

## FORM A.

(Members of Commonwealth contracting each for itself only.)

.....  
 His Majesty King Edward VIII of Great Britain, Ireland and the British Dominions beyond the Seas King, Emperor of India, (in respect of the Members of the British Commonwealth of Nations enumerated below, each contracting for itself and assuming no liability for each other) .....

## FORM B.

(Members of Commonwealth contracting as a group.)

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 His Majesty King Edward VIII of Great Britain, Ireland and the British Dominions beyond the Seas King, Emperor of India, (in respect of the Members of the British Commonwealth of Nations enumerated below contracting as a group and assuming liability for each other) .....

## FORM C.

(Members of Commonwealth contracting as a group but excluding liability for each other in respect of specific matters.)

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 His Majesty King Edward VIII of Great Britain, Ireland and the British Dominions beyond the Seas King, Emperor of India, (in respect of the Members of the British Commonwealth of Nations enumerated below, contracting as a group and assuming liability for each other except in regard to any liability specifically undertaken by one of them) .....

## Memorandum on the Effect of the Draft Naval Treaty of 1936 in regard to the Liabilities of the Members of the British Commonwealth participating therein.

1. The discussions which took place at the 4th meeting of the 1st Committee of the London Naval Conference and the refusal of the British Delegation to accept certain amendments to the draft of the recent London Naval Treaty proposed by the Union Government, render it desirable to consider the effect of a treaty, in the form adopted, on the obligations of the Members of the Commonwealth participating therein.

2. If A, B, C and D, on the one part, and X, on the other, enter into a contract, the question arises whether the result of the agreement is a contractual relationship between A, B, C and D as a group and X, or between A and X, B and X, C and X, D and X? Whatever answer be given to this question, a further question arises, viz., what is the extent of the liability of each of the members of the group *vis-à-vis* X?

3. If the group is the contracting party, then, of course, the group as such would be liable, which means that each would have to see to it that each of the other members of the group performs his obligations. If the contract is construed as one between A and X, B and X, C and X, and D and X, even then, because A, B, C and D appear as the parties of the one part, it is doubtful whether each of A, B, C and D would not be liable for the whole of the obligation undertaken (in solidum). Liability in solidum is, as a general rule, not presumed; but is not excluded merely because it is not expressly stated in the contract that each renders himself liable for the whole. The nature and circumstances of the case may point to solidarity.

4. Coming now to the Treaty, we find that the form of the Treaty is one between the President of the United States, the President of the French Republic, and *His Majesty the King*. This would be an indication that there are only three parties to the Treaty. It is true, lower down in the Preamble, it is made clear that the King is a composite person, and that he acts in respect of the Members of the Commonwealth represented by full powers; nevertheless, this does not do away with the fact that the form suggests that they are taking part in the Treaty as a group.

5. In this connection a perusal of the discussions of the 4th Meeting of the 1st Committee (13th December, 1935) is instructive. At that time the Conference was attended by the United States of America, France, Italy, Japan and the Members of the British Commonwealth of Nations. That did not prevent the Japanese Chief Delegate speaking of them as "All five Powers here", and of the United States of America, Japan and the British Empire as "three powers", apparently counting the Members of the British Commonwealth of Nations as one party.

6. After the Japanese Chief Delegate, Admiral Nagano, had explained, in greater detail, the Japanese plan regarding the common upper limit, the Chairman (First Lord of the Admiralty) remarked: "The original proposal put forward by the Japanese Delegation was that the common upper limit should apply only to Japan, the United States of America and the Members of the British Commonwealth, but to-day the Japanese Delegation are prepared to extend the common upper limit to all the Powers here represented. That, I take it, . . . means that the common upper limit is now extended to every country with a navy; and I am not at all sure whether that would not mean that the Dominions, if they so wished, could each have a common upper limit of their own." This shows that the First Lord of the Admiralty viewed the Members of the British Commonwealth of Nations, under the original plan, as a group forming one party, whereas under the second plan they would each be, individually, a party.

7. Thereupon Admiral Nagano remarked: "We came with the understanding that we are attending a five-Power Conference, but if each of the Dominions is to be counted as an independent country, what will be the number of participants in the Conference?" Mr. de Water replied that if the question had been put to him whether the Conference was a Five Power Conference, he would be content to argue that it was a Six Power Conference, substantiating his argument by a reference to the position of the Union at the League of Nations; but neither the British Delegation nor that of any other Member of the Commonwealth ventured to give a reply to the point raised by Admiral Nagano's query, thus confirming the impression that the Members of the Commonwealth were contracting as a group.

8. Furthermore, exception was taken to the words "of each" in the proposal of His Majesty's Government in the Union to insert, after the Titles of the King in the Preamble of the Treaty, the phrase: "in respect of each of the Members of the British Commonwealth of Nations enumerated below"; as well as to the proposal of the same Government to add the words: "each assuming liabilities in respect of himself only", should the words "of each", to which exception had been taken, be deleted in the proposed phrase. Both amendments suggested by the Union Government aimed at clearing up the ambiguity whether the Members of the Commonwealth participated in the Treaty as a group or individually.

9. The proposal of the Union Government to insert in the Treaty a clause which was intended to make it clear that each Member of the Commonwealth assumed liability for himself only and not for any other member was equally declared unacceptable.

10. When the above facts are kept in mind then the presumption in favour of the idea that the Members of the Commonwealth were expected to contract as a group becomes irresistible. This would mean that each of the Members of the British Commonwealth of Nations would be liable, *vis-à-vis* France and the United States, for the performance of their obligations by the other members of the Commonwealth. The Union was never prepared to accept such liability, as it had no authority to command any Member of the Commonwealth to do anything. It wished to confine itself to matters falling within its own jurisdiction, for which only it was prepared to accept liability.

Capetown,

4th June, 1936.

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