117th meeting (28 April 1972)

Article 11 (continued)

Article 11 was approved.

Article 12 (continued)

Mr. MANTILLA-MOLINA (Mexico) recalled that, when the provision in paragraph 1 was first examined, his delegation had stated that its wording could give the impression that cessation of the limitation period was linked indiscriminately with the institution of judicial proceedings or the delivery of the request for such proceedings to the defendant. The lack of clarity was all the more regrettable because paragraph 2 of article 13, on arbitration, stated that delivery of the request was taken into consideration. The problem was of considerable practical importance, since, in international proceedings, the institution of proceedings and delivery of the request to the defendant were often separated by several months.

Mr. RECZEI (Hungary) said he had reservations on the words "different contract" at the end of paragraph 2. Indeed, parties frequently maintained continuous trade relations and concluded a series of successive "different" contracts. Thus, the condition provided for at the end of paragraph 2 should not cover the contract, but the relationship between the parties.

Mr. MANTILLA-MOLINA (Mexico) said that the Commission had agreed to consider the article paragraph by paragraph and he regretted that members were not following that procedure.

The CHAIRMAN said that he had submitted article 12 as a whole for consideration by the Commission. He asked representatives to confine their comments to a single article.

Mr. KENNEDY (Australia) proposed deleting the words "against the debtor" in paragraph 1, in order that the provision should cover acts performed by way of counterclaim.

Mr. LOEWE (Austria) recommended that paragraph 1 should remain in its

present form and that it should be left to the relevant court to fix the date on which the period would cease to run. The case foreseen in article 13 was different, because the rules relating to arbitration did not always stipulate which acts would involve cessation of the period. In reply to the representative of Australia, he said that paragraph 2 was intended to cover acts performed by way of counterclaim.

His delegation, however, felt that at the end of paragraph 1, the words "for the purpose of obtaining satisfaction or recognition of his (the creditor's) claim", were open to criticism because it was not clear how a party could obtain satisfaction of his claim during legal proceedings. It would be better to use the phrase "for the purpose of obtaining recognition of his claim".

Mr. COLOMBRES (Argentina) said that the arguments put forward by the Mexican delegation on paragraph 1 lost their force when the provision was considered in the general context of articles 12, 13 and 15. He did not think the difference between articles 12 and 13, pointed out by the representative of Mexico, was important. Paragraph 1 of article 13 stipulated clearly that the limitation period ceased to run when either party commenced arbitral proceedings. Paragraph 2 of article 13 was merely an exception to the general rule established under article 12.

Mr. SMIT (United States of America) said that, if the Mexican delegation was concerned about a case in which delivery of a request for proceedings had not been received by the debtor, the new article 28 should suffice to dispel its fears. Like the representative of Austria, he believed that only paragraph 2 of article 12 referred to acts performed by way of counterclaim. He fully supported the comments made by the Hungarian delegation.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation was not convinced by the Argentine representative's reasoning, and still believed that the wording of articles 12 and 13 was inconsistent. If the Commission decided to retain paragraph 1 of article 12, he asked that his delegation's position be reflected in the record of the meeting.

The CHAIRMAN suggested that a drafting group, composed of the representatives of Austria and Hungary should be entrusted with the task of formulating the drafting changes which had been suggested during the discussion of article 12.

It was so decided.

The CHAIRMAN invited the Commission to take a decision on article 12, subject to the drafting changes entrusted to the drafting group.

Article 12 was approved.

Article 13 (continued)

Article 13 was approved.

Article 14 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that subparagraph (d) of the provision was unnecessary, since the cases provided for in the different paragraphs were only examples, as indicated by the words "including" which preceded the enumeration.

Mr. GUEST (United Kingdom) said that subparagraph (d) had been added by the Working Group to satisfy the Australian delegation, which had pointed out that company law in the common-law countries provided for situations which were similar to, but nevertheless different from, liquidation.

Mr. NESTOR (Romania) supported the representative of the USSR and said that the exceptions should be explicitly described. He would prefer deletion of subparagraph (d).

Mr. SMIT (United States of America) also shared the view of the USSR representative. Article 15 was sufficiently explicit to allow for deletion of subparagraph (d) of article 14.

