**Article 7**

A request to record evidence shall be executed by the competent authority in accordance with the law in force in that State. Provided that if the requesting State desires it to be executed in some other way, such request shall be complied with unless it conflicts with the law of the State in which such evidence is to be recorded.

**Article 8**

(a) The letter of request shall be addressed by a Diplomatic or Consular Officer of the requesting State to the competent authority of the State where such evidence is to be recorded.

(b) The letter of request shall be drawn up in the language of the State where the evidence is to be taken or be accompanied by a translation in such language. The letter of request shall state the nature of the proceeding for which the evidence is required and the full names and addresses of the witnesses whose evidence is to be recorded.

(c) The letter of request shall either be accompanied by a list of interrogatories and documents, if any, to be put to the witness or it shall request the competent authority to allow such questions to be asked *viva voce* as the parties or their representatives shall desire to ask.

**Article 9**

A request for the recording of evidence made in accordance with the aforesaid provisions shall be complied with unless:

(1) The authenticity of the letter of request is not established or

(2) The State, to whom the request is made, considers it to be contrary to its public policy.

**Article 10**

No fees shall be claimed as expenses for executing a letter of request for the recording of evidence except that any special fees or expenses incurred shall be paid by the requesting State.

Sd/- Adel Younis
Sd/- G.A. Shah
Sd/- Dhia Sheet Khattab.



**DOCUMENT A**

## DRAFT AGREEMENT ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, THE SERVICE OF PROCESS AND RECORDING OF EVIDENCE AMONG THE PARTICIPATING STATES BOTH IN CIVIL AND CRIMINAL CASES—SUBMITTED BY THE U.A.R. DELEGATION AT THE SIXTH SESSION

### A. Definitions

**Article 1**

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.

### B. Judgments rendered in Civil Matters

**Article 2**

A foreign judgment issued in civil matters and matters of personal status shall enjoy the *res judicata*, stipulated in the State where it was issued, within the scope of the *res judicatu* 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 to this effect.

The said judgment shall have the force of execution, provided for in laws of the State where it was issued, within 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.

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

B.—That it was issued according to regular procedures which enable the defendant to submit his defence.

C.—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 pending before these courts and had been commenced before serving the suit at the foreign court which issued the judgment whose effects are required to be maintained.

D.—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.

E.—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 relating to it.

**Article 5**

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



**Article 6**

When there are two foreign judgments or more, the effects stated in Article 2, shall be accorded to the judgment issued by a competent court according to a rule provided for by its laws, which is in more conformity with the rules of international jurisdiction stipulated by the laws 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 sought to be executed, or an official certificate to the effect that the text of the judgment has been served.
3. A certificate from the competent authority to the effect that the judgment sought 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, sought to be executed, was in default.

**C. Judgments rendered in Criminal Matters**

**Article 8**

No contracting State shall execute the judgments rendered in one of the others in penal matters in respect to the sanctions of that class which they impose.

They may, however, execute the said judgments in respect to security measures, cumulative penalties, recidivism, suspension of penalties, conditional release, rehabilitation, civil liability, and the effects thereof upon the property of the convicted person if they have been rendered by a court having competence in accordance with Article 3A and upon a hearing of the interested party and if the other conditions of form and procedure established by the foregoing articles have been complied with.

**Article 9**

No proceedings shall be taken against the accused if it is proved that he has been acquitted by a foreign judgment from the same offence or has been finally convicted and undergone his sentence.

### D. The Service of Documents and Writs

**Article 10**

The service of documents and writs shall take place in accordance with the laws of the State where service is sought, provided that if the State requesting service desires to have the service carried out in accordance with its own laws, such desire, unless it conflicts with the laws of the State where service is sought, shall be accorded.

**Article 11**

Writs shall be transmitted through diplomatic channels, subject to the following:

(a) The request shall involve all information regarding the person to be served: his name, surname, occupation and place of residence. Two copies of the document required to be served shall be drawn up, one of which must be delivered to the person to be served and the other must be returned, signed by him or endorsed by the serving officer to demonstrate whether the service had been effected or not and also the reasons for its refusal.

(b) The State requesting service shall collect, for its own account, the fees due thereon in accordance with its own laws and no fees shall be collected in the State in which service is sought.

**Article 12**

The State, in which service is sought, shall not object to such service being effected by the consulate of the country requesting service, within the limits of its jurisdiction if the person to be served is a national of that State, and where such service is so effected, the State in which it is effected shall bear no responsibility.



**Article 13**

Service effected in accordance with this Agreement shall be treated as if it had been effected in the territory of the State requesting service.

### E. Letters of Request

**Article 14**

Any State bound by this Agreement may request any other State party thereto, to proceed, on its behalf, in the territory of the State receiving the request with any judicial proceeding connected with a pending case, in accordance with the provisions of the following two articles.

**Article 15**

The letter of request shall be transmitted through diplomatic channels and effect shall be given in the following manner:

(a) The judicial authority concerned shall proceed to execute the request in accordance with the procedure in force, provided that where the requesting State desires to have it executed in some other way, such desire, unless it conflicts with the laws of the requested State, shall be accorded.

(b) The requesting authority shall be notified of the place and time at which it shall be put into effect in order to permit the party interested to appear in person, if he so wishes, or to appoint someone to represent him.

(c) Where the request pertains to a matter or procedure which is considered illegal in accordance with the laws of the requested State or where it is not possible to fulfil the request, the requested State shall so inform the requesting State stating the reasons.

(d) The requested State shall bear the costs with the exception of expert fees and the fees of the documents produced in the course of executing the request which shall be paid by the requesting State.

**Article 16**

A judicial procedure, taken in compliance with a letter of request in accordance with the preceding provisions, shall have the same illegal effect as if it had been undertaken by the competent authority in the requesting State.

**Article 17**

No claim shall be made against nationals of the requesting State, for fees, deposit or security for which the nationals of that State are not liable, nor shall they be deprived of the right which such nationals enjoy with regard to legal assistance or exemption from court fees.



