

United Nations Commission on International Trade Law

YEARBOOK

Volume III: 1972

SUPPLEMENT

**Draft convention on prescription (limitation)
in the international sale of goods: records
of discussion at the fifth session**



**UNITED NATIONS
New York, 1973**

NOTE

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INTRODUCTORY NOTE

The United Nations Commission on International Trade Law (UNCITRAL) at its fifth session (10 April-5 May 1972) approved a draft convention on prescription (limitation) in the international sale of goods. In accordance with General Assembly resolution 2929 (XXVII) of 28 November 1972, a United Nations conference will be convened to conclude a convention on the basis of the text approved by the Commission. It is expected that this conference will be convened in June 1974.

Volume III of the UNCITRAL Yearbook reproduces the text of the draft convention as approved by the Commission^{1/} and also a commentary on this draft.^{2/} Also reproduced in the same volume is the report of the Commission's Working Group on Time-limits and Limitations;^{3/} this report includes the draft articles that were the basis of the Commission's discussions that led to the approval of the draft convention.

This supplement to volume III of the Yearbook reproduces the Commission's summary records relating to these discussions. It is hoped that the present publication of these summary records will be of help in understanding the background, purpose and scope of the draft convention on prescription (limitation) in the international sale of goods which the Commission approved at its fifth session.^{4/}

1/ The text of the draft convention appears in paragraph 21 of the Commission's report on its fifth session. Yearbook of the United Nations Commission on International Trade Law, Volume III: 1972 (document A/CN.9/SER.A/1972, United Nations publication, Sales No. E.73.V.6), part one, II, A.

2/ Ibid., part two, I, B, 3.

3/ Ibid., part two, I, B, 2.

4/ Mr. Jorge Barrera Graf (Mexico) was the Chairman of the Commission at that session and Mr. Jerzy Jakubowski (Poland) was the Rapporteur.

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93rd meeting (10 April 1972)

The first part of the meeting was taken up by the discussion of other matters

The CHAIRMAN suggested that the draft Convention on prescription (limitation) should be considered article by article and that any observations made should be referred to the Working Group so that it might prepare a draft of any changes required and submit them to the Commission, which would study them during the third week of the session.

Mr. GUEST (United Kingdom) supported the Chairman's suggestion. In addition, he felt that, since the Commission had before it a long commentary prepared by the Secretariat, the Chief of the International Trade Law Branch should be asked to make a brief statement introducing each article.

Mr. LOEWE (Austria) endorsed the suggestion of the United Kingdom representative and wished to know whether amendments could be submitted orally.

Mr. SINGH (India) also endorsed the suggestion of the United Kingdom representative. In his view, delegations should submit their proposed amendments as soon as possible, so as not to delay the work of the Commission.

The CHAIRMAN said that it would indeed be useful if the Secretary of the Commission made an introductory statement before the consideration of each article. Proposed amendments should be submitted in writing as soon as possible so as not to delay the work of the Commission, especially in view of the time required for translation. He suggested that questions of form should be referred directly to the Working Group. Questions of substance would, on the other hand, be considered in plenary and the Working Group would base any new proposals on the Commission's deliberations and those proposals would then be submitted for consideration by the Commission at the last two meetings allocated to the draft Convention.

Mr. POLLARD (Guyana) endorsed the suggestion of the United Kingdom representative and proposed that consideration of the draft Convention should be deferred until the following day.

Mr. OGUNDERE (Nigeria) supported the suggestion of the United Kingdom representative and suggested that the Commission should draw up a time-table

indicating which articles of the draft Convention it intended to consider each day, so as to enable delegations to submit their proposed amendments at least a day in advance.

Mr. LOEWE (Austria) agreed that, in general, delegations should submit their amendments on questions of substance in writing and as soon as possible. He none the less wondered whether it would not be possible for amendments relating to the first few articles of the draft Convention to be submitted orally.

Mr. HONNOLD (Chief, International Trade Law Branch), before introducing article 1 of the draft Convention on prescription (limitation), remarked that the draft Convention contained 46 articles and that the Commission's schedule of meetings allowed seven working days in which to consider them. The Commission would therefore have to consider six or seven articles each day.

Article 1 of the draft Convention, which dealt with definitions, was difficult to introduce, since by its very nature, it referred to other articles of the law. There was, however, one point in article 1 which the Working Group had decided to refer to the Commission, namely the phrase in square brackets at the end of paragraph (1) ("or to a guarantee incidental to such a contract"). Paragraphs 8 to 13 of the commentary on the article (A/CN.9/70/Add.1) summarized the differing views which had emerged on that point in the Working Group. The majority of the members of the Working Group had been opposed to the inclusion of the phrase, noting that guarantees created a complex body of relationships that would be difficult to take into account in the present law and, in addition, that national rules dealt with the matter adequately (commentary, para. 9). Other members, however, had suggested that, if guarantees were not included in the field of application of the law, there was a possibility that claims based on a guarantee could be enforced after the principal obligation had been prescribed, and that the provision was therefore necessary in order to protect both the guarantor and the creditor (para. 10). The majority of the members, while agreeing with the objective that the limitation period for the debtor and the guarantor should expire at the same time, had concluded that this was difficult to achieve in practice (para. 11).

Mr. ROGNLIEN (Norway) drew attention to the studies and proposals in document A/CN.9/70/Add.2. He also pointed out that, in document A/CN.9/R.9, his delegation had proposed that a definition of "breach of contract" should be included in article 1, since that concept was clearer in Anglo-American law than was "contravention au contrat" in French law. At the same time, he wished to know how and to what extent the excellent commentary by the Secretariat (A/CN.9/70/Add.1) could be revised in the light of the Commission's work.

Mr. HONNOLD (Chief, International Trade Law Branch) replied that the commentary would have to be revised after the conclusion of the Commission's session, in the light of any changes made in the articles. The Secretariat would undertake such a revision if the Commission so wished and it would be grateful for any suggestions which would assist it in performing that task.

Mr. GUEST (United Kingdom) supported the proposal of the representative of Guyana that the consideration of article 1 should be deferred until the following meeting.

After an exchange of views between the CHAIRMAN and Mr. ROGNLIEN (Norway), it was decided that, at the next meeting, the Commission would consider articles 1 to 6 inclusive, since articles 5 and 6 were closely interrelated.

94th meeting (11 April 1972)

Article 1 (1)

Mr. JENARD (Belgium) said that guarantees incidental to an international sales contract, mentioned within the square brackets in article 1 (1), should be excluded from the sphere of application of the Uniform Law, since they constituted autonomous contracts and came under international private law. That law was different from the one which applied to the principal international sales contract. If the draft Convention was applied to such guarantees, it would interfere with juridical areas which the Commission had not yet touched upon, such as bank guarantees. Furthermore, the legal concepts governing guarantees were different in each country and it would be difficult to apply the Uniform Law to that question.

Mr. LOEWE (Austria) agreed with the representative of Belgium. The commentary in document A/CN.9/70/Add.1 showed that the wording of article 1 (1) had been intended to include claims arising by reason of the invalidity of a sales contract, although under article 32, States could declare that actions for annulment of the contract would not be covered by the provisions of the draft Convention. The nullity of a contract should not be dealt with in any fashion by the Convention, since the questions raised by nullity went far beyond the scope of the international sale of goods; nullity might, for instance, be due to a lack of capacity. Article 1 (3) (a) in any case spoke of "rights or duties under the contract of sale", which presupposed that the contract of sale was a valid one.

Mr. LEMONTEY (France) also agreed that the draft Convention should not apply to a guarantee incidental to an international sales contract, because such a guarantee was an autonomous contract and there might be conflict of law if the Convention applied to such cases. With regard to the presupposed validity of the contract of sale, he agreed with the Austrian representative. Actions for annulment covered all types of contract, not only contracts of international sale of goods, and should be dealt with by some other convention relating to sales contracts of every type. His delegation, together with the Belgian delegation, proposed an amendment (A/CN.9/V/CRP.4) whereby a sentence would be added to article 1 (1), stating that the Uniform Law should not apply to the limitation of legal proceedings

or to the prescription of rights based on cause for annulment of the contract or a finding that it was non-existent.

Mr. OLIVENCIA (Spain) said that he had submitted some amendments (A/CN.9/V/CRP.2) which substantially coincided with the comments made by the Belgian, Austrian and French representatives. His first amendment referred to the exclusion from the Uniform Law of incidental guarantees. While agreeing with the French representative that action for annulment should be excluded from prescription, he felt that a negative formulation which emphasized exclusion might better appear in article 6, which defined the matters outside the scope of the Convention, rather than in the very first article. His amendment also proposed the deletion of article 2 (2).

Mr. MANTILLA-MOLINA (Mexico) said that the phrase "limitation of legal proceedings" was a duplication of "prescription of the rights". Since the phrase was open to misinterpretation in civil law countries, he suggested that it should be deleted. However, he would not press for his suggestion to be adopted, if a consensus could be more speedily achieved by keeping the phrase. He agreed with the Belgian and French representatives that incidental guarantees should be excluded from the sphere of application of the Uniform Law. He also agreed that exclusions from the Law should be listed in article 6 and that the Convention should apply only to valid sales contracts.

The Commission should exercise care in deciding upon the language of the Convention, particularly with regard to actions for annulment. The civil law concept of such actions was different from that in common law and it was essential to avoid ambiguity.

Mr. COLOMBRES (Argentina) agreed with the representatives of Mexico and Spain that exclusions should appear in article 6, rather than article 1. If guarantees were excluded from the Uniform Law, article 1 (3) (c), which defined guarantees, should be deleted.

Mr. OGUNDERE (Nigeria) supported the exclusion from the scope of the Convention of guarantees incidental to contracts of international sale. He thought, however, that cases of invalidity of contracts should not be singled out. The Convention was intended to replace municipal legislation and the question of

limitations in the international sale of goods should therefore be treated as a whole. Delegations from civil law countries had been adamant on the subject of any possible modification of article 1 (1) and their intransigence went against the spirit of the work of the Commission, which was intended to unify international law by drafting a simple formulation, acceptable to all States. He found article 1 (1) acceptable in its current formulation.

He suggested that review of all the definitions in article 1 (3) should be deferred until a decision had been reached on the rest of the Convention. He could not support the amendments proposed by the French and Spanish representatives.

Mr. GUEST (United Kingdom) said that, after consultation with other members of the Commission, he agreed that guarantees should be excluded from the sphere of application of the Uniform Law. He fully agreed with the Nigerian representative; the draft Convention was intended as a bridge between civil law and common law systems, and would not be acceptable to representatives of both types of law, unless delegations adopted a flexible attitude. With reference to possible duplication involving the phrase "limitation of legal proceedings" and "prescription of the rights", which had been mentioned by the Mexican representative, he pointed out that in common law limitation was a matter of procedure, while in civil law it constituted an extinction of the rights of the buyer and of the seller. Article 1 (1) was an example of attempted reconciliation of the two legal systems.

With reference to the exclusion of actions for nullity from the scope of the Convention, there was a fundamental difference between civil and common law with regard to the meaning of the phrases "action en nullité" in civil law and "action for nullity" in common law. In common law, action for nullity covered several situations, such as lack of consensus between the parties to a contract and fundamental error in a contract. There were equitable remedies for situations such as fault, duress, undue influence and misrepresentation. It would be difficult for the Uniform Law to cover all those cases. The delegates from civil law countries should understand the position of the common lawyers and leave article 1 (1) as drafted, while those from common law countries should allow the civil lawyers to express their reservations, through article 32 of the draft Convention. Such reservations would derogate from the uniformity of the Uniform Law but each system of law should not attempt to force its own approach on the other system, as that

would lead to the failure of the Convention. The use of the phrase "actions for nullity" in the Convention might lead to disputes in its enforcement.

Mr. SMIT (United States of America) announced that his delegation would circulate a memorandum explaining its position on the principal points of the draft Convention.

He had no objection to the exclusion from article 1 (1) of the reference to guarantees. The construction of the text, however, posed a more substantial problem. Under United States law, a buyer could bring an action against a person other than his seller - for instance, a remote seller. The Convention could be understood as extending to an action brought against a manufacturer but it was stated in the commentary (A/CN.9/70/Add.1) that such a claim would not be governed by the Law. To clarify matters, therefore, he proposed the insertion of the words "against each other" after the words "buyer and seller", to ensure that the Law covered actions by parties in a relation of privity to each other.

There were three approaches to the issue of nullity. The first, which was the United States approach, would be to deal only with problems peculiar to sales and to leave other issues to the general law. The second would be to deal with all problems of prescription in the context of sales - the approach adopted in the Uniform Law. The third approach would be to draft a comprehensive convention relating to international sales generally. It followed from the adoption of the second approach that any attempt to limit the text should be resisted to avoid the excision of many other provisions in addition to that relating to annulment.

Mr. GUEIROS (Brazil) endorsed the comments of the representatives of Belgium, Austria, France, Nigeria and the United Kingdom. He particularly supported the views of the representatives of Argentina, Spain and Mexico. In supporting the exclusion from article 1 (1) of the reference to guarantees, he drew attention to paragraphs 9 to 13 of the commentary on the first article. The Commission must decide whether to include that reference or not and its decision would affect, in addition, the wording of articles 1 (3) (b), 10 and 14.

Mr. DEI-ANANG (Ghana) said that his delegation's views on the preliminary draft of article 1 were already on record (A/CN.9/70/Add.2). As to the final draft before the Commission, he was in broad agreement with the view that the reference

to guarantees should be deleted from article 1 (1). He shared the Belgian representative's views in that connexion, although his understanding was that the word "guarantee" could have a variety of different implications in relation to a contract of sale. Some clarification was needed. Was it the intention of the Law, for example, that a guarantee by a seller with regard to the performance of his product should not be subject to prescriptive rules? Such an approach would favour countries which bought large quantities of manufactured goods. Nevertheless, such guarantees of performance were usually limited to very short periods. If article 1 (1) was to be understood as extending to them, a situation could arise where a manufacturer's guarantee would be for a shorter period than that envisaged under the Law. Was it the understanding of those drafting the Law that such guarantees could cover a period shorter than the four years offered under the Law?

His delegation's first impression of the amendment by the French representatives had been that it was harmless. In view of the difficulties described by the United Kingdom representative, however, it would appear that to accept the French amendment would create serious problems for common law countries and he hoped that the French representative would have second thoughts.

He asked whether the reference to assigns in article 1 (3) (a) was an attempt to accommodate his delegation's views with regard to the problem of the definition of a seller which were stated in its comments on the preliminary draft (A/CN.9/70/Add.2, page 118).

Mr. ELLICOTT (Australia) said that previous speakers had anticipated many of his own delegation's views. In particular, he agreed that the reference to guarantees in article 1 (1) should be excluded. He also supported the retention of language distinguishing between the common law concept of limitation and the civil law concept of prescription.

He agreed with the representatives of Nigeria, the United Kingdom, the United States and Ghana regarding the question of the exclusion of nullity actions. It had been his intention to raise the problems already described in that connexion by the United Kingdom representative, who had stated the legal reasons why the proposal to exclude such actions should not be accepted. He thought that the problem should be resolved by relating it to the position of the businessman. It was very desirable that a businessman should have a package deal which would

allow him to see at once what limitations there were to the prescriptive period. It would be odd, for example, for a businessman to be told that he must bring an action for breach of contract within a period of four or five years, and then to be faced later with an action for rescission brought outside the time-limit. It would be unfair if the prescriptive period in relation to annulment was longer than that provided under the Law. The question should be approached from the point of view of the businessman and not exclusively from the standpoint of the various legal systems. There was no logical reason why a businessman should be at the mercy of variations in municipal law. For those reasons, the Commission should not agree to the exclusion of actions for nullity. Article 32 provided an opportunity for declarations to exclude actions for annulment of contract.

Mr. JAKUBOWSKI (Poland) said that the question of guarantees was a very difficult one, quite apart from the difficulties arising in the interpretation of the notion itself. Under Polish law, for example, a bank guarantee was independent of a personal guarantee. He agreed, therefore, that the whole question of guarantees should be studied after the consideration of other references to guarantees in the Law, by which time the whole scope and content of the Convention would have become apparent.

He agreed with the pragmatic approach of the Australian delegation to the exclusion of actions for annulment. Businessmen would not understand such an exclusion. In arbitral proceedings, the methods open to the defendant were numerous and depended on the circumstances of a given situation; it would be difficult to isolate the question of annulment from other elements of a contract. Article 32 offered adequate grounds for a compromise between the divergent views expressed in the Commission.

As a lawyer from a civil law country, he could accept the terminology in article 1 (1), to which lawyers from the common law countries attached much importance. The problem was rather one of translation, which could be overcome.

The CHAIRMAN said that there appeared to be a consensus in the Commission regarding the exclusion of the reference to guarantees appearing within square brackets in article 1 (1). There also appeared to be unanimity with regard to the retention of the wording relating to the prescription of the rights of buyers and sellers. The main problem appeared to be the inclusion or exclusion of

actions for annulment. Civil law countries supported their exclusion, while common law countries took the opposite view. The issue had been discussed by the Working Group but no agreement had been possible and the outcome had been the compromise in article 32. The issue might be referred to the Working Group, together with the proposals by the French, Spanish and United States representatives.

Mr. ROGNLIEN (Norway) said that there appeared to be a consensus that a guarantee incidental to a contract of international sale of goods should be outside the scope of the Law. In any case, if municipal law provided that the term of a guarantee in substance was shorter than that envisaged under the Uniform Law, the municipal provision would prevail.

There was some uncertainty as to what arose from a contract and what arose from its invalidity. For instance, the qualification of the concept of force majeure might be uncertain or vary in different States. The same uncertainty prevailed with regard to the termination of a contract. For example, was a claim for restitution after the termination of a contract based on the contract itself or on elements outside it? The existence of principal and subsidiary claims and possible differences in the respective periods of prescription had also to be taken into consideration. The decision regarding the exclusion or otherwise of actions for annulment was a decision of principle and as such should be taken by the Commission in plenary meeting. He suggested that, before the issue was referred to the Working Group, an indicative vote should be taken.

Mr. MATTEUCCI (UNIDROIT), referring to the question of the exclusion of actions for annulment of sales contracts, said that his organization was shortly to issue uniform provisions regulating questions which might affect the validity of contracts. The text had been prepared by an expert committee of jurists representing the various legal systems in order to fill a gap in existing law. He intended to suggest that the draft text should be sent to the Commission to be dealt with either as an independent instrument or as a protocol to the Uniform Law. He thought it logical to relate it to the Law.

Mr. KHOO (Singapore) agreed with previous speakers regarding the question whether the Uniform Law should extend to all proceedings resulting from international contracts of sale. He endorsed the remarks in that connexion of the representatives of the United Kingdom, Australia, Poland and Norway.

The second question was whether the Law should apply to guarantees to secure the performance of obligations incurred under a contract of sale. His view was that such contracts of guarantee should be excluded from the Law.

His delegation had reservations with regard to the use of the words "creditor" and "debtor" in article 1 (3) (d) and (e), which it would discuss at a later stage.

Mr. NESTOR (Romania) said that he was prepared to accept article 1 (1) with or without the bracketed reference to guarantees. His own view was that the Commission should expand the scope of the Law rather than restrict it. The question of a guarantee was not difficult, nor was it an independent problem. The important thing was that there should be the same period of prescription with regard to the contract and the guarantee. Even if the reference to a guarantee was removed from the text, that essential problem would remain. There were a variety of theoretical points which could arise in a detailed discussion of the text but the essential requirement was that the text should state clearly the intentions of the Commission.

Mr. DEI-ANANG (Ghana) said that his delegation would have some difficulty in agreeing to the exclusion of all forms of guarantees from the law. Guarantees relating to performance ought not to be excluded in view of the contradiction between article 11 and article 1.

Mr. HONNOLD (Secretary of the Commission) said that in article 1 the term "guarantee" referred to a promise by A to be responsible for performance by B. The term "undertaking" used in article 11, on the other hand, related to undertakings regarding the quality of goods. As they stood, therefore, there should be no contradiction between articles 1 and 11.

Mr. MICHIDA (Japan) supported the deletion of the reference to guarantees in article 1 and the retention of the reference to limitations. He also agreed to the Chairman's suggestion regarding the procedure to be followed by the Commission.

As to the question of the exclusion of annulment actions, his delegation thought that article 32 adequately covered the problem.

The amendment to article 1 (1) suggested by the United States representative was an improvement on the existing text and, as a member of the Working Group, he would welcome the views of other delegations on that amendment.

Mr. CHAFIK (Egypt) said that his delegation fully appreciated that the word "guarantee" in article 1 (1) was not used in the same sense as the word "undertaking" in article 11. Accordingly, it favoured the deletion of the words relating to personal guarantees in the square brackets.

Under the Egyptian legal system, actions for nullity were covered by special regulations concerning the length of the limitation period and its starting-point. His delegation was satisfied with the present text, but had reservations with regard to article 32; it would prefer to exclude actions for nullity from article 1 (1). His delegation shared the view of the Norwegian representative on the Chairman's suggestion to refer the question back to the Working Group. The point at issue was not a question of drafting, but of principle. Moreover, if the Commission referred it to the Working Group, the Working Group would refer it back to the Commission, and such a procedure was obviously undesirable. The Commission should take a decision forthwith on the desirability of inserting a reference to actions for nullity, after which the Working Group could begin work on formulating a suitable text.

Mr. POLLARD (Guyana) said that his delegation was in complete agreement with the views expressed by the United Kingdom representative with regard to the amendment proposed by the French delegation. In the view of his delegation, the United States proposal to insert the phrase "against each other" after the words "buyer and seller" in article 1 (1) could be further strengthened by the insertion of the word "immediate" before the word "buyer".

Mr. SZASZ (Hungary) said that his delegation supported the deletion of the text within square brackets in article 1 (1). With regard to the question of actions for nullity, although Hungary was a civil law country, his delegation could accept the draft as it stood.

Mr. JENARD (Belgium) said that, while his delegation would have preferred to exclude actions for nullity from article 1 (1), it was prepared, in a spirit of compromise, to accept the text of the paragraph as it stood. However, it felt that article 32 needed to be reformulated.

The CHAIRMAN noted that there appeared to be general agreement that the text within the square brackets should be removed from article 1 (1). The

United States proposal would be referred to the Working Group. A reformulation of article 32 might settle the problem of the exclusion of actions for nullity. He invited members to express their views so that the Working Group could take them into account when formulating a solution.

Mr. LOEWE (Austria) said that his delegation would support the compromise suggested by the Belgian representative.

Mr. OLIVENCIA (Spain) said that his delegation was prepared to support the compromise suggested by the Belgian representative and wished to withdraw its earlier amendment. It had found the statement by the representative of UNIDROIT both interesting and pertinent, particularly with regard to its draft provisions on nullity. His delegation supported the United States proposal to qualify the text of the article 1 (1).

Mr. MANTILLA-MOLINA (Mexico) noted differences between the French, Spanish and English versions of the draft Convention. He suggested that the French text should be used as the basis for the Commission's work.

Mr. GUEIROS (Brazil) said that his delegation could accept the compromise suggested by the Belgian representative and the amendment proposed by the United States delegation. He agreed with the suggestion made by the Mexican representative.

Mr. LASALVIA (Chile) supported the Mexican suggestion.

Mr. OLIVENCIA (Spain) said that his delegation was aware of the problem raised by the Mexican delegation and felt that the matter might be referred to the Working Group.

Article 1 (3)

Mr. POLLARD (Guyana) proposed the insertion of a subparagraph after article 1 (3) (a) which would read: "'contract of sale of goods' means a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price" (A/CN.9/V/CRP.6). He noted that the term "the international sale of goods" was used throughout the draft Convention. There were numerous contracts similar to the contract of sale of goods and his delegation therefore felt that it would be useful if the Convention contained a clear definition of the term.

Mr. MICHIDA (Japan) recalled that, in formulating article 4 (1) of the draft Convention, the Working Group, of which his delegation was a member, had attempted to distinguish the contract of sale from other forms of contract. While the text of article 4 (1) was perhaps neither clear nor adequate, the definition of a contract of sale of goods was an extremely difficult task. The Working Group had spent considerable time attempting to work out a suitable definition and had finally adopted the formula in article 4 (1). His delegation wished to urge the Commission not to try to evolve a new definition with undue haste.

Mr. LOEWE (Austria) said that his delegation had serious doubts as to the usefulness or feasibility of introducing a definition of the contract of sale of goods into the Convention. Such a definition had not been introduced into the Uniform Law of 1964 or its revision by the Working Group. In the opinion of his delegation, it would be most inappropriate to insert such a definition in a Convention designed to promote uniformity in the law of sales.

The CHAIRMAN suggested that the Working Group should examine the Guyanese proposal.

Mr. NESTOR (Romania) requested clarifications with regard to article 1 (3) (a), which contained definitions of the terms "buyer" and "seller". He inquired what difference there might be, from the standpoint of the application of the Convention, between persons who "buy or sell" and persons who "agree to buy or sell". Furthermore, he had some doubts regarding the phrase "successors to and assigns of".

Mr. OLIVENCIA (Spain) felt that the text of article 1 (3) (a) was somewhat confused. Perhaps a formulation such as "persons who buy or sell, or undertake to buy or sell" would improve the definition.

Mr. CHAFIK (Egypt) supported the Norwegian proposal (A/CN.9/R.9) to incorporate a definition of breach of contract into the Convention between article 1 (3) (e) and (f). However, he did not consider the Norwegian proposal to be well formulated, and would have preferred a form of words such as "'breach of contract' means failure to execute an obligation by a party or performance which is not in conformity with the contract".

Mr. JAKUBOWSKI (Poland) agreed that it would be desirable to define breach of contract; while it was well understood in practice, it was nevertheless a new concept in civil law countries. He felt that the Egyptian formula would be suitable.

Mr. NESTOR (Romania) felt that the Working Group should try to find a better formulation for article 1 (3) (d) and (e). Article 1 (3) (d) defined a creditor as a party seeking to exercise a claim and gave the impression that the status of a creditor was dependent on his intention of exercising his right; yet even if he did not wish to exercise his right, he was still a creditor. The same considerations applied to the definition of a debtor in the following subparagraph.

Mr. JAKUBOWSKI (Poland) felt that article 1 (3) (g) should encompass organizations and forms of association with no specific legal personality, such as the Handelsgesellschaft in German-speaking countries and the partnership in common law countries.

Mr. LOEWE (Austria) felt that the text of article 1 (3) (g) was perfectly satisfactory since it referred to "company, or other legal entity".

Mr. COLOMBRES (Argentina) felt that the subparagraph needed further elaboration. For example, in Argentina, there were sociudades en participación and sociudades irregulares which would not be covered by article 1 (3) (g).

Mr. JAKUBOWSKI (Poland) noted that the problem of organizations or forms of association with no legal entity existed in common law countries and asked representatives from those countries to state whether they considered that the definition in article 1 (3) (g) covered partnerships.

Mr. MICHIDA (Japan) felt that the present text was satisfactory and saw no reason to examine the matter further.

Mr. CHAFIK (Egypt) agreed that there was no need to refer the matter to the Working Group for further consideration.

Mr. GUEST (United Kingdom) felt that the words "legal entity" could be construed to cover the case of partnership under common law.

Mr. ELLICOTT (Australia) felt that it should be made clear that partnership was encompassed in the definition of "persons".

Mr. COLOMBRES (Argentina) felt that article 1 (3) (g) might well be deleted, since the definition contained therein might give rise to considerable problems.

Mr. OGUNDERE (Nigeria) proposed the insertion of the phrase "sole or aggregate" at the end of article 1 (3) (g).

Mr. GUEIROS (Brazil) supported the Argentine proposal to delete article 1 (3) (g). Alternatively, the word "legal" before "entity" might be deleted.

Mr. ROGNLIEN (Norway) said one of the aims of the definition in article 1 (3) (g) was to make it clear that the "buyer and seller" referred to in article 1 (1) were not only physical persons, but also "legal entities" or "personnes morales". He agreed with the representative of the United Kingdom that partnerships could be covered by the existing definition.

Mr. JAKUBOWSKI (Poland) pointed out that it was only under the French legal system that partnerships, or their equivalent "sociétés en participation" and "Offentliche Gesellschaft", were treated as full legal entities. The draft Convention had certain defects regarding the categories of persons it embraced. Those defects could be eliminated either by deleting article 1 (3) (g), which contained the definition of the persons concerned, or by giving equal treatment within that definition to bodies such as partnerships.

Mr. COLOMBRES (Argentina) thought that the issue, being purely technical, should be referred to the Working Group to avoid wasting time. It was extremely difficult to specify the equivalent in a given régime of an entity under another régime. He would in any case prefer the deletion of the text in question.

Mr. GUEIROS (Brazil) said that he agreed entirely with the Argentine representative. He also pointed out that the Napoleonic Code made no distinction between a juridical and a de facto person. Brazilian law followed the German system in that context. It would be wiser to delete article 1 (3) (g) or, alternatively, to leave it to the courts to decide what was meant by a legal entity. He could not accept the text as it stood.

The CHAIRMAN said that the matter would accordingly be referred to the Working Group.

Mr. NESTOR (Romania) noted that, according to article 1 (3) (h), "writing" included telegram and telex. He wondered if teletype was considered to be the same as telex.

The CHAIRMAN said that the question would be referred to the Working Group.

Article 2

Mr. HONNOLD (Secretary of the Commission), introducing article 2 of the draft Convention dealing with the applicability of the Uniform Law, recalled that the Commission was familiar with the problem. Paragraph 1 of the article was analogous to article 2 of the original ULIS, which adopted a universalist approach by excluding the rules of private international law for the purpose of the application. However, the Working Group on Sales had rejected that universalist approach and proposed an alternative solution which the Commission had discussed at its third session: the Uniform Law on sales would apply (a) when the parties had their places of business in different Contracting States or (b) when the rules of private international law led to the application of the law of a Contracting State. The question was whether that solution was applicable to a Uniform Law on prescription. Paragraph 8 of the Secretariat commentary recalled the difficulties arising from recourse to the rules of private international law in order to determine the scope of applicability of the Uniform Law because of the substantial differences between legal systems ultimately derived from Roman law and most systems of common law. By providing that the Uniform Law applied without regard to the rules of private international law, the draft Convention avoided those difficulties. It should be noted, however, that article 3⁴ of the draft Convention offered States an opportunity to enter a reservation with regard to the applicability of the Uniform Law when they had ratified one or more conventions on the conflict of laws affecting limitation.

Mr. DROZ (Hague Conference on Private International Law), speaking at the invitation of the Chairman, pointed out that the universalist approach which was that of the draft Convention on prescription had given rise to difficulties when ULIS was drafted and when it was revised by the Commission. It should also be noted that ULIS, which would come into force in August 1972, would be accompanied by reservations, particularly by the United Kingdom and the Netherlands, of such a nature that its universalist character would be seriously jeopardized. The purpose

of adopting that universalist approach for the law on prescription had been to establish a uniform rule which would have the effect of making limitation subject to the rules of the forum (lex fori) in order to meet the requirements of juridical certainty. That objective was limited, however, to the extent that there were many unreasonable forums. The choice made was, moreover, subject to an important exception, which was stated in paragraph 2 of article 2 and which undermined the validity of the argument of juridical certainty. Whereas the effect of paragraph 1 was to state a principal rule of conflict, paragraph 2 introduced a subsidiary rule not of conflict but of applicability. In his view, it would be preferable not to inject a rule of conflict in the draft Convention and to delete article 2. Since a suggestion for its deletion would probably have little chance of being adopted, he had submitted, in writing, suggestions* for replacing article 2 by a provision to the effect that the Law should apply irrespective of which law was applicable to the contract of sale itself, except where the parties had expressly made prescription subject to the law applicable to the contract of sale, in which case the said law would be applied even if it was the law of a non-Contracting State. The advantage of that provision was that it stated a principal rule and then qualified it by a subsidiary rule which was nevertheless mandatory for all States, thus ensuring a balance between the two rules.

Mr. OGUNDERE (Nigeria) said that he had listened with great interest to the statement of the observer for the Hague Conference. The question to be asked was what was the objective of the draft Convention and if its objective was to be universally applicable, it should break with the vestiges of the past and lay down new rules with the help of the developing countries. Accordingly, the Commission should try to eliminate all provisions which would impede its application. For those reasons, he suggested deletion of paragraph 2 of article 2 and of article 34.

Mr. OLIVENCIA (Spain) recalled that his delegation had submitted an amendment to article 2 calling for the deletion of paragraph 2. After hearing the comments of the observer for the Hague Conference and the representative of Nigeria, it was his suggestion that discussion of article 2 should be deferred until the various amendments had been circulated.

* Subsequently issued as document A/CN.9/V/CRP.5.

Mr. CHAFIK (Egypt) supported that suggestion.

Mr. ROGNLIEN (Norway) considered that it was always dangerous to interrupt a discussion in progress and saw no reason why the Commission could not discuss the basic question, namely, whether to adopt a universalist approach or to rely instead on the rules of private international law. His personal opinion was that the Commission should adopt a universalist approach to prescription. That position did not reflect a preference as a matter of principle since Norway was against a universalist approach towards questions relating to the international sale of goods; it was based on essentially practical considerations arising from the difficulty of reconciling common law systems with civil law systems derived from Roman law. He felt that paragraph 2 should be referred to the Working Group.

The CHAIRMAN considered that the discussion of article 2 should not be deferred.

Mr. LOEWE (Austria) reminded the members that he had submitted an amendment to article 2 based on the following considerations. Faced with a choice between a universally applicable system or recourse to the rules of private international law, the first was preferable not only for practical reasons but because it was an expression of the will to bring about a practical unification of laws. He therefore favoured retention of paragraph 1. Paragraph 2 dealt with the problem of the extent to which the parties could derogate from the rules of a Uniform Law. In order to evade applying the Uniform Law, the parties could choose as the applicable law the law of a non-Contracting State which had no connexion with their contract. Since an international convention could not make provision for the specific stipulations of the parties, paragraph 2 should provide an opportunity for the parties to derogate expressly from the Uniform Law wholly or partially. The parties could also make the contract itself subject to a specified law which would also apply to prescription to the extent that it considered prescription to be governed by the law of the contract.

Mr. LEMONTEY (France) said that he favoured the universalist approach expressed in paragraph 1. On the other hand, paragraph 2 raised problems first concerning the extent to which the parties could derogate from the Uniform Law

and secondly, in the event that the Uniform Law was excluded, concerning which law was applicable. He agreed with the Austrian representative that it was difficult to disregard the principle of the autonomy of the will of the parties as regarded prescription. Furthermore, paragraph 2 was ambiguous because it was not clear whether the applicable law concerned prescription only or the contract as a whole. Paragraph 2, while it qualified the universalist principle in paragraph 1, introduced an element of unpredictability: in the event, for example, that the parties, in accordance with paragraph 2, were to choose to make their contract subject to a law which made the lex causae applicable to prescription, their arrangements would be thwarted if a conflict arising between them were brought before the tribunal of a country which applied the lex fori. It was paradoxical that in the matter of prescription, the parties should not enjoy the same freedom afforded them under ULIS with regard to sales. For that reason, his delegation had joined with that of Belgium in submitting an amendment^{*} which reverted to the views expressed by the observer for the Hague Conference: it would afford the parties the option of excluding the application of the Uniform Law without restricting their choice to the law of a non-Contracting State.

Mr. WARIOBA (United Republic of Tanzania) said that his delegation supported paragraph 1. However, paragraph 2 raised a fundamental question and his delegation would like the members of the Working Group on Prescription to explain why they had used the words "the law of a non-Contracting State". The point was that although the uniform rules of the Hague had never been intended to apply to more than a limited number of States, the task of United Nations bodies was to draft instruments which would apply to all States. The phrase in question appeared to imply that a law was being drafted for adoption with the authors knowing in advance that some States would not apply it.

Mr. ELLICOTT (Australia) said that it was not a question of choosing between the two principles, of universalism and autonomy of the will, it was a practical question: was it possible and necessary for UNCITRAL, an assemblage

* Subsequently issued as document A/CN.9/V/CRP.4.

of jurists from different countries, to impose a specific system on the parties and expect legislators to adopt it?

His delegation believed that there was a contradiction between paragraph 1 and paragraph 2 and that the solution expressed in paragraph 1 would be preferable since it was simpler and eliminated any uncertainty on the part of the parties. It therefore supported the adoption of paragraph 1 and the deletion of paragraph 2.

Mr. POLLARD (Guyana) was in favour of the principle of universalism, as expressed in paragraph 1. He agreed with the representative of Australia and supported his proposal to delete paragraph 2.

Mr. OLIVENCIA (Spain) expressed regret that the Commission had not decided to adjourn debate on article 2, since members did not yet have before them the suggestions of the observer for the Hague Conference or the amendments proposed by France and Belgium.

His delegation proposed that paragraph 1 should be adopted, since it embodied the universalist principle, and that paragraph 2 should be deleted. If that solution was not accepted, it would request that the end of paragraph 2 should read "as the law applicable to the contract", to bring the provision into line with the intention expressed in paragraph 11 of the commentary.

His delegation endorsed the Tanzanian delegation's request for clarification.

Mr. FARNSWORTH (United States of America) said that a provision along the lines of the present paragraph 2 should be retained and if possible, liberalized to conform more closely to the corresponding ULIS provision.

Mr. SZASZ (Hungary) recalled that his delegation had already made it very clear that it was against the universalist principle. But the problem posed by article 2 was different and really stemmed from the divergent approaches to prescription in the countries with common law systems and those with civil law systems. In his delegation's view, paragraph 1, was more a statement of the lex fori principle than a declaration of the universalist principle, and was therefore acceptable because of its practical value. Logically, paragraph 2

should be deleted. However, if a practical solution was required similar to that under ULIS, his delegation could accept paragraph 2, provided that it was amended as the representative of Spain had requested.

Mr. GUEST (United Kingdom) said that his delegation supported paragraph 1, which constituted an application of the lex fori principle while ensuring a certain universalism. However, it was opposed to the retention of paragraph 2. The ambiguity of that provision arose not from the drafting but from the difficulties encountered by some legal systems in defining the applicable law. Furthermore, the paragraph did not guarantee uniformity in any way, as could easily be shown by examples.

Like the Australian delegation, his delegation had misgivings concerning the solution proposed by the representative of Austria, which would include a provision affirming the principle of the autonomy of the parties. However, it would accept it if that was the will of the Commission, provided that it stated that the exclusion of the Uniform Law must be expressly stipulated by the parties - which in fact would greatly limit its value.

Mr. DEI-ANANG (Ghana) was of the opinion that the pragmatic approach of the representative of Australia should guide the Commission in deciding on article 2. His delegation therefore favoured retaining paragraph 1 and deleting paragraph 2.

Mr. JENARD (Belgium) said that his delegation, which supported paragraph 1, believed that paragraph 2 was an essential qualification of paragraph 1. The autonomy of the will of the parties should be respected, as it was in ULIS, otherwise unnecessarily complicated situations might well ensue and it would be just as easy to find examples to prove that point as to support the argument of the United Kingdom representative. There would inevitably always be non-Contracting States whose law the parties would be able to invoke if they so wished. In fact the concept of lex fori and that of lex causae contractus were at variance on the subject. His delegation fully supported the suggestions of the observer for the Hague Conference, which might facilitate a compromise.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation had no difficulty with regard to the substance of paragraph 2. He pointed out that the Spanish text

of paragraph 1 differed considerably from the English and French texts, which stated that cases where the Uniform Law did not apply should be specified in the Uniform Law itself ("unless otherwise provided herein").

Mr. JAKUBOWSKI (Poland) recalled that in its reply to the questionnaire, his Government had declared that it was in favour of a general application of the Uniform Law, without regard to the law of the contract. It supported paragraph 1, amended if necessary as proposed by the Mexican delegation. Paragraph 2 gave rise to more serious problems. In such a specialized field as prescription, there were considerable differences between the various legal systems, particularly in that the countries with civil law systems believed that it was a matter deriving from jus cogens, whereas the common law countries did not. The question might perhaps be referred back to the Working Group for further discussion.

The CHAIRMAN said that there appeared to be a consensus on paragraph 1. However, most members of the Commission were in favour of deleting paragraph 2, although some insisted that it should be retained. A compromise must be found. The solution might be to retain paragraph 2, but to introduce a provision to the effect that application of the Uniform Law could only be excluded by an express stipulation of the parties to the contract and to include the addition proposed by the Spanish delegation. He therefore suggested that paragraph 2 of article 2 should be referred back to the Working Group for redrafting, taking into account the suggestions of the observer for the Hague Conference and the proposals made by the representatives of the United Kingdom and Spain.

It was so decided

Article 3

Mr. HONNOLD (Secretary of the Commission) said that the Working Group on Prescription had approached the problem of the definition of the international sale of goods from the same angle as the Working Group on Sales, confining itself to certain drafting amendments. The Working Group on Prescription had had to decide for example whether the Uniform Law should retain all the criteria for the international sale of goods specified in ULIS. The Working Group had decided

to simplify those criteria by establishing a basic criterion, namely the fact that the seller and the buyer had their places of business in different States. The criterion of international carriage of the goods had been rejected for the reasons explained in paragraph 4 of the commentary on article 3.

Such a simplification also met the wishes of some members who were anxious that the Uniform Law should apply to transactions in which carriage of goods preceded the conclusion of the contract.

The CHAIRMAN invited the members of the Commission to consider article 3 paragraph by paragraph.

Mr. POLLARD (Guyana) recalled that during the discussion of the UNCITRAL report on its fourth session by the Sixth Committee, his delegation had already stated that the definition of the international sale of goods should be the same in both uniform laws. Despite what the Secretary of the Commission had said, he did not think that the Working Group on Prescription had adhered closely to the solution adopted by the Working Group on Sales. In the latter's report (A/CN.9/62), there was a provision (paragraph 2 of article 1) which should also appear in article 3 of the draft Convention on Prescription immediately after paragraph 1, to ensure uniformity of the definition. His delegation would like to know why there were such discrepancies in the texts drafted by the two Working Groups.

Mr. HONNOLD (Secretary of the Commission), replying to the representative of Guyana, said that the Working Group on Prescription and the Working Group on Sales had both worked towards more objective criteria for determining the place of business of the parties. The phrase at the end of paragraph 2 of article 3 of the draft Convention on Prescription ("having regard to the circumstances known to... of the contract") had its counterpart in article 1 of the revised Uniform Law on the International Sale of Goods (A/CN.9/62/Add.2). The latter text appeared between brackets to indicate that the final wording had not yet been decided. In any case, it could be stated that the two Working Groups had worked along the same lines, even though they had not adopted identical formulae.

Mr. POLLARD (Guyana) said that he was not convinced by the explanations given by the Secretary of the Commission because the wording at the end of paragraph 2 of article 3 of the draft Convention on Prescription and at the end of subparagraph (a) of article 4 of the revised Uniform Law on the International Sale of Goods was identical.

Mr. HONNOLD (Secretary of the Commission) said that the discrepancies between the two texts could no doubt be explained by a time factor. When it drew up the definitive text of the draft Convention, the Working Group on Prescription had not seen the latest revised text of ULIS, which dated from January 1972.

Mr. LEMONTEY (France) observed that the Commission had before it three definitions of the international sale of goods. One was contained in a text which would become an instrument of substantive law, that of the 1964 ULIS, while the other two were drafts prepared by the Working Group on Sales and the Working Group on Prescription respectively. Ideally, his delegation would have liked the definition of ULIS to be reproduced word for word in the draft instrument on prescription, but it recognized that that was not possible.

There remained, therefore, the two proposals from the Working Groups. That of the Working Group on Prescription was more general, since the only criterion laid down was that the parties should have their places of business in different States. That of the Working Group on Sales introduced other factors. It was hardly acceptable for the two drafts to contain different definitions of the international sale of goods. He therefore proposed that the draft instrument on prescription should reproduce the latest text of the definition adopted by the Working Group on Sales, with the proviso that the provision contained in article 33, paragraph (a) should be adopted and even extended to States which had not yet acceded to the 1964 ULIS.

Furthermore, as it was probable that the Convention on Prescription would enter into force before the revised Uniform Law on the sale of goods, he would prefer the Convention to contain a revision clause under which its definition of the international sale of goods would be automatically adjusted to correspond to that of the future revised ULIS.

Mr. ROGNLIEN (Norway) pointed out that it was difficult to ensure that the definition of the international sale of goods contained in the draft Convention on Prescription corresponded to the revised ULIS since that text was still being drafted and the Convention on Prescription would very probably be adopted before the revised ULIS. That difficulty could be overcome by providing a revision clause, as the representative of France had proposed, or better still, by extending the scope of article 33, paragraph (a) to cover the new definition which might be contained in the final text of the revised ULIS.

In any event, the Working Group on Prescription had felt that the identity of purpose of the two texts was not such as to call for absolute uniformity. It had envisaged the draft Convention as a separate instrument, which would, of course, be part of a single system but would not require a totally unified terminology.

Moreover the only difference remaining between the two texts was minimal. The Working Group might have repeated the text decided upon by the Working Group on Sales word for word, but it had felt that would unnecessarily complicate the definition and position of the parties. The Working Group had therefore adopted the main criterion of places of business in different States, without the small exception adopted by the Working Group on Sales in respect to what appears from the contract. Indeed, in respect of prescription, the need for full certainty at the time of the conclusion of the contract might not be of immediate concern to the parties; it only became important at the time of action in the event of a dispute. The parties would however always have the possibility of having full certainty by mutually disclosing their places of business.

For his part, he felt the simple and large definition in the draft Convention was adequate. However, to satisfy those who had expressed misgivings on that point, it would be desirable to extend the derogation permitted under article 33, paragraph (a) to cover the definition which would be contained in the revised text of ULIS.

Mr. LOEWE (Austria) pointed out that, if the Convention on Prescription was to be concluded in the near future, it would be impossible to take into account the revised text of ULIS, which was still being worked out. The Working Group on Prescription had been right to widen the scope of applicability of the draft as much as possible; it was not as wide as the 1964 ULIS since sales to consumers were excluded, but it was wider than the revised text of ULIS, since paragraph 2 of

article 1 of that text had not been repeated in the draft. It would not be desirable to incorporate it at the present stage. Indeed, the attempts to make the revised text of ULIS more precise were justified by the desire to avoid a situation where a party unknowingly became subject to the provisions of the Uniform Law and forfeited his rights because he had not complied with that Law (because, for example, he had been late in making a claim which should have been made upon delivery). The case of prescription was completely different in that respect.

He proposed, therefore, that the rules drawn up by the Working Group should be maintained as they were. He did not see the need for burdening article 33 with a revision clause, since such revision would in any case be made when the need was felt, especially as UNCITRAL would undoubtedly be anxious to ensure the continuing adjustment of an international instrument drawn up under its auspices.

Mr. MATEUCCI (International Institute for the Unification of Private Law), speaking at the invitation of the Chairman, said he shared the opinions expressed by the representative of France, except that he did not consider it desirable to insert a revision clause in the draft a priori. He would prefer that the scope of article 33, paragraph (a) should be extended.

In the opinion of UNIDROIT, the best solution would be to synchronize all the efforts to unify international trade law and to submit all the draft Conventions to a single diplomatic conference; it would thus be possible to arrive at a single definition of the international sale of goods. It was not essential to complete the draft on prescription at all costs before the revision of ULIS. A delay of one or two years would not have disastrous consequences.

Mr. DEI-ANANG (Ghana) said he shared the concern expressed by the representative of Guyana concerning the discrepancies, however small, between the definitions of the international sale of goods, since his delegation considered the draft Convention on Prescription to be an essential complement of ULIS. In fact, the problem was less one of definition than of scope of applicability. It could be solved by including in the draft Convention a provision making the Convention applicable to all contracts covered by the definition which would be given in the Uniform Law on the International Sale of Goods.

To link the two texts in that way would be to delay the adoption of the draft on prescription, but, like the observer for UNIDROIT, he did not feel that was a

matter for concern. The important thing was to avoid a multiplicity of definitions. With that in mind, his delegation proposed the postponement of all decisions on the definition of the international sale of goods for the purposes of the draft Convention.

Mr. FARENSWORTH (United States of America) was also apprehensive that two different definitions might be adopted. It seemed to him that the instruments currently being drawn up would more easily gain the support of Governments and would be more widely utilized by the parties if the scope of their applicability was the same.

Mr. ELLICOTT (Australia) said he shared the opinion of the United States representative that the text of the draft Convention should remain as close as possible to that of ULIS. However, a comparison of article 1, paragraph 1 of the latter text with the definition given in article 3, paragraph 1, of the draft Convention revealed that the first contained elements which were not in the second. Paragraph 1 (b) of ULIS could hardly be repeated, since it referred to the rules of private international law whose application was excluded under the terms of article 2, paragraph 1 of the draft Convention. It was, however, possible to retain one of the elements in paragraph 1 (a) of ULIS by stipulating in article 3, paragraph 1, of the draft Convention that a contract for a sale of goods would be considered international if the seller and buyer had their places of business in different contracting States. That was his delegation's proposal (A/CN.9/V/CRP.3). Insertion of the word "contracting" would, admittedly, restrict scope of the draft Convention, but it was easier, if the need arose, to extend the scope of an instrument than to restrict it. The addition would have the advantage of ensuring greater uniformity between the two texts. It also met the practical goal of eliminating the difficulties which businessmen from non-Contracting States might encounter if they believed that their obligations were extinguished under the law of their own country but remained in force under the Uniform Law on Prescription. However, if the proposed change was not acceptable to members of the Commission, his delegation would be willing to withdraw its proposal.

Mr. GUEST (United Kingdom) observed that all members of the Commission were troubled by the noticeable discrepancies between the two definitions. Being a member of both Working Groups, he had become aware that the revision of ULIS was

a more difficult task than had been expected and could not be expected to yield concrete results for several years to come. In the circumstances, it would be very regrettable if the Commission postponed work on the definitive text of the draft Convention on Prescription. On the contrary, it was important that the Commission should soon produce some tangible and positive results or it would lose the confidence of the General Assembly.

Mr. FEDOROV (Union of Soviet Socialist Republics) indicated that the USSR representative to the Commission had only just arrived in New York. He requested the Chairman to reserve his right to make statements on matters already discussed by the Commission.

The CHAIRMAN said that the USSR representative would be given every opportunity to express the views of his Government.

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/The first part of the meeting was taken
up by the discussion of other matters/

Article 3 (continued)

Mr. GUEST (United Kingdom) said he agreed with the Austrian representative that the Commission should take a somewhat cautious approach to the question of adopting the tentative results of the Working Group on Sales (A/CN.9/62/Add.2) in preference to the formulation of article 3 of the draft Convention under consideration (A/CN.9/70, annex I). The Commission should look at the present article 3 and consider whether the article really reflected the appropriate sphere of application for a convention on limitation. The Commission should deal with article 3 on its own merits and make every effort to devise the most suitable formula for a convention on limitation.

Mr. CHAFIK (Egypt) said that his delegation tended to favour a single definition of the international sale of goods. It would be satisfied with the solution in article 3 (1); the Commission should not await the final decision of the Working Group on Sales, but should make every effort to produce a document reflecting its views as soon as possible.

Mr. OLIVENCIA (Spain) felt that the problem of the diversity of concepts of the international sale of goods was an extremely complex one. The Commission should harmonize the draft Convention on prescription with other work in progress, including the revision of the Uniform Law on the International Sale of Goods (ULIS). That would involve an unknown variable, since the revision had not yet been completed. Since it was extremely difficult to reconcile the different concepts, his delegation believed that the proposal made by the Austrian delegation at the preceding meeting was most useful and timely and that the Commission should accordingly try to draw up the broadest possible definition.

Mr. POLLARD (Guyana) asked whether the Working Group on Prescription intended the term "States" in article 3 (1) to include territories under the mandate or other authority of the State concerned. His delegation was fully aware of the difficulties to which the term could give rise, and for that very reason felt that it should be defined in the Convention.

Mr. ROGNLIEN (Norway) said that article 3 (1) had merely spoken of "different States". It had not specified what was meant by different States, and had left any further definition for the courts. However, it would be his understanding that Hong Kong, for example, was a different State from the United Kingdom for the purposes of the Convention.

Mr. MANTILLA-MOLINA (Mexico) suggested that a provisional definition of a contract of international sale might be included in article 3 (1) in an attempt to co-ordinate the definitions of sales presented by the Working Group on Prescription and the Working Group on Sales. The article could specify that a contract of sale of goods would be considered international as defined in ULIS and that, until ULIS came into force, the provisional definition would apply. Countries would be able to reserve their right to make that provisional definition permanent.

Mr. JENARD (Belgium) thought that it had been a mistake to change the definition in the original ULIS. Since the definition had been changed, the problem arose of whether a new element should be introduced into article 2 (1). A new provision in the Uniform Law on prescription would avoid having three definitions of international sale and would also help to remedy the excessively broad definition of such sale based on the concept that the place of business of seller and buyer must be in different States.

Mr. SMIT (United States of America) said that, in the interests of making progress, the Commission should retain the definition of a contract of international sale which had been drafted by the Working Group on Prescription. It should be recalled that article 3 should be envisaged in conjunction with article 2. The concept of choice of law was a very broad one. The Australian delegation had understood that and its amendment (A/CN.9/V/CRP.3) would limit the definition of a contract of international sale given in the draft Convention. If the definition of a contract of international sale was too broad, the choice of law became even more important. The proposed revision of ULIS took those problems into account and lessened the scope of the definition.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) agreed with the United States representative that article 3, and particularly paragraph (1), could not be isolated from article 2. With regard to the sphere of application of the Convention, he agreed with those representatives who had stated that the

corresponding articles in ULIS should be used as a model. The Commission should remember that, if the sphere of application of the Convention was limited to States parties to the Convention, the question of choice of law would be prejudged. Before trying to define an international sale, the Commission should decide whether the Convention would apply only to States parties.

Mr. KAMAT (India) said that the draft Convention endeavoured to use the provisional definition by the Working Group on Sales existing at the time when the Convention had been drafted, in September 1971. Subsequently, however, some delegations at the third session of the Working Group on Sales had wanted to introduce different criteria for determining the location of the place of business. The Commission must first decide whether the definition in the draft Convention should be the same as in ULIS or whether it should be different because the character of the Convention was different from that of ULIS. He thought that the Uniform Law on prescription should be complementary to ULIS and should therefore contain the same definition. There might be some practical difficulties, but a uniform approach was needed to ensure the acceptability of the Convention on prescription.

Mr. GUEIROS (Brazil) said that, because of the differences between domestic laws and the lack of agreement regarding the terms "places of business" and "States", article 3 could perhaps be referred to the Working Group on Sales, which could then place the definition within the context of the revised ULIS.

Mr. COLOMBRES (Argentina) expressed agreement with the statement made by the representative of the United Kingdom at the preceding meeting. The Commission had a duty to present a complete draft Convention on prescription. The text of draft article 3 should be approved, since it reflected the work of the Working Group on Sales. The revision of ULIS would take five to ten years. It was imperative that the Commission should adopt the text of a definition, which would be a valid basis for future work.

Mr. SAM (Ghana) said that the Commission seemed to have reached a deadlock on the definition of international sales. He suggested that the Working Group on Prescription and the Working Group on Sales should meet jointly to agree on a definition. They could then report to a plenary meeting.

Mr. ROGNLIEN (Norway) said that all members of the Commission agreed that a definition should be evolved during the current session. Although it was easy to say that the same definition should be given in the Uniform Law on prescription and in ULIS, such a result was in fact difficult to achieve. The majority of the Commission appeared to think that the ULIS definitions could not be used for articles 2 and 3 of the Convention because of the difficulties of reconciling the civil law and the common law approach to the matters of conflict of laws dealt with in those articles. The Commission should therefore attempt to reach an independent definition but States ratifying ULIS should be allowed to apply the ULIS definitions. The States parties to each instrument would thus have a choice of definition and that flexible approach would satisfy States which felt that a definition was absolutely essential to the Convention. The definition in the Convention on prescription would not be dependent on the ULIS definition, which might not become final for another ten years.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that he did not insist that the sphere of application of the Convention on prescription should be the same as that of the revised ULIS; it could be broader. Like all the other delegations, his delegation would strive to agree on the draft Convention. However, article 2 (1) as it stood was not satisfactory, because it did not reflect the position and objectives of all delegations. It might be better for article 2 (1) to state that, unless otherwise provided therein, the Law would apply in all cases where legal proceedings were instituted in the territory of a State that was a party to the Convention. The application of the Convention would thus not be limited to States parties but would also be extended to cases where legal proceedings were instituted in a contracting State, even if the place of business of one of the parties to the dispute was not in a State party to the Convention.

Mr. LASALVIA (Chile) pointed out that no definition of a contract of international sale of goods would meet with the approval of all members; furthermore, it must be remembered that many countries were not even represented in the Commission. Thus, any definition would have to be the result of a compromise. So far, the Commission had been engaged in more of a formal than a substantive discussion on the paragraph in question, having concerned itself

mainly with the problem of whether or not the text was in conformity with the definition agreed by the Working Group on Sales. He therefore suggested that for the time being, the Commission should approve a compromise version and recommend to the Working Group on Sales that it should adopt the same definition. Such a procedure would have the advantage of allowing the Commission to advance in its work and of helping to solve the problem of form, since it was quite likely that the Working Group on Sales would accept the definition recommended to it.

Mr. NESTOR (Romania) said his delegation supported the text of article 3 (1) proposed by the Working Group on Prescription. It must be remembered that the juridical concept of prescription was quite different from that of an international contract of sale as such. It was therefore quite possible to accept a definition for the draft Convention on prescription which was different from one adopted for the Uniform Law on sales. Since the draft Convention on prescription would be discussed again, either at an international conference convened for the purpose or in the Sixth Committee, he suggested that the Commission should leave the text as it stood. The USSR proposal for a reformulation of article 2 (1) seemed to be closer to his delegation's views. However, it would reserve its position on the matter until the written text was available.

Mr. GUEIROS (Brazil) said his delegation was in favour of leaving the text of article 3 as it appeared in the draft prepared by the Working Group on Prescription. It would seem that the only paragraph which presented difficulties for the Commission was the first one; since the Commission worked on the basis of consensus, he suggested that debate on that paragraph should be suspended. That did not mean, however, that his delegation was not in favour of the text as it stood.

Mr. SMIT (United States of America) said it seemed that, if article 3 (1) was considered in conjunction with article 2 (1), it could lead to results which might be categorized as imperialistic. For example, if the seller had his place of business in State A, which was not a party to the Convention, the buyer had his place of business in State B, which was not a party to the

Convention either, and litigation was brought in State C, which was a party to the Convention, then the rules of the Uniform Law would apply even if there was no relationship between country C and the parties to the dispute. That was why his delegation preferred the definition formulated by the Working Group on Sales (A/CN.9/62/Add.2). It had been suggested that problems might arise because the civil law countries would consider prescription a matter of substance and the common law countries would consider it a matter of form. However, the United States had a practice whereby, if an action was brought in another country, the prescription law of that country could be applied. However, if the difference in approach between civil law and common law countries made reliance on the formulation of the Working Group on Sales inappropriate, it should be eliminated.

