

MUTUAL ASSISTANCE FOR SERVICE OF PROCESS, ISSUE OF LETTERS ROGATORY AND THE RECORDING OF EVIDENCE ABROAD, BOTH IN CIVIL AND CRIMINAL CASES

Introductory

The subject "Mutual Assistance for Service of Process, Issue of Letters Rogatory and the Recording of Evidence Abroad both in Civil and Criminal Cases", was taken up by the AALCC at its Seventeenth Session held in Kuala Lumpur in June 1976 at the initiative of the delegate of Iran with a view to the preparation of a draft of a Regional or Sub-Regional Convention.

The need for international judicial assistance¹ which a country might render to another for suppression of crimes and for proper adjudication of rights of individuals arises both in criminal and civil proceedings, with the object of facilitating the expeditious disposal of a trial, *inter alia*, by such means as :

1. the use of letters rogatory for the examination of witnesses or experts in foreign countries;
2. the service of official documents, writs and of records of judicial verdicts;
3. service of summons for personal appearance of witnesses, experts or persons in custody and transmission of extracts from judicial records.

There is no rule of public international law which obliges a State to render assistance to another State in such matters. Save for some international (regional) conventions, each of

1. Writers in Civil Law countries use the term "International Judicial Assistance", a term little known in Common Law parlance.

which was binding on a few members of the AALCC who were parties to them, mutual assistance in this field between judicial and administrative authorities of different States in the Asian-African region was based mainly on informal or *ad hoc* arrangements or upon bilateral agreements which have been promoted by practical necessity and international courtesy.

International co-operation in judicial matters has assumed increasing importance in the Asian-African region during the past decade in view of wider involvement of the countries in the region in trade, commerce, know-how and personnel as also employment of labour in industrial projects. For example, some of the member States of the AALCC have recently acquired substantial assets including interests in larger industrial undertakings in other States. Extensive investments have been made in developing countries of the region in projects of national importance by countries both within and outside the region necessitating employment of technicians and other personnel from the investing countries. Furthermore, shortage of manpower in some of the countries of the region has led to vast movement of labour from the over populated areas in search of employment. These increasing contacts make it incumbent that proper judicial processes are available to facilitate protection of rights and enforcement of obligations of the parties involved in this movement towards the economic growth of the countries in the Asian-African region. These objectives cannot be achieved without adequate co-operation between the countries concerned.

For these reasons and the persistent legislative and judicial trends which have been observed in several member countries to broaden the scope of international judicial assistance, the AALCC earlier included in its programme of work the question relating to "Reciprocal Enforcement of Judgments, Service of Process and Recording of Evidence among States both in Civil and Criminal Cases" which was referred to the AALCC under Article 3(b) of its Statutes by the Government of Sri Lanka (Ceylon as it was known then) with a view to formulating a uniform set of rules to ensure reciprocal recognition and enforcement of foreign judgments and to facilitate

the service of process and recording of evidence in foreign countries.

At the Sixth Session of the AALCC held in Cairo in 1964, the subject was considered by a Sub-Committee consisting of the representatives of Sri Lanka, India, Iraq and the Arab Republic of Egypt, on the basis of the memoranda submitted by the delegations of Sri Lanka and Egypt, and a comprehensive study prepared by the Secretariat. The AALCC at its Seventh Session in 1965 took up for consideration the Report of the Sub-Committee and adopted the Model Rules for the Service of Judicial Process and Recording of Evidence in Civil and Criminal Cases.²

Since the AALCC had finalised its report on the recognition and enforcement of foreign judgments, for this reason this topic has been left out of the present study.

The Sub-Committee of Experts examined various aspects of the problem relating to service of process, issuing of letters rogatory and recording of evidence. It was observed that Asian-African countries have adopted either the Common Law or Civil Law system with regard to the determination of the applicable rules of private international law. As far as is known, there is no indigenous system of laws on this subject in the region. A correct assessment of the current position is made some what difficult by the fact that the available material does not usually indicate actual State practice in this field. One of the principal objects of the Sub-Committee was to bridge differences arising from the application of Common Law and Civil Law systems among the member countries.

