

# The Common Market Judgments Convention—Its Threat and Challenge to Americans

Persons living in the United States are now in danger of being deprived of property located in Europe as a result of judicial actions which might be termed "unfair." This threat is inherent in the terms of the new Common Market Convention Relating to the Jurisdiction of Courts and the Enforcement of Judgments in Civil and Commercial Matters,<sup>1</sup> which became effective on February 1, 1973.<sup>2</sup>

The "full faith and credit"<sup>3</sup> clause of the American Constitution was inserted to ensure the smooth functioning of our own federal system. The Judgments Conventions of the European Economic Community (E.E.C.) represents a type of "full faith and credit" clause for the Common Market nations, and, as such, should substantially contribute toward a more efficient allocation of judicial business between the member states. However, while improving the situation of litigants within the E.E.C., the Convention considerably worsens the position of persons domiciled outside the Common Market. Since no court will recognize or enforce a foreign judgment unless the original court has jurisdiction, an understanding of this Convention first calls for an analysis of the bases of jurisdiction used by the nations within the E.E.C.

## I. Jurisdictional Concepts in Civil Law

### A. Usual Grounds for *In Personam* Jurisdiction

The civil law countries, like the United States, accept domicile (and sometimes residence) of the defendant as a proper basis for jurisdiction over both the subject matter and the person. Civilian nations also claim jurisdiction where either a tort is committed or a contract is made or to be performed<sup>4</sup> in

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<sup>1</sup>Convention Relating to the Jurisdiction of Courts and the Enforcement of Judgments in Civil and Commercial Matters, translated in 2 CCH COMM. MKT. REP. ¶6003 (1968).

<sup>2</sup>206 Common Market Reports, Issue No. 213, Feb. 13, 1973, Part II, 2 COMM. MKT. REP.

<sup>3</sup>U.S. CONST., art. IV, §1.

<sup>4</sup>SCHLESINGER, COMPARATIVE LAW 291 (1970).

their countries. These concepts are really not so different from many of our own. In reaching a party located outside the territory of the court, however, we have added the qualifications of the *International Shoe Co.* case,<sup>5</sup> and its offspring,<sup>6</sup> to the effect that there must have been sufficient minimum contacts to satisfy traditional notions of fair play and justice.

Those same cases, which likewise establish the perimeters within which the "doing business" test can be applied, often serve as the basis upon which U.S. courts take jurisdiction over an out-of-state corporation. In contrast, merely "doing business" is not a sufficient ground for jurisdiction in civil law. In continental Europe, the place to sue a business entity is usually at its seat ("seige social"). In addition, action may be brought where a company has a branch or an "establishment," but generally only for claims arising out of the activities of the branch or establishment.<sup>7</sup>

Despite divergent analytical approaches, the foregoing European concepts in practice seldom give cause for serious complaint on the part of common law jurists. However, there do exist on the continent other jurisdictional grounds which American attorneys find highly objectionable. For convenience, let us label such grounds as "excessive."

## B. Excessive Bases for In Personam Jurisdiction

### 1. NATIONALITY OR DOMICILE OF THE PLAINTIFF

Article 14 of the French Civil Code provides:

An alien, even not residing in France, . . . may be called before the French Courts for obligations incurred by him in a foreign country toward French persons.<sup>8</sup>

Under this provision, the French court will take jurisdiction over a foreign defendant simply on the basis of the French nationality of the plaintiff. The defendant need not have stepped foot in France nor, indeed, have had any other contact with that nation.<sup>9</sup> Article 14 applies to both torts and contracts.<sup>10</sup>

For example, assume a Delaware Corporation, D, makes a contract with a French chemist, P. D does not even know P is French. A dispute arises and P returns to France where he sues D in a French court. That court would take jurisdiction on the basis of P's nationality.<sup>11</sup> If the corporation had known P was

<sup>5</sup>*International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

<sup>6</sup>*See, e.g., McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958); and *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

<sup>7</sup>SCHLESINGER, *supra* note 4, at 288.

<sup>8</sup>(1804).

<sup>9</sup>SCHLESINGER, *supra* note 4, at 607, and De Vries, *Jurisdiction in Civil Law Countries*, 55 AM. BAR J. 246 (1969).

<sup>10</sup>SCHLESINGER, *supra* note 4, at 608.

<sup>11</sup>*Id.* at 607.

a Frenchman, D could have protected itself by having had P sign a waiver of his rights under Article 14, which the French courts will recognize.<sup>12</sup> Minus such a waiver, jurisdiction in accordance with French law, lies in France.

