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.

Mr. ROGNLIEN (Norway) said that many delegations in the Working Group on Prescription had also considered the last five words in article 7 repetitive but had concluded that no real purpose would be served by deleting them.

Mr. WARIOBA (United Republic of Tanzania) said that article 7 in its existing formulation was somewhat redundant, since uniformity of application and interpretation was the whole purpose of all laws. In national legal systems a body of case law usually evolved, which could be drawn upon for interpretation of laws. However, the framework of definitions within the draft Convention was very limited, since most paragraphs represented a compromise between the concepts in different legal systems. A domestic lawyer who had no access to those different systems would be unable to draw on the experience of other countries if the Uniform Law itself did not contain any guidelines similar to the article on interpretation in the Vienna Convention on the Law of Treaties.

Mr. POLLARD (Guyana) said that, in the absence of an integrated judicial system, it was impossible to have uniform interpretation and application of a Convention such as the one on prescription. There did, however, exist similar conventions on international transactions, such as the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air. A practice had evolved of drawing upon the judgements pronounced in other legal systems in interpreting and applying such conventions. That practice had been quite successful to date. He therefore supported the text of article 7 as it stood.

Article 8

Mr. HONNOLD (Secretary of the Commission) said that the question of the limitation period had been thoroughly investigated by the Working Group on Prescription and a questionnaire on the matter had been sent to Governments and interested international organizations. The suggested periods of limitation had ranged from five years to two years. The majority of Governments had expressed a preference for a limitation period of five years or three years and the Working Group had decided that four years would be an acceptable compromise. In deciding upon a limitation period, the Working Group had not only attempted to find a

period corresponding to the wishes of Governments but had also taken account of other provisions in the Uniform Law which affected the running of the limitation period.

Mr. LOEWE (Austria) said that his delegation would prefer a three-year limitation period and could consider a five-year limitation period. In Austria there was a whole range of limitation periods, but none of them was of four years, so that application of the draft Convention would complicate the application of Austrian laws. He had submitted an amendment to article 9 (A/CN.9/V/CRP.1) which dealt with the limitation period for claims arising from lack of conformity of the goods. If his amendment to article 9 was accepted, a second sentence would have to be added to article 8.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation would also prefer a limitation period of three years.

Mr. DEI-ANANG (Ghana) said his delegation had originally been in favour of a five-year limitation period, but after reading the commentary on the draft Convention (A/CN.9/70/Add.1) he could support a limitation period of four years.

Mr. COLOMBRES (Argentina) said that the Working Group had evaluated the various proposals on the limitation period very carefully before coming to the conclusion that a four-year period would be an acceptable compromise.

Mr. OLIVENCIA (Spain) said that the advantages of a limitation period shorter than four years outweighed the disadvantages. A longer period could be justified by the geographical, legal and linguistic differences between countries but in the existing state of international trade those differences were not as important as the advantages resulting from a reduction in the limitation period proposed in article 8. The legal security enjoyed by businessmen against risks such as lack of solvency, which could result from extended delays in the resolution of disputed claims, would be increased if the limitation period was less than four years.

Mr. CHAFIK (Egypt) said that the limitation period of four years had been chosen in the interest of developing countries, where businessmen had not the same facilities as in developed countries and needed time to find out and assert their exact rights.

Mr. MUDHO (Kenya) agreed with the representative of Egypt. In his country the period of limitation was longer than four years but he could accept the compromise solution in article 8.

Mr. JENARD (Belgium) said that his delegation would prefer a limitation period of three years but could agree to a period of four years, in the interests of achieving a consensus.

Mr. RECZEI (Hungary) said that a limitation period of four years was a purely mathematical compromise between five and three years, which his delegation could accept.

Mr. OGUNDERE (Nigeria) pointed out that all national legislations had different periods of limitation. He could, however, accept the compromise period of four years.

The CHAIRMAN said that there appeared to be agreement regarding article 8, subject to consequential changes if the Austrian amendment to article 9 was adopted.

