

121st meeting (2 May 1972)

The CHAIRMAN said that the Commission had before it addenda 5 to 9 of document A/CN.9/V/CRP.21/Rev.1, which contained the amendments proposed by the different drafting parties which had been asked to reformulate certain articles, and also document A/CN.9/V/CRP.27 which contained a proposal by the representative of Singapore.

Paragraph 1 of article 18 (A/CN.9/V/CRP.21/Rev.1/Add.5) (continued)

Mr. MICHIDA (Japan) said that, in accordance with the Commission's instructions, the drafting party, composed of the representatives of Argentina, Singapore and Japan, had revised the wording of article 18, paragraph 1 by using the words "which... has the effect of recommencing the limitation period prescribed under that law" to describe the act accomplished by the debtor and by reducing the extension of the limitation period from 10 to four years.

Mr. CHAFIK (Egypt) wondered why the authors of the text had put certain words in round brackets in the first sentence and whether those brackets should not be deleted.

Mr. LOEWE (Austria) supported the suggestion made by the representative of Egypt. If the English and French versions were compared, it could be seen that the French text was more correct in using the words "faire courir un nouveau délai de prescription". Moreover, the words "prescribed under that law" which did not appear in the French text, should be deleted from the English text because they were purely repetitive.

Mr. GUEST (United Kingdom), supported by Mr. GUEIROS (Brazil), proposed that the English text should employ the words corresponding exactly to the French formula, "faire courir un nouveau délai de prescription".

Mr. SMIT (United States of America) proposed that the text submitted by the drafting party should be clarified by inserting in the fourth line of the English text the word "original" before the words "limitation period".

Mr. SAM (Ghana) proposed that the round brackets should be replaced by commas.

Mr. MICHIDA (Japan) said he would not object to the deletion of the words "prescribed under that law" from the English text; they had been inserted merely to avoid any ambiguity.

Mr. KHOO (Singapore) supported the proposals for the deletion of the round brackets and the words "prescribed under that law".

Mr. JENARD (Belgium) supported the proposal put forward by the United States representative and suggested that in the French text the words "un nouveau délai de prescription" should be replaced by the words "à nouveau le délai initial de prescription".

The CHAIRMAN suggested that the Commission should adopt the text of article 18, paragraph 1 as proposed by the drafting party, with the following amendments: the round brackets would be replaced by commas; the words "prescribed under that law" would be deleted from the English text; the word "original" would be inserted before the words "limitation period" in the fourth line of the English text; and the words "un nouveau délai de prescription" would be replaced by the words "à nouveau le délai initial de prescription" in the French text.

Article 18, paragraph 1, as amended, was approved.

Articles 12 and 23 (A/CN.9/V/CRP.21/Rev.1/Add.6) (continued)

Mr. RECZEI (Hungary) said that the representative of Austria and himself had been instructed to put forward a new text of article 12, paragraph 2 and article 23, paragraph 2 (a). At the end of article 12, paragraph 2, which dealt with the counterclaim, a new sentence had been introduced making it clear that the claim and the counterclaim related to a contract or contracts concluded in the course of the same transaction. The amendment to article 23, paragraph 2 (a) followed logically on the amendment to article 12.

Mr. CHAFIK (Egypt) felt that the last sentence of article 12, paragraph 2 should be deleted because the counterclaim raised a question of procedure within the field of the lex fori. With regard to article 23, paragraph 2 (a), the two

claims in question should arise, during the same transaction, not from a contract or contracts but from the same cause. Admittedly, the Roman-law countries and the common-law countries understood the notion of cause in different ways, but the wording proposed by the drafting party gave satisfaction to neither group.

Mr. COLOMBRES (Argentina) supported the suggestion made by the representative of Egypt that the regulation of counterclaims should be left to the lex fori.

Mr. SMIT (United States of America) felt that the drafting party had found very suitable wording for article 12, paragraph 2, which he fully supported. If the second sentence of that paragraph was to be deleted, consideration should be given to deleting the whole paragraph, so as to avoid dealing only with one aspect of the problem.

Mr. GUEST (United Kingdom) supported the new article 12, paragraph 2 proposed by the drafting party. However, he would have no objection to the deletion of the last sentence of that paragraph if a majority emerged in favour of it.

