INTERNATIONAL TRADE LAW AND THE UNITED NATIONS CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

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I. INTRODUCTION

The law of international trade has been defined by the United Nations Secretariat as "the body of rules governing commercial relationships of a private law nature involving different countries".[1] Its development has gone through three identifiable stages. Firstly, it appeared in the form of the medieval *lex mercatoria*, a body of commercial or trade laws adhered to by most of the civilized countries at that time.[2] Secondly, it was incorporated into the municipal law of the various national States which succeeded the feudal stratification on medieval society. The culmination of this development was the adoption in France of the *Code de Commerce* of 1807,[3] the promulgation in Germany of the *Allegemeine Handelsgetzbuch* of 1861,[4] and the incorporation in England of the custom of merchants into the common law by Lord Mansfield.[5] Finally, the law of international trade was further developed by contemporary commercial custom and international conventions. Commercial custom developed widely accepted legal concepts, particularly such trade terms as f.o.b. (free on board) and c.i.f. (cost, insurance and freight) and institutionalized banker's commercial credits, while international conventions brought a measure of unification in important branches of international trade law

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1 See U.N. GEN. ASS. OFF. REC. 19th Sess., Annex No. 2 (A/5728); U.N. GEN. ASS. OFF. REC. 20th Sess., Annexes, Agenda Item No. 92, par. 3 (A/C.6/L.572) as cited in 1 UNCITRAL YRBK., 1968-1970, (A/CN.9/Ser.A/1970) (U.N. Pub. Sales No. E.71.V.1.).

2 See e.g. Gerard de Malynes' Lex Mercatoria, first published in 1636 in 1 UNCITRAL YRBK., 1968-1970, 22.

3 Preceded by the *Ordonnance sur le commerce* of Louis XIV of 1673 and Colbert's *Ordonnance de la marine* of 1681 as cited in *Ibid.*

4 The *Allgemeine Handelsgetzbuch* of 1861 is still in operation in Austria, but it was superseded by the *Handelgetzbuch* of 1897 in Germany as cited in *Ibid.*

5 T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 332 (4th ed., (1948) as cited in *Ibid.*

relating to negotiable instruments, transport by sea, air, and land, international sale of goods and commercial arbitration.[6]

Characteristics of Contemporary Law on International Trade

In the third and final stage of its development, international trade law exhibits three characteristics, namely: (1) the application of the law of international trade in the various municipal jurisdictions is provided for by authority of the national sovereigns; (2) in municipal jurisdictions where they may be applied, the rules of international trade exhibit a remarkable similarity; and, (3) their formulation and harmonization are mainly brought about by international agencies created by governments or by non-governmental bodies.[7]

Being of a private law nature, the modern law on international trade is neither enacted by an international legislator nor applied in municipal jurisdictions *proprio vigore* as part of the national law. It may only be applied in the various municipal jurisdictions by leave and license of their respective sovereigns. As a general rule, therefore, the national public policy or public order of a particular State overrides or qualifies the rules of international trade law.[8]

Irrespective of the division of the world between countries of free enterprise and countries of centrally planned economy, and between the legal families of the civil law and common law traditions, there is a remarkable similarity in the interpretation and application of the rules on international trade law, particularly in municipal jurisdictions where it may be applied.[9] This similarity is premised on three fundamental propositions: (1) the parties are free, subject to limitations imposed by the national law, to contract on whatever terms they are able to agree (autonomy of the parties' will); (2) once the parties have entered into a contract, that contract must be faithfully fulfilled (*pacta sunt servanda*) and only in very exceptional circumstances, such as *force majeure*, does the law excuse a party from performing his obligations; and (3) arbitration is widely used in international trade for the settlement of disputes, and the awards of arbitration tribunals command far reaching international recognition and are often capable of enforcement abroad.[10]

The formulation of rules of international trade by international "formulating agencies" is the outstanding characteristic of the modern development of international trade law. Some of these agencies are United Na-

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[6] 1 UNCITRAL YRBK., 1968-1970, 22.

[7] *Ibid.*

[8] C.M. Schmitthoff, *The Law of International Trade, Its Growth, Formulation and Operation*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE; WITH SPECIAL REFERENCE TO EAST-WEST TRADE 4 (Schmitthoff ed., 1964) as cited in *Ibid.*

[9] *Ibid.*, p. 3.

[10] 1 UNCITRAL YRBK., 1968-1970, 22.

tions organs, as for example, the Economic Commission for Europe, Asia and the Far East, Latin America and Africa. Others are inter-governmental organizations, as for example, the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law and the Council for Mutual Economic Assistance (CMEA). Some agencies are formed by merchants, for example, the International Chamber of Commerce (ICC) and the International Maritime Committee (IMC), and others by international jurists, such as the International Law Association (ILA).[11]

The conventions, model laws and customary practices formulated by the abovementioned international agencies have largely contributed to the progressive unification and harmonization of international trade law. Thus, for instance, a certain degree of uniformity has been achieved in the field of international sale of goods on account of the following major formulations: the Convention of July 1, 1964 relating to a Uniform Law on the International Sale of Goods (Corporeal Movables) and the Convention of July 1, 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables), both of which were sponsored by UNIDROIT; the Convention of June 15, 1955 on the Law Applicable to International Sale of Goods promoted by the Hague Conference on Private International Law; Icoterms of 1953 sponsored by the International Chamber of Commerce; General Conditions for Delivery of Goods, 1958, issued by the Council for Mutual Economic Assistance (CMEA); Various General Conditions for Sale and Standard Forms of Contract formulated by the Economic Commission for Europe (ECE); the Convention of April 15, 1958 on the Competence of the Forum in the International Sale of Goods; and, the Convention of November 15, 1965 on the Choice of Court sponsored by the Hague Conference.[12]

II. ESTABLISHMENT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

As previously discussed, the law of international trade is of a private law nature, and therefore, can only be applied to the various municipal jurisdictions by leave and license of their respective sovereigns. Consequently, diversity arises between those municipal jurisdictions which apply and those which do not apply the law of international trade. Notwithstanding the adoption of similar, fundamental precepts, diversity may arise on account of the differences in the economic bases of the various national societies, in their traditions, customs and other circumstances.

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[11] *Ibid.*
[12] *Ibid.*, p. 39.

Resort to the rules of private international law — particularly in civil law countries which admit the application of foreign law and even make it obligatory in certain cases involving foreign elements — does not solve the problem of diversity. For said rules are municipal in character varying from one country to another. There is a great variety in the solutions given to the question of when and how to apply foreign law in cases involving foreign elements. A single transaction involving multiple legal relationships — *e.g.* a contract of sale may give rise to different disputes relating to the capacity of the parties, form of the contract, essential validity of its provisions, and performance — may be subject to divergent rules of different national laws, seldom known in all their particulars to all the parties directly involved. In case of litigation, the courts or arbitral tribunals are faced with considerable difficulty in determining the law applicable to the different aspects of an international commercial transaction. Sometimes the parties include in the contract a stipulation concerning the law applicable to the various aspects of the transaction. However, where such a clause is absent, the rules of private international law of the forum are held applicable, and the different national laws can give divergent solutions for the same problem.[13]

The diversity in the interpretation and application of the law of international trade has produced irritants among the members of the international community, and has placed a seemingly formidable obstacle to the development of world trade. This has prompted U.N. agencies as well as inter-governmental and non-governmental organizations to sponsor international conventions, formulate model laws and evolve uniform customs and practices relating to important branches of international trade law. However, although their efforts in attempting to unify and harmonize international trade law show some progress, an objective evaluation thereof cannot fail to reveal the following shortcomings:

> "(a) The progress made in the unification and harmonization of the law of international trade has been rather slow in relation to the amount of time and effort expended on it. The relatively modest results obtained up to now are attributable to a number of factors, such as the difficulties inherent in any attempt to bring about changes in national legislation and practices, and the limited membership and authority of formulating agencies. As a consequence, the completion of the technical work of preparing draft conventions, model laws or uniform laws has often failed to culminate in an international conference or in the adoption of uniform legislation. Where conventions have been adopted, generally speaking only a small percentage of the present members of the United Nations have become parties;
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> (b) The developing countries of recent independence have had the opportunity to participate only to a small degree in the activities

[13] *Ibid.*, p. 14.

carried out up to now in the field of harmonization, unification, and modernization of the law of international trade. Yet those are the countries that especially need adequate and modern laws, which are indispensable to gaining equality in their international trade. In many of these States the prevailing legal system was introduced before they obtained their independence from the metropolitan countries; often the provisions thus received are unsuitable to their present stage of economic development or to the requirements of newly independent states...;

(c) None of the formulating agencies commands world-wide acceptance; none has a balanced representation of countries of free enterprise economy, countries of centrally planned economy, developed and developing countries...; and,

(d) There has been insufficient co-ordination and co-operation among formulating agencies. Therefore, their activities have tended to be unrelated, and a considerable amount of duplication has resulted..."[14]

Action by the General Assembly

The diversity in the interpretation and application of international law and the relative failure of governmental and non-governmental organizations to minimize, if not remove, such legal obstacle to the flow of international trade, made it imperative for the United Nations to play a more active role in the progressive unification and harmonization of international trade law. Thus, the United Nations Commission on International Trade Law (UNCITRAL) was established by General Assembly Resolution 2205 (XXI) of December 17, 1966.[15]

Membership and Functions

The UNCITRAL consists of twenty-nine State members of the United Nations representing the various geographic regions and the principal economic and legal systems of the world. The members are elected by the General Assembly for a term of six years, and may be eligible for re-election. In electing said members, the General Assembly observes the following distribution of seats: (a) seven from African States; (b) five from Asian States; (c) four from Eastern European States; (d) five from Latin American States; and (e) eight from Western European and other States.[16] The Philippines was elected as a member of UNCITRAL in 1973 and assumed office on January 1, 1974.

As per General Assembly Resolution 2205 (XXI) of December 17, 1966, the UNCITRAL was assigned the following functions:

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[14] See discussions in *Ibid.*, pp. 41-42.

[15] Adopted in the 1497th plenary meeting of the General Assembly on December 17, 1966, the full text of which is found in *Ibid.*, pp. 65-66.

[16] See GEN. ASS. RES. 2205 (XXI) of 17 December 1966 reproduced in *Ibid.*, pp. 65-66.

"(a) Co-ordinating the work of organizations active in this field (international trade law) and encouraging co-operation among them;

(b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;

(c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organization operating in this field;

(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;

(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;

(g) Maintaining liason with other United Nations organs and specialized agencies concerned with international trade;

(h) Taking any other action it may deem useful to fulfill its functions."[17]

Legal Techniques Used to Reduce Conflicts and Divergencies

Two basic techniques are followed, which are different but complimentary, in order to reduce conflicts and divergencies in international trade law.

The first technique, which is referred to as the *clinical method* of finding the best possible solution of the acute case at bar, seeks to establish uniform rules regulating conflict of laws, *i.e.* rules relating to the various aspects of a commercial transaction, and rules governing the determination of the competence of courts in a particular litigation. The Bustamante Code and the Hague Conference on Private International Law are the most comprehensive attempts made so far to establish uniform conflict rules in the field of international trade law.[18]

The second, which is described as the *preventive method,* is the antithesis of the first technique. Its purpose is to avoid law conflicts by providing uniform substantive rules regulating international trade. There can be no conflict of laws where a common solution is accepted by all municipal laws.[19] A majority of the present members of UNCITRAL

[17] *Ibid.*
[18] See *Ibid.*, p. 21.
[19] See *Ibid.*

favors this universalist approach, although they are cognizant of the futility of harmonizing certain aspects of international trade law, in which case uniform conflicts rules would be preferable.