DOCUMENT A1

## MEMORANDUM SUBMITTED BY THE U.A.R. DELEGATION AT THE SIXTH SESSION

The recognition and enforcement of a foreign judgment, outside the country in which it is originally issued, is a matter of considerable importance. In fact if there is need to apply foreign laws and to recognise their extraterritoriality, following the prerequisites of justice and its sound administration, the question of giving effect to foreign judgments becomes very delicate. In applying foreign laws, the national judge resorts to the provisions of his State legislation or applies the rules of Private International Law governing the conflict of laws. As to foreign judgments, the situation differs because they are issued by a foreign judge in the name of a foreign *imperium*, and as such it is not easy to admit for them direct operation *ipso jure* outside the sphere of the original territory.

The judgment in this sense means any decision delivered by a court of competent jurisdiction to take cognizance of the litigation submitted to it and leading to bring to an end the pleadings, exceptions and proceedings of inquiry and execution that may arise and having the *res judicata* or the force of the *chose jugee*.

A judgment, in its capacity as a procedure of legal form, expresses the truth concerning the question adjudged and as such entails three effects:

(1) The force of evidence which the judgment enjoys by virtue of the fact that its contents were practised by a public 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 public authority even by coercion, if necessary, to ensure justice for all.

Undoubtedly the first effect, namely the force of evidence is recognised without the need for taking any other measure 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 public authority.

As to the other two effects, their recognition needs more details which we shall deal with after.

The territory of the State means every part of it subjected to its sovereignty either on land or at sea or in the air without any limited height. As for the territorial sea, its limits differ according to the national legislation and the international custom.

The judgment is considered foreign, according to the Latin theory, if it is issued by a court in the name of a foreign *imperium*, no matter where it is held. But in the Anglo-Saxon system, the judgment is considered foreign if it is issued by any of the independent jurisdictional unities which are incorporated in the constitutional organisation of the State. Every one of them is a legal autonomy like the Commonwealth. Any judgment issued in any of the Commonwealth countries is considered foreign if it is desired to be carried into effect in other countries embodied in the Commonwealth. Similarly, in the U.S.A., any judgment issued in any sister State is considered foreign in another state. With this in view, any judgment issued by any British consulate court outside England, under capitulations in a country having this system, is considered foreign if it is desired to be enforced in England.

As to the force of the execution of foreign judgment outside the State in which it was issued, some authorities are of the opinion that it is possible to enforce the civil and not the penal foreign judgments. The basic ground of this opinion is that the criminal law is originally connected with the sovereignty of the State on its territory. In other words, if any crime is committed in a country, it is subjected to its law even if the accused is a subject of another country, except cases of exemption from jurisdiction and extra-territoriality. They add that the conception of territoriality of the criminal law is based upon social and practical considerations as the crime, being a social phenomenon, causes troubles in the community in which it takes place. The reaction in this community makes it necessary to enforce the judgment issued on this crime in



the place where it was committed, besides safeguarding the administration of justice according to the status and the system prevalent in the aforementioned community, and thus securing a fair trial for the parties of the criminal suit according to the conceptions of this community.

One of the prerequisites of the conception of territoriality of criminal law is that the penal judgment must have its effect confined within the territory of the country in which it was issued. It should have no positive effect outside it. In other words, it must have no effect on recidivism or on the nullity of conditional punishment. Moreover, it does not affect the liability of the convicted person in a way to cause any criminal effect or subsidiary penalties such as deprivation of certain rights and privileges. It does not restrict the civil judge in a civil suit, which a victim or an injured person may bring outside the country in which the penal judgment was rendered, in connection with proofs, legal form or imputability to the doer, contrary to the national penal judgment which restricts the civil judge in all these matters.

Furthermore, according to the conception of territoriality, the foreign judgment does not give any negative effect outside the country in which it was issued. In other words, it does not bar the fresh proceedings before the national judge. Thus the *res judicata* is not accepted unless there is an explicit provision in this respect in the legislation of the country where the new prosecution upon the same offence is served.

It is possible to sum up the grounds of those who advocate the different treatment between the civil and the penal judgments as follows:

(1) Penal judgments express the *imperium* of the State in which they are rendered. They—like the laws binding upon them—have a commanding characteristic expressing the sovereignty of the State in its full form. Any attempt to bring their effects abroad endangers the sovereignty of the State and restricts its *imperium*.

(2) It is hardly necessary to state that the civil judgments are not enforced in a foreign country if they are in-

compatible with the public policy of that country. As the penal judgments, in general, are in close relation with the public policy, the limitation of their effects within the territory of the state in which they are delivered is quite in conformity with the general principle that prevails upon the civil judgments themselves.

(3) There is no urgent need to enforce the foreign penal judgment as the country in which they are issued could resort to the extradition.

(4) The enforcement of foreign judgments requires, in many forms, the institution of an equivalence between the penalties of different countries so that the judgment may not swerve from its real letter and change its nature when it is sought to be enforced abroad.

Other jurists, however, advocate a contradictory opinion based on the fact that it is not fair to ignore, completely, the foreign penal judgment as the modern social requirements, the spread of criminality and the necessity of cooperation between countries to combat it call for the respect of foreign penal judgments. It is not incompatible, however, with the sovereignty of the State if it takes this judgment as a basis for what measures its laws may take for public security. It gives it its external force of execution and the size of effects it wants. So there is no need to differentiate between the civil and the penal judgments. Each of them expresses the *imperium* of the State of the judge who has issued it. Moreover, if the enforcement of the civil judgment beyond the boundaries of the country in which it was issued does not conflict with the sovereignty of the foreign country, according to an agreement, this should be applied to penal judgments. Furthermore, *imperium* is not incompatible now with the limits and requirements which the social and political mutual cooperation among countries requires.

