

AN ASSESSMENT OF THE CONVENTION ON THE LIMITATION
PERIOD IN THE INTERNATIONAL SALE OF GOODS
THROUGH CASE LAW

LUCA G. CASTELLANI*

THE first product of the work of the United Nations Commission on International Trade Law (UNCITRAL) in the area of international sale of goods was the Convention on the Limitation Period in the International Sale of Goods (Limitation Convention),¹ which intended to consolidate a limited, but complex area of the law of sale of goods.² The Limitation Convention was a forerunner and indeed functionally forms a part of the United Nations Convention on Contracts for the International Sale of Goods (CISG).³ It was finalized and adopted as a separate treaty due to the uncertainty surrounding the possibility to conclude rapidly the preparation of the CISG.⁴

* Luca G. Castellani is a legal officer with the UNCITRAL Secretariat. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

1. See Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, 13 I.L.M. 952 [hereinafter Unamended Limitation Convention], available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html; Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 696 [hereinafter Amended Limitation Convention]; see also Entry Into Force for the United States of the Convention on the Limitation Period in the International Sale of Goods, With Protocol, 60 Fed. Reg. 3484-01 (Jan. 17, 1995).

2. For selected articles discussing the Limitation Convention, see Katharina Boele-Woelki, *The Limitation of Rights and Actions in the International Sale of Goods*, 4 UNIF. L. REV. 621, 621–50 (1999); Anita F. Hill, *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*, 25 TEX. INT'L L.J. 1, 1–22 (1990); Hans Smit, *The Convention on the Limitation Period in the International Sale of Goods: UNCITRAL's First-Born*, 23 AM. J. COMP. L. 337, 337–62 (1975); Kazuaki Sono, *Unification of Limitation Period in the International Sale of Goods*, 35 LA. L. REV. 1127 (1975); Peter Winship, *The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's Firstborn*, 28 INT'L L. 1071 (1994); see also REINHARD ZIMMERMANN, *COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION 1* (2002). Moreover, the provisions of the Limitation Convention are commented on in, SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1215–70 (Ingeborg Schwenzer ed., 3d ed. 2010).

3. See Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG], available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html. The CISG concluded in 1980.

4. However, a sudden acceleration in the drafting process brought the adoption of the CISG in 1980.

As of January 1, 2013, the Limitation Convention had been adopted by twenty-nine states, including the United States of America. However, until recently case law interpreting and applying the Limitation Convention was not readily available to a wide audience. This article will assess the relevance of the Limitation Convention through a preliminary analysis of the case law applying that treaty. This study will assist in evaluating the contribution of the Limitation Convention to current and future law reform initiatives in the field of contract law.

I. AN OVERVIEW OF THE SUBSTANTIVE CONTENT OF THE LIMITATION CONVENTION

The Limitation Convention establishes uniform rules governing the period of time within which a party to a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from that contract, or relating to its breach, termination, or validity. By doing so, the Limitation Convention brings clarity and predictability to an aspect of great importance for the adjudication of a claim.

Most legal systems limit or proscribe a claim being asserted after the lapse of a certain period of time. This is done to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost, and to protect against the uncertainty that would result if a party were to remain exposed to unasserted claims for an extensive period of time or even forever.⁵ However, numerous disparities exist among legal systems with respect to the conceptual basis for doing so, resulting in significant variations in the length of the limitation period and in the rules governing the claims after that period. Those differences have the potential to greatly complicate the adjudication of claims arising from international sales transactions. In an attempt to address those difficulties, the Limitation Convention was prepared and then adopted in 1974. The Convention was amended by a protocol adopted in 1980 in order to harmonize its text with that of the CISG, in particular, with regard to scope of application and admissible treaty declarations.

The Limitation Convention applies to contracts for the sale of goods between parties whose places of business are in different states if both of those states are contracting states, or—but only in its amended version—when the rules of private international law lead to the application of the law of a contracting state. It may also apply by virtue of parties' choice.

The Convention sets the limitation period at four years in Article 8.⁶ In certain cases, such as acknowledgment of the debt in writing or per-

5. This may not, however, be the case of those legal systems influenced by Islamic law. See Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 13 PACE INT'L L. REV. 1, 42-46 (2001) (concluding, however, compatibility of Limitation Convention with Islamic law).

6. See Unamended Limitation Convention, *supra* note 1, art. 8.

formance of an act that has the effect of recommencing the limitation period, that period may be extended to a maximum of ten years.⁷ The Limitation Convention also regulates certain questions pertaining to the effect of commencing proceedings in a contracting state.

