115th meeting (27 April 1972)

The CHAIRMAN said that the Commission had before it the new text of articles 1-28 of the draft Convention on prescription (A/CN.9/V/CRP.21/Rev.1), which the Working Group had prepared on the basis of the opinions and comments made by the members of the Commission during the present session. The Chairman therefore suggested that representatives should be brief.

Mr. GUEST (United Kingdom), speaking as a member of the Working Group, pointed out that the proposed text, even when it had been approved by the Commission, was only a working document intended for the Sixth Committee or a diplomatic conference and that delegations would therefore be able to submit draft amendments to it right up to the stage of the final drafting.

Mr. ROGNLIEN (Norway), speaking as Chairman of the Working Group, said that the Group had followed the Commission's instructions, but that had not always been easy. Those instructions were scmetimes vague and even ambiguous. For example, the Commission had referred certain provisions to the Working Group and had requested it to take into account all the points of view, sometimes contradictory, expressed in plenary sessions. Nevertheless, the Group had tried to harmonize the different positions and the text should therefore be acceptable to a very large majority of delegations. When it had not been possible to reconcile opposing positions, the Group had suggested several alternatives for a given provision. As the United Kingdom representative had pointed out, the draft Convention, even when it had been approved by the Commission, would not be a final text. The Commission must therefore decide on the measures to be taken to ensure that the text could be rapidly incorporated in a convention.

In reply to a question by Mr. GUEIROS (Brazil), the CHAIRMAN explained that the members of the Commission, like all the other States Members of the United Nations, could submit amendments to the draft Convention even when it had been adopted by the Commission.

Mr. KAMAT (India) said he wondered, since the draft Convention would not be a final text even after its adoption by the Commission, whether the text could

again be sent back to the Working Group and if the Commission was really now at the final stage of its work.

Mr. ROGNLIEN (Norway), speaking as Chairman of the Working Group, said that the Group had finished its task and that it was now for the Commission to take a decision itself on any amendments which delegations might submit; the time had come to agree on the text to be submitted to a diplomatic conference.

Mr. LEMONTEY (France) felt that the Commission should have confidence in its Working Group. It should not take up the proposed text article by article but merely decide on the questions which the Group had not been able to solve and which it had included in its text as alternatives or between square brackets.

Mr. BURGUCHEV (Union of Soviet Socialist Republics), supported by Mr. GUEIROS (Brazil) and Mr. DEI-ANANG (Ghana) said that, at the stage of the second and final reading, the Commission could not merely take a decision on the few questions which had given rise to alternatives without reconsidering, article by article, the text proposed by the Working Group. If the Working Group had in fact finished its task, a small drafting group might perhaps be entrusted with the minor adjustments to be made in the light of the final comments by delegations. Only then would the Commission be able to submit to a diplomatic conference a draft which was as carefully prepared as possible.

Mr. GUEST (United Kingdom) felt that the Commission should now concentrate its attention on the questions of substance still pending and, as the representative of Norway had suggested, take a decision on them once and for all. The establishment of a new drafting group would merely be an expedient and might prolong indefinitely the backward and forward movement of texts, for which there was no longer time. In order to accelerate the last stage of discussion, delegations should be brief and leave aside questions of detail.

Mr. NESTOR (Romania) felt that the Commission should consider the proposed text article by article, concentrating its attention on the important points and deciding, when necessary, to refer certain provisions to a drafting group.

Mr. ROGNLIEN (Norway) felt that it would be preferable, in order to avoid any confusion, to consider the proposed text article by article, although as the representative of France had observed, numerous provisions should be adopted without difficulty.

Mr. COLOMBRES (Argentina) felt that the Commission should itself settle the final questions of substance that were still pending if it wished to be able to adopt the draft before the end of the current session.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that, in regard to the substance, he agreed with the opinion expressed by the United Kingdom representative. However, if the Commission did not succeed in agreeing on a given point, it would have to use a drafting group or a working group, particularly as certain provisions of the proposed text were very imprecise; for example, the Russian and English versions of article 18, paragraph 2, were equally incomprehensible.

Mr. GARRIGUES (Spain) said that, in the present final stage, the Commission should consider the draft for the last time article by article, while trying to restrict statements to basic issues. He shared the USSR representative's opinion regarding the need for a very small drafting group to settle any final differences which might arise.

Following a suggestion by Mr. MANTILLA-MOLINA (Mexico), the CHAIRMAN suggested that members of the Commission should examine the text article by article, restricting their comments to questions of substance and particularly to provisions in respect of which the Working Group had proposed alternatives or had used square brackets, it being understood that the Commission could use a small drafting group or even the direct help of the Secretariat for any question of drafting or translation.

It was so decided.

Mr. HONNOLD (Secretary of the Commission) explained, in reply to the Chairman, that delegations could avoid speaking in plenary session on mere translation problems; they could bring such problems directly to the attention of Mr. Colombres (Argentina) for the Spanish text, Mr. Jenard (Belgium) for the French text, Mr. Guest (United Kingdom) for the English text or Mr. Burguchev (Union of Soviet Socialist Republics) for the Russian text.

Article 1 (continued)

Mr. OGUNDERE (Nigeria) said he approved of article 1, while considering that article 7, which dealt with interpretation and application of the Uniform Law should be linked with that article.

Mr. GUEIROS (Brazil) wondered whether the term "person" defined in article 1 (3) (f) was concerned only with the physical persons or persons having legal existence, or if it could also mean de facto entities.

Mr. ROGNLIEN (Norway) explained that the position taken by the Working Group was that the term "person" should be understood also to mean any group, whether or not it had legal personality; that idea was expressed by using the words "company, association or entity".

Mr. COLOMBRES (Argentina) added that the Working Group had retained the idea of de facto entities rather than that of individuals or legal persons, thus using the broader concept employed in certain national legislations.

Mr. MANTILLA-MOLINA (Mexico) felt that in article 1, paragraph (1), the words "and to the prescription of the rights" were superfluous since the draft Convention dealt only with prescription. He therefore proposed that those words should be deleted. Furthermore, article 24, by making provision for payment after the expiry of the limitation period, recognized that the right itself subsisted, even if it could not be legally exercised, after the expiry of the limitation period.

Mr. ROGNLIEN (Norway) pointed out that the draft had to take into account the different legal systems and for that reason the Working Group had decided to deal with rights and claims.

Mr. RECZEI (Hungary) shared the Norwegian representative's view. He felt that both terms were necessary because certain national legislations recognized de facto and de jure limitation.

The CHAIRMAN noted that the majority of members approved of aritcle 1. He therefore proposed that the Commission should adopt it.

Article 1 was adopted.

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.

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.