It should be further pointed out that the question of enforcing foreign civil judgments was fought against at first. But later, it was recognized on the basis of international courtesy. The matter ends by putting on this conception its present legal dress, referring it to the authority and desire of the country itself. In



fact, the enforcement of penal judgments meets now the same objections which faced civil judgments before.[1]

Those who advocate this last opinion believe that it is not true that the foreign penal judgment conflicts with the public policy of the state in all its forms. However, if the country requested to enforce the judgment within its territory, finds that it conflicts with the prevailing public policy, it can abstain from enforcing the said judgment.

Regarding the objection based on extradition, it does not conflict in any way with the necessity of recognizing the foreign penal judgment because the extradition is ruled by complicated procedures which differ from one country to another. In addition, some countries resort to it only within the limits of treaties and conventions held between them, while others refuse to hand over their subjects.

As regards the difficulty of making an equivalence among the penalties of the different countries, it is easier for them, by private treaties, to point out what is considered as equivalent penalties in their different legislations, so that each of them, in case of enforcing a foreign judgment, may inflict upon the convicted person in its territory the penalty stipulated in its legislation and which is considered to be the adjudicated penalty. That is what France did after she had restored the Alsace and Lorraine from Germany after the First World War. Thus the decree of 25 December 1918 with which she applied her criminal laws on the provinces of Moselles and Lower and Upper Rhine stipulates that the judgments of the Alsace and Lorraine Courts which were issued in compliance with the German Law and which acquired the force of "chose jugee" should remain valid. Article 6 and the following articles of this decree stipulate what is considered equivalent in the French Penal Code to that in German criminal legislation[2].

Undoubtedly the idea of enforcing foreign penal judgments was not easy to accept at first and it was only brought back to

[1] Donnedieu de Vabres: *Revue de Droit Penal et de Criminologie*, 1950-p. 457

[2] Donnedieu de Vabres: *Les Principes Modernes de Droit Penal International*, p. 210

minds lately. Some countries hold agreements to reciprocate the enforcement of foreign judgments like the agreement between France and Morocco which was held on 1-4-1912 and which stipulates in article 22 the reciprocity of the enforcements of penalties restricting freedom issued by the courts of each of the two countries in the territory of the other[3]. Moreover, the treaty held between France and Spain on September 22, 1916 to point out the legal relation between the spheres of influence belonging to each in Morocco stipulates that each must respect the penal judgments of the other in her own territory.

The international conferences advocated the possibility of enforcing foreign penal judgments (Paris Conference 1895, Washington Conference 1910, Bucarest Conference 1929 etc.....).

The Bucarest Conference (7-9 October 1929) decided that every legal penal judgment issued by a competent judge in compliance with the applicable law gives abroad, under the supervision of the local judicial authority, the effects necessary for international cooperation and which complies with the public policy of the country which is requested to enforce it. The Conference deemed it necessary to show by an international agreement, a table of the penalties and the security measures equivalent among the states forming the international family. The draft of the unified code set by the League of Nations to combat terrorism recognizes openly the effect of foreign penal judgments on Recedivism[4].

Lastly, Article 7, Clause 73 of the Pact of the North Atlantic Treaty Organisation (N.A.T.O.) states that each country in which a penal judgment was issued by a court belonging to any of the contracting countries is invited to take the necessary measures to enforce this judgment in its territory, e.g. if an American Court Martial held in France delivered a penal judgment and requested the French authorities to enforce it, these authorities may enforce it in their territory.[5]

[3] Bouzat & Pinatel, *Traite de Droit Penal et de Criminologie*, Vol. 2—ed. 1963.—p. 1343

[4] *Revue de Droit Penal et de Criminologie*, 1935, p. 733

[5] Bouzat & Pinatel. *op. cit.*, p. 1344



On the other hand, it is noticed that the negative force of the foreign penal judgment is recognized by many legislations. The reasons are that the foreign judge, in rendering the penal judgment, is supposed to have stable right not only for his own country but also for humanity in all over the world: the right of combating criminality. Besides, ignoring the conclusive judgment and reconsidering the dispute conflicts with the rule that a person should not be tried twice—*non bis in idem*[6].

Some legislations give effect to the foreign judgment dealing with deprivation of rights when the convicted person is a subject of the country in which the execution of that foreign judgment is sought provided that certain conditions exist such as Article 23 of the Spanish law applied on January 1st, 1929, which stipulates

> "If a foreign court issues a judgment against a Spanish native inflicting a penalty of deprivation of his rights in an offence on which this law inflicts a penalty or any deprivation of legal capacity, the Spanish court, at the request of the Minister of Justice and after hearing the concerned party, adjudicates the criminal effects brought out in Spain by this foreign judgment".[7]

Articles 436 and 437 of the Code of Private International Law (the Bustamande Code) annexed to the Convention on Private International Law adopted by the 6th International Conference of American States at Havana in 1928 provide that

> "No contracting States shall execute the judgments rendered in one of the others in penal matters in respect to the sanctions of that class which they impose. They may, however, execute the said judgments in respect to civil liability and the effects thereof upon the property of the convicted person if they have been rendered by a competent judge or tribunal in accordance with this code and upon a hearing of the interested party and if the other conditions of form and procedure established by the said code regarding the enforcement of civil judgments have been complied".

[6] Fausten Helie. *Traite de l Instruction Criminelle*, No. 1042

[7] Donnedieu de Varbres, *op. cit.* p. 339
Travers, *Droit Penal, International*, p. 472 No. 1585

### Recognition of Foreign Judgment in Civil Suits

If the recognition of the foreign penal judgment, in connection with the criminal penalties it has adjudicated, is not acceptable, we should at least recognize it in the civil suit served with the criminal proceedings.

Some criminal legislations had taken into consideration this fact and applied it in their codes. Thus, the Italian Penal Code stipulates in Article 12(4) that it is possible to recognize the foreign penal judgment relating to restitution or reparation of damages provided that this judgment has been issued by the judicial authority of any country with which Italy has held a treaty of extradition. If there is no treaty of that sort, it is possible to recognize the foreign judgment at the request of the Minister of Justice.

