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The Limitation Convention: The Forerunner to Establish UNCITRAL's Credibility

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THE LIMITATION CONVENTION: THE FORERUNNER TO ESTABLISH UNCITRAL'S CREDIBILITY

Kazuaki Sono*

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I. SUBJECT MATTER: SISTER CONVENTION TO THE UNITED
NATIONS SALES CONVENTION

A. *A Shift above Prescription v. Statute of Limitation*

The Convention on the Limitation Period in the International Sale of Goods ("Limitation Convention"), adopted in New York on June 14, 1974, is the first legal instrument that emanated from the work of the United Nations Commission on International Trade Law (UNCITRAL).¹ The Limitation Convention replaces a wealth of conflicting national laws concerning the limitation of actions over claims or rights which arise out of a contract of international sale of goods. The purpose of this Limitation Convention is to provide a concrete set of uniform rules governing the period of time within which a party to the contract must commence legal proceedings against the other party in order to assert a claim under the contract. In the Convention, this period is referred to as the *limitation period*, a term isolated from the traditional legal shorthands.

In common law countries, this is referred to as the *statute of limitation*. In civil law countries, it is a question of *prescription*. This difference in terminology is more than a matter of nomenclatures. It reflects significant differences in approaching the subject matter. Under the common law, the expiration of the limitation period is classified as a *procedural* bar of the *forum* against bringing legal proceedings. On the other hand, most civil law countries regard this question as a matter of substantive law. Thus, where the law of a civil law country is the law applicable to the contract, that law incorporates prescription rules as a matter of substance and the court in a common law country may apply the "prescription" period even if it is shorter than the period under the statute of limitation of the *forum*. Consequently, where the law applicable is that of a common law country and a suit is brought in a civil law country, the claim may never be barred. Of course, the characterization pro-

¹ The text of the Convention appears in U.N. DOC. A/CONF.63/15, reproduced in *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods*, NEW YORK, 20 MAY-14 JUNE 1974, PT. 1, U.N. DOC. A/CONF.63/16, SALES NO. E.74.V.8 (1974), in *YEARBOOK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW*, V Y.B. U.N. COMM'N ON INT'L TR. L. 210, PT. 3, CH. I, § B, U.N. DOC. A/CN.9/SFR.A/1974, U.N. SALES NO. E.75.V.2. [hereinafter the Limitation Convention].

cess of the forum's private international law will solve such absurdity, but how is far from certain.

The length of the limitation period under national laws varies widely, ranging from six months to thirty years. Some periods are short in relation to the practical requirements of international transactions. Other periods are longer than are appropriate and fail to provide the essential protection that limitation rules should afford. It was considered advisable to provide uniform rules that are as concrete and complete as possible in view of the varying concepts and approaches prevailing under national laws with respect to the limitation of claims and the prescription of rights. This Convention confines its coverage to one type of international transaction, *i.e.*, the sale of goods, and stipulates uniform rules for this type of transaction with a degree of concreteness as specifically as feasible within a text of manageable length. To protect the uniform rules from diverse applications derived from domestic laws, the Convention adopts its own self-contained framework with neutral terminology.

The Limitation Convention is a sister convention to the United Nations Convention on Contracts for the International Sale of Goods ("Sales Convention"), adopted in Vienna on 10 April 1980.² The Sales Convention deals with the substantive rights or claims of the parties arising from a contract for the international sale of goods, which would be subject to the limitation period. In fact, Article 38(2) of the Limitation Convention did anticipate future linkage with the forthcoming Sales Convention.³ At the time the Sales Convention was adopted in 1980, the Protocol amending the Limitation Convention was also adopted to take care of some adjustments which became

² OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, VIENNA, 10 MARCH-11 APRIL 1980, U.N. DOC. A/CONF.97/19, U.N. SALES NO. E.81.IV.3 (1981). Until the adoption of the Limitation Convention, official names of most of the conventions in the private law field started with the word "Convention," *e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The practice to prefix the words "United Nations" to the official title of a convention emerging from the Commission, started with the second convention, *i.e.*, the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg). Hence, the Limitation Convention is the only convention that starts without the words "United Nations" among UNCITRAL conventions.