Mr. KHOO (Singapore) proposed solving the problem by deleting subparagraph (d) and amending subparagraph (d) to read "the dissolution or liquidation or other cognate proceedings in respect of a corporation, company, association or entity".

Mr. KENNEDY (Australia) supported the proposal made by the representative of Singapore. However, if the Commission was against that proposal, his delegation would accept deletion of subparagraph (d).

Mr. RECZEI (Hungary) proposed that the whole of article 14 should be deleted. The provision concerned only procedural questions, which were settled in

very different ways depending on the various jurisdictions. It introduced an element of imbalance since it only covered the case of the debtor. The article was either unnecessary or inadequate.

Mr. LOEWE (Austria) supported the Hungarian delegation's proposal. Article 14 merely indicated that it was impossible to settle the cases to which it referred.

Mr. OGUNDERE (Nigeria) said that deletion of article 14 would not remove the difficulties. The provision was important and should be retained. However, his delegation would support deletion of subparagraph (d).

Mr. DEI-ANANG (Ghana) said that his delegation was also in favour of retaining article 14 and deleting subparagraph (d). It was more important to settle the case of the debtor than that of the creditor, who generally left successors who were in a position to obtain recognition of their claims.

The CHAIRMAN invited the Commission to take a decision on article 14, with subparagraph (d) deleted.

Article 14, with subparagraph (d) deleted, was approved.

Article 15 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the words "without the consent of the debtor" in paragraph 1 lacked clarity. Was it to be understood that they referred to a simple oral agreement between the parties?

Although the intention of paragraph 2 was clear, the wording was not and should be improved.

The reference to articles 12, 13 and 14 in paragraph 1 should also be employed in paragraph 2.

Mr. LOEWE (Austria) said that he also was puzzled by the words "without the consent of the debtor". He did not think their appearance in the article constituted a simple drafting problem, but a substantive change. Since the problem had not been raised when the Commission first examined the draft, it was to be feared that the Working Group had somewhat exceeded its terms of reference on the point. His delegation proposed deleting the words and returning to the original text.

Mr. JAKUBOWSKI (Poland) said that the words criticized by the representatives of Austria and the USSR expressed an important idea which was worth retaining, but for which a satisfactory formulation had unfortunately not been found. The words excluded, for example, cases where the creditor might discontinue the proceedings after the debtor had informed him of his willingness to extend the period under article 21; in such cases, the cessation of the period would continue. The end of the paragraph might be amended in the following manner:

"... if the proceedings are dismissed for want of prosecution or if the creditor discontinues the proceedings, unless he acts with the consent of the debtor".

Mr. KENNEDY (Australia) said his delegation was somewhat concerned about the additional period envisaged in paragraph 2. He proposed that the end of the first sentence in that paragraph should be amended to read as follows:

"... the creditor shall in any event be entitled to an additional period of one year within which to institute legal proceedings to obtain satisfaction or recognition of his claim".

Mr. SMIT (United States of America) supported the Australian suggestion.

Mr. ROGNLIEN (Norway) recalled that article 15 was based on the former article 18; it regrouped several paragraphs of that article. The matter of discontinuance of the proceedings had presented a delicate problem for the Working Group, inasmuch as in certain legal systems, discontinuance entailed extinction of the right on which the action was based while in others the right was not extinguished. That made it necessary to consider the problem of the limitation period. There were many reasons why a creditor might wish to discontinue the proceedings; for example, he might fear an unfavourable ruling or he might deem the court incompetent. Paragraph 1 dealt with cases where the creditor acted without the consent of the debtor, since cases where the two parties agreed about discontinuing the proceedings were covered by the provision contained in paragraph 2. If the last words of paragraph 1 were deleted, the entire balance of the article would have to be reviewed. He would not, however, have any objection to the drafting amendment proposed by the Polish representative.

Paragraph 2 of article 15 covered a very complex question. If the wording

appeared abstruse, that was because it envisaged not only judicial proceedings, but arbitration proceedings as well. If the present text was too dense, it could quite well be divided into several subparagraphs like the former article 18.