The French jurisprudence accepted, after hesitation, the principle of issuing the "Exequatur" for judgments rendered by foreign penal courts in civil suits brought with criminal proceedings.[8]

### International Trends Relating to Penal Effects of Foreign Judgments

In 1928, the Sub-Committee of the Conference for the Unification of Penal Law, held in Rome, endorsed several decisions, one of which is the enforcement of deprivation of legal capacity and rights which results from the foreign penalty outside the territory in which it was issued.[9]

The different legislations do not follow the same way. Some give the foreign judicial antecedents the same force as the national ones such as the Mexican Code. Others give the judge the choice to take into consideration the foreign antecedent as an aggravating factor like Norway and England. Others confine the foreign antecedents to those issued in offences liable to extradition as in the Argentinian Code issued in 1921 (Article 50).

[8] The Seine Court of Appeal, 28 Jan. 1924
Dalloz H. 1924—2—202

[9] Cheshire. *Private International Law*, 1952, pp. 761



### Procedure of the Recognition of Foreign Judgments

The Anglo-Saxon system does not apply the "Exequatur" adopted in France, U.A.R. and other countries, but it is based on the theory known as the recognition of foreign created rights or legal obligations.

Therefore, to enforce a foreign judgment in England it is necessary to bring a fresh suit on it subject in its examination to urgent procedures of actions and based on *prima facie* evidence. This process was soon developed to the recognition of a force of conclusive evidence for the foreign judgment provided that it was delivered by a competent court and it was final in a sense that the court which has issued it will not consider it again, even if it is assailable in a court higher than that which has issued it.

Foreign judgment is not enforced in England if it conflicts with her public policy or if it is vitiated by fraud. The enforcement of foreign judgment in England is controlled by Judgment Extension Act of 1868 which was the first statutary provision which deals with the direct enforcement of judgments issued by the courts of Scotland, Ireland and Wales as between each other. The Administration of Justice Act of 1920 enforces the judgments issued by the courts in the Dominions and the British Colonies. Lastly, the Foreign Judgment Reciprocal Enforcement Act 1933 gives effect to judgments issued in foreign countries on reciprocal basis.

The American system, like the English one, ignores the "Exequatur". It necessitates for the enforcement of foreign judgments the service of a new suit. The American jurisprudence was developed towards the recognizing for the foreign judgment of a conclusive evidence. But the basis of this recognition differs from that of the English system. In the latter the force of the foreign judgment has its foundation in the vested rights or legal obligations; while in the American system it is based on international courtesy.

As for the Italian legislation promulgated on October 16th, 1940, it states that the foreign judgment is subjected to a private suit which aims to the declaration of its efficiency. It is quite possible, however, to enforce the foreign judgment if it is submitted

in the course of a pending suit without any need to stop its proceedings in order to serve an independent one to that effect.

**Recognition and Enforcement of Foreign Judgments in the U.A.R.**

**(I). Foreign Civil Judgments**

The U.A.R. legislator, in dealing with the enforcement of foreign judgments, applies the principle of 'treatment on equal footing" or the principle of "reciprocity".

Article 491 of the Egyptian Code of Civil Procedures stipulates that the execution of judgments and orders delivered in a foreign country may be ordered on the same conditions required by the law of such country for the execution therein of Egyptian judgments and orders. Thus, if the laws of the country in which the foreign judgment is issued do not give an effect to the judgments issued by the courts of the U.A.R. necessitating the service of a new suit by the petitioner before its courts to assert his rights by submitting the judgment, sought to be exempted, as an evidence, susceptible to prove the contrary, as in Scandinavian countries, or insusceptible to prove the contrary as in Anglo-American countries, then in such case, the judgment issued in that foreign country will have no effect and the judgment creditor, to enforce his rights in the U.A.R., has to bring a new suit at its courts. On the contrary, when a foreign country allows the execution of judgments issued by the courts of the U.A.R. as judgments, such as in France, Italy and Germany, an *exequatur* may be issued after fulfilling the conditions and procedures stated by the Egyptian Code of Civil Procedures, namely:

1. That the judgment was passed by a competent judicial authority according to the law of the court that passed it. (Art. 493, clause 3 of the Egyptian Code of Procedures). In this connection, competence means international competence.

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

This is a progressive rule in the field of conflict of jurisdictions contradictory to the usual practice in various countries such as



France, Italy, Germany, England and the U.S.A., which subject the competence of the court which issued the foreign judgment to the rules of conflict of jurisdictions as stated by the law of the country, requested to execute the judgment in its territory.

We think that it is not the concern of the judge, competent to issue the order to enforce the judgment, to discuss whether the competence of the court that has issued it is *rationae materea* or *rationae loci*.

Jurisprudence in England and U.S.A. adopts this point of view, and in this way it differs from that in France which insists that the court which has issued the judgment must have the said competence.

2. That the summons of the litigants to attend court is valid and their representation in the suit is proper. This is stipulated by clause 2 of Article 493 of the Egyptian Code of Procedures and is defined by referring to the law of the country to which the judgment was issued. This condition is stated in France and most of the countries.

3. That the judgment has the force of the "chose jugee" or *res judicata*. Clause 1, Art. 49 of the Egyptian Code of Procedures says that the force of the "chose jugee" is secured for the foreign judgment sought for enforcement in accordance with the law of the country in which it was issued, because if the foreign judgment has not this force, it may be revocable by the courts of the country in which it was issued.

4. That the foreign judgment is not contradictory to any other judgment already issued by the U.A.R. courts. The principle is stipulated by clause 2, Article 493 of the Egyptian Code of Procedures. In fact, this is one of the forms of contradiction to the public policy of the country to which the judge requested to issue the *exequatur* belongs. The reason is that the domestic judgment incorporates the evidence of truth and validity and should be considered as expressing truth and justice and as such it is much favourable than the foreign judgment.

