) to *contracts for the international sale of goods* is defined and limited by articles 2 and 3. A sales contract is international if the seller and the buyer have their places of business in different States. Limitation Convention, art. 2(a). For the Convention to apply, however, the places of business of both the seller and buyer must be in States that have ratified or acceded to the Convention, or, when the 1980 Protocol is relevant, conflict of laws rules may make the law of a Contracting State applicable. Limitation Convention, art. 3(1); Protocol, art. I(1). Articles 2 and 3 together follow closely the similar provisions in the Sales Convention. *Compare* Limitation Convention, arts. 2–3, *with* Sales Convention, arts. 1, 10.

As under domestic sales law, a claim may be lost by failure to give a required *notice*—as contrasted with a limitation period governing the time for commencing legal proceedings. Thus, U.C.C. section 2-607(3) states that a buyer must notify the seller of a breach (*e.g.*, nonconforming goods) “within a reasonable

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10. A State may declare that it will not apply the Limitation Convention to *action for annulment*. Limitation Convention, art. 35. In some legal systems a party may not assert a claim until a contract is declared invalid or terminated by a separate judicial action for annulment. Commentary, *article 1* (fn.1).

time . . . or be barred from any remedy.” This “reasonable time” for notice will often be less than the four-year limitation period for commencing “an action” provided in U.C.C. section 2-725. A similar provision is set out in Article 39 of the Sales Convention: notice is to be given within a “reasonable time,” with another limit of two years. A buyer who fails to give notice within a reasonable time is not necessarily barred from all remedies. Sales Convention, art. 44 (limited remedies permitted if reasonable excuse for failure to give notice). Even where the law does not prescribe these notice periods, parties to a sales contract may themselves agree that the buyer must give notice within a specified time or lose any claim.

The Limitation Convention is not concerned with these notice requirements. Thus, Article 1(2) of the Limitation Convention excludes from the scope of the Convention “time-limit[s] within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.” Of course, if notice is given within the time periods set by domestic legislation or by the Sales Convention, the aggrieved party must still institute legal proceedings within the limitations period of the Convention.

2. *Excluded transactions and issues.* Articles 4 through 6 set out specific transactions and issues to which the Limitation Convention does not apply. These exclusions are similar to, if not identical with, the exclusions in articles 2 through 5 of the Sales Convention. The 1980 Protocol amends articles 3 and 4 to conform with the Sales Convention; the remaining differences were not sufficiently significant to warrant amendment. The similarity of scope will make it easier for enterprises engaged in foreign trade to determine whether the Limitation Convention applies to them.

Sales to consumers and claims based on the death of, or personal injury to, any person are the most important topics excluded by these provisions. Limitation Convention, arts. 4(a), 5(a); Protocol, art. II(1). These exclusions plus the fact that the Convention governs only claims between the immediate parties to a sales contract mean that most products liability claims fall outside the Convention’s coverage.

3. *Agreement to exclude or to limit application of the Limitation Convention.* Parties to an international sales contract may exclude application of the Convention. Limitation Convention, art. 3(3). The parties must, however, expressly agree to the exclusion. If they do so, some system of domestic law will apply. On the other hand, agreements modifying the Convention’s rules are sharply restricted by article 22. Once a period has started to run the *creditor* (*i.e.*, claimant) may extend the period by a declaration in writing (art. 22(2)). In addition, a clause in a contract of sale may set a shorter period for commencing arbitral proceedings if this provision is valid under applicable domestic law (art. 22(3)). *Compare* Sales Convention, art. 6 (by better reading, implied exclusions enforceable; derogations authorized).

C. DURATION & COMMENCEMENT OF THE LIMITATION PERIOD  
(ARTS. 8–12, 22–23, 28–29)

The basic limitation period prescribed by the Limitation Convention is four years. Limitation Convention, art. 8. Subject to the qualifications noted below, the seller and buyer may not extend or shorten this period in their original agreement. Limitation Convention, art. 22(1). After the original agreement, but before the limitation period has run, a party may start the limitation period afresh by a written acknowledgment of the obligation arising from the sales contract. Limitation Convention, art. 20. Alternatively, a party against whom a claim has been asserted may extend the limitation period by a written declaration to this effect if the party does so before the original period has run. Limitation Convention, art. 22(2). The party may then renew this extension one or more times but may not extend the limitation period beyond the absolute limit of ten years provided by article 23.

