Party bears international responsibility, unless the State concerned, on ratifying or acceding to the Convention, has stipulated that the Convention shall not apply to certain of its territories. Any State making such a stipulation may, at any time thereafter, by notification to the Secretary-General extend the application of the Convention to any or all of such territories.

Article 16

Entry into Force

1. This Convention shall come into force on the thirtieth day folloiwng the date of deposit of the second instrument of ratification or accession in accordance with Article 15.

2. For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day following the date of the deposit by such State of this instrument.

Article 17

Denunciation

Any Contracting Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article 18

Settlement of Disputes

Any dispute which may arise between any two or more Contracting Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall at the request of any one of the parties to the dispute be referred to the International Court of Justice, or, in case the latter should not have jurisdiction, to an arbitrator appointed by the President of the International Court of Justice for decision, unless they agree to another mode of settlement.

Article 19

Reservations

In the event that any State submits a reservation to any of the articles of this Convention at the time of ratification or accession, the Secretary-General shall inform of the reservation to all States which are Parties to this Convention and to the other States referred to

in Article 15. Any Contracting Party which objects to the reservation may, within a period of ninety days from the date of the communication, notify the Secretary-General that it does not accept it. Any State thereafter acceding may make such notification at the time of its accession. In such case the Convention shall not enter into force as between the objecting State and the State making the reservation.

Article 20

Deposit of Convention and Languages

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall transmit certified true copies thereof to all States referred to in Article 15.

2. DRAFT CONVENTION FOR CUSTODIANSHIP

Article 1

Primary Jurisdiction

The courts listed in the attached Schedule shall have jurisdiction to make orders for the custody of infants.

Article 2

Subsidiary Jurisdiction

Where jurisdiction under Article 1 has not been exercised the courts of the country in which the infant is resident at the time of the commencement of the proceedings shall have jurisdiction to make an order for the custody of the infant.

Article 3

Concurrent Jurisdiction

(i) Where separate proceedings have been commenced contemporaneously under Articles 1 and 2 respectively, the proceedings by virtue of Article 2 shall, on application to that court, be stayed, pending the determination by the competent court under Article 1.

(ii) Notwithstanding the power to stay any such proceedings the court seized with the dispute under Article 2 may, if it thinks fit, for the reasons set out in Article 5, proceed to determine the issue.

Article 4

Recognition and Enforcement

Where an order under Article 1 has been made, such order shall be both recognised and enforced in the countries who are parties to this Convention.

Article 5

Jurisdiction to Vary

Notwithstanding an order under Article 4 a court of any country in which the infant is resident during the period of any proceedings under any article of this Convention, may, if it thinks fit, vary any order made under Article 1 having regard to events which have occurred since the order under Article 1 was made.

Provided that, when the infant has been removed in pursuance of an attempt to seek a change of custody in disobedience to an order under Article 1 no such variation under this Article shall be permissible.

Article 6

Access

Any order for custody under the provisions of this Convention may, but need not, be accompanied by an order allowing any party whom the court making the order regards as a poorer party access to the infant on such terms as the court thinks fit.

Article 7

Variations of Access Order

Notwithstanding any order of access made under Article 6, a court of any country in which the infant is present may, if it thinks fit, vary or rescind any order made under Article 6.

Article 8

General Principles

In any proceedings before any court particular attention shall be paid to the best interests of the infant.

Article 9

Definitions

In this Convention.

"Access" means the right to have the care and control of the

infant for such period or periods or at such times as the court making the order decrees.

"Custody" means the legal right to determine the upbringing of the infant and shall include the care and control of such infant.

"Infant" means any person who by the law of the court seized with the issue has not reached the age of majority.

Schedule

Under Article 1 of this Convention the following courts shall have jurisdiction:

1. (a) The courts of the country of which the infant is national.

   (b) The courts of the country of which the infant is national do not administer a uniform system of laws, those courts of that country shall have jurisdiction which are competent according to the jurisdictional rules of the law of that country.

