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# The French *Exequatur* Proceeding: The Exorbitant Jurisdictional Rules of Articles 14 and 15 (*Code Civil*) as Obstacles to the Enforcement of Foreign Judgments in France

By THOMAS E. CARBONNEAU\*

## INTRODUCTION

This article examines the jurisdictional problems that might arise when a plaintiff attempts to enforce a foreign judgment in France against a French national or domiciliary. The statement of a hypothetical case is followed by a description and analysis of the substantive French Law, as well as the recently enacted EEC Convention on the Enforcement of Judgments. The application of these legal principles to the facts of the hypothetical case demonstrates unequivocally the unbending nationalistic orientation of the jurisprudence: French courts have construed the relevant *Code* provisions to grant them *exclusive* jurisdiction to hear matters involving French nationals or domiciliaries. As a general rule, foreign judgments rendered against French nationals or domiciliaries by non-Common Market jurisdictions will not be enforceable in France.

## THE HYPOTHETICAL CASE

Fortem, a United States corporation with its corporate headquarters in New Orleans, and Docile, a French *société anonyme* with its *siège social* in Paris, entered into an agreement providing, *inter alia*, that Docile would deliver 45,000 articles of its perfume products to Fortem at its retail sales outlet in Washington, D.C. Docile further agreed to provide Fortem with specially trained bilin-

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gual French personnel to sell the products at a special fashion and perfume festival which was to take place in New York City. The final agreement represented the culmination of fifteen months of intensive negotiations which had taken place at Fortem's corporate headquarters in New Orleans and at its expense. Fortem intended to revolutionize the United States perfume market and considered that its association with the prestigious French firm was indispensable to the achievement of that objective. In order to overcome Docile's reticence, Fortem had invested considerable capital into its projected operations and accepted some unfavorable contractual provisions. In any event, the Presidents of the two respective companies signed the contract in New Orleans at Fortem's corporate headquarters. Docile began performance of its obligations a few months thereafter.

Citing the adverse economic effect of a national workers' strike in France and the increase in the price of raw materials as its reasons, Docile rescinded the agreement unilaterally a few weeks after the delivery of its third shipment to the Washington outlet and after about one-third of the promised personnel had arrived in New York. Fortem learned through other sources that the President of Docile had reconsidered the United States venture and decided that it would be more patriotic and European to keep the company's assets and its investment capital in France and expand its commercial operations on a limited basis in some of the Member States of the EEC Community. Deeming that litigation in the French courts would be costly and would impair its chances of obtaining satisfactory compensation, Fortem decided to initiate an action in a New Orleans court. Upon being informed of Fortem's decision, however, the corporate management of Docile, S.A., sent their Fortem counterparts a letter in which they stated that the company would not "set foot" in a United States jurisdiction. Docile stated that, in its view, only a French court could provide an appropriate resolution of the dispute. Despite the letter, Fortem proceeded to file an action in the United States District Court in New Orleans.

### **THE QUESTION PRESENTED**

The question presented is as follows: In the event that Fortem obtains a default judgment against Docile from the United States District Court in New Orleans, would that judgment be enforceable in France?

## THE ENFORCEMENT OF FOREIGN JUDGMENTS IN FRANCE: THE ORDONNANCE D'EXEQUATUR

In the absence of an international agreement providing for the recognition and enforcement of foreign judgments, the *ordonnance d'exequatur* constitutes the legal procedure by which foreign judgments are given *force exécutoire*, i.e., are given *res judicata* effect and rendered enforceable, in France.<sup>1</sup> Unlike its United States procedural analogue, the *exequatur* proceeding is not a new plenary action, but rather represents an abbreviated procedure and can be likened to a motion: the granting of an *exequatur* is simply the recognition by a French court of the validity and enforceability in France of an already existing judgment rendered by a foreign jurisdiction. With the notable exception of foreign judgments relating to personal status matters (and despite the fact that a foreign judgment, even when it lacks an *exequatur*, may have evidentiary and other legal consequences in French proceedings<sup>2</sup>), foreign judgments which have not been granted an *exequatur* are devoid of legal effect in France as a general rule. The only legal recourse left to the beneficiary of a foreign judgment who has failed to obtain an *exequatur* is to sue in France on his original cause of action.<sup>3</sup>

Although specific reference is made to the *exequatur* in several provisions of the various French *Codes*, most notably in Article 2133 of the *Code civil*, Article 546 of the old *Code de procédure civile* and Article 821 of the *Nouveau Code de procédure civile*, the task of devising rules for its procedural and substantive application was left to the courts.<sup>4</sup> According to a jurisprudence that dates back to the

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1. See 2 H. BATIFFOL & P. LAGARDE, *DRIT INTERNATIONAL PRIVE* Pt. III, ch. III (16th ed. 1976) [hereinafter cited as BATIFFOL]. Only those judgments rendered in the name of a foreign sovereign entity will be granted an *exequatur*. See, e.g., *Elsen et Cie Le Patrimoine c. Boudet*, 60 REV. CRIT. DR. INT'L PR. 554 (1971) (Cass. civ. Ire 6. Jan. 1971), in which the court ruled that Andorra judicial decisions were not those of a foreign sovereign entity. This case was cited in BATIFFOL, *supra* at § 713. For a discussion of the mechanics of an *exequatur* proceeding, see *id.* at §§ 730-34.

