

116th meeting (27 April 1972)

Article 10 (continued)

The CHAIRMAN pointed out that the new draft Uniform Law in document A/CN.9/V/CRP.21/Rev.1 contained two alternatives for article 10, and invited members to comment on them.

Mr. DEI-ANANG (Ghana) reminded the Commission that his delegation had submitted an amendment to that article (previously article 9) and that there had been a substantial consensus, which was reflected in the record of the 99th meeting, in favour of the principle it advocated, namely that, in cases of lack of conformity of goods, the limitation period should start when the defect was discovered. There had also been a general consensus in favour of setting a maximum limitation period and some delegations had met to prepare proposals embodying those ideas for consideration by the Working Group. However, alternative A in no way reflected the instructions given to the Working Group by the plenary and he asked for clarifications regarding its origin. His delegation preferred alternative B, in so far as it accorded with the general consensus arrived at the week before, but had reservations with respect to paragraph 2. Firstly, because it reintroduced the idea that the limitation period should start on the date on which the goods were duly placed at the buyer's disposition or were handed over to him, an idea that his delegation strongly opposed, and, secondly, because that period was shortened by the last phrase in the paragraph, "whichever is the earlier". Such a provision would rob the text of all its force. Although his delegation had been authorized to revise its amendment and send it to the Working Group, there was no trace of the ideas contained in the amendment in the final draft now before the Committee.

Mr. ROGNLIEN (Norway), replying to the representative of Ghana, said that although that representative was quite correct in his assessment of what the majority opinion had been, when the Working Group had examined the question a new idea had emerged, namely, that a distinction could be made between patent and latent defects. Since the purpose of the Convention was to facilitate the settlement of stale and disputed claims, the Working Group had felt that the

limitation period set should not be too long and had decided to recommend a limitation period of two years, in cases of patent defects and, in cases of latent defects, a period of two years from the date of the discovery, with an over-all period of five years from the time when the goods were placed at the disposition of the buyer. Naturally, it had not known whether the Commission would approve of the suggestion. If the Commission decided in favour of alternative B, then the Working Group recommended that the limitation period should begin from the time the buyer got the goods in the case of patent defects, and from the time of the discovery of the defect, in the case of latent defects, provided the over-all limit did not exceed five years. Finally, he did not understand the representative of Ghana's concern over the phrase "from the date on which they are duly placed at his disposition or handed over, whichever is the earlier".

Mr. OGUNDERE (Nigeria) said the representative of Ghana had correctly assessed the situation regarding the instructions to the Working Group. His delegation had originally been in favour of excluding sales of plant and machinery altogether; however, realizing that such a proposal was utopian, it had been content to stress the importance of taking into account the difficulty of discovering latent defects in machinery. Businessmen in the developing countries did not have an army of legal advisers to help them in negotiating the installation of heavy machinery. That was why his delegation preferred the formulation in alternative B. Paragraphs 1 and 3 of that alternative were quite acceptable to his delegation, but paragraph 2, regarding latent defects, was not. His delegation was particularly disappointed to note that that paragraph provided for an over-all period of five years, whereas article 18, which dealt with interruption of the period, provided for a total of 14 years. His delegation attached far greater importance to the question of latent defects than to the question of interruption.

In a spirit of compromise and in order to take into account, at least to a minimum degree, the interests of the developing countries, his delegation proposed that in article 10 (2), alternative B, the words "they are duly placed at his disposition, or are handed over to him, whichever is the earlier" should be replaced by the words "the claim becomes due". That amendment had the advantage

of allowing for a total period of nine years in the event the defect could not be discovered until nearly four years from the date on which the buyer received the goods. Such an allowance was particularly important to the entrepreneurs of the developing countries. His amendment would give a bare minimum of satisfaction to the developing countries and he hoped it would be acceptable to the Commission.

Mr. GUEST (United Kingdom) said the delegations of Ghana and Nigeria had done less than justice to the desire of the Working Group to give effect to the wishes of the Ghanaian delegation. The basic proposition of the draft submitted to the Working Group by Ghana and other Afro-Asian countries had been that, in cases of latent defects, the period should commence to run from the date on which the defect or lack of conformity was or could reasonably be discovered. The Working Group had given effect to that principle in article 10 (2).

The point had then arisen whether there should be an over-all limitation period. It had been the understanding of the Working Group that, as a result of their informal meeting, the Afro-Asian countries had been willing to accept an over-all period of five years. He apologized for any possible misinterpretation of the wishes of the Afro-Asian countries. If the period of five years was not acceptable to them, he was sure the Commission could reach an agreement on a different period. Under alternative B, the buyer would still have four years from the date on which the defect was or could have been discovered. He did not fully understand the Nigerian proposal.

