98th meeting (13 April 1972)

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

Article 6

Mr. HONNOLD (Secretary of the Commission) said that, whereas the Commission's consideration of previous articles had involved questions of the co-ordination of the texts prepared by the Working Groups, article 6 posed a problem of a different kind. The Uniform Law on the International Sale of Goods (ULIS) contained no provision corresponding to that in article 6 in the draft Convention. That was not because of any difference of view but because the Working Group on Prescription had found that special problems arose in connexion with the prescription of certain kinds of claims. Article 5 excluded some types of sales on the basis of the character of the transaction or of the goods; article 6 excluded certain claims arising in connexion with the transactions to be governed by the Law. Assuming, by way of example, that an international sale took place between S, the seller, and B, the buyer, claims arising from a breach of contract would be subject to the Law. If, however, the sale involved a machine which exploded and killed B, article 6 (a) would exclude from the scope of the Convention any claim based on the death of B. The view underlying article 6 was that prescription under the Convention was directed to commercial claims and that it would be inappropriate to direct it also to claims based on death or injury. The words "or other person" had been bracketed in article 6 (a) because the Working Group had been divided on the question presented by the following facts: B brought a claim against S as the result of a pecuniary loss resulting from a claim against B as a result of his having resold, for example, a machine to a third party (T) who suffered physical injury as a result of the defect. Should the claim by B against S be excluded from the law? In that connexion, he drew attention to paragraph 2 of the commentary on article 6 (A/CN.9/70/Add.1). The substance of the question was whether all claims by a buyer against a seller, based on physical injury, should be excluded from the Law,

regardless of whether such claims resulted from injury to the buyer himself or to a third party to whom he subsequently sold the goods in question.

Mr. OLIVENCIA (Spain) drew attention to amendments which his delegation had proposed to article 6 (A/CN.9/V/CRP.2).

His delegation considered that the question of liability for the death or physical injury of the buyer or any other person should be excluded from the sphere of application of the Law. The social and legal basis of the two kinds of claim under discussion were quite different. The draft Convention was concerned with rights arising from contracts. The relation of the object causing the damage with the contract should therefore be made clear by the inclusion of a reference to damage caused by the object sold.

Mr. ROGNLIEN (Norway) said that his delegation, too, felt that claims based upon liability for death or injury should be excluded from the Law.

Mr. LOEWE (Austria) said that his delegation differed from previous speakers in wishing to delete article 6 (a). The rules on prescription prevailing in individual municipal régimes were quite complicated and retention of article 6 (a) would subject the various types of claims arising from an international contract to different régimes. Article 6 (a) concerned not only claims for physical injury but other types of claims such as actions brought by the heirs of decedents. If article 6 (a) was deleted, article 9 should specify a starting-point for the period of prescription relating to claims based on liability for death or injury. A further consideration was that, if claims arising from physical injury were excluded from the draft Convention, the prescriptive period in respect of damages would be governed by municipal law and thus be different from that relating to the other obligations of the sellers governed by the Convention. It would scarcely be possible to make municipal law accord in that respect with the draft Convention. From the human point of view it was important that the Convention should also take into account physical injury to the human person.

Mr. GUEST (United Kingdom) said that his delegation had originally shared the views of the Austrian representative but had eventually concluded from discussions in the Working Group that it would be wiser to exclude from the Convention liability for all damage or physical injury caused by goods sold.

In the case of the inclusion in goods sold of harmful substances whose effects were detectable only in the long term - such as thalidomide or carcinogenic substances - the social considerations were quite different from those arising in connexion with defects causing loss to the buyer. The question of the prescriptive period in respect of damages caused by such substances should be left to municipal law.

Mr. MATTEUCCI (UNIDROIT) said that, if the reason for the exclusion of death or physical injury was purely juridical, that should be stated clearly in the draft Convention. In the case of death resulting from a defect in the goods, claims must be based on the contract. If the text was referring to death due to negligence, all other claims based on extra-contractual liability must also be excluded. As to the humanitarian grounds invoked by the Austrian representative in favour of the inclusion of death or physical injury, it could equally be argued that the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air should be amended because it treated passengers and goods alike in the context of delays.

Mr. RECZEI (Hungary) thought that article 6 (a) should be retained. He agreed with the Spanish representative regarding the need to draft the text in such a way as to link the damage with the goods delivered as opposed to referring only to the damage or injury.

Mr. JENARD (Belgium) said that his delegation considered that article 6 (a) should be retained. It had joined the French delegation in submitting an amendment (A/CN.9/V/CRP.4).

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer to the Working Group for final drafting article 6 (a) and the proposals relating thereto.

It was so decided.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) felt that article 6 (e) was not clear and asked what kind of documents were meant.

Mr. NESTOR (Romania) said that under Romanian law there was a provision whereby the State Notary Office was empowered to issue documents on which direct enforcement or execution could be obtained. It was in that sense that his delegation understood article 6 (e), which should be retained in order to cover that kind of quite common situation.

Mr. ROGNLIEN (Norway) said that article 6 (e) referred to documents which were titres exécutoires. For example, the document might record a compromise or settlement of a dispute out of court. In many legal systems, such a settlement would have the same force as a judgement and could be enforced directly.

Mr. SINGH (India) supported the views expressed by the Norwegian representative.

Mr. COLOMBRES (Argentina) agreed with the representative of the Soviet Union that article 6 (e) was not absolutely clear. In the view of his delegation, article 6 (e) was a general provision which should encompass article 6 (f). The fact that bills of exchange, cheques and promissory notes were specifically mentioned in a separate paragraph would obviously lead to confusion and create uncertainty about the kind of document referred to in article 6 (e). In the interests of clarity, article 6 (f) should be deleted.