He therefore suggested that article 3 (1) should be maintained, but that article 3 (2) should be replaced by the formulation in article 1, paragraph 1 (a), of the revised text of ULIS prepared by the Working Group on Sales (A/CN.9/62/Add.2). His amendment would have the same effect as the Australian amendment (A/CN.9/V/CRP.3) but would provide for greater symmetry of style.

Mr. GUEST (United Kingdom) said it would appear that the discussion had progressed to the point where certain issues could be isolated and referred to the Working Group on Prescription, which could meet later in the day. The Working Group could consider the various suggestions and proposals made, with a view to finding a solution during the current session.

Mr. SZASZ (Hungary) supported the United Kingdom suggestion. Article 3 (1), when considered in conjunction with article 2 (1), determined the sphere of application of the draft Convention. Those articles should be reformulated or combined and the USSR proposal should also be considered.

Mr. LOEWE (Austria) said he had no objection to the United Kingdom suggestion that the basic questions under discussion should be referred to the Working Group. He wished to stress that the options open to the Commission were very important and would have a bearing on the future Convention itself. It would be more appropriate to settle the question of limiting the application of the Convention to commercial relations between parties in contracting States, as

suggested by Australia, in the provision concerning the territorial sphere of application rather than in the definition of an international contract of sale.

His delegation did not agree with such a limitation. If the Australian proposal was adopted, the Convention would be even more restricted than the revised text of ULIS which provided two criteria for the application of the law, namely, when the States were both contracting States or when the rules of private international law led to the application of the law of a contracting State. If the new text of ULIS came into force as envisaged, the second criterion would be applied in the majority of cases. It would be difficult, however, to include that criterion in the text on prescription, since in many countries prescription did not in principle follow the same lines as the law of contracts. There would always be a lag between the law applicable to the sale as such and the law on prescription. The solution adopted in many conventions on transport, whereby it was sufficient for one of the States concerned to be a contracting State, could be applied in the draft Convention on prescription. If the sphere of application of the draft Convention was to be limited, he hoped it would be specified that only one of the States concerned had to be a contracting State.

Mr. POLLARD (Guyana) supported the United Kingdom suggestion that the issues raised should be referred to the Working Group. He proposed that the Working Group should also consider an additional article* which would be aimed at preventing legal absurdities that might arise from the differences between the Uniform Law on sales and the draft Convention on prescription. The new article would preclude parties from disputing the nature of a transaction by reference to relevant provisions in any other convention relating to an international sale of goods which might be in force for the parties concerned at the time legal proceedings were initiated.

Mr. KAMAT (India) pointed out that the issues raised by the Austrian representative concerned the whole question of the exclusion of private international law. His delegation could not take a position on the limitation of the Convention to parties in contracting States unless that question was also clarified.

* Subsequently circulated as document A/CN.9/V/CRP.8.

The CHAIRMAN said that, if he heard no objection, he would take it that the Commission adopted the United Kingdom suggestion to refer the issues raised in connexion with article 3 (1) and its relationship with article 2 to the Working Group on Prescription. The Working Group should take into consideration the views and suggestions made at the current meeting. It would be helpful if delegations that were not members of the Working Group also participated in its deliberations.

It was so decided.

Mr. GUEIROS (Brazil) said that the wording of article 3 (2), (3) and (4) was entirely acceptable to his delegation.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) requested clarification of the words "nationality" and "civil or commercial character" in article 3 (4).

The CHAIRMAN said that his understanding was that the Law would apply even if the parties to a contract were of the same nationality, provided that the other requirements of the article were met. The reference to the civil or commercial character of the parties or of the contract was designed to take account of cases where different systems, such as a civil code and a commercial code, were applicable to the parties.

Mr. ROGNLIEN (Norway) said that the provisions of article 3 (4) had been taken from ULIS and it was open to question whether they were necessary in the context of prescription. Their main purpose was the avoidance of discrimination between citizens of different States or parties covered by different systems. They were limited by article 5 (a) to the extent that it excluded a non-commercial buyer from the scope of the Law.

Mr. KAMAT (India) observed that the Working Group on Prescription had apparently thought it proper to base the text of article 3 (2) (3) and (4) on texts formulated by the Working Group on Sales. He was therefore at a loss to understand why the Working Group on Prescription had not also adopted the wording in article 1, paragraph 2, of the latest version of revised ULIS (A/CN.9/62/Add.2).

Mr. ROGNLIEN (Norway), replying to the representative of India, said that the Working Group on Prescription had felt that the inclusion of the rule of article 2 (a) of revised ULIS would complicate and also narrow the definition in the Law. It was important for parties to know, at the stage of the conclusion of a contract, what law would apply to the contract of sale - because there were certain things which they had to do at that stage. In the context of prescription, however, it was not so important at the stage of the conclusion of the contract for parties to know what laws would apply in respect of future claims; by the time they engaged in litigation they would certainly know where the opposing party had its place of business. The omission of the provisions of article 2 (a) of revised ULIS from the draft Convention might widen the scope of the latter somewhat, but only to a limited extent within the contract of the parties.

Mr. KAMAT (India) observed that the remarks of the representative of Norway were directed to the earlier version of revised ULIS prepared in 1970 by the Working Group on Sales - a version which was subjective. The Working Group on Sales had subsequently prepared a more objective version of the text in question and its adoption by the Working Group on Prescription would have the advantage of harmonizing ULIS and the draft Convention and would facilitate the displacement of municipal law by a uniform law. The latest version of revised ULIS (A/CN.9/62/Add.2) avoided the application of the uniform law to a purely national transaction.

Mr. MICHIDA (Japan) drew attention to paragraph 9 of the commentary on article 3 (A/CN.9/70/Add.1) which set forth two reasons why the Working Group on Prescription had not adopted the text of article 2 (a) of revised ULIS. The second reason stated in paragraph 9 was still valid with regard to the inclusion of the later text specified by the Indian representative. Nevertheless, he considered it appropriate that the Working Group should examine the point made by that representative.

Mr. JENARD (Belgium) agreed with the representative of India. The latest definition by the Working Group on Sales was a new element because it had been adopted after the meetings of the Working Group on Prescription. The Commission should include the issue among those to be considered by the Working Group.

The CHAIRMAN said that the issue raised by the representative of India would be referred to the Working Group.

Article 4

Mr. POLLARD (Guyana) drew attention to the difference between the formulation of article 4 (1) of the draft Convention and the corresponding provisions of revised ULIS.

Mr. HONNOLD (Secretary of the Commission) said that the problem was one of the co-ordination of the texts prepared by the two Working Groups. The language prepared by the Working Group on Sales had been carried from article 6 of the earlier version of revised ULIS to article 3, paragraph 1, of the latest version of revised ULIS, without reconsideration of its substance. Accordingly, the latest version (A/CN.9/62/Add.2) did not represent a decision by the Working Group on Sales to accept or reject any particular wording. The Working Group on Prescription had dealt with the same issue in article 4 (1) of the draft Convention and the difference of language resulted from its attempt to clarify the draft. The Commission might therefore wish to consider article 4 (1) in conjunction with article 3, paragraph 1, of the latest version of revised ULIS. Article 4 (2) of the draft Convention and article 3, paragraph 2, of the latest version of revised ULIS were identical, apart from an immaterial drafting change, and had been taken from article 6 of the 1964 ULIS.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that his delegation was not inclined to defend or prefer either formulation. He did believe, however, that the formulations used in ULIS and the draft Convention should be identical.

Mr. POLLARD (Guyana) endorsed the views of the USSR representative.

Mr. LEMONTEY (France) agreed with the USSR representative. It would prejudice uniform interpretation of the two texts if they used different language. He himself had no preference for either text.

Mr. AKINTAN (Nigeria) said that he was in some doubt as to the appropriateness of the words "the preponderant" in article 4 (1) and proposed that they should be replaced by "any".

Mr. ROGNLIEN (Norway) agreed that the wording of article 4 (1) and that of ULIS should be exactly the same. The issue should be referred to the Working Group.

The amendment proposed by the Nigerian representative posed a difficulty in that a seller usually assumed certain duties in connexion with delivery, often in the form of some smaller service such as maintenance. The Commission would go too far if it excluded from the Law all contracts in which a seller had a duty beyond the delivery of goods. The Nigerian proposal would involve the exclusion from the Law of too great a range of contracts of that type.

Mr. GUEST (United Kingdom) said that the origin of article 3, paragraph 1, of the latest version of revised ULIS had been an idea put forward by the USSR representative at the penultimate meeting of the Working Group on Sales. One difficulty which arose from it was that a seller in international sales of goods (especially CIF contracts) undertook substantial obligations in addition to delivery - for example, insurance. He had the impression that neither that article nor article 4 (1) of the draft Convention were entirely satisfactory to certain delegations and it would be helpful if they were to inform the Working Group of any alternative proposals they might have.

Mr. LASALVIA (Chile) said that, in the Spanish version of article 4 (2), the word "entrega", which had no meaning in the Chilean system of law, should be replaced by some word such as "aprovisionamiento" or "ventas a futuro".

Mr. MANTILLA-MOLINA (Mexico) said that he agreed with previous speakers that the language of the draft Convention and that of ULIS should conform.

He could not support the Nigerian proposal for the reasons already explained relating to accessory obligations. He agreed with the Chilean representative regarding the use of the word "entrega". The term "contratos de compravenda" might be preferable. He would pursue the matter with the Working Group.

He proposed that, for the sake of logical sequence, the text of the draft Convention should be rearranged so that article 4 (1) was incorporated into article 5 and article 4 (2) was either incorporated into article 3 or left as a separate article 4.

Mr. ELLICOTT (Australia) proposed that the word "essential" should be omitted from article 4 (2) because it added nothing to the text and its interpretation would in any case be open to dispute. He further proposed the insertion of the word "raw" before the words "materials necessary". On many occasions, contracts for the supply of goods to be manufactured or produced involved the delivery of dies and patterns. His amendment would ensure that the text referred only to basic raw materials.

Article 5

Mr. HONNOLD (Secretary of the Commission) stated that the only differences between article 5 of the draft Convention and article 2 of the latest version of the revised Uniform Law on the International Sale of Goods (ULIS) related to article 5 (a) and (e). At its third session, the Working Group on Sales had decided to replace the subjective test in the earlier version of revised ULIS, which had been reproduced in article 5 (a), by a more objective one, as stated in paragraph 11 of the addendum to its report (A/CN.9/62/Add.1). With regard to article 5 (e), the Working Group on Prescription had decided to delete the phrase within brackets in article 2, paragraph 2 (b), of revised ULIS. Those seemed to be the two points on which the Commission should concentrate.

Mr. POLLARD (Guyana) expressed surprise that the argument in favour of adopting an objective test for the definition of international sales (see A/CN.9/70/Add.1, commentary on article 3 (9)) had had no effect on article 5 (a). For the sake of consistency, the same objective test should be applied in both cases.

Mr. MICHIDA (Japan) recalled that article 5 (a) had been drafted in September, before the Working Group on Sales decided to amend the text of revised ULIS. His delegation felt that the latest version of revised ULIS was an improvement and should be taken into account in the draft Convention. He proposed that the words "or similar use" should be deleted from the present text of article 5 (a) and that the rest of the text should be replaced by the formula evolved by the Working Group on Sales at its third session.

Mr. DEI-ANANG (Ghana) strongly supported the Japanese proposal and even suggested that the Commission should take a decision on the matter right away. If the text amended by the Working Group on Sales was accepted it should be included immediately in the draft Convention.

Mr. ROGNLIEN (Norway) had no objection to replacing the present text of article 5 (a) by the new wording adopted by the Working Group on Sales. With regard to article 5 (e), the Working Group on Prescription had deleted all reference to the registration of ships and aircraft, while the Working Group on Sales, feeling that it called for further consideration, had placed the reference in brackets. The Working Group on Prescription had felt that the reference was superfluous and was actually a hindrance since the scope of the Law should not be limited by the place where the ship or aircraft was registered or used. The reference to registration created an unnecessary uncertainty for the seller, who might have difficulty in ascertaining where the ship or aircraft would finally have to be registered. The phrasing of the two texts should be harmonized on that point also. It was for the Commission to take a decision on the matter.

Mr. MUDHO (Kenya) associated himself with the delegations which had expressed their preference for the latest version of revised ULIS. However, the problem still remained of the words that the Working Group on Sales had kept within brackets, implying that opinion had been divided. He would prefer to delete the words.

Mr. KHOO (Singapore) felt that there was a tendency to exaggerate the difference between subjective and objective tests. In his country, the question whether or not the parties knew what use would be made of the goods would be decided by the judge on the basis not only of the parties' own statements but also of the facts and objective circumstances of the transaction. His delegation had no strong preference for either formula for, in practice, they amounted to the same thing.

Mr. MICHIDA (Japan), supported by Mr. DEI-ANANG (Ghana), wanted the opposite of what the representative of Kenya wished; the phrase within brackets in article 2, paragraph 1 (a), of revised ULIS should be kept. The phrase had been left in brackets not because opinion in the Working Group on Sales had been divided but because there had been no time for a detailed consideration of the proposed text. It would be unfortunate to delete the phrase when no argument of substance had been put forward against it.

Mr. LEMONTEY (France) associated himself with the position taken by Japan and Ghana. The new definition drafted by the Working Group on Sales was preferable to the earlier version in so far as it introduced objective elements based on the content of the contract and the parties' objective behaviour.

Mr. POLLARD (Guyana) pointed out that the text of revised ULIS did not take account of cases where the seller might have other information than that given by the buyer. In order to remedy that omission, he proposed that in article 5 (a) the word "knows" should be replaced by the words "has reason to know". Such a formulation would preserve the objectivity which everyone wanted in that provision.

Mr. GUEIROS (Brazil) was in favour of the text drafted by the Working Group on Sales, including the passage in brackets.

Mr. COLOMBRES (Argentina) noted that there seemed to be a consensus in favour of replacing the present text of article 5 (a) by the latest version drafted by the Working Group on Sales. However, the text should be simplified, for example, by saying "unless it appears from the contract or the parties' behaviour...".

Mr. ELLICOTT (Australia) also wished to see the present article 5 (a) replaced by article 2, paragraph 1 (a), of revised ULIS. His delegation was not in favour of the Guyanese proposal that reference should be made to information from another source than the parties, for that would upset the balance of the present text which placed seller and buyer on an equal footing.

Article 5 (e) did not cover small boats as presently phrased. Although the exclusion of vessels subject to registration was perfectly justifiable, the exclusion of small boats was less so. If they were to be covered by the Law, it must be stated that the ships and vessels referred to in article 5 (e) were those above a certain tonnage, to be established. Otherwise the reference to registration contained in article 2, paragraph 2 (b), of revised ULIS must be kept.

Mr. LOEWE (Austria) felt that the new version drafted by the Working Group on Sales was an improvement. It would be unwise to add a reference to information from sources other than the parties, for the text concerned an evaluation prior to the application of a rule of law, which should remain as objective as possible.

With regard to article 5 (e), the provisions of national laws regulating the registration of vessels were far from uniform and it would be almost impossible to establish a tonnage or size above which ships or vessels would be excluded from the sphere of application of the Law. If a distinction was to be made between ships and vessels, on the one hand, and small boats, on the other, it would be better to exclude registered ships only, as in revised ULIS.

Mr. LASALVIA (Chile) pointed out a difficulty raised by the term "bought for a different use". It appeared that all the members of the Commission felt that any use other than personal or household was commercial. However, a buyer might acquire the goods not for his own personal use but as a gift for a third party. In order to avoid any ambiguity, the term "commercial use" should be substituted for "a different use".

Mr. MICHIDA (Japan) recalled that, in the text drafted by the Working Group on Sales, the reference to the registration of ships and aircraft was put in brackets. The question was highly complex and there had been lengthy discussions. In fact there were two systems of registration: national registration for maritime shipping purposes and local registration essentially for tax purposes. The members of the Working Group on Sales had felt that vessels subject only to the system of local registration should not be excluded from the sphere of application of the Law, but they had had great difficulty in finding a test which would make it possible to distinguish between the two kinds of registration. They had therefore felt that the point should be examined in greater detail.

The Working Group on Prescription had for its part decided to delete all reference to registration. The representatives of Australia and Austria wished to reintroduce it, for perfectly justified reasons, but their proposal would in practice raise problems of apparently insuperable complexity.

Mr. SZASZ (Hungary) said that article 5 (a) referred to a rather special case, and reflected above all a desire to be explicit. Nevertheless, he preferred the revised ULIS wording.

With regard to article 5 (e), he noted that in Hungary all ships, vessels and aircraft were indeed registered, but that the registration was different from

that practised in the United States, for example. The Commission might perhaps request experts to indicate the differences between the various types of registration.

Mr. JENARD (Belgium) said that, where sales to consumers were concerned, his delegation preferred the revised ULIS text, for the reasons already stated by the delegations of Austria and France. On the question of ships, vessels and aircraft, it shared the view of the Australian delegation, and thought that the Working Group might provide the necessary clarifications.

Mr. ELLICOTT (Australia) pointed out that registration was bound up with the right to fly a flag; it was the latter concept which was used in the Convention on the High Seas. Accordingly, he suggested that the phrase between brackets in revised ULIS should be supplemented by a reference to the flag.

Mr. DEI-ANANG (Ghana) said that his delegation had no strong views on the matter. Nevertheless, he suggested that the Commission should follow up the Hungarian suggestion, and consult the International Maritime Consultative Organization (IMCO).

The CHAIRMAN noted that a consensus had emerged in favour of replacing article 5 (a) of the draft Convention on prescription by article 2, paragraph 1 (a), of revised ULIS.

Moreover, there appeared to be a clear majority in favour of maintaining the passage between brackets in that provision of revised ULIS.

On the other hand, opinions differed on article 5 (e) of the draft Convention on prescription. He accordingly suggested that the question should be referred to the Working Group with a request that it should consult IMCO or any other appropriate organization.

Mr. LOEWE (Austria) said that his delegation understood the concern expressed by Australia and Ghana, countries whose shipping was essentially maritime. However, vessels engaged in inland navigation and aircraft did not have the right to a flag. For them, registration was comparable to the registration of real estate rights, and those vessels and aircraft were, in practice, movable property treated as fixed property. He was therefore afraid that IMCO might not be able

to give an authoritative opinion on the subject. Perhaps the International Civil Aviation Organization (ICAO) could be consulted with regard to aircraft. Where vessels used in inland navigation were concerned, since there was no international organization, the Economic Commission for Europe (ECE) could be contacted.

The point was one of detail, but nevertheless risked giving rise to litigation.

Mr. OGUNDERE (Nigeria) said that he, too, supported the wording used in article 2, paragraph 1 (a), of revised ULIS, including the passage between brackets. On the question of ships, vessels and aircraft, he suggested that the present wording of the draft Convention on prescription should be retained, for the sake of simplicity.

Mr. ROGNLIEN (Norway) said that in fact the question raised with regard to vessels was not a problem of shipping, but a problem of sales law, especially since vessels could be registered and treated as fixed property. The question was relatively unimportant, but clarity was necessary. At the time when a contract was concluded, the seller did not always know whether the vessel would be subject to registration. All doubts would be removed by deleting the words placed between brackets in article 2, paragraph 2 (b), of revised ULIS.

Mr. CHAFIK (Egypt) also supported the formula used in article 2, paragraph 1 (a), of revised ULIS, including the words between brackets. Nevertheless, even in that version, there was a drafting problem. The text referred to a purchase made by "an individual", in other words by a physical person. However, a legal entity could also buy and sell for purposes of consumption. The difficulty could be resolved simply by deleting the words "by an individual".

Mr. OLIVENCIA (Spain) said that where sales to consumers were concerned, his delegation, too, preferred the revised ULIS wording, whose adoption would also have the merit of bringing the two texts in line with each other. As to the phrases between brackets, more strictly objective criteria would be preferable. His delegation would, however, accept the inclusion of those phrases if the majority wished that to be done, but in that case it would like the wording of the provision improved as suggested by the delegation of Argentina.

The wording of article 2, paragraph 2 (b), of revised ULIS, gave rise to problems of interpretation, since it could refer to several types of registration, and even to the right to the flag. Moreover, the text did not make it clear whether the ships, vessels and aircraft in question had to be registered under the law of the buyer of the seller, of the place of the transaction or under any other law which might be applicable. His delegation felt that, if registration was referred to, objective criteria should be given. If not, it would be preferable to delete the words between brackets.

Mr. MICHIDA (Japan) proposed that the Secretariat should obtain information from the competent organizations on the differences between the various types of registration.

Mr. POLLARD (Guyana) said that the problem raised by article 2, paragraph 2 (b), of revised ULIS was not simply one of interpretation. The sale of registered aircraft was governed by the Geneva Convention of 1948. Perhaps the Secretariat could obtain information on that point.

Mr. ELLICOTT (Australia) said he was afraid the Commission might not arrive at a satisfactory wording, and proposed that it should keep to the present wording of article 5 (e) of the draft Convention on prescription.

The CHAIRMAN pointed out that the Australian delegation, which had raised the problem of article 2, paragraph 2 (b), of revised ULIS, had by its last statement removed that problem. He suggested that the Commission should adopt that provision, without the words appearing between brackets. In any case, the question was of secondary importance.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation, too, preferred article 2, paragraph 1 (a), of revised ULIS to article 5 (a) of the draft Convention on prescription.

With regard to article 5 (e), the problem was indeed solved by the Australian representative's last statement. As the latter had said, the régime governing ships was different from that for other movable property. It would accordingly be wise to exclude them from the sphere of application of a Uniform Law on prescription.

Mr. LILAR (Belgium) said that the problem of article 5 (e), which was of relatively minor importance, could have only one solution, namely that suggested by the Chairman: the wording of article 2, paragraph 2 (b), of revised ULIS should be adopted, without the words appearing between brackets. Otherwise, the Commission might become bogged down. Not only was the concept of registration interpreted differently in different countries; even the definition of a "ship" could give rise to endless discussion, since a ship which was neither fully movable nor fully immovable property, presented features of both.

The CHAIRMAN suggested that the Commission should replace article 5 (e) of the draft Convention on prescription by article 2, paragraph 2 (b), of revised ULIS, omitting the words between brackets.

Mr. POLLARD (Guyana) asked for it to be indicated in the summary record of the meeting that his delegation was not in favour of the deletion of the words between brackets since that might give rise to a conflict between the Uniform Law on prescription and the 1948 Geneva Convention.

Mr. ROGNLIEN (Norway) expressed regret at the position taken by the delegation of Guyana and pointed out that, if the words between brackets were deleted, all sales of vessels and aircraft of any kind would be excluded from the Law's application; there would then be no possibility of conflict with other instruments.

Mr. SMIT (United States of America) proposed that, in article 5 (f), the words "of gas and" should be added before "of electricity".

Mr. GUEST (United Kingdom) associated himself with the proposal made by the representative of the United States and pointed out that, at the time when the Uniform Law had been drafted at The Hague, sales of natural gas had been less important than they now were.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) supported the United States proposal.

Mr. MUDHO (Kenya) also supported that proposal, and he suggested that article 5 (f) should include a reference to petroleum.

Mr. ELLICOTT (Australia) said that he wished to know whether the intention was to exclude from the scope of the Law all sales of gas, including for example sales of gas in cylinders, or merely sales by pipeline between one country and another.

Mr. SMIT (United States of America) replied that he had in mind only sales in large quantities.

Mr. MANTILLA-MOLINA (Mexico) asked whether the term "gas" was intended to cover only butane or hydrocarbons. In its scientific sense, the word had a wider meaning, and could, for example, refer to oxygen. A more specific reference was desirable.

Mr. ROGNLIEN (Norway) associated himself with the requests for clarification made by the representatives of Australia and Mexico. He thought it would be going too far to exclude sales of gas in cylinders from the scope of the Law. He proposed that article 5 (f) should be simply deleted since electricity could not be described as "goods" in any event.

Mr. DEI-ANANG (Ghana) said that the proposed deletion had rather taken the Commission by surprise; however, his delegation was in principle in favour of retaining article 5 (f).

Mr. LEMONTEY (France) said that he shared the view of the representative of Norway. In fact, electricity had been excluded from the Convention on Sales for a very definite reason, namely, that the sale of electricity was covered by special clauses. Nevertheless, that argument was no longer valid for questions of prescription: article 5 (f) should therefore be deleted, and it should be left to the courts to decide whether certain forms of energy, such as electricity, were or were not goods.

Mr. SMIT (United States of America) supported the proposal made by the representative of Norway.

Mr. LASALVIA (Chile) said that he had no position of principle on the matter; nevertheless, he thought that it would be advisable to maintain the exclusion of electricity, which required a special mode of transport.

Mr. OGUNDERE (Nigeria) reminded the Commission that it was essential to harmonize the conventions on prescription and on sales. Article 5 (f) should therefore be retained: electricity could be sold on the same basis as other products, and the Convention on Prescription, by omitting any reference to it, might create difficulties both in law and in business.

Mr. SZASZ (Hungary) said that the question of deciding whether to exclude electricity, gas and possibly other products was connected with the question of their delivery. The exclusion of such products should therefore be linked to the manner in which they were supplied.

Mr. DEI-ANANG (Ghana) supported the suggestion made by the representative of Hungary, and proposed that the wording of article 5 (f) should be amended specifically to exclude petroleum and natural gas, in addition to electricity, if they were sold through pipelines or in bulk.

Mr. MICHIDA (Japan) pointed out that, in contrast to electricity, petroleum was certainly tangible: for that reason, he was against mentioning petroleum in article 5 (f).

Mr. LOEWE (Austria) said that the 1964 Conference had decided to exclude electricity not because it was subject to special contracts - since that would have led to other products being excluded also - but because electricity had not been considered to be goods. In his opinion, the physical characteristics or the special mode of transport of certain products should not lead to a multiplicity of exclusions; it would therefore be advisable to retain article 5 (f) as it stood.

Mr. GUEIROS (Brazil) said that he supported the representative of Austria.

Mr. SMIT (United States of America) said that, in his view, article 5 (f) should be deleted or, if it were kept, it should mention gas also.

Mr. HONNOLD (Secretary of the Commission) thought that the mere deletion of article 5 (f) would create a problem of interpretation. Electricity was excluded specifically from the scope of ULIS; since the provisions of ULIS and of the draft Convention were similar in other respects, the deletion of this exclusion from the draft Convention might lead to the conclusion that electricity was to be governed, whereas the opposite was intended.

The CHAIRMAN observed that there seemed to be no agreement on article 5 (f). Some members favoured deleting it, others wished to retain it unchanged, while still others proposed that a specific reference should be made to gas and possibly other products as well as to electricity. He requested the members of the Commission to indicate which solution they favoured by raising their hands as he put the alternatives to them.

Mr. OGUNDERE (Nigeria) said that, according to its mandate, the Commission should make every effort to take its decisions on the basis of a consensus; a vote by a show of hands on article 5 (f) would establish an unfortunate precedent, since that procedure could equally well be applied to all the articles of the draft. He suggested that the Commission should keep to its usual method of consultation and reflection so that, where there was disagreement, a decision acceptable to all could be reached. It was for the majority to persuade the sponsor of a draft amendment, if necessary, to withdraw it if it was not favourably received.

The CHAIRMAN said that the point of order raised by the representative of Nigeria was very pertinent. He had wished merely to determine how much support there was for the various views before referring the question to the Working Group.

Mr. ELLICOTT (Australia) stressed the importance of reaching a consensus. If that was to be achieved it seemed that a clear distinction should be made between, first, cases where electricity, oil or natural gas were supplied regularly through a special mode of transport, by cable or pipeline or any similar mode of transport and, secondly, cases where those same products could be considered as goods when they were sold in the form of electric batteries or in containers of a specific capacity.

Mr. ROGNLIEN (Norway), referring to the observations made by the representative of Nigeria, said that he thought that during a debate it might not always be a good procedure to require each delegation to set out its position, and that sometimes it was desirable, if only to expedite the work, to ask members to indicate their views by a show of hands.

The suggestion made by the representative of Australia was interesting, but it should be submitted in a more detailed form so as to avoid any ambiguity, it was possible to imagine various products that might be transported by cable or by pipeline.

Mr. SMIT (United States of America) announced that, in a spirit of conciliation, he withdrew his draft amendment.

Mr. NESTOR (Romania) said that he had interpreted the Chairman's initiative in requesting members to express their views by a show of hands, as a way of reaching a consensus.

Although like the representative of France he personally would prefer that article 5 (f) should be deleted, in a spirit of compromise, he would not oppose its retention. At the same time, he wondered whether the means of transporting a product was of any importance from the legal point of view as far as prescription was concerned. Rules of prescription should be applicable as soon as the parties were bound by mutual obligations, and there was therefore no reason to exclude from their application specific items, even ships. In articles 5 (b) and 5 (c), which referred to sales by auction and on execution, the position was different, since in that case it was a matter of taking special legal action. Another special case was that referred to in article 6 of the draft Convention, which, in excluding from the scope of the law claims based upon liability for nuclear damage caused by goods sold, was based on the fact that, as far as prescription was concerned, no satisfactory solution could be proposed as long as it was not known how long the effects of such damage might persist.

Mr. OGUNDERE (Nigeria) pointed out that the subamendment he had proposed had become pointless since the draft amendments to which it referred had been withdrawn.

The CHAIRMAN said that retaining the present article 5 (f) unchanged seemed to be a generally acceptable compromise solution. A consensus had therefore been reached to the effect that the text of article 5 should be replaced by that of article 2 of revised ULIS (A/CN.9/62/Add.2), the words in brackets in paragraph 1 (a) being retained and the words in brackets in paragraph 2 (b) being deleted.

Mr. ROGNLIEN (Norway) observed that the consensus which the Commission had just reached constituted a decision of substance and that the task of the Working Group would be to consider matters of drafting, taking into account, in particular, the suggestions made by the representatives of Egypt and Spain.

98th meeting (13 April 1972)

/The first part of the meeting was taken
up by the discussion of other matters/

Article 6

Mr. HONNOLD (Secretary of the Commission) said that, whereas the Commission's consideration of previous articles had involved questions of the co-ordination of the texts prepared by the Working Groups, article 6 posed a problem of a different kind. The Uniform Law on the International Sale of Goods (ULIS) contained no provision corresponding to that in article 6 in the draft Convention. That was not because of any difference of view but because the Working Group on Prescription had found that special problems arose in connexion with the prescription of certain kinds of claims. Article 5 excluded some types of sales on the basis of the character of the transaction or of the goods; article 6 excluded certain claims arising in connexion with the transactions to be governed by the Law. Assuming, by way of example, that an international sale took place between S, the seller, and B, the buyer, claims arising from a breach of contract would be subject to the Law. If, however, the sale involved a machine which exploded and killed B, article 6 (a) would exclude from the scope of the Convention any claim based on the death of B. The view underlying article 6 was that prescription under the Convention was directed to commercial claims and that it would be inappropriate to direct it also to claims based on death or injury. The words "or other person" had been bracketed in article 6 (a) because the Working Group had been divided on the question presented by the following facts: B brought a claim against S as the result of a pecuniary loss resulting from a claim against B as a result of his having resold, for example, a machine to a third party (T) who suffered physical injury as a result of the defect. Should the claim by B against S be excluded from the law? In that connexion, he drew attention to paragraph 2 of the commentary on article 6 (A/CN.9/70/Add.1). The substance of the question was whether all claims by a buyer against a seller, based on physical injury, should be excluded from the Law,

regardless of whether such claims resulted from injury to the buyer himself or to a third party to whom he subsequently sold the goods in question.

Mr. OLIVENCIA (Spain) drew attention to amendments which his delegation had proposed to article 6 (A/CN.9/V/CRP.2).

His delegation considered that the question of liability for the death or physical injury of the buyer or any other person should be excluded from the sphere of application of the Law. The social and legal basis of the two kinds of claim under discussion were quite different. The draft Convention was concerned with rights arising from contracts. The relation of the object causing the damage with the contract should therefore be made clear by the inclusion of a reference to damage caused by the object sold.

Mr. ROGNLIEN (Norway) said that his delegation, too, felt that claims based upon liability for death or injury should be excluded from the Law.

Mr. LOEWE (Austria) said that his delegation differed from previous speakers in wishing to delete article 6 (a). The rules on prescription prevailing in individual municipal régimes were quite complicated and retention of article 6 (a) would subject the various types of claims arising from an international contract to different régimes. Article 6 (a) concerned not only claims for physical injury but other types of claims such as actions brought by the heirs of decedents. If article 6 (a) was deleted, article 9 should specify a starting-point for the period of prescription relating to claims based on liability for death or injury. A further consideration was that, if claims arising from physical injury were excluded from the draft Convention, the prescriptive period in respect of damages would be governed by municipal law and thus be different from that relating to the other obligations of the sellers governed by the Convention. It would scarcely be possible to make municipal law accord in that respect with the draft Convention. From the human point of view it was important that the Convention should also take into account physical injury to the human person.

Mr. GUEST (United Kingdom) said that his delegation had originally shared the views of the Austrian representative but had eventually concluded from discussions in the Working Group that it would be wiser to exclude from the Convention liability for all damage or physical injury caused by goods sold.

In the case of the inclusion in goods sold of harmful substances whose effects were detectable only in the long term - such as thalidomide or carcinogenic substances - the social considerations were quite different from those arising in connexion with defects causing loss to the buyer. The question of the prescriptive period in respect of damages caused by such substances should be left to municipal law.

Mr. MATTEUCCI (UNIDROIT) said that, if the reason for the exclusion of death or physical injury was purely juridical, that should be stated clearly in the draft Convention. In the case of death resulting from a defect in the goods, claims must be based on the contract. If the text was referring to death due to negligence, all other claims based on extra-contractual liability must also be excluded. As to the humanitarian grounds invoked by the Austrian representative in favour of the inclusion of death or physical injury, it could equally be argued that the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air should be amended because it treated passengers and goods alike in the context of delays.

Mr. RECZEI (Hungary) thought that article 6 (a) should be retained. He agreed with the Spanish representative regarding the need to draft the text in such a way as to link the damage with the goods delivered as opposed to referring only to the damage or injury.

Mr. JENARD (Belgium) said that his delegation considered that article 6 (a) should be retained. It had joined the French delegation in submitting an amendment (A/CN.9/V/CRP.4).

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer to the Working Group for final drafting article 6 (a) and the proposals relating thereto.

It was so decided.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) felt that article 6 (e) was not clear and asked what kind of documents were meant.

Mr. NESTOR (Romania) said that under Romanian law there was a provision whereby the State Notary Office was empowered to issue documents on which direct enforcement or execution could be obtained. It was in that sense that his delegation understood article 6 (e), which should be retained in order to cover that kind of quite common situation.

Mr. ROGNLIEN (Norway) said that article 6 (e) referred to documents which were titres exécutoires. For example, the document might record a compromise or settlement of a dispute out of court. In many legal systems, such a settlement would have the same force as a judgement and could be enforced directly.

Mr. SINGH (India) supported the views expressed by the Norwegian representative.

Mr. COLOMBRES (Argentina) agreed with the representative of the Soviet Union that article 6 (e) was not absolutely clear. In the view of his delegation, article 6 (e) was a general provision which should encompass article 6 (f). The fact that bills of exchange, cheques and promissory notes were specifically mentioned in a separate paragraph would obviously lead to confusion and create uncertainty about the kind of document referred to in article 6 (e). In the interests of clarity, article 6 (f) should be deleted.

Mr. OGUNDERE (Nigeria) said that his delegation had some difficulty with regard to article 6 (e). Article 1 (3) (f) had defined "legal proceedings" as including judicial, administrative and arbitral proceedings and the settlement out of court referred to by the Norwegian representative as falling under article 6 (e) would, in the opinion of his delegation, fall under article 6 (d).

Mr. GUEST (United Kingdom) said that the purpose of the insertion of article 6 (e) was to cover the titre exécutoire, which was not necessarily a judgement or award in legal proceedings. With regard to the comment of the Argentine representative, in the United Kingdom a bill of exchange was not a document on which direct enforcement could be obtained. For those reasons, it would be better to maintain article 6 (e) and article 6 (f) as they stood.

Mr. LEMONTEY (France) felt that article 6 (e) should be maintained. In the view of his delegation, documents on which direct enforcement or execution could be obtained were quite distinct from the commercial documents mentioned in article 6 (f) and article 6 (g). For example, parties to an agreement could have a notarized contract which could be enforced in the same way as a judgement. Auction sales and closure of mortgages could have the same character. Therefore, the maintenance of article 6 (e) would appear to be justified, although instances in which it could be invoked might be rare in international trade.

Mr. LOEWE (Austria) said he could understand that article 6 (e) seemed to some delegations to be superfluous. However, in Austria more than 50 per cent of legal actions were settled before a judge or arbitrator without any formal judgement or award made in legal proceedings. The document referred to in article 6 (e) was simply one in which the judge or arbitrator noted the decision reached by the parties concerned in a dispute and on which enforcement could be obtained. Under the Austrian legal system, the provision was of considerable importance and it was therefore essential to decide on the exclusion of rights arising from that kind of situation. He appealed to the Commission to maintain article 6 (e) as it stood; otherwise countries with legal systems similar to that of Austria would find it difficult to accede to the Convention.

Mr. CHAFIK (Egypt) said that his delegation favoured maintaining article 6 (e) for the reasons already adduced. Under the Egyptian legal system, in situations such as debts acknowledged in writing, a creditor might be able to obtain direct enforcement through an ordonnance sur requête. Such a document was a titre exécutoire and fell within the scope of article 6 (e).

Mr. LASALVIA (Chile) supported the appeal made by the Austrian representative. In Chile, títulos ejecutivos, such as those issued in cases of debt, would fall under article 6 (e).

With regard to article 6 (f), he proposed the insertion of the words "or any negotiable instrument" after "promissory note". Since there was a steady proliferation of new kinds of credit documents, his delegation felt that article 6 (f) should encompass all kinds of negotiable instruments. Moreover, article 5 had used the term "negotiable instruments" and it seemed only consistent

to use the same expression in article 6. In that regard, his delegation wished to appeal to the Working Groups to make every effort to use the same terms when drafting their documents.

Mr. MATTEUCCI (UNIDROIT) felt that it might be dangerous to extend the exclusion to all negotiable instruments. For example, article 6 (f) might then be construed as covering bills of lading which might be negotiable and be transferred to other parties who would be able to claim the goods in question. Transactions in maritime trade currently covered by special prescription periods might well be affected. In his view, the insertion of the words "or any negotiable instruments" in article 6 (f) would have the effect of jeopardizing many transactions.

Mr. MICHIDA (Japan) supported the view expressed by the representative of UNIDROIT. In Japan the term "negotiable instrument" was not precisely defined and its inclusion in article 6 (f) could create considerable difficulties. Bills of lading or trust receipts might be considered as falling within the scope of the definition. His delegation was therefore unable to accept the Chilean proposal.

Mr. LASALVIA (Chile) felt that it was inconsistent that some delegations which accepted the term "negotiable instruments" in article 5 objected to it in article 6. Bills of lading were a special case and a special study on the subject was to be submitted to the Commission. In the view of his delegation, all negotiable instruments should have been included in article 6 (f) for the sake of consistency.

Mr. JAKUBOWSKI (Poland) requested a clarification on article 6 (g). If it meant that dealings between the buyer and the bank were excluded from the scope of application of the Convention, his delegation would have no difficulties. However, if the provision related to settlement of payment between the buyer and seller by means of a letter of credit, it would be difficult to exclude that

frequently used mode of payment from the sphere of application of the Convention. Perhaps it would be possible to devise a more precise formulation.

Mr. HONNOLD (Secretary of the Commission) drew attention to the words "claims based upon" in the opening line of article 6. If a bank issued a letter of credit and the claim was directed to the bank "based upon" the letter of credit, that claim would be excluded. On the other hand, if the buyer had failed to establish a letter of credit, a claim against the buyer for that failure, based upon breach of contract, would not be excluded by this provision.

The CHAIRMAN suggested that a more precise formulation should be evolved by the Working Group.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) agreed that the Working Group should be asked to study article 6 (g) again. Since the draft Convention was intended to regulate relations between seller and buyer, without involving banks, he wondered what direct claims could arise from a documentary letter of credit to which article 6 (g) referred. Perhaps it might be deleted altogether as it was not directly pertinent to the draft Convention.

Mr. OGUNDERE (Nigeria) agreed that the Working Group should reconsider article 6 (g), although he found the explanation given in the commentary by the Secretariat (A/CN.9/70/Add.1) quite adequate.

The CHAIRMAN noted that article 6 (g) would be referred back to the Working Group.

Article 7

Mr. HONNOLD (Secretary of the Commission) explained that the text of article 7 had originally been drafted in August 1970 at the second session of the Working Group on Prescription and had been adopted by the Working Group on Sales in December 1970. There was only a stylistic difference between the text adopted by the two Working Groups. The Working Group on Sales had placed square brackets around the last five words in the article ("in its interpretation and application") because of a question of style as to whether the language was repetitious.

Mr. ROGNLIEN (Norway) said that many delegations in the Working Group on Prescription had also considered the last five words in article 7 repetitive but had concluded that no real purpose would be served by deleting them.

Mr. WARIOBA (United Republic of Tanzania) said that article 7 in its existing formulation was somewhat redundant, since uniformity of application and interpretation was the whole purpose of all laws. In national legal systems a body of case law usually evolved, which could be drawn upon for interpretation of laws. However, the framework of definitions within the draft Convention was very limited, since most paragraphs represented a compromise between the concepts in different legal systems. A domestic lawyer who had no access to those different systems would be unable to draw on the experience of other countries if the Uniform Law itself did not contain any guidelines similar to the article on interpretation in the Vienna Convention on the Law of Treaties.

Mr. POLLARD (Guyana) said that, in the absence of an integrated judicial system, it was impossible to have uniform interpretation and application of a Convention such as the one on prescription. There did, however, exist similar conventions on international transactions, such as the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air. A practice had evolved of drawing upon the judgements pronounced in other legal systems in interpreting and applying such conventions. That practice had been quite successful to date. He therefore supported the text of article 7 as it stood.

Article 8

Mr. HONNOLD (Secretary of the Commission) said that the question of the limitation period had been thoroughly investigated by the Working Group on Prescription and a questionnaire 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. In deciding upon a limitation period, the Working Group had not only attempted to find a

period corresponding to the wishes of Governments but had also taken account of other provisions in the Uniform Law which affected the running of the limitation period.

Mr. LOEWE (Austria) said that his delegation would prefer a three-year limitation period and could consider a five-year limitation period. In Austria there was a whole range of limitation periods, but none of them was of four years, so that application of the draft Convention would complicate the application of Austrian laws. He had submitted an amendment to article 9 (A/CN.9/V/CRP.1) which dealt with the limitation period for claims arising from lack of conformity of the goods. If his amendment to article 9 was accepted, a second sentence would have to be added to article 8.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation would also prefer a limitation period of three years.

Mr. DEI-ANANG (Ghana) said his delegation had originally been in favour of a five-year limitation period, but after reading the commentary on the draft Convention (A/CN.9/70/Add.1) he could support a limitation period of four years.

Mr. COLOMBRES (Argentina) said that the Working Group had evaluated the various proposals on the limitation period very carefully before coming to the conclusion that a four-year period would be an acceptable compromise.

Mr. OLIVENCIA (Spain) said that the advantages of a limitation period shorter than four years outweighed the disadvantages. A longer period could be justified by the geographical, legal and linguistic differences between countries but in the existing state of international trade those differences were not as important as the advantages resulting from a reduction in the limitation period proposed in article 8. The legal security enjoyed by businessmen against risks such as lack of solvency, which could result from extended delays in the resolution of disputed claims, would be increased if the limitation period was less than four years.

Mr. CHAFIK (Egypt) said that the limitation period of four years had been chosen in the interest of developing countries, where businessmen had not the same facilities as in developed countries and needed time to find out and assert their exact rights.

Mr. MUDHO (Kenya) agreed with the representative of Egypt. In his country the period of limitation was longer than four years but he could accept the compromise solution in article 8.

Mr. JENARD (Belgium) said that his delegation would prefer a limitation period of three years but could agree to a period of four years, in the interests of achieving a consensus.

Mr. RECZEI (Hungary) said that a limitation period of four years was a purely mathematical compromise between five and three years, which his delegation could accept.

Mr. OGUNDERE (Nigeria) pointed out that all national legislations had different periods of limitation. He could, however, accept the compromise period of four years.

The CHAIRMAN said that there appeared to be agreement regarding article 8, subject to consequential changes if the Austrian amendment to article 9 was adopted.

Article 9

Mr. OLIVENCIA (Spain) said that, as the Working Group had endeavoured to solve all the practical problems connected with the commencement of the limitation period, the resulting text was not very clear. Furthermore, the draft Convention, in article 9 and in article 10, drew a distinction between actions for annulment of a contract and actions deriving from breach of contract, which should in fact be treated in the same manner. A uniform period of limitation should be applied to both types of action and the Commission should attempt to have a consistent language in articles 9 and 10. If the commencement of the limitation period was the same for all claims, the goal of uniformity among the various systems of law would be promoted.

Mr. ROGNLIEN (Norway) agreed that articles 9 and 10 were interrelated. Article 11 was also connected to those articles. For that reason he had proposed various amendments to those three articles (A/CN.9/R.9). The amendments consisted in regrouping and amending the provisions of the three articles. He proposed that those amendments should be referred to the Working Group.

Mr. GUEST (United Kingdom) said that the Working Group had devoted many meetings to its discussion of the text on the commencement of the limitation period. It had adopted the formulation in the draft because it had felt that it would be more comprehensible to the businessmen who would have to apply it. He hoped the Commission would be able to endorse that text. His delegation thought it would be useful to consider the Norwegian proposal that, for the benefit of the civil law countries, the concept of breach of contract should be defined in article 1.

Mr. OLIVENCIA (Spain) pointed out that the French text for article 9 (1) had not been drafted in final form, but contained two alternative wordings. If his delegation's amendments (A/CN.9/V/CRP.10) regarding the commencement of the period were not accepted, it would favour the second alternative wording in the French text, namely "l'exécution de l'obligation devient exigible". That formulation should then be translated directly into the other languages. His delegation felt that would be a suitable compromise solution.

Mr. MANTILLA-MOLINA (Mexico) said he strongly supported the Spanish proposal. It must be made perfectly clear that prescription referred to prescription of the claim and not prescription of the right on which it was based. That was particularly important in the case of the civil law countries.

Mr. ELLICOTT (Australia) said his delegation was in favour of the adoption of the text of article 9 (1) as it stood. The Working Group represented the various legal systems represented on the Commission and all the questions raised at the current meeting had already been amply discussed. The Working Group had been instructed to formulate a text that was certain, realistic and simple and it had endeavoured to do precisely that. He appealed to members to accept the texts of article 9 (1) and article 10, in general terms, as they had been drafted by the Working Group.

Mr. SMIT (United States of America) said his delegation was quite willing to accept the text of article 9 (1) as drafted by the Working Group. However, articles 9, 10 and 11 raised the additional question of when the period should commence in connexion with the various types of claims that might arise in relation to a contract. It seemed to him that, if the main aim of the Commission was to provide a practical text for the use of businessmen and lawyers, it would be more logical to have a single article setting out the various dates on which the period would commence. It should begin with the most general rule - namely, the one currently embodied in article 10 - and then go on to specific rules. His delegation would submit a draft concerning the commencement of the period in the various circumstances that might arise.

He did not agree with the criterion used in article 10, which introduced an element of uncertainty and did not take into account the question of fraud. His delegation would also be submitting an amendment in that connexion. He asked that his delegation's proposals should be considered by the Working Group on Prescription in conjunction with the other proposals that would be before it.

The CHAIRMAN suggested that the United States delegation should submit its proposals to the Working Group for its consideration.

Mr. ROGNLIEN (Norway) suggested that the Spanish and Mexican positions might be met if the criterion set forth in article 10, namely that the limitation period should commence on the date on which the claim could first be exercised, was incorporated into the first paragraph of article 9 as the principal rule for the commencement of the period and if the criterion concerning breach of contract was included in a second paragraph of article 9.

Mr. LOEWE (Austria) said his delegation preferred the second alternative wording in the French text of article 9 (1). The first question which had to be considered in examining the two alternative versions was whether or not they meant the same thing; it seemed to him that they did not. There were two solutions to the problem; either to adopt the English text or to use the second alternative French text. If that was not possible, the Working Group should reconsider the whole paragraph.

He fully agreed with the remarks made by the Spanish and Mexican representatives and stressed that the concept of "breach of contract" was completely foreign to his country and others under the civil law system. No jurist in those countries could do much with the concept, even if it was defined under article 1. The problem presented by article 9 (1) was one of the most difficult ones facing the Commission during the current session. He suggested that, rather than defining "breach of contract" in article 1, the Commission might follow the opposite approach and adopt the Spanish proposal, expounding it for the benefit of the common law countries. He had serious misgivings regarding the use of different wording in the English and French versions and felt it would be simpler to translate the French wording into English.

Mr. JENARD (Belgium) said the wording of article 9 (1) had presented very complex problems to the Working Group on Prescription, as was shown by the difference in the French and English texts. If the Austrian suggestion was not acceptable to the Commission, his delegation would be willing to give favourable consideration to the Norwegian suggestion.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said his delegation had no comments to make on the substance of articles 9, 10 and 11, although the language adopted by the Working Group did not impress his delegation as being particularly brilliant. Nor was it happy about the difference in the English and French texts. A norm as important as the one in question should not be stated in such complex terms. The purpose of the draft was to provide a text that would be more practical than theoretical; the Commission should therefore ask the Working Group to consider how best it could simplify the draft in order to make it useful to ordinary businessmen. The United States proposal was worthy of consideration. Although he did not wish to suggest a general definition for the commencement of the period, he felt that it would be more methodical to give a general definition first and then set out the exceptions for individual cases. Articles 9, 10 and 11 could be combined without detriment to the text of the draft Convention.

Mr. LEMONTEY (France) supported the position taken by the delegations of Spain, Mexico, Austria and Belgium, but was willing to have the Working Group take into account the conflict of systems by defining "breach of contract". However, it would be difficult, as a matter of principle, to embody in the same convention the two concepts representing different legal systems. The Working Group should reconsider the matter.

The CHAIRMAN agreed with the French delegation's view that the problem had not yet been adequately solved. He therefore suggested that the matter should be referred to the Working Group, which should consider it as a matter of priority, since the solution to the problem raised in article 9 (1) would also have a bearing on the remainder of article 9, as well as on articles 10 and 11. If he heard no objection, he would take it that the Commission agreed to that suggestion and that it could proceed to consider the implications of the Austrian amendment to article 8, whereby the limitation period would be reduced to one year in the case referred to in article 9 (3) (A/CN.9/V/CRP.1).

It was so decided.

Article 9 (3)

Mr. MICHIDA (Japan) stressed that transactions in international trade often involved huge and complicated industrial plant systems and heavy machinery. Claims regarding defects in the operation of such machinery often included 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 delegation could not accept any proposal to shorten the limitation period in such cases. If the parties wished to shorten the period by mutual agreement, they should be able to do so, but he did not agree to the incorporation of such a principle in the law.

Mr. DEI-ANANG (Ghana) said that his delegation whole-heartedly endorsed the Japanese representative's remarks.

Mr. RECZEI (Hungary) said that the Working Group would be able to simplify the text if it based its approach on two situations, namely, that arising when a contract had been fulfilled, but not in accordance with its terms, and that arising when one party failed to fulfil the contract, and on the fact that in both cases a subsidiary situation could arise whereby a party entitled to do so notified the other party of his intention to terminate the contract.

Mr. LOEWE (Austria) said that the idea of a limitation period of four years in respect of a claim arising from lack of conformity was absolutely unacceptable to his delegation. Austrian legislation provided for a six-month preclusion period which could not be interrupted, suspended or prolonged. The system worked well and was not outlandish considering that article 49 of the 1964 ULIS, which had been the subject of considerable discussion, provided for a period of one year. It was regrettable that the provision for the suspension of the limitation period during negotiations had disappeared from ULIS; it had offered an opportunity of making a distinction between machinery and, for example, apples. Article 33 of the draft Convention, as it stood, would allow all States to invoke the provisions of article 49 of the 1964 ULIS instead of being bound for the four-year limitation period provided under the draft Convention. He suggested that the opportunity available under article 33 to any State which had ratified the 1964 ULIS to opt for other provisions should also be extended to those States, such as his own, which had not ratified that instrument.

Mr. HONNOLD (Secretary of the Commission) observed that article 49 of the 1964 ULIS provided for a limitation period starting from the point at which a buyer gave notice in accordance with article 39 of the same text. Under the latter article, the buyer might be entitled to give notice of a lack of conformity of the goods as late as two years from the date on which the goods were handed over. Under article 49, therefore, the total prescriptive period could amount to three years.

Article 9 (continued)

Mr. DEI-ANANG (Ghana) said that his delegation attached a deep and fundamental importance to its proposed amendments to article 9, contained in document A/CN.9/V/CRP.9. He recalled that his Government had already expressed reservations on the present form of article 9, as could be seen in pages 119 to 122 of document A/CN.9/70/Add.2, which contained his country's comments on the provision (then article 7). Among those comments, his Government had stated in particular that it was "inappropriate to make the limitation period run from the date on which the breach of contract occurred", and that its objection extended to the article as a whole. His delegation had subsequently modified its position in a spirit of compromise, and had accepted the time of the breach of contract as the beginning of the limitation period, despite its doubts on that criterion. However, it could not go beyond that point without sacrificing the interest of all developing nations and, ultimately, world trade. That was why it proposed replacing article 9 (3) by the text in document A/CN.9/V/CRP.9, and deleting paragraph 4.

Several considerations had led his delegation to reject the decision of the Working Group.

First, although article 9 (3), as it stood, reflected "a significant choice of policy" by the Working Group, as indicated in paragraph 6 of the commentary on that article (A/CN.9/70/Add.1, p. 34), it would seem that the two alternatives were evenly balanced. Therefore there could be no objection to the adoption of the Ghanaian proposal.

Secondly, if "the law of limitation must, by its nature, be definite in operation" (paragraph 6 of the commentary), fixing the date of breach of contract as the time for the commencement of the limitation period was not necessarily the best way to achieve that end, as his Government had already pointed out in its comments (A/CN.9/70/Add.2, pp. 120 and 121). Obviously, a failure to deliver goods (like a failure to pay for them) was easy to fix in time. But if a seller supplied goods which did not conform to the contract, the real time when he broke his contract would be when he made an error in the manufacture of the goods involved.

The date on which the goods "were placed at the disposition of the buyer", as stated in the present text of paragraph 3, was no more than a convenient legal notion. His delegation was by no means convinced of the utility of such a notion. The criterion which it proposed in its amendment - i.e. the date on which the lack of conformity of the goods was or ought reasonably to have been discovered by the buyer - should dispel any anxiety that the position of the buyer might be too advantageous, because it was an objective criterion.

Thirdly, the Working Group seemed to be afraid that claims might be pressed at 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 (paragraph 6 of the commentary). That argument wholly ignored the existence of latent defects, which often only became apparent a long time after the buyer had received the goods, or even after he had started to make use of them. His country, which bought practically all its consumer goods, could not accept such a risk.

Fourthly, the Working Group itself had confessed that the rule of article 9 (3) could produce harsh results in some circumstances (paragraph 7 of the commentary). That was a serious understatement, and the developing countries were in a position to appreciate the extreme harshness of those results and the frequency with which they occurred.

In proposing a solution, his delegation was aware that, in the common law countries, the existence of a cause of action did not generally depend on the awareness of the person who had the right to take action. However, in view of all the injustices which could ensue, it did not think that the principle should be strictly applied in a law which was aimed at avoiding the doctrine-ridden ideas of both major systems of jurisprudence. It was true that prescription as such was essentially expropriatory in nature, in that a claim could be barred, however well founded it might be, simply because a certain period of time had elapsed. That rule could be justified when the delay in presenting the claim was due to some fault. But, when there was no fault on the part of the claimant, it would be both illogical and unjust to deprive him of any recourse to legal process. To prevent such injustice, was there not a danger that the buyer might be tempted to over-exercise his rights of recourse, under article 9 (3) as it now stood?

It had been said that the amendment proposed by his delegation would result in the seller being left in a state of perpetual uncertainty as to when he would be finally cleared of his obligations to the buyer. That argument was only superficially convincing; the true businessman took too great a pride in the durability of his goods to wish to cease to be considered as the seller at a specific point in time. Furthermore, if such a problem did exist, the solution was not to protect sellers against the long-term effects of a defect in the manufacture of the goods they sold, but to encourage them to sell goods of the highest possible quality. If the seller felt that such a risk was unacceptable, it was for him to exclude it in his sales contract. That was the usual practice and such protection was adequate in most cases.

It was a matter of both radical principle and extreme practical importance and the developing countries could not accept being deprived of recourse under the law on prescription.

Mr. POLLARD (Guyana) said that the problem raised by paragraph 3, and in particular the phrase "irrespective of the time at which such defects or other lack of conformity are discovered or damage therefrom ensues" was as profoundly political and economic as it was commercial and technical. Thus his delegation could not accept the arguments advanced by the representative of Austria at the 98th meeting, or the amendments proposed by the Austrian delegation in document A/CN.9/V/CRP.1. In his delegation's view, the drafting of a uniform law could be justified only in so far as it could lead to a redefinition of the structure of international economic relations, particularly in redressing the wrongs committed against the third world countries. It was generally accepted that the structure of international economic relations was largely a function of the nature of the controlling normative framework. If that was true, the third world countries were not concerned with the unification of obsolescent, inequitable norms, but rather with the harmonization of a law which reflected their legitimate interests. His delegation's proposal certainly placed the buyer in a particularly favourable position, because of the subjective nature of the criterion employed. But that could be remedied by making the criterion involved more objective in character, which would mean that the seller (i.e. the industrial countries) would also be in an equally favourable position.

His delegation supported the Ghanaian amendment and proposed two subamendments to it, namely, the insertion of "serious" before the word "defects" in the first line and the deletion of the words "were or" in the fourth line.

Mr. WARIOBA (United Republic of Tanzania) supported the Ghanaian amendment for the reasons already explained by several representatives, particularly the representative of Japan. Some points in the Ghanaian amendment could however be improved upon. His delegation agreed with the delegation of Guyana that the word "serious" should be inserted before "defects", although it might be difficult to define the seriousness of the defect; that problem might perhaps be entrusted to the Working Group. He was afraid that the word "reasonably" might also give rise to uncertainty.

His delegation would have difficulty in accepting the Austrian amendment contained in document A/CN.9/V/CRP.1. He said that his country, where the normal limitation period was five years, had already agreed to apply the four-year period provided for under the Uniform Law with respect to international transactions. The fixing of a new limitation period, now reduced to one year, would make it difficult to enforce the convention. He therefore asked the Austrian delegation not to insist on its amendment.

