99th meeting (13 April 1972)

Article 9 (continued)

Mr. DEI-ANANG (Ghana) siad that his delegation attached a deep and fundamental importance to its proposed amendments to article 9, contained in document A/CN.9/V/CRP.9. He recalled that his Government had already expressed reservations on the present form of article 9, as could be seen in pages 119 to 122 of document A/CN.9/70/Add.2, which contained his country's comments on the provision (then article 7). Among those comments, his Government had stated in particular that it was "inappropriate to make the limitation period run from the date on which the breach of contract occurred", and that its objection extended to the article as a whole. His delegation had subsequently modified its position in a spirit of compromise, and had accepted the time of the breach of contract as the beginning of the limitation period, despite its doubts on that criterion. However, it could not go beyond that point without sacrificing the interest of all developing nations and, ultimately, world trade. That was why it proposed replacing article 9 (3) by the text in document A/CN.9/V/CRP.9, and deleting paragraph 4.

Several considerations had led his delegation to reject the decision of the Working Group.

First, although article 9 (3), as it stood, reflected "a significant choice of policy" by the Working Group, as indicated in paragraph 6 of the commentary on that article (A/CN.9/70/Add.1, p. 34), it would seem that the two alternatives were evenly balanced. Therefore there could be no objection to the adoption of the Ghanaian proposal.

Secondly, if "the law of limitation must, by its nature, be definite in operation" (paragraph 6 of the commentary), fixing the date of breach of contract as the time for the commencement of the limitation period was not necessarily the best way to achieve that end, as his Government had already pointed out in its comments (A/CN.9/70/Add.2, pp. 120 and 121). Obviously, a failure to deliver goods (like a failure to pay for them) was easy to fix in time. But if a seller supplied goods which did not conform to the contract, the real time when he broke his contract would be when he made an error in the manufacture of the goods involved.

The date on which the goods "were placed at the disposition of the buyer", as stated in the present text of paragraph 3, was no more than a convenient legal notion. His delegation was by no means convinced of the utility of such a notion. The criterion which it proposed in its amendment - i.e. the date on which the lack of conformity of the goods was or ought reasonably to have been discovered by the buyer - should dispel any anxiety that the position of the buyer might be too advantageous, because it was an objective criterion.

Thirdly, the Working Group seemed to be afraid that claims might be pressed at a late date which would make it difficult to produce trustworthy evidence on the true condition of the goods at the time they were received by the buyer (paragraph 6 of the commentary). That argument wholly ignored the existence of latent defects, which often only became apparent a long time after the buyer had received the goods, or even after he had started to make use of them. His country, which bought practically all its consumer goods, could not accept such a risk.

Fourthly, the Working Group itself had confessed that the rule of article 9 (3) could produce harsh results in some circumstances (paragraph 7 of the commentary). That was a serious understatement, and the developing countries were in a position to appreciate the extreme harshness of those results and the frequency with which they occurred.

In proposing a solution, his delegation was aware that, in the common law countries, the existence of a cause of action did not generally depend on the awareness of the person who had the right to take action. However, in view of all the injustices which could ensue, it did not think that the principle should be strictly applied in a law which was aimed at avoiding the doctrine-ridden ideas of both major systems of jurisprudence. It was true that prescription as such was essentially expropriatory in nature, in that a claim could be barred, however well founded it might be, simply because a certain period of time had elapsed. That rule could be justified when the delay in presenting the claim was due to some fault. But, when there was no fault on the part of the claimant, it would be both illogical and unjust to deprive him of any recourse to legal process. To prevent such injustice, was there not a danger that the buyer might be tempted to over-exercise his rights of recourse, under article 9 (3) as it now stood?

It had been said that the amendment proposed by his delegation would result in the seller being left in a state of perpetual uncertainty as to when he would be finally cleared of his obligations to the buyer. That argument was only superficially convincing; the true businessman took too great a pride in the durability of his goods to wish to cease to be considered as the seller at a specific point in time. Furthermore, if such a problem did exist, the solution was not to protect sellers against the long-term effects of a defect in the manufacture of the goods they sold, but to encourage them to sell goods of the highest possible quality. If the seller felt that such a risk was unacceptable, it was for him to exclude it in his sales contract. That was the usual practice and such protection was adequate in most cases.

It was a matter of both radical principle and extreme practical importance and the developing countries could not accept being deprived of recourse under the law on prescription.

Mr. POLLARD (Guyana) said that the problem raised by apragraph 3, and in particular the phrase "irrespective of the time at which such defects or other lack of conformity are discovered or damage therefrom ensues" was as profoundly political and economic as it was commercial and technical. Thus his delegation could not accept the arguments advanced by the representative of Austria at the 98th meeting, or the amendments proposed by the Austrian delegation in document A/CN.9/V/CRP.1. In his delegation's view, the drafting of a uniform law could be justified only in so far as it could lead to a redefinition of the structure of international economic relations, particularly in redressing the wrongs committed against the third world countries. It was generally accepted that the structure of international economic relations was largely a function of the nature of the controlling normative framework. If that was true, the third world countries were not concerned with the unification of obsolescent, inequitable norms, but rather with the harmonization of a law which reflected their legitimate interests. His delegation's proposal certainly placed the buyer in a particularly favourable position, because of the subjective nature of the criterion employed. But that could be remedied by making the criterion involved more objective in character, which would mean that the seller (i.e. the industrial countries) would also be in an equally favourable position.

