ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT
OF THE
SEVENTH SESSION
BAGHDAD
1965

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INTRODUCTORY NOTE

ESTABLISHMENT AND FUNCTIONS OF THE COMMITTEE

The Asian Legal Consultative Committee, as it was originally called was constituted by the governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria as from the 15th of November 1956, to serve as an Advisory Body of Legal Experts, to deal with problems that may be referred to it, and to help in the exchange of views and information on matters of common concern between the participating countries. In response to a suggestion made by the late Prime Minister of India, which was accepted by all the participating countries in the Asian Legal Consultative Committee, the Statutes of the Committee were amended with effect from the 19th April 1958, so as to include participation of countries in the African continent. Consequent upon this change in the Statutes, the name of the Committee was altered, and it was renamed as the Asian-African Legal Consultative Committee. Membership of the Committee is open to the countries in the Asian and African continents in accordance with the provisions of its Statutes.

The United Arab Republic upon its formation by the merger of Egypt and Syria became an original participating country in the Committee in the place of Syria. Sudan was admitted to the Committee with effect from the 1st of October, 1958, Pakistan from the 1st of January, 1959, Morocco from the 24th of February, 1961, Thailand from the 6th of December 1961, and Ghana from the 28th of October, 1963.

The Committee is governed in all matters by its Statutes and the Statutory Rules. Its functions as set out in Article 3 of the Statutes are:

(a) Examination of questions that are under consideration by the International Law Commission, and to arrange for the views of the Committee to be placed before the said Commission; to consider the reports of the Commission and to make recommendations thereon to the governments of the participating countries;

(b) Consideration of legal problems that may be referred to the Committee by any of the participating countries and to make such recommendations to governments as may be thought fit;

(c) Exchange of views and information on legal matters of common concern; and

(d) To communicate with the consent of the governments of the participating countries, the points of view of the Committee on international legal problems referred to it, to the United Nations, other institutions and international organisations.

The Committee normally meets once annually by rotation in the countries participating in the Committee. Its first Session was held in New Delhi, the second in Cairo, the third in Colombo, the fourth in Tokyo, the fifth in Rangoon, the sixth in Cairo, and the seventh in Baghdad. The Committee has a permanent secretariat in New Delhi for the conduct of day to day work. A section of the Secretariat is charged with the collection of material and preparation of background papers for assisting the Committee in its deliberations during the sessions. The Committee functions in all matters through its Secretary who acts in consultation with the Liaison Officers appointed by each of the participating countries.

OFFICE BEARERS OF THE COMMITTEE AND ITS SECRETARIAT

The Committee during its First Session elected the Member for Burma, the Hon'ble Chief Justice U Myint Thein, and the Member for Indonesia, the Hon'ble Chief Justice Dr. Wirjono Prodjodikoro as President and Vice-President respectively, of the Committee for the year 1957-58. During the Second Session, the Committee elected the Member for the United Arab Republic, H.E. Mr. Abdel Aziz Mohamed, President of the Cour de Cassation, as President, and the Member for Ceylon, the Hon'ble Chief Justice Mr. H.H. Basnayake as Vice-President of the Committee for the year 1958-59. At its Third Session, the Member for Ceylon, the Hon'ble Chief Justice Mr. H.H. Basnayake was elected as President and Chaudhuri Nazir Ahmed Khan, Attorney

General of Pakistan, was elected as Vice-President of the Committee. At its Fourth Session, the Member for Japan, Dr. Kenzo Takayanagi, President, Cabinet Commission on Constitutional Reforms, was elected as President and the Hon'ble Dr. Wirjono Prodjodikoro, Chief Justice of the Republic of Indonesia, as Vice-President of the Committee. At its Fifth Session, the Member for India the Hon'ble Mr. M.C. Setalvad, Attorney General of India, was elected as President and the Hon'ble Mr. A.T.M. Mustafa, Minister for Law of the Government of East Pakistan, was elected as Vice-President of the Committee. At the Sixth Session of the Committee, the Committee elected the Member for U.A.R. Mr. Hafez Sabek, Ex-President of the Cour de Cassation, as President, and the Member for Ghana, Mr. J.K. Abensetts, Solicitor-General of Ghana, as Vice-President of the Committee. At the Seventh Session of the Committee, the Committee elected the Hon'ble Mr. Justice Shakir Al-Ani, Member for Iraq as President, and the Hon'ble Mr. Justice T.S. Fernando, Member for Ceylon, as Vice-President.

The Committee at its First Session decided to locate its Permanent Secretariat at New Delhi (India). The Committee also decided during its First, Second, Fourth, Sixth and Seventh Session that Mr. B. Sen, Hon. Legal Adviser to the Ministry of External Affairs, Government of India, should perform the functions of the Secretary to the Committee.

CO-OPERATION WITH OTHER ORGANISATIONS

The Committee maintains close contacts with and receives published documents from the United Nations, the Specialised Agencies, the International Law Commission, the Organisation of American States, the Arab League and the International Institute for Unification of Private Law. The Committee is empowered under its Statutory Rules to admit to its sessions Observers from international and regional inter-governmental organisations. The International Law Commission was represented at the Committee's Fourth, Fifth, Sixth and Seventh Sessions by Dr. F.V. Garcia-Amador, Dr. Radhabinod Pal, Mr. Eduardo Jimenez De Arechaga, and Prof. Roberto Ago respectively. The Secretary-General of the United Nations was represented at the Committee's Fifth Session by Mr. Oscar Schachter of the U.N. Secretariat, at the Sixth

Session by Mr. Luis Moreno Verdin, Director of the U.N. Information Centre, Cairo, and at the Seventh Session by Mr. Dik Lehmkul, Director, U.N. Information Centre, Baghdad. At the Sixth Session, the Organisation of American States was also represented by Dr. F.V. Garcia-Amador in the capacity of Observer. At the Sixth and Seventh Sessions, the U.N. High Commissioner for Refugees was represented by the U.N. Deputy High Commissioner for Refugees, H.H. Prince Sadruddin Aga Khan. The Arab League also sent representatives to the Committee's Second, Fifth and Sixth and Seventh Sessions. The Committee sends Observers to the sessions of the International Law Commission in response to a standing invitation extended to it by the Commission. The Committee also sends observers to international conferences convened by the United Nations to discuss legal problems. At the Sixth Session, the Committee decided to extend standing invitations to the Legal Counsel of the United Nations, the International Law Commission, the League of Arab States, the Organisation of African Unity and the Organisation of American States to be represented by Observers at future sessions of the Committee. The Secretary has the discretion to invite any agency of the United Nations to attend the sessions of the Committee. The Committee has also decided to enter into consultative arrangements with the Hague Conference on Private International Law.

THE SESSIONS OF THE COMMITTEE

First Session: During the First Session held in New Delhi, the Committee discussed and drew up reports for submission to the governments of the participating countries on three subjects, viz., "Diplomatic Immunities," "Principles of Extradition," and "Immunity of States." The subjects were, however, carried forward for further consideration at the next session.

Second Session: During the Second Session held in Cairo, the Committee had before it five main subjects for consideration, viz., "Diplomatic Immunities," "Principles of Extradition," "Immunity of States in respect of Commercial Transactions," "Dual Nationality" and "the Status of Aliens." It also discussed briefly the questions relating to "Free Legal Aid" and "Reciprocal Enforcement of Foreign Judgments in Matrimonial Matters." The

Committee also considered, generally, the Reports of the 9th and 10th Sessions of the International Law Commission.

The Committee finalised its Reports on "Diplomatic Immunities" and on "Immunity of States in respect of Commercial Transactions." These Reports were submitted to the Governments of the participating countries. Final conclusions were not reached on the other subjects discussed at this Session.

Third Session: The Committee at its Third Session held in Colombo considered the comments of the governments on its Reports on "Functions, Privileges and Immunities of Diplomatic Envoys", and "Immunity of States in respect of Commercial Transactions", which the Committee had finalised during its Second Session in Cairo. The Committee re-affirmed the view it had taken in its Report with regard to restrictions on the Immunity of States in respect of Commercial Transactions. It, however, made certain changes in its Report on Diplomatic Immunities in the light of the comments received from the governments of the participating countries. This Report was later placed before the U.N. Conference of Plenipotentiaries on Diplomatic Relations.

The Committee gave detailed consideration to the subjects of the "Status of Aliens" and "Extradition," and was able to draw up provisionally the principles governing these subjects in the form of Draft Articles. The Provisional Recommendations of the Committee on these two subjects were submitted to the governments of the participating countries for their comments.

The Committee also generally considered questions relating to "Dual Nationality" and the recommendations of the International Law Commission on Arbitral Procedure. The Committee decided to take up, at its next session, the question of "the Legality of Nuclear Tests" and the legal aspects of certain economic matters, namely "Conflict of Laws in respect of International Sales and Purchases" and "Relief against Double Taxation."

Fourth Session: The Fourth Session of the Committee was held in Tokyo from 15th to 28th February, 1961. The Committee at this Session discussed in detail the subjects of "Extradition" and "the Status of Aliens" on the basis of the Draft Articles as

provisionally drawn up by the Committee at its Third Session. The Committee revised the drafts on the subjects in the light of the comments made by the Delegations present at the session and adopted Final Reports for submission to the governments of the participating countries. The subject relating to "Diplomatic Protection of Citizens Abroad" and "State Responsibility for Maltreatment of Aliens" was also generally considered by the Committee. The Committee gave special attention to the question of "the Legality of Nuclear Tests." The Delegates made statements indicating the scope of the subject under consideration by this Committee and the basic principles on which further material needed to be collected. After a general discussion the Committee unanimously decided that the consideration of this subject was a matter of utmost urgency and should, therefore, be placed as the first item on the agenda of the Fifth Session.

The Committee also considered the subjects relating to "Free Legal Aid" and "Recognition of Foreign Decrees in Matrimonial Matters." It decided to publish the Reports of the Rapporteur on both these subjects so that they could be presented to the governments of the participating countries.

Fifth Session: The Fifth Session of the Committee was held in Rangoon from 17th to 30th January, 1962. The Committee at this session discussed in detail the subjects of "Dual Nationality and "the Legality of Nuclear Tests." The Committee drew up a set of Draft Articles embodying the principles relating to elimination or reduction of dual or multiple nationality. It was decided that the Draft Articles should be submitted to the governments of the participating countries for comments and that the subject should be placed before the next session of the Committee for fuller consideration in the light of the comments received from the governments.

The Committee discussed the subject of "the Legality of Nuclear Tests" on the basis of the materials on the scientific and legal aspects of nuclear tests collected by the Secretariat of the Committee. The Committee heard the views and expressions of opinion on the various aspects of the subject from the Delegates present at the Session, and took note of the written memoranda

presented by some of the Governments. On the basis of these discussions, the Secretary of the Committee drew up a Draft Report for the consideration of the Committee. After a general discussion, the Committee decided that the Secretariat should submit the Draft Report to the Governments of the participating countries for their comments, and that the subject should be placed before the next session of the Committee as a priority item on the agenda.

The Committee also considered the subject of Arbitral Procedure and the Report of the Secretariat on the work done by the International Law Commission at its Thirteenth Session. The Committee decided that a report should be drawn up on Arbitral Procedure incorporating the views expressed by the various Delegations.

Sixth Session: The Sixth Session of the Committee was held in Cairo from 24th February to 6th March, 1964.

At this Session, the Committee finalised its recommendations on the subjects of "Dual Nationality" and "the Legality of Nuclear Tests." It also discussed the subjects of "the Rights of Refugees" and the "U.N. Charter from the Asian-African Viewpoint," which were referred to the Committee by the Government of the U.A.R. The questions relating to "the Reciprocal Enforcement of Judgments, the Service of Process and the Recording of Evidence in Civil and Criminal Cases," referred by the Government of Ceylon, were considered by a Sub-Committee appointed at the Session.

The subject of "Dual Nationality" was discussed at this Session on the basis of the Preliminary Report adopted at the Fifth Session and the comments received thereon from the delegates. The Committee drew up and adopted its Final Report containing Model Rules embodying "Principles relating to Elimination or Reduction of Dual or Multiple Nationality" which it decided to submit to the governments of the participating countries.

The question of "the Legality of Nuclear Tests," which had been under consideration by the Committee since the Fourth

Session, was finalised at this Session taking into account the Draft Report presented by the Secretary at the Fifth Session and the comments and memoranda received from the member governments thereon. The Committee was able to adopt its conclusions on the subject unanimously.

The Committee considered certain questions relating to the recently concluded Vienna Conventions viz., the Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, and the Vienna Convention on Nuclear Damage of 1963. The Committee also took note of the Report on the work done by the International Law Commission at its Fifteenth Session.

Seventh Session of the Committee

The Seventh Session of the Committee was held in Baghdad from 23rd March to 1st April 1965. At this Session, the Committee finalised its recommendations on the topic "Reciprocal Enforcement of Judgments, the Service of Process and the Recording of Evidence in both Civil and Criminal Cases," and considered in detail the topics "the Rights of Refugees" and "the U.N. Charter from the Asian-African Viewpoint". It also took up for preliminary consideration the topics "the Law of Outer Space" and "the Codification of Principles of Peaceful Co-existence", both referred to it by the Government of India. The topics "Double Taxation" and "Diplomatic Protection and State Responsibility" were also given consideration by Sub-Committees appointed at this Session.

The topic "Reciprocal Enforcement of Judgments" was considered at this Session on the basis of the Report prepared by a Sub-Committee at the Sixth Session. The Report contained two draft agreements, one on reciprocal enforcement of judgments, and the other on service of process and the recording of evidence. On a general discussion, it was agreed that the Committee would consider the provisions of the draft articles as model rules on the subject, and after detailed consideration of the various articles, the Committee finalised its recommendations on this subject.

"The Rights of Refugees" was the principal subject discussed at this session. The Secretariat of the Committee had presented

a working paper and a Basis of Discussion containing certain principles in the form of Draft Articles to facilitate discussion. The U.N. Deputy High Commissioner, H.H. Prince Sadruddin Aga Khan, and Dr. E. Jahn, Legal Adviser to the U.N. High Commission took part in the deliberations of the Committee. At the conclusion of the discussion it was decided that the Committee was not to draft a new convention, but should formulate general principles on the subject and that in the light of those principles the Committee should examine the text of the 1951 U.N. Convention in order to consider whether it was necessary to suggest any amendment to that Convention, particularly as the situation had greatly changed since the year 1951 when that convention was drawn up and in view of the fact that the Convention itself contemplated changes being made in its provisions.

The Committee discussed in detail the principles concerning the treatment of refugees and an Interim Report containing eleven articles incorporating the principles agreed upon was adopted.

The topic of "the U.N. Charter from the Asian-African Viewpoint" was considered at this session on the basis of a working paper prepared by the Secretariat and a memorandum presented by the U.A.R. Government. After a general debate, the Committee decided to postpone, until a more propitious time, to be decided in consultation with member governments, the question concerning the revision of the Charter. On the proposal of the U.A.R. delegation, a resolution was adopted in which the Committee expressed its full confidence in the United Nations, and appealed to all Member States to faithfully live up to their obligations under the Charter.

The topics "Law of Outer Space" and "Codification of the Principles of Peaceful Co-existence" were given preliminary consideration at this Session. After general observations made by the Delegates, the Committee decided that the Secretariat be directed to prepare detailed studies on these topics for consideration of the Committee at its next session. It was also decided to request the governments of the participating countries to send their views and observations on these topics to the Secretariat of the Committee for inclusion in the Briefs for the next session.

The Committee took note of the Report, on the work done by the International Law Commission at its Sixteenth Session, submitted to it by Mr. Hafez Sabek, who had represented the Committee as an Observer at that Session. The Committee took up for consideration the subject of "the Law of Treaties" as a matter arising out of the work done by the Commission at that Session. As the Committee did not have sufficient time to give adequate consideration to the 73 Draft Articles drawn up by the International Law Commission, it decided to appoint a Special Repporteur to prepare a report on the subject to assist the Committee in its study of the subject at the next Session.

Work done by the Committee

The subjects which the Committee has been able to finalise so far are "Diplomatic Immunities and Privileges", "Immunity of States with regard to Commercial Transactions", "Legal Aid", "Reciprocal Enforcement of Judgments in Matrimonial Matters", "Extradition", "Status of Aliens", "Dual Nationality", "Legality of Nuclear Tests" and "the Reciprocal Enforcement of Judgments, Service of Process and Recording of Evidence in Civil and Criminal Cases".

The Committee has also made considerable progress on "Diplomatic Protection and State Responsibility", "Double Taxation", "Laws relating to International Sales and Purchases", "the Rights of Refugees", "the U.N. Charter from the Asian-African Viewpoint", "the Law of Outer Space", "Codification of Principles of Peaceful Co-existence" and "the Law of Treaties". The Committee has also before it for consideration several of the other subjects including "the Law of the Territorial Sea", "Accessions to General Multilateral Conventions concluded under the auspices of the League of Nations," and "State Succession". The Committee has completed its compilation of Volume I of its proposed publication "A Digest of Asian and African Constitutions". This is shortly to go to Press. It has also made progress on its proposed digest of important decisions of the municipal courts of Asian and African countries on international legal questions. The Committee has completed and will soon bring out, in mimeographed form, its studies on International Economic Law.

DELEGATES OF THE PARTICIPATING COUNTRIES, OBSERVERS AND CONFERENCE ORGANIZATION

BURMA	NOT REPRESENTED
CEYLON	
Member and Leader of the Delegation	Hon. T.S. Fernando, Judge, Supreme Court of Ceylon.
Adviser	Mr. Y. Duraiswamy, Charge d'Affaires of Ceylon.
Adviser	Mr. H.L. de Silva, Crown Counsel.
Adviser	Mr. W.S.L. de Alwis, Asstt. High Commissioner for Ceylon in Madras.
GHANA	
Member and Leader of the Delegation	Mr. J.K. Abensetts, Solicitor-General.
Alternate Member	Mr. Osei Tutu, Director, Legal and Consular Department, Ministry of Foreign Affairs, Accra.
Adviser	Mr. K. Gyeke-Dako, Senior State Attorney, Ministry of Justice, Accra.
INDIA	
Member and Leader of the Delegation	Mr. C.K. Daphtary, Attorney-General of India.
Alternate Member and Deputy Leader	Mr. B.N. Lokur, Secretary to the Government of India, Ministry of Law.
Adviser	Mr. G.A. Shah, Joint Secretary, Ministry of Law.

Adviser	Dr. K. Krishna Rao, Director (L & T), Ministry of External Affairs.
Adviser	Mr. S.R. Krishnaswamy, First Secretary, Embassy of India, Baghdad.
INDONESIA	NOT REPRESENTED
IRAQ	
Member and Leader of the Delegation	Mr. Shakir Al-Ani, Judge, Court of Cassation.
Alternate Member	Dr. Hasan Zakariya, Advocate.
Adviser	Mr. Dhia Sheet Khattab, Judge, Court of Cassation.
Adviser	Mr. Shakir Nasir Haider, Professor, Faculty of Law, University of Baghdad.
Adviser	Dr. Hassan Al-Chalabi, Faculty of Law, University of Baghdad.
Adviser	Dr. Hassan Al-Haddawi, Faculty of Law, University of Baghdad.
Adviser	Dr. Nouri Al-Kadhim, Director of International Conference Office, Ministry of Foreign Affairs.
JAPAN	
Member and Leader of the Delegation	Dr. Kenzo Takayanagi, President of the Cabinet Commission on Constitution, Government of Japan.

Alternate Member	Dr. Kumao Nishimura, Member of the Atomic Energy Commission.
Adviser	Mr. Chusei Yamada, Second Secretary, Embassy of Japan, New Delhi.
Adviser	Mr. Akira Watanabe, Third Secretary, Embassy of Japan, Baghdad.
PAKISTAN	
Member and Leader of the Delegation	Mr. A.T.M. Mustafa, Barrister-at-Law.
Alternate Member (Leader of Delegation up to 27-3-65)	Mr. M.B. Zaman, Advocate.
Adviser	Mr. Imam Hussain, Secretary, Embassy of Pakistan, Baghdad.
THAILAND	NOT REPRESENTED
UNITED ARAB REPUBLIC	
Member and Leader of the Delegation	Mr. Mohammed Fouad Gaber, President of the Court of Cassation.
Alternate Member and Deputy Leader	Dr. Gaber Gaad Abdel Rahman, Dean, Faculty of Law, Cairo University.
Adviser	Dr. Hamed Sultan, Professor, Faculty of Law, Cairo University.
Adviser	Dr. Mohamed Hafez Ghanem, Professor, Faculty of Law, Ein Shams University.

SPECIAL INVITEE OF THE COMMITTEE—Under Rule 7(5)	Mr. Hafez Sabeq, Legal Adviser, Ministry of Justice, Iraq; and Ex-President of the Court of Cassation, U.A.R.
SECRETARY TO THE COMMITTEE	Mr. B. Sen, Senior Advocate of the Supreme Court of India and Hon. Legal Adviser, Ministry of External Affairs, Government of India.

OBSERVERS

CAMEROONS	Mr. Langoul Eloi, Judge, Supreme Court of the Cameroons.
MALAYSIA	Mr. Abdul Kadir bin Yousuf, Attorney General.
	Mr. Salah bin Abbas, Sen. Federal Counsel.
TANZANIA	Mr. Felician Mahatane, State Attorney, Attorney General's Department.
ARAB LEAGUE	Mr. Sharaf El Din Abdalla, Legal Department.
INTERNATIONAL LAW COMMISSION	Prof. Roberto Ago, Chairman, International Law Commission.
UNITED NATIONS	Mr. Dik Lehmkuhl, Director, United Nations Information Centre, Baghdad.

UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER	H.H. Prince Sadruddin Aga Khan, U.N. Deputy High Commissioner for Refugees.
	Dr. E. Jahn, Chief of UNHCR Legal Section.
	Mr. Omar Sharaf, Deputy Representative of UNHCR

CONFERENCE ORGANISATION

Head of Organisation	Mr. S. Mudhallal
Conference and Credentials Officer	Dr. Nouri Al-Kadhim, Director, International Conferences Division, Ministry of Foreign Affairs.

LIAISON OFFICERS OF THE PARTICIPATING COUNTRIES ON THE COMMITTEE

BURMA	U Ba Maung, First Secretary, Embassy of Burma, New Delhi.
CEYLON	Mr. I.B. Fonseka, Counsellor, Ceylon High Commission, New Delhi.
GHANA	Mr. Jacob Charles Bonney, Counsellor Ghana High Commission, New Delhi.
INDIA	Dr. K. Krishna Rao, Joint Secretary and Legal Adviser, Ministry of External Affairs, Government of India, New Delhi.
INDONESIA	Mr. Imam Abikusno, Counsellor, Embassy of Indonesia, New Delhi.
IRAQ	Mr. Ahmad Al-Farisi, Counsellor, Embassy of Iraq, New Delhi.
JAPAN	Mr. Kiyoshi Sumiya, Counsellor, Embassy of Japan, New Delhi.

PAKISTAN	Mr. Afzal Iqbal, Deputy High Commissioner, Pakistan High Commission, New Delhi.
THAILAND	Dr. Suchati Chuthasmit, First Secretary, Embassy of Thailand, New Delhi.
UNITED ARAB REPUBLIC	Mr. Hussein El-Attar, Second Secretary, Embassy of U.A.R., New Delhi.

AGENDA OF THE SESSION

I. ADMINISTRATIVE AND ORGANISATIONAL MATTERS

1. Adoption of the Agenda.
2. Election of the President and Vice-President of the Session.
3. Admission of Observers to the Session.
4. Consideration of the Secretary's Report.
5. Consideration of the Committee's programme of work for 1965-66.
6. Question of extending the term of the Committee after November 1966.
7. Date and place of the Eighth Session.

II. MATTERS ARISING OUT OF THE WORK DONE BY THE INTERNATIONAL LAW COMMISSION UNDER ARTICLE 3 (a) OF THE STATUTES.

1. Consideration of the Report on the work done by the International Law Commission at its Sixteenth Session.
2. Law of Treaties.

III. MATTERS REFERRED TO THE COMMITTEE BY THE GOVERNMENTS OF THE PARTICIPATING COUNTRIES UNDER ARTICLE 3 (b) OF THE STATUTES

1. Status of Aliens (Referred by the Government of Japan):—
   (a) Diplomatic Protection of Aliens by their Home States; and
   (b) Responsibility of States arising out of Mal-treatment of Aliens.
2. The Rights of Refugees (Referred by the Government of the U.A.R.).
3. United Nations Charter from the View of Asian-African Countries, (Referred by the Government of the U.A.R.).

4. Law of the Territorial Sea (Referred by the Governments of Ceylon and U.A.R.).
5. Enforcement of Judgments, the Service of Process and Recording of Evidence among States both in Civil and Criminal Cases (Referred by the Government of Ceylon).
6. Law of Outer Space (Referred by the Government of India).
7. Codification of the Principles of Peaceful Co-existence. (Referred by the Government of India).

