

102nd meeting (17 April 1972)

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.