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

to simplify those criteria by establishing a basic criterion, namely the fact that the seller and the buyer had their places of business in different States. The criterion of international carriage of the goods had been rejected for the reasons explained in paragraph 4 of the commentary on article 3.

Such a simplification also met the wishes of some members who were anxious that the Uniform Law should apply to transactions in which carriage of goods preceded the conclusion of the contract.

The CHAIRMAN invited the members of the Commission to consider article 3 paragraph by paragraph.

Mr. POLLARD (Guyana) recalled that during the discussion of the UNCITRAL report on its fourth session by the Sixth Committee, his delegation had already stated that the definition of the international sale of goods should be the same in both uniform laws. Despite what the Secretary of the Commission had said, he did not think that the Working Group on Prescription had adhered closely to the solution adopted by the Working Group on Sales. In the latter's report (A/CN.9/62), there was a provision (paragraph 2 of article 1) which should also appear in article 3 of the draft Convention on Prescription immediately after paragraph 1, to ensure uniformity of the definition. His delegation would like to know why there were such discrepancies in the texts drafted by the two Working Groups.

Mr. HONNOLD (Secretary of the Commission), replying to the representative of Guyana, said that the Working Group on Prescription and the Working Group on Sales had both worked towards more objective criteria for determining the place of business of the parties. The phrase at the end of paragraph 2 of article 3 of the draft Convention on Prescription ("having regard to the circumstances known to... of the contract") had its counterpart in article 1 of the revised Uniform Law on the International Sale of Goods (A/CN.9/62/Add.2). The latter text appeared between brackets to indicate that the final wording had not yet been decided. In any case, it could be stated that the two Working Groups had worked along the same lines, even though they had not adopted identical formulae.

Mr. POLLARD (Guyana) said that he was not convinced by the explanations given by the Secretary of the Commission because the wording at the end of paragraph 2 of article 3 of the draft Convention on Prescription and at the end of subparagraph (a) of article 4 of the revised Uniform Law on the International Sale of Goods was identical.

Mr. HONNOLD (Secretary of the Commission) said that the discrepancies between the two texts could no doubt be explained by a time factor. When it drew up the definitive text of the draft Convention, the Working Group on Prescription had not seen the latest revised text of ULIS, which dated from January 1972.

Mr. LEMONTEY (France) observed that the Commission had before it three definitions of the international sale of goods. One was contained in a text which would become an instrument of substantive law, that of the 1964 ULIS, while the other two were drafts prepared by the Working Group on Sales and the Working Group on Prescription respectively. Ideally, his delegation would have liked the definition of ULIS to be reproduced word for word in the draft instrument on prescription, but it recognized that that was not possible.

There remained, therefore, the two proposals from the Working Groups. That of the Working Group on Prescription was more general, since the only criterion laid down was that the parties should have their places of business in different States. That of the Working Group on Sales introduced other factors. It was hardly acceptable for the two drafts to contain different definitions of the international sale of goods. He therefore proposed that the draft instrument on prescription should reproduce the latest text of the definition adopted by the Working Group on Sales, with the proviso that the provision contained in article 33, paragraph (a) should be adopted and even extended to States which had not yet acceded to the 1964 ULIS.

Furthermore, as it was probable that the Convention on Prescription would enter into force before the revised Uniform Law on the sale of goods, he would prefer the Convention to contain a revision clause under which its definition of the international sale of goods would be automatically adjusted to correspond to that of the future revised ULIS.

Mr. ROGNLIEN (Norway) pointed out that it was difficult to ensure that the definition of the international sale of goods contained in the draft Convention on Prescription corresponded to the revised ULIS since that text was still being drafted and the Convention on Prescription would very probably be adopted before the revised ULIS. That difficulty could be overcome by providing a revision clause, as the representative of France had proposed, or better still, by extending the scope of article 33, paragraph (a) to cover the new definition which might be contained in the final text of the revised ULIS.

In any event, the Working Group on Prescription had felt that the identity of purpose of the two texts was not such as to call for absolute uniformity. It had envisaged the draft Convention as a separate instrument, which would, of course, be part of a single system but would not require a totally unified terminology.

Moreover the only difference remaining between the two texts was minimal. The Working Group might have repeated the text decided upon by the Working Group on Sales word for word, but it had felt that would unncessarily complicate the definition and position of the parties. The Working Group had therefore adopted the main criterion of places of business in different States, without the small exception adopted by the Working Group on Sales in respect to what appears from the contract. Indeed, in respect of prescription, the need for full certainty at the time of the conclusion of the contract might not be of immediate concern to the parties; it only became important at the time of action in the event of a dispute. The parties would however always have the possibility of having full certainty by mutually disclosing their places of business.

For his part, he felt the simple and large definition in the draft Convention was adequate. However, to satisfy those who had expressed misgivings on that point, it would be desirable to extend the derogation permitted under article 33, paragraph (a) to cover the definition which would be contained in the revised text of ULIS.

