118th meeting (28 April 1972)

Article 16 (continued)

Mr. RECZEI (Hungary) requested clarification concerning the number of times a creditor could repeat the procedure set out in paragraph (1). He hoped that when the United States representative prepared the new formulation, he would take account of the fact that no limit had been indicated in the text.

Mr. MANTILLA-MOLINA (Mexico) felt that the text of paragraph (2) required clarification. It should at least state that if execution of a decision was refused, the action would be brought in the State which refused to implement the decision.

Mr. JENARD (Belgium) felt that paragraph (2) was useful, although the language should perhaps be clarified.

Mr. LOEWE (Austria) said that the article seemed to be inappropriate because it completely destroyed the operation of the Convention.

Mr. NESTOR (Romania) felt that the article should be reformulated to make it clear that the creditor did not have unrestricted liberty to commence whatever proceedings he wanted in different States.

The CHAIRMAN noted that there appeared to be a majority in favour of retaining paragraph (2) of article 16.

He invited the members of the Commission to consider article 17.

Article 17 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the Convention was intended to regulate relations between importers and exporters. The new paragraph (2) of the article introduced a purely domestic element into those international relations, which was undesirable. Quite apart from that consideration, a practical inequity might well arise if paragraph (2) as formulated by the Working Group was retained. According to that paragraph, where legal proceedings had been commenced against the buyer and when notification had been effected, the limitation period could be extended at the request of the importer for the entire period of the legal proceedings in question. In practice, it

seemed that the provision would never be applied by importers in countries where legal proceedings were carried out quickly. On the other hand the provision might have a definite adverse effect against exporters from such States if legal proceedings in the country of the importer continued over a number of years, since the exporter would forfeit the right to make a claim against his supplier. Therefore the situation could hardly be regarded as fair and placed parties on an unequal footing, depending on the length of legal proceedings. Furthermore, if a case went on for a number of years, the exporter would have to keep all the relevant documents for the entire length of the period, however long, while he waited for the decision to be rendered on the case in question. Paragraph (3) was also unclear since it did not specify which alternative period would be applied and would thus give rise to difficulties.

Mr. HYERA (United Republic of Tanzania) said that his delegation was somewhat puzzled by the fact that the buyer was allowed an additional year. Furthermore, he could envisage circumstances in which subpurchasers might institute proceedings successively. It would seem that in the final analysis paragraph (2) did not prescribe any limitation to such proceedings.

Mr. LOEWE (Austria) said that his delegation would prefer to delete the entire article, but if that was not acceptable, it would strongly favour the deletion of paragraph (2).

Mr. MUDHO (Kenya) said that his delegation would favour the retention of the article. However, his delegation had some difficulties with regard to paragraph (2) and more specifically with regard to the phrase "the limitation period prescribed by this Law shall cease to run".

Mr. RECZEI (Hungary) said that his delegation would prefer to delete paragraph (2) of article 17 and redraft paragraph (3).

Mr. ROGNLIEN (Norway) noted that the Soviet representative had raised the question of whether in paragraph (2) proceedings by a subpurchaser against a buyer should be introduced before the commencement of a limitation period. Paragraph (2) stated that they should begin within that period and the only difficulty was that a claim by a third purchaser was outside the scope of the present Convention. The only prescription period was between the buyer and the

seller, and that had been spelled out in paragraph (1). However, if the text was not clear on that point, it could doubtless be improved. In connexion with paragraph (3), the Soviet representative had raised the question of the alternatives for the institution of legal proceedings either within the limitation period or within one year from the date on which legal proceedings referred to in paragraphs (1) and (2) had ended. In the view of his delegation, it seemed logical to leave the choice to the creditor.

Mr. MANTILLA-MOLINA (Mexico) supported the proposal to delete paragraph (2) and to amend paragraph (3). However, if paragraph (2) was retained, he felt that a much shorter period of time should be allowed.

Mr. JAKUBOWSKI (Poland) said that his delegation supported the deletion of paragraph (2) because it contained elements foreign to the Convention.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that the matter at issue was not whether legal proceedings were carried out during or after the limitation period. The problem was that, depending on the length of judicial proceedings in different countries, paragraph (2) would not have the same consequences in all countries. Therefore his delegation proposed that paragraph (2) should be deleted and that paragraph (3) should be amended.

