If the agreement is valid according to the court which rendered the judgment but illegal according to the court in which the judgment is sought to be enforced, it may lead to difficulties. The Set of Principles adopted by the I.L.A. at its New York Conference tried to tackle this question by referring the validity of the submission to the law governing the validity according to the choice of law rules of the forum. But the Model Act adopted at the Hamburg Conference of the I.L.A. is silent on this matter. Some clue to this is provided by the discussions at the Hamburg Conference. If the agreement to submit to the jurisdiction of the foreign court is objectionable to the court in which recognition or enforcement of the judgment is sought, the court may refuse recognition or enforcement to the judgment on grounds of public policy.

(ii) Voluntary appearance by the judgment debtor in the proceedings

This is generally accepted as a basis of jurisdiction of court in the international sense. However, it may not always be possible to say with certainty as to what would constitute voluntary appearance, and the interpretation given by different legal systems may differ. The two cases which require consideration are (a) where the defendant appears in the foreign court to protest against that court's jurisdiction, and (b) where the defendant appears in the foreign court to defend his property which is seized or threatened with seizure. It would appear that appearance limited to a protest against the jurisdiction of the foreign court would not be considered as voluntary appearance in the suit, though courts in England have held to the contrary.[34] Supposing the defendant's protest against jurisdiction is rejected by the foreign court, and if the defendant, thereafter, proceeds to argue the case on merits, either solely to obtain release of the property which is seized by the foreign court or for the sole purpose of protecting his property from future seizure by the foreign court, does such appearance become voluntary submission to the court. An English court has answered this question in the affirmative.[35] According to some eminent judges, however, neither of these cases would amount to vountary submissions.[36]

[34] *Harris* V. *Taylor* (1915) 2 K.B. 580.

[35] *Boissiere* V. *Brackner* (1889) 6 T.L.R. 85.

[36] Denning L.J. in *re Dulles* (1951) Ch. 842; Lord Merivale in *Tallack* V. *Tallack* (1927) p. 211.

According to the Model Act of the I.L.A., these are not cases of voluntary submission.

Another case may be mentioned here. Supposing the party, who in the proceedings for the enforcement of the foreign judgment against him questions the jurisdiction of the foreign court, had himself approached the foreign court as plaintiff. It is obvious that a person who goes to a court as plaintiff exposes himself to counter-claims and cross actions, and if the judgment goes against him, it is not fair that he should then try to evade its enforcement by questioning the jurisdiction of that court. The laws of India and Ceylon specifically mention this.

(iii) Habitual Residence

(iv) Service of summons personally within jurisdiction

These two jurisdictional bases may be discussed together, because the principles involved in them are more or less the same. In both these cases the defendant must be within the territorial dominion. However, in the latter case, the presence in the country may be even transient, because summons may be served on a person who is on a short visit to or even passing through the country. Under English law (and probably also under the laws of countries like Ceylon and India whose laws are based on English law), service of summons on the defendant on such temporary presence gives jurisdiction to the courts of the country. This is a ground of jurisdiction unkown to civil law.[37] It is easy to imagine how this may easily lead to inconvenience and injustice to the defendant. This basis of jurisdiction has been criticised as undesirable.[38] Residence, on the other hand, satisfies the principle of territorial dominion—the principle that all persons within a territorial dominion owe obedience to its sovereign power. The I.L.A. used the phrase 'habitual residence' to denote this basis of jurisdiction in its draft Set of Principles, but the Model Act speaks of the place where judgment debtor originally resides.

[37] See Rudolf Graupner, "Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe" in *Int. & Comp. Law Quarterly*, Vol. 12, p. 367 at p. 377.

[38] Cheshire, opp. *cit.* p. 610-11, Rudolf Graupner, op. cit., pp. 375 & 377

In the case of an artificial person, such as a corporation, residence or domicile has no real meaning.[39] But since a corporation is a person in law and carries on business like a natural person, the law ascribes to it, for certain purposes, residence and also domicile. The I.L.A. draft Set of Principles equate the place of incorporation of the company as well as its principal place of business to the habitual residence of person for the purpose of basing the jurisdiction of the court. In the Model Act adopted later at Hamburg and which was worked out on the basis of the Set of Principles, the concept of corporate domicile or residence was further elaborated to include the seat (*siege*) of the corporation and the place of its central administration. This was done obviously to accommodate the various views concerning the concept of corporate domicile and residence. The answer which the laws of the various member countries would give to the question as to when a corporation is to be considered to have its residence in a country is not clear. But the broad interpretation given in the Model Act of the I.L.A. would cover all the answers.

(v) Situation of the commercial establishment or branch office of the judgment debtor

This is a jurisdiction very close to the one discussed above. It may be that the defendant is not present, resident or domiciled in the foreign country. But if he is carrying on business in that country, say, through a manager or agent, he may be subject to the jurisdiction of the courts of that country in so far as the claim arises from the business done there. This is an application of the principle of territorial dominion. The Model Act adopted by the I.L.A. includes this international jurisdiction. 'Carrying on business in the foreign country' by the defendant is enough, according to the laws of both Ceylon and Iraq, to give competent jurisdiction upon the defendant to the foreign court. This jurisdiction appears to accord with business convenience.

(vi) Domicile

Though the connection between a person and the country in which he is domiciled is very close, still domicile does not appear to

[39] Dicey's *Conflict of Laws* p. 1027.

be a generally agreed ground of jurisdiction. It is not included among the jurisdictional bases recognised by the law of Ceylon or of India. Dr. Cheshire[40] considers it a more desirable ground of jurisdiction than political allegiance which is a ground of jurisdiction according to the laws of many countries, including those of India and Ceylon.

