106th meeting (19 April 1972)

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. BURGUCHEV (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".

Mr. COLOMBRES (Argentina) observed that article 25 was taken almost textually from article 96 of the CMEA General Conditions of Delivery of Goods. It might be brought into line with paragraph 3 of rule 13 of the Draft European Rules on Extinctive Prescription.

The CHAIRMAN said that, if there was no objection, article 25 would be referred to the Working Group, together with the comments of delegations.

It was so decided.

Article 26

The CHAIRMAN noted that there were no comments on the article.

Article 27

Mr. HONNOLD (Secretary of the Commission) said that the method of calculating the date on which the limitation period commenced to run under article 27 was explained in paragraph 1 of the commentary on the article (A/CN.9/70/Add.1). There was a problem in that certain dates, for example 29 February, did not recur yearly; that was dealt with in the second sentence of the article.

Mr. ELLICOTT (Australia) said that one problem with regard to the calculation of the date, which should be considered, was the fact that a businessman flying from Sydney to San Francisco would arrive at his destination 15 minutes before he left his point of departure. If, for example, a breach of contract occurred at 6 p.m. on 8 April in London, the equivalent time would be 4 a.m. in Sydney on 9 April. On which date were Australian courts to base themselves?

Mr. MANTILLA-MOLINA (Mexico) expressed support of article 27. He pointed out that the Geneva Convention providing a Uniform Law for Cheques contained a specific provision to cover transactions involving countries with different calendars.

Mr. ROGNLIEN (Norway), referring to the Australian representative's question, said that the time to be observed would be that prevailing in the jurisdiction in which a claim was to be asserted.

Mr. CHAFIK (Egypt) pointed out that article 3 of the Egyptian Civil Code provided that a limitation period would be calculated according to the Gregorian calendar.

Mr. OLIVENCIA (Spain) said that the Norwegian representative's answer to the Australian question was not entirely satisfactory. The question of the conversion of the starting date of the limitation period to the time scale prevailing in the jurisdiction in which a claim was asserted had still to be resolved.

Mr. DEI-ANANG (Ghana) suggested that the problem might be solved by stipulating that the operative time should be that prevailing in the place where the breach of contract occurred.

Mr. GUEST (United Kingdom) said that the problem raised by the Australian representative was intractable and almost insoluble. The Working Group would welcome suggestions from the Australian and Spanish delegations regarding its solution.

Mr. SMIT (United States of America) said that the words "the last day of the last calendar month" were somewhat ambiguous. They could relate either to the limitation period or to the year in which it expired.

Mr. GUEIROS (Brazil) said that the French version of the text left no room for ambiguity. He suggested that the Working Group should adapt the English to the French.

The CHAIRMAN suggested that article 27 should be referred to the Working Group together with the comments of delegations.

It was so decided.

Article 28

Mr. KHOO (Singapore) asked whether proceedings under article 13 had been deliberately excluded from article 28.

Mr. GUEST (United Kingdom) replied that the Working Group had felt that, particularly in view of the provisions of article 13 (2), it was unlikely that proceedings in connexion with arbitration under article 13 would arise in the context of article 28.

Mr. GUEIROS (Brazil) said that the Working Group should replace the Latin expression "dies non juridicus" by plain language; the draft Convention, being intended for businessmen, should avoid legalistic Latinisms.

Mr. ELLICOTT (Australia) said that his delegation was proposing a new article 28 A containing a provision as to service (A/CN.9/V/CRP.16).

Mr. LOEWE (Austria) said that, while the Working Group could usefully discuss the Australian proposal, his delegation would have some difficulty in agreeing to the addition of a purely procedural provision as to service, which took no account of either Austrian legislation or international instruments to which Austria was a party. Indeed, the inclusion of such a provision would make it impossible for his Government to accede to the draft Convention.

Mr. JENARD (Belgium) said that he entirely agreed with the Austrian representative's remarks.

Mr. OGUNDERE (Nigeria) said that his country's legislation provided that service could be accomplished in a variety of ways - by hand directly, by publication in newspapers or through notices in the Official Gazette. A provision such as that envisaged by the Australian representative would be too restrictive.

Mr. MANTILLA-MOLINA (Mexico) regretted that his delegation could not support the inclusion of the provision as to service proposed by the Australian representative.