Article 9

Mr. OLIVENCIA (Spain) said that, as the Working Group had endeavoured to solve all the practical problems connected with the commencement of the limitation period, the resulting text was not very clear. Furthermore, the draft Convention, in article 9 and in article 10, drew a distinction between actions for annulment of a contract and actions deriving from breach of contract, which should in fact be treated in the same manner. A uniform period of limitation should be applied to both types of action and the Commission should attempt to have a consistent language in articles 9 and 10. If the commencement of the limitation period was the same for all claims, the goal of uniformity among the various systems of law would be promoted.

Mr. ROGHLIEN (Norway) agreed that articles 9 and 10 were interrelated. Article 11 was also connected to those articles. For that reason he had proposed various amendments to those three articles (A/CN.9/R.9). The amendments consisted in regrouping and amending the provisions of the three articles. He proposed that those amendments should be referred to the Working Group.

Mr. GUEST (United Kingdom) said that the Working Group had devoted many meetings to its discussion of the text on the commencement of the limitation period. It had adopted the formulation in the draft because it had felt that it would be more comprehensible to the businessmen who would have to apply it. He hoped the Commission would be able to endorse that text. His delegation thought it would be useful to consider the Norwegian proposal that, for the benefit of the civil law countries, the concept of breach of contract should be defined in article 1.

Mr. OLIVENCIA (Spain) pointed out that the French text for article 9 (1) had not been drafted in final form, but contained two alternative wordings. If his delegation's amendments (A/CN.9/V/CRP.10) regarding the commencement of the period were not accepted, it would favour the second alternative wording in the French text, namely "l'exécution de l'obligation devient exigible". That formulation should then be translated directly into the other languages. His delegation felt that would be a suitable compromise solution.

Mr. MANTILLA-MOLINA (Mexico) said he strongly supported the Spanish proposal. It must be made perfectly clear that prescription referred to prescription of the claim and not prescription of the right on which it was based. That was particularly important in the case of the civil law countries.

Mr. ELLICOTT (Australia) said his delegation was in favour of the adoption of the text of article 9 (1) as it stood. The Working Group represented the various legal systems represented on the Commission and all the questions raised at the current meeting had already been amply discussed. The Working Group had been instructed to formulate a text that was certain, realistic and simple and it had endeavoured to do precisely that. He appealed to members to accept the texts of article 9 (1) and article 10, in general terms, as they had been drafted by the Working Group.

Mr. SMIT (United States of America) said his delegation was quite willing to accept the text of article 9 (1) as drafted by the Working Group. However, articles 9, 10 and 11 raised the additional question of when the period should commence in connexion with the various types of claims that might arise in relation to a contract. It seemed to him that, if the main aim of the Commission was to provide a practical text for the use of businessmen and lawyers, it would be more logical to have a single article setting out the various dates on which the period would commence. It should begin with the most general rule - namely, the one currently embodied in article 10 - and then go on to specific rules. His delegation would submit a draft concerning the commencement of the period in the various circumstances that might arise.

He did not agree with the criterion used in article 10, which introduced an element of uncertainty and did not take into account the question of fraud. His delegation would also be submitting an amendment in that connexion. He asked that his delegation's proposals should be considered by the Working Group on Prescription in conjunction with the other proposals that would be before it.

The CHAIRMAN suggested that the United States delegation should submit its proposals to the Working Group for its consideration.

Mr. ROGNLIEN (Norway) suggested that the Spanish and Mexican positions might be met if the criterion set forth in article 10, namely that the limitation period should commence on the date on which the claim could first be exercised, was incorporated into the first paragraph of article 9 as the principal rule for the commencement of the period and if the criterion concerning breach of contract was included in a second paragraph of article 9.

Mr. LOEWE (Austria) said his delegation preferred the second alternative wording in the French text of article 9 (1). The first question which had to be considered in examining the two alternative versions was whether or not they meant the same thing; it seemed to him that they did not. There were two solutions to the problem; either to adopt the English text or to use the second alternative French text. If that was not possible, the Working Group should reconsider the whole paragraph.

He fully agreed with the remarks made by the Spanish and Mexican representatives and stressed that the concept of "breach of contract" was completely foreign to his country and others under the civil law system. No jurist in those countries could do much with the concept, even if it was defined under article 1. The problem presented by article 9 (1) was one of the most difficult ones facing the Commission during the current session. He suggested that, rather than defining "breach of contract" in article 1, the Commission might follow the opposite approach and adopt the Spanish proposal, expounding it for the benefit of the common law countries. He had serious misgivings regarding the use of different wording in the English and French versions and felt it would be simpler to translate the French wording into English.