Mr. OGUNDERE (Nigeria) congratulated the representative of Ghana on his excellent analysis of article 9. Nigeria had submitted an amendment to article 4 (1) (A/CN.9/11/CRP.7) with a view to excluding sales of plant and machinery from the area of application of the law, since such sales gave rise to complex technical problems and lengthy administrative procedures, which Egypt had experienced on several occasions. In the case of plant sold for immediate possession, for example, it might take several years to make it operational. It was not therefore logical that the seller should be exempt from all responsibility upon completion of a four-year period from delivery of the plant, at the time when the buyer had just begun to use the plant without having been able to ascertain whether there were in fact any defects. If his proposal was accepted, he would be willing to support the present text of article 9 (3). If it was rejected, the paragraph would become unacceptable to the majority of the developing countries and his country would then support the Ghanaian proposal.

Mr. MUDHO (Kenya) said that he supported the amendment proposed by the representative of Ghana. Although the wording was not a fundamental issue, he agreed with the representative of Tanzania that the word "reasonably" might cause difficulties to some delegations. The question might be referred to the Working Group.

Mr. LOEWE (Austria) said that he wished to clear up certain misunderstandings. Firstly, his proposal for a relatively short limitation period for claims arising from lack of conformity had been dictated only by legal considerations, to answer the need of parties for security, and not by any political or economic considerations. Secondly, with regard to the commencement of the limitation period, he could support the solution proposed by the representative of Ghana. There was no question of laying down all the obligations of the seller before the buyer had had the opportunity to examine what he had bought. Thirdly, in answer to the remarks made by the representative of Tanzania, he said that his position did not depend on the existence of similar provisions in Austrian law, since UNCITRAL should, of course, seek a compromise between all the existing systems of law. In addition, while his country had participated in drawing up the 1964 ULIS, it had not signed that Convention, bearing in mind the legitimate wish of countries which had not been present at the Hague Conference to study the text, and had merely asked to be treated in the same way as the countries which had ratified that document. Nevertheless, ULIS was due to enter into force in August 1972, and it would not be advisable to lay down completely different rules with regard to prescription. In proposing a limitation period of one year - since a period of three years would be much too long - he had nevertheless not set a date for the commencement of that period, and was ready to consider what would be the best possible solution in that respect. The matter should be borne in mind when article 33 was to be considered.

Mr. CHAFIK (Egypt) welcomed the statement of the representative of Ghana, urging the restoration of a fair balance between the interests of the buyer and of the seller. However, neither the interests of the seller, nor the important factors of stability and certainty in commercial transactions should be ignored. His delegation was ready to agree to the Ghanaian proposal, provided that it was accompanied by a provision to eliminate the possibility of a dispute, in other

words, to rule out, in all cases, action by the buyer on completion of a specified period from the moment when the goods had been placed at his disposition.

Mr. ELLICOTT (Australia) said that, in the interest of fairness, he supported the amendment proposed by the representative of Ghana. Although that proposal departed from the principle of legal certainty, its result would be to put an end to the position of inferiority of certain countries, such as Australia, which were a long way from the great markets of the world.

Mr. ROGNLIEN (Norway) emphasized that the Working Group had taken into account the importance of the principle of certainty in fixing the length of the prescription period. It was essential to distinguish between cases involving the sale of plant and heavy equipment, where, even to the detriment of the principle of certainty, flexible rules should be adopted to protect the interests of the buyer, and cases involving ordinary goods, for which more rigid rules could be adopted. In fact, article 11 contained a solution to the problem: in cases where the seller gave an express undertaking, the limitation period would begin only from the date on which the buyer informed the seller that he intended to assert a claim based on the undertaking. If, independently of article 11, the Ghanaian proposal was adopted, there should at least be provision for a maximum time-limit for the exercise of action by the buyer.

Mr. SINGH (India) said that his country had experience of the difficulties met with by the developing countries. He would support the Ghanaian proposal, provided that a specified period was included in it. The essence of any legal formulation was precision, and the possibility of a dispute could not be allowed to continue indefinitely. Thus, as the representative of Egypt had suggested, a period should be fixed beyond which action by the buyer was no longer possible.

Mr. LEMONTEY (France) said that there were two problems connected with article 9, paragraph 3. The first related to the length of the limitation period. On that subject, his delegation, for reasons different from those stated by the representative of Ghana, was not happy with the period laid down for cases involving lack of conformity. He considered that a shorter period should be chosen. The second problem involved the commencement of the limitation period, which could

be changed without difficulty. The date of commencement set in article 9, paragraph 3 was different from that laid down in article 49 of the original ULIS, in which the period began on the date on which the buyer gave notice of the lack of conformity. The same date of commencement had been retained in article 39 of the revised ULIS. It was highly desirable that the law on sales and the law on prescription should be harmonized in that respect.

In summary, he thought that the period should be less than four years, but that its date of commencement should be the giving of notice by the buyer, which should take place within two years. As the representative of Egypt had proposed, a maximum period of a certain number of years from the date when the goods were returned should be laid down, after which no further action would be possible.

Mr. GUEST (United Kingdom) said that the problem raised by the representative of Ghana was not peculiar to developing countries nor to sales contracts relating to heavy industrial equipment. He agreed with the representatives of Egypt and France that, if the Ghanaian proposal was adopted, it would be imperative to fix a maximum period beyond which the buyer would not be able to exercise his right of recourse.

The CHAIRMAN observed that there seemed to be a majority in favour of the Ghanaian proposal. That proposal could be referred to the Working Group for redrafting together with the various other suggestions which had been formulated for a specific maximum period (Egypt, India) and for a shorter period in cases involving lack of conformity (France, Austria). At the request of the representative of Norway, Chairman of the Working Group, who wished to know the size of the majority in favour of the Ghanaian proposal, the President requested the representatives who wished article 9 to be amended as proposed to indicate their preference by raising their hands. He noted that the representatives of Argentina, Australia, Chile, Egypt, Ghana, Guyana, India, Kenya, Mexico, Nigeria and Tanzania were in favour of the amendment submitted by the delegation of Ghana.

Mr. SMIT (United States of America) said that his delegation had also submitted an amendment to the effect that the period should commence on the date when the breach of contract was discovered. He was prepared to support the Ghanaian amendment if his own amendment was adopted, and if it was specified that notice must be given of the lack of conformity within a specified period.

Mr. GUEST (United Kingdom) observed that many proposals concerning important changes had already been referred to the Working Group. The Group was faced with an enormous task, and although it would do its best to cope with it, it could not guarantee that it could carry out all the redrafting necessary before the end of the session.

Mr. RECZEI (Hungary) proposed that, in order to assist the Working Group, the Commission should set up a small drafting group which might, for example, be composed of the representatives of Ghana, Egypt, India and the United States of America, and which would be entrusted with redrafting article 9, paragraph 3.

Mr. OLIVENCIA (Spain) said that his delegation too had submitted an amendment to article 9, paragraph 3*, which had not yet been issued. He requested that the amendment should also be taken into consideration by the Working Group. In short, his delegation proposed three alterations. The first was to replace the expression "defects in, or other lack of conformity of, the goods" by the words "a lack of conformity of the goods". The phrase "lack of conformity" was sufficiently wide to cover all the circumstances referred to, and to use it would help to simplify the drafting of the provision. The second change related to the commencement of the limitation period. His delegation proposed that the phrase "according to the contract of sale" should be deleted. According to paragraph 5 of the commentary on that article, the phrase pointed to the circumstances which constituted placing the goods at the buyer's disposition, whether placed on the due date contemplated by the contract or otherwise. That added nothing to the expression "placed at the disposition of the buyer". His third proposal was to combine paragraphs 3 and 4 into a single provision. Paragraph 4 related to special circumstances, those of carriage, which could be adequately dealt with in paragraph 3.

In addition, he pointed out that the Spanish text of article 9 contained a number of terminological errors. In particular, the text referred to "anulación" of the contract where the word "resolución" should have been used.

* Subsequently issued as document A/CN.9/V/CRP.10.

Mr. CHAFIK (Egypt) proposed that, in order that the different versions of the draft should conform with each other, the drafting group should include one French-speaking and one Spanish-speaking member.

Mr. GUEST (United Kingdom) said that he feared that enlargement of the drafting group would amount to creating two working groups. He proposed that the members of the Commission who favoured the amendment submitted in document A/CN.9/V/CRP.9 should, together with the representative of Ghana, meet to undertake its redrafting, and that the representative of Ghana should be invited to participate in the meeting of the Working Group dealing with article 9, paragraphs 3 and 4.

It was so decided.

Article 9 (continued)

Mr. KHOO (Singapore) said his delegation could not accept the starting-point for the limitation period specified in the first sentence of article 9 (5), according to which if, as a result of a breach of contract by one party before performance was due, the other party thereby became entitled to and elected to treat the contract as terminated, the limitation period in respect of any claim arising out of such breach would commence on the date on which such breach occurred. In the view of his delegation, that provision could be applied only in the simplest situations, such as that illustrated in the commentary (A/CN.9/70/Add.1, page 35, para. 10). There were many other situations in which it would introduce an element of uncertainty. For example, a contract might be signed for the supply of 2,000 telex lines, of which 1,000 were to be completed by the end of 1972 and 1,000 by the end of 1973. The contract might stipulate that the seller was to proceed diligently to the delivery and installation of the lines and that, if he did not, the buyer would be entitled to terminate the contract either with or without notice. Other than those stipulations, the contract might not specify any further subperiods or dates for partial delivery and installation. The seller might fail to take the necessary steps to complete the supply and installation of the lines within the time provided, and might fail to inform the buyer whether or not he intended to meet the terms of the contract. The buyer could not be expected to wait until the end of the year to terminate the contract, but should be able to do so whenever it became evident to him that the seller had no intention of honouring it. The problem then arose as to how to determine the date on which the breach of contract occurred. Of the three possible dates for the commencement of the limitation period, mentioned in paragraph 11 of the commentary, it would seem that the only one which could reasonably be applied in that case would be the notification of termination, i.e. the date on which the buyer notified the seller that, in view of the latter's apparent inability or unwillingness to honour the contract, it should be terminated.

His delegation doubted seriously whether article 9 (5) would be workable in practice. He therefore asked that the Working Group should reconsider that paragraph.

The CHAIRMAN asked the representative of Singapore to transmit his suggestions to the Working Group, preferably in written form.

Articles 12, 13 and 15

Mr. HONNOLD (Secretary of the Commission) said that articles 12, 13 and 15 were concerned with action under three types of legal proceedings that stopped the running of the limitation period. The significance of such legal proceedings was that they prevented the limitation period from expiring so that the claim would not be barred under article 24. As noted in paragraph 1 of the commentary to article 12 (A/CN.9/70/Add.1, page 41), the reference in the heading to "interruption" did not imply that the consequences of "interruption" under various national legal systems were imported into the Law. The text of the Law itself did not use the term "interruption" in connexion with those provisions. Article 16, which did refer to "interruption", was scarcely an exception since the reference was limited to those legal systems that used that concept. The Working Group had felt that the use of the term in the general heading for that group of articles might be helpful as an indication of the general character of the problem with which the articles dealt. However, in view of the ambiguity of the term, he understood that the Working Group might wish, as a matter of style, to consider whether the heading might be modified.

The aim of articles 12, 13 and 15 was to define the stage which proceedings must reach before the expiration of the period in order to stop the running of the period. Article 12, which dealt with judicial proceedings, took account of the fact that such proceedings were instituted in various ways in different legal systems. Paragraphs 3 and 4 of the commentary to article 12 therefore referred to the rules of the jurisdiction where the proceedings were brought, which defined the steps to be taken in order to institute proceedings. A different approach was taken with regard to other proceedings, such as arbitration.

Mr. ROGNLIEN (Norway) remarked that the draft did not use technical legal terms which had different meanings under different legal systems, such as "suspension" and "interruption"; however, the heading of the group of articles did use the word "interruption". Since that term might lead to confusion, he suggested that it might be replaced by a word such as "discontinuance" or, in French, "arrêt".

Mr. POLLARD (Guyana) said the wording of article 12 was vague and difficult to understand. He therefore proposed that the beginning of article 12 (1) should be amended to read as follows: "The limitation period shall cease to run when the creditor performs any act which, under the law of the jurisdiction where such act is performed, is recognized as:". The word "as" should then be deleted from subparagraphs (a) and (b).*

Mr. ELLICOTT (Australia) pointed out that article 12 (2) treated the counterclaim as the institution of judicial proceedings, in other words, as falling under the terms of article 12 (1) (a). He felt it would be more appropriate to treat it as falling under the terms of subparagraph (1) (b). He suggested that the words "which he has commenced against the debtor in relation to another claim" in subparagraph (1) (b) should either be omitted or replaced by the words "which the debtor has instituted against him or which he has instituted against the debtor".

Mr. OLIVENCIA (Spain) said the entire text of the articles under consideration was obscure; the Commission must not lose sight of the fact that the draft Convention was designed mainly to serve businessmen and not lawyers. The Spanish text was incomprehensible and he had had to refer to the French text in order to understand the meaning of the articles. He suggested that the Spanish translation should be based on the French text, since many of the errors in the Spanish text seemed to stem from the fact that it had been translated from the English. The entire draft Convention was indeed much too long and confusing and should be considerably simplified, systematized and synthesized.

Mr. MANTILLA-MOLINA (Mexico) said he had had difficulty in understanding the French, Spanish and English versions. For example, as he understood it, article 12 (1) (b) envisaged the contingencies set forth in article 15. It would

* Subsequently circulated as document A/CN.9/V/CRP.13.

have been much simpler merely to make reference to that article, rather than trying to spell out the situation in such complicated terms.

The CHAIRMAN said that the suggestion made by the Spanish representative would be transmitted to the Secretariat.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the words "as invoking his claim" in article 12 (1) (b) were not clear to him. He did not understand what sort of claim was meant. If it was a counterclaim, that should be made clear. If the words referred to the introduction of a petition to increase the sum involved in the original claim, there was no purpose in introducing that subparagraph, since it was covered by subparagraph (a). He would appreciate clarification as to what the drafters had had in mind.

Mr. LEMONTEY (France) said that the use of the word "interruption" in the heading for that section of the draft Convention was confusing. He suggested that a different heading should be used which would be neutral and not likely to lead to errors of interpretation. He suggested the use of a heading such as "cessation of the running of the limitation period" (cessation du cours de la prescription).

Mr. HONNOLD (Secretary of the Commission) pointed out that, whereas the headings of the main sections of the draft Convention had been prepared by the Working Group, the bracketed captions in the commentary (A/CN.9/70/Add.1) had been inserted for ease of reference and had no legal effect.

Mr. ROGNLIEN (Norway) pointed out that the Working Group had not used the technical terms "interruption" or "suspension" in the body of article 12. The text left it for municipal law to decide what acts should be recognized as instituting judicial proceedings and thus causing discontinuance. The effects of such discontinuance, however, were not left to municipal law - except where a judgement or award was made. The effects under the draft Convention of such discontinuance were stated in articles 18 et seq. Discontinuance was not interruption in the sense that a full new limitation period would commence to run exactly from the time of the act causing the original limitation period to cease to run. Nor was it suspension in the sense that the former limitation period would recommence at the conclusion of the judicial proceedings. The effect of the text was that a new period, as specified in articles 18 et seq., would commence to run after the term of the discontinuance. The Working Group had felt that it would be easier in practice

for parties to proceedings to calculate the extension of the limitation period as from the conclusion of the proceedings, according to the rules in articles 18 et seq.

Mr. LASALVIA (Chile) said that the representative of France, whose remarks he endorsed entirely, had anticipated the Chilean delegation's comments.

He supported the Spanish representative's remarks regarding the Spanish version of the draft Convention.

Mr. DEI-ANANG (Ghana) supported the amendment of the representative of Guyana to article 12.

Mr. GUEST (United Kingdom) said that the Working Group had used the expression "cease to run" in article 12 because it was bringing into operation a novel system not reflected in any current legal system. The consequences of discontinuance varied from one legal system to another. Under English law, for example, the period of limitation continued to run during legal proceedings although the length of the latter was governed as a procedural matter.

There were three possible results in the operation of the system introduced under article 12. First, the creditor could obtain judgement in his favour - in which case the draft Convention ceased to be applicable by virtue of the exclusions for which article 6 provided. Secondly, the creditor could fail to win his case, in which case the matter would be closed in so far as the jurisdiction before which the proceedings had been instituted was concerned. Thirdly, the proceedings could be abortive - for example, the creditor could withdraw his claim, or the jurisdiction before which the proceedings were instituted could declare itself incompetent; such situations were dealt with under articles 18 et seq. Such being the operation of the system, the Working Group had felt that it need not specify the consequences of its use for municipal law.

Referring to the USSR representative's queries regarding article 12 (1) (b), he said that if a creditor instituted proceedings against a debtor for a sum of money owed to the creditor as a result of a loan and, subsequently, the creditor added an extra claim to his already instituted proceedings - for example, a claim for the price of goods sold to the debtor - the intention was that article 12 (1) (b) would stop the running of the limitation period in respect of the claim for the price of the goods. It could be argued that article 12 (1) (a) would cover such a situation

but the Working Group had felt that the provision should be made quite clear. It was for the Working Group to consider whether article 12 (1) (b), which concerned situations where the creditor was the plaintiff, was strictly necessary. That was a difficult question in view of the provisions regarding counterclaims in article 12 (2), in which the creditor was the defendant.

Mr. POLLARD (Guyana) said that the Working Group's indiscriminate use of the words "cease to run" and "interruption" had led to confusion. Only article 16 was genuinely concerned with interruption. Article 14 was rather concerned with the termination of the limitation period. He suggested, therefore, that the heading of the section should be changed to read: "Termination and interruption of the limitation period".

Mr. SMIT (United States of America) said that the introduction of a wholly novel system implied the introduction of wholly novel problems, although he had no objection to the system which the Working Group proposed.

A problem which could arise under that system would result from a situation in which a court not having jurisdiction nevertheless decided a case on its merits. Article 16 would not apply in such a case and the limitation period might therefore never cease to run. He wondered whether there was any strong reason why the Commission should select the novel system. His delegation found articles 12, 13 and 15 unnecessarily prolix and detailed; they did no more than define the point at which legal proceedings were commenced. That could be done in a single article in simpler language providing that the limitation period should be interrupted or cease to run when a claim was asserted in legal proceedings. It would be left for municipal law to determine the exact date upon which the claim was interposed. The compression of articles 12, 13 and 15 into a single article would avoid many additional problems arising from the text as it stood. His delegation would propose a draft text of a single article.*

Mr. LEMONTEY (France) said that articles 12, 13, 15, 18 and 21 were related and the heading of the section should be altered to make their relationship clear.

Mr. OLIVENCIA (Spain) said that the Commission did indeed have a new system before it but it was one which lacked order and should be systematized. The text

* Subsequently circulated as document A/CN.9/V/CRP.14.

should refer, first, to acts which caused the limitation period to cease to run and should enumerate those acts. It should then deal with the concepts inherent in each of the acts enumerated and, lastly, should state the effects deriving from each of them.

Mr. CHAFIK (Egypt) drew a distinction between the suspension and the interruption of the limitation period. He could accept the wording "shall cease to run" in article 12 (1) but thought it wiser, in view of the difficulty raised by the word "interruption", to remove the headings from the draft Convention.

Mr. COLOMBRES (Argentina) proposed that article 12 (1) (b) should be eliminated by the inclusion of the concept of counterclaims in the text of article 12 (1) (a).

Referring to the French representative's remarks concerning the grouping of articles, he agreed that the heading should be worded in neutral language - for example: "Cessation of the running of the limitation period".

Mr. OLIVENCIA (Spain) supported the Argentine representative's proposal regarding the elimination of article 12 (1) (b).

The CHAIRMAN said that the comments and proposals made during the debate would be referred to the Working Group.

Article 14

Mr. LOEWE (Austria) said that his delegation would prefer article 14 not to appear in the draft Convention. It believed that the institution of proceedings in a court against a joint debtor should in no way involve interruption or cessation of the limitation period vis-à-vis another joint debtor. In the opinion of his delegation, claims against the debtors might be of different kinds and it did not seem a good idea to make the limitation period depend on whether another person was a joint debtor. A debtor against whom no claim was filed, but in respect of whom the limitation period was interrupted might have great difficulties with regard to evidence, and one of the objectives of the institution of the limitation period was not to risk a procedure in which one party, for the reason that too much time had elapsed, would not be able to invoke evidence. It would surely be better to allow the limitation period to run irrespective of any link between debtors.

Mr. ROGNLIEN (Norway) said that article 14 raised an important question of principle, namely, whether different debtors jointly and severally liable towards the creditor should be treated independently of each other. In Norway, they were. However, the French legal system embodied the principle that, when the limitation period was interrupted in respect of one debtor, it was automatically interrupted in respect of other debtors. In international law it was important to know with some certainty what would happen in such cases. For that reason the Working Group had drawn up article 14, whose aim was to provide a link between the different legal systems and also to avoid unnecessary cumulation of litigation. It seemed undesirable for creditors to institute separate actions against each debtor, and the Working Group had felt that it would be much more practical to institute proceedings against one debtor and to issue warnings to the other debtors. The parties concerned would know the position and, if no settlement was reached, proceedings could then be instituted against other debtors.

His delegation felt that the scope of the article should be as broad as practical considerations would allow, and it proposed (document A/CN.9/R.9) that the scope of the article should be extended to cases where debtors had been sued under the alternative. For example, in cases of agency, the real debtor might not be known. It also proposed to extend the article to relations between buyer and seller when proceedings were instituted by a subpurchaser against a buyer. For example, in the case of a buyer who resold goods to a subpurchaser, who subsequently sued the buyer because of a defect in the goods, if the buyer lost his case he could claim against the seller. However, it was undesirable for the buyer to be compelled to sue the seller before knowing the outcome of any action instituted by the subpurchaser against him. For purely practical reasons, his delegation felt that it should be sufficient for the buyer to inform the seller that proceedings had been instituted against him by the subpurchaser and that he reserved his right to bring an action against the seller pending the outcome of those proceedings.

Mr. KAMAT (India) said that his delegation shared the view of the Austrian delegation. It felt that the article introduced an unnecessary complication into the draft Convention. Furthermore, his delegation felt that the solution contemplated by the Working Group was not an equitable one, since it clearly favoured the creditor. Finally, if article 14 was deleted, the individual national

laws would be applied and in most countries there were appropriate provisions to enable the creditor to sue debtors in the same action. In India, when there were debtors jointly liable, they were sued together. His delegation was therefore unable to accept the article.

Mr. LOEWE (Austria) noted that, if a creditor had claims against two debtors and started proceedings against one debtor and notified the other before the expiration of the limitation period, the interruption would involve certain consequences under article 18. If his delegation had understood the Norwegian representative correctly, the debtor who was not being sued wanted to know the position concerning the limitation period against him and could follow the proceedings between the creditor and the other debtor in order to ascertain whether the period had been prolonged or not. However, in international cases, that might be very difficult. If a creditor obtained an award against one debtor, presumably the debtor in question would be obliged to pay. However, under the Austrian legal system the judgement against the first debtor would have no effect on any other debtors who were not parties to the proceedings. The article would give rise to complications and for that reason should be deleted.

Mr. COLOMBRES (Argentina) felt that the article was a most useful one. It was rather difficult to institute proceedings in different countries and the provision that interruption should have effect with regard to joint debtors, provided due notification was given, seemed a good solution. In many national legal systems, in order to institute proceedings against a joint debtor, notification had to be served on the principal debtor; for that reason, his delegation could accept the article.

Mr. OLIVENCIA (Spain) said that his delegation had no objection to article 14. However, the question of the effects of the limitation period on joint debtors was a general one which did not merely involve legal proceedings. He wondered if it could be assumed that other causes of interruption of the limitation period had no effect on other debtors. If the rule was to apply to all acts interrupting limitation periods, that fact should be spelled out.

Mr. COLOMBRES (Argentina) said that the article was intended to limit the effect in respect of joint debtors to judicial and arbitral proceedings.

Mr. SMIT (United States of America) said that his delegation felt that article 14 was a useful one which would avoid unnecessary litigation. It felt that the article might be drafted more broadly in order to cover the provisions of article 16, which seemed superfluous.

Mr. MANTILLA-MOLINA (Mexico) agreed with the United States representative. It felt that the article was a satisfactory compromise between the various legal systems and supported its inclusion in the draft Convention.

Mr. POLLARD (Guyana) inquired what kind of effect was meant in the article. He felt that the point needed clarification. In general, his delegation felt that the article was a useful one, but that in its present form it would give rise to confusion.

Mr. ROGNLIEN (Norway) said that the "effect" was the one dealt with in articles 12 and 13, namely that the limitation period would be discontinued. With regard to the Austrian comment that a judgement with regard to one debtor would have no effect on other debtors, he felt that there was indeed an omission in the draft Convention. His delegation proposed in document A/CN.9/R.9 that a provision should be added to article 18 specifying that in such a case the limitation period would be extended by one year in relation to debtors who had not been sued, provided they had been duly notified before the expiration of the limitation period that proceedings had been instituted.

In his opinion, the provision was of considerable practical importance. The Indian representative's observations concerning the existence of suitable national provisions applied to most, but not all, countries. However, the main problem was that, when there were several debtors in several different countries with different legal systems, there was no rule that all the debtors could be sued in one single action in one country. If article 14 was deleted, there would be international cases not covered by the Uniform Law or by national law. There was also the problem of relations between different parties regarding the law of substance, which might be based on different legal systems, and therefore there would be some uncertainty regarding the relations in law between the different parties. In conclusion, the present formulation of article 14 concerned only relations between the main creditor and the several debtors. It might be important to have the same system for mutual relations between the several debtors; if an action was brought against one debtor by

the creditor at a very late stage, there would be no possibility for the debtor to interrupt the limitation period in relation to his co-debtors. That problem would have to be solved by extending article 14 to mutual relations between co-debtors.

Mr. LEMONTEY (France) said he supported article 14 because, if the provision contained in that article did not appear in the draft Convention, the concept of joint liability would be nullified. The essence of that concept was that any rules applying to one debtor would apply to all debtors. In many countries, furthermore, the assumption of joint liability existed in trade matters. If the Commission decided to delete article 14, it must insert a new provision stating that the reverse of that article would apply, since silence on the matter would be impossible. He agreed that the scope of article 14 should be extended to cover the contents of articles 12, 13, 16 and 17 with regard to acknowledgement of obligation by one of the debtors.

Mr. OGUNDERE (Nigeria) agreed with the representative of Austria that article 14 was not necessary. The philosophy of the Convention was to make the lex fori prevail and article 14 seemed to confuse lex fori with regard to the procedure of the juncture of parties. If a creditor brought an action against one of two debtors, he wished to recover all his claim. However, the draft Convention appeared to say that, if action was successfully brought against one debtor, who could pay only 50 per cent of the claim, judgement could not be executed against the other debtor and also that the limitation period would cease to run with respect to that other debtor. If article 14 was deleted, national procedure on joint liability would apply in respect of any action. That appeared logical and creditors would then be happier with the Convention.

The CHAIRMAN invited representatives to indicate by raising their hands whether they were in favour of the deletion of article 14.

He noted that the representatives of Austria, India, Nigeria and Singapore were in favour of that deletion.

He further invited representatives to indicate whether they wished to expand the scope of article 14 so that it would also refer to other acts interrupting the limitation period, such as those mentioned in articles 16 and 17. Article 14 might also be expanded to deal with relations other than those specified.

He noted that the representatives of Australia, Egypt, Ghana, Guyana, Norway, Poland and the United States were in favour of extending the scope of article 14.

Mr. ROGNLIEN (Norway) thought that representatives should have been invited to indicate their views on his delegation's amendments in document A/CN.9/R.9.

Mr. OLIVENCIA (Spain) noted that the Commission agreed that the Uniform Law should apply only to direct relations between the buyer and seller. It would be dangerous to apply it to third parties, even if they were joint debtors, since the question of incidental guarantees, which had been discussed during the debate on article 1, would then be reintroduced into the sphere of application of the Convention. Perhaps the Working Group could consider the matter and report back to the plenary meeting.

Mr. GUEST (United Kingdom) said he fully supported the Chairman's request for an expression of opinion. The Working Group thus had some indication of the strength of feeling on article 14, which it would take into account in its consideration of that article.

The CHAIRMAN said that, in view of the opinions expressed by the representatives of Spain and the United Kingdom, article 14 should be referred to the Working Group for clarification of its contents and implications. The Working Group should make sure that the text was not so vague that it could cover other matters such as incidental guarantees, as pointed out by the Spanish representative.

Article 15 (continued)

Mr. RECZEI (Hungary) said that he had some difficulties with regard to article 15. In the case of inheritance due to death of a debtor or a liquidation of a company, the executors ex officio took account of outstanding claims but did not issue appeals to creditors. They simply enumerated the creditors. The provision in article 15 to the effect that the limitation period would cease to run only if the creditor performed an act recognized under the law applicable to the proceedings listed in article 15 was a dangerous one, since some creditors might have no knowledge of the existence of the legal proceedings. Perhaps the article could include a provision stating that, in cases where the applicable law did not require

any act to be performed on behalf of the creditor, the limitation period would start from the beginning of such proceedings and would run until the end of the proceedings. Furthermore, in cases where the executor enumerated among the creditors a creditor who was not required to perform any act, he wondered whether that enumeration could be considered as an acknowledgement under article 17 and whether the limitation period would therefore start anew. The Commission should either delete the article or insert a sentence referring to systems where there was no obligation for the creditor to take action in case of the insolvency of a debtor.

Mr. MANTILLA-MOLINA (Mexico) found article 15 difficult to understand, perhaps because of the different concepts which existed in various legal systems. In Mexican law, for instance, judicial proceedings were undertaken to establish the rights of creditors after a bankruptcy. Article 12 (1) (a), which covered judicial proceedings, already covered all the contingencies referred to in article 15. The latter article could therefore be deleted from the draft Convention.

Mr. SMIT (United States of America) explained article 12 stated that the limitation period would cease to run only when the creditor took action against the debtor. Article 15 was intended to cover situations when it was not the creditor, but someone else, who took action against the debtor. It allowed the creditor an opportunity to present his own claim. However, he felt that the draft article was somewhat too specific and should perhaps be comprehensive enough to cover all forms of interposition of claims. As his delegation had proposed (A/CN.9/V/CRP.14), articles 12, 13 and 15 should be replaced by a new formula.

Mr. GUEST (United Kingdom) said that article 15 was useful and should be retained. In some legal systems, proceedings such as those mentioned were characterized as being judicial, whereas in other systems they were regarded as administrative. For instance, in the United Kingdom, in a case of bankruptcy the limitation period ceased when the bankruptcy came into force. Afterwards the law of bankruptcy was the one which applied with regard to the time at which the creditor should assert his claim. The Working Group had considered that partly judicial and partly administrative situations of that type should be dealt with in article 15, which was parallel to but distinct from article 12.

In reply to the objection of the United States representative that article 15 was too specific, he said that lawyers were usually helped by having their attention drawn to the specific situation in which they were interested, rather than by being faced by general principles which they might have difficulty in interpreting, particularly if a foreign legal situation was involved.

Mr. JAKUBOWSKI (Poland) fully agreed with the representative of the United Kingdom. There was advantage in specifying the situations covered by the Convention, in view of the conceptual differences in different legal systems. Article 13, for instance, was important because it indicated what was considered to be the time of institution of arbitration proceedings. In ad hoc arbitration procedure, the document of claim was normally filed only after the court had been constituted, and that could take a year or more.

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Article 15 (continued)

Mr. OGUNDERE (Nigeria) said he was in favour of retaining article 15 which was justified because it provided for the case of legal proceedings commenced in well-defined situations. The inclusion of those provisions in article 12 would be an unnecessary complication.

Mr. ELLICOTT (Australia) said that, he, too, supported the retention of article 15. The term "dissolution" in subparagraph (c), however, seemed to him to be too restrictive. In Australian law, that word was only used when a legal entity ceased to exist. The term "liquidation" would undoubtedly be more appropriate since it was broader in scope and could, in Australian law, refer to other situations besides insolvency which required the appointment of a receiver.

Mr. CHAFIK (Egypt) also supported the retention of article 15 independently of article 12. It should, however, be specified that the creditor must perform the act referred to at the end of the first sentence of article 15 only if the law applicable to the proceedings so required. In Egyptian law, only the bankruptcy of a company, not judicial liquidation, affected debts and their prescription.

Mr. KHOO (Singapore) agreed to article 15, subject to the change suggested by the representative of Australia.

Mr. JENARD (Belgium) said that he, too, was in favour of retaining article 15.

Mr. SAM (Ghana) said that he favoured the retention of article 15. The article was, however, still unclear with regard to its effects on third parties, especially in the case of bankruptcy. He therefore thought that the article should be revised in order to avoid any confusion in its application and any conflict with national laws.

Mr. POLLARD (Guyana) agreed to article 15 subject to a change which would make it more general in character. For instance, in the first line of the article, the words "upon the occurrence of" might be replaced by the words "upon such an occurrence as". The suggestions made by the representatives of Hungary and Egypt should also be taken into account.

Mr. OLIVENCIA (Spain) said that he had not been aware of the written proposal of the United States representative, but he, too, thought that a convention could not provide for all the specific cases to which it could apply. It would therefore be desirable to find a general formula which would at the same time avoid the problem raised by the interpretation of the different subparagraphs. In particular, he shared the doubts of the representative of Mexico concerning subparagraph (d).

The CHAIRMAN noted that there appeared to be consensus in favour of retaining article 15 subject to changes. The article would therefore be referred to the Working Group which would seek to give it a more general formulation, taking into account the various proposals which had been made.

He invited the members of the Commission to consider article 16.

Article 16

Mr. SZASZ (Hungary) said that he was in favour of the interruption of the limitation period provided for in article 16. It should not, however, be possible for such an interruption to occur several times in succession since that would result in prolonging the limitation period indefinitely. He therefore suggested that a restriction to that effect should be introduced into article 16, specifying that it would no longer be possible to interrupt the limitation period after a certain lapse of time, which might for example be six years, from the start of the initial period.

Mr. JENARD (Belgium) pointed out that article 16 had been introduced at the request of various delegations whose national laws provided for the possibility of interrupting the limitation period without recourse to judicial proceedings. He admitted, however, that article 16 was too broad in scope and he proposed the introduction of two limitations: first, it could be specified that the

provisions of article 16 were only applicable if the debtor had his place of business in a State whose national law recognized such a procedure; secondly, as the representative of Hungary had just suggested, a time-limit could be set for such a procedure, for example, by adding to article 16 the last sentence of article 19 according to which "the limitation period shall in no event be extended beyond 10 years from the date on which the period would otherwise expire in accordance with article 8 to 11".

Mr. SMIT (United States of America) said he thought that article 16 contradicted the other provisions of the draft Convention since it allowed a creditor to extend the limitation period by a unilateral act. He therefore proposed that the article should be deleted.

Mr. WARIOBA (United Republic of Tanzania) supported the United States representative's proposal.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) expressed doubts as to the advisability of retaining article 16. Article 16 was unclear since there was some question as to how far it duplicated articles 12 and 17 and the words "manifesting his desire" were too vague. He tended to favour the deletion of article 16 which seemed to him to serve little purpose and to be complicated to apply. He would, however, be prepared to consider any compromise formula which the Working Group might work out. Article 16 should at least be crystal clear from the legal point of view and its tenor should correspond to that of articles 12 and 17.

Mr. LEMONTEY (France) said he thought that article 16 should be retained since it reflected a principle recognized by various national laws. Moreover, by offering a creditor the opportunity to interrupt the limitation period, the article counterbalanced article 22, which allowed the debtor to extend the limitation period. He nevertheless supported the suggestions of the representative of Belgium to limit the scope of application of article 16.

Mr. MICHIDA (Japan) felt that article 16 lacked clarity and he wondered in particular what should be understood by the term "public authority": did that term refer to an administrative department of some kind or was it applicable only

to judicial departments operating under the control of the courts? In Japan, for example, the postal services guaranteed the date of delivery of a letter to the addressee and its contents in the case of registered mail, and the Japanese courts would have to ask whether they should consider the postal administration as a "public authority". It might also be asked whether the words "notice of this act is served" could apply to the dispatch of a letter. For that reason, his position was close to that of the Norwegian delegation (A/CN.9/R.9) which proposed either that article 16 should be deleted or that it should be rephrased to introduce certain essential clarifications.

Mr. GUEST (United Kingdom) said that at first sight his delegation's position with regard to article 16 had been unfavourable and had been similar to that of the representatives of the United States and the Soviet Union. Upon reflection, however, it appeared that the retention of that article could be justified because of the existence in certain national legal systems of acts other than judicial proceedings which interrupted the limitation period. By limiting the application of article 16 to cases where a debtor had his place of business in a State whose law recognized the act in question, the proposal of the representative of Belgium, which had been supported by the representative of France, did not derogate from the interests of the State of the creditor whose law did not recognize that act; such a solution was, on the contrary, advantageous to the creditor since he could benefit from an interruption of the limitation period without his own national law in turn opening up the same possibility.

Mr. OGUNDERE (Nigeria) said he thought that the advantage pointed out by the United Kingdom representative would in fact raise serious practical difficulties if, for example, a national of a country which did not recognize that method of interrupting the limitation period found himself in a country which applied it and his creditor seized that opportunity to notify him of his desire to interrupt the limitation period. In principle, his delegation's position was similar to that of the representatives of the United States and Tanzania. However, if a consensus emerged in favour of rephrasing article 16, he could concur in it.

Mr. MANTILLA-MOLINA (Mexico) said that he was against the retention of article 16 both for the theoretical reasons already adduced by other members of the Commission and for practical reasons. The purpose of the article, which was to avoid judicial proceedings as far as possible, could be achieved even if the provision contained therein was deleted, for example, in the hypothesis where the parties to a dispute were in good faith, by the use of the provisions of article 17 or article 22, paragraph (2), which allowed the debtor to interrupt the limitation period in order to prolong efforts at negotiation.

Article 16 might create many uncertainties, particularly on the question of the extent to which the jurisdiction of the other party would recognize that the limitation period had been interrupted by the act performed by the creditor. In the circumstances, it would be preferable simply to delete the article.

Mr. KAMAT (India) said that, despite what the United Kingdom representative had said, his delegation had considerable reservations about article 16, basically because it ran counter to the general spirit of the draft convention which was to promote uniformity. It would be unfortunate if the convention left it up to the national jurisdictions to determine what acts could interrupt the limitation period. Resorting to the reservations provided for under article 35 would not solve the problem, for the interruption would continue to be effective in States whose laws recognized its validity. Moreover, as the representative of Japan had pointed out, the term "public authority" was ambiguous. Either article 16 should be radically amended so as to indicate precisely what acts could interrupt the limitation period - thus giving all parties an element of certainty - or it should simply be deleted.

Mr. LOEWE (Austria) said that at first glance he was not much in favour of article 16. Under Austrian law, in order to interrupt the limitation period the creditor must perform an act which involved a certain amount of risk for him. Interruption therefore was not completely unilateral.

However, the unification of laws, should not be pursued as an end in itself. In that respect his position was similar to that of the United Kingdom. He was against article 16 as it stood but would agree to its being kept if its effects were limited to the territory of countries that recognized the sort of acts it

referred to. The only parties for whom it would be a disadvantage would be those established in a country whose legislation recognized the acts in question. If the article were phrased in such a way as not to place the other parties at a disadvantage, it would be acceptable, subject to the limitations suggested by the representative of Belgium himself.

Mr. CHAFIK (Egypt) stated that he supported article 16 provided it was accompanied by the limitations suggested by the representative of Belgium.

Mr. OLIVENCIA (Spain) stated that his delegation's position was similar to that of the representative of Austria. Article 16 should be kept provided it was modified and made more specific. The article raised numerous difficulties, for, by referring to national laws it seemed to run counter to the spirit of the draft on a major point, namely acts of interruption. However, he was prepared to agree that the validity of the acts mentioned in article 16 should be recognized when the debtor had his place of business or was normally resident in a country in which such acts were recognized.

As it now stood the article gave rise to divergent interpretations. It did not refer to lex fori, as some had said, but rather to the law of the country in which the act was performed and there was no way of being sure how the provisions would be applied in a country where the mere sending of a registered letter could interrupt the limitation period. To use the reservation provided for under article 35 would create further confusion.

The best solution would be to rephrase article 16 so that its application was limited to cases in which the debtor's country recognized the validity of the acts to which it referred. In addition, the ambiguity of the phrase "act... manifesting his desire to interrupt" must be eliminated. The commentary on the article stated that presumably the national law in question gave legal effect to that manifestation of desire. If that were the case, the article itself should make that quite clear.

Mr. KHOO (Singapore) said he was in favour of deleting article 16 because it would create huge problems for businessmen and lawyers alike by requiring that they refer to national laws in order to determine whether or not a given act interrupted the limitation period. Another disadvantage would be that it would subject the parties to the diversity of national laws and thus would encourage

lengthy lawsuits, whereas creditors should on the contrary be encouraged to exercise their rights diligently. Finally, it ran counter to the convention's aim of unifying and harmonizing laws. However, if the majority was in favour of keeping article 16 his delegation could agree, providing it was recognized that the acts referred to in the article interrupted the limitation period both in the creditor's country and in that of the debtor.

Mr. LASALVIA (Chile) said that his delegation was in favour of deleting the article for the reasons already stated by many delegations. However, if the majority wished it to remain, he would have no objection, provided the proposed amendments were made, particularly those of the representative of Spain.

There was an inaccuracy in the Spanish version of the article. The term "la autoridad publica" normally meant the executive. The indefinite article should be substituted for the definite article in order to make the text clearer.

The elimination of article 14, the text of which could be found in the foot-note in paragraph 2 of the commentary on article 16, was unfortunate. That article reflected a spirit of unification and could have been very valuable to businessmen. His delegation would very much like to see it replace article 16.

Mr. LOEWE (Austria) agreed with the representative of Chile concerning the reinsertion of article 14.

Mr. NESTOR (Romania) said he was in favour of deleting article 16. That article could not serve as a counterpart to article 22 since the two provisions were not comparable. In fact, as far as limitation was concerned, the creditor mentioned in article 16 was in fact the "debtor" of an obligation in that he must exercise his rights before the expiration of the four years and was authorized to extend that period by a unilateral act. The debtor's position was different since he was in effect the beneficiary of a right which he could exercise only during proceedings. There was therefore no question of offsetting article 22 by article 16 and the best solution would be to delete article 16 unless a generally acceptable formula could be found and that seemed unlikely.

Mr. ELLICOTT (Australia) said that in addition to the three alternatives already mentioned, namely to delete article 16, keep it or limit its effect, there

was a fourth alternative, namely to make article 16 a rule with general application enabling any creditor to interrupt the limitation period once and only once. Indeed, one of the problems the Commission would encounter would be that of a suit brought against the buyer by a national subpurchaser in countries where the limitation period was more than four years as was the case in Australia. If such a suit was brought after the expiration of the limitation period provided by the Uniform Law the buyer exposed to the action of the subpurchaser would have no recourse against the original seller. It would be difficult to solve that problem by amending the national limitation periods, for in countries with a federalist structure the limitation periods were determined by each state. However, it could be solved by enlarging article 16 so that it would protect any buyer against any seller. The "new limitation period" would not necessarily be four years and could be reduced to two, for example.

Mr. SAM (Ghana) endorsed the Australian representative's remarks but said that he was not convinced by the argument put forward by the United Kingdom representative. To take account of the particularities of certain States would be contrary to the very purpose of the Uniform Law which was to be generally acceptable.

Article 16 might be improved by taking account of the suggestions of the Hungarian and Norwegian delegations. However, the effect in the long run would be the same.

The best thing to do would be to delete the article unless a generally acceptable formula could be found.

Mr. MUDHO (Kenya) said he was in favour of deleting article 16 for the reasons already stated. If the Commission decided to keep it, his delegation could accept it in a spirit of compromise provided it stipulated that the act interrupting the limitation period was recognized both by the legislation of the creditor's country and that of the debtor, as had already been suggested.

As it stood the article lacked precision and the word "manifesting" in particular was too vague. The act in question should not "manifest" the desire to interrupt the limitation period; it must bring about the interruption.

The CHAIRMAN noted that several delegations were in favour of deleting article 16, but that some were willing to consider a redrafted text. Others had spoken in favour of retaining the article, with various changes. Thus, it appeared that a consensus had arisen in favour of article 16, revised in accordance with the suggestions which had been made. Consequently, he suggested that the delegations which had suggested changes should transmit them to the Working Group, which would be responsible for the preparation of the new text of article 16.

It was so decided.

/The last part of the meeting was taken
up by the discussion of other matters/

Article 17

Mr. BURGUCHEV (Union of Soviet Socialist Republics), referring to article 17 (4), said that the acknowledgement of an obligation should have the consequences described in article 17 only if it took place within the limitation period. If it took place after the expiration of that period, a new obligation would arise. Article 17 should therefore be changed to specify that acknowledgement should take place within the limitation period.

Mr. CHAFIK (Egypt) said that, while he had no objection to the remainder of article 17, he thought article 17 (4) should be deleted. He referred in that connexion to the option available under article 23 of the draft Convention.

Mr. MANTILLA-MOLINA (Mexico) endorsed the comments of the USSR and Egyptian representatives concerning article 17 (4), which his delegation could not accept.

The wording of article 17 (3) was not clear. It should be plainly stated that the underlying idea was that payment of interest implied acknowledgement of the obligation.

Mr. LOEWE (Austria) agreed that article 17 (4) should be deleted. He suggested that the words "in writing" in article 17 (1) should be deleted as being an excessive requirement.

Mr. GUEST (United Kingdom) said that English law would recognize the institution inherent in article 17 (4), although Scots law would not. Under common law systems, acknowledgement after the expiration of the limitation period did not take effect as a fresh obligation. There were certain advantages in the retention of the text, therefore, although from a civil law point of view it was difficult to see how an extinct obligation could be revived. The essential question was whether the Commission wished to produce a law which provided for conformity between the two systems or intended to leave the issue to be resolved by municipal law.

Mr. SAM (Ghana) disagreed with the representative of Austria, considering it essential to retain the words "in writing" as a legal safeguard.

He agreed with the representative of Mexico that article 17 (3) was vague. He thought that it should be worded in language similar to that of article 26. He saw some merit in the retention of article 17 (4) but would not oppose its deletion if that was favoured by the majority of the Commission.

Mr. LASALVIA (Chile) supported the view of the Austrian representative with regard to article 17 (1). Moreover, he noted that, since in the Uniform Law on the International Sale of Goods the contract was deemed to be consensual, it would be difficult to require that the limitation period be extended in writing.

His delegation felt that paragraph (4) should be deleted, since it would give rise to serious difficulties in many legal systems, including his own. Civil law systems made a clear distinction between civil and natural obligations; yet under article 17 (4) a person who believed that he was performing a natural obligation could revert to the status of a debtor and a natural obligation could thus become a civil obligation.

Mr. KAMAT (India) felt that article 17 created comparatively few problems, since the rule on acknowledgement could be found in many legal systems relating to limitation. However, his delegation had some difficulty in understanding in the third sentence of paragraph 3 of the commentary on article 17 (A/CN.9/70/Add.1) how a partial repair could lead to the situation envisaged in article 17 whereby a further limitation period could be extended to the creditor.

There was no such provision in the Indian legal system as that in article 17 (4), which should be deleted for the reasons adduced by the delegations of the Soviet Union, Egypt, Mexico and Austria. He noted that the United Kingdom had raised a number of points relating to countries which applied the doctrine of consideration. Indian law did not recognize that acknowledgement of a time-barred debt could revive obligations, and its contract law did not preclude a debtor from entering into a new contract if he gave a specific promise to pay a time-barred debt. The problem could therefore be met under its contract law. However, if

paragraph (4) was deleted, it would be desirable to insert the phrase "before the expiration of the limitation period" after the word "creditor" in article 17 (1).

Mr. JENARD (Belgium) felt that, while article 17 (1) might appear to be excessively formal in requiring the obligation to be acknowledged in writing, there was an obvious need for legal security.

Mr. WARIOBA (United Republic of Tanzania) felt that article 17 (4) should be deleted. In his opinion, article 17 (1) was very close in its formulation to article 16, according to which the limitation could be prolonged indefinitely.

Furthermore, the meaning of acknowledgement was not clear; in most cases the evidence required concerned the nature and extent of the obligation and it was not enough for a debtor to acknowledge his debt. The nature of the acknowledgement was not sufficiently clear from the article and it would therefore be better to place a limit on the acknowledgement and bring it into line with the provisions of article 19.

Mr. ELLICOTT (Australia) said that his delegation would prefer to retain article 17 (4) for the reasons adduced by the United Kingdom representative. Its retention would, in fact, be more advantageous to civil law countries because a creditor in a civil law country could enforce a promise to pay against a debtor in a common law country which applied the doctrine of consideration.

Mr. NESTOR (Romania) said that his delegation would prefer to delete article 17 (4). However, if it was retained, article 17 (1) would certainly need to be amended. His delegation would prefer to retain the phrase "in writing" in article 17 (1). In conclusion, it felt that article 17 (3) needed to be reformulated.

Mr. OGUNDERE (Nigeria) felt that the phrase "in writing" should be retained since the draft Convention dealt with international transactions. His delegation shared the view of the United Kingdom and Australia with regard to the retention of article 17 (4), but would be prepared to reconsider its position in the event of a strong feeling against the paragraph.

Mr. HONNOLD (Secretary of the Commission) said that the Indian representative's difficulties with regard to the third sentence of paragraph 3 of the commentary might be due in part to a typographical error in the second line, where "then" should be replaced by "when". The commentary stressed that a partial payment was perhaps the most common instance of performance which in some circumstances might acknowledge that a further obligation had not yet been paid.

Mr. KHOO (Singapore) felt that article 17 (1) might not be sufficiently clear as it stood. In the view of his delegation, article 17 (4) was a clarifying provision and its deletion would not resolve the inadequacies in paragraph (1), which should be studied further. Lastly, his delegation favoured the retention of the term "in writing" in paragraph (1).

Mr. MUDHO (Kenya) said that his delegation favoured the deletion of article 17 (4). It felt that the words "in writing" should be retained in paragraph (1). In the view of his delegation, the Commission should consider whether the present formulation of paragraph (1) would not lead to an indefinite prolongation of the limitation period unless a maximum limit was fixed. With regard to paragraph (1), the Indian proposal would strengthen the paragraph and cover the point raised by the representative of Singapore.

Mr. HONNOLD (Secretary of the Commission) noted that the Commission might wish to consider the point raised in paragraph 4 of the commentary on article 17 in document A/CN.9/70/Add.1, namely that there was a relationship between article 17 (4) and articles 23 and 25. Article 23 unified the divergent rules on whether expiration of the limitation period should be taken into consideration only at the request of a party to the legal proceedings. Article 25 concerned performance after the expiration of the limitation period. Article 17 (4) seemed to be in line with the approach adopted by both those articles and any reversal would involve certain consequences for articles 23 and 25.

The CHAIRMAN suggested that article 17 should be referred to the Working Group. He invited representatives to indicate by raising their hands

whether they were in favour of establishing a maximum 10 years for the limitation period concerned.

He noted that the delegations of Kenya and the United Republic of Tanzania were in favour of establishing such a maximum.

Mr. KAMAT (India) explained that the amendment he had proposed would apply only if paragraph (4) were deleted.

Mr. OLIVENCIA (Spain) said that the two problems relating to article 17 (1) and (4) were general and should not be discussed in isolation. Moreover, the provisions of paragraph (4) were related to those of other articles, particularly articles 22 and 25 which had not yet been discussed. The paragraph should not be referred to the Working Group until the other related problems had been settled.

Mr. ROGNLIEN (Norway) said that, if the majority favoured deleting paragraph (4), he would not oppose the proposal.

Mr. CHAFIK (Egypt) said that, when he had proposed the deletion of paragraph (4), he had not intended that anything should be added to paragraph (1), which should be left as it was.

The CHAIRMAN suggested that article 17 and the proposals relating thereto should be referred to the Working Group with an indication that a majority of members of the Commission were in favour of the deletion of paragraph (4).

It was so decided.

Article 18

Mr. HONNOLD (Secretary of the Commission) reminded the Commission that, according to articles 12, 13 and 15, when legal proceedings were instituted the limitation period ceased to run. Further provisions were therefore needed to deal with such proceedings, otherwise the limitation period would never expire. Article 18 supplied those provisions.

Mr. OLIVENCIA (Spain) pointed out that the introductory sentence of paragraph (1) was misleading, since some of the rules contained in the articles mentioned therein were not directed to cases in which the creditor commenced legal proceedings. It should be altered accordingly.

In the Spanish version of paragraph (1) (a), the words "deja perecer su acción o se desiste de ella" would be preferable to "desiste de dichos procedimientos o retira su demanda". Paragraph 1 (b) was ambiguous and could be interpreted as meaning that the limitation period was automatically subject to a one-year extension. The wording of article 19 in that respect expressed the idea more clearly and should be used instead. Secondly, there was the problem of when the one-year extension should start to run. The present text was not clear on that point either and should be amended to show that the extension would begin to run from the date on which the declaration ending the proceedings became final. His delegation would propose an amended version of article 18.*

Mr. SZASZ (Hungary) said that, in general terms, his delegation agreed with the Spanish representative's observations.

Mr. ROGNLIEN (Norway) drew attention to the amendments submitted by his delegation in document A/CN.9/R.9. It proposed the deletion of paragraph (1) (a), which seemed superfluous, since the situation it referred to would have the effect of making the issue of prescription irrelevant. Although in some legal systems a claim would be considered to continue in existence even after its withdrawal, that situation could be dealt with under paragraph (1) (b). He would like to know if other members supported his proposal for the deletion of paragraph (1) (a).

His delegation had also proposed the addition of a new paragraph (3), which was intended to deal with the case envisaged in article 14.

Mr. KAMAT (India) said his delegation had no strong views regarding paragraph (1) (a). It agreed with the Spanish representative that changes should be made in the introductory sentence of paragraph (1).

* Subsequently issued as document A/CN.9/V/CRP.17.

With regard to paragraph (1) (b), he pointed out that his delegation had originally wanted the scope of article 18 to be limited to cases where the court was unable to give judgement because of a defect of jurisdiction and not to include cases where the proceedings were unsuccessful. He noted that in its present form article 18 also covered cases where legal proceedings had ended without a judgement, award or decision on the merits of the claim. His delegation was prepared to accept that provision, but felt it was essential to qualify it by requiring good faith on the part of the creditor, who should not be allowed to abuse the law by bringing proceedings towards the end of the period when he knew that the court would declare itself incompetent or that the proceedings would not be successful. His delegation therefore proposed that article 18 should include the requirement that the creditor should have acted in good faith and have instituted the proceedings with due diligence. If his proposal was accepted, his delegation would be willing to accept the one-year extension for the cases envisaged under paragraph (1) (b).

Mr. DALTON (United States of America) drew attention to the proposal for a revised text of article 18 submitted by his delegation (A/CN.9/V/CRP.14). His delegation felt that the existing text of paragraph (1) (a) unduly penalized the creditor who withdrew his claim. With regard to paragraphs (1) (b) and (2), he agreed with those delegations, especially the Spanish delegation, which had remarked that the draft was not entirely clear. The language proposed by his delegation represented an attempt at clarification.

Mr. MANTILLA-MOLINA (Mexico) agreed with the Spanish representative that the introductory sentence of article 18 (1) should be changed. However, he felt that discontinuance of the proceedings and withdrawal of the claim should be dealt with separately. His comments were based on the French text, since the Spanish text, as had been pointed out at earlier meetings, was totally unsatisfactory. Paragraph (1) (a) should either be deleted, as proposed by Norway, or should relate to what in Spanish was referred to as desistimiento and state that the period should be deemed to have continued to run.

The Spanish representative's comments regarding paragraph (1) (b) were all pertinent and helped to clarify that provision without changing its substance.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) supported the Spanish proposal to clarify the text concerning the date when the one-year extension would begin. As he understood article 18, its purpose was to provide for a one-year extension in the event that a claim had been put before a court or tribunal and the court or tribunal declared itself incompetent. His delegation felt that the article should clearly stipulate that such legal proceedings must have been initiated before the expiration of the limitation period, since he believed that had been the intention of the Working Group in drafting the text. If that was not made clear, the creditor might abuse the provisions of article 18 by initiating proceedings after the expiration of the period.

Mr. JENARD (Belgium) said his delegation agreed in principle with the provisions of article 18. He wondered whether the reference to withdrawal (désistement) was to be understood as meaning that the creditor could withdraw his claim without waiting for a declaration of incompetence by the court or tribunal. He did not think the creditor should be obliged to wait for such a declaration in order to withdraw his claim. He felt that the one-year extension provided for in paragraph 1 (b) should be used by the creditor for the purpose of initiating a claim and not for the purpose of interrupting the limitation period, as envisaged in article 16. He agreed with the Spanish amendments, which would clarify the text considerably.

Mr. LOEWE (Austria) said that his delegation agreed in principle with the rules set forth in article 18. The Spanish amendments were very pertinent and should be carefully considered by the Working Group. He had difficulty in accepting the Norwegian proposal to delete paragraph (1) (a); although in some legal systems discontinuance or withdrawal might extinguish the right, that was not always the case. His delegation agreed in principle that it might be useful to include a paragraph which would supplement article 14, as proposed by Norway, but he did not fully agree with the text proposed by that delegation, which tended to complicate the draft.

The United States amendment (A/CN.9/V/CRP.14) should be carefully studied by the Working Group.

Mr. GUEST (United Kingdom) said his delegation agreed in principle with the provisions of article 18. It did not agree with the Norwegian proposal to delete paragraph (1) (a). With regard to the Spanish proposal, he wished to point out that every legal system had some provision for dealing with the situation that might arise when the creditor did not actively pursue his claim; he therefore felt that matter should be left to municipal law. The Spanish proposals to improve the formulation of the points covered by paragraph (1) (b) had much to commend them.

He supported the USSR proposal to the effect that the text should clearly state that the proceedings referred to in paragraph (1) (b) must have been commenced within the limitation period. It had been the intention of the Working Group to convey precisely that meaning.

Mr. OGUNDERE (Nigeria) said that, as he understood it, article 18 covered two points of principle, namely, that abortive legal proceedings should not terminate the limitation period and that a litigant should not be allowed to abuse the system of limitation. Such abuse would be encouraged if a one-year extension was granted to a litigant who knowingly chose an abortive legal proceeding. It was important for the Commission to decide on that matter of principle before referring article 18 to the Working Group. His delegation was not in favour of granting the extension, which would undoubtedly encourage abuse. Except for that issue of principle, he supported the Spanish amendments, which would help clarify the text.