Or assume A, a vacationing American, has an automobile collision in Italy with B, a Swede. B's car is insured by C, a French insurance company. C pays B for the damages to his car. Under Article 14, C as a subrogee of B, may sue A in a French court—even though A has never been in France.<sup>13</sup>

The situation is equally onerous in reverse. Suppose a New York Corporation, P, makes a contract with D, a Frenchman domiciled in New York. A disagreement arises. P sues D in a New York court and obtains a valid, final New York judgment. D has no assets in New York but owns an apartment house in Paris. P then asks the French court in Paris to recognize the New York judgment and to execute against D's assets in Paris. Article 15 of the French Civil Code states:

A Frenchman may be called before the French Court for obligations incurred by him, in a foreign country, even towards an alien.<sup>14</sup>

French cases have held the remedy available under Article 15 is exclusive. Since P could have sued D in France initially, French law concludes that the courts of no other nation could have jurisdiction over the case. Consequently, in the eyes of the French judge, the New York court would have lacked jurisdiction and the New York judgment would not be entitled to recognition.<sup>15</sup>

Luxembourg's Code contains the same jurisdictional concepts.<sup>16</sup> Italy<sup>17</sup> and Belgium<sup>18</sup> also recognize jurisdiction predicated upon the nationality of the plaintiff—but only as a retaliatory measure against nations, like France, who assert such jurisdictional claims against Italian or Belgium citizens. Holland permits jurisdiction to be based on the *domicile* of the plaintiff.<sup>19</sup>

## 2. PRESENCE OF ASSETS FOR IN PERSONAM JURISDICTION

Under Section 23 of the German Code of Civil Procedure, German courts are vested with jurisdiction over non-residents who have assets in that country. This provision confers in personam jurisdiction and should not be confused with the American concept of in rem jurisdiction. Jurisdiction under Section 23 is available regardless of the value of the assets and is not limited to the amount of the assets.<sup>20</sup>

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>(1804).

<sup>15</sup>SCHLESINGER, *supra* note 4, at 609.

<sup>16</sup>LUXEMBOURG CIVIL CODE, art. 14 (1807); Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967).

<sup>17</sup>See, ITALIAN CODE CIV. PROC., art. 4(4) (1942), Nadelmann, *supra* note 16, at 999, n. 26.

<sup>18</sup>Law on Jurisdiction on March 25, 1876, arts. 53, 54 [1876] *Pasinomie* (Belgium) 121; Nadelmann, *supra* note 16, at 999, n. 25.

<sup>19</sup>DUTCH CODE CIV. PROC., art. 12(3) (1838); Nadelmann, *supra* note 16, at 999, n. 27.

<sup>20</sup>Nadelmann, *supra* note 16, at 999.

Suppose D, a Californian, inherits a small apartment in Germany worth \$10,000. While driving in California, he hits a German tourist, P. P returns to Germany and sues D for \$40,000. Under Section 23, the German courts have jurisdiction over D for the full \$40,000 claimed—even though D may never have been outside the United States.

Perhaps the most notorious example of the use of this basis of jurisdiction was the case involving the skier, Jean-Claude Killy. The plaintiff therein brought a paternity suit against Killy in Austria. Since he had long since departed from that nation, the Austrian court took jurisdiction over him on the basis of a provision in the Austrian law similar to Section 23 of the German Code. The property of Killy which provided this jurisdictional foundation consisted of a piece of underwear he had left in an Austrian Hotel.<sup>21</sup>

## **II. Excessive Bases for Jurisdiction Under the E.E.C. Convention**

These excessive bases for jurisdiction are not new. Articles 14 and 15 of the French Civil Code date back to 1804, the Luxembourg provisions to 1807, and the German assets test to 1877. However, so long as American defendants had, for example, no property in France against which execution might be levied, they could often ignore a French Article 14 proceeding on the theory that they had nothing in France and no other nation would recognize or enforce a judgment predicated on such a tenuous jurisdictional ground. This feeling of safety is no longer justified under the E.E.C. Judgments Convention.

That Convention begins with a stipulation that no court of a Common Market nation will take jurisdiction over any person domiciled in the Common Market on the basis of one of these "excessive" grounds for jurisdiction. Article 3 specifically rules out Articles 14 and 15 of the French Civil Code and Section 23 of the German Code of Civil Procedure, as well as comparable provisions of the laws of other member countries. Thus, it will no longer be possible for a French plaintiff to sue a German defendant in a French court merely on the basis of the plaintiff's nationality; likewise, a German court cannot assert in personam jurisdiction over an Italian, who happened to have a small piece of property in Germany. Even nationals of third countries, who are domiciled within the Common Market, will receive the protection of Article 3. This means that a Frenchman will not be able to invoke Article 14 of the French Civil Code to sue an Argentine who is domiciled in Holland.