2. See P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 587-88 (1967) [hereinafter cited as P. HERZOG]. Professor Herzog notes that, although "[f]oreign judgments relating to personal status have *res judicata* effect in France without *exequatur*", they must be granted an *exequatur* in order to be enforced against persons and property in France. *Id.* at 587. Furthermore, a foreign judgment without an *exequatur* may be used as evidence in an action on the same subject matter or entitle its holder to obtain an attachment. *Id.* at 588. See also G. DELAUME, *AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW* 160-61 (1961); Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L. J. 188, 196-98 (1920).

3. See P. HERZOG, *supra* note 2, at 587 n.1.

4. See BATIFFOL, *supra* note 1, at § 712; C. CIV. (FR.), art. 2133 (DALLOZ 1977-78); C. pr. civ. (FR.), art. 546 (DALLOZ 1975-76); NOU. C. PR. CIV. (FR.), art. 821 (DALLOZ 1977).

first half of the Nineteenth Century,<sup>5</sup> a French court sitting in an *exequatur* proceeding had (until 1964) the authority to engage in a full review of the merits of foreign judgments, especially those involving non-status matters.<sup>6</sup> It could deny enforceability to a foreign judgment if it deemed any factual or legal point to have been decided erroneously by the foreign tribunal.<sup>7</sup> In the opinion of one court: "[J]udges ruling on a request for *exequatur* have general jurisdiction to review a judgment rendered by foreign judges."<sup>8</sup> And, in *Holker v. Parker*,<sup>9</sup> an 1819 case involving the enforcement in France of a United States money judgment, the *Cour de Cassation* held that foreign judgments have no conclusive legal effect in France; the French courts could engage in a general review of the merits of such judgments.<sup>10</sup> Although there had been a more liberal evolution relating to the recognition and enforcement of foreign judgments involving personal status matters,<sup>11</sup> the position taken by the *Cour de Cassation* in *Holker* was reaffirmed in subsequent cases involving non-status foreign judgments.<sup>12</sup>

This all-encompassing discretion not only ran counter to the ostensible purpose of the *exequatur* proceeding (*i.e.*, to avoid double litigation and to prevent post-judgment forum shopping), but was also an unnecessary grant of power since the judge could invoke a number of other grounds to deny *exequatur* to a foreign judgment he considered unsuitable for enforcement in France.<sup>13</sup>

In *Munzer c. dame Jacoby-Munzer*,<sup>14</sup> a landmark case decided in 1964, the *Cour de Cassation* reversed the earlier jurisprudence and laid down new rules relating to the enforcement of foreign judg-

5. See, e.g., Civ. 19 Apr. 1819, I SIREY 19.228; Req. 1 Apr. 1839, I DALLOZ PERIOD. 39.172; Req. 11 Jan. 1843, I DALLOZ PERIOD. 43.305 cited in BATIFFOL, *supra* note 1, at § 729.

6. See Nadelmann, *French Courts Recognize Foreign-Money Judgments: One Down and More to Go*, 13 AM. J. COMP. L. 72, 73-74 (1964). The review power of the courts in relation to foreign judgments on status matters had been abolished partially by the year 1860 and was abandoned completely by the beginning of the twentieth century. *Id.* at 73.

7. See BATIFFOL, *supra* note 1, at § 729.

8. Req. 21 Aug. 1882, I SIREY 84.425, cited in BATIFFOL, *supra* note 1, at § 729 (author's translation).

9. See *Holker c. Parker*, 1 SIREY *Jurisprudence* 62 (1819-1821) Cass. civ. 19 Apr. 1819). For a discussion of this case, see Nadelmann, *Non-Recognition of American Money Judgments Abroad and What To Do About It*, 42 IOWA L. REV. 236, 242-43 (1957).

10. See Nadelmann, *supra* note 9, at 243.

11. See text at and accompanying note 6 *supra*.

12. See Nadelmann, *supra* note 6, at 73.

13. See generally D. ALEXANDRE, LES POUVOIRS DU JUGE DE L'EXEQUATUR 51 (1970).

14. *Munzer c. dame Jacoby-Munzer*, *La Semaine Juridique* [1964] J.C.P. II No. 13590, *Jurisprudence* (Cass. civ. 1re 7 Jan. 1964). See also Ancel, *Observation, id.*

ments in France. Before being granted an *exequatur*, a foreign judgment must satisfy all of the following requirements:

- (1) it must have been rendered by a competent foreign tribunal, *i.e.*, one having both domestic and international jurisdiction to hear the matter;
- (2) it must have been rendered according to regular procedure, *i.e.*, a procedure conforming to the requirements of basic procedural fairness;
- (3) the foreign tribunal must have applied the law designated by French choice of law rules as the law governing the merits of the litigation;
- (4) the judgment must not be tainted by fraud;
- (5) finally, the judgment must be enforceable in the country in which it was rendered.<sup>15</sup>