(vii) Situation of property of the defendant

The courts of some countries, such as Germany and Austria, assume jurisdiction on the mere ground that some property of the defendant is situate within the country. It is not necessary that the claim should be in relation to the property. It is not among the grounds upon which the Model Act of the I.L.A. above referred to bases international competence. The law of Ceylon does not recognise this jurisdiction. And so too the laws of India and Iraq. According to a recent article in the *International and Comparative Law Quarterly*,[41] this basis of jurisdiction is considered undesirable.

(viii) Place where the cause of action arose

The courts of some countries base their jurisdiction in a suit if the cause of action arises within the country. Thus, if the action is on a contract, the court of the country where the contract is to be performed or where the breach has occurred will have jurisdiction; if the action is on tort, the court of the country where the tort is committed will have jurisdiction, irrespective of whether the defendant is present, resident or domiciled in that country. This is an international jurisdiction recognised by the Iraqi Law. It does not appear to be a grund of international jurisdiction recognised by the law of Ceylon or India. The objection appears to be to general application of the principle involved, and not to its application in some particular spheres. A particular application of this principle is jurisdiction based upon the situation of the commercial establishment of the defendant provided the cause of action arose out of business done within jurisdiction. And this does not appear to be an objectionable ground of jurisdiction. The Model Act adopted by the I.L.A. at the Hamburg Conference accepts this

[40] *Private International Law*, 6th ed., p. 617.

[41] Vol. 12 p. 367 at p. 375.

principle of jurisdiction not generally but in two particular cases. The jurisdiction based on the place of performance of the contract and the jurisdiction based on the place of commission of the wrong in an action in tort referred to respectively in sub-sections (g) and (h) of Section 5 of the Model Act embody this principle.

(ix) Nationality

One of the grounds of international jurisdiction recognised by the laws of India and Ceylon is nationality. International jurisdiction based on the nationality of the defendant would probably be acceptable to the courts of Burma and Pakistan. The law of Nigeria mentions this as a ground of jurisdiction. However, this is not among the international jurisdictions stated in the Model Act referred to or the Draft Set of Principles adopted by the I.L.A. Dr. Cheshire thinks that nationality *per se* is not a reason that can justify the exercise of jurisdiction.[42] Graveson says that "while it is admittedly a basis of general jurisdiction in international law, and while it may be justified as a basis for exceptional criminal jurisdiction, such as murder and bigamy, or statutory cases of public policy, such as under the Defence Regulations, there seems no valid reason today for accepting nationality as a basis of civil judicial jurisdiction."[43] Though nationality is also a basis of jurisdiction in many civil law countries, it is submitted that the above statement of Graveson puts nationality as a connecting factor in its proper perspective in the present day.

2. Reciprocity

There are many countries whose laws concerning the recognition and enforcement of foreign judgments are based upon reciprocity. As has been stated earlier, this practice derives theoretical support from the doctrine of comity advocated by some Dutch writers of the 17th century, according to which the recognition by a State of rights created under foreign law is an act of courtesy dictated by a *comitas gentium*.[44] Though comity is not

[42] *Private International Law*, 5th ed., p. 617.

[43] *Conflict of Laws*, 4th ed., p. 542.

[44] Wolff, *Private International Law*, 2nd Ed., 1950, p. 15; Graveson, *The Conflict of Laws*, 4th ed., 1960, p. 9.

among the doctrines which are being seriously put forward today to explain the application of foreign law, still the requirement of reciprocity is a part of the law in many countries.

Among the member countries of the Committee, the law of the U.A.R. stipulates that judgments and orders issued in a foreign country may be executed in the U.A.R. under the same conditions as those imposed by that foreign country for the execution therein of Egyptian judgments and orders. The law of Iraq requires reciprocity in the sense that judgments of the courts of Iraq are enforceable in the foreign country concerned. It appears that reciprocity does not extend to the extent of requiring identical or nearly identical conditions or procedures of enforcement. The Japanese law speaks of mutual guarantee which probably means reciprocity. The laws of Ceylon, Burma, India and Pakistan do not make the existence of reciprocity a condition for the enforcement of foreign judgments, though the existence of reciprocity very much simplifies the procedure, i.e., instead of bringing a suit on the foreign judgment, direct execution proceedings may be commenced.

The requirement of reciprocity has been described as the all-important feature of German law.[45] In England and in the United States of America, though in the earlier cases reciprocity was insisted upon by the courts, it does not form part of the law any more.[47] However, in England, it is a requirement in cases governed by statute. It has been described as an extra-legal prerequisite[48].

It has been stated that reciprocity as between two countries involved is quite irrelevant to the relationship between two private parties.[49] It may have relevance in cases of public international

[45] Gatteride, "Reciprocity in Regard to Foreign Judgments" in XIII *British Year Book of International Law* (1932) 49-67 at p. 59.

[46] *Simpson V. Fogo* (1863) 1 H & M 195 in England; *Hilton v Guyot* (1895), 159 U.S. 113 in U.S.A.

[47] See Dicey's *Conflict of Laws*, 7th ed., p. 984.

[48] *Ibid.*

[49] Graveson participating in the discussions of the I.L.A. at its 48th Conference held in New York. See *Report of the 48th Conference* (of I.L.A.) held at New York in 1958.

law flavour, such as where a sovereign state is a party, but not where the parties concerned are both private persons. The American judge, Van Kirk, referring to the case of *Hilton* V. *Guyot*, a case in which the American court imposed the requirement of reciprocity, says as follows:

> "The decision in Hilton case would deprive a party of the right he has acquired by reason of a foreign judgment because the country in whose courts the judgment was rendered has a rule of evidence different from that which we have and does not give the same effect as this State gives to foreign judgment."[50]

Beale says[51] that the doctrine of reciprocity is not only unsound in theory but also in its practical aspects. He lists three arguments for recognition of foreign judgments without regard to reciprocity. They are: (i) a judgment is a law governing private rights, and it should be recognised as such in foreign contract and property law; (ii) trade facilities and (iii) prevention of unnecessary litigation.

