THE LIMITATION OF ACTIONS IN THE INTERNATIONAL SALE OF GOODS

Katharina Boele-Woelki*

(This article will be published in the Uniform Law Review 1999, issue 3)

INTRODUCTION

UNCITRAL's First Born,[1] the Convention on the Limitation Period in the International Sale of Goods, has received remarkably little attention in legal literature in Europe. The Limitation Convention was concluded on 14 June 1974 and amended by Protocol of 11 April 1980. No Member State of the European Union has ratified it. The mandatory limitation periods specified in the Convention are generally longer than the periods under national law and are disliked by exporters in Western Europe.[2] However, the objections to such limitation periods were recently overcome in a leading industrialised country. Twenty years after the conclusion of the Limitation Convention, the United States ratified the Convention and Protocol on the recommendation of the American Bar Association.[3] This is a noteworthy development and deserves closer attention. It is, after all, quite conceivable that the accession of the United States to the Limitation Convention will influence the attitude of the countries of the European Union towards the uniform rules on the limitation of actions in the international sale of goods.[4] The Convention is presently in force in 24 countries and applies, in its amended form (as laid down in the Protocol), in 17 countries. These countries include many developing countries and States of the former Socialist Bloc[5] with which the Member States of the European Union trade on a large scale.

Since the publication of the 16 national reports on extinctive prescription following the 14th Congress of Comparative Law in Athens in 1994, there has been scarcely any occasion for a comparative study of how this subject is dealt with in different national legal systems.[6]

---

* Professor of Private International Law and Comparative Law, University of Utrecht.

1 This term has been borrowed from Smit, AJIL 1975 pp. 337-355; also used by Winship, Int. Law 1994, pp. 1071-1081.

2 See Diedrich, RIW 1995 p. 362 n. 83.

3 Magnus, ZEuP 1995 p. 215 writes in this connection: "Ob dem Übereinkommen damit der Durchbruch zu allgemeiner oder nahezu allgemeiner Geltung gelungen ist, bleibt abzuwarten".

4 At the German-French workshop on the first experiences concerning the Vienna Sales Convention held in Paris on 13 October 1995, Heuzé also raised limitation periods regarding international sales agreements as a point for discussion. See Krebs, NJW 1996, p. 501.

5 See for further data section 5.

6 The country by country reports are concerned with the following legal systems: Australia, Belgium, Brazil, Canada, Denmark, England and Wales, France, Germany,

The purpose of this article is to assess whether the arguments advanced by a number of countries of the European Union at the time of the conclusion of the Limitation Convention in 1974 and at the time of the amendment in 1980 for not becoming a party to this important instrument of unification are still convincing today. For this purpose it is essential to have a nodding acquaintance with the Convention. I shall also deal with private international law aspects of the limitation of actions in the international sale of goods.

1 CLASSIFICATION OF PRESCRIPTION (I.E. LIMITATION OF ACTIONS

Prescription (i.e. the limitation of actions) is a concept known to the majority of legal systems.[7] The primacy of legal certainty requires that the possibility of successfully instituting an action should be extinguished in due course in order to avoid the difficulties of evidence caused by lapse of time.[8] Prescription has, for example, been defined in Dutch legal literature as follows:[9]

> Prescription is the expiration of a period fixed by law during which no facts regarded as relevant by law occur showing that the creditor asserts his right or that the debtor acknowledges the existence of his debt, after which period the debtor can no longer be required to perform his obligation if he invokes the passage of time.

The rules on prescription in national legal systems differ markedly from one another. The statutory provisions diverge not just as regards the periods themselves but also as regards the

---

Israel, Japan, the Netherlands, New Zealand, Quebec, Romania, Turkey and the United States. The General Rapporteur was E.H. Hondius, who also edited the compilation which appeared in 1995.

7 See, for example, the aforementioned country by country reports referred to in the previous note. For a brief overview of the prescription regulations concerning sales in a number of legal systems see Piltz (1993) no. 89.

8 Deslauriers, in: Hondius (1995) pp. 297-316 (292), provides a generally applicable justification: `There are three main foundations. First, extinctive prescription is justified by the quest for social peace. In a society where speed is often synonymous with productivity, ambiguity can be fatal to the proper conduct of business. Therefore, it is crucial to establish parameters within which cleraly defined legal situations add to a sense of security. Secondly, prescription must be perceived as a form of penalty for negligent behaviour. It seems fair to say that those who do not avail themselves of their rights within a prescribed period of time are guilty of negligence, and therefore precluded from acting in the future. Thirdly, it can be presumed after a certain period of time that a payment that was due and owing has been made. In such a case, prescription comes to the aid of the debtor given the enormously difficult task of collection any evidence after a very long period of time.'

9 Taken from Koopmann (1993) p. 10. See also Arts. 3:306 in conjunction with 3:310; 7:23 Dutch Civil Code.

start of the period and its other features, for example the discretionary power of the courts to extend the period. Limitation periods of, say, six months[10] or a year[11] seem too short to be able meet the practical needs of international transactions,[12] taking account of the time required for negotiations and, if necessary, instituting proceedings in another - quite often distant - country. On the other hand, periods of, say, ten years[13] can be regarded as too long in international commercial transactions since they provide insufficient protection against the uncertainty caused by the possibility of actions instituted at a late date.[14] Such uncertainty can undermine the economic stability of businesses. Doubt about the question of what national legal system governs the limitation of an action in an international transaction involving the sale of goods is a problem that should not be underestimated. The question of how the limitation of actions is classified plays an important role in this respect.

Most civil law countries classify prescription as a substantive law institution, with the result that it is governed by the *lex causae contractus*. By contrast, common law countries have traditionally classified the limitation of actions as a concept of procedural law and therefore regard the *lex fori* as applicable. The different dogmatic views on the institution of prescription are therefore of practical importance to the conflict of laws. Kosters[15] wrote in 1917 that prescription ?gives rise to a well-known issue in private international law, namely which legislation should apply??. He defended the substantive law classification already used in continental Europe as follows:

---

10 Such as in German law, ? 277(1) BGB. Many authors consider this short period, which has its roots in Roman law, as *übertrieben verkäuferfreundlich*. The Kommission zur Überarbeitung des Schuldrechts suggests a three-year period for all claims resulting from contractual obligations. See Honsell (1995) ? 277 nos. 1-4, and Zimmermann, in: Hondius (1995) p. 189.

11 Art. 210 of the Swiss *Obligationenrecht* (OR).

12 See Diedrich, RIW 1995 p. 362.

13 Such as under certain circumstances in the Philippines, see Krapp, Journal of World Trade Law 1990 p. 362.

14 See the report by Sono, Yearbook UNCITRAL 1979 Vol. X p. 146. Kosters (1917) skilfully described the necessity for the institution of prescription: "A moment in time must come when the threat of impending legal proceedings ceases and the existing factual situations will be affirmed by the law. The broad general interest of legal certainty and social quietude, and the drawbacks associated with proceedings concerning long-instituted facts and situations, require that the debtor, who would wish assistance, be protected after a certain length of time".

15 Kosters (1917) p. 813. He described the various notions: prescription as a procedural institution (Paul Voet, Huber, the English approach); prescription as a personal defence with the consequence that the law of the debtor's domicile is applicable (Jan Voet and the old French theory); prescription as an institution of substantive law (the Belgian, German, Italian, French, Swiss, Greek, Russian and Brazilian notions).

> We are inclined to endorse the correctness of the view generally accepted by Dutch scholars and our newer case law to the effect that the law that governs the obligation is also decisive as regards the limitation period.

According to Kosters,[16] the main advantage of this definition is the fact that the parties know from the outset what law governs their legal relations and can take account of this subsequently; this is of particular importance in the case of short limitation periods. It is not the chance circumstance of where the action is carried on that is decisive. This argument is still convincing and has resulted for example in the incorporation in a number of conventions under private international law of a provision subjecting prescription to the *lex causae*.[17]

The traditional problem of classification has, however, become less acute in recent years.[18] Various important members of the Anglo-American law family, for example South Africa[19] and Canada (Ontario),[20] have introduced a prescription provision in accordance with the continental European pattern, while others, for example England and Wales,[21] some American States[22] and Scotland,[23] have prescribed a *lex causae* approach to prescription in relation to international legal relations. Finally, it should be pointed out that both the

---

16 Kosters (1917) p. 819.

17 See Art. 8(8) Traffic Accidents Convention 1971; Art. 8(9) Products Liability Convention 1973; Art. 8(1) Agency Convention; Art. 10(1)(d) EC Contracts Convention; and Art. 12(g) Convention relating to the International Sale of Goods 1986, which has not yet entered into force. As far as the first three mentioned conventions are concerned, there are no Member States which belong to the Anglo-American legal family. Ratification of the EC Contracts Convention by the UK has changed the English conflicts law concerning the limitation of actions resulting from contractual obligations, see note 21. A reservation as regards Art. 10(1)(d) EC Contracts Convention is not possible according to Art. 22 EC Contracts Convention.

18 According to Girsberger (1989) p. 217.

19 Ibid, pp. 67-68.

20 See the country report by Des Rosiers, in: Hondius (1995) pp. 91-111.

21 The Foreign Limitation Periods Act 1984, which entered into force on 1 October 1985 (Commencement Order 1985, S.I. 1985/1276), in its s. 1(1) determines that the prescription of actions, in which the English court has to decide the issue according to foreign law, is governed by the *Lex causae* to the exclusion of the *lex fori*.

22 Arkansas, Colorado, North Dakota, Oregon and Washington have, by means of the National Conference of Commissioners on Uniform States Laws, ratified the Uniform Conflict of Laws Limitation Act. See extensively on this, Hay, IPRax 1989 pp. 197-202.

23 Girsberger (1989) pp. 66-67.

substantive law and the procedural law classification of prescription mean that an action cannot be successfully instituted after the expiration of a given period. Both approaches mean in principle that the action is dismissed if the debtor claims that the statutory period within which the action may be instituted against him has expired. Mention should be made in this context of the opinion of the Israeli Special Law Commission, which has declined to choose between the two classifications:[24]

> ... the consequences of prescription should be determined according to their desirability and not by the procedural/substantive classification.

2 PRESCRIPTION AND UNIFORM LAW ON THE SALE OF GOODS

The author of a Swiss dissertation[25] on the limits of unification in relation to the international sale of goods gave a provocative title to his chapter on the limitation of actions in international contracts of sale, namely ?*La prescription des droits découlant du contrat: talon d?achile de l?uniformisation*?. Together with validity, transfer of title and agency, this author regards prescription as the ?fourth window? of the ?*façade de l?uniformisation*. This is because the help of national law must be sought in respect of these subjects. Marchand considers the lack of uniform rules on prescription (as many countries have not ratified the Limitation Convention) to be disadvantageous since prescription is closely connected with the remedies available to the parties under the United Nations Convention on Contracts for the International Sale of Goods (1980) (referred to below as ?CISG). National legislation on the sale of goods traditionally regulates the limitation of actions too. In Marchand?s view,[26] the application of the national periods of prescription, which in many respects differ widely from one another, to the remedies made available by the uniform law on the sale of goods is ?*le vétir d?habits forcément mal ajustés*. By contrast, the Limitation Convention is, in his opinion, tailor-made for the international sale of goods. To what extent there has been coordination with the CISG will be dealt with below in section 5, which describes the content of the Limitation Convention. First of all, I will examine from the perspective of the uniform law on the sale of goods why and how private international law is involved in the question of prescription.

2.1 The provisions in the uniform law on the sale of goods

---

[24] See the Israeli report by Gilead, in: Hondius (1995) pp. 207-228 (210). The author reasons as follows: "A rigid rule of classification, which tends to dictate the consequences of prescription not according to their desirability but on the basis of a predetermined dogmatic approach is inadequate. Policy should not be sacrificed for the sake of formalistic legal abstraction".

[25] Marchand (1994) p. 283.

[26] Idem and p. 284. He cites Spiro (1992) p. 197: `Man erkannte klar und war einig darüber, dass das Verjährungsabkommen eine wichtige, ich wage zu sagen: notwendige Ergänzung des einheitlichen Kaufrechts bildet.'