IV. MATTERS OF COMMON CONCERN TAKEN UP BY THE COMMITTEE UNDER ARTICLE 3 (c) OF THE STATUTES

1. Relief Against Double Taxation. (Referred by the Government of India).

THE RIGHTS OF REFUGEES

THE RIGHTS OF REFUGEES

Introductory Note

The subject of "The Rights of Refugees" was referred to this Committee by the Government of the United Arab Republic under Article 3(b) of the Statutes. In its memorandum on the subject, the U.A.R. Government, whilst indicating the legal issues for consideration of the Committee, had stated that apart from humanitarian considerations, the status and rights of refugees raised several issues of mutual interest to the member countries of the Committee and that the Committee's views would be valuable in an understanding of the refugee problem.

At the Sixth Session of the Committee, the subject was taken up for consideration on the basis of a preliminary note prepared by the Secretariat. The Committee was also furnished with a memorandum by the Office of the U.N. High Commissioner for Refugees. The U.N. Deputy High Commissioner for Refugees, who attended the Session in the capacity of an Oberver on behalf of the UNHCR, also addressed the Committee.

The Committee after a general discussion on the subject decided to direct the Secretariat to collect further material on the subject, particularly on the issues relating to compensation, the minimum standard of treatment of a refugee in the State of asylum, and the constitution of international tribunals for determination of compensation which could be claimed by a refugee.

The Secretariat accordingly approached the member governments and certain institutions concerned with the subject requesting for information on the above-mentioned issues. In response, some material was received from the Governments of Iraq and Japan whilst the Government of Burma stated that they had no comments to offer and the Government of Ceylon intimated that there were no provisions in their laws regarding refugees.

At the Seventh Session held in Baghdad, the Committee considered the subject on the basis of a revised memoranda prepared by the Secretariat. After giving detailed consideration

to the subject, the Committee adopted an Interim Report and decided to submit the same to the member governments for their comments. The Committee directed that the subject be placed on the agenda of the next session.

INTERIM REPORT OF THE COMMITTEE ADOPTED AT THE SESSION

The Government of the United Arab Republic by a reference made under Article 3 (b) of the Statutes requested this Committee to consider the subject of "the Rights of Refugees" in general and in particular the following issues:

1. Definition of refugees and their classifications.
2. The relation between the problem of refugees and the preservation of peace and justice in the world.
3. Principles guiding the solution of refugee problem:
   (a) The right of asylum.
   (b) The right of repatriation and resettlement.
   (c) The right of indemnification.
4. Rights of refugees in the country of residence:
   (a) The right to life and liberty.
   (b) The right to fair trial.
   (c) The right to speech, conscience and religion.
   (d) The right of employment.
   (e) The right to social security.
   (f) The right to education.
5. International assistance to refugees:
   (a) Travel documents—visas.
   (b) Financial assistance.
   (c) Technical assistance.
   (d) International co-operation in the field of refugees: International Agreements and International Agencies.

The subject was placed on the agenda of the Sixth Session of the Committee for consideration. At that session, the Committee generally discussed the subject on the basis of a note prepared by the Secretariat and a memorandum submitted by the

Office of the United Nations High Commissioner for Refugees. The Committee had the benefit of the views expressed by the Deputy High Commissioner for Refugees, who attended the Session. The Committee after a general discussion decided to direct the Secretariat to collect further material on the subject, particularly on the issues relating to compensation, the minimum standard of treatment of a refugee in the State of asylum and the constitution of international tribunals for determination of compensation that can be claimed by a refugee. The Secretariat, in accordance with the directions of the Committee, had prepared a revised note on the subject including certain draft articles on the rights of refugees to serve as a basis of discussion in the Committee. The Secretariat had also placed before the Commitee considerable material on the subject, including the text of the Agreement of 28th July, 1951 relating to the Status of Refugees.

The Committee gave detailed consideration to this subject at its meetings held on 23rd, 24th, 25th, 27th, and 28th March, 1965. The Committee had the benefit at this Session also of the views of the Deputy High Commissioner for Refugees in consideration of the subject. The Commtittee decided at this Session to formulate certain general principles on the rights a refugee should have, and the principles adopted on this subject are set out in the form of articles in *Annexure* to this Report.

The Committee decided to postpone consideration of the question as to whether any provision should be made for ensuring the implementation of the right to return and the right to compensation which have been provided for in the articles on the rights of refugees.

The Committee could not, for lack of time, give detailed consideration to the provisions of the United Nations Refugee Convention of 1951, and accordingly it decided to postpone its recommendation on the question as to whether a State should endeavour to afford to the refugee treatment in conformity with the principles contained in that convention.

The Committee was also not in a position to consider a proposal made by the Delegation of India to incorporate a provision in the articles relating to the rights of refugees. The text of the Draft

Article suggested by the Delegation of India was in the following terms:—

> "A refugee shall lose his status as a refugee if he does not return to the State of which he is a national, or, if he has no nationality, to the State of which he was a habitual resident, or to avail himself of the protection of such State even after the circumstances in which he became a refugee ceased to exist."

The Committee, having regard to the urgency of the problem, decided to draw up this Interim Report and to submit the same to the Governments with a view that their comments and observations may be available before the next session of the Committee, when it proposes to give further consideration to this subject.

The Committee records its deep appreciation of the assistance rendered to the Committee by the Deputy High Commissioner for Refugees in the study of this subject.

Sd/—
(SHAKIR AL-ANI)
President.
1-4-1965.

ANNEXURE

PRINCIPLES CONCERNING TREATMENT OF REFUGEES

Article I

Definition of the term 'Refugee'

A "Refugee' is a person who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group:

(a) leaves the State of which he is a national, or, if he has no nationality, the State of which he is a habitual resident; or,

(b) being outside such State, is unable or unwilling to return to it or to avail himself of its protection.

Exceptions: (1) A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any of the States of which he is a national. (2) A person who has committed a crime against peace, a war crime, or a crime against humanity or a serious non-political crime or has committed acts contrary to the purposes and principles of the United Nations shall not be a refugee.

Explanation: The dependants of a refugee shall be deemed to be refugees.

Explanation: The expression "leaves" includes voluntary as well as involuntary leaving.

NOTES

(i) The Delegations of Iraq, Pakistan and the United Arab Republic expressed the view that, in their opinion, the definition of the term 'Refugee' includes a person who is obliged to leave the State of which he is a national under the pressure of an illegal act or as a result of invasion of such State, wholly or partially, by an alien with a view to occupying the State.

(ii) The Delegation of Ceylon and Japan expressed the view that in their opinion the expression "persecution" means something more than discrimination or unfair treatment but includes such conduct as shocks the conscience of civilized nations.

(iii) The Delegation of Japan expressed the view that the word 'and' should be substituted for the word 'or' in the last line of paragraph (a).

Article II

Loss of Status as Refugee

A refugee shall lose his status as refugee if—

(i) he voluntarily returns to the State of which he is a national or, if he has no nationality, to the State of which he is a habitual resident; or

(ii) he voluntarily acquires the nationality of another State and is entitled to the protection of that State.

NOTE : The Delegation of Iraq and the United Arab Republic reserve their position on paragraph (ii).

Article III

Asylum to a Refugee

A State has the sovereign right to grant or refuse asylum to a refugee in its territory.

Article IV

Right of Return

A refugee shall have the right to return, if he so choses, to the State of which he is a national and in this event it shall be the duty of such State to receive him.

Article V

Right to Compensation

1. A refugee shall have the right to receive compensation from the State which he left or to which he was unable to return.

2. The compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of dependants of the refugee or of the person whose dependant the refugee was, and destruction of or damage to property and assets, caused by the authorities of the State, public officials or mob violence.

Article VI

Right of Movement and Residence

1. Subject to the conditions imposed for the grant of asylum in the State and subject also to the local laws, regulations and orders, a refugee shall have the right—

   (i) to move freely throughout the territory of the State; and

   (ii) to reside in any part of the territory of the State.

2. The State may, however, require a refugee to comply with provisions as to registration or reporting or otherwise so as to regulate or restrict the right of movement and residence as it may consider appropriate in any special circumstances or in the national or public interest.

Article VII

Personal rights

Subject to local laws, regulations and orders, a refugee shall have the right—

(i) to freedom from arbitrary arrest;

(ii) to freedom to profess and practise his own religion;

(iii) to have protection of the executive and police authorities of the State;

(iv) to have access to the courts of law; and

(v) to have legal assistance.

Article VIII

Right to property

Subject to local laws, regulations, and orders and subject also to the conditions imposed for the grant of asylum in the State, a refugee shall have the right to acquire, hold and dispose of property.

Article IX

Expulsion and Deportation

1. Save in the national or public interest or on the gr[ound] of violation of the conditions of asylum, the State sh[all] not ordinarily expel a refugee.

2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

3. A refugee shall not be deported to a State where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group.

Article X

Conflict with Treaties or Conventions

Where the provisions of a treaty or convention between two or more States conflict with the principles set forth herein, the provisions of such treaty or convention shall prevail as between those States.

INTRODUCTORY NOTE

The subject of 'Relief against Double Taxation and Fiscal Evasion' was referred to the Committee by the Government of India under the provisions of Article 3(c) of the Statutes of the Committee for exchange of views and information between the participating countries.

The Committee took up the subject for consideration at its Fourth Session and appointed a Sub-Committee to examine in what manner the Committee should treat the problem of avoidance of double taxation and fiscal evasion. The Committee discussed the subject on the basis of a General Note prepared by the Secretariat of the Committee. The Committee, accepting the recommendations of the Sub-Committee, decided that the Secretariat should request the governments of the participating States to forward to the Secretariat the texts, if any, of agreements on avoidance of double taxation and fiscal evasion concluded by them and the texts of the provisions of their municipal laws concerning the subject. The Committee also directed the Secretariat to draw up the Topics of Discussions (Questionnaire with short comments) and send the same to the Governments of the participating countries.

In accordance with the directions of the Committee, the Secretariat invited the governments of the participating States to send their comments on the Topics of Discussions.

At the Sixth Session of the Committee, the subject was further considered, and a Sub-Committee was appointed to go into the question. The Sub-Committee had before it a memorandum from the U.A.R. Delegation and also a note from the Delgation of Ceylon containing its supplementary answers to the U.N. Questionnaire on Double Taxation. The Sub-Committee after a preliminary exchange of views concluded that though bilateral Double Taxation agreements provided a practical solution to the financial problems which arose from the economic intercourse of nations, for the conclusion of a model multilateral convention it was desirable to have an exchange of views on the techniques employed by the participating States, their experiences and practices in similar circumstances. Since the views of some of the States were not before the Sub-

Committee, the Committee accepting the recommendations of the Sub-Committee, decided to postpone consideration of the subject to the Seventh Session and directed the Secretariat to complete the compilation of rules, regulations and practices of the participating States and the agreements concluded by them.

At the Seventh Session held in Baghdad, the subject was again considered by a Sub-Committee appointed for the purpose. The Sub-Committee faced the same difficulty as its predecessors, but having regard to the importance of the subject to the developing Asian-African countries, it deemed proper to make a beginning by formulating certain broad principles on the subject in a report which it drew up for consideration of the Committee. The Committee took note of that report and decided to give consideration to the same at the next Session.

REPORT OF THE SUB-COMMITTEE APPOINTED AT THE SESSION

INTRODUCTION

This subject was referred to the Committee by the Government of India under Article 3 (c) of the Statutes for exchange of views and information between the participating countries. The subject was considered by two Sub-Committees appointed at the Fourth and Sixth Session, but the matter was deferred until this session for lack of complete information regarding the laws, practices and bilateral agreements of the participating States. This Sub-Committee was also hampered in its deliberations because of incomplete information. The subject is too complex to admit of easy solution. The conflicting interests of the countries, variegated pattern of their taxing laws, differing tax structures and absence of a universally acceptable system of tax distribution among various countries make the task of proposing any model agreement on this subject difficult. Nevertheless, having regard to the vital importance of the subject to the developing countries for economic cooperation, expansion of trade and business, exchange of technical knowledge and cultural activities, flow of capital and business enterprises, the Sub-Committee thought that a beginning should be made by formulating certain broad principles for consideration of the Governments of the participating States. In formulating these principles, the Sub-Committee found the material collected by the Secretariat very useful and informative. The Sub-Committee wishes to place on record its appreciation of the labours of the Secretariat.

GENERAL PRINCIPLES

In order to solve the problem of double taxation in an effective way, it is necessary to lay down certain general principles which should govern the tax law of all the countries. These principles are universally accepted in most of the bilateral agreements entered into by the member countries and other non-member countries. These may be stated in general terms as follows:—

(1) The taxation of income shall be governed by the laws of the country except where provision to the contrary is made by express agreement.

(2) National Treatment Clause—The Contracting States shall not impose upon nationals of other countries more burdens of taxes than they impose upon their own nationals.

(3) The laws should contain a provision empowering the Government to enter into bilateral or multilateral agreements to grant relief against double or multiple taxation, unilaterally or on reciprocal basis.

(4) The most practical method for providing relief against double or multiple taxation is by entering into bilateral agreements which take care of the special relations between the two countries, but an attempt should be made to evolve a common pattern for economic development of all the participating countries on cooperative basis.

(5) In order to minimise the evil of double or multiple taxation on the same income, the participating countries should endeavour to enter into arrangements on the basis of:—

(a) Allocation of sources of income in respect of the categories of activities where the loss and gain would be substantially equal, having regard to the state of trade relations between the two countries.

(b) In other cases where the same income is taxable in two countries, systems of tax credit or tax rebates should be introduced.

(6) In granting the tax credits, any special tax concessions, tax holidays or development rebates granted by one country as an incentive to industrial development or export trade, should not be taken into account and full credit should be given to the tax which is normally payable but for such special concessions. Otherwise the whole object of granting special concessions would be nullified and one taxing country would get undue advantage at the expense of the other.

(7) The participating countries should exchange information available to them under their respective laws in the normal

course of administration to enable the contracting parties to carry out their obligations under bilateral agreements and prevent tax evasion. The information should be treated as secret and shall not be disclosed to any person other than those concerned with assessment and collection of tax. No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process.

(8) Any tax payer may make representation to the competent authorities of the contracting State of which the taxpayer is a resident if the action of the taxation authority of the other contracting State has resulted in double taxation contrary to the provisions of the agreement. The competent authority shall have a right to present his case to the appropriate authorities of the taxing State, and every endeavour should be made to come to an agreement with a view to avoid double taxation and ensure fair implementation of the agreement.

PRINCIPLE OF ALLOCATION OF TAX JURISDICTION

The Sub-Committee is of the view that the most satisfactory method of granting relief against double taxation is exclusive allocation of specific sources of income to the country to which the source is allocated. This is because the participating countries are approximately at equal level of economic development and the contracting country would give up substantially the same amount of tax revenue which it would gain through the corresponding relinquishment by other country. The psychological effect of exempting foreign income from the allocated sources would facilitate trade and business abroad with corresponding augmentation of invisible exports and exchange of resources. The Experts Committee appointed by the League of Nations, the International Chamber of Commerce, and the Secretariat of the Asian-African Legal Consultative Committee have favoured the principle of allocation of sources. This system has the added advantage of simplification of procedure by allocation of income to the country where it has originated. This sytem of allocation of sources cannot, of course, be all pervasive in respect of all types of income, but to start with it can be applied to certain specific categories which would not unduly deprive the State of any

substantial revenue but ensure fair, equitable distribution and at the same time grant relief against double taxation.

The Sub-Committee recommends that initially the following categories of income should be allocated to the countries mentioned in the following paragraphs:—

(i) Income from immovable property including rents, royalties and gains from sale, exchange or transfer. This source should be allocated to the country of situs, that is, where the property is situate.

(ii) Royalties and profits from operating of mine, quarry and other natural resources. This should be allocated to the country where the operation is carried on.

(iii) The income from operation of international flights and shipping should be allocated exclusively to the country where the air corporation or the shipping company is incorporated and or has its head office with substantial control and management. In the case of air corporations and shipping companies, ordinarily the country of incorporation and the country in which the head office is situate happen to be the same. If, however, this allocation is considered disadvantageous to certain participating members, the source should be allocated to the countries in which the income has originated.

(iv) The salaries, wages, pensions paid out of Government funds to its nationals in respect of services rendered to such Government shall not be subjected to tax in any other country. This exemption, however, shall not apply to services rendered in connection with trade or business carried on by such Governments for purposes of profit.

(v) Salaries and remuneration paid for personal services shall be taxed by the country where the services are performed except if the services are rendered for a period not exceeding six months on behalf of the resident of other country.

(vi) Salary or remuneration earned by an individual, who has been invited by a Government of other country or university, college or other educational institution for a period not exceeding two years, shall not be subject to tax of the inviting country.

(vii) The remittances, grants, scholarships and other allowances to the students at recognised university, research institutions, religious or charitable organisations etc. shall be exempt from tax in the receiving country.

(viii) The royalties and profits earned by copyright, patent, trade mark, trade name, etc. should be allocated to the country where the profits are earned.

These categories of income have been allocated to the respective countries of sources in almost all the bilateral agreements entered into by member countries and other countries, and it appears to this Sub-Committee that it will be a useful pattern to follow in all future agreements.

TAX ON TRADE, BUSINESS, INDUSTRY AND OTHER PROFITS

The most important source of income, however, relates to trade, business and industry. Because of the diversity of business and industrial operations and the tax structure of different countries it is impossible to devise a single system to cover all aspects. Various methods of allocation of income, tax exemption, tax rebate, tax credit, etc. will have to be examined to arrive at an acceptable solution. In the absence of fuller information on the laws and practices of the participating countries the Sub-Committee recommends that this aspect of Double Taxation should be deferred till the next session of the Committee, and the Secretariat should be requested to collect further material and formulate its proposals on this matter.

RECOMMENDATION

It is earnestly hoped that the participating countries would favourably consider the above proposals as a step forward towards international fiscal cooperation in minimising the undoubted evil of double taxation and furnish their views as also the necessary

information to assist the Committee in the task of formulating agreed proposals to achieve further progress in this direction.

Sd/—
Mr. G.A. Shah (India) Chairman
Mr. K. Gyeke-Dako (Ghana)
Dr. Hassan Al Haddawy (Iraq)
Mr. A. Watanabe (Japan)

Sd/—
(SHAKIR AL—ANI)
President
1-4-1965.

THE RECOGNITION AND RECIPROCAL ENFORCEMENT OF JUDGMENTS, SERVICE OF PROCESS AND RECORDING OF EVIDENCE IN CIVIL AND CRIMINAL CASES

FINAL REPORT OF THE COMMITTEE ADOPTED AT THE SESSION

The questions relating to "Reciprocal Enforcement of Judgments, Service of Process, and Recording of Evidence among States both in Civil and Criminal Cases" have been referred to this Committee under Article 3 (b) of its Statutes by the Government of Ceylon with a view to formulating uniform set of rules to ensure reciprocal recognition and enforcement of foreign judgments and to facilitate the service of process and recording of evidence in foreign countries.

At the Sixth Session of the Committee, the subject was considered by a Sub-Committee consisting of the Representatives of Ceylon India, Iraq and the United Arab Republic on the basis of a study prepared by the Secretariat and the memoranda submitted by the Delegations of Ceylon and the United Arab Republic. The Sub-Committee placed before the Committee a report containing two draft agreements, one on the subject of "Recognition and Enforcement of Judgments", and the other on the subject of "Service of Process and Recording of Evidence."

The Committee at the present Session took up for consideration the Report of the Sub-Committee appointed at the Cairo Session. It was agreed in the Committee to give detailed consideration to the provisions of the two drafts prepared by the Sub-Committee on the basis that those provisions, if adopted, would be recommended as model rules on the subject for consideration of the Governments. The Committee, after a careful consideration of the Report of the Sub-Committee, is agreed on the adoption of the model rules on the subject, which are set out in Annexures I and II to this Report.

The Committee decides to submit this Report to the Government of Ceylon and the Governments of other participating countries in the Committee as the Final Report of the Committee on the subject.

Annexure—1

MODEL RULES ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL CASES

Article 1

In these model rules:

(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 it was delivered.

(c) "recognized" 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 capable of being compulsorily executed.

Article 2

These rules 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, fine or penalty.

Note: The Delegations of India and Pakistan desired express provision excluding (1) arbitration award, even if such an award is enforceable as money decree or judgment, (2) order for the payment of money arising out of matrimonial proceedings.

Article 3

A foreign judgment shall be recognized as conclusive and be enforceable between the parties thereto as if it had been issued by a court of the State in which its enforcement is sought.

Article 4

A foreign judgment shall not be recognized or enforced unless the following facts are verified:

(a) that it is final and conclusive.

(b) that it is issued by a court which is internationally competent.

(c) that it is issued according to a procedure which would enable the defendant to submit his defence.

(d) that it does not violate the public policy or morality of the State in which enforcement is sought.

(e) that it is not obtained by fraud.

(f) that it does not conflict with any judgment, delivered by any court of the State in which enforcement is sought, between the same parties on the same subject matter in an action instituted earlier.

(g) that there is no action, instituted earlier, pending between the same parties on the same subject matter in the State in which enforcement is sought.

Note (I) Regarding Clause (b) of the Article.

The Delegations of India and Ceylon desired that the expression "A court which is internationally competent" should be defined to mean a court having jurisdiction which satisfies the following requirements:

(1) (a) the judgment debtor has voluntarily appeared in the proceedings for the purpose of contesting the merits and not solely for the purpose of:

(i) contesting the jurisdiction of the said court, or

(ii) protecting his property from seizure or obtaining the release of seized property; or

(iii) protecting his property on the ground that in the future it may be placed in jeopardy of seizure on the strength of the judgments; or

(b) the judgment debtor has submitted to the jurisdiction of the said court by an express agreement; or

(c) the judgment debtor at the time of the institution of the proceeding ordinarily resides in the State of the said court; or

(d) the judgment debtor instituted the proceeding as plaintiff or counterclaimed in the State of the said court; or

(e) the judgment debtor, being a corporate body, was incorporated or has its seat (*siege*) in the State of the said court, or at the time of the institution of the proceeding had its place of central administration or principal place of business in that State; or

(f) the judgment debtor, at the time of the institution of the proceeding, has either a commercial establishment or a branch office in the State of the said court and the proceeding is based upon a cause of action arising out of the business carried on there; or

(g) in an action based on contract, the parties to the contract ordinarily reside in different states and all, or substantially all, of the performance by the judgment debtor was to take place in the State of the said court; or

(h) in an action in tort (*delict* or *quasi delict*) either the place where the defendant did the act which caused the injury, or the place where the last event necessary to make the defendant liable for the alleged tort (*delict* or *quasi delict*) occurred, in the State of the said court.

(2) Notwithstanding anything in clause (1), the court which issued the judgment shall not have jurisdiction:

(a) in the cases stated in sub Clauses (c), (e), (f) and (g), if the bringing of proceedings in the said court was contrary to an express agreement between the parties under which the dispute in question was to be settled otherwise than by a proceeding in that court;

(b) if by the law of the country in which enforcement is sought, exclusive jurisdiction over the subject matter of the action is assigned to another court.

The bases of jurisdiction recognized in the foregoing clauses are 'however' not exclusive and the court in which enforcement is sought may accept additional bases.

The Delegations of Ghana and Pakistan desired that Clause (b) of Article 4 be altered as follows: "that it had been issued by a court of competent jurisdiction."

Note (II)—Regarding Clause (c) of this Article, the Delegations of India and Pakistan suggested that the following be substituted:

"that it had been issued according to a procedure which gives the defendant reasonable notice of the proceeding and reasonable opportunity of submitting his defence and follows the principles of natural justice".

Note (III)—Regarding Clause (f) of this Article, the Delegation of the United Arab Republic desired that the clause should be as follows:

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

Note (IV)—Regarding Clause (d) of this Article, the Delegations of India and Pakistan desired that the following clauses should be added to the Article as clauses (h) and (i):

(h) that it is not founded on a refusal to recognize the law of the State in which enforcement is sought in cases where such law is applicable.

(i) that it does not sustain a claim founded on a breach of any law in force in the State in which enforcement is sought.

Article 5

A foreign judgment shall not be recognized 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.

Note The Delegations of India and Pakistan desired an additional provision to the following effect:

"Proceedings for enforcement shall be stayed on proof of appeal being filed or other steps being taken to have the judgment set aside".

Article 6

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

Article 7

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.

Annexure II

MODEL RULES FOR THE SERVICE OF JUDICIAL PROCESS AND THE RECORDING OF EVIDENCE IN CIVIL & CRIMINAL CASES

PART ONE—GENERAL PROVISIONS

Article 1

In these model rules—

(a) "Judicial Process" means every type of document, 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 record evidence in terms of these Rules.

