

107th meeting (19 April 1972)

Article 29 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that his delegation had the most serious reservations with regard to article 29. The adoption of article 29 would mean that ratification or accession would have different effects for different States according to whether a unitary State or a federal State was involved.

The CHAIRMAN noted that the majority of delegations which had spoken on article 29 had expressed a wish that consideration of it should be deferred until the sphere of application of the draft Convention was clearly defined and he suggested that the Commission should postpone further consideration of that article.

It was so decided.

Article 30

The CHAIRMAN noted that no delegation appeared to wish to speak on article 30 and he suggested that that article should be considered adopted.

It was so decided.

Part III: Declarations and reservations

Mr. ROGNLIEN (Norway) said that the Working Group had before it proposed amendments which would limit the application of the draft convention to relations between nationals of Contracting States. The Working Group proposed to draft a provision to that effect which would take the form either of an express stipulation which would be general in scope, or of an optional reservation.

Article 31

Mr. MATTEUCCI (International Institute for the Unification of Private Law) said that he had doubts regarding the advisability of the provisions of article 31, which had been modelled on those of article II of the 1964 Convention where they had been introduced to reserve the application of the Uniform Law

adopted by the Scandinavian countries and that which the Benelux countries were in the process of elaborating. It might be asked whether the reasons which justified the inclusion of those provisions in ULIS were valid in the case of an instrument on prescription, a matter which related more to procedure. It might be feared that article 33 would give rise to difficult situations: in the case of successive international sales, one of which took place within a free exchange zone having its own rules and the other between States subject to the Convention on prescription, the buyer might have to take account of two different limitation periods in his relations with the seller, on the one hand, and in his relations with the subpurchaser, on the other hand. It would obviously be preferable if all countries recognized the same rule on limitations.

Mr. JENARD (Belgium) said he thought that article 31 was useful. The draft Convention text which represented a compromise between States having different legal systems, no longer appeared necessary between countries which applied the same rules. Moreover, article 31 made it possible to avoid conflicts of conventions. Once the sphere of application of the Uniform Law had been clearly defined, some provisions of the article could be deleted.

Mr. MANTILLA-MOLINA (Mexico) said he would like to have an explanation regarding the scope of article 31. If the text was interpreted literally, any Contracting State might at any time declare that the Uniform Law did not apply to a given contract, which seemed quite surprising.

Mr. LOEWE (Austria) shared the view of the Belgian delegation. It should be noted, moreover, that the volume of trade between countries which had already adopted common provisions was in general quite considerable by comparison with that between such countries and third countries, and it would be unnecessarily complicated to seek to apply a new system to them. Lastly, it should be pointed out that relations between countries having the same rules were exclusively bilateral and had no effect on third States.

Mr. CHAFIK (Egypt) shared the view of the representatives of Belgium and Austria. The article under consideration was, in fact, designed to encourage regional unification at the same time as universal unification. Regional

unification was of unquestionable importance to countries which, like those grouped within the Arab League, had not only ties of proximity, but also deeper affinities.

Mr. GUEIROS (Brazil) said he had listened with great interest to the statement by the observer for UNIDROIT. He himself shared the doubts of the Mexican delegation regarding the scope to be given to article 31.

Mr. ROGNLIEN (Norway) pointed out that it was article II of the 1964 Hague Convention which had served as a model for article 31. When it adopted an international convention, a State incorporated it into its internal law, following procedures which depended on its Constitution and which the text of article 31 could not set out in detail. He thought, however, that the Working Group should try to improve the wording of the article. He agreed with the principle stated in article 31, but if it created difficulties for certain States, the words "because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention", at the end of paragraph (1), should perhaps be deleted.

Mr. OGUNDERE (Nigeria) said he understood the position of those who supported article 31, although he was not convinced by their arguments. The aim of the draft Convention was, in fact, to set uniform rules. Article 31, which seemed made to measure for certain European countries and which introduced an important reservation in their favour would make it all the more difficult to apply a convention which was not designed for professors of law but for merchants and businessmen.

Mr. ROGNLIEN (Norway) observed that article 31, which was couched in general terms, was also applicable to groups of African or Latin American countries, for example, a fact which the latter should take into account.

Mr. KAMAT (India) said that he could not agree with the proposal of the Norwegian delegation which, by deleting the last two lines of paragraph (1), would deprive article 31 of its justification. That provision would become much too broad in scope. He approved of the concern to preserve regional unity, provided that, as stated in article 31, the legal rules of the countries concerned were the same or very closely related.