Mr. LOEWE (Austria) said he opposed the deletion of the second sentence of article 12, paragraph 2 because, if the effect of counterclaims were restricted, there was the danger of re-introducing prescribed rights.

Mr. CHAFIK (Egypt) pointed out to the representative of Austria that he had not proposed that all restrictions on counterclaims should be removed but merely that the matter should be left to the lex fori.

Mr. POLLARD (Guyana) said he favoured the retention of the second sentence of article 12, paragraph 2, but in the English text the words "relate to" should be replaced by the words "arise from".

Mr. SAM (Ghana) pointed out that article 12 had been approved in first reading subject to drafting amendments. He felt that the new wording was satisfactory.

Mr. RECZEI (Hungary) pointed out that the deletion of the second sentence of article 12, paragraph 2, leaving the question of counterclaims to the different national legislations, was contrary to the aim of unification being sought. He did not oppose the amendment put forward by the representative of Guyana.

Mr. SMIT (United States) pointed out that the proposal of the representative of Guyana would restrict the scope of the text.

The CHAIRMAN noted that a majority had emerged in favour of the revised version of paragraph 2 of article 12 and he suggested that the Commission should adopt that text.

Revised article 12, paragraph 2, was approved.

The CHAIRMAN suggested that the Commission should approve revised article 23.

Revised article 23 was approved.

Article 15 (A/CN.9/V/CRP.21/Rev.1/Add.7) (continued)

Mr. GUEST (United Kingdom), speaking as a member of the drafting party which had been asked to revise article 15, pointed out that in the first reading the Commission had been divided on the question whether paragraph 1 should retain the provision relating to the consent of the debtor. Finally, the drafting party had not maintained that restriction because, under article 21, paragraph 2, the debtor could, in any case, during the limitation period, prolong that period by a written declaration. Furthermore, the drafting party had tried to formulate paragraph 2 more clearly because certain delegations, including that of the Soviet Union, had found it incomprehensible.

Mr. KAMAT (India), speaking as a member of the drafting party, said that he fully approved of paragraph 1 of article 15, but would have preferred some other formulation for paragraph 2. He considered that, to be entitled to an additional period, a creditor should produce proof that he had instituted the initial proceedings with all due dispatch. In a spirit of compromise, however, he had given his support to the text before the Commission.

Mr. OGUNDERE (Nigeria) welcomed the new wording of article 15.

Mr. GUEIROS (Brazil) said that, while he did not withdraw his proposal concerning the article and although he endorsed the Indian representative's comments, he was ready to accept the new wording in a spirit of compromise.

Mr. LOEWF (Austria) supported the revised version of article 15.

Mr. GUNDRA (Spain) said that the use of the term "perención" in the Spanish version was inappropriate.

The CHAIRMAN suggested that Spanish-speaking delegations should amend the text as necessary to accommodate the Spanish delegation's view and invited the Commission to approve revised article 7.

Revised article 7 was approved.

Article 16 (A/CN.9/V/CRP.31/Add.9) (continued)

Mr. SMIT (United States of America), speaking on behalf of the drafting party, said that the new text proposed for article 16 represented an attempt to resolve the problems arising where a creditor, having pursued to judgement an action based on the merits of his claim, found that the judgement could be enforced only in the country in which it was rendered, the assets of the debtor being situated in another State. Revised article 16 would allow the creditor either to institute new proceedings in the other State in order to assert his original claim (para. 1) or to take the necessary steps to obtain recognition or execution in that State of the original decision (para. 2). In both cases, he was entitled to an additional period of one year on the basis of the decision which the Commission had already taken in that connexion. He added that the Commission had already approved paragraph 2 which the drafting party had amended only as necessary to bring it into line with the new wording of paragraph 1.

Mr. MANTILLA-MOLINA (Mexico) had some misgivings with regard to the new wording of article 16. It was for the creditor to establish whether the judgement which he was seeking would be enforceable and, if it was not, he should bear the consequences. Furthermore, he feared that the new article would allow a creditor who had received only partial satisfaction of his claim through judicial proceedings to claim a review of the original judgement by resorting to a court in another State, a procedure contrary to the principle of res judicata.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) thought that paragraph 1 should be deleted. If a majority of the Commission did not agree with that view, he requested that his delegation's position should be noted in the summary record of the meeting.

Mr. COLOMBRES (Argentina) associated himself with the comments of the Mexican delegation and said that paragraph 1 would be acceptable only if it specified the effect of judgements in the two States in question. His delegation could agree to the deletion of the provision.

