94th meeting (11 April 1972)

Article 1 (1)

Mr. JENARD (Belgium) said that guarantees incidental to an international sales contract, mentioned within the square brackets in article 1 (1), should be excluded from the sphere of application of the Uniform Law, since they constituted autonomous contracts and came under international private law. That law was different from the one which applied to the principal international sales contract. If the draft Convention was applied to such guarantees, it would interfere with juridical areas which the Commission had not yet touched upon, such as bank guarantees. Furthermore, the legal concepts governing guarantees were different in each country and it would be difficult to apply the Uniform Law to that question.

Mr. LOEWE (Austria) agreed with the representative of Belgium. The commentary in document A/CN.9/70/Add.1 showed that the wording of article 1 (1) had been intended to include claims arising by reason of the invalidity of a sales contract, although under article 32, States could declare that actions for annulment of the contract would not be covered by the provisions of the draft Convention. The nullity of a contract should not be dealt with in any fashion by the Convention, since the questions raised by nullity went far beyond the scope of the international sale of goods; nullity might, for instance, be due to a lack of capacity. Article 1 (3) (a) in any case spoke of "rights or duties under the contract of sale", which presupposed that the contract of sale was a valid one.

Mr. LEMONTEY (France) also agreed that the draft Convention should not apply to a guarantee incidental to an international sales contract, because such a guarantee was an autonomous contract and there might be conflict of law if the Convention applied to such cases. With regard to the presupposed validity of the contract of sale, he agreed with the Austrian representative. Actions for annulment covered all types of contract, not only contracts of international sale of goods, and should be dealt with by some other convention relating to sales contracts of every type. His delegation, together with the Belgian delegation, proposed an amendment (A/CN.9/V/CRP.4) whereby a sentence would be added to article 1 (1), stating that the Uniform Law should not apply to the limitation of legal proceedings

or to the prescription of rights based on cause for annulment of the contract or a finding that it was non-existent.

Mr. OLIVENCIA (Spain) said that he had submitted some amendments (A/CN.9/V/CRP.2) which substantially coincided with the comments made by the Belgian, Austrian and French representatives. His first amendment referred to the exclusion from the Uniform Law of incidental guarantees. While agreeing with the French representative that action for annulment should be excluded from prescription, he felt that a negative formulation which emphasized exclusion might better appear in article 6, which defined the matters outside the scope of the Convention, rather than in the very first article. His amendment also proposed the deletion of article 2 (2).

Mr. MANTILLA-MOLINA (Mexico) said that the phrase "limitation of legal proceedings" was a duplication of "prescription of the rights". Since the phrase was open to misinterpretation in civil law countries, he suggested that it should be deleted. However, he would not press for his suggestion to be adopted, if a consensus could be more speedily achieved by keeping the phrase. He agreed with the Belgian and French representatives that incidental guarantees should be excluded from the sphere of application of the Uniform Law. He also agreed that exclusions from the Law should be listed in article 6 and that the Convention should apply only to valid sales contracts.

The Commission should exercise care in deciding upon the language of the Convention, particularly with regard to actions for annulment. The civil law concept of such actions was different from that in common law and it was essential to avoid ambiguity.

Mr. COLOMBRES (Argentina) agreed with the representatives of Mexico and Spain that exclusions should appear in article 6, rather than article 1. If guarantees were excluded from the Uniform Law, article 1 (3) (c), which defined guarantees, should be deleted.

Mr. OGUNDERE (Nigeria) supported the exclusion from the scope of the Convention of guarantees incidental to contracts of international sale. He thought, however, that cases of invalidity of contracts should not be singled out. The Convention was intended to replace municipal legislation and the question of

limitations in the international sale of goods should therefore be treated as a whole. Delegations from civil law countries had been adamant on the subject of any possible modification of article 1 (1) and their intransigence went against the spirit of the work of the Commission, which was intended to unify international law by drafting a simple formulation, acceptable to all States. He found article 1 (1) acceptable in its current formulation.