Mr. GUEST (United Kingdom), referring to the remarks made by the representatives of India and Nigeria, felt there was little risk that creditors might actually act in bad faith, since they would not want to incur the expense involved in initiating proceedings merely for the purpose of extending the limitation period. However, if the Indian and Nigerian delegations felt the issue was an important one, the Working Group could certainly consider it.

Mr. SAM (Ghana) said that it would expedite the Commission's work if a proposal by one delegation which had been supported by another and not opposed were regarded as having been considered favourably and thus referred to the Working Group.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the United Kingdom representative had accurately described the USSR delegation's position in

connexion with article 18. His delegation proposed an amendment* to the effect that the words "provided that the limitation period had not expired when the initial legal proceedings were instituted" should be added at the end of paragraphs (1) (b) and (2). The substance of the amendment was in line with the Spanish proposal, which his delegation supported, and he felt that the underlying idea should be conveyed in article 18.

The CHAIRMAN invited representatives to indicate by raising their hands whether they were in favour of the Indian proposal that the language of paragraph (1) (b) should be clarified to eliminate any risk of abuse.

He noted that the proposal was supported by the delegations of Ghana, Nigeria and the United Republic of Tanzania and was not opposed by any delegation.

Mr. ELLICOTT (Australia) said that he neither supported nor opposed the Indian proposal. There was much sense in what the United Kingdom representative had said: it was indeed unlikely that abuse would occur. Furthermore, he did not believe that tests which were practically unnecessary should be introduced. They would merely constitute another element for judges to consider and matters such as the definition of "due diligence" were already very complicated.

Mr. LOEWE (Austria) said that his delegation's position was very close to that of the Australian representative. The Indian proposal was basically very equitable but he was somewhat wary of introducing the concept of good faith because it would have to be defined. He thought that the substance of paragraph (1) (b) should remain as it stood, with the possible alteration of the languages suggested by the Spanish representative.

Mr. OGUNDERE (Nigeria) said that, in supporting the Indian proposal, his delegation had been supporting the idea that there should be no abuse of the régime and no extension of the limitation period in respect of abortive proceedings. It had not been supporting the insertion of an explicit reference to "good faith" as such.

Mr. CHAFIK (Egypt) said that he supported the substance of paragraph (1) (a), which took account of situations which could arise under Egyptian law.

* Subsequently circulated as document A/CN.9/V/CRP.15.

The idea in paragraph (1) (b) was very clear and should be maintained, although there was room for drafting changes by the Working Group. As to the risk of abuse of the régime, the Commission appeared to have forgotten that a creditor had the right to do everything in his power to enforce his claim and prove that he was not "sleeping".

Mr. COLOMBRES (Argentina) said that he generally supported the Spanish representative's statement. He wondered, however, whether the intention was that the one-year period should in all cases replace the four-year period.

The CHAIRMAN said that his understanding was that if more than three years of the original limitation period had elapsed, a new period of one year would come into effect.

Mr. MAHUNDA (United Republic of Tanzania) said that, while his delegation did not anticipate constant abuse under article 18 (1) (b), some cases of abuse would arise. Even though such cases might be rare, the Commission should be careful to draft a law which left no loop-holes. As it stood, article 18 (1) (b) offered a loop-hole.

Mr. OLIVENCIA (Spain) said that the Spanish version of the words "stayed or set aside" in paragraph (2) was absolutely incorrect from the legal point of view. The Spanish version of the commentary at that point was also unintelligible from the juridical standpoint. The French version of the words, however, was acceptable.

Under the Spanish system, recourse to the Supreme Court in legal arbitration proceedings was possible where there had been a failure by a lower jurisdiction to abide by the law and the Supreme Court might eventually make a decision on the substance of the case. That did not appear to be the situation contemplated in paragraph (2), where it was rather a case of the judicial authority ending the proceedings. He noted that the legal consequences of paragraph (2) were the same as those of paragraph (1) (b). His delegation therefore proposed that paragraph (2) should be deleted and that its substance should be included in paragraph (1) (b).

Mr. MANTILLA-MOLINA (Mexico) endorsed the Spanish representative's remarks concerning the Spanish version of the draft Convention and the commentary thereon.

He did not agree that paragraph (2) should be deleted. The termination of arbitration proceedings by a judicial decision was a matter which should be dealt with separately and the language of paragraph (2) implied a decision on the substance of the issue of arbitration.

Mr. GUEST (United Kingdom) said that the situation envisaged in paragraph (2) could arise under the common law system. A basic proposition of that system was that the courts exercised considerable control over arbitration proceedings. It was open for a party to such proceedings to appeal to the courts, which could settle the dispute - in which case, the arbitral proceedings would cease. The English courts reserved the right to question arbitral awards and, if necessary, to set aside the decisions of arbiters. Such situations were not covered by article 18 (1) (b) which did not extend to cases where arbitration proceedings were terminated without decision on the merits of the case. He would agree, however, that the same legal consequences followed from paragraphs (1) (b) and (2). He hoped that, for the purposes of the common law system, the draft Convention would include a provision to cover the situations which he had described.

Mr. OLIVENCIA (Spain) said that his delegation's proposal had been directed to the formulation of a general norm covering both arbitration and legal decisions on the merits of a claim.

The CHAIRMAN suggested that article 18, together with the relevant proposals and comments, should be referred to the Working Group.

It was so decided.

103rd meeting (17 April 1972)

Article 19

Mr. ROGNLIEN (Norway) said that the Working Group had intended to revise article 19 but had not had time to do so. The main problem raised by the article was that it dealt with a subject which in an earlier version of the draft had been covered by two articles, one regarding force majeure, the other intentional misrepresentation or concealment on the part of the debtor. During the drafting of the text it had been decided to delete that latter provision and to redraft the first of the two articles in such a way as to cover both force majeure, and fraud. The Working Group would like to hear the opinions of the members of the Commission as to whether the new formulation of the two ideas in a single article was acceptable. For the sake of greater clarity, the words "and the creditor got knowledge of it or could, with reasonable diligence, have discovered it" could be added at the end of the first sentence of that article, since in cases of fraud the crucial time was that at which the fraud was discovered.

Mr. OLIVENCIA (Spain) said that the amendment to article 19 proposed by his delegation (A/CN.9/V/CRP.17) covered several points.

It related first of all to the notion of force majeure. The Working Group had fortunately succeeded in avoiding the use of that expression, which gave rise to differing interpretations in different legal systems. However, the Spanish version of the existing article 19 was definitely less explicit than the French version, which enumerated the characteristics of force majeure. The Spanish version should be brought into line with the French version in that respect. Secondly, the Spanish amendment related to the notion of interruption. That notion was foreign to the draft Convention, under which the period was not interrupted but ceased to have effect. His delegation would like article 19 to repeat the terms used in the preceding articles, in which it was said that the period ceased to run. Thus the wording of the series of articles would be consistent. The last change proposed by his delegation related to the second sentence of the present article 19. Spain felt that the sentence should apply to all cases of extension of the period and

should appear in a separate article referring to all the articles relating to the extension of the period of limitation. Also, the maximum duration of the extension provided for in the present article 19 should be shortened. Spain proposed that it should be limited to six years, which, together with the four years of the normal period of limitation, would amount to a maximum period of 10 years. The fact that Ghana's amendment to article 9 had been approved in principle made it all the more necessary to shorten the maximum period of the extension.

Mr. SMIT (United States of America) said that article 19 was formulated in terms which were so vague that it was not clear exactly how it could be applied. The beginning of the article stated three conditions which all raised important difficulties in the context of United States law. The first condition was that the circumstances should not be personal to the creditor, which excluded cases of mental illness, incapacity or death of the creditor, all of which were recognized by United States law. Those circumstances too should have the effect of extending the period.

The second condition was that the circumstances could not have been avoided or overcome. It could be asked whether a case in which a debtor had made a false statement was actually covered by the provisions of article 19, for it would always be possible to argue that the creditor should have foreseen and prevented the bad faith of the other party. In addition, article 19 presupposed that the limitation period had commenced at the normal date, whereas, in the case of concealment, the date of the beginning of the period might itself have been misrepresented.

The third condition was that the creditor must have taken all reasonable measures with a view to preserving his claim, a formulation which could cover very different factual situations depending on the legal systems in question.

Article 19 should therefore be revised considerably so that it would clearly be applicable to all those eventualities.

Mr. LEMONTEY (France) said that his delegation was in favour of article 19. In its view, the scope of the article should not be extended to cover fraud or

other circumstances affecting the consent of the parties; such cases could be settled by the application of article 9, paragraph 1. However, the wording of the article was not satisfactory and it should be revised along the lines proposed by the Spanish representative.

Mr. MANTILLA-MOLINA (Mexico) said that he supported the text of article 19 proposed by the Spanish delegation.

However, he thought that the reference to circumstances which could not be avoided at the beginning of the article should be deleted and that a more exact formulation should be found to replace the expression "not personal to the creditor".

Mr. CHAFIK (Egypt) said that he was entirely satisfied with the present wording of article 19, which accurately reflected the notion of force majeure as recognized in Egyptian law. However, like the Spanish representative, he thought that the first sentence of the article could be improved; for example, the words "d'interrompre la prescription en raison de" in the French text should be replaced by the words "de faire cesser le delai de prescription de courir en raison de".

Mr. SAM (Ghana) said that since the main purpose of the draft Convention was to facilitate international transactions, it was essential to draw up as clear and precise a text as possible. Therefore, it would be preferable to make cases of fraud and cases of force majeure the subject of two separate paragraphs. His delegation agreed with that of the United States that article 19 should be redrafted so as to eliminate any possibility of uncertainty. The Commission could accordingly refer it to the Working Group so that it could be revised and divided into two paragraphs.

The CHAIRMAN noted that the Spanish delegation had proposed that the second part of the present article 19 should be made a separate article which would cover all provisions relating to the extension of the period and which would provide for a maximum extension shorter than that provided for in the text of article 19 as it stood. He invited the members of the Commission to express their views on that proposal.

Mr. GUEST (United Kingdom) proposed that the members of the Commission should let the Working Group know directly which were the specific cases that they

would like the provisions of article 19 to cover. The Working Group, for its part, had limited itself to cases in which the creditor was prevented from pressing his claim by circumstances beyond his control, such as a state of war or the interruption of communication between the two countries, and had excluded circumstances personal to the creditor, such as illness or death.

With regard to the Spanish proposal concerning the end of article 19, perhaps it would be better not to discuss it until the Commission had completed consideration of all the articles to which it was supposed to apply. Members would then be in a better position to make a value judgment regarding it.

The CHAIRMAN said that the proposals and suggestions of the representative of the United Kingdom had been accepted and he invited the members of the Commission to consider the next article.

Article 20

Mr. ELLICOTT (Australia) said that his delegation was concerned with the problem which arose when a subpurchaser sought to obtain recognition of his claim against a seller after the expiry of the period provided for in the draft. Such cases might arise where municipal law provided, as in the case of Australia, for a period of limitation longer than four years. His delegation therefore proposed an amendment to article 20* which would protect the international buyer against the possibility of a claim instituted after the running of the period of four years provided for in the draft Convention. That was a very important question which could have a decisive influence on the way in which Australian business circles and the Australian Government received the draft Convention.

Mr. LOEWE (Austria) said that the problem to which the Australian representative had referred was not new and had been encountered whenever an effort had been made to determine limitation periods, without ever being resolved. It was perhaps an insoluble problem, in which case it would be better not to deal with it in the Uniform Law.

* Subsequently issued as document A/CN.9/V/CRP.16.

The situation described by the Australian representative, where a national subpurchaser instituted proceedings against the international buyer, might also arise in a reverse form, where the international buyer instituted proceedings against the seller before the expiry of the four-year limitation period provided for in the draft and the seller wished to take action in turn against a previous seller and came up against a limitation period shorter than that provided for by the Uniform Law, as was frequently the case in countries following the Roman tradition. In both instances, the ideal solution would be to bring national rules on prescription into line with the Uniform Law; that was, however, difficult in practice.

Article 20 had a further drawback inasmuch as it might enable a person of bad faith to evade the other provisions of the Uniform Law. That might happen, for example, in the case of a purchaser who, after allowing the limitation period to expire without instituting proceedings, asked a front man to institute proceedings in order to enable him to take action against the seller. The best course would be simply to delete article 20.

Mr. OLIVENCIA (Spain) said that he too was in favour of the deletion of article 20 and endorsed the comments made by the representative of Austria. In his opinion, subordinating the term of the limitation period to intervention by a third party would pointlessly complicate the Uniform Law, which should alone govern the relationship between seller and purchaser. While recognizing that the problem raised by the Australian delegation was a real one, he too felt that it was perhaps a problem for which there was no solution.

Mr. SMIT (United States of America) said he felt that article 20 stated a necessary principle: if the buyer against whom proceedings were instituted had a claim against another party, he should not be placed at a disadvantage because he had not immediately instituted proceedings against that other party. Such a situation might, however, arise if proceedings were instituted against the buyer towards the very end of the limitation period. The extension of the period provided for in article 20 would obviate the need for the buyer to institute legal proceedings precipitously and would protect his interests against

unforeseeable circumstances. The additional one-year period provided for in article 20 was perhaps even inadequate.

In his opinion, article 20 was based on the same principle as article 14 but was even more necessary. He was in favour of retaining it, either as an independent article or as a paragraph of article 14.

Mr. SINGH (India) said that he could see why some delegations felt the need for a provision specifying the recourse available to a buyer against whom proceedings were instituted by a third party. Article 20 would, however, complicate the Uniform Law, which should remain as simple as possible. He asked whether the deletion of article 20 would have really serious consequences for Australia and for other countries which found themselves in the same position.

Mr. ELLICOTT (Australia) replied that the deletion of article 20 would require an amendment of the rules on prescription in force in the six States of the Australian Commonwealth, which all applied a six-year limitation period. Such an amendment would raise great problems and would take considerable time, during which Australian businessmen might be exposed to serious risks.

In his opinion, if it was agreed that articles 18 and 19 met needs of a practical nature, it should be recognized that that was true also with regard to article 20.

Mr. KHOO (Singapore) said that his delegation was in favour of retaining article 20, for the reasons stated earlier by the United States representative.

Mr. ROGNLIEN (Norway) recalled that, in document A/CN.9/R.9, his delegation had drawn attention to an error in the drafting of article 20, which should not refer to a "person jointly and severally liable with the buyer" but to a "person to whom the buyer is jointly and severally liable with the seller". With regard to the substance, the problem dealt with in article 20 was that of the creditor's remedy against co-debtors. In some legal systems that were based on French law, if a creditor interrupted the limitation period in respect of a debtor, the period was interrupted in respect of all the co-debtors and a new period automatically began to run. Other systems settled the matter by taking as the starting point of the period a factor other than breach of contract. The question

was to decide whether it was preferable to delete article 20 and leave the solution of the question to the various national legislations or to retain the compromise effort represented by that provision. The deletion of article 20 would be possible if article 14 was broad enough to cover proceedings instituted by a subpurchaser.

Mr. MANTILLA-MOLINA (Mexico) endorsed the arguments put forward by the Spanish delegation and expressed a preference for the deletion of article 20. Nevertheless, after hearing the arguments in favour of the opposite course, he did not feel that the retention of article 20 would be an insurmountable obstacle to the implementation of the Convention. In that case, however, a buyer against whom proceedings were instituted by a subpurchaser should be placed under an obligation to inform the seller of the institution of such proceedings. Such a procedure would be possible under the terms of article 20.

Mr. OGUNDERE (Nigeria) said that he was in favour of retaining article 20. His country, which, like Australia, had a federal structure, likewise applied a six-year limitation period in all its constituent States. However, many countries following the Roman tradition did business with Nigeria without anyone's so far having encountered the difficulties to which the Australian representative had referred. Moreover, the latter's proposal would not alter anything if the subpurchaser instituted proceedings against the buyer during the final days of the limitation period.

Mr. JENARD (Belgium) said that he was in favour of deleting article 20. Besides introducing an element of uncertainty, that provision was of limited value because of the subpurchaser's possibility of instituting proceedings at a late stage.

Mr. MICHIDA (Japan) said that he was in favour of retaining article 20.

Mr. SAM (Ghana) said that he too was in favour of retaining article 20. He considered that the Australian proposal would improve that provision. The Working Group could, moreover, perhaps combine article 20 with article 14.

Mr. SINGH (India) said that his country, which was more often a buyer than a seller, had every interest in retaining article 20. He supported the amendment proposed by the Australian delegation.

Mr. CHAFIK (Egypt) said that he was in favour of retaining article 20, which, although it would probably complicate the Uniform Law, was a necessary element. He felt that the Australian proposal merited consideration, and he proposed that the matter should be referred back to the Working Group.

Mr. GUEST (United Kingdom) agreed with the Australian representative that article 20 was a very important provision of the Uniform Law. If articles 18 and 19 were regarded as necessary, it was difficult to justify the deletion of article 20, which dealt with a situation that arose much more frequently. He supported the Australian amendment. If the amendment proved unacceptable to the Commission as a whole, the Commission should at least retain article 20 in its present form. His delegation believed that the additional one-year period provided for in article 20 should not be further extended.

The CHAIRMAN noted that a majority had come out in favour of retaining article 20, that some delegations even felt that that provision should be strengthened by replacing the additional one-year period by a two-year period, while yet other delegations were in favour of its deletion. In the circumstances, the present text appeared to constitute a compromise. He therefore suggested that article 20 should be retained as it stood and should be merely referred back to the Working Group for any necessary drafting changes.

It was so decided.

Article 21

Mr. SMIT (United States of America) said that, in principle, article 21 fulfilled a worthy purpose: it was normal, if a creditor had obtained a judgement in one State which he could not have carried out in another State, to extend the limitation period so that he could institute the necessary legal proceedings in that other State. In fact, however, article 21 was made redundant by the

provisions of article 12. Article 21 would be necessary only if interruption of the limitation period was not intended to have an international effect. The opposite of that was laid down, and the reservations in article 35 were the exception rather than the rule.

In addition, the concept of "recognition" of a judgement was ambiguous, and was interpreted in various ways in different countries. If the Commission decided to retain article 21, what form of recognition was intended should be specified.

Mr. ROGNLIEN (Norway) considered that article 21 was useful, since it referred to the particular case, not taken into account in articles 12, 13 or 16, where a final judgement or award was obtained. The wording of the article was not perhaps ideal, and it could no doubt be improved by the Working Group, taking into account in particular the remarks made by the representative of the United States with regard to the various forms of recognition which were possible, and specifying that the judgement referred to was neither recognized nor enforceable in the State in which its application was sought.

Mr. LOEWE (Austria) thought that article 21, the application of which seemed to be connected with that of articles 12 and 35, posed complex problems and might lead to a legal impasse. If, for example, a claim was founded on the judgement, not recognized in Austria, of a foreign court, the application of article 21 would have the effect, if the normal limitation period had already expired, of reviving a claim which in Austrian law was extinguished. For that reason, his Government would no doubt have to register reservations with regard to the article if it was retained. Even the wording of article 21 was not beyond criticism: in the case of a judgement which, for example, only partially granted the claims of a creditor, the text as it stood would nevertheless allow that creditor to institute proceedings for the entire claim within the new limitation period he was granted; one might equally imagine a creditor invoking an unrecognized judgement even when it had been given against him. His delegation therefore favoured deleting article 21 or, if that article was retained, providing in article 35 for the possibility of its non-application.

Mr. OGUNDERE (Nigeria) said that to a certain extent he shared the opinion of the representative of Austria. In addition, he wondered why, while the additional limitation period provided for in article 20 was one year, that in

article 21 was four years. If a consensus emerged in favour of article 21, his delegation could support it, provided that an attempt was made to harmonize the length of the various extensions.

Mr. LEMONTEY (France) thought that article 21 was a necessary complement to article 12, and that it also took into account the desire for fairness by granting a plaintiff a supplementary period to allow him to secure the enforcement of a judgement in his favour. However, it should be specified that the competence of the State which did not recognize the judgement in question, and in which the creditor might institute new proceedings, should be based on rules independent of the convention, so that further cases of jurisdictional competence would not arise. As to the four-year period, it should be taken into account that for different situations the draft provided for specific periods which were not all of the same length. He would therefore prefer article 21 not to lay down a specific period, but to provide that the creditor should be entitled to a "new limitation period" whose length would depend on the type of claim. If, for example, that claim was based on lack of conformity, the length of the new period would be that which was laid down for such cases. His delegation would also not be opposed to provision being made in article 35 for the possibility of making reservations with regard to article 21.

Mr. JENARD (Belgium) thought that article 21 usefully supplemented article 12 since it both provided for the new case where a judgement had been made and specified the length of the extension of the limitation. Since article 21 referred precisely to the cases where one State did not recognize the judgement of another State, the possibility of departing from that article should not be included in article 35.

Mr. GUEST (United Kingdom) said that he favoured deleting article 21, which introduced unnecessary complications. In fact, before considering proceedings in the United Kingdom, a party should normally ask in which country the assets of the other, foreign, party were situated, and whether a judgement rendered in the United Kingdom would be enforceable in the country in question. Article 21 also carried the risk of indefinitely prolonging the limitation period: if, for example, the judgement rendered following an action instituted shortly before the end of the normal four-year limitation period became final only at the

end of three years, the article would give rise to an additional period of four years, or a total of 11 years. If the Commission decided to retain article 21, it should at least reduce to one year the length of the extension, and should also set a limit to the total length of the extended period, which should not exceed 10 years.

Mr. ELLICOTT (Australia) said that he shared the view of the representative of the United Kingdom, but would not oppose retaining article 21 if it was decided to set a maximum length for the extended limitation period.

Mr. JAKUBOWSKI (Poland) said that he favoured retaining article 21, which seemed to be very useful. The suggestion just made by the representative of the United Kingdom with regard to reducing the extension period to one year could serve as a basis for a compromise. On the other hand, the example that representative had quoted with reference to the total length of the limitation period after extension did not really seem convincing, and his delegation was opposed to the idea of setting a maximum length for the period.

Mr. ROGNLIEN (Norway), supported by Mr. SINGH (India), Mr. CHAFIK (Egypt), and Mr. LEMONTEY (France), said that he did not disagree with the intention behind the proposed reduction of the extension period to one year, but found it difficult to agree to the idea of setting a maximum limit to the limitation period after extension. It might happen that the proceedings by the creditor were held up by the system of procedure itself, through no fault of the creditor. If the question of the non-recognition of a judgement in another country was to arise, that judgement would have had to have been rendered; in addition, a second action could not be instituted before the first action had been terminated.

The CHAIRMAN noted that a consensus had emerged in favour of retaining article 21, while reducing the length of the extension to one year, but without setting a limit for the total length of the limitation period after extension. Article 21 would therefore be referred back to the Working Group, who would be asked to reformulate it in accordance with the observations which had been made.

104th meeting (18 April 1972)

/The first part of the meeting was taken
up by the discussion of other matters/

Article 22

Mr. HONNOLD (Secretary of the Commission) recalled that the subject matter of article 22, namely, the modification of the limitation period, had been discussed at some length during the Commission's fourth session. The length of the prescriptive period and related matters, including modification of the period, had also been the subject of a questionnaire circulated to Governments by the Working Group on Prescription. He drew attention to the analysis of replies to the questionnaire in section 14 of document A/CN.9/70/Add.2 and, in particular, to the paragraphs of that section which dealt with rules under national laws concerning the modification of the limitation period. Those rules being greatly divergent, the problem facing the Working Group had been the achievement of some degree of unification in the draft Convention. The replies of Governments regarding the reconciliation of the divergent approaches to the question were analysed in paragraphs 26-28 of section 14 of the same document. The comments of members of the Commission had been summarized in paragraphs 29 et seq.

In article 22 (1) the Working Group had suggested a general rule excluding modification of the limitation period, subject to the exceptions in article 22 (2) and (3). The reasons for the relaxation of the rule under article 22 (2) was stated in paragraph 3 of the commentary on the article in document A/CN.9/70/Add.1. The reasons for the exception to the general rule allowed under article 22 (3) were discussed in paragraphs 5 and 6 of the commentary.

Mr. COLOMBRES (Argentina) said that article 22 was one of the most important articles in the draft Convention. It was designed to prevent the stronger party to a contract from changing the usual limitation period by, for example, the use of standard contract forms. One situation in which such changes could be imposed was that arising when a large industrial corporation sold machinery to a smaller corporation in another country. The question of developed and developing countries did not arise; the article was concerned with the protection of

the weaker party to a contract. The Commission's discussion earlier of the substance of article 22 had shown that even in municipal legislation there was a tendency to protect the weaker partner as, for example, in the case of standard contracts (contratos normativos). In Argentina, insurance companies had used standard contract forms containing provisions for the reduction of the limitation period prescribed by law and had thus vitiated the whole purpose of the limitation period. The Argentine legislature had introduced a special Act to end the practice.

The draft Convention should strive for the establishment of equilibrium between the parties to contracts and thus to protect the weaker side. He therefore urged the Commission to adopt article 22.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) observed that it would be possible, under article 22 (2), to extend the original four-year limitation period to a total of 14 years. He suggested that the 10-year extension period could be reduced somewhat to introduce greater stability in commercial relations, although he would not press that suggestion. In addition, he found the expression "or have expired" in the paragraph (2) difficult to understand. The paragraph should state that the declaration extending the limitation period must be made during the running of that period.

Mr. WARIOBA (United Republic of Tanzania) said that his delegation had opposed the inclusion of article 22 in the draft Convention at the Commission's fourth session and was still strongly opposed to it. Limitation was a question of public policy and both parties to a contract should be protected equally. He did not consider that limitation was an over-riding factor once the contract had been concluded; nor did he believe that businessmen should be encouraged to think in terms of litigation. Arguments based on the possibility that the stronger party could influence the weaker after the start of the limitation period were somewhat theoretical; by that time the stronger party would be the party which stood to benefit from the extension of the limitation period. In any case, if a weak party threatened a stronger party with the prolongation of the limitation period the latter could threaten future retaliatory measures.

Mr. ROGNLIEN (Norway), referring to the USSR representative's statement, said that the words "or have expired" meant that the declaration could be made

after the original four-year period had expired; the situation was the same as that arising under article 17 (4). If article 17 (4) was to be deleted, article 22 (2) could be reworded so that the possibilities open to the debtor could be invoked only if he made his declaration before the original four-year limitation period had expired, in which case the article could read: "... 10 years from the date on which the period would otherwise expire in accordance with articles 8 and 11". Article 22 (2) did only apply where the debtor made the declaration after the limitation period had started to run - at which point, in the view of the Working Group, he would be on an equal footing with the creditor. He agreed that the stronger party should certainly not be able to press changes in the limitation period upon the weaker party, but the Working Group had seen no great danger of abuse in that connexion after the limitation period had started to run. When that period was nearing its end and the parties were negotiating in an effort to avoid litigation, they should have an opportunity to extend it. It was not sufficient to rely on the provision regarding acknowledgement under article 17 because the debtor might not agree to recognize the debt. In such a situation, the effect of article 22 would be to avoid litigation.

Mr. OLIVENCIA (Spain) said that his delegation's position on the issues raised under article 22 had been stated in its answer to the questionnaire circulated by the Working Group and in the debate during the Commission's fourth session. That position was inspired by a concern to reconcile the varying approaches to the question in the different legal systems - an extremely difficult task. It was in that spirit that his delegation had introduced amendments to the article (A/CN.9/V/CRP.17). In its amended version of article 22, it had omitted the provisions of article 22 (3) of the draft Convention as formulated by the Working Group, because it regarded them as unnecessary in that they related to matters under municipal law which were not covered by the draft Convention. His delegation's version of article 22 merely stated that the limitation period might be extended at any time by the debtor after it had started to run. In an article 22 bis, his delegation provided that such extension should in no event extend the limitation period beyond the end of six years from the date on which the period would have expired in accordance with the normal running period provided for in articles 8 to 11. It had felt that it would be wiser to establish a general norm to cover all possible situations.

He agreed with the USSR representative regarding the possible reduction of the extension period of 10 years contemplated in article 22 (2). Its own version of the article provided for a maximum period of 10 years - the original four-year limitation and a six-year period which was thus a compromise. His delegation's suggestions were not based on any supposed difference between developed and developing countries but had been inspired by a concern for stability in international transactions. Those proposals represented a considerable concession by comparison with his delegation's position during the Commission's fourth session, as an examination of the records would show. The provision in its amended version of article 22 (2) to the effect that the debtor might in any case waive the limitation acquired, but not the right to set a limitation period for the future, was based on the Spanish Civil Code.

He agreed with the USSR representative regarding the difficulty of interpreting the words "or have expired" in article 22 (2) of the text prepared by the Working Group.

Mr. LOEWE (Austria) said that extension of the limitation period was not permissible under Austrian law; if necessary, therefore, his delegation could accept the deletion of the whole of article 22. It would prefer its maintenance, however, because it represented the only remaining basis for the continuation of negotiations between contracting parties at the stage when the limitation period had almost expired. He thought that the entire article should be understood to mean that no debtor could be bound in advance, by the contract or by an agreement added to that contract, to a limitation period.

The USSR proposal that the declaration stipulated in article 22 (2) could be made only during the running of the limitation period was attractive and the logical consequence of the Commission's approach to article 17. He also agreed with the USSR representative that the total limitation period of 14 years possible under article 22 (2) could profitably be reduced. A period of six years from the expiration of the original limitation period would be acceptable to his delegation.

If article 22 was retained, the United States amendments (A/CN.9/V/CRP.14) should be incorporated into it.

Mr. NESTOR (Romania) said that his delegation would prefer to maintain

the text as originally drafted by the Working Group, but was prepared to accept the amendments suggested by the Soviet delegation.

Mr. OGUNDERE (Nigeria) said that his delegation considered the principle stated in article 22 (1) to be sound and could therefore support its inclusion. With regard to paragraph (2), the main reason adduced in the commentary had been that time should be allowed for negotiations to be concluded. His delegation, like that of the United Republic of Tanzania, felt that businessmen had neither the time nor the desire to indulge in unduly protracted negotiations and therefore, if the only justification for retaining article 22 (2) was to grant extra time to a debtor to enable him to complete negotiations with a creditor, his delegation saw no reason for retaining it. In such a situation, there was nothing to prevent the debtor from invoking article 17 (1); too many escape clauses would make the draft Convention ineffective. However, if it was generally felt that paragraph (2) should be retained, his delegation would be prepared to consider the proposals put forward by the Spanish delegation (A/CN.9/V/CRP.17). While his delegation was not entirely convinced of the need to retain paragraph (3), it favoured any solution which sought to establish equilibrium in the draft Convention. It was important to try to establish a situation of uniformity between the creditor and the debtor and in the different periods established throughout the Convention.

Mr. RECZEI (Hungary) felt that the period specified in paragraph (2) was too long. Both the Spanish and United States proposals were highly commendable, but he tended to favour the United States proposal (A/CN.9/V/CRP.14), which would ensure that stronger parties were not able to impose their will on weaker parties. However, if the Commission adopted the United States formulation to the effect that at any time after its commencement the limitation period might be extended by a declaration and that a new period would then commence, it would be necessary to adopt a further provision stating that such extension could take place on only one occasion, in order to prevent the limitation period from being prolonged indefinitely. The Commission might therefore wish to choose between the Spanish proposal to set a maximum limit or the United States proposal, as amended by his delegation

Mr. MUDHO (Kenya) agreed with the Tanzanian representative that limitation

was a matter of public policy and therefore found it difficult to accept paragraph (2). An amendment along the lines proposed by the Spanish delegation would be satisfactory and would prevent parties from prolonging the extension period indefinitely. The present formulation of paragraph (2) might give parties undue freedom with regard to extending the limitation period.

Mr. ELLICOTT (Australia) said that his delegation was inclined to support the retention of article 22. In its view, there was no clear-cut distinction between a situation of acknowledgement and one of modification. Parties engaged in negotiations at the end of the initial limitation period who might be loath to enter into litigation might wish to extend the period and should have an opportunity of doing so. However, a debtor might not wish to extend the limitation period by as much as four years and might find an extension of one or two years more convenient. His delegation fully agreed with the Tanzanian representative that it was undesirable to give undue attention to the possibility of subsequent litigation at the time of entering into a contract.

Mr. GUEST (United Kingdom) said that, ideally, complete autonomy of the parties to lengthen, shorten or even waive the limitation period would be desirable. However, such a solution had proven unacceptable and the Working Group had adopted the compromise in article 22. The inclusion of a provision allowing an extension after the commencement of the limitation period had been urged by the Egyptian representative and would seem to obviate the possibility that a stronger party might impose its will upon another party. His delegation had no objection to shortening the over-all period from 14 to 10 years. However, with regard to paragraph (3), it wished to point out that in civil law systems periods were usually specified during which the buyer was required to notify the seller of any defects in goods and that a similar régime had been established in ULIS. However, no such provisions existed in common law systems and, in the view of his delegation, the present system whereby parties agreed to such notice by contractual provisions should be placed outside the scope of the Convention. That point should be made quite clear. However, as the commentary on the article pointed out, article 22 (3) had a second purpose, namely the question of arbitration. It was a fact that in most commodity markets there were provisions for the submission of claims for arbitration within a

certain period, which would normally be shorter than the four years envisaged as the limitation period for the purposes of the draft Convention. Those provisions should be upheld, provided they were valid under the applicable law. They were obviously open to abuse, but courts could exercise close control to ensure that the weaker party was not placed at a disadvantage.

Finally, his delegation agreed with the Austrian representative with regard to the advantages of a modest extension of the limitation period to make possible further negotiations. Businessmen were most reluctant to embark upon litigation in order to bring disputes to a speedy end; they clearly preferred to solve them by negotiation and agreement, and in such a case a modest extension of the limitation period or a waiver of the limitation period would seem to be in the best interests of all parties.

Mr. POLLARD (Guyana) could not support the retention of article 22. The argument that a declaration by the debtor in writing to extend the limitation period after its commencement could protect the weaker party was not valid. A creditor might coerce a weaker debtor into making precisely the sort of declaration envisaged in article 22. For those reasons, his delegation also opposed the amendments, particularly those of the United States. The Spanish amendments were also unacceptable from the standpoint of principle. Finally, the article specified the exceptions before stating the rule and his delegation felt that such an order was unacceptable.

Mr. MANTILLA-MOLINA (Mexico) supported the Spanish amendments (A/CN.9/V/CRP.17) but wondered whether it would be enough to delete paragraph (3). Even if it was deleted, the clauses in the contract of sale to which the paragraph referred would still be valid. A good way of achieving a reduction in the limitation period would be to stipulate in the contract that the parties could exercise a claim within 60 days after the arrival of the goods. Such a procedure would be in accordance with article 22 (3). With regard to the comments by the Nigerian delegation, he felt that it was one thing to waive the limitation period and grant an extension to enable negotiations to be continued, as in article 22, but it was another to oblige the debtor to recognize that he was in breach of contract.

Mr. SAM (Ghana) said that his delegation had no strong views on the

retention of article 22. Although it considered that the Spanish proposal to reduce the over-all limitation period from 14 to 10 years had great merit, it preferred the United States proposals. It also supported the Soviet proposal to specify that the declaration should be made within the limitation period. It could not support the United States amendment to paragraph (1), since it felt that it would be better to retain the existing wording. However, it could support the United States amendment to paragraph (2), which would shorten the total limitation period from 14 to 8 years and allow it to be extended on only one occasion. His delegation agreed with the Mexican delegation's opinion on the dissimilarity of articles 22 and 17. Finally, it wished to appeal to the Commission to accept article 22 as amended by the United States and modified by other delegations.

Mr. SMIT (United States of America) noted that many delegations had agreed that limitation was a question of public policy. It seemed that his delegation's proposals (A/CN.9/V/CRP.14) reflected that fact more appropriately than the present paragraph (1). If the parties wanted to avoid the creation of stale claims by making the limitation period shorter, they would be pursuing the very policy which the statute of limitations sought to implement. However, it was necessary to ensure that the stronger party did not impose its will upon the weaker party and the United States proposal achieved that goal.

With regard to paragraph (2), since his delegation took the view that the parties should not be permitted to extend the limitation period ad infinitum, it was opposed to any provisions that had that consequence. However, it appreciated that, if the parties were in fact engaged in negotiations, they should not be forced into litigation. The amendment to paragraph (2) had been proposed not because his delegation felt that four years was a suitable period but because in some cases it might be difficult to determine whether the debtor had given an acknowledgement under article 17 or a declaration under article 22 (2) and there would be some uncertainty as to the length of the extension. The amendment therefore made it clear that, whether extension of the limitation period was based on an acknowledgement by the debtor under article 17 or a declaration under article 22, the consequences were the same. Another way to achieve that result would be for article 22 (2) to require the declaration to state the length of time by which the limitation period was extended. The declaration would then be easier to distinguish from an acknowledgement under

article 17. In view of previous comments, and particularly the statement by the Hungarian representative, he was prepared to accept a shorter extension period than four years, so that the over-all limitation period would not be longer than six years. He agreed with the Hungarian representative that only one extension should be allowed. There appeared to be some measure of agreement that the debtor should be entitled to a moderate extension of the limitation period. The United States proposal, as revised, could be a possible compromise.

Mr. CHAFIK (Egypt) said that article 22 as a whole was useful and acceptable. Paragraphs (1) and (2) should be maintained in their existing formulation, because they protected the interests of the weaker party and allowed a reasonable period for the debtor and creditor to conduct negotiations which might be long and difficult. He agreed with the suggestion by the USSR representative: the text of article 22 (2) should specify that the declaration by the debtor should be made during the original limitation period. Article 22 (3) was somewhat confusing but he could support it, since the final authority would be "the applicable law". The text of article 22 should be reconsidered by the Working Group.

Mr. KAMAT (India) said that modification of the limitation period was a matter for public policy as well as for the parties to the dispute. He could not accept the argument that because negotiations were in progress a modification of the limitation period should be allowed and that public policy should be ignored, since experience had shown that negotiations usually succeeded only after a suit had been filed. He pointed out that a shorter extension period than that provided in article 22 (2) was allowed under other articles, such as article 18. As the United States representative had said, the stronger party might have an opportunity to coerce the weaker party into agreeing to a shorter limitation period. Any reference to extension or reduction of the limitation period should therefore be omitted from the Convention.

For the purposes of a new limitation period, no distinction should be drawn between an acknowledgement under article 17 and a declaration under article 22. That was not because there already existed a rule on limitation periods after acknowledgement by the debtor, in article 17, but because matters of public policy would be involved if extensions of the limitation period were allowed after a declaration under article 22.

With regard to a shorter over-all limitation period, he was prepared to accept the views of the majority, although a 10-year period was acceptable.

Mr. ROGNLIEN (Norway) said that an acknowledgement under article 17 meant that there were no more grounds for negotiations between debtor and creditor - that the debtor had yielded to the creditor. If a possibility of extension during negotiations was desired, the Convention should include an article such as article 22. With reference to the over-all length of the limitation period, the United States proposal for article 22 (2) (A/CN.9/V/CRP.14) had some merit. An extension of the limitation period might be needed because the parties wished to negotiate their dispute without going to court, or the decision of the parties might depend on a point of principle, which was to be decided by a court. For instance, in the case of a complicated lawsuit between one of the parties and a third party, many years might elapse before the court took a final decision, and that decision could affect relations between debtor and creditor. The parties might therefore face a very long period before they could settle their case. The Working Group had therefore considered that the parties should be able to repeat the extension procedure once. The reason why the text of article 22 (2) had mentioned a period of 10 years was to avoid repeating how often the limitation period could be extended. The maximum limitation period should not be computed from the time when the original period of limitation had started to run, since that time was uncertain under the new formula adopted in articles 8 to 11. For instance, if a claim was based, under article 9, on a lack of conformity which could not be discovered at the time of examination of the goods, the start of the original period of limitation from the time of recovery would be a bad point for computing the over-all time limit; in such cases the criteria for determining the starting-point of the limitation period would have to be decided by the courts. He therefore supported the United States proposal that the new period of limitation would run from the date of the declaration. He also agreed that it should be possible for the parties to repeat their declaration under article 22; such repetition might be necessary in some cases and there was no danger of abuse, since the parties could judge whether or not such a repetition was in their interests.

Regarding cases where the declaration might be made after the limitation period had expired, he explained that the authors of the draft had intended the extension

of the limitation period to be carried out either by a formal agreement or by a declaration that the limitation period would not be invoked as a defence in legal proceedings. Such a declaration was related to article 23, which stated that expiration of the limitation period would be taken into consideration only at the request of a party to legal proceedings. It might be in the interest of the debtor not to invoke the limitation period as a defence, for instance in the case of a counterclaim based on the contract, when the debtor would not want the limitation period to be invoked against his counterclaim. He therefore supported article 23. The Uniform Law could perhaps distinguish between the different aspects of extension of the limitation period and say that the declaration must be made before the limitation period expired. It could also state that when litigation occurred, article 23 would apply. He agreed that article 22 should be sent back to the Working Group, which could examine the possibility of reducing the over-all limitation period, which should, however, not be too short.

Mr. JAKUBOWSKI (Poland) agreed that the limitation period should be modified, but only in the sense of extending it. It should not be reduced from a total of 10 years, as had been suggested by the United States delegation.

Mr. KHOO (Singapore) said that he was prepared to accept the principle in article 22 that a limited degree of autonomy, apart from public policy, should be given to the parties in extending the limitation period. He could not agree, however, that the over-all limitation period should amount to 10 years, though he could support a shorter period. The text of article 22 (1) and (2) was inelegant and unnecessarily complicated. Article 22 (1) said that the limitation period could not be modified by any agreement between the parties, except in the cases provided for in paragraph (2), while article 22 (2) said that the debtor could extend the limitation period by a declaration. Taken in conjunction, those two statements gave the impression that only a unilateral declaration by the debtor would be accepted as valid for the extension of the limitation period and that any other modification of the period was excluded. Article 22 (2) was therefore extremely unsatisfactory if the intention of the Working Group had been to provide for modification of the limitation period by agreement.

With reference to the Indian representative's statement, agreement for the extension of a limitation period was most often reached during negotiations by the parties. The buyer and the seller found that negotiations took so long that not much time was left for legal proceedings, so that one of the parties suggested that they should agree to extend the limitation period. Public policy on matters of extension of the limitation period should therefore be subordinate to the conduct of such negotiations.

The Working Group should improve the text of article 22, bearing in mind that article 16 provided that the limitation period could be extended after an act by the creditor. Article 22 should in fact make a reference to article 16.

The CHAIRMAN invited representatives to indicate by raising their hands whether they were in favour of the deletion of article 22.

He noted that the delegations of Guyana and the United Republic of Tanzania were in favour of the deletion of article 22. It was clear that the majority of members wished to retain that article.

Mr. GUEIROS (Brazil) said he wished to stress that his delegation still favoured a three-year limitation period, as proposed in the Austrian amendment to article 8 (A/CN.9/V/CRP.1). In modern times, when telex messages could be used as evidence, that period was quite ample for the purpose of allowing the parties to obtain the necessary documentation.

His delegation supported the United States amendments to article 22 (A/CN.9/V/CRP.14) and favoured referring them, and the other proposals that had been made, to the Working Group.

The CHAIRMAN said that the Commission should decide whether it agreed to the principle established in article 22 (1) or whether it wished to adopt the United States proposal allowing for a reduction of the period. He invited representatives to indicate by raising their hands whether they were in favour of the United States proposal.

He noted that only the delegations of the United States, Brazil and Austria were in favour of the United States proposal. He therefore took it that the Commission agreed to maintain the principle established in article 22 (1) of the draft.

Mr. ROGNLIEN (Norway) explained that he had not indicated support for the United States proposal because the Working Group had agreed, as a compromise, to a limitation period of four years, not subject to modification. However, his delegation might wish to consider the possibility of allowing a reduction of the period if the Commission subsequently decided to establish a longer period than four years.

The CHAIRMAN drew the attention of members to the various proposals concerning the duration of the extension period envisaged in article 22 (2). He invited representatives to indicate by raising their hands which proposal they favoured.

He noted that only two delegations favoured an extension of a period of 10 years, namely, a total period of 14 years. Seven delegations favoured an extension which would provide for a maximum total period of six years. Fourteen members favoured an extension of four years, namely, a maximum of eight years.

Mr. OLIVENCIA (Spain) explained that his delegation had agreed, in a spirit of compromise, to an extension period of four years, although it had originally proposed a maximum extension of six years. He stressed that his proposal still differed from the United States proposal in respect of the date when the extension would begin to run.

The CHAIRMAN, after asking representatives to indicate their views by a show of hands, noted that a majority of members agreed that the extension provided for in article 22 (2) should begin before and not after the expiration of the initial period.

He then asked representatives to indicate whether they wished to have the new period commence from the date of expiration of the initial period, as proposed in the existing draft, or from the date of the declaration by the debtor, as proposed in the United States amendment (A/CN.9/V/CRP.14).

Mr. ROGNLIEN (Norway) said it would be premature for the Commission to take a position on the matter at that stage. It would be preferable to await the outcome of the Working Group's deliberations concerning article 19.

The CHAIRMAN pointed out that the indication he was requesting was intended only to provide information for the Working Group, in order to help it

gauge the feeling of the Commission. He noted that nine delegations were in favour of having the period commence from the date of expiration of the original period and that seven delegations favoured the United States formulation.

He then invited representatives to indicate by raising their hands whether they were in favour of the deletion of article 22 (3). He noted that four delegations were in favour of the deletion of that paragraph.

He then drew attention to article 22 (2) proposed by the Spanish delegation (A/CN.9/V/CRP.17), which provided that the debtor could waive the limitation acquired. After asking for a show of hands on that amendment, he noted that eight delegations supported it.

Drawing attention to the Spanish amendment entitled "article 22 bis", he asked members whether they agreed with the principle contained therein, to the effect that the extension should also cover the situations envisaged in articles 18 and 19.

Mr. OLIVENCIA (Spain) said he felt that the amendment could be referred directly to the Working Group, since it was mainly aimed at achieving greater symmetry in the draft as a whole and was not of a substantive nature.

The CHAIRMAN said that, in view of the Spanish representative's remarks, the Spanish amendment entitled "article 22 bis" would be referred directly to the Working Group.

Article 23

Mr. WARIOBA (United Republic of Tanzania) stressed that, at the fourth session of the Commission, his delegation had opposed the inclusion of article 23 in the draft Convention. It seemed to his delegation that the Commission had already established too many exceptions to the rules regarding limitation, particularly in articles 8 to 11. The inclusion of article 23 would have far-reaching implications. If only the parties were allowed to raise the question of limitation in court, three possible situations might arise. In the first place, the parties might agree, before going to court, not to raise the issue of limitations, which would be tantamount to allowing an implied modification of the

Law by the parties. In the second place, the parties might simply be unaware of the existence of the limitation period. In the third place, the court might draw attention to the question of limitation but would not be able to do more than that.

In view of all the exceptions provided for in articles 17, 22 and 23, he failed to see where public policy considerations were taken into account in the draft, which removed the power of public authorities to do anything regarding limitation. If the Commission wished to discourage stale claims, it must enable the public authorities to do so. He had not submitted an amendment proposing the deletion of article 23 because he had already made his position clear at the fourth session and had not succeeded in influencing the Working Group. However, he wished to place on record his delegation's opposition to that article, which had the effect of tying the hands of the public authorities and making the entire Law work on behalf of the autonomy of the parties.

Mr. POLLARD (Guyana) said his delegation supported article 23 in principle, although it felt its formulation was vague and should be improved. He therefore suggested that it should be amended to read as follows: "Expiration of the limitation period shall be pleaded as a bar to the exercise of a claim in any legal proceedings only by the party against whom such a claim is sought to be exercised."

The point raised by the representative of Tanzania was a valid one, but he felt that it was unwise to give the court the power to say that a claim had been barred, since that would place it in the position of acting as an advocate.

Mr. KAMAT (India) said his delegation fully shared the views expressed by the Tanzanian representative. He was not convinced by the justification for the article mentioned in the commentary (A/CN.9/70/Add.1, p. 59). If, as was stated in the commentary, a party who could interpose that defence would rarely fail to do so, there should be no objection to having the court impose the limitation. The second argument mentioned in the commentary, namely, that the tribunal could draw attention to the lapse of time and inquire whether the party wished the issue to be taken into consideration was contrary to judicial propriety, since the court would not have the power to enforce the limitation. Article 22

provided the parties with an opportunity to agree in advance to a modification of the period; in the absence of such an agreement, the court should be able to raise the issue of limitation suo officio. His delegation maintained its position that public policy was an essential consideration in the drafting of the Convention and reiterated its dissatisfaction with the inclusion of article 23.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) informed members that his delegation would be submitting a corrected English version of its observations and proposals concerning the draft Convention.*

* Subsequently circulated as document A/CN.9/V/CRP.15/Rev.1 (English only).

Article 23 (continued)

Mr. OGUNDERE (Nigeria) said that the very concept of limitation implied that the judge was called upon to decide on the question of the admissibility or non-admissibility of proceedings. The principle of the autonomy of the parties, which was valid where the conclusion of a contract was concerned, did not apply to limitation. For that reason his delegation doubted whether article 23 was really justified. It seemed to him, moreover, that while the Working Group's text suited the interests of large commercial companies which had legal advisers to see that their rights were protected, it disregarded the fate of the small businessman who had no legal knowledge or assistance. His delegation had not formally requested the deletion of article 23, but it hoped that the Commission would allow itself to be convinced by his arguments and would abandon a provision which, by making the debtor the helpless victim of the creditor, would run counter to the general trend of its work.

Mr. MUDHO (Kenya) felt that article 23 was unnecessary for the reasons adduced by the representatives of Tanzania and Nigeria. It had been said that the deletion of that provision would create a gap in the uniform law. That was not the view of his delegation which thought that, on the contrary, it was the inclusion of article 23 which created an imbalance in the draft Convention since it operated in favour of the party to the contract who was aware of the existence of the Convention and to the disadvantage of the party who was not. It would therefore be best to delete the article. If it was decided to retain it, it should at least be expanded to specify that the tribunal could invoke limitation suo officio, declaring itself incompetent.

Mr. MICHIDA (Japan) said that, while he understood the concern of the delegations which were opposed to article 23, he found it hard to accept their arguments for several reasons. In the first place, if a party allowed its rights

to lapse, the deletion of article 23 would not help him in any way. Secondly, that provision was not justified only by a concern to respect the autonomy of the parties; another consideration had to be taken into account, namely, that the deletion of the article would lead to procedural complications for the court or the arbitral tribunal. While it was in fact normal for a judge to apply the law suo officio in the case of other time-limits (déchéance, etc.), it was difficult to ask him to do the same in the case of the limitation period to which complex rules relating to suspension, extension, etc., applied. That would complicate the judges' task considerably, add to the already heavy burden of the courts, and delay the settlement of cases. Thirdly, to allow the judge to invoke limitation suo officio would be to allow the parties to claim that the judge had not applied the uniform law correctly, in other words to appeal and thereby prolong the proceedings indefinitely.

The Working Group had not disregarded the case of small businessmen, who were particularly numerous in his own country. He did not think that they would have reason to complain of article 23.

Mr. MANTILLA-MOLINA (Mexico) said he was surprised at the difficulties raised by article 23. In the view of his delegation, the deletion of that provision would create a serious gap and would be a source of uncertainty since it would no longer be known whether it was for the parties or the tribunal to invoke limitation. It had been proposed that the tribunal should be able to point out to the parties that they had the right to invoke limitation; such a procedure was hard to accept and would require the revision of the code of procedure of all countries whose law derived from Roman law. It had also been proposed that the tribunal itself should be able to invoke limitation suo officio: that would be to forget that, if the parties failed to use that means of defence they might be doing so voluntarily.

His delegation was in favour of retaining article 23, with one drafting change: it thought that it would be more exact to say that limitation could be taken into consideration "only at the request of the defendant in such proceedings".

Mr. OLIVENCIA (Spain) supported the observations of the Mexican representative and said that he, too, was in favour of retaining article 23.

That provision seemed to him necessary, not in order to favour certain economic interests at the expense of others, but to respect the legal principle according to which the judge based his judgement on the arguments submitted to him by the parties. Furthermore, as had already been observed, the judge might not be aware of the reasons which led the parties not to invoke limitation.

As for the wording, he supported the change proposed by the Mexican delegation. He was afraid, however, that the concern to draft a law easily accessible to those engaged in international trade might run counter to legal precision. The words "shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings", in particular, seemed him to be open to criticism as being lacking in precision.

Mr. ROGNLIEN (Norway) said that, in the view of the Working Group, article 23 met a concern for uniformity. The absence of a provision of that nature would mean that one would have to rely on lex fori on that point. He pointed out that it might be in the interests of a party not to invoke limitation: that was so, for example, when the defendant intended to submit a counter-claim. In any event, the decision no longer depended on the Working Group, which had already given its views. It was for the Commission to decide whether it wished to delete or retain article 23.

Mr. SMIT (United States of America) endorsed the observations of the Spanish delegation. He added that, frequently, a judge who was called upon to invoke limitation suo officio would not have sufficient knowledge of the facts to reach a decision. He would therefore have to gather the facts, which would make him a party to the litigation and not a judge.

Mr. GUEST (United Kingdom) supported the remarks of the United States representative. He pointed out that limitation was a question of public policy and its main purpose was to prevent the parties from invoking out-dated claims. For its part, his delegation would prefer that article 23 be retained. It did not, however, wish to impose foreign rules on countries whose legal system allowed a judge to invoke limitation suo officio. It would like to hope that the representatives of those countries also did not intend to impose their own rules. A middle course was

therefore called for. It might consist in modifying article 23 in such a way as to emphasize that the question as to who could invoke limitation was a procedural question. The following wording, for example, might be employed: "Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings, except where the rules of public policy of the forum otherwise provide".

Mr. LEMONTEY (France) said that his delegation was not convinced by the arguments which had been advanced to justify the deletion of article 23. In his view, to oblige the judge to invoke limitation suo officio would be to give him an inquisitorial role which was not desirable, to complicate the task of the tribunal, and to force the parties to have recourse to a means of defence which they might have good reasons for wishing to avoid. His delegation was therefore in favour of retaining the provision, since its deletion would detract from uniformity in the application of the law.

As for the form, it was indeed open to criticism, and his delegation proposed the following wording: "Limitation may not be raised by the judge or by the arbitrators suo officio".

Mr. LOEWE (Austria) said that, according to Austrian law, only the parties could invoke limitation and that a strong legal tradition was opposed to the judge being able to raise the issue suo officio, especially since in Austria judicial decisions brought the responsibility of the State into play. The Austrian system, moreover, presented no difficulty for the parties since it should be remembered, first, that a lawyer would never fail to invoke limitation if he thought that it was in the interests of his client to do so and, secondly, that in minor cases where the intervention of a lawyer was not necessary the judge had a duty to remind the parties of their rights. He was therefore in favour of retaining article 23. States which were opposed to it should be permitted not to apply it, although such a derogation would detract from the principle of the uniformity of application of the convention.

Mr. LASALVIA (Chile) said he advocated the retention of article 23 and considered that the deletion of that article would be all the more serious because the absence of that provision would then have to be interpreted as a refusal on the part of the Commission to retain a norm recognized in many legal systems and retained

for that reason by the Working Group. However, he shared the views of the representative of Mexico with regard to the need to improve the drafting of the article.

Mr. MUDHO (Kenya) said he had listened carefully to the statements of those advocating the retention of the article, but had heard no persuasive arguments supporting the objections to its deletion. The representative of Austria, on the other hand, had shown that the absence of the provision would not present any practical disadvantage for Austrian law. Although his position therefore remained unchanged in principle, he could nevertheless accept the amendment proposed by the United Kingdom as a compromise.

Mr. KHOO (Singapore) said he had no strong opinions on the point under consideration. Indeed, neither the retention nor the deletion of article 23 would have any practical consequences in so far as the law of Singapore was concerned. If the purpose of the article was to lay down a rule of judicial proceeding, however, it would seem that it should be left to the competent court itself to decide the question.

Mr. WARIOBA (United Republic of Tanzania) said he was not convinced by the reasoning advanced by those favouring retention of article 23. Replying to the objections raised by the Japanese delegation in particular, he did not think, first of all, that it was correct to take no interest in the situation of debtors who failed to invoke limitation, since the purpose of the Convention was precisely to protect the interests of all parties concerned. Secondly, it was wrong to underestimate the importance of the activities of businessmen relative to those of judges. Thirdly, if judges' time was really so valuable, why should they be prohibited from barring limitation suo officio, placing on the parties the burden of proving that the limitation period had or had not expired? He reminded those who had opposed any suo officio intervention by the judge that the deletion of article 23 would not be tantamount to granting a special right to the judge, but to allowing each court to apply its own national law in the matter. In that connexion, the question might be raised of the purpose to be served by the amendment proposed by the United Kingdom representative, for it, too, referred back to national law. In conclusion, he stated that his country could not accept article 23 as it stood and

that, if the article was retained, it would be compelled either to abstain from ratifying the Convention or to enter a reservation with respect to that article; in either case, the uniformity sought by the entire membership of the Commission would be impaired.

Mr. ELLICOTT (Australia) said he had listened with interest to the statement by the representative of Tanzania; he felt the problem should be approached in proper perspective and from an essentially juridical point of view. The answer to the question whether the matter was one of procedure or one of substance no doubt varied from one legal system to another. In Australia, as in most countries with a common law system, the question was a procedural one in which the initiative was left entirely to the parties, since Australian legal proceedings were of the adversary not the inquisitional type and there was therefore no need for the judge to intervene. A question of equity arose in cases where a lawyer's intervention was not necessary and where, as under the Austrian system, it was no doubt appropriate for the judge to instruct the parties as to the extent of their respective rights. He felt that article 23 should be retained, but that the drafting of the article should be improved. Since there was no question, however, of favouring the debtor, he proposed that the existing text of article 23 should be replaced by the following: "A party shall not in any legal proceedings be entitled to the benefit of the expiration of the limitation period unless he specifically relies upon it in the proceedings." Nevertheless, he would not object to the amendment proposed by the United Kingdom, which might, however, be more clearly worded.

Mr. DEI-ANANG (Ghana) said he did not object to article 23, but suggested, for greater clarity, that the words "shall be taken into consideration" be replaced with the words "shall have legal effect". He pointed out that the retention of article 23 was linked with the question whether the rule was procedural or substantive, which had not been decided by the Working Group. If the rule was procedural, article 23 would suffice, but if, on the contrary, the question was deemed to be substantive, it would then be appropriate to recognize the judge's right to intervene on his own initiative. Like the representative of Tanzania, he considered that the claimant should not be able to institute legal proceedings after

the expiration of the limitation period. If, however, the claimant did institute proceedings even though the period had expired, the outcome of the proceedings should not depend merely on the grounds invoked by the defence, but on the substance of the claim itself. It should also be noted that when the parties did not invoke the expiration of the limitation period in proceedings, the effect was an automatic extension of the period, which was contrary to article 22 and could provide grounds for intervention by the judge. The commentary by the Secretariat on article 23, which stated that the question was not of large practical importance, did not take account of the diversity of legal systems, for some systems made it easier than others for the judge to instruct the parties, a fact which ran counter to the desired uniformity. Although some delegations had finally ruled out any possibility of intervention by the judge in order to avoid making the proceedings inquisitional in nature, he considered that, to a certain extent, that risk had to be taken and that it would be possible, if not to compel the judge to intervene, at least to give him the opportunity to do so when intervention was justified by reasons of equity.

