The CHAIRMAN observed that there appeared to be a consensus to delete article 34.

Article 35

Mr. GUEST (United Kingdom) said that article 35 raised a general problem regarding a point of policy determined by the Working Group at its previous session, namely, that, in the case of a claim involving, for example, a buyer in the United Kingdom and a seller in Japan, if both States were parties to the Convention, the institution of legal proceedings in the United Kingdom should have the effect of causing the limitation period to cease to run in Japan and international effect would be given to that interruption. His delegation considered that policy far too ambitious. There should be uniformity, whatever the forum. Moreover, under United Kingdom legislation, one year could pass before a foreign party learned of a claim brought against it. It was unreasonable to ask a foreign court to recognize the interruption of the limitation period. Accordingly, if the Commission ultimately decided to give international effect to such interruptions, it would be essential to include a provision along the lines of that contained in article 35.

Mr. ROGNLIEN (Norway) recalled that the initial draft Convention had provided for giving only local effect to interruption; ultimately, the Working Group had felt that it would be strange if the international Convention did not also provide for international effect of interruption and that such interruption should be international unless otherwise provided in the text. Article 35 had been included in order to allow States to enter reservations.

A number of members had serious doubts as to the workability of article 35 and feared that considerable practical difficulties would arise for private parties if many States elected to make the reservation under the article. He personally thought that the scope of article 35 should be limited to articles 15 and 16. It was extremely important that judicial proceedings instituted in ahy State, under article 12 for instance, should have a universal effect of interruption of the limitation period. Lack of knowledge of the institution of proceedings should not lead to abuse, since those proceedings were in the hands of a public authority and were therefore of public notoriety. He agreed with the representative of the United Kingdom that, in some instances, time might elapse before the other party

received notice of such proceedings, but in most cases the defendant would soon become aware of the institution of proceedings against him. Reservations should not be allowed on article 14 and particularly on article 18 (1) (b); the reference to those two articles should therefore be deleted from article 35. The fact that article 21 had not been mentioned in article 35, as had been suggested, was a concession to the United Kingdom delegation.

Mr. LOEWE (Austria) said that, during the discussion of the articles mentioned in article 35, he had already said that it would be either unsatisfactory or impractical for proceedings abroad to have an international effect of interruption. Such an effect could be accepted only if reservations were allowed in some cases. He fully endorsed the position of the United Kingdom representative. However, the Commission should take three considerations into account. The first was that a distinction should be made between proceedings instituted in a foreign jurisdiction and those instituted in the national jurisdiction. In his view in the case of a decision on the merits of the case which was taken abroad but which would be recognized on the national territory, the institution of proceedings would justify the interruption of the limitation period. Secondly, in view of the important restrictions which had been made to article 16, it was not absolutely necessary to include that article within the scope of article 35; his country was prepared to recognize the effect of interruption if non-judicial proceedings took place in a contracting State against a debtor whose place of business or residence was in that State. The third consideration had already been stated during discussions of article 21; that article authorized the reopening of a limitation period on a debt which had already expired. He therefore urged that article 35 (1) should also allow reservations to article 21.

Mr. OLIVENCIA (Spain) pointed out that an article on reservations was necessary. However, before taking a final position on the subject of reservations, the Commission should know how the final version of articles 16 and 21 would read.

Mr. RECZEI (Hungary) said that article 35 had been included in the Convention for the benefit of common law countries. He fully agreed with the Norwegian representative that a more selective choice of reservations was needed. Article 35 (1) allowed the exclusion of almost one quarter of the Convention and led to new complications.

Interruption of the limitation period could be the product of legal proceedings or of non-procedural means; non-procedural means could be covered by reservations. However, if a judgement subsequent to legal proceedings in a foreign country was recognized in the United Kingdom, he wondered why the institution of such proceedings should not lead to interruption of the limitation period in the United Kingdom.

Mr. DEI-ANANG (Ghana) said that his country followed common law but he was nonetheless unhappy about article 35, which should be deleted. That article amounted to a statement that the prospective plaintiff should institute legal proceedings in the two relevant countries at the same time. If the plaintiff instituted proceedings in country A but could not interrupt the limitation period in country B, there was no reason for the defendant in country B to take any measures. He need only wait until the judgement had been given in the other country (A) and then state that the limitation period had expired. Commercial lawsuits sometimes took as long as 10 years, so that such a course was obviously unfair.