Mr. GUEIROS (Brazil) supported the criticism of revised article 16 made by the delegations of Mexico and Argentina. His delegation was, however, opposed to the deletion of paragraph 1 and would prefer to see its substance stated in two or three paragraphs.

Mr. LOEWE (Austria) supported the USSR delegation's proposal to delete paragraph 1.

Mr. SMIT (United States of America) observed that the deletion of paragraph 1 might have unwelcome consequences. In the absence of that provision, a creditor who had caused the limitation period to cease to run by instituting legal proceedings and had then obtained a favourable decision on the merits of his claim would be entitled to an unlimited period in which to assert that claim. The new version of paragraph 1 met the need to set a limit in that connexion; it would not conflict with the principle of res judicata because it was stated that the creditor could institute new proceedings in another State only "under the applicable law". The deletion of the provision would resolve nothing and the same problem would arise in connexion with paragraph 2, which the Commission had already approved in first reading.

Mr. MANTILLA-MOLINA (Mexico) remained convinced that article 16 was a judicial misconstruction and recommended that, if paragraph 1 was deleted, paragraph 2, which was no less fallacious, should also be deleted.

Mr. GUEST (United Kingdom) said that the arguments of the Soviet delegation, which was doubtless opposed to the additional period of one year allowed by the new article, and those of the United States delegation, which opposed the deletion of paragraph 1, were equally convincing. The solution might be to reformulate the text to indicate that, when legal proceedings had led to a decision on the merits of a claim, the limitation period should be deemed to have continued to run and that any additional period was ruled out. With regard to

paragraph 2, he asked that the commentary on the draft Convention should state that his delegation would have preferred the régime established under the original article 21 and that it had given up that régime solely in a spirit of compromise.

Mr. OGUNDERE (Nigeria) said that his delegation, which opposed the additional delay provided in paragraph 1, supported the United Kingdom delegation's proposal. He feared that paragraph 2 would also be a source of difficulty.

Mr. LOEWE (Austria) asked that it should be noted in the Commission's report that his delegation had proposed the deletion of the whole of article 16. The latter conflicted with the amendment of article 28 which the Commission had advocated and it was regrettable that its provisions were not limited so as to apply only where the original judgement was rendered in a Contracting State.

Mr. NESTOR (Romania) said that his delegation, too, thought the article should be deleted.

Mr. MANTILLA-MOLINA (Mexico) said that, having regard to Mexican legislation, the new version of article 16 would be impossible to apply. He pointed out that so many delegations were opposed to the article that it could not be said that there was any consensus; if it was adopted notwithstanding, States should at least be entitled to formulate reservations in that connexion.

Mr. GONDRA (Spain) said that his delegation would prefer paragraph 1 to be deleted and that it also had some misgivings with regard to paragraph 2. He associated himself with the comments by the Austrian representative concerning the need to restrict application of article 16 to Contracting States. He proposed that as a compromise, the article should be placed in square brackets and submitted to the diplomatic conference for consideration.

Mr. SAM (Ghana) supported the proposal by the Spanish delegation.

Mr. JAKUBOWSKI (Poland) said his delegation could agree to the deletion of paragraph 1, but not of paragraph 2.

Mr. GUEIROS (Brazil) associated himself with the comments by the Mexican representative. However, his delegation would be opposed to putting paragraph 1 in square brackets, unless the diplomatic conference had the summary records of the Commission's discussions at its disposal.

Mr. RECZEI (Hungary) supported the proposal by the Spanish delegation.

Mr. CHAFIK (Egypt) said that he would prefer to retain the article in its entirety. He felt that paragraph 1, because of the possibilities it offered to the creditor, was useful without being dangerous.

Mr. JENARD (Belgium) said that his delegation was also in favour of article 16. The provision in paragraph 1 would eliminate any temporal restriction on the assertion of the creditor's claim, at least in countries like Belgium which did not recognize that foreign decisions had the force of res judicata.

Mr. BURGUCHEV (Union of Soviet Socialist Republics), replying to the comments by the Egyptian delegation, pointed out, that it was precisely the possibilities offered to the creditor by paragraph 1 which were dangerous.