The Convention's rules for calculating the limitation period and the effect of legal holidays are self-explanatory. Limitation Convention, arts. 28, 29. The Gregorian calendar is used as the standard for measuring a year. Limitation Convention, art. 1(3)(h).

Rules for determining when the limitation period commences appear in articles 9 through 12. The basic rule is that the period begins to run when the claim accrues. Limitation Convention, art. 9(1). Claims arising from a breach of contract accrue on the date of the breach, while claims based on fraud (in an action, *e.g.*, to avoid a contract) arise on the date the fraud is, or could have been, discovered. Limitation Convention, arts. 10(1), (3); see also art. 1(3)(d) (definition of *breach of contract*). Slightly more complex rules apply to breaches of warranty. Breaches of warranty accrue when the goods are "handed over" to the buyer or when the buyer rejects them. Limitation Convention, art. 10(2). If, however, the seller expressly warrants the quality of the goods "for a certain period of time," the limitation period commences when the buyer notifies the seller of the defect, but not later than the date on which the extended warranty expires. Limitation Convention, art. 11. Special rules for anticipatory breach and installment contracts are set out in article 12.

On most particulars these rules are similar to U.S. law. Both the Convention and U.C.C. § 2-725(1) provide for a four-year limitation period. Under neither law may the parties agree initially to extend this limitation period, but they may do so after the original agreement. *Compare* Limitation Convention, art. 22, *with* U.C.C. § 2-725(1). This Code has no analogue to the Convention's absolute limitation of ten years. The most noticeable difference between the laws is that, except for special arbitration rules, the Convention does not permit parties to agree to reduce the limitation period, while the Code permits them to "reduce the period of limitation to not less than one year." *Compare* Limitation Convention, art. 22(1), (3), *with* U.C.C. § 2-725(1). Parties to an international

sales contract, however, may effectively reduce the limitation period. They may agree, for example, on shorter time periods for notice of the kind saved by article 1(2) or may agree to exclude the Convention altogether in favor of a shorter limitation period of domestic law.

Rules on when the limitation period commences are likewise similar in both laws. Both state that the limitation period commences when the claim *accrues*. *Compare* Limitation Convention, art. 9(1), with U.C.C. § 2-725(1). A claim for breach of contract accrues when the breach occurs, while a claim for breach of warranty accrues on “tender of delivery” unless there is an express warranty as to future performance. *Compare* Limitation Convention, arts. 10(1), (2) & 11, with U.C.C. § 2-725(2).

#### D. CESSATION AND EXTENSION OF THE LIMITATION PERIOD (ARTS. 13–21)

Different legal systems ascribe different consequences to the commencement of legal proceedings on the running of the limitation period. To protect a party from loss of claim if the period expires during the pendency of a proceeding that aborts, some legal systems view the commencement as suspending the limitation period until the proceedings are concluded, at which time the period resumes, while others provide that commencing (or concluding) legal proceedings triggers the start of a new limitation period. Still others simply allow the limitation period to continue to run notwithstanding the commencement of a legal proceeding. U.C.C. § 2-725(3), quoted *supra* at note 7 on page 6, in specified circumstances assures a “period of six months after termination of the first action” within which to bring a new action. For other approaches to this problem, see Smit, *supra* note 8, at 342; Krapp, *supra* note 8, at 354–55.

The Limitation Convention does not fully adopt any of these approaches although functionally the convention’s rules will almost always lead to the same results that would be reached by application of domestic U.S. limitation rules. This can be illustrated by examining how the convention’s most important conceptual components work.

To deal with the problem presented by legal actions that abort (*e.g.*, by voluntary dismissal or by running afoul of jurisdictional or procedural barriers), the Convention has the following system based on articles 13 and 17. When a creditor (*i.e.*, claimant or plaintiff) brings a legal action article 13 states, as a general rule, that the limitation period *ceases to run*. (“Stops running” would be more natural in English but literal translation of “stop” was said to suggest a degree of finality that, as we shall see, was incorrect.) In fact, this general rule is subject to exceptions. If the legal proceeding aborts (ends “without a decision binding on the merits of the claim”) the limitation period is *deemed to have continued to run*—an approach designed to protect the debtor (*i.e.*, defendant) from prolongation of the period by the plaintiff through bringing an action and then letting it lie, or by bringing and aborting a series of actions. On the other

hand, to protect the creditor, article 17(2) affords the plaintiff a period of one year, from the time the first proceeding ends, to bring a new action.

