

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.