2. The courts of the country exercising jurisdiction in divorce, nullity, judicial separation and other such matrimonial proceedings, provided that such jurisdiction in general and the order made thereunder in particular are recognised by the laws of the courts exercising jurisdiction by virtue of Articles 1-3 inclusive.

APPENDIX IV

I. COMMENTS RECEIVED FROM THE GOVERNMENT OF INDIA

Comments on The Rapporteurs Memorandum on the Recognition and Enforcement of Foreign Decrees in Matrimonial Matters.

It is desirable to have reciprocal arrangements between India and the other participating countries for the enforcement of maintenance orders and also of decrees of divorce and nullity. The general provisions regarding the presumptions as to foreign judgments in India are contained in sections 13 and 14 of the Civil Procedure Code, 1908. But after agreements or a convention to recognise the divorce and nullity decrees passed by the courts in participating countries are recognised, provisions can be made for their enforcement by way of execution. In view of the human considerations involving the personal happiness of foreign spouses involved, it would be advisable to consider the draft convention for the mutual recognition of judgments in divorce and nullity of marriage adopted by the International Law Association at the Conference at Prague in 1947 in the light of the views of the U. K. Royal Commission on Marriage and Divorce as suggested by the Rapporteur.

2. Maintenance orders of certain reciprocating territories are enforceable in India by execution under the Maintenance Orders Enforcement Act, 1921. It is desirable to bring as many participating countries as possible into these reciprocating arrangements. The draft convention on the recovery abroad of claims for maintenance reproduced in Appendix III of the Rapporteur Memorandum may also be considered in this regard.

Sd. V. S. DESHPANDE
Dy. Legal Adviser.

11-8-1959

INDONESIA

The judgments and decrees passed by foreign courts cannot as such be executed in Indonesia. However, an Indonesian court can whilst passing a judgment or decree in a particular matter take into account a judgment or decree which might have been passed by a foreign court relating to the personal status of the parties or in respect of the matter in issue before him. Cases of this type are foreign decrees on dissolution of a marriage or a foreign judgment

of a declaratory nature regadring the validity of a marriage. Decisions of foreign courts can also be used as evidence before the Indonesian courts.

COMMENTS OF THE UNITED ARAB REPUBLIC

The U.A.R. Delegation realises the importance of the recognition and enforcement of foreign judgments relating to matters of nullity of marriage, dissolution, divorce, maintenance and custody.

This memorandum clarifies the effects of such foreign judgments in the U.A.R. according to its laws, and comments on the recommendations of the Committee's rapporteur, and explains the Delegation's point of view in treating this subject, alongside with the memorandum presented by the Delegation to the Committee in its second session.

A—Rules of effects of Foreign Judgments issued in any of the aforementioned matters in the U.A.R.[1]

A foreign judgment may entail effects, after satisfying certain conditions and procedures of domestic judicature.

A foreign judgment is an act issued by a foreign court in the name of a foreign imperium.

A judicial judgment, in its capacity as a procedure of pleadings entails three effects:

1. The force of evidence which the judgment enjoys by virtue of the fact that its contents were practised by a general authority.

2. The res judicata which the judgment enjoys in so far as it is an expression of the truth of the subject adjudicated.

3. The force of execution which the judgment possesses in so far as it constitutes an order from the general authority, whose duty is to ensure justice for all. Undoubtedly the first effect, namely the force of evidence is recognised without the need for taking any other measures, because this effect is in fact entitled by the foreign judgment in its capacity as a "title" i.e. an official document issued by a general authority.

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1 These rules are stated by Articles 491, 492, 493, 495 of the Egyptian Code of Procedure issued in 1949 which correspond to Articles 306, 307, 308, 311 of the Syrian Code of Procedure issued 1953.

As to the second effect, namely the **res judicata,** a chose jugee —is not equivalent to the recognition of a foreign judgment in this country asit requires the prevention of courts from the reconsideration of the dispute, in which such a judgment has been passed, incorporating the evidence of truth, and because public security necessitates that an end should be put to the dispute, while recognition of a foreign judgment in Anglo-American countries means that a person, in whose favour a foreign judgment is issued, may file a law-suit upon such a judgment.