The scope of the uniform rules on the sale of goods are limited under Article 4 of the CISG to the formation of contracts of sale and the rights and obligations of the seller and the buyer arising from such a contract. If one of the parties to an international contract of sale claims that an action is barred by prescription, it is necessary to choose what law and what legal rules govern the period of limitation. To date there have been only a few cases involving the application of the CISG in which the courts have had to rule on the question of limitation periods. In these cases the chosen solutions have closely resembled the approach to this problem under the 1964 Uniform Law Conventions on the International Sale of Goods. Often the courts rely on paragraph 2 of Article 7 of the CISG. This rule provides that questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in accordance with the law applicable by virtue of the rules of private international law. The problem of gap filling in conformity with the general principles of the Convention or internal law is a subject that has been much discussed in the literature.[27] There have been various cases in which questions governed by the Convention but not expressly settled in it have been resolved by the courts by reference to the instructions in Article 7 (2) of the CISG. The majority of the cases in which the national courts or arbitrators have been called to give a decision have concerned the amount of the interest to be paid.[28]

2.2 Internal and external gaps

Article 7 (2) of the CISG deals with questions concerning matters governed by the CISG which are not expressly settled in it. A distinction should therefore be made between internal gaps, for which Article 7 (2) provides directions,[29] and external gaps, to which this provision does not apply. The limitation of actions arising from a contract for the sale of goods is a subject that is not covered by the CISG.[30] The following arguments can be advanced in

---

[27] See comprehensively concerning the emergence of the content of Art. 7 CISG as an interpretation clause, Trompenaars (1989) pp. 135-162; also recently Bertrams (1995) pp. 15-19 and Ferrari (1995) pp. 172-174.

[28] This gap, which was expressly left open, can according to Neumayer, RIW 1994 p. 106, however, be filled by the use of other CISG conditions.

[29] Comprehensively on this see Magnus, RabelsZ 1995 pp. 470-494. He writes (p. 472): `Mit dem punktuellen Ansatz von Vereinheitlichungsvorhaben ist zwangsläufig ein gewisser fragmentarischer Charakter der Regelung verbunden. Selbst bei so weitgreifenden Konventionen wie dem UN-Kaufrecht, das die Vertragsbeziehungen der Parteien umfassend regeln will, bleiben Fragen des allgemeinen Schuldrechts offen, bleibt die Einpassung in das jeweilige nationale Rechtssystem durchaus problematisch.'

[30] According to Marchand (1994) p. 166 one cannot speak of a gap because `un système à double niveau' bestaat: `Le fait que ces Conventions (bedoeld worden de Verjarings-conventie en het Verdrag van Genève inzake de vertegenwoordiging bij de internationale koop van roerende zaken van 17 februari 1983, KBW) n'aient pas été ratifiées par la Suisse, et qu'elles aient été de façon générale moins largement ratifiées

support of this proposition. The scope of the substantive application of the CISG can be inferred from Article 4 in conjunction with Article 2. Three subjects are excluded from the scope of the Convention, namely the validity of the contract or of any of its provisions or of any usage and the effect which the contract may have on the property in the goods sold. The opening words of the second sentence of Article 4 make clear that the Convention is ?in particular not concerned with? the matters just mentioned. The summary is therefore not exhaustive. Examples of other subjects that are not covered by the uniform law on the sale of goods are product liability, assignment, debt transfer and set-off.[31] To this list can be added the limitation of actions arising from contracts for the sale of goods.[32] Since UNCITRAL allowed the Limitation Convention, which was concluded in 1974, to continue in existence as an independent international convention alongside the CIGS and merely amended it by means of a protocol to bring it into line with the CIGS, this is a clear indication that prescription does not belong to the matters governed by the CIGS ?which are not expressly settled in it?. It follows that the instruction given in Article 7 (2) of the CIGS need not be followed if a debtor claims that an action arising from an international contract for the sale of goods is barred by prescription.

3 CHOICE OF LAW APPLICABLE TO THE LIMITATION PERIOD

How should the law applicable to the limitation of actions arising from an international contract for the sale of goods be chosen? The external gap must be filled by rules that are procedurally independent. The choice of similar rules can be made in two ways. First of all, by application of unified substantive law for which the Limitation Convention of 1974 must be consulted and, second, by application of provisions of a national legal system that must be designated by conflict rules of the courts to which the application is made. As regards the latter approach, to which resort should be had only if the uniform law is not eligible for application, the instruction contained in Article 7 (2) of the CISG is invoked in some cases although it only regulates the filling of internal gaps. To what extent the extension of the scope of this provision can be deemed permissible will be examined below.

First of all, it is necessary to make an observation of a methodological nature concerning the relationship between uniform private law and private international law. When examining the question of whether the uniform law on prescription that is recorded in an international convention is eligible for application, is it necessary that ?permission? be granted by the concurrence provision of Article 21 of the Convention on the Law applicable to Contractual Obligations (referred to below as the EC Contracts Convention) of 19 June 1980? Article 21 of the EC Contracts Convention provides that the Convention is without prejudice to the

---

que la convention de Vienne, est l'expression d'une volonté des Etats et non d'une lacune du droit uniforme.'

31 According to Asam, Jahrbuch für Italienisches Recht 1992 p. 63, this is generally accepted.

32 Bertrams/Van der Velden (1994) p. 80 speak of other, more specific private international law conventions.

application of international conventions to which a Contracting State is or becomes a party. On the assumption that a Contracting State under the EC Contracts Convention is also a party to the Limitation Convention, it does not follow that it can be inferred from Article 21 that the Limitation Convention can be regarded as *lex specialis* in relation to the EC Contracts Convention. This is because Article 21 of the EC Contracts Convention applies only to conventions unifying private international law,[33] not to those unifying substantive law. This concurrence provision therefore does not apply in the relationship between uniform law and private international law.[34] There is no system of *renvoi* under convention law. Private international law can, after all, be regarded as an emergency solution in the absence of unified substantive law. If uniform law is eligible for application, regardless of whether or not it has taken effect in the country of the court to which application has been made,[35] the circuitous route of private international law should be avoided. This means that the applicability of uniform law is not ?permitted? under Article 21 of the EC Contracts Convention. In relation to the Limitation Convention - and also to the CISG - the EC Contracts Convention is a subsidiary source of law.

4 PRESCRIPTION LAW DERIVED FROM THE LAW THAT GOVERNS THE CONTRACT

Under Dutch private international law, prescription is governed by the law applicable to the action in substantive terms.[36] This rule of private international law is generally accepted in

---

33 See Bertrams/Van der Velden (1994) p. 80.

34 Otherwise apparent in Strikwerda (1995) p. 83 with regard to the question of the admissibility and the effect of a choice for a treaty on uniform law. He writes in this connection (NJB 1996 p. 411) that the concurrence regulation of Art. 21 EC Contracts Convention means that the provisions of a treaty, which contains uniform private law, concerning the consequences of opting in must take precedence over the provisions of Art. 3 EC Contracts Convention.

35 With the aid of the *kollisionsrechtliche Vorschaltlosung* the formal fields of application of the CISG, the Limitation Convention (see section 5.2.2) and the UNIDROIT Conventions on leasing and factoring are determined. UNILEX reports 15 German, 3 Swiss and 9 Dutch cases wherein the CISG on the basis of Art. 1(1)(b) was applied because the conflict regulations indicated the law of a party to the Convention while the country of the court to which application had been made had not (yet) become a party to the Convention. See on this Ferrari, NIPR 1995 pp. 327-328. The Limitation Convention, according to Art. 33, should be applied by contracting states after the entering into force of the Convention on concluded sales contracts. This intertemporal regulation is somewhat more strictly formulated than Art. 100 CISG because there is here a question of a contracting state having to apply the Convention. Evidently, those concerned did not take the trouble to harmonise both regulations.

36 HR 27 May 1983 NJ 1983, 561 with note by J.C. Schultsz S and HR 24 January 1986 NJ 1987, 56 with note by J.C. Schultsz.

continental Europe and has been recorded in Article 10 (1)(d) of the EC Contracts Convention as regards contractual obligations.[37] On the basis of this provision, the subjects governed by the applicable law include the various ways of extinguishing obligations and prescription and limitation of actions. Two observations can be made here. First of all, the subjection of prescription to the *lex causae* should be regarded not as an accessory connecting factor but merely as a concrete designation of the scope of the law applicable to the contract.[38] Second, the principle that the courts can only apply their own procedural law does not result in *Unverjährbarkeit* of the action if, pursuant to Article 10 (1)(d) of the EC Contracts Convention, a foreign law that treats prescription as a procedural law institution is applicable.[39] In other words, a *renvoi* by virtue of a procedural law classification is not recognised.[40] The problem of the *renvoi de qualifications* was considered at length in a judgment of the *Cour d?appel de Paris* of 3 March 1994.[41] Aside from the fact that the French judge had doubts about the procedural law classification of prescription under English law owing to the introduction of the Foreign Limitation Periods Act of 1984,[42] he considered that *renvoi* was excluded as regards the area of contract law, particularly since the parties had designated the applicable law.[43]

The question of how Article 10 (1) (d) of the EC Contracts Convention functions if the contract for the sale of goods is governed by the CSIG , which (as we have seen) does not regulate prescription, will be discussed by reference to an example of the decided cases. According to a judgment of the Hamm *Oberlandesgericht* (German regional appeal court) of 9 June 1995,[44] prescription is a matter governed by the law applicable to the contract, which should be chosen in accordance with Article 27 *et seq*. of the Act introducing the German

---

37 Art. 148 of the Swiss Act on private international law determines likewise: "Verjährung und Erlöschen einer Forderung unterstehen dem auf die Forderung anwendbaren Recht". See for a brief *tour d'horizon* of the private international law approach to prescription in the various countries, Hage Chahine (1995) no. 67.

38 See Keller/Siehr (1986) p. 285: `Keine echte akzessorische Anknüpfung liegt bei denjenigen Rechtsfragen vor, bei denen man bei fehlender Zuordnung zum allgemeinen Forderungsstatut von besonderen Problemen spricht, nämlich von einer abweichenden Qualifikation, durch welche die Frage einem anderen Statut (etwa der *lex processualis fori*) zugewiesen wird, oder von einer Sonderanknüpfung.'

39 See extensively on this problem Girsberger (1989) pp. 70-73 who, among other things, cites the *Fehlurteil* of the German *Reichsgericht* from 1886 (p. 48) where the *Unverjahrbarkeit* of the claim was accepted.

40 See Girsberger (1989) pp. 70-71.

41 Rev. crit. dr. int. prive 1994 pp. 532-545 with a note by B. Ancel.

42 See note 21.

43 In this case English authors and case-law were extensively referred to.

44 Rechtsprechung des OLG Hamm 1995 pp. 169-170 = UNILEX D.1995-17.

Civil Code (EGBGB). Article 32 (1), point 4, provides that the law applicable to the contract governs prescription. This rule, which is the same as Article 10 (1) (d) of the EC Contracts Convention, is based on the assumption that the contract is subject to national law. An observation should be made here. The *Oberlandesgericht* held that the CISG was applicable to the relations between the parties because they were domiciled in different Contracting States. The reasoning that followed is important to the choice of law that was ultimately applied to the prescription.

> `Daran ändert sich auch nichts dadurch, daß die Parteien aufgrund ihres Verhaltens im Prozeß deutsches Recht gewählt haben (Art. 27 Abs. 2 EGBGB). ... Die damit vorgenommene Wahl deutschen Rechts führt aber wiederum zur Anwendung des CISG, das Bestandteil des deutschen Rechts ist und innerhalb seines Anwendungsbereichs dem BGB vorgeht.'[45]

As prescription does not come within the scope of the CISG, the judge applied German law to the subject of prescription on the basis that this had been the tacit choice of the parties. Under Article 10 (1)(d) of the EC Contracts Convention, however, prescription is governed by the law applicable to the contract, which was the CISG in the case in question. Does this mean therefore that in addition to the uniform law on the sale of goods a national law is applicable to the contract? This question should be answered in the negative. The ?circle? must be broken only in respect of those matters that are not settled in the CIGS. It follows that an ?auxiliary? law applicable to matters beyond the scope of the CIGS is designated by private international law only for external gaps.[46] This applies to all matters which are not settled in the CIGS but which are regarded by virtue of Article 10 (1)(d) of the EC Contracts Convention as within the scope of the law applicable to the contract, for example set-off as well as prescription. Many judgments choose the same private international law approach in relation to set-off.[47]

---

[45] A tacit exclusion on the basis of Art. 6 CISG was not accepted although the parties had only explicitly referred to the provisions of the BGB. It is generally accepted that this circumstance leads to the exclusion of the CISG.

