

Article 24

Mr. HONNOLD (Secretary of the Commission) noted that article 24 (2) applied only to claims raised as a defence for the purpose of set-off. Affirmative relief was not within the scope of that article. Paragraph 3 of the commentary on the article (A/CN.9/70/Add.1) explained the reasoning behind article 24 (2).

Mr. CHAFIK (Egypt) said that the formulation of article 24 (1) was difficult to understand. It did not make clear that the "claim" was invoked during a legal proceeding. He suggested that it should perhaps state that no claim would be recognized or enforced in any legal proceedings which took place after the expiration of the limitation period. Furthermore, recognition of a claim meant that its enforcement was requested. The word "enforced" could therefore be omitted.

The formulation of article 24 (1) implied that the effect was automatically produced by the expiration of the limitation period. Article 23, however, stated that the expiration of the limitation period must be invoked by one of the parties, if it was to have an influence in the legal proceedings. Article 24 (1) should speak of an "acquired" limitation, decreed by a court.

Mr. JENARD (Belgium), supported by Mr. MANTILLA-MOLINA (Mexico), said that the text of article 24 (1) was extremely difficult to understand. It should either be deleted, since it was not very useful, or else amended as suggested by the Egyptian representative.

Mr. GUEIROS (Brazil), supported by Mr. LASALVIA (Chile), fully endorsed the Egyptian suggestion.

Mr. LOEWE (Austria) said that article 24 (1) was an unnecessary enunciation of obvious principles, which was badly written. It could therefore be deleted but article 24 (2) contained necessary details and should be retained.

Mr. SMIT (United States of America) said that a comprehensive Convention on limitation should contain a provision such as that in article 24 (1), whose formulation could be improved.

Mr. KAMAT (India) agreed with the United States representative. If the Convention did not contain a provision such as that in article 24 (1), there would be no provision for proceedings instituted after the limitation period had expired. If members considered that article 23 should be deleted, a consequential amendment should be made to article 24 (1) and the phrase "and of article 23" should be deleted. The text of article 24 could be improved in accordance with the Egyptian representative's suggestion.

Mr. OGUNDERE (Nigeria) said that the intention of the authors of article 24 (1) had apparently been to provide a provision on the recognition and enforcement of foreign judgements. If a tribunal made an award which was brought to court for enforcement in another jurisdiction, the person against whom judgement was sought could argue that the award was barred by reasons of limitation, in accordance with the Convention. Article 24 (1) provided a safeguard against such arguments and, if it was deleted, there would therefore be a lacuna in the Uniform Law.

Article 24 (2) established a different principle: even though the limitation period had expired, the parties could set up counter-claims against the party suing them. He agreed with the representatives of the United States and India that the Working Group should redraft article 24.

Mr. KHOO (Singapore) said he had no difficulty in accepting article 24 (1), which was a useful provision in an international convention. However, he did not agree with the Nigerian representative's interpretation. Article 24 dealt not with the enforcement of foreign judgements but with claims which were yet to be adjudicated when the limitation period expired.

Mr. BURUCHEV (Union of Soviet Socialist Republics) said it would be desirable to maintain article 24 (1). It was a very necessary provision, particularly in view of the discussion at the previous meeting, where the opinion had been put forward that claims could be asserted even after the expiration of the limitation period. However, article 24 (2) should be deleted since it appeared to state that the creditor could meet his claims by means of set-off even when the limitation period had expired. It was thus not consonant with the very essence of the concept of limitation.

Mr. COLOMBRES (Argentina) agreed with the representative of the Soviet Union that article 24 (1) should be retained, if it was redrafted. He also agreed that article 24 (2) was not really in keeping with the institution of prescription. It should be recalled, however, that set-off and counter-claim could exist at the same time; that was the situation in clearing-houses. If both had coexisted at any one time, regardless of the expiration of the limitation period, article 24 (2), which had been based on rule 14 of the Draft European Rules on Extinctive Prescription, was very important and should be retained.

Mr. KHOO (Singapore) said that article 24 (2) was necessary because previous articles, such as article 19 and 21, allowed the limitation period to be extended on the basis of actions by the creditor. If the debtor was not similarly entitled to extend the limitation period in respect of his claim, one party would have an advantage over the other, since the creditor could maintain a claim against the debtor outside the normal limitation period while the debtor was not able to set up a counter-claim or a set-off against the creditor. The debtor should have a right to make a counter-claim as a protection against the creditor, as provided by article 24 (2).