Methods Employed to Harmonize and Unify International Trade Law

Essentially, there are three methods adopted to further the progressive unification and harmonization of international trade law. The first is the introduction of normative regulations devised and elaborated within the framework of international treaties and agreements concluded by two or more States. The second, which is, in effect, an alternative to the first, is the formulation of model laws to serve as guides for local adaptation, and uniform laws to be incorporated by States into their respective municipal laws. The third consists in the formulation, normally under the auspices of an international agency, of commercial customs and practices which are founded upon the usages of the international commercial community.[20]

These methods differ from each other because the first two methods are applicable by virtue of the authority of the State, whereas the third is founded upon the autonomy of the will of the parties who adopt it as the regime applicable to the individual transaction at hand. Each of these methods is essential to the unification of international trade law, and each complements the other. There is a consensus among the members of the UNCITRAL that the future development of the law of international trade requires that all of such methods should be actively pursued.[21]

III. UNITED NATIONS CONFERENCE ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

In order to facilitate the work relative to priority topics selected at its Third Session, the members of UNCITRAL organized themselves into working groups, which regularly met to study, discuss and thereafter formulate draft conventions, model laws and customary practices. The only work completed so far is the draft convention pertaining to "time-limits and limitations (prescription) in the field of international sale of goods".[22] It was deliberated and voted upon by an international conference of plenipotentiaries held on May 20 to June 14, 1974 at the U.N. Headquarters in New York under the auspices of UNCITRAL pursuant to General Resolution 2929 (XXVII) of November 28, 1972.

Sixty-six States were officially represented in the U.N. Conference on Prescription (Limitation) in the International Sale of Goods, while three other States sent observers. The Council of Europe, the International

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[20] See discussions in *Ibid.*, pp. 39-40.

[21] *Ibid.*

[22] The text of the draft convention appears in paragraph 21 of the Commission's report on its fifth session; reproduced in 3 UNCITRAL YRBK., 12-16 (A/CN.9/SER.A1972) (U.N. Pub. Sales No.: E.73.V.6).

Chamber of Commerce, the Hague Conference on Private International Law, and the United Council for Nambia also sent observers.[23]

The Rationale of the Convention is Consistent with the Basic Purposes of the United Nations

The preamble of the U.N. Convention on the Limitation Period in the International Sale of Goods reads:

> "*Preamble*
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> *The States Parties to the present Convention,*
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> *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:"

The preamble of the Convention does not merely state the underlying reasons for its formulation, but also tersely declares that it is in full accord with the basic purposes of the United Nations. By providing that "international trade is an important factor in the promotion of friendly relations amongst States" and that "the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade", the participants of the Convention implicitly emphasized that the action of the U.N. General Assembly in calling such a Convention is pursuant to the provisions of Article 1 and 13 of the U.N. Charter, which respectively read:

> "Article I
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> The Purpose of the United Nations are:
>
> 1. . . .
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> 2. *To develop friendly relations among nations* based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. *To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character,* and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion; and
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> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.
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> Article 13
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> 1. The General Assembly shall initiate studies and make recommendations for the purpose of:

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[23] *Ibid.*

(a) . . .

(b) *promoting international co-operation in the economic, social, cultural, educational and health fields,* and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

2. The further responsibilities, functions and powers of the general Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X."[24]

The Concept of Limitation

Under the common law, the term "prescription" is generally used with reference to the acquisition of a right by lapse of time. Thus, under the common law, one may acquire a right to real property or to an easement by prescription. On the other hand, the word "limitation", as applied to actions under the common law, has reference to the time within which an action must be brought after the right of action has accrued. Under the Civil Code of the Philippines, the word "prescription" is used to cover both ideas.[25]

Article 1, paragraph 1 of the Convention provides:

"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 expiration of a period of time. Such period of time is hereinafter referred to as "the limitation period."

Prior to the adoption of this article, a long debate ensued in the convention between delegates coming from civil law countries and those coming from common law countries as to what term should be used — time-limits, prescription or limitation. It took the participants of the convention almost three days to finally decide to use the term "limitation", the meaning of which was delimited to the loss of a right of action by lapse of time.

Claims Relating to Invalidity of Contracts of International Sale of Goods

It should be noted that, under Article 1, paragraph 1, the scope of application of the Convention covers "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." There was a conflict of opinion among the delegates to the Convention as to whether or not claims relating to invalidity of a contract of international sale of goods

[24] N. BETWICH & A. MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 5 & 42 (2nd ed., 1951).

[25] A.M. TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 1 (1956).

should be included within its coverage. Those in favor of its inclusion argued that pursuant to the ultimate goal of UNCITRAL to harmonize and unify international trade law, the Convention should be given the widest possible application. Others contended, however, that prescription solely covers the performance aspect of the contract of sale, and claims relating to invalidity should be covered by other conventions, particularly those that will deal with "uniform rules governing the international sale of goods" in general.[26]

From the point of view of Philippine national law, the Civil Code specifies four defective contracts, to wit: (1) the rescissible contract, which is a contract that has caused a particular damage to one of the parties or to a third person, and which for equitable reasons may be set aside even if it is valid;[27] (2) the voidable or annullable contract, which is a contract in which the consent of one party is defective, either because of want of capacity or because it is vitiated, but which contract is valid until set aside by a competent court;[28] (3) the unenforceable contract, which is a contract that for some reason cannot be enforced, unless it is ratified in the manner provided by law;[29] and, (4) the void or inexistent contract, which is an absolute nullity and produces no effect, as if it had never been executed or entered into.[30]

Except for unenforceable contracts, the Civil Code provides different prescriptive periods for the filing of claims relating to defective contracts. Actions on void contracts are imprescriptible, while those on voidable and rescissible contracts prescribe in four years, the commencement of the period of which depends on the various grounds provided for in the Code.[31] However, the Convention under consideration does not distinguish the different kinds of defective contracts, and provides only one prescriptive period of four years.[32] Moreover, it provides only one ground (fraud), upon which claims relating to invalidity of a contract of international sale of goods shall be subject to the provisions of the Convention.[33] In view thereof, the Philippine delegation to the Convention on Limitation joined those who objected to the inclusion of claims relating to invalidity within the scope of its application.

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[26] *Supra*, note 6 at 132-146; the subject on international sale of goods has been subdivided by UNCITRAL into the following: (1) uniform rules governing international sale of goods; (2) time-limits and limitations (prescriptions); and, (3) general conditions of sale and standard contracts.

[27] CIVIL CODE, see arts. 1380-1389, 1526, 1539, 1542, 1556 & 1560.

[28] *Ibid.*, see arts. 1390-1402.

[29] *Ibid.*, see arts. 1403-1408.

[30] *Ibid.*, see arts. 1409-1422.

[31] *Ibid.*, see arts. 1389, 1391 & 1410.

[32] See CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS, art. 8.

[33] *Ibid.*, art. 10, par. 3.

As a compromise, therefore, it was proposed and thereafter adopted that "(A) 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."[34]

The Date When the Limitation Period Shall Start to Run Shall Not Be Dependent on any Particular Act of the Parties Except as Provided for in Articles 10, par. 3, 11 and 12

The Convention is intended to regulate commercial transactions entered into by businessmen or traders, who should be able to easily comprehend the scope and meaning of its provisions. The language used, therefore, is couched in simple terms, and the situations covered by its rules are not dependent on events that are difficult to pinpoint. This is precisely the reason why the delegates to the Convention decided, as a general rule, to make the date when the limitation period starts to run mainly dependent on a physical event[35] (date when the claim accrues) rather than on the act of the parties. This rule is further emphasized by Article 1, paragraph 2 and Article 9, paragraph 2 of the Convention which respectively provide:

> "This Convention shall not be affected by a particular 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."
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> "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
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> (b) a provision in an arbitration agreement that no right shall arise until an arbitration award has been made."

The only exceptions to this general rule are provided for in Articles 10, paragraph 3, 11 and 12, which shall be discussed in the later part of this paper.

Foreign Elements Determinative of the International Character of a Contract under the Rules of Private International Law

Of the various fields of study in conflicts of law, the most difficult and complicated are those involving contractual obligations. For example, a contract of sale may present an impressive number of foreign elements: X, a resident of the United States and a Philippine national, makes an offer to sell by letter while sojourning in Canada, to Y who is a German national residing in England; Y actually receives the offer while on a

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[34] *Ibid.*, art. 35.
[35] *Ibid.*, art. 9, par. 1.

vacation tour in France, writes his letter of acceptance and mails it in Switzerland during a stop-over; and finally, the contract is drafted and signed by the parties in Belgium, and is to be performed in Denmark. In this case, a number of questions may arise: (1) what law governs the capacity of the parties to enter into the contract of sale? (2) what law governs the formalities of the contract? (3) what law governs the obligations arising therefrom? (4) what law governs the effects of the contract? (5) what law governs the question of performance?[36]

The foregoing example, no matter how exaggerated, focuses on the following important factors as being determinative of what rule of private international law to apply in disputes arising from a contract of sale or any other contract for that matter: the nationality of the parties, their places of residence or business, the places where the offer and acceptance are made, the place where the contract is executed, and the place where the obligation is to be performed. These factors are taken into account, either singly or in combination with others, in order to resolve questions relating to the capacity of the parties, the formalities of the contract, the essential validity of its provisions and performance.

The place where the contract is executed and the nationality of the parties are the most important factors determinative of conflicts rules governing the capacity of the parties. The prevailing rule, expressed in certain judicial decisions including that of the Philippine Supreme Court in *Insular Government v. Frank,*[37] is that capacity is governed by the law of the place of contracting (*lex loci contractus*). On the other hand, certain municipal jurisdictions subject the capacity of the parties to their national law; ironically, this rule is embodied in Article 15 of the Philippine Civil Code taken from Article 9 of the Spanish Civil Code, which was practically ignored by the Supreme Court in the aforecited case.[38]

The place where the contract is executed is also an important factor in determining the conflicts rule governing the formalities of a contract. Premised on the broad proposition that the place governs the act (*locus regit actum*), the law of the place of contracting (*lex loci contractus*) governs the formalities of a contract. This rule is expressly provided in Article 17 of the Philippine Civil Code.[39]

With respect to the essential validity of the provisions of the contract, several theories have been advanced. The first theory maintains that it takes the sanction of the law plus the acts of the parties to complete a contract, and therefore, whether a contract is valid or not should be governed by the law of the place where the contract is entered into

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[36] See J.R. SALONGA, PRIVATE INTERNATIONAL LAW 336 (3rd ed., 1967).
[37] 13 Phil. 236 (1909).
[38] See J.R. SALONGA, *op. cit., supra,* note 36 at 380.
[39] See *Ibid.,* pp. 340-345.