Articles 13 through 16 define what actions or circumstances stop the running of the limitation period. Any action that a court recognizes under its procedural law as commencing judicial proceedings to enforce a claim or as asserting a claim in judicial proceedings that have already commenced will cause the period to stop running. Limitation Convention, art. 13. Thus, the filing of a complaint with a federal district court will stop the limitation period. Federal Rules of Civil Procedure, Rule 3. The limitation period also ceases to run when arbitration proceedings commence but this date is determined by looking to the arbitration agreement, to the law applicable to the proceedings, or, in the absence of such provisions, to the time when a request for arbitration is delivered to the other party. Limitation Convention, art. 14. As for legal proceedings that are not usually instituted by the creditor, such as bankruptcy or probate proceedings, the limitation period stops when the creditor asserts its claim, subject to the law governing the proceedings. Limitation Convention, art. 15. In all these legal proceedings, counterclaims related to a claim made by the other party in a legal proceeding are deemed to be made at the time the earlier claim was asserted. Limitation Convention, art. 16.

When a proceeding ends with a judgment or award on the merits, the Convention does not answer all the possible problems that arise. An action on the judgment itself is expressly excluded from the Convention's coverage. Limitation Convention, art. 5(d). A judgment creditor may, however, wish to bring another action on the original claim if this is permitted by domestic law. A forum's legal rules, such as rules regarding *res judicata* and merger of the claim into the judgment, may prevent the assertion of the claim but the Convention leaves these questions to domestic law. Commentary, *Article 30* (fn.1). If the claim can be relitigated, the creditor may assert the claim at any time, subject only to the ten-year limit set out in article 23.

For two special classes of third parties the Convention provides special rules: a third party jointly and severally liable with a defendant, and a seller whose buyer has sold to a subpurchaser who asserts a claim against the buyer. Limitation Convention, art. 18. Instituting the first proceeding will cause the limitation period to cease on the claim against the third party if the third party is informed of the proceeding within that period. This notice permits the third party to investigate and perhaps intervene in the first proceeding in order to protect its interest. If the first proceedings terminate without a decision on the merits, the limitation period on the claim against the third party is deemed to have continued to run but the claimant is granted a minimum limitation period of one year from the date the proceedings end in order to assert the claim against the third party. Limitation Convention, art. 18(3).

Articles 19 and 20 set out two exceptions to the Convention's novel, but uniform, conceptual structure. In the circumstances covered by these articles, the

limitation period recommences for a new period of four years subject only to the ultimate ten-year limitation provided in article 23. Article 29 gives effect to acts which, under the laws “in the State in which the debtor has his place of business,” have the effect of recommencing a limitation period. These acts must be acts other than acts which institute legal proceedings covered by the earlier articles of the Convention. The example given by the Commentary is “a demand for performance.” Commentary, *Article 19* (para. 1). The Convention does not, however, give full effect to these national laws because it substitutes a new four-year limitation period for any different period prescribed by local law in these circumstances. Article 20 is less startling. A debtor’s written acknowledgment of a claim also starts a new four-year limitation period.

Article 21 extends the Convention’s limitation period where circumstances prevent a party from commencing legal proceedings or otherwise taking steps to stop the limitation period from running. The party relying on this article must not have caused the circumstances or be able to avoid or overcome them. If this article is applicable, the limitation period is extended so that it will not expire before one year from the date on which the circumstance ceased to exist subject only to article 23’s absolute limit of ten years.

Notwithstanding their different conceptual assumptions articles 13 through 21 of the Limitation Convention will usually yield results that are similar to the results under U.S. law. In most cases, the cessation and extension of the limitation period under the Convention will operate as if the limitation period continued to run notwithstanding the commencement of legal proceedings—*i.e.*, as if the U.S. rule were applicable. Like article 17, U.C.C. section 2-275(3) provides that where a timely action is dismissed without a decision on the merits, the creditor may institute legal proceedings in another action asserting the same claim within a specified period after the termination (six months, rather than one year).