The CHAIRMAN noted that a consensus appeared to have emerged in favour of retaining article 31. That article should, however, be referred to the Working Group so that it could improve the text in the light of the observations which had been made regarding it, in particular by the Mexican delegation.

Article 32

The CHAIRMAN noted that no delegation had expressed a wish to speak on article 32 and he suggested that it would be considered adopted.

It was so decided.

Article 33

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he thought that article 33, which contained a special reservation in favour of States which had ratified the 1964 ULIS, was not justified from either the legal or the practical viewpoint. He therefore requested that the article should be deleted.

Mr. ROGNLIEN (Norway) said that the Working Group had drafted a new version of article 33 which extended the application of that provision to States Parties to any Convention on the international sales of goods, without restricting it, as the present text did, to States Parties to the 1964 ULIS. According to the new version, article 33 could be applied, inter alia, to the revised ULIS. The justification for the article was evident since, without the reservation contained therein, it would appear difficult to ask States which had already ratified an instrument on sales containing a certain definition of international sales to adopt another on limitation containing another definition of international sales.

Mr. MUDHO (Kenya) shared the view of the representative of the Soviet Union. Article 33, which ran counter to the uniformity sought, would, in fact, raise insuperable difficulties with regard to the application of the Convention between a country which had ratified the 1964 ULIS and a third country. It might, however, be thought that article 33 applied in conditions similar to those of article 31 and that States Parties to the 1964 ULIS could have recourse to it only in respect of relations between themselves.

Mr. GUEST (United Kingdom) agreed with the representative of the Soviet Union that article 33, was not justified from the legal viewpoint. From the practical viewpoint, however, due account should be taken of the fact that ULIS, which had already been ratified by six States, would enter into force in August 1972. There were, however, divergencies between the text of ULIS, in particular article 49, and the text of the draft Convention on prescription. If, therefore, it was hoped that States which had ratified ULIS would also be able to ratify the Convention on prescription, article 33 should be retained.

Mr. WARIOBA (United Republic of Tanzania) agreed with the representative of Kenya. Article 33, which in the view of the United Kingdom representative was not legally sound, was not justifiable from the practical standpoint either. It contained an important reservation which was mainly to the advantage of certain European countries and directly contradicted the principle of uniformity. His country could not therefore become a party to the Convention if the article was retained as it stood. He proposed that it should be deleted or at least amended in accordance with the suggestion by the representative of Kenya, so that its application would be limited to the reciprocal relations of States Parties to ULIS.

Mr. OGUNDERE (Nigeria) also opposed the retention of article 33, which imposed an additional obligation on States that were not parties to ULIS. The article in question was moreover, in conflict with article 19 of the Vienna Convention on the Law of Treaties, which, although it had not yet entered into force, was an essential basic text. Article 19 (c) of the Vienna Convention provided that any reservation which a State might make with regard to a treaty must not conflict with "the aim and purpose" of the treaty. Article 33 was, however, in direct contradiction with the aim of the draft Convention, namely, the unification of the rules governing prescription.

Mr. LOEWE (Austria) noted that he had submitted a proposal to amend article 33 (A/CN.9/V/CRP.11) by adding a second paragraph designed to grant States which had not ratified the 1964 ULIS the same prerogative as was granted, under article 33 (b), to States which had ratified it. He favoured the retention of article 33, whose significance should not be overestimated inasmuch as it dealt with two very specific situations relating, first, to the sphere of

application of the Convention on Prescription in the case of countries which had ratified ULIS and, secondly, to the question of lack of conformity, which was the subject of the Austrian amendment. Austria, which had not ratified the 1964 ULIS, was awaiting the final formulation of revised ULIS, at which point it would be able to decide whether to ratify the 1964 ULIS, revised ULIS or neither. If article 33 was deleted, Austria would have to defer any consideration of ratifying the Convention on Prescription until after it took a decision with regard to ULIS.

Mr. LEMONTEY (France) said that since the procedure for ratification of the 1964 ULIS had been initiated in the French Parliament, his delegation was obviously in favour of retaining article 33.

Mr. MATTEUCCI (International Institute for the Unification of Private Law) associated himself with the representative of Kenya in pointing to the difficulties which could arise in a situation where a businessman who was a national of a country which had invoked the reservation available under article 33 entered into a contract with a national of a country which had not acceded to the 1964 Convention; in such cases, the courts would be faced with a conflict of definitions. To avoid problems of that kind, article 33 should be amended to bring it into line with article 31. The reservation would thus apply only to reciprocal relations between States which had ratified the 1964 Convention.

