

## ANNEXURE-I

## MEMORANDUM OF THE GOVERNMENT OF CEYLON

## Recognition and Enforcement of Foreign Judgments, Service of Process and Recording of Evidence among States both in Civil and Criminal Cases

## PART .I

This subject is a subsidiary one falling under Article 3(c) of the Statutes of the Committee. Under Article 3(c), the Committee can exchange views and information on any legal matter of common concern to the member countries. It would appear that an exchange of views on this topic should be of great practical importance if it is done with the purpose of formulating a uniform set of rules to ensure the reciprocal recognition and enforcement of all foreign judgments; and to facilitate the service of process and the recording of evidence in foreign countries.

The problems that are dealt with may be illustrated by a few simple examples.

1. 'A', a national of State 'A', obtains from the courts of State 'A' a valid judgment against 'B'. The judgment is unsatisfied and 'B' is now residing in State 'B'. Should 'A' be entitled to obtain satisfaction of this decree in State 'B' ? What are the principles that should be agreed upon to enable 'A' to make an application to the courts of State 'B' to obtain satisfaction of his judgment ?

The fact that the judgment of court 'A' cannot reach out against a person in State 'B' involves the principle that the courts of a country, however constituted and whatever their precepts and sources, constitute only the law for that country and of no other and accordingly the judgment given by a court of such a unit or territory represents the judgment only of that court and nothing else.

2. 'A', a national of State 'A', files an action in the courts of State 'A' against 'B' a national of and residing in



State 'B'. Process has to be served on 'B' in State 'B'. Under what terms and conditions and by what procedure should State 'B' assist 'A' to have such process served?

3. In an action in State 'A', it is found that the evidence of a witness in State 'B' is material for the decision of his case. On what terms and conditions and by what procedure should State 'A' offer facilities for the recording and transmission of such evidence?

The above three cases will be considered separately in turn.

### Recognition and Enforcement of Foreign Judgments

**Basis of recognition**—It would appear, speaking historically, that judges and writers in the past have used the term 'comity' to indicate the basis on which foreign judgments were recognised. Notwithstanding the lip service paid to this term by judges and writers, the courts have developed and applied a system of legal rules relating to this matter.

The true basis for such recognition lies neither in comity, courtesy of courts or nations, caprice or reciprocity nor on any such narrow grounds as are sometimes adduced by courts such as a fictional quasi-contract or the doctrine of *res judicate* in the technical sense. The true basis on which our courts act is on the basis that a foreign judgment proves the fact that a vested right has been created through the judicial process by the law of a foreign country. This is popularly called the doctrine of obligation.

The recognition of foreign judgments as creating rights is in accord with public policy in its widest sense. It facilitates mercantile and other international intercourse, and as a measure of comity using the term as mutual courtesy it goes a long way to promote amity. Such recognition is also generally in accord with the principles expressed by the maxims *Interest rei publicae ut sit finis litium* and *Nemo debet vis vexari pre adem causa*. The basis referred to above not only supports and explains the requirement of finality and conclusiveness by court but the whole basis is implicit in the doctrine of the territoriality of law. This principle, however, does not mean that every right created by a foreign court will be recognised without qualification. To be recognised as an operative

fact, the right must have been created by the law of a State which has jurisdiction in the international sense and has satisfied certain other requirements.

### Enforcement of foreign judgments

Owing to the principle of territorial sovereignty a judgment delivered in one country cannot in the absence of international agreement have a direct operation of its own force in another country. As far as the general principles of law are concerned, it is open to a person, who has obtained a judgment in a foreign country and which is unsatisfied, either to sue on the judgment in the foreign country or to sue on the original cause of action.

