96th meeting (12 April 1972)

/The first part of the meeting was taken up by the discussion of other matters/

Article 3 (continued)

Mr. GUEST (United Kingdom) said he agreed with the Austrian representative that the Commission should take a somewhat cautious approach to the question of adopting the tentative results of the Working Group on Sales (A/CN.9/62/Add.2) in preference to the formulation of article 3 of the draft Convention under consideration (A/CN.9/70, annex I). The Commission should look at the present article 3 and consider whether the article really reflected the appropriate sphere of application for a convention on limitation. The Commission should deal with article 3 on its own merits and make every effort to devise the most suitable formula for a convention on limitation.

Mr. CHAFIK (Egypt) said that his delegation tended to favour a single definition of the international sale of goods. It would be satisfied with the solution in article 3 (1); the Commission should not await the final decision of the Working Group on Sales, but should make every effort to produce a document reflecting its views as soon as possible.

Mr. OLIVENCIA (Spain) felt that the problem of the diversity of concepts of the international sale of goods was an extremely complex one. The Commission should harmonize the draft Convention on prescription with other work in progress, including the revision of the Uniform Law on the International Sale of Goods (ULIS). That would involve an unknown variable, since the revision had not yet been completed. Since it was extremely difficult to reconcile the different concepts, his delegation believed that the proposal made by the Austrian delegation at the preceding meeting was most useful and timely and that the Commission should accordingly try to draw up the broadest possible definition.

Mr. POLLARD (Guyana) asked whether the Working Group on Prescription intended the term "States" in article 3 (1) to include territories under the mandate or other authority of the State concerned. His delegation was fully aware of the difficulties to which the term could give rise, and for that very reason felt that it should be defined in the Convention.

Mr. ROGNLIEN (Norway) said that article 3 (1) had merely spoken of "different States". It had not specified what was meant by different States, and had left any further definition for the courts. However, it would be his understanding that Hong Kong, for example, was a different State from the United Kingdom for the purposes of the Convention.

Mr. MANTILLA-MOLINA (Mexico) suggested that a provisional definition of a contract of international sale might be included in article 3 (1) in an attempt to co-ordinate the definitions of sales presented by the Working Group on Prescription and the Working Group on Sales. The article could specify that a contract of sale of goods would be considered international as defined in ULIS and that, until ULIS came into force, the provisional definition would apply. Countries would be able to reserve their right to make that provisional definition permanent.

Mr. JENARD (Belgium) thought that it had been a mistake to change the definition in the original ULIS. Since the definition had been changed, the problem arose of whether a new element should be introduced into article 2 (1). A new provision in the Uniform Law on prescription would avoid having three defintions of international sale and would also help to remedy the excessively broad defintion of such sale based on the concept that the place of business of seller and buyer must be in different States.

Mr. SMIT (United States of America) said that, in the interests of making progress, the Commission should retain the definition of a contract of international sale which had been drafted by the Working Group on Prescription. It should be recalled that article 3 should be envisaged in conjunction with article 2. The concept of choice of law was a very broad one. The Australian delegation had understood that and its amendment (A/CN.9/V/CRP.3) would limit the definition of a contract of international sale given in the draft Convention. If the definition of a contract of international sale was too broad, the choice of law became even more important. The proposed revision of ULIS took those problems into account and lessened the scope of the definition.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) agreed with the United States representative that article 3, and particularly paragraph (1), could not be isolated from article 2. With regard to the sphere of application of the Convention, he agreed with those representatives who had stated that the

corresponding articles in ULIS should be used as a model. The Commission should remember that, if the sphere of application of the Convention was limited to States parties to the Convention, the question of choice of law would be prejudged. Before trying to define an international sale, the Commission should decide whether the Convention would apply only to States parties.

