119th meeting (1 May 1972)

New draft proposed by the Working Group on Prescription (A/CN.9/V/CRP.21/Rev.1) (continued)

Article 19 (continued)

Article 19 was approved.

Article 20 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that in the English text the words "which is not personal to the creditor" seemed to duplicate the other terms used to define the circumstances envisaged in article 20. There should be no difficulty in deleting those words.

Mr. MANTILLA-MOLINA (Mexico) said that the French and Spanish versions of article 20 diverged from the English version on one point. The French text spoke of a circumstance which the creditor could "neither foresee (prévoir) nor overcome" whereas the English text used the words "avoid" and "overcome". The terminology used in the English text seemed more appropriate for there were examples of force majeure, war for example, which could easily be foreseen without it being possible to overcome them. The terms used should therefore be harmonized.

Mr. GUEST (United Kingdom) explained that the Working Group had used the terms "not personal to the creditor" to introduce the idea of non-imputability. There were in fact unforeseeable and insurmountable circumstances which were personal to the creditor - the fact that he fell ill, for example. Such circumstances were excluded from the field of application of article 20.

Mr. SMIT (United States) said he was afraid that the expression "not personal to the creditor" would give rise to uncertainty and confusion. He would prefer it to be replaced by the expression "beyond the control of the creditor" which was more currently employed by Anglo-Saxon jurists.

Mr. SAM (Ghana) supported the suggestion made by the United States representative.

Mr. LOEWE (Austria) pointed out that, in the preceding articles, the Commission had decided to restrict the extension of the limitation period to a duration of four years, making a total maximum period of eight years. He proposed that the period of extension should also be limited to four years in the case of article 20.

The CHAIRMAN, after having requested those members of the Commission in favour of the Austrian proposal to signify, noted that a majority favoured the restriction of the period of extension to four years. Article 20 would therefore be amended to that effect. He proposed that the drafting changes should be entrusted to a small group composed of the representatives of the United States, Mexico, the USSR and Belgium.

It was so decided.

Article 21 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) requested a clarification of the meaning of the new provision which appeared in paragraph 3 and which seemed to nullify the effects of paragraphs 1 and 2. Two questions arose: What was the aim of the proposed waiver? Should the waiver be made before or after the expiry of the normal limitation period? His delegation would favour the deletion of that provision, whose meaning and scope it did not understand.

Mr. MAHUNDA (United Republic of Tanzania) said that his delegation, during the first reading of the draft, had put forward very serious objections to the article under consideration. In Tanzania, limitation was a question of public policy completely removed from the initiative of the parties. His delegation, noting that the provision which it had opposed had not been amended, reserved the right to take the necessary measures at the time of the conclusion of the convention.

Mr. GONDRA (Spain) pointed out that his Government, in its reply to the Secretariat's questionnaire, had expressed reservations concerning the desirability of authorizing modification of the limitation period in the convention.

Paragraph 3 of article 21 had been introduced at the initiative of the Spanish delegation so as to offer the debtor the possibility of waiving limitation after the expiry of the limitation period. That provision was linked to article 22 which allowed the parties to invoke limitation.

In spite of the general reservations it had expressed on article 21, his delegation was ready to accept the present wording.

Mr. GUEST (United Kingdom) said that the Working Group had discussed the revision of article 21 at great length. With regard to paragraph 2, the members of the Working Group who, as a majority, felt that a four-year extension was too short, had said they would abide by the Commission's decision. Paragraph 3 had been inserted at the suggestion of the Spanish delegation and seemed to have been welcomed by the Commission. The waiver envisaged would take place after the expiry of the limitation period, as was clear from the French and Spanish texts.

Mr. HONNOLD (Secretary of the Commission) drew attention to the amendment to article 21 proposed by the Norwegian delegation (A/CN.9/V/CRP.22). Should that amendment not be adopted, the Norwegian representative had asked the Secretariat to mention the amendment in the Commission's report.