Mr. SZASZ (Hungary) noted that Hungarian law embodied a provision similar to article 23. However, the judge should be able to draw the parties' attention to any pertinent fact, and he would therefore be able to support amendments along those lines. Nevertheless, it should not be forgotten that the Convention would be pointless if too much stress was placed on the discretionary power of the judge, for the judge would tend to rely on his national law.

Mr. KAMAT (India) said he considered that the arguments in support of retention of article 23 had not shown that the deletion of the article could lead to real difficulties. Under Indian law, the judge was obliged to raise the question of limitation by requesting the parties to present evidence that the limitation period had not yet expired. The difficulties raised by article 23 resulted not from technical obstacles, but from different legal concepts and traditions. He proposed that, in view of that difference in principles, the members of the Commission should take time for reflection.

Mr. NESTOR (Romania) said he was in favour of retaining article 23, although Romanian legislation went in an entirely different direction. In Romania,

limitation was a matter of public policy which must be raised by the judge suo officio. His delegation nevertheless considered, that it was necessary to retain the provision contained in article 23, which reflected the spirit of legal unification underlying the draft Convention. If the provision was deleted, the result would be irreconcilable diversity, which would create great uncertainty for the parties. Moreover, the field of limitation was quite delicate, and it was preferable that the judge should not have to enter it. He could be empowered to instruct the parties concerning the means for defence available to them, but should not have the right to disregard the wishes of the parties.

Mr. OGUNDERE (Nigeria) stated that in his country the law governing limitation was part of procedural law. Nigeria was a federal State with a highly complex judicial structure, where customary courts existed alongside common law courts, which were themselves categorized by rank into magistrate courts and high courts whose competence was determined by the amount involved in litigation. In the customary courts (called area courts) and in the magistrate courts, which accounted for three quarters of the country's courts, judges had the duty to instruct the parties concerning their rights. Only at the level of the high courts was it necessary for limitation to be expressly raised by the parties.

The provision stated in article 23 would therefore be inapplicable in three quarters of the courts of Nigeria. It would be better to delete the article; that would have the effect of referring judges automatically to the rules of the forum (lex fori) and would thus respect the judicial system and procedural law of every country.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that article 23, as it stood, was perfectly acceptable to his delegation. However, it would not object to any formula which authorized judges to instruct the parties concerning the means of defence available to them. On the other hand, it was against deletion of the article or any formulation which would give rise to uncertainty. The Working Group might consider the best way of resolving the problem posed by article 23. In any event, the Commission should refuse to rely on national law because that would run counter to the principle of unification which was the Commission's very raison d'être.

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Mr. GUEIROS (Brazil) said that a distinction was made in Brazilian law between the time-limit, which meant the extinction of a right, and limitation, which was the loss of the power to exercise a right. In the first instance, irrespective of the findings of the parties, the judge had to dismiss the case. In the second instance, it was up to the parties to invoke limitation.

In the opinion of his delegation, it would be better to delete article 23. While it would not object to having the Working Group try to work out a compromise formula, the task was so difficult that it did not believe the Group would succeed. If the Commission decided to delete article 23, there would be fewer articles in the Convention with the result that it would have the advantage of being more concise and therefore more accessible to those engaged in international sales. If, on the contrary, it decided to refer the article to the Working Group, it would also have to refer paragraph 2 of article 24, which was closely related to article 23.

Mr. JENARD (Belgium) said he favoured retaining article 23, but improving the wording along the lines suggested by the French delegation.

A number of solutions advanced in the course of the discussion should be discarded. His delegation could not agree to the outright deletion of the article because that would introduce a serious element of uncertainty into the Convention. Nor could it agree that the provision in article 23 should confer discretionary power on a judge to rule on the question. It would also be against any rule which would reproduce the present text but suspend its application in jurisdictions where the law called for a different procedure. There was one last solution which he commended to the Commission's attention, and that was to retain article 23 as it now stood and to qualify it by allowing for a reservation. The advantage of that solution would be to simplify the drafting and introduce an element of certainty because it would be easy to find out what countries had entered reservations.

Mr. MANTILLA-MOLINA (Mexico) proposed a compromise formula, which was different from the procedural law normally followed in civil law countries, but would be in harmony with the general spirit of the Convention which, up to a point, safeguarded the autonomy of the will of the parties. The draft Convention fixed a limitation period of specified duration which could be extended by agreement between the parties. A parallel provision might be introduced whereby the present text of

article 23 would be applicable for a given period - four years, for example - beyond which the judge would have to raise the issue of expiration of the limitation period of his own motion (suo officio). It would be useful if the Working Group could discuss whether such a formula was likely to be acceptable to the membership of the Commission.

Mr. ELLICOTT (Australia) made a proposal to replace the present text of article 23 by the following wording, which had the support of the delegations of Ghana, Nigeria and Tanzania:

"In any legal proceedings to enforce a claim arising in relation to a contract of sale to which this law applies, the tribunal can draw the attention of the parties to the provisions of this Law."

His delegation considered that new wording to represent a workable compromise which deserved consideration by the members of the Commission.

Mr. JAKUBOWSKI (Poland) said he favoured retaining the present article 23. Apart from the arguments adduced by the delegations which had spoken before him, he drew attention to the fact that most disputes concerning the international sale of goods were settled by courts of arbitration, whose members were not always necessarily experienced jurists, and might have difficulties in interpreting the provisions of the Convention correctly. Moreover, if the judge or arbitrator was under obligation to raise the limitation issue suo officio, thought should be given to the consequences if the judge or arbitrator failed to discharge that obligation.

The Polish delegation, which felt that the amendment proposed by the United Kingdom representative would introduce unnecessary complications and which feared that the revised text submitted by the Australian delegation did not entirely satisfy those delegations which were against retaining article 23, was prepared to support the Belgian proposal. That proposal, by offering States the option of entering a reservation concerning the application of the article, represented a solution which reduced the risks of uncertainty to the minimum.

Mr. CHAFIK (Egypt) said he was in favour of retaining article 23 as it now stood, subject to a few improvements in the drafting. In Egypt, limitation was not a matter of public policy and could only be raised at the request of the parties.

Article 23 should be referred back to the Working Group with a request that it find a compromise formula which would not sacrifice the aim of unifying the law, which was the purpose of the Convention.

Mr. COLOMBRES (Argentina) said that article 23 should be retained and made subject to a reservation, as suggested by the Belgian representative. That solution, which should not be applied to all articles, would avoid placing an even greater burden on the Working Group. Nevertheless, the delegations which were against retaining article 23 could try to work out a formula acceptable to the Working Group and the Commission. If they failed, the best solution would be to adopt the Belgian proposal.

The CHAIRMAN, summarizing the discussion for the guidance of the Working Group, recalled that the delegations of India, Kenya, Nigeria and Tanzania had called for the deletion of article 23 and that those of Brazil and Singapore were similarly inclined, but not without some hesitation. All the other delegations had favoured retaining the article and improving the wording. It would be useful if those who were against article 23 endeavoured to work out a formula for submission to the Working Group, which would consider it together with all the other amendments submitted to it. If it proved impossible to arrive at a solution by that means, the Commission should undoubtedly adopt the solution proposed by the Belgian delegation.

Article 24

Mr. HONNOLD (Secretary of the Commission) noted that article 24 (2) applied only to claims raised as a defence for the purpose of set-off. Affirmative relief was not within the scope of that article. Paragraph 3 of the commentary on the article (A/CN.9/70/Add.1) explained the reasoning behind article 24 (2).

Mr. CHAFIK (Egypt) said that the formulation of article 24 (1) was difficult to understand. It did not make clear that the "claim" was invoked during a legal proceeding. He suggested that it should perhaps state that no claim would be recognized or enforced in any legal proceedings which took place after the expiration of the limitation period. Furthermore, recognition of a claim meant that its enforcement was requested. The word "enforced" could therefore be omitted.

The formulation of article 24 (1) implied that the effect was automatically produced by the expiration of the limitation period. Article 23, however, stated that the expiration of the limitation period must be invoked by one of the parties, if it was to have an influence in the legal proceedings. Article 24 (1) should speak of an "acquired" limitation, decreed by a court.

Mr. JENARD (Belgium), supported by Mr. MANTILLA-MOLINA (Mexico), said that the text of article 24 (1) was extremely difficult to understand. It should either be deleted, since it was not very useful, or else amended as suggested by the Egyptian representative.

Mr. GUEIROS (Brazil), supported by Mr. LASALVIA (Chile), fully endorsed the Egyptian suggestion.

Mr. LOEWE (Austria) said that article 24 (1) was an unnecessary enunciation of obvious principles, which was badly written. It could therefore be deleted but article 24 (2) contained necessary details and should be retained.

Mr. SMIT (United States of America) said that a comprehensive Convention on limitation should contain a provision such as that in article 24 (1), whose formulation could be improved.

Mr. KAMAT (India) agreed with the United States representative. If the Convention did not contain a provision such as that in article 24 (1), there would be no provision for proceedings instituted after the limitation period had expired. If members considered that article 23 should be deleted, a consequential amendment should be made to article 24 (1) and the phrase "and of article 23" should be deleted. The text of article 24 could be improved in accordance with the Egyptian representative's suggestion.

Mr. OGUNDERE (Nigeria) said that the intention of the authors of article 24 (1) had apparently been to provide a provision on the recognition and enforcement of foreign judgements. If a tribunal made an award which was brought to court for enforcement in another jurisdiction, the person against whom judgement was sought could argue that the award was barred by reasons of limitation, in accordance with the Convention. Article 24 (1) provided a safeguard against such arguments and, if it was deleted, there would therefore be a lacuna in the Uniform Law.

Article 24 (2) established a different principle: even though the limitation period had expired, the parties could set up counter-claims against the party suing them. He agreed with the representatives of the United States and India that the Working Group should redraft article 24.

Mr. KHOO (Singapore) said he had no difficulty in accepting article 24 (1), which was a useful provision in an international convention. However, he did not agree with the Nigerian representative's interpretation. Article 24 dealt not with the enforcement of foreign judgements but with claims which were yet to be adjudicated when the limitation period expired.

Mr. BURUCHEV (Union of Soviet Socialist Republics) said it would be desirable to maintain article 24 (1). It was a very necessary provision, particularly in view of the discussion at the previous meeting, where the opinion had been put forward that claims could be asserted even after the expiration of the limitation period. However, article 24 (2) should be deleted since it appeared to state that the creditor could meet his claims by means of set-off even when the limitation period had expired. It was thus not consonant with the very essence of the concept of limitation.

Mr. COLOMBRES (Argentina) agreed with the representative of the Soviet Union that article 24 (1) should be retained, if it was redrafted. He also agreed that article 24 (2) was not really in keeping with the institution of prescription. It should be recalled, however, that set-off and counter-claim could exist at the same time; that was the situation in clearing-houses. If both had coexisted at any one time, regardless of the expiration of the limitation period, article 24 (2), which had been based on rule 14 of the Draft European Rules on Extinctive Prescription, was very important and should be retained.

Mr. KHOO (Singapore) said that article 24 (2) was necessary because previous articles, such as article 19 and 21, allowed the limitation period to be extended on the basis of actions by the creditor. If the debtor was not similarly entitled to extend the limitation period in respect of his claim, one party would have an advantage over the other, since the creditor could maintain a claim against the debtor outside the normal limitation period while the debtor was not able to set up a counter-claim or a set-off against the creditor. The debtor should have a right to make a counter-claim as a protection against the creditor, as provided by article 24 (2).

Mr. ELLICOTT (Australia) agreed that article 24 (1) should be retained and that article 24 (2) was desirable as it was an attempt to adjust the rights of the parties in cases when limitation periods might start to run at different times because of the type of contract involved. It appeared reasonable that, if one party sought to set up a claim, the other party should be allowed to set up a counter-claim. He agreed with the representative of the USSR that article 24 (2) was not completely consistent with the institution of prescription but noted that it was an attempt to cover all the courses of action open to the parties.

Mr. GUEST (United Kingdom) fully supported retention of article 24 (2). Ideally the limitations contained in subparagraphs (a) and (b) should be deleted so that effect would be given to the common law principle that the remedy was barred but the right remained. In civil law that amounted to a recognition of the natural right of the debtor. The compromise solution contained in article 24 (2) was excellent because it recognized the principle of mutuality for a contract of sale. He agreed with the representative of Singapore that it was intolerable that one party should be in a position where he was exposed to action without being able to set off his own claim.

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Mr. LOEWE (Austria) said that there appeared to be a consensus that article 24 (1) was badly worded and that the consequences it described were so obvious in civil law that there was no need to state them, but that for common law countries such a statement was useful. All members agreed that the creditor could institute proceedings for any reason and that during the proceedings it would be established whether he had a claim or not. The judge would take account of the limitation period under article 23 and, if that period had expired, the action would have to be dismissed and article 24 (1) would apply. He had no objection to retention of article 24 (1) but it should be redrafted. A claim could not be "enforced" in legal proceedings; once the claim had been recognized, voluntary or compulsory enforcement was, so far as limitation was concerned, subject to other rules. The Working Group would have the difficult task of redrafting article 24 (1) to make it intelligible to common and civil lawyers.

Mr. LEMONTEY (France) said that article 24 (1) should be deleted, since it was a source of many difficulties. However, he was in favour of retaining article 24 (2) and agreed with the representative of Singapore that its scope should be extended to include a provision enabling the defendant to put forward a claim based on the limitation period, as a means of defence, even after the limitation period had expired. That concept was embodied in the civil law adage "Quae temporalia sunt ad agendum perpetua sunt ad excipiendum."

Mr. SMIT (United States of America) said that article 24 (2) was an acceptable compromise which the Commission should retain. It reflected a broadly accepted principle based on equity and reasonableness.

Mr. OLIVENCIA (Spain) said that article 24 (1) should be retained after being amended in accordance with the Egyptian suggestion.

He agreed with the representative of the USSR that article 24 (2) was not necessary, if reference was being made to a contract which was immediately executed. But when the contract of sale involved different stages, he wondered whether a claim by one party could be set-off by a claim which the other party had made 20 or 30 years previously, since the parties were speaking about different stages in the same contract. In any case, the text was unclear.

Mr. MANTILLA-MOLINA (Mexico) thought that many of the Spanish representative's objections to the article had their origin in the poor quality of the Spanish text. They were well-founded if directed to that text but not if

directed to the French version, which was in accord with the English text. He observed that the delegations which supported article 29 (1) were English-speaking in the main, whereas those opposing it were French- or Spanish-speaking. That might be because the English version was the better. He would prefer the deletion of article 24 (2).

Mr. RECZEI (Hungary) said that his delegation thought that the article should be retained, that article 24 (1) should be redrafted and that the provisions of paragraph (2) (a) were not necessary.

The CHAIRMAN said that there appeared to be a majority of delegations in favour of the maintenance of article 24, subject to its reformulation. He suggested that it should be referred to the Working Group with that end in view. The representatives of Egypt and the United States might submit their proposals to the Working Group in writing.

It was so decided.

Article 25

Mr. HONNOLD (Secretary of the Commission) said that article 25 was addressed to a situation where a party performed a contract after the expiry of the limitation period - 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. Article 25 was not designed to have any effect on claims for restitution based on other grounds, such as, that performance had been obtained by fraud.

Mr. GUEIROS (Brazil) said that he could accept the wording of article 25, having regard to the principle that the laws aid those who were vigilant, not those who slept upon their rights. The maintenance of stability in international commercial transactions required that that principle should be included in the draft Convention. Article 25 should therefore be maintained.

Mr. OLIVENCIA (Spain) said that the Working Group should ensure the conformity of the Spanish and French versions. In that connexion, the Spanish text should be brought into line with the French with regard to the use of the word "répétition".

Mr. COLOMBRES (Argentina) observed that article 25 was taken almost textually from article 96 of the CMEA General Conditions of Delivery of Goods. It might be brought into line with paragraph 3 of rule 13 of the Draft European Rules on Extinctive Prescription.

The CHAIRMAN said that, if there was no objection, article 25 would be referred to the Working Group, together with the comments of delegations.

It was so decided.

Article 26

The CHAIRMAN noted that there were no comments on the article.

Article 27

Mr. HONNOLD (Secretary of the Commission) said that the method of calculating the date on which the limitation period commenced to run under article 27 was explained in paragraph 1 of the commentary on the article (A/CN.9/70/Add.1). There was a problem in that certain dates, for example 29 February, did not recur yearly; that was dealt with in the second sentence of the article.

Mr. ELLICOTT (Australia) said that one problem with regard to the calculation of the date, which should be considered, was the fact that a businessman flying from Sydney to San Francisco would arrive at his destination 15 minutes before he left his point of departure. If, for example, a breach of contract occurred at 6 p.m. on 8 April in London, the equivalent time would be 4 a.m. in Sydney on 9 April. On which date were Australian courts to base themselves?

Mr. MANTILLA-MOLINA (Mexico) expressed support of article 27. He pointed out that the Geneva Convention providing a Uniform Law for Cheques contained a specific provision to cover transactions involving countries with different calendars.

Mr. ROGNLIEN (Norway), referring to the Australian representative's question, said that the time to be observed would be that prevailing in the jurisdiction in which a claim was to be asserted.

Mr. CHAFIK (Egypt) pointed out that article 3 of the Egyptian Civil Code provided that a limitation period would be calculated according to the Gregorian calendar.

Mr. OLIVENCIA (Spain) said that the Norwegian representative's answer to the Australian question was not entirely satisfactory. The question of the conversion of the starting date of the limitation period to the time scale prevailing in the jurisdiction in which a claim was asserted had still to be resolved.

Mr. DEI-ANANG (Ghana) suggested that the problem might be solved by stipulating that the operative time should be that prevailing in the place where the breach of contract occurred.

Mr. GUEST (United Kingdom) said that the problem raised by the Australian representative was intractable and almost insoluble. The Working Group would welcome suggestions from the Australian and Spanish delegations regarding its solution.

Mr. SMIT (United States of America) said that the words "the last day of the last calendar month" were somewhat ambiguous. They could relate either to the limitation period or to the year in which it expired.

Mr. GUEIROS (Brazil) said that the French version of the text left no room for ambiguity. He suggested that the Working Group should adapt the English to the French.

The CHAIRMAN suggested that article 27 should be referred to the Working Group together with the comments of delegations.

It was so decided.

Article 28

Mr. KHOO (Singapore) asked whether proceedings under article 13 had been deliberately excluded from article 28.

Mr. GUEST (United Kingdom) replied that the Working Group had felt that, particularly in view of the provisions of article 13 (2), it was unlikely that proceedings in connexion with arbitration under article 13 would arise in the context of article 28.

Mr. GUEIROS (Brazil) said that the Working Group should replace the Latin expression "dies non juridicus" by plain language; the draft Convention, being intended for businessmen, should avoid legalistic Latinisms.

Mr. ELLICOTT (Australia) said that his delegation was proposing a new article 28 A containing a provision as to service (A/CN.9/V/CRP.16).

Mr. LOEWE (Austria) said that, while the Working Group could usefully discuss the Australian proposal, his delegation would have some difficulty in agreeing to the addition of a purely procedural provision as to service, which took no account of either Austrian legislation or international instruments to which Austria was a party. Indeed, the inclusion of such a provision would make it impossible for his Government to accede to the draft Convention.

Mr. JENARD (Belgium) said that he entirely agreed with the Austrian representative's remarks.

Mr. OGUNDERE (Nigeria) said that his country's legislation provided that service could be accomplished in a variety of ways - by hand directly, by publication in newspapers or through notices in the Official Gazette. A provision such as that envisaged by the Australian representative would be too restrictive.

Mr. MANTILLA-MOLINA (Mexico) regretted that his delegation could not support the inclusion of the provision as to service proposed by the Australian representative.

Mr. CHAFIK (Egypt) agreed entirely with the objections of the Austrian representative. The Australian proposal concerned a question of pure procedure and Egyptian legislation in any case contained a provision exactly corresponding to that proposed by the Australian representative.

Mr. ELLICOTT (Australia) said that his delegation would not wish to press its proposal in the face of objections. It had not intended the provision in question to be exclusive; it would be without prejudice to other systems.

Article 29

Mr. BURGUCHEV (Union of Soviet Socialist Republics) thought it desirable that article 29 should be optional. It implied that, in addition to ratification, some special act or instrument was required for the entry into force of the Law.

In some States, however, ratification would be sufficient for the Law to enter into force. The article should not therefore be binding on such States.

Mr. JAKUBOWSKI (Poland) endorsed the USSR representative's remarks. He thought that the article should be deleted, but if a majority of the Commission considered it necessary he would support the USSR proposal that it should be facultative. Under his country's legal system, accession to a convention was sufficient for the instrument to become binding proprio vigore. The provisions of article 29 were in contradiction to the status of the draft Convention as such.

Mr. ROGNLIEN (Norway) said that the purpose of article 29 was to state that Part I of the Convention would have the force of law in each Contracting State. In his view, that principle was an important one. Part I of the Convention was entitled "Uniform Law"; it was an integral part of the Convention and should be regarded as binding. Paragraph (1) of article 29 did not spell out the way in which Contracting States should give the Uniform Law the force of law; that was left to each Contracting State to decide, in accordance with its constitutional procedures. In those countries where it was sufficient to ratify the Convention, Part I, being self-executing, would become the law of the land by the act of ratification and no further action would be required.

Article 29 (2) stated that each Contracting State should communicate to the Secretary-General of the United Nations the text whereby it had given effect to the Convention. If the text in question was simply the act of ratification, that instrument should be transmitted to the Secretary-General. In his view, the article was a significant one. However, if some delegations had difficulties, it should be possible for the Working Group to devise a formulation that would prove acceptable to all delegations and enable the article to be retained.

Mr. HONNOLD (Secretary of the Commission) agreed that paragraph (1) might have to be revised and clarified.

Mr. GUEIROS (Brazil) noted that, almost 30 years after the Brazilian delegation had taken part in the diplomatic conference to draft the Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, the Brazilian Congress had ratified the Convention and the question had arisen regarding the need for specific legislation to enable it to acquire legal force.

After a number of contradictory decisions, the Supreme Court of Brazil had ruled that the Uniform Law had become binding proprio vigore, as the result of the ratification of an international instrument such as the Convention. Therefore, his delegation considered that the article and commentary were both perfectly clear and covered the point satisfactorily.

Mr. LOEWE (Austria) associated himself with the views expressed by the Soviet and Polish representatives. His own country also observed the principle of direct transmission and a text such as article 29 could give rise to considerable difficulty; his delegation would therefore prefer to delete the article. However, if the article was to be retained, his delegation would support the proposal to reformulate it in order that it should specify that implementing legislation could be purely optional and that States could simply ratify the Convention.

Mr. JENARD (Belgium) felt that a protracted discussion was somewhat premature since the main point at issue was the field of application of the Convention. His own delegation would prefer the Convention to be applied by mutual agreement, in which case there would be no need of article 29. The alternative was that the Convention should be of the traditional kind. However, what was needed, first of all, was a decision upon the Convention's field of application.

Mr. KAMAT (India) said that his delegation appreciated the purpose of article 29 because in his country conventions did not automatically become the law of the land and implementing legislation was required. However, it had some doubts whether the language in the article could take care of the problem of reservations in Part III. The commentary on the article stated that the Uniform Law was not a "model Law" and that its provisions could not be changed to modify its meaning. However, Contracting Parties would presumably make changes or reservations with regard to Part I when adopting the implementing legislation. The language of the article did not seem quite satisfactory and should perhaps be amended to specify that the Contracting State would give the provisions of Part I the force of law, subject to any changes that might be necessary as a result of reservations.

Mr. RECZEI (Hungary) agreed with the views of the Belgian delegation and felt that the diplomatic conference would have to take a decision on the final scope of the Convention. In the opinion of his delegation, the ratification of an international convention had, in fact, the force of law because it was considered

as a special law which took precedence over general law. His delegation felt that the article should be deleted, as it appeared both superfluous and premature.

Mr. ELLICOTT (Australia) said that an international convention could not become part of Australian law automatically. His delegation was particularly concerned with two matters: the obligation undertaken by each of the Contracting States and the implementation of that obligation. It might be possible to separate those two aspects and specify either that the provisions in Part I should have the force of law in each Contracting State or that, when necessary, each Contracting State should, in accordance with its constitutional procedures, give the force of law to Part I. His delegation had a further difficulty; Australia was a federal State and it was not always possible for a federal Government to implement a convention which might come within the legislative jurisdiction of its constituent states. His delegation felt that there should be some provision to deal with the problems of federal or non-unitary States and it had therefore submitted an amendment to the article (A/CN.9/V/CRP.16).

Mr. KHOO (Singapore) said that it should not be too difficult to devise a formula for article 29 to satisfy those States whose constitution would require some legislative action to give effect to the Convention. His delegation felt that a formulation such as "Each Contracting State shall take such steps as may be necessary in accordance with its laws or constitution" would not imply that the Contracting State was obliged to take steps under its own law. In his view, such a formulation would solve at least some of the problems connected with article 29 (1). In paragraph (2), a formula such as "Each Contracting State shall notify the Secretary-General of the United Nations of the coming into force of this Convention in its territory and, where any instrument is required under the constitution of law of any Contracting State, a copy of such instrument shall also be forwarded to the Secretary-General of the United Nations" might prove satisfactory.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that article 29 was, to say the least, unsatisfactory. In paragraph (1) his delegation had the impression that the words "not later than the date of the entry into force" clearly implied that a document other than the instrument of ratification was necessary for the Convention to have the force of law. Furthermore, article 40 of Part IV stated

that the instruments of ratification were to be deposited with the Secretary-General of the United Nations and article 29 (2) was either a repetition and quite unnecessary, or referred to something other than article 40. Accordingly, article 29 should be referred back to the Working Group.

Mr. OGUNDERE (Nigeria) said that his delegation had some difficulties with article 29, as his own country was a federal State. The article was quite inappropriate in the case of federal or non-unitary States and should be either deleted or referred back to the Working Group with a request to study the problems of federal States more carefully.

Mr. JAKUBOWSKI (Poland) said that in his country a ratified convention acquired the force of law and no other implementing legislation was necessary. The present drafting of article 29 would make it necessary to take specific implementing action. Professors Matteucci and von Caemmerer had drawn attention to a number of situations in which Contracting Parties had introduced changes in the original text of a Uniform Law and had noted that legislative interpretation was one of the main sources of lack of uniformity in its application.

Mr. LEMONTEY (France) felt that the Commission should postpone further consideration of article 29 until it had discussed the field of application of the Convention.

Mr. YANEZ-BARNUEVO (Spain) said that his delegation shared the difficulties expressed by a number of delegations with regard to article 29, which seemed to be based on the assumption of the need to incorporate the Convention into national law. In view of the problems raised, his delegation felt that article 29 should be deleted or rephrased to include the expression "... shall have the force of law". Furthermore, his delegation wondered whether it would not be more appropriate to use the term "State Party" rather than "Contracting State"; the Working Group might wish to consider that point.

Mr. JENARD (Belgium) felt that it was still premature to discuss article 29 until the scope of the Convention had been defined. The Commission might envisage either a reciprocal Convention or a Uniform Law and, if it chose the latter, there would be problems for some countries because there would be two instruments, the Convention and the Uniform Law. If no time-limit was established, States might ratify the Convention without introducing the Uniform Law.

Mr. GUEIROS (Brazil) said that article 29 was very closely related to article 42. Both articles should be referred back to the Working Group.

Mr. SINGH (India) said that the question of the ratification of treaties fell within the purview of public international law, not private international law. Multilateral treaties must be governed by public international law. The Convention should not stipulate how States should ratify the instrument; it should be left to each country to ratify the Convention in accordance with its own procedures.

Mr. MAHUNDA (United Republic of Tanzania) said that he considered article 29 superfluous, inasmuch as it could be interpreted as calling for an act of ratification. Article 40 specified that the Convention was subject to ratification.

Mr. LEMONTEY (France) said that the Commission should not decide whether to retain or delete article 29 until it had taken a decision on the sphere of application of the Convention.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to defer consideration of article 29 until it had discussed the sphere of application of the Convention.

It was so agreed.

/The last part of the meeting was taken
up by the discussion of other matters/

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Article 29 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that his delegation had the most serious reservations with regard to article 29. The adoption of article 29 would mean that ratification or accession would have different effects for different States according to whether a unitary State or a federal State was involved.

The CHAIRMAN noted that the majority of delegations which had spoken on article 29 had expressed a wish that consideration of it should be deferred until the sphere of application of the draft Convention was clearly defined and he suggested that the Commission should postpone further consideration of that article.

It was so decided.

Article 30

The CHAIRMAN noted that no delegation appeared to wish to speak on article 30 and he suggested that that article should be considered adopted.

It was so decided.

Part III: Declarations and reservations

Mr. ROGNLIEN (Norway) said that the Working Group had before it proposed amendments which would limit the application of the draft convention to relations between nationals of Contracting States. The Working Group proposed to draft a provision to that effect which would take the form either of an express stipulation which would be general in scope, or of an optional reservation.

Article 31

Mr. MATTEUCCI (International Institute for the Unification of Private Law) said that he had doubts regarding the advisability of the provisions of article 31, which had been modelled on those of article II of the 1964 Convention where they had been introduced to reserve the application of the Uniform Law

adopted by the Scandinavian countries and that which the Benelux countries were in the process of elaborating. It might be asked whether the reasons which justified the inclusion of those provisions in ULIS were valid in the case of an instrument on prescription, a matter which related more to procedure. It might be feared that article 33 would give rise to difficult situations: in the case of successive international sales, one of which took place within a free exchange zone having its own rules and the other between States subject to the Convention on prescription, the buyer might have to take account of two different limitation periods in his relations with the seller, on the one hand, and in his relations with the subpurchaser, on the other hand. It would obviously be preferable if all countries recognized the same rule on limitations.

Mr. JENARD (Belgium) said he thought that article 31 was useful. The draft Convention text which represented a compromise between States having different legal systems, no longer appeared necessary between countries which applied the same rules. Moreover, article 31 made it possible to avoid conflicts of conventions. Once the sphere of application of the Uniform Law had been clearly defined, some provisions of the article could be deleted.

Mr. MANTILLA-MOLINA (Mexico) said he would like to have an explanation regarding the scope of article 31. If the text was interpreted literally, any Contracting State might at any time declare that the Uniform Law did not apply to a given contract, which seemed quite surprising.

Mr. LOEWE (Austria) shared the view of the Belgian delegation. It should be noted, moreover, that the volume of trade between countries which had already adopted common provisions was in general quite considerable by comparison with that between such countries and third countries, and it would be unnecessarily complicated to seek to apply a new system to them. Lastly, it should be pointed out that relations between countries having the same rules were exclusively bilateral and had no effect on third States.

Mr. CHAFIK (Egypt) shared the view of the representatives of Belgium and Austria. The article under consideration was, in fact, designed to encourage regional unification at the same time as universal unification. Regional

unification was of unquestionable importance to countries which, like those grouped within the Arab League, had not only ties of proximity, but also deeper affinities.

Mr. GUEIROS (Brazil) said he had listened with great interest to the statement by the observer for UNIDROIT. He himself shared the doubts of the Mexican delegation regarding the scope to be given to article 31.

Mr. ROGNLIEN (Norway) pointed out that it was article II of the 1964 Hague Convention which had served as a model for article 31. When it adopted an international convention, a State incorporated it into its internal law, following procedures which depended on its Constitution and which the text of article 31 could not set out in detail. He thought, however, that the Working Group should try to improve the wording of the article. He agreed with the principle stated in article 31, but if it created difficulties for certain States, the words "because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention", at the end of paragraph (1), should perhaps be deleted.

Mr. OGUNDERE (Nigeria) said he understood the position of those who supported article 31, although he was not convinced by their arguments. The aim of the draft Convention was, in fact, to set uniform rules. Article 31, which seemed made to measure for certain European countries and which introduced an important reservation in their favour would make it all the more difficult to apply a convention which was not designed for professors of law but for merchants and businessmen.

Mr. ROGNLIEN (Norway) observed that article 31, which was couched in general terms, was also applicable to groups of African or Latin American countries, for example, a fact which the latter should take into account.

Mr. KAMAT (India) said that he could not agree with the proposal of the Norwegian delegation which, by deleting the last two lines of paragraph (1), would deprive article 31 of its justification. That provision would become much too broad in scope. He approved of the concern to preserve regional unity, provided that, as stated in article 31, the legal rules of the countries concerned were the same or very closely related.

The CHAIRMAN noted that a consensus appeared to have emerged in favour of retaining article 31. That article should, however, be referred to the Working Group so that it could improve the text in the light of the observations which had been made regarding it, in particular by the Mexican delegation.

Article 32

The CHAIRMAN noted that no delegation had expressed a wish to speak on article 32 and he suggested that it would be considered adopted.

It was so decided.

Article 33

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he thought that article 33, which contained a special reservation in favour of States which had ratified the 1964 ULIS, was not justified from either the legal or the practical viewpoint. He therefore requested that the article should be deleted.

Mr. ROGNLIEN (Norway) said that the Working Group had drafted a new version of article 33 which extended the application of that provision to States Parties to any Convention on the international sales of goods, without restricting it, as the present text did, to States Parties to the 1964 ULIS. According to the new version, article 33 could be applied, inter alia, to the revised ULIS. The justification for the article was evident since, without the reservation contained therein, it would appear difficult to ask States which had already ratified an instrument on sales containing a certain definition of international sales to adopt another on limitation containing another definition of international sales.

Mr. MUDHO (Kenya) shared the view of the representative of the Soviet Union. Article 33, which ran counter to the uniformity sought, would, in fact, raise insuperable difficulties with regard to the application of the Convention between a country which had ratified the 1964 ULIS and a third country. It might, however, be thought that article 33 applied in conditions similar to those of article 31 and that States Parties to the 1964 ULIS could have recourse to it only in respect of relations between themselves.

Mr. GUEST (United Kingdom) agreed with the representative of the Soviet Union that article 33, was not justified from the legal viewpoint. From the practical viewpoint, however, due account should be taken of the fact that ULIS, which had already been ratified by six States, would enter into force in August 1972. There were, however, divergencies between the text of ULIS, in particular article 49, and the text of the draft Convention on prescription. If, therefore, it was hoped that States which had ratified ULIS would also be able to ratify the Convention on prescription, article 33 should be retained.

Mr. WARIOBA (United Republic of Tanzania) agreed with the representative of Kenya. Article 33, which in the view of the United Kingdom representative was not legally sound, was not justifiable from the practical standpoint either. It contained an important reservation which was mainly to the advantage of certain European countries and directly contradicted the principle of uniformity. His country could not therefore become a party to the Convention if the article was retained as it stood. He proposed that it should be deleted or at least amended in accordance with the suggestion by the representative of Kenya, so that its application would be limited to the reciprocal relations of States Parties to ULIS.

Mr. OGUNDERE (Nigeria) also opposed the retention of article 33, which imposed an additional obligation on States that were not parties to ULIS. The article in question was moreover, in conflict with article 19 of the Vienna Convention on the Law of Treaties, which, although it had not yet entered into force, was an essential basic text. Article 19 (c) of the Vienna Convention provided that any reservation which a State might make with regard to a treaty must not conflict with "the aim and purpose" of the treaty. Article 33 was, however, in direct contradiction with the aim of the draft Convention, namely, the unification of the rules governing prescription.

Mr. LOEWE (Austria) noted that he had submitted a proposal to amend article 33 (A/CN.9/V/CRP.11) by adding a second paragraph designed to grant States which had not ratified the 1964 ULIS the same prerogative as was granted, under article 33 (b), to States which had ratified it. He favoured the retention of article 33, whose significance should not be overestimated inasmuch as it dealt with two very specific situations relating, first, to the sphere of

application of the Convention on Prescription in the case of countries which had ratified ULIS and, secondly, to the question of lack of conformity, which was the subject of the Austrian amendment. Austria, which had not ratified the 1964 ULIS, was awaiting the final formulation of revised ULIS, at which point it would be able to decide whether to ratify the 1964 ULIS, revised ULIS or neither. If article 33 was deleted, Austria would have to defer any consideration of ratifying the Convention on Prescription until after it took a decision with regard to ULIS.

Mr. LEMONTEY (France) said that since the procedure for ratification of the 1964 ULIS had been initiated in the French Parliament, his delegation was obviously in favour of retaining article 33.

Mr. MATTEUCCI (International Institute for the Unification of Private Law) associated himself with the representative of Kenya in pointing to the difficulties which could arise in a situation where a businessman who was a national of a country which had invoked the reservation available under article 33 entered into a contract with a national of a country which had not acceded to the 1964 Convention; in such cases, the courts would be faced with a conflict of definitions. To avoid problems of that kind, article 33 should be amended to bring it into line with article 31. The reservation would thus apply only to reciprocal relations between States which had ratified the 1964 Convention.

Mr. ELLICOTT (Australia) said that, given the stage reached in the work relating to international sales, retaining article 33 would create a serious risk of conflict in the definition of such sales. No satisfactory solution could be achieved until that definition had been finalized. He therefore proposed that consideration of article 33 should be deferred until an acceptable definition was formulated.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) requested the observer for UNIDROIT to explain how it was that the 1964 Convention was entering into force without taking account of recommendation II in the annex to the Final Act of the Hague Conference. That recommendation, which was entirely pertinent, provided that if ULIS did not come into force by 1 May 1968, a meeting of representatives of States which had participated in the Conference should be

convened to consider what further action could be taken to promote the unification of law on the international sale of goods. If the 1964 Convention was entering into force, it could well be asked what purpose was served by the work of UNCITRAL. A serious situation had thus arisen. Article 33 should not be regarded lightly. His delegation favoured its deletion because it would otherwise nullify the work of unification undertaken under United Nations auspices.

Mr. RECZEI (Hungary) said that he favoured the deletion of article 33. The Commission's current debate created the impression that the will to achieve a unified law had waned and gave reason to fear that the States which had ratified the 1964 ULIS no longer had any real interest in the effort to achieve uniformity in the field of international sales. There was no justification for introducing into the draft Convention a rule which favoured the six countries that had ratified the 1964 ULIS while the Commission was working to revise that instrument in the interests of all countries.

There was a further difficulty which might arise from the application of article 33. Article V of the 1964 Convention provided that a State could declare that it would apply the Uniform Law only to certain contracts. A paradoxical situation might arise if a State availed itself, at one and the same time, of the reservation provided for in article 33 of the draft Convention on Prescription and the one provided for in article V of the 1964 Convention. It would be impossible to decide which was the applicable law.

Mr. GUEIROS (Brazil) associated himself with the delegations which were opposed to retaining article 33. The latter's retention by the Commission would be an implicit admission of helplessness which would discourage in advance any endeavour to achieve uniformity. His delegation favoured the deletion of article 33 because its provisions gave more importance to the 1964 ULIS than to the Commission's revision of that instrument.

Mr. JAKUBOWSKI (Poland) said that he favoured the deletion of article 33 for the reasons given by other members of the Commission. In his view, the matters dealt with in the draft Convention were not identical with those which ULIS was intended to regulate. In addition, the wording of article 33 (b) was too general;

it implied that there were numerous possibilities of conflict. Retention of the article would give the impression that a provision which would undermine in advance any attempt to revise ULIS had been introduced into the draft Convention.

Mr. NESTOR (Romania) said that current efforts to achieve uniformity in law were proceeding simultaneously at the levels of regional relations and of remote international relations. The problem facing the Commission was to decide whether work to achieve uniformity in international law proper should be pursued to the detriment of regional efforts to that end. The uniformity achieved by certain groups of States should be preserved, and steps should be taken to ensure uniformity in relations extending outside regional economic groupings. At the regional level, relations between Romania and the other countries of the Council for Mutual Economic Assistance were governed by the relevant COMECON instruments, which extended to matters of prescription. His delegation was none the less concerned to achieve uniformity in the law governing its relations with countries which were not part of the same region. That was why it favoured the deletion of the final words of article 36 ("in special fields") in order to safeguard the provisions of regional agreements.

As for article 33, it was unacceptable that the countries which had ratified the 1964 Convention should impose the ULIS definition of international sales on other countries. If, on the other hand, those countries wished to retain that definition in their reciprocal relations, his delegation would have no objection.

Mr. KAMAT (India) said he agreed with the representative of the USSR in finding it regrettable that the Working Group had made article 33 apply only to countries which had ratified the 1964 Convention. The Working Group should have borne in mind the fact that the Commission was revising ULIS and should therefore have made the article applicable to countries which became parties to the revised ULIS, in which there would unquestionably be a different definition of international sales. Some delegations had proposed that article 33 should be deleted, but that would not solve the problem; the definition of international sales in article 3 of the draft Convention on prescription would still be different from the definition which the Working Group was currently attempting to formulate. The representative of UNIDROIT had proposed that article 33 should be brought into

line with article 31 so that the declaration enabling a State to derogate from the Uniform Law on prescription would affect the relations of that State with another State only if the other State agreed. That was also no solution and would merely delay ratification of the Convention on Prescription, since each State, before committing itself, would prefer to wait until the definition contained in the revised ULIS was known.

The only possible solution was to make the definition of international sales in the law on sales identical with that in the law on prescription. If the two definitions coincided, there would be no problem in deleting article 33.

Mr. COLOMBRES (Argentina) said that his delegation had strong reservations concerning article 33 but could accept it if it was amended in the manner suggested by the representative of UNIDROIT; subparagraph (a) would then provide that the State in question would apply the ULIS definition of international sales only to States which had ratified the 1964 Convention.

Mr. JENARD (Belgium), noting that his country had ratified the 1964 Convention, said that the reason why his Government regarded the reservation provided for in article 33 as indispensable was precisely that it wished to accede to the future Convention on Prescription but could not do so unless that reservation was permitted. In practical terms, article 33 responded to two needs. First, it lent a certain flexibility to the question of defining international sales; his delegation had not opposed the definition contained in article 3 precisely because it had hoped that article 33 would be adopted. Secondly, article 33 dealt with the problem raised by article 49 of the 1964 Uniform Law, the solution of which was in turn linked to the version ultimately decided upon for articles 9 and 10 of the draft Convention on Prescription.

His delegation had made important concessions since the beginning of the debate but could make no concession on the reservation provided for in article 33, whatever its final formulation might be.

Mr. MATTEUCCI (International Institute for the Unification of Private Law), replying to the representative of the USSR, said that the reason why the recommendation annexed to the Final Act of the Hague Conference had not been acted upon was that UNCITRAL had already been in existence in 1968 and had been dealing with the revisions of ULIS.

With regard to article 33, he was in favour of the compromise solution proposed by the Argentine delegation, which called for limiting the scope of the reservation provided for in the article. However, that would not solve every problem, since the revised ULIS might also contain a definition of international sales different from that in the Uniform Law on prescription. It would also be advisable to leave a door open for States that ratified the new ULIS.

The difficulties raised by article 33 were due to the fact that the Commission was dealing with a provisional situation; they would disappear if, once the revision of ULIS was completed, a diplomatic conference was called to consider a single text and thus ensure the establishment of a truly uniform law. Admittedly, certain differences might persist even then in the definition of sales, since, as the representative of Austria had said, the Convention on Prescription could have a broader sphere of application than the Convention on international sales. However, the problem was not insoluble. It would therefore be desirable for the Commission to proceed with its work, either retaining article 33 with the proposed change or simply eliminating it.

Mr. CHAFIK (Egypt) said that he appreciated the concern of Governments which had ratified the 1964 Convention and did not wish to be confronted by different definitions of an international contract of sale. On the other hand, retention of article 33 could only be harmful to the efforts to achieve unified law. The change suggested by the observer for UNIDROIT could solve the problem if it was carried further; in order for derogation to article 3 to be permitted, the two States concerned should not only have ratified the 1964 Convention but should also have made the reservation provided for in article 33.

Mr. CATHALA (Commission of the European Communities), referring to the comments by the Romanian representative on the international and regional unification of law, said that the European community institutions had refrained from taking any initiative in the sphere of international sales and had always co-operated with the work of UNCITRAL in the hope that the widest possible uniformity would be achieved. With regard to article 33, he shared the concern of those States which had not ratified the 1964 Convention and also of those which

had ratified it. As the Indian representative had said, the difficulty arose from the varying definitions of sales. He supported the proposal made by the representative of UNIDROIT.

After an exchange of views in which Mr. BURGUCHEV (Union of Soviet Socialist Republics), Mr. KAMAT (India), Mr. CHAFIK (Egypt), Mr. WARIOBA (United Republic of Tanzania) and the CHAIRMAN participated, Mr. OGUNDERE (Nigeria) proposed that in an effort to solve the serious problem raised by article 33 on the basis of the consensus approach which the Commission sought to follow, the article in question should be referred back to the Working Group. The Group would be requested to submit a draft that took account of the various changes which had been suggested.

Mr. ROGNLIEN (Norway) said that the interests affected by article 33 went beyond the competence of the Working Group. If the Commission could not find a solution, it could perhaps place article 33 in square brackets and leave the decision on it to the diplomatic conference which would be convened to adopt the Convention.

Mr. JENARD (Belgium) proposed that the problem of article 33 should be submitted to an ad hoc group composed of representatives of countries which did not intend to ratify the 1964 Convention as well as of countries which had ratified it or intended to do so.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that he supported that idea.

After an exchange of views in which Mr. LOEWE (Austria), Mr. KHOO (Singapore), Mr. ROGNLIEN (Norway), Mr. GUEST (United Kingdom) and the CHAIRMAN participated, the CHAIRMAN suggested that, in accordance with the proposal made by the Belgian representative, the Commission should establish an ad hoc group, consisting of the representatives of Austria, Belgium, Kenya and the USSR, to consider article 33.

It was so decided.

Article 34

Mr. WARIOBA (United Republic of Tanzania) said that article 34 would have the effect of jeopardizing the Commission's efforts in earlier articles to prepare a uniform statement to replace the rules of private international law. There would be no harm in omitting article 34, which would only lead to considerable confusion.

Mr. MUDHO (Kenya) said that article 34 would completely weaken article 2 (1) and that parties which had not acceded to previous Conventions on the conflict of laws affecting limitation in respect of the international sale of goods would be placed in a very difficult situation. He would be prepared to retain article 34 if delegations which had acceded to such Conventions could provide some clarification as to its intent.

Mr. DROZ (Hague Conference on Private International Law) emphasized that article 34 referred to States that had already acceded to Conventions on the conflict of laws affecting limitation in respect of the international sale of goods. He knew of no conventions in force which specifically dealt with that subject. The 1955 Hague Convention on the Law Applicable to International Sales of Goods was silent on the matter. A question of principle was involved, namely, whether a State which signed a treaty was no longer bound by its commitments under a previous treaty.

Mr. GUEIROS (Brazil) said that he could not accept the argument advanced by the representative of the Hague Conference. Article 34 discouraged the uniformity which the Commission was striving to achieve. It should be either deleted or referred back to the Working Group, which could seek a compromise.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that article 34 might create confusion and uncertainty in the application of the Convention. The provisions of the article detracted from the uniformity aimed at by the Commission in the drafting of the Convention.

Mr. KAMAT (India) said that article 34 was not really necessary, since it was intended to cover two types of situations whose likelihood of occurring was actually very remote. The article referred to countries which were already parties

to other Conventions on the conflict of laws affecting limitation in respect of the international sale of goods; however, as the representative of the Hague Conference had indicated, no such instrument existed and the parties to the 1955 Hague Convention did not consider it applicable to limitation. The article also had in mind countries which become parties to such Conventions before they became parties to the Convention on prescription. That was unlikely to occur. His delegation agreed that the applicability of the Convention should not be reduced.

Mr. RECZEI (Hungary) said that confusion would result if allowance were made for States to enter reservations on limitation. Article 34 spoke of Conventions on the conflict of laws "affecting" limitation; however, no such convention existed. The situation was unclear in respect of the 1955 Hague Convention. If the applicable law was continental law, then limitation was affected, whereas it was not affected if the applicable law was common law. Article 34 attempted to give universal effect to a Convention which had been ratified by only seven States. The States which had ratified that Convention and planned to become Parties to the Convention on prescription would have to decide which of the two would prevail in cases in which they were involved. He therefore agreed that article 34 should be deleted.

Mr. OGUNDERE (Nigeria) said that the views he had expressed with regard to article 33 also applied to article 34. Article 34 should be deleted, as it was not conducive to uniformity and would only lead to confusion. If the relationship between the 1955 Hague Convention and the draft Convention on prescription was disputed among specialists, persons who were not specialists would encounter even greater difficulties. Moreover, it was essential that the Convention should not consolidate the interests of a few States at the expense of the interests of the international community.

Mr. JENARD (Belgium) said that, although Belgium was a party to the 1955 Hague Convention, it would not object to the deletion of article 34, because it felt that the Hague Convention did not specifically cover limitation.

Mr. COLOMBRES (Argentina) proposed that an attempt should be made to limit the cases covered in the article to reciprocal relations between two States having obligations under another treaty.

The CHAIRMAN observed that there appeared to be a consensus to delete article 34.

Article 35

Mr. GUEST (United Kingdom) said that article 35 raised a general problem regarding a point of policy determined by the Working Group at its previous session, namely, that, in the case 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. His delegation considered that policy far too ambitious. There should be uniformity, whatever the forum. Moreover, under United Kingdom legislation, one year could pass before a foreign party learned of a claim brought against it. It was unreasonable to ask a foreign court to recognize the interruption of the limitation period. Accordingly, if the Commission ultimately decided to give international effect to such interruptions, it would be essential to include a provision along the lines of that contained in article 35.

Mr. ROGNLIEN (Norway) recalled that the initial draft Convention had provided for giving only local effect to interruption; ultimately, the Working Group had felt that it would be strange if the international Convention did not also provide for international effect of interruption and that such interruption should be international unless otherwise provided in the text. Article 35 had been included in order to allow States to enter reservations.

A number of members had serious doubts as to the workability of article 35 and feared that considerable practical difficulties would arise for private parties if many States elected to make the reservation under the article. He personally thought that the scope of article 35 should be limited to articles 15 and 16. It was extremely important that judicial proceedings instituted in any State, under article 12 for instance, should have a universal effect of interruption of the limitation period. Lack of knowledge of the institution of proceedings should not lead to abuse, since those proceedings were in the hands of a public authority and were therefore of public notoriety. He agreed with the representative of the United Kingdom that, in some instances, time might elapse before the other party

received notice of such proceedings, but in most cases the defendant would soon become aware of the institution of proceedings against him. Reservations should not be allowed on article 14 and particularly on article 18 (1) (b); the reference to those two articles should therefore be deleted from article 35. The fact that article 21 had not been mentioned in article 35, as had been suggested, was a concession to the United Kingdom delegation.

Mr. LOEWE (Austria) said that, during the discussion of the articles mentioned in article 35, he had already said that it would be either unsatisfactory or impractical for proceedings abroad to have an international effect of interruption. Such an effect could be accepted only if reservations were allowed in some cases. He fully endorsed the position of the United Kingdom representative. However, the Commission should take three considerations into account. The first was that a distinction should be made between proceedings instituted in a foreign jurisdiction and those instituted in the national jurisdiction. In his view in the case of a decision on the merits of the case which was taken abroad but which would be recognized on the national territory, the institution of proceedings would justify the interruption of the limitation period. Secondly, in view of the important restrictions which had been made to article 16, it was not absolutely necessary to include that article within the scope of article 35; his country was prepared to recognize the effect of interruption if non-judicial proceedings took place in a contracting State against a debtor whose place of business or residence was in that State. The third consideration had already been stated during discussions of article 21; that article authorized the reopening of a limitation period on a debt which had already expired. He therefore urged that article 35 (1) should also allow reservations to article 21.

Mr. OLIVENCIA (Spain) pointed out that an article on reservations was necessary. However, before taking a final position on the subject of reservations, the Commission should know how the final version of articles 16 and 21 would read.

Mr. RECZEI (Hungary) said that article 35 had been included in the Convention for the benefit of common law countries. He fully agreed with the Norwegian representative that a more selective choice of reservations was needed. Article 35 (1) allowed the exclusion of almost one quarter of the Convention and led to new complications.

Interruption of the limitation period could be the product of legal proceedings or of non-procedural means; non-procedural means could be covered by reservations. However, if a judgement subsequent to legal proceedings in a foreign country was recognized in the United Kingdom, he wondered why the institution of such proceedings should not lead to interruption of the limitation period in the United Kingdom.

Mr. DEI-ANANG (Ghana) said that his country followed common law but he was nonetheless unhappy about article 35, which should be deleted. That article amounted to a statement that the prospective plaintiff should institute legal proceedings in the two relevant countries at the same time. If the plaintiff instituted proceedings in country A but could not interrupt the limitation period in country B, there was no reason for the defendant in country B to take any measures. He need only wait until the judgement had been given in the other country (A) and then state that the limitation period had expired. Commercial lawsuits sometimes took as long as 10 years, so that such a course was obviously unfair.

The Commission should not retain article 35 in the Convention in the hope that few Contracting States would use it. If all States parties used their option under article 35 (1) a quarter of the Convention would be useless for all practical purposes and there would really be no point in trying to have a Uniform Law applicable to all countries.

Mr. JAKUBOWSKI (Poland) said that the best solution would be for the Commission to adopt the principle of the international effect of interruption. Some causes of interruption could be exempt from reservation, as suggested by the Norwegian representative, but not interruption due to the institution of judicial and arbitral proceedings. If no international effect of interruption was granted by the Convention, the status quo would be better, for the reasons given by the representative of Ghana.

If some countries needed to express reservations on interruption of the limitation period due to proceedings, two solutions were possible. The first was to follow the Norwegian suggestion and to limit reservations to the special proceedings mentioned in article 15, while the second solution was to retain article 35 (1) in its existing form but to maintain the possibility of a declaration under article 35 (2). It would be unfair for one of the parties to be penalized by

a provision to the effect that proceedings must always be instituted in the country of residence of the defendant.

Mr. JENARD (Belgium) said that the reservations allowed under article 35 (1) would make the Convention lose an important part of its substance; it would be peculiar if an international Convention did not have an international effect. The dangers of article 35 were greater than the dangers arising from abuses of the articles for which reservations were permitted. He supported the deletion of article 35. With reference to article 12, he agreed with the representative of Ghana. Proceedings could be taken against the debtor in a foreign country and it was for the debtor to ascertain which States were parties to the Convention. Reservations with regard to the provisions of article 16 did not seem very useful, since article 16 referred to the jurisdiction where the interruptive act occurred. A reservation under article 18 (1) (b) would lead to a ridiculous situation whereby a judgement in country A was not recognized in country B while the court in country B stated that it was not competent in the matter because proceedings were in progress in country A. Article 21 could not be the subject of a reservation, as suggested by the representative of Austria, because its provisions were even more necessary if the other reservations in article 35 (1) were maintained.

Mr. SMIT (United States of America) agreed with the principle of the international effect of interruption, but with qualifications. International effect would be most inappropriate if the sphere of application of the Convention was extended to all contracts of international sale irrespective of where they were concluded. The Convention should also explain exactly what it meant by the international effect of interruption. That effect should be limited to circumstances arising in States parties to the Convention or to the country where the effect had occurred, under article 16 subject to those reservations, the Convention should give interruption of the limitation period international effect.

He agreed with the representative of the United Kingdom regarding possible lack of knowledge of the defendant in a lawsuit. In the United States, for instance, the plaintiff could start a lawsuit without the defendant's knowledge, by filing a complaint in court, which marked the start of the lawsuit. Such a case would be possible in an international situation also, for instance by use of the institution of "signification au parquet". In most cases that would not be a serious problem because the defendant learned of the institution of proceedings, so

that the international effect of interruption did not present great dangers. The Commission should not take a decision on article 35 until the Working Group had considered it further.

Mr. GUEIROS (Brazil) said that he was opposed to article 35 because the application of the Uniform Law would become complicated in proportion to the amount of reservations allowed. Businessmen would have difficulty in finding out whether their own Governments had made reservations on any articles, particularly in view of the provision in article 35 (2) that any State could "at any time" declare its reservations. Furthermore, the phrase in article 35 (2) that a State would "not be compelled" was unseemly, in view of the sovereignty of States.

Mr. LEMONTEY (France) said that article 35 would lead to a fragmentation of the Convention which would make it pointless. He agreed with the Brazilian representative that a substantive difficulty would arise if article 35 was retained, and also total confusion in the application of the Convention because it would be very difficult to find out who had made reservations. Article 35 (2) appeared to provide for retaliatory measures against countries which had made reservations under article 35 (1). He agreed that article 35 should be deleted; if it was retained, he was entirely opposed to the inclusion of any new article within its scope.

With regard to the United States representative's reference to the institution of "signification au parquet" under which an action could be started against a non-resident defendant without the defendant's knowledge, he noted that legislative measures had been taken in France to alleviate that provision and careful search was made, by orders of the court, to find out the address of the non-resident and to give him notice of the proceedings.

Mr. ELLICOTT (Australia) said that article 35 cut across the idea of uniformity and universality and it was understandable that many delegations should consider it undesirable. It would be patently unfair for a limitation period to cease to run without the debtor becoming aware of the fact. The United Kingdom representative's remarks in that connexion were sound and the Commission should endeavour to overcome the problem. Under Australian law too, it was possible to

take out a writ and to extend it after 12 months. His delegation could only suggest that the draft Convention should contain a provision that the limitation period should not be interrupted unless the fact of the institution of proceedings had been brought to the debtor's attention within three months. Failing that, the draft Convention should contain provisions on the lines of article 35, although it would not be necessary to include a reference to articles, such as article 16, which contained provisions for the serving of notice of an act on the debtor. The real problem arose from article 12, which must be considered in conjunction with article 18. Article 35 might be confined, therefore, to a situation arising from the application of those two articles.

Mr. OGUNDERE (Nigeria) said that, having taken a universalist approach to the draft Convention as a whole, his delegation could hardly reverse its position on article 35, despite the United Kingdom representative's remarks concerning its application in the common law system - on which his own country's legislation was based. The application and interpretation of reservations was the most difficult aspect of the work of legal advisers to Governments, and a plethora of reservations should be discouraged as a general rule.

It had been argued that the effect of the reservations in article 35 would be that the debtor would have adequate notice of legal proceedings. The latter were constituted either by a court action or by arbitration and, in his experience, the debtor was always notified of the institution of such proceedings. In any case, the debtor was usually informed beforehand that his failure to effect performance would have certain consequences and it was only when the debtor failed to effect performance that proceedings were instituted.