Mr. CHAFIK (Egypt) agreed entirely with the objections of the Austrian representative. The Australian proposal concerned a question of pure procedure and Egyptian legislation in any case contained a provision exactly corresponding to that proposed by the Australian representative.

Mr. ELLICOTT (Australia) said that his delegation would not wish to press its proposal in the face of objections. It had not intended the provision in question to be exclusive; it would be without prejudice to other systems.

Article 29

Mr. BURGUCHEV (Union of Soviet Socialist Republics) thought it desirable that article 29 should be optional. It implied that, in addition to ratification, some special act or instrument was required for the entry into force of the Law.

In some States, however, ratification would be sufficient for the Law to enter into force. The article should not therefore be binding on such States.

Mr. JAKUBOWSKI (Poland) endorsed the USSR representative's remarks. He thought that the article should be deleted, but if a majority of the Commission considered it necessary he would support the USSR proposal that it should be facultative. Under his country's legal system, accession to a convention was sufficient for the instrument to become binding proprio vigore. The provisions of article 29 were in contradiction to the status of the draft Convention as such.

Mr. ROGNLIEN (Norway) said that the purpose of article 29 was to state that Part I of the Convention would have the force of law in each Contracting State. In his view, that principle was an important one. Part I of the Convention was entitled "Uniform Law"; it was an integral part of the Convention and should be regarded as binding. Paragraph (1) of article 29 did not spell out the way in which Contracting States should give the Uniform Law the force of law; that was left to each Contracting State to decide, in accordance with its constitutional procedures. In those countries where it was sufficient to ratify the Convention, Part I, being self-executing, would become the law of the land by the act of ratification and no further action would be required.

Article 29 (2) stated that each Contracting State should communicate to the Secretary-General of the United Nations the text whereby it had given effect to the Convention. If the text in question was simply the act of ratification, that instrument should be transmitted to the Secretary-General. In his view, the article was a significant one. However, if some delegations had difficulties, it should be possible for the Working Group to devise a formulation that would prove acceptable to all delegations and enable the article to be retained.

Mr. HONNOLD (Secretary of the Commission) agreed that paragraph (1) might have to be revised and clarified.

Mr. GUEIROS (Brazil) noted that, almost 30 years after the Brazilian delegation had taken part in the diplomatic conference to draft the Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, the Brazilian Congress had ratified the Convention and the question had arisen regarding the need for specific legislation to enable it to acquire legal force.

After a number of contradictory decisions, the Supreme Court of Brazil had ruled that the Uniform Law had become binding proprio vigore, as the result of the ratification of an international instrument such as the Convention. Therefore, his delegation considered that the article and commentary were both perfectly clear and covered the point satisfactorily.

Mr. LOEWE (Austria) associated himself with the views expressed by the Soviet and Polish representatives. His own country also observed the principle of direct transmission and a text such as article 29 could give rise to considerable difficulty; his delegation would therefore prefer to delete the article. However, if the article was to be retained, his delegation would support the proposal to reformulate it in order that it should specify that implementing legislation could be purely optional and that States could simply ratify the Convention.

Mr. JENARD (Belgium) felt that a protracted discussion was somewhat premature since the main point at issue was the field of application of the Convention. His own delegation would prefer the Convention to be applied by mutual agreement, in which case there would be no need of article 29. The alternative was that the Convention should be of the traditional kind. However, what was needed, first of all, was a decision upon the Convention's field of application.

Mr. KAMAT (India) said that his delegation appreciated the purpose of article 29 because in his country conventions did not automatically become the law of the land and implementing legislation was required. However, it had some doubts whether the language in the article could take care of the problem of reservations in Part III. The commentary on the article stated that the Uniform Law was not a "model Law" and that its provisions could not be changed to modify its meaning. However, Contracting Parties would presumably make changes or reservations with regard to Part I when adopting the implementing legislation. The language of the article did not seem quite satisfactory and should perhaps be amended to specify that the Contracting State would give the provisions of Part I the force of law, subject to any changes that might be necessary as a result of reservations.

Mr. RECZEI (Hungary) agreed with the views of the Belgian delegation and felt that the diplomatic conference would have to take a decision on the final scope of the Convention. In the opinion of his delegation, the ratification of an international convention had, in fact, the force of law because it was considered

as a special law which took precedence over general law. His delegation felt that the article should be deleted, as it appeared both superfluous and premature.