³ See *infra* note 13, and accompanying text.

necessary in order for the two Conventions to be mutually accommodating and to apply to the same transaction.⁴

B. *1980 Protocol and Contracting States: Untangling Apparent Complication*

After entry into force of both the Limitation Convention and its Protocol, the Secretary-General of the United Nations, pursuant to the request contained in Article XIV(2) of the Protocol, prepared a text of the Convention as amended by the Protocol and transmitted its certified true copies to all States Parties to the amended Convention.⁵ However, the consolidation of the texts necessitated some renumbering as well as footnoting by the Secretariat referring to the original texts. Thus, the examination of the original texts has become indispensable.⁶ The preparation of this amended text appears to have been unnecessary and this writer submits that the reading of both original texts are far easier to understand. Furthermore, changes made by the 1980 Protocol to the substance of the 1974 Limitation Convention are only minor.⁷ The remainder concerns mostly transitional procedural matters for implementation and meets various contingencies that might have arisen in relation to the entry force of the Protocol. However, those contingencies did not occur because the Convention and Protocol entered on the same date, seven months after the entry into force of the Sales Convention. This chronology was extremely fortunate for these three legal instruments.

At present, there are seventeen contracting States to the Convention as amended by the Protocol (Argentina, Belarus, Cuba, Czech Republic, Egypt, Guinea, Hungary, Mexico, Po-

⁴ Protocol amending the Convention on the Limitation Period in the International Sale of Goods, "Final Act of the United Nations Conference on Contracts for the International Sale of Goods" (A/CONF.97/18), annex II, reproduced in *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, VIENNA, 10 MARCH-11 APRIL 1980, PT. 1, U.N. Doc. A/CONF.97/19, U.N. SALES No. E.81.IV.3, in *UNCITRAL: The United Nations Commission on International Trade Law*, ANNEX II.D, U.N. SALES No. E.86.V.8.

⁵ The text is reproduced in YEARBOOK, PT. 3 (1989).

⁶ For example, the American Bar Association's report on the Limitation Convention, *infra* note 22, bases their examination of the 1974 Limitation Convention and the 1980 Protocol on the original texts.

⁷ Articles I to XV of the Protocol amend articles 3, 4, 31, 34, 37 and 40 of the Limitation Convention.

land, Republic of Moldova, Romania, Slovakia, Slovenia, Uganda, United States, Uruguay, and Zambia). On the other hand, the number of contracting States to the original 1974 Limitation Convention is twenty-four, *i.e.*, the seventeen above plus seven.⁸ Out of the latter seven States, four (Dominican Republic, Ghana, Norway, and Yugoslavia) ratified or acceded to the Limitation Convention before the Protocol was adopted (and have not ratified the Protocol yet); two States (Ukraine and Brundi) ratified only the original Convention in 1993 and 1998 respectively, and Bosnia and Herzegovina declared succession of the original Convention in 1994 on the theory that former Yugoslavia was a contracting State to the 1974 Convention.⁹

II. HISTORICAL CONTEXT: WHY THE LIMITATION CONVENTION CAME FIRST

A. *Political Background*

The adoption of the Limitation Convention had to precede the preparation of the Sales Convention for partly political reasons. In the early 1970s, the Commission, now popular by the name of UNCITRAL, was not well known even at the United Nations Headquarters. Diplomats stationed at diplomatic missions were conversant with international law and international relations but not with the law of international sale of goods. Some wondered why pharmacists from all over the world as-

⁸ Accession to the 1980 Protocol by any State which is not yet a Contracting Party to the 1974 Limitation Convention will have the effect of accession to that Convention as amended by the Protocol (Article VIII (2)). Nevertheless, it is also possible for a State to ratify or accede only to the 1974 Limitation Convention after the entry into force of the Protocol (Article X). For the most current status of the Limitation Convention and its Protocol, see <http://www.un.or.at/uncitral/status>.

Important note: The text of article XI of the Protocol which is reproduced at p. 115 of *UNCITRAL: The United Nations Commission on International Trade Law* 115, ANNEX II.D, U.N. SALES NO. E.86.V.8. contains an unfortunate error and it should read as follows: "Any State which becomes a Contracting Party to the 1974 Limitation Convention, as amended by this Protocol, by virtue of articles VIII, IX or X of this 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 this Protocol."

