95th meeting (11 April 1972)

Article 2

Mr. HONNOLD (Secretary of the Commission), introducing article 2 of the draft Convention dealing with the applicability of the Uniform Law, recalled that the Commission was familiar with the problem. Paragraph 1 of the article was analogous to article 2 of the original ULIS, which adopted a universalist approach by excluding the rules of private international law for the purpose of the application. However, the Working Group on Sales had rejected that universalist approach and proposed an alternative solution which the Commission had discussed at its third session: the Uniform Law on sales would apply (a) when the parties had their places of business in different Contracting States or (b) when the rules of private international law led to the application of the law of a Contracting State. The question was whether that solution was applicable to a Uniform Law on prescription. Paragraph 8 of the Secretariat commentary recalled the difficulties arising from recourse to the rules of private international law in order to determine the scope of applicability of the Uniform Law because of the substantial differences between legal systems ultimately derived from Roman law and most systems of common law. By providing that the Uniform Law applied without regard to the rules of private international law, the draft Convention avoided those difficulties. It should be noted, however, that article 34 of the draft Convention offered States an opportunity to enter a reservation with regard to the applicability of the Uniform Law when they had ratified one or more conventions on the conflict of laws affecting limitation.

Mr. DROZ (Hague Conference on Private International Law), speaking at the invitation of the Chairman, pointed out that the universalist approach which was that of the draft Convention on prescription had given rise to difficulties when ULIS was drafted and when it was revised by the Commission. It should also be noted that ULIS, which would come into force in August 1972, would be accompanied by reservations, particularly by the United Kingdom and the Netherlands, of such a nature that its universalist character would be seriously jeopardized. The purpose

of adopting that universalist approach for the law on prescription had been to establish a uniform rule which would have the effect of making limitation subject to the rules of the forum (lex fori) in order to meet the requirements of juridical certainty. That objective was limited, however, to the extent that there were many unreasonable forums. The choice made was, moreover, subject to an important exception, which was stated in paragraph 2 of article 2 and which undermined the validity of the argument of juridical certainty. Whereas the effect of paragraph 1 was to state a principal rule of conflict, paragraph 2 introduced a subsidiary rule not of conflict but of applicability. In his view, it would be preferable not to inject a rule of conflict in the draft Convention and to delete article 2. Since a suggestion for its deletion would probably have little chance of being adopted, he had submitted, in writing, suggestions* for replacing article 2 by a provision to the effect that the Law should apply irrespective of which law was applicable to the contract of sale itself, except where the parties had expressly made prescription subject to the law applicable to the contract of sale, in which case the said law would be applied even if it was the law of a non-Contracting State. The advantage of that provision was that it stated a principal rule and then qualified it by a subsidiary rule which was nevertheless mandatory for all States, thus ensuring a balance between the two rules.

Mr. OGUNDERE (Nigeria) said that he had listened with great interest to the statement of the observer for the Hague Conference. The question to be asked was what was the objective of the draft Convention and if its objective was to be universally applicable, it should break with the vestiges of the past and lay down new rules with the help of the developing countries. Accordingly, the Commission should try to eliminate all provisions which would impede its application. For those reasons, he suggested deletion of paragraph 2 of article 2 and of article 34.

Mr. OLIVENCIA (Spain) recalled that his delegation had submitted an amendment to article 2 calling for the deletion of paragraph 2. After hearing the comments of the observer for the Hague Conference and the representative of Nigeria, it was his suggestion that discussion of article 2 should be deferred until the various amendments had been circulated.

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* Subsequently issued as document A/CN.9/V/CRP.5.

Mr. CHAFIK (Egypt) supported that suggestion.

Mr. ROGNLIEN (Norway) considered that it was always dangerous to interrupt a discussion in progress and saw no reason why the Commission could not discuss the basic question, namely, whether to adopt a universalist approach or to rely instead on the rules of private international law. His personal opinion was that the Commission should adopt a universalist approach to prescription. That position did not reflect a preference as a matter of principle since Norway was against a universalist approach towards questions relating to the international sale of goods; it was based on essentially practical considerations arising from the difficulty of reconciling common law systems with civil law systems derived from Roman law. He felt that paragraph 2 should be referred to the Working Group.