The Limitation Convention further provides rules on the cessation and extension of the limitation period, which ceases when the claimant commences judicial or arbitral proceedings or when it asserts claims in an existing process. If the proceedings end without a binding decision on the merits, it is deemed that the limitation period continued to run during the proceedings. However, if the period has expired during the proceedings or has less than one year to run, the claimant is granted an additional year to commence new proceedings.⁸

No claim shall be recognized or enforced in legal proceedings commenced after the expiration of the limitation period.⁹ Such expiration is not to be taken into consideration unless invoked by parties to the proceedings;¹⁰ however, states may lodge a declaration allowing for courts to take into account the expiration of the limitation period on their own initiative.¹¹ An exception to the rule barring recognition and enforcement after the expiration of the limitation period occurs when the party raises its claim as a defense to or set-off against a claim asserted by the other party.¹²

II. CASE LAW ON THE LIMITATION CONVENTION

A. *À la recherche de la jurisprudence perdue*

Article 7 of the Limitation Convention sets forth the duty to interpret and apply the text in light of its international character and the need to promote uniformity. Reporting and disseminating relevant cases are activities critical to achieving the goal of uniform interpretation and application of the treaty. However, case law applying the Limitation Convention has not been readily available for several years. This has affected the general opinion on the relevance and effective application of the Convention: the lack of decisions was explained as evidence of a lack of relevance of the treaty, an observation that, in turn, may have discouraged active advocacy in favor of the adoption of this text.

UNCITRAL is tasked with the promotion not only of the adoption of the texts that are the product of its work, but also with their uniform interpretation. In order to discharge this function, UNCITRAL has requested its secretariat maintain Case Law on the UNCITRAL Texts (CLOUT) case reporting system. CLOUT collects and publishes abstracts of decisions ap-

7. *See id.* art. 23.

8. *See id.* art. 17.

9. *See id.* art. 25(1).

10. *See id.* art. 24.

11. *See id.* art. 36.

12. *See id.* art. 25(2).

plying UNCITRAL texts, making them available at no cost in the six official languages of the United Nations.¹³ More recently, CLOUT abstracts have been compiled in digests of case law, presenting main interpretative trends in a neutral and accessible manner.

However, no case on the Limitation Convention had been reported for about two decades after the entry into force of the treaty in 1988. An interesting question then arose: Was the lack of cases due to the inexistence of those cases, or rather to the fact that cases were not reported to the UNCITRAL secretariat? Hence, the secretariat embarked on a global search for cases, alerting correspondents and other experts of the issue, and asking for their cooperation. Cases started to emerge; the most meaningful were selected for publication in CLOUT. Currently, CLOUT contains cases applying the Limitation Convention from Croatia, Cuba, Hungary, Montenegro, Poland, Serbia, Slovenia, Ukraine, and the United States. Cases referring to the Limitation Convention have been reported also from the Slovak Republic and Switzerland. Certainly, many more cases exist but are not yet easily accessible by an international audience. It seems therefore appropriate to conclude that the Limitation Convention is indeed relevant and applied, but that case reporting systems in the jurisdictions where it is applied are not easy to access for foreigners due to linguistic and other reasons. Additional work is desirable in order to highlight the importance of sharing precedents interpreting uniform law, both for future guidance and to inform the global trade law community of the commitment to the uniform interpretation of texts of supranational origin.

Improved availability of case law may, on the one hand, raise practitioners' awareness of the Limitation Convention, thus leading to its wider application, and, on the other hand, highlight the importance of reporting existing cases, thus paving the way to collecting further material to be used for orientation and guidance. The first case from the United States mentioning the Limitation Convention, albeit to discard its applicability,¹⁴ may be seen as a promising sign of this new attitude.

B. *La jurisprudence retrouvée*

1. *Scope of Application*

Not surprisingly, the vast majority of the cases reported discuss the scope of application of the Limitation Convention. In this respect, a significant issue arises from the fact that Yugoslavia had become a party to the Convention in 1978, and therefore necessarily adopted its unamended version. Moreover, Yugoslavia did not adopt the amended version of the Limitation Convention when ratifying the CISG. Thus, the successor

13. See *Case Law on UNCITRAL Texts (CLOUT)*, UNCITRAL, http://www.uncitral.org/uncitral/en/case_law.html (last visited Apr. 13, 2013).

14. See *Maxxsonics USA, Inc. v. Fengshun Peiyong Electro Acoustic Co.*, No. 10 C 1174, 2012 WL 962698, at *1 (N.D. Ill. Mar. 21, 2012) [CLOUT Case 1186].

states to Yugoslavia need to explicitly state that they intend to adopt the amended version of the treaty when becoming a party to the Limitation Convention. This was done by Slovenia and, more recently, by Montenegro. The matter is relevant because one major difference between the unamended and amended versions of the Limitation Convention is the possibility to apply the treaty by virtue of rules of private international law: in states that are parties to the unamended text, the Limitation Convention may apply only if all contractual parties have their place of business in contracting states.