His delegation supported the Ghanaian amendment and proposed two subamendments to it, namely, the insertion of "serious" before the word "defects" in the first line and the deletion of the words "were or" in the fourth line.

Mr. WARIOBA (United Republic of Tanzania) supported the Ghanaian amendment for the reasons already explained by several representatives, particularly the representative of Japan. Some points in the Ghanaian amendment could however be improved upon. His delegation agreed with the delegation of Guyana that the word "serious" should be inserted before "defects", although it might be difficult to define the seriousness of the defect; that problem might perhaps be entrusted to the Working Group. He was afraid that the word "reasonably" might also give rise to uncertainty.

His delegation would have difficulty in accepting the Austrian amendment contained in document A/CN.9/V/CRP.1. He said that his country, where the normal limitation period was five years, had already agreed to apply the four-year period provided for under the Uniform Law with respect to international transactions. The fixing of a new limitation period, now reduced to one year, would make it difficult to enforce the convention. He therefore asked the Austrian delegation not to insist on its amendment.

Mr. OGUNDERE (Nigeria) congratulated the representative of Ghana on his excellent analysis of article 9. Nigeria had submitted an amendment to article 4 (1) (A/CN.9/11/CRP.7) with a view to excluding sales of plant and machinery from the area of application of the law, since such sales gave rise to complex technical problems and lengthy administrative procedures, which Egypt had experienced on several occasions. In the case of plant sold for immediate possession, for example, it might take several years to make it operational. It was not therefore logical that the seller should be exempt from all responsibility upon completion of a four-year period from delivery of the plant, at the time when the buyer had just begun to use the plant without having been able to ascertain whether there were in fact any defects. If his proposal was accepted, he would be willing to support the present text of article 9 (3). If it was rejected, the paragraph would become unacceptable to the majority of the developing countries and his country would then support the Ghanaian proposal.

Mr. MUDHO (Kenya) said that he supported the amendment proposed by the representative of Ghana. Although the wording was not a fundamental issue, he agreed with the representative of Tanzania that the word "reasonably" might cause difficulties to some delegations. The question might be referred to the Working Group.

Mr. LOEWE (Austria) said that he wished to clear up certain misunderstandings. Firstly, his proposal for a relatively short limitation period for claims arising from lack of conformity had been dictated only by legal considerations, to answer the need of parties for security, and not by any political or economic considerations. Secondly, with regard to the commencement of the limitation period, he could support the solution proposed by the representative of Ghana. There was no question of laying down all the obligations of the seller before the buyer had had the opportunity to examine what he had bought. Thirdly, in answer to the remarks made by the representative of Tanzania, he said that his position did not depend on the existence of similar provisions in Austrian law, since UNCITRAL should, of course, seek a compromise between all the existing systems of law. In addition, while his country had participated in drawing up the 1964 ULIS, it had not signed that Convention, bearing in mind the legitimate wish of countries which had not been present at the Hague Conference to study the text, and had merely asked to be treated in the same way as the countries which had ratified that document. Nevertheless, ULIS was due to enter into force in August 1972, and it would not be advisable to lay down completely different rules with regard to prescription. In proposing a limitation period of one year - since a period of three years would be much too long - he had nevertheless not set a date for the commencement of that period, and was ready to consider what would be the best possible solution in that respect. The matter should be borne in mind when article 33 was to be considered.

Mr. CHAFIK (Egypt) welcomed the statement of the representative of Ghana, urging the restoration of a fair balance between the interests of the buyer and of the seller. However, neither the interests of the seller, nor the important factors of stability and certainty in commercial transactions should be ignored. His delegation was ready to agree to the Ghanaian proposal, provided that it was accompanied by a provision to eliminate the possibility of a dispute, in other

words, to rule out, in all cases, action by the buyer on completion of a specified period from the moment when the goods had been placed at his disposition.

Mr. ELLICOTT (Australia) said that, in the interest of fairness, he supported the amendment proposed by the representative of Ghana. Although that proposal departed from the principle of legal certainty, its result would be to put an end to the position of inferiority of certain countries, such as Australia, which were a long way from the great markets of the world.

Mr. ROGNLIEN (Norway) emphasized that the Working Group had taken into account the importance of the principle of certainty in fixing the length of the prescription period. It was essential to distinguish between cases involving the sale of plant and heavy equipment, where, even to the detriment of the principle of certainty, flexible rules should be adopted to protect the interests of the buyer, and cases involving ordinary goods, for which more rigid rules could be adopted. In fact, article 11 contained a solution to the problem: in cases where the seller gave an express undertaking, the limitation period would begin only from the date on which the buyer informed the seller that he intended to assert a claim based on the undertaking. If, independently of article 11, the Ghanaian proposal was adopted, there should at least be provision for a maximum time-limit for the exercise of action by the buyer.