Mr. MUDHO (Kenya) pointed out that his delegation, like that of Tanzania, had been very concerned about paragraph 2 of article 21, which gave the parties an excessive freedom which was incompatible with the whole basis of limitation. His delegation was ready, however, to approve paragraphs 1 and 2 of article 21 provided that the maximum limitation period was restricted to eight years. It had some difficulty with paragraph 3 whose exact meaning it failed to grasp. He would accept, however, the article as a whole, if a majority was in favour of it, provided that his comments were reflected in the report.

Mr. MANTILLA-MOLINA (Mexico) felt that paragraph 3 could be deleted without difficulty because the waiver, which took place after the expiry of the limitation period, would take effect only in the circumstances envisaged in article 22. Paragraph 4 contained a general provision which should appear, not in the article on the modification of the limitation period, but in paragraph 2 of article 1. Should the latter suggestion not be accepted, he would like his remarks to be reflected in the report.

Mr. RECZEI (Hungary) said his delegation would like paragraph 2 to be replaced by the amendment proposed by Norway (A/CN.9/V/CRP.22). It would favour the deletion of paragraph 3 because it felt that the waiver envisaged had no specific effect: when the limitation period had expired, the debtor should merely abstain from invoking limitation to ensure that the limitation period was not taken into consideration.

Certain representatives had criticized paragraph 2 because in their countries limitation was a question of public policy. Their reasoning was perhaps not very accurate, because, while the existence itself of limitation was indeed a matter for public policy, the length of the limitation period or the autonomy allowed to the parties in that respect were actually matters for regulation.

Mr. OGUNDERE (Nigeria) said that he had certain reservations about paragraphs 3 and 4 but in the spirit of compromise he was ready to approve the article as a whole.

Mr. KAMAT (India) said that, in spite of his delegation's reservations on paragraph 2, he was ready to support the new text of that paragraph, which was a valid compromise in the sense that it restricted the possibilities of extension to a maximum of four years. On the other hand, paragraph 3 seemed to go beyond what had been agreed upon within the Commission and to contradict the desire, expressed in the previous paragraph, not to prolong the limitation period indefinitely. It might therefore be thought that the provision of article 22 made paragraph 3 superfluous.

Mr. DEI-ANANG (Ghana) agreed with the representative of Hungary that the revised version of paragraph 2 proposed by Norway was clearer than the text prepared by the Working Group and should be adopted. He did not understand the exact meaning of paragraph 3, and would like it to be deleted.

Mr. SMIT (United States of America) said he supported the amendment proposed by Norway, which would enable the debtor to extend the period beyond four years. His delegation approved of the two-stage procedure suggested by Norway, provided that the extension was calculated not from the expiration of the normal limitation period but from the date of the declaration by the debtor, in accordance with the provision of article 19, paragraph 1 relating to the acknowledgement of debt.

Article 21, paragraph 3 was not superfluous, since it dealt with the period between the expiration of the limitation period and the commencement of proceedings, which was covered neither by article 21, paragraph 2, nor by article 22.

Mr. GONDRA (Spain) agreed with the United States representative that paragraph 3 did not overlap with article 22, although the two articles did have the same basis. Paragraph 4, on the other hand, was not clear and could lead to confusion with regard to the application of the provisions concerning "time-limits" (déchéance), which under article 1, paragraph 2 were excluded from the sphere of application of the Uniform Law. Article 21, paragraph 4 should therefore be deleted, in order to avoid all ambiguity.

Mr. JENARD (Belgium) said he could accept the article, although he would have preferred the parties to be given an opportunity to reduce the limitation period. In his view, the text proposed by the Working Group was preferable to that suggested by the Norwegian delegation, for it was clearer and provided for a maximum limitation period of eight years, as did articles 18, 19 and 20. He had no objection to deleting paragraph 3 but would prefer to retain paragraph 4; he could accept the amendment to the latter paragraph proposed by the Mexican delegation.