The rule seems clear, but the case law offers a remarkable variety of options and solutions. A Slovenian court pointed out the fact that the Limitation Convention should apply since all the contractual parties had their places of business in contracting states.¹⁵ Conversely, another Slovenian court ruled out the application of the Convention when one party to the contract had its place of business in a non-contracting state.¹⁶ However, the court did not verify if the Limitation Convention could have applied by virtue of its Article 3(1)(b).¹⁷

Likewise, a Slovak court considering a case where a party was not in a contracting state, decided for the non-applicability of the Limitation Convention. However, it did not discuss Article 3 of the Limitation Convention, and, in particular, the declaration lodged by the Slovak Republic on Article 3(1)(b), but rather pointed at the fact that Austrian law was applicable by virtue of private international law rules, and that Austria is not a party to the Limitation Convention.¹⁸

A similar statement on the need for all contractual parties to have their place of business in contracting states for the Limitation Convention to apply was made by a Serbian arbitrator; here, however, this is the only case in which the Convention may apply, as Serbia is a party to the unamended version of the Convention.¹⁹ Likewise, another Serbian decision did not apply the Limitation Convention when one party had its place of

15. See *Višje sodišče v Ljubljani* [Ljubljana High Ct.], Oct. 13, 2010, VSL sodba I Cpg 972/2010 (Slovn.) [CLOUT Case 1154], available at http://www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2010040815253998. The parties were located in Belarus and Slovenia.

16. See *Višje sodišče v Ljubljani* [Ljubljana High Ct.], Apr. 8, 2010, VSL odločba II Cpg 260/2010 (Slovn.), available at <http://www.sodisce.si/vislj/odlocitve/2010040815245114/>. The parties were located in Italy and Slovenia.

17. Slovenia is a party to the amended version of the Convention. In this case, since the court found that Italian law applied, and Italy is not a party to the Limitation Convention, the outcome of the decision would have been similar.

18. See *Krajjský súd v Bratislave* [Regional Ct. Bratislava], Oct. 11, 2005, KS BA-26CB/114/1995 (Slovk.), translation available at <http://www.cisg.sk/en/26CB-114-1995.html>. The parties were from Austria and the Slovak Republic.

19. See [Foreign Trade Ct. of Arbitration attached to the Serbian Chamber of Commerce in Belgrade], Jan. 5, 2007, No. T-13/05 (Serb.) [CLOUT Case 1138], available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/070105sb.html>. One party had its place of business in Serbia and the other in the United States.

business in a contracting state and the other did not, but the decision did not discuss explicitly the applicability of the Limitation Convention.²⁰

Another application of the same rule by a Serbian court²¹ contains an element of special interest: the contract had been concluded by a company with its place of business in Serbia (a state party to the Limitation Convention) and a company with its place of business in the German Democratic Republic (another state party to the Limitation Convention) on December 12, 1989.²² Since the Federal Republic of Germany did not become a party to the Limitation Convention, the court concluded that the requirements for the application of the Convention are not met. However, the matter deserves further analysis on the application of inter-temporal treaty law as the Limitation Convention was, indeed, in force in both states at the moment of the conclusion of the contract.²³

In line with the above cases, a Montenegrin court observed that Montenegro was a party to the unamended text of the Limitation Convention,²⁴ and therefore all parties had to have their places of business in contracting states for the Convention to apply.²⁵ However, another Montenegrin court applied the Limitation Convention in a case where one of the parties had its place of business in a non-contracting state, despite the fact that Montenegro was, at the time of the judgment, still a party to the unamended Limitation Convention.²⁶ The court justified its decision with the international nature of the transaction.

The Polish Supreme Court observed that the Limitation Convention is not applicable under Article 3(1)(a) and (b) in a case involving an Ital-

20. See [Foreign Trade Ct. of Arbitration attached to the Serbian Chamber of Commerce in Belgrade], Jan. 24, 2006, No. T-12/04 (Serb.), available at <http://cisgw3.law.pace.edu/cases/060124sb.html>. The parties were located in Australia and Serbia. Serbia is a party to the unamended version of the Limitation Convention.