He suggested that review of all the definitions in article 1 (3) should be deferred until a decision had been reached on the rest of the Convention. He could not support the amendments proposed by the French and Spanish representatives.

Mr. GUEST (United Kingdom) said that, after consultation with other members of the Commission, he agreed that guarantees should be excluded from the sphere of application of the Uniform Law. He fully agreed with the Nigerian representative; the draft Convention was intended as a bridge between civil law and common law systems, and would not be acceptable to representatives of both types of law, unless delegations adopted a flexible attitute. With reference to possible duplication involving the phrase "limitation of legal proceedings" and "prescription of the rights", which had been mentioned by the Mexican representative, he pointed out that in common law limitation was a matter of procedure, while in civil law it constituted an extinction of the rights of the buyer and of the seller. Article 1 (1) was an example of attempted reconciliation of the two legal systems.

With reference to the exclusion of actions for nullity from the scope of the Convention, there was a fundamental difference between civil and common law with regard to the meaning of the phrases "action en nullité" in civil law and "action for nullity" in common law. In common law, action for nullity covered several situations, such as lack of consensus between the parties to a contract and fundamental error in a contract. There were equitable remedies for situations such as fault, duress, undue influence and misrepresentation. It would be difficult for the Uniform Law to cover all those cases. The delegates from civil law countries should understand the position of the common lawyers and leave article 1 (1) as drafted, while those from common law countries should allow the civil lawyers to express their reservations, through article 32 of the draft Convention. Such reservations would derogate from the uniformity of the Uniform Law but each system of law should not attempt to force its own approach on the other system, as that

would lead to the failure of the Convention. The use of the phrase "actions for nullity" in the Convention might lead to disputes in its enforcement.

Mr. SMIT (United States of America) announced that his delegation would circulate a memorandum explaining its position on the principal points of the draft Convention.

He had no objection to the exclusion from article 1 (1) of the reference to guarantees. The construction of the text, however, posed a more substantial problem. Under United States law, a buyer could bring an action against a person other than his seller - for instance, a remote seller. The Convention could be understood as extending to an action brought against a manufacturer but it was stated in the commentary (A/CN.9/70/Add.1) that such a claim would not be governed by the Law. To clarify matters, therefore, he proposed the insertion of the words "against each other" after the words "buyer and seller", to ensure that the Law covered actions by parties in a relation of privity to each other.

There were three approaches to the issue of nullity. The first, which was the United States approach, would be to deal only with problems peculiar to sales and to leave other issues to the general law. The second would be to deal with all problems of prescription in the context of sales - the approach adopted in the Uniform Law. The third approach would be to draft a comprehensive convention relating to international sales generally. It followed from the adoption of the second approach that any attempt to limit the text should be resisted to avoid the excision of many other provisions in addition to that relating to annulment.

Mr. GUEIROS (Brazil) endorsed the comments of the representatives of Belgium, Austria, France, Nigeria and the United Kingdom. He particularly supported the views of the representatives of Argentina, Spain and Mexico. In supporting the exclusion from article 1 (1) of the reference to guarantees, he drew attention to paragraphs 9 to 13 of the commentary on the first article. The Commission must decide whether to include that reference or not and its decision would affect, in addition, the wording of articles 1 (3) (b), 10 and 14.

Mr. DEI-ANANG (Ghana) said that his delegation's views on the preliminary draft of article 1 were already on record (A/CN.9/70/Add.2). As to the final draft before the Commission, he was in broad agreement with the view that the reference

to guarantees should be deleted from article 1 (1). He shared the Belgian representative's views in that connexion, although his understanding was that the word "guarantee" could have a variety of different implications in relation to a contract of sale. Some clarification was needed. Was it the intention of the Law, for example, that a guarantee by a seller with regard to the performance of his product should not be subject to prescriptive rules? Such an approach would favour countries which bought large quantities of manufactured goods. Nevertheless, such guarantees of performance were usually limited to very short periods. If article 1 (1) was to be understood as extending to them, a situation could arise where a manufacturer's guarantee would be for a shorter period than that envisaged under the Law. Was it the understanding of those drafting the Law that such guarantees could cover a period shorter than the four years offered under the Law?