Mr. LOEWE (Austria) said he agreed with the Belgian delegation, but considered it necessary to delete paragraph 3, which in his view was out of keeping with the spirit of the Convention for the reasons given by the representative of the Soviet Union and India.

Mr. GUEST (United Kingdom) said he approved of the current version of article 21. Paragraph 2 seemed preferable to that proposed by the Norwegian delegation, which was too complicated. The four-year extension beyond the end of the initial limitation period was, in fact, a satisfactory compromise between the position of those who favoured unlimited extension and the position of those who were opposed to any extension.

The CHAIRMAN observed that there seemed to be a consensus in favour of paragraph 1. A majority wished to retain paragraph 2, despite the reservations

expressed by some delegations, which would be included in the report. A majority was likewise in favour of deleting paragraph 3 and retaining paragraph 4, the text of which should no doubt be amended in order to avoid any confusion with "time-limits" (déchéance). He therefore suggested that the Commission should approve paragraphs 1 and 2 of article 21, delete paragraph 3 and approve paragraph 4, subject to the introduction of drafting changes in paragraph 4.

It was so decided.

Article 22 (continued)

Mr. MAHUNDA (United Republic of Tanzania) recalled the objection of principle which his delegation had formulated during the first reading of the article. He considered that the article should be deleted.

Mr. KAMAT (India) recalled that his delegation had already expressed very serious reservations concerning article 22, which reproduced word-for-word the original article 23. The Commission had, however, instructed the Working Group to prepare a compromise text, taking into account all the views expressed, and it had been understood that if the Group could not find a solution, it should allow for reservations to that article.

Mr. GUEST (United Kingdom) said that the Working Group had been unable to find a form of wording that reconciled the opposing positions. It had therefore retained the original text, while providing in article 34 that any State could derogate from article 22 by making an express declaration to that effect at the time of the deposit of its instrument of ratification or accession.

Mr. DEI-ANANG (Ghana) considered that the provision concerning possible reservations could have been included in article 22. He recalled that the Australian delegation had proposed a compromise solution concerning which the Working Group had given no explanation, although it had been instructed to take into account all the views expressed.

Mr. JENARD (Belgium) said that the Working Group had indeed considered all the views expressed in plenary, but had been unable to find a compromise formula that would reconcile certain irreconcilable positions. Furthermore, even

in those countries where the judge could intervene, the nature of that intervention varied considerably; it might be optional or mandatory. The Working Group had therefore preferred to adopt a very flexible solution; it had reproduced the original text while making allowance in article 34 for possible reservations.

Mr. OGUNDERE (Nigeria) recalled that his delegation had expressed the view that the article should be deleted. If it was to be retained, it should include a provision stating that it would not apply in countries whose legal systems permitted the judge to intervene in the proceedings. In any event, if the current text was retained with a provision concerning possible derogations, the latter provision should be included in the article itself, not in a separate article.

Mr. MUDHO (Kenya) said he fully agreed with the views expressed by the representative of Nigeria. He considered the Working Group's solution less satisfactory than the amendment proposed by the United Kingdom representative during the first reading, according to which the provisions of the article would not apply where the rules of public policy of the forum otherwise provided.

Mr. MANTILLA-MOLINA (Mexico) considered that the Working Group had not made the necessary effort to reconcile the various points of view and had merely adopted the majority opinion. Furthermore, by laying down a general rule and at the same time making it possible to derogate from that rule the Group had departed from the principle of uniformity which should form the very basis of the Convention. Although intervention by a judge might be justified under some national laws, it might be in the interest of the parties themselves not to invoke limitation, either because they wanted their dispute to be considered in detail or because they tacitly wished to extend the limitation period. In a spirit of conciliation, he suggested that in those countries where the law provided that the judge could invoke limitation suo officio, that should not be done until the judgement had been handed down, after the case had been considered in detail. He was opposed to the Australian proposal, according to which the tribunal could draw the attention of the parties to the possibility of invoking limitation, for that would be out of keeping with the impartiality of the judge.