The CHAIRMAN considered that the discussion of article 2 should not be deferred.

Mr. LOEWE (Austria) reminded the members that he had submitted an amendment to article 2 based on the following considerations. Faced with a choice between a universally applicable system or recourse to the rules of private international law, the first was preferable not only for practical reasons but because it was an expression of the will to bring about a practical unification of laws. He therefore favoured retention of paragraph 1. Paragraph 2 dealt with the problem of the extent to which the parties could derogate from the rules of a Uniform Law. In order to evade applying the Uniform Law, the parties could choose as the applicable law the law of a non-Contracting State which had no connexion with their contract. Since an international convention could not make provision for the specific stipulations of the parties, paragraph 2 should provide an opportunity for the parties to derogate expressly from the Uniform Law wholly or partially. The parties could also make the contract itself subject to a specified law which would also apply to prescription to the extent that it considered prescription to be governed by the law of the contract.

Mr. LEMONTEY (France) said that he favoured the universalist approach expressed in paragraph 1. On the other hand, paragraph 2 raised problems first concerning the extent to which the parties could derogate from the Uniform Law

and secondly, in the event that the Uniform Law was excluded, concerning which law was applicable. He agreed with the Austrian representative that it was difficult to disregard the principle of the autonomy of the will of the parties as regarded prescription. Furthermore, paragraph 2 was ambiguous because it was not clear whether the applicable law concerned prescription only or the contract as a whole. Paragraph 2, while it qualified the universalist principle in paragraph 1, introduced an element of unpredictability: in the event, for example, that the parties, in accordance with paragraph 2, were to choose to make their contract subject to a law which made the lex causae applicable to prescription, their arrangements would be thwarted if a conflict arising between them were brought before the tribunal of a country which applied the lex fori. It was paradoxical that in the matter of prescription, the parties should not enjoy the same freedom afforded them under ULIS with regard to sales. For that reason, his delegation had joined with that of Belgium in submitting an amendment* which reverted to the views expressed by the observer for the Hague Conference: it would afford the parties the option of excluding the application of the Uniform Law without restricting their choice to the law of a non-Contracting State.

Mr. WARIOBA (United Republic of Tanzania) said that his delegation supported paragraph 1. However, paragraph 2 raised a fundamental question and his delegation would like the members of the Working Group on Prescription to explain why they had used the words "the law of a non-Contracting State". The point was that although the uniform rules of the Hague had never been intended to apply to more than a limited number of States, the task of United Nations bodies was to draft instruments which would apply to all States. The phrase in question appeared to imply that a law was being drafted for adoption with the authors knowing in advance that some States would not apply it.

Mr. ELLICOTT (Australia) said that it was not a question of choosing between the two principles, of univeralism and autonomy of the will, it was a practical question: was it possible and necessary for UNCITRAL, an assemblage

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* Subsequently issued as document A/CN.9/V/CRP.4.

of jurists from different countries, to impose a specific system on the parties and expect legislators to adopt it?

His delegation believed that there was a contradiction between paragraph 1 and paragraph 2 and that the solution expressed in paragraph 1 would be preferable since it was simpler and eliminated any uncertainty on the part of the parties. It therefore supported the adoption of paragraph 1 and the deletion of paragraph 2.

Mr. POLLARD (Guyana) was in favour of the principle of universalism, as expressed in paragraph 1. He agreed with the representative of Australia and supported his proposal to delete paragraph 2.

Mr. OLIVENCIA (Spain) expressed regret that the Commission had not decided to adjourn debate on article 2, since members did not yet have before them the suggestions of the observer for the Hague Conference or the amendments proposed by France and Belgium.

His delegation proposed that paragraph 1 should be adopted, since it embodied the universalist principle, and that paragraph 2 should be deleted. If that solution was not accepted, it would request that the end of paragraph 2 should read "as the law applicable to the contract", to bring the provision into line with the intention expressed in paragraph 11 of the commentary.