The Commission should not retain article 35 in the Convention in the hope that few Contracting States would use it. If all States parties used their option under article 35 (1) a quarter of the Convention would be useless for all practical purposes and there would really be no point in trying to have a Uniform Law applicable to all countries.

Mr. JAKUBOWSKI (Poland) said that the best solution would be for the Commission to adopt the principle of the international effect of interruption. Some causes of interruption could be exempt from reservation, as suggested by the Norwegian representative, but not interruption due to the institution of judicial and arbitral proceedings. If no international effect of interruption was granted by the Convention, the status quo would be better, for the reasons given by the representative of Ghana.

If some countries needed to express reservations on interruption of the limitation period due to proceedings, two solutions were possible. The first was to follow the Norwegian suggestion and to limit reservations to the special proceedings mentioned in article 15, while the second solution was to retain article 35 (1) in its existing form but to maintain the possibility of a declaration under article 35 (2). It would be unfair for one of the parties to be penalized by

a provision to the effect that proceedings must always be instituted in the country of residence of the defendant.

Mr. JENARD (Belgium) said that the reservations allowed under article 35 (1) would make the Convention lose an important part of its substance; it would be peculiar if an international Convention did not have an international effect. The dangers of article 35 were greater than the dangers arising from abuses of the articles for which reservations were permitted. He supported the deletion of article 35. With reference to article 12, he agreed with the representative of Chana. Proceedings could be taken against the debtor in a foreign country and it was for the debtor to ascertain which States were parties to the Convention. Reservations with regard to the provisions of article 16 did not seem very useful, since article 16 referred to the jurisdiction where the interruptive act occurred. A reservation under article 18 (1) (b) would lead to a ridiculous situation whereby a judgement in country A was not recognized in country B while the court in country B stated that it was not competent in the matter because proceedings were in progress in country A. Article 21 could not be the subject of a reservation, as suggested by the representative of Austria, because its provisions were even more necessary if the other reservations in article 35 (1) were maintained.

Mr. SMIT (United States of America) agreed with the principle of the international effect of interruption, but with qualifications. International effect would be most inappropriate if the sphere of application of the Convention was extended to all contracts of international sale irrespective of where they were concluded. The Convention should also explain exactly what it meant by the international effect of interruption. That effect should be limited to circumstances arising in States parties to the Convention or to the country where the effect had occurred, under article 16 subject to those reservations, the Convention should give interruption of the limitation period international effect.

He agreed with the representative of the United Kingdom regarding possible lack of knowledge of the defendant in a lawsuit. In the United States, for instance, the plaintiff could start a lawsuit without the defendant's knowledge, by filing a complaint in court, which marked the start of the lawsuit. Such a case would be possible in an international situation also, for instance by use of the institution of "signification au parquet". In most cases that would not be a serious problem because the defendant learned of the institution of proceedings, so

that the international effect of interruption did not present great dangers. The Commission should not take a decision on article 35 until the Working Group had considered it further.

Mr. GUEIROS (Brazil) said that he was opposed to article 35 because the application of the Uniform Law would become complicated in proportion to the amount of reservations allowed. Businessmen would have difficulty in finding out whether their own Governments had made reservations on any articles, particularly in view of the provision in article 35 (2) that any State could "at any time" declare its reservations. Furthermore, the phrase in article 35 (2) that a State would "not be compelled" was unseemly, in view of the sovereignty of States.

Mr. LEMONTEY (France) said that article 35 would lead to a fragmentation of the Convention which would make it pointless. He agreed with the Brazilian representative that a substantive difficulty would arise if article 35 was retained, and also total confusion in the application of the Convention because it would be very difficult to find out who had made reservations. Article 35 (2) appeared to provide for retaliatory measures against countries which had made reservations under article 35 (1). He agreed that article 35 should be deleted; if it was retained, he was entirely opposed to the inclusion of any new article within its scope.

With regard to the United States representative's reference to the institution of "signification au parquet" under which an action could be started against a non-resident defendant without the defendant's knowledge, he noted that legislative measures had been taken in France to alleviate that provision and careful search was made, by orders of the court, to find out the address of the non-resident and to give him notice of the proceedings.