Mr. GUEST (United Kingdom), referring to the statement by the representative of Kenya, observed that the United Kingdom proposal had not been accepted by the Working Group. The latter's solution nevertheless had definite advantages, for article 34 enabled a State to declare expressly that it intended to make a reservation to the application of article 22. It would thus be possible to ascertain which States applied article 22 and which States derogated from it.

Mr. LOEWE (Austria) considered that the provisions of articles 22 and 34 constituted a fair compromise, which all delegations should be able to accept. The incorporation of reservations into article 22 itself might lead to confusion and should be avoided.

Mr. KHOO (Singapore) inquired whether the Group had considered the possibility of simply deleting article 22. If so, he would like to know why the Group had not adopted that solution.

Mr. GUEST (United Kingdom) said that the Working Group had indeed considered that possibility, but had decided that the deletion of article 22 would not be a satisfactory solution, because under article 23, paragraph 1 the judge would then be obliged to invoke limitation suo officio.

Mr. JENARD (Belgium) shared the view that it would be a mistake to delete article 22. Without that provision it would not be clear whether it was for the parties or for the judge to invoke limitation. Moreover, the problem would arise again in article 23.

Mr. OGUNDERE (Nigeria) said that he did not see how article 34 could be amended to meet the objections his delegation had raised with respect to article 22. If, nevertheless, article 22 was approved, he would request that the Commission's report should indicate that reservations had been expressed by several delegations regarding that provision.

Mr. RECZEI (Hungary) said that provision could be made in article 22 for the possibility of reminding the parties that they were entitled to invoke limitation to be open to the judge.

Mr. CHAFIK (Egypt) said that the suggestion made by the Hungarian delegation would be contrary to the principle of the judge's impartiality.

Mr. HYERA (United Republic of Tanzania) proposed that the Commission should suspend its discussion of article 22 and take a decision on that article when it took up article 34.

The CHAIRMAN said that, in his opinion, it would be better for the Commission to take a decision immediately on article 22. He proposed that the article should be approved on the understanding that the objections raised by various delegations would be reflected in the Commission's report and that the question of reservations would be considered in connexion with article 34.

Article 22 was approved.

Article 23 (continued)

Mr. MANTILLA-MOLINA (Mexico) said that the article was incomprehensible, at least in the Spanish version. Moreover, even the English and French texts of paragraph 1 were not precisely equivalent. The English text appeared to sustain the interpretation that a claimant could be prevented from pressing a claim in respect of which the period of limitation had expired only by judicial decision. The French text, on the other hand, indicated that the claim itself would not be recognized.

Mr. RECZEI (Hungary) recalled that in connexion with the discussion of article 12, his delegation had requested that the words "out of a different contract", which appeared at the end of paragraph 2, should be replaced by a formulation indicating that the restriction in question did not apply to the contract but to the commercial relationship between the two parties. He recommended that the wording adopted for that purpose should also be used in article 23, paragraph 2 (a), which referred to "the same contract".

Mr. SMIT (United States of America) supported the suggestion put forward by the Hungarian delegation. Replying to the point raised by the Mexican delegation, he observed that article 22 met the Working Group's concern to establish a general rule. That provision was not incompatible with article 23 inasmuch as the latter was "Subject to the provisions... of article 22".

Mr. COLOMBRES (Argentina) supported the comments made by the representative of Mexico with reference to paragraph 1 and recommended that the French and Spanish texts should be changed accordingly.

Mr. JENARD (Belgium) said that, in his opinion, the French text was satisfactory and he saw no reason to change it.

Mr. CHAFIK (Egypt) said that whatever the wording chosen to replace the phrase "to the same contract", it should express the idea that both claims must relate to the same action.

Mr. JAKUBOWSKI (Poland) associated himself with the view expressed by the representative of Hungary to the effect that articles 12 and 23 should be changed in tandem.

Mr. COLOMBRES (Argentina) proposed, in view of the obscurity of article 23, paragraph 1, that the provision in question should simply be deleted.

Mr. LOEWE (Austria) seconded that proposal.

