

120th meeting (1 May 1972)

The CHAIRMAN invited the Commission to continue its consideration of the new draft of articles 29-46 proposed by the Working Group on Prescription (A/CN.9/V/CRP.21/Rev.1/Add.1)

Articles 29 and 30 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that his delegation's views on the substance of article 29 were already known. It was undesirable to require States to provide for an additional instrument giving part I of the Convention the force of law. The article should be redrafted or deleted.

Mr. JENARD (Belgium) thought that the article should be deleted because the Convention would be applicable only in respect of a contract of sale concluded between partners having their places of business in Contracting States.

Mr. GUEST (United Kingdom) was uncertain as to the possible effects of the deletion of article 29. He could not immediately say whether it would be possible, for example, for a State to ratify the Convention and yet not implement it. It might be that ratification would connote that the State in question had implemented the Convention or that it proposed to implement it. If there was any possibility that deletion of article 29 would leave a loop-hole whereby States could ratify but not implement the Convention it would be better to refer the article to the international conference of plenipotentiaries.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) proposed that article 30 should be referred to the conference of plenipotentiaries without further discussion in the Commission.

Mr. KENNEDY (Australia) supported the USSR proposal.

Mr. LOEWE (Austria) agreed that article 29 should be deleted, as it served no purpose.

Article 30 would be applicable in the case of Austria, which was a federal State. However, it would be difficult to reconcile it with the Austrian federal

structure because all the legislative acts relating to the Convention would fall under federal jurisdiction. The requirement that the federal Government should bring acts to the notice of the Austrian provinces would therefore raise difficulties for his Government. As a solution, the text of paragraph (b) might be amended to refer to articles which did not fall entirely within the legislative purview of the federal authority.

Mr. OGUNDERE (Nigeria) said that while he could not agree to the approach suggested by the representative of Austria, he could accept the substitution of "may" for "shall" in paragraph (b).

Mr. GUEST (United Kingdom) said that it would be better to leave the text as it stood for consideration by the international conference of plenipotentiaries, at which States could express their views regarding its content.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) endorsed the United Kingdom representative's remarks.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer articles 29 and 30, as formulated by the Working Group and in brackets, for discussion by the international conference of plenipotentiaries.

It was so decided.

Article 31 (continued)

Article 31 was approved.

Part III: Declarations and reservations

The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the title of part III.

It was so decided.

Article 32 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that paragraphs 2 and 3 of article 32, which the Working Group had left in brackets,

should be deleted as superfluous in view of the decision that the Convention would be applicable only in respect of a contract of sale concluded between parties having their places of business in Contracting States. He also wondered whether there was any need to retain paragraph 4 of the article; its substance was covered in article 2 of the Convention.

Mr. LOEWE (Austria) agreed that paragraphs 2 and 3 of article 32 should be deleted.

Mr. JENARD (Belgium) endorsed the USSR proposal for the deletion of paragraphs 2 and 3 of article 32.

He noted that article 32 referred to the "Convention", whereas other articles referred to the "Uniform Law". To avoid any ambiguity, he proposed that the word "Convention" should be used throughout the Convention.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) endorsed the Belgian proposal.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the Belgian representative's proposal.

It was so decided.

Mr. KHOO (Singapore) asked whether the words "any contract" in paragraph 1 were intended to refer to individual contracts or to transactions in general. If the reference was to individual contracts, he would strongly oppose it, because it would nullify the work already done by the Commission.

Mr. MANTILLA-MOLINA (Mexico) endorsed the comment of the representative of Singapore. The underlying idea was a reference to transactions in general and not to a single contract. If, for example, Mexico and Guatemala had similar legislation, the application of article 32 could only be general.