Mr. GUEST (United Kingdom) said that, as he understood it, the basic point made by the representative of the Soviet Union was that proceedings between the subpurchaser and the buyer might take a considerable time and then at the end of those proceedings, paragraph (3) gave the buyer an extra year. It would seem that some provision which allowed a modest extension in the case of claims introduced by the subpurchaser against the buyer at a late stage of the limitation period ought to find a place within the Uniform Law. If the present text was unacceptable, perhaps the Soviet delegation could accept the idea expressed in the previous text, namely, that the one-year period should run from the institution of the legal proceedings. That solution might not commend itself to others who thought that the period of one year should run from the date of the judgement in

the proceedings by the subpurchaser against the buyer, but his delegation felt that that formula might constitute a possible compromise solution.

Mr. SAM (Ghana) said he supported the proposal to delete paragraph (2). He agreed with the Soviet representative that the draft Convention was intended to deal with the relations between the buyer and the seller at the international level. Any action by a subpurchaser should be based on national law and there was no reason to involve the seller in such proceedings.

Mr. KENNEDY (Australia) said that the retention of paragraph (2) was very important to his delegation, for the reasons outlined in document A/CN.9/V/CRP.16. It had been his understanding that the paragraph would be retained as a compromise between the countries that had sought the deletion of paragraph 20 of the draft contained in document A/CN.9/70 and those that had supported his proposal to strengthen that article. Although he would have to go along with the majority decision, he wished to place on record the fact that his delegation would be very reluctant to have that paragraph deleted or not replaced by some suitable compromise wording.

Mr. OGUNDERE (Nigeria) said his delegation felt that paragraph (2) was an important provision inasmuch as it preserved the right of recourse. Although he agreed with the Soviet representative that action by the subpurchaser might be outside the scope of the relationship between the buyer and the seller in an international transaction, he felt it was important not to allow the law to become a straitjacket. A buyer of machinery or other goods often distributed those goods as soon as they arrived. If paragraph (2) was deleted, and the original buyer was out of funds or otherwise financially weak, the subpurchaser would have no remedy. The retention of that paragraph was very important in his part of the world. He would not object to shortening the period envisaged in the article but would object to the deletion of paragraph (2).

Mr. ROGNLIEN (Norway) said it was true that the relations between the subpurchaser and the buyer were beyond the scope of the Convention, but relations

between the buyer and the seller were not. If paragraph (2) was deleted, the Convention would not allow the extension of the period within which the buyer could institute proceedings against the seller and thus would preclude recourse action by the buyer against the seller. As it stood, the article provided that legal proceedings had to be commenced within the limitation period and that the seller must be informed within that period. It could well be in the interest of both the buyer and the seller to defer legal proceedings until such time as there was a decision on the claim instituted by the subpurchaser against the buyer. The extension provided for in paragraph (3) might be shortened, but such a change might also compel the buyer to institute legal proceedings before it was actually necessary.

Mr. MICHIDA (Japan) said his delegation had no serious objection to the deletion of paragraph (2). However, he recalled that the present text represented a compromise reached by the Working Group in light of the debate at the 103rd plenary meeting. As the United Kingdom representative had suggested, if the Commission decided to delete paragraph (2), it would have to go back to the old article 20. If there was no agreement on the article at the current meeting, he suggested that the whole matter should be referred to a small drafting group which should formulate a new text in the light of the current debate. However, the principle contained in the paragraph must remain because the Commission had already decided that it should.

Mr. RECZEI (Hungary) pointed out that paragraph (2) provided for only one situation in a very complex sphere in which a variety of situations could arise. The paragraph provided for two tests: namely, that the legal proceedings must have been commenced by a subpurchaser against the buyer and that the buyer must inform the seller of the proceedings. Furthermore, those tests must be met within the four-year period. However, domestic limitation periods were quite different and might provide a much longer period within which a subpurchaser could institute proceedings against the buyer. In such a case, there would be no reason for the buyer to inform the seller because the period would have expired.