Mr. LOEWE (Austria) pointed out that, if the Convention on Prescription was to be concluded in the near future, it would be impossible to take into account the revised text of ULIS, which was still being worked out. The Working Group on Prescription had been right to widen the scope of applicability of the draft as much as possible; it was not as wide as the 1964 ULIS since sales to consumers were excluded, but it was wider than the revised text of ULIS, since paragraph 2 of

article 1 of that text had not been repeated in the draft. It would not be desirable to incorporate it at the present stage. Indeed, the attempts to make the revised text of ULIS more precise were justified by the desire to avoid a situation where a party unknowingly became subject to the provisions of the Uniform Law and forfeited his rights because he had not complied with that Law (because, for example, he had been late in making a claim which should have been made upon delivery). The case of prescription was completely different in that respect.

He proposed, therefore, that the rules drawn up by the Working Group should be maintained as they were. He did not see the need for burdening article 33 with a revision clause, since such revision would in any case be made when the need was felt, especially as UNCITRAL would undoubtedly be anxious to ensure the continuing adjustment of an international instrument drawn up under its auspices.

Mr. MATEUCCI (International Institute for the Unification of Private Law), speaking at the invitation of the Chairman, said he shared the opinions expressed by the representative of France, except that he did not consider it desirable to insert a revision clause in the draft a priori. He would prefer that the scope of article 33, paragraph (a) should be extended.

In the opinion of UNIDROIT, the best solution would be to synchronize all the efforts to unify international trade law and to submit all the draft Conventions to a single diplomatic conference; it would thus be possible to arrive at a single definition of the international sale of goods. It was not essential to complete the draft on prescription at all costs before the revision of ULIS. A delay of one or two years would not have disastrous consequences.

Mr. DEI-ANANG (Ghana) said he shared the concern expressed by the representative of Guyana concerning the discrepancies, however small, between the definitions of the international sale of goods, since his delegation considered the draft Convention on Prescription to be an essential complement of ULIS. In fact, the problem was less one of definition than of scope of applicability. It could be solved by including in the draft Convention a provision making the Convention applicable to all contracts covered by the definition which would be given in the Uniform Law on the International Sale of Goods.

To link the two texts in that way would be to delay the adoption of the draft on prescription, but, like the observer for UNIDROIT, he did not feel that was a

matter for concern. The important thing was to avoid a multiplicity of definitions. With that in mind, his delegation proposed the postponement of all decisions on the definition of the international sale of goods for the purposes of the draft Convention.

Mr. FARENSWORTH (United States of America) was also apprehensive that two different definitions might be adopted. It seemed to him that the instruments currently being drawn up would more easily gain the support of Governments and would be more widely utilized by the parties if the scope of their applicability was the same.

Mr. ELLICOTT (Australia) said he shared the opinion of the United States representative that the text of the draft Convention should remain as close as possible to that of ULIS. However, a comparison of article 1, paragraph 1 of the latter text with the definition given in article 3, paragraph 1, of the draft Convention revealed that the first contained elements which were not in the second. Paragraph 1 (b) of ULIS could hardly be repeated, since it referred to the rules of private international law whose application was excluded under the terms of article 2, paragraph 1 of the draft Convention. It was, however, possible to retain one of the elements in paragraph 1 (a) of ULIS by stipulating in article 3, paragraph 1, of the draft Convention that a contract for a sale of goods would be considered international if the seller and buyer had their places of business in different contracting States. That was his delegation's proposal (A/CN.9/V/CRP.3). Insertion of the word "contracting" would, admittedly, restrict scope of the draft Convention, but it was easier, if the need arose, to extend the scope of an instrument than to restrict it. The addition would have the advantage of ensuring greater uniformity between the two texts. It also met the practical goal of eliminating the difficulties which businessmen from non-Contracting States might encounter if they believed that their obligations were extinguished under the law of their own country but remained in force under the Uniform Law on Prescription. However, if the proposed change was not acceptable to members of the Commission, his delegation would be willing to withdraw its proposal.

Mr. GUEST (United Kingdom) observed that all members of the Commission were troubled by the noticeable discrepancies between the two definitions. Being a member of both Working Groups, he had become aware that the revision of ULIS was

a more difficult task than had been expected and could not be expected to yield concrete results for several years to come. In the circumstances, it would be very regrettable if the Commission postponed work on the definitive text of the draft Convention on Prescription. On the contrary, it was important that the Commission should soon produce some tangible and positive results or it would lose the confidence of the General Assembly.

Mr. FEDOROV (Union of Soviet Socialist Republics) indicated that the USSR representative to the Commission had only just arrived in New York. He requested the Chairman to reserve his right to make statements on matters already discussed by the Commission.

The CHAIRMAN said that the USSR representative would be given every opportunity to express the views of his Government.