Mr. JAKUBOWSKI (Poland) supported the USSR proposal for the deletion of paragraphs 2 and 3 for the reasons already stated by previous speakers. It seemed that paragraph 1 required redrafting to avoid the difficulties referred to by the representatives of Singapore and Mexico. The language might be made much simpler, providing simply that two Contracting States might agree not to apply the Convention because they had similar legislation in the area in question. A contract

concluded between parties having their places of business in Sweden and Norway, respectively, could only be an international contract, even though it might be decided that the Convention was not applicable to it because the two States had similar legislation. It would not be advisable, therefore, to include the language in article 32 providing that such contracts should "not be considered international within the meaning of article 2".

Mr. OGUNDERE (Nigeria) said that he would be quite content to delete article 32. Paragraph 1 gave Governments random permission to make declarations regarding the applicability of the Convention, which he found unacceptable. If it was to be retained, however, Contracting Parties should make the declaration in question when they ratified the Convention and not subsequently. He therefore proposed that the words "may at any time declare" should be changed to "may declare at the time of ratification".

Mr. JENARD (Belgium) thought it essential that the words "at any time" should be retained. In the case of the Benelux countries, for example, one State might decide to ratify the Convention some time after another had done so. However similar their legislation, therefore, they could only make the declaration after the second State had ratified the Convention. He agreed that the reference was to contracts of sale in general.

Mr. OGUNDERE (Nigeria), referring to the Belgian representative's statement, observed that countries which stood to benefit from article 32 because they had similar legislation should hold consultations before either ratified it. It was hardly acceptable that a State should be free to make a declaration of the kind envisaged, 10 years or more after ratifying the Convention.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed that paragraph 1 should be redrafted to take account of the problem to which the representative of Singapore had referred and that paragraphs 2, 3 and 4 should be deleted.

It was so decided.

Articles 33 and 34 (continued)

Mr. JENARD (Belgium) pointed out that the text of both articles should refer to the Convention as opposed to the "Uniform Law".

Articles 33 and 34 were approved.

Article 35 (continued)

Mr. BURGUCHEV (Union of Soviet Socialist Republics) proposed that article 35 should be deleted for the reasons which he had given for the deletion of article 29.

Mr. JAKUBOWSKI (Poland) said that as the Commission had not adopted the text of alternative B which the Working Group had proposed for article 3, there was no reason to retain article 35. He agreed that it should be deleted.

It was so decided.

Article 36 (continued)

Replying to a question by Mr. OGUNDERE (Nigeria), Mr. JENARD (Belgium) explained that article 36 and article 32, paragraph 1, covered different cases and should both be retained. Article 36 covered conventions, while article 32, paragraph 1, referred to the case of Contracting States which applied the same or closely related legal rules.

Mr. LOEWE (Austria) pointed out that article 36 in fact referred to the Uniform Law on the International Sale of Goods, which did not regulate all matters of prescription in the field of sales, such as cases of non-delivery of goods and failure to pay. Article 32 was wider in scope, since it enabled countries to state that the Convention would not apply between them. It was therefore necessary to retain both articles.

The CHAIRMAN noted that a majority of the Commission was in favour of retaining article 36.

Articles 37-46

The CHAIRMAN suggested that articles 37-46, which had not been considered by the Working Group, should be referred to the international conference of plenipotentiaries for consideration.

Mr. LOEWE (Austria), supported by Mr. BURGUCHEV (Union of Soviet Socialist Socialist Republics), said that the reference to article 35 should be deleted from articles 37 and 38, since article 35 had been deleted.

The CHAIRMAN noted that the Commission agreed that articles 37-46 should be referred to the international conference of plenipotentiaries and asked the Secretariat to make the requisite drafting changes.

Articles 8 and 10 (continued)

The CHAIRMAN called the Commission's attention to the Working Group's proposed new articles 8 and 10 (A/CN.9/V/CRP.21/Rev.1/Add.3). Article 8 simply embodied the Commission's views and would be incorporated in the draft Convention. He asked the delegates for their views on proposed new article 10.

Mr. GUEST (United Kingdom) said that the Working Group had followed its instructions from the Commission in extending the five-year cut-off period to eight years. In the new draft the limitation period was two years from the date of delivery of the goods in cases of patent defects and from the date of discovery of the defect in cases of latent defects. The Working Group had drafted a more satisfactory formulation of the commencement of the limitation period.