(*lex loci contractus*). The second theory contends that the place of performance is the "seat" of the contract, and should therefore determine the conflicts rule relating to essential validity. The third is the personal law theory espoused by the Italian school, which emphasizes the nationality of the parties. The fourth theory is a combination of several rules, wherein the validity of a contract is controlled by the *lex loci celebrationis*, if the element in question relates to the making of the contract, by the *lex loci solutionis*, if it relates to performance, and by the *lex loci considerationis*, if it is the consideration of the contract whose sufficiency or legality is disputed. The last theory (autonomy rule), which is the prevailing rule, allows the parties, subject to certain policy considerations, to choose the law that shall govern their contract, its validity and effects. In the absence of an express choice, the court may select the law impliedly chosen by the parties, or the legal system having the most substantive and real connection with the contract, in which case the following factors may be considered:

> "(a) the domicile, nationality, and even the residence of the parties;
> (b) the national character of a corporation and the place of its principal business;
> (c) the place where the contract is made;
> (d) the place or places where the contract is to be performed;
> (e) the form in which the contract is made;
> (f) the fact that a certain stipulation is valid under one law and void under another;
> (g) the matrimonial domicile in the case of a marriage settlement contract;
> (h) the nationality of the ship in maritime contracts;
> (i) the economic connection of the contract with some other contract or contracts;
> (j) the law most favorable to the contract;
> (k) the fact that one of the parties is a sovereign State; and,
> (l) the nature and situs of the subject matter, and similar facts and considerations having any bearing on the nature and character of the contract."[40]

Finally, with respect to the question of performance, some opine that the conflict rules governing essential validity, as above described, likewise apply. But in the United States, matters connected with performance of the contract are segregated from matters pertaining to essential validity. Thus, the American Restatement states that the minute details of the manner, method, time and sufficiency of performance should be governed by the law of the place of performance (*lex loci solutionis*).[41]

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[40] For a fuller discussion of the five theories relating to the essential validity of contracts, refer to *Ibid.*, pp. 346-378.

[41] *Ibid.*, p. 340.

Under Article 2 of the Convention, the Places of Business of the Buyer and the Seller Are the Only Factors That Make a Contract of Sale International in Character

"*Article 2*

For the purpose 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 the 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 contemplated by the parties at the time of the conclusion of the contract;

(d) where the 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."

In view of the varying rules of private international law governing contractual obligations, there is a real need to simplify and harmonize the same in order to facilitate the smooth flow of international trade. Hence, a majority of the delegates to the Convention deemed it necessary to reduce the number of foreign elements that make a contract of sale international in character. Under Article 2 (a) of the Convention, the places of business of the buyer and the seller are practically the only factors determinative of the international character of a contract of sales, although, alternatively, reference is made to their habitual residences where either party does not have a place of business under Article 2 (d). This is further emphasized by Article 2 (e) which states that "neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration". The only instance when other foreign elements are taken into account is "where a party to a contract of sale of goods has places of business in more than one State", in which case "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 contemplated by the parties at the time of the conclusion of the contract."[42]

[42] *Supra*, note 32, art. 2(c).

Other delegates, however, who constitute the minority, opposed the provisions of Article 2 asserting that it is an oversimplification. They preferred to adopt instead the provisions of Article 1 of the Annex to the Hague Convention of July 1, 1964 relating to a Uniform Law on the International Sale of Goods, which reads:

> "1. The present law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:
>
> (a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;
>
> (b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;
>
> (c) where the delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.
>
> 2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.
>
> 3. The application of the present law shall not depend on the nationality of the parties."[43]

It should be noted that the foregoing Article provides for another factor in addition to the places of business of the parties before a contract of sale may be considered international. The additional factor may either be one of the aforementioned situations enumerated in said Article. This will serve as a guaranty that, in cases where the places of business of the parties are merely incidental to the contract of sale, such contract shall be considered domestic rather than international. For instance, if A, a Filipino whose place of business is in Hawaii, after having bought in Manila certain machinery from B (who is also a Filipino but having his place of business in Manila), subsequently sells the same to C (another Filipino having his place of business also in Manila) in Manila, both the first and second contracts of sale shall be considered domestic under Article 1 of the Annex to the Hague Convention of July 1, 1964 provided that the offer and acceptance in both cases where also made in Manila. In other words, the applicable law will be the rules of private international law as provided for under Philippine national law. However, said contracts shall be considered international under Article 2 of the U.N. Convention on the Limitation Period in the International Sale of Goods, and may be subject to its provisions if the other requirements stated in Article 3 to 6 are met.

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[43] Reproduced in 1 REGISTER OF TEXTS OF THE CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 43 (U.N. Pub. Sales No.: E. 71.V.3).

The Philippine delegation concurred with the opinion of the minority. But the underlying reason for the Philippines' opposition was based more on practical rather than theoretical grounds. The general prescriptive period provided for in the Philippine Civil Code is ten years for actions based upon a written contract[44] and six years for actions based upon an oral contract.[45] With respect to rescissible and voidable contracts, the prescriptive period is four years, while actions disputing contracts that are void *ab initio,* are imprescriptible.[46] On the other hand, the Convention provides a uniform prescriptive period of four years[47] for claims arising from a contract of international sale, whether such claims relates to its breach, termination or invalidity. This great disparity between the Philippine national laws on prescription and that provided for in Article 8 of the Convention caused the Philippine delegation to side with the minority group's proposal to require the existence of additional factors before a contract of sale may be considered international in character. Such proposal delimits the sphere of application of the Convention and thereby reduces the instances where our national rules on private international law may have to give way to the rules adopted by the Convention.

The Rules of the Convention Are Applicable Only to Contracting States

> **"Article 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 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."**

Before a person can invoke the rules of the Convention to enforce his claim arising from a contract of sale of goods, it is not only necessary that such contract be characterized as international under Article 2, but must also meet the requirements laid down under Article 3 and must not fall within the exclusionary rules provided in Articles 4, 5 and 6.

Similar to the phraseology of Article 2, the "time of the conclusion of the contract" is the physical event under Article 3, during which the place of business of the parties to a contract of international sale of goods ought to be situated in "Contracting States" before the rules of the Convention can apply to the claims arising therefrom. Apparently, therefore,

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[44] *Supra,* note 27, art. 1144.
[45] *Ibid.,* art. 1145.
[46] *Ibid.,* arts. 1389, 1391 & 1410.
[47] *Supra,* note 32, art. 8.

the rules of the Convention shall apply even if any of the parties therein transfers his place of business to another State other than a "Contracting State" after the conclusion of the contract. The term "Contracting States" refer to those States who shall sign and ratify or subsequently accede to the Convention as provided for in Articles 41-44 thereof.

Paragraphs 2 and 3 of Article 3 are intended to make the application of the provisions of the Convention compulsory. Paragraph 2 bars the application of conflicts rules in cases covered by the provisions of the Convention, while paragraph 3 limits the freedom of the parties to make stipulations in their contract of sale that are contrary to the provisions of the Convention except when they have expressly excluded its application. During the deliberations on these provisions, some delegates aired certain misgivings on their wisdom and practicality. With respect to paragraph 2, the desired compulsory application of the rules of the Convention cannot generally be effected in cases where the claim is filed in a forum situated in a non-Contracting State without its consent. And with respect to paragraph 3, it is too radical a departure from one of the fundamental postulates of international trade law, that is, the autonomy of the parties' will.

Definition by Exclusion

As previously stated, the unification of substantive rules of international trade law negates the use of private international law. However, in cases not covered or inadequately regulated by a unified system of international trade law, applicable conflicts rule of the forum shall still apply.

It should be noted that the Convention does not provide a substantive definition of a contract of sale of goods such as that provided in Article 1458 of the Philippine Civil Code. The implication is clear therefore that the task of defining such contract, as it is used in the Convention, and of distinguishing it from other contracts shall be left to the applicable conflicts rule of the forum.

Instead of a substantive definition, the participants to the Convention opted to provide in Articles 4, 5 and 6 a definition by exclusion. They are intended to serve as imperative guides for the courts of the forum in determining the substantive scope of the contract of international sale of goods as envisioned in the Convention.

Properties or Goods That Are Not Ordinarily Treated as Objects of International Sales

"*Article 4*

This Convention shall not apply to sale:
(a) of goods bought for personal, family or household use;
(b) by auction;

(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investments, securities, negotiable instruments or money;
(e) of ships, vessels or aircraft;
(f) of electricity."

Article 4 excludes from the scope of the Convention various types of property or goods that are not ordinarily treated as objects of international sales. Paragraphs (c), (d), (e) and (f) were literally taken from Article 5, pargraph 1 of the Annex to the Hague Convention of July 1, 1964 relating to a Uniform Law of International Sale of Goods with slight modifications. Paragraphs (a) and (b) were innovations introduced by the working group that prepared the draft of the Convention. The enumeration provided in Article 4 was not intended to be exclusive, and whatever ambiguity that arises from the interpretation of its provisions shall be left to the conflicts rule of the forum to adjudicate upon.

The most controversial provisions of Article 4 are those specified in paragraphs (e) and (f). Regarding paragraph (e), it was proposed that only registered ships and vessels should be excluded from the scope of the Convention. It was even further suggested that only ships or vessels subject to national registration for maritime shipping purposes should be excluded, while those subject to local registration merely for tax purposes should be included. The main reason for these proposals is that, under some municipal jurisdictions including that of the Philippines,[48] ships and vessels assume the characteristics of real property by virtue of their registration. However, it was discovered during the deliberations in the Convention that the system of registration of and its legal effects on vessels or ships generally differ from one country to another, and that the text of the Convention does not specify where the ships or vessels should be registered (whether in the place of business of the buyer or the seller, in the place where the transaction was entered into, or in any other places where the provisions of the Convention may be applied). In view thereof, the proposals were discarded, and ships, vessels and aircrafts were excluded from the scope of the Convention without any distinction.[49]

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[48] Although under Article 585 of the Philippine Code of Commerce, vessels are classified as personal property, the Philippine Supreme Court stated that "they partake to a certain extent, of the nature and conditions of real property, on account of their value and importance in the world of commerce" (Rubio v. Rivera, 27 Phil. 72). A vessel and real property are similar in the sense that (1) the ownership of both is evidenced by a certificate of ownership, and (2) any conveyance of both, to be effective against third persons, must be registered in their respective proper registry. See art. 573 of the Philippine Code of Commerce.

[49] See Commission's summary records relating to the discussions at the fifth session of the Working Group on the draft Convention on Prescription (Limitation) in the International Sales of Goods reproduced in 3 UNCITRAL YRBK., 1972 Suppl. 45-50 (A/CN.9/SER.A/1972/Add.1) (U.N. Pub. Sales No.: E.73.V.9).

With respect to paragraph (f), it was proposed that natural gas and petroleum be also excluded from the scope of the Convention. But other delegates maintained that only sales of natural gas or petroleum in large quantities or by pipeline between one country to another should be excluded, while sales in cylinders should be included. Because of the difficulty of distinguishing between cases where natural gas or petroleum are delivered by cable, pipeline or any special mode of transport, and cases where those same products may be considered as goods when they are sold in containers of specific quantity, the aforementioned proposal was withdrawn in the spirit of compromise.[50]

Claims That May Arise in Connection With a Contract of International Sale of Goods, But Are Excluded from the Scope of the Convention

"Article 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 judgment 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."

Article 5 enumerates certain claims that may arise in connection with a contract of international sale of goods, but expressly exclude the same from the scope of the Convention.