The draft Convention represented a balance between the common law and civil law systems. In a spirit of conciliation, his delegation was prepared to make a concession to the civil law countries, on a quid pro quo basis, to maintain that balance.

Mr. KAMAT (India) said that his delegation would find it difficult to take an immediate stand on article 35. He appreciated the arguments based on the need for universality but would point out that many provisions in earlier articles were

by no means universal - as his delegation had pointed out in the discussion of them. Article 16, for example, referred to acts extending the period of limitation but its approach was not universal; it was rather an attempt to give international effect to acts under certain municipal systems. Article 18, also, was neither universal nor fair and his delegation had pointed out that, if the desire was to exclude abortive proceedings, it should require the creditor to act in good faith. His delegation had received no clear answer in that connexion and the article had been referred to the Working Group. It was only when that and other articles were resubmitted by the Working Group that his delegation would be in a position to take a decision with regard to article 35. He found arguments that article 35 would emasculate the draft Convention to be somewhat exaggerated, because the article referred only to certain rules regarding interruption. Those rules were not the heart of the draft Convention but an attempt to accomodate national systems. He suggested that article 35 should be placed in square brackets pending the resubmission of the earlier articles. The Commission should not be forced to take any definite position on article 35 immediately, particularly in view of the provisions of article 37.

Mr. NESTOR (Romania) said that his delegation favoured the deletion of articles 34 and 35 although it stood ready to search for a compromise. The number of reservations possible under the draft Convention should be kept as small as possible.

Mr. GUEST (United Kingdom) said that article 35 raised a problem more fundamental than that of the opposition of the common law and the civil law systems. Unfortunately, that problem had been dealt with by recourse to reservations; it would have been better if the Working Group had inserted a section in the draft Convention, dealing with the whole question of the international effect of interruption. It had not explored the question of acts which, while unknown to the other party, were held to constitute judicial proceedings. Nor had it considered the question of the institution of proceedings before incompetent jurisdictions whose judgements other countries refused to recognize. The blanket approach in article 35 could raise the most serious problems with regard to the ratification of the draft Convention. His delegation would be happy to see it deleted, but only on condition that the problems to which he had referred were dealt with systematically in the text.

The representative of Ghana had said that the retention of article 35 would lead to the institution of two series of proceedings as opposed to one. He himself believed that its deletion would have that effect. If, for example, an English buyer instituted proceedings in London against a Japanese seller in the form of a "ghost" action designed merely to prevent the running of the limitation period, the English buyer would ultimately have to institute proceedings in Japan or in a country where the Japanese seller's assets were located. The deletion of article 35 would therefore mean that two actions would have to be instituted, not one.

The Polish representative had raised the question of arbitral proceedings, which were referred to in article 13. Under article 35, however, reservations with regard to article 13 would not be possible.

With regard to the relation by previous speakers of article 35 to article 21, he pointed out that if a buyer in London obtained a judgement against a Japanese seller which was recognized in Japan, the Japanese jurisdiction would enforce that judgement under the applicable laws of Japan - those laws were outside the scope of the draft Convention. It was only if the judgement was not recognized in Japan that article 21 would come into play and the buyer would have to institute an action in Japan.

Mr. SMIT (United States of America), replying to the representative of France, said that in using the French term "signification au parquet", he had been referring to a Dutch institution deriving from the French system. It was possible to begin actions against non-resident defendants in a number of countries which, although they followed the French system, had not followed the recent enlightened legislative example of France.

A possible solution would be a provision that interruption would be effective only where notice was given to the defendant.

Mr. MUDHO (Kenya) was inclined to think that the mere deletion of article 35 would not solve the basic problem to which various delegations, notably that of the United Kingdom, had referred. Nevertheless, his delegation would have difficulty in agreeing to the retention of the article as it stood.

The Commission would do well to consider a solution on the lines suggested by the representatives of Australia and the United States, namely, that the debtor should be notified when proceedings which could constitute interruption were instituted.

Mr. CHAFIK (Egypt) said that, although a draft Convention without reservations would be the ideal, there were States which did not accept the international effect of interruptive acts. Reservations were therefore a necessary evil. There appeared to be two views on the question in the Commission, one in favour of extending the scope of the reservations, the other in favour of reducing it. His delegation was prepared to accept the principle embodied in the article but felt that the scope of the reservations must be discussed further. A possible solution would be to redraft the article and introduce an element of reciprocity in article 35 (2).

Mr. DEI-ANANG (Ghana) said that, in proposing the deletion of article 35, he had not been unaware of the problems described by the United Kingdom representative but had considered them somewhat theoretical. While proceedings were instituted under the common law system by a writ renewable after one year, those proceedings could not be pursued to judgement without the defendant becoming aware of them. A judgement in default of appearance was possible, but only if it could be proved that the defendant had been shown the original writ. A judgement on the grounds of no defence could be obtained only if the defendant had been served with the writ and a full statement of the claim. A judgement in default of defence could be obtained only if the defendant failed to introduce his defence within the stipulated time. Such being the case, article 35 was not necessary to the common law system. The United Kingdom representative had referred to "ghost" actions. The Ghanaian system ensured that such actions could not remain on the books of the court indefinitely by means of a rule, present in many other common law systems, providing for a summons to show cause why an action should not be struck out if a step within that action had not been followed within one year by the next required step. Thus, the common law system did have internal corrective measures.

He agreed with the Australian representative that an attempt should be made to find a solution to the problems raised by the United Kingdom. The essential problem was to find a way of ensuring that a debtor was informed in due time of proceedings initiated against him in a foreign country by a creditor. He thought the matter should be referred to the Working Group for consideration.

Mr. GUEST (United Kingdom) said that the three problems which the Working Group should consider were: (a) the question of the notification of a debtor of the institution against him of judicial proceedings; (b) the question of the competence of the forum in which the proceedings were instituted; and (c) whether international effect should be given to the causes of interruption stated in articles 12, 14, 15, 16 and 18 (1) (b).

Mr. SMIT (United States of America) said that the Working Group should also consider the question of the definition of the countries in which the occurrence of an interruptive event would have international effect.

The CHAIRMAN observed that certain delegations, such as Belgium, Brazil, France and Nigeria, favoured the deletion of article 35, that others were opposed to it but would accept a reformulation of the principles stated therein and that the overwhelming majority favoured a compromise solution. He suggested that the article should be referred to the Working Group together with the comments of delegations, notably those of the United Kingdom.

It was so decided.

Article 36

Mr. BURGUCHEV (Union of Soviet Socialist Republics) proposed that discussion of article 36 should be deferred until the Commission's next meeting because the Working Group was currently engaged in its reformulation.

It was so decided.

Articles 37 and 38

The CHAIRMAN noted that the Soviet delegation had proposed (A/CN.9/V/CRP.19) that article 37 should be deleted.

Mr. ROGNLIEN (Norway) felt that the deletion of article 37 would mean that any State could make any reservations it deemed appropriate. The Working Group's intention had been to indicate that, while reservations to specific articles could be made, States would not be free to make other reservations if they wished to be regarded as Contracting States. If article 37 was deleted altogether, States would be able to enter all kinds of reservations and declarations. His delegation would like to have some clarification from the Soviet delegation on that point.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) assured the members of the Commission that it was not the intention of the USSR to enter an indefinite number of reservations. His delegation felt that any international document should permit the minimum number of reservations but was unable to accept article 37, since it stipulated that reservations could be made only in accordance with specific articles and that no other reservations would be permitted. His delegation might have to make declarations or reservations on certain provisions when it signed the Convention, and consequently was unable to support an article which formally precluded such a possibility.

Mr. WARIOBA (United Republic of Tanzania) said that there would obviously be provisions in the Convention that were unacceptable to one delegation or another, but he felt that all delegations should make every effort to reach agreement. The Soviet proposal did not commend itself to his delegation because according to general international law, if there was no article on reservations, any State could enter the reservations it deemed appropriate. Furthermore, as the Nigerian representative had pointed out, the interpretation of reservations was a very difficult task. If the Commission deleted article 37, the result would be a confusing proliferation of reservations and declarations. In the view of his delegation, it would be better for States to become parties to the Convention as it stood or not to become parties at all.

Mr. SMIT (United States of America) said that his delegation supported the deletion of article 37, not because it felt that countries which wanted to ratify the Convention should be free to make any reservations they deemed appropriate, but because it was conscious of the doctrinal concept of the nature

of international law and of the role of sovereignty. It was also anxious to avoid a lengthy and inconclusive debate on the sovereign right of States to make any reservations they desired.

Mr. JAKUBOWSKI (Poland) said that, while his delegation supported a limitation on reservations and felt that any limitation on the scope of the Convention would give rise to very complicated legal consequences, in view of the problems which had given rise to the Soviet proposal, he would suggest that the phrase "in respect of Part I of the Convention" should be inserted at the end of article 37.

Mr. DEI-ANANG (Ghana) said that so far the Commission had been dealing with technical problems but it was now encountering political ones. Certain articles, which were really appendages to the Convention, might give rise to problems for many delegations. For that reason, although his delegation would have liked to retain article 37, it was prepared to accept the proposal of the Soviet delegation.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that, although his delegation found the Polish proposal constructive and had no desire to make reservations on the operative part of the Convention, it was nevertheless the sovereign right of States to make reservations. That right should not be curtailed.

Mr. OGUNDERE (Nigeria) suggested that the article might be placed in square brackets for the time being.

Mr. ROGNLIEN (Norway) noted with satisfaction that there appeared to be a consensus that it should not be possible to enter reservations on Part I of the Convention, namely the Uniform Law. He therefore wished to propose that article 37 should be placed in square brackets and referred to the Diplomatic Conference. The Commission should report agreement that there should be no possibility of reservations in respect of Part I of the Convention. It should state that the article was placed in square brackets because it would be left for the Diplomatic Conference to decide whether or not it should be included in the Convention, since the reasons adduced for its deletion had been based on

the principle of sovereignty. The Commission should also refer to the problem of relations between States which made reservations and States which did not make reservations. Finally, in his view, if article 37 was deleted, it might be necessary to have a special provision to clarify the situation; but that could be left to the Diplomatic Conference.

Mr. OLIVENCIA (Spain) supported the Norwegian proposal. He agreed with the representative of Ghana that the subject under discussion was not technical but political and felt that the Diplomatic Conference was the appropriate forum for its solution. Articles 37 and 38, together with Part IV, should be referred directly to the Diplomatic Conference without further discussion in the Commission.

Mr. CHAFIK (Egypt) supported the Norwegian proposal.

Mr. GUEST (United Kingdom) said that, although his delegation would have preferred to retain paragraph 37, it had some doubts about the solution proposed by Poland. It agreed with the Spanish delegation that articles 37 and 38, together with the final clauses, should be referred to the Diplomatic Conference or the Sixth Committee.

The CHAIRMAN said that, if there was no objection, he would take it that articles 37 and 38 and Part IV of the Convention, on which there had been no discussion, should be referred to the Diplomatic Conference.

It was so decided.

Article 36 (continued)

The CHAIRMAN, after recalling that at the preceding meeting the representative of the USSR had requested that discussion of article 36 should be deferred until the small Drafting Party established to settle the problems raised by article 33 could present the results of its work, invited the representative of Austria to report to the Commission the conclusions reached by the Drafting Party.

Mr. LOEWE (Austria) said that the small Drafting Party, consisting of the representatives of Belgium, the USSR, Kenya and Austria, had reached a compromise solution on the basis of a proposal by the USSR. The Drafting Party proposed the deletion of article 33, which would satisfy those delegations opposed to its retention; in return, it recommended that article 3 (1) should be placed in square brackets, in the hope that the Commission would be able to elaborate a more widely accepted definition, and that the sphere of application of article 36 should be enlarged. Article 36 should be amended to read as follows:

"This Convention shall not prevail over Conventions already entered into or which may be entered into, and which contain provisions concerning limitation of legal proceedings or prescription of rights in respect of the international sale, provided the parties to the contract of sale have their places of business in States parties to such a Convention."

The new wording would enable States which had acceded to ULIS to apply that instrument in their mutual relations.

The CHAIRMAN invited the members of the Commission to think over the proposed amendment to article 36, consideration of which would be resumed after the Commission had considered the proposals put forward by the Spanish delegation concerning the methods of work of the Commission.

/The last part of the meeting was taken
up by the discussion of other matters/

110th meeting (24 April 1972)

/The first part of the meeting was taken up
by the discussion of other matters/

The CHAIRMAN invited comments on the proposal of Drafting Party I in document A/CN.9/V/CRP.20.

Mr. ROGNLIEN (Norway) said that he had serious doubts about the proposal, since it merely glossed over the problems facing the Commission and did nothing to promote the adoption of a uniform law. It might only delay the adoption of such a law by a diplomatic conference. With regard to point 1 of the proposal, it must be noted that, unlike parts II and III of the draft Convention, part I, which was actually the text of the uniform law, dealt with technical matters and should not contain any provisions in square brackets, since the draft Convention must propose a definitive text. Moreover, the Working Group had arrived at another solution, which appeared in document A/CN.9/V/CRP.21 and which he hoped the Commission would be able to agree on when it considered that document. It was difficult to see what improvement points 2 and 3 of the proposal of Drafting Party I would make in the text of the draft Convention. The Drafting Party, while proposing the deletion of article 33, was expanding the sphere of application of article 36, which would become much too broad. The proposed article 36 would make the Convention on prescription a model text which States would adopt while reserving the right to apply it as they saw fit. The present text of the draft Convention was better, since it made a careful distinction between a general convention (article 33) and conventions in special fields (article 36). He felt that a compromise formula should be found for article 33 or, if that was not possible, the present text of the article should be retained in square brackets.

In reply to a request for clarification from Mr. GUEIROS (Brazil) Mr. LOEWE (Austria) said that, as a result of the decisions taken by the Commission, article 34 had been deleted and article 35 had been referred to the Working Group for a decision. The proposals made by Drafting Party I were compromise measures concerning the two points dealt with in article 33. It had been agreed to delete subparagraph (a) of that article, provided that paragraph 1

of article 3 of the draft was placed in square brackets. The brackets were intended to indicate that the provision would have to be reconsidered at a later stage. When the diplomatic conference which would meet to adopt the draft Convention came to consider paragraph 1 of article 3 it could take a decision on it, in the light of accessions to ULIS of 1964 as at that time and the results achieved by the Working Group on Sales.

Subparagraph (b) of article 33 was also deleted, but the scope of article 36 was expanded as a result of the deletion of the words "in special fields". However, it should be stressed that the scope of the amended article 36 would still be less than that of the provision appearing in subparagraph (b) of article 33, since its application was restricted to relations between States which had ratified the same instrument. That provision was essential if States which applied the 1964 ULIS were to ratify the new Convention.

Mr. SMIT (United States of America) said that, in his opinion, points 1 and 2 of the report of the Drafting Party could not be considered independently of the new formulation for articles 2 and 3 proposed by the Working Group in document A/CN.9/V/CRP.21. However, the new wording of article 36 (point 3 of the report of Drafting Party I) was quite acceptable to his delegation.

Mr. OGUNDERE (Nigeria) recalled that his delegation had spoken in favour of deleting article 33. It was satisfied with the solution worked out by the Drafting Party, since ULIS would no longer apply to States which had not ratified it.

Mr. ELLICOTT (Australia) said that he had no objection to the new wording of article 36, which was an acceptable compromise. His delegation agreed with the United States delegation that the placing of paragraph 1 of article 3 in square brackets must be considered in the light of the new wording of articles 2 and 3 formulated by the Working Group.

Mr. GUEIROS (Brazil) said that he welcomed the felicitous formulation which had been found for article 36 (A/CN.9/V/CRP.20). The amendment met the requirements of those delegations which had favoured the deletion of article 33. He entirely agreed with the proposals of the Drafting Party.

Mr. KAMAT (India) stressed that the new version of article 3 drawn up by the Working Group could not fully meet the objections of his delegation with regard to article 33, in so far as the definition which was to be included in the revised law on sales was still in the process of formulation. His delegation, which had spoken in favour of a reservation allowing the application of the definition in the revised ULIS, did not believe that the placing of paragraph 1 of article 3 in square brackets should give rise to any objections, since the diplomatic conference to which the draft Convention would be submitted would not be able to meet before 1973 at the earliest. It was to be hoped that in the meantime the Working Group on Sales would succeed in putting the definition of an international sale into final form. If the Commission did not agree that the provision in paragraph 1 of article 3 should be placed in square brackets, thought would have to be given to reconsidering the content of article 33. The solutions proposed by the Drafting Party appeared to be the best compromise possible in the circumstances.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) felt that the representative of Austria had clearly explained the criteria that had guided the members of Drafting Party I in working out the compromise now before the Commission.

In the view of his delegation, article 36 was unacceptable without the reformulations introduced by the Drafting Party because it allowed the conclusion of agreements concerning limitation only in special fields. Article 33 was unacceptable because it referred to instruments which were unrelated to the draft and were binding upon States which had not acceded to them.

Paragraph 1 of article 3 was to be put in square brackets so as to emphasize that the question of the sphere of application of the draft Convention had not yet been solved and that no decision had been taken as to whether and under what conditions the Convention would apply between States parties and third States. The square brackets therefore meant that the definition of sales must be reconsidered and there was no way at present of knowing the outcome of such reconsideration.

To avoid insoluble difficulties in the future, the Commission should endorse the proposals of Drafting Party I; they represented the best possible compromise and did not prejudice the sphere of application of the Convention.

Mr. JENARD (Belgium) said that he fully agreed with the solution put forward by Drafting Party I on condition that it was adopted in its entirety. It was a double compromise the elements of which could not be fragmented. He had not pressed for the retention of article 33 (a), on condition that the definition of sales was put in square brackets; the existing definition was not satisfactory but he hoped that the Working Group on Sales would make further progress towards a definition which would be acceptable to all States. He had also agreed that article 33 (b) should be deleted, because the new version of article 36 was satisfactory, since it enabled the 1964 ULIS to be applied in relations between States which had ratified that instrument.

Mr. RECZEI (Hungary) supported the adoption of the proposals submitted by Drafting Party I; they should be considered as a whole. Placing paragraph 1 of article 3 in square brackets did not amount to deleting it, but was simply aimed at leaving the question open for the future. There was no reason to postpone a decision on the proposals by Drafting Party I, when they were viewed in that light.

Mr. CHAFIK (Egypt) said he could not accept the idea that the draft Convention should be submitted to a diplomatic conference without prior settlement of the question of definition. He was therefore opposed to placing paragraph 1 of article 3 in square brackets. The Commission must take a decision on that point, either by adopting a final definition or by making reference to a definition contained in another instrument.

Mr. LEMONTEY (France) said that, in his view, the three proposals prepared by Drafting Party I formed an indivisible whole. He agreed with the representatives of India and of the USSR, that the diplomatic conference could be entrusted with the task of taking a decision on the definition of international sales, in the light of the new draft which might be prepared by the Working Group on Sales. In any case, he could agree to the proposals of Drafting Party I only if the compromise which had been attained was accepted as a whole.

Mr. SMIT (United States of America) and Mr. ROGNLIEN (Norway) pointed out that it would be difficult for the Commission to take a decision on paragraph 1 of article 3 before it had agreed on the new draft of that paragraph, proposed by the Working Group.

Mr. GUEST (United Kingdom) supported the comments by the representatives of the United States and of Norway; to avoid a possibly sterile debate, he suggested that the Committee should first adopt all the conclusions reached by Drafting Party I (A/CN.9/CRP.20) and should reserve the right to come back to the definition of sales during consideration of the new draft proposed by the Working Group on Prescription (A/CN.9/V/CRP.21).

The CHAIRMAN suggested that the Commission might adopt all the changes proposed by Drafting Party I (A/CN.9/V/CRP.20) on the understanding that, if the Commission wished to reconsider the definition placed in square brackets (paragraph 1 of article 3), it could do so during its consideration of the new draft proposed by the Working Group.

It was so decided.

/The last part of the meeting was taken
up by the discussion of other matters/

115th meeting (27 April 1972)

The CHAIRMAN said that the Commission had before it the new text of articles 1-28 of the draft Convention on prescription (A/CN.9/V/CRP.21/Rev.1), which the Working Group had prepared on the basis of the opinions and comments made by the members of the Commission during the present session. The Chairman therefore suggested that representatives should be brief.

Mr. GUEST (United Kingdom), speaking as a member of the Working Group, pointed out that the proposed text, even when it had been approved by the Commission, was only a working document intended for the Sixth Committee or a diplomatic conference and that delegations would therefore be able to submit draft amendments to it right up to the stage of the final drafting.

Mr. ROGNLIEN (Norway), speaking as Chairman of the Working Group, said that the Group had followed the Commission's instructions, but that had not always been easy. Those instructions were sometimes vague and even ambiguous. For example, the Commission had referred certain provisions to the Working Group and had requested it to take into account all the points of view, sometimes contradictory, expressed in plenary sessions. Nevertheless, the Group had tried to harmonize the different positions and the text should therefore be acceptable to a very large majority of delegations. When it had not been possible to reconcile opposing positions, the Group had suggested several alternatives for a given provision. As the United Kingdom representative had pointed out, the draft Convention, even when it had been approved by the Commission, would not be a final text. The Commission must therefore decide on the measures to be taken to ensure that the text could be rapidly incorporated in a convention.

In reply to a question by Mr. GUEIROS (Brazil), the CHAIRMAN explained that the members of the Commission, like all the other States Members of the United Nations, could submit amendments to the draft Convention even when it had been adopted by the Commission.

Mr. KAMAT (India) said he wondered, since the draft Convention would not be a final text even after its adoption by the Commission, whether the text could

again be sent back to the Working Group and if the Commission was really now at the final stage of its work.

Mr. ROGNLIEN (Norway), speaking as Chairman of the Working Group, said that the Group had finished its task and that it was now for the Commission to take a decision itself on any amendments which delegations might submit; the time had come to agree on the text to be submitted to a diplomatic conference.

Mr. LEMONTEY (France) felt that the Commission should have confidence in its Working Group. It should not take up the proposed text article by article but merely decide on the questions which the Group had not been able to solve and which it had included in its text as alternatives or between square brackets.

Mr. BURGUCHEV (Union of Soviet Socialist Republics), supported by Mr. GUEIROS (Brazil) and Mr. DEI-ANANG (Ghana) said that, at the stage of the second and final reading, the Commission could not merely take a decision on the few questions which had given rise to alternatives without reconsidering, article by article, the text proposed by the Working Group. If the Working Group had in fact finished its task, a small drafting group might perhaps be entrusted with the minor adjustments to be made in the light of the final comments by delegations. Only then would the Commission be able to submit to a diplomatic conference a draft which was as carefully prepared as possible.

Mr. GUEST (United Kingdom) felt that the Commission should now concentrate its attention on the questions of substance still pending and, as the representative of Norway had suggested, take a decision on them once and for all. The establishment of a new drafting group would merely be an expedient and might prolong indefinitely the backward and forward movement of texts, for which there was no longer time. In order to accelerate the last stage of discussion, delegations should be brief and leave aside questions of detail.

Mr. NESTOR (Romania) felt that the Commission should consider the proposed text article by article, concentrating its attention on the important points and deciding, when necessary, to refer certain provisions to a drafting group.

Mr. ROGNLIEN (Norway) felt that it would be preferable, in order to avoid any confusion, to consider the proposed text article by article, although as the representative of France had observed, numerous provisions should be adopted without difficulty.

Mr. COLOMBRES (Argentina) felt that the Commission should itself settle the final questions of substance that were still pending if it wished to be able to adopt the draft before the end of the current session.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that, in regard to the substance, he agreed with the opinion expressed by the United Kingdom representative. However, if the Commission did not succeed in agreeing on a given point, it would have to use a drafting group or a working group, particularly as certain provisions of the proposed text were very imprecise; for example, the Russian and English versions of article 18, paragraph 2, were equally incomprehensible.

Mr. GARRIGUES (Spain) said that, in the present final stage, the Commission should consider the draft for the last time article by article, while trying to restrict statements to basic issues. He shared the USSR representative's opinion regarding the need for a very small drafting group to settle any final differences which might arise.

Following a suggestion by Mr. MANTILLA-MOLINA (Mexico), the CHAIRMAN suggested that members of the Commission should examine the text article by article, restricting their comments to questions of substance and particularly to provisions in respect of which the Working Group had proposed alternatives or had used square brackets, it being understood that the Commission could use a small drafting group or even the direct help of the Secretariat for any question of drafting or translation.

It was so decided.

Mr. HONNOLD (Secretary of the Commission) explained, in reply to the Chairman, that delegations could avoid speaking in plenary session on mere translation problems; they could bring such problems directly to the attention of Mr. Colombres (Argentina) for the Spanish text, Mr. Jenard (Belgium) for the French text, Mr. Guest (United Kingdom) for the English text or Mr. Burguchev (Union of Soviet Socialist Republics) for the Russian text.

Article 1 (continued)

Mr. OGUNDERE (Nigeria) said he approved of article 1, while considering that article 7, which dealt with interpretation and application of the Uniform Law should be linked with that article.

Mr. GUEIROS (Brazil) wondered whether the term "person" defined in article 1 (3) (f) was concerned only with the physical persons or persons having legal existence, or if it could also mean de facto entities.

Mr. ROGNLIEN (Norway) explained that the position taken by the Working Group was that the term "person" should be understood also to mean any group, whether or not it had legal personality; that idea was expressed by using the words "company, association or entity".

Mr. COLOMBRES (Argentina) added that the Working Group had retained the idea of de facto entities rather than that of individuals or legal persons, thus using the broader concept employed in certain national legislations.

Mr. MANTILLA-MOLINA (Mexico) felt that in article 1, paragraph (1), the words "and to the prescription of the rights" were superfluous since the draft Convention dealt only with prescription. He therefore proposed that those words should be deleted. Furthermore, article 24, by making provision for payment after the expiry of the limitation period, recognized that the right itself subsisted, even if it could not be legally exercised, after the expiry of the limitation period.

Mr. ROGNLIEN (Norway) pointed out that the draft had to take into account the different legal systems and for that reason the Working Group had decided to deal with rights and claims.

Mr. RECZEI (Hungary) shared the Norwegian representative's view. He felt that both terms were necessary because certain national legislations recognized de facto and de jure limitation.

The CHAIRMAN noted that the majority of members approved of article 1. He therefore proposed that the Commission should adopt it.

Article 1 was adopted.

Article 2 (continued)

Mr. ROGNLIEN (Norway) pointed out that the Commission had already adopted with respect to article 2 a compromise which consisted in placing between square brackets the definition in paragraph (1), so as to bring it to the attention of the diplomatic conference.

Mr. ELLICOTT (Australia) said that, although he was not opposed to that provisional solution, the Commission would sooner or later have to deal with the question of the definition of an international sale. He therefore proposed that that question should be included in the agenda for the Commission's sixth session, which would no doubt precede the meeting of the diplomatic conference. He also suggested that the Working Group on Sales should be asked to give its views on the matter.

Mr. KAMAT (India) said that his delegation supported the compromise mentioned by the representative of Norway.

The CHAIRMAN invited the Commission to approve article 2 on the understanding that paragraph (1) was placed in square brackets and that the question of the definition of an international sale was included in the agenda for the Commission's sixth session.

Article 2 was adopted.

Article 3 (continued)

Mr. ROGNLIEN (Norway) pointed out that the Working Group had prepared two alternative texts for article 3 and that the Commission should now take a decision on the matter. The first alternative would have the effect of limiting the application of the Convention to parties having their places of business in different Contracting States. Since some delegations had considered alternative A too limiting, the Working Group had prepared another alternative, alternative B, supplemented by the reservation in article X. He added that there was a third solution, namely, to adopt the definition used by the Working Group on Sales.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that, although his delegation preferred alternative A, it would not oppose the adoption of alternative B if the majority expressed itself in favour of it. He added that, if alternative A was adopted, paragraph (2) did not seem to him necessary.

Mr. RECZEI (Hungary) said that his delegation was in favour of alternative A. Alternative B would involve the possibility of a supplementary reservation, which would constitute one further obstacle to the uniformization of the law.

Mr. DROZ (The Hague Conference on Private International Law) said that he, too, was in favour of alternative A, although he agreed with the comments of the USSR representative concerning paragraph (2). Alternative A had the merit of establishing a reasonable link between the parties, litigation and prescription.

Mr. LOEWE (Austria) said that, although his delegation had a slight preference for alternative B, it was prepared to accept alternative A. It was, however, opposed to the deletion of paragraph (2), which was a necessary provision. There were in fact countries where the applicable law did not depend on the place where the parties had their places of business but, for example, on the place where the contract had been concluded. The deletion of paragraph (2) would give rise to uncertainty and there might be some question, for instance, as to whether a contract concluded in a third country would be subject to the provisions of the Convention or not. Paragraph (2) was, moreover, in conformity with the solution adopted in the uniform law on sales.

Mr. OGUNDERE (Nigeria) said that, he, too, had a preference for alternative A. His delegation did not fully agree with paragraph (3) but would bow to the wishes of the majority.

Mr. GUEIROS (Brazil) favoured alternative A, including paragraph (2). He repeated the arguments of the representative of Austria concerning that provision.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) withdrew his proposal for the deletion of paragraph (2) of article 3 (alternative A).

Mr. LOEWE (Austria) said that paragraph (3) seemed to him both ambiguous and inadequate: ambiguous, because it was not known whether the law chosen by the parties applied to the contract or to prescription; inadequate, because it did not give the parties enough freedom. It could happen that the parties might wish purely and simply to exclude the application of the Convention, thus leaving the rules of international private law operative. It could also happen that they might wish to apply to prescription the internal law of a Contracting State, for example in the case of two parties who were nationals of the same Contracting State but one of whom resided abroad; it would be natural for those parties to prefer to apply their national law rather than the Uniform Law. Paragraph (3), however, rejected those two hypotheses in favour of a third, which was almost academic since it was hard to see why two parties having their places of business in different Contracting States should choose the law of a third, non-Contracting, State.

He proposed that paragraph (3) should be referred to a drafting group for redrafting.

Mr. ROGNLIEN (Norway) said he could not accept the arguments advanced by the representative of Austria. He feared that granting greater freedom to the Parties would derogate from the uniform character of the law to the detriment of the parties themselves, who would have to ascertain at any time in which countries the Convention applied and in which countries it did not. The solution might perhaps be to permit States, at the time of ratification, to make a reservation which would consist in deleting the word "non-Contracting" in paragraph (3). Accordingly, he proposed that that word should be placed in square brackets.

Mr. LOEWE (Austria) observed that in paragraph (3) the Working Group had replaced the word "expressly" by the word "validly". That word seemed to him too vague. He would not be opposed to the retention of the word "validly" if that was the wish of the majority, but he asked that his delegation's position on that point should be reflected in the summary record.

Mr. ELLICOTT (Australia) shared the view of the Austrian delegation regarding the word "validly", which seemed to him to give rise to uncertainty.

He pointed out that when that provision had first been considered, the Commission had recognized the need for an "express" stipulation, as the summary record of the 95th meeting showed (A/CN.9/SR.95, p. 8).

Mr. LEMONTEY (France), referring to the article as a whole, said he favoured alternative A. With regard to paragraph (3), he pointed out that the text submitted to the Commission was the result of a compromise among the members of the Working Group. If, however, the question was reopened, his delegation would side with the Austrian delegation, for the same reasons. His delegation would, however, oppose the replacement of the word "validly" by the word "expressly" since, in French law, the choice of a foreign law might be implicit and derive, for instance, from the conditions in which the contract was concluded.

Mr. GONDRA (Spain) said he was opposed to the retention of paragraph (3), which was contrary to the principles of Spanish legislation relating to prescription, in that the institution, being in the sphere of public policy, should be governed by compulsory norms. That provision would, moreover, give rise to difficulties of interpretation. The word "validly" should be replaced by some more explicit word.

Mr. MUDHO (Kenya), after expressing himself in favour of alternative A, said he supported the observations of the Australian delegation concerning paragraph (3) and that he, too, thought it would be preferable to replace "validly" by "expressly".

In order to allay the fears expressed by the representative of Norway, he proposed that alternative A should be accompanied by a reservation similar to that provided for in article A.

Mr. NESTOR (Romania) said that to replace "validly" by "expressly" would solve nothing. An express agreement could, in fact, quite well not be valid. In some systems, in particular, the choice of parties was limited and for a law to be applicable to a contract it was essential that it should have a definite link with it.

His delegation favoured alternative A, including paragraph (3).

Mr. SMIT (United States of America) agreed with the comments made by the representative of Romania concerning the word "validly". He thought that paragraph (3) represented a middle course between the solution of giving the

parties total freedom and the solution that would amount to giving them none at all. His delegation, too, was in favour of alternative A, including paragraph (3).

Mr. RECZEI (Hungary) said that he was also in favour of retaining paragraph (3).

Mr. GUEST (United Kingdom) supported the remarks made by the representatives of the United States and Romania. Paragraph (3) was a compromise text, whose wording had been carefully considered by the Working Group. His delegation was in favour of alternative A, including paragraph (3).

Mr. JAKUBOWSKI (Poland) said that his delegation, which preferred alternative A, also had some doubts concerning the suitability of the word "validity". However, it could accept paragraph (3) as submitted by the Working Group. As a means of eliminating the difficulties mentioned by the Norwegian delegation, the solution proposed by the representative of Kenya would seem preferable to placing the word "contracting" in square brackets.

Mr. JENARD (Belgium) also favoured alternative A. With regard to paragraph (3), his delegation would have liked the parties to have been allowed greater freedom, but would support the text proposed in a spirit of compromise. It would prefer not to introduce the word "expressly" because, in Belgium, the choice of a foreign law could be tacit.

Mr. ROGNLIEN (Norway) said that the compromise solution afforded by paragraph (3) had the support of his delegation. He considered that the word "validly" should be retained. For a foreign law to be chosen, there must be a genuine agreement, a free and valid intention on the part of the contracting parties and, their choice must be valid, legally permissible, in the light of the law applicable in the country of the tribunal.

Mr. OGUNDERE (Nigeria) said that the retention of the word "validly" would be an illusory compromise solution. If the freedom of the parties was to be safeguarded, and if they were to be allowed to choose the law of a non-contracting State, it was not for the tribunal to pronounce on the validity of their choice. The word could simply be deleted. If it had to be replaced, the words "in writing" might be inserted rather than "expressly".

Mr. MANTILLA-MOLINA (Mexico) supported the comments made by the Austrian delegation concerning paragraph (3).

Mr. DEI-ANANG (Ghana) said that he was in favour of alternative A, including paragraph (3).

Mr. LOEWE (Austria) said that his delegation, although not convinced by the arguments put forward in defence of paragraph (3), appreciated the fact that the provisions represented a compromise. He accordingly withdrew his proposal.

Mr. KAMAT (India) said that he also preferred alternative A, although it gave rise to some uncertainty. In effect, paragraph (3) contradicted paragraph (2), and the term "validly" reintroduced the rules of private international law. The best solution would be to delete paragraph (3) and thus preclude the application of those rules. Conversely, there would be the solution of making the law applicable where the rules of private international law led to its application, as in the case of the uniform law on sales.

Mr. MICHIDA (Japan) said that he was in favour of alternative A, which on first reading had commanded the support of a majority of Commission members. Having participated in the lengthy discussions held on paragraph (3) in the Working Group, he would point out that the proposed text was the result of a delicate compromise and he thought it would be a pity to reopen the discussion on that point.

Mr. CHAFIK (Egypt) said that his delegation preferred alternative A. He could agree to the retention of paragraph (3) but shared the view of the representative of Austria that it would be better to specify which law was involved. He accordingly proposed the addition of the words "to govern prescription" at the end of the paragraph.

Mr. HYERA (United Republic of Tanzania) said that if the two alternatives were put to a vote, he would vote in favour of alternative A, which struck a balance between two opposing schools of thought. His delegation considered that prescription was a matter of public policy and should therefore not be

left to the choice of the parties: however, it found paragraph (3) an acceptable provision inasmuch as the adverb "validly" implicitly gave States an opportunity to limit the freedom of choice of the parties. His delegation was willing to support the proposal by Kenya to allow States to make reservations on that point.

Mr. GONDRA (Spain) said that, in a spirit of compromise, he was willing to accept alternative A as it stood.

Mr. ELLICOTT (Australia) said that he would not object to the compromise solution which seemed to have the support of the majority, although he still felt that the compromise had been achieved at the expense of precision. Although the arguments put forward by the representatives of the United States and Romania in favour of the retention of "validly" had not convinced him, he would withdraw the amendment he had proposed.

Mr. MANTILLA-MOLINA (Mexico) said that he would support the position of the majority and withdraw his proposal to delete paragraph (3).

The CHAIRMAN suggested that alternative A should be adopted as article 3 of the draft convention, on the understanding that the comments made by members of the Commission would be duly reflected in the summary record of the meeting.

It was so decided.

Articles 4 and 5 (continued)

Articles 4 and 5 were adopted.

Article 6 (continued)

Mr. MANTILLA-MOLINA (Mexico) recalled that, during the first reading of the article, the representative of Chile had criticized the use, in paragraph (2), of the words "contracts for the supply", which did not correspond to any precise legal concept.

Mr. JENARD (Belgium) proposed, to meet the criticism voiced by the representative of Chile, that the words in question should be replaced by some such phrase as "contracts whose purpose is the supply".

Article 6, as amended, was adopted.

Article 7 (continued)

Mr. HYERA (United Republic of Tanzania) said that in his opinion article 7 was insufficiently precise. It failed to mention the need to promote uniformity, although the purpose of the draft was not merely to ensure standardization but also to make the rules of international law more equitable.

The CHAIRMAN said that the comments made by the representative of Tanzania would be reflected in the summary record.

Article 7 was adopted.

Article 8 (continued)

Article 8 was adopted.

Article 9 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) drew attention to some problems arising out of the present structure of article 9. Paragraph (1) seemed to establish a general rule concerning the point of departure for the limitation period, and that rule would allow for exceptions to be made in the cases referred to in articles 10 and 11. However the provisions of paragraphs (2) and (3) of article 9 also constituted exceptions. That inconsistency needed to be remedied.

Moreover, it might be wondered what relationship there was between the provision of article 9 (3), concerning breach of contract, and the content of article 10, which dealt with "lack of conformity", which was not a particular type of breach of contract.

To eliminate that inconsistency, he proposed that minor drafting changes should be made in article 9 (2) and (3), which would improve the over-all structure of the article. Paragraph (2) and the first sentence of paragraph (3) would then read:

"(2) In respect of a claim based on fraud committed before or at the time of the conclusion of the contract, the claim shall be considered to be done on the date on which the fraud was or could have been discovered.

"(3) In respect of a claim arising from a breach of the contract of sale, the claim shall be considered to be due on the date on which such breach occurs."

Moreover, it might perhaps be desirable to reverse the order of paragraphs (2) and (3), since it could be assumed that in practice the type of litigation referred to in paragraph (3) would be encountered much more frequently than that referred to in paragraph (2). The provisions of article 9 would then appear in decreasing order of generality.

Mr. LEMONTEY (France) said he would have some difficulty in accepting the structural changes proposed by the representative of the Soviet Union. It was clear from the Working Group's debates that paragraph (1) referred essentially to actions for annulment of the contract, in which case the time at which the limitation period commenced was the same as the time at which the contract was concluded. Paragraph (2) referred to the specific case of actions for annulment of the contract based on fraud committed at the time of the conclusion of the contract. The two provisions were thus closely related. Paragraph (3), on the other hand, referred to cases of failure to carry out obligations, which were necessary subsequent to the date of conclusion of the contract.

Mr. GUEST (United Kingdom) said that his delegation had no objection to the drafting changes proposed by the representative of the Soviet Union. Where the order of the paragraphs was concerned, he thought the Soviet delegation would agree to abide by the original text.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he was prepared to withdraw his proposal concerning the inversion of paragraphs (2) and (3) if the Commission felt the present order to be more logical. His delegation's only concern was to shorten the text and make it more coherent.

Mr. DEI-ANANG (Ghana) supported the drafting changes proposed by the representative of the Soviet Union, which he felt constituted an improvement.

Mr. ROGNLIEN (Norway) pointed out that article 9 (1) proclaimed a general principle, the application of which was restricted by the provisions of the two following paragraphs. Paragraph (2), which referred to fraud committed at the time of the conclusion of the contract, was complemented by the provisions of article 20 relating to fraud committed subsequent to the conclusion of the contract. The drafting changes proposed by the Soviet Union were acceptable for paragraph (2),

but raised a number of difficulties with regard to paragraph (3), since the cases of anticipated breach referred to in article 11 should be taken into account.

Mr. MANTILLA-MOLINA (Mexico) said he was extremely puzzled by the present wording of article 9. It appeared in fact that paragraph (1) and paragraph (3) contained contradictory provisions. For any legal proceedings to take place, there must be failure to carry out an obligation, and therefore the two paragraphs dealt with the same subject, while establishing different rules. If, for example, goods were delivered in a quantity less than the agreed amount, the time of commencement was different depending on whether paragraph (1) or paragraph (3) was followed. Under paragraph (1), the limitation period commenced on the date when the goods were received, while under paragraph (3) the time of commencement of the limitation was the date when the breach occurred, in other words when the goods were loaded. He would not propose any formal amendment to article 9, but wished to stress the seriousness of the contradiction he had pointed out.

Mr. LOEWE (Austria) said that he too was confused by the complicated wording of article 9. Paragraph (1) established a general rule with which Austrian jurists were well acquainted. Paragraph (3) established another kind of commencement for the limitation period. On analysis, it appeared that it was paragraph (3) which constituted the general rule, while paragraph (1) was merely an exception designed to cover cases of action for annulment of the contract. Since Austria intended to invoke article 33 to exclude actions for annulment of the contract, the public authorities would find themselves in the paradoxical situation of having to explain to Austrian lawyers that the general rule was not the rule laid down in paragraph (1), but that appearing in paragraph (3). It was difficult to conceive of proceedings being instituted unless there was a breach of contract as defined in article 1 subparagraph 3 (b) of the draft.

Without opposing the substance of article 9, he nevertheless found it difficult to conceive of a more tortuous way of setting out its provisions.

Mr. GONDRA (Spain) expressed the view that the Commission had a duty to eliminate the obscurities in the present wording of article 9. Consequently, he formally proposed that the article be reviewed.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) explained the considerations which had promoted him to make his previous statement. His first concern was that formulation of article 9 should be logical. The changes he had proposed aimed at clearly relating the exceptions referred to in paragraphs (2) and (3) to the general rule laid down in paragraph (1), on the understanding that articles 10 and 11 were exceptions to the exceptions referred to in article 9. The draft could only gain in clarity if the logical linkages between the provisions of those three articles were made more clearly apparent.

Mr. JENARD (Belgium) said the discussion showed that the Working Group had, in spite of its efforts, not achieved a satisfactory text. It might perhaps be possible to place greater stress on the subordinate nature of paragraphs (2) and (3) by making them the subparagraphs (a) and (b) of a single provision. In any case, the text of article 9 could be improved, and the Commission should not omit to do so.

Mr. ELLICOTT (Australia) said that in his view breach of contract was not really an exception to the rule laid down in paragraph (1). What was important in cases of failure to carry out obligations was the second sentence of paragraph (3); the first sentence of that paragraph could be deleted without creating any problem. On the other hand, paragraph (2) did indeed establish an exception, to which attention could be drawn in paragraph (1) by some such phrase as "subject to the provisions of paragraph (2)".

The CHAIRMAN said that the problems raised by article 9 were essentially of a drafting nature. He suggested that a small group of representatives should be given the task of drafting a new wording which would take into account the comments made by members of the Commission. That small drafting group would be composed of the representatives of the United States, Australia and Norway.

It was so decided.

Article 10 (continued)

The CHAIRMAN pointed out that the new draft Uniform Law in document A/CN.9/V/CRP.21/Rev.1 contained two alternatives for article 10, and invited members to comment on them.

Mr. DEI-ANANG (Ghana) reminded the Commission that his delegation had submitted an amendment to that article (previously article 9) and that there had been a substantial consensus, which was reflected in the record of the 99th meeting, in favour of the principle it advocated, namely that, in cases of lack of conformity of goods, the limitation period should start when the defect was discovered. There had also been a general consensus in favour of setting a maximum limitation period and some delegations had met to prepare proposals embodying those ideas for consideration by the Working Group. However, alternative A in no way reflected the instructions given to the Working Group by the plenary and he asked for clarifications regarding its origin. His delegation preferred alternative B, in so far as it accorded with the general consensus arrived at the week before, but had reservations with respect to paragraph 2. Firstly, because it reintroduced the idea that the limitation period should start on the date on which the goods were duly placed at the buyer's disposition or were handed over to him, an idea that his delegation strongly opposed, and, secondly, because that period was shortened by the last phrase in the paragraph, "whichever is the earlier". Such a provision would rob the text of all its force. Although his delegation had been authorized to revise its amendment and send it to the Working Group, there was no trace of the ideas contained in the amendment in the final draft now before the Committee.

Mr. ROGNLIEN (Norway), replying to the representative of Ghana, said that although that representative was quite correct in his assessment of what the majority opinion had been, when the Working Group had examined the question a new idea had emerged, namely, that a distinction could be made between patent and latent defects. Since the purpose of the Convention was to facilitate the settlement of stale and disputed claims, the Working Group had felt that the

limitation period set should not be too long and had decided to recommend a limitation period of two years, in cases of patent defects and, in cases of latent defects, a period of two years from the date of the discovery, with an over-all period of five years from the time when the goods were placed at the disposition of the buyer. Naturally, it had not known whether the Commission would approve of the suggestion. If the Commission decided in favour of alternative B, then the Working Group recommended that the limitation period should begin from the time the buyer got the goods in the case of patent defects, and from the time of the discovery of the defect, in the case of latent defects, provided the over-all limit did not exceed five years. Finally, he did not understand the representative of Ghana's concern over the phrase "from the date on which they are duly placed at his disposition or handed over, whichever is the earlier".

Mr. OGUNDERE (Nigeria) said the representative of Ghana had correctly assessed the situation regarding the instructions to the Working Group. His delegation had originally been in favour of excluding sales of plant and machinery altogether; however, realizing that such a proposal was utopian, it had been content to stress the importance of taking into account the difficulty of discovering latent defects in machinery. Businessmen in the developing countries did not have an army of legal advisers to help them in negotiating the installation of heavy machinery. That was why his delegation preferred the formulation in alternative B. Paragraphs 1 and 3 of that alternative were quite acceptable to his delegation, but paragraph 2, regarding latent defects, was not. His delegation was particularly disappointed to note that that paragraph provided for an over-all period of five years, whereas article 18, which dealt with interruption of the period, provided for a total of 14 years. His delegation attached far greater importance to the question of latent defects than to the question of interruption.

In a spirit of compromise and in order to take into account, at least to a minimum degree, the interests of the developing countries, his delegation proposed that in article 10 (2), alternative B, the words "they are duly placed at his disposition, or are handed over to him, whichever is the earlier" should be replaced by the words "the claim becomes due". That amendment had the advantage

of allowing for a total period of nine years in the event the defect could not be discovered until nearly four years from the date on which the buyer received the goods. Such an allowance was particularly important to the entrepreneurs of the developing countries. His amendment would give a bare minimum of satisfaction to the developing countries and he hoped it would be acceptable to the Commission.

Mr. GUEST (United Kingdom) said the delegations of Ghana and Nigeria had done less than justice to the desire of the Working Group to give effect to the wishes of the Ghanaian delegation. The basic proposition of the draft submitted to the Working Group by Ghana and other Afro-Asian countries had been that, in cases of latent defects, the period should commence to run from the date on which the defect or lack of conformity was or could reasonably be discovered. The Working Group had given effect to that principle in article 10 (2).

The point had then arisen whether there should be an over-all limitation period. It had been the understanding of the Working Group that, as a result of their informal meeting, the Afro-Asian countries had been willing to accept an over-all period of five years. He apologized for any possible misinterpretation of the wishes of the Afro-Asian countries. If the period of five years was not acceptable to them, he was sure the Commission could reach an agreement on a different period. Under alternative B, the buyer would still have four years from the date on which the defect was or could have been discovered. He did not fully understand the Nigerian proposal.

He pointed out that the idea of shortening the period from four years to two, which was reflected in alternative A, had indeed been advanced in the Commission by Austria and other delegations, whose views in that regard were reflected in the summary records. It was unfair to insinuate that alternative A bore no relation to the discussions in the Commission.

He assured the Afro-Asian countries that the Working Group had had no desire to ride roughshod over their views.

Mr. DEI-ANANG (Ghana) said that his delegation could not accept the proposition that the over-all period should run from the date on which the goods were duly placed at the disposition of the buyer. In the case of an F.O.B. contract, that date would be the date when the goods were placed on board ship. His delegation held the view that the period should start from the date of

discovery of the defect or lack of conformity by the buyer, in respect of all defects, whether patent or latent. At the 99th meeting, when he had introduced his amendment, he had only mentioned latent defects in pointing out that the Working Group had not taken that matter into account (A/CN.9/SR.99, p. 3). His amendment had had nothing to do with latent defects, but had been concerned with the date of commencement of the period. Paragraph 2 of alternative B did not reflect his proposal.

Mr. MANTILLA-MOLINA (Mexico) said he strongly supported the views expressed by the representatives of Ghana and Nigeria. Although the precepts incorporated in the draft might seem abstract, the fact was that they would have the effect of favouring the industrialized countries at the expense of the developing countries. The industrialized countries imported raw materials, whose defects were rapidly observable, and therefore they did not come up against the question of late discovery. The developing countries, on the other hand, imported heavy machinery whose defects could not be discovered for a long time.

He wished to ask for clarification on a few points. In the first place, it was not clear to him what was meant by the term "duly placed at his disposition". Did that mean the delivery of the goods in strict conformity with the contract or simple delivery? Furthermore, he did not understand how delivery could take place prior to the placing of the goods at the disposition of the buyer. The latter was a unilateral action by the seller, whereas the former was a bilateral action wherein the seller handed over the goods and the buyer received them. Finally, he was confused by an apparent discrepancy between the wording used in the French and Spanish texts. Paragraphs 1 and 2 referred to "prescripción de una acción" ("prescription d'une action") whereas paragraph 3 referred to "prescripción de los derechos" ("prescription des droits"). Did the two terms have a different meaning or did they merely represent an oversight on the part of the drafters?

Mr. MUDHO (Kenya) said his delegation had supported the Ghanaian amendment proposed at the 99th meeting because it had considered that the original article 9 was unfair to the third world. With due respect to the Working Group, it seemed to him that the new article 10 represented an ingenious effort to maintain the old article 9. He appreciated the remarks made by the United Kingdom representative to the effect that the Working Group might have misinterpreted the

Afro-Asian draft. The intention of the Afro-Asian countries had been to establish that the additional period should begin from the discovery of the defect.

What was most important now was for the Commission to decide whether it wished to allow extra time in respect of latent defects. His delegation preferred alternative B but felt that the Working Group had misinterpreted the Ghanaian proposal. He supported the Nigerian amendment to paragraph 2 of alternative B. However, in a spirit of compromise, he would be content if the last part of the paragraph, starting with the word "provided", was simply deleted so that the period would run from the date of discovery of the defect and the over-all period would be eight years. If additional time was to be granted in cases of latent defects, the Commission must decide how much time; four years would certainly not be unreasonable in view of the provision contained in article 18.

Mr. JENARD (Belgium) said that article 10 was one of the most difficult and complex ones with which the Commission had had to deal, but did not involve the issue of a confrontation between the interests of the developing countries and others. It merely dealt with the relations between the seller and the buyer.

His delegation preferred alternative A. A distinction must be made between apparent and latent defects and in the latter case, the period should commence to run from the date on which the defect or lack of conformity was or could reasonably be discovered. Once that defect was discovered, a two-year period would be long enough. The longer the period, the more difficult it would be to submit proof. In many countries, the period in respect of lack of conformity was very brief, often as short as six months to a year. His delegation could accept, as a compromise, a period of two years, but felt that four years was too long. As for the length of the over-all period, if the time provided in alternative B was too short for some delegations, he would agree to a somewhat longer period. The commencement of the period, in the case of apparent defect, should be the date on which the goods were placed at the disposition of the buyer, whether they were so placed by the seller, by the carrier, or by anyone else.

He wished to stress that if the Commission tried to draft a convention that was too different from the legislation of the various countries there would be little hope of having it ratified.

Mr. KAMAT (India) said he did not think the Working Group had departed from the draft submitted to it by the Afro-Asian countries. Those countries had agreed that the old article 9 (3) was not fair in that the commencement of the period should not be the date when the goods were placed at the disposition of the buyer, since certain defects, as in the case of heavy machinery, could not be discovered until a considerable time after that date.

They had also agreed that there should be a maximum limitation period. Since it would not be appropriate, from a legal standpoint, to say that the over-all period should extend from the date of discovery of the defects, as that would lead to uncertainty, the Egyptian and Indian delegations had suggested a period of six to eight years.

A small group had subsequently met to propose its formulation to the Working Group and had been told that the Working Group favoured the distinction made in ULIS between patent and latent defects, a distinction they had incorporated in paragraphs 1 and 2 of alternative B, which had then been accepted by the Afro-Asian group. The text submitted by the Working Group did not represent a departure from the Ghanaian amendment, but was rather a result of subsequent developments. The only departure was to be found in the last part of paragraph 2 of alternative B, which provided for an over-all period of five years rather than eight.

He felt the issue could be resolved, as the United Kingdom representative had suggested, by considering a different length for the over-all period. It might be possible to use a formulation such as "not beyond X years from the placing of the goods at the disposition of the buyer by the seller in accordance with the contract".

Mr. HYERA (United Republic of Tanzania) said he supported alternative B of article 10. He agreed with the representatives of Nigeria and Kenya. With regard to the statement of the representative of India, he could, as a compromise, accept a limitation period of eight years for claims arising from latent defects. He would, however, prefer a longer period in view of the state of know-how and technology in developing countries.

Mr. MICHIDA (Japan) observed that the Working Group had spent several days discussing the Ghanaian proposal. It had not departed from the mandate contained in the Chairman's summing up at the Commission's 99th meeting.

Mr. CHAFIK (Egypt) said that the Ghanaian proposal had not mentioned any distinction between latent and patent defects; that distinction had been referred to for the first time in the Working Group. He had held informal consultations with representatives of developing countries, during which the distinction had been discussed and accepted and it had been decided that a limitation period of one year for claims arising from patent defects was not long enough, but that a period of two years could possibly be accepted. For cases of latent defects the limitation period should be six or eight years and it should run only from the date of effective delivery. The Working Group, however, had considered that a limitation period longer than five years would not be acceptable.

A possible solution would be to expand the five-year period referred to in alternative B of article 10 (2) and to delete the phrases "they are duly placed at his disposition, or" and "whichever is the earlier", so that the period would run from the date of handing over of the goods.

Mr. SMIT (United States of America) said that the Commission's original discussion of the Ghanaian proposal had centred not on types of defects but rather on the date of commencement of the limitation period in cases of defect. The Ghanaian proposal had been that the limitation period should start from the date of discovery of a defect. In the Working Group the question had arisen of a distinction between discovery of latent defects and of patent defects. His delegation had always supported alternative B of article 10 (2). If, however, the Convention was to be successful it should be acceptable both to developing and developed countries, since otherwise it would be useless. He would therefore be prepared to accept alternative A of article 10 if it helped to ensure wide ratification of the Convention.

Mr. GUEST (United Kingdom) said that all delegates agreed that the limitation period should start to run on the date when the latent defect was or could reasonably be discovered, as stated in the Ghanaian proposal. There were two considerations on which the Commission should reach a decision. The first was whether the period should be two years, as in alternative A or four years as in alternative B, after discovery of the defect. The second consideration was the length of the maximum limitation period. It appeared that

the maximum period of five years in both alternatives of article 10 (2) was too short in the view of some delegations; it was in any case only one year longer than the ordinary limitation period. He would be prepared to accept a period of eight or 10 years.

Mr. ORGNLIEN (Norway) said that there appeared to be no consensus regarding alternative A of article 10; he personally preferred alternative B. The meaning of the words "duly placed at his disposition" in article 10 (2) was that goods must be placed at the disposition of the buyer in accordance with the terms of the contract. It might happen that goods could not be duly placed at the disposition of the buyer. As an example, he cited a case where a shipment might be sent from Egypt to Japan under the contract stipulating that the port of arrival should be Tokyo. If there was a shipwreck outside Singapore and the goods were brought into Singapore they could not be placed at the disposition of the buyer in Singapore since that port was not stipulated in the contract. The limitation period would therefore not start unless the buyer actually took delivery of the goods in Singapore. On the other hand, the criterion "handed over" to the buyer, would not be applicable if the buyer refused to receive them. In such an eventuality one needed the other criterion "duly placed at his disposition". Both possibilities were needed, to cover all contingencies; a choice was not allowed, which accounted for the phrase "whichever is the earlier".

With regard to article 10 (1) the limitation period would commence to run on the date on which the goods were duly placed at the disposition of the buyer or handed over to him because the exact date of discovery of defects was not open to dispute since the defects were apparent.

Mr. GUEIROS (Brazil) said he preferred alternative B of article 10. He supported the compromise proposal made by the representative of the United Kingdom that the maximum limitation period be longer than five years, since that would be more consistent with article 18. He proposed that the maximum limitation period should be eight years rather than five.

Mr. LOEWE (Austria) said that the Working Group had considered two proposals. The first proposal submitted by the developing countries, had been based on the fact that the prescription period might expire before the buyer

discovered a defect in the goods. The other proposal, which he himself had made, had been based on the fear that four years would be too long a period for claims based on a defect. It had not been inspired by economic considerations but by the fact that some national laws provided for a very brief limitation period. A distinction between latent and patent defects was the only way to reach a compromise with regard to the respective limitation periods.

As has been pointed out by the representative of the United Kingdom, all delegations supported the Ghanaian position that the buyer should have time to examine the goods. However, there should be a maximum limitation period, which would allow the buyer enough time to examine the goods and to put forward a claim, after which claims based on a defect would not be allowed. For purely legal reasons his country could not ratify a convention which envisaged an interminable limitation period after discovery of defects. A two-year limitation period gave plenty of time for the buyer to put forward a claim after discovering a defect. In a spirit of compromise, he could accept a maximum limitation period of six or seven years, if alternative A of article 10 was accepted.

Mr. OGUNDERE (Nigeria) said that his delegation fully appreciated the intensive and arduous work that had been done by the Working Group, but felt that since it had been clearly specified that the interests of the developing countries should be taken into consideration, those countries were entitled to raise the point under discussion. His delegation agreed that the period of limitation should start from the date on which a defect or lack of conformity was discovered. However, it maintained that the maximum period, which had been set at five years, should be extended. The United Kingdom representative had mentioned the possibility of 10 years and other delegations had spoken of eight years. If the majority of delegations wished to set the maximum limitation period at eight years, his delegation, in a spirit of compromise, would be prepared to accept that period.