He pointed out that the idea of shortening the period from four years to two, which was reflected in alternative A, had indeed been advanced in the Commission by Austria and other delegations, whose views in that regard were reflected in the summary records. It was unfair to insinuate that alternative A bore no relation to the discussions in the Commission.

He assured the Afro-Asian countries that the Working Group had had no desire to ride roughshod over their views.

Mr. DEI-ANANG (Ghana) said that his delegation could not accept the proposition that the over-all period should run from the date on which the goods were duly placed at the disposition of the buyer. In the case of an F.O.B. contract, that date would be the date when the goods were placed on board ship. His delegation held the view that the period should start from the date of

discovery of the defect or lack of conformity by the buyer, in respect of all defects, whether patent or latent. At the 99th meeting, when he had introduced his amendment, he had only mentioned latent defects in pointing out that the Working Group had not taken that matter into account (A/CN.9/SR.99, p. 3). His amendment had had nothing to do with latent defects, but had been concerned with the date of commencement of the period. Paragraph 2 of alternative B did not reflect his proposal.

Mr. MANTILLA-MOLINA (Mexico) said he strongly supported the views expressed by the representatives of Ghana and Nigeria. Although the precepts incorporated in the draft might seem abstract, the fact was that they would have the effect of favouring the industrialized countries at the expense of the developing countries. The industrialized countries imported raw materials, whose defects were rapidly observable, and therefore they did not come up against the question of late discovery. The developing countries, on the other hand, imported heavy machinery whose defects could not be discovered for a long time.

He wished to ask for clarification on a few points. In the first place, it was not clear to him what was meant by the term "duly placed at his disposition". Did that mean the delivery of the goods in strict conformity with the contract or simple delivery? Furthermore, he did not understand how delivery could take place prior to the placing of the goods at the disposition of the buyer. The latter was a unilateral action by the seller, whereas the former was a bilateral action wherein the seller handed over the goods and the buyer received them. Finally, he was confused by an apparent discrepancy between the wording used in the French and Spanish texts. Paragraphs 1 and 2 referred to "prescripción de una acción" ("prescription d'une action") whereas paragraph 3 referred to "prescripción de los derechos" ("prescription des droits"). Did the two terms have a different meaning or did they merely represent an oversight on the part of the drafters?

Mr. MUDHO (Kenya) said his delegation had supported the Ghanaian amendment proposed at the 99th meeting because it had considered that the original article 9 was unfair to the third world. With due respect to the Working Group, it seemed to him that the new article 10 represented an ingenious effort to maintain the old article 9. He appreciated the remarks made by the United Kingdom representative to the effect that the Working Group might have misinterpreted the

Afro-Asian draft. The intention of the Afro-Asian countries had been to establish that the additional period should begin from the discovery of the defect.

What was most important now was for the Commission to decide whether it wished to allow extra time in respect of latent defects. His delegation preferred alternative B but felt that the Working Group had misinterpreted the Ghanaian proposal. He supported the Nigerian amendment to paragraph 2 of alternative B. However, in a spirit of compromise, he would be content if the last part of the paragraph, starting with the word "provided", was simply deleted so that the period would run from the date of discovery of the defect and the over-all period would be eight years. If additional time was to be granted in cases of latent defects, the Commission must decide how much time; four years would certainly not be unreasonable in view of the provision contained in article 18.

Mr. JENARD (Belgium) said that article 10 was one of the most difficult and complex ones with which the Commission had had to deal, but did not involve the issue of a confrontation between the interests of the developing countries and others. It merely dealt with the relations between the seller and the buyer.

His delegation preferred alternative A. A distinction must be made between apparent and latent defects and in the latter case, the period should commence to run from the date on which the defect or lack of conformity was or could reasonably be discovered. Once that defect was discovered, a two-year period would be long enough. The longer the period, the more difficult it would be to submit proof. In many countries, the period in respect of lack of conformity was very brief, often as short as six months to a year. His delegation could accept, as a compromise, a period of two years, but felt that four years was too long. As for the length of the over-all period, if the time provided in alternative B was too short for some delegations, he would agree to a somewhat longer period. The commencement of the period, in the case of apparent defect, should be the date on which the goods were placed at the disposition of the buyer, whether they were so placed by the seller, by the carrier, or by anyone else.