Mr. ELLICOTT (Australia) said that article 35 cut across the idea of uniformity and universality and it was understandable that many delegations should consider it undesirable. It would be patently unfair for a limitation period to cease to run without the debtor becoming aware of the fact. The United Kingdom representative's remarks in that connexion were sound and the Commission should endeavour to overcome the problem. Under Australian law too, it was possible to

take out a writ and to extend it after 12 months. His delegation could only suggest that the draft Convention should contain a provision that the limitation period should not be interrupted unless the fact of the institution of proceedings had been brought to the debtor's attention within three months. Failing that, the draft Convention should contain provisions on the lines of article 35, although it would not be necessary to include a reference to articles, such as article 16, which contained provisions for the serving of notice of an act on the debtor. The real problem arose from article 12, which must be considered in conjunction with article 18. Article 35 might be confined, therefore, to a situation arising from the application of those two articles.

Mr. OGUNDERE (Nigeria) said that, having taken a universalist approach to the draft Convention as a whole, his delegation could hardly reverse its position on article 35, despite the United Kingdom representative's remarks concerning its application in the common law system - on which his own country's legislation was based. The application and interpretation of reservations was the most difficult aspect of the work of legal advisers to Governments, and a plethora of reservations should be discouraged as a general rule.

It had been argued that the effect of the reservations in article 35 would be that the debtor would have adequate notice of legal proceedings. The latter were constituted either by a court action or by arbitration and, in his experience, the debtor was always notified of the institution of such proceedings. In any case, the debtor was usually informed beforehand that his failure to effect performance would have certain consequences and it was only when the debtor failed to effect performance that proceedings were instituted.

The draft Convention represented a balance between the common law and civil law systems. In a spirit of conciliation, his delegation was prepared to make a concession to the civil law countries, on a quid pro quo basis, to maintain that balance.

Mr. KAMAT (India) said that his delegation would find it difficult to take an immediate stand on article 35. He appreciated the arguments based on the need for universality but would point out that many provisions in earlier articles were

by no means universal - as his delegation had pointed out in the discussion of them. Article 16, for example, referred to acts extending the period of limitation but its approach was not universal; it was rather an attempt to give international effect to acts under certain municipal systems. Article 18, also, was neither universal nor fair and his delegation had pointed out that, if the desire was to exclude abortive proceedings, it should require the creditor to act in good faith. His delegation had received no clear answer in that connexion and the article had been referred to the Working Group. It was only when that and other articles were resubmitted by the Working Group that his delegation would be in a position to take a decision with regard to article 35. He found arguments that article 35 would emasculate the draft Convention to be somewhat exaggerated, because the article referred only to certain rules regarding interruption. Those rules were not the heart of the draft Convention but an attempt to accomodate national systems. He suggested that article 35 should be placed in square brackets pending the resubmission of the earlier articles. The Commission should not be forced to take any definite position on article 35 immediately, particularly in view of the provisions of article 37.

Mr. NESTOR (Romania) said that his delegation favoured the deletion of articles 34 and 35 although it stood ready to search for a compromise. The number of reservations possible under the draft Convention should be kept as small as possible.

Mr. GUEST (United Kingdom) said that article 35 raised a problem more fundamental than that of the opposition of the common law and the civil law systems. Unfortunately, that problem had been dealt with by recourse to reservations; it would have been better if the Working Group had inserted a section in the draft Convention, dealing with the whole question of the international effect of interruption. It had not explored the question of acts which, while unknown to the other party, were held to constitute judicial proceedings. Nor had it considered the question of the institution of proceedings before incompetent jurisdictions whose judgements other countries refused to recognize. The blanket approach in article 35 could raise the most serious problems with regard to the ratification of the draft Convention. His delegation would be happy to see it deleted, but only on condition that the problems to which he had referred were dealt with systematically in the text.

The representative of Ghana had said that the retention of article 35 would lead to the institution of two series of proceedings as opposed to one. He himself believed that its deletion would have that effect. If, for example, an English buyer instituted proceedings in London against a Japanese seller in the form of a "ghost" action designed merely to prevent the running of the limitation period, the English buyer would ultimately have to institute proceedings in Japan or in a country where the Japanese seller's assets were located. The deletion of article 35 would therefore mean that two actions would have to be instituted, not one.