Some legislators add another prerequisite that no case on the subject between the same parties, relating to the judgment required

to be executed, has been instituted in the courts of the country to which the judge, requested to issue the *exequatur* belongs (Art. 797 of the Italian Code of Procedures and Art. 176 of the Draft Rules of the French Private International Law). The French jurisprudence has applied this principle.[10]

5. That the judgment shall not involve anything of a nature to violate morals and public policy in the U.A.R. This is stipulated by clause 4 of Art. 493 of the Egyptian Code of Procedures. Regarding the definition of the public policy, it is conditioned by the legal decisions of that country in which enforcement is sought.

But the conception of public policy is not rigid. It develops and takes forms according to the conditions of every country. So its definition should be conditioned by the time of the enforcement of the judgment and not that of its issuance. (French Civil Cassation 22/3/1944: Sirey 1945-1-177.)

6. That the court issuing the judgment has applied the applicable law. Although there is no statutary provision to this effect, yet it is necessitated by the rules of the administration of justice. Some jurists insist that the court that issued the judgment must have applied the applicable law according to the rules on the conflict of laws enacted in the country as applied by the requested court for the execution of the judgment. The French jurisprudence supports this opinion (*Revue critique de Droit International Prive*, 1951, p. 412.: F. Cass. 17-4-1951; Sirey 19-2-1952).

But the contemporary doctrine 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.

**Procedure of Enforcement of Foreign Judgment**

The fulfilment of the previous prerequisites does not imply that the foreign judgement enjoys *ipso facto* the force of execution. A decision to execute the said judgment must be issued by the domestic court. The *exequatur* may be requested by suit before

[10] *Revue critique de Droit International Prive*, 1925 p. 343



the tribunal in whose territorial competence the judgment is desired to be executed following the rules of ordinary proceedings. But if the tribunal finds that the foreign judgment is based upon simulant proceedings or it was void of reasons, in this case, it conflicts with the public policy and as such it is not to be endorsed.

But as the principle of discussing the formality of the judgment may conflict with what is stated in the Anglo-Saxon countries relating to the recognition of the conclusive evidence, the doctrine in these countries denies the judge his right to object to the evidence incorporated in the judgment.[11]

But the English jurisprudence gives the judge the chance to reconsider the evidence and discuss it if it is the only way to expose fraud.

**(II.) Enforcement of Foreign Criminal Judgments**

The contemporary legislation of the U.A.R. does not recognize the effect for the foreign criminal judgment. The Court of Cassation, in one of its decisions, said:

> "It is one of the prerequisites of every country to be independent in its administrative and judicial affairs, and it alone should enforce what judgments its courts may issue in the name of the supreme legal authority in it or in the name of its nation. It cannot force any of other nations to enforce these judgments, and any country cannot carry it out unless there is an agreement to this effect between the two countries."[12]

The agreement relating to the enforcement of judgments held among the Arab League states, which has become effective since August 28th, 1954, includes private clauses for the reciprocity of final judgments connected with the civil or trade rights or with the damages adjudicated by the penal courts or connected with personal status issued by the judicial organisations in any of these states. This means that the penal judgments are not included in the agreement.

[11] Cheshire, *Private International Law*, 4th., 1956, p. 628.

[12] *Criminal Cassation*, 11-12-1930; *Official Bulletin* No. 37; 1932, p. 112.

Nevertheless, the Egyptian-Sudanese Convention, which was endorsed by the Cabinet on May 11th, 1902, states in Article 20 that the Sudanese Government can enforce in Sudan and at the request of the Egyptian Government judgments of imprisonments of less than 6 months that are issued by Egyptian courts.

Certain laws stipulate that penal effects of foreign judgments should be respected. As an illustration to this, we can cite Art. 417 of the Law No. 583 for the year 1955 dealing with the organisations of private schools which stipulates the deprivation of any person convicted by a foreign criminal judgment in a felony or a misdemeanour or breach of faith of owning a private school or getting any administrative or education job in any school.

The legislator, in this matter, followed some foreign laws in arranging the order of the criminal effects of the foreign judgments in connection with the different vocational activities such as the French law issued on November 30, 1892 on practising medicine which was modified by the ordinance issued on September 24, 1945, the law issued on July 29th, 1959, about abortion, the law issued on March 31st, 1928 on military service, the law of June 19th, 1930 on bank business, the bill of August 8th, 1915 on the deprivation of directing firms and the law of August 30th, 1937 on improving the industrial and trade crafts. In all these laws, the foreign decisions are not binding to the French courts, but the said courts have the choice to give this effect after making sure that the foreign judgment is in due form. Lastly the draft of the new French Penal Law (Art. 18) stipulates that the foreign penal judgments issued on offences on which the French law inflicts penalty, could be taken into consideration for applying the security measures in France.

The Italian Law (Art. 12) and the Swiss Law (Arts. 21 & 67) give an effect for the foreign penal judgment in connection with recidivism and the annulment of conditional penalty. But the French Law does not give it this effect.

The Penal Code of the U.A.R. recognizes for the Foreign Penal Judgment the negative authority as Art. 4 stipulates: "No proceedings shall be taken if it is proved that the person accused has been acquitted by a foreign judgment and has been finally convicted and undergone his sentence".



In these circumstances, the respect of the penal judgment does not depend upon the prerequisites of reciprocity nor does it need an *exequatur* as in the foreign civil judgment. It suffices in this respect to make sure that the foreign judgment was issued by a competent jurisdiction, that it is in due form and in conformity with the law of the country in which it was issued (*lex loci*) and that the accused has been acquitted or finally convicted and undergone the whole sentence.