Recognition of a foreign judgments in such a manner does not, in fact, mean its recognition as a judgment, i.e. as an act issued by a foreign legal authority, but as a recognition of the right engendered by the judgment, and thus the recognition falls within the domain of the international respect of acquired rights.

The third effect, namely, the force of execution is equivalent to the compulsory enforcement of judgments (by coercion if necessary) in Anglo-American countries.

The force of execution and the **res judicata** (the chose jugee) are dealt with by the Egyptian Law as follows.

I. First, Force of Execution

(a) Issurance of a decision for the execution of a foreign judgment (Exequator).

The Egyptian legislator, in dealnig with the execution of foreign judgments, applied the principle of "treatment on equal footing" or the principle of "reciprocity".

Article 491 of the Egyptian Code of Procedure stipulates that judgments and orders issued in a foreign country may be executed by exequator under the same conditions stated by the law of that foreign country for the execution of Egyptian judgments and orders in its territory, meaning that foreign judgments are treated by the U.A.R. in the same manner as judgments issued by the courts of the Republic are treated by the country, whose courts issued the foreign judgments desired to be executed in the territory of the Republic; and that foreign judgments have the same value of the judgments passed by the courts of the Republic in the country that passed the foreign judgment, desired to be executed in the territory of the Republic. The case may involve two matters.

I. When a foreign country does not recognise the effects of judgments passed by the courts of the U.A.R. and demands that the petitioner file a new suit at its courts to assert his rights, and then submit the judgment, desired to be executed, as evidence, susceptible to prove the opposite, as in Scandinavian Countries, or insusceptible to prove the opposite as in Anglo-American countries, then in such a case, the judgment issued in that foreign country, as a judgment will have no effect, and the person in whose favour the judgment was passed, to enforce his right in the Republic, has to file a new suit at its courts.

II. When a foreign country allows the execution of judgments issued by the courts of the U.A.R. as judgments, as in France, Italy and Germany, an exequator may be issued after fulfilling the conditions and procedures stated by the Egyptian and Syrian Codes of Procedure, namely:

1. That the judgment was passed by a competent judiical authority, according to the law of the court that passed it, and not the law of the court desired to issue the exequator (Article 493, clause I, of the Egyptian Code of Procedure). Competence means international competence.

The provision that the court issuing the judgment should be internationally competent is approved by all countries. Nevertheless the Egyptian legislation advocates that the court issuing the judgment is competent according to its own law.

This is a progressive rule in the domain of conflict of jurisdiction, contradictory to the usual practice in various countries, such as France, Italy, Germany, England, and the U.S.A., that subjects the competence of the court that issued the foreign judgment to the rules of conflict of jurisdiction, as stated by the law of the country, requested to execute the judgment in its territory.

2. That the summons of the litigants to attend courts is valid and their representation in the lawsuit is proper;

Clause 2 of Article 493 of the Egyptian Code of Procedure stipulates as a prerequisite to issue an exequator for the execution of a foreign judgment issued in a foreign country, to prove that the litigants were properly and duly summoned and represented in the lawsuit, in which the judgment, required to be executed, was passed according to the law of that country. The purpose of this prerequisite is to ensure that the person against whom the judgment was passed, had a fair chance to defend himself.

3. That the judgment is unassailable "final".

Clause I of Article 493 of the Egyptian Code of Procedure stipulates that the foreign judgment for whose execution an exe-

quator is requested, should be unassailable according to the law of the court that issued it, because if the foreign judgment is not unassailable it would be subject to annulment by the courts of the country that issued, and hence an exequator cannot be issued, before the judgment becomes unassailable.

4. That the foreign judgment is not contradictory to any judgment already issued by domestic courts. In fact, contradiction between the foreign judgment and the domestic judgment is a form of contradiction to the public policy of the country to which the judge, requested to issue the exequator, belongs. This is because the domestic judgment incorporates the evidence of truth and validity, and should be considered as signifying truth and justice. Some legislators add another prerequisite that no case on the same subject matter and between the same persons, relating to the judgment required to be executed, has been insitituted in the courts of the country to which the judge, requested to issue the exequator belongs (Article 797 of the Italian Code of Procedure). This pre-requisite has been adopted by the draft Rules of the French Special International Law. (Article 136).

