105th meeting (18 April 1972)

Article 23 (continued)

Mr. OGUNDERE (Nigeria) said that the very concept of limitation implied that the judge was called upon to decide on the question of the admissibility or non-admissibility of proceedings. The principle of the autonomy of the parties, which was valid where the conclusion of a contract was concerned, did not apply to limitation. For that reason his delegation doubted whether article 23 was really justified. It seemed to him, moreover, that while the Working Group's text suited the interests of large commercial companies which had legal advisers to see that their rights were protected, it disregarded the fate of the small businessman who had no legal knowledge or assistance. His delegation had not formally requested the deletion of article 23, but it hoped that the Commission would allow itself to be convinced by his arguments and would abandon a provision which, by making the debtor the helpless victim of the creditor, would run counter to the general trend of its work.

Mr. MUDHO (Kenya) felt that article 23 was unnecessary for the reasons adduced by the representatives of Tanzania and Nigeria. It had been said that the deletion of that provision would create a gap in the uniform law. That was not the view of his delegation which thought that, on the contrary, it was the inclusion of article 23 which created an imbalance in the draft Convention since it operated in favour of the party to the contract who was aware of the existence of the Convention and to the disadvantage of the party who was not. It would therefore be best to delete the article. If it was decided to retain it, it should at least be expanded to specify that the tribunal could invoke limitation suo officio, declaring itself incompetent.

Mr. MICHIDA (Japan) said that, while he understood the concern of the delegations which were opposed to article 23, he found it hard to accept their arguments for several reasons. In the first place, if a party allowed its rights

to lapse, the deletion of article 23 would not help him in any way. Secondly, that provision was not justified only by a concern to respect the autonomy of the parties; another consideration had to be taken into account, namely, that the deletion of the article would lead to procedural complications for the court or the arbitral tribunal. While it was in fact normal for a judge to apply the law suo officio in the case of other time-limits (décheance, etc.), it was difficult to ask him to do the same in the case of the limitation period to which complex rules relating to suspension, extension, etc., applied. That would complicate the judges' task considerably, add to the already heavy burden of the courts, and delay the settlement of cases. Thirdly, to allow the judge to invoke limitation suo officio would be to allow the parties to claim that the judge had not applied the uniform law correctly, in other words to appeal and thereby prolong the proceedings indefinitely.

The Working Group had not disregarded the case of small businessmen, who were particularly numerous in his own country. He did not think that they would have reason to complain of article 23.

Mr. MANTILLA-MOLINA (Mexico) said he was surprised at the difficulties raised by article 23. In the view of his delegation, the deletion of that provision would create a serious gap and would be a source of uncertainty since it would no longer be known whether it was for the parties or the tribunal to invoke limitation. It had been proposed that the tribunal should be able to point out to the parties that they had the right to invoke limitation; such a procedure was hard to accept and would require the revision of the code of procedure of all countries whose law derived from Roman law. It had also been proposed that the tribunal itself should be able to invoke limitation suo officio: that would be to forget that, if the parties failed to use that means of defence they might be doing so voluntarily.

His delegation was in favour of retaining article 23, with one drafting change: it thought that it would be more exact to say that limitation could be taken into consideration "only at the request of the defendant in such proceedings".

Mr. OLIVENCIA (Spain) supported the observations of the Mexican representative and said that he, too, was in favour of retaining article 23.

That provision seemed to him necessary, not in order to favour certain economic interests at the expense of others, but to respect the legal principle according to which the judge based his judgement on the arguments submitted to him by the parties. Furthermore, as had already been observed, the judge might not be aware of the reasons which led the parties not to invoke limitation.

As for the wording, he supported the change proposed by the Mexican delegation. He was afraid, however, that the concern to draft a law easily accessible to those engaged in international trade might run counter to legal precision. The words "shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings", in particular, seemed him to be open to criticism as being lacking in precision.

Mr. ROGNLIEN (Norway) said that, in the view of the Working Group, article 23 met a concern for uniformity. The absence of a provision of that nature would mean that one would have to rely on lex fori on that point. He pointed out that it might be in the interests of a party not to invoke limitation: that was so, for example, when the defendant intended to submit a counter-claim. In any event, the decision no longer depended on the Working Group, which had already given its views. It was for the Commission to decide whether it wished to delete or retain article 23.

Mr. SMIT (United States of America) endorsed the observations of the Spanish delegation. He added that, frequently, a judge who was called upon to invoke limitation suo officio would not have sufficient knowledge of the facts to reach a decision. He would therefore have to gather the facts, which would make him a party to the litigation and not a judge.