The CHAIRMAN noted that divergent opinions had emerged on the revised text of article 16 and he accordingly suggested that the provision should be placed in square brackets, as the Spanish delegation had proposed. In reply to the objection raised by the Brazilian representative, he said that the text of the draft Convention would be accompanied by a commentary prepared by the Secretariat, as well as comments by Governments.

Mr. GUEIROS (Brazil) said that, in those circumstances, his delegation could accept the Spanish proposal.

Mr. LOEWE (Austria) supported the Spanish proposal.

The CHAIRMAN suggested that the text of revised article 16 should be placed in square brackets and submitted to the diplomatic conference for consideration.

It was so decided.

#### Article 21 bis (A/CN.9/V/CRP.27)

Mr. KHOO (Singapore) said that the text proposed by his delegation was intended to remedy a number of defects in the draft. In its present form, the latter contained provisions which would make it possible to extend the limitation period well beyond what the Commission had wished and, in certain extreme cases, up to 15 years. For that reason the proposed article 21 bis imposed a maximum limit of 10 or 8 years, according to the individual case. Furthermore, the figures could be discussed.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation warmly supported the text proposed by the representative of Singapore because it had proposed that formula with regard to article 22.

Mr. LOEWE (Austria) said that he could agree in principle with the provision proposed by the delegation of Singapore, but pointed out that the words "no legal proceedings shall in any event be brought" gave the impression that a period of estoppel was involved. It would be better, in the context of the draft Convention, to use the appropriate terminology and to replace the phrase by the words "any action shall be prescribed".

Mr. OGUNDERE (Nigeria) said that he favoured the establishment of a maximum over-all period and, consequently, the proposed new article. However, he felt that it was not advisable to contemplate a period of 10 years in some cases and 8 in others; he would prefer the maximum over-all period to be 8 years in every case.

Mr. COLOMBRES (Argentina) warmly supported the proposal by the representative of Singapore, but felt that it should be amended in the way indicated by the Austrian representative.

Mr. JENARD (Belgium) said that he was in favour of the new article 21 bis, with the amendment proposed by the Austrian representative.

Mr. GUEIROS (Brazil) unreservedly supported the proposal by the representative of Singapore, including the new formulation of the title.

Mr. GUEST (United Kingdom) said that his delegation was in favour of a maximum over-all period. However, the adoption of an article such as that under consideration would probably make it necessary to recast a number of articles which already stipulated maximum periods, in order to harmonize the drafting of the entire section on the modification of the period.

Mr. SMIT (United States of America) said that he wished to express his delegation's reservations with regard to the proposed new article. In fact, articles 18, 20 and 21 already stipulated a maximum period and it was rather unlikely that the application of articles 15, 17 and 19 would lead to excessive extensions. However, the new article 21 bis could give rise to serious injustices.

For example, if a creditor had agreed to extend the stipulated period of payment on condition that the debtor extended the limitation period in the manner set out in paragraph 2 of article 21 and if, upon the expiration of the extended period, the debtor was still not in a position to pay, the creditor might not have enough time to assert his claim before the limitation was applied under article 21 bis. If that provision was adopted, his delegation would like its reservations to be reflected in the report.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) felt that although the proposed new article was of interest, its provisions could not be adopted without due consideration because a number of articles already provided for a maximum period. His delegation would be opposed to its immediate adoption, and would propose that it should be submitted to the diplomatic conference which would be able to consider it in a better perspective.

Mr. KAMAT (India) said that he favoured the idea of a temporal limitation on extensions of the limitation period. However, his delegation had not had time to make a detailed examination of the practical consequences which the new provision submitted by the representative of Singapore might have. It fully supported the suggestion by the representative of the USSR and wished to propose that the text of the article should be placed in square brackets so as to bring it to the attention of the diplomatic conference.

Mr. CHAFIK (Egypt) said that he agreed with the principle embodied in the proposed new article, but reserved his position because he had not had time to study its effects or to consider its place in the draft. In fact, it might be appropriate to insert it after article 8 rather than after article 21.

Mr. GONDRA (Spain) said that the proposal by the representative of Singapore needed careful study and for that reason the Commission should take no immediate decision on it but should refer it to the diplomatic conference.

Mr. SZASZ (Hungary), supported by Mr. MUDHO (Kenya) and Mr. SAM (Ghana), said that in principle he was in favour of establishing a maximum over-all limitation period, but felt that the Commission was not in a position to take a decision on the new article 21 bis in the time available. He therefore proposed that article 21 bis should be placed in square brackets and brought to the attention of the diplomatic conference.