To the general principle that a foreign judgment though creating an obligation that is actionable cannot be enforced locally except by the institution of fresh legal proceedings, our law contains a few statutory exceptions. They are as follows:—

#### 1. The Reciprocal Enforcement of Judgments Ordinance (Chapter 94):

It is an Ordinance to provide for the enforcement in Ceylon of judgments obtained in the superior courts of the United Kingdom and of other parts of Her Majesty's Realms and Territories. It applies to judgments, decrees or orders made by any court in any civil proceedings, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place. The procedure for enforcement is contained in section 3 of the Ordinance and is as follows:—

- "3(1) Where a judgment has been obtained in a superior court in the United Kingdom, the judgment-creditor may apply to the registering court at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case they think it is just and convenient that the judgment should



be enforced in Ceylon, and subject to the provisions of this section, order the judgment to be registered accordingly.

- (2) No judgment shall be ordered to be registered under this section if—
- (a) the original court acted without jurisdiction; or
  - (b) the judgment-debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or
  - (c) the judgment-debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear notwithstanding that he—
    - (i) was ordinarily resident, or
    - (ii) was carrying on business within the jurisdiction of that court, or
    - (iii) agreed to submit to the jurisdiction of that court;
 or
  - (d) the judgment was obtained by fraud; or
  - (e) the judgment-debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or
  - (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.
- (3) Where a judgment is registered under this section—
- (a) the judgment shall, as from the date of registration, be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered upon the date of registration in the registering court;

- (b) the registering court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but in so far only as related to execution under this section.

The Ordinance does not take away the right of a person to sue on the judgment, and presumably the right of a person to sue on the original debt.

## 2. Maintenance Orders (Facilities for Enforcement) Ordinance (Chapter 92).

This is an Ordinance to facilitate the enforcement in Ceylon of Maintenance Orders made in Britain or any British possession or protectorates. The Ordinance provides for the reciprocal registration and enforcement of Maintenance Orders, and a special feature of this Ordinance is a reciprocal power given to make provisional orders in the absence of the respondent.

## 3. British Courts Probates (Resealing) Ordinance (Chapter 99):

This Ordinance provides for the recognition and resealing in Ceylon of probates and letters of administration granted in any other part of Her Majesty's territory.

4. Prior to our becoming an independent State, powers were given to our courts to enforce certain matrimonial decrees under the Indian and Colonial Divorce Jurisdiction Act and Matrimonial Causes (War Marriages) Act.

5. We also have in our statute book an Ordinance entitled Foreign Judgments Ordinance. It is designed to provide for the enforcement in Ceylon of judgments given in countries which accord reciprocal treatment to judgments given in Ceylon, for facilitating enforcement in other country of judgments given in Ceylon, and for other purposes connected with them. This enactment, however, has not been brought into operation.

## Principles applied by our courts when action is brought on a judgment

In so far as our courts are concerned, the following general principles could be formulated as representing the law on this topic.



It should, however, be noted that these principles are given effect to irrespective of reciprocity. It may also be mentioned that these principles have been gleaned from the applicable texts and there are no decisions of our courts giving precise formulation of these principles.

1. A foreign judgment has no direct operation in Ceylon apart from the statutory provisions referred to earlier.

2. A valid foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either of fact or of law.

3. A valid foreign judgment *in personam* may be enforced by an action for the amount due under it if the judgment is—

- (a) for a debt or definite sum of money; and
- (b) final and conclusive.

4. An action cannot be maintained on a valid foreign judgment if the cause of action, in respect of which the judgment was obtained, was of such a character that it would not have supported an action in Ceylon.

5. A valid judgment *in personam*, if it is final and conclusive on the merits, is a good defence to an action in Ceylon for the same matter when either—

- (a) the judgment was in favour of the defendant;
- (b) a judgment being in favour of the plaintiff has been satisfied.

6. A valid foreign judgment *in rem* in respect of the title to movable property gives a valid title to the movable property in Ceylon to the extent to which such title is given by or under the judgment in the State where the judgment is pronounced.

7. A valid foreign judgment or sentence of divorce or of nullity of marriage or of judicial separation has in Ceylon the same effect as a decree of divorce or of nullity of marriage granted by a court in Ceylon as regards the status of the parties to the marriage

which is dissolved or annulled or in respect of which a decree of a judicial separation is pronounced.

