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

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* 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 jucicial 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.