Mr. ELLICOTT (Australia) said that an international convention could not become part of Australian law automatically. His delegation was particularly concerned with two matters: the obligation undertaken by each of the Contracting States and the implementation of that obligation. It might be possible to separate those two aspects and specify either that the provisions in Part I should have the force of law in each Contracting State or that, when necessary, each Contracting State should, in accordance with its constitutional procedures, give the force of law to Part I. His delegation had a further difficulty; Australia was a federal State and it was not always possible for a federal Government to implement a convention which might come within the legislative jurisdiction of its constituent states. His delegation felt that there should be some provision to deal with the problems of federal or non-unitary States and it had therefore submitted an amendment to the article (A/CN.9/V/CRP.16).

Mr. KHOO (Singapore) said that it should not be too difficult to devise a formula for article 29 to satisfy those States whose constitution would require some legislative action to give effect to the Convention. His delegation felt that a formulation such as "Each Contracting State shall take such steps as may be necessary in accordance with its laws or constitution" would not imply that the Contracting State was obliged to take steps under its own law. In his view, such a formulation would solve at least some of the problems connected with article 29 (1). In paragraph (2), a formula such as "Each Contracting State shall notify the Secretary-General of the United Nations of the coming into force of this Convention in its territory and, where any instrument is required under the constitution of law of any Contracting State, a copy of such instrument shall also be forwarded to the Secretary-General of the United Nations" might prove satisfactory.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that article 29 was, to say the least, unsatisfactory. In paragraph (1) his delegation had the impression that the words "not later than the date of the entry into force" clearly implied that a document other than the instrument of ratification was necessary for the Convention to have the force of law. Furthermore, article 40 of Part IV stated

that the instruments of ratification were to be deposited with the Secretary-General of the United Nations and article 29 (2) was either a repetition and quite unnecessary, or referred to something other than article 40. Accordingly, article 29 should be referred back to the Working Group.

Mr. OGUNDERE (Nigeria) said that his delegation had some difficulties with article 29, as his own country was a federal State. The article was quite inappropriate in the case of federal or non-unitary States and should be either deleted or referred back to the Working Group with a request to study the problems of federal States more carefully.

Mr. JAKUBOWSKI (Poland) said that in his country a ratified convention acquired the force of law and no other implementing legislation was necessary. The present drafting of article 29 would make it necessary to take specific implementing action. Professors Matteucci and von Caemmerer had drawn attention to a number of situations in which Contracting Parties had introduced changes in the original text of a Uniform Law and had noted that legislative interpretation was one of the main sources of lack of uniformity in its application.

Mr. LEMONTEY (France) felt that the Commission should postpone further consideration of article 29 until it had discussed the field of application of the Convention.

Mr. YAÑEZ-BARNUEVO (Spain) said that his delegation shared the difficulties expressed by a number of delegations with regard to article 29, which seemed to be based on the assumption of the need to incorporate the Convention into national law. In view of the problems raised, his delegation felt that article 29 should be deleted or rephrased to include the expression "... shall have the force of law". Furthermore, his delegation wondered whether it would not be more appropriate to use the term "State Party" rather than "Contracting State"; the Working Group might wish to consider that point.

Mr. JENARD (Belgium) felt that it was still premature to discuss article 29 until the scope of the Convention had been defined. The Commission might envisage either a reciprocal Convention or a Uniform Law and, if it chose the latter, there would be problems for some countries because there would be two instruments, the Convention and the Uniform Law. If no time-limit was established, States might ratify the Convention without introducing the Uniform Law.

Mr. GUEIROS (Brazil) said that article 29 was very closely related to article 42. Both articles should be referred back to the Working Group.

Mr. SINGH (India) said that the question of the ratification of treaties fell within the purview of public international law, not private international law. Multilateral treaties must be governed by public international law. The Convention should not stipulate how States should ratify the instrument; it should be left to each country to ratify the Convention in accordance with its own procedures.

Mr. MAHUNDA (United Republic of Tanzania) said that he considered article 29 superfluous, inasmuch as it could be interpreted as calling for an act of ratification. Article 40 specified that the Convention was subject to ratification.

Mr. LEMONTEY (France) said that the Commission should not decide whether to retain or delete article 29 until it had taken a decision on the sphere of application of the Convention.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to defer consideration of article 29 until it had discussed the sphere of application of the Convention.

It was so agreed.

/The last part of the meeting was taken up by the discussion of other matters/