Mr. ELLICOTT (Australia) said that, given the stage reached in the work relating to international sales, retaining article 33 would create a serious risk of conflict in the definition of such sales. No satisfactory solution could be achieved until that definition had been finalized. He therefore proposed that consideration of article 33 should be deferred until an acceptable definition was formulated.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) requested the observer for UNIDROIT to explain how it was that the 1964 Convention was entering into force without taking account of recommendation II in the annex to the Final Act of the Hague Conference. That recommendation, which was entirely pertinent, provided that if ULIS did not come into force by 1 May 1968, a meeting of representatives of States which had participated in the Conference should be

convened to consider what further action could be taken to promote the unification of law on the international sale of goods. If the 1964 Convention was entering into force, it could well be asked what purpose was served by the work of UNCITRAL. A serious situation had thus arisen. Article 33 should not be regarded lightly. His delegation favoured its deletion because it would otherwise nullify the work of unification undertaken under United Nations auspices.

Mr. RECZEI (Hungary) said that he favoured the deletion of article 33. The Commission's current debate created the impression that the will to achieve a unified law had waned and gave reason to fear that the States which had ratified the 1964 ULIS no longer had any real interest in the effort to achieve uniformity in the field of international sales. There was no justification for introducing into the draft Convention a rule which favoured the six countries that had ratified the 1964 ULIS while the Commission was working to revise that instrument in the interests of all countries.

There was a further difficulty which might arise from the application of article 33. Article V of the 1964 Convention provided that a State could declare that it would apply the Uniform Law only to certain contracts. A paradoxical situation might arise if a State availed itself, at one and the same time, of the reservation provided for in article 33 of the draft Convention on Prescription and the one provided for in article V of the 1964 Convention. It would be impossible to decide which was the applicable law.

Mr. GUEIROS (Brazil) associated himself with the delegations which were opposed to retaining article 33. The latter's retention by the Commission would be an implicit admission of helplessness which would discourage in advance any endeavour to achieve uniformity. His delegation favoured the deletion of article 33 because its provisions gave more importance to the 1964 ULIS than to the Commission's revision of that instrument.

Mr. JAKUBOWSKI (Poland) said that he favoured the deletion of article 33 for the reasons given by other members of the Commission. In his view, the matters dealt with in the draft Convention were not identical with those which ULIS was intended to regulate. In addition, the wording of article 33 (b) was too general;

it implied that there were numerous possibilities of conflict. Retention of the article would give the impression that a provision which would undermine in advance any attempt to revise ULIS had been introduced into the draft Convention.

Mr. NESTOR (Romania) said that current efforts to achieve uniformity in law were proceeding simultaneously at the levels of regional relations and of remote international relations. The problem facing the Commission was to decide whether work to achieve uniformity in international law proper should be pursued to the detriment of regional efforts to that end. The uniformity achieved by certain groups of States should be preserved, and steps should be taken to ensure uniformity in relations extending outside regional economic groupings. At the regional level, relations between Romania and the other countries of the Council for Mutual Economic Assistance were governed by the relevant COMECON instruments, which extended to matters of prescription. His delegation was none the less concerned to achieve uniformity in the law governing its relations with countries which were not part of the same region. That was why it favoured the deletion of the final words of article 36 ("in special fields") in order to safeguard the provisions of regional agreements.

As for article 33, it was unacceptable that the countries which had ratified the 1964 Convention should impose the ULIS definition of international sales on other countries. If, on the other hand, those countries wished to retain that definition in their reciprocal relations, his delegation would have no objection.

Mr. KAMAT (India) said he agreed with the representative of the USSR in finding it regrettable that the Working Group had made article 33 apply only to countries which had ratified the 1964 Convention. The Working Group should have borne in mind the fact that the Commission was revising ULIS and should therefore have made the article applicable to countries which became parties to the revised ULIS, in which there would unquestionably be a different definition of international sales. Some delegations had proposed that article 33 should be deleted, but that would not solve the problem; the definition of international sales in article 3 of the draft Convention on prescription would still be different from the definition which the Working Group was currently attempting to formulate. The representative of UNIDROIT had proposed that article 33 should be brought into

line with article 31 so that the declaration enabling a State to derogate from the Uniform Law on prescription would affect the relations of that State with another State only if the other State agreed. That was also no solution and would merely delay ratification of the Convention on Prescription, since each State, before committing itself, would prefer to wait until the definition contained in the revised ULIS was known.

The only possible solution was to make the definition of international sales in the law on sales identical with that in the law on prescription. If the two definitions coincided, there would be no problem in deleting article 33.