His delegation endorsed the Tanzanian delegation's request for clarification.

Mr. FARNSWORTH (United States of America) said that a provision along the lines of the present paragraph 2 should be retained and if possible, liberalized to conform more closely to the corresponding ULIS provision.

Mr. SZASZ (Hungary) recalled that his delegation had already made it very clear that it was against the universalist principle. But the problem posed by article 2 was different and really stemmed from the divergent approaches to prescription in the countries with common law systems and those with civil law systems. In his delegation's view, paragraph 1, was more a statement of the lex fori principle than a declaration of the universalist principle, and was therefore acceptable because of its practical value. Logically, paragraph 2

should be deleted. However, if a practical solution was required similar to that under ULIS, his delegation could accept paragraph 2, provided that it was amended as the representative of Spain had requested.

Mr. GUEST (United Kingdom) said that his delegation supported paragraph 1, which constituted an application of the lex fori principle while ensuring a certain universalism. However, it was opposed to the retention of paragraph 2. The ambiguity of that provision arose not from the drafting but from the difficulties encountered by some legal systems in defining the applicable law. Furthermore, the paragraph did not guarantee uniformity in any way, as could easily be shown by examples.

Like the Australian delegation, his delegation had misgivings concerning the solution proposed by the representative of Austria, which would include a provision affirming the principle of the autonomy of the parties. However, it would accept it if that was the will of the Commission, provided that it stated that the exclusion of the Uniform Law must be expressly stipulated by the parties - which in fact would greatly limit its value.

Mr. DEI-ANANG (Ghana) was of the opinion that the pragmatic approach of the representative of Australia should guide the Commission in deciding on article 2. His delegation therefore favoured retaining paragraph 1 and deleting paragraph 2.

Mr. JENARD (Belgium) said that his delegation, which supported paragraph 1, believed that paragraph 2 was an essential qualification of paragraph 1. The autonomy of the will of the parties should be respected, as it was in ULIS, otherwise unnecessarily complicated situations might well ensue and it would be just as easy to find examples to prove that point as to support the argument of the United Kingdom representative. There would inevitably always be non-Contracting States whose law the parties would be able to invoke if they so wished. In fact the concept of lex fori and that of lex causae contractus were at variance on the subject. His delegation fully supported the suggestions of the observer for the Hague Conference, which might facilitate a compromise.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation had no difficulty with regard to the substance of paragraph 2. He pointed out that the Spanish text

of paragraph 1 differed considerably from the English and French texts, which stated that cases where the Uniform Law did not apply should be specified in the Uniform Law itself ("unless otherwise provided herein").

Mr. JAKUBOWSKI (Poland) recalled that in its reply to the questionnaire, his Government had declared that it was in favour of a general application of the Uniform Law, without regard to the law of the contract. It supported paragraph 1, amended if necessary as proposed by the Mexican delegation. Paragraph 2 gave rise to more serious problems. In such a specialized field as prescription, there were considerable differences between the various legal systems, particularly in that the countries with civil law systems believed that it was a matter deriving from jus cogens, whereas the common law countries did not. The question might perhaps be referred back to the Working Group for further discussion.

The CHAIRMAN said that there appeared to be a consensus on paragraph 1. However, most members of the Commission were in favour of deleting paragraph 2, although some insisted that it should be retained. A compromise must be found. The solution might be to retain paragraph 2, but to introduce a provision to the effect that application of the Uniform Law could only excluded by an express stipulation of the parties to the contract and to include the addition proposed by the Spanish delegation. He therefore suggested that paragraph 2 of article 2 should be referred back to the Working Group for redrafting, taking into account the suggestions of the observer for the Hague Conference and the proposals made by the representatives of the United Kingdom and Spain.

It was so decided

Article 3

Mr. HONNOLD (Secretary of the Commission) said that the Working Group on Prescription had approached the problem of the definition of the international sale of goods from the same angle as the Working Group on Sales, confining itself to certain drafting amendments. The Working Group on Prescription had had to decide for example whether the Uniform Law should retain all the criteria for the international sale of goods specified in ULIS. The Working Group had decided