Mr. GUEST (United Kingdom) supported the remarks of the United States representative. He pointed out that limitation was a question of public policy and its main purpose was to prevent the parties from invoking out-dated claims. For its part, his delegation would prefer that article 23 be retained. It did not, however, wish to impose foreign rules on countries whose legal system allowed a judge to invoke limitation suo officio. It would like to hope that the representatives of those countries also did not intend to impose their own rules. A middle course was

therefore called for. It might consist in modifying article 23 in such a way as to emphasize that the question as to who could invoke limitation was a procedural question. The following wording, for example, might be employed: "Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings, except where the rules of public policy of the forum otherwise provide".

Mr. LEMONTEY (France) said that his delegation was not convinced by the arguments which had been advanced to justify the deletion of article 23. In his view, to oblige the judge to invoke limitation suo officio would be to give him an inquisitorial role which was not desirable, to complicate the task of the tribunal, and to force the parties to have recourse to a means of defence which they might have good reasons for wishing to avoid. His delegation was therefore in favour of retaining the provision, since its deletion would detract from uniformity in the application of the law.

As for the form, it was indeed open to criticism, and his delegation proposed the following wording: "Limitation may not be raised by the judge or by the arbitrators suo officio".

Mr. LOEWE (Austria) said that, according to Austrian law, only the parties could invoke limitation and that a strong legal tradition was opposed to the judge being able to raise the issue suo officio, especially since in Austria judicial decisions brought the responsibility of the State into play. The Austrian system, moreover, presented no difficulty for the parties since it should be remembered, first, that a lawyer would never fail to invoke limitation if he thought that it was in the interests of his client to do so and, secondly, that in minor cases where the intervention of a lawyer was not necessary the judge had a duty to remind the parties of their rights. He was therefore in favour of retaining article 23. States which were opposed to it should be permitted not to apply it, although such a derogation would detract from the principle of the uniformity of application of the convention.

Mr. LASALVIA (Chile) said he advocated the retention of article 23 and considered that the deletion of that article would be all the more serious because the absence of that provision would then have to be interpreted as a refusal on the part of the Commission to retain a norm recognized in many legal systems and retained

for that reason by the Working Group. However, he shared the views of the representative of Mexico with regard to the need to improve the drafting of the article.

Mr. MUDHO (Kenya) said he had listened carefully to the statements of those advocating the retention of the article, but had heard no persuasive arguments supporting the objections to its deletion. The representative of Austria, on the other hand, had shown that the absence of the provision would not present any practical disadvantage for Austrian law. Although his position therefore remained unchanged in principle, he could nevertheless accept the amendment proposed by the United Kingdom as a compromise.

Mr. KHOO (Singapore) said he had no strong opinions on the point under consideration. Indeed, neither the retention nor the deletion of article 23 would have any practical consequences in so far as the law of Singapore was concerned. If the purpose of the article was to lay down a rule of judicial proceeding, however, it would seem that it should be left to the competent court itself to decide the question.

Mr. WARIOBA (United Republic of Tanzania) said he was not convinced by the reasoning advanced by those favouring retention of article 23. Replying to the objections raised by the Japanese delegation in particular, he did not think, first of all, that it was correct to take no interest in the situation of debtors who failed to invoke limitation, since the purpose of the Convention was precisely to protect the interests of all parties concerned. Secondly, it was wrong to underestimate the importance of the activities of businessmen relative to those of judges. Thirdly, if judges' time was really so valuable, why should they be prohibited from barring limitation suo officio, placing on the parties the burden of proving that the limitation period had or had not expired? He reminded those who had opposed any suo officio intervention by the judge that the deletion of article 23 would not be tantamount to granting a special right to the judge, but to allowing each court to apply its own national law in the matter. In that connexion, the question might be raised of the purpose to be served by the amendment proposed by the United Kingdom representative, for it, too, referred back to national law. In conclusion, he stated that his country could not accept article 23 as it stood and

that, if the article was retained, it would be compelled either to abstain from ratifying the Convention or to enter a reservation with respect to that article; in either case, the uniformity sought by the entire membership of the Commission would be impaired.

Mr. ELLICOTT (Australia) said he had listened with interest to the statement by the representative of Tanzania; he felt the problem should be approached in proper perspective and from an essentially juridical point of view. The answer to the question whether the matter was one of procedure or one of substance no doubt varied from one legal system to another. In Australia, as in most countries with a common law system, the question was a procedural one in which the initiative was left entirely to the parties, since Australian legal proceedings were of the adversary not the inquisitional type and there was therefore no need for the judge to intervene. A question of equity arose in cases where a lawyer's intervention was not necessary and where, as under the Austrian system, it was no doubt appropriate for the judge to instruct the parties as to the extent of their respective rights. He felt that article 23 should be retained, but that the drafting of the article should be improved. Since there was no question, however, of favouring the debtor, he proposed that the existing text of article 23 should be replaced by the following: "A party shall not in any legal proceedings be entitled to the benefit of the expiration of the limitation period unless he specifically relies upon it in the proceedings." Nevertheless, he would not object to the amendment proposed by the United Kingdom, which might, however, be more clearly worded.