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 Requesting State provided that the State in which it is to be served shall bear no responsibility.

NOTE : The Delegation of Ghana desired the omission of the proviso to Clause (a).

Article 3

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

(a) The Letter of Request shall be addressed by a Diplomatic or Consular Officer of the Requesting State to the competent authority of the State where such 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 Letter of 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.

PART THREE—RECORDING OF EVIDENCE

Article 5

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.

Article 6

A request to record evidence shall be executed by the competent authority in acordance with the law in force in that State, provided

that if the requesting State desires it to be executed in some other way, such request shall be complied with unless it conflicts with the law of the State in which such evidence is to be recorded.

Article 7

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

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

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

Article 8

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

(1) The authenticity of the Letter of Request is not established; or

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

Sd/—
(SHAKIR AL-ANI)
President.
1-4-1965.

OTHER DECISIONS OF THE COMMITTEE

United Nations Charter from Asian-African Viewpoint

The subject of U.N. Charter from Asian-African Viewpoint had been referred to the Committee by the Government of the U.A.R. under Article 3(b) of the Statutes with the request that the Committee might examine the provisions of the Charter from the legal point of view taking into account in particular the changed composition of the United Nations after the admission of the newly independent Asian and African States.

At the Sixth Session of the Committee, the subject was considered on the basis of the memoranda submitted by the Governments of India and the U.A.R., and the preliminary study made by the Secretariat of the Committee. The Delegates present at the Session made statements expressing their views.

The Committee noted with satisfaction the adoption of the two resolutions by the General Assembly on the question of equitable representation in the Security Council and the Economic and Social Council and recommended that the participating States should ratify the resolutions by the 1st of September, 1965. The Committee also made an appeal to all Member States of the United Nations to ratify the said amendments by 1st of September, 1965. It was decided to transmit the Resolution of the Committee to the United Nations Secretariat so that it may be brought to the attention of the Member States of the United Nations. The Committee directed the Secretariat to compile further material on the subject and to place the same before the next Session.

At the Seventh Session of the Committee, the subject was given further consideration by the Committee on the basis of the study prepared and presented to it by the Secretariat. After a general debate, the Committee, whilst directing the Secretariat to continue its study of the subject, decided to postpone until a more propitious time, to be decided in consultation with Governments, the question concerning the revision of the Charter. On the proposal of the U.A.R. Delegate a resolution was adopted, in which the Committee expressed its full confidence in the United Nations and appealed to

all Member States of the Organisation to faithfully live up to their obligations under the Charter.

Law of Outer Space

The Law of Outer Space had been referred to this Committee by the Government of India under Article 3(b) of the Statutes. In particular, the Government of India have suggested the following questions for the consideration of the Committee:

(1) The question of drafting an international convention or declaration reserving outer space exclusively for peaceful purposes;

(2) The question of formulating rules on liability for injury or loss caused by the operation of space-vehicles;

(3) The question of formulating rules regarding assistance to, and rescue of, astronauts and space-vehicles in distress.

At the Seventh Session of the Committee, the subject was taken up for preliminary consideration. The Delegates of Ceylon, Ghana, India, Japan and the Observer for Malaysia made general statements. The Committee took note of these statements and directed the Secretariat to collect relevant material on the questions referred by the Government of India and to prepare a detailed study on the subject on the basis of such material for consideration of the Committee at its next Session. The Committee requested the participating governments to furnish their views and observations on the subject to the Secretariat.

Codification of the Principles of Peaceful Co-existence

This subject has been referred to the Committee by the Government of India under Article 3(b) of the Statutes.

At the Seventh Session of the Committee, the subject was taken up for preliminary consideration and the Delegates of Ceylon, India, Japan, Iraq and the Observer for Malaysia made general statements. The Committee directed the Secretariat to collect the relevant material on the subject including the Report of the Special Committee of the General Assembly on the Principles of International Law concerning Friendly Relations and Co-operation among States, and to prepare a study for the consideration of the Committee at its next session.

Relief against Double Taxation & Fiscal Evasion

The subject relating to Relief against Double Taxation was referred to the Committee by the Government of India under the provisions of Article 3(c) of the Statutes of the Committee for the exchange of views and information between the participating countries. The Committee took up the subject for consideration at the Fourth Session and appointed a Sub-Committee to examine the manner in which the Committee should treat the problem of Avoidance of Double Taxation and Fiscal Evasion. The Sub-Committee discussed the subject on the basis of a general note prepared by the Secretariat of the Committee. The Committee, accepting the recommendations of the Sub-Committee, decided that the Secretariat should request the Governments of the participating countries to forward to the Secretariat the texts, if any, of agreements for Avoidance of Double Taxation and Fiscal Evasion concluded by them and the texts of the provisions of their municipal laws concerning the subject. The Committee also directed the secretariat to draw up the topics of discussion (questionnaire with short comments) and to circulate it to the governments of the participating countries.

At the Sixth Session of the Committee, the subject was taken up for further consideration and a sub-committee was appointed to go into the question. The Sub-Committee received a memorandum for the U.A.R. Delegation and also a note from the Delegation of Ceylon containing its answers to the U.N. Questionnaire on Double Taxation. The Sub-Committee after a preliminary exchange of views concluded that though bilateral double taxation agreements provided a practical solution to the financial problems which arose from the economic intercourse of nations, the conclusion of a multilateral convention may be desirable. The Sub-Committee felt that it was necessary for this purpose to have an exchange of views on the techniques employed by the participating states, their experiences and practices. Since the views of some of the participating countries were not before the Sub-Committee, it recommended the postponement of the consideration of this subject to the next Session and direction to the Secretariat, meanwhile to complete the compilation of rules, regulations and State practice of the participating States and of the agreements concluded by them.

At the Seventh Session of the Committee, the subject was again

considered by a Sub-Committee. The Sub-Committee faced the same difficulty as its predecessor, but having regard to the vital importance of the subject to the developing Asian and African countries for the promotion of economic cooperation, expansion of trade and commerce, flow of capital and business enterprise, it deemed proper to make a beginning by formulating broad principles on the subject in the report which it drew up for the consideration of the Committee. The Committee took note of this report and decided to give it consideration at the next Session.

Diplomatic Protection & State Resoponsibility

The subject relating to the Status of Aliens was referred to this Committee under Article 3(b) of the Statutes by the Government of Japan. At the Third Session held in Colombo, it was decided to consider the subject under the separate topics namely "Diplomatic Protection of Citizens Abroad" and "State Responsibility for Maltreatment of Aliens". The Final Report of the Committee relating to substantive rights of aliens was adopted at the Fourth Session held in Tokyo. The Committee at that session directed the Secretariat to collect further material and prepare drafts of articles on Diplomatic Protection and State Responsibility for submission to the Committee at its Fifth Session. The Draft Articles on Diplomatic Protection alongwith commentaries were placed before the Committee at its Fifth and Sixth Sessions, but were not taken up at those sessions because of Committee's preoccupation with other more urgent subjects.

At the Seventh Session, the topic of Diplomatic Protection was given consideration by a Sub-Committee, appointed for the purpose. Considering that the subject is closely related to that of State Responsibility, the Sub-Committee recommended that they should be studied together at some future session.

Work Done by the International Law Commission-
The Law of Treaties.

During its Sixteenth Session, the International Law Commission had considered *inter alia* the subjects of the Law of Treaties, the law relating to Special Missions and that relating to Relations between States and Inter-Governmental Organisations. Mr. Hafez Sabek,

had represented the Committee as an Observer at this Session of the Commission. He submitted his Report, under clause 5 (a) of Rule 6 of the Statutory Rules, to the Committee at its Seventh Session. The Committee expressed its appreciation for the services rendered by Mr. Sabek in representing the Committee at the Commission's session and for his valuable report. Prof. Roberto Ago, Chairman of the International Law Commission, was invited to address the Committee. Prof. Ago made certain observations on the functions and scope of work of the Commission. He also stressed the need for closer co-operation between the Commission and this Committee. Taking note of the observations and suggestions of Prof. Roberto Ago, the Committee decided to take up the subject of the Law of Treaties for consideration on a priority basis at its next session, with a view to formulating proposals and suggestions from the Asian-African viewpoint for the consideration of the Commission. The Committee further decided to appoint Dr. Hasan Zakariya, Alternate Member for Iraq, as Special Rapporteur on the Law of Treaties, with the request that he prepare a report on such specific points arising out of the Commission's Draft Articles on the subject as require consideration from the Asian-African viewpoint, and that he suggest any amendments to the draft articles that he may consider necessary. The Committee requested the participating governments to send their comments on the Draft Articles to the Rapporteur through the Secretariat of the Committee by August 1965 and requested the Rapporteur to complete his Report by October 1965 and to transmit the same to the Secretariat. The Committee directed the Secretariat to circulate the Report of the Rapporteur to the participating governments inviting their comments and observations, and to place this Report together with any comments and observations that may be received from the participating governments, before the Committee at its next session.

THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, SERVICE OF PROCESS AND RECORDING OF EVIDENCE AMONG STATES BOTH IN CIVIL AND CRIMINAL CASES

REPORT OF THE COMMITTEE & BACKGROUND MATERIALS

(I) INTRODUCTORY NOTE

The subject of "The Recognition and Reciprocal Enforcement of Judgments, Service of Process, and Recording of Evidence among States in Civil and Criminal Cases" has been referred to this Committee under Article 3(b) of its Statutes by the Government of Ceylon with a view to formulating a uniform set of rules to ensure reciprocal recognition and enforcement of judgments, and to facilitate the service of process and recording of evidence in foreign countries.

At the Sixth Session of the Committee, the subject was considered by a Sub-Committee, appointed for the purpose, on the basis of a study prepared by the Secretariat and the memoranda submitted by the Delegations of Ceylon and U.A.R. The Sub-Committee placed before the Committee a report containing two draft agreements, one on the subject of "Recognition and Enforcement of Judgments", and the other on the subject of "Service of Process and Recording of Evidence." As the Committee did not have sufficient time to consider that report, it directed that the report be placed before it at its Seventh Session.

At the Seventh Session held in Baghdad, the report of the Sub-Committee appointed at the Sixth Session was taken up for consideration. The Committee finalized consideration of the subject by adopting its Final Report, which contains two sets of model rules, one on the subject of "Recognition and Enforcement of Foreign Judgments", and the other on the subject of "Service of Process and Recording of Evidence". As directed by the Committee, the Final Report has been submitted by the Secretariat to the Government of Ceylon and the governments of the other participating countries.

(II) STUDY PREPARED BY THE SECRETARIAT OF THE COMMITTEE

CONTENTS

I. INTRODUCTORY

The question of recognition and enforcement of foreign judgments arises fairly frequently before the municipal courts of a country in civil matters, particularly those arising out of commercial transactions, matrimonial decrees and maintenance orders. The Committee has already finalised its Report on the question of Recognition and Enforcement of Foreign Judgments in Matrimonial Matters, and this topic has been, therefore, left out of consideration in this report. Recognition and enforcement of foreign judgments generally depend on the municipal law of each state and on a basis of reciprocity. It is, however, desirable to have some kind of uniformity in practice with regard to this matter and to have a set of uniform rules for enforcement of foreign judgments in the interest of comity and to facilitate international trade and commerce. Several learned societies have devoted considerable attention to achieve this object, and certain conventions have been entered into between a group of states which contain a set of rules for observance by states parties to the Conventions with regard to this matter. It is for the Committee to consider whether it would like to draw up a set of model rules with regard to enforcement of foreign judgments as this appears to be the object of the reference by the Government of Ceylon.

It may be stated that there can be no question of enforcement of foreign judgments in criminal matters for crimes are essentially local in character; they are cognizable and punishable in the country where they are committed subject only to the exception that the laws of some countries authorise trial and punishment of their own nationals for crimes committed abroad. In no case, however, will a State imprison or punish a person resident or sojourning in its territory in execution of a judgment rendered by a foreign court.

The service of process of foreign courts and rendering of evidence for use in judicial proceedings in the courts of another country are regarded as part of international judicial assistance which a country may be expected to render to another for suppression of crimes, and for proper adjudication of the rights of individuals. These arise both in criminal and civil proceedings. It appears that in so far as criminal matters are concerned, mutual assistance in (1) execution

of letters rogatory, (2) the service of writs and of records of judicial verdicts, (3) service of summons for personal appearance of witnesses and experts, and (4) communication of extracts from judicial records required in criminal cases is considered desirable. There can be no doubt that assistance rendered in such matters would greatly facilitate administration of criminal justice, and in fact the member states of the Council of Europe have entered into a Convention for mutual assistance with regard to these matters.

Similarly, in civil matters also judicial assistance and mutual co-operation are desirable for due and proper administration of justice. For example, if the defendant in an action or the material witnesses are resident in a country other than the one where the suit has been failed, the court before which the suit is pending would be greatly hampered in its task unless the other State renders its assistance in the service of the writs or for recording of evidence. There is no rule of public international law which would oblige a State to render assistance in such matters. Some States do render assistance to foreign courts as matter of comity or on the basis of reciprocity. Attempts have, however, been made to put the matter on a more satisfactory footing by means of bilateral treaties or multilateral conventions providing for mutual administrative and/or judicial assistance in these respects.

II. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The question of recognition and enforcement of foreign judgments comes before the courts fairly frequently, and it has become a matter of considerable importance in the modern world. Indeed with the increase in international commerce and acceleration in the movement of goods and people across the national boundaries, reciprocal enforcement of judgments and decrees has become essential in the interests of trade and commerce. However, as Prof. Castel has pointed out "the increased volume of international trade has not been followed by a comparable development of the facilities granted to creditors to recover on their claims."[1] A businessman, who has obtained a judgment in the courts of one country, may learn that the property of the debtor situate in that country may not be sufficient to satisfy the judgment and that the property out of which the judgment may be satisfied is situate in another country, or that the defendant has moved in company with all his assets to another country. The interests of international commerce demand that the plaintiff should be able to enforce his judgment in that other country. Otherwise the plaintiff has to bring a new suit against the defendant in that other country and go through the whole procedure once again, resulting in waste of time and money. In some cases, it may not be possible for the plaintiff to bring a new suit. This would be the case if the courts of the country, where the property of the defendant is situate or to which he has escaped, have no jurisdiction to entertain the suit. In this case the creditor will be without remedy. Not to give effect to foreign judgments would, in some cases, put the defendant also to unnecessary inconvenience and even harrassment, because the plaintiff who was unsuccessful in one country may bring a fresh suit against the defendant in another country provided the jurisdictional rules of that country permit it. Therefore, the interest of the defendant also demands that a valid judgment obtained in the courts of one country should become a bar to indentical action between the same parties on the same cause of action in the courts of another country.

[1] *See Report of the 48th Conference of the International Law Association*, p. 103. Prof. J.G. Castel was the Rapporteur appointed by the I.L.A. to prepare a report on the "Reciprocal Enforcement of Foreign Judgments".

In fact the municipal courts of many countries do give effect to foreign judgments. But before a court does so, it requires the foreign judgment to satisfy certain conditions. These conditions are not, however, uniform and they vary from country to country. In addition, there is also the difference in the rules of procedure, the rules of jurisdiction and the juridical concepts of the various countries. Consequently, the international efficacy of a judgment is very much in doubt unless the countries concerned are bound by treaties regulating the matter. The uncertainty is not conducive to international trade and commerce which is very vital to every nation in the world. Therefore, it is not merely the interests of plaintiffs and defendants, but also the interests of the world community in general that demand that proper facilities are created for judgments rendered in one country to be enforced in another, whenever it is so necessary.

The rules concerning the recognition and enforcement of foreign judgments are part of the rules of conflict of laws. They are a body of rules which have grown out of the need of each legal system to develop a set of principles and rules for dealing with cases involving elements of foreign law. Such cases are increasingly encountered by the legal system of a country as the social and economic intercourse of the country with other countries grows. Though the law of a country is influenced by its social conditions, there are certain common features all over the world in the social relationships which give rise to this branch of the law, and therefore the principles which hold good to one legal system should be so equally to another legal system, subject to such modifications and exceptions as may be necessary because of the difference in the basic ideas and principles on which the two legal systems are based. Almost all the modern systems of conflict of laws have their genesis in the doctrines which originally found acceptance in the continent of Europe.[2] Nor is the influence of jurists Huber, Storey and Savigny confined to the systems of conflict of laws of the countries of their birth. A study of the conflict of laws of the various countries will show that one of its important sources is comparative law.

[2]As to the historical antecedents of English law, (on which are based the laws of India, Burma, Ceylon and Pakistan), see Alexander N. Sack, *Conflicts of Laws in the History of the English Law: A Century of Progress, 1835-1935*, pp. 342-454. For a general history of the subject see Beale, *Conflict of Laws*.

SECTION "A"

Principles underlying the Recognition and Enforcement of Foreign Judgments in the laws of the various countries

It may be mentioned at the very outset that as between several countries of Europe the question of enforcement of foreign judgments is governed by provisions of bilateral treaties or multilateral conventions. And so also between some of the member countries of the Arab League[3] and among the members of the Organisation of American States. As between countries parties to a convention, the matter is regulated by the terms of the convention itself. But such cases are few compared to cases not covered by conventions. As regards the countries between whom there are no treaty relations, the matter is governed by the general laws of the courts. However, the courts of a country do not always apply the same rule for recognition or enforcement of all foreign judgments. This applies equally to the *mode* of enforcement and the *conditions* under which the foreign judgment will be enforced. The applicable rules differ according to the existence of reciprocity. This is the practice of most countries though there are countries which apply the same rules irrespective of the existence of reciprocity. Thus, in the case of most countries, there may be three sets of principles applicable to the enforcement of foreign judgments: one based upon convention; one on reciprocity; and the third in the absence of either.

The problem of enforcement of foreign judgments has two main aspects. One is the mode of enforcement, i.e., the procedure by which a foreign judgment may be enforced. The other is the conditions which the foreign judgment must satisfy in order to qualify for enforcement. Both these aspects will be examined as practised by the various States.

[3]The Convention is signed by all members of the League, but it appears to have been ratified so far by three countries only—Egypt, Jordan and Saudi Arabia. For the text of the Convention see Appendix.

MEMBER COUNTRIES

INDONESIA

In Indonesia, foreign judgments are generally not enforceable. The only exception is in a case of general average decided by a competent foreign judicial authority. Foreign judgments are also generally not recognised in Indonesia. The Indonesian judges have, however, the discretion to use the foreign judgment as evidence.[4]

CEYLON[5]

In Ceylon, a foreign judgment, as such, has no direct operation unless the statute provides for it. But a suit can be brought in a Ceylon court making the foreign judgment the cause of action. If the foreign judgment fulfils the conditions required by the law of Ceylon, it will be enforced. Otherwise not. The court will not, in such a case, go into the merits of the case.[6] Judgments obtained in the "Superior Courts of the United Kingdom and of other parts of the Her Majesty's Realms and Territories" can be enforced in Ceylon without recourse to a suit. In these cases the judgment-debtor may apply to the court in Ceylon within twelve months from the date of the judgment to have the judgment registered in that court, and on such registration the foreign judgment will have the same effect as if it were a judgment of the Ceylon court. In both the above cases, i.e., whether the judgment is sought to be enforced by a suit or by registration, the judgment must satisfy certain conditions which are very nearly the same. The judgment must be final and conclusive,[7] and in an action in *personam* it must be for a debt or a definite sum of money. Even if the above

[4]See Appendix IV.

[5]The Law of Ceylon in this respect follows the principles of English Law, and accordingly bears close resemblance to the laws of Burma, India and Pakistan. See Appendix I.

[6]It may be noted that according to the law of Ceylon, the foreign judgment does not extinguish the original cause of action. The parties to the foreign judgment can still bring an original suit in Ceylon on the same cause of action, (instead of suing on the foreign judgment) and in such a suit, the court will examine the merits of the case.

conditions are satisfied, the foreign judgment will not be enforced in Ceylon, if:—

(a) the judgment was not pronounced by a court of competent jurisdiction—competent according to the rules of conflict of laws of Ceylon.

(b) the judgment was in respect of a cause of action which would not have supported an action in Ceylon.

(c) the judgment was obtained by fraud.

(d) the proceedings in which the judgment was given is contrary to natural justice.[8]

According to the Ceylon rules of conflict of laws, the foreign court is not competent to try an action against a sovereign or an ambassador or a diplomatic agent. The foreign court has also no jurisdiction to adjudicate in respect of immovable property not situate in the country in which the court is situate. In an action *in personam*, the foreign court has competent jurisdiction if the defendant is present or resident in that foreign country at the commencement of the action or if he is a subject or citizen of that country at the time of the judgment or if he has expressly or impliedly submitted or contracted to submit to the jurisdiction of that court. In an action *in personam*, the Ceylon law does not recognise foreign court's jurisdiction based upon the presence in that foreign country of the property of the defendant. But if the action is *in rem*, a court has jurisdiction to determine the title to movable or immovable property situate in the country in which the court is situate.[9]

INDIA

It may be mentioned here that the Indian courts follow the English practice in this respect. In India, a foreign judgment as

[7]For the purpose of enforcement by registration, the judgment is not final if an appeal is pending or if the judgment-debtor satisfies the registering court that he is entitled and intends to appeal.

[8]The statutory provisions providing for the enforcement of certain judgments by registration specifically state that the defendant in the foreign proceedings must have been given sufficient notice to afford him an opportunity to defend himself. In cases to which the statute does not apply, this condition would be covered by the requirements of natural justice.

[9]See also Appendix I.

such has no force or authority. But it can be enforced by bringing a suit on it.[10] If the foreign judgment satisfies certain conditions which are required to be satisfied according to the conflict of law-rules of India, the judgment will be enforced. Otherwise it will be refused enforcement. The court will not examine the merits of the case. The court is concerned to see if the required conditions are satisfied, and since one of the conditions is that the foreign judgment must not have been obtained by fraud, the court may go into evidence to see if there was fraud. Judgments of certain territories known as reciprocating territories, i.e., countries which have entered into agreements with India for reciprocal enforcement of judgments—can be enforced in India by a simpler procedure. No suit need be brought to enforce them. What is required is to file a certified copy of the foreign judgment in the Indian court in which the foreign judgment is sought to be enforced and then the judgment can be enforced in India as if it were a judgment of that court. In both the above cases, i.e., whether the foreign judgment is sought to be enforced by a suit on it or by filing an application for execution, it is necessary that the judgment must have been rendered by a court of competent jurisdiction—competent according to the Indian conflict of laws rules. These rules are based upon decided cases and are not exhaustive and cover only actions *in personam*. In an action *in personam*, the foreign court has competent jurisdiction, according to Indian law, if the defendant was a subject of that foreign country or was resident there at the commencement of the action, or if he has voluntarily appeared in that court or submitted or contracted to submit to that court's jurisdiction or if the defendant has sued as plaintiff in the foreign court on the same cause of action. On the production of a duly certified copy of the foreign judgment, the court will presume in favour of the foreign court's competency. The presumption can be displaced by contrary evidence. Even if the above condition is satisfied, the Indian court will refuse enforcement (or recognition) to the foreign

[10]It may be noted that in this suit the foreign judgment is made the cause of action. But since the foreign judgment does not extinguish the original cause of action, the parties to the foreign judgment also have the right to bring a suit on the original cause of action provided jurisdiction exists (instead of suing on the foreign judgment) and in proceedings thereof, the court will go into the merits of the case. But a foreign judgment which is conclusive according to Indian Law is a complete answer to such proceedings.

judgment if:—

(a) it was not given on the merits of the case;

(b) it was obtained by fraud;

(c) it appears on the face of the proceedings to be founded on an incorrect view of international law or refusal to apply the Indian law in cases in which such law is applicable.

(d) it sustains a claim founded on a breach of any law in force in India.

(e) the proceedings in which the judgment was given is contrary to natural justice.[11]

BURMA

In Burma, the mode of enforcement of foreign judgments as well as the conditions under which foreign judgments are recognised and enforced appear to be the same as in India. The laws of Burma and India in this respect have a common genesis and continue to be the same in substance.[12]

PAKISTAN

In Pakistan also, the procedures available for the enforcement of foreign judgments are the same as the two modes available in India and referred to above. The conditions under which the foreign judgments will be enforced are also the same as those required by the laws of India and Burma.[13]

JAPAN

In Japan, a foreign judgment can be enforced by filing a suit in the appropriate District Court for its execution. In such a proceeding, the Japanese court will not re-examine the merits of the

[11]See Appendix III.

[12]See Appendix II for the statutory provisions. The Civil Procedure Codes of Burma and India retain the provisions as they existed when they had a common Civil Procedure Code.

[13]See Appendix VI.

case. The foreign judgment must, however, fulfil the following conditions:

(1) The judgment must be final and conclusive in the foreign court.