It may also be mentioned that at the New York Conference of the I.L.A. there was general agreement that the question of recognition and enforcement of foreign judgments should not depend upon reciprocity. If the judgment is a good judgment on merits, that is, if it satisfies the idea of justice held by the enforcing court, that is a sufficient reason to enforce it. Whether a foreign court accords a similar treatment to its own judgments is a consideration not relevant to the issue involved. That a judgment regularly obtained from a court with a proper jurisdiction should be given conclusive effect everywhere is also the view of the Committee on Reciprocal Enforcement of Foreign Judgments of the International Law Association.

3. Natural Justice

This is a phrase to be found in some of the earlier cases on the enforcement of foreign judgments decided by English courts.

[50] *Johnston v Compagnie*, 242 N.Y. 381 quoted in Beale's *Treatise on the Conflict of Laws*, 1935 p. 1388.

[51] *Treatise on the Conflict of Laws*, 1935.

What it means as applied to foreign judgments is

> "first that the court being a court of competent jurisdiction had given notice to the litigant that they were about to proceed to determine the case, and secondly, that he should be afforded an opportunity of substantially presenting his case before the court."[52]

The idea is that the defendant must be given the opportunity to present his case and therefore given notice of the proceedings in sufficient time to prepare his defence and put his case before the court. Of course, this has no application where the assumption of jurisdiction by the court is based upon his appearance in the proceedings in the court. In other cases, it is an important safeguard against a judgment being delivered against a person without being given an opportunity to present his case.

That the foreign court, which rendered the judgment, should have satisfied certain procedural requirements is a condition required by both civil and common law countries. Under common law if the defendant shows that no notice of the foreign proceedings was given to him or that it was not given in sufficient time to afford him reasonable opportunity to prepare his defence, it is a sufficient argument against the enforcement of the foreign judgment. Under French rules of conflict of laws, material procedural irregularity is a defence against the enforcement of the foreign judgment against him, but the courts' refusal to apply the judgment in such a case is probaly based on *ordre public*. The Indian Civil Procedure Code which contains certain provisions expressly dealing with the enforcement of foreign judgments denies effect to a foreign judgment which is opposed to natural justice. Similar provisions exist in the laws of Burma and Pakistan. The law of Ceylon, generally applicable to foreign judgments, requires that the proceedings in the foreign court was not contrary to natural justice. The statutory provisions do not refer to natural justice, but in its place require that the defendant in the foreign proceedings was duly served with the process of that court. The Egyptian Code of Procedure requires that before an *exequatur* can be issued for execution of a foreign judgment, the plaintiff must prove that the

[52] Atkin L.J. in *Jacobson v. Frachon* (1927) 44 T.L.R. 103 at p. 105.

litigants were properly and duly summoned and represented in the foreign law suit. Under Iraqi law, it is required that sufficient notice of the action in the foreign court must have been given to the judgment debtor.

A question that appears in this connection is, whether the service of summons must be within the jurisdiction or is it enough if the notice is served on the defendant outside the country. If the notice gives him sufficient opportunity to appear in the court either by himself or through a representative and present his case, it would appear that the requirements of natural justice would be satisfied.

4. Public Policy

It is hardly necessary to state that no court will enforce a judgment or apply a law which is contrary to the distinctive policy of its country. The exclusion of foreign law or the non-recognition of the foreign judgment on grounds of public policy is part of the private international law of all countries. In all international conventions, which have unified the various aspects of private international law, the right of States to exclude the foreign law on a ground of public policy has always been accepted. Such exclusion of foreign law is an exception to the general principles of private international law and no country can do without such occasional overruling of the normal conflict of law rules. On the continent of Europe, such exclusion of the foreign law is based on the doctrine of *ordre public*, which is much wider in scope than the doctrine followed in England, America and other countries which have assimilated the common law into their legal systems. Germany, under the influence of Savigny, has tried to restrict cases of exclusion of foreign law.

The types of cases which are considered to infringe the public policy of a country are not very clear. According to Dr. Wolff, public policy is a vague and slippery conception.[83] It is an indefinite concept according to Graveson.[84] The question of public policy or rather its infringement arises not only in the

[83] *Private International Law*, 2nd ed., p. 179.
[84] *The Conflict of Laws*, 4th ed., p. 563.

enforcement of foreign judgments but also in the application of foreign law. Though it would be desirable to determine the province of public policy internationally, it is doubtful if it can be done in a convention for Reciprocal Enforcement of Foreign Judgments. It may require a separate and independent treatment.

Under the law of *Iraq*, a foreign judgment is not enforceable in Iraq if the cause of action is such as would infringe the public policy of Iraq. But it does not give the instances in which the public policy of Iraq is deemed to be infringed. Similar provision exists in the law of *Japan*, but it speaks of public order and good morals. The law of *Ceylon* excludes the enforcement of foreign judgment if the cause of action was such that it would not have supported an action in Ceylon. The reason for the exclusion is 'public policy or some other similar reason'. Judgments contrary to morality or public policy in Egypt will not be executed in the *U.A.R.* The *Indian law* does not refer to public policy as such. But judgments founded on an incorrect view of international law or a refusal to recognise the law of India or sustaining a claim founded on a breach of any law in force in India are unenforceable in India. These would appear to be cases which infringe the public policy of India. Similar would be the position of *Burma* and *Pakistan*.

The Draft Principles of the I.L.A. referred to above include public policy as a ground on which recognition and enforcement may be refused to foreign judgments. Judgments contrary to the general order or public policy may be refused execution under the Agreement on the Reciprocal Enforcement of Foreign Judgments signed by the members of the Arab League. It is for each country to determine for itself what these terms mean and what judgments come under them.

The above survey shows that the right to refuse recognition or enforcement to the foreign judgment on the ground of infringement of its public policy or some such similar reason is accepted by the rules of private international law of most of the countries.