21. See Vrhovni sud Srbije u Beogradu, May 28, 2003, Prev. 112/2003 (Serb.) [CLOUT Case 1131].

22. The German Democratic Republic acceded to the Federal Republic of Germany effective October 3, 1990.

23. See Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994*, 1 CORNELL REV. CISG 51, 51 n.11, 52 (1995). The matter has been debated by German scholars. See Fritz Enderlein, *Das UN-verjährungsüberkommen und seine Geltung in Deutschland* [The UN-Limitation Convention and Its Applicability in Germany], in *DER WEG ZUR DEUTSCHEN RECHTSEINHEIT: INTERNATIONALE UND INTERNE AUSWIRKUNGEN IM PRIVATRECHT* 65, 65–81 (Erik Jayme & Oliver Furtak eds., 1991) (Ger.); Ulrich Magnus, *Aktuelle Fragen des UN-Kaufrechts* [Current Issues of UN-Sales Law], 1 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 79, 92–94 (1993) (Ger.); Karsten Thorn, *Die UN-Verjährungskonvention und ihre Geltung in Deutschland* [The UN Limitation Convention and Its Validity in Germany], 13 IPRAX 215, 215–16 (1993) (Ger.).

24. The statement was correct at the time the judgment was rendered.

25. See *Enker and Zeničko-dobojski kanton v. Zeljezara Niksic Lld* [Ct. App. Montenegro], Oct. 8, 2010, Ca. No. Mal. 341/10 (Montenegro) [CLOUT Case 1050].

26. See *Mi-Rad Int'l, Inc. v. Top Art Lld* [Ct. App. Montenegro], Jan. 22, 2009, Ca. No. Mal. 418/07 (Montenegro) [CLOUT Case 1053].

ian party “since Italy is not a party to the Convention.”²⁷ However, it remains unclear which law would be applicable.²⁸ If Polish law were applicable, the Limitation Convention might apply by virtue of Article 3(1)(b).

A United States court indicated that the Limitation Convention is not applicable when a party has its place of business in a non-contracting state. In fact, when the United States acceded to the amended version of the Convention, it lodged a declaration preventing the application of Article 3(1)(b).²⁹

Article 3(1)(b) of the Limitation Convention refers to the applicability of the law of a contracting state to contracts for the sale of goods. A Swiss decision illustrated the point by explaining that:

If the conflict of laws rules of the forum State lead to the application of the substantive law of a Contracting State to the United Nations Convention on the Limitation Period in the International Sale of Goods of 14 June 1974, the issue of limitation is to be determined in accordance with this Convention.³⁰

The court ultimately concluded that the Convention did not apply.

A Hungarian court applied the Limitation Convention on the basis of the agreement of the parties.³¹ This argument evokes a rather complex matter. The CISG may be applied by virtue of the parties’ choice of law, to the extent that a choice of non-national law is permissible under applicable law, or that the chosen national law incorporates the CISG; it may also apply within the limits recognized to contractual freedom, and in that case its provisions are incorporated in the contract.³² However, similar application mechanisms in the field of prescription law, which is more sensitive to

27. See “O.O.” AG in *M. v. Leszek W. & Zbigniew W.* [Pol. Sup. Ct.], Dec. 19, 2003, Case No. III CK 80/02 (Pol.) [CLOUT Case 1081]. Other cases were decided similarly; see, e.g., [Pol. Sup. Ct.], Nov. 17, 2008, Case No. I CSK 105/08 (Pol.); [Poznan App. Ct.], Jan. 24, 2006, Case No. I ACa 795/05 (Pol.) (between Polish and Italian parties); see also [Poznan App. Ct.], Aug. 5, 2009, Case No. I ACa 483/09 (between a Polish party and a Belgian party, before the entry into force of the Limitation Convention for Belgium).

28. The analysis carried out on secondary sources, such as CLOUT abstracts, is necessarily limited by the amount of information available in those sources. Access to the original texts would, of course, greatly improve the quality of the analysis, which is therefore to be intended as a call to elicit further work on those original sources.

29. See *Maxxsonics USA, Inc. v. Fengshun Peiyong Electro Acoustic Co.*, No. 10 C 1174, 2012 WL 962698, at *1 (N.D. Ill. Mar. 21, 2012) [CLOUT Case 1186].

30. See Bundesgericht [BGer] [Federal Supreme Court], May 18, 2009, docket no. 4A_68/2009 (Switz.), available at <http://cisgw3.law.pace.edu/cases/090518s1.html>. The private international law rules pointed at Swiss law, and Switzerland is not a party to the Limitation Convention.

31. See [Heves Cnty. Ct.], Apr. 8, 2008, Case No. 4.G.20.305/2007/20 (Hung.) [CLOUT Case 1055].

32. See PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 65–66 (2007).

matters of public policy, might incur additional hurdles. In other words, limitation matters might be more likely to be deemed of mandatory application than substantive rules on sale of goods. Therefore, limitation matters might be excluded from those left to party autonomy.

Another Hungarian decision seems to exclude the applicability of the Limitation Convention on the basis of the fact that one party does not have its place of business in a contracting state.³³ However, in the abstract there is no reference to a discussion of the possible application via rules of private international law, which is, in principle, possible given that Hungary is a party to the amended version of the Convention.