(2) The judgment must have been rendered by a court of competent jurisdiction.

(3) If the defendant is a Japanese, he must have received notice of the proceedings in the court or otherwise must have appeared in the court.

(4) The foreign judgment must not be contrary to the Japanese ideas of public order or good morals.

The Japanese Code of Civil Procedure does not give the conditions or circumstances under which the foreign court will be considered a court of competent jurisdiction. The Japanese law also stipulates the condition that there must be mutual guarantee, which probably means that the Japanese court will enforce a foreign judgment only if the foreign court, whose judgment is sought to be enforced in Japan, gives reciprocal treatment to its judgment.[14]

UNITED ARAB REPUBLIC

Under Egyptian law,[15] foreign judgments will be enforced in Egypt on a reciprocal basis. When an Egyptian decree is sought to be enforced in a foreign country, if that country requires the petitioner to file a new suit, the judgments of the courts of that country can be enforced in Egypt by bringing a new suit. On the other hand, if Egyptian judgments can be enforced in the foreign country by directly applying for execution, similar procedure is available to enforce the judgment of the courts of that country. The party against whom the judgment is to be enforced must be served with a writ of summons. Before the court issues an *exequatur*, it must be satisfied that the foreign judgment fulfils the following conditions:

(1) The judgment was rendered by a competent judicial authority according to the law of that foreign country and that according to that law the judgment was final.

[14] See Appendix VII.
[15] See Appendix VIII.

(2) The parties were properly and duly summoned and represented in the suit.

(3) The foreign judgment is not contrary to any judgment already given by the Egyptian court.

(4) The judgment is not contrary to public policy or morality in Egypt.

IRAQ

In Iraq, judgments of certain specified countries-specified by regulations made from time to time—can be enforced by filing an application in the Iraqi court for an order for execution of the judgment together with an authenticated copy of the judgment. Those countries may be so specified by regulations whose courts enforce the judgments rendered by the Iraqi courts. The Iraqi courts will issue an order for execution if they are satisfied that the foreign judgment fulfils certain conditions. They are required not to presume them. The conditions are:

(1) that the foreign judgment was delivered by a court of competent jurisdiction—competent according to the law of Iraq in this respect.

(2) that the defendant was given reasonable and sufficient notice.

(3) that the cause of action on which the judgment is founded is not contrary to the Iraqi ideas of public policy.

(4) that the judgment is executory in the foreign country.

Only judgments for a debt or a definite sum of money are enforceable in Iraq. Civil compensation decreed in penal action is also enforceable.

Even if the court is satisfied as to the above conditions, still the judgment will be refused execution if the judgment debtor proves that—

(a) the foreign judgment was obtained by fraud; or

(b) that the proceedings in the foreign court is contrary to justice or equity.

The foreign judgment must be final. If the judgment debtor has a right of recourse to a higher court, and if he has already taken or intends to take such recourse, the judgment is not enforceable. But in suitable cases, the Iraqi court may pass an order of seizure against judgment debtor's property.

The Iraqi law[16] on the execution of foreign judgments lists a number of grounds upon which the foreign court is required to base its jurisdiction. When the foreign court has based its jurisdiction on any of those grounds, it will be deemed competent by the Iraqi courts. These grounds are: that the property in dispute was situate in the foreign country; that the contract from which the action arose was either made or intended to be performed in that country; that the acts which gave rise to the cause of action were done in that foreign country; that the judgment-debtor was ordinarily resident or carrying on business in that country; and that the judgment-debtor has either voluntarily appeared in the foreign court or had agreed to submit to its jurisdiction.

SOME OTHER SELECTED COUNTRIES

NIGERIA[17]

The only African country, apart from the United Arab Republic, about which the Secretariat has been able to gather information so far is Nigeria. The Nigerian law concerning the recognition and enforcement of foreign judgments is based upon the English law. There are a number of countries in the African continent whose legal system is based on the English pattern whilst there are some which have the continental system. According to Dr. Elias, a foreign judgment is enforceable in Nigeria only by way of registration as provided for by the Foreign Judgments (Reciprocal Enforcement) Ordinance. This Ordinance is based upon English statute law. Only the judgments of the courts of those countries will be recognised and enforced in Nigeria which satisfy the requirements of reciprocity. The conditions under which the foreign judgments will be enforced are as follows:

(1) The judgment must be final and conclusive.

[16]See Appendix V.

[17]See T.O. Elias, *Groundwork of Nigerian Law*, on which the note is based. The relevant portion is given in Appendix IX.

(2) It must be for a definite sum of money but not payable by way of taxes or penalty.

(3) It must have been rendered by a court of competent jurisdiction—competent as recognised by Nigerian law.

(4) It must not be vitiated by fraud.

(5) It must not offend against public policy in Nigeria.

The judgment is not enforceable if the defendant was not duly served with notice of the proceedings and therefore did not attend.

It may also be mentioned that the judgments contemplated by the Ordinance are the judgments of the superior courts of the reciprocating foreign countries given otherwise than on appeal.

ENGLAND[18]

Most of the Asian-African countries have adopted either the common law or the continental system with regard to their rules of private international law. As far as is known, there is no indigenous system of laws on this subject. It is, therefore, useful to state what the relevant rules are in England as well as in the continent of Europe.

In England, the common law procedure for the enforcement of a foreign judgment is to bring a suit on it. The foreign judgment cannot be enforced as such. But it may be made a cause of action on which an English judgment may be obtained. Though a new suit is required, the court will not enquire into the merits of the case except in exceptional circumstances, such as, when fraud is alleged, and therefore the time and money involved are much less than in a regular suit and the successful party in the foreign action is saved the trouble of proving his case all over again. This is because the judgment of a competent foreign court on the merits is normally recognised by English courts as conclusive of the matter thereby decided. There is also another procedure, provided for by statute, for enforcing foreign judgments. The judgment of a country which comes under the statutory provisions will be registered by English courts on the evidence of a certified copy of it, and after

[18]See Dicey's *Conflict of Laws*, 7th edition, pp. 979-1075; Graveson, The *Conflict of Laws*, 4th ed. pp. 536-77; Cheshire, *Private International Law*, 5th ed. pp. 595-645; Wolff, *Private International Law*, 2nd ed., pp. 249-74.

such registration, it will be enforced in the same way as an English judgment. Whether the foreign judgment is sought to be enforced by a suit on it or by registration, the judgment must fulfil certain conditions which are very nearly the same. The conditions are as follows:—

(1) The judgment must be for a definite sum of money.

(2) The judgment must be final and conclusive in the foreign court. For the purpose of registration under the statutory system, the judgment is not final if an appeal is pending or if the judgment-debtor satisfies the court that he is entitled and intends to appeal.

(3) The judgment must have been delivered by a court of competent jurisdiction—competent in the view of English conflict of laws.

(4) The judgment must not be contrary to English ideas of public policy or natural justice.

(5) The judgment must not be vitiated by fraud.

Normally the court's presumption is in favour of the existence of these conditions unless the contrary appears on the face of the documents.

English courts do not enforce foreign penal judgments or judgments for payment of taxes.

CONTINENT OF EUROPE[19]

In the *Netherlands*, foreign judgments are generally not enforceable.

In *France*, a foreign judgment can be enforced by obtaining an *exequatur* of the French court. In such a proceeding, the

[19]See Gutheridge in 13 *British Yearbook of International Law* (1932) pp. 47-67; Rudolf Graupner in 12 *International and Comparative Law Quarterly* (1963) pp. 367-86; Batiffol, *Traite elementaire de Droit International Prive*, 3rd ed. 1959; Niboyet, *Traite de Droit International Prive francais* (1949); Riezler, *Internationales Zivilprozessrecht* (1949). Also see the Civil Codes of the countries concerned.

French court will re-examine the case on merits. The foreign judgment is required to fulfil the following conditions:

(1) The judgment must be valid, executory and possess the authority of *res judicata.*

(2) The foreign judgment must have been given in conformity with the French rules of conflict of laws.

(3) It must have been rendered by a court of competent jurisdiction. If the defendant is a Frenchman, unless he has agreed to the jurisdiction of the foreign court, that court has no competence.

(4) It must not be contrary to the French view of public policy (*Ordre public*).

In *Germany*, the judgment of only those foreign courts will be recognised or enforced which have reciprocity of treatment to the judgments of German courts. The procedure for enforcement is in the nature of an *exequatur*, but the court will not re-examine the case on merits. The conditions under which foreign judgment will be enforced are that it emanates from a court of competent jurisdiction, that the parties were served with proper notice or had otherwise submitted to the court's jurisdiction and that the judgment is not *contra bonos mores* or against the object of a German law. The German courts will not permit the foreign judgments to be impeached on the ground of fraud.

SECTION "B"

Doctrinal Basis for Recognition of Foreign Judgments

As already stated, courts of many countries recognise and enforce foreign judgments though there is no agreed theoretical basis for this well-recognised practice. A search for the juristic basis of the rules concerning the recognition and enforcement of foreign judgments leads one to the basis of the application of the foreign law and therefore the basis of the Conflict of Laws itself. According to Von Bar, a judgment is a *lex specialis*, a law regulating one single case.[20] Whether it is so or not, the statement emphasizes the closeness between the problems raised by the need to apply foreign laws and by the need to give effect to foreign judgments, a point all the more emphasized by the vested rights theory.[21]

The earliest theory is the statute theory which was developed by the Italian universities of the thirteenth century and to which conflict of laws owes its origin. The statutists never raised and answered the question, why apply the foreign law ? They presupposed the existence of two independent laws effective at the same time and place and proceeded to determine which of them applied to a given situation. The result was the division of laws into real and personal, which has left its mark throughout the subsequent development of this branch of the law. Some of the well-known maxims of conflict of laws, such as *mobilia sequuntur personam, locus regit actum* also owe their origin to the statutists.

The later theories can be divided into two groups, viz. the international theories and the territorial theories. The former contend the existence of a single set of principles of conflict of laws common to all nations which are given effect to by municipal legal systems. Though this is a desirable international situation, and

[20]See Wolff, *Private International Law*, 2nd ed. pp. 251-253, where Von Bar's theory is summarised. Von Bar's work is "*Theorie und Praxis des internationalen Privatrechts*, 2 Vols. 2nd ed., 1889.

[21]French authors consider the two problems as separate, the one conflict of laws, and the other the conflict of judgments. But this does not represent the French law correctly, because the French court does not recognise a foreign judgment merely because the foreign court had jurisdiction according to the view of the French court but it also requires that the foreign court should have rendered the judgment according to French rules of conflict of laws.

would conform to Savigny's expectations that "the same legal relations have to expect the same decision whether the judgment is delivered in this state or that", the rules of conflict of laws existing in the various countries do not show any support for this theory. Nor is there any rule of international law which obliges the States to accept a minimum standard of private international law.[22] The theory of *comity*, which may also be included in this group, requires some mention because of its practical implications. According to this theory, the basis for the application of foreign law is courtesy extended by one State to another and not an obligation founded in international law. Implied in the theory is the idea of reciprocity of treatment. There are many legal systems which make the existence of reciprocity a condition for the enforcement of foreign judgments.

The territorial theories are all built on the concept of territoriality of laws. They attempt to work out a case for the application of foreign laws in cases where justice so requires in such a way so as not to infringe the territorial sovereignty of the State applying the foreign laws and not to place any reliance on any super-national source of obligation. From the principle of territorial sovereignty it follows that the judgments of the courts of one country cannot have direct operation, of their own accord, in another country. Then how to reconcile the enforcement of foreign judgments with the concept of territorial sovereignty ? The explanation offered by these theories is that the courts of a country never apply foreign laws as such, and "when they are popularly said to enforce a foreign law what they enforce is not a foreign law, but a right acquired under the law of a foreign country...."[23] The territorial theories are mainly concerned with reconciling the application of foreign law with the principle of territoriality of laws. They are inadequate to provide a satisfactory basis on which the rules of conflict of laws can be constructed.[24]

[22]See Wolff, *op. cit.*, pp. 12-14, Dr. Mann, an eminent English jurist, has been developing the idea that international law should impose an obligation upon States to maintain an adequate standard of private international law—See "International Delinquencies Before Municipal Courts" in 70 *Law Quarterly Review* (1954) p. 181.

[23] Dicey's *Conflict of Laws*.

[24] Graveson, *The Conflict of Laws*, 4th ed., p. 29.
Cheshire, *Private International Law*, 5th ed., pp. 34-36.

All attempts to construct a theory of conflict of laws appear to have been not very successful. It appears that there is no single doctrine by reference to which correct solution of all diverse cases that arise in practice can be discovered. Dr. Martin Wolff says "In the last seventy or eighty years it has come to be recognised more and more that the coining of general formulae....is not very helpful...."[25] Speaking of English law Prof. Graveson says "It may be admitted that no single theory so far advanced has succeeded in explaining satisfactorily every aspect of English private international law."[26] Probably this is true of conflict of laws of most countries.

[25] *Private International Law*, 2nd ed., p. 40.

[26] Graveson, *The Conflict of Laws*, 4th ed., pp. 31-32.

SECTION "C"

The Conditions under which Foreign Judgments are Recognised and Enforced

1. Competent Jurisdiction of Foreign Court

The comparison between law and judgment made by Von Bar[27] in his attempt to harmonise the recognition and enforcement of foreign judgments with the application of foreign laws emphasises the importance of the source from which the judgment emanates. Just as the legal validity of a rule depends upon the source or the authority it emanates from, so too a judgment derives its validity from the competence of its source. A judgment is valid and enforceable only if it is pronounced by a court of competent jurisdiction whether within the municipal sphere or in the international sense. That a foreign judgment in order to be given effect to should be pronounced by a court of competent jurisdiction is a requirement of almost all the countries which give effect to foreign judgments. And this should be so, otherwise the way would be open to the abuse of the process and much injustice would result.

(a) Internal Competence and International Competence Distinguished

The determination of the jurisdiction of the foreign court involves two questions. One is what may be termed as the internal competence of the foreign court, i.e. competence of the foreign court as determined by the laws of that country. If the foreign judgment was rendered by a court which has no jurisdiction according to the laws of that country, the judgment itself would be a nullity in that country and therefore unenforceable everywhere. Though there was some doubt about it in certain quarters,[28] it now appears to be generally recognised that unless the foreign judgment is rendered by a court of competent jurisdiction according to the law of that foreign country, the judgment cannot be recognised as valid in another country.

[27] L. Von Bar, *Theorie and Praxis des Internationalen Privatrechts*. Gillespee's English translation p. 891 et. sec.

[28] See Westlake, *Private International Law*, 7th ed. 1925, p. 398. Dicey's *Conflict of Laws*, 6th ed. (the 7th edition has corrected this view).

The second question in the determination of jurisdiction is the competence of the foreign court in the international sense. According to the laws of most countries, it is not enough that the foreign court is duly invested with jurisdiction under the domestic rules of the foreign country. The assertion of jurisdiction, which the foreign court makes, must also meet the test prescribed by the rules of conflict of laws (or the rules of conflict of jurisdiction as the French authors call it) of the court in which the enforcement is sought. In other words, the foreign court which rendered the judgment must not only be internally competent but must also be so internationally.

(b) **Public International Law and International Competence**

The jurisdictional bases regarded by the rules of conflict of laws of the various countries as adequate to invest the foreign court with internationally competent jurisdiction (so as to render an internationally enforceable judgment) are not the same.[29] There is no rule of public international law which obliges the States to recognise and enforce foreign judgments based upon any type or set of jurisdictional grounds.[30] There is also no obligation under public international law, except for one exception, to refuse recognition or enforcement to a foreign judgment, because it is founded on a particular jurisdictional basis.[31] The exception is where the court has asserted jurisdiction on persons and things who are immune from such jurisdiction under public international law. Foreign States, sovereigns and diplomatic and consular representatives come under this immunity. If the judgment

[29] Though a country may apply the same rules for determining the international competence of a foreign court as are applicable to the assertion of jurisdiction by its own courts, it is necessary to remember that these two questions are distinct and different. The question under investigation in the jurisdiction of the courts of country A as recognised by the law of country B while the other question is the jurisdiction of the courts of country B as it exists according to the law of B. It is necessary to emphasise this, because the distinction may not be clear in many cases. The distinction is clear in English law. The English courts do not concede to the foreign courts all the jurisdictional bases which they claim for themselves.

[30] Wolff, *Private International Law* 2nd ed., 1950 p. 53; Jellinek, *Die Zweiscitgen staatsvertraege ueber Anerkennung auslaendischer Zivilurteile*, 1953, Vol. I. p. 217, et. seq.

[31] *Ibid.*

of a court violates such immunity, that judgment would be unenforceable everywhere. Apart from this, there is no international jurisdiction which is generally recognised or prohibited by the international community of States or a large section thereof.[32]

(c) **Principles of International Competence Embodied in the Reciprocal Enforcement of Judgments Concluded between Member States of the Arab League**

The Reciprocal Enforcement of Judgments Agreement approved by the Council of the League of Arab States on September 14, 1952[33] does not make an attempt to define international competence. Article 1, which sets out the types of judgments which shall be executory in each others territories, also refers to the source from which the judgments have to emanate. They have to emanate from a competent court. Article II which deals with the conditions under which the execution may be given or refused states that the court of a member State may refuse execution of the judgment (among other grounds) if the legal authority which rendered the judgment was not competent to hear the case on account of lack of jurisdiction or because of prevailing principles of international law. It is not possible, from the bare text of the Agreement, to say, by what rules the lack of jurisdiction is intended to be determined. Is the jurisdiction (or the lack of it) to be determined according to the law of the State whose court has rendered the judgment ? The law of U.A.R. is to that effect. Its requirements of international competence are satisfied if the foreign court which rendered the judgment was internally competent. However, according to the law of Iraq, the fact that the foreign court was internally competent is not enough. To satisfy its (Iraq's) requirements of international competence, the foreign court must have asserted jurisdiction on one of the grounds specified by the Iraqi rules of conflict of laws. The existence of such conflicting jurisdictional requirements in the laws of the signatories to the Agreement makes it all the more difficult to say by what law the lack of jurisdiction referred to in Article II of the Agreement is intended to be determined.

[32] Rudolf Graupner, "Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe, in the *International Comparative Law Quarterly*, Vol. 12, p. 367 at 374.

[33] See Appendix X.

(d) **Principles of International Competence Adopted by the International Law Association**

The subject of recognition and enforcement of foreign judgments has been under consideration by the International Law Association for a number of years. At its New York Conference held in 1958, the I.L.A. agreed upon a draft set of principles concerning the recognition and enforcement of foreign judgments. These principles were further elaborated and were also slightly amended at the next Conference of the I.L.A. held in 1960 at Hamburg. The Hamburg Conference produced a model law known as the "Model Act Respecting the Recognition and Enforcement of Foreign (Money) Judgments", which embodies the principles as amended. The Set of Principles adopted at the New York Conference as well as the Model Act adopted at the Hamburg Conference are reproduced in the Appendices. The Model Act contains the provisions 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 international competences recognised by the Model Act are set out in its Section 5 which is as follows:

"5. (1) For the purposes of this Act the original court has jurisdiction when:—

(a) the judgment debtor has voluntarily appeared in the proceedings for the purpose of contesting the merits and not solely for the purpose of

(i) contesting the jurisdiction of the original court, or

(ii) protecting his property from seizure or obtaining the release of seized property, or

(iii) protecting his property on the ground that in the future it may be placed in jeopardy of seizure on the strength of the judgment;

or

(b) the judgment debtor has submitted to the jurisdiction of the original court by an express agreement; or

(c) the judgment debtor at the time of the institution of the proceeding ordinarily resides in the state of the original court; or

(d) the judgment debtor instituted the proceeding as plaintiff or counterclaimed in the State of the original court; or

(e) the judgment debtor, being a corporate body was incorporated or has its seat (*siege*) in the State of the original court, or at the time of the institution of the proceeding there had its place of central administration or principal place of business there; or

(f) the judgment debtor, at the time of the institution of the proceeding, has either a commercial establishment or a branch office in the State of the original court and the proceeding is based upon a cause of action arising out of the business carried on there; or

(g) in an action based on contract the parties to the contract ordinarily reside in different States and all, or substantially all, of the performance by the judgment debtor was to take place in the state of the original court; or

(h) in an action in tort (*delict or quasi-delict*) either the place where the defendant did the act which caused the injury, or the place where the last event necessary to make the defendant liable for the alleged tort (*delict* or *quasi-delict*) occurred, is in the State of the original court.

(2) Notwithstanding anything in sub-section (1), original court has no jurisdiction:

(a) in the cases stated in clauses (c), (e), (f) and (g) if the bringing of proceedings in the original court was contrary to an express agreement between the parties under which the dispute in question was to be settled otherwise than by a proceeding in that court;

(b) if by the law of the forum exclusive jurisdiction over the subject matter of the action is assigned to another court."

(e) **Important International Competences**

(i) **Agreement to submit to the jurisdiction of the court**

International contracts sometimes contain a clause which stipulates the country whose courts shall have jurisdiction to decide all disputes arising out of the contract. Such agreements may be valid under some laws, while they may not be valid under some others.

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 voluntary submissions.[36]

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

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

[36] Denning L.J. in *re Duffes* (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 unknown 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.[40] 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

[40] 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 juriadiction 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.[43] 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."[44] 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*.[45] Though comity is not

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

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

[45] 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.[46] 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

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

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

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

[49] *Ibid.*

[50] 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.[53] 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.[54]

[53] 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.

[54] 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 number 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[88]. 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

[88] 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.'[89] 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.

[89] 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 Danboyne 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.

Article 7

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

Article 8

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

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

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

Article 9

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

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

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

Article 10

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

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

DOCUMENT A

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

A. Definitions

Article 1

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

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

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

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

B. Judgments rendered in Civil Matters

Article 2

A foreign judgment issued in civil matters and matters of personal status shall enjoy the *res judicata*, stipulated in the State where it was issued, within the scope of the *res judicata* of the judgments issued by courts of the State in whose territory its effects are required to be maintained, without need for taking any procedure to this effect.

The said judgment shall have the force of execution, provided for in laws of the State where it was issued, within the courts of the State requested to execute it in its territory, after undertaking the procedure stipulated by the law of this State.

Article 3

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

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

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

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

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

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

Article 4

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

Article 5

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

Article 6

When there are two foreign judgments or more, the effects stated in Article 2, shall be accorded to the judgment issued by a competent court according to a rule provided for by its laws, which is in more conformity with the rules of international jurisdiction stipulated by the laws of the State in whose territory the effects are required to be maintained.

Article 7

Requests for execution should be supported by the following documents:

1. A certified true copy of the judgment desired to be executed, duly authenticated by the competent authorities and attested as being executory.
2. The original summons of service of the text of the judgment sought to be executed, or an official certificate to the effect that the text of the judgment has been served.
3. A certificate from the competent authority to the effect that the judgment sought to be executed is final and executory.
4. A certificate that the parties were duly summoned to appear before the competent authority, in case the judgment, sought to be executed, was in default.

C. Judgments rendered in Criminal Matters

Article 8

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

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

Article 9

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

D. The Service of Documents and Writs

Article 10

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

Article 11

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

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

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

Article 12

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

Article 13

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

E. Letters of Request

Article 14

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

Article 15

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

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

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

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

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

Article 16

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

Article 17

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

DOCUMENT A1

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

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

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

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

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

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

(3) The force of execution which the judgment possesses in so far as it constitutes an order from the public authority even by coercion, if necessary, to ensure justice for all.

Undoubtedly the first effect, namely the force of evidence is recognised without the need for taking any other measure because this effect is in fact entitled by the foreign judgment in its capacity as a "title", i.e. an official document issued by a public authority.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[4] *Revue de Droit Penal et de Criminologie*, 1935, p. 753

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

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

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

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

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

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

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

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

Recognition of Foreign Judgment in Civil Suits

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

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

The French jurisprudence accepted, after hesitation, the principle of issuing the "Exequatur" for judgments rendered by foreign penal courts in civil suits brought with criminal proceedings.[4]

International Trends Relating to Penal Effects of Foreign Judgments

In 1928, the Sub-Committee of the Conference for the Unification of Penal Law, held in Rome, endorsed several decisions, one of which is the enforcement of deprivation of legal capacity and rights which results from the foreign penalty outside the territory in which it was issued.[5]

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

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

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

Procedure of the Recognition of Foreign Judgments

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

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

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

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

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

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

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

(I). Foreign Civil Judgments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But the contemporary doctrine advocates that the court that issued the foreign judgment should have applied the proper law according to the rules on the conflict of laws enacted in its country. We are in favour of the last view.