[46] The consideration of the District Court of Arnhem 20 December 1993, as indicated in the Court of Appeal of Arnhem 22 August 1995, NIPR 1995 no. 514, that as far as the interest rate was concerned "alongside the CISG German law is applicable" is in this respect also not correct.

[47] For set-off see OLG Koblenz 17 September 1993, RIW 1993, 934-938 and Rb Arnhem 25 February 1993, NIPR 1993 no. 445. For the rate of interest, which is not expressly referred to in Art. 10(1) EC Contracts Convention, reference is frequently made to Art. 7(2) CISG because the law on interest is indeed laid down in Art. 78 of the Convention. See OLG Frankfurt 13 June 1991, RIW 1991, 591; Pretura di Locarno-Campagna 16 December 1991, RSDIE 1993, 663; Zivilgericht Kanton Basel Stadt 21 December 1992, RSDIE 1995, 276-277; Rb Roermond 6 May 1993, UNILEX 1995/II D.1993-14; OLG Koblenz 17 September 1993, RIW 1993, 934-938; Rb Arnhem 30 December 1993, NIPR 1994 no. 268; Rb Amsterdam 5 October 1994, NIPR 1995 no. 230; ICC Arbitration Paris 1994, Bull. CCI November 1995, 63-66; LG Landshut 5 April 1995, UNILEX D.1995-12; LG Aachen 20 July 1995,

In an arbitral award given under the auspices of the International Chamber of Commerce on 23 August 1994,[48] the arbitrators reached a result similar to that of the judgment of the Hamm *Oberlandesgericht*. A contract of sale between an Italian seller and a Czech buyer was assessed by reference to Austrian law on the ground of the parties? choice of law. Under Article 1 (1)(b) of the CIGS, the CISG was held to be applicable as Austria was one of the Contracting States.[49] According to the arbitrators, however, the agreed reduction of the 2-year time limit specified in Article 39 (2) CIGS to 18 months did not affect the prescription period because the subject of prescription was outside the scope of the CIGS. Austrian law as chosen by the parties was applied to the subject of prescription.

The private international law approach to the subject of prescription in international contracts of sale can also be found in the case law concerning the application of the 1964 Uniform Law Conventions on the International Sale of Goods (LUVI). It was held in these cases that neither prescription nor set-off were covered by these Conventions. This resulted in application of provisions derived from the *lex causae contractus*.[50]

5 THECONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

The Convention on the Limitation Period in the International Sale of Goods was concluded in New York on 14 June 1974 under the auspices of UNCITRAL and entered into force on 1 August 1988.[51] The Convention now applies to 24 countries:[52] Argentina,[53] Belarus,[54] Bosnia-Herzegovina,[55] Burundi,[56] Cuba,[57] the Czech Republic,[58] the Dominican Republic[59], Egypt,[60]

UNILEX D.1995-19.

48 DirComInt 1995, 234 No. 54.

49 It was explicitly indicated that Art. 1(1)(b) could also lead to the application of the CISG if the parties have chosen the law of a contracting state. Otherwise see the opinion of the Vienna Bundesgericht für Handelssachen 20 February 1992, öRdW 1992, 239. According to Austrian private international law the choice of law is namely also to be considered as a *Gesamtverweisung* with the consequence that a reference back or subsequent reference must be accepted.

50 See for example KG Berlin 29 May 1986, RIW 1986, 905 and LG Duisburg 10 June 1986, RIW 1986, 903 et seq.

51 According to Art. 44(1) ten ratifications were required therefor.

52 Status of Conventions issued by UNCITRAL. Last update on 1 February 1999, see <http://www.un.or.at/uncitral/en/index.htm>.

53 Since 1 August 1988.

54 Since 1 August 1997.

55 Since 6 March 1992.

Ghana,[61] Guinea,[62] Hungary,[63] Mexico,[64] Moldova,[65] Norway,[66] Poland,[67] Romania,[68] Slovenia,[69] Slovakia,[70] Uganda,[71] Ukraine,[72] the United States,[73] Uruguay,[74] Yugoslavia[75] and Zambia.[76] With the exception of Burundi, the Dominican Republic and Ghana, these countries

---

[56] Since 1 April 1999.

[57] Since 1 June 1995.

[58] Since 1 January 1993 by continued alignment. Czechoslovakia had ratified the Convention on 26 May 1977.

[59] See note 53.

[60] See note 53.

[61] Since 1 August 1991.

[62] See note 53.

[63] See note 53.

[64] See note 53.

[65] Since 1 April 1998.

[66] See note 53.

[67] Since 1 December 1995.

[68] Since 1 November 1992. See the country report by Mircea Cosmovici/Munteanu in: Hondius (1995) pp. 317-341 (328).

[69] Since 1 March 1996.

[70] See note 56.

[71] Since 1 September 1992.

[72] Since 1 April 1994.

[73] Since 1 December 1994. See for a comparison of the Limitation Convention with Section 2-275 of the Uniform Commercial Code, Hill, Texas Int. Journal 1990 pp. 1-22.

[74] Since 1 November 1997.

[75] See note 53.

[76] See note 53.

are also parties to the CISG. The version of the Convention amended by the Protocol of 11 April 1980 applies to only 17 countries,[77] all of which are parties to the CISG. These are Argentina,[78] Cuba,[79] the Czech Republic,[80] Egypt,[81] Guinea,[82] Hungary,[83] Mexico,[84] Poland,[85] Romania,[86] Slovenia,[87] Slovakia,[88] Uganda,[89] the United States[90] and Zambia.[91]

The German Democratic Republic ratified the Convention and the Protocol in 1989, but is no longer listed as a Contracting State by the United Nations.[92] Since the reunification of East and West Germany on 3 October 1990, Article 12 of the *Vertrag der BRD under der DDR über die Herstellung der Einheit Deutschlands* has given rise to a heated debate in the German literature on whether the Limitation Convention still applies to the area of the former GDR. Asam[93] takes the view that in a case concerning, say, a contract of sale between a seller domiciled in Dresden or Leipzig and a Dutch buyer, the question of prescription should be determined by reference to the Limitation Convention if private international law indicates the law of a Contracting State - even a former Contracting State - being the place of domicile of

---

77 See note 52.

78 Since 1 August 1988.

79 Since 1 June 1995.

80 Since 1 January 1993.

81 See note 78.

82 Since 1 August 1991.

83 See note 78.

84 See note 78.

85 Since 1 December 1995.

86 Since 1 November 1992.

87 Since 1 March 1996.

88 Since 1 January 1993.

89 Since 1 September 1992.

90 Since 1 December 1994.

91 See note 78.

92 See note 52.

93 Jahrbuch für italienisches Recht (1992) p. 77. In a similar sense Reinhart (1991) pp. 224-225.

the seller in the absence of a choice of law.[94] Asam bases this argument on a provision of the *Einigungsvertrag*,[95] which appears to make an exception to Article 3 of the *Vertragsgesetz*[96] in which the German legislator has included a special arrangement for the limitation of actions in the international sale of goods following the ratification of the CIGS by the Federal Republic of Germany. The provision reads:

> `Artikel 3 ist nicht anzuwenden, soweit die Anwendung mit einer von der Deutschen Demokratischen Republik übernommenen völkerrechtlichen Verpflichtung nicht zu vereinbaren ist.'

According to Herber,[97] however, it cannot be inferred from this provision that the Limitation Convention is also applicable in the five new states of the Federal Republic. The provision employed the wording **?***soweit***?**, which indicates in his view that Article 3 of the *Vertragsgesetz* is not applicable only if other considerations of a public international law nature warrant such a result. This is not the case in relation to the Limitation Convention. Since 3 October 1990 - the date of reunion of the two Germanies - the GDR has no longer been a party to the Limitation Convention.

Five important publications about the Limitation Convention should be mentioned here. The two most frequently quoted articles on the Convention were published in 1975 and were written by two delegates, namely Landfermann in *Rabels Zeitschrift* and Smit in the *American Journal of Comparative Law*. A third delegate, Enderlein, from the former GDR, published an article-by-article commentary which was updated in 1991. Finally, the subject of the uniform law of prescription was considered at length in two more recent French monographs of Heuzé (1992) and Marchand (1994).

I decided against analysing the 46 articles of the Convention[98] individually in the present article. The sections below concentrate on the substantive and procedural sphere of application of the Convention and on some important provisions relating to the duration and commencement of the limitation period and its cessation and extension. The section concludes with a passage on the position taken by the Netherlands in relation to the Limitation Convention.

5.1 The substantive scope

Whereas various conventions unifying substantive law or private international law devote one

---

94 See on the suitability of the Limitation Convention as regards designating a law of a contracting state by means of the conflicts law of the court to which application is made under section 5.2.2.

95 Sch. I, part II, chapter III, disc. D, ch. III no. 5 (BGBl. 1990 II 960).

96 This provision will be considered in section 6.

97 MDR 1993 p. 106.

98 See the Appendix.

or two provisions to prescription, the limitation period is *la seule matière traitée*[99] in the Convention of New York of 1974. The uniform rules of this Convention are of a substantive law nature.[100] They are directly applicable without private international law devices if the debtor?s claim that the action is barred by limitation comes within the scope of the Convention. The Convention does not settle the private international law problem of prescription. The advantage of this approach was that the *Rechtsnatur* of the prescription did not need to be determined by the drafters of the Convention. Only the nature of the prescription is defined in Article 1 (1) of the Limitation Convention in such a way that a claim can no longer be exercised in certain circumstances after the expiration of a period. This neutral formulation was chosen in order to cover both concepts of prescription: on the one hand, the view universally held in the common law countries that prescription is an institution of procedural law, and on the other the prevailing definition of prescription in continental Europe as an institution of substantive law. Consequently, the definition covers both the limitation of legal proceedings and the prescription of rights[101] and therefore allows every State Party the opportunity to treat the uniform provision as procedural law or substantive law depending on its definition of prescription.[102] Nonetheless, it should be noted that in the view of the drafters of the Convention prescription is in principle a ?right? and not a ?power?. This is because Article 25 provides that no claim[103] shall be recognised or enforced in any legal proceedings commenced after the expiration of the limitation period if the debtor has raised the limitation period as a defence. This basic principle was weakened by two provisions

---

99 According to Hage Chahine (1995) no. 108bis.

100 Four "disguised" conflict rules are to be found in Art. 13: the *lex fori* determines whether a certain action on the part of the creditor suffices the necessary requirements for halting the limitation period; in Art. 19: actions on the part of the creditor which, according to the law of the country of the debtor's registered office, interrupt the limitation period (such as, for example, the Belgian and French law of personal demands) and which mean that the limitation period will recommence; in Art. 22(3): the validity of a contractual clause wherein a shorter limitation period than that determined in the Limitation Convention has been agreed upon and in which case arbitration proceedings must be commenced, will be adjudged according to the law which is applicable to the sales contract; and in Art. 28(2): the computation of the limitation period will take place according to the *lex fori*. See on this Hage Chahine (1995) no. 110 and Girsberger (1989) pp. 162-163. Burman, Commercial Law Annual 1994 p. 284, incorrectly qualifies the Limitation Convention as a private international law treaty.

101 This may be considered to be the Limitation Convention's main objective, see Girsberger (1989) p. 164.

102 See Landfermann, RabelsZ 1975 pp. 257-258. The German and Austrian delegations' proposal to state expressly in the preamble that the issue of the definition would be left to national law was finally rejected.