Mr. KAMAT (India) said that the draft Convention endeavoured to use the provisional definition by the Working Group on Sales existing at the time when the Convention had been drafted, in September 1971. Subsequently, however, some delegations at the third session of the Working Group on Sales had wanted to introduce different criteria for determining the location of the place of business. The Commission must first decide whether the definition in the draft Convention should be the same as in ULIS or whether it should be different because the character of the Convention was different from that of ULIS. He thought that the Uniform Law on prescription should be complementary to ULIS and should therefore contain the same definition. There might be some practical difficulties, but a uniform approach was needed to ensure the acceptability of the Convention on prescription.

Mr. GUEIROS (Brazil) said that, because of the differences between domestic laws and the lack of agreement regarding the terms "places of business" and "States", article 3 could perhaps be referred to the Working Group on Sales, which could then place the definition within the context of the revised ULIS.

Mr. COLOMBRES (Argentina) expressed agreement with the statement made by the representative of the United Kingdom at the preceding meeting. The Commission had a duty to present a complete draft Convention on prescription. The text of draft article 3 should be approved, since it reflected the work of the Working Group on Sales. The revision of ULIS would take five to ten years. It was imperative that the Commission should adopt the text of a definition, which would be a valid basis for future work.

Mr. SAM (Ghana) said that the Commission seemed to have reached a deadlock on the definition of international sales. He suggested that the Working Group on Prescription and the Working Group on Sales should meet jointly to agree on a definition. They could then report to a plenary meeting.

Mr. ROGNLIEN (Norway) said that all members of the Commission agreed that a definition should be evolved during the current session. Although it was easy to say that the same definition should be given in the Uniform Law on prescription and in ULIS, such a result was in fact difficult to achieve. The majority of the Commission appeared to think that the ULIS definitions could not be used for articles 2 and 3 of the Convention because of the difficulties of reconciling the civil law and the common law approach to the matters of conflict of laws dealt with in those articles. The Commission should therefore attempt to reach an independent definition but States ratifying ULIS should be allowed to apply the ULIS definitions. The States parties to each instrument would thus have a choice of definition and that flexible approach would satisfy States which felt that a definition was absolutely essential to the Convention. The definition in the Convention on prescription would not be dependent on the ULIS definition, which might not become final for another ten years.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that he did not insist that the sphere of application of the Convention on prescription should be the same as that of the revised ULIS; it could be broader. Like all the other delegations, his delegation would strive to agree on the draft Convention. However, article 2 (1) as it stood was not satisfactory, because it did not reflect the position and objectives of all delegations. It might be better for article 2 (1) to state that, unless otherwise provided therein, the Law would apply in all cases where legal proceedings were instituted in the territory of a State that was a party to the Convention. The application of the Convention would thus not be limited to States parties but would also be extended to cases where legal proceedings were instituted in a contracting State, even if the place of business of one of the parties to the dispute was not in a State party to the Convention.

Mr. LASALVIA (Chile) pointed out that no definition of a contract of international sale of goods would meet with the approval of all members; furthermore, it must be remembered that many countries were not even represented in the Commission. Thus, any definition would have to be the result of a compromise. So far, the Commission had been engaged in more of a formal than a substantive discussion on the paragraph in question, having concerned itself

mainly with the problem of whether or not the text was in conformity with the definition agreed by the Working Group on Sales. He therefore suggested that for the time being, the Commission should approve a compromise version and recommend to the Working Group on Sales that it should adopt the same definition. Such a procedure would have the advantage of allowing the Commission to advance in its work and of helping to solve the problem of form, since it was quite likely that the Working Group on Sales would accept the definition recommended to it.

Mr. NESTOR (Romania) said his delegation supported the text of article 3 (1) proposed by the Working Group on Prescription. It must be remembered that the juridical concept of prescription was quite different from that of an international contract of sale as such. It was therefore quite possible to accept a definition for the draft Convention on prescription which was different from one adopted for the Uniform Law on sales. Since the draft Convention on prescription would be discussed again, either at an international conference convened for the purpose or in the Sixth Committee, he suggested that the Commission should leave the text as it stood. The USSR proposal for a reformulation of article 2 (1) seemed to be closer to his delegation's views. However, it would reserve its position on the matter until the written text was available.