8. A valid foreign judgment in matters of succession is binding upon and is to be followed by the court.

9. Any foreign judgment which is not pronounced by a court of competent jurisdiction is invalid in Ceylon.

10. A foreign judgment which is obtained by fraud is invalid in Ceylon.

11. A foreign judgment may sometimes be invalid in Ceylon on account of the proceedings in which the judgment was obtained being opposed to natural justice.

12. The courts of a foreign country are not courts of competent jurisdiction as against—

- (a) any Sovereign;
- (b) any Ambassador or diplomatic agent.

13. Courts of a foreign country have no jurisdiction—

- (a) to adjudicate upon the title or the right to the possession of any immovable property not situate in such country;
- (b) to give redress for any injury in respect of any immovable property not situate in such country.

14. In an action *in personam* in respect of a cause of action, the courts of a foreign country will have jurisdiction—

- (a) where at the time of the commencement of the action the defendant was resident or present in such country so as to have the benefit and be under the protection of the laws thereof;
- (b) where the defendant is at the time of the judgment in the action, a subject or citizen of such country;
- (c) where the party subject to such jurisdiction of the courts of such country has by his own conduct submitted to such jurisdiction—



- (i) by appearing as plaintiff in the action or by counter claim;
- (ii) by voluntarily appearing as defendant in such action;
- (iii) by having expressly or impliedly contracted to submit to the jurisdiction of such courts.

15. In an action *in personam* the courts of a foreign country would not acquire jurisdiction either—

- (a) from the mere possession by the defendant at the commencement of the action of property locally situated in that country;
- (b) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country.

16. In an action or proceeding *in rem* the courts of a foreign country have jurisdiction to determine the title to any immovable property or movable property within such country. This jurisdiction is unaffected by the domicile of the deceased.

17. The courts of a foreign country have jurisdiction to administer and to determine the succession to all immovables and movables of a deceased person locally situated in such country.

18. The courts of a foreign country have jurisdiction to determine the succession to all movables, wherever locally situated, on a testate or intestate by the domicile in such country.

The competence of courts in regard to matrimonial decrees has already been dealt with and finalised at the Fourth Session of the Committee held in Tokyo.

#### Recommendations

Since we are concerned only with the principles and provisions relating to the recognition and enforcement of foreign judgments, this Committee should endeavour to agree upon a convention or multilateral treaty which will permit the reciprocal enforcement of foreign judgments in each others countries. This objective seems to be an ideal one and it is doubtful how far this can be realised.

In this connection it is interesting to observe that the Hague Conference on Private International Law in 1925 produced a draft Convention on the Recognition and Enforcement of Foreign Judgments. This was revised in 1928 but had never been ratified on a multilateral basis although it has served as a model for a number of bilateral agreements. In 1951, the Conference asked the Netherlands Commission d'Etat (which prepares its work) to examine the matter. In 1956, the Commission expressed the view which was endorsed by the Conference that the time had not yet come for drawing up a general multilateral convention. At the 9th Hague Conference held in October 1960, the following decisions respecting future work of the Conference were taken:—

- (a) to instruct the Permanent Bureau with respect to matters of property to continue work on the jurisdiction of the chosen court and on the reciprocal recognition and execution of judicial decisions in general.

(It established a Special Commission for these two matters and requested a State Commission to take the necessary steps for summoning this Special Commission as soon as the stage of preparatory work will allow.)

- (b) to instruct the Permanent Bureau to indicate the steps and consultations essential for the possible working out of a convention on the Recognition of Foreign Judgments on Personal Status.

It may be a little too optimistic or premature at this stage to expect that a convention on this topic would be realised. Failing such a convention, the Committee should endeavour to agree upon and formulate certain common principles which could be adopted by all the member countries so as to reciprocally facilitate the enforcement of foreign judgments in each others countries. The task of such a formulation will be greatly helped by a comparative study of the legal provisions of various systems of law and of various countries with special reference to the laws of the principal countries.