Mr. COLOMBES (Argentina) said that his delegation had strong reservations concerning article 33 but could accept it if it was amended in the manner suggested by the representative of UNIDROIT; subparagraph (a) would then provide that the State in question would apply the ULIS definition of international sales only to States which had ratified the 1964 Convention.

Mr. JENARD (Belgium), noting that his country had ratified the 1964 Convention, said that the reason why his Government regarded the reservation provided for in article 33 as indispensable was precisely that it wished to accede to the future Convention on Prescription but could not do so unless that reservation was permitted. In practical terms, article 33 responded to two needs. First, it lent a certain flexibility to the question of defining international sales; his delegation had not opposed the definition contained in article 3 precisely because it had hoped that article 33 would be adopted. Secondly, article 33 dealt with the problem raised by article 49 of the 1964 Uniform Law, the solution of which was in turn linked to the version ultimately decided upon for articles 9 and 10 of the draft Convention on Prescription.

His delegation had made important concessions since the beginning of the debate but could make no concession on the reservation provided for in article 33, whatever its final formulation might be.

Mr. MATTEUCCI (International Institute for the Unification of Private Law), replying to the representative of the USSR, said that the reason why the recommendation annexed to the Final Act of the Hague Conference had not been acted upon was that UNCITRAL had already been in existence in 1968 and had been dealing with the revisions of ULIS.

With regard to article 33, he was in favour of the compromise solution proposed by the Argentine delegation, which called for limiting the scope of the reservation provided for in the article. However, that would not solve every problem, since the revised ULIS might also contain a definition of international sales different from that in the Uniform Law on prescription. It would also be advisable to leave a door open for States that ratified the new ULIS.

The difficulties raised by article 33 were due to the fact that the Commission was dealing with a provisional situation; they would disappear if, once the revision of ULIS was completed, a diplomatic conference was called to consider a single text and thus ensure the establishment of a truly uniform law. Admittedly, certain differences might persist even then in the definition of sales, since, as the representative of Austria had said, the Convention on Prescription could have a broader sphere of application than the Convention on international sales. However, the problem was not insoluble. It would therefore be desirable for the Commission to proceed with its work, either retaining article 33 with the proposed change or simply eliminating it.

Mr. CHAFIK (Egypt) said that he appreciated the concern of Governments which had ratified the 1964 Convention and did not wish to be confronted by different definitions of an international contract of sale. On the other hand, retention of article 33 could only be harmful to the efforts to achieve unified law. The change suggested by the observer for UNIDROIT could solve the problem if it was carried further; in order for derogation to article 3 to be permitted, the two States concerned should not only have ratified the 1964 Convention but should also have made the reservation provided for in article 33.

Mr. CATHALA (Commission of the European Communities), referring to the comments by the Romanian representative on the international and regional unification of law, said that the European community institutions had refrained from taking any initiative in the sphere of international sales and had always co-operated with the work of UNCITRAL in the hope that the widest possible uniformity would be achieved. With regard to article 33, he shared the concern of those States which had not ratified the 1964 Convention and also of those which

had ratified it. As the Indian representative had said, the difficulty arose from the varying definitions of sales. He supported the proposal made by the representative of UNIDROIT.

After an exchange of views in which Mr. BURGUCHEV (Union of Soviet Socialist Republics), Mr. KAMAT (India), Mr. CHAFIK (Egypt), Mr. WARIOBA (United Republic of Tanzania) and the CHAIRMAN participated, Mr. OGUNDERE (Nigeria) proposed that in an effort to solve the serious problem raised by article 33 on the basis of the consensus approach which the Commission sought to follow, the article in question should be referred back to the Working Group. The Group would be requested to submit a draft that took account of the various changes which had been suggested.

Mr. ROGNLIEN (Norway) said that the interests affected by article 33 went beyond the competence of the Working Group. If the Commission could not find a solution, it could perhaps place article 33 in square brackets and leave the decision on it to the diplomatic conference which would be convened to adopt the Convention.

Mr. JENARD (Belgium) proposed that the problem of article 33 should be submitted to an ad hoc group composed of representatives of countries which did not intend to ratify the 1964 Convention as well as of countries which had ratified it or intended to do so.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that he supported that idea.

After an exchange of views in which Mr. LOEWE (Austria), Mr. KHOO (Singapore), Mr. ROGNLIEN (Norway), Mr. GUEST (United Kingdom) and the CHAIRMAN participated, the CHAIRMAN suggested that, in accordance with the proposal made by the Belgian representative, the Commission should establish an ad hoc group, consisting of the representatives of Austria, Belgium, Kenya and the USSR, to consider article 33.

It was so decided.