Mr. GUEIROS (Brazil) said his delegation was in favour of leaving the text of article 3 as it appeared in the draft prepared by the Working Group on Prescription. It would seem that the only paragraph which presented difficulties for the Commission was the first one; since the Commission worked on the basis of consensus, he suggested that debate on that paragraph should be suspended. That did not mean, however, that his delegation was not in favour of the text as it stood.

Mr. SMIT (United States of America) said it seemed that, if article 3 (1) was considered in conjunction with article 2 (1), it could lead to results which might be categorized as imperialistic. For example, if the seller had his place of business in State A, which was not a party to the Convention, the buyer had his place of business in State B, which was not a party to the

Convention either, and litigation was brought in State C, which was a party to the Convention, then the rules of the Uniform Law would apply even if there was no relationship between country C and the parties to the dispute. That was why his delegation preferred the definition formulated by the Working Group on Sales (A/CN.9/62/Add.2). It had been suggested that problems might arise because the civil law countries would consider prescription a matter of substance and the common law countries would consider it a matter of form. However, the United States had a practice whereby, if an action was brought in another country, the prescription law of that country could be applied. However, if the difference in approach between civil law and common law countries made reliance on the formulation of the Working Group on Sales inappropriate, it should be eliminated.

He therefore suggested that article 3 (1) should be maintained, but that article 3 (2) should be replaced by the formulation in article 1, paragraph 1 (a), of the revised text of ULIS prepared by the Working Group on Sales (A/CN.9/62/Add.2). His amendment would have the same effect as the Australian amendment (A/CN.9/V/CRP.3) but would provide for greater symmetry of style.

Mr. GUEST (United Kingdom) said it would appear that the discussion had progressed to the point where certain issues could be isolated and referred to the Working Group on Prescription, which could meet later in the day. The Working Group could consider the various suggestions and proposals made, with a view to finding a solution during the current session.

Mr. SZASZ (Hungary) supported the United Kingdom suggestion. Article 3 (1), when considered in conjunction with article 2 (1), determined the sphere of application of the draft Convention. Those articles should be reformulated or combined and the USSR proposal should also be considered.

Mr. LOEWE (Austria) said he had no objection to the United Kingdom suggestion that the basic questions under discussion should be referred to the Working Group. He wished to stress that the options open to the Commission were very important and would have a bearing on the future Convention itself. It would be more appropriate to settle the question of limiting the application of the Convention to commercial relations between parties in contracting States, as

suggested by Australia, in the provision concerning the territorial sphere of application rather than in the definition of an international contract of sale.

His delegation did not agree with such a limitation. If the Australian proposal was adopted, the Convention would be even more restricted than the revised text of ULIS which provided two criteria for the application of the law, namely, when the States were both contracting States or when the rules of private international law led to the application of the law of a contracting State. If the new text of ULIS came into force as envisaged, the second criterion would be applied in the majority of cases. It would be difficult, however, to include that criterion in the text on prescription, since in many countries prescription did not in principle follow the same lines as the law of contracts. There would always be a lag between the law applicable to the sale as such and the law on prescription. The solution adopted in many conventions on transport, whereby it was sufficient for one of the States concerned to be a contracting State, could be applied in the draft Convention on prescription. If the sphere of application of the draft Convention was to be limited, he hoped it would be specified that only one of the States concerned had to be a contracting State.

Mr. POLLARD (Guyana) supported the United Kingdom suggestion that the issues raised should be referred to the Working Group. He proposed that the Working Group should also consider an additional article* which would be aimed at preventing legal absurdities that might arise from the differences between the Uniform Law on sales and the draft Convention on prescription. The new article would preclude parties from disputing the nature of a transaction by reference to relevant provisions in any other convention relating to an international sale of goods which might be in force for the parties concerned at the time legal proceedings were initiated.