Other aspects of the Convention’s codification are not dealt with uniformly by U.S. law. U.C.C. section 2-275(4) provides that it “does not alter the law on tolling of the statute of limitations.” These tolling rules are non-uniform. Typical tolling rules that suspend the running of the limitation period are death of a party, his or her incapacity, absence from the jurisdiction, and fraudulent concealment of material facts. Some of these circumstances would fall within the scope of article 21 of the Limitation Convention, which gives the creditor a minimum of one year from the end of the tolled period to institute legal proceedings. Under the U.C.C. the extension will not be uniform because it will be the time remaining in the basic four-year limitation period after the tolling ceases.

#### E. CONSEQUENCES OF THE RUNNING OF THE LIMITATION PERIOD (ARTS. 24–27)

After the limitation period for a claim has expired no legal proceeding commenced afterwards may recognize the claim unless it is asserted as a defense

or as a set-off. Limitation Convention, art. 25. Where the claim is asserted as a set-off, the claims must relate to the same sales transaction or be claims that could have been set-off before the limitation period expired. Limitation Convention, art. 25(2). In an excess of caution, article 27 provides that when a limitation period expires as to a principal debt it also expires as to an obligation to pay interest on that debt.

A party who performs after the limitation period expires may not claim restitution. Limitation Convention, art. 26. It does not matter whether or not the party knew that the limitation had expired. *Id.* This consequence is consistent with the concept that the expiration of the limitation period bars the remedy but not the right. It is also consistent with the policy of not opening up litigation related directly or indirectly to stale claims. Article 26's bar is limited, however, to claims for restitution based on satisfaction of the claim; other grounds for restitution, such as performance induced by fraud, remain.

Only a party to a legal proceeding may invoke the expiration of the limitation period. Limitation Convention, art. 24.<sup>11</sup>

These rules are consistent with U.S. law. Non-Code law generally permits a claim to be raised as a defense or set-off even if the limitation period has run, although U.S. rules on permitted set-offs are narrower in that they require the claims *both* to relate to the same transaction *and* to be capable of set-off before the limitation period expires.

#### F. INTERNATIONAL EFFECT (ART. 30)

Article 30 requires Contracting States to give effect to the acts and circumstances referred to in articles 13 through 19 (on cessation and extension) when they take place in another Contracting State. To have this international effect, however, the creditor must ensure that all reasonable steps are taken to inform the other party as soon as possible.

Article 30 does not mention articles 20 (acknowledgment by debtor) and 21 (extension where institution of legal proceedings prevented), but these articles will be given international effect by their own terms. Commentary, *article 30* (para. 4); *see also* Smit, *supra* note 8, at 350.

### III. Implementation; Declarations & Reservations; Final Clauses (Arts. 31–46)

Parts II through IV of the Limitation Convention contain non-controversial provisions directed toward its implementation. Several of the authorized reser-

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11. Contracting States are authorized to declare that they will not apply article 24. Limitation Convention, art. 36. Countries that recognize a more active role for judges insisted on this reservation at the conference. It has been suggested that many African countries, India, and Pakistan will make this declaration. Krapp, *supra* note 8, at 357 n.83. To date, however, no Contracting State has done so.

vations do, however, require the United States to make decisions at the time it accedes.

#### A. IMPLEMENTATION (ARTS. 31–33)

Only two of the three articles in Part II are of interest to the United States. The “federal state” provisions of article 31, as amended by the 1980 Protocol, are designed for States like Canada where federal constitutional authority is limited with respect to private international law issues. The Sales Convention has a similar provision which the United States concluded was not relevant to it. *See* Sales Convention, art. 93.

Article 32, on the other hand, was drafted with States like the United States in mind. In several earlier articles, the Limitation Convention refers to the “applicable” or “governing” law. *See, e.g.*, Limitation Convention, arts. 12, 14(1), 15 & 22(3). If the applicable law is that of an individual state in the United States, however, a further decision must be made as to whether state or federal law is applicable. Despite its opaque language, article 32 is intended to clarify that the forum’s conflict of laws rules should also be consulted when making this further decision. *See* Commentary, *article 31* (para. 1).

Article 33 states that the Limitation Convention applies only to contracts concluded on or after the Convention enters into force. This is a standard provision. *See* Sales Convention, art. 100; U.C.C. § 2-275(4).

#### B. DECLARATIONS AND RESERVATIONS (ARTS. 34–40)

The Limitation Convention authorizes Contracting States to make only the four reservations permitted by articles 34, 35, 36 and 39. Limitations Convention, art. 39. To these four reservations should be added two declarations permitted by the 1980 Protocol. Protocol, arts. XI–XII.