5. That the judgment shall not involve anything of a nature to violate morals and public policy in the U.A.R.

Clause 4, Article 443, stipulates that no order to execute a foreign judgment shall be issued except after assuring that it does not involve anything of a nature to violate morals and public policy in the U.A.R.

6. That the court issuing the judgment has applied in that case the applicable law.

The law does not include this pre-requisite.

Some jurists insist that the court that issued the judgment shall have applied the applicable law, according to the rules on the conflict of law enacted in the country, requested to execute the judgment. But contemporary jurisprudence advocates that the court that issued the foreign judgment should have applied the proper law, according to the rules on the conflict of laws enacted in its country. We are in favour of the last view.

B. Procedure of the order to execute a domestic judgment

The fulfilment of the previous pre-requisites does not imply that the foreign judgment enjoys the force of execution.

A decision to execute the foreign judgment shall be issued by the domestic court. The executor may be requested by a lawsuit before the primary court, in whose territorial competence the judgment is desired to be executed, following the rules of ordinary procedure.

II. The Res Judicata

The foreign judgment may have the **res judicata** in the territory of Republic when the same pre-requisites and procedure, required for the issue of an exequator, are fulfilled. Yet, jurisprudence advocates that some foreign judgments passed in matters of status and capacity such as divorce, annulment of marriage, dissolution or separation, should have **res judicata** without need for the issue of an exequator from domestic jurisdiction, as those foreign judgments may have **res judicata** without need of an exequator and resort to the principle of reciprocity, so long as the execution of the judgment does not entail the seizure of money in cases of maintenance and alimony, or constraint on persons, in cases of custody, provided that the aforementioned external or formal pre-requisite are fulfilled.

Rules of International Jurisdiction of Domestic Courts

The rules of international jurisdiction differ from one country to another. This difference appears in its widest range between the Anglo-American States and the European States and others that followed their suit. The result of this difference is that a country requested to execute a foreign judgment may not grant the request.

Article 859—867 of the Egyptian Code of Procedure and Articles 3, 5, 6, 7, 8, 9, 10 of the Syrian Code of Procedure issued in 1953 state the rules of international jurisdiction of the courts of the U.A.R. in matters of annulment of marriage, divorce, dissolution of marriage, maintenance and custody as follows:

A. Domestic courts are competent to adjudicate suits brought against a national irrespective of his domicile, i.e. whether he is domiciled in the Republic or abroad.

B. Domestic courts are competent to adjudicate a suit brought against an alien in the following cases:

(a) When the alien defendant has a domicile in the U.A.R. meaning a place of habitual residence.

(b) When the alien defendant has no domicile in the U.A.R. in the following cases:

(i) When the defendant has no known domicile abroad and the petitioner, national or alien, is domiciled in the Republic.

(ii) When the petitioner, national or alien, is domiciled in the Republic and the law that should be applied is the domestic law.

(iii) When the suit refutes a marriage contract and the contract is required to be endorsed by a national notary.

(iv) When the suit, concerning dissolution of marriage, corporal separation (a mensa et toro) or divorce is brought by a wife who lost the nationality of the U.A.R. through marriage and is habitually resident in the Republic.

(v) When the suit is brought by a wife, habitually resident in the Republic against her husband, who was domiciled in it, and he deserted his wife, or made his domicile abroad, after the establishment of the grounds for divorce, dissolution or corporal separation, or was deported from the Republic.

(vi) When the suit brought by the wife concerns maintenance, and the wife is a national or an alien habitually resident in the Republic, even if the defendant has a known domicile abroad.

C. The courts of the U.A.R. are competent to give orders regarding the temporary and provisional measures taken in the Republic, even if not competent to adjudicate the original suit, and are also competent to take the necessary temporary or provisionary procedures during the hearing of the divorce or separation suit, such as permitting the wife to reside in a house agreeable to the two parties, or appointed by the judge, or handing over to the wife the articles necessary for her personal use, and estimation of a temporary alimony for her.