5. Other Conditions

Apart from the procedural requirements discussed above in connection with natural justice, some countries (e.g., France) require that the foreign court must have applied the system of law which it itself would have applied according to its choice-of-law rules had the case been decided by it. It means that if the choice-of-law rules of the foreign court are different from the court before whom the enforcement is sought, the judgment would not be enforced. As against this, the common law countries go to the opposite extreme. If the procedural rules of the foreign court satisfy their ideas of natural justice, they would enforce the judgment even though it is based upon a violation of substantive law and therefore a wrong judgment.

In almost all countries, recourse against a judgment lies (unless it is a judgment of the highest court) by way of appeal to the superior court. In some countries like France, the defendant may move the same court to set aside its judgment or to have further proceedings (on certain grounds). If the judgment is to be enforced in another country before such a right of appeal or revision is exhausted in the country where the judgment is rendered, a situation may arise whereby the judgment of country A which is enforced in country B may no more be a judgment of country A, because it may have been reversed, or altered on appeal or revision. Therefore, some countries recognise foreign judgments only if they are unassailable, i.e., if there is no further right of appeal or revision. Though under English rules of Private International Law a foreign judgment is enforceable only if it is final, finality means that the judgment cannot be altered by the court which delivered it, but it may be open to appeal, to *cassation* or to revision.

The enforcement of a foreign judgment is naturally conditioned by the enforcement machinery at the disposal of the enforcing court. There is generally no difficulty where the judgment is to pay a certain sum of money. The courts of most countries enforce the judgment (where the judgment-debtor refuses to satisfy the judgment), by attachment and sale of the property of the judgment-debtor. But the enforcement machinery of all countries may not be suitable for certain other remedies, say for instance, specific

performance.[55] Therefore, some countries require that the foreign judgment, in order to be enforceable, must be for a definite sum of money.

It is hardly necessary to mention that a foreign judgment is enforceable only if it is a *judgment* of a *court of law*. It is, however, not always easy to say whether the foreign judicial act in question is a *judgment of a court of law*. It is therefore necessary that a court called upon to recognise or enforce a foreign judicial act or the decision of a foreign tribunal, should satisfy itself that what it is enforcing is a judgment of a court of law.[56]

[55] A foreign judgment for specific performance raises other difficulties as well. For example, specific performance is a remedy both under French and English laws. But under French law, it is enforceable by a penalty since breach of a civil obligation is not punishable with imprisonment in France; while under English law an order for specific performance is enforceable by imprisonment. How should an English court deal with an order for specific performance of a French court and *vice versa* ?

The second difficulty will arise in commercial cases. According to many common law countries, a foreign court would not be competent to make an order for specific delivery of chattel unless the *res litigiosa* is situate within that territory at the time of the judgment. And therefore these countries may not be willing to lend their assistance to enforce a foreign decree for specific performance of chattel rendered by a court in whose country the *res litigiosa* was not situate at the time of judgment.

[56] There are really two conditions here: one the foreign institution whose decision is sought to be enforced must be a *court of law*. A foreign private arbitral tribunal, for instance, is not considered a court of law in the English courts even though the party in whose favour the award is given can bring an action on the award without going back to the original cause of action. Second, the foreign judicial act must be a *judgment*. It may not always be that a judicial act considered a judgment in one country may be considered so in another country.

SECTION D

Attempts Made By International Bodies

The question of enforcement or execution of foreign judgments has engaged the attention of international lawyers for over 80 years. A number of bilateral agreements have come into being as a result. There are also in existence a few multilateral conventions on a regional basis.

There are at least five organisations which have taken up the study of this subject, or have attempted to solve this problem internationally. They are: the *Arab League, the International Law Association, the Organisation of American States, the Hague Conference* and *the Council of Europe.*

The recognition of foreign judgments in civil and commercial matters was on the agenda of the International Law Association almost from its very inception. Since then the matter was discussed at its various conferences as well as by other bodies in America and in the European continent. The early discussions served to bring out the practice of various countries on the question of enforcement of foreign judgment, and to appreciate the obstacles in the way of attaining uniform rules. The I.L.A. Conference held in Milan in 1883 was of the view that the matter required to be settled by international convention, and it formulated a set of principles to serve as the basis of such a convention. It was recommended that if the foreign judgment fulfils certain conditions, the tribunal before which the execution of the judgment is sought must not enter into the merits and should give the same effect as is given to a domestic judgment. The conditions to be fulfilled are that the judgment must emanate from a court of competent jurisdiction, that the parties must have been duly cited, they must be given the opportunity to defend themselves and that the judgment must have been executory in the country in which it was pronounced. It was also agreed at this conference that no country should be obliged to enforce a judgment which is contrary to morality, public order or public law. The conference also considered the question under what circumstances is the foreign court to be considered competent—but did not reach any agreement. The conference did not make any effort to define the term 'public policy'.

In the ensuing years, the International Law Association devoted itself to the comparative study of the laws of the various countries in this respect, and in 1924 at its Stockholm Conference the I.L.A. formulated a set of "Draft Rules for the Enforcement of Foreign Judgments." They deal in more detail with the procedure to be followed by the enforcing court in the execution of foreign judgments and refer only briefly to the circumstances or conditions under which the foreign judgments should be enforced. One of the important features of this draft is that reciprocity is not considered a relevant consideration in the enforcement of foreign judgments. The rules are based upon the practice of the countries of Europe, of enforcing foreign judgments by proceedings in the nature of an *exequatur*. The defendant must be served with a writ of summons at his domicile or residence if it has the appearance of domicile, and the defendant may impugne the competency or the jurisdiction of the enforcing court. But the competency or jurisdiction of the court which pronounced the original judgment or the correctness of the judgment itself cannot be questioned. As no convention on these lines was signed, a detailed discussion of these rules is unnecessary. However, the basic proposition embodied in these rules, namely that a judgment regularly obtained from a court with proper jurisdiction should be given conclusive effect everywhere without the requirement of reciprocity, still enjoys universal support as revealed by the discussions at the New York Conference of the International Law Association in 1958.[87]

After the Stockholm Conference of the International Law Association in 1924, a number of developments took place on a regional level. Several bilateral agreements were also concluded between a nember of countries of the European Continent.[88] Three multilateral conventions were signed and were brought into force, namely the Bustamante Code of Private International Law signed by the South American countries in 1928 (which contains provisions on the enforcement of foreign judgments), the Inter-

[87] See the *Report of the 48th I.L.A. Conference* held at New York, page 103 et seq. See also the Report of the Committee on Reciprocal Enforcement of Foreign Judgments at p. 116 et. seq. especially p. 118.