⁹ The former German Democratic Republic, one of the original signatory States to the Limitation Convention, was a participant from March 1, 1990 by virtue of its ratification of the Convention and accession to the 1980 Protocol on August 31, 1989, until October 1990 when it ceased to exist.

sembled at the United Nations to discuss the period of prescription. Many wondered if the United Nations, which deals with *peace*, could meaningfully undertake international legislation of a private law nature, which requires professional precision away from political influence. Moreover, in the field of private law, there were already well-established international bodies such as the International Institute for the Unification of Private International Law ("UNIDROIT") and the Hague Conference on Private International Law ("Hague Conference").¹⁰

In an atmosphere where this new Commission was looked at with suspicion, the Commission which was established anew in 1966 had to demonstrate that it could produce a concrete result. Fortunately, under the Commission's priority work program described below, the work on the limitation period was progressing rapidly by a working group under the strong chairmanship of Mr. Stein Rognlien of Norway. Socialist countries were also eager to adopt the Limitation Convention first. Having established trade relations with the west since 1965, these Socialist countries most likely wished to eliminate a misconception about their legal behavior by establishing uniform rules at the United Nations and by demonstrating their willingness to be bound thereby.¹¹

The opposition was nevertheless strong particularly from some western European States. The States were members of the 1964 Hague Sales Convention as well as the UNIDROIT and Hague Conference. They opposed preparing and adopting a uniform law on the limitation period independent of the law dealing with the rights or claims under a contract of interna-

¹⁰ It was understandable that the establishment of the Commission was not a pleasant development for those international organizations. For example, a report submitted to the third session of the Commission in 1970 by UNIDROIT, entitled *Progressive Codification of the Law of International Trade*, U.N. Doc. A/CN.9/L.19 aggressively demonstrated its long experience and superior expertise in this field. *Reproduced in* YEARBOOK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, I Y.B. U.N. COMM'N ON INT'L TR. L., PT. 3 (1968-70). (Note that volume I of YEARBOOK covers the Commission's activities from 1968 to 1970, but thereafter, one volume has been assigned to each year).

¹¹ While the Convention was open for signatures, the following nine States signed the Convention of which seven were socialist countries: Brazil, Byelorussia, Costa Rica, the German Democratic Republic, Hungary, Mongolia, Poland, U.S.S.R., and Ukraine.

tional sale.¹² Meanwhile, a project started in the late 1960s encountered difficulty: the Committee on Juridical Cooperation ("CJC") of the Council of Europe started the project to prepare European uniform laws on extinctive prescription of civil and commercial matters and on the calculation of time-limits. The project was too ambitious in its attempt to cover prescription in various fields together with time-limits of all nature. The CJC abandoned the project in 1970 because it became clear that no European State could anticipate ratification.¹³ Thus, it was a good opportunity for the Commission to show that it successfully could establish a workable uniform law focused on concrete issues within a defined area of law, such as international sale of goods.

B. *Process as Priority Item of UNCITRAL*

International sale of goods was one of the topics on the original program of work that was accorded priority by the Commission at its first session in 1968. In view of the wide scope and complex nature of this topic, the Commission decided to focus on particular aspects of it, including "time-limits and limitation (prescription)" in the international sale of goods, and substantive rules governing contracts for international sale of goods.¹⁴ Subsequently, during its second session in 1969, the Commission observed that the problems arising from the divergences among national rules in this area were sufficiently serious to justify the preparation of uniform international legal rules on prescription or limitation of actions for claims arising from the

¹² As a reflection of a compromise under such an atmosphere, the provision in article 38(1) permits reservation for a Contracting State to an existing convention relating to the international sale of goods, *i.e.*, the 1964 Hague Sales Convention, to declare that the Convention will apply "exclusively to contracts of international sale of goods as defined in such existing convention." However, article 38(2) also provides that such declaration becomes ineffective 12 months after a new convention on the international sale of goods under the auspices of the United Nations entered into force. This indicates clearly that the Limitation Convention was adopted with the future linkage in mind with a forthcoming new United Nations sales convention. In reality, the Limitation Convention entered into force seven months after the entry into force of the Sales Convention. Since the definition of internationality of the sales contract is the same under both conventions, article 38 has now only a historical meaning.