103 The English text speaks of "claim", the French of *droit* and the German of *Anspruch*.

expressing a more procedural law approach. First of all, Article 25 (2) stipulates that notwithstanding the expiration of the limitation period the claim may be used as a defence or for the purpose of set-off and, second, Article 26 provides that where the debtor performs his obligation after the expiration of the limitation period he is not entitled to claim restitution. Hage Chahine[104] has commented on this as follows:

> `Quoi qu'il on soit, la perpetuité de l'exception et la validité du paiement effectué posterieurement à l'expiration du delai, montrent que les deux qualifications sont distinctes au niveau des concepts mais qu'elles débouchent, en pratique, sur deux résultats presque identiques.'

Paragraph 2 of Article 1 makes clear that the Limitation Convention does not apply to time-limits.[105] The distinction between time-limits and limitation periods should be made on the basis of a procedural criterion. A limitation period exists where a claim has to be instituted within a given period.[106] All other periods specified by law within which a given right or power must be exercised should be regarded as time-limits.[107]

To what claims does the Limitation Convention apply? Article 1 (1) stipulates that the Convention covers all claims of a buyer and a seller against each other arising from a contract for the international sale of goods or relating to the breach, termination or invalidity[108] of that contract.[109] This definition means that all contractual claims as well as, say, a claim for unjustified enrichment on account of the nullity of a contract come within the scope of the uniform rule on the limitation period. However, extra-contractual obligations are beyond its scope.[110] Also excluded are various claims that can arise from or in connection with a contract for the international sale of goods. The claims exhaustively listed in Article 5 (a)-(f) include

---

104 Hage Chahine (1995) no. 111.

105 Such as Arts. 39 and 43 of the CISG. See extensively hereover Girsberger (1989) pp. 165-166.

106 From Art. 1(3)(e) it would seem that the following is understood by "legal proceedings": the ordinary court, arbitration or administrative procedure.

107 The substantive law delineation between lapsing and prescription in some respects seems to be complicated, see Landfermann, RabelsZ 1975 p. 258. See in general also Hartkamp (1992) p. 642. He differentiates between the weak operation of the limitation period, because this first operates if and when the debtor appeals to it, and the stronger operation of "lapsing" because after the expiry of the period the law *ipso jure* comes to nothing. According to him, the relationship between prescription and lapsing is one of annullable and voidable *ipso jure*.

108 This is in contrast to Art. 4 CISG where the validity of the sales contract falls outside the uniform regulation.

109 See Girsberger (1989) pp. 169-171.

110 See Enderlein (1991) p. 310 no. 4 and Girsberger (1989) pp. 170-171.

claims based upon death of or personal injury to any person and claims relating to a security interest in property.[111] The former category is intended above to cover product liability claims[112] and the latter includes claims of the seller to obtain the return of unpaid goods delivered subject to a reservation of title. Here too there is correspondence with the scope of the CISG.[113]

Articles 2, 3 (1) and (2), 4 and 6 specify the types of contract for the sale of goods that are governed by the Limitation Convention. During the preparation of the Convention in 1974, the Conference already knew the provisional results of the UNCITRAL working party for the revision of The Hague Conventions on the international sale of goods. In anticipation of the definition of the substantive scope of the CISG, which had not yet been fixed, the drafters of the Limitation Convention were guided not by The Hague Conventions[114] but by their planned revision.[115] Even as early as 1974, the provisions of the Limitation Convention were accordingly almost totally coordinated with the new uniform rules on the international sale of goods, which had not yet been fixed. For example, the restriction of the substantive scope in Article 4 has the same wording as Article 2 of the CISG. An important feature is the exclusion of consumer contracts. The Protocol of 1980 made only minimal alterations to Article 4 (a) and (e).[116]

5.2 The procedural scope

The most radical amendment made by the Protocol at the Conference in Vienna to the Limitation Convention relates to the procedural scope regulated in Article 3. The so-called private international law pre-selection, which leads to frequent application of uniform law on the international sale of goods pursuant to Article 1 (1) CIGS was copied by the drafters of the Limitation Convention. Three cases can therefore be distinguished in the case of the procedural scope: (1) applicability on the grounds of the place of business of the parties in Contracting States; (2) applicability if the rules of private international law make the law of a Contracting State applicable to the contract of sale; (3) non-applicability where the parties have expressly excluded application of the Limitation Convention.

5.2.1 Place of business of parties in a Contracting State

Article 3 (1) provides that the Limitation Convention will apply if, at the time of the conclusion of the contract, the places of business of the parties to a contract for the

---

111 The last-mentioned rules are mostly adjudged according to the *lex rei sitae*.

112 See Enderlein (1991) p. 315 no. 2 and Heuzé (1992) no. 137.

113 See Art. 4 CISG.

114 On the departures from the Hague Conventions on the international sale of goods see Landfermann, RabelsZ 1975 p. 260 and Bess, RIW 1975 pp. 130-134.

115 See Landfermann, RabelsZ 1975 pp. 259-260.

116 See extensively Heuzé (1992) nos. 133-136.

international sale of goods are in Contracting States. Under Article 23 of the CISG, a contract is deemed to be concluded at the moment when an acceptance of offer becomes effective. The fact that the parties may have their places of business in the same country at the time of the proceedings does not prevent the application of the Convention.[117] Since there are two versions of the Limitation Convention and allowance must be made for the different dates of entry into force,[118] the question arises of what constitutes a ?Contracting State?. How should the capacity of Contracting State be defined by States that have ratified the original version of the Limitation Convention in their relationship with Contracting States to which the amended version applies? Articles 44*bis* and 45*bis* of the Limitation Convention have resolved this problem of concurrence in the following way. Save where there is notification to the contrary, each State that ratifies the amended version of the Convention is considered to be also a Contracting Party to the unamended version of the Convention. If a State does give a notification to the contrary within the meaning of Article 44*bis* when ratifying the amended version of the Limitation Convention, this means that the State concerned is not deemed to be a Contracting State within the meaning of Article 3 (1) in relation to a Contracting State that has ratified only the original version of the Limitation Convention. In such a case, the uniform law of prescription is not applicable. To date not a single State has made use of this option.[119]

5.2.2 Designation of the law of a Contracting State by the rules of private international law of the court to which application is made

The content of the substantial expansion of the procedural scope of the Limitation Convention intended by the Protocol of 11 April 1980 in relation to Article 3 (1)(d) corresponds to the motion proposed by the Norwegian delegation during the preparation of the Limitation Convention with regard to Article 1 (1)(b) of the CISG. In 1974 this motion had been defeated by 21 votes to 15.[120] The harmonisation of the procedural scope of the two Conventions thus gave rise to problems at the Vienna Conference in 1980. Many delegations pointed out that the Conference in New York had intentionally excluded the application of the Limitation Convention under private international law renvoi and had voted against inclusion of the Limitation Convention of the wording used in Article 1 (1)(b) CISG. Other delegations pointed out that a State that ratifies both Conventions should have a uniform area of application for both in order to avoid inconsistencies.[121] Ultimately the advocates of uniformity prevailed, but the same concession as under the CISG was made.[122] The new version of Article 3 (1)(b) Limitation Convention may be excluded by means of a reservation.

---

[117] According to Enderlein (1991) p. 313 no. 2.

[118] See notes 53-72 and 74-87.

[119] On this point see extensively Heuzé (1992) no. 145.

[120] See Landfermann, RabelsZ 1975 p. 261 and Girsberger (1989) p. 159.

[121] See Enderlein (1991) p. 313 no. 1.

[122] At the request of the Czech delegate, see Girsberger (1989) p. 159 note 682.

The United States and the Czech Republic have made a reservation of this kind[123] in accordance with Article 36bis Limitation Convention.[124] Both the Czech Republic and Slovakia maintained the latter reservation in the declarations that they continue to be bound by the Convention with effect from 1 January 1993. The amendment which Article I of the Protocol makes to Article 3 of the Convention does not apply to these countries. It follows that the ?old? version of Article 3 of Limitation Convention continues to apply to the ?reservation countries? and that in accordance with the wishes to the national legislators the extra private international law step cannot result in application of the Limitation Convention.

The intermediate international law step may mean that the Dutch courts too have to apply the Limitation Convention if the private international law rules of the EC Contracts Convention designate the law of a Contracting Party to the Convention.[125] The same even applies if the Contracting State has made the reservation provided for in Article 36*bis* Limitation Convention.[126] This is because a reservation is binding only on the State that has made it and is not relevant to the other States.[127] According to Piltz,[128] the referral by private international law rules to the law of a country that is a party to the Limitation Convention does not lead directly to the application of the rules of the Convention under Article 3 (1)(b). In his view, there is a *sachliche Rechtsspaltung*. Two different prescription regimes are eligible for application, the national and the international. The decision as to which of the two is applicable should, according to Piltz, be decided by reference to the private international law

---

123 The same reservation, namely Art. 95, was made by both states with regard to Art. 1(1)(b) CISG.

124 This provision is identical to Art. XII of the Protocol.

125 See on this point the text in section 3 and the case-law cited in footnote 35. Similarly see Piltz (1993) no. 153. As justification therefor he adduces that the court applying the law is obliged to reach the same decision as the court of the state assigned under private international law.

126 According to Girsberger (1989) pp. 160-161 a differentiation should be made between a *Sachnorm*- and a *Gesamtverweisung*. In the latter case account should be taken of the reservation made by the contracting state because this reservation can have the character of a conflict regulation which refers to the internal substantive law of the designated state. In the case of a *Sachnormverweisung*, as regulated under the EC Contracts Convention, the reservation on the part of the *lex causae* is not relevant because of its conflicts law content.

127 See on this point Boele-Woelki (1996) pp. 16-17. Otherwise see Magnus (1995) p. 215 who is of the opinion that the German courts must respect the reservation made by another contracting state. He obviously takes as a point of departure the analogical application of the partial reservation made by Germany as regards the ratification of the CISG. Thereafter, the German courts have not been able to apply Art. 1(1)(b) CISG against states which have made a reservation under Art. 95. Similarly with regard to the CISG see Neumayer, RIW 1994 p. 101.

128 Piltz (1993) nos. 154-155.

of the designated law. This private international law ?intermediate selection? is, in his view, not contrary to the principle of the *Sachnormverweisung* derived from Article 15 of the EC Contracts Convention because the private international law of the Contracting State is used only as an aid in order to regulate the existing *sachliche Rechtsspaltung*. The first argument that can be made against this dogmatic approach, which is also defended by Piltz in relation to Article 1 (1)(b) CISG,[129] is that private international law cannot perform a task of this nature, even if its use is described as an aid. The purpose of rules of private international law is to delineate the applicability of the various national systems of law. Consulting the private international law rules of the Contracting Party to the Limitation Convention also involves the danger they may choose the *lex fori* because prescription is defined as a concept of procedural law. How is the *sachliche Rechtsspaltung* solved in such a case? This question does not admit of an answer. Finally, it is evident from the case law on the applicability of the CISG under Article 1 (1)(d) that the uniform law on the international sale of goods is applied directly. The private international law of the Contracting State that is designated by the private international law rules of the court to which application is made are not consulted. Mention should be made in this connection of section 2 of the Dutch Act of 18 December 1991 repealing the Uniform Acts on the Sales of Goods.[130] This section provides that the CISG is applicable if Dutch law would, pursuant to any rule of private international law, apply to an international contract for the sale of goods. According to Piltz?s approach, this provision could be used in choosing between two different systems. As far as I am aware, however, no foreign court - for which this provision is evidently intended[131] - has ever referred to this rule.

5.2.3 Opting in and opting out of the uniform prescription arrangement

The question whether parties may declare the Convention to be applicable if it is not applicable either directly or indirectly can be answered in the affirmative,[132] although the Convention itself makes no provision for this subject. The importance of opting in may be the fact that the parties can avoid the application of what are sometimes widely differing national periods of limitation. Choosing the Limitation Convention is an acceptable compromise. However, the scope of a choice of uniform law - i.e. whether it is substantive law or conflict of laws - is open to dispute.[133]

Opting out involves exclusion by the parties of uniform prescription law. What requirements should such an exclusion satisfy? Article 3, paragraph 2, of the Limitation Convention provides that exclusion must have been expressly agreed by the parties. How the term ?expressly? is to be interpreted is not dealt with at all in the case law and is barely touched upon in scholarly writings. In any event, it does not have to be in writing. Clear

---

[129] Piltz, NJW 1989 pp. 615-621 (620).