Mr. SAM (Ghana) said that he was pleased to see that some measure of consensus was emerging with regard to the limitation period in respect of defects. He would, however, have preferred that period to be four years instead of two. The purchaser was in fact in a worse position if he found a defect in the goods than if the basic four-year limitation period had applied, since the new article 10 meant that a purchaser must take action within two years of discovery of the defect or could not take action at all. However, in a spirit of compromise, he could accept article 10 and would appeal to other delegations to do likewise.

Mr. LOEWE (Austria) said that his delegation reluctantly accepted the compromise proposed by the Working Group, for whose efforts he was grateful. He continued to think that it would be difficult to determine the point at which the limitation period would commence to run under the terms of paragraph 1 and that the period itself was extremely and unusually long.

Mr. CHAFIK (Egypt) said that he could accept the text of article 10 prepared by the Working Group even though it was somewhat less favourable to the developing countries than the version he had originally supported.

Mr. SMIT (United States of America) said that his delegation welcomed the compromise reflected in the proposed new article 10. The representative of Egypt had made a valuable contribution to the achievement of that compromise.

Mr. JENARD (Belgium) welcomed the compromise reflected in the text before the Commission, which his delegation would do everything possible to implement.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) commended the Working Group, which had achieved a compromise. At the same time, he found it very difficult to understand the relation between paragraphs 1 and 2 and paragraph 3 and wondered whether the tenor of paragraph 2 did not contradict the content of paragraph 3. He would not pursue the matter during the current debate but wished his delegation's doubts as to whether paragraphs 2 and 3 were fairly balanced to be recorded. He reserved his delegation's right to state its views in that connexion at the international conference of plenipotentiaries, should it find it necessary to do so.

Mr. MANTILLA-MOLINA (Mexico) pointed out that whereas the English text of paragraph 3 was consistent in referring to a "claim" the French and Spanish referred alternately to "action" (acción) and "droit" (derecho). The French and Spanish versions should use "action" (acción) throughout. He also pointed out that the expression "whether expressed in terms of a specific period of time or otherwise" was loose and required reformulation.

Mr. GONDRA (Spain) pointed out that in the Spanish text "entregados" did not correspond to the English phrase "handed over". He suggested that the wording "puestos a disposición" should be used.

The CHAIRMAN invited the representatives of Mexico and Spain to submit their amendments to the Secretariat.

Article 20 (continued)

The CHAIRMAN drew the Commission's attention to the proposed new article 20, in document A/CN.9/V/CRP.21/Rev.1/Add.4.

Mr. SMIT (United States of America) said that in the new article 20, which replaced the original article 19 (A/CN.9/70), the phrase "not personal to the creditor" had been replaced by "beyond the control of the creditor" and the 10-year maximum limitation period had been reduced to four years. In the French and Spanish texts the word "prévoir" ("prever") had been replaced by "éviter" ("evitar") so that the texts in those languages would be closer to the English text.

Mr. CHAFIK (Egypt) said that he would prefer to retain the word "prévoir" (foresee) in the French text, particularly since "éviter" (avoid) and "surmonter" (overcome) were practically synonymous.

Mr. MANTILLA-MOLINA (Mexico) said that the Working Group had discussed the point raised by the representative of Egypt and had considered that "avoiding" and "overcoming" were different, since the first came before and the second after the event. As had been pointed out in the Working Group, foreseeability might apply to contractual obligations, but not with regard to circumstances affecting the limitation period. The Working Group had therefore thought it should not introduce the idea of foreseeability into article 20 by using the words "prévoir" or "prever".

Mr. KHOO (Singapore) said that the formulation of article 20 was no improvement on the original article 19. It allowed extension of the limitation period in a situation where, for example, a creditor could not take action because of adverse financial circumstances. While not objecting to the new article going into the draft Convention, his delegation wished to reserve its position thereon.

Mr. SAM (Ghana), supported by Mr. MUDHO (Kenya), said that article 20 could be readily understood by businessmen and was therefore quite acceptable.