¹³ Council of Europe Doc. EXP/Delai (70)13, at 4.

¹⁴ The Commission's report on its first session (1968), para. 48(II), reproduced in YEARBOOK, *supra* note 10, PT. 2, CH. I, § A.

international sale of goods as a high priority issue. The Commission, therefore, established the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods, and instructed it to study the topic of "limitation or prescription"¹⁵ with a view to the preparation of a preliminary draft of an international convention.¹⁶

The Working Group, consisting of seven States, *i.e.*, Belgium, Czechoslovakia (later Poland), United Kingdom, Japan, Egypt, Argentina, and Norway, expeditiously disposed of its mandate during three sessions of two weeks (two sessions in New York and one in Geneva) from the summer of 1969 to the summer of 1971 under the strong Chairmanship of Mr. Stein Rognlien of Norway. Mr. Rognlien supported by the excellent draftsmanship of Professor Anthony Guest of the United Kingdom. The Secretariat's analysis of detailed replies from governments to a questionnaire on the operation of rules relating to limitation and time-limits in regard to international sale of goods also provided useful basis in grasping complex practical situations existing in this field.¹⁷

The Commission approved the text of a draft convention on prescription (limitation) in the international sale of goods, based on the Working Group's draft articles, at its fifth session (10 April – 5 May 1972)¹⁸ after three weeks of deliberation.¹⁹

¹⁵ Although the name of the Working Group referred to Time-limits and Limitation, note that the final instruction given to the Working Group was to focus on limitation or prescription. Thus, such time-limits for giving notice to the other party about the defects in the delivered goods as a prerequisite for asserting claims thereon (*e.g.* art. 39 of the Sales Convention), or other similar time-limits for the exercise of claims (broadly called *decheance*) have thus been excluded from the coverage of the work. It may also be noted that all the detailed reports from Czechoslovakia, Norway, the United Kingdom, and Belgium submitted in response to the Commission's general call to governments to do so concentrated only on limitation or prescription, and they became members of the Working Group. These reports are available in U.N. Doc. A/CN.9/16 and in its Add.1 and Add.2 (unfortunately not reproduced in YEARBOOK.)

¹⁶ The Commission's report on its second session (1969), paras. 40-47, reproduced in YEARBOOK, *supra* note 10, PT. 2, II.A.

¹⁷ U.N. Doc. A/CN.9/WG.1/WP.24, reproduced in YEARBOOK, *infra* note 18, PT. 2, CH. I, § B(1).

¹⁸ The text of the draft convention appears in paragraph 21 of the Commission's report on its fifth session (1972), reproduced in III Y.B. U.N. COMM'N ON INT'L TR. L., PT. 1, CH. II, § A (1972) and in A/CONF.63/4, reproduced in *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods*, New York, 20 May-14 June 1974, Y.B. U.N. COMM'N ON

Thereafter, in accordance with General Assembly resolution 2929 (XXVII) of November 28, 1972, the Commission sought comments on the draft convention from governments, analyzed the replies, and convened the United Nations Conference on Prescription (Limitation) in the International Sale of Goods from May 20 to June 14, 1974 in New York to conclude the convention based on the Commission's approved text. On June 12, 1974, the Conference adopted the Convention on the Limitation Period in the International Sale of Goods.²⁰

III. BRIEF DESCRIPTION OF RULES ON RUNNING AND EXPIRATION OF THE LIMITATION PERIOD²¹

The Convention is essentially concerned with the time within which the parties to an international sale of goods may bring legal proceedings to exercise claims. Article 8 provides that the basic length of the limitation period is *four years*. Articles 9 to 12 specifically elaborate the starting point in time for the running of the period for such claims based on breach of

INT'L TR. L., PT. 1, § B, U.N. DOC. A/CONF.63/16, U.N. SALES NO. E.74.V.8 (1974). The summary records relating to the discussion on the draft convention are reproduced in Supplement, YEARBOOK, *supra*, U.N. SALES NO. E.73.V.9. Mr. Jorge Barrera Graf (Mexico) was the Chairman of the Commission at that session.