Interesting examples of the expansive application of the Limitation Convention come from Croatia, a state that is not a party to the Limitation Convention.³⁴ In two cases, a Croatian court found that the Limitation Convention applied, in conjunction with the CISG, where both parties had their place of business in states where the Limitation Convention is not in force.³⁵

Similarly, in Cuba the Limitation Convention was applied although one of the parties was not located in a contracting state. Cuba is a party to the amended version of the Limitation Convention. The court argued in favor of the applicability of the convention on the basis of its nature of *lex specialis*, allowing the provisions of a treaty to prevail over those of national legislation, as well as the fact that the parties had not opted out of it. The CISG was also applied to the case.³⁶

This survey, albeit brief, provides some significant results. The provisions on the scope of application of the Limitation Convention are not easily applied. From the case law available, it may seem that indirect application under Article 3(1)(b) is sometimes neglected. At the same time, a significant trend towards expansive application is also present.

One possible reason for such expansive application of the Limitation Convention is the attraction exercised by the CISG. Another reason is the desire to apply rules deemed more suitable for transnational matters than domestic ones. A third reason could relate to the desire to simplify the quest for applicable law by preventing the resort to private international law rules, which are particularly complex in the case of limitation law. Hence, if the application of a supranational text can be invoked, the

33. See [Hajdú-Bihar Cnty. Ct. in Debrecen], Apr. 26, 2007, Case No. 5.G.40.127/2007/31 (Hung.) [CLOUT Case 1056].

34. The adoption of the Limitation Convention might be considered by that country in the near future.

35. See *Jelen d.d. v. Malinplast GmbH* [High Commercial Ct.], Oct. 30, 2007, Case No. Pž-1134/05-3 (Croat.) [CLOUT Case 912]; *Industria Conciaria S.p.A. v. Šimecki d.o.o.* [High Commercial Ct.], July 26, 2005, Pž-2728/04-3 (Croat.) [CLOUT Case 919]. The abstracts do not provide further information on the judicial reasoning.

36. See *Nelson Servizi S.r.l. v. Empresa RC Comercial* [Sala de lo Económico de lo Tribunal Supremo Popular], Apr. 30, 2009, Case No. 3 (Cuba) [CLOUT Case 1052].

courts might have a preference for doing so. At a general level, it should not be forgotten that cases involving issues of limitation are often difficult to deal with given the practical challenges of gathering evidence as time passes. Therefore, simplification in the form of applicability of uniform texts may be particularly welcome.

Similar considerations were made with respect to arbitration proceedings,³⁷ where it was suggested that the Limitation Convention should apply not only under its own terms, but also through the discretionary power attributed by provisions enacting Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration.³⁸

2. *Other Issues*

While most reported cases on the Limitation Convention deal exclusively or partially with the scope of application, additional issues, touching on the substance of the treaty, have also been discussed.

With respect to the commencement of the limitation period, dealt with in Article 10(1) of the Limitation Convention, it was indicated that the right to a claim arising from a breach of contract begins to run from the date when the breach of contract occurs.³⁹ In a case relating to partial payment of the price, the court deemed the date of the order of the goods to be the date of the breach of contract.⁴⁰ In another case relating to partial payment of price, the sole arbitrator considered the dates of delivery of the goods as relevant for the commencement of the limitation period.⁴¹

Article 19 of the Limitation Convention indicates that a new limitation period shall commence when the creditor performs, under certain conditions, acts which, under the law of the state in which the debtor has its place of business, have the effects of recommencing the limitation period. This article needs therefore to be complemented with the relevant national legislation. In Hungary, that national legislation was identified in Articles 327 and 329 of the Civil Code, referring, *inter alia*, to the suspension of the limitation period due to a written notice requesting performance of a claim, the judicial enforcement of a claim, the acknowledgment of a debt by the obligor, and the assignment of a claim.⁴²

37. See Benjamin Hayward, *New Dog, Old Tricks: Solving a Conflict of Laws Problem in CISG Arbitrations*, 26 J. INT'L ARB. 405, 432 (2009).

38. See UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 61/33, 61st Sess., U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

39. See *Mi-Rad Int'l, Inc. v. Top Art Lld* [Ct. App. Montenegro], Jan. 22, 2009, Ca. No. Mal. 418/07 (Montenegro) [CLOUT Case 1053].

40. Further information on the agreed date of payment is unfortunately not available in the abstract.

41. See [Foreign Trade Ct. of Arbitration Attached to the Serbian Chamber of Commerce in Belgrade], Jan. 5, 2007, No. T-13/05 (Serb.) [CLOUT Case 1138].

