Article 2 (continued)

Mr. ROGNLIEN (Norway) pointed out that the Commission had already adopted with respect to article 2 a compromise which consisted in placing between square brackets the definition in paragraph (1), so as to bring it to the attention of the diplomatic conference.

Mr. ELLICOTT (Australia) said that, although he was not opposed to that provisional solution, the Commission would sooner or later have to deal with the question of the definition of an international sale. He therefore proposed that that question should be included in the agenda for the Commission's sixth session, which would no doubt precede the meeting of the diplomatic conference. He also suggested that the Working Group on Sales should be asked to give its views on the matter.

Mr. KAMAT (India) said that his delegation supported the compromise mentioned by the representative of Norway.

The CHAIRMAN invited the Commission to approve article 2 on the understanding that paragraph (1) was placed in square brackets and that the question of the definition of an international sale was included in the agenda for the Commission's sixth session.

Article 2 was adopted.

Article 3 (continued)

Mr. ROGNLIEN (Norway) pointed out that the Working Group had prepared two alternative texts for article 3 and that the Commission should now take a decision on the matter. The first alternative would have the effect of limiting the application of the Convention to parties having their places of business in different Contracting States. Since some delegations had considered alternative A too limiting, the Working Group had prepared another alternative, alternative B, supplemented by the reservation in article X. He added that there was a third solution, namely, to adopt the definition used by the Working Group on Sales.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that, although his delegation preferred alternative A, it would not oppose the adoption of alternative B if the majority expressed itself in favour of it. He added that, if alternative A was adopted, paragraph (2) did not seem to him necessary.

Mr. RECZEI (Hungary) said that his delegation was in favour of alternative A. Alternative B would involve the possibility of a supplementary reservation, which would constitute one further obstacle to the uniformization of the law.

Mr. DROZ (The Hague Conference on Private International Law) said that he, too, was in favour of alternative A, although he agreed with the comments of the USSR representative concerning paragraph (2). Alternative A had the merit of establishing a reasonable link between the parties, litigation and prescription.

Mr. LOEWE (Austria) said that, although his delegation had a slight preference for alternative B, it was prepared to accept alternative A. It was, however, opposed to the deletion of paragraph (2), which was a necessary provision. There were in fact countries where the applicable law did not depend on the place where the parties had their places of business but, for example, on the place where the contract had been concluded. The deletion of paragraph (2) would give rise to uncertainty and there might be some question, for instance, as to whether a contract concluded in a third country would be subject to the provisions of the Convention or not. Paragraph (2) was, moreover, in conformity with the solution adopted in the uniform law on sales.

Mr. OGUNDERE (Nigeria) said that, he, too, had a preference for alternative A. His delegation did not fully agree with paragraph (3) but would bow to the wishes of the majority.

Mr. GUEIROS (Brazil) favoured alternative A, including paragraph (2). He repeated the arguments of the representative of Austria concerning that provision.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) withdrew his proposal for the deletion of paragraph (2) of article 3 (alternative A).

Mr. LOEWE (Austria) said that paragraph (3) seemed to him both ambiguous and inadequate: ambiguous, because it was not known whether the law chosen by the parties applied to the contract or to prescription; inadequate, because it did not give the parties enough freedom. It could happen that the parties might wish purely and simply to exclude the application of the Convention, thus leaving the rules of international private law operative. It could also happen that they might wish to apply to prescription the internal law of a Contracting State, for example in the case of two parties who were nationals of the same Contracting State but one of whom resided abroad; it would be natural for those parties to prefer to apply their national law rather than the Uniform Law. Paragraph (3), however, rejected those two hypotheses in favour of a third, which was almost academic since it was hard to see why two parties having their places of business in different Contracting States should choose the law of a third, non-Contracting, State.

He proposed that paragraph (3) should be referred to a drafting group for redrafting.

Mr. ROGNLIEN (Norway) said he could not accept the arguments advanced by the representative of Austria. He feared that granting greater freedom to the Parties would derogate from the uniform character of the law to the detriment of the parties themselves, who would have to ascertain at any time in which countries the Convention applied and in which countries it did not. The solution might perhaps be to permit States, at the time of ratification, to make a reservation which would consist in deleting the word "non-Contracting" in paragraph (3). Accordingly, he proposed that that word should be placed in square brackets.

Mr. LOEWE (Austria) observed that in paragraph (3) the Working Group had replaced the word "expressly" by the word "validly". That word seemed to him too vague. He would not be opposed to the retention of the word "validly" if that was the wish of the majority, but he asked that his delegation's position on that point should be reflected in the summary record.

Mr. ELLICOTT (Australia) shared the view of the Austrian delegation regarding the word "validly", which seemed to him to give rise to uncertainty.

He pointed out that when that provision had first been considered, the Commission had recognized the need for an "express" stipulation, as the summary record of the 95th meeting showed (A/CN.9/SR.95, p. 8).

Mr. LEMONTEY (France), referring to the article as a whole, said he favoured alternative A. With regard to paragraph (3), he pointed out that the text submitted to the Commission was the result of a compromise among the members of the Working Group. If, however, the question was reopened, his delegation would side with the Austrian delegation, for the same reasons. His delegation would, however, oppose the replacement of the word "validly" by the word "expressly" since, in French law, the choice of a foreign law might be implicit and derive, for instance, from the conditions in which the contract was concluded.

Mr. GONDRA (Spain) said he was opposed to the retention of paragraph (3), which was contrary to the principles of Spanish legislation relating to prescription, in that the institution, being in the sphere of public policy, should be governed by compulsory norms. That provision would, moreover, give rise to difficulties of interpretation. The word "validly" should be replaced by some more explicit word.