Mr. KAMAT (India) recalled that, during the first examination of the former article 18, his delegation had proposed that the scope of the article should be restricted to cases where the proceedings had been instituted in good faith, in order to exclude proceedings instituted for purely dilatory purposes. His proposal had been supported by Nigeria and had not met any opposition, although the Austrian representative had remarked that it would appear difficult to restrict article 18 in that way. His delegation still felt that its proposal could have considerable practical effect. If no delegation objected, article 15 (2) should be restricted to proceedings instituted in good faith. That could be done, for example, by inserting the words "have been instituted by a bona fide creditor but" between the words "where legal proceedings" and the words "have ended", in the first line.

Mr. KHOO (Singapore) supported the Indian proposal aimed at excluding the abuse of recourse to the courts from the sphere of application of article 15, paragraph 2.

The article contained several ambiguous expressions. It was not very clear what the "other cases" envisaged at the beginning of paragraph 2 might be. Further on in the same paragraph, the English text contained the words "in any event", which seemed superfluous, since the circumstances under which the provision would apply had already been clearly spelled out. He strongly supported the Australian amendment to the same sentence.

The words "before the expiration of the limitation period", in paragraph 1, were superfluous, since any procedure commenced "in accordance with articles 12, 13 or 14" must necessarily be commenced before the expiration of the period.

The CHAIRMAN invited members of the Commission to limit their interventions to the two substantive problems which seemed to have arisen during the debate, namely, the need to maintain the reference to the absence of consent of the debtor with regard to paragraph 1, and the advisability of limiting the scope of paragraph 2, to proceedings commenced by a bona fide creditor. Drafting suggestions should be transmitted directly to the drafting group, which would be responsible for making the necessary drafting changes in article 15.

Mr. GUEIROS (Brazil) said he was in favour of rewording paragraph 2 in order to exclude abusive recourse to the courts. In any event, the words "without the consent of the debtor" should be deleted from paragraph 1, because otherwise it would be impossible to prevent purely dilatory manoeuvres.

Mr. GARRIGUES (Spain) recalled that his delegation had proposed an amendment (A/CN.9/V/CRP.17) which would considerably improve the drafting of article 15 (2). If it could be changed so as to reflect the wishes of the Indian representative, the Spanish amendment might well provide a valid solution to all the problems that had arisen.

Mr. JAKUBOWSKI (Poland) said the question raised by the Indian delegation should be taken into account. He wondered, however, whether paragraph 2 did not already, by its very content, exclude purely dilatory proceedings, since the creditor could not take advantage of the additional period envisaged except "to obtain satisfaction or recognition of his claim". That would seem to exclude proceedings that had been instituted for the sole purpose of interrupting the running of the period.

Mr. NESTOR (Romania) said his delegation was in favour of deleting the words "without the consent of the debtor" in the first paragraph. Romanian law recognized without reservation the principle of "availability" according to which the creditor was the master of his own proceedings. He was prepared to accept an amendment to paragraph 2 in the sense proposed by the Indian representative.

Mr. GUEST (United Kingdom) said he supported the retention of the last words of paragraph 1 for the reasons expressed by the Norwegian representative. He would have some difficulty, however, in accepting the amendment proposed by India, because reference to the good faith of the parties would introduce into the provision a very delicate question of interpretation. If the text was amended to that effect, it would be necessary to spell out what would happen when proceedings were instituted in bad faith, so as not unduly to penalize the litigant who acted in good faith.

Mr. SMIT (United States of America) said that the present text was sufficiently explicit to exclude proceedings instituted by the creditor in bad faith. If an action was instituted for the sole purpose of gaining time, and then

interrupted, paragraph 1 provided that the limitation period would continue to run. The existing provision thus protected the other party from dilatory manoeuvres without its being necessary to resort to the notion of good faith, which was always difficult to interpret. Indeed, the primary objective of paragraph 1 was not to exclude the mala fide litigant, but to enable the honest creditor who discovered that a court was incompetent to discontinue the proceedings in order to avoid unduly prolonging the case. From that standpoint, it was essential to retain the words "without the consent of the debtor" in order to compensate for the absence of an extension of the period.

With regard to paragraph 2 and the case of a mala fide litigant, he pointed out that abusive recourse to the courts was severely punished in every country and it would be preferable to leave it to the courts to decide on that, rather than introduce a reference to the good faith of the parties, which would unduly complicate the proceedings.