[130] Stb. 1991, 753.

[131] See Bertrams/Van der Velden (1994) p. 139.

[132] See also Magnus (1995) p. 215.

[133] See on this Boele-Woelki (1996) pp. 17-18 with regard to "opting in" under the CISG.

agreement must have been reached by the parties on this point.[134] The question arises in this connection of whether there is express exclusion if the parties determine that prescription will be governed by a given national law. In the case of Article 6 of the CISG, such a choice of law does not result in exclusion of the uniform law on the sale of goods if the designated law belongs to the law of a Contracting State.[135] To my knowledge there has been no case law on this subject. It would be advisable if the courts called on to interpret Article 3, paragraph 2, of the Limitation Convention were to take account of the case law that has been developed in respect of Article 6 of the CISG[136] in order to achieve a consistent approach. As regards the opting out situation Hage Chahine[137] rightly questions the effect of such an exclusion. Does such an exclusion have only a negative effect, i.e. the non-applicability of the Convention, or can it also have a positive effect as a choice of a national law can be assumed? According to Hage Chahine, the answer to this question depends on the approach adopted by the national courts to prescription. If prescription is treated as substantive law, the opting out clause is covered by the principle of the parties? autonomy and the parties may declare that the national law of one of the parties is applicable to prescription. If, however, the courts consider that prescription is a procedural matter, the choice of a law other than the *lex fori* has no effect.

5.3 Duration and commencement of the limitation period

The Limitation Convention has only one period of limitation that is applicable to all claims arising out of international contracts for the sale of goods. No distinction is made between claims for payment of the purchase price and claims for non-performance. The same is true of visible and hidden defects. The period of limitation is 4 years. The period for claims based on the fact that the goods delivered do not fulfil the terms of the contract is the result of a compromise.[138] Developing countries in particular had pressed for a long period as claims brought because industrial goods do not fulfil the terms of the contract would otherwise be frustrated by the passage of time in many cases. In keeping with the draft convention of

---

134 See Heuzé (1992) no. 139.

135 See Karollus, JBI 1993 pp. 23-33 (27) and the diverging opinion of Neumayer on this, RIW 1994 p. 102 (note 19 contains extensive references to the literature dealing with the prevailing doctrine). See recently also OLG Munich 8 February 1995, UNILEX D. 1995-4 and LG Landshut 5 April 1995, UNILEX D. 1995-12.

136 See Witz, D. 1990 pp. 107-112 (109-110). This author correctly points out that Art. 1(1)(b) CISG, contrary to the intention of those who drafted it, will lose a major part of its substance if, by reason of this provision, only entering into the contract objectively would lead to the use of a uniform law on the sale of goods because choosing a national law could be considered to exclude a uniform law on the sale of goods.

137 Hage Chahine (1995) no. 110bis.

138 See Girsberger (1989) p. 172.

1972[139] France and Belgium defended a term of two years. They then differentiated between two dates on which the period would start to run: the time of delivery in the case of visible defects and the time of discovery in the case of hidden defects. Germany too[140] advocated a distinction between visible and hidden defects. It proposed a period of one year for the former category and two years for the latter category, in each case starting at the moment of delivery. Countries which expressly advocated the 4-year period were the United Kingdom, Denmark, Norway and Sweden, later supported by the Netherlands, Japan and Yugoslavia. They took the view that the difficult distinction between visible and hidden defects should be avoided. The period of limitation for claims based on the non-conformity of the delivered goods should start to run at the moment of delivery to the buyer or from the moment that the buyer refuses to take possession of the goods.[141] When Articles 8-12 were finally drawn up, the internationally accepted standards[142] were reflected in Article 9, paragraph 1, which provides that the limitation period commences on the date on which the claim accrues.[143]

Enderlein[144] takes the view that the period of four years is an acceptable compromise. According to him, the uniform duration of the limitation period should be seen as the main result of the legal unification since different periods and different commencement dates (*dies a quo*) cause legal uncertainty.

Under Article 24 expiration of the limitation period has to be taken into consideration in any legal proceedings if invoked by the debtor. The only circumstance in which a State is not compelled to apply the provisions of Article 24 is if it has made a reservation to this effect.[145] This is one of the three reservations permitted under the Limitation Convention. The second possible reservation[146] provides for non-application of the Convention to actions for annulment of the contract.[147] The third reservation relating to the Article 3, paragraph 1 (b),

---

[139] Formulated by a working party made up of Argentina, Belgium, Czechoslovakia (later replaced by Poland), Japan, Norway, the United Arab Republic and the UK.

[140] At this particular time chairing the EC and being represented by a large delegation.

[141] See extensively on this Landfermann, RabelsZ 1975 pp. 266-268.

[142] Girsberger (1989) p. 173.

[143] See extensively on this point Heuzé (1992) nos. 469-470.

[144] See Enderlein (1991) Art. 8 no. 1.

[145] Art. 36. Included at the request of the African states, India and the socialist states who considered the limitation period to be a matter of public order. See Girsberger (1989) p. 164 and Enderlein (1991) p. 338 no. 1.

[146] Art. 35.

[147] This was advocated mainly by the representatives from the Romance legal systems; see extensively on this Girsberger (1989) p. 170. In general he considers the limited number of reservations to be striking factor (p. 163): `Die zwingende Natur der meisten nationalen Verjährungsbestimmungen wäre wohl Grund genug, dass ein Verjährungsübereinkommen mehr Vorbehalte zuliesse als andere

was discussed in section 5.2.2 above.

5.4 Cessation and extension of the limitation period

The limitation period works only if it has not ceased to run as a result of cessation or extension.[148] An act of the creditor which is regarded under the *lex fori* as the institution of legal proceedings against the debtor causes the limitation period to cease to run under Article 13 of the Limitation Convention.[149] A writ of summons and a request for provisional measures may be regarded as the institution of legal proceedings.[150] The commencement of arbitral proceedings is equated with this in so far as the parties have agreed an arbitration clause (Article 14).[151] It can be inferred from Article 17 that the period of limitation is merely interrupted and not terminated.[152] If the proceedings do not end in a decision on the merits of the claim, for example because the court rules that it lacks jurisdiction, the limitation period is deemed to have continued to run.[153]

It is evident from Article 22, paragraph 1, of the Limitation Convention that the 4-year limitation period is peremptory law. The period is not a subject for agreement by the parties. There are two exceptions to this principle. First of all, Article 22, paragraph 2, provides that the debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. The declaration may even be renewed, but the maximum duration of 10 years under Article 23 may not be exceeded. In addition, a unilateral declaration of this nature is valid only if the limitation period has not yet expired.[154] The peremptory nature of the 4-year limitation period fulfils the wishes of developing countries, which feared that the stronger party would otherwise be able to impose its will at the expense of the weaker party.[155] The second exception deals with the possibility of a reduction of the 4-

---

zivilrechtsvereinheitlichenden Staatsverträge.'

148 See extensively on the interruption of the limitation period Heuzé (1992) nos. 473-480.

149 The English text specifically states "The limitation period shall cease to run . . .".

150 See Enderlein (1991) no. 1.

151 Most commonly occurring in international judicial matters: Arts. 13 and 14. Art. 15 deals with procedures to be instigated *ex officio* in connection with the death of the debtor or alternatively the debtor's bankruptcy, while Art. 16 regulates the procedure in the case of a counterclaim.

152 Here it is understood that the period which had already run before the actual termination can no longer be counted and a new limitation period will begin to run. For Dutch law see, for example, Koopman (1993) p. 69.

153 See Heuzé (1992) no. 475.

154 See Enderlein (1991) p. 328 nos. 2 and 3.

155 See Enderlein (1991) p. 328 no. 1.

year period. Under Article 22, paragraph 3, a clause in the contract of sale which stipulates that arbitral proceedings shall be commenced within a shorter period of limitation than that prescribed in the Limitation Convention is valid provided that it is valid under the law applicable to the contract of sale. As the CISG will in many cases be applicable to the contract and it contains no provisions governing the validity of such an agreement, it will be necessary to resort to the law designated by the rules of private international law.

5.5 Two coordinated uniform arrangements

At the diplomatic conference in 1974 the aim was to coordinate the arrangement governing the limitation period as closely as possible with the 1964 Hague Conventions on the international sale of goods. This aim was achieved only partially.[156] Many countries wished to await the review of the uniform law on contracts for the sale of goods before considering whether to ratify the Limitation Convention. Full harmonisation was finally achieved with the CISG as a result of the Protocol of 11 April 1980.[157] The scope of procedural application of the two conventions is identical.[158] The same is true of the scope of the substantive application.[159] The basic premise of the CISG, namely that all forms of non-performance should be dealt with in the same way, is copied in the Limitation Convention. The 4-year limitation period applies to all claims without distinction. Although a distinction is made between different categories in the provision regulating the *dies a quo*, this is in accordance with the distinctions also made in the CISG.

Unfortunately, not all State which ratified the original version of the Limitation Convention have acceded to the Protocol.[160] The disadvantage of this situation is that two different versions exist and correct information about the data of the Conventions must be available in order to determine which of the two is to be applied.

UNCITRAL has, as we have seen, created two mutually coordinated convention systems. At this date it is not possible to say with certainty why it was decided in 1980 to amend the Limitation Convention rather than incorporate it into the system of the CISG.[161] The limitation period was undoubtedly an important subject for UNCITRAL. But the countries taking part in the 1980 conference evidently took a different view. Owing to the lack of ratifications the

---

156 See extensively on this, Bess, RIW 1975 pp. 130-134 (134). According to him, UNCITRAL should have first completed the revision of the uniform law on the sale of goods before formulating "ein Satellitenabkommen wie es ein Verjährungsabkommen nun einmal ist".

157 On the basis thereof Krapp, Journal of World Trade Law 1985 p. 343 expected that not only the CISG but also the Limitation Convention would be accepted worldwide.

158 Art. 1 CISG and Art. 3 Limitation Convention.

159 Arts. 2 and 3 CISG and Arts. 4 and 6 Limitation Convention.

160 In the same sense see Heuzé (1992) no. 131.

161 Heuzé (1992) no. 465 deplores this circumstance.

Limitation Convention was not a success.[162] If it had been incorporated into the new CISG this might have adversely affected the uniform law on the international sale of goods. It was, after all, the intention that, following the disappointments of the 1964 Hague Conventions, the CISG should evolve into the global law on the sale of goods. The limitation periods rules were merely extra ballast and could therefore be better left in an independent instrument. In addition, as the limitation period was already regulated in a convention it would have taken an extra effort - albeit of a technical nature - to have incorporated it into the new Convention. The rules governing the limitation period are in themselves in keeping with the structure of the CISG and could have formed a part of this Convention along with the other parts. The lack of interest in the Limitation Convention could have been remedied by the drafters of the CISG if they had permitted a reservation for the limitation period provisions. Whatever the case, this did not happen and we can now only guess at the reasons. Nonetheless, just how closely the limitation period rules are related to the uniform law on the sale of goods is evident from the opportunity which the drafters of the CISG may possibly have deliberately ignored. In view of this close relationship, one may wonder why the majority of the 53 countries that have now acceded to the UN Convention have not also ratified simultaneously the instrument that complements it.[163] According to Diedrich,[164] it is regrettable that the no agreement was reached during the conference in Vienna in 1980 that each State that ratified the CISG should be obliged to approve at the same time the Limitation Convention and the Protocol.

As stated in the introduction, the United States recently ratified the Limitation Convention at the suggestion of the American Bar Association.[165] The reasons for doing so may be summarised as follows:[166] (1) the Convention provides certainty about the date on which claims can no longer be instituted and such certainty is of great value in international commerce; (2) application of the rules of the Convention produces a result comparable to the application of a federal law of the United States; (3) the 4-year period is an acceptable period

---

[162] The following countries had ratified the Convention before April 1980: Ghana (1975), the Dominican Republic (1977), Czechoslovakia (1977) and Yugoslavia (1976). Norway ratified on 20 March 1980, three weeks (!) before the Convention was amended by the Protocol.