Mr. KAMAT (India) pointed out that the issues raised by the Austrian representative concerned the whole question of the exclusion of private international law. His delegation could not take a position on the limitation of the Convention to parties in contracting States unless that question was also clarified.

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* Subsequently circulated as document A/CN.9/V/CRP.8.

The CHAIRMAN said that, if he heard no objection, he would take it that the Commission adopted the United Kingdom suggestion to refer the issues raised in connexion with article 3 (1) and its relationship with article 2 to the Working Group on Prescription. The Working Group should take into consideration the views and suggestions made at the current meeting. It would be helpful if delegations that were not members of the Working Group also participated in its deliberations.

It was so decided.

Mr. GUEIROS (Brazil) said that the wording of article 3 (2), (3) and (4) was entirely acceptable to his delegation.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) requested clarification of the words "nationality" and "civil or commercial character" in article 3 (4).

The CHAIRMAN said that his understanding was that the Law would apply even if the parties to a contract were of the same nationality, provided that the other requirements of the article were met. The reference to the civil or commercial character of the parties or of the contract was designed to take account of cases where different systems, such as a civil code and a commercial code, were applicable to the parties.

Mr. ROGNLIEN (Norway) said that the provisions of article 3 (4) had been taken from ULIS and it was open to question whether they were necessary in the context of prescription. Their main purpose was the avoidance of discrimination between citizens of different States or parties covered by different systems. They were limited by article 5 (a) to the extent that it excluded a non-commercial buyer from the scope of the Law.

Mr. KAMAT (India) observed that the Working Group on Prescription had apparently thought it proper to base the text of article 3 (2) (3) and (4) on texts formulated by the Working Group on Sales. He was therefore at a loss to understand why the Working Group on Prescription had not also adopted the wording in article 1, paragraph 2, of the latest version of revised ULIS (A/CN.9/62/Add.2).

Mr. ROGNLIEN (Norway), replying to the representative of India, said that the Working Group on Prescription had felt that the inclusion of the rule of article 2 (a) of revised ULIS would complicate and also narrow the definition in the Law. It was important for parties to know, at the stage of the conclusion of a contract, what law would apply to the contract of sale - because there were certain things which they had to do at that stage. In the context of prescription, however, it was not so important at the stage of the conclusion of the contract for parties to know what laws would apply in respect of future claims; by the time they engaged in litigation they would certainly know where the opposing party had its place of business. The omission of the provisions of article 2 (a) of revised ULIS from the draft Convention might widen the scope of the latter somewhat, but only to a limited extent within the contract of the parties.

Mr. KAMAT (India) observed that the remarks of the representative of Norway were directed to the earlier version of revised ULIS prepared in 1970 by the Working Group on Sales - a version which was subjective. The Working Group on Sales had subsequently prepared a more objective version of the text in question and its adoption by the Working Group on Prescription would have the advantage of harmonizing ULIS and the draft Convention and would facilitate the displacement of municipal law by a uniform law. The latest version of revised ULIS (A/CN.9/62/Add.2) avoided the application of the uniform law to a purely national transaction.

Mr. MICHIDA (Japan) drew attention to paragraph 9 of the commentary on article 3 (A/CN.9/70/Add.1) which set forth two reasons why the Working Group on Prescription had not adopted the text of article 2 (a) of revised ULIS. The second reason stated in paragraph 9 was still valid with regard to the inclusion of the later text specified by the Indian representative. Nevertheless, he considered it appropriate that the Working Group should examine the point made by that representative.

Mr. JENARD (Belgium) agreed with the representative of India. The latest definition by the Working Group on Sales was a new element because it had been adopted after the meetings of the Working Group on Prescription. The Commission should include the issue among those to be considered by the Working Group.