¹⁹ The text of these draft articles which was submitted by the Working Group appears in YEARBOOK, *supra* note 18, PT. 2, CH. I, § B(2).

²⁰ For official records, see *supra* note 1.

²¹ At the request of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods (Summary records of the 10th plenary meeting, paras. 74-77, in *Official Records of the Conference*, *supra* note 19, PT. 2), a Commentary on the 1974 Limitation Convention was prepared, and reprinted in YEARBOOK (1979), *supra* note 18, PT. 3, CH. I, U.N. DOC. A/CONF.63/17 and in UNCITRAL: *The United Nations Commission on International Trade Law*, *supra* note 4, at Annex II.B. Also useful for the general understanding of the Convention are: H. Smit, *The Convention on the Limitation Period in the International Sale of goods: UNCITRAL's First-Born*, 23 AM. J. COMP. L. 337 (1975); Krapp, *The Limitation Convention for International Sale of Goods*, 19 J. WORLD TR. L. 343 (1985); Sumulong, *International Trade Law and the United Nations Convention on the Limitation Period in the International Sale of Goods*, 50 PHILIPPINE L.J. 318 (1975); and K. Sono, *Unification of Limitation Period in the International Sale of Goods*, 35 LA. L. REV. 1127 (1975). In addition, for the detailed analysis and explanation of the operation of the rules under the Convention, see *Report of the Section of International Law and Practice, American Bar Association, on the Limitation Convention, reproduced in* 24 INT'L LAWYER, NO. 2, 583 *et. al.* (1990). This report was instrumental for the accession by the United States in 1994 to the 1974 Limitation Convention, as amended by the 1980 Protocol. See also *infra* note 22.

contract, defects in the goods or other lack of conformity. The basic rule is that the limitation period begins to run on the date the claim accrues. Articles 13 to 21 indicate when the limitation period "ceases to run" or when the period is extended. Articles 24 to 27 state the consequences of the expiration of the period. The net effect of these rules is that legal proceedings for enforcement may only be brought before the limitation period has expired. Thus, no claim will be recognized or enforced in a legal proceeding commenced thereafter if a party to the proceeding invokes the expiration of the period. Legal proceedings may, however, end without a decision on the merits of the claim for various reasons. A proceeding may be dismissed because it is brought in a tribunal without jurisdiction or venue over the case, or because of procedural defects preventing adjudication on the merits; a higher authority within the same jurisdiction may declare that the lower court lacked competence to handle the case; arbitration may be stayed or set aside by judicial authority within the same jurisdiction; moreover, a proceeding may not result in a decision binding on the merits of the claim where the creditor discontinues the proceeding or withdraws his claim. Thus, article 17 covers these instances wherever "such legal proceedings have ended without a decision binding on the merits of the claim." The rule is that "the limitation period shall be deemed to have continued to run."

However, a substantial period of time may have passed after the creditor asserted his claim in a legal proceeding. If this occurs after the expiration of the limitation period, the creditor may no longer have an opportunity to institute a new legal proceeding. Therefore, article 17(2) provides: "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." On the other hand, the period may thus be extended for such a substantially prolonged period that would be no longer compatible with the purpose of providing a definite limitation period. Therefore, article 23 sets forth an over-all time period of 10 years after the claim originally accrued as the cut-off point beyond which no legal proceedings to assert the claim may be started.

To protect a party from loss of claim if the limitation period expires during pending legal proceedings which abort, some legal systems view the commencement as *suspending* the running of the limitation period until the proceedings are concluded, at which time the running of the period resumes. Other legal systems state that the commencement of legal proceedings triggers the start of a new limitation period afresh by *interruption* of the period. The Limitation Convention does not fully adopt any of these approaches.²² However, the Convention responds to the suspension technique with article 17, described above. Regarding the interruption approach, the Convention provides two situations where the limitation period recommences to run afresh. One situation is where the creditor performs in the debtor's State an act that, under the law of that State, has the effect of recommencing a limitation period. The other is where the debtor acknowledges in writing his obligation to the creditor or pays interest or partially performs the obligation from which his acknowledgement can be inferred. It should be noted, however, that in all these situations the over-all cut-off period of ten years as provided in article 23 would prevail.