Mr. DEI-ANANG (Ghana) said he did not object to article 23, but suggested, for greater clarity, that the words "shall be taken into consideration" be replaced with the words "shall have legal effect". He pointed out that the retention of article 23 was linked with the question whether the rule was procedural or substantive, which had not been decided by the Working Group. If the rule was procedural, article 23 would suffice, but if, on the contrary, the question was deemed to be substantive, it would then be appropriate to recognize the judge's right to intervene on his own initiative. Like the representative of Tanzania, he considered that the claimant should not be able to institute legal proceedings after

the expiration of the limitation period. If, however, the claimant did institute proceedings even though the period had expired, the outcome of the proceedings should not depend merely on the grounds invoked by the defence, but on the substance of the claim itself. It should also be noted that when the parties did not invoke the expiration of the limitation period in proceedings, the effect was an automatic extension of the period, which was contrary to article 22 and could provide grounds for intervention by the judge. The commentary by the Secretariat on article 23, which stated that the question was not of large practical importance, did not take account of the diversity of legal systems, for some systems made it easier than others for the judge to instruct the parties, a fact which ran counter to the desired uniformity. Although some delegations had finally ruled out any possibility of intervention by the judge in order to avoid making the proceedings inquisitional in nature, he considered that, to a certain extent, that risk had to be taken and that it would be possible, if not to compel the judge to intervene, at least to give him the opportunity to do so when intervention was justified by reasons of equity.

Mr. SZASZ (Hungary) noted that Hungarian law embodied a provision similar to article 23. However, the judge should be able to draw the parties' attention to any pertinent fact, and he would therefore be able to support amendments along those lines. Nevertheless, it should not be forgotten that the Convention would be pointless if too much stress was placed on the discretionary power of the judge, for the judge would tend to rely on his national law.

Mr. KAMAT (India) said he considered that the arguments in support of retention of article 23 had not shown that the deletion of the article could lead to real difficulties. Under Indian law, the judge was obliged to raise the question of limitation by requesting the parties to present evidence that the limitation period had not yet expired. The difficulties raised by article 23 resulted not from technical obstacles, but from different legal concepts and traditions. He proposed that, in view of that difference in principles, the members of the Commission should take time for reflection.

Mr. NESTOR (Romania) said he was in favour of retaining article 23, although Romanian legislation went in an entirely different direction. In Romania,

limitation was a matter of public policy which must be raised by the judge suo officio. His delegation nevertheless considered, that it was necessary to retain the provision contained in article 23, which reflected the spirit of legal unification underlying the draft Convention. If the provision was deleted, the result would be irreconcilable diversity, which would create great uncertainty for the parties. Moreover, the field of limitation was quite delicate, and it was preferable that the judge should not have to enter it. He could be empowered to instruct the parties concerning the means for defence available to them, but should not have the right to disregard the wishes of the parties.

Mr. OGUNDERE (Nigeria) stated that in his country the law governing limitation was part of procedural law. Nigeria was a federal State with a highly complex judicial structure, where customary courts existed alongside common law courts, which were themselves categorized by rank into magistrate courts and high courts whose competence was determined by the amount involved in litigation. In the customary courts (called area courts) and in the magistrate courts, which accounted for three quarters of the country's courts, judges had the duty to instruct the parties concerning their rights. Only at the level of the high courts was it necessary for limitation to be expressly raised by the parties.

The provision stated in article 23 would therefore be inapplicable in three quarters of the courts of Nigeria. It would be better to delete the article; that would have the effect of referring judges automatically to the rules of the forum (lex fori) and would thus respect the judicial system and procedural law of every country.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that article 23, as it stood, was perfectly acceptable to his delegation. However, it would not object to any formula which authorized judges to instruct the parties concerning the means of defence available to them. On the other hand, it was against deletion of the article or any formulation which would give rise to uncertainty. The Working Group might consider the best way of resolving the problem posed by article 23. In any event, the Commission should refuse to rely on national law because that would run counter to the principle of unification which was the Commission's very raison d'être.