Mr. SINGH (India) said that his country had experience of the difficulties met with by the developing countries. He would support the Ghanaian proposal, provided that a specified period was included in it. The essence of any legal formulation was precision, and the possibility of a dispute could not be allowed to continue indefinitely. Thus, as the representative of Egypt had suggested, a period should be fixed beyond which action by the buyer was no longer possible.

Mr. LEMONTEY (France) said that there were two problems connected with article 9, paragraph 3. The first related to the length of the limitation period. On that subject, his delegation, for reasons different from those stated by the representative of Ghana, was not happy with the period laid down for cases involving lack of conformity. He considered that a shorter period should be chosen. The second problem involved the commencement of the limitation period, which could

be changed without difficulty. The date of commencement set in article 9, paragraph 3 was different from that laid down in article 49 of the original ULIS, in which the period began on the date on which the buyer gave notice of the lack of conformity. The same date of commencement had been retained in article 39 of the revised ULIS. It was highly desirable that the law on sales and the law on prescription should be harmonized in that respect.

In summary, he thought that the period should be less than four years, but that its date of commencement should be the giving of notice by the buyer, which should take place within two years. As the representative of Egypt had proposed, a maximum period of a certain number of years from the date when the goods were returned should be laid down, after which no further action would be possible.

Mr. GUEST (United Kingdom) said that the problem raised by the representative of Ghana was not peculiar to developing countries nor to sales contracts relating to heavy industrial equipment. He agreed with the representatives of Egypt and France that, if the Ghanaian proposal was adopted, it would be imperative to fix a maximum period beyond which the buyer would not be able to exercise his right of recourse.

The CHAIRMAN observed that there seemed to be a majority in favour of the Ghanaian proposal. That proposal could be referred to the Working Group for redrafting together with the various other suggestions which had been formulated for a specific maximum period (Egypt, India) and for a shorter period in cases involving lack of conformity (France, Austria). At the request of the representative of Norway, Chairman of the Working Group, who wished to know the size of the majority in favour of the Ghanaian proposal, the President requested the representatives who wished article 9 to be amended as proposed to indicate their preference by raising their hands. He noted that the representatives of Argentina, Australia, Chile, Egypt, Ghana, Guyana, India, Kenya, Mexico, Nigeria and Tanzania were in favour of the amendment submitted by the delegation of Ghana.

Mr. SMIT (United States of America) said that his delegation had also submitted an amendment to the effect that the period should commence on the date when the breach of contract was discovered. He was prepared to support the Ghanaian amendment if his own amendment was adopted, and if it was specified that notice must be given of the lack of conformity within a specified period.

Mr. GUEST (United Kingdom) observed that many proposals concerning important changes had already been referred to the Working Group. The Group was faced with an enormous task, and although it would do its best to cope with it, it could not guarantee that it could carry out all the redrafting necessary before the end of the session.

Mr. RECZEI (Hungary) proposed that, in order to assist the Working Group, the Commission should set up a small drafting group which might, for example, be composed of the representatives of Ghana, Egypt, India and the United States of America, and which would be entrusted with redrafting article 9, paragraph 3.

Mr. OLIVENCIA (Spain) said that his delegation too had submitted an amendment to article 9, paragraph 3*, which had not yet been issued. He requested that the amendment should also be taken into consideration by the Working Group. In short, his delegation proposed three alterations. The first was to replace the expression "defects in, or other lack of conformity of, the goods" by the words "a lack of conformity of the goods". The phrase "lack of conformity" was sufficiently wide to cover all the circumstances referred to, and to use it would help to simplify the drafting of the provision. The second change related to the commencement of the limitation period. His delegation proposed that the phrase "according to the contract of sale" should be deleted. According to paragraph 5 of the commentary on that article, the phrase pointed to the circumstances which constituted placing the goods at the buyer's disposition, whether placed on the due date contemplated by the contract or otherwise. That added nothing to the expression "placed at the disposition of the buyer". His third proposal was to combine paragraphs 3 and 4 into a single provision. Paragraph 4 related to special circumstances, those of carriage, which could be adequately dealt with in paragraph 3.

In addition, he pointed out that the Spanish text of article 9 contained a number of terminological errors. In particular, the text referred to "anulación" of the contract where the word "resolución" should have been used.

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* Subsequently issued as document A/CN.9/V/CRP.10.

Mr. CHAFIK (Egypt) proposed that, in order that the different versions of the draft should conform with each other, the drafting group should include one French-speaking and one Spanish-speaking member.

Mr. GUEST (United Kingdom) said that he feared that enlargement of the drafting group would amount to creating two working groups. He proposed that the members of the Commission who favoured the amendment submitted in document A/CN.9/V/CRP.9 should, together with the representative of Ghana, meet to undertake its redrafting, and that the representative of Ghana should be invited to participate in the meeting of the Working Group dealing with article 9, paragraphs 3 and 4.

It was so decided.