The Convention also provides other special rules, *inter alia*, on the treatment of counterclaims,²³ and the effect of the expiration of limitation period on set-off as a defense.²⁴ Article 18 also provides that, where proceedings have been commenced against a buyer to the international sale of goods by a sub-purchaser from him, the limitation period ceases to run in respect of the buyer's recourse claim against the seller, provided that the buyer has informed the seller in writing within the limitation period that such a proceeding against the buyer has been commenced. This will enable the buyer to avoid the trouble and expense of instituting proceedings against the seller and the disruption of their good business relationship if it turns out that the claim against the buyer was unsuccessful.

²² But note that the American Bar Association's report, *supra* note 22, which compares the Limitation Convention with the U.S. law, finds the common ground in the rationale in approaching relevant issues, and comfortably concludes that the approach of the Convention is functionally almost the same as the Uniform Commercial Code § 2-725.

²³ See the Limitation Convention, *supra* note 1, art. 16.

²⁴ See *id.* art 25(2).

IV. SOME SPECIFIC FEATURES OF THE CONVENTION

A. *Exclusion of Decheance from the Scope: A Success Point of the Convention*

Article 39 of the Sales Convention provides that notice must be given within a reasonable time, with an additional over-all limit of two years. Non-conformity will extinguish the substantive right under the sales contract (subject to an exceptional limited remedy under article 44). Even where the law does not prescribe these notice periods, parties may agree that the buyer must give notice within a specified time or lose any claim. However, the Limitation Convention is not concerned with this notice requirement, which is sometimes called *decheance*. Article 1(2) of the Limitation Convention clearly excludes from the scope of the Convention "time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings."

This confinement of the coverage was a key for the success of the Limitation Convention because one of the reasons for the failure of the Council of Europe project in this field was its attempt to cover anything relating to *time-limit*, whether prescription or *decheance*.²⁵ The question of *decheance* is a matter which could more aptly be dealt with in relation to the rights and claims arising from a sales contract and distinct from the period within which a party must institute legal proceedings for the exercise of his rights or claims arising from the contract.

B. *Its Mandatory Character*

The parties may agree to opt out of the Limitation Convention as a whole.²⁶ Otherwise, the modification of the period by agreement of the parties is permissible only in two restricted situations: (1) it can be extended by a written declaration of the debtor only after the period started to run,²⁷ and (2) the parties may stipulate a shorter period for the commencement of arbitral proceedings, often done in commodity trading in some common law countries like the United Kingdom, provided that such

²⁵ See *supra* note 14, and accompanying text.

²⁶ See the Limitation Convention, *supra* note 1, art. 3(3).

²⁷ See *id.* art. 22(3).

stipulation is valid under the law applicable to the contract.²⁸ The latter exception to the time requirement for bringing arbitral proceedings may represent a residue of the days when an arbitral proceeding was not regarded as a legal action under the statute of limitation. Note that *decheance*, a time-limit saved by article 1(2), is outside the scope of the Limitation Convention as unrelated to the institution of legal proceedings, although the arbitral proceedings is now included as one of the legal proceedings under the Convention.

In all other situations, the provisions of the Convention bind the parties as well as legal proceedings. This is in sharp contrast to the Sales Convention, of which the substantive provisions are always subject to parties' different agreement. This distinctive nature of the Limitation Convention is also reflected in the difference between article 7 of the Limitation Convention and article 7(1) of the Sales Convention, both relating to the manner of interpretation to promote uniformity. Unlike the Sales Convention, the reference to the observance of good faith is absent from article 7 of the Limitation Convention.

C. *Exclusion of Private International Law*

The 1974 Limitation Convention applies "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."²⁹ Article 3(2), which provides that "[u]nless 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," excludes the operation of the rules of private international law. If it did not exclude the rules of private international law, it would have caused confusion because of the sharp difference in approach between the civil law and common law. The point which the original convention tried to avoid would have been brought in and the question of *characterization* under the private international law of each State would have resurfaced.