D. The courts of the U.A.R. are competent to settle any primary questions or casual demands, raised during the hearing of the original suit, even if such questions and demands do not come within their jurisdiction, and are also competent to adjudicate any other suit connected with the standing suit, even if not originally competent to hear it.

All this is meant to enable the courts to do their duty and to ensure the good course of justice.

E. The courts of the U.A.R. are competent to adjudicate suits on the basis of submission to jurisdiction.

II. Comments on the Committee Rapporteur's Recommendations

The U.A.R. Delegation is aware of the difficulty of treating the effects of foreign judgments by setting unified rules recognised by all participating States, if put in the form of an international agreement or national legislation of every State.

It is a difficulty felt by all scientific bodies and conferences that dealt with this matter. The reason is that the rules of the effects of foreign judgments in the State are closely connected with the rules of international judicial competence of its courts. These last rules differ from one country to another, according to the difference in their judicial systems, as aforementioned.

Disputes arise regarding the basis on which the rule of competence is laid, e.g. whether it is the mere residence of the defendant in the territory of a State, or should he be domiciled in it, and should competence be based on the nationality of the defendant or his domicile or should be based on the nationality of the petitioner or his domicile; should the defendant be summoned to court while residing in the territory of the State, or is it unnecessary to do so?

If the point of contact could be agreed upon, then the application of it may lead to different results according to the different characterisation accepted by the judges of the different States.

If the domicile is taken as a basis of competence, views about the characterisation of domicile may differ from one State to another. In some States like France it means the seat of the principal work of the person, while in other States like the U.A.R. and Germany it means the habitual residence place of the person. Also, the domicile in certain States like the U.A.R. may be numerous or non-existant, while in other States like France and the Anglo-American States it can never be numerous or non-existent.

Again, could the wife have a domicile other than the joint matrimonial residence, or the wife's domicile is the domicile of her husband.

However, the definition of the wife's domicile differs according to whether the law that should be applied decides whether the marriage is valid or void, bearing in mind that such a law differs

from one State to another. Sometimes it is the law of the spouse's nationality or the law of the domicile of each of them and other times it is the law of the locality where the contract was endorsed. This is a question upon which the States could hardly agree, especially if their judicial systems are different.

Owing to these difficulties the States did not welcome the projects prepared by scientific bodies or international conferences, aiming at setting unified rules in this respect, except within narrow limits, especially the States whose judicial systems are similar like those of the Scandinavian Union, or the States whose judicial systems are recently developed and have common interests, like the Latin South American States.

It is rather difficult for any State to leave out the rules of international competence in its law, especially if these rules are closely connected with the rest of its judicial system, and became established by the lapse of time.

Consequently, the U.A.R. Delegation states the following:

First

The Delegation disapproves the recommendations to establish international agreements based on the draft of the rules on recognition of foreign judgments in matters of divorce as suggested by "the British Royal Commission on Marriage and Divorce in England". Moreover, the Delegation does not accept the draft agreement on the recognition of foreign judgments in matters of divorce and nullity of marriage, approved by the International Law Association in 1947, and the other draft relating to custody.

These drafts dealt with certain rules of international judicial competence of the State courts in a manner which is not in conformity with its rules of our domestic law, and the Delegation shall give its final opinion in the light of the discussions that will take place during the Session.

Second

As to the recommendation to adopt the rules mentioned in the Draft Convention set by the Expert Committee, formed at the request of the Economic and Social Council of the United Nations, concerning the recovery abroad of claims for due maintenance, and the proposal to insert these rules in the domestic legislation of the States participating in the Committee, the U.A.R. Delegation believes that the Draft Convention did not deal with the manner which defines the court that shall be internationally competent to settle the claims for due maintenance. If this appointment of the competent court should be left to the "Transmitting Agency" in the State where the maintenance claimant is domiciled then how could the Agency know which court is competent, moreover, what would be the solution if the courts of more than one State are competent according to the rule set by each of them.