In Hungary, there was a rule that as long as a foreign buyer had a claim against a Hungarian exporter, the Hungarian exporter had the right to sue his

internal seller as well. That provision covered only exporters, not importers. However, he had had occasion to deal with a case in which a Hungarian importer had bought a Swiss truck which was guaranteed to have a capacity of 25 tons. The Hungarian subpurchaser, however, had not loaded the truck up to the 25-ton capacity within the limitation period. Some time after the period had expired, he had done so and the truck had collapsed. Although the Hungarian importer was liable to his subpurchaser, he had no recourse against the Swiss exporter. A situation such as that would not be covered under the terms of article 17.

Mr. LOEWE (Austria) said that if there were several subpurchasers and each one instituted legal proceedings against the buyer, the limitation period within which the buyer could sue the seller would be successively extended. In protecting the buyer, the draft Convention operated to the disadvantage of the seller.

He had often referred to Austrian law and felt constrained to do so once more because of situations which could arise if paragraph (2) was retained. For example, the prescription period for non-delivery was 30 years. Thus, the first buyer could sue after 29 years; assuming the trial took two years, the litigation would not end until 31 years had elapsed from the time of the sale. He felt it would be better if at least paragraph (2) of article 17 was deleted.

Mr. HYERA (United Republic of Tanzania) said he was inclined to agree with the Austrian representative that paragraph (2) was rather unfair to the seller. He asked the Chairman of the Working Group on Prescription for clarification regarding the situation that would arise when several subpurchasers instituted proceedings at different times against the buyer.

Mr. OGUNDERE (Nigeria) said he agreed with the Hungarian representative that paragraph (2) did not cover every situation that might arise; however, no drafter could make provision for every contingency. The Commission could do no more than try to envisage as many problems as it could. The right of recourse provided for in paragraph (2) was a very important element in the draft. His delegation wished to stress once more its opposition to the deletion of that paragraph.

Mr. ROGNLIEN (Norway), replying to the representative of Tanzania, pointed out that no matter how many subpurchasers there might be, there would be

no extension of the period unless the buyer informed the seller in writing within that period that the proceedings had commenced. Furthermore, there would be no extension unless the buyer actually instituted legal proceedings against the seller.

The CHAIRMAN suggested that in light of the comments made by the Japanese delegation, paragraph (2) should be referred to a small drafting group, which should try to agree on a compromise formulation. It should also try to clarify paragraph (3) of article 17 so as to eliminate some of the uncertainties that had been pointed out by several delegations. He suggested that the drafting group should be composed of the representatives of the USSR and the United Kingdom.

Mr. LOEWE (Austria) asked the Chairman to request an indicative vote in order to ascertain the feelings of delegations regarding the deletion or retention of paragraph (2).

Mr. GUEST (United Kingdom) said he had no objection to having the Chairman take an indicative vote, but asked him to bear in mind that several delegations had said they would agree to the deletion of paragraph (2) provided that the principle established in the former article 20 was retained.

Mr. SAM (Ghana) pointed out that several delegations might be in a difficult position if an indicative vote was taken, particularly in view of the comments just made by the United Kingdom representative. He appealed to the Austrian representative not to press his request for an indicative vote.

Mr. LOEWE (Austria) withdrew his request.

The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer the article to the small drafting group, in line with his previous suggestion.

It was so decided.

Article 18 (continued)

Mr. MICHIDA (Japan) said his delegation supported article 18 as redrafted on the basis of the former article 16. He had no question as to the

substance of the new article, but wished to make one comment on the drafting. He noted that the new text maintained the term "interrupting". Since it had been agreed to eliminate that term from the draft, he wondered whether in article 18 it might not be replaced by a term such as "ceasing to run". The corresponding changes should be made in the other language versions.

Mr. LOEWE (Austria) said his delegation had no particular interest in article 18, but he did feel that the 10-year extension provided for was too long. It would be preferable to stipulate that the over-all maximum would be 10 years; thus, the extension provided for would not exceed six years.