[163] In the case of six countries the date of ratification/accesion of the CISG is the same as that of the ratification/accession of the Limitation Convention: Burundi (4 September 1998), Cuba (2 November 1994), Egypt (6 December 1982), Guinea (23 January 1991), Poland (19 May 1995), Uganda (12 February 1992) and Zambia (6 June 1986). In the case of Mexico there is barely a month separating both dates (29 December 1987 CISG and 21 January 1988 Limitation Convention). Uruguay first ratified the Limitation Convention (1 November 1997) and acceded more than a year later to CISG (25 January 1999).

[164] Diedrich, RIW 1995 p. 362.

[165] See American Bar Association, Section of International Law and Practice, Reports to the House of Delegates, Int. Law 1990 pp. 583-599.

[166] See extensively on this point Winship, Int. Law 1994 pp. 1071-1081.

for international commerce and corresponds to the provisions of ? 2-275 of the US Uniform Commercial Code;[167] (4) the Convention limits the scope for forum shopping; (5) the Convention reduces the costs of studying the content of foreign law; (6) the Convention serves as additional law in cases where the parties have not made any other arrangements. In addition, the seller and buyer may, if they wish, exclude the uniform law on prescription. Winship[168] gives a simple but telling description of the significance of the Limitation Convention for international commerce in his commentary on the Convention following its approval by the United States.

> While not a major treaty, the Convention does remove yet another legal barrier to the free flow of trade.

Burman[169] hopes in this connection that the Convention will be frequently applied in international commercial arbitration ?as an acceptable synthesis of current statute of limitation law which avoids citing particular national codes.

5.6 The Dutch view of the Limitation Convention

When it was concluded in 1974 the Limitation Convention received little if any attention in the Netherlands. 66 countries were represented at the 3-week conference in New York. Since only 28 countries had attended the conference in The Hague in 1964 on the international sale of goods,[170] the attendance at the New York conference testified to a remarkable level of interest in the unification of substantive private law.[171] However, the subject was judged of little import in the Netherlands. Nor did the Netherlands show much interest in the work of UNCITRAL in general. The reaction of the Dutch Minister of Justice to the preliminary draft presented in 1972[172] was negative. The Netherlands saw no reason why the scope of the draft convention and that of the Uniform Law Conventions on the International Sale of Goods (LUVI) should differ. In view of the close relationship with the LUVI, it was felt that there was no need to convene an international conference on prescription as early as 1974. It would be better to await the outcome of the review of the LUVI. Only then could a definite view be expressed on the merits of the draft convention.[173] In a letter to the Minister for Foreign

---

167 For a comparison with the Limitation Convention see extensively Hill. Texas Int. Law Journal 1990 pp. 1-22 and Burman, Commercial Law Annual 1994 pp. 287-289.

168 See note 162, p. 1081.

169 Commercial Law Annual 1994 p. 295.

170 See extensively Landfermann, RabelsZ 1975 p. 255.

171 On its materialisation see Girsberger (1989) pp. 156-158.

172 On this see Loewe, in: Festschrift für Zepos 1973 pp. 409-420.

173 In June 1973 within the Council of Europe's *Comité de coopération juridique*, which fell under the *Sous-Comite sur la prescription extinctive en matiere civile et commerciale*, the draft convention drawn up by UNCITRAL was discussed. On 20 September 1970 this *Comité* had drawn up general regulations for the releasing limitation in the *Projet de régles europeennes relatives à la prescription extinctive en*

Affairs on 4 July 1973 the Minister of Justice wrote:[174]

> I do not, incidentally, consider it a good idea to apply what is in my view a very complicated and rather opaque set of rules to such a limited subject as prescription in relation to the international sale of goods, since this would be disadvantageous rather than advantageous to international commerce.

As is evident from the above, the final version differed in many respects from the preliminary draft. Nonetheless, the Dutch position was and remained noncommittal. W.G. Belinfante, a retired civil servant who had formerly worked on private law legislation, took part in the 1974 conference on behalf of the Netherlands without receiving prior instructions from the Ministry of Justice. It was felt that there was no need for international rules in practice. It was also known in advance that the negotiations would be difficult since widely differing solutions were conceivable. The Dutch delegate was in any event aware of this.[175]

But what of the present position? In an opinion of 28 February 1990 submitted by the Ministry of Justice to the Ministry of Foreign Affairs[176] concerning the position regarding the Limitation Convention, it was stated that for the time being there was no reason to accede to the Convention since none of the Netherlands? trading partners in the West had done so. Substantive objections too were mentioned. The opinion of the Ministry of Justice was endorsed by the Ministry of Economic Affairs.[177] The 1991 annual survey[178] submitted by the government to parliament shows that the Limitation Convention had accordingly been added to the list of treaties in respect of which a definite decision had been taken that it would not be desirable or worthwhile to become a party to them.[179]

Finally, the lack of scholarly interest in the unification of prescription law at the international level is evident from a thesis published by Koopman in 1993 on the subject of discharge by prescription. Although this thesis contained many comparative law assessments of German, French, Belgian and Swiss law, it did not make a passing mention of the Limitation Convention.

---

matiere civile et commerciale, CCJ (70) 24, Annex III. These efforts remained without success, however.

174 From the Ministry of Justice's records.

175 Information received from W.G. Belinfante during a discussion on 20 February 1996.

176 Referring to a letter from the Ministry of Foreign Affairs dated 23 November 1989.

177 Letters deposited at the Ministry of Foreign Affairs' Treaties Department on 23 November 1989.

178 Proceedings of the Lower House, 1990-1991, 21 800 V no. 66 p. 9.

179 The Limitation Convention is erroneously referred to with the date 2 June 1974 instead of 14 June 1974, see previous note.

6. NATIONAL PRESCRIPTION LAW ?VERSUS? UNIFORM PRESCRIPTION LAW

When describing the provisions of the Limitation Convention, authors generally compare them with the national rules on prescription.[180] After comparing the provisions of the Convention with the prescription rules in the Uniform Commercial Code one author[181] concludes:[182]

> `Practitioners engaged in projects involving the sale of goods across national boundaries should take note of the substantive provisions of the Limitation Convention, especially when differing national laws might lead to irremediable conflicts. The Limitation Convention provides an extensive set of rules that apply to a variety of transactions in goods and, thus, has the potential for far-reaching effects. The uniformity provided by the Limitation Convention will resolve the inconsistent and frequently conflicting laws a party engaged in international trade often faces.'

Marchand too[183] is convinced of the practicability of the uniform rules on the limitation period in international commerce and raises the subject of the application of national prescription law in an original way. He takes as his starting point the uniform law as laid down in the Limitation Convention and the function of this Convention in relation to the CISG. What influence do the international rules have on the national rules which were conceived not for international but for internal cases? Marchand examines three possibilities in relation to - in his case - the rules of Article 210 of the Swiss OR:[184] (1) direct application of the national rules; (2) amendment of the national rules; and finally (3) abolition of the national rules. Marchand considers direct application of the short Swiss limitation period to be contrary to *l?esprit de la Convention*.[185] The second possibility - amendment of the national law to bring it into line with the

---

180 See, for example, Girsberger (1989) pp. 25-43, 52-69, making a comparison with Swiss, English, American, Scottish and South African law; Krapp, Journal of World Trade Law 1985 pp. 360-362, making a comparison with German, Swiss and French law; Asam, Jahrbuch fur Italienisches Recht 1992 pp. 59-60, making a comparison with German and Italian law; and Marchand (1994) pp. 285-295, making a comparison with Swiss law.

181 Hill, Texas Int. Law Journal 1990 p. 22.

182 Para. 2-725.

183 Marchand (1994) pp. 286-295.

184 As a consequence of this provision the period of limitation is extremely short. It begins to run at the moment the goods come into the buyer's possession. The first section reads as follows: `Die Klagen auf Gewährleistung wegen Mängeln der Sache verjähren mit Ablauf eines Jahres nach deren Ablieferung an den Käufer, selbst wenn dieser die Mängel erst später entdeckt, es sei denn, dass der Verkäufer eine Haftung auf längere Zeit übernommen hat.'

185 Marchand (1994) pp. 286-289.

international situation - has his full support. By amendment he means a special rule governing the limitation of actions arising from contracts for the international sale of goods to which uniform law is applicable, as promulgated by the German legislator to supplement ratification of the CIGS. Article 3 of the German *Vertragsgesetz*[186] reads:

> `Auf die Verjährung der dem Käufer nach Artikel 45 des Übereinkommens von 1980 zustehenden Ansprüche wegen Vertragswidrigkeit der Ware sind, sofern nicht die Vertragswidrigkeit auf Tatsachen beruht, die der Verkäufer kannte oder über die er nicht in Unkenntnis sein konnte und die er dem Käufer nicht offenbart hat, die ?? 477 und 478 des Bürgerlichen Gesetzbuchs entsprechend anzuwenden mit der Maßgabe, daß die in ? 471 Abs. 1 Satz 1 des Bürgerlichen Gesetzbuches bestimmte Frist mit dem Tage beginnt, an dem der Käufer gemäß Artikel 39 des Übereinkommens die Vertragswidrigkeit dem Verkäufer anzeigt. Das Recht des Käufers, die Aufhebung des Vertrages zu erklären oder den Preis herabzusetzen, gilt im Sinne des Satzes 1 als Anspruch auf Wandlung oder Minderung.'

A condition for the prescription regulated in Article 3 is the applicability of German law. Without this provision the short limitation period of six months, as regulated in ? 477, paragraph 1, first sentence. BGB would start to run at the moment of delivery of the goods. In the case of hidden defects discovered only after the expiry of six months this would mean that the limitation period had already expired, although the buyer is entitled under Article 39, paragraph 2, of the CISG to rely on a lack of conformity within two years of delivery.[187] Article 3 therefore applies only to remedies available to the buyer under Article 45 of the CISG on account of non-conformity. According to Marchand,[188] the absence of a statutory basis in Switzerland means that such an amendment cannot be made by the courts there. After referring to a number of other Swiss authors he therefore advocates[189] abolition of Article 210 OR, which applies specifically to contracts for the sale of goods, *dans le contexte du droit uniforme* in favour of the general Swiss prescription rules that are more favourable to the debtor.[190]

As far as Swiss law is concerned, where there is clear friction between the uniform law on the sale of goods and the national rules on prescription which are not in line with the uniform law, Marchand has thus chosen the correct premise. When applying the law it is necessary to

---

186 *Gesetz zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf* of 5 July 1989, BGBl. II S. 586.

187 See Schlechtriem in: Von Caemmerer/Schlechtriem (1995) Art. 3 VertragsG nos. 3-6.

188 Marchand (1994) pp. 289-290: `La solution allemande est donc une excellente solution, qui permet l'application du droit national allemand tout en l'adaptant aux contexte du droit uniforme. Cette solution est à prôner *mutatis mutandis* et *de lege ferenda* en droit suisse.'.

189 Idem, pp. 291-294.

190 According to Art. 127 OR the limitation period runs for ten years.

refer to the uniform law if the contract of sale is governed by the CISG.[191]

Can Marchand?s views also be of relevance for instance to Dutch law? In the new Dutch Civil Code the legislator has opted for a limitation period not exceeding twenty years,[192] but a much shorter limitation period applies to actions for non-performance and for annulment on the grounds of error. Such actions are barred after two years under Article 7:23 of the Civil Code. The period starts to run at the moment that the buyer informs the seller that what has been delivered is not in conformity with the contract. The notice must be given after the buyer has discovered the non-conformity or could reasonably be expected to have discovered it. On the other hand, the action brought by the seller for payment of the purchase price - an action which seeks performance of an obligation resulting from a contract to give or do - is barred under Article 3:307 (1), of the Civil Code by the expiration of five years from the start of the day following that on which the claim becomes due.[193]

This brief outline of the rules for the limitation of actions resulting from contracts for the sale of goods shows that Article 7:23 scarcely creates any problems in so far as the buyer exercises his right to protest in accordance with Article 39 of the CISG. The term under both sets of rule is two years. However, a difference exists as regards the *dies a quo,* even in relation to Dutch law. The period under Article 39 (2), CISG starts to run at the moment that the goods are actually handed over to the buyer, whereas the period under Article 7:23 of the Civil Code starts to run at the moment that the buyer notifies the seller that of non-conformity. This difference in the commencement dates presents few problems, however, since the date of notification to the seller will usually be immediately after the goods are handed over to the buyer. Nonetheless, overall harmony between the rules of prescription and uniform law on the sale of goods is guaranteed only by the Limitation Convention. This is because the parties are in uncertainty about the question of whether the national prescription rules designated by private international law does not frustrate the period of Article 39, paragraph 2, of the CISG. The designation of the applicable prescription law provides a solution in this case, but this means that the parties must have thought of this choice of law provision in the contract.