The draft agreement for service of judicial process in civil and criminal cases submitted by the Sri Lanka delegation suggested, however, in addition to the usual method of serving process through the regular channels of the State, service by a Consular Officer or other agents of the requesting State and also service through postal channels.

2. The Report of the Sub-Committee is contained in the AALCC publication entitled "Reciprocal Recognition and Enforcement of Foreign Judgments".

After careful consideration of the constitutional and other aspects of such procedures, the Sub-Committee decided to include a provision in the Model Rules, confining it to the method of service of process through the officials of the State in which it was to be affected except in the case where nationals of the requesting State were concerned where service by the Consular agent was permissible.

The Sub-Committee also considered the probability of evidence being taken by a person specially designated in the letter of request or where such evidence would be taken without the intervention of the State Authority, by a person directly appointed for the purpose by the court of the requesting State. This method did not find favour in the Sub-Committee, and accordingly the Model Rules proposed the recording of evidence only through the competent authority of the State requested to record such evidence.

At the Seventeenth Session of the AALCC held in Kuala Lumpur (1976), it was decided, at the initiative of the Delegate of Iran, that this topic, "The Service of Process, Issue of Letters Rogatory and the Recording of Evidence both in Civil and Criminal Cases", should be taken up by the AALCC with a view to the preparation of a study and the draft of a Convention for the Asian-African region, to facilitate international co-operation in the administration of justice in the Asian-African countries and also to formulate a uniform set of rules and procedure for this purpose.

The Secretariat examined the subject-matter in detail after reviewing the State practice as well as the Conventions, both bilateral and multilateral. It also carefully examined the various aspects of the problem, including the question of how many and what kind of legal instruments were to be elaborated. It felt that a single composite international instrument, unlike other regional conventions, covering the "Service of Process, Letters Rogatory and Taking of Evidence, both in Civil and Criminal Cases", was not only feasible and proper but also preferable. Various regional organisations have, however, dealt with this subject separately, both from the point of view

of civil and criminal matters as well as with regard to service of process on the one hand and taking of evidence on the other. In the light of the earlier work done by the AALCC and the adoption of Model Rules at its Seventh Session (1965), the Secretariat felt that, a common integrated and comprehensive approach might be most appropriate.

The main preoccupation of the Secretariat had been to fill the gaps between existing international conventions and at the same time to avoid overlapping them so as to establish a coherent conventional framework on which international judicial assistance between the member States of the AALCC could be based. It may be noted that in this field as in others, statistics of the use made of existing procedures are not necessarily accurate or appropriate indicators of the usefulness of these procedures. In this area, knowledge of the ability to effect service must tend to encourage voluntary settlements, so that the mere existence of facilitating arrangements was of value, even if the arrangements were seldom invoked.

Seoul Session (1979)

In accordance with the mandate, a detailed and comprehensive study was prepared by the Secretariat which was placed before the AALCC at its Twentieth Session held in Seoul in February 1979. That study contained the following aspects of the topic: general aspects, historical perspective, State practice of the Asian-African States, a summation of international regional conventions³ concerning the topic and

3. There are several multilateral conventions which have been concluded on regional basis, though those to which a member country of this Committee is a party are very few :—
 - (i) The Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965).
 - (ii) The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1968).
 - (iii) European Convention on the Service Abroad of Documents Relating to Administrative Matters (1977).
 - (iv) European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (1978).
 - (v) European Convention on Mutual Assistance in Criminal Matters (1959) and Additional Protocol (1978).

finally the draft of a proposed multilateral convention on mutual assistance for the issue of letters rogatory, the service of process and the recording of evidence abroad, both in civil and criminal cases.