Mr. ELLICOTT (Australia) agreed that article 24 (1) should be retained and that article 24 (2) was desirable as it was an attempt to adjust the rights of the parties in cases when limitation periods might start to run at different times because of the type of contract involved. It appeared reasonable that, if one party sought to set up a claim, the other party should be allowed to set up a counter-claim. He agreed with the representative of the USSR that article 24 (2) was not completely consistent with the institution of prescription but noted that it was an attempt to cover all the courses of action open to the parties.

Mr. GUEST (United Kingdom) fully supported retention of article 24 (2). Ideally the limitations contained in subparagraphs (a) and (b) should be deleted so that effect would be given to the common law principle that the remedy was barred but the right remained. In civil law that amounted to a recognition of the natural right of the debtor. The compromise solution contained in article 24 (2) was excellent because it recognized the principle of mutuality for a contract of sale. He agreed with the representative of Singapore that it was intolerable that one party should be in a position where he was exposed to action without being able to set off his own claim.

Mr. LOEWE (Austria) said that there appeared to be a consensus that article 24 (1) was badly worded and that the consequences it described were so obvious in civil law that there was no need to state them, but that for common law countries such a statement was useful. All members agreed that the creditor could institute proceedings for any reason and that during the proceedings it would be established whether he had a claim or not. The judge would take account of the limitation period under article 23 and, if that period had expired, the action would have to be dismissed and article 24 (1) would apply. He had no objection to retention of article 24 (1) but it should be redrafted. A claim could not be "enforced" in legal proceedings; once the claim had been recognized, voluntary or compulsory enforcement was, so far as limitation was concerned, subject to other rules. The Working Group would have the difficult task of redrafting article 24 (1) to make it intelligible to common and civil lawyers.

Mr. LEMONTEY (France) said that article 24 (1) should be deleted, since it was a source of many difficulties. However, he was in favour of retaining article 24 (2) and agreed with the representative of Singapore that its scope should be extended to include a provision enabling the defendant to put forward a claim based on the limitation period, as a means of defence, even after the limitation period had expired. That concept was embodied in the civil law adage "Quae temporalia sunt ad agendum perpetua sunt ad excipiendum."

Mr. SMIT (United States of America) said that article 24 (2) was an acceptable compromise which the Commission should retain. It reflected a broadly accepted principle based on equity and reasonableness.

Mr. OLIVENCIA (Spain) said that article 24 (1) should be retained after being amended in accordance with the Egyptian suggestion.

He agreed with the representative of the USSR that article 24 (2) was not necessary, if reference was being made to a contract which was immediately executed. But when the contract of sale involved different stages, he wondered whether a claim by one party could be set-off by a claim which the other party had made 20 or 30 years previously, since the parties were speaking about different stages in the same contract. In any case, the text was unclear.

Mr. MANTILLA-MOLINA (Mexico) thought that many of the Spanish representative's objections to the article had their origin in the poor quality of the Spanish text. They were well-founded if directed to that text but not if

directed to the French version, which was in accord with the English text. He observed that the delegations which supported article 29 (1) were English-speaking in the main, whereas those opposing it were French- or Spanish-speaking. That might be because the English version was the better. He would prefer the deletion of article 24 (2).

Mr. RECZEI (Hungary) said that his delegation thought that the article should be retained, that article 24 (1) should be redrafted and that the provisions of paragraph (2) (a) were not necessary.

The CHAIRMAN said that there appeared to be a majority of delegations in favour of the maintenance of article 24, subject to its reformulation. He suggested that it should be referred to the Working Group with that end in view. The representatives of Egypt and the United States might submit their proposals to the Working Group in writing.

It was so decided.

#### Article 25

Mr. HONNOLD (Secretary of the Commission) said that article 25 was addressed to a situation where a party performed a contract after the expiry of the limitation period - performance being constituted by the payment of a price or the replacement or repair of defective goods - and then realized that there was no legal requirement for him to do what he had done, with the result that he sued for restitution. Article 25 was not designed to have any effect on claims for restitution based on other grounds, such as, that performance had been obtained by fraud.

Mr. GUEIROS (Brazil) said that he could accept the wording of article 25, having regard to the principle that the laws aid those who were vigilant, not those who slept upon their rights. The maintenance of stability in international commercial transactions required that that principle should be included in the draft Convention. Article 25 should therefore be maintained.

Mr. OLIVENCIA (Spain) said that the Working Group should ensure the conformity of the Spanish and French versions. In that connexion, the Spanish text should be brought into line with the French with regard to the use of the word "répétition".