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.

In the Spanish version of paragraph (1) (a), the words "deja perecer su acción o se desiste de alla" 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.