He wished to stress that if the Commission tried to draft a convention that was too different from the legislation of the various countries there would be little hope of having it ratified.

Mr. KAMAT (India) said he did not think the Working Group had departed from the draft submitted to it by the Afro-Asian countries. Those countries had agreed that the old article 9 (3) was not fair in that the commencement of the period should not be the date when the goods were placed at the disposition of the buyer, since certain defects, as in the case of heavy machinery, could not be discovered until a considerable time after that date.

They had also agreed that there should be a maximum limitation period. Since it would not be appropriate, from a legal standpoint, to say that the over-all period should extend from the date of discovery of the defects, as that would lead to uncertainty, the Egyptian and Indian delegations had suggested a period of six to eight years.

A small group had subsequently met to propose its formulation to the Working Group and had been told that the Working Group favoured the distinction made in ULIS between patent and latent defects, a distinction they had incorporated in paragraphs 1 and 2 of alternative B, which had then been accepted by the Afro-Asian group. The text submitted by the Working Group did not represent a departure from the Ghanaian amendment, but was rather a result of subsequent developments. The only departure was to be found in the last part of paragraph 2 of alternative B, which provided for an over-all period of five years rather than eight.

He felt the issue could be resolved, as the United Kingdom representative had suggested, by considering a different length for the over-all period. It might be possible to use a formulation such as "not beyond X years from the placing of the goods at the disposition of the buyer by the seller in accordance with the contract".

Mr. HYERA (United Republic of Tanzania) said he supported alternative B of article 10. He agreed with the representatives of Nigeria and Kenya. With regard to the statement of the representative of India, he could, as a compromise, accept a limitation period of eight years for claims arising from latent defects. He would, however, prefer a longer period in view of the state of know-how and technology in developing countries.

Mr. MICHIDA (Japan) observed that the Working Group had spent several days discussing the Ghanaian proposal. It had not departed from the mandate contained in the Chairman's summing up at the Commission's 99th meeting.

Mr. CHAFIK (Egypt) said that the Ghanaian proposal had not mentioned any distinction between latent and patent defects; that distinction had been referred to for the first time in the Working Group. He had held informal consultations with representatives of developing countries, during which the distinction had been discussed and accepted and it had been decided that a limitation period of one year for claims arising from patent defects was not long enough, but that a period of two years could possibly be accepted. For cases of latent defects the limitation period should be six or eight years and it should run only from the date of effective delivery. The Working Group, however, had considered that a limitation period longer than five years would not be acceptable.

A possible solution would be to expand the five-year period referred to in alternative B of article 10 (2) and to delete the phrases "they are duly placed at his disposition, or" and "whichever is the earlier", so that the period would run from the date of handing over of the goods.

Mr. SMIT (United States of America) said that the Commission's original discussion of the Ghanaian proposal had centred not on types of defects but rather on the date of commencement of the limitation period in cases of defect. The Ghanaian proposal had been that the limitation period should start from the date of discovery of a defect. In the Working Group the question had arisen of a distinction between discovery of latent defects and of patent defects. His delegation had always supported alternative B of article 10 (2). If, however, the Convention was to be successful it should be acceptable both to developing and developed countries, since otherwise it would be useless. He would therefore be prepared to accept alternative A of article 10 if it helped to ensure wide ratification of the Convention.

Mr. GUEST (United Kingdom) said that all delegates agreed that the limitation period should start to run on the date when the latent defect was or could reasonably be discovered, as stated in the Ghanaian proposal. There were two considerations on which the Commission should reach a decision. The first was whether the period should be two years, as in alternative A or four years as in alternative B, after discovery of the defect. The second consideration was the length of the maximum limitation period. It appeared that

the maximum period of five years in both alternatives of article 10 (2) was too short in the view of some delegations; it was in any case only one year longer than the ordinary limitation period. He would be prepared to accept a period of eight or 10 years.

Mr. ORGNLIEN (Norway) said that there appeared to be no consensus regarding alternative A of article 10; he personally preferred alternative B. The meaning of the words "duly placed at his disposition" in article 10 (2) was that goods must be placed at the disposition of the buyer in accordance with the terms of the contract. It might happen that goods could not be duly placed at the disposition of the buyer. As an example, he cited a case where a shipment might be sent from Egypt to Japan under the contract stipulating that the port of arrival should be Tokyo. If there was a shipwreck outside Singapore and the goods were brought into Singapore they could not be placed at the disposition of the buyer in Singapore since that port was not stipulated in the contract. The limitation period would therefore not start unless the buyer actually took delivery of the goods in Singapore. On the other hand, the criterion "handed over" to the buyer, would not be applicable if the buyer refused to receive them. In such an eventuality one needed the other criterion "duly placed at his disposition". Both possibilities were needed, to cover all contingencies; a choice was not allowed, which accounted for the phrase "whichever is the earlier".