However, Article I of 1980 Protocol deletes article 3(2) of the 1974 Convention, and, after stating the rule of original arti-

²⁸ See *id.*

²⁹ See the Limitation Convention, *supra* note 1, art. 3(1).

cle 3(1) as new article 3(1)(a), provides in new article 3(1)(b) that the Convention shall apply "if the rules of private international law make *the law* of a Contracting State *applicable to the contract of sale*."³⁰ It should be noted, however, that this reference to the rules of private international law is in the context of designating the law applicable to a contract of sale, governing the rights and claims under the contract; not to the law which might become applicable to the limitation period. In other words, the Protocol only broadened the scope of applicability of the Convention to those contracts that did not otherwise fall within the ambit of the original article 3(1) of the Convention (e.g., one of the parties to the contract not having a place of business in a contracting State). On the other hand, article 1(1)(b) of the Sales Convention provides that the Convention applies "when the rules of private international law lead to the application of the law of a Contracting State." A proposal during the preparation of the Protocol to amend the original article 3(2) of the Limitation Convention in the same way as the Sales Convention was rejected.³¹ Thus, the basic attitude of the Convention to exclude the rules of private international law in relation to the limitation period remains unchanged.³²

D. *Recognition of Importance of Arbitration in International Trade*

The Limitation Convention is friendly to arbitration. It gives full credit to arbitration as an important means to settle disputes in the international trade by classifying arbitral proceedings as "legal proceedings" at the same level as judicial proceedings.³³ Orderly promotion of international commercial arbitration had already been listed as a priority item in the work of the Commission and the Limitation Convention sub-

³⁰ Protocol art. 3(1)(b) (emphasis added).

³¹ See summary records of the 7th and 8th meetings of the Second Committee in *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, *supra* note 2, at 465-70.

³² Note that, under the Sales Convention, a reservation is permitted in order to not be bound by article 1(1)(b) of the Convention under article 95. Under the Protocol to the Limitation Convention, a Contracting State may also opt to not be bound by Article I of Protocol under Article XII. Czechoslovakia (hence, now Czech Republic and Slovakia by succession) and the United States, which are contracting States to both Conventions, made reservations under both Conventions.

³³ See the Limitation Convention, *supra* note 1, art. 1(3)(e).

scribes in this direction. Certainly, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards assures the enforcement of foreign arbitral awards. However, problems could arise if the enforcement were rejected or where it was found later that the debtor's assets were in different State after an arbitral awards was obtained in another State. An arbitral proceeding may also end without award on the merits for procedural or other reasons. In such instances, can parties successfully initiate another legal proceeding despite the fact that the limitation period has already expired? At least in many civil law countries, whether the traditional law can accord *interruption* to the running of the limitation period by the institution of arbitral proceedings is uncertain. This weak aspect of arbitration is hence cured by the Limitation Convention.

E. *International Effect (Article 30)*

Article 30 is one of the most important provisions of the Limitation Convention: once a legal proceeding is initiated in one of the contracting states, the effect of cessation of the running of the limitation period is to be recognized by other contracting states. Even if a contracting State does not recognize and enforce a judgment of another contracting State, this rule applies. Suppose that a suit is brought in a contracting State and the plaintiff wins but finds no debtor's assets to seize in that State. He further realizes that the country where the debtor's assets exist does not recognize or enforce the judgment of the first State.

Under article 30, he can bring action within one year in the second State if that State is a contracting State to the Convention even if the limitation period would have otherwise already expired. Thus, it would become no longer necessary for a creditor to bring proceedings in all countries where the debtor's assets might possibly exist. The Convention not only achieves replacement by a "uniform law" of divergent domestic laws on limitation, but also provides an important solution to the world where procedural rules of each nation exist mutually independent. The Convention provides international effect for the cessation of the running of the limitation period or the extension thereof in regard to all contracting States once a legal proceed-

ing is brought in any one of the contracting States, provided that the creditor take all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