The proposed draft convention substantially revised and modernised the techniques for letters of request and service of process, and, in addition it widened the scope of the use of consuls for the taking of evidence and introduced the concept of the use of "Commissioners" to take evidence. Other significant features of the draft were new rules on language, the introduction of the institution of a Central Authority as a "receiving" and "sending" authority, provisions for the privileges and immunities of witnesses etc. As regards criminal matters, the draft convention was separate from the conventions dealing with extradition. Mutual assistance had to be independent of extradition, in that it was to be granted even in cases where extradition was refused and it might be granted in cases of proceedings against nationals of the requested country. The objective of the AALCC's initiatives with regard to service of process was to facilitate the expeditious disposal of cases when the individual concerned does not live in the territory of the State in which the case was instituted and to ensure that a defendant received notice of proceedings being taken against him in good time so as to enable him to defend himself.

The basic principles applied were that the methods of procedure must be *tolerable* to the requested State, but the evidence obtained must be utilizable in the courts of the requesting State. In addition, fundamental principles of "judicial sovereignty" in the State of execution must be respected, as well as the diametrically different approaches in

- (vi) Inter-American Convention on Letters Rogatory (1975) and Protocol (1979).
- (vii) Inter-American Convention on the taking of Evidence Abroad (1975).
- (viii) Agreement relating to Writs and Letters of Request of the League of Arab States (1953).
- (ix) The Commonwealth Practice.

the Common Law and Civil Law countries must be overcome. The draft convention was flexible enough to take within its scope all existing procedures in any State which provide judicial co-operation on a basis more liberal or less restrictive than the provisions contained in it. In fact, the draft convention expressly preserved any prior conventions to which signatory States were parties. As regards the future arrangements, the underlying idea was that the draft convention permitted the Contracting States to conclude agreements supplementing the own provisions or facilitating the application of the principles it contained.

The draft convention was divided into four chapters containing 39 Articles in all. Chapter I which included Articles 1-20, dealt mainly with general provisions, regarding use of the terms; establishment of Central Authority, letters rogatory, their form, scope and the manner of execution. It also dealt with duties and privileges of witnesses, experts and persons in custody and their immunities, language to be used; costs and special expenses and grounds for refusal to comply with the request.

The scope of the draft Convention was to render mutual assistance to the Contracting States by means of letters rogatory issued for the purpose of service of process and taking of evidence or obtaining information abroad, addressed by an authority or judicial officer of the requesting State, to the competent authority of the requested State, both in civil and criminal proceedings. The Convention, however, did not apply to arrests, the enforcement of verdicts or offences under military law which were not offences under ordinary law.

Chapter II, which included Articles 21-25, dealt with other channels of transmission of letters rogatory, such as by consular agents, diplomatic agents and commissioners, the limits of their powers and functions; the procedure applied, the extent to which the approval and consent of the requested State might be required; the extent of compulsion to be exercised against the witness.

Chapter III included Articles 26-30 and dealt with request and supply of information and documents. It provided for exchange of information from judicial records also. Information laid by one Contracting State with a view to proceedings in the courts of another State shall be transmitted between the Central Authorities unless a Contracting State availed itself of the option provided in Article 24, paragraph (3).

Chapter IV contained the final provisions, included in Articles 31-39. It dealt with entry into force of the draft Convention, revision, accession by a non-member State, reservations, denunciation and territorial scope of the draft Convention, and, lastly, it provided for the functions of the depository of the draft Convention.

Finally, the draft Convention provided uniform and binding solutions to a number of fundamental problems connected with mutual assistance both in civil and criminal matters which had previously been dealt with partially and miscellaneously in bilateral agreements. It would not, however, be correct to say that the draft Convention offered perfect solutions to all the problems that might arise in mutual assistance. It was in fact a compromise which kept in mind the conflicting judicial systems of various States.