Mr. MUDHO (Kenya), after expressing himself in favour of alternative A, said he supported the observations of the Australian delegation concerning paragraph (3) and that he, too, thought it would be preferable to replace "validly" by "expressly".

In order to allay the fears expressed by the representative of Norway, he proposed that alternative A should be accompanied by a reservation similar to that provided for in article A.

Mr. NESTOR (Romania) said that to replace "validly" by "expressly" would solve nothing. An express agreement could, in fact, quite well not be valid. In some systems, in particular, the choice of parties was limited and for a law to be applicable to a contract it was essential that it should have a definite link with it.

His delegation favoured alternative A, including paragraph (3).

Mr. SMIT (United States of America) agreed with the comments made by the representative of Romania concerning the word "validly". He thought that paragraph (3) represented a middle course between the solution of giving the

parties total freedom and the solution that would amount to giving them none at all. His delegation, too, was in favour of alternative A, including paragraph (3).

Mr. RECZEI (Hungary) said that he was also in favour of retaining paragraph (3).

Mr. GUEST (United Kingdom) supported the remarks made by the representatives of the United States and Romania. Paragraph (3) was a compromise text, whose wording had been carefully considered by the Working Group. His delegation was in favour of alternative A, including paragraph (3).

Mr. JAKUBOWSKI (Poland) said that his delegation, which preferred alternative A, also had some doubts concerning the suitability of the word "validity". However, it could accept paragraph (3) as submitted by the Working Group. As a means of eliminating the difficulties mentioned by the Norwegian delegation, the solution proposed by the representative of Kenya would seem preferable to placing the word "contracting" in square brackets.

Mr. JENARD (Belgium) also favoured alternative A. With regard to paragraph (3), his delegation would have liked the parties to have been allowed greater freedom, but would support the text proposed in a spirit of compromise. It would prefer not to introduce the word "expressly" because, in Belgium, the choice of a foreign law could be tacit.

Mr. ROGNLIEN (Norway) said that the compromise solution afforded by paragraph (3) had the support of his delegation. He considered that the word "validly" should be retained. For a foreign law to be chosen, there must be a genuine agreement, a free and valid intention on the part of the contracting parties and, their choice must be valid, legally permissible, in the light of the law applicable in the country of the tribunal.

Mr. OGUNDERE (Nigeria) said that the retention of the word "validly" would be an illusory compromise solution. If the freedom of the parties was to be safeguarded, and if they were to be allowed to choose the law of a non-contracting State, it was not for the tribunal to pronounce on the validity of their choice. The word could simply be deleted. If it had to be replaced, the words "in writing" might be inserted rather than "expressly".

Mr. MANTILLA-MOLINA (Mexico) supported the comments made by the Austrian delegation concerning paragraph (3).

Mr. DEI-ANANG (Ghana) said that he was in favour of alternative A, including paragraph (3).

Mr. LOEWE (Austria) said that his delegation, although not convinced by the arguments put forward in defence of paragraph (3), appreciated the fact that the provisions represented a compromise. He accordingly withdrew his proposal.

Mr. KAMAT (India) said that he also preferred alternative A, although it gave rise to some uncertainty. In effect, paragraph (3) contradicted paragraph (2), and the term "validly" reintroduced the rules of private international law. The best solution would be to delete paragraph (3) and thus preclude the application of those rules. Conversely, there would be the solution of making the law applicable where the rules of private international law led to its application, as in the case of the uniform law on sales.

Mr. MICHIDA (Japan) said that he was in favour of alternative A, which on first reading had commanded the support of a majority of Commission members. Having participated in the lengthy discussions held on paragraph (3) in the Working Group, he would point out that the proposed text was the result of a delicate compromise and he thought it would be a pity to reopen the discussion on that point.

Mr. CHAFIK (Egypt) said that his delegation preferred alternative A. He could agree to the retention of paragraph (3) but shared the view of the representative of Austria that it would be better to specify which law was involved. He accordingly proposed the addition of the words "to govern prescription" at the end of the paragraph.

Mr. HYERA (United Republic of Tanzania) said that if the two alternatives were put to a vote, he would vote in favour of alternative A, which struck a balance between two opposing schools of thought. His delegation considered that prescription was a matter of public policy and should therefore not be

left to the choice of the parties: however, it found paragraph (3) an acceptable provision inasmuch as the adverb "validly" implicitly gave States an opportunity to limit the freedom of choice of the parties. His delegation was willing to support the proposal by Kenya to allow States to make reservations on that point.

Mr. GONDRA (Spain) said that, in a spirit of compromise, he was willing to accept alternative A as it stood.

Mr. ELLICOTT (Australia) said that he would not object to the compromise solution which seemed to have the support of the majority, although he still felt that the compromise had been achieved at the expense of precision. Although the arguments put forward by the representatives of the United States and Romania in favour of the retention of "validly" had not convinced him, he would withdraw the amendment he had proposed.

Mr. MANTILLA-MOLINA (Mexico) said that he would support the position of the majority and withdraw his proposal to delete paragraph (3).

The CHAIRMAN suggested that alternative A should be adopted as article 3 of the draft convention, on the understanding that the comments made by members of the Commission would be duly reflected in the summary record of the meeting.

It was so decided.

Articles 4 and 5 (continued)

Articles 4 and 5 were adopted.

Article 6 (continued)

Mr. MANTILLA-MOLINA (Mexico) recalled that, during the first reading of the article, the representative of Chile had criticized the use, in paragraph (2), of the words "contracts for the supply", which did not correspond to any precise legal concept.

Mr. JENARD (Belgium) proposed, to meet the criticism voiced by the representative of Chile, that the words in question should be replaced by some such phrase as "contracts whose purpose is the supply".

Article 6, as amended, was adopted.