## PART II

This part deals briefly with the state of law on this topic in some Commonwealth countries excluding such countries as are members of this Committee.

## UNITED KINGDOM

English courts accept, in the main, foreign judgments as conclusive provided that certain conditions are satisfied. Briefly these conditions are as follows:—

- (1) The foreign judgment must be final and conclusive in the country in which it is pronounced.
- (2) The foreign court in question must have been competent to adjudicate upon the matter in question.
- (3) The judgment must not have been obtained by fraud.
- (4) The judgment must not have been obtained by proceedings contrary to natural justice.
- (5) The judgment must not have been based according to the cause of action contrary to English public policy.

A distinction must, of course, be drawn between the recognition of foreign judgments and its enforcement although recognition is a prerequisite to the latter. The judgment may be recognised as valid in a foreign country although it would be unenforceable in England. For example, polygamy is lawful in certain countries but a judgment given in connection therewith would be unenforceable in English courts being contrary to public policy.

English law never enforces a foreign judgment even in a criminal or fiscal matter.

The principles on which English courts recognise and enforce foreign judgments as conclusive depend upon case law and certain statutes.

In accordance with the latest doctrines as developed by leading cases, a foreign judgment creates a common legal obligation, i.e. there is no merger of the original cause of action. The plaintiff may either sue on the foreign judgment or on the original cause of

action upon which it is based. Action on foreign judgments are usually preceded with by summary process, that is to say, by a special writ under Order 3 rule 6 of the Rules of the Supreme Court for the amount of the judgment debt and costs.

English law also provides for the recognition and enforcement of judgments by a statutory registration system. There are three relevant enactments—

1. Judgments Extension Act, 1868.
2. Administration of Justice Act, 1920.
3. Foreign Judgments (Reciprocal Enforcement) Act, 1933.

These Acts base the enforcement of foreign judgments on reciprocity between the countries in question. At present they only apply to judgments emanating from the United Kingdom, British Dominions and territories and from France and Belgium. In all cases which do not come within these territories, the foreign judgment must be enforced by a fresh action. As we have already stated, where a foreign judgment is for a definite sum of money, an action can be brought in England on the judgment itself and not only on the original cause of action. Proceedings can be instituted by specially endorsed writ under R.S.C. Order. 3, Rule 6, but the foreign judgment must be verified by the seal of the foreign court or the signature of the competent authority.

## (1) Judgments Extension Act, 1868.

This Act was the first statutory provision which deals with the direct enforcement of foreign judgments. From the point of view of private international law, Scotland and Ireland are foreign countries, and this Act applied only to judgments of the superior courts of England, Scotland and Ireland, as between each other. The Act was extended to apply for judgments of inferior courts by the Inferior Courts Extension Act, 1882.

Before 1868, a plaintiff, who had obtained judgment in Scotland or Ireland, and who desired to enforce it against a defendant in England, was in no better position than if he had obtained his judgment in some other foreign country and his only course was to bring a fresh action in England.



The Act now applies only to judgments obtained in the English High Court of Justice, the High Court of Justice in Northern Ireland, and the Court of Session in Scotland.

The Act provides for a system of registration of judgments "for any debt, damages or costs". Registration must be made within twelve months from the date of the original judgment. The Act provides that "the certificate shall, from the date of such registration, be of the same force and effect and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained.....in the court in which it is so registered and all the reasonable costs and charges attendant upon the obtaining and registering of such certificate shall be recovered in like manner as if the same were part of the original judgment."

Judgments in relation to divorce, probate or land do not come within the provisions of this Act.