42. See *Fovárosi Itélotábla* [Metropolitan Judicial Board in Budapest], Oct. 9, 2008, Decision No. 14.Gf.40.225/2008/3 (Hung.) [CLOUT Case 1054]; [Heves

Under Article 20(1) of the Limitation Convention, the limitation period shall commence again if the debtor acknowledges in writing its obligation to the creditor before the expiration of the previous limitation period. A decision correctly equates the data message (in this case, an e-mail) to the written form in presence of legislation establishing such functional equivalence.⁴³ Functional equivalence between electronic and paper media is achieved through the identification of the relevant provision in national legislation, after application of the rules of private international law. At a general level, it should be noted that matters of equivalence between electronic and written form in the Limitation Convention may be fully addressed by the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts,⁴⁴ and, in particular, its Article 20.

A further matter of special interest relates to the application of the Limitation Convention to trade taking place in the former Yugoslavia. Armed conflicts necessarily disrupt commercial relations. The post-conflict peace-building process should bear in mind the necessity of bringing fairness and predictability to disputes related to commercial relations that took place before the breaking out of the conflict. Due to the significant amount of time often elapsed during the conflict, limitation issues are likely to be particularly relevant in those cases.

In this regard, it was indicated that Article 21 of the Convention, relating to cases when the creditor is prevented from causing the limitation period to cease to run due to circumstances beyond the control of the creditor and which he could neither avoid nor overcome, applies in cases of war.⁴⁵

Article 24 of the Limitation Convention requires that a party shall invoke the expiration of the limitation period for it to be taken into consideration. It was clarified that the party should provide evidence of when the limitation period commences and expires.⁴⁶ Last, but not least, Article 27 of the Limitation Convention has been explicitly cited as a persuasive model in a case decided by the Polish Supreme Court and relating to

Cnty. Ct.], Apr. 8, 2008, Case No. 4.G.20.305/2007/20 (Hung.) [CLOUT Case 1055].

43. *See* LLC Horizont Marketing-Finance-Logistika v. LLC Terkyrii-2 [High Commercial Ct. of Ukraine], Dec. 17, 2009, Case No. 2009/17/140-3571 (9/56-1492) (Ukr.) [CLOUT Case 1051].

44. *See* United Nations Convention on the Use of Electronic Communications in International Contracts art. 20, Nov. 23, 2005, U.N. Doc. A/60/515 (registration pending; treaty entered into force on Mar. 1, 2013).

45. *See* Enker and Zeničko-dobojski kanton v. Zeljezara Niksic Lld [Ct. App. Montenegro], Oct. 8, 2010, Ca. No. Mal. 341/10 (Montenegro) [CLOUT Case 1050].

46. *See* Višje sodišče v. Ljubljani [Ljubljana High Ct.], Oct. 13, 2010, VSL sodba I Cpg 972/2010 (Slovn.) [CLOUT Case 1154].

the limitation of claims relating to interests.⁴⁷ Thus, a provision contained in the Limitation Convention contributed to fill a legislative gap in Polish domestic law.

III. CURRENT STATUS OF THE LIMITATION CONVENTION AND PROSPECTS FOR WIDER ADOPTION

Although the CISG and the Limitation Convention clearly complement each other, the former has been significantly more successful in terms of adoption by states than the latter. Several reasons contribute to this: lack of resources, including parliamentary time, for international trade law reform may induce states to prioritize the adoption of the CISG over that of the Limitation Convention, given the broader scope of the CISG;⁴⁸ moreover, the public policy concerns associated with limitation may mean that additional caution is necessary when considering supranational uniform texts in this field; finally, at the outset, the Limitation Convention was perceived as a product of the interests of socialist countries and as such was received with caution in Western and Central Europe. The adoption of the Limitation Convention in some capitalist countries, including the United States of America, did not sufficiently change this perception.⁴⁹

The Limitation Convention is particularly relevant in certain regions of the world, namely Eastern Europe and North and Central America, where it enjoys significant adoption.⁵⁰ Further expansion of its application in those regions would therefore be particularly useful to strengthen certainty in regional commercial relations.

Additional states became parties to the Limitation Convention at a regular, albeit reduced pace, and usually in conjunction with the adoption of the CISG or following that adoption. In other cases, the consideration process is still at an early stage. Thus, in certain countries, such as Japan and the People's Republic of China, academics have recommended the adoption of the Convention.⁵¹ In Canada, the Uniform Law Commission

47. See Sad Najwyższy Izba Cywilna [Civ. Chamber of Sup. Ct.], Jan. 26, 2005, Case No. III CZP 42/04 (Pol.).

48. See generally Kazuaki Sono, *The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility*, 16 PACE INT'L L. REV. 147 (2004).

49. The United States ratified the Limitation Convention on May 5, 1994, i.e., twenty years after the adoption of the treaty by a diplomatic conference.