With regard to article 10 (1) the limitation period would commence to run on the date on which the goods were duly placed at the disposition of the buyer or handed over to him because the exact date of discovery of defects was not open to dispute since the defects were apparent.

Mr. GUEIROS (Brazil) said he preferred alternative B of article 10. He supported the compromise proposal made by the representative of the United Kingdom that the maximum limitation period be longer than five years, since that would be more consistent with article 18. He proposed that the maximum limitation period should be eight years rather than five.

Mr. LOEWE (Austria) said that the Working Group had considered two proposals. The first proposal submitted by the developing countries, had been based on the fact that the prescription period might expire before the buyer

discovered a defect in the goods. The other proposal, which he himself had made, had been based on the fear that four years would be too long a period for claims based on a defect. It had not been inspired by economic considerations but by the fact that some national laws provided for a very brief limitation period. A distinction between latent and patent defects was the only way to reach a compromise with regard to the respective limitation periods.

As has been pointed out by the representative of the United Kingdom, all delegations supported the Ghanaian position that the buyer should have time to examine the goods. However, there should be a maximum limitation period, which would allow the buyer enough time to examine the goods and to put forward a claim, after which claims based on a defect would not be allowed. For purely legal reasons his country could not ratify a convention which envisaged an interminable limitation period after discovery of defects. A two-year limitation period gave plenty of time for the buyer to put forward a claim after discovering a defect. In a spirit of compromise, he could accept a maximum limitation period of six or seven years, if alternative A of article 10 was accepted.

Mr. OGUNDERE (Nigeria) said that his delegation fully appreciated the intensive and arduous work that had been done by the Working Group, but felt that since it had been clearly specified that the interests of the developing countries should be taken into consideration, those countries were entitled to raise the point under discussion. His delegation agreed that the period of limitation should start from the date on which a defect or lack of conformity was discovered. However, it maintained that the maximum period, which had been set at five years, should be extended. The United Kingdom representative had mentioned the possibility of 10 years and other delegations had spoken of eight years. If the majority of delegations wished to set the maximum limitation period at eight years, his delegation, in a spirit of compromise, would be prepared to accept that period.

Mr. COLOMBRES (Argentina) felt that the distinction between latent defects and patent defects would help certain non-industrialized countries. Although his delegation would not oppose reducing the limitation period in the case of patent defects, it felt that in the case of latent or hidden defects the limitation period should be increased to 10 years or thereabouts.

Mr. KHOO (Singapore) felt that the only substantial point in dispute was the over-all limitation period. His delegation would be in favour of alternative B but felt that an over-all limitation period of five years for latent defects was

rather short. It could therefore accept a period of eight years or thereabouts. His delegation had some difficulty with the words "date on which they are duly placed at the disposition of the buyer or handed over to him". He noted that in the first example cited by the Chairman of the Working Group, the goods were held up, so there was no question of delivery, and in the second example, the buyer refused to take delivery of the goods and consequently there could not be a suit based on lack of conformity. His delegation felt that a simpler formulation such as "date of delivery" would cover the matter satisfactorily and would be understood by courts all over the world.

Mr. MICHIDA (Japan) pointed out that the use of the word "delivery" had been deliberately avoided because in the 1964 ULIS "delivery" had been deemed to start with the handing over of the goods to the carrier.

Mr. JENARD (Belgium) said that his delegation could agree to an extension from five to eight years for the limitation period, provided that the period of two years stipulated in alternative A was maintained. Furthermore, it felt that article 10 needed to be formulated more clearly.

The CHAIRMAN suggested that the Commission might refer article 10 to a small drafting group composed of the representatives of Austria, Ghana, Nigeria and the United Kingdom, for amendment and clarification. He noted that there appeared to be agreement that the starting point of the limitation period should be the time at which the defect was discovered. With regard to the length of the limitation period, there appeared to be a consensus in favour of a maximum of eight years. The Commission might also accept a two-year period for paragraphs 1 and 2 of alternative A.

Mr. DEI-ANANG (Ghana) said that his delegation would be happy to consider the compromises suggested by the Chairman and wished to reassure the Working Group that the delegations of the developing countries had no intention of casting aspersions on its work.