Procedure of Enforcement of Foreign Judgment

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

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

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

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

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

(II.) Enforcement of Foreign Criminal Judgments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 806 of the Public Prosecution Instructions stipulates:

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

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

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

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

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

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

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

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

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

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

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

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

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

DOCUMENT 'B'

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

Article I

In this Agreement—

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

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

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

Comment

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

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

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

Article II

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

Comment

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

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

Article III

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

Comment

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

Article IV

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

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

Comment

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

Article V

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

Comment

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

Article VI

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

Comment

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

Article VII

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

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

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

Article VIII

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

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

Comment

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

Article IX

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

Comment

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

Article X

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

Comment

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

DOCUMENT B[1]

*DRAFT AGREEMENT IN REGARD TO RECOGNITION OF FOREIGN PROBATES

Article I

In this Agreement—

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

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

Article II

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

Article III

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

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

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

Article IV

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

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

sealed with the seal of that court provided that all stamp fees, testamentary and estate duties have been paid or secured in respect of the property situated in that State.

Article V

Where probate or letters of administration are sealed by the competent court in the manner hereinbefore provided, it shall be of like force and effect and have the same operation in the State of that court as if granted by that court.

Article VI

The sealing of probate or letters of administration under Article IV shall not affect the liability of an executor or administrator in conformity with the law of that State—

(a) to file an inventory of the deceased person's property and effects situated in that State;

(b) to file as regards the deceased's property and effects situated in that State a true account of his executorship or administration;

(c) to be compelled to make judicial settlement of his accounts as executor or administrator with respect to the deceased's property situated in that State;

(d) to pay all debts whether domestic or foreign according to the law of that State.

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DOCUMENT 'C'

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

Article I

In this Agreement, *judicial process* means every type of document whether judicial or extra-judicial and includes a summons, citation, warrant, notice, order, decree, interrogatories, petition, affidavit, mandate or other document which is required to be served by the rules of civil or criminal procedure on a party or witness in civil or criminal proceedings when the appropriate court directs such service.

Requesting State means the State which in pursuance of this Agreement requests the service of judicial process in the territory of another State.

Signatory State means a State which is a party to this Agreement.

Competent authority in any State means the authority which is authorised by the law of that State to serve process in pursuance of this Agreement.

Recipient means the person on whom the process is to be served.

Article II

This Agreement shall apply to all judicial process issued in civil or criminal proceedings including maintenance and affiliation proceedings.

Article III

When any judicial process is required to be served on any person or body of persons, corporate or unincorporate, in the territory of another State, such process may, without prejudice to the provisions of Article VI be served on the recipient, whatever his nationality, in any of the ways provided in Articles IV and V.

Article IV

(a) A request for service of judicial process 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, requesting such authority to cause the documents to be served. If there be no Diplomatic or Consular Officer, it shall be made by such other person as may be agreed upon by the States concerned.

(b) The request for service shall state the full names, address and description of the recipient and the nature of the process to be served and shall enclose the documents (originals or copies) to be served together with a list of such documents.

(c) The document to be served shall either be drawn up in the language of the State in which it is to be served or be accompanied by a translation in such language in duplicate. Such translation shall be certified as correct by a Diplomatic or Consular Officer or such other person as aforesaid of the Requesting State.

(d) Service shall be effected by the competent authority of the State where the process is to be served by serving the process in the manner prescribed by the municipal law of such State for the service of similar process, except that if a request for some special manner of service be made, such manner of service shall be followed in so far as it is not incompatible with the law of that State.

(e) The execution of the request for service duly made in accordance with the preceding provisions of this Article shall not be refused unless (1) the authenticity of the request for service is not established or (2) the State to which the request is made considers that to be prejudicial to its safety or otherwise contrary to the public interest.

(f) The competent authority by whom the request for service is executed shall furnish a certificate proving the service or explaining the reason which has prevented such service. Such certificate shall be countersigned by the Diplomatic or Consular Officer or such other person as aforesaid of the requesting State and shall be *prima facie* proof of its contents.

Article V

(a) Service of judicial process may be effected without any request to or intervention of the authorities of the State where it is to be effected

(1) By a Diplomatic or Consular Officer of the requesting State

(2) By an agent appointed for the purpose either by the judicial authority by whom service of the process is required or by the party on whose application the process was issued.

But in neither of these cases can measures of compulsion such as would deprive a person of his liberty be employed.

(b) All documents served in the manner provided in the preceding paragraph shall, unless the recipient is a subject of the requesting State, either be drawn up in the language of the State in which service is to be effected or be accompanied by a translation into such language certified as correct as prescribed in Article IV (c).

Article VI

Nothing in this Agreement shall render illegal or inadmissible the service in the territory of a signatory State of process issuing from the courts of another signatory State by any one of the following methods of service in any case where such method is recognised as valid by the law of the State from which the process emanates:

(a) By the competent officials or officers of the State where they are to be served acting directly at the request of the parties concerned in cases where such officers or officials are empowered so to act by the law of that State.

(b) Through postal channels.

(c) By any other mode of service which is not illegal under the law existing at the time of service in the State where it is to be effected.

Article VII

In any case where process has been served in accordance with the provisions of Article IV, the requesting State shall pay to the State to whom the request is made any charges and expenses which are payable under the law or regulations in force in that State.

DOCUMENT 'D'

*DRAFT AGREEMENT IN REGARD TO TAKING OF EVIDENCE

Article I

In this Agreement

Signatory State means a State which is a party to this Agreement.

Requesting State means the State from which a request to take evidence emanates.

Competent Authority means the authority empowered to act under this agreement by the law of such Signatory State.

Article II

This Agreement shall apply to the taking of evidence in both civil and criminal proceedings before the courts of the signatory States.

Article III

When a court of one of the signatory States requires that evidence should be taken in the territory of another signatory State, such evidence may be taken in any one of the ways prescribed in Articles IV, V and VI.

Article IV

(a) A court which requires such evidence, as is referred to in Article III, may address itself by means of "letters of request" to the competent authority of the State where the evidence is to be taken requesting such authority to take the evidence.

(b) The "letters of request" shall be drawn up in the language of the State where the evidence is to be taken or be accompanied by a translation in such language. Such translation shall be certified as correct by a Diplomatic or Consular Officer of the requesting State. The "letters of request" shall state the nature of the proceedings for which the evidence is required, the full names and

*In the absence of more information in regard to taking of evidence among Member States, the above is offered as a tentative draft.

descriptions of the parties thereto, and the full names, addresses and descriptions of the witnesses.

(c) The "letters of request" shall either be accompanied by a list of interrogatories to be put to the witness or witnesses or if this procedure is recognised by the law of the requesting State, request the competent authority to allow such questions to be asked *viva voce* as the parties or their representatives shall desire to ask.

(d) The competent authority to whom the "letters of request" are transmitted or forwarded shall give effect thereto and obtain the evidence required by the use of such compulsory measures and such procedures as may be provided by the law of the State. If a request is made that some special procedure be made in the "letters of request", such special procedure shall be followed in so far as it is not incompatible with the law of the State where the evidence is to be taken.

(e) The execution of the "letters of request" may be refused only (1) if the authenticity of the "letters of request" is not established or (2) if the State where the evidence is to be taken considers such request to be prejudicial to its safety or otherwise contrary to the public interest.

Article V

(a) If the law of the State where the evidence is to be taken authorises such procedure, the court by whom the evidence is required may in the "letters of request" addressed to the competent authority request such authority to appoint a person specially designated in the "letters of request" to take the evidence. A Diplomatic or Consular Officer of the requesting State or other suitable person approved by the signatory State concerned may be so designated.

(b) Where the procedure in paragraph (a) of this Article is adopted, the provisions of paragraphs (b), (c) and (e) of Article IV shall apply.

(c) The competent authority to whom the "letters of request" are transmitted shall give effect thereto and shall appoint the person designated to take the evidence unless such person be unwilling so

to act. The competent authority shall, if necessary, make use of such compulsory powers as it possesses under its own law to secure the attendance of and the giving of evidence by the witnesses and the production of documents before the person so appointed.

(d) The person thus appointed shall have power to administer an oath, and any person giving false evidence before him shall be liable in the courts of the State where the evidence is taken to the penalties provided by the law of that State for perjury.

(e) The evidence shall be taken in acordance with the law of the requesting State provided such method is not contrary to the law of the State where evidence is to be taken and the parties shall have the right to be present in person or to be represented by lawyers or other persons who are competent to appear before the courts of the State concerned.

Article VI

(a) The evidence may also be taken, without any request to or the intervention of the competent authority of the State in which it is to be taken by a person directly appointed for the purpose by the court of the requesting State. A Diplomatic or Consular Officer of the requesting State or other suitable person approved by the signatory State concerned may be so appointed.

(b) A person so appointed to take evidence may request the persons named by the court appointing him to appear before him and give evidence or produce any document. He may take such evidence as is not contrary to the law of the State where the evidence is being taken and shall have power to administer an oath, but shall have no compulsory powers.

(c) The evidence may be taken in accordance with the pocedure recognised by the law of the requesting State and the parties will have the right to be represented by lawyers or by any persons competent to appear before the court of the requesting State.

Article VII

The fact, that an attempt to take evidence by the method laid down in Article VI has failed owing to the refusal of any witness

to appear, to give evidence, or to produce douments, does not preclude a request being subsequently made in accordance with Articles IV or V.

Article VIII

Where evidence is taken in either of the ways provided in Articles IV or V, the requesting State shall repay to the other State concerned any expense incurred by the competent authority of the latter, in the execution of the request, in respect of any charges and expenses payable to witnesses, experts, interpreters or translators, the costs of obtaining the attendance of witnesses who have not appeared voluntarily and the charges and expenses payable to any person whom such authority may have deputed to act, and any charges and expenses incured by reason of a special procedure being requested and followed. These expenses shall be such as are usually allowed in similar cases in the court of the State where the evidence has been taken.

(IV) FINAL REPORT ADOPTED AT THE SEVENTH SESSION

FINAL REPORT OF THE COMMITTEE ON RECIPROCAL ENFORCEMENT OF JUDGMENTS, SERVICE OF PROCESS AND RECORDING OF EVIDENCE IN CIVIL AND CRIMINAL CASES

The questions relating to "Reciprocal Enforcement of Judgments, Service of Process, and Recording of Evidence among States both in Civil and Criminal Cases"have been referred to this Committee under Article 3 (b) of its Statutes by the Government of Ceylon with a view to formulate a uniform set of rules to ensure reciprocal recognition and enforcement of foreign judgments and to facilitate the service of process and recording of evidence in foreign countries.

At the Sixth Session of the Committee held in Cairo in 1964, the subject was considered by a Sub-Committee appointed for the purpose, consisting of the Representatives of Ceylon, India, Iraq and the United Arab Republic on the basis of a study prepared by the Secretariat and certain memoranda submitted by the Delegations of Ceylon and the United Arab Republic. The Sub-Committee placed before the Committee a report containing two draft agreements, one on the subject of "Recognition and Enforcement of Judgments", and the other on the subject of "Service of Process and Recording of Evidence."

The Committee at the present Session took up for consideration the Report of the Sub-Committee appointed at the Cairo Session. It was agreed in the Committee to give detailed consideration to the provisions of the two drafts prepared by the Sub-Committee on the basis that those provisions, if adopted, would be recommended as model rules on the subject for consideration of the Governments. The Committee, after a careful consideration of the Report of the Sub-Committee, is agreed on the adoption of the model rules on the subject, which are set out in Annexures I and II to this Report.

The Committee decides to submit this Report to the Government of Ceylon and the Governments of other participating countries in the Committee as the Final Report of the Committee on the subject.

ANNEXURE I

MODEL RULES ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL CASES

Article 1

In these model rules:

(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 it was delivered.

(c) *recognized* 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 capable of being compulsorily executed.

Article 2

These rules 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, fine or penalty.

Note:—The Delegations of India and Pakistan desired express provision excluding (1) arbitration award, even if such an award is enforceable as money decree or judgment, (2) order for the payment of money arising out of matrimonial proceedings.

Article 3

A foreign judgment shall be recognized as conclusive and be enforceable between the parties thereto as if it had been issued by a court of the State in which its enforcement is sought.

Article 4

A foreign judgment shall not be recognized or enforced unless the following facts are verified:

(a) that it is final and conclusive.

(b) that it is issued by a court which is internationally competent.

(c) that it is issued according to a procedure which would enable the defendant to submit his defence.

(d) that it does not violate the public policy or morality of the State in which enforcement is sought.

(e) that it is not obtained by fraud.

(f) that it does not conflict with any judgment, delivered by any court of the State in which enforcement is sought, between the same parties on the same subject matter in an action instituted earlier.

(g) that there is no action, instituted earlier, pending between the same parties on the same subject matter in the State in which enforcement is sought.

Note:—(I) Regarding Clause (b) of the Article.

The Delegations of India and Ceylon desired that the expression "a court which is internationally competent" should be defined to mean a court having jurisdiction which satisfies the following requirements:

(1) (a) the judgment debtor has voluntarily appeared in the proceedings for the purpose of contesting the merits and not solely for the purpose of:

(i) contesting the jurisdiction of the said court, or

(ii) protecting his property from seizure or obtaining the release of seized property; or

(iii) protecting his property on the ground that in the future it may be placed in jeopardy of seizure on the strength of the judgments; or

(b) the judgment debtor has submitted to the jurisdiction of the said court by an express agreement; or

(c) the judgment debtor at the time of the institution of the proceeding ordinarily resides in the State of the said court; or

(d) the judgment debtor instituted the proceeding as plaintiff or counterclaimed in the State of the said court; or

(e) the judgment debtor, being a corporate body, was incorporated or has its seat (*siege*) in the State of the said court, or at the time of the institution of the proceedings had its place of central administration or principal place of business in that State; or

(f) the judgment debtor, at the time of the institution of the proceeding, has either a commercial establishment or a branch office in the State of the said court and the proceeding is based upon a cause of action arising out of the business carried on there; or

(g) in an action based on contract, the parties to the contract ordinarily reside in different States and all, or substantially all, of the performance by the judgment debtor was to take place in the State of the said court; or

(h) in an action in tort (*delict* or *quasi delict*) either the place where the defendant did the act which caused the injury or the place where the last event necessary to make the defendant liable for the alleged tort (*delict* or *quasi delict*) occurred in the State of the said court.

(2) Notwithstanding anything in clause (1), the court which issued the judgment shall not have jurisdiction:

(a) in the cases stated in sub Clauses (c), (e), (f) and (g), if the bringing of proceedings in the said court was contrary to an express agreement between the parties under which the dispute in question was to be settled otherwise than by a proceeding in that court

(b) if by the law of the country in which enforcement is sought exclusive jurisdiction over the subject matter of the action is assigned to another court;

The bases of jurisdiction recognized in the foregoing clauses are, however, not exclusive and the court in which enforcement is sought may accept additional bases.

The Delegations of Ghana and Pakistan desired that Clause

(b) of Article 4 be altered as follows: "that it had been issued by a court of competent jurisdiction".

Note:—(II) Regarding Clause (c) of this Article,

The Delegations of India and Pakistan suggested that the following be substituted:

> "that it had been issued according to a procedure which gives the defendant reasonable notice of the proceeding and reasonable opportunity of submitting his defence and follows the principles of natural justice".

Note:—(III) Regarding Clause (f) of this Article.

The Delegations of the United Arab Republic desired that the clause should be as follows:

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

Note:—(IV)—Regarding Clause (d) of this Article

The Delegations of India and Pakistan desired that the following clauses should be added to the Article as clauses (h) and (i):

(h) that it is not founded on a refusal to recognize the law of the State in which enforcement is sought in cases where such law is applicable.

(i) that it does not sustain a claim founded on a breach of any law in force in the State in which enforcement is sought.

Article 5

A foreign judgment shall not be recognized 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.

Note:—The Delegation of India and Pakistan desired an additional provision to the following effect:

"Proceedings for enforcement shall be stayed on proof of

appeal being filed or other steps being taken to have the judgment set aside".

Article 6

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

Article 7

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.

ANNEXURE II

MODEL RULES FOR THE SERVICE OF JUDICIAL PROCESS AND RECORDING OF EVIDENCE IN CIVIL & CRIMINAL CASES

PART ONE—General Provisions

Article 1

In these model rules:

(a) *Judicial Process* means every type of document, 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 record evidence in terms of these Rules.

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 requesting State provided that the State in which it is to be served shall bear no responsibility.

Note:—The Delegation of Ghana desired the omission of the proviso to Clause (a).

Article 3

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

(a) The Letter of Request shall be addressed by a Diplomatic or Consular Officer of the requesting State to the competent authority of the State where such 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 Letter of 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.

PART THREE—Recording of Evidence

Article 5

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.

Article 6

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

Article 7

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

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

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

Article 8

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

(1) The authenticity of the Letter of Request is not established; or

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

Sd/-Shakir Al-Ani
President.
1-4-1965.

APPENDICES

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 publicao 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 territorality 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 Committe 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 Britsh 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 counterclaimed 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.

(2) Although the payment in the particular case was after action brought and may not have been an accord and satisfaction of the whole action, as the plaintiffs thereby received all that they were entitled to before the action, viz. 18,035 francs, they had suffered no damage other than nominal damage. Nominal damage is but "a mere peg on which to hang costs."

The question as to whether depreciation of the foreign currency during the period between the date on which payment was due and that of judgment in England may be made subject of a claim for damage has been considered and rejected in *Di Ferdinando* v. *Simon, Smits and Co. Ltd.* It was held that the damage caused by the deterioration of foreign currency is too remote.

The rule above referred to, that the rate of exchange to be taken is that prevailing when the debt should have been paid, has been further complicated by two provisions of the Exchange Control Act, 1947. The Act prohibits in general payment to persons resident outside the sterling area without Treasury permission. It must be borne in mind that the purpose of the Act is *inter alia*, to protect the pound sterling. These provisions were referred to in the Court of Appeal judgment in *Cummings* v. *London Bullion Co. Ltd.* where it was held—

(1) In relation to a debt to be paid in foreign currency two dates have to be considered, namely the date upon which it is due, and the date upon which it is payable.

(2) The date upon which a debt is due is (special terms apart) the date upon which, had it not been for the term implied by section 33(1) of the Act, it ought to have been paid.

(3) The date upon which a debt is payable and, therefore, the date to be taken for fixing the rate of exchange in accordance with Vionnet's case (supra) is (special terms apart) the date when it is lawful for the debtor to pay it.

(4) It is lawful for the debtor to pay the debt—

(a) If the debtor obtains Treasury permission; he may then pay in foreign currency.

(b) If the debtor issues a writ; the creditor may then pay the money in sterling into court.

The date upon which the debt is payable is, therefore, whichever of (a) or (b) (the granting of permission or the issue of the writ) happens first.

(5) The creditor may issue a writ for the debt by action as soon as it is due and before Treasury permission for the payment has been obtained notwithstanding that, by the term implied by section 33(1) of the Act, performance of the contract is dependent upon such permission' this is because para 4 of Schedule IV prevents this implied term being set up as a defence to an action for the debt.

In view of the fluctuation of foreign currency, questions have again recently arisen as to what rate of exchange should be applied. Reference should be made to two cases, namely, *Cummings* v. *London Bullion Co. Ltd.* and *East India Trading Co. Inc.* v. *Carmel Exporters and Importers Ltd.*, which have helped to clarify the position.

In the case *East India Trading Co., Inc.* v. *Carmel Exporters and Importers Ltd.*, where an action was brought upon a foreign judgment and the question was raised as to what rate of exchange was applicable, the court held that—

(1) Where an action is brought upon a foreign judgment, the date at which the rate of exchange should be taken is that of the foreign judgment itself.

(2) It was immaterial that, if the plaintiff has sued upon the original cause of action, the rate at the date of that cause of action would have been taken. It was the plaintiff's right to select the most advantageous course.

Section 2 of the Act provides that a foreign judgment duly registered in an English court shall be recognised as conclusive between the parties thereto and may, in subsequent proceedings, be relied on by way of defence or counterclaim.

The Act specially provides that the expression "action in personam" shall not be deemed to include any matrimonial cause or

any proceedings in connection with the administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy or guardianship of infants.

(4) Conventions with France and Belgium

Under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, provision was made for the Act to be extended by Order-in-Council to judgments given in the superior courts of any foreign country thus permitting such judgments to be registered in accordance with the provisions of the 1933 Act. Extension will only be granted if the foreign country in question extends similar benefit by recognising and enforcing United Kingdom judgments in its courts. In other words, the doctrine of reciprocity is strictly applied.

So far only two conventions have been signed with France on January 18, 1934, and with Belgium on May 2, 1934, the High Contracting Parties thereto "being desirous to provide on the basis of reciprocity for the recognition and enforcement of judgments in civil and commercial matters". These conventions were made effective so far as the United Kingdom was concerned, by Orders-in-Council extending the Foreign Judgments (Reciprocal Enforcement) Act, 1933, to these two countries.

Since the two conventions are on almost identical lines, they may conveniently be considered together.

Under both conventions, only judgments of the superior courts of the United Kingdom, Belgium and French courts may be registered. The superior courts of France comprise:—

> La Court de Cassation, less Cours d' Appel, Les Tribunaux de premiere instance at les Tribunaux de commerce, and in the case of judgments for the payment of compensation to a "partie civile" in criminal proceedings, les Tribunaux correctionnels and les Cours d' Assises;
>
> And, in the case of Belgium:—
>
> the Court of Cassation, all Courts of Appeal, Tribunals of First Instance and Tribunals of Commerce.

> Superior courts in the case of the United Kingdom are—the House of Lords; and for England and Wales, the Supreme Court of Judicature (Court of Appeal and High Court of Justice) and the Courts of Chancery of the Counties of Palatine of Lancaster and Durham; for Scotland, the Court of Session, and for Northern Ireland, the Supreme Court of Judicature.

All other courts are deemed to be inferior courts.

Recognition and enforcement of a French or Belgian judgment is accorded whatever may be the nationality of the judgment creditor or debtor. The conventions do not, however, apply—

(a) To judgments given on appeal from inferior courts; and

(b) To judgments given in matters of status or family law (including judgments in matrimonial causes or concerning the pecuniary relations between the spouses as such); to judgments in matters of succession or administration of estates of deceased persons or judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate.

Any French or Belgian judgment will be recognised unless, as provided under the 1933 Act, it can be established that the judgment was contrary to public policy or natural justice or was obtained by fraud, or unless it can be shown that the original court did not have jurisdiction. The various aspects of these defences have already been fully discussed above.

No French or Belgian judgment can be executed in the United Kingdom unless it bears the executory formula prescribed by French or Belgian law. A certified copy of the judgment issued by the original court, including the reasons therefor, must accompany the application for registration. The issue of the certified copy of the judgment by the original court is conclusive evidence that such judgment was capable of execution in the country of the original court at the time when the certified copy was issued.

As soon as the judgment is registered, the English court has the same control and jurisdiction over the execution of the judg-

ment as if it had been a judgment emanating from an English court. Any copy of a judgment certified by the original court and attested with its seal is accepted in England without further legalization.

Both conventions provide that no security for costs or *cautic judicatum solvi* shall be required of any person who makes application for registration or for the grant of *exequatur*. Registration must be made within six years from the date of the judgment of the original court.

Any difficulties which may arise in connection with the interpretation or application of the conventions shall be settled through the diplomatic channel without allowing, however, that the decisions of their respective courts shall be reopened.

The conventions were ratified by the High Contracting Parties in 1936 and were thereafter deemed to remain in force for three years after which either party may give six months' notice to terminate them".

AUSTRALIA

(4) The Australian Service and Execution of Process Act, 1901-1934.

In 1901, the Australian Parliament enacted the Service and Execution of Process Act, Part IV of which provides for direct enforcement of the judgments of all courts of record of the Australian States in sister States of the Commonwealth. Procedure under the Act is simple. Suppose 'A' secures a judgment against 'B' in New South Wales and desires to enforce it in Victoria. On 'A's demand the proper officer of the New South Wales court must issue a certificate of judgment signed by him and bearing the seal of the court. Within twelve months after the date of the judgment, 'A' can have his certificate registered by the proper officer of the Victoria Court in a book kept by him known as "The Australian Register of Judgments". Registration is merely a ministerial act and the officer is bound to register the judgment, and has no power to inquire into the validity of the judgment. After twelve months have elapsed 'A' must get leave to register his certificate from the Victoria Court. Such a proceeding being judicial, the validity of the New South Wales judgment may be put in issue, and if the

judgment is found to be invalid, it will be denied registration. After the certificate is registered, 'A' upon filing in the Victoria court an affidavit stating that the amount for which he desires execution is unpaid, will be issued an execution for the amount to which he has sworn, unless 'B' meanwhile has secured a stay of proceedings from that court.