In accordance with section 4 of the Act, the registration of a Scottish or Northern Ireland judgment does not give the English court power to enforce it by all means of execution applicable to the execution of an English judgment. It was held in *Re Watsen* that the English court is not empowered to institute bankruptcy proceedings on the strength of the original judgment alone. The judgment creditor must, therefore, first sue the debtor again on the Scottish or Northern Irish judgment before he is in a position to institute proceedings in bankruptcy.

It was held in *Bailey v. Welpley* that, when a defendant wishes to attach the original judgement on its merits, he cannot do so without taking proceedings in the original court.

## (2) Administration of Justice Act, 1920.

This Act applies to judgments of superior courts of British territories overseas, including territories under Her Majesty's protection or mandate.

The Act only provides for the enforcement within the United Kingdom of money judgments or orders.

The difference between this Act and the Act of 1868, is *inter alia*, that registration is not as of right but is within the discretion of the court. The court will order the judgment to be registered only "if in all the circumstances of the case the court thinks it is just and convenient that the judgment should be enforced in the United Kingdom".

No judgment can be registered in the circumstances set out in section 9(2). "Judgment", for the purposes of the Act, means any judgment or order in civil proceedings whereby a sum of money is made payable and includes an award in arbitration proceedings if the award was enforceable as a judgment in the place where it was made.

The Act does not prevent an action being brought on the colonial judgment itself.

The foreign judgment, when registered, may form the basis of a bankruptcy notice.

It should be noted that no further extension of the Act can now be made. An Order-in-Council dated November 10, 1933, made provision, under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, that the Administration of Justice Act, 1920, shall not be extended to any parts of the British Dominions, etc., unless it was so extended before November 10, 1933.

## (3) Foreign Judgments (Reciprocal Enforcement) Act, 1933.

The position up to 1933 with regard to enforcing foreign judgments in England had given rise to many complaints from business men, and representation had been made to various legal bodies and to the Foreign Office. The Lord Chancellor, Viscount Sankey, set up a Foreign Judgments (Reciprocal Enforcement), Committee in November, 1931, "to consider (1) what provisions should be included in conventions made with foreign countries for the mutual enforcement of judgments on a basis of reciprocity, and (2) what legislation is necessary or desirable for the purpose of enabling such conventions to be made and to become effective, or for the purpose of securing reciprocal treatment from foreign countries".



The report was presented to Parliament in December, 1932, submitting a draft Bill which was passed by Parliament and became law on April 13, 1933.

The aim of the Committee was to remove two main difficulties, namely.

1. That a new action has to be brought upon the foreign judgment which, as we have seen in the foregoing, is not enforced as such, and
2. That the principles upon which a foreign judgment is accepted as conclusive depend on case law and are not laid down by statute.

It was therefore suggested, in order to facilitate the enforcement of foreign judgments, that conventions should be signed between England and other foreign countries for the adequate and reciprocal enforcement of judgments. They recommended that the existing procedure by action on a foreign judgment be replaced by a system of registration. Such registered judgment should then be enforceable in a like manner as a judgment of an English court, subject to the defendant having the same rights to resist registration on similar grounds to those on which he can now plead that a foreign judgment should not be recognised in England. The system of registration has already been applied to the Administration of Justice Act, 1920.

Another motive which guided the Committee was that the procedure up to that time was unfamiliar to foreign lawyers and gave rise to international misunderstanding.

The purpose of the Act is "to make provisions for the enforcement in the United Kingdom of judgments given in foreign countries which accord reciprocal treatment to judgments given in the United Kingdom, for facilitating the enforcement in foreign countries of judgments given in the United Kingdom, and for other purposes in connection with the matter aforesaid". The application of this Act is substantially based on reciprocity of treatment with regard to the enforcement in a foreign country of judgments given in the superior courts of the United Kingdom.