Mr. JENARD (Belgium) said he favoured the retention of the words "without the consent of the debtor". He was against including a reference to the good faith of the creditor, which would involve the judges in a difficult investigation of intentions.

Mr. ROGNLIEN (Norway) said the Working Group had taken the Indian proposal into consideration, but had not retained it because it introduced into the law an element of uncertainty. That uncertainty would be further aggravated because the good faith of the parties would have to be assessed not by the court initially seized with the case, but by the second court, which might find it difficult to gather the evidence it would need in order to hand down a decision.

With regard to the Australian proposal, the Commission should endeavour to find a formulation that would refer not only to judicial proceedings, but to recourse to arbitration as well. It might be advisable to use a general formulation such as "take the necessary steps in order to"..

Mr. LOEWE (Austria) said that, in the view of his delegation, the draft under consideration was not a procedural convention, but an instrument regulating the substance of the law. The concepts reflected in article 15 were unknown to Austrian procedure and their retention might hinder acceptance of the draft. Under

Austrian law, the creditor was always entitled to discontinue his action, with or without the consent of the debtor. The last words of paragraph 1 should therefore be deleted. Nevertheless, it might be possible to arrive at a compromise formulation inspired by the provisions of Austrian law under which the discontinuance of an action by the creditor entailed the extinction of his right unless he discontinued the action with the consent of the debtor. He submitted his suggestion for consideration, although he knew that certain countries would undoubtedly find it difficult to accept.

With regard to the Indian proposal, he would hesitate to make prescription dependent on the good faith of the parties, since that was normally a question of substance, not of procedure.

Mr. DEI-ANANG (Ghana) said he favoured deleting the last words of paragraph 1, for the reasons explained by the USSR representative. His delegation, which had originally supported the Indian proposal, would not press for its adoption if that created too many difficulties. It also favoured the amendment proposed by Australia, which should also be inserted in article 16 (2), the wording of which paralleled that of article 15 (2).

Mr. OGUNDERE (Nigeria) considered the new article 15 satisfactory. Paragraph 1 allayed the concern his delegation had expressed during the discussion on former article 18 about the possibility of the creditor commencing proceedings as a delaying tactic. In view of the convincing arguments invoked by the representatives of Norway and the United Kingdom, he approved of retaining the words "without the consent of the debtor". With regard to paragraph 2, he felt it would be inappropriate to refer to the concept of good faith in provisions relating to procedure, especially since paragraph 1 made it possible to avoid abusive proceedings.

Mr. KAMAT (India) thanked those delegations which had supported his position and said that the opposing arguments had not changed his mind. Contrary to the views expressed by the representatives of the United States and Nigeria, he did not think that paragraph 1 would make it possible to cope with all the delaying tactics to which a creditor could resort. He acknowledged the existence of the difficulties mentioned, particularly with regard to proving the creditor's

bad faith. It should be noted, however, that other provisions had similar drawbacks. It would therefore be desirable to set up a small drafting group to study ways of eliminating all possibility of abuse. He volunteered his services as a member of the group, whose work would be greatly facilitated by the participation of the United Kingdom representative. Lastly, he was in favour of deleting the reference to the consent of the debtor in paragraph 1.

Mr. COLOMBRES (Argentina) said that he had already expressed reservations in the Working Group concerning any reference to the consent of the debtor in paragraph 1, since that was basically a procedural problem with which the Convention should not deal. He was also opposed to introducing in paragraph 2 the subjective notion of good faith. In any event, the sheer expense of unjustified proceedings would in most cases be a sufficient deterrent, especially since the additional period provided for was only one year.

Mr. CHAFIK (Egypt) said that he, too, was in favour of deleting the reference to the consent of the debtor in paragraph 1, and was opposed to introducing the concept of good faith in paragraph 2, which dealt solely with procedure. A court called on to determine the creditor's good faith might not have the necessary information to take a decision on that point, and he did not see why a creditor should be deprived of the benefits made available to him by paragraph 2 if he had done everything to deserve them.

The CHAIRMAN observed that the majority seemed to be opposed to introducing the concept of good faith in paragraph 2. He suggested that article 15 should be referred to a small drafting group composed of the representatives of the Soviet Union, India and the United Kingdom, who would seek to overcome the drafting difficulties pointed out by the various delegations. He noted, however, that the Commission was divided on the question whether the words "without the consent of the debtor" in paragraph 1 should be retained or deleted.