His delegation's first impression of the amendment by the French representatives had been that it was harmless. In view of the difficulties described by the United Kingdom representative, however, it would appear that to accept the French amendment would create serious problems for common law countries and he hoped that the French representative would have second thoughts.

He asked whether the reference to assigns in article 1 (3) (a) was an attempt to accommodate his delegation's views with regard to the problem of the definition of a seller which were stated in its comments on the preliminary draft (A/CN.9/70/Add.2, page 118).

Mr. ELLICOTT (Australia) said that previous speakers had anticipated many of his own delegation's views. In particular, he agreed that the reference to guarantees in article 1 (1) should be excluded. He also supported the retention of language distinguishing between the common law concept of limitation and the civil law concept of prescription.

He agreed with the representatives of Nigeria, the United Kingdom, the United States and Ghana regarding the question of the exclusion of nullity actions. It had been his intention to raise the problems already described in that connexion by the United Kingdom representative, who had stated the legal reasons why the proposal to exclude such actions should not be accepted. He thought that the problem should be resolved by relating it to the position of the businessman. It was very desirable that a businessman should have a package deal which would

allow him to see at once what limitations there were to the prescriptive period. It would be odd, for example, for a businessman to be told that he must bring an action for breach of contract within a period of four or five years, and then to be faced later with an action for rescission brought outside the time-limit. It would be unfair if the prescriptive period in relation to annulment was longer than that provided under the Law. The question should be approached from the point of view of the businessman and not exclusively from the standpoint of the various legal systems. There was no logical reason why a businessman should be at the mercy of variations in municipal law. For those reasons, the Commission should not agree to the exclusion of actions for nullity. Article 32 provided an opportunity for declarations to exclude actions for annulment of contract.

Mr. JAKUBOWSKI (Poland) said that the question of guarantees was a very difficult one, quite apart from the difficulties arising in the interpretation of the notion itself. Under Polish law, for example, a bank guarantee was independent of a personal guarantee. He agreed, therefore, that the whole question of guarantees should be studied after the consideration of other references to guarantees in the Law, by which time the whole scope and content of the Convention would have become apparent.

He agreed with the pragmatic approach of the Australian delegation to the exclusion of actions for annulment. Businessmen would not understand such an exclusion. In arbitral proceedings, the methods open to the defendant were numerous and depended on the circumstances of a given situation; it would be difficult to isolate the question of annulment from other elements of a contract. Article 32 offered adequate grounds for a compromise between the divergent views expressed in the Commission.

As a lawyer from a civil law country, he could accept the terminology in article 1 (1), to which lawyers from the common law countries attached much importance. The problem was rather one of translation, which could be overcome.

The CHAIRMAN said that there appeared to be a consensus in the Commission regarding the exclusion of the reference to guarantees appearing within square brackets in article 1 (1). There also appeared to be unanimity with regard to the retention of the wording relating to the prescription of the rights of buyers and sellers. The main problem appeared to be the inclusion or exclusion of

actions for annulment. Civil law countries supported their exclusion, while common law countries took the opposite view. The issue had been discussed by the Working Group but no agreement had been possible and the outcome had been the compromise in article 32. The issue might be referred to the Working Group, together with the proposals by the French, Spanish and United States representatives.

Mr. ROGNLIEN (Norway) said that there appeared to be a consensus that a guarantee incidental to a contract of international sale of goods should be outside the scope of the Law. In any case, if municipal law provided that the term of a guarantee in substance was shorter than that envisaged under the Uniform Law, the municipal provision would prevail.

There was some uncertainty as to what arose from a contract and what arose from its invalidity. For instance, the qualification of the concept of force majeure might be uncertain or vary in different States. The same uncertainty prevailed with regard to the termination of a contract. For example, was a claim for restitution after the termination of a contract based on the contract itself or on elements outside it? The existence of principal and subsidiary claims and possible differences in the respective periods of prescription had also to be taken into consideration. The decision regarding the exclusion or otherwise of actions for annulment was a decision of principle and as such should be taken by the Commission in plenary meeting. He suggested that, before the issue was referred to the Working Group, an indicative vote should be taken.

