

Article 7 (continued)

Mr. HYERA (United Republic of Tanzania) said that in his opinion article 7 was insufficiently precise. It failed to mention the need to promote uniformity, although the purpose of the draft was not merely to ensure standardization but also to make the rules of international law more equitable.

The CHAIRMAN said that the comments made by the representative of Tanzania would be reflected in the summary record.

Article 7 was adopted.

Article 8 (continued)

Article 8 was adopted.

Article 9 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) drew attention to some problems arising out of the present structure of article 9. Paragraph (1) seemed to establish a general rule concerning the point of departure for the limitation period, and that rule would allow for exceptions to be made in the cases referred to in articles 10 and 11. However the provisions of paragraphs (2) and (3) of article 9 also constituted exceptions. That inconsistency needed to be remedied.

Moreover, it might be wondered what relationship there was between the provision of article 9 (3), concerning breach of contract, and the content of article 10, which dealt with "lack of conformity", which was not a particular type of breach of contract.

To eliminate that inconsistency, he proposed that minor drafting changes should be made in article 9 (2) and (3), which would improve the over-all structure of the article. Paragraph (2) and the first sentence of paragraph (3) would then read:

"(2) In respect of a claim based on fraud committed before or at the time of the conclusion of the contract, the claim shall be considered to be done on the date on which the fraud was or could have been discovered.

"(3) In respect of a claim arising from a breach of the contract of sale, the claim shall be considered to be due on the date on which such breach occurs."

Moreover, it might perhaps be desirable to reverse the order of paragraphs (2) and (3), since it could be assumed that in practice the type of litigation referred to in paragraph (3) would be encountered much more frequently than that referred to in paragraph (2). The provisions of article 9 would then appear in decreasing order of generality.

Mr. LEMONTEY (France) said he would have some difficulty in accepting the structural changes proposed by the representative of the Soviet Union. It was clear from the Working Group's debates that paragraph (1) referred essentially to actions for annulment of the contract, in which case the time at which the limitation period commenced was the same as the time at which the contract was concluded. Paragraph (2) referred to the specific case of actions for annulment of the contract based on fraud committed at the time of the conclusion of the contract. The two provisions were thus closely related. Paragraph (3), on the other hand, referred to cases of failure to carry out obligations, which were necessary subsequent to the date of conclusion of the contract.

Mr. GUEST (United Kingdom) said that his delegation had no objection to the drafting changes proposed by the representative of the Soviet Union. Where the order of the paragraphs was concerned, he thought the Soviet delegation would agree to abide by the original text.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he was prepared to withdraw his proposal concerning the inversion of paragraphs (2) and (3) if the Commission felt the present order to be more logical. His delegation's only concern was to shorten the text and make it more coherent.

Mr. DEI-ANANG (Ghana) supported the drafting changes proposed by the representative of the Soviet Union, which he felt constituted an improvement.

Mr. ROGNLIEN (Norway) pointed out that article 9 (1) proclaimed a general principle, the application of which was restricted by the provisions of the two following paragraphs. Paragraph (2), which referred to fraud committed at the time of the conclusion of the contract, was complemented by the provisions of article 20 relating to fraud committed subsequent to the conclusion of the contract. The drafting changes proposed by the Soviet Union were acceptable for paragraph (2),

but raised a number of difficulties with regard to paragraph (3), since the cases of anticipated breach referred to in article 11 should be taken into account.

Mr. MANTILLA-MOLINA (Mexico) said he was extremely puzzled by the present wording of article 9. It appeared in fact that paragraph (1) and paragraph (3) contained contradictory provisions. For any legal proceedings to take place, there must be failure to carry out an obligation, and therefore the two paragraphs dealt with the same subject, while establishing different rules. If, for example, goods were delivered in a quantity less than the agreed amount, the time of commencement was different depending on whether paragraph (1) or paragraph (3) was followed. Under paragraph (1), the limitation period commenced on the date when the goods were received, while under paragraph (3) the time of commencement of the limitation was the date when the breach occurred, in other words when the goods were loaded. He would not propose any formal amendment to article 9, but wished to stress the seriousness of the contradiction he had pointed out.

Mr. LOEWE (Austria) said that he too was confused by the complicated wording of article 9. Paragraph (1) established a general rule with which Austrian jurists were well acquainted. Paragraph (3) established another kind of commencement for the limitation period. On analysis, it appeared that it was paragraph (3) which constituted the general rule, while paragraph (1) was merely an exception designed to cover cases of action for annulment of the contract. Since Austria intended to invoke article 33 to exclude actions for annulment of the contract, the public authorities would find themselves in the paradoxical situation of having to explain to Austrian lawyers that the general rule was not the rule laid down in paragraph (1), but that appearing in paragraph (3). It was difficult to conceive of proceedings being instituted unless there was a breach of contract as defined in article 1 subparagraph 3 (b) of the draft.

Without opposing the substance of article 9, he nevertheless found it difficult to conceive of a more tortuous way of setting out its provisions.

Mr. GONDRA (Spain) expressed the view that the Commission had a duty to eliminate the obscurities in the present wording of article 9. Consequently, he formally proposed that the article be reviewed.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) explained the considerations which had promoted him to make his previous statement. His first concern was that formulation of article 9 should be logical. The changes he had proposed aimed at clearly relating the exceptions referred to in paragraphs (2) and (3) to the general rule laid down in paragraph (1), on the understanding that articles 10 and 11 were exceptions to the exceptions referred to in article 9. The draft could only gain in clarity if the logical linkages between the provisions of those three articles were made more clearly apparent.

Mr. JENARD (Belgium) said the discussion showed that the Working Group had, in spite of its efforts, not achieved a satisfactory text. It might perhaps be possible to place greater stress on the subordinate nature of paragraphs (2) and (3) by making them the subparagraphs (a) and (b) of a single provision. In any case, the text of article 9 could be improved, and the Commission should not omit to do so.

Mr. ELLICOTT (Australia) said that in his view breach of contract was not really an exception to the rule laid down in paragraph (1). What was important in cases of failure to carry out obligations was the second sentence of paragraph (3); the first sentence of that paragraph could be deleted without creating any problem. On the other hand, paragraph (2) did indeed establish an exception, to which attention could be drawn in paragraph (1) by some such phrase as "subject to the provisions of paragraph (2)".

The CHAIRMAN said that the problems raised by article 9 were essentially of a drafting nature. He suggested that a small group of representatives should be given the task of drafting a new wording which would take into account the comments made by members of the Commission. That small drafting group would be composed of the representatives of the United States, Australia and Norway.

It was so decided.