Paragraphs (a) and (b) of said Article are premised on the theory that rights arising from contracts have a different social and legal basis from rights to be indemnified for the death or physical injury of the buyer or any other person. The Convention is directly concerned with commercial claims, and it would be inappropriate to include within its scope claims based on death or injury. For example, in a contract of international sale between S (seller) and B (buyer), claims arising from a breach thereof shall be subject to the provisions of the Convention. If, however, the sale involved a machine which exploded and killed B, Article 5 (a) would exclude from the scope of the Convention any claim based on the death of B.

Despite the fine distinction abovementioned between rights arising from contract and rights arising from tort, it should be emphasized that there are certain rights that may arise from both. This is particularly true in some municipal jurisdictions like the Philippines where claims may

[50] *Ibid.*, pp. 50-54.

at the same time arise from contractual negligence (*culpa contractual*) and tort (*culpa aquiliana*). Hence, in the example given above, if the contract of sale stipulates that S shall be liable to B for whatever damages that the machine sold may cause to the latter, the claim arising from the explosion of said machine should also be considered contractual in character although it may generally be classified as a tort.

The claims mentioned in paragraphs (c) and (d) are excluded because they are remotely connected with claims arising from contracts. A lien, mortgage or other security interest in property are merely accessory to the principal contract, while a judgment or award made in legal proceedings are mainly concerned with the execution of the decision of a court or tribunal.

The document referred to in paragraph (e) are those which have the same effect as a judgment or award, but are not classified as such in some municipal jurisdictions. Said documents are popularly known as *titres executoires,* which include notarized contracts, extra-judicial settlements, auction sales, foreclosure of mortgages, acknowledgment of debts in writing, etc. that are given the same effect as judgments or awards in some municipal jurisdictions.[51] In the Philippines, extra-judicial foreclosure of real mortgages may be classified as *titres executoires.*

Finally, claims based upon a bill of exchange, cheque or promissory note under paragraph (f) are excluded from the scope of the Convention because they are treated as a special kind of contract governed by another field of international trade law — international payments. Consequently, they should be regulated by other conventions relating to international payments.

Contract of Sale Distinguished from Lease of Service

> *"Article 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 labor 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."

Article 6 distinguishes between a contract of sale and lease of services, and excludes the latter from the scope of the Convention. Paragraph 2 thereof was literally taken from Articles 6 of the Annex to the Hague Convention of July 1, 1964 relating to a Uniform Law on International

[51] *Ibid.*, pp. 58-59.

Sale of Goods. Paragraph 1, on the other hand, is a new provision intended to exclude from the scope of the Convention "contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services". A good illustration of such contracts are "facilities management contracts" entered into in connection with the sale of electronic data processing equipment (computer). In computer parlance, the effectiveness and utility of a computer equipment solely depends on the persons who program, process and operate the same. Thus, the cost of services stipulated in a facilities management contract is generally higher than the cost of the computer equipment itself. In which case, said contract should therefore be considered more of a lease of service rather than a contract of sale.

Principles of Statutory Construction

> ***"Article 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."**

Most of the provisions of the Convention were a result of a compromise between various concepts prevailing in different legal systems. Numerous aspects of the law on sales, *i.e.* substantive definition of the contract of sale, have been left to the courts of the forum for them to adjudicate upon in accordance with the applicable rule of private international law. It is necessary therefore to provide certain principles of statutory construction, as that specified in Article 7, in the Convention that shall serve as a general guideline for national courts.

Be that as it may, it should be underscored that the absence of an integrated judicial system renders it practically impossible to have a uniform interpretation and application of the provisions of the Convention. It is doubtful whether the case law practice of some municipal jurisdictions of drawing upon the judgments pronounced in other legal systems, which is yet to be universally recognized, can achieve such uniformity.

The General Prescriptive Period of Four Years is a Result of a Compromise

> ***"Article 8***
>
> **The limitation period shall be four years."**

Even prior to the calling of the Convention, the members of UNCITRAL conducted a preliminary discussion concerning the length of the limitation period. Questionaires together with the draft Convention were sent to different States, including the Philippines, for comments to seek the best possible compromise on the question of the length of the limitation

period. As a result of such effort, it was later found out that four years would be an acceptable compromise. As aptly stated by Mr. Honnold, the Secretary of UNCITRAL:

> "the question of the limitation period had been thoroughly investigated by the Working Group on Prescription and a questionaire on the matter had been sent to Governments and interested international organizations. The suggested periods of limitation had ranged from five years to two years. The majority of Governments had expressed a preference for a limitation period of five years or three years and the Working Group had decided that four years would be an acceptable compromise."[52]

Opposition of the Philippine Delegation to the Compromise Limitation Period

The manner of selecting the limitation period acceptable to most States, particularly to developing countries like the Philippines, is not a purely academic exercise involving abstract normative concepts. Empirical factors have to be taken into consideration such as those that will promote a fair balance between the interests of the buyer and the seller as well as the stability and certainty of commercial transactions.

Since the time the Philippines gained political sovereignty, its importation of goods has greatly exceeded its exports. As shown by the following statistics, since 1945 until the first quarter of 1974, it was only in 1959, 1963 and 1973 that Philippine exports exceeded its imports:

"NEDA Statistical Report for 1975

Calendar	All Countries		
	Net	Exports	Imports
1931	4,793	103,972	99,179
1932	20,968	100,374	79,406
1933	43,255	110,622	67,367
1934	32,623	116,283	83,615
1935	16,391	101,926	85,535
1936	46,548	147,677	101,129
1937	57,926	166,961	109,035
1938	14,383	147,001	132,618
1939	35,327	157,892	122,565
1940	21,194	155,925	134,731
1941	25,544	161,135	135,591
1942-1944			
1945	(28,261)	672	28,933

[52] *Ibid.*, p. 62.

1946	(231,670)	64,188	295,858
1947	(245,802)	265,548	511,350
1948	(249,000)	319,205	568,205
1949	(338,039)	247,854	585,893
1950	(10,818)	331,035	341,853
1951	(61,507)	427,447	488,954
1952	(75,695)	345,727	421,422
1953	(54,121)	398,252	452,373
1954	(78,222)	400,504	478,726
1955	(147,085)	400,649	547,734
1956	(52,984)	453,179	506,163
1957	(182,168)	431,062	613,230
1958	(65,901)	492,758	558,659
1959	(5,913)	529,493	523,580
1960	(43,481)	560,389	603,870
1961	(111,786)	499,512	611,298
1962	(30,717)	556,021	586,738
1963	108,916	727,006	618,190
1964	(38,289)	742,036	780,325
1965	(39,131)	768,448	807,579
1966	(24,577)	828,195	852,772
1967	(240,735)	821,456	1,062,191
1968	(292,503)	857,715	1,150,218
1969	(276,885)	854,601	1,131,486
1970	(28,418)	1,061,702	1,090,120
1971	(49,528)	1,136,431	1,185,959
1972	(124,049)	1,105,544	1,229,593
1973	289,696	1,886,315	1,596,619
1974-1st Qtr.	(45,434)	582,620	628,054"[53]

The foregoing statistics simply show that, as far as foreign trade is concerned, the Philippines, more often than not, has assumed the role of the buyer. It is therefore in keeping with its national interest that the Philippine delegation to the UNCITRAL speaks in favor of the interest of buyers in the U.N. Convention on Limitation. The principal reasons for the Philippine delegation's opposition to the compromise prescriptive period of four years provided for in Article 8 of the Convention, is briefly

[53] *Balance of Payment; Foreign Trade,* NEDA STATISTICAL YRBK. OF THE PHIL. 380 (1975). The major source of data for this table of statistics is the Central Bank. Starting in 1973, however, the National Census and Statistics Office (NCSO) assumed primary responsibility in the tabulation and releases of statistics on foreign trade, although the Central Bank continues compiling these data for its own internal use.

summarized in the report submitted by its Chairman to Secretary Carlos P. Romulo after the former attended said Convention, to wit:

> "As approved by the Conference, the Convention provides that proceedings relating to an international sale of goods shall prescribe in four years, counted from the date when the claim accrued.
>
> On the other hand, under the Civil Code of the Philippines an action based on a contract of sale shall prescribe in ten years if the contract is in writing and in six years if not in writing. Since contracts of sale between traders from different countries are usually in writing, it can be said that under Philippine law the period of prescription is ten years which is far different from the four-year period provided for in the Convention.
>
> I therefore took exception to the four-year period of prescription provided in the Convention, not only because it differs greatly from the ten-year period prescribed in our Civil Code, but also because as a law practitioner I have always believed that in case of disagreement between the buyer and seller, especially when the buyer claims to have discovered a hidden defect in the goods sold and delivered to him, the parties should be allowed to explore the possibility of reaching an amicable settlement, instead of being forced due to the shortness of the period of prescription to resort to court proceedings. I therefore recommended that the Convention provide for a five-year period of prescription as recommended by the International Chamber of Commerce (which consulted our national committee), or better yet a six-year period as proposed by the Delegates of Nigeria and Ghana who pointed out that when complex machinery and equipment are imported by their developing countries, it takes time to discover hidden defects because these could be discovered only with the aid of expert technicians, and even if discovered, they also agreed with me that the parties should first be allowed to try to compose their differences extrajudicially instead of being forced to take recourse at once to the courts."[54]

The most important and substantial reason for the aforementioned opposition to the four-year prescriptive period although not clearly and emphatically stated in the foregoing report — is that such period is too short particularly in cases where the goods sold are sophisticated, modern machinery. As will be discussed in more detail in the later part of this commentary, under Article 10, paragraph 2, the four-year prescriptive period shall be counted from the time "the goods are actually handed over to, or their tender is refused by, the buyer" whether or not the defect or lack of conformity of the goods sold are patent or latent. Unless such period be counted from the time the buyer could have reasonably discovered the

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[54] Letter report dated 25 July 1974 submitted by former Senator Lorenzo Sumulong to Secretary Carlos P. Romulo explaining the stand of the Philippine delegation on the U.N. Convention on the Limitation Period in the International Sale of Goods, p. 3.

defect or other lack of conformity of the goods, in cases where such defect or other lack of conformity is latent or hidden, such period would be too short from the standpoint of buyers from developing countries, who are generally incapable of detecting such defects in the goods by themselves, and who more likely will depend solely on the expertise of the seller himself or other specialists coming from the country of the seller.

Notwithstanding the difference between the prescriptive period provided in the Philippine Civil Code and that specified in Article 8 of the Convention, the Chairman of the Philippine delegation recommended a five-year prescriptive period, which is not too far off from the compromise prescriptive period of four years because the ten-year prescriptive period in the Philippine Civil Code may be absolutely unrealistic in the light of modern developments in commercial trade. The argument that the parties should be allowed to explore the possibility of reaching an amicable settlement, instead of being forced due to the shortness of the period of prescription to resort to court proceedings, is insubstantial and not very convincing. As will be shown later, the limitation period may be extended by the debtor under Article 22, paragraph 2.

Commencement of the Limitation Period

"*Article 9*

1. Subject to the provisions of articles 10, 11 and 12 the limitation period shall commence on the date on 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."