Mr. MATTEUCCI (UNIDROIT), referring to the question of the exclusion of actions for annulment of sales contracts, said that his organization was shortly to issue uniform provisions regulating questions which might affect the validity of contracts. The text had been prepared by an expert committee of jurists representing the various legal systems in order to fill a gap in existing law. He intended to suggest that the draft text should be sent to the Commission to be dealt with either as an independent instrument or as a protocol to the Uniform Law. He thought it logical to relate it to the Law.

Mr. KHOO (Singapore) agreed with previous speakers regarding the question whether the Uniform Law should extend to all proceedings resulting from international contracts of sale. He endorsed the remarks in that connexion of the representatives of the United Kingdom, Australia, Poland and Norway.

The second question was whether the Law should apply to guarantees to secure the performance of obligations incurred under a contract of sale. His view was that such contracts of guarantee should be excluded from the Law.

His delegation had reservations with regard to the use of the words "creditor" and "debtor" in article 1 (3) (d) and (e), which it would discuss at a later stage.

Mr. NESTOR (Romania) said that he was prepared to accept article 1 (1) with or without the bracketed reference to guarantees. His own view was that the Commission should expand the scope of the Law rather than restrict it. The question of a guarantee was not difficult, nor was it an independent problem. The important thing was that there should be the same period of prescription with regard to the contract and the guarantee. Even if the reference to a guarantee was removed from the text, that essential problem would remain. There were a variety of theoretical points which could arise in a detailed discussion of the text but the essential requirement was that the text should state clearly the intentions of the Commission.

Mr. DEI-ANANG (Ghana) said that his delegation would have some difficulty in agreeing to the exclusion of all forms of guarantees from the law. Guarantees relating to performance ought not to be excluded in view of the contradiction between article 11 and article 1.

Mr. HONNOLD (Secretary of the Commission) said that in article 1 the term "guarantee" referred to a promise by A to be responsible for performance by B. The term "undertaking" used in article 11, on the other hand, related to undertakings regarding the quality of goods. As they stood, therefore, there should be no contradiction between articles 1 and 11.

Mr. MICHIDA (Japan) supported the deletion of the reference to guarantees in article 1 and the retention of the reference to limitations. He also agreed to the Chairman's suggestion regarding the procedure to be followed by the Commission.

As to the question of the exclusion of annulment actions, his delegation thought that article 32 adequately covered the problem.

The amendment to article 1 (1) suggested by the United States representative was an improvement on the existing text and, as a member of the Working Group, he would welcome the views of other delegations on that amendment.

Mr. CHAFIK (Egypt) said that his delegation fully appreciated that the word "guarantee" in article 1 (1) was not used in the same sense as the word "undertaking" in article 11. Accordingly, it favoured the deletion of the words relating to personal guarantees in the square brackets.

Under the Egyptian legal system, actions for nullity were covered by special regulations concerning the length of the limitation period and its starting-point. His delegation was satisfied with the present text, but had reservations with regard to article 32; it would prefer to exclude actions for nullity from article 1 (1). His delegation shared the view of the Norwegian representative on the Chairman's suggestion to refer the question back to the Working Group. The point at issue was not a question of drafting, but of principle. Moreover, if the Commission referred it to the Working Group, the Working Group would refer it back to the Commission, and such a procedure was obviously undesirable. The Commission should take a decision forthwith on the desirability of inserting a reference to actions for nullity, after which the Working Group could begin work on formulating a suitable text.

Mr. POLLARD (Guyana) said that his delegation was in complete agreement with the views expressed by the United Kingdom representative with regard to the amendment proposed by the French delegation. In the view of his delegation, the United States proposal to insert the phrase "against each other" after the words "buyer and seller" in article 1 (1) could be further strengthened by the insertion of the word "immediate" before the word "buyer".