Mr. KAMAT (India) suggested that the drafting group should concentrate on paragraph 1 of alternative B.

Mr. SMIT (United States of America) suggested that the Belgian representative should also be a member of the drafting group.

Mr. GUEST (United Kingdom) said that although he discerned general agreement on a maximum limitation period of eight years, subject to certain conditions and reservations, the basic questions remained of whether once the defect had been discovered, the limitation period should be two years as in alternative A or four years as in alternative B. The Indian representative had suggested that the drafting group should proceed on the assumption that it would be better to adopt the four-year period, but other delegations strongly favoured a two-year period. Without some guidance from the Commission, the drafting group would inevitably come up with two alternative proposals similar to the present alternatives A and B, and it would therefore be useful to know the Commission's opinion on the matter.

Mr. RECZEI (Hungary) said he agreed with the Belgian delegation's view that a latent defect was latent only as long as it was not discovered. After discovery it was the same as a patent defect. The same period of time should be adopted for both latent and patent defects. With regard to the length of the period, in practice, the buyer never required more than two months after discovery of a defect or lack of conformity to exercise his rights and claims. A four-year period seemed a very long time and his delegation therefore favoured a two-year period for both latent and patent defects.

Mr. MANTILLA-MOLINA (Mexico) felt that the drafting group might consider whether it was appropriate to use the word "acción" in the Spanish text of article 10.

The CHAIRMAN said that if he heard no objection, article 10 would be referred to a drafting group composed of the representatives of Austria, Belgium, Ghana, Nigeria and the United Kingdom.

It was so decided.

Article 9 (continued)

The CHAIRMAN invited the Commission to comment on the proposed new article 9 in document A/CN.9/V/CRP.21/Rev.1/Add.2.

Mr. LEMONTEY (France) suggested that the phrase "for the purpose of paragraph 1" should be added between the word "shall" and the words "be deemed"

in paragraphs 2 and 3. He also pointed out a typographical error in the French text. The word "vol" should read "dol".

Mr. SMIT (United States of America) pointed out that if the proposed new article 9 was accepted, the words "subject to articles 10 and 11" should be deleted from paragraph 3, for it would be quite clear that the entire article was subject to those articles.

Mr. KHOO (Singapore) said that he was satisfied with the revised article 9, whether or not it was amended as suggested by the representative of France.

Mr. MANTILLA-MOLINA (Mexico) said that he was not satisfied with the formulation of article 9. Although paragraph 3 was intended as a clarification of paragraph 1, in fact it destroyed it and he would be quite satisfied to delete the first sentence of paragraph 3 as the representative of Australia had suggested at the morning meeting. Besides, there were two different elements in paragraph 3. The first was contained in the first sentence and the second, regarding the provisions in cases where notice to the other party was a condition for the acquisition or exercise of a claim, should be the subject of a separate paragraph.

Mr. GONDRA (Spain) said he agreed entirely with the objection of the representative of Mexico and that the attempt to establish an alleged connexion between paragraphs 1 and 3 of article 9 was not justifiable because those paragraphs related the start of the prescription period to two points in time which were conceptually and practically distinct. Paragraph 3 provided for an exception to the general norm established in paragraph 1 and, to preserve the balance of the legal construct, should be deleted. He also favoured the deletion of the final point in paragraph 3 relating to the question of time-limits (caducidad), which was outside the sphere of application of the Law.

Mr. GUEST (United Kingdom) supported by Mr. NESTOR (Romania) and Mr. KENNEDY (Australia), said that he agreed with the revised article 9 as amended by the French and the United States representatives.

The CHAIRMAN noted that there seemed to be general acceptance of the revised article 9 with the addition, in paragraphs 2 and 3, of a reference to

paragraph 1 and the deletion from paragraph 3 of the phrase "subject to articles 10 and 11".

Mr. MANTILLA-MOLINA (Mexico) pointed out that as it stood paragraph 3 contradicted paragraph 1. Moreover, it was inconsistent with the system adopted elsewhere in the Convention, since claims based on fraud (article 9 (2)) and those based on defects (article 10 (2)) were both deemed to become due on the date on which the fraud or defect came to the buyer's knowledge. The Convention was therefore inconsistent.

Mr. CHAFIK (Egypt) and Mr. COLOMBRES (Argentina) supported the objection of the representative of Mexico.

The CHAIRMAN said that it would be noted that four delegations objected to article 9.