Mr. COLOMBRES (Argentina) felt that the distinction between latent defects and patent defects would help certain non-industrialized countries. Although his delegation would not oppose reducing the limitation period in the case of patent defects, it felt that in the case of latent or hidden defects the limitation period should be increased to 10 years or thereabouts.

Mr. KHOO (Singapore) felt that the only substantial point in dispute was the over-all limitation period. His delegation would be in favour of alternative B but felt that an over-all limitation period of five years for latent defects was

rather short. It could therefore accept a period of eight years or thereabouts. His delegation had some difficulty with the words "date on which they are duly placed at the disposition of the buyer or handed over to him". He noted that in the first example cited by the Chairman of the Working Group, the goods were held up, so there was no question of delivery, and in the second example, the buyer refused to take delivery of the goods and consequently there could not be a suit based on lack of conformity. His delegation felt that a simpler formulation such as "date of delivery" would cover the matter satisfactorily and would be understood by courts all over the world.

Mr. MICHIDA (Japan) pointed out that the use of the word "delivery" had been deliberately avoided because in the 1964 ULIS "delivery" had been deemed to start with the handing over of the goods to the carrier.

Mr. JENARD (Belgium) said that his delegation could agree to an extension from five to eight years for the limitation period, provided that the period of two years stipulated in alternative A was maintained. Furthermore, it felt that article 10 needed to be formulated more clearly.

The CHAIRMAN suggested that the Commission might refer article 10 to a small drafting group composed of the representatives of Austria, Ghana, Nigeria and the United Kingdom, for amendment and clarification. He noted that there appeared to be agreement that the starting point of the limitation period should be the time at which the defect was discovered. With regard to the length of the limitation period, there appeared to be a consensus in favour of a maximum of eight years. The Commission might also accept a two-year period for paragraphs 1 and 2 of alternative A.

Mr. DEI-ANANG (Ghana) said that his delegation would be happy to consider the compromises suggested by the Chairman and wished to reassure the Working Group that the delegations of the developing countries had no intention of casting aspersions on its work.

Mr. KAMAT (India) suggested that the drafting group should concentrate on paragraph 1 of alternative B.

Mr. SMIT (United States of America) suggested that the Belgian representative should also be a member of the drafting group.

Mr. GUEST (United Kingdom) said that although he discerned general agreement on a maximum limitation period of eight years, subject to certain conditions and reservations, the basic questions remained of whether once the defect had been discovered, the limitation period should be two years as in alternative A or four years as in alternative B. The Indian representative had suggested that the drafting group should proceed on the assumption that it would be better to adopt the four-year period, but other delegations strongly favoured a two-year period. Without some guidance from the Commission, the drafting group would inevitably come up with two alternative proposals similar to the present alternatives A and B, and it would therefore be useful to know the Commission's opinion on the matter.

Mr. RECZEI (Hungary) said he agreed with the Belgian delegation's view that a latent defect was latent only as long as it was not discovered. After discovery it was the same as a patent defect. The same period of time should be adopted for both latent and patent defects. With regard to the length of the period, in practice, the buyer never required more than two months after discovery of a defect or lack of conformity to exercise his rights and claims. A four-year period seemed a very long time and his delegation therefore favoured a two-year period for both latent and patent defects.

Mr. MANTILLA-MOLINA (Mexico) felt that the drafting group might consider whether it was appropriate to use the word "acción" in the Spanish text of article 10.

The CHAIRMAN said that if he heard no objection, article 10 would be referred to a drafting group composed of the representatives of Austria, Belgium, Ghana, Nigeria and the United Kingdom.

It was so decided.

Article 9 (continued)

The CHAIRMAN invited the Commission to comment on the proposed new article 9 in document A/CN.9/V/CRP.21/Rev.1/Add.2.

Mr. LEMONTEY (France) suggested that the phrase "for the purpose of paragraph 1" should be added between the word "shall" and the words "be deemed"

in paragraphs 2 and 3. He also pointed out a typographical error in the French text. The word "vol" should read "dol".

Mr. SMIT (United States of America) pointed out that if the proposed new article 9 was accepted, the words "subject to articles 10 and 11" should be deleted from paragraph 3, for it would be quite clear that the entire article was subject to those articles.

Mr. KHOO (Singapore) said that he was satisfied with the revised article 9, whether or not it was amended as suggested by the representative of France.

Mr. MANTILLA-MOLINA (Mexico) said that he was not satisfied with the formulation of article 9. Although paragraph 3 was intended as a clarification of paragraph 1, in fact it destroyed it and he would be quite satisfied to delete the first sentence of paragraph 3 as the representative of Australia had suggested at the morning meeting. Besides, there were two different elements in paragraph 3. The first was contained in the first sentence and the second, regarding the provisions in cases where notice to the other party was a condition for the acquisition or exercise of a claim, should be the subject of a separate paragraph.

Mr. GONDRA (Spain) said he agreed entirely with the objection of the representative of Mexico and that the attempt to establish an alleged connexion between paragraphs 1 and 3 of article 9 was not justifiable because those paragraphs related the start of the prescription period to two points in time which were conceptually and practically distinct. Paragraph 3 provided for an exception to the general norm established in paragraph 1 and, to preserve the balance of the legal construct, should be deleted. He also favoured the deletion of the final point in paragraph 3 relating to the question of time-limits (caducidad), which was outside the sphere of application of the Law.

Mr. GUEST (United Kingdom) supported by Mr. NESTOR (Romania) and Mr. KENNEDY (Australia), said that he agreed with the revised article 9 as amended by the French and the United States representatives.

The CHAIRMAN noted that there seemed to be general acceptance of the revised article 9 with the addition, in paragraphs 2 and 3, of a reference to

paragraph 1 and the deletion from paragraph 3 of the phrase "subject to articles 10 and 11".

Mr. MANTILLA-MOLINA (Mexico) pointed out that as it stood paragraph 3 contradicted paragraph 1. Moreover, it was inconsistent with the system adopted elsewhere in the Convention, since claims based on fraud (article 9 (2)) and those based on defects (article 10 (2)) were both deemed to become due on the date on which the fraud or defect came to the buyer's knowledge. The Convention was therefore inconsistent.

Mr. CHAFIK (Egypt) and Mr. COLOMBRES (Argentina) supported the objection of the representative of Mexico.

The CHAIRMAN said that it would be noted that four delegations objected to article 9.

Article 11 (continued)

Article 11 was approved.

Article 12 (continued)

Mr. MANTILLA-MOLINA (Mexico) recalled that, when the provision in paragraph 1 was first examined, his delegation had stated that its wording could give the impression that cessation of the limitation period was linked indiscriminately with the institution of judicial proceedings or the delivery of the request for such proceedings to the defendant. The lack of clarity was all the more regrettable because paragraph 2 of article 13, on arbitration, stated that delivery of the request was taken into consideration. The problem was of considerable practical importance, since, in international proceedings, the institution of proceedings and delivery of the request to the defendant were often separated by several months.

Mr. RECZEI (Hungary) said he had reservations on the words "different contract" at the end of paragraph 2. Indeed, parties frequently maintained continuous trade relations and concluded a series of successive "different" contracts. Thus, the condition provided for at the end of paragraph 2 should not cover the contract, but the relationship between the parties.

Mr. MANTILLA-MOLINA (Mexico) said that the Commission had agreed to consider the article paragraph by paragraph and he regretted that members were not following that procedure.

The CHAIRMAN said that he had submitted article 12 as a whole for consideration by the Commission. He asked representatives to confine their comments to a single article.

Mr. KENNEDY (Australia) proposed deleting the words "against the debtor" in paragraph 1, in order that the provision should cover acts performed by way of counterclaim.

Mr. LOEWE (Austria) recommended that paragraph 1 should remain in its

present form and that it should be left to the relevant court to fix the date on which the period would cease to run. The case foreseen in article 13 was different, because the rules relating to arbitration did not always stipulate which acts would involve cessation of the period. In reply to the representative of Australia, he said that paragraph 2 was intended to cover acts performed by way of counterclaim.

His delegation, however, felt that at the end of paragraph 1, the words "for the purpose of obtaining satisfaction or recognition of his (the creditor's) claim", were open to criticism because it was not clear how a party could obtain satisfaction of his claim during legal proceedings. It would be better to use the phrase "for the purpose of obtaining recognition of his claim".

Mr. COLOMBRES (Argentina) said that the arguments put forward by the Mexican delegation on paragraph 1 lost their force when the provision was considered in the general context of articles 12, 13 and 15. He did not think the difference between articles 12 and 13, pointed out by the representative of Mexico, was important. Paragraph 1 of article 13 stipulated clearly that the limitation period ceased to run when either party commenced arbitral proceedings. Paragraph 2 of article 13 was merely an exception to the general rule established under article 12.

Mr. SMIT (United States of America) said that, if the Mexican delegation was concerned about a case in which delivery of a request for proceedings had not been received by the debtor, the new article 28 should suffice to dispel its fears. Like the representative of Austria, he believed that only paragraph 2 of article 12 referred to acts performed by way of counterclaim. He fully supported the comments made by the Hungarian delegation.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation was not convinced by the Argentine representative's reasoning, and still believed that the wording of articles 12 and 13 was inconsistent. If the Commission decided to retain paragraph 1 of article 12, he asked that his delegation's position be reflected in the record of the meeting.

The CHAIRMAN suggested that a drafting group, composed of the representatives of Austria and Hungary should be entrusted with the task of formulating the drafting changes which had been suggested during the discussion of article 12.

It was so decided.

The CHAIRMAN invited the Commission to take a decision on article 12, subject to the drafting changes entrusted to the drafting group.

Article 12 was approved.

Article 13 (continued)

Article 13 was approved.

Article 14 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that subparagraph (d) of the provision was unnecessary, since the cases provided for in the different paragraphs were only examples, as indicated by the words "including" which preceded the enumeration.

Mr. GUEST (United Kingdom) said that subparagraph (d) had been added by the Working Group to satisfy the Australian delegation, which had pointed out that company law in the common-law countries provided for situations which were similar to, but nevertheless different from, liquidation.

Mr. NESTOR (Romania) supported the representative of the USSR and said that the exceptions should be explicitly described. He would prefer deletion of subparagraph (d).

Mr. SMIT (United States of America) also shared the view of the USSR representative. Article 15 was sufficiently explicit to allow for deletion of subparagraph (d) of article 14.

Mr. KHOO (Singapore) proposed solving the problem by deleting subparagraph (d) and amending subparagraph (d) to read "the dissolution or liquidation or other cognate proceedings in respect of a corporation, company, association or entity".

Mr. KENNEDY (Australia) supported the proposal made by the representative of Singapore. However, if the Commission was against that proposal, his delegation would accept deletion of subparagraph (d).

Mr. RECZEI (Hungary) proposed that the whole of article 14 should be deleted. The provision concerned only procedural questions, which were settled in

very different ways depending on the various jurisdictions. It introduced an element of imbalance since it only covered the case of the debtor. The article was either unnecessary or inadequate.

Mr. LOEWE (Austria) supported the Hungarian delegation's proposal. Article 14 merely indicated that it was impossible to settle the cases to which it referred.

Mr. OGUNDERE (Nigeria) said that deletion of article 14 would not remove the difficulties. The provision was important and should be retained. However, his delegation would support deletion of subparagraph (d).

Mr. DEI-ANANG (Ghana) said that his delegation was also in favour of retaining article 14 and deleting subparagraph (d). It was more important to settle the case of the debtor than that of the creditor, who generally left successors who were in a position to obtain recognition of their claims.

The CHAIRMAN invited the Commission to take a decision on article 14, with subparagraph (d) deleted.

Article 14, with subparagraph (d) deleted, was approved.

Article 15 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the words "without the consent of the debtor" in paragraph 1 lacked clarity. Was it to be understood that they referred to a simple oral agreement between the parties?

Although the intention of paragraph 2 was clear, the wording was not and should be improved.

The reference to articles 12, 13 and 14 in paragraph 1 should also be employed in paragraph 2.

Mr. LOEWE (Austria) said that he also was puzzled by the words "without the consent of the debtor". He did not think their appearance in the article constituted a simple drafting problem, but a substantive change. Since the problem had not been raised when the Commission first examined the draft, it was to be feared that the Working Group had somewhat exceeded its terms of reference on the point. His delegation proposed deleting the words and returning to the original text.

Mr. JAKUBOWSKI (Poland) said that the words criticized by the representatives of Austria and the USSR expressed an important idea which was worth retaining, but for which a satisfactory formulation had unfortunately not been found. The words excluded, for example, cases where the creditor might discontinue the proceedings after the debtor had informed him of his willingness to extend the period under article 21; in such cases, the cessation of the period would continue. The end of the paragraph might be amended in the following manner:

"... if the proceedings are dismissed for want of prosecution or if the creditor discontinues the proceedings, unless he acts with the consent of the debtor".

Mr. KENNEDY (Australia) said his delegation was somewhat concerned about the additional period envisaged in paragraph 2. He proposed that the end of the first sentence in that paragraph should be amended to read as follows:

"... the creditor shall in any event be entitled to an additional period of one year within which to institute legal proceedings to obtain satisfaction or recognition of his claim".

Mr. SMIT (United States of America) supported the Australian suggestion.

Mr. ROGNLIEN (Norway) recalled that article 15 was based on the former article 18; it regrouped several paragraphs of that article. The matter of discontinuance of the proceedings had presented a delicate problem for the Working Group, inasmuch as in certain legal systems, discontinuance entailed extinction of the right on which the action was based while in others the right was not extinguished. That made it necessary to consider the problem of the limitation period. There were many reasons why a creditor might wish to discontinue the proceedings; for example, he might fear an unfavourable ruling or he might deem the court incompetent. Paragraph 1 dealt with cases where the creditor acted without the consent of the debtor, since cases where the two parties agreed about discontinuing the proceedings were covered by the provision contained in paragraph 2. If the last words of paragraph 1 were deleted, the entire balance of the article would have to be reviewed. He would not, however, have any objection to the drafting amendment proposed by the Polish representative.

Paragraph 2 of article 15 covered a very complex question. If the wording

appeared abstruse, that was because it envisaged not only judicial proceedings, but arbitration proceedings as well. If the present text was too dense, it could quite well be divided into several subparagraphs like the former article 18.

Mr. KAMAT (India) recalled that, during the first examination of the former article 18, his delegation had proposed that the scope of the article should be restricted to cases where the proceedings had been instituted in good faith, in order to exclude proceedings instituted for purely dilatory purposes. His proposal had been supported by Nigeria and had not met any opposition, although the Austrian representative had remarked that it would appear difficult to restrict article 18 in that way. His delegation still felt that its proposal could have considerable practical effect. If no delegation objected, article 15 (2) should be restricted to proceedings instituted in good faith. That could be done, for example, by inserting the words "have been instituted by a bona fide creditor but" between the words "where legal proceedings" and the words "have ended", in the first line.

Mr. KHOO (Singapore) supported the Indian proposal aimed at excluding the abuse of recourse to the courts from the sphere of application of article 15, paragraph 2.

The article contained several ambiguous expressions. It was not very clear what the "other cases" envisaged at the beginning of paragraph 2 might be. Further on in the same paragraph, the English text contained the words "in any event", which seemed superfluous, since the circumstances under which the provision would apply had already been clearly spelled out. He strongly supported the Australian amendment to the same sentence.

The words "before the expiration of the limitation period", in paragraph 1, were superfluous, since any procedure commenced "in accordance with articles 12, 13 or 14" must necessarily be commenced before the expiration of the period.

The CHAIRMAN invited members of the Commission to limit their interventions to the two substantive problems which seemed to have arisen during the debate, namely, the need to maintain the reference to the absence of consent of the debtor with regard to paragraph 1, and the advisability of limiting the scope of paragraph 2, to proceedings commenced by a bona fide creditor. Drafting suggestions should be transmitted directly to the drafting group, which would be responsible for making the necessary drafting changes in article 15.

Mr. GUEIROS (Brazil) said he was in favour of rewording paragraph 2 in order to exclude abusive recourse to the courts. In any event, the words "without the consent of the debtor" should be deleted from paragraph 1, because otherwise it would be impossible to prevent purely dilatory manoeuvres.

Mr. GARRIGUES (Spain) recalled that his delegation had proposed an amendment (A/CN.9/V/CRP.17) which would considerably improve the drafting of article 15 (2). If it could be changed so as to reflect the wishes of the Indian representative, the Spanish amendment might well provide a valid solution to all the problems that had arisen.

Mr. JAKUBOWSKI (Poland) said the question raised by the Indian delegation should be taken into account. He wondered, however, whether paragraph 2 did not already, by its very content, exclude purely dilatory proceedings, since the creditor could not take advantage of the additional period envisaged except "to obtain satisfaction or recognition of his claim". That would seem to exclude proceedings that had been instituted for the sole purpose of interrupting the running of the period.

Mr. NESTOR (Romania) said his delegation was in favour of deleting the words "without the consent of the debtor" in the first paragraph. Romanian law recognized without reservation the principle of "availability" according to which the creditor was the master of his own proceedings. He was prepared to accept an amendment to paragraph 2 in the sense proposed by the Indian representative.

Mr. GUEST (United Kingdom) said he supported the retention of the last words of paragraph 1 for the reasons expressed by the Norwegian representative. He would have some difficulty, however, in accepting the amendment proposed by India, because reference to the good faith of the parties would introduce into the provision a very delicate question of interpretation. If the text was amended to that effect, it would be necessary to spell out what would happen when proceedings were instituted in bad faith, so as not unduly to penalize the litigant who acted in good faith.

Mr. SMIT (United States of America) said that the present text was sufficiently explicit to exclude proceedings instituted by the creditor in bad faith. If an action was instituted for the sole purpose of gaining time, and then

interrupted, paragraph 1 provided that the limitation period would continue to run. The existing provision thus protected the other party from dilatory manoeuvres without its being necessary to resort to the notion of good faith, which was always difficult to interpret. Indeed, the primary objective of paragraph 1 was not to exclude the mala fide litigant, but to enable the honest creditor who discovered that a court was incompetent to discontinue the proceedings in order to avoid unduly prolonging the case. From that standpoint, it was essential to retain the words "without the consent of the debtor" in order to compensate for the absence of an extension of the period.

With regard to paragraph 2 and the case of a mala fide litigant, he pointed out that abusive recourse to the courts was severely punished in every country and it would be preferable to leave it to the courts to decide on that, rather than introduce a reference to the good faith of the parties, which would unduly complicate the proceedings.

Mr. JENARD (Belgium) said he favoured the retention of the words "without the consent of the debtor". He was against including a reference to the good faith of the creditor, which would involve the judges in a difficult investigation of intentions.

Mr. ROGNLIEN (Norway) said the Working Group had taken the Indian proposal into consideration, but had not retained it because it introduced into the law an element of uncertainty. That uncertainty would be further aggravated because the good faith of the parties would have to be assessed not by the court initially seized with the case, but by the second court, which might find it difficult to gather the evidence it would need in order to hand down a decision.

With regard to the Australian proposal, the Commission should endeavour to find a formulation that would refer not only to judicial proceedings, but to recourse to arbitration as well. It might be advisable to use a general formulation such as "take the necessary steps in order to".

Mr. LOEWE (Austria) said that, in the view of his delegation, the draft under consideration was not a procedural convention, but an instrument regulating the substance of the law. The concepts reflected in article 15 were unknown to Austrian procedure and their retention might hinder acceptance of the draft. Under

Austrian law, the creditor was always entitled to discontinue his action, with or without the consent of the debtor. The last words of paragraph 1 should therefore be deleted. Nevertheless, it might be possible to arrive at a compromise formulation inspired by the provisions of Austrian law under which the discontinuance of an action by the creditor entailed the extinction of his right unless he discontinued the action with the consent of the debtor. He submitted his suggestion for consideration, although he knew that certain countries would undoubtedly find it difficult to accept.

With regard to the Indian proposal, he would hesitate to make prescription dependent on the good faith of the parties, since that was normally a question of substance, not of procedure.

Mr. DEI-ANANG (Ghana) said he favoured deleting the last words of paragraph 1, for the reasons explained by the USSR representative. His delegation, which had originally supported the Indian proposal, would not press for its adoption if that created too many difficulties. It also favoured the amendment proposed by Australia, which should also be inserted in article 16 (2), the wording of which paralleled that of article 15 (2).

Mr. OGUNDERE (Nigeria) considered the new article 15 satisfactory. Paragraph 1 allayed the concern his delegation had expressed during the discussion on former article 18 about the possibility of the creditor commencing proceedings as a delaying tactic. In view of the convincing arguments invoked by the representatives of Norway and the United Kingdom, he approved of retaining the words "without the consent of the debtor". With regard to paragraph 2, he felt it would be inappropriate to refer to the concept of good faith in provisions relating to procedure, especially since paragraph 1 made it possible to avoid abusive proceedings.

Mr. KAMAT (India) thanked those delegations which had supported his position and said that the opposing arguments had not changed his mind. Contrary to the views expressed by the representatives of the United States and Nigeria, he did not think that paragraph 1 would make it possible to cope with all the delaying tactics to which a creditor could resort. He acknowledged the existence of the difficulties mentioned, particularly with regard to proving the creditor's

bad faith. It should be noted, however, that other provisions had similar drawbacks. It would therefore be desirable to set up a small drafting group to study ways of eliminating all possibility of abuse. He volunteered his services as a member of the group, whose work would be greatly facilitated by the participation of the United Kingdom representative. Lastly, he was in favour of deleting the reference to the consent of the debtor in paragraph 1.

Mr. COLOMBRES (Argentina) said that he had already expressed reservations in the Working Group concerning any reference to the consent of the debtor in paragraph 1, since that was basically a procedural problem with which the Convention should not deal. He was also opposed to introducing in paragraph 2 the subjective notion of good faith. In any event, the sheer expense of unjustified proceedings would in most cases be a sufficient deterrent, especially since the additional period provided for was only one year.

Mr. CHAFIK (Egypt) said that he, too, was in favour of deleting the reference to the consent of the debtor in paragraph 1, and was opposed to introducing the concept of good faith in paragraph 2, which dealt solely with procedure. A court called on to determine the creditor's good faith might not have the necessary information to take a decision on that point, and he did not see why a creditor should be deprived of the benefits made available to him by paragraph 2 if he had done everything to deserve them.

The CHAIRMAN observed that the majority seemed to be opposed to introducing the concept of good faith in paragraph 2. He suggested that article 15 should be referred to a small drafting group composed of the representatives of the Soviet Union, India and the United Kingdom, who would seek to overcome the drafting difficulties pointed out by the various delegations. He noted, however, that the Commission was divided on the question whether the words "without the consent of the debtor" in paragraph 1 should be retained or deleted.

Mr. OGUNDERE (Nigeria) suggested that in order to settle the difficulty the words should be retained but placed between square brackets.

Mr. KHOO (Singapore) proposed that the drafting group suggested by the Chairman should be enlarged and instructed to amend the current wording to take into account the Indian representative's comments concerning the need for

paragraph 1 to cover all possible delaying tactics and the Spanish delegation's proposal contained in document A/CN.9/V/CRP.17.

Mr. MICHIDA (Japan) reminded the Commission that its usual practice was to take decisions by consensus; he stressed the danger of hasty decisions. The contemplated drafting group should be given time to reflect on the question whether to retain or delete the reference to the consent of the debtor in paragraph 1. If the group could not reach a solution on that point, he would support the Nigerian proposal to place the words "without the consent of the debtor" in square brackets.

Mr. JENARD (Belgium) observed that the Austrian representative had proposed the submission of a compromise text designed to command the widest possible support. An effort should be made to reach agreement and to avoid leaving words in square brackets.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) considered that the Commission should avoid hasty decisions and await the proposals of the envisaged drafting group.

Mr. SAM (Ghana) supported the representative of the Soviet Union and proposed that consideration of article 15 be suspended.

Mr. KAMAT (India) suggested that the representative of Singapore should be a member of the envisaged drafting group.

The CHAIRMAN suggested that consideration of article 15 should be referred to a drafting group composed of the representatives of the Soviet Union, India, the United Kingdom, the United States and Singapore.

It was so decided.

Article 16 (continued)

Mr. DEI-ANANG (Ghana) reminded the Commission he had already suggested that the end of paragraph 1 and the end of paragraph 2 of article 16 should be amended in accordance with the Australian representative's proposal concerning article 15.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that article 16 (1) seemed particularly obscure, since it did not spell out the reason why the creditor should commence fresh legal proceedings.

Mr. LOEWE (Austria) reminded the Commission of the objections he had made during the discussion of former article 21, which was the basis of new article 16. Furthermore, it seemed that the Working Group had exceeded its terms of reference by providing, in paragraph 2, that the creditor could be entitled to an additional period of one year from the date when recognition was refused. In Austria, for example, only decisions given in countries with which Austria had concluded a treaty on that subject could be recognized or executed. Consequently, any Austrian lawyer knew whether proceedings commenced in Austria to obtain recognition of a foreign judgement were admissible. In cases where a decision had been given in a State which had not concluded such a treaty with Austria it would be far too easy for a creditor to request recognition or execution in that country in order to seek refusal and thus benefit by an additional period. If that provision was retained, he thought that his country might refrain from becoming a party to the envisaged Convention.

Mr. ROGNLIEN (Norway), speaking as the representative of Norway, observed that former article 21 had not given creditors the opportunity to commence fresh proceedings in a State unless that State did not recognize a previous decision given in another State. New article 16 took into account the exclusion provided for in new article 5 (d) and dealt solely with a procedural question. The wording of article 16 was obscure; he recalled that he had proposed new wording in document A/CN.9/V/CRP.22, and requested that it be included in the Commission's report. In any case, he favoured the proposed additional period of one year.

Mr. SMIT (United States of America) observed that article 16 concerned the case of a creditor who had obtained a decision in his favour in one State but was unable to have it executed in that State because, for example, his adversary had no property there. When the creditor considered commencing fresh proceedings in a State where his debtor had property, he could try to obtain a new decision on the merits on the basis of his original rights, and that was the case envisaged in paragraph 1. The creditor could also consider seeking to have the existing decision recognized in the second State, and if that failed, he could resort to the provisions of paragraph 2, which gave him an additional period in which to commence fresh proceedings.

Mr. MANTILLA-MOLINA (Mexico) considered that article 16 raised complex questions; the members of the Commission should be given more time to think about it. He therefore suggested that the Chairman should bring the meeting to an end.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that in view of the explanations given he was not opposed to retaining paragraph 1, provided that the reason for that paragraph was clearly specified.

The CHAIRMAN suggested that the United States representative should propose a new and clearer wording for paragraph 1.

Article 16 (continued)

Mr. RECZEI (Hungary) requested clarification concerning the number of times a creditor could repeat the procedure set out in paragraph (1). He hoped that when the United States representative prepared the new formulation, he would take account of the fact that no limit had been indicated in the text.

Mr. MANTILLA-MOLINA (Mexico) felt that the text of paragraph (2) required clarification. It should at least state that if execution of a decision was refused, the action would be brought in the State which refused to implement the decision.

Mr. JENARD (Belgium) felt that paragraph (2) was useful, although the language should perhaps be clarified.

Mr. LOEWE (Austria) said that the article seemed to be inappropriate because it completely destroyed the operation of the Convention.

Mr. NESTOR (Romania) felt that the article should be reformulated to make it clear that the creditor did not have unrestricted liberty to commence whatever proceedings he wanted in different States.

The CHAIRMAN noted that there appeared to be a majority in favour of retaining paragraph (2) of article 16.

He invited the members of the Commission to consider article 17.

Article 17 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the Convention was intended to regulate relations between importers and exporters. The new paragraph (2) of the article introduced a purely domestic element into those international relations, which was undesirable. Quite apart from that consideration, a practical inequity might well arise if paragraph (2) as formulated by the Working Group was retained. According to that paragraph, where legal proceedings had been commenced against the buyer and when notification had been effected, the limitation period could be extended at the request of the importer for the entire period of the legal proceedings in question. In practice, it

seemed that the provision would never be applied by importers in countries where legal proceedings were carried out quickly. On the other hand the provision might have a definite adverse effect against exporters from such States if legal proceedings in the country of the importer continued over a number of years, since the exporter would forfeit the right to make a claim against his supplier. Therefore the situation could hardly be regarded as fair and placed parties on an unequal footing, depending on the length of legal proceedings. Furthermore, if a case went on for a number of years, the exporter would have to keep all the relevant documents for the entire length of the period, however long, while he waited for the decision to be rendered on the case in question. Paragraph (3) was also unclear since it did not specify which alternative period would be applied and would thus give rise to difficulties.

Mr. HYERA (United Republic of Tanzania) said that his delegation was somewhat puzzled by the fact that the buyer was allowed an additional year. Furthermore, he could envisage circumstances in which subpurchasers might institute proceedings successively. It would seem that in the final analysis paragraph (2) did not prescribe any limitation to such proceedings.

Mr. LOEWE (Austria) said that his delegation would prefer to delete the entire article, but if that was not acceptable, it would strongly favour the deletion of paragraph (2).

Mr. MUDHO (Kenya) said that his delegation would favour the retention of the article. However, his delegation had some difficulties with regard to paragraph (2) and more specifically with regard to the phrase "the limitation period prescribed by this Law shall cease to run".

Mr. RECZEI (Hungary) said that his delegation would prefer to delete paragraph (2) of article 17 and redraft paragraph (3).

Mr. ROGNLIEN (Norway) noted that the Soviet representative had raised the question of whether in paragraph (2) proceedings by a subpurchaser against a buyer should be introduced before the commencement of a limitation period. Paragraph (2) stated that they should begin within that period and the only difficulty was that a claim by a third purchaser was outside the scope of the present Convention. The only prescription period was between the buyer and the

seller, and that had been spelled out in paragraph (1). However, if the text was not clear on that point, it could doubtless be improved. In connexion with paragraph (3), the Soviet representative had raised the question of the alternatives for the institution of legal proceedings either within the limitation period or within one year from the date on which legal proceedings referred to in paragraphs (1) and (2) had ended. In the view of his delegation, it seemed logical to leave the choice to the creditor.

Mr. MANTILLA-MOLINA (Mexico) supported the proposal to delete paragraph (2) and to amend paragraph (3). However, if paragraph (2) was retained, he felt that a much shorter period of time should be allowed.

Mr. JAKUBOWSKI (Poland) said that his delegation supported the deletion of paragraph (2) because it contained elements foreign to the Convention.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the matter at issue was not whether legal proceedings were carried out during or after the limitation period. The problem was that, depending on the length of judicial proceedings in different countries, paragraph (2) would not have the same consequences in all countries. Therefore his delegation proposed that paragraph (2) should be deleted and that paragraph (3) should be amended.

Mr. GUEST (United Kingdom) said that, as he understood it, the basic point made by the representative of the Soviet Union was that proceedings between the subpurchaser and the buyer might take a considerable time and then at the end of those proceedings, paragraph (3) gave the buyer an extra year. It would seem that some provision which allowed a modest extension in the case of claims introduced by the subpurchaser against the buyer at a late stage of the limitation period ought to find a place within the Uniform Law. If the present text was unacceptable, perhaps the Soviet delegation could accept the idea expressed in the previous text, namely, that the one-year period should run from the institution of the legal proceedings. That solution might not commend itself to others who thought that the period of one year should run from the date of the judgement in

the proceedings by the subpurchaser against the buyer, but his delegation felt that that formula might constitute a possible compromise solution.

Mr. SAM (Ghana) said he supported the proposal to delete paragraph (2). He agreed with the Soviet representative that the draft Convention was intended to deal with the relations between the buyer and the seller at the international level. Any action by a subpurchaser should be based on national law and there was no reason to involve the seller in such proceedings.

Mr. KENNEDY (Australia) said that the retention of paragraph (2) was very important to his delegation, for the reasons outlined in document A/CN.9/V/CRP.16. It had been his understanding that the paragraph would be retained as a compromise between the countries that had sought the deletion of paragraph 20 of the draft contained in document A/CN.9/70 and those that had supported his proposal to strengthen that article. Although he would have to go along with the majority decision, he wished to place on record the fact that his delegation would be very reluctant to have that paragraph deleted or not replaced by some suitable compromise wording.

Mr. OGUNDERE (Nigeria) said his delegation felt that paragraph (2) was an important provision inasmuch as it preserved the right of recourse. Although he agreed with the Soviet representative that action by the subpurchaser might be outside the scope of the relationship between the buyer and the seller in an international transaction, he felt it was important not to allow the law to become a straitjacket. A buyer of machinery or other goods often distributed those goods as soon as they arrived. If paragraph (2) was deleted, and the original buyer was out of funds or otherwise financially weak, the subpurchaser would have no remedy. The retention of that paragraph was very important in his part of the world. He would not object to shortening the period envisaged in the article but would object to the deletion of paragraph (2).

Mr. ROGNLIEN (Norway) said it was true that the relations between the subpurchaser and the buyer were beyond the scope of the Convention, but relations

between the buyer and the seller were not. If paragraph (2) was deleted, the Convention would not allow the extension of the period within which the buyer could institute proceedings against the seller and thus would preclude recourse action by the buyer against the seller. As it stood, the article provided that legal proceedings had to be commenced within the limitation period and that the seller must be informed within that period. It could well be in the interest of both the buyer and the seller to defer legal proceedings until such time as there was a decision on the claim instituted by the subpurchaser against the buyer. The extension provided for in paragraph (3) might be shortened, but such a change might also compel the buyer to institute legal proceedings before it was actually necessary.

Mr. MICHIDA (Japan) said his delegation had no serious objection to the deletion of paragraph (2). However, he recalled that the present text represented a compromise reached by the Working Group in light of the debate at the 103rd plenary meeting. As the United Kingdom representative had suggested, if the Commission decided to delete paragraph (2), it would have to go back to the old article 20. If there was no agreement on the article at the current meeting, he suggested that the whole matter should be referred to a small drafting group which should formulate a new text in the light of the current debate. However, the principle contained in the paragraph must remain because the Commission had already decided that it should.

Mr. RECZEI (Hungary) pointed out that paragraph (2) provided for only one situation in a very complex sphere in which a variety of situations could arise. The paragraph provided for two tests: namely, that the legal proceedings must have been commenced by a subpurchaser against the buyer and that the buyer must inform the seller of the proceedings. Furthermore, those tests must be met within the four-year period. However, domestic limitation periods were quite different and might provide a much longer period within which a subpurchaser could institute proceedings against the buyer. In such a case, there would be no reason for the buyer to inform the seller because the period would have expired.

In Hungary, there was a rule that as long as a foreign buyer had a claim against a Hungarian exporter, the Hungarian exporter had the right to sue his

internal seller as well. That provision covered only exporters, not importers. However, he had had occasion to deal with a case in which a Hungarian importer had bought a Swiss truck which was guaranteed to have a capacity of 25 tons. The Hungarian subpurchaser, however, had not loaded the truck up to the 25-ton capacity within the limitation period. Some time after the period had expired, he had done so and the truck had collapsed. Although the Hungarian importer was liable to his subpurchaser, he had no recourse against the Swiss exporter. A situation such as that would not be covered under the terms of article 17.

Mr. LOEWE (Austria) said that if there were several subpurchasers and each one instituted legal proceedings against the buyer, the limitation period within which the buyer could sue the seller would be successively extended. In protecting the buyer, the draft Convention operated to the disadvantage of the seller.

He had often referred to Austrian law and felt constrained to do so once more because of situations which could arise if paragraph (2) was retained. For example, the prescription period for non-delivery was 30 years. Thus, the first buyer could sue after 29 years; assuming the trial took two years, the litigation would not end until 31 years had elapsed from the time of the sale. He felt it would be better if at least paragraph (2) of article 17 was deleted.

Mr. HYERA (United Republic of Tanzania) said he was inclined to agree with the Austrian representative that paragraph (2) was rather unfair to the seller. He asked the Chairman of the Working Group on Prescription for clarification regarding the situation that would arise when several subpurchasers instituted proceedings at different times against the buyer.

Mr. OGUNDERE (Nigeria) said he agreed with the Hungarian representative that paragraph (2) did not cover every situation that might arise; however, no drafter could make provision for every contingency. The Commission could do no more than try to envisage as many problems as it could. The right of recourse provided for in paragraph (2) was a very important element in the draft. His delegation wished to stress once more its opposition to the deletion of that paragraph.

Mr. ROGNLIEN (Norway), replying to the representative of Tanzania, pointed out that no matter how many subpurchasers there might be, there would be

no extension of the period unless the buyer informed the seller in writing within that period that the proceedings had commenced. Furthermore, there would be no extension unless the buyer actually instituted legal proceedings against the seller.

The CHAIRMAN suggested that in light of the comments made by the Japanese delegation, paragraph (2) should be referred to a small drafting group, which should try to agree on a compromise formulation. It should also try to clarify paragraph (3) of article 17 so as to eliminate some of the uncertainties that had been pointed out by several delegations. He suggested that the drafting group should be composed of the representatives of the USSR and the United Kingdom.

Mr. LOEWE (Austria) asked the Chairman to request an indicative vote in order to ascertain the feelings of delegations regarding the deletion or retention of paragraph (2).

Mr. GUEST (United Kingdom) said he had no objection to having the Chairman take an indicative vote, but asked him to bear in mind that several delegations had said they would agree to the deletion of paragraph (2) provided that the principle established in the former article 20 was retained.

Mr. SAM (Ghana) pointed out that several delegations might be in a difficult position if an indicative vote was taken, particularly in view of the comments just made by the United Kingdom representative. He appealed to the Austrian representative not to press his request for an indicative vote.

Mr. LOEWE (Austria) withdrew his request.

The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer the article to the small drafting group, in line with his previous suggestion.

It was so decided.

Article 18 (continued)

Mr. MICHIDA (Japan) said his delegation supported article 18 as redrafted on the basis of the former article 16. He had no question as to the

substance of the new article, but wished to make one comment on the drafting. He noted that the new text maintained the term "interrupting". Since it had been agreed to eliminate that term from the draft, he wondered whether in article 18 it might not be replaced by a term such as "ceasing to run". The corresponding changes should be made in the other language versions.

Mr. LOEWE (Austria) said his delegation had no particular interest in article 18, but he did feel that the 10-year extension provided for was too long. It would be preferable to stipulate that the over-all maximum would be 10 years; thus, the extension provided for would not exceed six years.

Mr. MANTILLA-MOLINA (Mexico) observed that paragraph (1) should not refer only to States where the debtor had his place of business, but should also cover States which were competent to deal with a dispute between the parties. Some contracts provided that the parties must submit to the jurisdiction of a given State or court of arbitration which might be different from or located in a State other than the State in which the debtor had his place of business. He therefore proposed the addition, after the words "place of business", of the following: "or where the court which, according to the contract, is competent to take cognizance of any dispute which might arise between the parties, is located...".

He suggested that the matter of the length of the extension provided should be deferred for the time being. However, rather than repeat in articles 20 and 21 the circumstances under which an extension could be granted, it would be preferable merely to state that in such and such a case, the limitation period should not extend beyond a specific number of years from such and such a date.

Mr. KAMAT (India) recalled that he had objected to the original draft of article 18 because it would result in uncertainty in the application of the Convention and would detract from the uniformity of the Uniform Law. Although the new formulation was an improvement he maintained his objections.

Mr. KHOO (Singapore) said that he was extremely concerned at the length of extension to the limitation period allowed under the articles concerning duration and extension of the limitation period (articles 10-20). Article 10 added four years to the basic limitation period of four years which had been agreed upon by the Commission and article 17 (1) provided for cessation of the limitation period, while other articles provided for one-year extensions. Article 18, in its present form, would involve a four-year extension of the limitation period. He found it difficult to accept such a long extension and the idea that an act recognized by a law which might be unknown to a national lawyer could lead to an interruption of the limitation period in that lawyer's country.

Mr. SMIT (United States of America) said that he too had been opposed to article 18 in its original form, which had been based on the idea that creditors could extend the limitation period. However, the new draft provided not only that the act interrupting the limitation period must be contemplated by the State where the act was performed, but also that such act would be recognized only if the place of business of the debtor was in that State. United States law did not recognize acts having an interruptive effect and within its own terms article 18 could therefore not operate in his country. The same would apply to all countries whose representatives were opposed to article 18, which was in fact intended only for those countries where the rule of interruptive effect applied. It was true that it detracted from the uniformity of the Convention but it should be accepted by the Commission in a spirit of compromise.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he endorsed the statement by the representative of Singapore. Each article, when considered in isolation, was quite acceptable. However the combination of all the articles led to so many reservations and extensions of the basic four-year limitation period that the exact limitation period which would apply in any one case could only be guessed at.

Mr. ROGNLIEN (Norway) said, with reference to the comments by the representatives of Singapore and of the USSR, that even if the Commission was to establish a fixed maximum time-limit on extensions of the limitation period, that limit should not apply to cases where legal proceedings were involved. Such proceedings sometimes lasted a very long time and their duration was outside the control of either party. The parties should not be penalized by a fixed time-limit in such cases.

Mr. JENARD (Belgium) noted that although article 18 detracted from the uniformity of the Uniform Law, its scope was limited and it enabled some countries to use their existing legislation. He agreed with the representative of Japan, that the word "interruption" should not be used in the Convention and with the representative of Austria, that the limitation period under article 18 should not be extended for more than six years. He could accept article 18 if those two suggestions were approved by the Commission.

Mr. OGUNDERE (Nigeria) said he agreed with the representatives of Singapore and the USSR. He had been opposed to article 18 in its original form but could accept the new draft, since it stated that debtors would be affected only if their place of business was in the State where the interruptive act occurred. With reference to the suggestion by the representative of Belgium, for a total limitation period of 10 years, he thought 10 years was too long a time and preferred a total of eight years.

Mr. GUEST (United Kingdom), referring to the comments by the representative of Singapore, said that the prospect of various extensions of the limitation period caused great concern to anyone practising common law. In common law only a very brief extension of the limitation period was allowed, in cases of acknowledgement by the creditor. Civil law was more flexible in allowing an extension when the justice of the situation demanded it. He fully supported retention of article 18, since it could not prejudice countries where interruption did not exist and might even be of benefit to those countries in certain circumstances.

The Commission in any case was not called upon to adopt a final text for the Convention on prescription. That was the task of the diplomatic conference, which would work on the basis of the draft submitted by the Commission.

Mr. MUDHO (Kenya) said that although he had been opposed to the original formulation of article 18 he could accept the new text, which was more precise. With reference to the over-all limitation period, he agreed that a 10-year period was excessive and supported a total limitation period of eight years, as suggested by the representative of Nigeria.

Mr. KAMAT (India) said he recognized the validity of the arguments advanced by the representatives of the United States and the United Kingdom. However, the requirement that the debtor should have his place of business in a State where a given act had the effect of interrupting the period did not solve the difficulty for his country. The courts would have to inquire into a number of questions of fact, such as whether the debtor had his place of business in another country, what effect the law would have and so forth. The difficulties of proof would be considerable. He felt it would be preferable to spell out certain acts which would be considered as having the effect of interrupting the period and then agree on a compromise text.

Mr. CHAFIK (Egypt) said he supported the retention of article 18 because it envisaged cases which were well known in many countries, including his own. He agreed, however, with the representatives of Singapore and the USSR that the draft Convention provided for too many different periods. It would be preferable to adopt, as far as possible, a single period for all cases of extension, which might be eight or 10 years if it was to be a long one or one or two years if it was to be a short one.

Mr. SAM (Ghana) said his country's position had already been quite adequately explained by representatives of other common law countries. He agreed that the Commission should try to make the length of the extension the same in all cases.

The CHAIRMAN said he took it that the Commission approved article 18, with the drafting change suggested by Japan, i.e. to replace the term "interrupting" by an equivalent expression such as "ceasing to run".

Mr. KHOO (Singapore), speaking on a point of order, asked whether it was really clear that there was a consensus in favour of the retention of article 18. He thought that the point raised by the Indian representative, regarding the difficulties of the courts, had some force. He wondered whether the Indian representative would agree to the retention of the article.

The CHAIRMAN said that, despite the divergent views that had been expressed in the Commission, it seemed clear that members had accepted article 18 as a compromise solution. The most recent remarks made by the Indian representative

had not been supported by any other delegation. Furthermore, as the United States representative had pointed out, the article would not affect those countries which did not accept or recognize cases such as the ones envisaged in article 18.

The only point on which there was not yet clear agreement was the matter of how long the extension should be. He took it that most members were against granting an extension allowing for a total period of 14 years. The Austrian representative had suggested an extension of six years, which would bring the over-all period to 10 years, but others had preferred an extension of four years. After asking for a show of hands, he noted that no delegation wished to maintain the extension of 10 years.

Mr. MICHIDA (Japan) pointed out that page 10 of the summary record of the 101st meeting (A/CN.9/SR.101) of 14 April 1972 contained a statement by the Chairman to the effect that it appeared that a consensus had arisen in favour of article 16, revised in accordance with the suggestions which had been made. The Chairman had suggested that the delegations which had suggested changes should transmit them to the Working Group, which would be responsible for the preparation of the new text of article 16, which was now being considered as article 18.

Mr. KAMAT (India) stressed that the summary record had clearly stated that a redrafted text of article 16 would be prepared by the Working Group. While his delegation did not wish to take issue on the matter if it was the view of the Chair that a consensus now existed in favour of the redrafted text, now under consideration as article 18, it did wish the report to reflect very clearly that his delegation and certain others did not approve of the approach in the article, which sought to interrupt the limitation period for certain acts, without spelling out what those acts were. In the view of his delegation, that would greatly detract from the uniformity of the law and would also create substantial difficulties with regard to proof.

Mr. KHOO (Singapore) said that he was extremely concerned about the number of exceptions allowed under the Convention and said that his delegation intended to submit a proposal with regard to a maximum limitation period.

The CHAIRMAN requested the representative of Singapore to submit his proposal as soon as possible and invited representatives to indicate by raising their hands whether they were in favour of a 10-year period, a six-year period or a four-year period.

He noted that there were no representatives in favour of a 10-year period, four representatives in favour of a six-year period, and 14 in favour of a four-year period.

Mr. COLOMBRES (Argentina) suggested that in the Spanish text "interrupción" should be replaced by "cesar de correr" because in some States interruption gave rise to a new limitation period whereas in others limitation period was merely suspended.

The CHAIRMAN suggested that article 18 should be referred to a drafting group composed of the representatives of Argentina, Japan and Singapore.

It was so decided.

[The last part of the meeting was taken
up by the discussion of other matters]

119th meeting (1 May 1972)

New draft proposed by the Working Group on Prescription (A/CN.9/V/CRP.21/Rev.1)
(continued)

Article 19 (continued)

Article 19 was approved.

Article 20 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that in the English text the words "which is not personal to the creditor" seemed to duplicate the other terms used to define the circumstances envisaged in article 20. There should be no difficulty in deleting those words.

Mr. MANTILLA-MOLINA (Mexico) said that the French and Spanish versions of article 20 diverged from the English version on one point. The French text spoke of a circumstance which the creditor could "neither foresee (prévoir) nor overcome" whereas the English text used the words "avoid" and "overcome". The terminology used in the English text seemed more appropriate for there were examples of force majeure, war for example, which could easily be foreseen without it being possible to overcome them. The terms used should therefore be harmonized.

Mr. GUEST (United Kingdom) explained that the Working Group had used the terms "not personal to the creditor" to introduce the idea of non-imputability. There were in fact unforeseeable and insurmountable circumstances which were personal to the creditor - the fact that he fell ill, for example. Such circumstances were excluded from the field of application of article 20.

Mr. SMIT (United States) said he was afraid that the expression "not personal to the creditor" would give rise to uncertainty and confusion. He would prefer it to be replaced by the expression "beyond the control of the creditor" which was more currently employed by Anglo-Saxon jurists.

Mr. SAM (Ghana) supported the suggestion made by the United States representative.

Mr. LOEWE (Austria) pointed out that, in the preceding articles, the Commission had decided to restrict the extension of the limitation period to a duration of four years, making a total maximum period of eight years. He proposed that the period of extension should also be limited to four years in the case of article 20.

The CHAIRMAN, after having requested those members of the Commission in favour of the Austrian proposal to signify, noted that a majority favoured the restriction of the period of extension to four years. Article 20 would therefore be amended to that effect. He proposed that the drafting changes should be entrusted to a small group composed of the representatives of the United States, Mexico, the USSR and Belgium.

It was so decided.

Article 21 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) requested a clarification of the meaning of the new provision which appeared in paragraph 3 and which seemed to nullify the effects of paragraphs 1 and 2. Two questions arose: What was the aim of the proposed waiver? Should the waiver be made before or after the expiry of the normal limitation period? His delegation would favour the deletion of that provision, whose meaning and scope it did not understand.

Mr. MAHUNDA (United Republic of Tanzania) said that his delegation, during the first reading of the draft, had put forward very serious objections to the article under consideration. In Tanzania, limitation was a question of public policy completely removed from the initiative of the parties. His delegation, noting that the provision which it had opposed had not been amended, reserved the right to take the necessary measures at the time of the conclusion of the convention.

Mr. GONDRA (Spain) pointed out that his Government, in its reply to the Secretariat's questionnaire, had expressed reservations concerning the desirability of authorizing modification of the limitation period in the convention.

Paragraph 3 of article 21 had been introduced at the initiative of the Spanish delegation so as to offer the debtor the possibility of waiving limitation after the expiry of the limitation period. That provision was linked to article 22 which allowed the parties to invoke limitation.

In spite of the general reservations it had expressed on article 21, his delegation was ready to accept the present wording.

Mr. GUEST (United Kingdom) said that the Working Group had discussed the revision of article 21 at great length. With regard to paragraph 2, the members of the Working Group who, as a majority, felt that a four-year extension was too short, had said they would abide by the Commission's decision. Paragraph 3 had been inserted at the suggestion of the Spanish delegation and seemed to have been welcomed by the Commission. The waiver envisaged would take place after the expiry of the limitation period, as was clear from the French and Spanish texts.

Mr. HONNOLD (Secretary of the Commission) drew attention to the amendment to article 21 proposed by the Norwegian delegation (A/CN.9/V/CRP.22). Should that amendment not be adopted, the Norwegian representative had asked the Secretariat to mention the amendment in the Commission's report.

Mr. MUDHO (Kenya) pointed out that his delegation, like that of Tanzania, had been very concerned about paragraph 2 of article 21, which gave the parties an excessive freedom which was incompatible with the whole basis of limitation. His delegation was ready, however, to approve paragraphs 1 and 2 of article 21 provided that the maximum limitation period was restricted to eight years. It had some difficulty with paragraph 3 whose exact meaning it failed to grasp. He would accept, however, the article as a whole, if a majority was in favour of it, provided that his comments were reflected in the report.

Mr. MANTILLA-MOLINA (Mexico) felt that paragraph 3 could be deleted without difficulty because the waiver, which took place after the expiry of the limitation period, would take effect only in the circumstances envisaged in article 22. Paragraph 4 contained a general provision which should appear, not in the article on the modification of the limitation period, but in paragraph 2 of article 1. Should the latter suggestion not be accepted, he would like his remarks to be reflected in the report.

Mr. RECZEI (Hungary) said his delegation would like paragraph 2 to be replaced by the amendment proposed by Norway (A/CN.9/V/CRP.22). It would favour the deletion of paragraph 3 because it felt that the waiver envisaged had no specific effect: when the limitation period had expired, the debtor should merely abstain from invoking limitation to ensure that the limitation period was not taken into consideration.

Certain representatives had criticized paragraph 2 because in their countries limitation was a question of public policy. Their reasoning was perhaps not very accurate, because, while the existence itself of limitation was indeed a matter for public policy, the length of the limitation period or the autonomy allowed to the parties in that respect were actually matters for regulation.

Mr. OGUNDERE (Nigeria) said that he had certain reservations about paragraphs 3 and 4 but in the spirit of compromise he was ready to approve the article as a whole.

Mr. KAMAT (India) said that, in spite of his delegation's reservations on paragraph 2, he was ready to support the new text of that paragraph, which was a valid compromise in the sense that it restricted the possibilities of extension to a maximum of four years. On the other hand, paragraph 3 seemed to go beyond what had been agreed upon within the Commission and to contradict the desire, expressed in the previous paragraph, not to prolong the limitation period indefinitely. It might therefore be thought that the provision of article 22 made paragraph 3 superfluous.

Mr. DEI-ANANG (Ghana) agreed with the representative of Hungary that the revised version of paragraph 2 proposed by Norway was clearer than the text prepared by the Working Group and should be adopted. He did not understand the exact meaning of paragraph 3, and would like it to be deleted.

Mr. SMIT (United States of America) said he supported the amendment proposed by Norway, which would enable the debtor to extend the period beyond four years. His delegation approved of the two-stage procedure suggested by Norway, provided that the extension was calculated not from the expiration of the normal limitation period but from the date of the declaration by the debtor, in accordance with the provision of article 19, paragraph 1 relating to the acknowledgement of debt.

Article 21, paragraph 3 was not superfluous, since it dealt with the period between the expiration of the limitation period and the commencement of proceedings, which was covered neither by article 21, paragraph 2, nor by article 22.

Mr. GONDRA (Spain) agreed with the United States representative that paragraph 3 did not overlap with article 22, although the two articles did have the same basis. Paragraph 4, on the other hand, was not clear and could lead to confusion with regard to the application of the provisions concerning "time-limits" (déchéance), which under article 1, paragraph 2 were excluded from the sphere of application of the Uniform Law. Article 21, paragraph 4 should therefore be deleted, in order to avoid all ambiguity.

Mr. JENARD (Belgium) said he could accept the article, although he would have preferred the parties to be given an opportunity to reduce the limitation period. In his view, the text proposed by the Working Group was preferable to that suggested by the Norwegian delegation, for it was clearer and provided for a maximum limitation period of eight years, as did articles 18, 19 and 20. He had no objection to deleting paragraph 3 but would prefer to retain paragraph 4; he could accept the amendment to the latter paragraph proposed by the Mexican delegation.

Mr. LOEWE (Austria) said he agreed with the Belgian delegation, but considered it necessary to delete paragraph 3, which in his view was out of keeping with the spirit of the Convention for the reasons given by the representative of the Soviet Union and India.

Mr. GUEST (United Kingdom) said he approved of the current version of article 21. Paragraph 2 seemed preferable to that proposed by the Norwegian delegation, which was too complicated. The four-year extension beyond the end of the initial limitation period was, in fact, a satisfactory compromise between the position of those who favoured unlimited extension and the position of those who were opposed to any extension.

The CHAIRMAN observed that there seemed to be a consensus in favour of paragraph 1. A majority wished to retain paragraph 2, despite the reservations

expressed by some delegations, which would be included in the report. A majority was likewise in favour of deleting paragraph 3 and retaining paragraph 4, the text of which should no doubt be amended in order to avoid any confusion with "time-limits" (déchéance). He therefore suggested that the Commission should approve paragraphs 1 and 2 of article 21, delete paragraph 3 and approve paragraph 4, subject to the introduction of drafting changes in paragraph 4.

It was so decided.

Article 22 (continued)

Mr. MAHUNDA (United Republic of Tanzania) recalled the objection of principle which his delegation had formulated during the first reading of the article. He considered that the article should be deleted.

Mr. KAMAT (India) recalled that his delegation had already expressed very serious reservations concerning article 22, which reproduced word-for-word the original article 23. The Commission had, however, instructed the Working Group to prepare a compromise text, taking into account all the views expressed, and it had been understood that if the Group could not find a solution, it should allow for reservations to that article.

Mr. GUEST (United Kingdom) said that the Working Group had been unable to find a form of wording that reconciled the opposing positions. It had therefore retained the original text, while providing in article 34 that any State could derogate from article 22 by making an express declaration to that effect at the time of the deposit of its instrument of ratification or accession.

Mr. DEI-ANANG (Ghana) considered that the provision concerning possible reservations could have been included in article 22. He recalled that the Australian delegation had proposed a compromise solution concerning which the Working Group had given no explanation, although it had been instructed to take into account all the views expressed.

Mr. JENARD (Belgium) said that the Working Group had indeed considered all the views expressed in plenary, but had been unable to find a compromise formula that would reconcile certain irreconcilable positions. Furthermore, even

in those countries where the judge could intervene, the nature of that intervention varied considerably; it might be optional or mandatory. The Working Group had therefore preferred to adopt a very flexible solution; it had reproduced the original text while making allowance in article 34 for possible reservations.

Mr. OGUNDERE (Nigeria) recalled that his delegation had expressed the view that the article should be deleted. If it was to be retained, it should include a provision stating that it would not apply in countries whose legal systems permitted the judge to intervene in the proceedings. In any event, if the current text was retained with a provision concerning possible derogations, the latter provision should be included in the article itself, not in a separate article.

Mr. MUDHO (Kenya) said he fully agreed with the views expressed by the representative of Nigeria. He considered the Working Group's solution less satisfactory than the amendment proposed by the United Kingdom representative during the first reading, according to which the provisions of the article would not apply where the rules of public policy of the forum otherwise provided.

Mr. MANTILLA-MOLINA (Mexico) considered that the Working Group had not made the necessary effort to reconcile the various points of view and had merely adopted the majority opinion. Furthermore, by laying down a general rule and at the same time making it possible to derogate from that rule the Group had departed from the principle of uniformity which should form the very basis of the Convention. Although intervention by a judge might be justified under some national laws, it might be in the interest of the parties themselves not to invoke limitation, either because they wanted their dispute to be considered in detail or because they tacitly wished to extend the limitation period. In a spirit of conciliation, he suggested that in those countries where the law provided that the judge could invoke limitation suo officio, that should not be done until the judgement had been handed down, after the case had been considered in detail. He was opposed to the Australian proposal, according to which the tribunal could draw the attention of the parties to the possibility of invoking limitation, for that would be out of keeping with the impartiality of the judge.

Mr. GUEST (United Kingdom), referring to the statement by the representative of Kenya, observed that the United Kingdom proposal had not been accepted by the Working Group. The latter's solution nevertheless had definite advantages, for article 34 enabled a State to declare expressly that it intended to make a reservation to the application of article 22. It would thus be possible to ascertain which States applied article 22 and which States derogated from it.

Mr. LOENE (Austria) considered that the provisions of articles 22 and 34 constituted a fair compromise, which all delegations should be able to accept. The incorporation of reservations into article 22 itself might lead to confusion and should be avoided.

Mr. KHOO (Singapore) inquired whether the Group had considered the possibility of simply deleting article 22. If so, he would like to know why the Group had not adopted that solution.

Mr. GUEST (United Kingdom) said that the Working Group had indeed considered that possibility, but had decided that the deletion of article 22 would not be a satisfactory solution, because under article 23, paragraph 1 the judge would then be obliged to invoke limitation suo officio.

Mr. JENARD (Belgium) shared the view that it would be a mistake to delete article 22. Without that provision it would not be clear whether it was for the parties or for the judge to invoke limitation. Moreover, the problem would arise again in article 23.