[88] E.g., Between the Netherlands and Belgium, France and Italy, Germany and Switzerland, Italy and Switzerland, Switzerland and Sweden, Great Britain and France, and Great Britain and Belgium.

Scandinavian Convention on the Reciprocal Enforcement of Foreign Judgments in 1932, and the Reciprocal Enforcement of Judgments Agreement signed in 1953 by the members of the League of Arab States[59]. Canada as well as the United States of America passed legislations to enable themselves to enter into bilateral agreements on reciprocal basis. In Great Britain, the Foreign Judgments (Reciprocal Enforcement) Act was passed in 1933 which led to the conclusion of treaties with France and Belgium. It may also be recalled that the Hague Conference on Private International Law had produced a draft convention on the Recognition and Enforcement of Foreign Judgments in 1928. Though it served as a model to a number of bilateral conventions between the countries of Europe, it failed to obtain ratification as a multilateral convention.

The International Law Association after reviewing the whole situation again took up the question in 1957 and appointed a Committee on Reciprocal Enforcement of Foreign Judgments for undertaking the study. The Committee which presented a report to the New York Conference of the International Law Association, held in 1958, expressed the opinion that further attempts to obtain adoption of a universal convention was not likely to succeed. According to the Committee, the methods more likely to bring about a solution are bilateral treaties and uniform legislation. In its report to the New York Conference, the Committee presented two documents, one, a set of principles prepared by Prof. Nadelmann to serve as a basis for bilateral treaties, and the other, a model law for uniform legislation prepared by Mr. Walter Johnson. The New York Conference instructed the Committee to proceed with its work on the basis of the Set of Principles. At the Hamburg Conference, held in 1960, the I.L.A. adopted a model law known as the Model Act Respecting the Recognition of Foreign (Money) Judgments, which provides the substantive law which, in the opinion of the I.L.A., should be embodied in any convention between high contracting parties relating to recognition of judgments. The Model Act and the Set of Principles are both annexed to this report.

Though efforts in the direction of a broad-based multilateral convention have been abandoned for the time being, they are

[59] The Convention has now come into force among Saudi Arabia, the United Arab Republic, Jordan, Iraq and Libya.

continuing on a regional level. Reference has already been made to the three regional conventions which have come into force, one in South America, one in Scandinavia and one in the region of West Asia. Though there exist some bilateral treaties between its member countries, the Council of Europe also felt the need for a multilateral regional convention. Of the Member States of the Council those who were members of the European Economic Community were already committed to engage in negotiations for the 'simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards.'[60] The Legal Committee of the Assembly of the Council of Europe which considered this question was of the opinion that steps should be taken to conclude a multilateral convention not merely among the Inner Six, but on a wider basis so as to include all member States of the Council of Europe. As the Hague Conference is the body which is most closely connected with the unification of the rules of conflict of laws, the Council of Europe decided to entrust the matter to it. The Ninth Session of the Hague Conference took place in 1960 to consider this proposal. It had also before it a proposal of the Belgian Government regarding a general convention on the recognition and enforcement of foreign judgments. The Ninth Session was of the opinion that this problem presented certain common features with the problem of general jurisdiction of the chosen court (which subject is also under its consideration) and accordingly instructed its Permanent Bureau to continue the study of these two questions together. As to whether these two matters should form the object of a single convention or of two distinct conventions, the discussions were inconclusive. The work of the Hague Conference on these matters is still in the preparatory stage.

[60] Art. 220 of Rome Treaty.

III. THE SERVICE OF PROCESS AND RECORDING OF EVIDENCE

A. General Note

Assistance to foreign courts in civil matters (apart from execution of judgments) may include the service of documents and obtaining of evidence. These may be procured in three ways: (1) through 'letters rogatory' (letters of request) from court to court, i.e. on the application of the party, the court may send a letter of request to the foreign court requesting that court to execute the judicial act in question; (2) by 'commissioning' a private person to execute the judicial act in question; and (3) by 'commissioning' a diplomatic or consular officer of the requesting State to execute the judicial act in question. It may be noted that there are several variations of these methods. These are broad groupings. Commissioning of private persons is in practice in Britain[1] and America[2], but is unknown to civil law. The third method of appointing diplomatic or consular officers to take evidence is also not available in many countries.[3] The last two methods suffer from the disadvantage that witnesses cannot usually be compelled to attend and that they can not be punished for perjury. Further, administration of oath and taking of evidence in a State's territory by a foreign private person or by a diplomatic or consular officer may be considered illegal in some countries[4]. The first method of sending letters of request

[1] See "Service And Evidence Abroad (under English Civil Procedure)" Pt I by B.A. Harwood, in *Int. and Comp. Law Quarterly*, April, 1961, p. 284 at p. 290

[2] See Nussbaum, *Principles of Private International Law*, 1943.

[3] See "Service And Evidence Abroad (Under English Civil Procedure)". Pt. II by Lord Dunboyne in *Int. and Comp. Law Quarterly*, April, 1961, p. 295 et seq., where the methods available for serving documents and obtaining evidence in a large number of countries are given.