Power is, therefore, given to extend the Act by Order-in-Council to British Dominions, colonies, protectorates and mandated territories as well as to foreign countries, since it was impractical that there should be two systems of registration, one applying to the British Commonwealth and the other to foreign countries and it is intended that the 1933 Act shall thus gradually replace the 1920 Act, although this substitution only applies to British overseas territories, foreign countries never having come within the scope of the 1920 Act. With a view to achieving this object, it was enacted by Order-in-Council that the 1920 Act shall cease to apply to any part of Her Majesty's Dominions in respect of which an Order will be made under the 1933 Act. Orders to that effect have been made for India and Burma.

It was intended that the same procedure should apply to British territories overseas and to foreign countries, but so far only two conventions with foreign countries have been signed, namely with France and Belgium and these will be discussed later.

#### Procedure under the Act

The procedure for registration of a foreign judgment is somewhat similar to that under the 1920 Act. There are, however, important differences. The application for registration must be made to the High Court of Justice within six years from the date of the foreign judgment and, subject to certain provisos, the court is directed to order registration. The discretionary element which exists under the 1920 Act does not apply here.

The judgment, emanating from a superior court of the foreign country, will be registered, if:—

- (a) it is final and conclusive as between the parties thereto; and
- (b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
- (c) it is given after the coming into operation of the Order-in-Council directing that the Act shall extend to that particular foreign country.



A judgment shall be deemed to be final and conclusive notwithstanding that it may still be subject to an appeal in the courts where the original judgment was pronounced. For practical reasons, a pending appeal would generally be a good ground for the adjournment of the application for registration.

Part or parts of a foreign judgment may be registered.

The judgment shall not be registered if, at the date of the application—

- (a) It has been wholly satisfied; or
- (b) It could not be enforced by execution in the country of the original court.

A registered judgment shall for the purposes of execution have the same effect as if it had been a judgment originally given in the registering country. Proceedings may be taken on a registered judgment and the sum for which a judgment is registered shall carry interest.

The court has power to make rules for making provision with regard to the giving of security for costs by persons applying for the registration of judgments.

The registration shall be set aside if the court is satisfied of the existence of the conditions prescribed in Part I, s.4(1)(a).

The foreign original court is deemed to have had jurisdiction—

- (a) in the case of a judgment given in an action *in personam*, *inter alia*;
  - (i) If the judgment debtor submitted to the jurisdiction of the court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting or obtaining the release of property seized or threatened with seizure; or
  - (ii) if the judgment debtor was plaintiff in, or counter-claimed in the proceedings in the original court.

(b) in the case of a judgment given in an action *in rem*, namely:—

- (i) where the subject-matter was immovable property; or
- (ii) if the subject-matter was movable property if the same was, at the time of the proceedings in the original court, situate in the country of that court.

Section 2(3) of the Act provides that the rate of exchange to be taken is that prevailing at the date of the judgment of the original court. The English court can only give a money judgment in terms of English currency. This rule is logical as no execution can be levied for a sum expressed in foreign currency.

Cases on this point date mainly from the end of the 1914 war. The question of what rate of exchange is applicable was fully dealt with in the case of *Vionnet (Madeleine) at Cie v. Wills*, when the Court of Appeal established that, where a debt is payable in a foreign currency and sued for in England, the rate of exchange would be taken as that which prevailed at the date upon which the debt became payable. One explanation for this rule is that an agreement to pay a sum of money in foreign currency is to be treated as a contract to deliver a commodity; if the contract is broken, then the damage in accordance with well-established principles, is the market value of that commodity at the date of the failure to deliver.

It should be further pointed out that, where the contract provides for the payment of foreign currency in a foreign country then, when proceedings are taken in England on the breach of that obligation, the rate of exchange should be taken as at the date on which payment should have been made. This does not in any way affect the contractual obligation itself which still requires one to make payment in foreign currency. This question was fully discussed in the case *Societe des Hotels le Touquet Parisplage v. Cummings* where it was held that

- (1) A debtor may always pay the amount of the debt at any time before action brought even after the due date for payment, and if payment is accepted, no action can be brought even for nominal damages for belated payment. Such payment and acceptance operate as an accord and satisfaction of the whole debt and is a complete defence.