Added to the difficulty of competence, another difficulty arises concerning the procedure of the lawsuit brought to the court as the validity of marriage may be disputed, if there accrued a cause for divorce, where the maintenance suit is heard? This dispute may often demand the hearing of the litigants and witnesses. Such are matters that may not be sufficient to convince the judge to resort to the "letters of request" especially if it deemed necessary that the witnesses should face each other.

It also seems, in the matters of maintenance claims, that the draft is based on the supposition that the property of the debtor is situated in the territory of the State, whose courts are competent to hear the maintenance suit, while this property may very probably be situated in another State. In this case the problem of the enforcement of foreign judgments, which is not treated by the draft, may arise.

Lastly

We fear that maintenance claims, in the manner stated by the Draft, may be used illicitly as a means to break the rules restricting currency exportation, set by the State required to forward the alimony of maintenance, so long as the maintenance claim is recognised, or when a passed judgment was executed voluntarily or judicially.

The U.A.R. Delegation shall give its final opinion regarding this Draft, in the light of the discussions that shall take place during the Session.

As a solution to the difficulties of recognising foreign judgments in matters of nullity of marriage, divorce, maintenance between spouses and custody, the Delegation proposes the following Draft Convention.

APPENDIX V

DRAFT AGREEMENT ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN MATRIMONIAL MATTERS

Article 1

Definitions

In applying this Agreement, the following definitions shall be taken into consideration:

(a) A foreign judgment means any decision issued by a judicial authority in any of the contracting States.

(b) A final judgment means an enforceable judgment which is irrefutable by any of the ordinary procedures of refuting judgments.

(c) The force of execution of the judgment means its capability of being compulsorily executed.

Article 2

A foreign judgment issued in matters of nullity of marriage, dissolution, divorce, maintenance of spouses and custody shall enjoy the **res judicata**, stipulated in the State where it was issued within the scope of the **res judicata** of the judgments issued by courts of the State in whose territory its effects are required to be maintained, without need for taking any procedure relative to it.

This judgment shall have the force of execution, enjoyed in the State where it was issued, within the scope of the force of execution of judgments issued by the courts of the State requested to execute it in its territory, after undertaking the procedure stipulated by the law of this State.

Article 3

The foreign judgment shall not have the effects stated in the afore-mentioned articles, unless the following conditions have been verified.

1. That the judgment is final and issued by a judicial authority, internationally competent, according to its law.

2. That it was issued according to regular procedures which enabled the defendant to submit his defence.

3. That it shall not contradict any judgment issued by the courts of the State in whose territory its effects are required to be maintained, and that there is no other action between the same parties on the same subject matter already standing before these courts and had been commenced before filing the suit at the foreign court which issued the judgment whose effects are required to be maintained.

4. That the judgment does not involve anything of a nature to violate the public policy of the State in whose territory its effects are required to be maintained.

5. That the court issuing the judgment has applied the applicable law, according to the rules on conflict of laws stated by its law.

Article 4

The law of every contracting State shall determine the competent judicial authority to which the request for the execution of the judgment may be submitted, the procedures to be followed in its adjudication and the means of refuting the judgment relative to it.

Article 5

The competent judicial authority, requested to maintain the **res judicata** of the judgment, or issue a decision for its enforcement, shall not be allowed to investigate the subject matter settled by the judgment.

Article 6

When there are two foreign judgments or more, the effects stated in article 2, shall pertain to the judgment which was issued by a competent court, according to a rule set by its law, in closer agreement with the rules of international competence stipulated by the law of the State in whose territory the effects are required to be maintained.

Article 7

Requests for execution should be supported by the following documents:

(1) A certified true copy of the judgment desired to be executed, duly authenticated by the competent authorities and attested as being executory.

(2) The original summons of service of the text of the judgment desired to be executed, or an official certificate to the effect that the text of the judgment had been served.

(3) A certificate from the competent authority to the effect that the judgment desired to be executed, is final and executory.

(4) A certificate that the parties were duly summoned to appear before the competent authority, in case the judgment, desired to be executed, was in default.