Mr. OGUNDERE (Nigeria) said that he did not see how article 34 could be amended to meet the objections his delegation had raised with respect to article 22. If, nevertheless, article 22 was approved, he would request that the Commission's report should indicate that reservations had been expressed by several delegations regarding that provision.

Mr. RECZEI (Hungary) said that provision could be made in article 22 for the possibility of reminding the parties that they were entitled to invoke limitation to be open to the judge.

Mr. CHAFIK (Egypt) said that the suggestion made by the Hungarian delegation would be contrary to the principle of the judge's impartiality.

Mr. HYERA (United Republic of Tanzania) proposed that the Commission should suspend its discussion of article 22 and take a decision on that article when it took up article 34.

The CHAIRMAN said that, in his opinion, it would be better for the Commission to take a decision immediately on article 22. He proposed that the article should be approved on the understanding that the objections raised by various delegations would be reflected in the Commission's report and that the question of reservations would be considered in connexion with article 34.

Article 22 was approved.

Article 23 (continued)

Mr. MANTILLA-MOLINA (Mexico) said that the article was incomprehensible, at least in the Spanish version. Moreover, even the English and French texts of paragraph 1 were not precisely equivalent. The English text appeared to sustain the interpretation that a claimant could be prevented from pressing a claim in respect of which the period of limitation had expired only by judicial decision. The French text, on the other hand, indicated that the claim itself would not be recognized.

Mr. RECZEI (Hungary) recalled that in connexion with the discussion of article 12, his delegation had requested that the words "out of a different contract", which appeared at the end of paragraph 2, should be replaced by a formulation indicating that the restriction in question did not apply to the contract but to the commercial relationship between the two parties. He recommended that the wording adopted for that purpose should also be used in article 23, paragraph 2 (a), which referred to "the same contract".

Mr. SMIT (United States of America) supported the suggestion put forward by the Hungarian delegation. Replying to the point raised by the Mexican delegation, he observed that article 22 met the Working Group's concern to establish a general rule. That provision was not incompatible with article 23 inasmuch as the latter was "Subject to the provisions... of article 22".

Mr. COLOMBRES (Argentina) supported the comments made by the representative of Mexico with reference to paragraph 1 and recommended that the French and Spanish texts should be changed accordingly.

Mr. JENARD (Belgium) said that, in his opinion, the French text was satisfactory and he saw no reason to change it.

Mr. CHAFIK (Egypt) said that whatever the wording chosen to replace the phrase "to the same contract", it should express the idea that both claims must relate to the same action.

Mr. JAKUBOWSKI (Poland) associated himself with the view expressed by the representative of Hungary to the effect that articles 12 and 23 should be changed in tandem.

Mr. COLOMBRES (Argentina) proposed, in view of the obscurity of article 23, paragraph 1, that the provision in question should simply be deleted.

Mr. LOEWE (Austria) seconded that proposal.

Mr. OGUINDERE (Nigeria) said that his delegation was opposed to the deletion of paragraph 1.

Mr. KAMAT (India) recalled that during its initial consideration of article 23, the Commission had expressed itself in favour of retaining paragraph 1. In view of that decision, nothing more than mere drafting changes could be envisaged for the provision in question.

Mr. RECZEI (Hungary) read out the text proposed by the Egyptian delegation for the final clause in article 12, paragraph 2: "provided that such counterclaim does not arise out of a contract of a different nature". His delegation endorsed that formulation and recommended that a similar wording should be used in article 23, paragraph 2 (a).

The CHAIRMAN observed that a clear majority was in favour of retaining article 23, paragraph 1. With regard to paragraph 2, he proposed that a drafting group consisting of the representatives of Austria and Hungary should be entrusted with the task of amending that provision, taking into account the Egyptian proposal. Subject to that amendment, he put article 23 forward for the Commission's approval.

Article 23 was approved.

Article 24 (continued)

Article 24 was approved.

Article 25 (continued)

Article 25 was approved.

Article 26 (continued)

Mr. MANTILLA-MOLINA (Mexico) said that he was not completely satisfied with paragraph 2 since the real issue was not the calendar but rather the date.

Article 26 was approved.

Article 27 (continued)

Article 27 was approved.

Article 28 (continued)

Mr. GUEST (United Kingdom), speaking on behalf of the Working Group, noted that article 28 was a new provision which the Working Group believed would solve the problem raised by the former article 35. That problem was twofold. First, should the institution of legal proceedings in a non-Contracting State have international effect?

Secondly, what would happen if a debtor had not been informed of the fact that legal proceedings had been taken against him? Article 28 provided an answer to those two questions which the Working Group hoped would be acceptable to the Commission as a whole.

Speaking as the representative of the United Kingdom, he added that his delegation would have preferred to retain the reservation provided for in the former article 35, if only for the sake of settling the matter of proceedings instituted before an incompetent jurisdiction. In a spirit of compromise, however, his delegation had agreed to dispense with that reservation and to accept the provisions, which in its view were insufficient, of the new article 28. However, it insisted that its position on the matter should be mentioned in the commentary on the draft convention and reserved the right to raise the matter again at the time of the diplomatic conference.

Mr. OGUNDERE (Nigeria) said that his delegation, which had been opposed to the reservation provided for in the former article 35, found the solution arrived at in the new article 28 more satisfactory.

Mr. LOEWE (Austria) said that his delegation was not entirely satisfied with article 28. In the first place, it was inconsistent with the uniformity which the future Convention aimed at promoting to require that the acts in question must take place "in a Contracting State". His delegation could, nevertheless, have overlooked that point if at least the meaning of the provision had been clear. The text as worded, however, could give rise to misunderstanding, and it would be better to modify the structure of the sentence so as to say that no Contracting State would be bound to recognize the effect of the acts referred to in articles 12, 13, etc.... in respect of acts which took place in a non-Contracting State. Secondly, he considered that the last part of the article ("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") would not be valid before the courts of his country, where it would be inconceivable for a creditor's claim to be rejected on the ground that the debtor had not been informed of the institution of legal proceedings.

Mr. SMIT (United States of America) said that he thought it might be possible for the Commission to arrive at a compromise between the position of the United Kingdom delegation, which would prefer to retain the reservation provided for in the former article 35, and that of the Austrian delegation, whose objections concerning article 28 would vanish if those provisions were of an optional rather than mandatory nature.

Mr. JAKUBOWSKI (Poland) said that his delegation also had some difficulty in accepting the rule contained in article 28 under which the institution of proceedings in a non-Contracting State would be without effect in a Contracting State. It was often the case that arbitration proceedings took place in a third country. The new article 28, by denying the parties that possibility, would go beyond the sphere of prescription.

The CHAIRMAN said that the Commission would continue its consideration of article 28 at the next meeting.

120th meeting (1 May 1972)

The CHAIRMAN invited the Commission to continue its consideration of the new draft of articles 29-46 proposed by the Working Group on Prescription (A/CN.9/V/CRP.21/Rev.1/Add.1)

Articles 29 and 30 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that his delegation's views on the substance of article 29 were already known. It was undesirable to require States to provide for an additional instrument giving part I of the Convention the force of law. The article should be redrafted or deleted.

Mr. JENARD (Belgium) thought that the article should be deleted because the Convention would be applicable only in respect of a contract of sale concluded between partners having their places of business in Contracting States.

Mr. GUEST (United Kingdom) was uncertain as to the possible effects of the deletion of article 29. He could not immediately say whether it would be possible, for example, for a State to ratify the Convention and yet not implement it. It might be that ratification would connote that the State in question had implemented the Convention or that it proposed to implement it. If there was any possibility that deletion of article 29 would leave a loop-hole whereby States could ratify but not implement the Convention it would be better to refer the article to the international conference of plenipotentiaries.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) proposed that article 30 should be referred to the conference of plenipotentiaries without further discussion in the Commission.

Mr. KENNEDY (Australia) supported the USSR proposal.

Mr. LOEWE (Austria) agreed that article 29 should be deleted, as it served no purpose.

Article 30 would be applicable in the case of Austria, which was a federal State. However, it would be difficult to reconcile it with the Austrian federal

structure because all the legislative acts relating to the Convention would fall under federal jurisdiction. The requirement that the federal Government should bring acts to the notice of the Austrian provinces would therefore raise difficulties for his Government. As a solution, the text of paragraph (b) might be amended to refer to articles which did not fall entirely within the legislative purview of the federal authority.

Mr. OGUNDERE (Nigeria) said that while he could not agree to the approach suggested by the representative of Austria, he could accept the substitution of "may" for "shall" in paragraph (b).

Mr. GUEST (United Kingdom) said that it would be better to leave the text as it stood for consideration by the international conference of plenipotentiaries, at which States could express their views regarding its content.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) endorsed the United Kingdom representative's remarks.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer articles 29 and 30, as formulated by the Working Group and in brackets, for discussion by the international conference of plenipotentiaries.

It was so decided.

Article 31 (continued)

Article 31 was approved.

Part III: Declarations and reservations

The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the title of part III.

It was so decided.

Article 32 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that paragraphs 2 and 3 of article 32, which the Working Group had left in brackets,

should be deleted as superfluous in view of the decision that the Convention would be applicable only in respect of a contract of sale concluded between parties having their places of business in Contracting States. He also wondered whether there was any need to retain paragraph 4 of the article; its substance was covered in article 2 of the Convention.

Mr. LOEWE (Austria) agreed that paragraphs 2 and 3 of article 32 should be deleted.

Mr. JENARD (Belgium) endorsed the USSR proposal for the deletion of paragraphs 2 and 3 of article 32.

He noted that article 32 referred to the "Convention", whereas other articles referred to the "Uniform Law". To avoid any ambiguity, he proposed that the word "Convention" should be used throughout the Convention.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) endorsed the Belgian proposal.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the Belgian representative's proposal.

It was so decided.

Mr. KHOO (Singapore) asked whether the words "any contract" in paragraph 1 were intended to refer to individual contracts or to transactions in general. If the reference was to individual contracts, he would strongly oppose it, because it would nullify the work already done by the Commission.

Mr. MANTILLA-MOLINA (Mexico) endorsed the comment of the representative of Singapore. The underlying idea was a reference to transactions in general and not to a single contract. If, for example, Mexico and Guatemala had similar legislation, the application of article 32 could only be general.

Mr. JAKUBOWSKI (Poland) supported the USSR proposal for the deletion of paragraphs 2 and 3 for the reasons already stated by previous speakers. It seemed that paragraph 1 required redrafting to avoid the difficulties referred to by the representatives of Singapore and Mexico. The language might be made much simpler, providing simply that two Contracting States might agree not to apply the Convention because they had similar legislation in the area in question. A contract

concluded between parties having their places of business in Sweden and Norway, respectively, could only be an international contract, even though it might be decided that the Convention was not applicable to it because the two States had similar legislation. It would not be advisable, therefore, to include the language in article 32 providing that such contracts should "not be considered international within the meaning of article 2".

Mr. OGUNDERE (Nigeria) said that he would be quite content to delete article 32. Paragraph 1 gave Governments random permission to make declarations regarding the applicability of the Convention, which he found unacceptable. If it was to be retained, however, Contracting Parties should make the declaration in question when they ratified the Convention and not subsequently. He therefore proposed that the words "may at any time declare" should be changed to "may declare at the time of ratification".

Mr. JENARD (Belgium) thought it essential that the words "at any time" should be retained. In the case of the Benelux countries, for example, one State might decide to ratify the Convention some time after another had done so. However similar their legislation, therefore, they could only make the declaration after the second State had ratified the Convention. He agreed that the reference was to contracts of sale in general.

Mr. OGUNDERE (Nigeria), referring to the Belgian representative's statement, observed that countries which stood to benefit from article 32 because they had similar legislation should hold consultations before either ratified it. It was hardly acceptable that a State should be free to make a declaration of the kind envisaged, 10 years or more after ratifying the Convention.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed that paragraph 1 should be redrafted to take account of the problem to which the representative of Singapore had referred and that paragraphs 2, 3 and 4 should be deleted.

It was so decided.

Articles 33 and 34 (continued)

Mr. JENARD (Belgium) pointed out that the text of both articles should refer to the Convention as opposed to the "Uniform Law".

Articles 33 and 34 were approved.

Article 35 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) proposed that article 35 should be deleted for the reasons which he had given for the deletion of article 29.

Mr. JAKUBOWSKI (Poland) said that as the Commission had not adopted the text of alternative B which the Working Group had proposed for article 3, there was no reason to retain article 35. He agreed that it should be deleted.

It was so decided.

Article 36 (continued)

Replying to a question by Mr. OGUNDERE (Nigeria), Mr. JENARD (Belgium) explained that article 36 and article 32, paragraph 1, covered different cases and should both be retained. Article 36 covered conventions, while article 32, paragraph 1, referred to the case of Contracting States which applied the same or closely related legal rules.

Mr. LOEWE (Austria) pointed out that article 36 in fact referred to the Uniform Law on the International Sale of Goods, which did not regulate all matters of prescription in the field of sales, such as cases of non-delivery of goods and failure to pay. Article 32 was wider in scope, since it enabled countries to state that the Convention would not apply between them. It was therefore necessary to retain both articles.

The CHAIRMAN noted that a majority of the Commission was in favour of retaining article 36.

Articles 37-46

The CHAIRMAN suggested that articles 37-46, which had not been considered by the Working Group, should be referred to the international conference of plenipotentiaries for consideration.

Mr. LOEWE (Austria), supported by Mr. BURGUCHEV (Union of Soviet Socialist Republics), said that the reference to article 35 should be deleted from articles 37 and 38, since article 35 had been deleted.

The CHAIRMAN noted that the Commission agreed that articles 37-46 should be referred to the international conference of plenipotentiaries and asked the Secretariat to make the requisite drafting changes.

Articles 8 and 10 (continued)

The CHAIRMAN called the Commission's attention to the Working Group's proposed new articles 8 and 10 (A/CN.9/V/CRP.21/Rev.1/Add.3). Article 8 simply embodied the Commission's views and would be incorporated in the draft Convention. He asked the delegates for their views on proposed new article 10.

Mr. GUEST (United Kingdom) said that the Working Group had followed its instructions from the Commission in extending the five-year cut-off period to eight years. In the new draft the limitation period was two years from the date of delivery of the goods in cases of patent defects and from the date of discovery of the defect in cases of latent defects. The Working Group had drafted a more satisfactory formulation of the commencement of the limitation period.

Mr. SAM (Ghana) said that he was pleased to see that some measure of consensus was emerging with regard to the limitation period in respect of defects. He would, however, have preferred that period to be four years instead of two. The purchaser was in fact in a worse position if he found a defect in the goods than if the basic four-year limitation period had applied, since the new article 10 meant that a purchaser must take action within two years of discovery of the defect or could not take action at all. However, in a spirit of compromise, he could accept article 10 and would appeal to other delegations to do likewise.

Mr. LOEWE (Austria) said that his delegation reluctantly accepted the compromise proposed by the Working Group, for whose efforts he was grateful. He continued to think that it would be difficult to determine the point at which the limitation period would commence to run under the terms of paragraph 1 and that the period itself was extremely and unusually long.

Mr. CHAFIK (Egypt) said that he could accept the text of article 10 prepared by the Working Group even though it was somewhat less favourable to the developing countries than the version he had originally supported.

Mr. SMIT (United States of America) said that his delegation welcomed the compromise reflected in the proposed new article 10. The representative of Egypt had made a valuable contribution to the achievement of that compromise.

Mr. JENARD (Belgium) welcomed the compromise reflected in the text before the Commission, which his delegation would do everything possible to implement.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) commended the Working Group, which had achieved a compromise. At the same time, he found it very difficult to understand the relation between paragraphs 1 and 2 and paragraph 3 and wondered whether the tenor of paragraph 2 did not contradict the content of paragraph 3. He would not pursue the matter during the current debate but wished his delegation's doubts as to whether paragraphs 2 and 3 were fairly balanced to be recorded. He reserved his delegation's right to state its views in that connexion at the international conference of plenipotentiaries, should it find it necessary to do so.

Mr. MANTILLA-MOLINA (Mexico) pointed out that whereas the English text of paragraph 3 was consistent in referring to a "claim" the French and Spanish referred alternately to "action" (acción) and "droit" (derecho). The French and Spanish versions should use "action" (acción) throughout. He also pointed out that the expression "whether expressed in terms of a specific period of time or otherwise" was loose and required reformulation.

Mr. GONDRA (Spain) pointed out that in the Spanish text "entregados" did not correspond to the English phrase "handed over". He suggested that the wording "puestos a disposición" should be used.

The CHAIRMAN invited the representatives of Mexico and Spain to submit their amendments to the Secretariat.

Article 20 (continued)

The CHAIRMAN drew the Commission's attention to the proposed new article 20, in document A/CN.9/V/CRP.21/Rev.1/Add.4.

Mr. SMIT (United States of America) said that in the new article 20, which replaced the original article 19 (A/CN.9/70), the phrase "not personal to the creditor" had been replaced by "beyond the control of the creditor" and the 10-year maximum limitation period had been reduced to four years. In the French and Spanish texts the word "prévoir" ("prever") had been replaced by "éviter" ("evitar") so that the texts in those languages would be closer to the English text.

Mr. CHAFIK (Egypt) said that he would prefer to retain the word "prévoir" (foresee) in the French text, particularly since "éviter" (avoid) and "surmonter" (overcome) were practically synonymous.

Mr. MANTILLA-MOLINA (Mexico) said that the Working Group had discussed the point raised by the representative of Egypt and had considered that "avoiding" and "overcoming" were different, since the first came before and the second after the event. As had been pointed out in the Working Group, foreseeability might apply to contractual obligations, but not with regard to circumstances affecting the limitation period. The Working Group had therefore thought it should not introduce the idea of foreseeability into article 20 by using the words "prévoir" or "prever".

Mr. KHOO (Singapore) said that the formulation of article 20 was no improvement on the original article 19. It allowed extension of the limitation period in a situation where, for example, a creditor could not take action because of adverse financial circumstances. While not objecting to the new article going into the draft Convention, his delegation wished to reserve its position thereon.

Mr. SAM (Ghana), supported by Mr. MUDHO (Kenya), said that article 20 could be readily understood by businessmen and was therefore quite acceptable.

The CHAIRMAN noted that the majority of the Commission appeared to be in favour of approving article 20.

He suggested that the Commission should consider alternative methods for the final adoption of the draft Convention on prescription as set out in document A/CN.9/R.12 and invited the representative of the Secretary-General to address the Commission on the matter.

Mr. SLOAN (Representative of the Secretary-General) said that document A/CN.9/R.12 contained an analysis of alternative methods for the final adoption of the draft Convention on prescription. The alternatives were the convening of an international conference of plenipotentiaries to study the draft articles and to conclude a convention or the conclusion of a convention within the framework of the General Assembly by having the Sixth Committee prepare a final draft. He had discussed the question with the Legal Counsel, who was also the Under-Secretary-General for General Assembly Affairs, and in their view the convening of an international conference of plenipotentiaries would be more suitable in view of the technical nature of the Convention and would be more likely to achieve the best results.

There were also other considerations which the Commission might wish to discuss. It had been suggested that the draft Convention should be circulated to Governments, whose comments and proposals might be reviewed by a small working group, such as the Working Group on prescription, which had played such a notable role in preparing the draft Convention.

Mr. MICHIDA (Japan) said that his delegation considered that an international conference of plenipotentiaries would be the most suitable forum for finalizing the draft Convention on prescription. Furthermore, the Secretariat might be requested to circulate the draft Convention together with the commentary to Governments and interested international organizations for comment and proposals. With regard to the suggestion that the Working Group on prescription should prepare a compilation of those comments and proposals, the Working Group itself had discussed the matter and had felt that the Secretariat would be the most appropriate organ to prepare a summary of comments and proposals received from Governments. His delegation associated itself with that view.

Mr. OGUNDERE (Nigeria) said that on balance his delegation supported the convening of an international conference of plenipotentiaries since it felt that an international conference would give greater publicity to the draft Convention. It would also be inclined to assign the task of compiling comments received from Governments to the Secretariat.

Mr. JENARD (Belgium) said that his delegation favoured an international conference of plenipotentiaries because the Convention dealt with technical issues of a private law nature which were somewhat outside the scope of the normal work of the Sixth Committee. Consequently, it might be necessary to call in experts in private law, which would be an expensive and time-consuming procedure. If the Commission decided to recommend the convening of an international conference of plenipotentiaries, it might be possible to convene it immediately after the 1974 session of UNCITRAL, since a number of the members of UNCITRAL would also be invited to attend the conference. His delegation was convinced of the need to circulate the draft Convention as soon as possible to Governments which had so far not had an opportunity of participating in the work of the Commission. He felt that the Secretariat should be entrusted with the work of summarizing the comments received from Governments.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that his delegation was also inclined to favour the convening of an international conference of plenipotentiaries. The annex to A/CN.9/R.12 indicated clearly that the conventions concluded by the Sixth Committee had been rather general in nature, whereas those concluded by international conferences of plenipotentiaries had dealt with more technical and complex subjects. The draft Convention on prescription dealt with technical matters and required a conference attended by specialists capable of considering all aspects of the Convention. An international conference of plenipotentiaries would therefore be the most appropriate forum for the work.

His delegation felt that Governments should be allowed sufficient time to study the draft Convention and that the Secretariat should be entrusted with the work of summarizing comments from Governments.

Mr. MANTILLA-MOLINA (Mexico) said that he was in favour of convening an international conference of plenipotentiaries. The draft Convention should be circulated as widely as possible to Governments for comments and the Secretariat should summarize the replies received from Governments.

The CHAIRMAN noted there appeared to be a consensus in favour of recommending the convening of an international conference of plenipotentiaries to study the draft articles and conclude a convention. However, before a final decision was taken, the question of financial implications would have to be considered. Second, the Secretariat would distribute copies of the draft Convention to Governments, and would invite them to submit their views. The Secretariat would summarize the replies from Governments, which would be submitted to the international conference of plenipotentiaries.

[The last part of the meeting was taken
up by the discussion of other matters]

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The CHAIRMAN said that the Commission had before it addenda 5 to 9 of document A/CN.9/V/CRP.21/Rev.1, which contained the amendments proposed by the different drafting parties which had been asked to reformulate certain articles, and also document A/CN.9/V/CRP.27 which contained a proposal by the representative of Singapore.

Paragraph 1 of article 18 (A/CN.9/V/CRP.21/Rev.1/Add.5) (continued)

Mr. MICHIDA (Japan) said that, in accordance with the Commission's instructions, the drafting party, composed of the representatives of Argentina, Singapore and Japan, had revised the wording of article 18, paragraph 1 by using the words "which... has the effect of recommencing the limitation period prescribed under that law" to describe the act accomplished by the debtor and by reducing the extension of the limitation period from 10 to four years.

Mr. CHAFIK (Egypt) wondered why the authors of the text had put certain words in round brackets in the first sentence and whether those brackets should not be deleted.

Mr. LOEWE (Austria) supported the suggestion made by the representative of Egypt. If the English and French versions were compared, it could be seen that the French text was more correct in using the words "faire courir un nouveau délai de prescription". Moreover, the words "prescribed under that law" which did not appear in the French text, should be deleted from the English text because they were purely repetitive.

Mr. GUEST (United Kingdom), supported by Mr. GUEIROS (Brazil), proposed that the English text should employ the words corresponding exactly to the French formula, "faire courir un nouveau délai de prescription".

Mr. SMIT (United States of America) proposed that the text submitted by the drafting party should be clarified by inserting in the fourth line of the English text the word "original" before the words "limitation period".

Mr. SAM (Ghana) proposed that the round brackets should be replaced by commas.

Mr. MICHIDA (Japan) said he would not object to the deletion of the words "prescribed under that law" from the English text; they had been inserted merely to avoid any ambiguity.

Mr. KHOO (Singapore) supported the proposals for the deletion of the round brackets and the words "prescribed under that law".

Mr. JENARD (Belgium) supported the proposal put forward by the United States representative and suggested that in the French text the words "un nouveau délai de prescription" should be replaced by the words "à nouveau le délai initial de prescription".

The CHAIRMAN suggested that the Commission should adopt the text of article 18, paragraph 1 as proposed by the drafting party, with the following amendments: the round brackets would be replaced by commas; the words "prescribed under that law" would be deleted from the English text; the word "original" would be inserted before the words "limitation period" in the fourth line of the English text; and the words "un nouveau délai de prescription" would be replaced by the words "à nouveau le délai initial de prescription" in the French text.

Article 18, paragraph 1, as amended, was approved.

Articles 12 and 23 (A/CN.9/V/CRP.21/Rev.1/Add.6) (continued)

Mr. RECZEI (Hungary) said that the representative of Austria and himself had been instructed to put forward a new text of article 12, paragraph 2 and article 23, paragraph 2 (a). At the end of article 12, paragraph 2, which dealt with the counterclaim, a new sentence had been introduced making it clear that the claim and the counterclaim related to a contract or contracts concluded in the course of the same transaction. The amendment to article 23, paragraph 2 (a) followed logically on the amendment to article 12.

Mr. CHAFIK (Egypt) felt that the last sentence of article 12, paragraph 2 should be deleted because the counterclaim raised a question of procedure within the field of the lex fori. With regard to article 23, paragraph 2 (a), the two

claims in question should arise, during the same transaction, not from a contract or contracts but from the same cause. Admittedly, the Roman-law countries and the common-law countries understood the notion of cause in different ways, but the wording proposed by the drafting party gave satisfaction to neither group.

Mr. COLOMBRES (Argentina) supported the suggestion made by the representative of Egypt that the regulation of counterclaims should be left to the lex fori.

Mr. SMIT (United States of America) felt that the drafting party had found very suitable wording for article 12, paragraph 2, which he fully supported. If the second sentence of that paragraph was to be deleted, consideration should be given to deleting the whole paragraph, so as to avoid dealing only with one aspect of the problem.

Mr. GUEST (United Kingdom) supported the new article 12, paragraph 2 proposed by the drafting party. However, he would have no objection to the deletion of the last sentence of that paragraph if a majority emerged in favour of it.

Mr. LOEWE (Austria) said he opposed the deletion of the second sentence of article 12, paragraph 2 because, if the effect of counterclaims were restricted, there was the danger of re-introducing prescribed rights.

Mr. CHAFIK (Egypt) pointed out to the representative of Austria that he had not proposed that all restrictions on counterclaims should be removed but merely that the matter should be left to the lex fori.

Mr. POLLARD (Guyana) said he favoured the retention of the second sentence of article 12, paragraph 2, but in the English text the words "relate to" should be replaced by the words "arise from".

Mr. SAM (Ghana) pointed out that article 12 had been approved in first reading subject to drafting amendments. He felt that the new wording was satisfactory.

Mr. RECZEI (Hungary) pointed out that the deletion of the second sentence of article 12, paragraph 2, leaving the question of counterclaims to the different national legislations, was contrary to the aim of unification being sought. He did not oppose the amendment put forward by the representative of Guyana.

Mr. SMIT (United States) pointed out that the proposal of the representative of Guyana would restrict the scope of the text.

The CHAIRMAN noted that a majority had emerged in favour of the revised version of paragraph 2 of article 12 and he suggested that the Commission should adopt that text.

Revised article 12, paragraph 2, was approved.

The CHAIRMAN suggested that the Commission should approve revised article 23.

Revised article 23 was approved.

Article 15 (A/CN.9/V/CRP.21/Rev.1/Add.7) (continued)

Mr. GUEST (United Kingdom), speaking as a member of the drafting party which had been asked to revise article 15, pointed out that in the first reading the Commission had been divided on the question whether paragraph 1 should retain the provision relating to the consent of the debtor. Finally, the drafting party had not maintained that restriction because, under article 21, paragraph 2, the debtor could, in any case, during the limitation period, prolong that period by a written declaration. Furthermore, the drafting party had tried to formulate paragraph 2 more clearly because certain delegations, including that of the Soviet Union, had found it incomprehensible.

Mr. KAMAT (India), speaking as a member of the drafting party, said that he fully approved of paragraph 1 of article 15, but would have preferred some other formulation for paragraph 2. He considered that, to be entitled to an additional period, a creditor should produce proof that he had instituted the initial proceedings with all due dispatch. In a spirit of compromise, however, he had given his support to the text before the Commission.

Mr. OGUNDERE (Nigeria) welcomed the new wording of article 15.

Mr. GUEIROS (Brazil) said that, while he did not withdraw his proposal concerning the article and although he endorsed the Indian representative's comments, he was ready to accept the new wording in a spirit of compromise.

Mr. LOEWE (Austria) supported the revised version of article 15.

Mr. GUNDRA (Spain) said that the use of the term "perención" in the Spanish version was inappropriate.

The CHAIRMAN suggested that Spanish-speaking delegations should amend the text as necessary to accommodate the Spanish delegation's view and invited the Commission to approve revised article 7.

Revised article 7 was approved.

Article 16 (A/CN.9/V/CRP.31/Add.9) (continued)

Mr. SMIT (United States of America), speaking on behalf of the drafting party, said that the new text proposed for article 16 represented an attempt to resolve the problems arising where a creditor, having pursued to judgement an action based on the merits of his claim, found that the judgement could be enforced only in the country in which it was rendered, the assets of the debtor being situated in another State. Revised article 16 would allow the creditor either to institute new proceedings in the other State in order to assert his original claim (para. 1) or to take the necessary steps to obtain recognition or execution in that State of the original decision (para. 2). In both cases, he was entitled to an additional period of one year on the basis of the decision which the Commission had already taken in that connexion. He added that the Commission had already approved paragraph 2 which the drafting party had amended only as necessary to bring it into line with the new wording of paragraph 1.

Mr. MANTILLA-MOLINA (Mexico) had some misgivings with regard to the new wording of article 16. It was for the creditor to establish whether the judgement which he was seeking would be enforceable and, if it was not, he should bear the consequences. Furthermore, he feared that the new article would allow a creditor who had received only partial satisfaction of his claim through judicial proceedings to claim a review of the original judgement by resorting to a court in another State, a procedure contrary to the principle of res judicata.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) thought that paragraph 1 should be deleted. If a majority of the Commission did not agree with that view, he requested that his delegation's position should be noted in the summary record of the meeting.

Mr. COLOMBRES (Argentina) associated himself with the comments of the Mexican delegation and said that paragraph 1 would be acceptable only if it specified the effect of judgements in the two States in question. His delegation could agree to the deletion of the provision.

Mr. GUEIROS (Brazil) supported the criticism of revised article 16 made by the delegations of Mexico and Argentina. His delegation was, however, opposed to the deletion of paragraph 1 and would prefer to see its substance stated in two or three paragraphs.

Mr. LOEWE (Austria) supported the USSR delegation's proposal to delete paragraph 1.

Mr. SMIT (United States of America) observed that the deletion of paragraph 1 might have unwelcome consequences. In the absence of that provision, a creditor who had caused the limitation period to cease to run by instituting legal proceedings and had then obtained a favourable decision on the merits of his claim would be entitled to an unlimited period in which to assert that claim. The new version of paragraph 1 met the need to set a limit in that connexion; it would not conflict with the principle of res judicata because it was stated that the creditor could institute new proceedings in another State only "under the applicable law". The deletion of the provision would resolve nothing and the same problem would arise in connexion with paragraph 2, which the Commission had already approved in first reading.

Mr. MANTILLA-MOLINA (Mexico) remained convinced that article 16 was a judicial misconstruction and recommended that, if paragraph 1 was deleted, paragraph 2, which was no less fallacious, should also be deleted.

Mr. GUEST (United Kingdom) said that the arguments of the Soviet delegation, which was doubtless opposed to the additional period of one year allowed by the new article, and those of the United States delegation, which opposed the deletion of paragraph 1, were equally convincing. The solution might be to reformulate the text to indicate that, when legal proceedings had led to a decision on the merits of a claim, the limitation period should be deemed to have continued to run and that any additional period was ruled out. With regard to

paragraph 2, he asked that the commentary on the draft Convention should state that his delegation would have preferred the régime established under the original article 21 and that it had given up that régime solely in a spirit of compromise.

Mr. OGUNDERE (Nigeria) said that his delegation, which opposed the additional delay provided in paragraph 1, supported the United Kingdom delegation's proposal. He feared that paragraph 2 would also be a source of difficulty.

Mr. LOEWE (Austria) asked that it should be noted in the Commission's report that his delegation had proposed the deletion of the whole of article 16. The latter conflicted with the amendment of article 28 which the Commission had advocated and it was regrettable that its provisions were not limited so as to apply only where the original judgement was rendered in a Contracting State.

Mr. NESTOR (Romania) said that his delegation, too, thought the article should be deleted.

Mr. MANTILLA-MOLINA (Mexico) said that, having regard to Mexican legislation, the new version of article 16 would be impossible to apply. He pointed out that so many delegations were opposed to the article that it could not be said that there was any consensus; if it was adopted notwithstanding, States should at least be entitled to formulate reservations in that connexion.

Mr. GONDRA (Spain) said that his delegation would prefer paragraph 1 to be deleted and that it also had some misgivings with regard to paragraph 2. He associated himself with the comments by the Austrian representative concerning the need to restrict application of article 16 to Contracting States. He proposed that as a compromise, the article should be placed in square brackets and submitted to the diplomatic conference for consideration.

Mr. SAM (Ghana) supported the proposal by the Spanish delegation.

Mr. JAKUBOWSKI (Poland) said his delegation could agree to the deletion of paragraph 1, but not of paragraph 2.

Mr. GUEIROS (Brazil) associated himself with the comments by the Mexican representative. However, his delegation would be opposed to putting paragraph 1 in square brackets, unless the diplomatic conference had the summary records of the Commission's discussions at its disposal.

Mr. RECZEI (Hungary) supported the proposal by the Spanish delegation.

Mr. CHAFIK (Egypt) said that he would prefer to retain the article in its entirety. He felt that paragraph 1, because of the possibilities it offered to the creditor, was useful without being dangerous.

Mr. JENARD (Belgium) said that his delegation was also in favour of article 16. The provision in paragraph 1 would eliminate any temporal restriction on the assertion of the creditor's claim, at least in countries like Belgium which did not recognize that foreign decisions had the force of res judicata.

Mr. BURGUCHEV (Union of Soviet Socialist Republics), replying to the comments by the Egyptian delegation, pointed out, that it was precisely the possibilities offered to the creditor by paragraph 1 which were dangerous.

The CHAIRMAN noted that divergent opinions had emerged on the revised text of article 16 and he accordingly suggested that the provision should be placed in square brackets, as the Spanish delegation had proposed. In reply to the objection raised by the Brazilian representative, he said that the text of the draft Convention would be accompanied by a commentary prepared by the Secretariat, as well as comments by Governments.

Mr. GUEIROS (Brazil) said that, in those circumstances, his delegation could accept the Spanish proposal.

Mr. LOEWE (Austria) supported the Spanish proposal.

The CHAIRMAN suggested that the text of revised article 16 should be placed in square brackets and submitted to the diplomatic conference for consideration.

It was so decided.

Article 21 bis (A/CN.9/V/CRP.27)

Mr. KHOO (Singapore) said that the text proposed by his delegation was intended to remedy a number of defects in the draft. In its present form, the latter contained provisions which would make it possible to extend the limitation period well beyond what the Commission had wished and, in certain extreme cases, up to 15 years. For that reason the proposed article 21 bis imposed a maximum limit of 10 or 8 years, according to the individual case. Furthermore, the figures could be discussed.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation warmly supported the text proposed by the representative of Singapore because it had proposed that formula with regard to article 22.

Mr. LOEWE (Austria) said that he could agree in principle with the provision proposed by the delegation of Singapore, but pointed out that the words "no legal proceedings shall in any event be brought" gave the impression that a period of estoppel was involved. It would be better, in the context of the draft Convention, to use the appropriate terminology and to replace the phrase by the words "any action shall be prescribed".

Mr. OGUNDERE (Nigeria) said that he favoured the establishment of a maximum over-all period and, consequently, the proposed new article. However, he felt that it was not advisable to contemplate a period of 10 years in some cases and 8 in others; he would prefer the maximum over-all period to be 8 years in every case.

Mr. COLOMBRES (Argentina) warmly supported the proposal by the representative of Singapore, but felt that it should be amended in the way indicated by the Austrian representative.

Mr. JENARD (Belgium) said that he was in favour of the new article 21 bis, with the amendment proposed by the Austrian representative.

Mr. GUEIROS (Brazil) unreservedly supported the proposal by the representative of Singapore, including the new formulation of the title.

Mr. GUEST (United Kingdom) said that his delegation was in favour of a maximum over-all period. However, the adoption of an article such as that under consideration would probably make it necessary to recast a number of articles which already stipulated maximum periods, in order to harmonize the drafting of the entire section on the modification of the period.

Mr. SMIT (United States of America) said that he wished to express his delegation's reservations with regard to the proposed new article. In fact, articles 18, 20 and 21 already stipulated a maximum period and it was rather unlikely that the application of articles 15, 17 and 19 would lead to excessive extensions. However, the new article 21 bis could give rise to serious injustices.

For example, if a creditor had agreed to extend the stipulated period of payment on condition that the debtor extended the limitation period in the manner set out in paragraph 2 of article 21 and if, upon the expiration of the extended period, the debtor was still not in a position to pay, the creditor might not have enough time to assert his claim before the limitation was applied under article 21 bis. If that provision was adopted, his delegation would like its reservations to be reflected in the report.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) felt that although the proposed new article was of interest, its provisions could not be adopted without due consideration because a number of articles already provided for a maximum period. His delegation would be opposed to its immediate adoption, and would propose that it should be submitted to the diplomatic conference which would be able to consider it in a better perspective.

Mr. KAMAT (India) said that he favoured the idea of a temporal limitation on extensions of the limitation period. However, his delegation had not had time to make a detailed examination of the practical consequences which the new provision submitted by the representative of Singapore might have. It fully supported the suggestion by the representative of the USSR and wished to propose that the text of the article should be placed in square brackets so as to bring it to the attention of the diplomatic conference.

Mr. CHAFIK (Egypt) said that he agreed with the principle embodied in the proposed new article, but reserved his position because he had not had time to study its effects or to consider its place in the draft. In fact, it might be appropriate to insert it after article 8 rather than after article 21.

Mr. GONDRA (Spain) said that the proposal by the representative of Singapore needed careful study and for that reason the Commission should take no immediate decision on it but should refer it to the diplomatic conference.

Mr. SZASZ (Hungary), supported by Mr. MUDHO (Kenya) and Mr. SAM (Ghana), said that in principle he was in favour of establishing a maximum over-all limitation period, but felt that the Commission was not in a position to take a decision on the new article 21 bis in the time available. He therefore proposed that article 21 bis should be placed in square brackets and brought to the attention of the diplomatic conference.

The CHAIRMAN noted that there appeared to be a consensus in favour of referring the new article 21 bis to the diplomatic conference. He suggested that the Commission should decide to place article 21 bis in square brackets and to refer it to the conference, together with the comments made by the members of the Commission, including the amendment proposed by the representative of Austria.

It was so decided.

Article 28 (A/CN.9/V/CRP.21/Rev.1/Add.8) (continued)

Mr. SMIT (United States of America) said that the drafting party entrusted with the revision of article 28, composed of the representatives of Austria, Poland and the United States, had endeavoured to eliminate the objections raised with regard to the previous wording of that article. The basic difference between the two texts was that the old article 28 could be interpreted as being a compulsory provision, while the new article was optional.

Mr. GUEST (United Kingdom) stated that the new version of article 28 in no way modified the reservations he had expressed during consideration of the original article prepared by the Working Group.

Mr. OGUNDERE (Nigeria) inquired as to the reason for paragraph 2, which did not seem very useful since the sphere of application of the Convention had been limited to relations between nationals of Contracting States.

Mr. MUDHO (Kenya) wondered whether the reference in paragraph 2 to article 13, which concerned arbitration, was really necessary. It was not very likely that a party to arbitral proceedings would be unaware that such proceedings were being held.

Mr. SMIT (United States of America) agreed that it might perhaps appear superfluous for article 28 to enumerate the situations falling outside the sphere of application of the Convention; however, the drafting party had wished to eliminate any uncertainty and any possibility of argument a contrario. The drafting party had thought it advisable that the creditor should have the responsibility of informing the debtor of acts he might have performed, because of the excessive time lapse which occurred in some countries between performance and notification of an act.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that despite the clarification given by the United States representative, he still had doubts as to the need for paragraph 2. The circumstances referred to in that paragraph came under national law and paragraph 2 in no way helped to solve the questions raised by those circumstances. While he was not opposed to retaining paragraph 2, he could see no purpose in doing so.

Mr. SZASZ (Hungary) said that he did not object to the provisions of the new article 28, but paragraph 2, which elaborated on paragraph 1, would perhaps be better placed in the commentary than in the actual text of the draft Convention.

Mr. JAKUBOWSKI (Poland) said that retention of paragraph 2 was very important for his delegation, because contracts of international sales concluded in Poland very often contained an arbitration clause providing for arbitral proceedings in a third country.

Mr. GUEST (United Kingdom) said he understood the reasons for including paragraph 2, but that the meaning of the last phrase in that paragraph was not very clear to him. Paragraph 1 stated that the creditor must take all reasonable steps to inform the debtor and paragraph 2 stated that the Convention did not regulate cases in which the creditor had failed to take the requisite steps. That was an apparent contradiction. He would be quite favourable to inclusion of paragraph 2 in the commentary on the draft Convention, as suggested by the representative of Hungary.

Mr. CHAFIK (Egypt) said he was in favour of paragraph 1; he would not oppose retention of paragraph 2 but would prefer it to be transferred to the commentary.

Mr. LOEWE (Austria) observed that paragraph 2 had been inserted at the request of the Polish delegation and that his delegation had no fixed position on the matter. With regard to paragraph 1, the Commission should avoid any misunderstanding. Paragraph 1 merely stipulated that a Contracting State was obliged to give effect to acts or circumstances referred to in the enumerated articles on two conditions: those acts or circumstances must have been performed or have taken place in a Contracting State and the creditor must have taken all

reasonable steps to inform the debtor as soon as possible. When either of those conditions was not fulfilled, each State was free to apply its national law. The distinction was an important one for his delegation, because Austria had concluded bilateral agreements regulating lis pendens which did not take account of the second condition mentioned in article 28, paragraph 1.

Mr. GONDRA (Spain) said that there was no need for paragraph 2, except as a commentary. It would be desirable to improve the Spanish version of article 28 by using the words "medidas requeridas" instead of the words "razonables disposiciones" in paragraph 1, and "disposiciones necesarias" in paragraph 2.

The CHAIRMAN suggested that the Commission should approve paragraph 1 of article 28 and should place paragraph 2 in the commentary on the draft Convention together with the comments made by members of the Commission.

It was so decided.

Article 17 (continued)

Mr. GUEST (United Kingdom) recalled that article 17 had been referred to a small drafting group composed of the United Kingdom and USSR delegations. The USSR representative had had strong reservations with regard to the provisions of paragraph 2 of article 17 concerning actions by a subpurchaser against a buyer and also with regard to the extension of the limitation period in such cases. In the drafting group, the USSR delegation had maintained its opposition to the inclusion in the draft Convention of the provisions in question but a compromise had been achieved whereby they would be submitted to the international conference of plenipotentiaries in brackets to show that the Commission had reached no final conclusions. In the drafting group the USSR representative had adduced a number of arguments against the provisions. One related to the fact that even if a subpurchaser commenced an action against a buyer within the limitation period, the proceedings could take many years to come to judgement, although the text of article 17 would allow for an extension of one year from the date on which the legal proceedings ended - which might fall a considerable number of years after the original limitation period would have expired. The drafting group had considered that a valid argument and had therefore preferred to return to the régime established under article 20 of the original draft (A/CN.9/70), whereby the buyer was entitled to an additional period of one year from the date of the institution of proceedings for the purpose of obtaining recognition or satisfaction of his claim against the seller. The drafting group considered that a better rule as it would allow a buyer time to establish whether his claim was well-founded and because a period of one year was not inordinate. The drafting group had decided that paragraph 1 of article 17 should not be changed, that paragraph 2 should be placed in square brackets and that, in paragraph 3, all references to actions commenced by a subpurchaser against a buyer should be placed in brackets and that a new rule should be included, with the result that the text would read:

"(3) In the circumstances mentioned in this article, the creditor for the buyer

must institute legal proceedings against the party jointly or severally liable /or against the seller/, either within the limitation period otherwise provided by this Law or within one year from the date on which the legal proceedings referred to in paragraph s/ 1 /and 2/ commenced, whichever is the later." The words "whichever is the later" had been included because certain delegations otherwise found the text obscure.

Mr. LOEWE (Austria) observed that article 17 had twice been the subject of extensive debate in the Commission and stated that the new version had not removed his delegation's reservations with regard to the proposed rules. Although he would prefer the deletion of the entire article, the Commission could make some progress if it agreed to delete at least the square brackets. The increasing use of such brackets was an admission of the Commission's inability to achieve a compromise. If the Commission, which had 29 members, could not reach agreement it might well be asked how the considerably larger membership of the United Nations could do so. He proposed the deletion of the article as the wisest course.

Mr. MANTILLA-MOLINA (Mexico) said he felt no great enthusiasm for the text formulated by the drafting group but would not oppose it. He noted that paragraph 1 required a creditor to give a debtor written notification within the limitation period of the commencement of proceedings against him. He thought that rule should be amended somewhat to require that such notification should be given immediately upon the commencement of the limitation period or, in accordance with the approach in ULIS, within a short or reasonable time after such commencement. He also felt that paragraph 3 should refer simply to the parties to proceedings as the "comprador" and "vendedor".

Mr. FARNSWORTH (United States of America) agreed with the Austrian delegate regarding the removal of the brackets in the text. Paragraph 2 dealt with a most important problem in a very satisfactory way. It would be regrettable if, because of the square brackets, the international conference of plenipotentiaries did not give adequate consideration to that problem. He proposed the deletion of the square brackets.

Mr. KENNEDY (Australia) supported the United States proposal. His delegation's views regarding the importance of paragraph 2 were well known. The words within the brackets should certainly be retained. He could accept a lesser provision such as that contained in article 20 of the draft prepared by the Working Group at its third session (A/CN.9/70) although the ideal solution would be that which his delegation had first proposed in A/CN.9/V/CRP.16.

Mr. GUEST (United Kingdom) pointed out that the compromise reached by the drafting group had involved the retention of the square brackets in the text.

Mr. OGUNDERE (Nigeria) said that he could not agree with the Austrian representative that article 17 should be deleted altogether. The international conference of plenipotentiaries must have all the material necessary for it to draw up a final version of the draft Convention. He agreed with the United States representative that all square brackets should be removed from the text and pointed out that the reasons why they had originally been included could be explained in the commentary.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said the fact that the drafting group had been composed of his own delegation and that of the United Kingdom was no accident. His delegation held the definite view that the provision contained in square brackets should be deleted as quite inconsistent with the spirit of the draft Convention. The agreed compromise was that it should be retained in brackets - a result which did not represent any concession by one group to another. The questions at issue were important and must be considered further.

Mr. KAMAT (India) pointed out that his delegation's position had been stated in the debate on the original text of article 17 (A/CN.9/70). He agreed entirely with the Austrian representative that it would be better to delete the whole of article 17. If it was not to be deleted, however, it would be quite unfair to place only the rule in paragraph 2 in brackets. The rule in paragraph 1, which was inequitable, should also be placed in brackets. The entire article should either be bracketed or deleted.

Mr. JENARD (Belgium) said that although, at first sight, he had been in favour of the text before the Commission he had come to the conclusion that it should be deleted. A major defect of the draft Convention was that it was excessively complicated. The rules proposed in article 17 regarding the establishment of dates were of logarithmic complexity and he considered that, being bizarre, they could only be a source of confusion and embarrassment to the creditor.

Mr. GUEIROS (Brazil) agreed with the Belgian representative that the article should be deleted altogether.

Mr. GUEST (United Kingdom) said that the representatives of Norway and France, neither of whom was present in the Commission, could certainly be expected to express strong opposition to any suggestion that the article should be deleted. The simpler course would be to place the entire article in square brackets and to record the views expressed during the current debate in the commentary.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to a compromise solution whereby the whole text of the proposed new article 17 would be placed in brackets and approved on the understanding that the views of delegations would be stated in the commentary on the article.

It was so decided.

Article 28 (continued)

Mr. JAKUBOWSKI (Poland) said that the general rule was stated in paragraph 1 and that paragraph 2 merely set forth one interpretation of the rule. Moreover, in the view of his delegation, paragraph 2 could lead to a conclusion contrary to that stated in paragraph 1. Paragraph 2 should therefore not be given the same weight as paragraph 1. He asked that his delegation's views be inserted in the commentary.

The CHAIRMAN said that the views of the Polish representative would be inserted in the commentary on article 28.

Draft decision proposed by the Working Group on Prescription

The CHAIRMAN drew attention to a draft decision proposed by the Working Group on Prescription (A/CN.9/V/CRP.26), whereby the Commission would (a) approve

the text of the draft Convention, (b) request the Secretary-General to prepare a commentary on its provisions, to circulate its text to Governments for comment and to prepare an analytical compilation of the resulting comments and proposals for submission to Governments and interested international organizations; and (c) recommend that the General Assembly should provide for the conclusion of a convention on prescription, possibly by an international conference of plenipotentiaries.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) pointed out that, in adopting the draft decision, the Commission would "approve" the text of the draft Convention. Yet the Commission had never even considered part IV of the draft Convention or its articles 37 and 38, while some provisions of the text which it had considered were still in square brackets. The language of the draft decision implied that the Commission had approved the entire draft Convention.

Mr. SAM (Ghana) said that his delegation had intended to make the same comments as the USSR representative.

Mr. HONNOLD (Secretary of the Commission) said that it was the intention that the draft decision should be included in the report of the Commission with any editorial changes necessary to make it perfectly clear which portions of the draft Convention had been approved and which had not. The Commission could not in any case approve the draft decision until it had considered the question of the financial implications of an international conference of plenipotentiaries to conclude a convention on prescription.

Mr. KAMAT (India) said that the subject-matter of the draft Convention and the complex issues of private law which it involved indicated that it should be considered by an international conference of plenipotentiaries rather than by the Sixth Committee of the General Assembly. He nevertheless wondered whether it was necessary for the Commission to make any firm recommendation to the Assembly in that connexion. The International Law Commission had recommended to the Assembly that an international conference on the representation of States in their relations with international organizations should be convened but at the twenty-sixth session of the Assembly a number of delegations had expressed the view that it would be better for the Sixth Committee to deal with the question.

It would be wiser for the Commission's report to state its views regarding the desirability of convening an international conference of plenipotentiaries and to leave the actual decision to the General Assembly.

Mr. RECZEI (Hungary) proposed that any draft decision adopted by the Commission should contain a paragraph expressing appreciation of the immensely valuable task performed by the Working Group on Prescription in preparing the draft Convention.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to complete consideration of the draft decision in the context of the adoption of its report.

It was so decided.

Mr. SLOAN (Director, General Legal Division), speaking as the representative of the Secretary-General, said that initial estimates by the Secretariat indicated that the over-all cost of an international conference of plenipotentiaries lasting three weeks would be approximately \$150,000 - on the assumption that it was convened in New York.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) observed that although the figure announced by the Secretariat appeared to be very considerable, the Commission could consider it only in comparative terms. More details were necessary before it could be discussed.

The CHAIRMAN suggested that consideration of the financial implications of a diplomatic conference should be deferred until more details were available.

It was so agreed.

[The last part of the meeting was taken
up by the discussion of other matters]

123rd meeting (4 May 1972)

Mr. HONNOLD (Secretary of the Commission) described the steps the Secretariat envisaged taking with a view to the final adoption of the draft Convention. The draft having been approved by the Commission, the next step would be the preparation of the revised commentary on the draft. The Secretariat expected that the commentary would be translated into all working languages and issued by September 1972. The draft and the commentary would then be circulated to Governments and to interested international organizations for comments and proposals. The following month, i.e., October 1972, UNCITRAL's report would be submitted to the Sixth Committee. The latter's debate would lead to a decision by the General Assembly in November or December. It seemed appropriate to request Governments and interested international organizations to send it their comments and proposals concerning the draft by the end of May 1973. The replies, which would probably be numerous, would be analysed by the Secretariat, as requested by the Working Group on Prescription. It was expected that the Secretariat's analytical compilation could be sent to Governments in September 1973. Lastly, a diplomatic conference if such were to be authorized by the General Assembly, might convene in the early months of 1974.

Mr. MICHADA (Japan) said he approved in principle of the proposed time-table. He would, however, have to consult his Government before expressing a definitive opinion.

Mr. GUEIROS (Brazil) said that the provisional time-table outlined by the Secretariat was very useful. His delegation, too, would have to consult its Government.

Mr. SAM (Ghana) inquired whether the proposals mentioned by the Secretariat and the exchange of views on them would be recorded in the Commission's report.

Mr. HONNOLD (Secretary of the Commission) thought it would be preferable for the Commission merely to indicate in its report that a provisional time-table had been envisaged.

Mr. SLOAN (Director, General Legal Division) indicated the financial implications of the diplomatic conference, as established by the Secretariat. Its estimates were based on the assumption that the conference would meet for three weeks in New York, with two meetings a day, and that it would require simultaneous interpretation and translation of documents into four languages, English, French, Russian and Spanish. That being so, the costs would be the following: interpretation, \$15,000; pre-session documentation, \$17,100; summary records, \$29,650; in-session documentation, \$23,600; post-session documentation \$58,600; total: \$143,950. If interpretation and translation into Chinese were required, the additional cost would amount to \$26,080.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) inquired what expenditure would be incurred if the draft Convention were considered and adopted by the Sixth Committee and the General Assembly. The Commission could not take a decision unless it could compare the cost of the two possible procedures.

Mr. SLOAN (Director, General Legal Division) replied that the cost of having the draft Convention adopted by the Sixth Committee and the General Assembly could not be calculated exactly, for in that case some of the expenditure would be covered by the expenses of the General Assembly. That would be the case, in particular, for the cost of interpretation, preparation of summary records and translation of in-session documents. The additional costs, for pre-session and post-session documentation, would amount to about \$50,000. If the diplomatic conference met at Headquarters at a time when there were relatively few meetings, some of the expenses could also be covered by the regular budget.

Mr. GUEST (United Kingdom) recalled that at the preceding meeting the Indian delegation had proposed that the Commission should not take a final decision on the matter, but should merely stress in its report that the draft Convention should be submitted to a body composed of highly qualified experts, leaving the decision to the Sixth Committee. Furthermore, nothing prevented UNCITRAL from indicating in its report that it would prefer the convening of a diplomatic conference.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that in his delegation's view, a diplomatic conference was the only satisfactory solution. The problems raised by the draft Convention were specific and complex. They should be studied by a body specially convened for that purpose, composed of experts of recognized competence. His delegation could not reconsider its position unless it was sure that adoption of the draft by the Sixth Committee and the General Assembly would result in substantial savings. However, the figures given by the representative of the Secretary-General were not convincing; consideration of the draft Convention by the Sixth Committee and the General Assembly would also involve expenses for interpretation, documentation and so on. In any event, the question should not be left pending and the Commission should take a decision on it.

Mr. LOEWE (Austria) said he fully agreed with the views expressed by the USSR representative. The savings which could be effected if the draft Convention were simply considered by the Sixth Committee and adopted by the General Assembly were perhaps apparent rather than real. In any case, that procedure would entail extra expenses for small delegations, which would have to send an expert on limitation to the Sixth Committee in addition to their usual representative. His delegation was emphatically in favour of convening a diplomatic conference.

Mr. OGUNDERE (Nigeria) reminded the Commission that a consensus had already emerged in favour of convening a diplomatic conference. He noted that the Commission could not foresee what solution would be chosen by the Sixth Committee. It would therefore perhaps not be very useful to spend too much time on the point; it would be better to leave it to the Sixth Committee to decide which procedure should be followed.

Mr. KAMAT (India) observed that when the Sixth Committee discussed the draft Convention, all countries which were not members of UNCITRAL would have an opportunity to consider the problem and express their views on the adoption procedure they considered most desirable. He proposed that the Committee should not make a formal recommendation, but should merely express a view, indicating in its report that in view of the technical nature of the draft Convention it

considered it desirable that the latter should be submitted to a diplomatic conference of highly-qualified plenipotentiaries. It was for the General Assembly to take a decision, taking into account the views expressed by the Commission and the financial implications established by the Secretariat.

Mr. JENARD (Belgium) agreed with the representatives of the USSR and Austria that the convening of a diplomatic conference was the only possible course. The way in which the Commission expressed its preference was of little importance, provided that its preference was clearly indicated.

Mr. RECZEI (Hungary) said it was not perhaps necessary to take a decision immediately. The envisaged diplomatic conference could not meet before 1974. The question of the procedure to be followed for the definitive adoption of the Convention was thus not particularly urgent.

Mr. MADHO (Kenya) said that the Commission would certainly not be exceeding its terms of reference if it expressed its preferences in a recommendation. Such a recommendation would obviously not be binding and the final decision would be taken by the competent bodies, but it could be argued that the Commission was in a better position than any other body to express an informed opinion on the subject. It should therefore adopt a recommendation inviting the General Assembly to convene a diplomatic conference.

Mr. SAM (Ghana) agreed with the representative of Nigeria that it was not necessary to spend time on the question, which would be re-examined by the Sixth Committee. His delegation favoured the course proposed by the representative of India.

Mr. SLOAN (Director, General Legal Division) drew the Commission's attention to document A/CN.9/R.12, paragraph 8, which indicated that the International Law Commission had submitted to the Sixth Committee a recommendation to the effect that the draft articles on relations between States and international organizations should be considered and adopted by an international conference of plenipotentiaries. If UNCITRAL did not formulate a specific recommendation, the members of the Sixth Committee might infer that it was not fully convinced of the need for a diplomatic conference.

Mr. KAMAT (India) observed that the Commission could indicate its preferences equally well by expressing them in its report. He inquired whether the International Law Commission had adopted a recommendation similar to that mentioned by the Director of the General Legal Division in connexion with all the draft Conventions prepared under its auspices.

Mr. SLOAN (Director, General Legal Division) said he was unable to reply immediately to that question.

Mr. GUEIROS (Brazil) suggested that the Commission should adopt the Hungarian representative's proposal to the effect that a decision on the matter should be deferred.

Mr. RECZEI (Hungary) explained that he had made no formal proposal and was not opposed to the adoption of a recommendation to the Sixth Committee.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) observed that the Commission did not take a decision on the adoption procedure, but made a recommendation that the General Assembly could either endorse or reject as it saw fit. He did not understand why some members of the Commission hesitated to express a preference.

Mr. GUEST (United Kingdom) said that he would not press his views and would support the position of the USSR representative.

Mr. KHOO (Singapore) said that the special nature of the draft Convention made it necessary for the States which took part in the diplomatic conference to be represented by experts. That requirement should be duly mentioned in the Commission's recommendation.

The CHAIRMAN suggested that the Commission should recommend the convening of an international conference of plenipotentiaries with specialized knowledge of limitation.

It was so decided.

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