The situation of persons domiciled outside the Common Market is, however, far different. Under Article 4 of the E.E.C. Judgments Convention, any of the "excessive" grounds of jurisdiction may be used against persons domiciled

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<sup>21</sup>This report inspired an American procedure expert to express his feelings in poetry. See, Siegal, *Pack Up Your Troubles—Carefully*, 76 CASE AND COMMENT 62 (1971).

outside the Common Market.<sup>22</sup> Moreover, under Paragraph 2 of Article 4, any person domiciled within the E.E.C., regardless of his nationality, must be treated as a national of that state for the purpose of invoking the "excessive" bases of jurisdiction. Hence a Japanese domiciled in France can now use Article 14 of the French Civil Code to sue in a French court a defendant domiciled in the United States.<sup>23</sup>

Assume, for instance, that P, a Japanese citizen domiciled in Paris, makes a contract in New York to be performed in New York with D, an American citizen domiciled in New York. P can now sue D in the courts of France pursuant to Article 4 of the E.E.C. Convention. If D has no assets in France, but owns a condominium in Italy, P can then take his French judgment to Italy and compel the Italian courts to recognize that French judgment and execute against the condominium. Article 26 of the E.E.C. Judgments Convention obligates the member nations to recognize each other's judgments.

Finally, the new members of the E.E.C.—Ireland, England, and Denmark—are required to accede to this Convention.<sup>24</sup> Hence the day will soon come when a Brazilian plaintiff, domiciled in France, can sue an American in the French courts under Article 14 and then compel an English court to execute that French judgment against any assets the American may have in England.

### III. Future Directions

Fortunately a way out of this difficulty does exist. Article 59 of the E.E.C. Convention permits its members to conclude with non-member nations judgment treaties in which they agree not to enforce judgments based on the "excessive" jurisdictional grounds against domiciliaries of the non-E.E.C. nation. The United States Department of State is currently negotiating such a treaty with Great Britain. The American draft of this agreement, in addition to setting forth specific grounds for jurisdiction which shall give rise to a judgment entitled to recognition in either nation, expressly prohibits the recognition of judgments in which jurisdiction was based on nationality, domicile or residence

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<sup>22</sup>See, e.g., De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L. Q. 706 (1968).

<sup>23</sup>*Id.* at 710.

<sup>24</sup>Article 220 of the Rome Treaty (1957) which established the Common Market provides that "member states shall . . . enter into negotiations with each other with a view to ensuring . . . the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals. . . ." 298 U.N.T.S. 3 (1958). Article 63 of the E.E.C. Judgments Convention, *supra* note 1, requires that new members of the Common Market "agree that this Convention shall serve as a basis for such negotiation between the Contracting States and that State as are necessary to assure the implementation of Article 220 . . . of the Treaty Establishing the European Economic Community [the Rome Treaty]." Article 3(1) of the Treaty in which Great Britain, Ireland, and Denmark joined the E.E.C. provides "The new member states undertake to accede to the Conventions provided for in Article 220 . . ." of the Rome Treaty. Act concerning the Conditions of Accession and the Adjustments to the Treaties (1972), 2 CCH COMM. MKT. REP. ¶7035.

of the plaintiff.<sup>25</sup> In personam jurisdiction founded on the mere presence of assets is also precluded.<sup>26</sup>

Once this British treaty has been concluded and ratified, the United States should move as rapidly as possible to obtain similar agreements from the other Common Market members—not only to solve the excessive jurisdiction problem, but also to smooth the flow of international transactions by ensuring appropriate recognition of judgments from other nations.

At present judgments from foreign countries are usually recognized in the United States,<sup>27</sup> if the rendering court had jurisdiction and the defendant was given adequate notice and an opportunity to be heard. The Uniform Monetary Judgments Act, enacted in six states, provides express statutory authority for such recognition of judgments from other nations.<sup>28</sup>

In contrast, non recognition of American judgments abroad is more the rule than the exception.<sup>29</sup> For example, U.S. judgments are reviewed on the merits in Belgium. In Germany, they are subject to a statutory reciprocity requirement which is often difficult to establish to the satisfaction of German judges who are accustomed to looking to statutes, rather than state court decisions, as the source of law. American judgments are not enforceable in The Netherlands because that nation's law requires the existence of a treaty. In the rest of Western Europe, as well as Latin America, the situation is not substantially different.<sup>30</sup>

Obviously drafting and negotiating these agreements on recognition of judgments will require a good deal of legal manpower. At present, there are in the State Department only two attorneys, available on a part time basis, to handle all the conventions in the private international law field. If we are to meet the challenge posed by this new E.E.C. Judgments Convention by securing the necessary treaties from each of the Common Market nations, the practising bar should take the initiative by communicating its interest to the State Department, by securing the assignment of more lawyers to this task, and by assisting in the international negotiating process.

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<sup>25</sup>Unpublished Draft Convention Between the United Kingdom of Great Britain and Northern Ireland and the United States of America Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, art. 15(2) (b) (iv) and (v).

<sup>26</sup>*Id.* at art. 15(2) (b) (iii).

<sup>27</sup>Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282, 1288 (1969).

<sup>28</sup>See the Uniform Foreign Money Judgments Recognition Act, 98 UNIFORM LAW ANN. 28 (1965 Suppl.), adopted by California, Indiana, Maryland, Michigan, New York and Oklahoma.

<sup>29</sup>Nadelmann, *supra* note 27, at 1289.

<sup>30</sup>*Id.*