Mr. SZASZ (Hungary) said that his delegation supported the deletion of the text within square brackets in article 1 (1). With regard to the question of actions for nullity, although Hungary was a civil law country, his delegation could accept the draft as it stood.

Mr. JENARD (Belgium) said that, while his delegation would have preferred to exclude actions for nullity from article 1 (1), it was prepared, in a spirit of compromise, to accept the text of the paragraph as it stood. However, it felt that article 32 needed to be reformulated.

The CHAIRMAN noted that there appeared to be general agreement that the text within the square brackets should be removed from article 1 (1). The

United States proposal would be referred to the Working Group. A reformulation of article 32 might settle the problem of the exclusion of actions for nullity. He invited members to express their views so that the Working Group could take them into account when formulating a solution.

Mr. LOEWE (Austria) said that his delegation would support the compromise suggested by the Belgian representative.

Mr. OLIVENCIA (Spain) said that his delegation was prepared to support the compromise suggested by the Belgian representative and wished to withdraw its earlier amendment. It had found the statement by the representative of UNIDROIT both interesting and pertinent, particularly with regard to its draft provisions on nullity. His delegation supported the United States proposal to qualify the text of the article 1 (1).

Mr. MANTILLA-MOLINA (Mexico) noted differences between the French, Spanish and English versions of the draft Convention. He suggested that the French text should be used as the basis for the Commission's work.

Mr. GUEIROS (Brazil) said that his delegation could accept the compromise suggested by the Belgian representative and the amendment proposed by the United States delegation. He agreed with the suggestion made by the Mexican representative.

Mr. LASALVIA (Chile) supported the Mexican suggestion.

Mr. OLIVENCIA (Spain) said that his delegation was aware of the problem raised by the Mexican delegation and felt that the matter might be referred to the Working Group.

Article 1 (3)

Mr. POLLARD (Guyana) proposed the insertion of a subparagraph after article 1 (3) (a) which would read: "'contract of sale of goods' means a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price" (A/CN.9/V/CRP.6). He noted that the term "the international sale of goods" was used throughout the draft Convention. There were numerous contracts similar to the contract of sale of goods and his delegation therefore felt that it would be useful if the Convention contained a clear definition of the term.

Mr. MICHIDA (Japan) recalled that, in formulating article 4 (1) of the draft Convention, the Working Group, of which his delegation was a member, had attempted to distinguish the contract of sale from other forms of contract. While the text of article 4 (1) was perhaps neither clear nor adequate, the definition of a contract of sale of goods was an extremely difficult task. The Working Group had spent considerable time attempting to work out a suitable definition and had finally adopted the formula in article 4 (1). His delegation wished to urge the Commission not to try to evolve a new definition with undue haste.

Mr. LOEWE (Austria) said that his delegation had serious doubts as to the usefulness or feasibility of introducing a definition of the contract of sale of goods into the Convention. Such a definition had not been introduced into the Uniform Law of 1964 or its revision by the Working Group. In the opinion of his delegation, it would be most inappropriate to insert such a definition in a Convention designed to promote uniformity in the law of sales.

The CHAIRMAN suggested that the Working Group should examine the Guyanese proposal.

Mr. NESTOR (Romania) requested clarifications with regard to article 1 (3) (a), which contained definitions of the terms "buyer" and "seller". He inquired what difference there might be, from the standpoint of the application of the Convention, between persons who "buy or sell" and persons who "agree to buy or sell". Furthermore, he had some doubts regarding the phrase "successors to and assigns of".

Mr. OLIVENCIA (Spain) felt that the text of article 1 (3) (a) was somewhat confused. Perhaps a formulation such as "persons who buy or sell, or undertake to buy or sell" would improve the definition.

Mr. CHAFIK (Egypt) supported the Norwegian proposal (A/CN.9/R.9) to incorporate a definition of breach of contract into the Convention between article 1 (3) (e) and (f). However, he did not consider the Norwegian proposal to be well formulated, and would have preferred a form of words such as "'breach of contract' means failure to execute an obligation by a party or performance which is not in conformity with the contract".