Article 9, paragraph 1, merely states the general rule that "the limitation period shall commence on the date on which the claim accrues", the specific application of which is provided for in Articles 10, 11 and 12. Paragraph 2 of Article 9, on the other hand, merely reiterates the provisions of Article 1, paragraph 2, and further adds that the limitation period shall not be postponed by "a provision in an arbitration agreement that no right shall arise until an arbitration award has been made". And as previously pointed out, the reason for these provision is to make the limitation period definite and independent from the will of the parties, except in the situations described in Articles 10, paragraph 3, 11 and 12.

"*Article 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.
>
> 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."

Under Article 10, paragraph 1, the limitation period with respect to claims arising from a breach of contract shall commence from the date on which such breach occurs. During the debate on this provision, some civil law countries manifested their objection to the use of the concept of "breach of contract" since such concept was alien to them. However, as a compromise, they agreed to its retention provided that it is specifically defined in the Convention. This is the reason for the inclusion of a definition of "breach of contract" in Article 1, paragraph 3 (c) of the Convention, which reads:

> "(c) 'breach of contract' means the failure of a party to perform the contract or any performance not in conformity with the contract."

With respect to paragraphs 2 and 3 of Article 10, there is an important distinction between a claim based on fraud and that arising from a defect or other lack of conformity of the goods. The former covers a wider variety of situations than the latter. And if, for example, the seller acts in bad faith in delivering defective goods to the buyer, the claim that may be filed against the former shall be based on fraud and not on defect or other lack of conformity of the goods. In such example, therefore, the commencement of the limitation period shall start on the date on which the fraud was or reasonably could have been discovered rather than on the date on which the goods are actually handed over to, or their tender is refused by, the buyer.

The most controversial provision in Article 10 is that provided in its second paragraph relating to the commencement of the limitation period when the claim is based on defect or other lack of conformity of the goods sold.

In cases where the defect or other lack of conformity is hidden or latent particularly when the contract involves sophisticated, modern equipment, many developing States advocated that the limitation period should commence to run on the date when such defect or other lack of conformity was or could have reasonably been discovered by the buyer. Even Mr. Michida of Japan, a representative of a highly industrial State, rightly observed that:

> ". . . transactions in international trade often involve huge and complicated industrial plant systems and heavy machinery. Claims . . .

> regarding defects in the operation of such machinery often include requests for a group of engineers to go to the factory in question and investigate the situation. That was a time consuming procedure and his (Japanese) delegation could not accept any proposal to shorten the limitation period in such cases . . ."[55]

If that is the case with respect to the Japanese experience, the problems to be encountered by developing countries must be doubly difficult considering that they are technologically incompetent to detect hidden defects in such machinery or equipment. It should be noted in this regard, that, as far as computer equipment are concerned, the only persons technologically competent to examine the same are engineers or other technicians especially employed by the person or entity who manufactures or produces such equipment. Thus, only IBM, NCR, Burroughs, UNIVAC, FACOM, etc. technicians or engineers completely understand the intricate operations of their respective computer equipment.

Philippine Delegation's Opposition to Article 10, paragraph 2 of the Convention

Before the United Nations called the conference of plenipotentiaries to consider the Convention on the Limitation Period in the International Sale of Goods, UNCITRAL formed a working group that prepared a draft of said Convention. The basic reference text that was used by said working group as a model to draft the Convention was the Annex to the Hague Convention of July 1, 1964 relating to a Uniform Law on International Sale of Goods. Article 39, paragraph 1 and Article 49, paragraph 1 of said Annex respectively provide:

> "The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it. If a defect which is provided for in Article 38 is found later, the buyer may nonetheless rely on that defect, provided that he gives the seller notice thereof, promptly after its discovery. In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period.
>
> The buyer shall lose his right to rely on lack of conformity with the contract at the expiration of a period of one year after he has given notice as provided in Article 39, unless he has been prevented from exercising his right because of fraud on the part of the seller."[56]

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[55] *Supra*, note 49 at 68.

[56] Reproduced in 1 REGISTER OF TEXT OF CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW, *op cit.*, 50-52.

It is interesting to note that the aforecited provisions specify a double limitation period with respect to claims arising from a defect or other lack of conformity of the goods. The buyer shall lose his right to rely on a defect or lack of conformity of the goods if he has not given the seller notice thereof within two years from the date on which the goods were handed over to him, unless the lack of conformity constituted a breach of a guarantee covering a longer period. Likewise, the buyer shall lose said right if he does not institute legal proceedings at the expiration of a period of one year after he has given notice to the seller, unless prevented from exercising his right because of fraud on the part of the seller.

The working group formed by UNCITRAL decided not to adopt the aforementioned double limitation period in the original draft of the Convention on Limitation. In lieu thereof, it provided a single limitation period of four years to be counted from the time when the goods are actually handed over to the buyer "irrespective of the time at which such defects or other lack of conformity are discovered or damage therefrom ensues."[57] This provision in the draft convention was heatedly debated upon during the fifth session of UNCITRAL in 1972. Most of the developed countries wanted to reduce the limitation period to one or two years. Their arguments were based on the following premises: (1) the certainty and stability of commercial transactions would be enhanced if disputes arising from the obligations between the seller and the buyer could be reduced or finally settled at the earliest possible time; (2) the security risks of the seller would be increased if the time, when he could be finally cleared of his obligations to the buyer, is too long; and (3) claims might be pressed on a late date, which would make it difficult to produce trustworthy evidence on the true condition of the goods at the time they were received by the buyer. Most of the developing countries, on the other hand, were willing to accept as a compromise the four-year limitation period, provided that, in case of latent defects, it shall only commence to run from the date on which the defect or other lack of conformity of the goods was or ought reasonably to have been discovered by the buyer. They contended (1) that the existence of latent defects, more often than not, only become apparent a long time after the buyer had received the goods, or even after he had started to make use of them; (2) that in cases where the contract of international sale involves complicated industrial machinery or equipment, buyers from developing countries usually depend only on the expertise of the seller himself or other specialists coming from the country of the seller in order to detect hidden defects therein; and (3) that it would be grossly unfair to the buyer, who

[57] *Supra*, note 49 at 68.

through no fault of his, may be barred from asserting his rightful claim before the courts or other competent bodies.[58]

Because of these conflicting views, the working group formed by UNCITRAL revised the original draft of the Convention providing therein, as a compromise, that in case of claims arising from a defect or other lack of conformity of the goods sold, the period of prescription shall be two years from delivery of the goods to the buyer if the defect or other lack of conformity was patent, but if the defect or other lack of conformity was hidden, the two year period of prescription shall be counted from the date of discovery of the defect or lack of conformity.[59]

This provision in the revised draft of the Convention was again subjected to another heated debate when it was discussed during the conference of plenipotentiaries called by the U.N. General Assembly on May 20 to June 14, 1974. At that time, the Philippines was just elected member of UNCITRAL and its delegation naturally sided with the developing countries during the debates asserting that the two-year period in the revised draft should even be increased. However, when voting was called, the text that was finally approved was that provided for in the original draft of the Convention initially prepared by the working group wherein the limitation period is four years counted from the date when the goods were actually handed over to, or their tender was refused by, the buyer. The provision does not distinguish between patent and hidden defects thereby implying that the commencement of the limitation period shall be the same in both cases. The Philippine delegation voted against the approval of this provision, which is now embodied in Article 10, paragraph 2 of the Convention. It is disappointing to note that some developing countries ultimately voted in favor of such provision thus reversing their original stand. In this regard, the Chairman of the Philippine delegation submitted the following observations to Secretary Carlos P. Romulo:

> "The draft Convention in its original form provided that in the case of claims based on defect or lack of conformity of the goods sold, the period of prescription shall be two years from delivery of the goods to the buyer if the defect or lack of conformity was patent, but if the defect or lack of conformity was hidden, the two-year period of prescription shall be counted from the date of discovery of the defect or lack of conformity.
>
> I consider the distinction reasonable and I therefore favored this original provision in the draft Convention.
>
> But during the debates the delegates of the big trading countries, who want a short period of prescription especially when their exports of complex machinery and equipment are alleged by the buyers in developing countries to contain hidden defects, were able to remove

[58] *Supra*, note 49 at 70-76.
[59] *Supra*, note 54 at 4.

> the said distinction. Consequently, Article 10 of the Convention as approved by the Conference provides that "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", regardless of whether the defect or lack of conformity is patent or hidden. And I am sorry to say in this connection that the delegates of some developing countries — who in their remarks argued for a longer period of prescription on the ground that it takes time to discover hidden defects in complex machinery and equipment because without the aid of expert technicians such defects are hard to detect for reasons quite hard to understand, went along with the big trading countries when the time of voting came."[60]

It should further be noted that Article 10, paragraph 2, cannot really be considered as a compromise, since it was rejected by most States in the initial draft of the Convention as prepared by the UNCITRAL working group.

Exception to the General Rule That the Limitation Period Shall Not Depend on the Will of the Parties

> *"Article 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.
>
> *"Article 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 installments, shall, in relation to each separate installment, 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 installments shall commence on the date on which the declaration is made to the other party."

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[60] *Ibid.*

As repeatedly stated in the preceding discussions, the provisions of Article 11 and 12 are exceptions to the general rule that the limitation period shall not be dependent on the will of the parties. Article 11 refers to an express undertaking or warranty relating to the goods given by the seller to the buyer for a certain period of time, in which case the limitation period shall commence on the date on which the buyer notifies the seller of the breach of the express undertaking or warranty; but the notice should be given not later than the date of the expiration of the period of the undertaking. Article 12, on the other hand, refers to certain instances where the limitation period generally commences to run on the date on which the claimant declares to the other party his right of action. These instances cover claims arising from a contract of sale, including sale on installments, in which one party is entitled to declare the contract terminated before performance thereof becomes due, and exercises such right.

Concept of Cessation and Extension of the Limitation Period

In the draft text of the Convention, the term "interruption" was initially used as the topic heading of Articles 13 to 21. But many delegates later objected to its use because its accepted definition did not accurately reflect nor even approximate the intent of said Articles. The effect of interruption, as the concept is understood in certain municipal jurisdictions including that of the Philippines,[61] is that a full, new limitation period would commence after the original period had been legally interrupted. In contrast thereto, the general rule provided for in Article 17 is that the original limitation period shall continue to run after the occurrence of the act causing it to cease to run, except when said period has already expired or has less than one year to run, in which case the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended. Article 17 provides:

> "*Article 17*
>
> 1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with Article 13, 14, 15 and 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."

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[61] See CIVIL CODE, arts. 1120-1125; 4 A.M. TOLENTINO, *op. cit., supra*, note 20 at 17.

Neither did the delegates to the Convention choose to adopt the concept of "suspension" — the effect of which is that the original limitation period shall continue to run again after the occurrence of the act causing it to cease to run — since it does not cover the aforesaid exception to Article 17. Instead, the novel and neutral concept of "cessation and extension" of the limitation period was adopted. But it should be underscored in this regard, as pointed out by one of the delegates, that the introduction of a wholly novel system implied the introduction of wholly novel problems, which may be brought about by varying judicial constructions in municipal courts of said concept.[62]

Legal Proceedings That Shall Cause the Running of the Limitation Period to Cease

"*Article 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.

"*Article 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.

"*Article 15*

In any legal proceedings other than those mentioned in articles 13 and 14, including legal proceedings commenced upon the occurrence 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 claims in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, subject to the law governing the proceedings."

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[62] *Supra*, note 49 at 84.