The CHAIRMAN said that the issue raised by the representative of India would be referred to the Working Group.

Article 4

Mr. POLLARD (Guyana) drew attention to the difference between the formulation of article 4 (1) of the draft Convention and the corresponding provisions of revised ULIS.

Mr. HONNOLD (Secretary of the Commission) said that the problem was one of the co-ordination of the texts prepared by the two Working Groups. The language prepared by the Working Group on Sales had been carried from article 6 of the earlier version of revised ULIS to article 3, paragraph 1, of the latest version of revised ULIS, without reconsideration of its substance. Accordingly, the latest version (A/CN.9/62/Add.2) did not represent a decision by the Working Group on Sales to accept or reject any particular wording. The Working Group on Prescription had dealt with the same issue in article 4 (1) of the draft Convention and the difference of language resulted from its attempt to clarify the draft. The Commission might therefore wish to consider article 4 (1) in conjunction with article 3, paragraph 1, of the latest version of revised ULIS. Article 4 (2) of the draft Convention and article 3, paragraph 2, of the latest version of revised ULIS were identical, apart from an immaterial drafting change, and had been taken from article 6 of the 1964 ULIS.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said that his delegation was not inclined to defend or prefer either formulation. He did believe, however, that the formulations used in ULIS and the draft Convention should be identical.

Mr. POLLARD (Guyana) endorsed the views of the USSR representative.

Mr. LEMONTEY (France) agreed with the USSR representative. It would prejudice uniform interpretation of the two texts if they used different language. He himself had no preference for either text.

Mr. AKINTAN (Nigeria) said that he was in some doubt as to the appropriateness of the words "the preponderant" in article 4 (1) and proposed that they should be replaced by "any".

Mr. ROGNLIEN (Norway) agreed that the wording of article 4 (1) and that of ULIS should be exactly the same. The issue should be referred to the Working Group.

The amendment proposed by the Nigerian representative posed a difficulty in that a seller usually assumed certain duties in connexion with delivery, often in the form of some smaller service such as maintenance. The Commission would go too far if it excluded from the Law all contracts in which a seller had a duty beyond the delivery of goods. The Nigerian proposal would involve the exclusion from the Law of too great a range of contracts of that type.

Mr. GUEST (United Kingdom) said that the origin of article 3, paragraph 1, of the latest version of revised ULIS had been an idea put forward by the USSR representative at the penultimate meeting of the Working Group on Sales. One difficulty which arose from it was that a seller in international sales of goods (especially CIF contracts) undertook substantial obligations in addition to delivery - for example, insurance. He had the impression that neither that article nor article 4 (1) of the draft Convention were entirely satisfactory to certain delegations and it would be helpful if they were to inform the Working Group of any alternative proposals they might have.

Mr. LASALVIA (Chile) said that, in the Spanish version of article 4 (2), the word "entrega", which had no meaning in the Chilean system of law, should be replaced by some word such as "aprovisionamiento" or "ventas a futuro".

Mr. MANTILLA-MOLINA (Mexico) said that he agreed with previous speakers that the language of the draft Convention and that of ULIS should conform.

He could not support the Nigerian proposal for the reasons already explained relating to accessory obligations. He agreed with the Chilean representative regarding the use of the word "entrega". The term "contratos de compravenda" might be preferable. He would pursue the matter with the Working Group.

He proposed that, for the sake of logical sequence, the text of the draft Convention should be rearranged so that article 4 (1) was incorporated into article 5 and article 4 (2) was either incorporated into article 3 or left as a separate article 4.

Mr. ELLICOTT (Australia) proposed that the word "essential" should be omitted from article 4 (2) because it added nothing to the text and its interpretation would in any case be open to dispute. He further proposed the insertion of the word "raw" before the words "materials necessary". On many occasions, contracts for the supply of goods to be manufactured or produced involved the delivery of dies and patterns. His amendment would ensure that the text referred only to basic raw materials.