In a New South Wales case where, twelve months having elapsed after the date of the judgment of a sister state, an *ex parte* order giving leave to register a certificate of judgment was issued. The order was set aside on appeal on the ground that the judgment was invalid for want of jurisdiction in the sister state. In this case the defendant resided in New South Wales and was served there under the provisions of Parts I and II of the Act. He had neither entered an appearance nor in any way assented to the jurisdiction of the sister state. There does not appear to have been a decision on the point, but it seems inevitably to follow that if a certificate of a similarly invalid judgment is registered within the twelve-month period by the clerical officer of the court, the defendant should be able to secure a stay of proceedings at any time prior to execution. Lack of jurisdiction in the sister state would seem to be a sufficient cause to move a court to exercise the discretion which the Act confers to order a permanent stay.

(5) New South Wales Administration of Justice Act, 1924, Part II.

Typical of the legislation enacted by the Australian states to enable them to be brought under the reciprocal operation of the English Administration of Justice Act, 1920, is the New South Wales Act of similar title. It is in substance and procedure a copy of the corresponding English Act, with modification to suit local exigencies and peculiarities of administration. It is made expressly applicable or self-executory to judgments of courts of the United Kingdom, which for this purpose is declared not to include either the Irish Free State or Northern Ireland. It does not apply to sister States or territories or mandatories of the dominion of Australia, and applies to dominions, colonies' protectorates, and mandated territories of the British Empire only when declared by executive proclamation to do so. New Zealand was proclaimed within the Act in 1925, as having enacted a corresponding statute in 1922. It is interesting to observe that in any action in any court

in New South Wales on any foreign judgment which might be registered under this Act, the plaintiff is, in the discretion of the court, not to have costs unless he has previously been refused its registration.

CANADA

(6) The Uniform Reciprocal Enforcement of Judgments Act

A draft Uniform Reciprocal Enforcement of Judgments Act was approved by the Conference of Commissioners on uniformity of legislation in Canada in 1924 and amended in 1925 providing for the reciprocal direct enforcement of the money judgments of the courts of the Canadian provinces and territories *inter se*. It has since been enacted by the provincial legislatures of Saskatchewan, British Columbia, New Brunswick, Ontario and Alberta. The Alberta statute was amended in 1935 with a view to taking advantage of the English Foreign Judgments (Reciprocal Enforcement) Act, 1933, by enabling that statute to be extended not only to the courts of other provinces but to those "in the United Kingdom of Great Britain and Northern Ireland or in any of His Majesty's protection in any territory in respect of which mandate has bee accepted by His Majesty or in any foreign country". It should be noted that by its terms the Uniform Act does not, on enactment by a provincial legislature, become *ipso facto* operative with respect to judgments of other provinces where the Act is in force. The Act provides that when satisfied that reciprocal provision has been or will be made by another province the Lieutenant-Governor may, by order in council, direct that it shall apply to that province.

Registration under this Act, like that under the English Act of 1920, must be secured by applying to the court of the province in which registration is sought, for an order. The judgment may be registered by filing with the proper officer of the registering court an exemplification or a certified copy of the judgment, together with the order for such registration, whereupon the same shall be entered as a judgment of the registering court and be of the same force and effect.

Like the earlier English acts, but unlike the Foreign Judgments (Reciprocal Enforcement) Act, 1933, this uniform Canadian Act

does not provide for an exclusive method of enforcement. Registerable judgments of sister provinces may still be enforced by action. Further, this Act contains a provision not found in the English Act, Section 4 reads as follows:—

4. No judgment shall be ordered to be registered under this Act if it is shown to the registering court that—

(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 during the proceedings 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 was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or

(d) The judgment was obtained by fraud; or

(e) An appeal is pending, or the judgment debtor 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 would not have been entertained by the registering court; or

(g) The judgment debtor would have a good defence if an action were brought on the original judgment."

Clause (g) is the one peculiar to the Canadian statutes, and the Supreme Courts of both Alberta and Ontario have held that unless a foreign (in both cases British Columbia) judgment is one which would be enforced by action thereon at common law, it cannot be registered under the Act. In both cases the British Columbia judgments were refused because the judgments were rendered without jurisdiction in the international sense over the defendants.

It was in the Ontario case that section 4, clause (g) was given especially restrictive force. The applicant for registration had

secured a default money judgment against the defendant in British Columbia, who had been personally served with the British Columbia writ in Ontario, but had never appeared. The defendant had never resided in British Columbia, but had made periodic selling trips to that province on behalf of the firm of which he was the sole proprietor. The court was of opinion that this was not "carrying on business" within Section 4, Clause (b) of the Act, and that even if it were , it would not be a valid answer to a defence of lack of jurisdiction raised under the terms of clause (g). The Court expressed itself as follows:—

> The Act is modelled to some extent upon Part 2 of the English Administration of Justice Act, 1920, (10-11 Geo V., Ch. 81, secs. 9-14) except that there are not provisions in that Act corresponding to clause (g) of sec. 4 of the Ontario Statute. Subject to that, as pointed out in Dicey's *Conflict of Laws*, 5th ed., p. 482, the cases in which registration is forbidden agree in general with those in which recognition would be refused to judgments of foreign courts. The author is of the opinion that under the English Act it is sufficient if the foreign court had exercised jurisdiction against an absentee defendant on the ground of his carrying on business. That would appear to be the meaning of the Ontario Act were it not for clause (g) of sec. 4, as, wherever reciprocal legislation has been enacted and made applicable, it seems to have been the intention that the ordinary rules of international law as to the recognition to be given to foreign judgments should be relaxed in cases where a non-appearing defendant in the foreign court had carried on business within the jurisdiction of such court. As "carrying on business" is not a basis of jurisdiction *in personam* over an individual at common law, registration of the judgment was refused. The question of jurisdiction is now governed in Saskatchewan by the Uniform Foreign Judgments Act, which is supplementary to the Reciprocal Enforcement Act concerning the validity of all foreign judgments. In other provinces, the Alberta and Ontario decisions should be followed.

Finally, emphasis should be put upon (a) the reciprocal nature of this legislation and (b) the fact that it does not affect either the existing common law or legislation of a province with regard to: (i) actions brought there upon non-registerable judgments, obtained in provinces which have not been brought within the Act or in other foreign law districts; and (ii) actions brought upon registerable judgments, secured in provinces which have come within the Act, as distinguished from applications for their registration.

NEW ZEALAND

(7) New Zealand Reciprocal Enforcement of Judgments Act, 1934.

New Zealand, which had been within the scope of the English Administration of Justice Act, 1920, by virtue of enacting its own statute of like name and effect passed in 1922, was the first dominion to copy and bring itself under the English Foreign Judgments (Reciprocal Enforcement) Act, 1933. The Dominion Parliament expressly made its Reciprocal Enforcement of Judgments Act, 1934, applicable to judgments of courts of the United Kingdom. It likewise, while repealing the Act of 1922, brought within the operation of the new statute those units of the British Empire which had been previously proclaimed to be within that Act. Otherwise the substance of the purview of the New Zealand legislation is the same as that of the English Act of 1933. It, too, may be extended to include reciprocally the judgments of law districts politically as well as legally foreign to the British Empire, in addition to those merely legally foreign within the Empire.

THE RECORDING OF EVIDENCE AND THE SERVICE OF PROCESS IN CIVIL SUITS IN EACH OTHER'S COUNTRIES

Recording of Evidence

Evidence may be taken without the intervention of the legal authorities by examiners, consular authorities or by any person. There is no legal bar or objection to evidence being taken in this country for use abroad without intervention of the authorities here. Any foreign court is, therefore, at liberty in accordance with the laws of its country to appoint a Examiner, Diplomatic Agent or any other person who takes evidence provided the witnesses are willing to attend to give evidence. The evidence so recorded should be returned to the foreign court without any assistance from the local authorities.

There is provision in the Foreign Tribunals Evidence Act, 1856, which enables any court or tribunal of competent jurisdiction in a foreign country before which a civil or commercial matter is pending to obtain testimony of any witness in Ceylon by application to the Supreme Court. The Supreme Court is empowered to command the attendance of the witness, to order his examination and to order the production of documents. The examination can take place before any person nominated in the order of the court.

There is provision in the Evidence by Commission Act, 1859, which provides that where a court or tribunal of competent jurisdiction in Her Majesty's Dominion has issued a commission, order or other process for obtaining a testimony of any witness in Ceylon, our Court is empowered to order the examination of the witness before the person appointed. Our court is also given the power to command his attendance and to order the production of documents.

There is also provision in the Evidence by Commission Act of 1885 which states that where, in any civil proceedings in any court of competent jurisdiction an order for the examination of any witness or person has been made and a commission, *mandamus*, order or request of said examination is addressed to any court in Ceylon, it shall be lawful for our courts to nominate such fit person to take such examination.

The procedure for applications under these provisions are set out in the rules called "Rules under the Tribunals Evidence Act". Application could be made by Commission Rogatoire or Letters of Request or by the Certificate of an Ambassador or Diplomatic Agent and it should be made on an application of any person shown to be duly authorised to make on application on behalf of such foreign court or tribunal and on production of the Commission Rogatoire or Letter of Request or of the Certificate referred to above. The rules also permit the Attorney-General to make such an application when it is desirable that the request should be given effect to without requiring an application to be made to the court by agents in Ceylon of any of the parties to the action or matter in the foreign country.

The provisions in our Civil Procedure Code relating to Commissions to examine witnesses locally are made applicable by Section 427 of the said Code to commission issued by—

(a) Court situate within the limits of the Republic of India.

(b) Court situate in any country in the Commonwealth other than the Republic of India.

(c) Courts of any foreign country that the.....being in alliance of Her Majesty.

SERVICE OF FOREIGN PROCESS

This has been a subject which has been dealt with from time to time by the Hague Conferences on Private International Law. The General Convention on Civil Procedure of 1954 dealt partly with this problem, and it was considered in greater detail by the Ninth Conference held in October 1960. At this Conference the International Union of Huyssiers De Justice and Judicial Officers had presented a memorandum which set out some of the present difficulties and proposed certain practical solutions. One of the difficulties, for example, is the procedure which is adopted in France and certain other countries whereby service of process can be made from a foreign defendant by giving notice of the proceedings with the French Parquet. The Memorandum of the Process Servers cited several instances to support their contention that a formal technical service of this kind was sufficient to bind the defendant even though notice of the proceedings never reached him until after judgment. The judgment was unimpeachable on the ground that the defendant had never been properly notified. This and other cases persuaded to permit the whole question of service of process to be stated to the Permanent Bureau of the Conference. This appears to be a case in which a good deal of useful work could be done by direct negotiation between the countries concerned. The solution proposed for service of process not only by diplomatic means but also by the transmission of copies direct to process servers in the defendants' countries of residence would seem to indicate a sensible and practical solution. Section 69 of our Civil Procedure Code states that a service of summons may be allowed in all cases where the court has jurisdiction. The court can describe the mode of service where

summons is allowed. The usual modes of service are the following depending whether or not they are available in each country.

(1) Service by an Agent for National Intervention.

(2) Service by the Government of the foreign country:

(3) Service in terms of any convention.

Provisions in our law relating to service abroad are contained in the "Rules of Court relating to execution of Letters of Request for Service of Foreign Process". It provides that in any civil or criminal matter, a court or tribunal of a foreign country can send to the Supreme Court a Letter of Request of any process or citation for service of any person in Ceylon.

The Rules state that the service of process of citation, unless... the Supreme Court otherwise directs shall be effected by the Fiscal. Process would be served in accordance with the provision of the Civil Procedure Code regulating the service of process as far as they are practicable.

ANNEXURE II

BURMESE LAW

I. ENFORCEMENT OF FOREIGN JUDGMENTS

Section 13 of the Civil Procedure Code is in the following terms:—

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties, or between parties under whom they or any of them claim, litigating under the same title, except—

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of the Union of Burma in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in the Union of Burma.

Section 14 provides that "The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction."

HOW A FOREIGN JUDGMENT MAY BE ENFORCED

A foreign judgment may be enforced by proceedings in execution in cases specified in section 44A of the Code of Civil Procedure. The section is as follows:—

"44A-Execution of decrees passed by Courts in reciprocating territory.

(1) Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in the Union of Burma as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1—'Reciprocating territory' means any country or territory, which the President may, from time to time, by notification in the Gazettee, declare to be reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such courts as may be specified in the said notification.

Explanation 2—'Decree', with reference to a superior court, means any decree or judgment of such court under which a sum of money is payable, 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, but shall in no case include an arbitration award, even if such award is enforceable as a decree or judgment."

In all other cases, a foreign judgment can be enforced by a suit upon the judgment. The suit must be brought within 6 years from the date of the judgment (Limitation Act—Article 117). If a decree is passed in favour of the plaintiff, he may proceed to execute it by attachment and sale of the defendant's property. The court will not enquire whether the foreign judgment is correct in fact or in law [1951 B.L.R. (H.C.) 399]. The general rule is that a

court which entertains a suit on a foreign judgment cannot enquire into the merits of the original action or the propriety of the decision.

II. SERVICE OF SUMMONS ISSUED BY A FOREIGN COURT

Section 29 of the Civil Procedure Code is as follows:—

"Summonses issued by any civil or revenue court situate beyond the limits of the Union of Burma may be sent to the courts in the Union of Burma and served as if they had been issued by such courts.

Provided that the President of the Union has, by notification in the Gazette, declared the provisions of this section to apply to such courts. There is a reciprocal arrangement between Burma and Pakistan. In respect of India, arrangements are being negotiated.

III. RECORDING OF EVIDENCE REQUIRED IN FOREIGN JUDICIAL PROCEEDINGS IN CIVIL AND CRIMINAL CASES

The provisions as to the execution and return of commissions for the examination of witnesses issued by the courts in Burma apply to commissions issued by or at the instance of courts of any foreign country.

Order XXVI Rule 27 of the Civil Procedure Code deals with the subject of commissions issued at the instance of Foreign Tribunals in Civil matters. It reads:—

"27.(1) If the High Court is satisfied—

(a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction,

it may issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in the Union of Burma and transmitted to the High Court through the President of the Union, or

(b) by a letter of request issued by the foreign court and transmitted to the High Court through the President of the Union, or

(c) by a letter of request issued by the foreign court and produced before the High Court by a party to the proceeding."

ANNEXURE—III

INDIAN LAW*

1. RECOGNITION AND RECIPROCAL ENFORCEMENT OF FOREIGN JUDGMENTS

A foreign judgment, as such, has no force or authority in India. But it can be the subject-matter of a suit if the same is filed within the period of limitation provided in Article 117 of the Indian Limitation Act. The effect of a foreign judgment is stated in Section 13 of the Civil Procedure Code, 1908. A party who has obtained a judgment in a foreign court can sue upon it in the Indian courts, and the foreign judgment will be conclusive in the Indian courts unless it comes within the exceptions mentioned in clauses (a) to (f) of Section 13 of the Civil Procedure Code. The procedure for obtaining relief is by way of a suit on the original side and not by way of an application unless the judgment is one to which Section 44-A of the Civil Procedure Code applies. Section 44-A of the Civil Procedure Code provides for the enforcement of judgments of certain countries known as reciprocating territories—countries who have entered into arrangements with the Government of India for reciprocal enforcement of judjments. No suit is necessary for the enforcement of judgments rendered by the courts of reciprocating territories. The procedure of enforcing them is the same as that for enforcing a decree of an Indian court. The plaintiff files an application for execution under section 44-A. But, in this case also, the foreign judgment, in order to be enforceable, must satisfy Section 13 of the Civil Procedure Code. If the judgment comes under the exceptions (a) to (f) of Section 13, it will be refused execution by the Indian courts.

Therefore, a foreign judgment, in order to obtain recognition and enforcement in the Indian courts, must satisfy certain conditions specified in Section 13 of the Civil Procedure Code. If such a judgment is from a reciprocating territory, it can be enforced directly, i.e. by filing an application for execution under Section 44-A. A judgment from any other foreign country can be enforced, not directly, but by bringing an action making the foreign judgment

*Prepared by the Secretariat of the Committee.

the cause of action. It may be noted that a plaintiff who has obtained a foreign judgment, may instead of suing on the foreign judgment, bring a fresh suit on the original case of action. But, if the foreign judgment is conclusive as defined in Section 13, the Indian court cannot give a judgment conflicting with the foreign judgment.

Conclusiveness of Foreign Judgments (Res judicata Effect)

The effect of a foreign judgment for the purpose of recognition and enforcement is given in Section 13.

Section 13. "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:—

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of (India) in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in (India).

Conclusiveness:

A foreign judgment involves no merger of the original cause of action. Therefore, a plaintiff who has obtained a foreign judgment may either bring an action on the original cause of action or sue on the foreign judgment. The rule as to the conclusiveness of foreign judgments means only that the matter thereby decided cannot be decided in a different manner[1]. A foreign judgment,

1. *Setabanji Sugar Mills* V. *Benozir Ahmed*, 1952 *Cal.* 116.

which is conclusive, is a complete answer to an identical action brought in the Indian courts by unsuccessful party to the foreign proceedings[2].

Courts of competent jurisdiction:

The competency of the foreign court will be determined not according to the law of the foreign State, but according to the rules of private international law of the forum. The Indian courts have mostly followed the rules observed by English courts in determining the competence of the foreign court. In personal actions the grounds of jurisdiction are[3]:

(1) that the defendant was a subject of the foreign country.

(2) that he was a resident of the foreign State when the action began.

(3) that the defendant had sued as plaintiff in the foreign court on the same cause of action.

(4) that the defendant voluntarily appeared in the foreign court or submitted to its jurisdiction.

(5) that the defendant had contracted to submit to the foreign court in which the judgment was obtained.

The above jurisdictional rules are subject to a *caveat* that a judgment of a foreign court which has jurisdiction in a personal action according to the above rules, if it creates a charge on immovable property situated in India, it will not be enforced by the Indian courts.

Ex Parte Decree:

An *ex parte* judgment against a non-resident foreigner, who has not submitted to the jurisdiction of the foreign court, is a nullity.

2. *Chockalings* V. *Duraiswami*, 51 Mad 720 .

3. *Per Mitter J.* in *Chor Mal Bal Chand* V. *Kasturi Chand Seraogi*, I.L.R. 63 Cal. 1033; 63 C.L.J. 175. See also *Sirdar Gur Dayal Singh* V. *Raja of Faridkote* 21 I.A. 171 P.C.

4. The Indian courts have held that filing of written statement though attacking jurisdiction is submission of jurisdiction. (*Subramania* V. *Aannswami*, A.I.R. 1948 Mad. 203.) But submission to jurisdiction in order to save property has been held to be not voluntary submission even if the defendant filed a statement on the merits as well. (*Veeraraghava Iyer* V. *Muga* Sait, 27 M.L.J. 535.)

But if the defendant is within the territorial jurisdiction of the foreign court, an *ex parte* decree passed against him after duly serving the summons is valid in the eyes of the Indian courts and it does not come within the exception stated in clause (b) of Section 13.

Judgment Opposed to Natural Justice:

Under this class come judgments such as obtained without notice to the defendant or obtained against minor etc.

Presumption concerning Foreign Judgments:

Section 14 of the Civil Procedure Code dealing with this matter is clear enough.

> *Section* 14: "The court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction."

Judgments of the courts of reciprocating territories:

In certain cases the successful party to the foreign judgment may directly commence proceedings for the execution of the foreign decree in the Indian courts. These are judgments of courts of reciprocating territories. Section 44-A of the Civil Procedure Code deals with these cases.

> *Section* 44-*A* : "(1) Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in (India) as if it had been passed by the District Court.
>
> (2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

> (3) The provisions of section 475 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.
>
> *Explanation 1*: 'Reciprocating territory' means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purpose of this section; and 'superior courts', with reference to any such territory, means such courts as may be specified in the said notification.
>
> *Explanation 2*: 'Decree' with reference to a superior court means any decree or judgment of such court under which a sum of money is payable, 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, but shall in no case include an arbitration award, even if such an award is enforceable as a decree of judgment."

II SERVICE OF PROCESS

Service in India of summonses issued by foreign courts

Summonses issued by certain foreign courts can be served in India through the assistance of Indian courts. The foreign courts

5. Section 47 is as follows :
"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.
(3) Where a question arises as to whether any person is or is not the represntative of a party, such question shall, for the purposes of any section, be determined by the court.
Explanation: For the purposes of this Section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

whose summonses can thus be served within India are those courts who are so specified, by notification, by the Government of India. The relevant provisions are contained in Sections 29 and 31 of the Indian Civil Procedure Code, 1908 which are as follows:—

Section 29:—Summonses and other processes issued by:—

(a) (not applicable)

(b) (not applicable)

(c) Any other civil or revenue court outside India to which the Central Government has, by notification in the Official Gazettee, declared the provisions of this Section to apply, may be sent to the courts in the territories to which this Code extends and may be served as if they were summonses issued by such courts.

Section 31: The provisions of Sections.....29 shall apply to summonses to give evidence or to produce documents or other material objects.

Service of Indian summonses in foreign countries

The Indian Civil Procedure Code does not speak of taking the assistance of foreign court to serve process on parties within the jurisdiction of such foreign court. If the defendant, against whom a suit is brought in an Indian court,resides out of India, the procedure for service of summons on him is to send the document by post. The procedure is given in Order V, rule 25.

Order V, rule 25: "Where the defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the court is situated.

Provided that where any such defendant resides in Pakistan, the summons, together with a copy thereof, may be sent for service on the defendant, to any court in that country (not being the High Court) having jurisdiction in the place where the defendant resides:

Provided further that where any such defendant is a public officer in Pakistan (not belonging to the Pakistan military,

naval or air forces) or is a servant of a railway company or local authority in that country, the summons, together with a copy thereof, may be sent for service on the defendant, to such officer or authority in that country as the Central Government may, by notification in the Official Gazette, specify in this behalf."

III. TAKING OF EVIDENCE

A. When the evidence of a person not within India is required in proceedings before the Indian courts:

Though ordinarily the witness must appear before the court to be examined on oath in the open court, there are circumstances in which a court may exempt the witness from attending the court and authorise some person or persons to examine him. One such case is when the witness is residing outside India. The procedure which the court may follow in such a case is given in Section 77 of the Civil Procedure Code, 1908, and Order XXVI, rule 5 thereof.

Section 77: "In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within (India)."

Order XXVI, Rule 5: "Where any Court, to which application is made for the issue of a commission for the examination of a person residing at any place not within (India), is satisfied that the evidence of such person is necessary, the court may issue such commission or a letter of request."

B. Judicial assistance available to foreign courts for examining witnesses residing within India:

The Indian Civil Procedure Code empowers the Indian courts to extend judicial assistance to foreign courts (if so requested), by providing for the issue of commission, at the instance of the foreign court, to examine witnesses residing within the Indian territory, but whose testimony is required in the proceedings before the foreign court. The relevant provisions are in Section 78.

Section 78: "Subject to such conditions and limitations as may be prescribed, the provisions as to the execution and

return of commissions for the examination of witnesses shall apply to commissions issued by or at the instanced—

(a) (omitted as inapplicable)

(b) (omitted as inapplicable)

(c) Courts of any State or country outside India."

Section 78 refers to "conditions and limitations as may be prescribed." These conditions and limitations are given in Order XXVI, rules 19,20, 21 and 22.

Order XXVI, Rule 19: (1) If a High Court is satisfied—

(a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction,

it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matter specified in clauses (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Central Government, or

(b) by a letter of request issued by the foreign court and transmitted to the High Court through the Central Government, or

(c) by a letter of request issued by a foreign court and produced before the High Court by a party to the proceeding.

Order XXVI, Rule 20: The High Court may issue a commission under rule 19—

(a) upon application by a party to the proceeding before the foreign court, or

(b) upon an application by a law officer of the State Government acting under instructions from the State Government.

Order XXVI, Rule 21: A commission under rule 19 may be issued to any court within the local limits of whose jurisdiction the witness resides, or where the witness resides within the local limits of the ordinary original civil jurisdiction of the High Court, to any person whom the court thinks fit to execute the commission."

Order XXVI, Rule 22: The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions and when such commission has been duly executed, it shall be returned together with the evidence taken under it, to the High Court, which shall forward it to the Central Government, alongwith the letter of request for transmission to the foreign court.

ANNEXURE IV

INDONESIAN LAW

Generally, judgments of foreign courts are not enforceable in Indonesia. The cases themselves, however, may be submitted for retrial by Indonesian courts. The Indonesian judge has the discretion to treat the foreign decree as evidence and the decree made by him will be enforced as a judgment of the Indonesian court.

There are, however, exceptions to this general rule:

1. In the case of general average which has been determined by the competent judicial authority in a foreign country, Article 436 of the Indonesian Rules of Civil Procedure provides that the decisions of foreign court as to the amount of the costs and damages which constitute the general average as well as the stipulation as to how the costs will be charged on the ship, the costs of transportation, and on the cargoes, may be enforced in Indonesia, subject to the obtaining of leave to that effect from the competent judge in whose territorial jurisdiction the decision is to be enforced. In applying for or in granting the leave, the case itself will, however, not be re-tried.
2. Article 436 of the Indonesian Rules of Civil Procedure further provides that foreign judgment may be enforced in Indonesia if such enforcement is authorised by an Act of Parliament. So far, however, the Parliament has not passed any such Act.