Only the two declarations permitted by the 1980 Protocol are of interest to the United States. The reservation authorized by article XII of the Protocol is the more important. Article XII permits a Contracting State to adopt the unamended version of article 3. As noted above, the 1980 Protocol amends article 3 to make the Convention applicable not only when the seller and buyer have their places of business in different Contracting States but also when a conflict of laws rules point to the law of a Contracting State. This amendment was made to make the scope of the Limitation Convention conform with that of the Sales Convention. Sales Convention, art. 1(1)(b). The Sales Convention itself, however, permits Contracting States to declare that they will not be bound by article 1(1)(b). Sales Convention, art. 95. When becoming a party to the Sales Convention, the United States made a declaration pursuant to article 95. The United States should make a similar declaration pursuant to the analogous provision in the 1980 Protocol.

The decision by the United States to make the reservation to the Sales Convention was taken in part on the advice of the American Bar Association.

The ABA made its recommendation because of the uncertainties introduced by non-uniform rules of conflict of laws, and because that broader application of the Sales Convention would come at the expense of the application of U.S. law. The report also noted that the United States could withdraw its reservation at a later date. *American Bar Association Report to the House of Delegates*, 18 *Int'l Law* 39, 42 (1984). See also Appendix B to the Department of State's *Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods*, Treaty Doc. No. 98-9, 98th Cong., 1st Sess. (1983). These same reasons apply in the case of the Limitation Convention, with the additional practical justification that the legal community will find it easier to deal with similar definitions of the basic scope of these related conventions.

The reservation authorized by Article XI of the Protocol is less significant. This provision authorizes a Contracting State to notify the depository that it will not consider itself a party to the unamended 1974 text with respect to Contracting States that have not acceded to the Protocol. As of March 1, 1989, only five of the ten Contracting States have not acceded to the Protocol.<sup>12</sup> Making the declaration, on the other hand, would deny to U.S. enterprises the benefits of the Convention with respect to the five countries that have not yet acceded to the Protocol unless and until they take this step. While it appears likely that these countries will eventually accede to the Protocol, there is likely to be some delay and there is also the possibility of governmental inertia or oversight. The substantive differences between the amended and unamended texts are minimal if, as we recommend, the United States makes the article 3(1). On balance, the Section does not recommend that the United States make a reservation under article XI.

The other authorized reservations permitted by articles 34, 35, 36 and 38 are not of interest to the United States.<sup>13</sup>

Article 34, as amended by the 1980 Protocol, provides that a Contracting State may declare that the Limitation Convention will not apply between parties whose places of business are in States whose legal rules are the same or closely related to matters governed by the Convention. *Compare* Sales Convention, art. 94. The United States has not chosen to exercise its right to make this declaration under the Sales Convention and there is not present reason to do so with respect to the Limitation Convention.

Article 35 provides that a Contracting State may declare that it will not apply the Convention to actions of "annulment." The diplomatic conference agreed to

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12. Czechoslovakia, Dominican Republic, Ghana, Norway, and Yugoslavia. See note 3 *supra*.

13. Article 37, as amended by Article V of the 1980 Protocol, provides that the Limitation Convention does not prevail over any international agreement that contains rules related to limitation periods when both the seller and buyer have their places of business in States that are parties to the agreement. The drafters of this provision had in mind the Convention relating to the 1964 Uniform Law on International Sales, the General Conditions of Delivery of Goods adopted by the Council of Mutual Economic Assistance, and agreement with respect to international trade in commodities. Commentary, *Article 37*. A similar provision is found in Article 90 of the 1980 Sales Convention. The provision is benign and, although it appears in part of the Limitation Convention dealing with declarations and reservations, Article 37 requires no action to make it effective.

this reservation in order to satisfy States in which a party may not assert claims until a contract is declared invalid or terminated by a separate judicial action for annulment. Commentary, *article 1* (fn. 1). Anglo-American legal systems do not have this requirement and, there being no other compelling reason to leave issues of invalidity to the vagaries of conflict of laws rules, the United States should not make a declaration pursuant to article 35.