The CHAIRMAN noted that there appeared to be a consensus in favour of referring the new article 21 bis to the diplomatic conference. He suggested that the Commission should decide to place article 21 bis in square brackets and to refer it to the conference, together with the comments made by the members of the Commission, including the amendment proposed by the representative of Austria.

It was so decided.

Article 28 (A/CN.9/V/CRP.21/Rev.1/Add.8) (continued)

Mr. SMIT (United States of America) said that the drafting party entrusted with the revision of article 28, composed of the representatives of Austria, Poland and the United States, had endeavoured to eliminate the objections raised with regard to the previous wording of that article. The basic difference between the two texts was that the old article 28 could be interpreted as being a compulsory provision, while the new article was optional.

Mr. GUEST (United Kingdom) stated that the new version of article 28 in no way modified the reservations he had expressed during consideration of the original article prepared by the Working Group.

Mr. OGUNDERE (Nigeria) inquired as to the reason for paragraph 2, which did not seem very useful since the sphere of application of the Convention had been limited to relations between nationals of Contracting States.

Mr. MUDHO (Kenya) wondered whether the reference in paragraph 2 to article 13, which concerned arbitration, was really necessary. It was not very likely that a party to arbitral proceedings would be unaware that such proceedings were being held.

Mr. SMIT (United States of America) agreed that it might perhaps appear superfluous for article 28 to enumerate the situations falling outside the sphere of application of the Convention; however, the drafting party had wished to eliminate any uncertainty and any possibility of argument a contrario. The drafting party had thought it advisable that the creditor should have the responsibility of informing the debtor of acts he might have performed, because of the excessive time lapse which occurred in some countries between performance and notification of an act.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that despite the clarification given by the United States representative, he still had doubts as to the need for paragraph 2. The circumstances referred to in that paragraph came under national law and paragraph 2 in no way helped to solve the questions raised by those circumstances. While he was not opposed to retaining paragraph 2, he could see no purpose in doing so.

Mr. SZASZ (Hungary) said that he did not object to the provisions of the new article 28, but paragraph 2, which elaborated on paragraph 1, would perhaps be better placed in the commentary than in the actual text of the draft Convention.

Mr. JAKUBOWSKI (Poland) said that retention of paragraph 2 was very important for his delegation, because contracts of international sales concluded in Poland very often contained an arbitration clause providing for arbitral proceedings in a third country.

Mr. GUEST (United Kingdom) said he understood the reasons for including paragraph 2, but that the meaning of the last phrase in that paragraph was not very clear to him. Paragraph 1 stated that the creditor must take all reasonable steps to inform the debtor and paragraph 2 stated that the Convention did not regulate cases in which the creditor had failed to take the requisite steps. That was an apparent contradiction. He would be quite favourable to inclusion of paragraph 2 in the commentary on the draft Convention, as suggested by the representative of Hungary.

Mr. CHAFIK (Egypt) said he was in favour of paragraph 1; he would not oppose retention of paragraph 2 but would prefer it to be transferred to the commentary.

Mr. LOEWE (Austria) observed that paragraph 2 had been inserted at the request of the Polish delegation and that his delegation had no fixed position on the matter. With regard to paragraph 1, the Commission should avoid any misunderstanding. Paragraph 1 merely stipulated that a Contracting State was obliged to give effect to acts or circumstances referred to in the enumerated articles on two conditions: those acts or circumstances must have been performed or have taken place in a Contracting State and the creditor must have taken all

reasonable steps to inform the debtor as soon as possible. When either of those conditions was not fulfilled, each State was free to apply its national law. The distinction was an important one for his delegation, because Austria had concluded bilateral agreements regulating lis pendens which did not take account of the second condition mentioned in article 28, paragraph 1.

Mr. GONDRA (Spain) said that there was no need for paragraph 2, except as a commentary. It would be desirable to improve the Spanish version of article 28 by using the words "medidas requeridas" instead of the words "razonables disposiciones" in paragraph 1, and "disposiciones necesarias" in paragraph 2.

The CHAIRMAN suggested that the Commission should approve paragraph 1 of article 28 and should place paragraph 2 in the commentary on the draft Convention together with the comments made by members of the Commission.

It was so decided.