In international transactions, the possibility of a legal proceeding being dismissed without adjudication on the merits of the claim increases because of the difficulty in ascertaining in advance whether a chosen *forum* would entertain the proceeding. *Forum non conveniens* may be invoked by a court; a *forum-selection* clause may not be honored; and, above all, the failure to comply with foreign procedural requirements may result in a dismissal of a proceeding without a judgment on the merit. Under article 30, the institution of a legal proceeding after concluding without a final decision a proceeding in another contracting State becomes feasible if initiated within the extended one year, even if the limitation period would have otherwise expired.³⁴ Where the recognition of a final decision on the merits of a claim in one contracting State is refused in another contracting State, a new proceeding may be initiated in that second State because the cessation of the running of the limitation period continues to have the same international effect in the second State, provided that the new legal proceeding is brought within the over-all limitation period of ten years under article 23 after the claim first accrued.³⁵

³⁴ Thus, such complicated techniques used by American courts, when the *forum* is "inconvenient," to refuse exercising jurisdiction on the condition that the defendant consent to jurisdiction of a "convenient" foreign court and that he would not plead the statute of limitation in that court would become no longer necessary in relation to another contracting State. See, e.g., *Wendel v. Hoffman*, 259 App. Div. 732, 18 N.Y.S.2d 96 (N.Y. App. Div. 1940); *Aetna Ins. Co. v. Creole Petroleum Corp.*, 23 N.Y.2d 717, 244 N.E.2d 56 (1968).

³⁵ In lieu of involving himself in a complicated process of proving the validity of the first decision, the creditor may bring a new legal proceeding based on the original claim in the Second State. The creditor who was rendered an unfavorable decision on the merits of claim may also consider having his claim tried again in another State. Legal rules variously termed such as *res judicata* or "merger" of the claim in the judgment, which may prevent a new legal proceeding, are usually clear within a single jurisdiction. However, it is unfortunately unclear on the international level. Thus, many States might entertain such a fresh legal proceeding, at least in the absence of a situation which justified application of principles similar to collateral estoppel. See, e.g., H. Smit, *International Res Judicata and Collateral Estoppel*, 9 UCLA L. REV. 44 (1962). Cf. a recent Tokyo High Court decision that applied the principle of good faith in dismissing a new action which was brought by

Whether a legal proceeding can be instituted on the basis of the same claim while another legal proceeding is pending in another State is a general question to be answered under the procedural rules of the *forum*. Creditor may want to do so because of various reasons. The proceeding in a State may take more time than he had initially expected. Debtor's assets that the creditor wished to seize may turn out to be in another State. However, the implementation of this Convention should decrease such a practical need for instituting plural proceedings in different jurisdiction, as motivated by the fear of time-bar.

V. CONCLUDING REMARKS

The Limitation Convention established the basic pattern of the process for the adoption of later UNCITRAL conventions. Looking back, it is also impressive that the first-born of UNCITRAL was from such a difficult area where the issues of substantive as well as procedural rules of each nation and private international law issues are delicately commingled. Most western European countries, which traditionally see the limitation period as a matter relating to the substantive law, are still missing among contracting States. They were perhaps hesitant because of their fear, although unfounded, that the accession might shake the basic structure of their legal system and profound adjustments might become necessary. However, the issue of the limitation period will gradually start to surface for those claims arising from an international sales contract which are covered by the Sales Convention, and it will be realized that the unification of the law of international sales could not be truly complete until the Limitation Convention is also acceded together with the Sales Convention.

At present, the economic activities of the world have become more and more integrated, thereby making the observance of the jurisdictional independence of each sovereign often awkward for the proper treatment of issues encompassing more than one State and international cooperation indispensable. For example, judicial cooperation by States is already being called for in dealing with the insolvency of international busi-

plaintiff unsatisfied with a prior German court decision on the merits. See 41 Tokyo Koto Saibansho Hanketsu-jiho Minniji 1 (Jan. 23, 1996).

ness concerns whose assets are located worldwide. Attempt is now being renewed to foster mutual recognition and enforcement of judicial decisions. This is the direction that the Limitation Convention already seeded more than a quarter century ago through its provision in article 30 on international effect.