Mr. GUEIROS (Brazil) said that a distinction was made in Brazilian law between the time-limit, which meant the extinction of a right, and limitation, which was the loss of the power to exercise a right. In the first instance, irrespective of the findings of the parties, the judge had to dismiss the case. In the second instance, it was up to the parties to invoke limitation.

In the opinion of his delegation, it would be better to delete article 23. While it would not object to having the Working Group try to work out a compromise formula, the task was so difficult that it did not believe the Group would succeed. If the Commission decided to delete article 23, there would be fewer articles in the Convention with the result that it would have the advantage of being more concise and therefore more accessible to those engaged in international sales. If, on the contrary, it decided to refer the article to the Working Group, it would also have to refer paragraph 2 of article 24, which was closely related to article 23.

Mr. JENARD (Belgium) said he favoured retaining article 23, but improving the wording along the lines suggested by the French delegation.

A number of solutions advanced in the course of the discussion should be discarded. His delegation could not agree to the outright deletion of the article because that would introduce a serious element of uncertainty into the Convention. Nor could it agree that the provision in article 23 should confer discretionary power on a judge to rule on the question. It would also be against any rule which would reproduce the present text but suspend its application in jurisdictions where the law called for a different procedure. There was one last solution which he commended to the Commission's attention, and that was to retain article 23 as it now stood and to qualify it by allowing for a reservation. The advantage of that solution would be to simplify the drafting and introduce an element of certainty because it would be easy to find out what countries had entered reservations.

Mr. MANTILLA-MOLINA (Mexico) proposed a compromise formula, which was different from the procedural law normally followed in civil law countries, but would be in harmony with the general spirit of the Convention which, up to a point, safeguarded the autonomy of the will of the parties. The draft Convention fixed a limitation period of specified duration which could be extended by agreement between the parties. A parallel provision might be introduced whereby the present text of

article 23 would be applicable for a given period - four years, for example - beyond which the judge would have to raise the issue of expiration of the limitation period of his own motion (suo officio). It would be useful if the Working Group could discuss whether such a formula was likely to be acceptable to the membership of the Commission.

Mr. ELLICOTT (Australia) made a proposal to replace the present text of article 23 by the following wording, which had the support of the delegations of Ghana, Nigeria and Tanzania:

"In any legal proceedings to enforce a claim arising in relation to a contract of sale to which this law applies, the tribunal can draw the attention of the parties to the provisions of this Law."

His delegation considered that new wording to represent a workable compromise which deserved consideration by the members of the Commission.

Mr. JAKUBOWSKI (Poland) said he favoured retaining the present article 23. Apart from the arguments adduced by the delegations which had spoken before him, he drew attention to the fact that most disputes concerning the international sale of goods were settled by courts of arbitration, whose members were not always necessarily experienced jurists, and might have difficulties in interpreting the provisions of the Convention correctly. Moreover, if the judge or arbitrator was under obligation to raise the limitation issue suo officio, thought should be given to the consequences if the judge or arbitrator failed to discharge that obligation.

The Polish delegation, which felt that the amendment proposed by the United Kingdom representative would introduce unnecessary complications and which feared that the revised text submitted by the Australian delegation did not entirely satisfy those delegations which were against retaining article 23, was prepared to support the Belgian proposal. That proposal, by offering States the option of entering a reservation concerning the application of the article, represented a solution which reduced the risks of uncertainty to the minimum.

Mr. CHAFIK (Egypt) said he was in favour of retaining article 23 as it now stood, subject to a few improvements in the drafting. In Egypt, limitation was not a matter of public policy and could only be raised at the request of the parties.

Article 23 should be referred back to the Working Group with a request that it find a compromise formula which would not sacrifice the aim of unifying the law, which was the purpose of the Convention.

Mr. COLOMBRES (Argentina) said that article 23 should be retained and made subject to a reservation, as suggested by the Belgian representative. That solution, which should not be applied to all articles, would avoid placing an even greater burden on the Working Group. Nevertheless, the delegations which were against retaining article 23 could try to work out a formula acceptable to the Working Group and the Commission. If they failed, the best solution would be to adopt the Belgian proposal.

The CHAIRMAN, summarizing the discussion for the guidance of the Working Group, recalled that the delegations of India, Kenya, Nigeria and Tanzania had called for the deletion of article 23 and that those of Brazil and Singapore were similarly inclined, but not without some hesitation. All the other delegations had favoured retaining the article and improving the wording. It would be useful if those who were against article 23 endeavoured to work out a formula for submission to the Working Group, which would consider it together with all the other amendments submitted to it. If it proved impossible to arrive at a solution by that means, the Commission should undoubtedly adopt the solution proposed by the Belgian delegation.