Lastly, the draft new Penal Code in the U.A.R., which is still under study, stipulates in Article 19 that:

"It is possible to rely on foreign penal judgments issued on crime, punishable by this code, committed abroad:

(1) To enforce the security measures or the subsidiary penalties if they do not conflict with one of the provisions of this code. To operate restitution, damages and other civil effects.

(2) To adjudge security measures and subsidiary penalties stated by this code and restitutions, damages and other civil effects.

(3) To apply the provisions of this code in connection with recidivism, habitual criminality, cumulative penalties, conditional release and rehabilitation.

To take a foreign judgment in consideration, the court competent for the kind of offence adjudged must examine the regularity of the said judgment and endorse it. However, if the suit is filed and the foreign judgment was presented in the course of the proceedings, the court hearing this suit shall be competent for its endorsement".

This provision confines the respect of the foreign penal judgment only to the enforcement of the security measures, the subsidiary and not the principal penalties and the civil decisions. It gives it effects too in recidivism, habitual criminality, cumulative penalties, conditional sentence, conditional release and rehabilitation provided that one has to make sure that the foreign judgment is regular and that it was endorsed by the court requested to enforce it. The last condition complies with the status mentioned in the

Code of Civil Procedures (Arts. 491-495) in connection with the issue of *exequatur* for the civil judgments. Furthermore, the judge must make sure that the foreign penal judgment does not conflict with the public policy, that the proceedings followed for its issuance are regular, that it complies with the law of the foreign country to which the judge belongs in deciding upon the crime and to make sure that the judgment is executory in the country where it was issued. He has to refuse its enforcement if it was issued on a political crime because if he is supposed to abstain from handing over the political criminal to the country that requests his extradition, it is unreasonable to enforce the foreign judgment in the country to which the said convicted person has resorted.

**Service of Process and Recording of Evidence in U.A.R.**

Regarding the service of summonses to persons having a known domicile abroad, Article 4 of the Code of Civil Procedure modified by the Law No. 49 of 1963 states that the summons should be handed over to the Public Prosecution which has to send a copy to the Ministry of Foreign Affairs to send it through the diplomatic channels. It is possible, provided the treatment is on equal footing, that the copy could be handed to the seat of diplomatic mission of the State, to whom belongs the domicile of the person sought to be summoned so as to be delivered to him without charging fees.

The instructions of the Public Prosecution have arranged the order of the service of summons abroad whether in civil, criminal or personal status affairs. They are summed up as following:

1. The papers needed for summons are submitted to the bailiff department, the original and two copies containing all information regarding the person to be summoned. If these papers are to be sent to any of the non-Arab countries, the petitioner must add a translation for it in the language of the country in which the service of the summons is to be carried on. It must be signed either by him or by his counsel. A French translation is enough if the language of the country in which the service is required is difficult for the petitioner to understand. In this case, he has to deposit a suitable security so that



the Ministry of Foreign Affairs may contact the competent Embassy or Delegation to translate the aforementioned papers.

2. The bailiff department communicates the papers to the Public Prosecution after charging the fixed fee. The original of the summons is sent back to the petitioner informing him that the Public Prosecution has received the summons. The latter, in its turn, sends two copies of the summons with the translation to the office of the Attorney-General to be transmitted to the Ministry of Foreign Affairs which sends them to the person to be served, through the diplomatic channels.

3. The Public Prosecution does not accept any writ for abroad unless the delays of distance stated by Article 22 of the Code of Procedures is observed (30 days for the Arab countries and 150 days for the other countries).

4. The agreement relating to writ and legal documents between the U.A.R. and the other Arab States ratified by them must be observed. Accordingly, summons could be made in compliance with the procedures stated by the law of the country requested to do it. But if the requesting country desires the procedures to be carried out in accordance with its law, its desire could be realised unless it does not conflict with the law of the country which has to carry out the summons. The requesting country charges the fixed fee according to its own law, while the country which served the summons charges nothing. The country, requested to carry out the summons in its territory, has no objections if the consulate of the requesting country undertakes the proceedings within the domain of her competence, if the summoned person is a subject of the requesting country. In this case, the country in which the service is carried out, bears no responsibility.

Writs sent to the U.A.R. from abroad by the diplomatic means are delivered by the bailiff of the court in the zone of which the person to be served has his domicile.

As to the recording of evidence among states, the U.A.R. answers the requests relating to letters rogatory even if there is no international agreement between it and the requesting country, only for internatonal courtesy (Article 807 of the Public Prosecution Instructions, 1958). Letters rogatory may incorporate all legal inquiries such as hearing and confrontation of witnesses, delegation of experts, seizure of things, searching and cross-examining the accused persons. It is not possible to ask in the letters rogatory to arrest the accused person who is to be questioned because this measure is only taken under the extradition procedures.

Article 806 of the Public Prosecution Instructions stipulates:

> "If it is desired to question an accused person or a witness who is domiciled abroad, the competent Prosecution has to write a memorandum on the facts of the case, the information regarding the identity and the domicile of the person desired to be questioned. The competent Prosecution communicates this memorandum to the Cabinet of the Attorney-General to make the decision of delegating the competent judicial authority in that country and taking the necessary steps to put it into effect."

The aforementioned agreement on writs and letters of request held among the Arab League States stipulates the rights of any of the contracting States to request any other State bound by this agreement to proceed on its behalf in its territory with any judicial proceeding connected with a pending case. The letter of request is submitted through diplomatic channels and is executed by the competent judicial authority in compliance with adopted legal proceedings. But if the requesting State desires to execute the request in some other way, such desire is accorded unless it conflicts with the law of the State giving effect to the request. The requesting judicial authority is informed of the place and time of the execution of the request in order to permit the party concerned to appear in person if he so wishes, or appoint someone to stand for him. Where it is not possible to give effect to the request or where it is in respect of a matter or proceeding which the law of the requested



State does not permit, the latter should so inform the judicial authority of the requesting State giving the reasons. The requested State bears the costs with the exception of the honoraries or experts which should be paid by the requesting State. A note of these fees has to be sent with the file of the letter of request, provided that the requested country may charge according to its law, the fees on the documents produced at the hearing of the case.