Mr. MANTILLA-MOLINA (Mexico) observed that paragraph (1) should not refer only to States where the debtor had his place of business, but should also cover States which were competent to deal with a dispute between the parties. Some contracts provided that the parties must submit to the jurisdiction of a given State or court of arbitration which might be different from or located in a State other than the State in which the debtor had his place of business. He therefore proposed the addition, after the words "place of business", of the following: "or where the court which, according to the contract, is competent to take cognizance of any dispute which might arise between the parties, is located...".

He suggested that the matter of the length of the extension provided should be deferred for the time being. However, rather than repeat in articles 20 and 21 the circumstances under which an extension could be granted, it would be preferable merely to state that in such and such a case, the limitation period should not extend beyond a specific number of years from such and such a date.

Mr. KAMAT (India) recalled that he had objected to the original draft of article 18 because it would result in uncertainty in the application of the Convention and would detract from the uniformity of the Uniform Law. Although the new formulation was an improvement he maintained his objections.

Mr. KHOO (Singapore) said that he was extremely concerned at the length of extension to the limitation period allowed under the articles concerning duration and extension of the limitation period (articles 10-20). Article 10 added four years to the basic limitation period of four years which had been agreed upon by the Commission and article 17 (1) provided for cessation of the limitation period, while other articles provided for one-year extensions. Article 18, in its present form, would involve a four-year extension of the limitation period. He found it difficult to accept such a long extension and the idea that an act recognized by a law which might be unknown to a national lawyer could lead to an interruption of the limitation period in that lawyer's country.

Mr. SMIT (United States of America) said that he too had been opposed to article 18 in its original form, which had been based on the idea that creditors could extend the limitation period. However, the new draft provided not only that the act interrupting the limitation period must be contemplated by the State where the act was performed, but also that such act would be recognized only if the place of business of the debtor was in that State. United States law did not recognize acts having an interruptive effect and within its own terms article 18 could therefore not operate in his country. The same would apply to all countries whose representatives were opposed to article 18, which was in fact intended only for those countries where the rule of interruptive effect applied. It was true that it detracted from the uniformity of the Convention but it should be accepted by the Commission in a spirit of compromise.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said he endorsed the statement by the representative of Singapore. Each article, when considered in isolation, was quite acceptable. However the combination of all the articles led to so many reservations and extensions of the basic four-year limitation period that the exact limitation period which would apply in any one case could only be guessed at.

Mr. ROGNLIEN (Norway) said, with reference to the comments by the representatives of Singapore and of the USSR, that even if the Commission was to establish a fixed maximum time-limit on extensions of the limitation period, that limit should not apply to cases where legal proceedings were involved. Such proceedings sometimes lasted a very long time and their duration was outside the control of either party. The parties should not be penalized by a fixed time-limit in such cases.

Mr. JENARD (Belgium) noted that although article 18 detracted from the uniformity of the Uniform Law, its scope was limited and it enabled some countries to use their existing legislation. He agreed with the representative of Japan, that the word "interruption" should not be used in the Convention and with the representative of Austria, that the limitation period under article 18 should not be extended for more than six years. He could accept article 18 if those two suggestions were approved by the Commission.

Mr. OGUNDERE (Nigeria) said he agreed with the representatives of Singapore and the USSR. He had been opposed to article 18 in its original form but could accept the new draft, since it stated that debtors would be affected only if their place of business was in the State where the interruptive act occurred. With reference to the suggestion by the representative of Belgium, for a total limitation period of 10 years, he thought 10 years was too long a time and preferred a total of eight years.

Mr. GUEST (United Kingdom), referring to the comments by the representative of Singapore, said that the prospect of various extensions of the limitation period caused great concern to anyone practising common law. In common law only a very brief extension of the limitation period was allowed, in cases of acknowledgement by the creditor. Civil law was more flexible in allowing an extension when the justice of the situation demanded it. He fully supported retention of article 18, since it could not prejudice countries where interruption did not exist and might even be of benefit to those countries in certain circumstances.

The Commission in any case was not called upon to adopt a final text for the Convention on prescription. That was the task of the diplomatic conference, which would work on the basis of the draft submitted by the Commission.

Mr. MUDHO (Kenya) said that although he had been opposed to the original formulation of article 18 he could accept the new text, which was more precise. With reference to the over-all limitation period, he agreed that a 10-year period was excessive and supported a total limitation period of eight years, as suggested by the representative of Nigeria.