Articles 13, 14 and 15 specify the legal proceedings, as such term is defined in the Convention,[63] which shall cause the running of the limitation period to cease. These Articles should be distinguished from Article 19, which covers a special situation where the act causing the limitation period to cease to run does not tantamount to instituting legal proceedings, but which under the law of the State where the debtor has his place of business, has the effect of recommencing a limitation period. Article 19 provides:

> *"Article 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."

Under Article 13, it is the law of the court where the proceedings are instituted that determines whether or not an act of a creditor may be recognized "as commencing judicial proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his claim." This is merely a reiteration of a recognized rule in private international law that the law of the forum (*lex fori*) shall determine questions of procedure in cases involving foreign elements. The delegates to the Convention deemed it appropriate to leave the resolution of such questions to municipal law because of the irreconcilable differences between the procedural rules adopted by the various municipal jurisdictions.

The broadly stated clause "as asserting his (creditor) claims in such proceedings already instituted against the debtor" under Article 13 is intended to cover special cases arising from an international sale of goods, *i.e.* an amendment to the complaint, asserting a new cause of action, an answer to a third or fourth party complaint, a complaint filed as a third party claim which is allowed in certain municipal jurisdictions, etc.

Article 14 is self-explanatory. It specifies the time when the limitation period shall start to run when arbitral proceedings are commenced by either party. In case there is an agreement to arbitrate, 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." The phrase "by the law applicable to such proceedings" anticipates the contingency where, in certain municipal jurisdictions, the law regulating the manner and time of instituting arbitration proceedings cannot be overridden by any contrary stipulation in the

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[63] *Supra*, note 32, art. 1, par. 3 (e); legal proceedings includes judicial, arbitral and administrative proceedings.

arbitration agreement. In case there is no such agreement, on the other hand, the limitation period shall cease to run "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."

Article 15 enumerates certain legal proceedings, which are not uniformly treated as judicial or arbitral proceedings in the various municipal jurisdictions. They cannot therefore simply be presumed included within the coverage of Article 13 and 14. Hence, the necessity for a special provision. It should further be noted that the limitation period with respect to such proceedings may cease to run in either of the following ways: (1) 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; or (2) upon the occurrence of the events provided for in subparagraphs (a), (b) and (c). The latter manner, by which the limitation period shall cease to run, was intended to meet the demands of certain States whose municipal law did not require the creditor to perform an act before the running of the limitation period could be stopped. For example, under Hungarian law, in proceedings relating to inheritance due to the death of a debtor or a liquidation of a company, the executors *ex oficio* simply take into account the outstanding claims and enumerate the creditors, but do not issue appeals or notices to them. Consequently, if the limitation period in Article 15 shall cease to run only if the creditor performed an act recognized under the law applicable to the proceedings enumerated in said Article, creditors in Hungary may be greatly prejudiced since they may not even be aware of the existence of such proceedings.[64]

Compulsory Counterclaim, Solidary Obligation and Proceeding Instituted by the Subpurchaser against the Buyer

> *"Article 16*
>
> For the purposes of Articles 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 counterclaim relate to the same contract or to several contracts concluded in the course of the same transaction."

Article 16 is mainly concerned with a procedural rather than a substantive rule relative to compulsory counterclaim as such term is understood under Philippine Law. It provides that "any act performed by way of

[64] *Supra*, note 49 at 90-91.

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."

"*Article 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 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 has expired or had less than one year to run".

Article 18 is self-explanatory. Its inclusion in the Convention is necessitated by the fact that, while it would be ideal to have the disputes of all the parties to a contract of international sale of goods resolved in a proceeding, all the parties to such contract may reside or have places of business in different States, in which case the municipal court where the proceedings are instituted may not be able to acquire jurisdiction over all of them. However, it should be noted that while in the situation contemplated under paragraph 1 of Article 18 there is only one cause of action, the same is not necessarily true with respect to paragraph 2 thereof. In the latter case, a procedural complication may arise if the contract between the seller and the buyer is separate and distinct from that of the buyer and the subpurchaser. In such eventuality where there are two different causes of action, the filing of legal proceedings by the subpurchaser against the buyer should not in any way affect whatever cause of action the buyer might have against the seller.

Exceptions to the General Rule Provided for in Article 17

As preciously discussed, the general rule with respect to the cessation and extension of the limitation period is provided for in Article 17. The exceptions, however, to this general rule are the cases covered under Article 19, 20 and 21.

"Article 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 the State has the effect of recommencing a limitation period, a new limitation period of four years shall commence on the date prescribed by the law".

Article 19 provides a new limitation period of four years which shall commence on the date prescribed by the law of the State where the debtor has his place of business, in case the creditor performs in such State any act, other than those described in Articles 13, 14, 15 and 16, which under the law of such State has the effect of recommencing a limitation period. This Article was included in the Convention at the request of various States whose national laws provided for the possibility of interrupting the limitation period without recourse to legal proceedings.

The main objection to Article 19 is that, basically, it runs counter to the general spirit of the Convention, which is to promote uniformity in international trade law. It would be unfortunate if the Convention would leave it up to some municipal jurisdictions to determine what acts could interrupt the limitation period. And it would create serious difficulties for businessmen and lawyers who may be required to constantly refer to national laws in order to determine whether or not a given act interrupted the limitation period.[65]

"Article 20

1. Where the debtor, before the expiration of the 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 acknowledgment.

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

Article 20 deals with the case wherein the debtor made a written acknowledgment of his obligation to the creditor before the expiration of the limitation period, in which case a new limitation period of four years shall commence to run from the date of such acknowledgment. The requirement that the acknowledgment be made in writing is intended to facilitate the presentation of evidence in case of litigation. The requirement that such acknowledgment be made before the expiration of the original limita-

[65] *Ibid.*, pp. 94-99.

tion period is intended to accommodate the demand of civil law countries whose municipal laws generally disallow the revival of extinct obligations.

"*Article 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."

Article 21 is concerned with cases of *force majeure* although the delegates to the Convention decided not to specifically use such term since it is alien to some municipal jurisdictions. In such cases, 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

"*Article 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 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 prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale."

Article 22, paragraph 1, states a general rule which precludes modification of the limitation period by the parties, subject to the exceptions provided for in paragraphs 2 and 3 thereof. This general rule is designed to prevent the stronger party to a contract from changing the four-year limitation period by resorting to the use of adhesion contracts or other standard contract forms.[66]

The exception in paragraph 2 of said Article is intended to accommodate the desire of certain States, including that of the Philippines, to give the parties to a contract some leeway in negotiating for an amicable settlement of their disputes rather than be forced to litigate due to the shortness of the limitation period. However, it is interesting to note that it is only the debtor who is given the right to unilaterally extend the limitation period. The reason for this is that it is usually the debtor who is placed

[66] *Ibid.*, pp. 125-126.

at a disadvantage, if the limitation period is extended. The possibility therefore of abusing such right is remote, which would be otherwise if the same right is granted to the creditor. Furthermore, it should be stressed that said right can only be exercised by the debtor under the following conditions: (1) if he declares in writing to the creditor his desire to extend the limitation period; and, (2) if such declaration is made within the original limitation period. Lastly, such declaration may be renewed, but subject to the provisions of Article 23. In other words, the original limitation period and the succeeding extensions made by the debtor shall not exceed ten years.

The exception provided for in paragraph 3 of Article 22, on the other hand, is intended to meet the request of Eastern European States, whose national laws provide a shorter limitation period than four years. The main objection to this provision is that it deviates from the ultimate objective of UNCITRAL to unify international trade law. The validity of the stipulation mentioned in paragraph 3, Articles 22 depends on the "law applicable to the contract", in which case conflict rules come into play. This is burdensome to lawyers and businessmen. Moreover, to a certain extent and in some instances, such provision gives an undue advantage to Eastern European and other States, under whose national laws the aforementioned stipulation or clause is considered valid. Thus, for example, if there is a stipulation in a contract of international sale covered by the Convention and entered into between the governments of the Philippines and USSR — whereby the former buys machinery from the latter — that arbitral proceedings shall be commenced within a limitation period shorter than four years, the Philippine government shall be bound by such stipulation in case it institutes proceedings in a Russian arbitration tribunal. The general rule in paragraph 1 of Article 22 cannot be invoked to nullify such stipulation, since it is precisely allowed under the exception provided for in paragraph 3. It would not be amiss to note, in connection herewith, that seven out of eight State signatories to the Convention as of July 11, 1974 come from Eastern European States.[67] Would it be too far-fetched and presumptuous then to surmise that the inclusion of paragraph 3 in Article 22 was one of the main reasons why said States voted for the approval of and thereafter signed the Convention?

"Article 23

Notwithstanding the provisions of this Convention, a limitation period shall in any event expire not later than 10 years from the

[67] As of 11 July 1964, Ambassador Anastacio B. Bartolome, the Acting Permanent Representative then of the Philippine Mission to the United Nations, reported that the Convention was signed by Brazil, Byelorussian SSR, German Democratic Republic, Hungary, Mongolia, Poland, Ukrainian SSR and USSR.

date on which it commenced to run under articles 9, 10, 11 and 12 of this Convention."

The obvious purpose of Article 23 is to provide a ceiling period of 10 years, beyond which the general limitation period of four years cannot be extended or modified by Articles 13 to 22 of the Convention. Most of the delegates to the Convention felt that a limitation period extending to more than 10 years is unreasonable and prejudicial to international commerce.

Consequences of the Expiration of the Limitation Period

"*Article 24*

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

In States that follow the adversary type of legal proceedings, it is generally recognized that only the parties to such proceedings could invoke the expiration of the limitation period and have it considered by the judge in the adjudication of the case. The judge cannot on his own initiative invoke the limitation period because that would tantamount to making him a party to or an advocate in the proceedings. Otherwise, the tasks of the court or tribunal shall become complicated. Judges should confine themselves to the reception of evidence in support of the allegations of the parties rather than force the parties to have recourse to a means of defense which they might have good reasons for wishing to avoid. On the other hand, in States that adhere to the inquisitorial type of legal proceedings, judges are allowed in most instances to intervene in such proceedings as a matter of public policy. The principle of the autonomy of the will of the parties therefore cannot compel the judge to shrink from his duty to decide on questions relative to the expiration of the limitation period.

Article 24 is patterned after the adversary type of legal proceedings. It was opposed by many African States, which in turn advocated the adoption of the inquisitorial type. They asserted that Article 24 suited the interests of large commercial companies which have legal advisers to see to it that their rights are protected, but it disregarded the fate of the small businessmen, who usually lack legal expertise and assistance.[68]

Because of this objection, the delegates to the Convention decided as a compromise to provide in Article 36 that "(A)ny 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."

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[68] *Supra*, note 49 at 141-151.

"*Article 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 proceeding 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 defense or for the purpose of set-off against a claim asserted by the other party, provided 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."

Article 25 states the general rule that "no claim shall be recognized or enforced in any legal proceedings commenced after the expiration of the limitation period". It is subject to the provisions of Article 24 in the sense that the non-recognition or non-enforcement of such claim can only be decreed by the court, if the expiration of the limitation period has been invoked by either party to the proceedings. Paragraph 2 of Article provides the exception to said general rule, wherein even if the limitation period had expired, one party may still rely on his claim as a defense, or for the purpose of set-off against a claim asserted by the other party; but set-off could be effected only if (a) both claims relate to the same contract or to several contracts concluded in the course of the same transaction, or if (b) said claims could have been set-off at any time before the expiration of the limitation period. This provision reflects a broadly accepted principle based on equity and reasonableness. For it would be intolerable that one party would be placed in a situation where he was exposed to an action instituted by his adversary without being able to set up his own claim as a defense or as a means of set-off. Furthermore, it is an attempt to adjust the rights of parties in cases when limitation periods might start to run at different times because of the varied types of contracts that might have been concluded by said parties.[69]

"*Article 26*

When the debtors 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."