50. The application of the Limitation Convention (as well as that of the CISG) in Mexico was extended to all contracts for international sale of goods involving a Mexican party and a maritime carriage leg. See Ley de Navegación y Comercio Marítimos [LNCM] [Law of Navigation and Maritime Commerce] art. 255, June 1, 2006 (Mex.), available at <http://info4.juridicas.unam.mx/ijure/fed/67/256.htm?s=>.

51. See H. Song & J. Zhao, *Comments on the Convention on the Limitation Period in the International Sale of Goods—Discussing the Possibility of Ratifying the Convention*, 6 J. INT'L TRADE 48–52 (1984); Yasutomo Sugiura, *Japan After Acceding to the CISG—Should We Consider Ratifying the Limitation Convention Next?*, in TOWARDS UNIFORMITY:

prepared in 2000 a new Uniform International Sales Conventions Act meant to deal with several conventions.⁵² However, the Uniform International Sales Conventions Act has not yet been adopted by any Canadian jurisdiction for several reasons: limited political visibility and therefore low priority on the legislative agenda; complexity of dealing with multiple treaties (including the two versions of the Limitation Convention) simultaneously; and on-going reform towards even shorter prescription periods (two years) at the domestic level. Those arguments do not preclude further legislative action, provided adequate reasoning and support are given.

One current trend relates to the adoption of the amended version of the Limitation Convention by those states that have already adopted the unamended one. The Dominican Republic and Montenegro have recently done so, in the context of a wider effort to modernize their international trade law framework.

Another trend relates to the possible reconsideration of certain declarations lodged upon becoming a party to the treaty, and, in particular, the one lodged under Article 36 bis of the Limitation Convention (Article XII of the Protocol), relating to the exclusion of the application of the convention under its Article 3(1)(b) when only one party to a contract for sale of goods is from a contracting state and that state's law applies by virtue of private international law rules.⁵³ This declaration was entered into by Czechoslovakia and the United States of America. By introducing this declaration, Socialist Czechoslovakia wished to ensure the application of its special legislation for foreign trade; reciprocity may have influenced the adoption of the declaration in the United States.⁵⁴ The Czech Republic and Slovakia have carried over the original declarations upon succession to Czechoslovakia, but have subsequently opted for other forms of economic organization and the special legislation meant to be protected has been abolished for some time.⁵⁵ As similar declarations lodged when becoming a party to the CISG are being reviewed, it is desirable that the same process is carried out with respect to the Limitation Convention.

Moreover, the Limitation Convention is interesting not only for its intrinsic technical qualities and for the fact that it sheds light on a particu-

THE 2ND ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE (Ingeborg Schwenzer & Lisa Spagnolo eds., 2011).

52. See INTERNATIONAL SALES CONVENTIONS ACT (Unif. Law Conference of Can. 2000), available at <http://www.ulcc.ca/en/uniform-acts-en-gb-1/473-international-sales-conventions-act/674-international-sales-conventions-act>.

53. This mechanism was introduced to reproduce the scope of application adopted in the CISG. Kazuaki Sono points out that Article 3 of the Limitation Convention, as amended, refers to the law applicable to the contract of sale, and not to the law applicable to the limitation period. See Sono, *supra* note 48, § IV.C.

54. See Gary F. Bell, *Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 9 SING. Y.B. INT'L L. 55 (2005).

55. See JOSEF FIALA, JAN HURDÍK & KATARINA KIRSTOVÁ, CONTRACT LAW IN THE SLOVAK REPUBLIC 22 (2010).

larly intricate area of the law of sale of goods. At times of repeated calls for further codification of uniform texts, it seems particularly advisable to seek careful coordination between regional and global levels, and to capitalize on existing texts by using them as building blocks towards the establishment of a broader legislative framework. Hence, the Limitation Convention is now receiving renewed interest in light of a global trend that sees legislative reform towards a reduction of the time period necessary for limitation and, at the same time, increased difficulty in ascertaining applicable law, in part due to that legislative reform activity.

Some recent efforts to modernize limitation law have given due recognition to the existence of the Limitation Convention, though they have not necessarily led to new adoptions of that Convention.⁵⁶ However, this was not always the case. Recently, the Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law explains, with respect to the CISG, that “[t]he Vienna Convention regulates certain aspects in contracts of sales of goods but leaves important matters outside its scope, such as defects in consent, unfair contract terms and prescription,”⁵⁷ but does not mention the existence of the Limitation Convention, despite the fact that eight of the twenty-seven European Union member states are a party to it.⁵⁸

A detailed comparison of the draft provisions of the Common European Sales Law with those of the Limitation Convention would be highly useful. Awareness of the need for this type of work seems to be growing.⁵⁹