The Polish representative had raised the question of arbitral proceedings, which were referred to in article 13. Under article 35, however, reservations with regard to article 13 would not be possible.

With regard to the relation by previous speakers of article 35 to article 21, he pointed out that if a buyer in London obtained a judgement against a Japanese seller which was recognized in Japan, the Japanese jurisdiction would enforce that judgement under the applicable laws of Japan - those laws were outside the scope of the draft Convention. It was only if the judgement was not recognized in Japan that article 21 would come into play and the buyer would have to institute an action in Japan.

Mr. SMIT (United States of America), replying to the representative of France, said that in using the French term "signification au parquet", he had been referring to a Dutch institution deriving from the French system. It was possible to begin actions against non-resident defendants in a number of countries which, although they followed the French system, had not followed the recent enlightened legislative example of France.

A possible solution would be a provision that interruption would be effective only where notice was given to the defendant.

Mr. MUDHO (Kenya) was inclined to think that the mere deletion of article 35 would not solve the basic problem to which various delegations, notably that of the United Kingdom, had referred. Nevertheless, his delegation would have difficulty in agreeing to the retention of the article as it stood.

The Commission would do well to consider a solution on the lines suggested by the representatives of Australia and the United States, namely, that the debtor should be notified when proceedings which could constitute interruption were instituted.

Mr. CHAFIK (Egypt) said that, although a draft Convention without reservations would be the ideal, there were States which did not accept the international effect of interruptive acts. Reservations were therefore a necessary evil. There appeared to be two views on the question in the Commission, one in favour of extending the scope of the reservations, the other in favour of reducing it. His delegation was prepared to accept the principle embodied in the article but felt that the scope of the reservations must be discussed further. A possible solution would be to redraft the article and introduce an element of reciprocity in article 35 (2).

Mr. DEI-ANANG (Ghana) said that, in proposing the deletion of article 35, he had not been unaware of the problems described by the United Kingdom representative but had considered them somewhat theoretical. While proceedings were instituted under the common law system by a writ renewable after one year, those proceedings could not be pursued to judgement without the defendant becoming aware of them. A judgement in default of appearance was possible, but only if it could be proved that the defendant had been shown the original writ. A judgement on the grounds of no defence could be obtained only if the defendant had been served with the writ and a full statement of the claim. A judgement in default of defence could be obtained only if the defendant failed to introduce his defence within the stipulated time. Such being the case, article 35 was not necessary to the common law system. The United Kingdom representative had referred to "ghost" actions. The Ghanaian system ensured that such actions could not remain on the books of the court indefinitely by means of a rule, present in many other common law systems, providing for a summons to show cause why an action should not be struck out if a step within that action had not been followed within one year by the next required step. Thus, the common law system did have internal corrective measures.

He agreed with the Australian representative that an attempt should be made to find a solution to the problems raised by the United Kingdom. The essential problem was to find a way of ensuring that a debtor was informed in due time of proceedings initiated against him in a foreign country by a creditor. He thought the matter should be referred to the Working Group for consideration.

Mr. GUEST (United Kingdom) said that the three problems which the Working Group should consider were: (a) the question of the notification of a debtor of the institution against him of judicial proceedings; (b) the question of the competence of the forum in which the proceedings were instituted; and (c) whether international effect should be given to the causes of interruption stated in articles 12, 14, 15, 16 and 18 (1) (b).

Mr. SMIT (United States of America) said that the Working Group should also consider the question of the definition of the countries in which the occurrence of an interruptive event would have international effect.

The CHAIRMAN observed that certain delegations, such as Belgium, Brazil, France and Nigeria, favoured the deletion of article 35, that others were opposed to it but would accept a reformulation of the principles stated therein and that the overwhelming majority favoured a compromise solution. He suggested that the article should be referred to the Working Group together with the comments of delegations, notably those of the United Kingdom.

It was so decided.

Article 36

Mr. BURGUCHEV (Union of Soviet Socialist Republics) proposed that discussion of article 36 should be deferred until the Commission's next meeting because the Working Group was currently engaged in its reformulation.

It was so decided.

Articles 37 and 38

The CHAIRMAN noted that the Soviet delegation had proposed (A/CN.9/V/CRP.19) that article 37 should be deleted.