The substance of Article 26 was taken almost textually from Section 96 of the General Conditions of Delivery, approved by the Council for

[69] *Ibid.*, pp. 154-155.

Mutual Economic Assistance (CMEA) in 1968.[70] It is addressed to a situation where a party performed a contract after the expiry of the limitation period — *i.e.* performance being constituted by the payment of a price or the replacement or repair of defective goods — and then realized that there was no legal requirement for him to do what he had done, with the result that he sued for restitution. Such a claim for restitution under Article 26 cannot prosper in the light of the broad policy — traditionally recognized in both civil and common law systems — that persons should be encouraged to fulfill their moral obligations. In civil law countries like the Philippines, the obligations referred to in Article 26 are denominated as "natural obligations". They are not enforceable by action, but nevertheless produce some juridical effects, such as the right to retain what has been voluntarily paid by debtor.[71]

"*Article 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."

Article 27 is self-explanatory. It is premished on the universally recognized legal principle that the accessory follows the principal.

Calculation of the Period

At the outset, it should be pointed out that the word "year" is defined in Article 1, paragraph 3 (h), and means a year in accordance with the Gregorian calendar. This implies that reference should be made to the Gregorian calendar in calculating the length of the limitation period provided for in the Convention, particularly with respect to the name and number of days in a week, month or year, the number of weeks in a month or year, and the name and number of months in a year.

"*Article 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."

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[70] The Convention on the General Conditions of Delivery of Goods Between Organizations of the Member Countries of the Council of Mutual Economic Assistance, 1968, is reproduced in 1 REGISTER OF TEXTS OF THE CONVENTIONS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW, *op. cit.*, 100.

[71] See CIVIL CODE, arts. 1423-1425; 4 A.M. TOLENTINO, *op. cit.*, *supra*, note 20 at 586- 593.

Paragraph 1, of Article 28 is self-explanatory. Hence, if the four-year limitation period commenced to run on March 5, 1972, it shall expire on March 5, 1976. The second sentence of said paragraph is somewhat vague, but as explained by Mr. Honnold (Secretary of the UNCITRAL), it is precisely intended to provide for the contingency in case the limitation period commences on February 29 on a leap year.[72] In cases where the limitation period is four years, there is no difficulty in calculating such period, since a leap year occurs every four years. But the second sentence of paragraph 1, Article 28 is still necessary in certain exceptional instances where the Convention provides a limitation period that is longer or shorter than four years, as the case may be.

Paragraph 2 of Article 28 provides that "(T)he limitation period shall be calculated by reference to the date of the place where the legal proceedings are instituted." This implies that if the claim accrued in a State other than the place where the legal proceedings were instituted, the time-table of the former State shall be converted to that of the latter State for the purpose of calculating the limitation period. Such a formula adopted by the Convention is intended to simplify the complex problems that may arise in the computation of the limitation period relative to a contract of international sale of goods. But it has certain drawbacks, because it does not specifically provide for the contingency where the time when the claim accrued is precisely at issue. For example, in a contract of international sale entered into by a person having his place of business in Sydney, Australia and a person having his place of business in London whereby the former purchased certain goods from the latter, if a defect in the goods is discovered when it was handed over to the buyer in the United States, from whence shall the limitation period be computed? In the absence of a clear-cut provision in the Convention, there are three possibles points of references, from which the limitation period may commence to run, to wit: (1) the time in the United States when said goods where handed over to the buyer; (2) the equivalent time in Sydney, Australia where the buyer has his place of business; and, (3) the equivalent time in London where the seller has his place of business. The time-tables of these States are different from each other. If the time when the defect in the goods were discovered occurred at 9:00 a.m., March 2 in the Pacific Coast of the United States, its equivalent time in Sydney is 3:00 a.m., March 3 while in London 5:00 p.m., March 2. It appears that the task of resolving such a difficult problem is left to the municipal court where the proceedings is instituted, which is not at all conducive to the unification of international trade law.

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[72] *Supra*, note 49 at 157.

"*Article 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."

Article 29 is again self-explanatory. It provides for the contingency where the last day of the limitation period falls on an official holiday or other *dies non juridicus,* in which case said period shall be extended so as not to expire until the end of the first day following such official holiday or *dies non juridicus.* The term *dies non juridicus* is a broad term, which includes official holidays referring to certain days of the year when courts or other tribunals do not or cannot officially function as such.

International Effect

"*Article 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 circumstance as soon as possible."

Article 30 was included in the Convention at the request of certain States which opined that the acts and circumstances which caused the limitation period to cease to run under Articles 13 to 19, should be given international effect in States that have ratified or acceded to the Convention. In a case therefore of a claim involving, for example, a buyer in the United Kingdom and a seller in Japan, if both States were parties to the Convention, the institution of legal proceedings in the United Kingdom should have the effect of causing the limitation period to cease to run in Japan and international effect would be given to that interruption.

However, it is important to note that only the institution of legal proceedings or acts or circumstances which are considered as such under Articles 13 to 19 are given international effect under Article 30. The situation envisaged in Articles 20 and 21 are brought about by exceptional circumstances (acknowledgment and *force majeure*) other than the institution of legal proceedings, and are therefore excluded from the scope of Article 30.

The main criticism advanced against the adoption of Article 30 is that it might encourage the filing of abortive proceedings, wherein a

creditor in bad faith shops for a forum that is incompetent to decide the issue arising from the contract of international sale in order to stop the running of the limitation period. However, a majority of the delegates did not consider such criticism meritorious enough, since the instances are very rare in international transactions where a creditor shall be willing to waste time, effort and money only for the purpose of stopping the running of the limitation period. Besides, the introduction of the concepts of "good or bad faith" in the Convention may lead to difficulties in defining and interpreting the same in the light of the varying laws in the different legal systems.[73]

Finally, it should be emphasized that the application of Article 30 is subject to the proviso that "the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstance as soon as possible." The intent of such proviso is that equity and fair play make it imperative that the debtor be informed of the institution of any legal proceedings against him that has the effect of stopping the running of the limitation period in all States that have ratified or acceded to the Convention. Such notice to the debtor can be dispensed with only if the creditor fails to do so after having taken all the reasonable steps to ensure that the former is informed of the institution of said legal proceedings.

Implementation of the Rules of the Convention with respect to Federal States

In federal governments like those in Australia, United States, Yugoslavia, etc., member States oftentimes adopt internal laws that are not only different from each other, but are also different from the laws of the national federation. Furthermore, their federal constitutions as well as the constitutions of their respective component States may grant to such States the sole prerogative of binding themselves to international conventions or treaties, or may provide certain procedures that have to be complied with before the federal government can bind its members States to such conventions or treaties. It cannot therefore be presumed that if a federal government ratifies or accedes to an international convention or treaty, its member States are necessarily bound thereto. In view thereof, Articles 31 and 32 were proposed and introduced by the Australian representative to the Convention.[74] These Articles state the manner by which the rules of the Convention shall be implemented with respect to federal or non-unitary States, to wit:

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[73] See *Ibid.*, pp. 157-159.

[74] *Ibid.*, p. 162.

"Article 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 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 States.

"Article 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."

Article 31 is self-explanatory. Article 32, on the other hand, is somewhat vague and uncertain, but it is by no means unintentional. The rule of private international law varies from one federal State to another. And in a conflicts case involving a citizen of a federal State residing in one of its territorial units, the law that may be applied may either be the national law of the federal State or the internal law of the territorial unit concerned depending on the prevailing law or jurisprudence of the forum on the subject. Hence, the delegates to the Convention decided to make the "law of the particular legal system concerned" the point of reference whenever the Convention makes mention of the law of a State in which different systems of law apply.

Contracts to Which the Rules of the Convention Shall Apply

"Article 33

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

Under Article 33, each Contracting State shall apply the provisions of the Convention to contracts of international sale of goods as defined in Articles 2 to 6, which shall be concluded on or after the date of entry into force of the Convention as provided for in Article 44.

Declarations and Reservations

As previously shown in the foregoing discussions, many of the substantive provisions of the Convention were formulated as a result of a compromise among States having different legal and economic systems as well as between developing and developed States. The effect of such a compromise is that most of the parties to it were not completely satisfied. In view thereof, Articles 34 to 38 were formulated in order to enable certain States to make declarations and reservations regarding some controversial substantive provisions of the Convention. This was necessary so as not to jeopardize the approval of the Convention.

> *"Article 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 Convention the same or closely related legal rules.
>
> *"Article 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."

Certain States that had been parties to previous conventions and treaties of an international or regional character, were reluctant to give their approval to the Convention, unless they were given the opportunity to maintain their existing international or regional arrangements at least with respect to State parties to such conventions or treaties. Apparently, they were not completely satisfied with the substantive provisions of the Convention as a whole, and they wanted to restrict its application. This is the reason why Articles 34 and 37 were included in the Convention. Article 34 enables those States that are traditionally affiliated with a regional grouping, *i.e.* the Nordic Council, the Benelux countries, the Arab League, etc., to make a joint declaration 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 the Convention, because they apply to the matters governed by the Convention the same or closely related legal rules. Article 37, on the other hand, precludes the application of the Convention in cases where the buyer and the seller in a contract of international sale have their places of business in States parties to other conventions already entered into or which may be entered into by them, and which contain provisions concerning limitation or prescription in the international sale of goods.

Notwithstanding their adoption, Articles 34 and 37 have been severely criticized as being in direct contravention of the primary goal of UNCITRAL, that is, to unify and harmonize international trade law. As emphatically stated by one of the delegates during the preliminary discussion of the draft convention in the UNCITRAL working group, said Articles conflict with Article 19 of the Vienna Convention on the Law of Treaties which provides that any reservation which a State might make with regard to a treaty must not conflict with its aim and purposes.[75] Furthermore, although the application of Articles 34 and 37 are limited to the reciprocal relations of States which have made joint declarations under Article 34 and those which are parties to the conventions described in Article 37, a contract of international sale may involve a third party, such as the situation envisaged in Article 18, having a place of business in a State that has not made such declaration nor is a party to said conventions. In such cases, two sets of conventions relating to limitation in the international sale of goods shall govern the relations of the parties, as the case may be, to the aforesaid contract.

"Article 38

1. A Contracting State which is a party to an existing convention relating to 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 months after a new convention on the international sale of goods, concluded under the auspices of the United Nations shall have entered into force."

Article 38 is again a concrete manifestation of the dissatisfaction of certain States with the work of the Convention. This time their discontentment specifically focused on the definition of international sale of goods as provided for in Articles 2 to 6. States who have ratified or intend to ratify or accede to the Hague Convention of July 1, 1964 relating to a Uniform Law on International Sale of Goods,[76] were the ones who were quite vocal in asserting the inclusion of paragraph 1, Article 38 in the Convention. They wanted to restrict the application of the rules of

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[75] *Ibid.*, p. 169.