The said agreement states also that a judicial proceeding taken in compliance with a letter of request in accordance with the aforementioned provision, shall have the same legal effect as if it had been taken before the authority in the requesting State. No claim shall be made against nationals of the requesting State in any of the States of the Arab League, for fees, deposit or security for which the nationals of that State are not liable, nor shall they be deprived of the right which such nationals enjoy with regard to legal aid or exemption from court fees.

Originally, if there is no agreement among States, letters of request are not obligatory. The Convention concluded at the Hague on July 17th, 1905, organized the proceedings of letters of request among the signatory States. The letter of request is to be transmitted to the foreign authority through the consul of the requesting state provided that every State has the right to send the request through diplomatic channels (Art. 9/2) or make direct contact between the judicial authorities of the two States, with a view to executing the request (Art. 9/4). The agreement does not prevent the consuls from executing the request provided that the requested country does not object (Art. 15). The requested State must proceed to execute the request provided that it considers itself having no jurisdiction to carry on the matter or that the request conflicts with its sovereignty or security (Art. II).

The agreement states also that the requesting State can ask to be notified of the time and place at which the request should be put into effect in order to permit the party concerned to appear at the hearing of the case (Art. 11/2).

The Italian jurisprudence is of the opinion that the execution of the letter of request should be done in Italy even if there is a judgment issued in the same suit for which the letter rogatory is

sought to be fulfilled because the judge who is in charge of this mission does not penetrate into the subject. (Italian Court of Cassation, 20/12/1933 referred to by Batifol: *International Law*, 2nd ed., 1955, p. 819).

Some States charge a private commissioner to execute the letters rogatory or delegate their consulate authority to this effect provided that the requesting State does not object. (Circular of the French Ministry of Foreign Affairs dated 20/1/1910 referred to by Batifol., *op. cit*, p. 818).

But it is not allowed to ask at a time the execution of letters rogatory through the judicial authorities in the requested State together with the delegation of a private commission or the consul of the requesting State. (See the letter despatched from the Assistant Secretary of State of the U.S.A. to Messrs. Parkinson & Lane, August 13, 1923 cited by G.H. Hackworth in the *Digest of International Law*, Vol. II, p. 98)

In fact, if some States authorize their consulates or diplomatic authorities abroad to carry out the execution of request, it is hardly necessary to state that this process is not practical because those representatives have no authority to force witnesses to come to give their evidence.

In these circumstances, it is much better to arrange this matter through international agreements with a view to putting into effect and to having its share in achieving cooperation among States.

The U.A.R. delegation realises the difficulty of treating the effects of foreign judgment by formulating unified rules to be enacted in all the participating States, whether these rules are put in the form of international agreements or incorporated in the municipal laws of every State. But in the light of the afore-mentioned explanations, statutory provisions and international agreements, the U.A.R. delegation proposes the following draft convention.



DOCUMENT 'B'

## DRAFT AGREEMENT ON THE PRINCIPLES OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS*

**Article I**

In this Agreement—

A *foreign judgment* means a judgment, decree or order or other adjudication pronounced or made by a court or tribunal whose jurisdiction does not extend to the territory governed by the law of the State in which enforcement of such judgment is sought and includes an award in arbitration proceedings, if such award becomes enforceable in the same manner as a judgment given by a court.

*Enforceable* means the liability or capability of a judgment to be compulsorily executed through the procedure of the appropriate court of the State in which enforcement is sought.

*Appropriate court* means the court which is authorised by the law of the State to which it belongs to adjudicate or make order upon a given matter.

**Comment**

A distinction is drawn between "voluntary jurisdiction" and "contentious jurisdiction". Judicial acts in the former category are not judgments for this purpose, example: the grant of *venia aetatis* to a minor, an adoption order etc. The agreement relates only to adjudication of a court or tribunal. An award by arbitrators would therefore not be covered unless it has been made a rule of court or unless a judgment or decree has been entered in terms of such award. Some judgments do not require enforcement, for example, merely declaratory judgments and all judgments dismissing an action unless there is an order for costs.

* This draft contemplates the conclusion of a subsequent Convention or bilateral Agreement among States and is intended to ascertain the areas of agreement on this subject with a view to considering the practicability of such a Convention or Agreement.

A foreign judgment will not be *enforceable* if it has been set aside or quashed by the appropriate court having appellate or revisionary powers.

**Article II**

This Agreement shall apply only to foreign judgments in civil or commercial matters excluding judgments in or incidental to proceedings in matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy, guardianship of infants. It shall not apply to judgments in actions for the enforcement of revenue laws or in actions of a penal nature.

**Comment**

Matrimonial matters are excluded because a draft agreement on this subject has already been submitted to the Committee. The other subjects are excluded because of the likelihood of controversy in these areas and because it would be preferable to have special provision in these cases.

The Agreement also excludes from its purview judgments in criminal proceedings or in actions of a penal nature. Judgments in actions for the enforcement of revenue laws are also excluded.

**Article III**

A foreign judgment shall not be enforceable in the court of another State except by mutual agreement of the States concerned on the basis of reciprocity.

**Comment**

This rule is inherent in the principle of territorial sovereignty recognised in international law. Bilateral agreements or conventions on a regional basis are contemplated. Reciprocal treatment is required only for the purpose of enforcement, and not for mere recognition.

**Article IV**

A foreign judgment shall not be enforceable except by a formal decision made by the appropriate court in accordance with the procedural requirements of the State in which enforcement is



sought. Proceedings for enforcement shall be stayed on proof of an appeal being filed against such judgment or of other steps being taken to have it set aside.

**Comment**

Such procedural requirements generally contemplate a system of registration, proof of prescribed particulars prior to registration such as requirements of proof as to authenticity of the judgment, proof of service of the text of the judgment and other matters such as specifying a time limit for applications and registration, fees for registration, payment of interest, costs of application etc.