[4] Under English law, probably it would be a misdemeanour, See B.A. Harwood, "Service and Evidence Abroad (Under English Civil Procedure)" in *Int. and Comp. Law Quarterly*, Vol. 10, Part 2, April, 1961, p. 284 at page 290. According to him in Switzerland, the parties would probably, be clapped in jail on a charge of economic espionage or of usurping the functions of the Swiss Government. In fact this is what happened to three Dutch lawyers, who representing the Ministry of Finance of Netherlands put questions to a Dutch national residing in Switzerland and had him sign a written copy of his answers. The lawyers

(*letters rogatory*) avoids these difficulties, because it entrusts the execution of the judicial act in question to the foreign court, that is, to the authority having jurisdiction in the territory where the act is to be executed. This method is commonly used as the courts of most countries entertain such letters of request.[5] But it too has its disadvantages, particularly for the purpose of taking evidence, because the courts in all countries do not follow the same procedure for examining witnesses and recording their evidence. The differences in principle and practice concerning the taking and use of evidence between the court issuing the *letter rogatory* and the court receiving that request lead to complications and to results which are not wholly satisfactory. For instance, in some countries the judge questions the witnesses and records the facts as he finds them, while in some other countries evidence is recorded not as the judge finds them, but as deposed by the witnesses. The evidence taken in one country may therefore be different from what is required in the country which had issued the Letter of Request. Again some countries require that the witnesses must be cross-examined while others do not so require; some countries have provisions for compelling unwilling witnesses to appear before the court and give evidence, while others do not so provide. These difficulties can be obviated by adopting the other two methods referred to above. The official or the private person appointed can adopt the procedure required by the law of the requesting State.

Therefore, parties who wish to serve summons or examine witnesses or take evidence in a foreign country are faced with several difficulties. Attempts have been made to meet these difficulties by bilateral conventions providing for mutual assistance and cooperation in these matters. There are a large number of such conventions, though those to which a member country of this Committee is a party are very few. There is one bilateral treaty signed between

were arrested by Swiss authorities under a charge of violation of Art. 271 of the Swiss Penal Code, i.e. of usurping the functions of the Swiss Government. The lawyers were also charged with 'economic espionage'. Probably there are other countries where the legal position is similar.

[5] *Ibid.*, p. 290. The courts of U.S.A. are not empowered to accept such requests in criminal cases—See *A.J.I.L.*, 1011 (1909). This follows from the constitutional provision that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

two member countries, namely between Ceylon and Japan. There are five bilateral treaties to which one of the parties is a member country. They are: between Japan and Denmark, Japan and Switzerland, Japan and Italy, Japan and Brazil and between Iraq and Britain.

A multilateral convention on a universal basis has not been found feasible so far, though there is a general convention on civil procedure signed in 1954 which deals with the problem partly. There are multilateral conventions on a regional basis, for instance, the Agreement Relating to Writs and Letters of Request signed by the members of the Arab League.*

With the growth of international trade and commerce and other forms of international intercourse, cases are multiplying in which it is necessary to serve process abroad, or to examine witnesses and collect evidence from abroad. In the absence of treaties, facilities available for this purpose are inadequate and unsatisfactory. The particular aspect of service of process has been a matter of concern for the International Union of Huissiers de Justice and Judicial Officers—a union of process servers. They had submitted a memorandum to the Hague Conference on Private International Law setting out the difficulties encountered by them. The Ninth Hague Conference which considered this memorandum has adopted the following resolution:

> "The Ninth Session having taken note of a memorandum presented by the International Union of Huissiers de Justice and Judicial Officers, is aware of the need to establish a system to ensure the effective and speedy transmission of judicial and extra-judicial documents to interested parties living abroad.
>
> It requests the State Commission to instruct the Permanent Bureau to undertake an inquiry into the facts of the problem in the Countries which possess the institution of *huissiers* as well as in those which do not possess it in order to bring together the factors necessary for a solution of the problem indicated."

* The Convention was signed in 1953 by the following countries: Jordan, Lebanon, Syria, Saudi Arabia, Egypt and Yemen.

B. Judicial Assistance Rendered By Member Countries

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

(i) Service of Process

The laws of *Burma, India* and *Pakistan* contain identical provisions concerning service of foreign summonses in their territories. Certain specified courts may send summons and other processes to the courts of these countries for service, and the courts of these countries receiving them will serve them on persons concerned as if these processes were issued by these courts themselves. The foreign courts are those which are notified by their Governments as courts whose processes may be thus served. Such notification, it would appear, will be made in respect of countries with whom reciprocal arrangements are agreed upon. The Supreme Court of *Ceylon* accepts letters of request from foreign courts, and the processes are served in Ceylon in the same way as the processes of its own courts are served. The assistance is given in both civil and criminal cases. The *Japanese* courts entertain letters of request from foreign courts who offer reciprocal judicial aid to the letters of request of Japanese courts. The judicial aid is available both in civil and criminal cases. The request must be made through diplomatic channel. The document, if it is in foreign language, must be accompanied by a translation in Japanese language. The law of *U.A.R.* in this respect is said to follow international practice. However, there does not appear to be any established international practice and therefore the procedure available cannot be ascertained with certainty. The judicial assistance afforded by the courts of the U.A.R. is based on reciprocity. The law of *Indonesia* contains no provisions concerning the service of foreign processes in Indonesia. *Iraq* has signed an Agreement Relating to Writs and Letters

of Request with the other members of the Arab League. This agreement adopts the mode of service through letters of request and also through a Consular Officer without the intervention of the authorities of the country of execution. Whether any, and if so, what mode of assistance will be available in this respect for the service of processes issued by the courts of countries with whom Iraq has no convention, is not clear.