[76] The Hague Convention of July 1, 1964 has not yet entered into force. But the following States have deposited their instruments of ratification with the government of the Netherland: (1) Belgium on December 12, 1968; (2) San Marino on May 24, 1968; and, (3) United Kingdom of Great Britain and Northern Ireland on August 31, 1967. The following States have signed the Conventions: France, Federal Republic of Germany, Greece, Holy See, Hungary, Israel, Italy, Luxembourg, Netherlands.

the Convention on Limitation to contracts of international sale of goods as defined the said Hague Convention of July 1, 1964.

Paragraph 2 of Article 38, on the other hand, imposes a resolutory condition to the declaration that may be made in paragraph 1 thereof. It provides that "(S)uch declaration shall cease to be effective on the first day of month following the expiration of 12 months after a new convention on the international sale of goods, concluded under the auspices of the United Nations, shall have entered into force." This provision was formulated at the insistence of some delegates to the Convention, who initially objected to the inclusion of paragraph 1 of Article 38 therein. They contended that said paragraph 1 not only deviates from the primary goal of UNCITRAL to unify and harmonize international trade law, but unduly favors States who have ratified or acceded to the Hague Convention of 1964. In response thereto, the latter States retorted that the definition of international sale of goods in Articles 2 to 6 of the Convention may still be revised by the future U.N. Convention on Uniform Rules governing International Sale of Goods, which is still in the process of being formulated and drafted by a working group organized by UNCITRAL. It would not be unreasonable then to allow State parties to the Hague Convention of 1964 to continue applying the definition in the said Convention considering that the same definition in the Convention on Limitation may not be definitive and permanent. Consequently, to avoid further division among the delegates, a compromise was arrived at which resulted in the formulation and adoption of paragraph 2 of Article 38.[77]

In connection with the above discussions, it is unfortunate that UNCITRAL treated the question of limitation separately from the uniform laws governing international sale of goods. A possibility therefore arose that different definitions of international sale of goods may be embodied in three international conventions, namely: (1) the Hague Convention of July 1, 1964 relating to a Uniform Law on the International Sale of Goods; (2) the U.N. Convention on the Limitation Period in the International Sale of Goods; and, (3) the U.N. Convention on Uniform Rules governing International Sale of Goods. The members of UNCITRAL failed to anticipate this possibility. They originally thought that uniform rules relating to limitation in the international sale of goods can easily be formulated, and the calling of a convention at the earliest possible time to discuss such rules would create a good impression on the general Assembly and the members of the international community. But it should be stressed that the task of unifying and systematizing international trade law is a highly complicated and technical job. Certain aspects of the subject such as international sale of goods cannot be taken on a piecemeal basis.

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[77] *Supra*, note 49 at 168-174.

"Article 35

A 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.

"Article 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."

The provisions of Articles 35 and 36 have previously been discussed in connection with Article 1, paragraph 1 and Article 24. Article 35 was formulated as a compromise in order to enable certain States to exclude from the scope of the Convention actions relating to invalidity of contracts. While Articles 36 permits some States to avoid the application of the adversary type of legal proceedings embodied in Article 24.

"Article 39

No reservations other than those made in accordance with articles 34, 35, 36 and 38 shall be permitted."

Article 39 makes the reservations provided for in Articles 34, 35, 36 and 38 exclusive. In other words, no other reservations or declarations aside from those specified in said Articles can be made by the States who intend to ratify or accede to the Convention. The inclusion of such a provision in the Convention is necessary, because in the absence thereof, any State asserting its sovereign rights may make any reservations it may deem appropriate. The clear intent of Article 39 is that the sovereign rights of States who intend to ratify or accede to the Convention must of necessity be subordinated to the primary purpose of UNCITRAL to unify and harmonize international trade law. To give such States an unlimited right to make reservations and declarations to the Convention will evidently defeat such purpose.

"Article 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 receipt by the Secretary-General of the United Nations.

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 Sec-

retary-General of the United Nations. In 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."

Article 40 is self-explanatory and needs no further elaboration. It merely specifies the procedure by which declarations shall be submitted to or withdrawn from the Secretary-General of the United Nations, and the time when it shall take effect after its submission or become inoperative after its withdrawal.

Ratification and Accession

"*Article 41*

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

"*Article 42*

This Convention is subject to ratification. The instrument of ratification shall be deposited with the Secretary-General of the United Nations.

"*Article 43*

This Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations."

Ratification of a convention is different from accession thereto, although both acts nevertheless subject the State parties to comply with the provisions of the convention once it enters into force. Under Articles 41 to 43, only those States who sign the Convention on or before December 31, 1975 may ratify the same. And those States who want to be parties to the Convention but fail to sign the same on the said date, may nonetheless accede thereto. Both instruments of ratification and accession shall be deposited with the Secretary-General of the United Nations.

It should be noted that Articles 41 to 43 are silent with respect to the manner, by which States shall ratify or accede to the Convention. The reason for this is that during the deliberations on these Articles, many delegates thought it wise not to specify the manner, by which States shall ratify or accede to the Convention. The constitutional or other legal procedures regulating the manner by which such official acts are made, vary from one country to another. In some States, the chief executive may perform such acts without any further requirement. In other States, approval by the legislature or even amendment of the national laws affected by the international convention or treaty are required. It was thought better therefore for the Convention not to touch on such matters.

"Article 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."

Article 44 states the time when the Convention shall enter into force. With respect to States that have deposited the first ten instruments of ratification or accession, it shall be effective 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. With respect to those States that shall ratify or accede to the Convention after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the first day of the month following the expiration of six months after the date of deposit of its instrument of ratification or accession.

"Article 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.

"Article 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."

Article 45 is self-explanatory. It simply provides for the manner by which a State party to the Convention may denounce the same, and the time when such a denunciation shall take effect. With regards Article 46, on the other hand, the important point to consider is that all the original texts of the Conventions, whether the same be published in Chinese, English, French, Russian or Spanish, are equally authentic. This simply means that in case of ambiguity or uncertainty of any provision of the Convention, all original texts published in said languages shall be consulted. No single text published in a particular language shall prevail over the others.

IV. Conclusion

Some writers on public international law, including Philip C. Jessup who had made an exposition on transnational law,[78] suggest that there has been an unparalleled extension of the scope of public international law. Referring to new fields like international constitutional law, international administrative law, international labor law, international criminal law, international commercial law, international anti-trust law, and international tax law, Wolfgang Friedmann states that:

> "Even if most of these newly developing branches of international law are still in an embryonic stage. . ., they already show clearly the imperative need for a far wider conception of international law . . . than is reflected in traditional attitudes."[79]

Others writers on the same subject, on the other hand, are more skeptical about these developments. According to W.C. Jenks:

> ". . . a number of these suggestions and categories rest upon debatable or ill-defined concepts and represent verbal innovations rather than a solid rethinking of the structure of the law; partly for this reason they have too often appeared to be vehicles for the views of particular writers rather than objectively valid contributions to a more satisfactory organization and exposition of international law as a whole."[80]

He is obliged to admit, however, that —

> ". . . International aviation law, international maritime law, international labor law, and international sanitary law have secured a wider, though still limited, measure of acceptance as recognized branches of international law, partly because they have been less identified with the views of particular writers but chiefly, no doubt, because they have a more definable scope and, as the result of the existence of a large number of widely ratified conventions and other international instruments, a more precise content."[81]

Despite the aforementioned differences in opinion, all the foregoing statements unmistakably suggest that public international law has indeed gradually extended to and is continuing to encompass subject matters traditionally regulated by municipal or private law. But as pointed out by W.C. Jenks, *supra,* such subject matters must be definite in scope, precise in content, and most important, widely accepted as recognized branches of international law.

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[78] P.C. Jessup, Transnational Law (1956).

[79] W. Friedmann, The Changing Structure of International Law 152 (1964).

[80] See, The Scope of International Law, Brit. Yrbk. Int'l. Law: 1954, 8 (1956).

[81] *Ibid.*

A cursory study of international trade law at its present stage of development will certainly lead one to conclude that it is more intimately related to private international law than to public international law. Its concepts are not yet clearly defined nor its contents precise. In fact, notwithstanding the attempt of the U.N. Secretariat to define international trade law, the UNCITRAL as a body has refrained up till now to officially adopt such definition or to formulate a new and more precise definititon. Most of the member States of UNCITRAL are hesitant to exactly delineate the scope of international trade law. At present, they prefer to initiate the formulation of international conventions, model laws and uniform customs and practices on certain important aspects of international trade law. They have restricted their work of unifying and harmonizing said law to certain priority areas, namely, international sale of goods, international payments, international commercial arbitration and international shipping.

Moreover, many aspects of international trade law still retain their municipal or domestic character because very few international conventions, treaties and other instruments dealing with such subject have been really given world-wide recognition. Very few States ratify or accede to such conventions, most of which do not represent a balanced representation of countries of free enterprise economy, countries of centrally planned economy, developed and developing countries. So far, the only Convention on international trade law that may be considered universally accepted is that relating to Uniform Customs and Practices for Documentary Credits formulated by the International Chamber of Commerce (ICC), because it had been accepted by 173 countries and territories adhering to different economic systems.[82]

Be that as it may, time will come when international trade law shall become an important branch or aspect of public international law. There is an economic and social demand by many members of the international community to reduce, if not completely remove, the legal obstacles to the smooth flow of international trade. The creation and organization of the UNCITRAL is a clear indication of this demand. And with the ever increasing pace of modernization and development, it is hoped that UNCITRAL will be able to gradually eliminate the legal obstacles until such time when international trade law shall assume a truly international character.

Turning now to the Convention on the Limitation Period in the International Sale of Goods — the first U.N. convention under the auspices of UNCITRAL — there is a great possibility that very few States will eventually ratify or accede to it considering the flaws and imperfections

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[82] For listings of the countries and territories concerned, see ICC document 470/INT.79 (19 April 1966).

of its provisions. But this does not mean that State members of UNCITRAL should abandon their task of unifying and harmonizing international trade law. In the first place the Convention on Limitation can still be revised if proven unacceptable to most States. Secondly, the future Convention on Uniform Rules governing International Sale of Goods can still improve the defective definition of international sale of goods as provided for in Articles 2 to 6 of the Convention on Limitation. Hence, rather than be pessimistic about the result of the work of the Convention on Limitation, State participants therein should make use of the experience they have gained in formulating the rules embodied in said Convention as a helpful guide in their future work.

In conclusion, therefore, State members of UNCITRAL should bear in mind that unifying and harmonizing international trade law is undoubtedly a long and arduous task. Systematizing its substantive rules is a highly technical work, which involves a knowledge of comparative commercial law, international commercial law, private and public international law and the economics of international trade. In addition, procedural rules have to be formulated hand in hand with the development and organization of an integrated judicial system in order to effectively implement such rules. These are the difficulties that have been encountered and will continue to be encountered by the members of UNCITRAL. The success of their work will greatly depend on how they will face up to these difficulties. For as wisely stated by Justice Holmes:

> ". . . To know what you want and why you think that such a measure will help is the first but by no means the last step towards intelligent legal reform. The other, and more difficult one is to realize what you must give up to get it, and to consider whether you are ready to pay the price."[83]

[83] O.W. HOLMES, IDEAS AND DOUBTS, Collected Legal Papers, 307 (1902).