Mr. JENARD (Belgium) said the wording of article 9 (1) had presented very complex problems to the Working Group on Precription, as was shown by the difference in the French and English texts. If the Austrian suggestion was not acceptable to the Commission, his delegation would be willing to give favourable consideration to the Norwegian suggestion.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said his delegation had no comments to make on the substance of articles 9, 10 and 11, although the language adopted by the Working Group did not impress his delegation as being particularly brilliant. Nor was it happy about the difference in the English and French texts. A norm as important as the one in question should not be stated in such complex terms. The purpose of the draft was to provide a text that would be more practical than theoretical; the Commission should therefore ask the Working Group to consider how best it could simplify the draft in order to make it useful to ordinary businessmen. The United States proposal was worthy of consideration. Although he did not wish to suggest a general definition for the commencement of the period, he felt that it would be more methodical to give a general definition first and then set out the exceptions for individual cases. Articles 9, 10 and 11 could be combined without detriment to the text of the draft Convention.

Mr. LEMONTEY (France) supported the position taken by the delegations of Spain, Mexico, Austria and Belgium, but was willing to have the Working Group take into account the conflict of systems by defining "breach of contract". However, it would be difficult, as a matter of principle, to embody in the same convention the two concepts representing different legal systems. The Working Group should reconsider the matter.

The CHAIRMAN agreed with the French delegation's view that the problem had not yet been adequately solved. He therefore suggested that the matter should be referred to the Working Group, which should consider it as a matter of priority, since the solution to the problem raised in article 9 (1) would also have a bearing on the remainder of article 9, as well as on articles 10 and 11. If he heard no objection, he would take it that the Commission agreed to that suggestion and that it could proceed to consider the implications of the Austrian amendment to article 8, whereby the limitation period would be reduced to one year in the case referred to in article 9 (3) (A/CN.9/V/CRP.1).

It was so decided.

Article 9 (3)

Mr. MICHIDA (Japan) stressed that transactions in international trade often involved huge and complicated industrial plant systems and heavy machinery. Claims regarding defects in the operation of such machinery often included requests for a group of engineers to go to the factory in question and investigate the situation. That was a time-consuming procedure and his delegation could not accept any proposal to shorten the limitation period in such cases. If the parties wished to shorten the period by mutual agreement, they should be able to do so, but he did not agree to the incorporation of such a principle in the law.

Mr. DEI-ANANG (Ghana) said that his delegation whole-heartedly endorsed the Japanese representative's remarks.

Mr. RECZEI (Hungary) said that the Working Group would be able to simplify the text if it based its approach on two situations, namely, that arising when a contract had been fulfilled, but not in accordance with its terms, and that arising when one party failed to fulfil the contract, and on the fact that in both cases a subsidiary situation could arise whereby a party entitled to do so notified the other party of his intention to terminate the contract.

Mr. LOEWE (Austria) said that the idea of a limitation period of four years in respect of a claim arising from lack of conformity was absolutely unacceptable to his delegation. Austrian legislation provided for a six-month preclusion period which could not be interrupted, suspended or prolonged. The system worked well and was not outlandish considering that article 49 of the 1964 ULIS, which had been the subject of considerable discussion, provided for a period of one year. It was regrettable that the provision for the suspension of the limitation period during negotiations had disappeared from ULIS; it had offered an opportunity of making a distinction between machinery and, for example, apples. Article 33 of the draft Convention, as it stood, would allow all States to invoke the provisions of article 49 of the 1964 ULIS instead of being bound for the four-year limitation period provided under the draft Convention. He suggested that the opportunity available under article 33 to any State which had ratified the 1964 ULIS to opt for other provisions should also be extended to those States, such as his own, which had not ratified that instrument.

Mr. HONNOLD (Secretary of the Commission) observed that article 49 of the 1964 ULIS provided for a limitation period starting from the point at which a buyer gave notice in accordance with article 39 of the same text. Under the latter article, the buyer might be entitled to give notice of a lack of conformity of the goods as late as two years from the date on which the goods were handed over. Under article 49, therefore, the total prescriptive period could amount to three years.