Mr. OGUNDERE (Nigeria) said that his delegation was opposed to the deletion of paragraph 1.

Mr. KAMAT (India) recalled that during its initial consideration of article 23, the Commission had expressed itself in favour of retaining paragraph 1. In view of that decision, nothing more than mere drafting changes could be envisaged for the provision in question.

Mr. RECZEI (Hungary) read out the text proposed by the Egyptian delegation for the final clause in article 12, paragraph 2: "provided that such counterclaim does not arise out of a contract of a different nature". His delegation endorsed that formulation and recommended that a similar wording should be used in article 23, paragraph 2 (a).

The CHAIRMAN observed that a clear majority was in favour of retaining article 23, paragraph 1. With regard to paragraph 2, he proposed that a drafting group consisting of the representatives of Austria and Hungary should be entrusted with the task of amending that provision, taking into account the Egyptian proposal. Subject to that amendment, he put article 23 forward for the Commission's approval.

Article 23 was approved.

Article 24 (continued)

Article 24 was approved.

Article 25 (continued)

Article 25 was approved.

Article 26 (continued)

Mr. MANTILLA-MOLINA (Mexico) said that he was not completely satisfied with paragraph 2 since the real issue was not the calendar but rather the date.

Article 26 was approved.

Article 27 (continued)

Article 27 was approved.

Article 28 (continued)

Mr. GUEST (United Kingdom), speaking on behalf of the Working Group, noted that article 28 was a new provision which the Working Group believed would solve the problem raised by the former article 35. That problem was twofold. First, should the institution of legal proceedings in a non-Contracting State have international effect?

Secondly, what would happen if a debtor had not been informed of the fact that legal proceedings had been taken against him? Article 28 provided an answer to those two questions which the Working Group hoped would be acceptable to the Commission as a whole.

Speaking as the representative of the United Kingdom, he added that his delegation would have preferred to retain the reservation provided for in the former article 35, if only for the sake of settling the matter of proceedings instituted before an incompetent jurisdiction. In a spirit of compromise, however, his delegation had agreed to dispense with that reservation and to accept the provisions, which in its view were insufficient, of the new article 28. However, it insisted that its position on the matter should be mentioned in the commentary on the draft convention and reserved the right to raise the matter again at the time of the diplomatic conference.

Mr. OGUNDERE (Nigeria) said that his delegation, which had been opposed to the reservation provided for in the former article 35, found the solution arrived at in the new article 28 more satisfactory.

Mr. LOEWE (Austria) said that his delegation was not entirely satisfied with article 28. In the first place, it was inconsistent with the uniformity which the future Convention aimed at promoting to require that the acts in question must take place "in a Contracting State". His delegation could, nevertheless, have overlooked that point if at least the meaning of the provision had been clear. The text as worded, however, could give rise to misunderstanding, and it would be better to modify the structure of the sentence so as to say that no Contracting State would be bound to recognize the effect of the acts referred to in articles 12, 13, etc.... in respect of acts which took place in a non-Contracting State. Secondly, he considered that the last part of the article ("provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstance as soon as possible") would not be valid before the courts of his country, where it would be inconceivable for a creditor's claim to be rejected on the ground that the debtor had not been informed of the institution of legal proceedings.

Mr. SMIT (United States of America) said that he thought it might be possible for the Commission to arrive at a compromise between the position of the United Kingdom delegation, which would prefer to retain the reservation provided for in the former article 35, and that of the Austrian delegation, whose objections concerning article 28 would vanish if those provisions were of an optional rather than mandatory nature.

Mr. JAKUBOWSKI (Poland) said that his delegation also had some difficulty in accepting the rule contained in article 28 under which the institution of proceedings in a non-Contracting State would be without effect in a Contracting State. It was often the case that arbitration proceedings took place in a third country. The new article 28, by denying the parties that possibility, would go beyond the sphere of prescription.

The CHAIRMAN said that the Commission would continue its consideration of article 28 at the next meeting.