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.