(ii) Taking of Evidence

The laws of Burma, India and Pakistan contain almost identical provisions concerning the taking of evidence in their territories required in proceedings in foreign courts. In India, on the application of the party to the foreign proceedings or the law officer of the foreign state concerned, the High Court within whose appellate jurisdiction the witness resides will issue a commission to examine the witness. The High Court must be satisfied either by a certificate of the Consular Officer of the foreign country in India or by the letter of request of the foreign court that such evidence is required there and also that the foreign proceeding is of a civil nature. The same provisions, as are applicable to the taking of evidence required by a domestic court, will apply to the taking of evidence required in the foreign proceedings. The law of Ceylon also contains provisions affording similar facilities for taking evidence required in foreign civil proceedings. The foreign court may apply to the Supreme Court of Ceylon, or the order for the examination of the witness made by the foreign court may be addressed to any court in Ceylon. Also, on the issue of a commission by a competent court in Her Majesty's Dominions, for obtaining testimony of any witness in Ceylon, the Ceylon courts have power to order such examination before such person. Commissions issued by the courts in India and other countries of the Commonwealth and also in countries which are allies of Her Majesty are governed by the same provisions as are applicable to commissions to examine witnesses issued by the courts in Ceylon. In addition to the above methods, evidence required for use abroad may be taken in Ceylon by private persons or foreign consular authorities without the intervention of the local authorities. There is no legal objection to it.[1] The

[1] This is not possible in some countries. Earlier in the report we have seen that in Switzerland it would be an offence.

Japanese courts render judicial aid for taking evidence required by those foreign courts who render reciprocal assistance to Japanese courts. The assistance is not restricted to foreign civil proceedings only, but also extends to criminal cases. The foreign court, wherein such evidence is required, must send a letter of request through diplomatic channel to the District Court concerned. The letter and other papers, if they are in foreign language must be accompanied by a translation in Japanese language. The law of U.A.R. in this respect is said to follow international practice. But as stated earlier in the report, there does not appear to be any established international practice, and therefore it has not been possible to ascertain the practice of the U.A.R. The judicial aid afforded by the courts in the U.A.R. is based on reciprocity. The law of Indonesia contains no provisions in this respect. Iraq has signed an Agreement Relating to Writs and Letters of Request with other members of the Arab League. This agreement adopts the procedure of obtaining evidence through a letter of request, and also through the consular officer who may take evidence without the intervention of the authorities of the country in which the evidence is taken. The facilities for taking evidence in Iraq required in foreign proceedings, in the absence of convention, are not clear.

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(III) REPORT OF THE SUB-COMMITTEE APPOINTED AT THE SIXTH SESSION HELD IN CAIRO

A Sub-Committee consisting of representatives from Ceylon, India, Iraq and U.A.R. was appointed by the Committee to consider the subject "The Recognition and Enforcement of Foreign Judgments, Service of Process and Recording of Evidence in Civil and Criminal Cases" and report thereon before the 3rd March, 1964.

Mr. Adel Younis of the U.A.R. was appointed Chairman. The Sub-Committee at its meeting of 26th February appointed the representative from Ceylon to act as rapporteur.

The Sub-Committee had before it the material relating to this subject prepared by the Secretariat, a draft agreement on this topic submitted by the U.A.R. delegation, which is annexed to this report marked Document *A* together with a memorandum marked *A 1* and three drafts submitted by the Ceylon delegation on each of the subjects of the recognition and enforcement of judgments, the service of judicial process and the recording of evidence which are annexed and marked as Documents B, C and D respectively.

The Sub-Committee decided to place before the Committee two separate draft agreements: one on the recognition and enforcement of judgments, and the other on the subject of service of process and the recording of evidence. The first appears as *Appendix I* to this report and the other as *Appendix II*.

Comments on Appendix I

The Sub-Committee decided to limit the scope of the proposed Agreement to judgments obtained in civil proceedings and to exclude judgments in criminal cases. The U.A.R. draft (*Document A*), however, contains certain provisions in that regard (Articles 8 and 9). The representative of the U.A.R. is of the view that judgments obtained in commercial cases should be specifically mentioned as civil courts of some countries do not deal with commercial matters which are dealt with by special courts. Although in some countries there was no provision for awarding damages or compensation to an injured party in a criminal case, the Sub-Committee is of

the view that judgments for the payment of compensation or damages arising from a criminal conviction should be regarded as a civil judgment for the purpose of this Agreement. The proposed Agreement excludes foreign judgments in matrimonial matters as a draft Agreement on this subject has already been prepared and placed before the Committee. The Sub-Committee has also limited the scope of the Agreement to judgments for the payment of money excluding judgments for the payment of taxes or criminal penalties. Having regard to the terms of Article 2 which confines the Agreement to money decrees, judgments in matters relating to the declaration of personal status are outside the scope of this Agreement except where the payment of money is decreed.

Article 1 deals with the definition of terms. The present draft relates only to decisions of the regular courts. Orders made by administrative tribunals or other bodies engaged in adjudication are excluded unless they form part of the judicature. Arbitration awards are not included unless a decree or order has been made by a court consequent on such an award.

The question of what is a final judgment is controversial. In certain States, upon an appeal being filed, there is an automatic suspension of the effect of a judgment while extraordinary methods of review such as an appeal to a Court of Cassation would not have that consequence unless a stay of execution is obtained. On the other hand, in other States finality is not lost because of the pendency of an appeal. It was decided that the question of finality should be determined by the law of the State in which such judgment was issued. The word decision is used in the Agreement as a compendious term to include every form of adjudication including the formal expression of such an adjudication as a decree or order. In terms of clause (b) of Article 4, a foreign judgment will not be enforced if it has been obtained in such circumstances that it does not have any extraterritorial or international validity. In view of a difference of opinion among the members of the Sub-Committee as to the law by which the question of international competence is to be determined, that is to say, whether it should be decided by the law of the issuing court as in the U.A.R. (Article 394 of the Code of Civil Procedures) or the law of the enforcing court, it was decided to leave this matter for decisions by the Committee.

In regard to clause (c) of Article 4, the representatives of both the U.A.R. and Iraq were of the view that natural justice in their legal systems meant principles of equity and that it was preferable to express the maxim "*audi alterem pattem*" as in clause (c) of Article 4.