The study prepared by the Secretariat was discussed in the fourth plenary meeting of the session held in Seoul. There was, however, no detailed discussion on the various provisions of the draft Convention but only preliminary matters were discussed in general. It was pointed out that for the first time a single composite international draft Convention, unlike other regional conventions, covering the "Service of Process, Issue of Letters Rogatory and Taking of Evidence Abroad, both in Civil and Criminal Cases", had been prepared and included in the study.

One of the delegates pointed out that as international judicial assistance was transnational in character, that is to say, a request emanated from the "requesting State" to the "rendering State", it had to be rendered in compliance with the laws and criminal policy of the rendering State, which should have

discretionary power to refuse a request. The request for judicial assistance should not impinge upon the sovereignty of a rendering State, and assistance may be granted under condition of reciprocity. Another delegate was of the view that further study should be made regarding the transfer of prisoners from one country to another to alleviate and mitigate human sufferings.

At the Seoul Session the delegates who participated in the discussions on this subject endorsed the views expressed in the Secretariat's study and suggested that the Secretariat should prepare explanatory notes to the proposed draft Convention and should collect further material and information concerning actual practices of States, which are widely different in procedure and also the State legislations along with bilateral, sub-regional agreements and other regional conventions, in view of diverse political, economic, social and cultural backgrounds of the countries in the Asian-African region, to facilitate further consideration of this subject.

Many of the member States of the AALCC appear to have provided facilities for the taking of evidence in their territories required in proceedings in foreign courts. Such countries have provisions in their laws empowering their courts to assist foreign courts in the taking of evidence. The request may come from any country, the courts are not required to restrict their assistance to the courts of particular countries. But assistance for the service of foreign process is available, in the case of most member countries, to the courts of certain specified countries only and not to the courts of all foreign countries.

Jakarta Session (1980) and Colombo Session (1981)

At the Twenty-First Session of the AALCC, held in Jakarta in 1980, the Secretariat submitted a Progress Report. The AALCC took note of the progress made by the Secretariat on the subject.

After the Jakarta Session the Secretariat prepared yet another study on the subject which was placed before the

Twenty-Second Session of the AALCC held in Colombo in May 1981, for discussion. That study contained, *inter alia*, a detailed introductory note, topics for discussion, text of the proposed draft Convention and article-wise explanatory notes thereto. It also included relevant extracts from the information sent by some of the member governments in response to the request made by the Secretariat in this connection and comments of the Hague Conference on Private International Law on the AALCC's proposed draft Convention. The study suggested the following topics of practical value relatable to the proposed draft of a regional or sub-regional convention for consideration at the Colombo Session :

- (1) Scope of the draft Convention
 - (i) Application of the draft Convention to proceedings of civil or criminal nature.
 - (ii) Judicial Authority.
- (2) The concept of Central Authority.
- (3) Modes of service; Forms of request
- (4) Language
- (5) Costs
- (6) Refusal to comply and duty to reply
- (7) Privileges and duties of witnesses and experts
- (8) Measures of compulsion
- (9) Other channels of transmission
 - (i) Service of process by post
 - (ii) Execution of letters rogatory by diplomatic officers, consular agents and commissioners.

At the Colombo Session, discussion mainly centered around three pertinent issues basic to the proposed draft Convention which were candidly focussed in the Secretariat's study requiring consideration, namely : (i) the practicability of acceding to the two Hague Conventions; (ii) the need for a separate Afro-Asian Convention and (iii) the feasibility of having one single Convention dealing with both civil and criminal matters.

It may be stated that the Hague Conference on Private International Law had devoted itself ever since the beginning of this century to bring about some kind of uniformity in regard to judicial assistance between the member States of the Conference. Thus, a Convention on Civil Procedure was promoted by the Hague Conference in the year 1905 which was revised in 1954. The Hague Conference adopted a Convention on Legalisation of Documents in 1961, a Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters in 1965 and a Convention on Taking of Evidence Abroad in 1970. These Conventions have been signed, acceded to or ratified by a number of members of the Conference which included three member States of the AALCC. There has been a recent trend for non-member States of the Conference to accede to Conventions drawn up by the Hague Conference since it has been made known to other States that it was open to them also to become parties to the Conventions. It was pointed out during the course of discussions at the Colombo Session that accession to the Hague Conventions would in no way prejudice the conclusion of regional, sub-regional or bilateral arrangements between States which may become parties to the Hague Conventions.