**Article V**

A foreign judgment shall be enforceable only if it is a final judgment of the appropriate court of the State in which it was pronounced or made.

**Comment**

The judgment must finally determine the rights and liabilities of the parties in the court of the country where it is pronounced. A judgment is not final if the same court which pronounces it has power to rescind or vary it subsequently; but a judgment for periodic payments may be final as regards payments already due for which an action may be brought. Where the judgment is for the payment of money, it must be for a sum certain. Thus an order for the payment of costs is not enforceable until the costs have been taxed. A judgment otherwise final is not the less so because it is the subject of an appeal to a higher court. In such cases proceedings for enforcement will be stayed till the appeal is finally determined. (Vide Article IV)

**Article VI**

A foreign judgment shall be enforceable only if at the relevant time it remains unsatisfied in whole or in part.

**Comment**

Procedural provisions would require a certificate from the competent authority of the State issuing the judgment to the effect that the judgment has not been wholly satisfied.

**Article VII**

A foreign judgment shall be enforceable only if it is valid.

A foreign judgment shall be invalid if any one or more of the following facts are established:

(a) if it has not been made by a court which is internationally competent.

(b) if it has been obtained by fraud, duress or undue influence.

(c) if it has been obtained by proceedings contrary to natural justice.

(d) if it is in any way contrary to the public policy of the State in which enforcement is sought.

**Comment**

(a) A foreign judgment will not be enforced if it has been obtained in such circumstances that it does not have any extra-territotrial or international validity, though unobjectionable by the *lex loci*.

In international law a court cannot assume jurisdiction in breach of the doctrines of sovereign immunity or diplomatic immunity. Nor does a foreign court have jurisdiction upon the title or the right to the possession of any immovable not situate in such State or to give redress for any injury in respect of any immovable not situate in such State. In an action *in personam* in respect of any cause of action, the courts of a foreign State have jurisdiction in the followng cases:

If the defendant was resident in such foreign State when the action was begun against him; if he was served with process while temporarily present in such foreign State for even a short period; if the defendant in his character as plaintiff himself selected the forum where the judgment was given against him; and where the defendant voluntarily appeared or where the defendant has contracted to submit to the jurisdiction.

The mere possession by the defendant at the time of the commencement of the action of property locally situate in the State—nor



the mere presence of the defendant in such State in the absence of any of the foregoing circumstances, cannot be considered as giving jurisdiction to the courts of that State.

A foreign court may not be the appropriate court by the law of the foreign State to try a particular action but such want of jurisdiction is a matter which should be pleaded in the foreign proceedings and not before the court of the State in which enforcement is sought.

In an action or proceeding *in rem*, the courts of a foreign State have jurisdiction to determine the title to any immovable or movable property within such State.

(b) The question which the courts have to consider, when the validity of a judgment is canvassed on the ground of fraud, is whether the foreign court has been intentionally misled by the person seeking to enforce it and thus procured judgment in his favour. In order to reach a decision on this question, the court of the State in which enforcement is sought will have to consider the merits of the case and of the foreign judgment. The issues of duress and undue influence are similarly triable before the court in which enforcement is sought.

(c) No foreign judgment which offends against "natural" or "substantial" justice will be enforced. Natural justice demands that a defendant be afforded a proper opportunity of presenting his case before the court. This will not be the case where either (a) he has not had sufficient notice of the proceedings or (b) where he has been unfairly prevented from presenting his case before the court.

(d) A foreign judgment will not be enforced if it offends against the public policy of the State in which enforcement is sought. Such will be the case when the enforcement of the foreign judgment or the cause of action on which it is founded is incompatible with the social or moral institutions of such State.

**Article VIII**

A foreign judgment shall not be enforceable if it contradicts any judgment delivered by any court of the State in which enforce-

ment is sought between the same parties or the same subject matter or if there is an action, instituted earlier, pending between the same parties on the same subject matter in the State in which enforcement is sought.

**Comment**

The rule is deductible both from the principle of territorial sovereignty and the doctrine of public policy.

**Article IX**

A foreign judgment shall not be enforced if it is established that there is another foreign judgment between the same parties in regard to the same subject matter which is in conflict with the judgment which is sought to be enforced.

**Comment**

The conflicting judgments may be judgments rendered in the same State or in two different States. There is no reason why the judgment which is later in time should be enforced.

**Article X**

A valid foreign judgment shall be enforceable notwithstanding any error of law or fact in the proceedings before judgment.

**Comment**

Under this Article, a rehearing on the merits is precluded. A review of the judgment on the merits will not be entertained even where error is clearly apparent. This view proceeds on the assumption that if parties had presented their case properly, such error could not have occurred and the proper remedy for an aggrieved party would have been an appeal.



DOCUMENT B[1]

## *DRAFT AGREEMENT IN REGARD TO RECOGNITION OF FOREIGN PROBATES

**Article I**

In this Agreement—

A court of *probate* means a court competent to issue probate or letters of administration and exercise other powers in regard to the estates of deceased persons.

A *competent court* means the court empowered to act under this Agreement.

**Article II**

Where a court of probate in a State grants probate or letters of administration, such grant will be recognised by another State in the manner set out in Article IV for the purpose of administering the estate of the deceased in that State provided the court of probate is a court of competent jurisdiction.

**Article III**

A court of probate shall have jurisdiction to grant probate or letters of administration if

(a) the deceased had a domicile in the State of the court of probate *and*

(b) if the deceased left immovable property in the State of the court of probate or if the deceased left movables which at the time of his death are or at any subsequent time have become situate in the State of the court of probate.

**Article IV**

Upon the probate or letters of administration granted by a court of probate, together with a certified copy thereof, being produced and deposited with the competent court, they shall be

*In the absence of information relating to testamentary proceedings in Member-States, the above is offered as a tentative proposal.