Article 36 authorizes a Contracting State to declare that it will not apply article 24, which limits persons entitled to invoke the limitation period to the parties to legal proceedings. This reservation is inserted to satisfy those States in which judges may recognize the limitation period on their own motion. There is no reason for the United States to make this reservation.

Article 38, by its own terms, is no longer of interest because the United Nations Convention on Contracts for the International Sale of Goods has now come into force.

### C. FINAL CLAUSES (ARTS. 41–46)

The Limitation Convention's final clauses are ministerial. They deal with such issues as adoption of the Convention, its entry into force, and its denunciation. *See also* Protocol, arts. XIII, XIV. These provisions are self-explanatory and noncontroversial. They are similar to the analogous provisions in the Sales Convention. Sales Convention, arts. 89–91, 99–101. As is the case with the Sales Convention, the official texts of the Convention and the Protocol are adopted in all the official languages of the United Nations and each language version is equally authentic.

## IV. Effect of the Limitation Convention on U.S. Law

In the United States, state law rather than federal law has traditionally determined the law governing the limitation period for claims arising from contracts of sale. *See* U.C.C. § 2-725. States, moreover, have an interest in protecting their judicial resources by excluding stale claims. Recognizing this governmental interest, parties to a sales contract have only limited authority to derogate from the statutory limitation period even when they have freedom of contract as to most other matters. U.C.C. §§ 1-102(3), 2-725(1).

Accession to the Limitation Convention by the United States would make the Convention applicable to some sales contracts to which state law would apply in the absence of the Convention. Federal Constitution, art. IV (supremacy clause). There is little question that the federal government has the constitutional power to act on this matter. Federal Constitution, art. I, sec. 8 (commerce clause; *Missouri v. Holland*, 252 U.S. 416 (1920)). There remains, however, the question of whether it is proper for the federal government to act on this matter. On this question of authority, this report notes the following considerations:

- (1) Parties to an international sales contract may opt out of the Convention by an express agreement to that effect. Limitation Convention, art. 3.

(2) By virtually universal adoption of U.C.C. section 2-725 states have recognized that uniform statutes of limitation are desirable for contracts for sale. States, however, cannot unilaterally impose this uniformity on non-U.S. sellers and buyers who may bring legal proceedings in foreign jurisdictions. Only an international convention, such as the Limitation Convention, can ensure uniform rules in the international arena.

(3) The Convention's provisions are not incompatible with the results under existing U.S. law. Most notably, the basic four-year limitation period is the same.

(4) The Convention only preempts state law where one of the parties to a sales contract has its place of business in a non-U.S. jurisdiction. Claims under domestic sales contracts continue to be governed by domestic state statutes of limitation.

(5) States have shown a growing willingness to recognize that the limitation period is a substantive issue potentially subject to foreign rules on limitations. In 1982, for example, the National Conference of Commissioners on Uniform State Laws approved the "Uniform Conflict of Laws-Limitation Act" drafted on the principle that limitation periods are substantive in character and should be treated like other laws that affect the existence of a claim. The states of Arkansas, Colorado, North Dakota, Oregon, and Washington have already adopted this uniform law. When asserting a claim arising from an international sales contract in these jurisdictions, a U.S. party is not assured that the state statute of limitation period will apply. Similar results may apply by operation of "borrowing" statutes.

(6) Parties to international sales contracts are not presently assured that a U.S. statute of limitations necessarily applies. Claims may be brought before a foreign court or arbitral tribunal. When a claim governed by the Convention is brought before a non-U.S. forum the U.S. enterprise may have difficulty determining the applicable limitation period because of differences in language or legal concepts. The time period itself may be surprisingly short or long. By displacing these non-uniform national rules with its uniform rules the Convention decreases legal transaction costs faced by U.S. enterprises based in the United States.

(7) Learned representatives from the United States participated effectively in the deliberations within UNCITRAL and the diplomatic conferences that adopted the Limitation Convention. One of these representatives, Professor Hans Smit of Columbia Law School, aptly summarizes the case for U.S. accession in a law review article published in 1975:

Although the significance of prescription problems in international sales should not be overrated, the Convention does offer the international businessman the advantages of reasonable and uniform rules that can easily be found. . . . Its ratification should be seriously considered, not only because of its intrinsic merits, but also because it would represent a significant affirmation of a commitment to a continued seeking of solutions to international problems on an international plane.

Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First Born*, 23 AM. J. COMP. L. 337, 355 (1975).