Mr. OGUNDERE (Nigeria) said that his delegation had some difficulty with regard to article 6 (e). Article 1 (3) (f) had defined "legal proceedings" as including judicial, administrative and arbitral proceedings and the settlement out of court referred to by the Norwegian representative as falling under article 6 (e) would, in the opinion of his delegation, fall under article 6 (d).

Mr. GUEST (United Kingdom) said that the purpose of the insertion of article 6 (e) was to cover the titre exécutoire, which was not necessarily a judgement or award in legal proceedings. With regard to the comment of the Argentine representative, in the United Kingdom a bill of exchange was not a document on which direct enforcement could be obtained. For those reasons, it would be better to maintain article 6 (e) and article 6 (f) as they stood.

Mr. LEMONTEY (France) felt that article 6 (e) should be maintained. In the view of his delegation, documents on which direct enforcement or execution could be obtained were quite distinct from the commercial documents mentioned in article 6 (f) and article 6 (g). For example, parties to an agreement could have a notarized contract which could be enforced in the same way as a judgement. Auction sales and closure of mortgages could have the same character. Therefore, the maintenance of article 6 (e) would appear to be justified, although instances in which it could be invoked might be rare in international trade.

Mr. LOEWE (Austria) said he could understand that article 6 (e) seemed to some delegations to be superfluous. However, in Austria more than 50 per cent of legal actions were settled before a judge or arbitrator without any formal judgement or award made in legal proceedings. The document referred to in article 6 (e) was simply one in which the judge or arbitrator noted the decision reached by the parties concerned in a dispute and on which enforcement could be obtained. Under the Austrian legal system, the provision was of considerable importance and it was therefore essential to decide on the exclusion of rights arising from that kind of situation. He appealed to the Commission to maintain article 6 (e) as it stood; otherwise countries with legal systems similar to that of Austria would find it difficult to accede to the Convention.

Mr. CHAFIK (Egypt) said that his delegation favoured maintaining article 6 (e) for the reasons already adduced. Under the Egyptian legal system, in situations such as debts acknowledged in writing, a creditor might be able to obtain direct enforcement through an ordonnance sur requête. Such a document was a titre exécutoire and fell within the acope of article 6 (e).

Mr. LASALVIA (Chile) supported the appeal made by the Austrian representative. In Chile, títulos ejecutivos, such as those issued in cases of debt, would fall under article 6 (e).

With regard to article 6 (f), he proposed the insertion of the words "or any negotiable instrument" after "promissory note". Since there was a steady proliferation of new kinds of credit documents, his delegation felt that article 6 (f) should encompass all kinds of negotiable instruments. Moreover, article 5 had used the term "negotiable instruments" and it seemed only consistent

to use the same expression in article 6. In that regard, his delegation wished to appeal to the Working Groups to make every effort to use the same terms when drafting their documents.

Mr. MATTEUCCI (UNIDROIT) felt that it might be dangerous to extend the exclusion to all negotiable instruments. For example, article 6 (f) might then be construed as covering bills of lading which might be negotiable and be transferred to other parties who would be able to claim the goods in question. Transactions in maritime trade currently covered by special prescription periods might well be affected. In his view, the insertion of the words "or any negotiable instruments" in article 6 (f) would have the effect of jeopardizing many transactions.

Mr. MICHIDA (Japan) supported the view expressed by the representative of UNIDROIT. In Japan the term "negotiable instrument" was not precisely defined and its inclusion in article 6 (f) could create considerable difficulties. Bills of lading or trust receipts might be considered as falling within the scope of the definition. His delegation was therefore unable to accept the Chilean proposal.

Mr. LASALVIA (Chile) felt that it was inconsistent that some delegations which accepted the term "negotiable instruments" in article 5 objected to it in article 6. Bills of lading were a special case and a special study on the subject was to be submitted to the Commission. In the view of his delegation, all negotiable instruments should have been included in article 6 (f) for the sake of consistency.

Mr. JAKUBOWSKI (Poland) requested a clarification on article 6 (g). If it meant that dealings between the buyer and the bank were excluded from the scope of application of the Convention, his delegation would have no difficulties. However, if the provision related to settlement of payment between the buyer and seller by means of a letter of credit, it would be difficult to exclude that

frequently used mode of payment from the sphere of application of the Convention. Perhaps it would be possible to devise a more precise formulation.

Mr. HONNOLD (Secretary of the Commission) drew attention to the words "claims based upon" in the opening line of article 6. If a bank issued a letter of credit and the claim was directed to the bank "based upon" the letter of credit, that claim would be excluded. On the other hand, if the buyer had failed to establish a letter of credit, a claim against the buyer for that failure, based upon breach of contract, would not be excluded by this provision.

The CHAIRMAN suggested that a more precise formulation should be evolved by the Working Group.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) agreed that the Working Group should be asked to study article 6 (g) again. Since the draft Convention was intended to regulate relations between seller and buyer, without involving banks, he wondered what direct claims could arise from a documentary letter of credit to which article 6 (g) referred. Perhaps it might be deleted altogether as it was not directly pertinent to the draft Convention.

Mr. OGUNDERE (Nigeria) agreed that the Working Group should reconsider article 6 (g), although he found the explanation given in the commentary by the Secretariat (A/CN.9/70/Add.1) quite adequate.

The CHAIRMAN noted that article 6 (g) would be referred back to the Working Group.

Article 7

Mr. HONNOLD (Secretary of the Commission) explained that the text of article 7 had originally been drafted in August 1970 at the second session of the Working Group on Prescription and had been adopted by the Working Group on Sales in December 1970. There was only a stylistic difference between the text adopted by the two Working Groups. The Working Group on Sales had placed square brackets around the last five words in the article ("in its interpretation and application") because of a question of style as to whether the language was repetitious.