Most of the delegates were of the view that it would not be practicable to have one Convention dealing both with civil and criminal matters. They pointed out that due to existence of various legal systems, practices, social backgrounds and criminal jurisdictions among Asian-African States, there were so many difficulties regarding mutual assistance in criminal cases which required a very careful study before drafting any specific rules. Therefore, the view was expressed that it would not be practicable to have one Convention dealing with judicial assistance both in civil and criminal matters. As regards mutual judicial assistance in civil matters, it was felt desirable for the member States of the AALCC to consider the possibility of becoming a party to, or at least making use of the Hague Conventions.

While participating in the discussion, the Observer for the Hague Conference on Private International Law informed the

Plenary that they were going to make their conferences relating to private international law questions open to all the States. He indicated the various features of the two Hague Conventions which make them flexible in operation. He said that despite the establishment of a Central Authority under the Convention it does permit the use of traditional systems for receiving and sending letters of request. In commercial matters, he said, one can use any traditional system. He further said that accession to the Hague Conventions does permit the signatory States to have regional or sub-regional arrangements between them. He termed the Hague Conventions system as a "basic system" and expressed his willingness to co-operate and provide the know-how in preparing regional or sub-regional arrangements. He said that mutual assistance and enforcement of foreign judgments in civil or criminal matters were different things and it was better to deal with the question of mutual assistance in judicial matters and the enforcement of foreign judgments in separate conventions.

Some of the delegations informed the Plenary that their countries had bilateral agreements with other countries and some countries also had national legislations on the subject. They were of the view that a draft Convention on a regional or sub-regional basis would be most useful because at present no such arrangements existed in the region. On the other hand, some of the delegates emphasised that the AALCC should promote co-operation among Asian-African States for concluding bilateral agreements among themselves for mutual assistance in judicial matters.

At the Colombo Session views were expressed by a number of delegations that it would be preferable to have separate drafts, one to deal with civil and commercial matters and the other relating to assistance in criminal proceedings. The AALCC also decided that the two drafts should be considered by an Expert Group during the inter-sessional period.

VI. ECONOMIC AND TRADE LAW MATTERS

(I) STANDARD/MODEL CONTRACTS SUITED TO THE NEEDS OF THE ASIAN-AFRICAN REGION

Introductory

During the eleventh session of the AALCC held in Accra in 1970 when the UNCITRAL's work on Uniform Law on International Sales (ULIS) and its draft of 'General' General Conditions were being discussed, the representative of the UNCITRAL Secretariat suggested that the AALCC could usefully undertake the preparation of standard/model contracts or general conditions of sale in respect of commodities of particular interest to the Asian-African region on the same pattern as was being followed by the Economic Commission for Europe (ECE). In the course of discussion at that session it was pointed out that the bulk of trade in regard to agricultural produce and other primary commodities was being carried on under standard contracts drawn up by trading institutions in the West which were not evenly balanced and which often worked unfavourably to the sellers who primarily came from the developing countries in Asia and Africa. Most of the member governments of the AALCC and various trade organisations in the region who were consulted in the matter expressed the view that the AALCC should prepare new standard contract forms which would be more evenly balanced. The suggestions concerning the commodities to be covered by such contract forms specifically mentioned the following: rubber, timber, textiles, light machinery, oil, minerals including bauxite and iron ore, animal products, hides, paper, maize, wheat, bananas, jute and jute products and cocoa.

Since the commodities recommended were too numerous to be covered by any single contract form, it was decided to proceed with this work in stages. To begin with, the draft of a standard contract form based on F.O.B./F.A.S. terms was prepared intended to be applicable to sales of agricultural