Mr. OGUNDERE (Nigeria) suggested that in order to settle the difficulty the words should be retained but placed between square brackets.

Mr. KHOO (Singapore) proposed that the drafting group suggested by the Chairman should be enlarged and instructed to amend the current wording to take into account the Indian representative's comments concerning the need for

paragraph 1 to cover all possible delaying tactics and the Spanish delegation's proposal contained in document A/CN.9/V/CRP.17.

Mr. MICHIDA (Japan) reminded the Commission that its usual practice was to take decisions by consensus; he stressed the danger of hasty decisions. The contemplated drafting group should be given time to reflect on the question whether to retain or delete the reference to the consent of the debtor in paragraph 1. If the group could not reach a solution on that point, he would support the Nigerian proposal to place the words "without the consent of the debtor" in square brackets.

Mr. JENARD (Belgium) observed that the Austrian representative had proposed the submission of a compromise text designed to command the widest possible support. An effort should be made to reach agreement and to avoid leaving words in square brackets.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) considered that the Commission should avoid hasty decisions and await the proposals of the envisaged drafting group.

Mr. SAM (Ghana) supported the representative of the Soviet Union and proposed that consideration of article 15 be suspended.

Mr. KAMAT (India) suggested that the representative of Singapore should be a member of the envisaged drafting group.

The CHAIRMAN suggested that consideration of article 15 should be referred to a drafting group composed of the representatives of the Soviet Union, India, the United Kingdom, the United States and Singapore.

It was so decided.

Article 16 (continued)

Mr. DEI-ANANG (Ghana) reminded the Commission he had already suggested that the end of paragraph 1 and the end of paragraph 2 of article 16 should be amended in accordance with the Australian representative's proposal concerning article 15.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that article 16 (1) seemed particularly obscure, since it did not spell out the reason why the creditor should commence fresh legal proceedings.

Mr. LOEWE (Austria) reminded the Commission of the objections he had made during the discussion of former article 21, which was the basis of new article 16. Furthermore, it seemed that the Working Group had exceeded its terms of reference by providing, in paragraph 2, that the creditor could be entitled to an additional period of one year from the date when recognition was refused. In Austria, for example, only decisions given in countries with which Austria had concluded a treaty on that subject could be recognized or executed. Consequently, any Austrian lawyer knew whether proceedings commenced in Austria to obtain recognition of a foreign judgement were admissible. In cases where a decision had been given in a State which had not concluded such a treaty with Austria it would be far too easy for a creditor to request recognition or execution in that country in order to seek refusal and thus benefit by an additional period. If that provision was retained, he thought that his country might refrain from becoming a party to the envisaged Convention.

Mr. ROGNLIEN (Norway), speaking as the representative of Norway, observed that former article 21 had not given creditors the opportunity to commence fresh proceedings in a State unless that State did not recognize a previous decision given in another State. New article 16 took into account the exclusion provided for in new article 5 (d) and dealt solely with a procedural question. The wording of article 16 was obscure; he recalled that he had proposed new wording in document A/CN.9/V/CRP.22, and requested that it be included in the Commission's report. In any case, he favoured the proposed additional period of one year.

Mr. SMIT (United States of America) observed that article 16 concerned the case of a creditor who had obtained a decision in his favour in one State but was unable to have it executed in that State because, for example, his adversary had no property there. When the creditor considered commencing fresh proceedings in a State where his debtor had property, he could try to obtain a new decision on the merits on the basis of his original rights, and that was the case envisaged in paragraph 1. The creditor could also consider seeking to have the existing decision recognized in the second State, and if that failed, he could resort to the provisions of paragraph 2, which gave him an additional period in which to commence fresh proceedings.

Mr. MANTILLA-MOLINA (Mexico) considered that article 16 raised complex questions; the members of the Commission should be given more time to think about it. He therefore suggested that the Chairman should bring the meeting to an end.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that in view of the explanations given he was not opposed to retaining paragraph 1, provided that the reason for that paragraph was clearly specified.

The CHAIRMAN suggested that the United States representative should propose a new and clearer wording for paragraph 1.