In regard to clause (d) of Article 4 a judgment delivered without stating the reasons therefor would according to some States be regarded as contrary to the public policy of the State.

Under Article 6, the enforcing court has power to regulate its own procedure and prescribe such matters as the service of the text of the judgment on the judgment debtor.

In regard to Article 7, it was agreed that when the enforcing court has to decide the issue of fraud under clause (e) of Article 4, it would be necessary to investigate the facts and decide the question on the merits.

The draft does not deal with the question of the recognition of foreign probates.

Comments on Appendix II

The draft submitted by the Ceylon Delegation (*Document C*) suggested, in addition to the usual method of serving process through the regular channels of the State, service by a Consular Officer or other agent of the requesting State and also service through postal channels.

This was not found acceptable to the majority of the Sub-Committee, and accordingly it was decided to confine it to the method of service through the officials of the State in which it was to be effected except in the case where nationals of the requesting State were concerned where service by the consular agent was permissible. Even this latter exception was not favoured by the Delegate of India on the ground that it would be unconstitutional in certain States. The Sub-Committee by a majority decided to include this provision in Article 2 clause (b).

The Sub-Committee did not approve of the proposal made in the Ceylon Draft (*Document D*) to take evidence through a person

specially designated in the letter of request or take evidence without the intervention of the State authority by a person directly appointed for the purpose by the court of the requesting State. Accordingly the draft proposes the recording of evidence only through the competent authority of the State requested to record such evidence.

Sd/- Adel Younis
Sd/- G.A. Shah
Sd/- Dhia Sheet Khattab
Sd/- H.L. de Silva.

APPENDIX I

DRAFT AGREEMENT ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL CASES SUBMITTED BY THE SUB-COMMITTEE

Article 1

In this Agreement :

(a) a foreign judgment means a decision made by a judicial authority whose jurisdiction does not extend to the State in which its enforcement is sought.

(b) a final judgment means a judgment which is enforceable in the State in which such judgment was delivered.

(c) "recognised" means being given effect to as a *res judicata* according to the law of the State in which its effects are sought to be maintained.

(d) "enforceable" means its capability of being compulsorily executed.

Article 2

This Agreement shall apply to foreign judgments in civil cases, including commercial cases, whereby a definite sum of money is made payable. It shall not apply to judgments whereby a sum of money is payable in respect of a tax or penalty.

Article 3

A foreign judgment shall be recognised as conclusive and be enforceable between the parties thereto as it was issued by the court of the State through which it is sought to be enforced.

Article 4

A foreign judgment shall not be recognised or be enforceable unless the following facts are verified:

(a) that the judgment is final;

(b) that it has been issued by a court which is internationally competent;

(c) that it has been issued according to a procedure which would enable the defendent to submit his defence;

(d) that it does not involve anything of such a nature as would violate the public policy or morality of the State in which enforcement is sought;

(e) that it has not been obtained by fraud;

(f) that it does not contradict any judgment delivered by a court of the State in which enforcement is sought.

Article 5

When there are two or more foreign judgments, the effect stated in Article 3 shall be accorded to the judgment which is more in 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 6

A foreign judgment shall not be recognised or 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.

Article 7

The appropriate judicial authority required to recognise or direct the enforcement of a foreign judgment shall not investigate the merits of that judgment.

Article 8

Requests for recognition or enforcement should be supported by the following documents:

(a) A certified true copy of the judgment sought to be executed, duly authenticated by the appropriate authorities;

(b) A certificate from the appropriate authority to the effect that the judgment sought to be enforced is final and executory;

(c) A certificate that the parties were duly summoned to appear before the appropriate authority in cases where the judgment was obtained in default of appearance of either party.

Sd/- Adel Younis

APPENDIX II

DRAFT AGREEMENT FOR THE SERVICE OF JUDICIAL PROCESS AND THE RECORDING OF EVIDENCE IN CIVIL AND CRIMINAL CASES

PART ONE—General Provisions

Article 1

In this Agreement—

(a) "Judicial Process" means every type of document, whether judicial or extra-judicial, which is required to be served on a party or witness in civil or criminal proceedings.

(b) "Recipient" means the person on whom such process is intended to be served.

(c) "Requesting State" in *Part Two* means the State which requests the service of judicial process in the territory of another State and in *Part Three* means the State from which a request to record evidence emanates.

(d) "Competent Authority" in *Part Two* means the authority which is empowered to serve judicial process and in *Part Three* means the authority which is empowered to record evidence in pursuance of this agreement.

PART TWO—Service of Process

Article 2

(a) Judicial Process shall be served in accordance with the law of the State in which such service is to be effected.

Provided that if the requesting State desires such process to be served in accordance with its own law, the request shall be complied with unless it conflicts with the law of the State where the service is to be effected.

(b) If the recipient is a national of the requesting State, the process may be served by a Consular Officer of the reqesting State provided that the State in which it is to be served shall bear no responsibility.

Article 3

Subject to the provisions of Article 2, a request for the service of judicial process shall be made as follows:

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

(b) It shall state the full name, address and such other information as is necessary to identify the recipient.

(c) Two copies of the process to be served shall be annexed to the request, and where the process is not drawn up in the language of the State in which it is to be served, it shall be accompanied by a translation in duplicate.

Article 4

(a) A request for service of process made in accordance with the preceding provisions shall be complied with unless—

(1) the authenticity of the request for service is not established; or

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

(b) the competent authority by whom the request is executed shall furnish a certificate in proof of such service or explain the reasons which have prevented such service.

Article 5

No fees shall be claimed as expenses for executing the request for the service of process by the State in which the service is to be effected.

PART THREE—Recording of Evidence

Article 6

When evidence is required to be recorded in a civil or criminal proceeding by a court of one State in the territory of another State, such evidence shall be taken in accordance with the following provisions.