Mr. KAMAT (India) said he recognized the validity of the arguments advanced by the representatives of the United States and the United Kingdom. However, the requirement that the debtor should have his place of business in a State where a given act had the effect of interrupting the period did not solve the difficulty for his country. The courts would have to inquire into a number of questions of fact, such as whether the debtor had his place of business in another country, what effect the law would have and so forth. The difficulties of proof would be considerable. He felt it would be preferable to spell out certain acts which would be considered as having the effect of interrupting the period and then agree on a compromise text.

Mr. CHAFIK (Egypt) said he supported the retention of article 18 because it envisaged cases which were well known in many countries, including his own. He agreed, however, with the representatives of Singapore and the USSR that the draft Convention provided for too many different periods. It would be preferable to adopt, as far as possible, a single period for all cases of extension, which might be eight or 10 years if it was to be a long one or one or two years if it was to be a short one.

Mr. SAM (Ghana) said his country's position had already been quite adequately explained by representatives of other common law countries. He agreed that the Commission should try to make the length of the extension the same in all cases.

The CHAIRMAN said he took it that the Commission approved article 18, with the drafting change suggested by Japan, i.e. to replace the term "interrupting" by an equivalent expression such as "ceasing to run".

Mr. KHOO (Singapore), speaking on a point of order, asked whether it was really clear that there was a consensus in favour of the retention of article 18. He thought that the point raised by the Indian representative, regarding the difficulties of the courts, had some force. He wondered whether the Indian representative would agree to the retention of the article.

The CHAIRMAN said that, despite the divergent views that had been expressed in the Commission, it seemed clear that members had accepted article 18 as a compromise solution. The most recent remarks made by the Indian representative

had not been supported by any other delegation. Furthermore, as the United States representative had pointed out, the article would not affect those countries which did not accept or recognize cases such as the ones envisaged in article 18.

The only point on which there was not yet clear agreement was the matter of how long the extension should be. He took it that most members were against granting an extension allowing for a total period of 14 years. The Austrian representative had suggested an extension of six years, which would bring the over-all period to 10 years, but others had preferred an extension of four years. After asking for a show of hands, he noted that no delegation wished to maintain the extension of 10 years.

Mr. MICHIDA (Japan) pointed out that page 10 of the summary record of the 101st meeting (A/CN.9/SR.101) of 14 April 1972 contained a statement by the Chairman to the effect that it appeared that a consensus had arisen in favour of article 16, revised in accordance with the suggestions which had been made. The Chairman had suggested that the delegations which had suggested changes should transmit them to the Working Group, which would be responsible for the preparation of the new text of article 16, which was now being considered as article 18.

Mr. KAMAT (India) stressed that the summary record had clearly stated that a redrafted text of article 16 would be prepared by the Working Group. While his delegation did not wish to take issue on the matter if it was the view of the Chair that a consensus now existed in favour of the redrafted text, now under consideration as article 18, it did wish the report to reflect very clearly that his delegation and certain others did not approve of the approach in the article, which sought to interrupt the limitation period for certain acts, without spelling out what those acts were. In the view of his delegation, that would greatly detract from the uniformity of the law and would also create substantial difficulties with regard to proof.

Mr. KHOO (Singapore) said that he was extremely concerned about the number of exceptions allowed under the Convention and said that his delegation intended to submit a proposal with regard to a maximum limitation period.

The CHAIRMAN requested the representative of Singapore to submit his proposal as soon as possible and invited representatives to indicate by raising their hands whether they were in favour of a 10-year period, a six-year period or a four-year period.

He noted that there were no representatives in favour of a 10-year period, four representatives in favour of a six-year period, and 14 in favour of a four-year period.

Mr. COLOMBRES (Argentina) suggested that in the Spanish text "interrupción" should be replaced by "cesar de correr" because in some States interruption gave rise to a new limitation period whereas in others limitation period was merely suspended.

The CHAIRMAN suggested that article 18 should be referred to a drafting group composed of the representatives of Argentina, Japan and Singapore.

It was so decided.

/ The last part of the meeting was taken up by the discussion of other matters /