CONCLUDING REMARKS

---

[191] Keller/Siehr (1995) p. 167 are also of the opinion that Art. 210 OR (1) does not apply when the parties can make use of a longer date of expiry as envisaged in Art. 39(1) CISG.

[192] Art. 3:306 new Civil Code. Previously, under Art. 2004 of the old Civil Code the period was 30 years.

[193] An interruption to the limitation period will occur with a written demand or a written notice by the debtor in which he unambiguously reserves his right of performance (Art. 3:317 Civil Code), with an act giving rise to criminal proceedings (Art. 3:316 section 1 Civil Code), or with the acknowledgement of the legal claim (Art. 3:318 Civil Code). The parties can by agreement deviate from the periods of limitation applicable under the law on condition that the contractually agreed period is shorter than that legally prescribed. Otherwise, it would be the case that the debtor would be protected to a lesser degree than under legal regulation. See extensively Hartkamp (1992) pp. 604-648.

The parties to international sale of goods transactions should take account of the possibility that uniform prescription law as agreed in the Limitation Convention may in certain circumstances also be eligible for application in a legal action in a country that is not a party to the Limitation Convention. The automatic applicability of the uniform prescription law may, however, be prevented by its explicit exclusion.

The private international law complications caused by the classification of prescription in the various legal systems do not arise when a case comes within the scope of the Limitation Convention. This is because, independently of the different theoretical approaches to the question in the national legal systems, the Convention applies if the period satisfies the description given in Article 1, paragraph 1; the action can no longer be successfully instituted by reason of the expiration of a period of time. The drafters of the Limitation Convention have succeeded in creating a suitable rule substrate for international commerce. This bridges not only the differences between the Anglo-American solutions and those of continental Europe but also the differences in the length of the prescription periods adopted by European legal systems. A rule of national law that the limitation of actions in a contract for the international sale of goods is governed by means of private international law may, in the absence of a choice of law, result in unpleasant surprises. Although the majority of cases are governed by uniform law on the sale of goods, the remedies available to the parties under the CISG are ultimately ?frustrated? by national prescription law. This is because a national prescription rule is in many cases not geared to the needs of international commerce.

Even a uniform rule of private international law which subjects prescription to the *lex causae* does not solve the problem of legal uncertainty caused by the differing prescription periods under the *lex causae*. The only solution is a uniform and codified international rule. In keeping with Diedrich?s suggestion,[194] a good case can be made out for all States that are parties to the CISG to accede to the Limitation Convention and for the industrialised countries to abandon their insistence on the short prescription periods favourable to their exporters, particularly since under Article 39, paragraph 1, of the CISG the buyer can only protest about the non-conformity of goods within 2 years of the date on which the goods are handed to him. National legislators should give serious consideration to whether they could not modify their internal law in order to simplify international commerce, even if such a change would represent a break with their own traditions and even if they feel that some aspects are better regulated in their own national prescription law than in the Limitation Convention.[195] This view is endorsed by Smit,[196] who concluded as follows shortly after the introduction of the Limitation Convention:

> `Although the significance of 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

---

194 RIW 1995 p. 363.

195 See also Krapp, Journal of World Trade Law (1990) p. 363.

196 A member of the American delegation, Am. J. Comp. L. 1975 p. 355.

affirmation of a commitment to a continued seeking of solutions to international problems on an international plane.'

The United States ratified the uniform prescription rules twenty years after the Limitation Convention was concluded. For a buyer situated in one of the other 44 countries that are parties to the CISG it may now be attractive to have his goods delivered by a seller established in the United States. Although such a prediction is naturally hypothetical, the ratification of the Limitation Convention by an influential industrialised country is in any event an important step in the direction of the general validity of the Limitation Convention. Accordingly, this cannot be a matter of complete indifference to the national legislators of other exporting countries.

Bibliography

American Bar Association, Section of International Law and Practice, Reports to the House of Delegates, 1. Convention on the Limitation Period in the International Sale of Goods, Int'l Law 1990 pp. 583-599

Asam, H., Rechtsfragen der Verjährung kaufvertraglicher Ansprüche im deutsch-italienischen Rechtsverkehr, in: Jahrbuch für Italienisches Recht 5 (C.F. Müller Juristischer Verlag-Heidelberg 1992) pp. 59-90

Bertrams, R.I.V.F., Enige aspecten van het Weens Koopverdrag, Preadviezen, uitgebracht voor de Vereniging voor Burgerlijk Recht (Koninklijke Vermande-Lelystad 1995) pp. 1-80

Bertrams, R.I.V.F./Van der Velden, F.J.A., Overeenkomsten in het internationaal privaatrecht en het Weense Koopverdrag (W.E.J. Tjeenk Willink-Zwolle 1994)

Bess, J., Das Übereinkommen über die Verjährungsfrist beim internationalen Kauf und die Ausschlußfristen der Art. 39 und 49 EKG, RIW 1975 pp. 130-134

Boele-Woelki, K., Geünificeerd materieel recht gaat vóór een conflictenrechtelijke benadering, Het formele toepassingsgebied van het Weense Koopverdrag, in: Op recht, ber Amicorum Struycken (Tjeenk Willink-Zwolle 1996) pp. 11-18

Burman, H.S., Harmonization of International Commercial Law: U.S. Accession to the United Nations Limitations Convention, Commercial Law Annual 1994 pp. 277-295

Von Caemmerer, E./Schlechtriem, P., Kommentar zum Einheitlichen UN-Kaufrecht (C.H. Beck'sche Verlagsbuchhandlung-München 1995)

Enderlein, F./Maskow, D./Strohbach, H., Internationales Kaufrecht, Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention (Rudolf Haufe Verlag GmbH & Co. KG-Freiburg/Berlin 1991)

Ferrari, F., CISG Article 1(1)(B) and Related Matters: Brief Remarks on the Occasion of a Recent Dutch Court Decision, NIPR 1995 pp. 317-328

Ferrari, F., Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, Preadviezen, uitgebracht voor de Vereniging voor Burgerlijk Recht (Koninklijke Vermande-Lelystad 1995) pp. 81-174

Girsberger, D., Verjährung und Verwirkung im internationalen Obligationenrecht, Schweizer Studien zum internationalen Recht, Band 57 (Schulthess Polygraphischer Verlag-Zürich 1989)

Hage Chahine, F., La prescription extinctive en droit international privé, Cours à l'Académie de droit international de la Haye, 1995 (wordt gepubliceerd in Receuil des Cours)

Hartkamp, A.S., Verbintenissenrecht, Deel I, De verbintenis in het algemeen (W.E.J. Tjeenk Willink-Zwolle 1992)
Hay, P., Die Qualifikation der Verjährung im US-amerikanischen Kollisionsrecht, IPRax 1989 pp. 197-202
Herber, R., UN-Kaufrechtsübereinkommen: Produkthaftung – Verjährung, MDR 1993 pp. 105-107
Heuzé, V., La vente internationale de marchandises (GLN Joly éditions-Paris 1992)
Hill, A.F., A Comparative Study of the United Nations Convention on the Limitation Period in the International Sale of Goods and Section 2-725 of the Uniform Commercial Code, Texas Int'l Journal 1990 pp. 1-22
Hondius, E.H. (ed.), Extinctive Prescription, On the Limitation of Actions, XIVth International Congress of Comparative Law (Kluwer Law International-The Hague/London/Boston 1995)
Honsell, H., J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Zweites Buch, Recht der Schuldverhältnisse, ?? 433-534 (Sellier/De Gruyter-Berlin 1995)
Karollus, M., UN-Kaufrecht: Hinweise für die Vertragspraxis, JBl 1993 pp. 23-33
Keller, M./Siehr, K., Allgemeine Lehren des internationalen Privatrechts (Schulthess Polygraphischer Verlag-Zürich 1986)
Keller, M./Siehr, K., Kaufrecht (Schulthess Polygraphischer Verlag-Zürich 1995)
Koopmann, M.W.E., Bevrijdende verjaring (Kluwer-Deventer 1993)
Kosters, J., Het Internationaal Burgerlijk Recht in Nederland (De Erven F. Bohn-Haarlem 1917)
Krapp, Th., The Limitation Convention for International Sale of Goods, Journal of World Trade Law 1985 pp. 343-363
Krebs, M., UN-Kaufrecht: Erste Bilanz – Deutsch-französische Tagung am 13.10.1995 in Paris, NJW 1996 pp. 500-501
Landfermann, H.-G., Das UNCITRAL-Übereinkommen über die Verjährung beim internationalen Warenkauf, RabelsZ 1975 pp. 253-277
Loewe, R., Der Übereinkommensentwurf der Vereinten Nationen über Verjährung in internationalen Kaufsachen, in: E. von Caemmerer e.a. (eds.) Festschrift für Pan. J. Zepos, II. Band (Ch. Katsikalis Verlag-Athen/Freiburg/Köln 1973) pp. 409-420
Magnus, U., Aktuelle Fragen des UN-Kaufrechts, ZEuP 1995 pp. 80-99
Magnus, U., Die allgemeinen Grundsätze im UN-Kaufrecht, RabelsZ 1995 pp. 469-494
Marchand, S., Les limites de l'uniformisation materiélle du droit de la vente internationale, Collection Genèvoise (Helbing & Lichtenhahn-Bâle/Francfort-sur-le-Main 1994)
Neumayer, K.H., Offene Fragen zur Anwendung des Abkommens der Vereinten Nationen über den internationalen Warenkauf, RIW 1994 pp. 99-109
Piltz, B., Internationales Kaufrecht, NJW 1989 pp. 615-621
Piltz, B., Internationales Kaufrecht, Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung (C.H. Beck Verlag-München 1993)
Reinhart, G., UN-Kaufrecht (C.F. Müller Juristischer Verlag-Heidelberg 1991)
Smit, H., The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's Firstborn, Am. J. Comp. L. 1975 pp. 337-355
Sono, K., Commentary on the Convention on the Limitation Period in the International Sale of Goods, done at New York, 14 June 1974, Yearbook UNCITRAL 1979, Vol. X pp. 145-173
Spiro, K., Befristung und Verjährung der Ansprüche aus dem Wiener Kaufrechtsüber-

einkommen, in: Hoyer, H./Posch, W. (eds.) Das Einheitliche Wiener Kaufrecht (Orac-Wien 1992) pp. 195-206
Strikwerda, L., De overeenkomst in het IPR, Praktijkreeks IPR, deel 11 (Kluwer-Deventer 1995)
Strikwerda, L., Kroniek van het internationaal privaatrecht, NJB 1996 pp. 408-412
Trompenaars, B.W.M., Pluriforme unificatie en uniforme interpretatie, In het bijzonder de bijdrage van UNCITRAL aan de internationale unificatie van het privaatrecht (Kluwer-Deventer 1989)
Winship, P., The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's Firstborn, Int'l Law. 1994 pp. 1071-1081
Witz, C., L'exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par la volonté des parties, D. 1990 pp. 107-112

Appendix

CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS, JUNE 14, 1974 AS AMENDED BY THE PROTOCOL, APRIL 11, 1980[197]

Preamble

The States Parties to the present Convention,

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Have agreed as follows:

Part I. Substantive provisions

Sphere of application

Art. 1 (1) This Convention shall determine when claims of a buyer and a 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. Such period of time is hereinafter referred to as "the limitation period".

(2) This Convention shall not affect a particular time-limit within which one party is required, as a condition for the acquisition of exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

(3) In this Convention:

(a) "buyer", "seller" and "party" mean persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or obligations under the contract of sale;

(b) "creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money;

(c) "debtor" means a party against whom a creditor asserts a claim;

(d) "breach of contract" means the failure of a party to perform the contract or any performance not in conformity with the contract;

(e) "legal proceedings" includes judicial, arbitral and administrative proceedings;

(f) "person" includes corporation, company, partnership, association or entity, whether private or public, which can sue or be sued;

(g) "writing" includes telegram and telex;

(h) "year" means a year according to the Gregorian calendar.