There is no rule in Indonesian legislation with regard to "service of summons" and "recording of evidence" required in foreign judicial proceedings.

ANNEXURE V

LAW OF IRAQ

I. LAW FOR THE EXECUTION OF FOREIGN JUDGMENTS LAW NO. 30 OF 1928

We, KING OF IRAQ

With the consent of the Senate and the Chamber of Deputies, do hereby order the enactment of the following law:—

1. In this law the expression

"Foreign Judgment" shall mean a judgment issued by a court constituted outside 'Iraq'.

"Foreign Courts" shall mean the court which issued the foreign judgment.

"Foreign Country" shall mean the country in which the foreign judgment is issued.

2. A foreign judgment may, in accordance with the provisions of this law, be executed in Iraq by the order of an Iraq court, which order is to be called an order for execution.

3. (a) A person desiring to execute a foreign judgment shall bring action in the Court of First Instance claiming the issue of an order for execution.

(b) The action shall be brought in the court having jurisdiction in the place in which the judgment debtor resides or, if he shall have no fixed residence in Iraq, in the place in which any property which it is proposed to attach is situated.

(c) The application shall be accompanied by a copy, authenticated in the usual manner of the foreign judgment and the reasons therefor.

4. On action being brought, the court shall fix a date for hearing and shall summon the judgment debtor whether he be in 'Iraq or abroad, in the usual manner.

5. After hearing the case, the court will issue or refuse the order for execution in accordance with the provisions of this law.

6. Every judgment in respect of which an order for execution is claimed must fulfil all the following conditions. The court shall examine the fulfilment of these conditions of its own accord whether the judgment debtor has in this respect raised the question in his defence or not.

(a) That the judgment debtor had reasonable and sufficient notice of the action in the foreign court.

(b) That the foreign court was competent within the meaning of Article 7 hereof.

(c) That the object of judgment is for a debt or definite sum of money and if pronounced in a penal action, is by way of civil compensation only.

(d) That the cause of action was not such as would be considered under "Iraq Law as contrary to public policy".

(e) That the judgment is executory in the foreign country.

7. The foreign court shall be deemed to be competent if one of the following conditions be fulfilled:

(a) That the action related to property, movable or immovable situated in the foreign country.

(b) That the cause of action arose from a contract entered into in the foreign country or intended to be there executed wholly or in the part, to which the judgment related.

(c) That the cause of action arose from acts which wholly or in part were done in the foreign country.

(d) That the judgment debtor is ordinarily resident in the foreign country or was carrying on commercial business in that country at the date on which the action was instituted.

(e) That the judgment debtor voluntarily appeared in the action or,

(f) That the judgment debtor agreed to submit to the jurisdiction of the foreign court in the case.

8.(1) The court shall dismiss the claim for the order for execution, if the judgment debtor proves to the court that the judgment was obtained fraudulently or that the proceedings in the foreign court were contrary to justice, equity or if the court finds that the judgment does not fulfil all the conditions of Article 6.

(2) The Court shall, if the judgment debtor proves that he has right of recourse to a higher court and that he has taken or intends to take such recourse, dismiss the case until completion of proceedings in such higher court, and it may, in case of necessity, direct that provisional seizure be made subject to the taking of security from the judgment creditor, provided that no objection to the judgment is established in accordance with para. (1) of this Article.

9. Decisions of the Court of First Instance under this law, given in default of appearance, shall be subject to the usual rules in regard to opposition. They shall not be appealable but shall be subject to revision by the Court of Cassation.

10. There shall be paid, in respect of action instituted under this law, one half of the fees prescribed for civil suits.

11. This law shall apply to the judgments issued by foreign courts to be specified by regulations from time to time issued under this law. Such regulations may be issued in any case in which the judgment of the Iraq courts may be executed in a foreign country whether by virtue of special agreement made with the Iraq State or by virtue of the ordinary law of such country and whether by the issue of an order for execution or by other procedure similar in effect.

12. The Minister of Justice is charged with the execution of this law.

Made at Baghdad this 26th day of June, 1928, and the 8th day of Muharram 1347.

FAISAL

ABDUL MUHSIN AL SA'DUN — Prime Minister

DAUD AL HAIDARI, — Minister of Justice.

(Published in the Waqay' al Iraqiya No. 666 dated 4.7.28.)

II. REGULATION NO. 29 OF 1932 FOR THE APPLICATION OF ARTICLE 11 OF THE LAW FOR THE EXECUTION OF FOREIGN JUDGMENTS IN IRAQ NO. 30 OF 1928

After perusal of Article 11 of the Law for the Execution of Foreign Judgments in Iraq (No. 30 of 1928) and with the approval of the Council of Ministers do hereby order the enactment of the following Regulation:—

Article 1.

The Law for the Execution of Foreign Judgments in Iraq (No. 30 of 1928) shall include the judgments issued by the courts of Canada, Jamaica, Hongkong, Malta, Nyasaland and Cyprus in cases where the laws of the said countries make provision for the execution of the Iraq judgments in accordance with Article 11 of the said Law.

Article 2.

Regulation No. 6 of 1929 is hereby replaced.

Article 3.

This Regulation shall come into force from the date of its publication in the Official Gazette.

Article 4.

The Minister of Justice is charged with the execution of this Regulation.

Made at Baghdad this 26th day of June, 1932, and the 22nd day of Safar, 1351.

JA' FAR AL' ASKARI
Acting Prime Minister,
Minister for Foreign Affairs and
Acting Minister of Defence.

NAJI SHAWAKAT,
Minister of Interior.

RUSTAM HAIDAR,
Minister of Finance

JAMAL BABAN
Minister of Justice

MUHAMMAD AMIN ZAKI
Minister of Economics and
Communications.

'ABDUL HUSAIN,
Minister of Education.

(Published in the Waqayi' al 'Iraqiya, No. 1152 of 7.7.32).

III. REGULATION NO. 5 OF 1929 FOR THE APPLICATION OF ARTICLE 11 OF THE LAW FOR THE EXECUTION OF FOREIGN JUDGMENTS IN IRAQ (NO. 30 OF 1928).

After perusal of Article 11 of the Law for the Execution of Foreign Judgments in Iraq No. 30 of 1928 and with the approval of the Council of Ministers, do hereby order the enactment of the following Regulation:—

Article 1.

The Law for the Execution of Foreign Judgments in Iraq No. 30 of 1928 shall include the judgments issued by the courts of Syria and Lebanon in cases where Syrian laws make provisions for the execution of the Iraq judgments in accordance with Article 11 of the said Law.

Article 2.

This Regulation shall come into force from the date of its publication in the Government Gazette.

Article 3.

The Minister of Justice is charged with the execution of this Regulation.

Made at Baghdad this 13th day of May, 1929, and 4th day of Dhil Hujja, 1347.

TAWFIQ AL SUWAIDI,
Prime Minister

ABDUL AZIZ,
Minister of Interior

YUSUF GHANIMA,
Minister of Finance

DAUD AL HAIDARI,
Minister of Justice

MUHD. AMIN ZAKI
Minister of Defence.

SALMAN AL BARAK
Minister of Irrigation and Agriculture.

ABDUL MUHSIN SHALASH
Minister of Communications and Works

KHALID SULAIMAN
Minister of Education.

(Published in the Waqayi' al 'Iraqiya, No. 759, dated 20th May, 1929).

IV. REGULATION NO. 21 OF 1928 FOR THE APPLICATION OF ARTICLE 11 OF THE LAW FOR THE EXECUTION OF FOREIGN JUDGMENTS (NO. 30 OF 1928).

After the perusal of Paragraph 1 of Article 26 of the Constitution and Article 11 of the Law for the Execution of Foreign Judgments No. 30 of 1928, and pursuant to the proposal of the Minister of Justice and with the concurrence of the Council of Ministers, order the enactment of the following regulation:—

Article 1.

The Law for the Execution of the Foreign Judgments, No. 30 of 1928, shall apply to the judgments of the courts of the United Kingdom.

Article 2.

This Regulation will come into force from the date of its publication in the Government Gazette.

Article 3.

The Minister of Justice is charged with the execution of the Regulation.

Made at Baghdad this 30th day of October, 1928, and the 16th day of Jamadi-al-Awwal, 1347.

ABDUL MUHSIN AL SA' DUN,
Prime Minister and
Minister of Foreign Affairs.

NAJI SHAWKAT,
Minister of Interior

YUSUF GHANIMA
Minister of Finance

DAUD AL-HAIDARI
Minister of Justice.

HURI AL SA'ID
Minister of Defence

SALMAN AL BARRAK,
Minister of Irrig. and Agr.

ABDUL MUHSIN SHELASH,
Minister of Communications and Works.

TAWFIQ AL SUWAIDI
Minister of Education.

SAYID AHMED AL DAUD,
Minister of Awqaf.

(Published in the Waqayi' al 'Iraqiya No. 704 dated 8-11-28).

ANNEXURE VI

LAW OF PAKISTAN

Section 44-A of the Code of Civil Procedure, 1908, provides for execution in Pakistan of decrees of the superior courts of the United Kingdom or any reciprocating territory which means any country, or territory situated in any part of Her Majesty's Dominions, which may, from time to time, be notified as such by the Central Government. Pakistan has reached agreements for execution of decrees on reciprocal basis with the governments of several countries.

Besides, the Central Government, by virtue of section 3 of the Maintenance Orders Enforcement Act, 1921 have also made arrangements on reciprocal basis for enforcement of maintenance orders with some countries.

Section 77 of the Code of Civil Procedure, 1908, provides that a court in Pakistan may issue a Letter of Request for examination of witness residing at any place outside Pakistan. Similarly rules 19 to 22 of Order XXVI of the Code Civil Procedure, 1908, empower the courts in Pakistan to receive a Letter of Request from foreign tribunals for examination of witnesses residing in Pakistan.

As regards commission for examination of witnesses in criminal cases, the provision contained in sub-section (2B) of section 503 read with section 508A of the Code of Criminal Procedure, 1898, provides that when the witness resides in the United Kingdom or any other country of the Commonwealth other than Pakistan, or in the Union of Burma, a commission may be issued to such courts or judge having authority in this behalf in that country as may be specified by the Central Government by notification in the official Gazette. So far arrangements have been made by exchange of letters with the Governments of some countries for examination of witnesses in criminal cases residing in those countries.

Section 29 of the Code of Civil Procedure provides that summonses and other processes issued by any civil court or revenue court situated outside Pakistan may be sent to the courts in Pakistan and served as if they were summonses issued by such courts. The

Central Government have by exchange of letters reached agreements on reciprocal basis with many countries regarding service of summonses and other processes.

CODE OF CIVIL PROCEDURE, 1908.

Section 44-A

44A. (1) Where a certified copy of a decree of any of the superior courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in Pakistan as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1. "Superior Courts", with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Explanation 2. "Reciprocating territory" means any country or territory, situated in any part of His Majesty's Dominions which the (Central Government) may, from time to time, by notification in the (Official Gazette), declare to be reciprocating territory for the purposes of this section; and "superior courts", with reference to

any such territory, means such courts as may be specified in the said notification.

Explanation 3. "Decree", with reference to a superior court, means any decree or judgment of such court under which a sum of money is payable, 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

(a) with reference to superior courts in the United Kingdom, includes judgments given and decrees made in any court in appeals against such decrees or judgments, but

(b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.

MAINTENANCE ORDERS ENFORCEMENT ACT, 1921.

Section 3.

3. ——(1) If the Central Government is satisfied that provisions have been made by the Legislature of any part of His Majesty's Dominions for the enforcement within that part of maintenance orders made by courts in Pakistan the (Central Government) may, by notificaton in the (Official Gazette), declare that this Act applies in respect of that part of His Majesty's Dominions and thereupon it shall apply accordingly.

(2) The (Central Government) may, by like notification, declare that this Act applies in respect of any (Acceding State or non-Acceding State), and where such a declaration has been made, this Act shall apply as if such protectorate or State were a reciprocating territory.

CODE OF CIVIL PROCEDURE, 1908.

Section 77

77. In lieu of issuing a commission, the court may issue a Letter of Request to examine a witness residing at any place not within Pakistan.

CODE OF CIVIL PROCEDURE, 1908

Order XXVI

(Rules 19 to 22)

Rule 19. (1) If a High Court is satisfied——

(a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it;

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction,

it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in Pakistan and transmitted to the High Court through the Central Government, or

(b) by a Letter of Request issued by the foreign court and transmitted to the High Court through the Central Government, or

(c) by a Letter of Request issued by the foreign court and produced before the High Court by a party to the proceeding.

Rule 20. The High Court may issue a commission under rule 19—

(a) upon application by a party to the proceeding before the foreign court, or

(b) upon an application by a law officer of the Provincial Government acting under instructions from the Provincial Government.

Rule 21.—A commission under rule 19 may be issued to any court within the local limits of whose jurisdiction the witness resides,

or, where the witness resides within the local limits of the ordinary original civil jurisdiction of the High Court, to any person whom the court thinks fit to execute the commission.

Rule 22.—The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed, it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Central Government, along with the Letter of Request for transmission to the foreign court.

CRIMINAL PROCEDURE CODE, 1898.

Section 503 (2B)

503.—(2B) When the witness resides in the United Kingdom or any other country of the Commonwealth other than Pakistan, or in the Union of Burma, the commission may be issued to such court or judge having authority in this behalf in that country as may be specified by the Central Government by notification in the official Gazette.

Section 508A

508A. The provisions of sub-section (3) of section 503, and so much of sections 505 and 507 as relates to the execution of a commission and its return by the Magistrate or officer to whom the commission is directed shall apply in respect of commissions issued (by any court or judge having authority in this behalf in the United Kingdom or in any other country of the Commonwealth other than Pakistan or in the Union of Burma under the law in force in that country) relating to commissions for the examination of witnesses, as they apply to commissions issued under section 503 or section 506.

CODE OF CIVIL PROCEDURE, 1908.

Section 29

29. Summonses (and other processes) issued by the civil or revenue court situate (outside Pakistan) may be sent to the courts

(in Pakistan) and served as if they (were summonses) issued by such courts;

[Provided that the courts issuing such summonses (or processes) have been established or continued by the authority of the Central Government or that the Provincial Government (of the Province in which such summonses or processes are) to be served has by notification in the official Gazette declared the provisions of this section to apply to (such courts)].

ANNEXURE VII

LAW OF JAPAN

I. Enforcement of Foreign Judgments

With reference to the enforcement of foreign judgments, the provisions of Articles 200, 514 and 515 of the Code of Civil Procedure shall be applied.

Article 200. A foreign judgment which has become final and conclusive shall be valid only upon the fulfilment of the following conditions:

(1) That the jurisdiction of the foreign court is not denied in laws and orders or treaty;
(2) That the defendant defeated, being a Japanese, has received service of summons or any other necessary orders to commence procedure otherwise by a public notice or has appeared without receiving service thereof;
(3) That the judgment of a foreign court is not contrary to the public order or good morals in Japan;
(4) That there is mutual guarantee.

Article 514. Execution based on the judgment of a foreign court may be carried out only when its lawfulness is pronounced by a judgment of execution by the Japanese court.

2. In regard to a suit demanding a judgment of execution, the District Court of the place, where the general forum of a debtor exists, shall have the jurisdiction and in case no general forum exists, the court which has jurisdiction over the suit against the debtor shall have the jurisdiction.

Article 515. A judgment of execution shall be rendered without inquiring into justifiableness of the decision.

2. A suit demanding a judgment of execution shall be turned down in the following cases:

(1) When it is not certified that the judgment of a foreign court has become final and conclusive;

(2) When the foreign judgment does not fulfil the requirements as prescribed in Article 200.

II. Service of Process and Recording of Evidence

With reference to the service of summons issued by foreign courts and the recording of evidence required in foreign judicial proceedings in both civil and criminal cases, the provisions of the Law relating to the Reciprocal Judicial Aid to be given at the Request of Foreign Courts shall be applied.

Article 1. (1) A court shall, at the request of a foreign court, render judicial aid in serving papers or taking evidence in connection with cases on civil or criminal matters.

The said judicial aid shall be given by the District Court which has jurisdiction over the place where the required proceedings are to take place.

(2) The said judicial aid shall be rendered under the following conditions:

(i) The request shall be made through the diplomatic channel.

(ii) The request for the service of papers shall be made in writing stating the name, nationality, and domicile or residence of the person on whom the papers are to be served.

(iii) The request to take evidence shall be made in writing stating the names of the parties to the litigation, the manner in which the evidence is to be taken, the name, nationality, and domicile or residence of the person to be examined, and the matters to be investigated. In regard to criminal matters, the request shall be accompanied by a statement of the essential facts of the case.

(iv) In case the Letter of Request and documents annexed thereto are not written in the Japanese language, a translation thereof into Japanese shall be appended to the original.

(v) The State to which the court making the request belongs shall guarantee the payment of the expenses incurred in the execution of the Letter of Request.

(vi) The State to which the court making the request belongs shall assure that it could render judicial aid in the same or similar matters if so requested by the Japanese courts.

In case where treaties or other documents of similar nature provide otherwise than as mentioned in the preceding paragraphs, such provision shall prevail.

Article 2.

In case the execution of the Letter of Request falls within the jurisdiction of a court other than that to which the request has been made, the latter shall transfer the same to the proper court.

Article 3.

The Letter of Request shall be executed in accordance with the laws of Japan.

ANNEXURE VIII

LAW OF THE UNITED ARAB REPUBLIC

I. Execution of Foreign Judgments

Code of Procedure for Civil and Commercial Matters

Article 491.

The execution of judgments and orders delivered in a foreign country may be ordered on the same conditions required by the law of such country for the execution therein of Egyptian judgments and orders.

Article 492.

The order of execution may be requested by serving in the usual form a writ of summons on the adverse party to appear before the First Instance Tribunal in the circumscription of which the execution shall take place.

Article 493.

The order of execution may be delivered only after making sure of the following:—

(1) that the judgment or order is delivered by a judicial body which is competent under the law of the country in which it has been delivered and that under the said law it has become a judgment or order at law.

(2) that the parties were regularly served with writ of summons to appear and has been legally represented.

(3) that the judgment or order is not in contradiction with a judgment or order already delivered by Egyptian courts.

(4) that the judgment or order is not contrary to morality or public policy in Egypt.

Article 495.

The Tribunal shall decide upon the request for an order of execution as soon as possible.

Article 496.

The execution of executory official deeds drawn up in a foreign country may be ordered on the same conditions required by the law of such country for the execution of executory official deeds drawn up in Egypt.

The order of execution may be requested by an application submitted to the duty judge of the First Instance Tribunal in the circumscription of which the execution shall take place.

The order of execution may be delivered only after making sure the conditions required by the law in which the deed has been drawn up are fulfilled and that such deed contains nothing contrary to morality and public policy in Egypt.

Article 497.

The above mentioned provisions are applicable without prejudice to the provisions of conventions concluded or which shall be concluded between Egypt and other countries in this respect.

II. Service of Process

Writ of summons and rogatory commission from foreign tribunals are carried out in the Egyptian region according to international practice and on a reciprocity basis.

ANNEXURE IX

LAW OF NIGERIA

Extracts from "Groundwork of Nigerian Law" by T.O. ELIAS

Foreign Judgments

The principles relating to the reciprocal enforcement of foreign judgments in Nigerian courts and *vice versa* are contained in certain local enactments the chief of which is the Foreign Judgments (Reciprocal Enforcement) Ordinance[1]. This provides for the registration of judgments of superior courts of foreign countries which accord substantial reciprocity of treatment to the enforcement of judgments of superior courts of Nigeria. A foreign judgment, other than one given on appeal, is so registrable if

(a) It is final and conclusive as between the parties to it (a judgment is deemed to be final and conclusive even though an appeal is pending against it or although it may be subject to appeals in the courts of the country of the original court); and

(b) There is payable under it 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 this Ordinance has come into force.[2]

The procedure is that the judgment creditor may apply for registration to any superior court of Nigeria at any time within six years after the date of the judgment or of the last judgment (where there has been an appeal in the foreign court). The Nigerian court will then order such judgment to be registered, unless at the date of the application (i) it has been wholly satisfied, or (ii) it could not be enforced by execution in the country of the original court. If the foreign judgment has been partly satisfied, only the balance due can be registered for enforcement in Nigeria.

The *effects of registration* are that

(1) A registered judgment has, for purposes of execution, the same force and effect as one delivered in Nigeria;

[1] No 48 of 1935 (cap. 73 of 1948 edition of *The Laws*).
[2] S. 3.

(2) Legal proceedings may be taken on it;

(3) The amount for which a judgment is registered carries interest; and

(4) The registering court has the same control over its execution as it has over any of its own judgments, though execution cannot issue on such a judgment until it is settled that no one can ask for it to be set aside.[3]

On a judgment debtor's application, the registering court may set aside a judgment if it is satisfied that

(i) The judgment does not come under the provisions of this Ordinance; or

(ii) The foreign country had no jurisdiction over the subject-matter of the judgment; or

(iii) The judgment debtor did not receive notice of those proceedings and so did not defend, or appear in, them; or

(iv) The judgment was obtained by fraud; or

(v) Its enforcement would be contrary to the public policy in Nigeria; or

(vi) The rights under the judgment are not vested in the applicant for registration; or

(vii) The judgment was in respect of a dispute which had already been finally and conclusively determined by another court having jurisdiction in the foreign country; or

(viii) An appeal is pending or the judgment debtor is entitled and intends to appeal against the judgment. (But here, the registering court may decide merely to postpone registration until the question of such appeal has been satisfactorily disposed of).

A foreign court is said to have jurisdiction—

(a) In the case of a judgment given in an action *in personam*[4]:

[3] S. 4.
[4] An action *in personam* does not include any matrimonial cause or matter, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy, or guardianship of infants. S. 2(2).

(i) If the judgment debtor had voluntarily and fully submitted, or had before the commencement, agreed to submit, to its jurisdiction; or

(ii) If the judgment debtor was plaintiff in, or counter-claimed in, the proceedings before it; or

(iii) If the judgment debtor was at the time when proceedings were instituted resident, or had his office or place of business, in the country of that court,

(b) In the case of a judgment given in an action of which the subject-matter was immovable property or in an action *in rem* of which the subject-matter was movable property—if the property in question was at the time of the proceedings in the original court situate in the country of that court; or

(c) If, in a case not falling under (a) or (b), the jurisdiction of the foreign court is otherwise recognised by the law of the registering court.

But no foreign court will be regarded as having had jurisdiction (i) if the subject-matter of the proceedings was immovable property outside the country of the original court, or (ii) if, with certain exceptions, the bringing of the proceedings in the foreign court was in breach of a prior agreement to settle the dispute otherwise than by proceedings in the courts of the country of that court, or (iii) if the judgment debtor was entitled to diplomatic immunity from the jurisdiction of the foreign court and had not submitted to it.[6]

It is important to remember that no proceedings for the recovery of a sum payable under a foreign judgment, other than proceedings by way of registration of such judgment, can be entertained by any court in Nigeria. The implication of this is that anyone wanting to sue for payment of any money due to him by virtue of a foreign judgment must in the first place register the whole judgment itself. It is only after such registration that he can ask a Nigerian court to assist him to enforce any payment due under it.[6]

[6] S. 6(1), (X), and (3).
[6] S. 8.

The foregoing provisions apply to Her Majesty's dominions outside Nigeria[7] and to judgments obtained in their courts as they apply to foreign countries and their courts.[8]

The judgments of such foreign courts as satisfy the requirements of reciprocity are recognised in any Nigerian court as conclusive between the parties to them in all proceedings founded on the same cause of action. This is so, whether it can be registered or not, and whether, if it can be registered, it is registered or not. But no recognition will be accorded to a registered foreign judgment the registration of which has been set aside on some ground other than (a) that a sum of money was not payable under the judgment; or (b) that the judgment had been wholly or partly satisfied; or (c) that at the date of application for registration the judgment could not be enforced by execution in the country of the original court.[9]

The Governor has power to order that recognition and enforcement of judgments of a foreign country be refused in the courts of Nigeria if such foreign country does not grant full reciprocity to the judgments of superior courts in Nigeria. No proceedings can be entertained in any court in the country for the recovery of any sum alleged to be payable under a judgment obtained in any court of such foreign country.[10]

Any judgment creditor in a superior court of Nigeria, who is desirous of enforcing the judgment in a foreign country enjoying reciprocity with Nigeria, can apply to the court in which he obtained the judgment for a certified copy of it together with a certificate containing all necessary particulars.[11]

Under the *Foreign Prisoners' Detention Ordinance*[12] persons sentenced to terms of imprisonment by any court of competent jurisdiction elsewhere than in Nigeria may, with the Governor's

[7] The expression 'Her Majesty's dominions outside Nigeria' includes any British Protectorate or State and a Mandated (sic Trust) territory s. 9(3).