At a very preliminary level, it should be noted that draft Articles 178 and 179 of the Common European Sales Law introduce the notion of a short period of prescription, applicable to the creditor, and of a long period of prescription, applicable to the debtor, as well as that of presumptive commencement of the prescription period from the time when the creditor “could be expected to have become aware of the facts as a result of which the right can be exercised.”⁶⁰ However, long-distance commercial relations require certainty and therefore are based, to the extent possible, on objective, rather than subjective circumstances. This approach was

56. See CONFÉDÉRATION SUISSE [SWISS CONFEDERATION], CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS], RAPPORT RELATIF À L’AVANT-PROJET, § 3.2.2 (2011) (Switz.), available at <http://www.ejpd.admin.ch/content/dam/data/wirtschaft/gesetzgebung/verjaehrungsfristen/vn-ber-f.pdf>.

57. *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, at 5, COM (2011) 635 final (Oct. 11, 2011).

58. Those eight states are: Belgium, the Czech Republic, Hungary, Norway, Poland, Romania, Slovakia, and Slovenia. Bulgaria is a signatory of the unamended version of the Limitation Convention but has not yet ratified it.

59. See *Prescription in the Proposal for a Common European Sales Law*, PARL. EUR. DOC. PE 462.466 (2012). This document, which formulates a number of remarks on the draft articles on prescription of the Common European Sales Law, also makes reference to certain provisions of the Limitation Convention.

60. *Regulation of the European Parliament and of the Council on a Common European Sales Law*, at 108, COM (2011) 635 final (Nov. 10, 2011).

adopted in Article 10 of the Limitation Convention and seems preferable. The mechanism adopted in the draft Common European Sales Law seems more adequate for consumer protection, which is a main goal of that text. Legislative techniques for consumer protection and long-range commercial transactions seem, however, still remarkably different.⁶¹

IV. CONCLUSION

The relevance of the Limitation Convention in judicial practice seems higher than the attention it usually receives from doctrine and practitioners. While a significant number of states have already adopted the treaty, additional effort should be made to promote it.⁶² Moreover, special attention should be given to coordinate law reform efforts in the field of prescription of contractual actions with the provisions of this text.

Case law indicates that there is a desire on the part of courts to take advantage of the existence of the Convention. Cases dealing with limitation in cross-border trade are particularly complex, and accordingly the contribution to the predictability of the rule of law provided by a uniform text is appreciated. Hence, states that are already parties to the CISG, or that are considering becoming parties, should take into consideration the possibility of adopting the Limitation Convention, too. Statistically, it is interesting to note that, due to the pattern of regional and sub-regional trade, often the Limitation Convention has not been applied in cases in which one party has its place of business in a contracting state, and the other party has its place of business in Austria or Italy. If the provisions of the Limitation Convention are considered adequate for the needs of cross-border trade, those two states, both already parties to the CISG, might wish to give careful consideration to the benefits arising from the adoption of the Convention.

61. The Draft Common European Sales Law has generated significant discussion. The difficulty of reconciling the goals of consumer protection and facilitation of cross-border trade among professionals is one point often made among many commentators. See Vincent Heuzé, *Le technocrate et l'imbécile: Essai d'explication du droit commun européen de la vente*, 25 SEMAINE JURIDIQUE 1225, 1225-32 (2012) (Fr.); Nicole Kornet, *The Common European Sales Law and the CISG—Complicating or Simplifying the Legal Environment?*, 19 MAASTRICHT J. EUR. & COMP. L. 164, 164-79 (2012) (Neth.).

62. See Ingeborg Schwenzer & Simon Manner, *The Claim is Time-Barred: The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration*, 23 ARB. INT'L 293, 307 (2007) (discussing limitation period issues in arbitral proceedings, recognizing that Limitation Convention "would be appropriate in the overwhelming majority of cases," but adding that Limitation Convention finds rare application due to its limited acceptance, and suggesting therefore recourse to provisions on limitation of Unidroit Principles of International Commercial Contracts). While that solution might be acceptable given the flexibility of arbitrators and parties to arbitral proceedings in identifying the applicable law, judges and parties to court proceedings may not enjoy a similar freedom. Formal adoption of the treaty seems therefore the most desirable solution.

The existence of two different versions of the Limitation Convention adds complexity to its interpretation. To avoid such complications, states that are parties to the unamended version of the Limitation Convention should become parties to the amended text. This applies, in particular, to those states that are already parties to the CISG.

Finally, when a state becomes a party to the Limitation Convention, special attention should be given to the rule contained in Article 43 bis of the Convention, indicating that, unless otherwise specified, the state becomes a party to the unamended version of the Convention only. This might lead to a result contrary to the intention of the state as well as to the prevailing trend towards expansion of the scope of application of the Limitation Convention and its alignment with that of the CISG.