Art. 2 For the purposes of this Convention:

(a) a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States;

(b) the fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(c) where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or comtemplated by the parties at the time of the conclusion of the contract;

(d) where a party does not have a place of business, reference shall be made to his habitual residence;

(e) neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Art. 3[198](1) This Convention shall apply only

---

197. Yearbook of the United Nations Commission on the International Trade Law, 1992, Vol. XXIII.

198. Text as amended in accordance with article I of the 1980 Protocol. States that make a declaration under article 36 *bis* (Article XII of the 1980 Protocol) will be bound by article 3 as originally adopted in the Limitation Convention, 1974. Art. 3 as originally adopted reads as follows:

(a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or

(b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale.

(2) This Convention shall not apply when the parties have expressly excluded its application.

Art. 4[199] This Convention shall not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

Art. 5 This Convention shall not apply to claims based upon:

(a) death of, or personal injury to, any person;

(b) nuclear damage caused by the goods sold;

(c) a lien, mortgage or other security interest in property;

(d) a judgement or award made in legal proceedings;

(e) a document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

(f) a bill of exchange, cheque or promissory note.

Art. 6 (1) This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Art. 7 In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity.

The duration and commencement of the limitation period

Art. 8 The limitation period shall be four years.

Art. 9 (1) Subject to the provisions of articles 10, 11 and 12 the limitation period shall commence on the date of which the claim accrues.

(2) The commencement of the limitation period shall not be postponed by:

(a) a requirement that the party be given a notice as described in paragraph 2 of article 1, or

(b) a provision in an arbitration agreement that no right shall arise until an arbitration award has been made.

Art. 10 (1) A claim arising from a breach of contract shall accrue on the date on which such breach occurs.

(2) A claim arising from a defect or other lack of conformity shall accrue on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.

`*Art. 3* (1) This Convention shall apply, only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States.

(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.

(3) This Convention shall not apply when the parties have expressly excluded its application.'

199. Text of paragraphs *(a)* and *(e)* as amended in accordance with Article II of the 1980 Protocol. Paragraphs *(a)* en *(e)* of article 4 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

`*(a)* of goods bought for personal, family or household use;

(e) of ships, vessels or aircraft;'.

(3) A claim based on fraud committed before or at the time of the conclusion of the contract or during its performance shall accrue on the date on which the fraud was or reasonably could have been discovered.

Art. 11 If the seller has given an express undertaking relating to the goods which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of any claim arising from the undertaking shall commence on the date on which the buyer notifies the seller of the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

Art. 12 (1) If, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due.

(2) The limitation period in respect of a claim arising out of a breach by one party of a contract for the delivery of or payment for goods by instalments shall, in relation to each separate instalment, commence on the date on which the particular breach occurs. If, under the law applicable to the contract, one party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant instalments shall commence on the date on which the declaration is made to the other party.

Cessation and extension of the limitation period

Art. 13 The limitation period shall cease to run when the creditor performs any act which, under the law of the court where the proceedings are instituted, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim.

Art. 14 (1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings.

(2) In the absence of any such provision, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration is delivered at the habitual residence or place of business of the other party or, if he has no such residence or place of business, then at his last known residence or place of business.

Art. 15 In any legal proceedings other than those mentioned in articles 13 and 14, including legal proceedings commenced upon the occurence of:

(a) the death or incapacity of the debtor,

(b) the bankruptcy or any state of insolvency affecting the whole of the property of the debtor, or

(c) the dissolution or liquidation of a corporation, company, partnership, association or entity when it is the debtor, the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, subject to the law governing the proceedings.

Art. 16 For the purposes of article 13, 14 and 15, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the claim against which the counterclaim is raised, provided that both the claim and the counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction.

Art. 17 (1) Where a claim has been asserted in legal proceedings within the limitation period in accordance with article 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

(2) If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended.

Art. 18 (1) Where legal proceedings have been commenced against one debtor, the limitation period prescribed in this Convention shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced.

(2) Where legal proceedings have been commenced by a subpurchaser against the buyer, the limitation period prescribed in this Convention shall cease to run in relation to the buyer's claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

(3) Where the legal proceedings referred to in paragraphs 1 and 2 of this article have ended, the limitation period in respect of the claim of the creditor or the buyer against the party jointly and severally liable or against the seller shall be deemed not to have ceased running by virtue of paragraphs 1 and 2 of this article, but the creditor or the buyer shall be entitled to an additional year from the date on which the legal proceedings ended, if at that time the limitation period had expired or had less than one year to run.

Art. 19 Where the creditor performs, in the State in which the debtor has his place of business and before the expiration of the limitation period, any act, other than the acts described in articles 13, 14, 15 and 16, which under the law of that State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by that law.

Art. 20 (1) Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement.

(2) Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgement under paragraph (1) of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

Art. 21 Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

Modification of the limitation period by the parties

Art. 22 (1) The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article.

(2) The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed.

(3) The provisions of this article shall not affect the validity of a clause in the contract of sale which stipulates that arbitral proceedings shall be commenced within a shorter period of limitation than that prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale.

General limit of the limitation period

Art. 23 Notwithstanding the provisions of this Convention, a limitation period shall in any event expire not later than 10 years from the date on which it commenced to run under articles 9, 10, 11 and 12 of this Convention.

Consequences of the expiration of the limitation period

Art. 24 Expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings.

Art. 25 (1) Subject to the provisions of paragraph (2) of this article and of article 24, no claim shall be recognized or enforced in any legal proceedings commenced after the expiration of the limitation period.

(2) Notwithstanding the expiration of the limitation period, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

(a) if both claims relate to the same contract or to several contracts concluded in the course of the same transaction; or

(b) if the claims could have been set-off at any time before the expiration of the limitation period.

Art. 26 Where the debtor performs his obligation after the expiration of the limitation period, he shall not on that ground be entitled in any way to claim restitution even if he did not know at the time when he performed his

obligation that the limitation period had expired.

Art. 27 The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

Calculation of the period

Art. 28 (1) The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last month of the limitation period.

(2) The limitation period shall be calculated by reference to the date of the place where the legal proceedings are instituted.

Art. 29 Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes legal proceedings or asserts a claim as envisaged in article 13, 14 or 15, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a claim could be asserted in that jurisdiction.

International effect

Art. 30 The acts and circumstances referred to in articles 13 through 19 which have taken place in one Contracting State shall have effect for the purposes of this Convention in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

Part II. Implementation

Art. 31 (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

(3) If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

(4)[200] If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party to a contract is located in that State, this place of business shall, for the purposes of this Convention, be considered not to be in a Contracting State unless it is in a territorial unit to which the Convention extends.

Art. 32 Where in this Convention reference is made to the law of a State in which different systems of law apply, such reference shall be construed to mean the law of the particular legal system concerned.

Art. 33 Each Contracting State shall apply the provisions of this Convention to contracts on or after the date of the entry into force of this Convention.

Part III. Declarations and reservations

Art. 34[201] (1) Two or more Contracting States which have the same or closely related legal rules on matters

---

200. New paragraph 4, added in accordance with Article III of the 1980 Protocol.

201. Text as amended in accordance with article IV of the 1980 Protocol. Art. 34 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, read as follows:

`*Art. 34* Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be governed by this Convention, because they apply to the matters governed by this

governed by this Convention may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under paragraph (2) of this article subsequently becomes a Contracting State, the declaration made shall, as from the date on which this Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Art. 35 Contracting State may declare, at the time of the deposit of its instrument of ratification or accession, that it will not apply the provisions of this Convention to actions for annulment of the contract.

Art. 36 Any State may declare, at the time of the deposit of its instrument of ratification or accession, that it shall not be compelled to apply the provisions of article 24 of this Convention.

Art. 36bis (Art. XII of the Protocol) Any State may declare at the time of the deposit of its instrument of accession or its notification under article 43 *bis* that it will not be bound by the amendments to article 3 made by article I of the 1980 Protocol.[202] A declaration made under this article shall be in writing and be formally notified to the depositary.

Art. 37[203] This Convention shall not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the seller and buyer have their places of business in States parties to such agreement.

Art. 38 (1) A Contracting State which is a party to an existing convention relating to the international sale of goods may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply this Convention exclusively to contracts of international sale of goods as defined in such existing convention.

(2) Such declaration shall cease to be effective on the first day of the month following the expiration of 12 m-onths after a new convention on the international sale of goods, concluded under the auspices of the United Nations, shall have entered into force.

Art. 39 No reservation other than those made in accordance with articles 34, 35, 36 bis and 38 shall be permitted.

Art. 40 (1) Declarations made under this Convention shall be addressed to the Secretary-General of the United Nations and shall take effect simultaneously with the entry of this Convention into force in respect of the State concerned, except declarations made thereafter. The latter declarations shall take effect on the first day of the month following the expiration of six months after the date of their recept by the Secretary-General of the United Nations. [Reciprocal unilateral declarations under article 34 shall take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the Secretary-General of the United Nations.][204]

(2) Any State which has made a declaration under this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the

---

Convention the same or closely related legal rules.'

202. Such a State will then be bound by article 3 of the unamended Convention. For its text, see footnote under article 3.

203. Text as amended in accordance with article V of the Protocol. Art. 37 as originally adopted in the Limitation Convention, 1974, prior to its amendment under the 1980 Protocol, reads as follows:

`*Art. 37* This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention.'

204. Last sentence of paragraph (1) of article 40 (between brackets) added in accordance with Article VI of the 1980 Protocol.

Secretary-General of the United Nations. In the case of a declaration made under article 34 of this Convention, such withdrawal shall also render inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Part IV. Final clauses

Art. 41 This Convention[205] shall be open until 31 December 1975 for signature by all States at the Headquarters of the United Nations.

Art. 42 This Convention[206] is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Art. 43 This Convention[207] shall remain open for accession by any State. The instrument of accession shall be deposited with the Secretary-General of the United Nations.

Art. 43bis (Article X of the Protocol) If a State ratifies or accedes to the 1974 Limitation Convention after the entry into force of the 1980 Protocol, the ratification or accession shall also constitute a ratification of or an accession to the Convention as amended by the 1980 Protocol if the State notifies the depositary accordingly.

Art. 43ter (Article VIII (2) of the Protocol) Accession to the 1980 Protocol by any State which is not a Contracting Party to the 1974 Limitation Convention shall have the effect of accession to that Convention as amended by the Protocol, subject to the provisions of article 44bis.

Art. 44 (1) This Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of the tenth instrument of ratification or accession.

(2) For each State ratifying or acceding to this Convention after the deposit of the tenth instrument of ratification or accession, this Convention shall enter into force on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification or accession.

Art. 44bis (Article XI of the Protocol) Any State which becomes a Contracting Party to the 1974 Limitation Convention, as amended by the 1980 Protocol, shall, unless it notifies the depositary to the contrary, be considered to be also a Contracting Party to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to the 1980 Protocol.

Art. 45 (1) Any Contracting State may denounce this Convention by notifying the Secretary-General of the United Nations to that effect.

(2) The denunciation shall take effect on the first day of the month following the expiration of 12 months after receipt of the notification by the Secretary-General of the United Nations.

Art. 45 bis (Article XIII (3) of the Protocol) Any Contracting State in respect of which the 1980 Protocol ceases to have effect by the application of paragraphs (1) and (2)[208] of article XIII of the 1980 Protocol shall remain a Contracting Party to the 1974 Limitation Convention, unamended, unless it denounces the unamended Convention in accordance with article 45 of that Convention.

Art. 46 The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

---

205. Refers to the 1974 Limitation Convention.
206. Refers to the 1974 Limitation Convention.
207. Refers to the 1974 Limitation Convention.
208. Paragraphs (1) and (2) of Article XIII of the Protocol read as follows: "(1) A Contracting State may denounce this Protocol by notifying the depositary to that effect. (2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the depositary."