[8] The Reciprocal Enforcement of Foreign Judgments Ordinance was repealed by s. 9(2) of the present Ordinance.

[9] S. 10

[10] S. 11

[11] S. 12

[12] Cap. 74 of 1948 edition of the *Laws of Nigeria*.

permission, be imprisoned and detained in Nigeria as if they were originally sentenced in Nigeria. But evidence of sentence and of the Governor's consent must be submitted to the Chief Secretary to the Government. Whereas the Foreign Judgments (Reciprocal Enforcement) Ordinance, just considered, deals with foreign countries as well as Her Majesty's dominions outside Nigeria, the present ordinance—Reciprocal Enforcement of Judgments Ordinance[33]—makes provisions for facilitating the reciprocal enforcement of judgments obtained in Nigeria and in the United Kingdom and other parts of Her Majesty's dominions and territories under Her Majesty's protection.

A judgment of the High Court in England or Ireland, or of the Court of Session in Scotland, may be registered in the Supreme Court in Nigeria at any time within twelve months after it has been given. To be so registrable, the judgment must not have been one in which—

(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 defendant was duly served with the process of the original court, and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;

(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.

The effect of registering a judgment is that it is treated for all purposes of execution as if it were a judgment of the Nigerian

[33] Cap. 192 of the 1948 edition of *The Laws*.

Supreme Court. A certified copy of it is obtainable by the judgment creditor on proof by him that the judgment debtor is resident in the United Kingdom.

Any part of Her Majesty's dominions outside the United Kingdom that has made reciprocal provisions by legislation for the enforcement within its territory of judgments obtained in the Supreme Court of Nigeria may be ordered by the Governor to be treated on the same footing as the United Kingdom for purposes of recognition and enforcement of judgments.

Similarly, the Maintenance Orders Ordinance[34] provides for the registration, confirmation and enforcement in Nigeria of orders (other than Affiliation Orders) made in England or Ireland for the periodical payments of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made. Orders made in Nigeria are equally enforceable in England or Ireland.

[34] Capt. 125 of 1948; No. 8 of 1921.

ANNEXURE X

AGREEMENTS CONCLUDED UNDER THE AUSPICES OF LEAGUE OF ARAB STATES

I. RECIPROCAL ENFORCEMENT OF JUDGMENTS AGREEMENT[1]

The Governments of:

The Hashemite Kingdom of Jordan,

The Syrian Republic,

The Kingdom of Iraq,

The Kingdom of Saudi Arabia,

The Lebanese Republic,

The Kingdom of Egypt, and

The Motawakilite Kingdom of Yemen

Desirous of facilitating, among their several States, the carrying out of the enforcement of judgments and in accordance with the provisions of Article 2 of the Pact of the Arab League, have agreed as follows:—

---

[1] A. Approval by the Council of the League of Arab States on September 14, 1952 during its Sixteenth Ordinary Session.

B. Signed by:

The Hashemite Kingdom of Jordan on the 17-2-1953
The Lebanese Republic on the 18-2-1953
The Syrian Republic on the 19-4-1953
The Kingdom of Saudi Arabia on the 23-5-1953
The Kingdom of Egypt on the 9-6-1953
The Kingdom of Iraq on the 27-7-1953
The Hashemite Kingdom of Jordan on the 28-7-1954

D. Reservations: The Motawakilite Kingdom of Yemen

1. With regard to paragraph (a) of Article 2, which reads thus:— "Yemen has no tribunals, at the present time, except Islamic Sharia Courts, competent in every law-suit."

2. With regard to paragraph (c) of Article 2 also, so worded:

"Non-execution of the judgment contrary to one of the common principles of Islamic Sharia Law".

Article I.

Any final judgment deciding civil or commercial rights or the payment of compensation by virtue of any sentence imposed by criminal courts, as well as judgments relating to personal status emanating from a competent court in any of the Member States of the Arab League, shall be executory in the other states of the League, in accordance with the provisions of this Agreement.

Article II.

The appropriate judicial authorities of the State, which are requested to execute the sentence shall not be allowed to investigate or review the subject matter of the case and shall not refuse execution of the judgment, except under the following circumstances:

(a) If the legal authority which rendered the judgment was not qualified to hear the case on account of lack of jurisdiction or because of prevailing principles of international law.

(b) If the parties concerned were not properly and duly summoned.

(c) If the judgment is contrary to the general order, or to the public policy of the State which is requested to carry out its execution. The said State shall decide whether the case is to be so considered, as also whether the execution of the judgment would be contrary to a recognised principle of international law.

(d) If the courts of the State, which is requested to carry out the execution, have already given judgment between the same parties on the same subject matter, or if a case is pending on the same subject and between the same parties, provided the said case had been instituted in the court of the requested State, prior to the date of its being instituted in the court of the requesting State, which gave verdict and asked for execution.

Article III.

With due consideration to Article I of this Agreement, the authorities who are requested to enforce execution are not entitled

to reconsider the award of arbitrators, which was given in any of the States of the League. However, request for execution may be refused in the following instances;

(a) If the laws of the requested State do not admit the settlement of litigation by means of arbitration.

(b) If the award given was not in pursuance of a valid arbitration agreement or any provisions thereof.

(c) If the arbitrators were not qualified to act in pursuance of a conditional agreement of arbitration, or in accordance with the provisions of the law under which the award was given.

(d) If the parties were not properly served with summons to appear.

(e) If the arbitrators' award includes anything considered to be against general order or public morals in the State requested to carry out execution. The requested State shall decide whether the case is to be considered as such and may refuse execution.

(f) If the arbitrators' award is not final in the State in which it was given.

Article IV.

The provisions of this Agreement shall not be applicable to any judgment issued against the Government of the requested State or any of its officers in his official capacity and in the course of the performance of his duties; nor shall they be applicable to judgments which are contrary to international treaties and agreements, in force in the requested State.

Article V.

Requests for execution should be supported by the following documents:—

1. A certified true copy of the judgment duly authenticated by the responsible authorities attested as being executory.
2. The original summons of service of the text of the judgment which is to be executed, or an official certificate to the effect that the text of the judgment had been served.

3. A certificate from a responsible authority to the effect that judgment is final and executory.
4. A certificate that the parties were duly served with summons to appear before the proper authorities or before the arbitrators in case the judgment or the award given was in default.

Article VI.

Judgments which are to be executed in any State of the League shall have the same legal validity as in the requesting State.

Article VII.

In any of the States of the League, nationals of the requested State shall not be asked to pay any fees, furnish any deposit, or produce any securities, which they are not required to do in their own country nor is it permitted to deprive them of legal aid or produce any securities, which they are not required to do in their own country, nor is it permitted to deprive them of legal aid or exemptions from legal fees.

Article VIII.

Each State shall designate the legal authority to which will be submitted all requestes for execution, procedure and appeals against decisions taken in this respect. Communication of such designations shall be made to each of the other contracting States.

Article IX.

States, which shall have accepted this Agreement, shall ratify it in accordance with their own constitutional laws and processes, at the earliest possible date. Instruments of ratification shall be deposited with the Secretary General of the League, which shall draw up a protocol of the deposit of the instruments of ratification by each State to this Agreement and shall notify the contracting States thereof.

Article X.

States of the League, who have not signed this Agreement may accede thereto, by sending notice to this effect to the Secretary

General of the League, who shall notify the other signatories of such accession.

Article XI.

This Agreement will come into force a month from the date of the deposit of the instruments of ratification of three of the signatory States. For other States, it shall come into effect a month from the date of the deposit of their instruments of ratification or the notice of accession thereto.

Article XII.

Any of the States, bound by this Agreement, may withdraw therefrom by serving a notice to this effect upon the Secretary General of the League of Arab States. Withdrawal shall be effective after the lapse of six months from the date of such notice. However, the provisions of this Agreement will remain valid and binding for execution of demands submitted before the date of expiration of the notice so served.

In testimony whereof, the Plenipotentiaries, whose names follow, have signed this Convention on behalf of their Governments and in their names.

This Convention was drawn up, in Arabic, in Cairo on Monday Safar 22nd, 1372 (November 10th, 1952), in one copy to be kept with the Secretariat General of the League of Arab States. A true copy of the original shall be duly delivered to each signatory State and to adherent State.

For the Governments of:

The Hashemite Kingdom of Jordan: (signed) Awni Abdel Hadi.

The Syrian Republic: (signed) Mustapha Al Shehabi.

The Kingdom of Iraq: (signed) Neguib Al Rawi.

The Kingdom of Saudi Arabia: (signed) Abdallah Al Fadl.

The Lebanese Republic: (signed) Nadim Dimechkieh.

The Kingdom of Egypt: (signed) Mahmoud Fawzi.

The Motawakilite Kingdom of Yemen: (signed) El Sayed Ali Al Moayyad.

With the reservation entered in the protocol of signature.

II. AGREEMENT RELATING TO WRITS AND LETTERS OF REQUEST[1]

The Governments of:

The Hashemite Kingdom of Jordan,
The Syrian Republic,
The Kingdom of Iraq,
The Kingdom of Saudi Arabia,
The Lebanese Republic,
The Kingdom of Egypt,
The Motewakilite Kingdom of Yemen,

Desiring, in the promotion of close collaboration between their respective States, to facilitate between them the service of writs and the carrying into effect of letters of request (commissions rogatories), have agreed on the following:—

1. Notices (Notification).

Article 1

The service of documents and writs within the States of the Arab League, signatories of this Agreement, shall be in accordance with the provisions of Articles 2 and 4.

Article 2

Service shall take place in accordance with the procedure laid down in the laws of the State where service is required, provided

[1] A. Approved by the Council of the League of Arab States on September 14th, 1952, during its Sixteenth Ordinary Session.
B. Signed by:
The Hashemite Kingdom of Jordan on the 17-2-1953
The Lebanese Republic on the 18-2-1953
The Syrian Republic on the 19-4-1953
The Kingdom of Saudi Arabia on the 23-5-1953
The Kingdom of Egypt on the 9-6-1953
Tye Kingdom of Iraq on the 27-7-1953
The Motawakilite Kingdom of Yemen on the 28-11-1953
C. The instruments of ratification were deposited with the Secretariat General by:
The Kingdom of Saudi Arabia on the 5-4-1954
The Republic of Egypt on the 15-5-1954
The Hashemite Kingdom of Jordan on the 28-7-1954.

that where the State requesting service desires to have the service carried out in accordance with its own laws, such desire, unless it conflicts with the laws of the State where service is required, shall be accorded.

Article 3

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

(a) The request must contain all information regarding the person to be served—his name, surname, occupation and place of residence—and two copies of the document required to be served shall be drawn up, one of which must be delivered to the person to be served and the other must be returned, signed by him or endorsed to the effect that service had been effected or that acceptance of service had been refused.

(b) The serving officer shall state, on the copy returned, the manner in which service was effected or the reasons for not effecting service.

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

Article 4

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

Article 5

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

II. Letters of request

Article 6

Any State bound by this Agreement may request any other State party thereto, to proceed, on its behalf, in the territory of the

State receiving the request with any judicial proceeding connected with a pending case, in accordance with the provisions of the following two articles.

Article 7.

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

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

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

(c) Where the request is in respect of a matter or proceeding which the law of the State to which the request is made does not permit effect to be given thereto or where it is not possible to fulfil the request, the State to which the request is made, shall so inform the State making the request, stating the reasons.

(d) The State to which the request is made shall bear the costs, with the exception of expert fees which shall be paid by the State making the request and of which a note shall be sent with the file of the letter of request, provided that the country to which the request is made may, on the documents produced at the hearing of the case, exact for its own account, the fees prescribed under its laws.

Article 8

A judicial proceeding, taken in compliance with a letter of request in accordance with the preceding provisions, shall have the same legal effect as if it had been taken before the competent authority in the State making the request.

Article 9

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

Article 10

This Agreement shall be ratified by the signatory States in accordance with their respective constitutional processes at the earliest possible date. Instruments of ratification shall be deposited with the Secretariat General of the League of Arab States, which shall draw up a protocol of the deposit of ratification of each State and notify it to the other contracting States.

Article 11

States of the League, non-signatories of this Agreement, may accede thereto by notice to be sent to the Secretary General, who shall notify such accession to the other Contracting States.

Article 12

This Agreement shall come into force one month after the deposit of the instruments of ratification of three signatory States and shall be deemed binding with respect to the other States, one month after the deposit of their instruments of ratification or their accession thereto.

Article 13

Any State, bound by this Agreement, may, by notice to be sent to the Secretary General of the League of Arab States, withdraw therefrom. Such withdrawal shall take effect six months after the transmission of such notice, provided that this Agreement shall remain in force, with regard to writs required to be served and letters of request made before the expiry of the said period.

In testimony whereof, the Plenipotentiaries, whose names follow hereafter, have signed this Convention on behalf of their Governments and in their names.

This Convention was drawn up in Arabic, in Cairo, on Thursday, Safar 18th, 1372 (November 6th, 1952), in one copy to be kept with the Secretariat General of the League of Arab States. A true copy of the original was duly delivered to each of the signatory States of this Agreement or to the adherents thereto.

For the Governments of :

The Hashemite Kingdom of Jordan:
(Signed) Awni Abdel Hadi

The Syrian Republic: (Signed) Mustapha Al Shehabi

The Kingdom of Iraq: (Signed) Naguib Al Rawi

The Kingdom of Saudi Arabia:
(Signed) Abdallah Al Fadl

The Lebanese Republic: (Signed) Nadim Dimechkieh

The Kingdom of Egypt: (Signed) Mahmoud Fawzi

The Motawakilite Kingdom of Yemen:
(Signed) Al Sayed Ali Al Moayyad.

ANNEXURE XI

(A) EXCHANGE OF NOTES CONCERNING RECIPROCAL JUDICIAL ASSISTANCE

BETWEEN

Denmark and Japan

Dated at Tokyo, July 16 and 23, 1936
Validity confirmed, August 11, 1952

Tokyo, July 16th 1936

Monsieur le Ministre,

With a view to facilitating the judicial procedure concerning cases in civil and commercial matters in Danish or Japanese courts, I have the honour, under instructions from my Government, to state as follows:

The Danish Government propose to institute, between the Danish and Japanese courts, mutual judicial aid on reciprocal terms regarding delivery of documents and taking of evidence in civil and commercial matters. If such mutual judicial aid be instituted, the expenses incurred in Danish or Japanese courts in the execution of judicial commissions shall be refunded by the Government of that country to which the court issuing such commission belongs.

The Danish Government will institute the above mentioned mutual judicial aid so soon as the Japanese Government agree to the above proposal.

In bringing forward the above proposal of my Government, I beg to request that your Excellency would be good enough to state whether the Japanese Government accept the same.

I avail myself of this opportunity to renew to your excellency the assurance of my highest consideration.

(Signed) Rud. Bertouch-Lehn.

His Excellency
Monsieur H. Arita,
Minister for Foreign Affairs
etc., etc., etc.

(Translation)

Tokyo, July 23rd 1936.

Monsieur le Ministre,

I have the honour to acknowledge the receipt of your Excellency's note of the 16th instant which reads as follows:—

"With a view to facilitating the judicial procedure concerning cases in civil and commercial matters in Danish or Japanese courts, I have the honour, under instructions from my Government, to state as follows:

The Danish Government propose to institute between the Danish and Japanese courts mutual judicial aid on reciprocal terms regarding delivery of documents and taking of evidence in civil and commercial matters. If such mutual judicial aid be instituted, the expenses incurred in Danish or Japanese courts in the execution of judicial commissions shall be refunded by the government of that country to which the court issuing such commission belongs.

The Danish Government will institute the above mentioned mutual judicial aid so soon as the Japanese Government agree to the above proposal.

In bringing forward the above proposal of my Government, I beg to request that your Excellency would be good enough to state whether the Japanese Government accept the same."

I beg to state that the above proposal of the Danish Government being in conformity with the stipulations of the Law No. 63 of the 38th Year of *Meiji* the Japanese Government accept the same and agree to institute on this date between the Japanese and Danish courts mutual judicial aid regarding delivery of documents and taking of evidence in civil or commercial matters.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

(Signed) Hachiro Arita,
Minister for Foreign Affairs.

His Excellency
Baron Rudolph Bertouch-Lehn,
Envoy Extraordinary and Minister
Plenipotentiary of Denmark.

(B) EXCHANGE OF NOTES CONCERNING RECIPROCAL JUDICIAL ASSISTANCE

BETWEEN CEYLON AND JAPAN

Dated at Tokyo, March 9 and 22, 1940

Notification of revival given, October 14, 1952

Revival published, December 13, 1952

Revived, January 14, 1953.

TOKYO, March 9th, 1940.

Your Excellency,

I have the honour to inform Your Excellency, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, that the Government of Ceylon have expressed the desire to enter into an arrangement with the Imperial Japanese Government whereby the Courts of Justice in Japan and Ceylon should, within the limits prescribed by the laws of their country, render mutual assistance on a reciprocal basis in the transmission of documents and in the taking of evidence relating to civil and criminal cases.

2. The Government of Ceylon consider it appropriate that the proposed arrangement shall provide that any costs incurred in the execution of Letters of Request or other Judicial Commissions shall be refunded by the Government of the country to which the Court issuing such Commissions belongs.

3. The Government of Ceylon would further propose that it shall be understood that Letters of Request and documents connected with them shall be transmitted through the diplomatic channel, and that they shall be accompanied by translations in the official language of the country wherein the court to which they are addressed is situated.

4. I have the honour to inform Your Excellency that, should such an arrangement be agreeable to the Imperial Japanese Government, the Government of Ceylon would be pleased to bring it into force forthwith.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

(Signed) R.L. Craigie.

His Excellency
Mr. Hachiro Arita,
His Imperial Japanese Majesty's
Minister for Foreign Affairs.

(Translation)

March 22nd, 1940.

Your Excellency,

I have the honour to acknowledge the receipt of Your Excellency's note of the 9th March informing me of the desire of the British Government to enter into an arrangement whereby the Courts of Justice in Japan and Ceylon should, within the limits prescribed by the laws of either country, render mutual assistance on a reciprocal basis in the transmission of documents and in the taking of evidence relating to civil and criminal cases. The British Government further propose that any costs incurred in the execution of Judical Commissions in rendering reciprocal judicial assistance shall be refunded by the Government of the country to which the Court issuing such commissions belongs, that Letters of Request and documents connected with them shall be transmitted through the diplomatic channel and that they shall be accompanied by translations in the language of the country wherein the court to which they are addressed is situated.

I have the honour to inform Your Excellency that the Imperial Government agree to the above proposals of the British Government and have decided, as from today, to commence mutual judicial assistance between the Courts of Justice in Japan and Ceylon, on a basis of reciprocity and within the limits prescribed by the laws of Japan, in the transmission of documents and in the taking of evidence relating to civil and criminal cases.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

(Signed) Hachiro Arita

Minister for Foreign Affairs.

His Excellency

The Right Honourable

Sir Robert Craigie, K.C.M.G., C.B.,

etc., etc., etc.

ANNEXURE XII

(A) MODEL ACT RESPECTING THE RECOGNITION OF FOREIGN (MONEY) JUDGMENTS

(Adopted by the **International Law Association** at the Hamburg Conference held in 1960)

1. This Act may be cited as *The Foreign (Money) Judgments Act.*

2. This Act applies to the recognition of judgments in civil and commercial matters.

3. In this Act:—

(a) "foreign judgment" means a final judgment, decree or order or part thereof, made by a court of a foreign State whereby a definite sum of money is made payable, but does not include a sum made payable in respect of a tax or penalty;

(b) "final judgment" means one that is capable of being enforced in the State of the original court although there may still be open an appeal or other method of attack in that State;

(c) "original court" means the court by which the foreign judgment was given;

(d) "forum" means the court in which it is sought to enforce the foreign judgment;

(e) "judgment debtor" means the party against whom the foreign judgment was given.

4. A foreign judgment is recognised by the forum as conclusive and is enforceable between the parties and may be relied upon as a defence or counterclaim except where:—

(a) the original court lacked jurisdiction under Section 5; or

(b) the foreign judgment was given by default and the forum is satisfied that the judgment debtor, being the defendant, did not have notice of the proceedings in the original court in sufficient time to enable him to defend and did not appear; or

(c) the original court denied natural justice, that is the foreign judgment was not rendered by an impartial tribunal or under a procedural system compatible with the requirements of due process of law; or

(d) the foreign judgment is based upon a cause of action which is contrary to the strong public policy (*ordre public international*) of the forum; or

(e) the foreign judgment is based upon cause of action which has formed the subject of another judgment between the same parties recognised as *res judicata* under the law of the forum; or

(f) the foreign judgment has been found by the forum to have been obtained by fraud.

5. (1) For the purposes of this Act the original court has jurisdiction when:—

(a) the judgment debtor has voluntarily appeared in the proceedings for the purpose of contesting the merits and not solely for the purpose of

(i) contesting the jurisdiction of the original court, or

(ii) protecting his property from seizure or obtaining the release of seized property, or

(iii) protecting his property on the ground that in the future it may be placed in jeopardy of seizure on the strength of the judgment; or

(b) the judgment debtor has submitted to the jurisdiction of the original court by an express agreement; or

(c) the judgment debtor at the time of the institution of the proceeding ordinarily resides in the State of the original court; or

(d) the judgment debtor instituted the proceeding as plaintiff or counterclaimed in the State of the original court; or

(e) the judgment debtor, being a corporate body, was incorporated or has its seat (*siege*) in the State of the original court, or at the time of the institution of the proceeding there had its place of central administration or principal place of business there; or

(f) the judgment debtor, at the time of the institution of the proceeding, has either a commercial establishment or a branch office in the State of the original court and the proceeding is based upon a cause of action arising out of the business carried on there ; or

(g) in an action based on contract the parties to the contract ordinarily reside in different States and all, or substantially all, of the performance by the judgment debtor was to take place in the State of the original court; or

(h) in an action in tort (*delict or quasi-delict*) either the place where the defendant did the act which caused the injury, or the place where the last event necessary to make the defendant liable for the alleged tort (*delict or quasi-delict*) occurred, is in the State of the original court.

(2) Notwithstanding anything in subsection (1), the original court has no jurisdiction:

(a) in the cases stated in clauses (c), (e), (f) and (g) if the bringing of proceedings in the original court was contrary to an express agreement between the parties under which the dispute in question was to be settled otherwise than by a proceeding in that court;

(b) if by the law of the forum exclesive jurisdiction over the subject matter of the action is assigned to another court.

6. The bases for jurisdiction recognised in Section 5 are not exclusive and the forum may accept additional bases.

7. The forum shall, on terms that it thinks just, adjourn the hearing concerning the recognition of a foreign judgment when an appeal or other method of attack has been taken in the State of the original court, and may adjourn the hearing to allow the judgment debtor a reasonable opportunity for taking such action.

(B) PRINCIPLES ON RECOGNITION OF FOREIGN MONEY JUDGMENTS

(Adopted by the 48th Conference of the International Law Association)

(1) A final judgment for a sum of money rendered by a foreign court in the course of regular proceedings and through the impartial administration of justice shall be given conclusive effect, without the requirement of reciprocity, provided :

(a) the original court had jurisdiction as specified under (2) and (3);

(b) the judgment debtor was given reasonable notice and a reasonable opportunity to be heard;

(c) the cause of action underlying the judgment does not violate the public policy of the forum;

(d) the judgment debtor does not prove that the judgment was procured by fraud.

(2) The requirement of jurisdiction will be satisfied if :

(a) the judgment debtor had submitted to the jurisdiction of the original court by an agreement valid under the law governing the validity according to the choice of law rules of the forum, or

(b) the judgment debtor has voluntarily appeared in the proceeding, not solely for contesting the jurisdiction of the court or for protecting property located within the jurisdiction of the court, or

(c) the judgment debtor had at the time of the beginning of the proceeding his habitual residence in the State of the original court or, being a corporate body, was incorporated or had its principal place of business in the State of the original court, or

(d) the judgment debtor had a commercial establishment or a branch office in the State of the original court and is sued upon a cause of action arising out of the business there done.

(3) Provided the court applied to assumes jurisdiction under similar circumstances, the requirement of jurisdiction will also be satisfied (a) in an action in tort, if the place where the wrong was committed is in the State of the original court, (b) in an action based on contract, if the place of the making of the contract or the place where the contract is to be performed is in the State of the original court.

(4) These principles are not meant to suggest non-recognition by the court applied to of other bases of jurisdiction recognised by the court but not here listed, as, for example, personal service upon the defendant.

(5) An expeditious proceeding, in accord with due process of law, shall be available for the enforcement of foreign money judgments entitled to recognition.