Mr. JAKUBOWSKI (Poland) agreed that it would be desirable to define breach of contract; while it was well understood in practice, it was nevertheless a new concept in civil law countries. He felt that the Egyptian formula would be suitable.

Mr. NESTOR (Romania) felt that the Working Group should try to find a better formulation for article 1 (3) (d) and (e). Article 1 (3) (d) defined a creditor as a party seeking to exercise a claim and gave the impression that the status of a creditor was dependent on his intention of exercising his right; yet even if he did not wish to exercise his right, he was still a creditor. The same considerations applied to the definition of a debtor in the following subparagraph.

Mr. JAKUBOWSKI (Poland) felt that article 1 (3) (g) should encompass organizations and forms of association with no specific legal personality, such as the Handelsgesellschaft in German-speaking countries and the partnership in common law countries.

Mr. LOEWE (Austria) felt that the text of article 1 (3) (g) was perfectly satisfactory since it referred to "company, or other legal entity".

Mr. COLOMBRES (Argentina) felt that the subparagraph needed further elaboration. For example, in Argentina, there were sociedades en participación and sociedades irregulares which would not be covered by article 1 (3) (g).

Mr. JAKUBOWSKI (Poland) noted that the problem of organizations or forms of association with no legal entity existed in common law countries and asked representatives from those countries to state whether they considered that the definition in article 1 (3) (g) covered partnerships.

Mr. MICHIDA (Japan) felt that the present text was satisfactory and saw no reason to examine the matter further.

Mr. CHAFIK (Egypt) agreed that there was no need to refer the matter to the Working Group for further consideration.

Mr. GUEST (United Kingdom) felt that the words "legal entity" could be construed to cover the case of partnership under common law.

Mr. ELLICOTT (Australia) felt that it should be made clear that partnership was encompassed in the definition of "persons".

Mr. COLOMBRES (Argentina) felt that article 1 (3) (g) might well be deleted, since the definition contained therein might give rise to considerable problems.

Mr. OGUNDERE (Nigeria) proposed the insertion of the phrase "sole or aggregate" at the end of article 1 (3) (g).

Mr. GUEIROS (Brazil) supported the Argentine proposal to delete article 1 (3) (g). Alternatively, the word "legal" before "entity" might be deleted.

Mr. ROGNLIEN (Norway) said one of the aims of the definition in article 1 (3) (g) was to make it clear that the "buyer and seller" referred to in article 1 (1) were not only physical persons, but also "legal entities" or "personnes morales". He agreed with the representative of the United Kingdom that partnerships could be covered by the existing definition.

Mr. JAKUBOWSKI (Poland) pointed out that it was only under the French legal system that partnerships, or their equivalent "sociétés en participation" and "Offentliche Gesellschaft", were treated as full legal entities. The draft Convention had certain defects regarding the categories of persons it embraced. Those defects could be eliminated either by deleting article 1 (3) (g), which contained the definition of the persons concerned, or by giving equal treatment within that definition to bodies such as partnerships.

Mr. COLOMBRES (Argentina) thought that the issue, being purely technical, should be referred to the Working Group to avoid wasting time. It was extremely difficult to specify the equivalent in a given régime of an entity under another régime. He would in any case prefer the deletion of the text in question.

Mr. GUEIROS (Brazil) said that he agreed entirely with the Argentine representative. He also pointed out that the Napoleonic Code made no distinction between a juridical and a de facto person. Brazilian law followed the German system in that context. It would be wiser to delete article 1 (3) (g) or, alternatively, to leave it to the courts to decide what was meant by a legal entity. He could not accept the text as it stood.

The CHAIRMAN said that the matter would accordingly be referred to the Working Group.

Mr. NESTOR (Romania) noted that, according to article 1 (3) (h), "writing" included telegram and telex. He wondered if teletype was considered to be the same as telex.

The CHAIRMAN said that the question would be referred to the Working Group.