The CHAIRMAN noted that the majority of the Commission appeared to be in favour of approving article 20.

He suggested that the Commission should consider alternative methods for the final adoption of the draft Convention on prescription as set out in document A/CN.9/R.12 and invited the representative of the Secretary-General to address the Commission on the matter.

Mr. SLOAN (Representative of the Secretary-General) said that document A/CN.9/R.12 contained an analysis of alternative methods for the final adoption of the draft Convention on prescription. The alternatives were the convening of an international conference of plenipotentiaries to study the draft articles and to conclude a convention or the conclusion of a convention within the framework of the General Assembly by having the Sixth Committee prepare a final draft. He had discussed the question with the Legal Counsel, who was also the Under-Secretary-General for General Assembly Affairs, and in their view the convening of an international conference of plenipotentiaries would be more suitable in view of the technical nature of the Convention and would be more likely to achieve the best results.

There were also other considerations which the Commission might wish to discuss. It had been suggested that the draft Convention should be circulated to Governments, whose comments and proposals might be reviewed by a small working group, such as the Working Group on prescription, which had played such a notable role in preparing the draft Convention.

Mr. MICHIDA (Japan) said that his delegation considered that an international conference of plenipotentiaries would be the most suitable forum for finalizing the draft Convention on prescription. Furthermore, the Secretariat might be requested to circulate the draft Convention together with the commentary to Governments and interested international organizations for comment and proposals. With regard to the suggestion that the Working Group on prescription should prepare a compilation of those comments and proposals, the Working Group itself had discussed the matter and had felt that the Secretariat would be the most appropriate organ to prepare a summary of comments and proposals received from Governments. His delegation associated itself with that view.

Mr. OGUNDERE (Nigeria) said that on balance his delegation supported the convening of an international conference of plenipotentiaries since it felt that an international conference would give greater publicity to the draft Convention. It would also be inclined to assign the task of compiling comments received from Governments to the Secretariat.

Mr. JENARD (Belgium) said that his delegation favoured an international conference of plenipotentiaries because the Convention dealt with technical issues of a private law nature which were somewhat outside the scope of the normal work of the Sixth Committee. Consequently, it might be necessary to call in experts in private law, which would be an expensive and time-consuming procedure. If the Commission decided to recommend the convening of an international conference of plenipotentiaries, it might be possible to convene it immediately after the 1974 session of UNCITRAL, since a number of the members of UNCITRAL would also be invited to attend the conference. His delegation was convinced of the need to circulate the draft Convention as soon as possible to Governments which had so far not had an opportunity of participating in the work of the Commission. He felt that the Secretariat should be entrusted with the work of summarizing the comments received from Governments.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that his delegation was also inclined to favour the convening of an international conference of plenipotentiaries. The annex to A/CN.9/R.12 indicated clearly that the conventions concluded by the Sixth Committee had been rather general in nature, whereas those concluded by international conferences of plenipotentiaries had dealt with more technical and complex subjects. The draft Convention on prescription dealt with technical matters and required a conference attended by specialists capable of considering all aspects of the Convention. An international conference of plenipotentiaries would therefore be the most appropriate forum for the work.

His delegation felt that Governments should be allowed sufficient time to study the draft Convention and that the Secretariat should be entrusted with the work of summarizing comments from Governments.

Mr. MANTILLA-MOLINA (Mexico) said that he was in favour of convening an international conference of plenipotentiaries. The draft Convention should be circulated as widely as possible to Governments for comments and the Secretariat should summarize the replies received from Governments.

The CHAIRMAN noted there appeared to be a consensus in favour of recommending the convening of an international conference of plenipotentiaries to study the draft articles and conclude a convention. However, before a final decision was taken, the question of financial implications would have to be considered. Second, the Secretariat would distribute copies of the draft Convention to Governments, and would invite them to submit their views. The Secretariat would summarize the replies from Governments, which would be submitted to the international conference of plenipotentiaries.

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