In establishing the conditions for enforcement, the court also restricted the *exequatur* judge's scope of authority and explicitly prohibited the judge from engaging in a review of the merits of the foreign judgment:

[T]his verification, which suffices to protect the legal order and French interests, the very purpose of the *exequatur* proceeding, constitutes simultaneously in all matters the expression and the limit of the supervisory function of the judge . . . without having him engage in a review of the merits of the [foreign] judgment . . . .<sup>16</sup>

The court's holding relating to the review power (*pouvoir de révision*) of the *exequatur* judge represented a significant departure from former doctrine. Until *Munzer*, the *Cour d'appel* of Paris was the only modern court to have criticized the scope of the *exequatur* judge's authority. In *Charr c. Hazim Ulusahim*,<sup>17</sup> the *Cour d'appel* held that a foreign judgment should be enforceable in France provided it did not violate procedural safeguards or French international public policy concerns (*ordre public*). It reasoned that the *pouvoir de révision* had become an anachronism since it had emerged at a time when the conditions for the granting of an *exequatur* were ill-defined. By refining the requirements and stan-

15. *Id.* (author's translation). It should be noted that the parties need not raise these issues; the *exequatur* judge must ascertain *ex officio* whether these conditions for enforcement have been satisfied. See BATIFFOL, *supra* note 1, at § 717.

16. LA SEMAINE JURIDIQUE, J.C.P. II No. 13590 (author's translation).

17. *Charr c. Idazim Ulahasim*, 83 J. DR. INT'L - CLUNET 164 (1956) (*Cour d'appel* Paris 21 Oct. 1955). See also *Hohenzollern c. Lambrino*, 52 Rev. Crit. Dr. Int'l Pr. 109 (1963) (Cass. civ. 1re 8 Jan. 1963). See generally, BATIFFOL, *supra* note 1, at § 729.

dards, contemporary jurisprudence had obviated any need for its continued application. Finally, the court pointed to the practical consideration that an accurate review of the substance of a foreign litigation might well be impossible precisely because it took place in a foreign judicial setting.<sup>18</sup>

Although the *Charr* reasoning did not surface explicitly in the text of the *Munzer* decision, other cases<sup>19</sup> confirmed that the substance of that decision was meant to act as an approval of the *Cour d'appel's* reasoning in *Charr*.

### THE MUNZER DOCTRINE IN LIGHT OF EEC DEVELOPMENTS

The EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,<sup>20</sup> which came into force on February 1, 1973,<sup>21</sup> embodies the *Munzer* prohibition against a substantive review of the merits of foreign judgments, making the prohibition a part of the European treaty law relating to the six original Member States of the EEC Community. In conformity with Article 220 of the Rome Treaty,<sup>22</sup> the Convention attempts to simplify legal formalities for the recognition and enforcement of foreign judgments by providing for a set of uniform and concise rules<sup>23</sup> which apply, albeit with some notable exceptions,<sup>24</sup>

18. 83 J. DR. INT'L - CLUNET, *supra* note 17, at 167.

19. See *Delle Loesch c. Le Breton*, 55 REV. CRIT. DR. INT'L PR. 289 (1966) (Cass. civ. 1re. 24 Nov. 1965); *Veuve Kolin c. Fondation Ivo Racid*, 60 REV. CRIT. DR. INT'L PR. 743 (1971) (Cass. civ. 1re 3 June 1969); *Vannier c. Yacob dit Msika*, 2 GAZ. PAL. *Jurisprudence* 317 (1970) (Cour d'appel Paris 1re 20 May 1970) (*exequatur* judge cannot review foreign judge's interpretation of a contract); *Société Eurasia*, 2 LA SEMAINE JURIDIQUE [1973] J.C.P. *Tableaux De Jurisprudence* 200 (Cass. civ. 4 Apr. 1973) (court of appeals cannot review merits of foreign judgement).

20. 2 COMM. MKT. REP. (CCH) 6003-96 (1978).

21. *Id.*

22. See INTERGOVERNMENTAL CONFERENCE ON THE COMMON MARKET AND EURATOM, TREATY SETTING UP THE EUROPEAN ECONOMIC COMMUNITY, art. 220, at 69 (1967). In relevant part, Article 220 reads:

Member States shall, so far as necessary, enter into negotiations with each other with a view to ensuring for the benefit of their nationals:

\* \* \*

the simplification of the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

*Id.* See also 2 COMM. MKT. REP. (CCH) Preamble 6004 (1978).

23. See *id.* art. 6003.01.

24. See *id.* art. 1, ¶ 6005. Article 1 of the Convention provides:

This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal . . . .

to most civil judgments rendered by one of the Contracting States.<sup>25</sup>

Article 29 of the Convention clearly proscribes a national court of a Member State from reviewing the merits of a foreign judgment in an enforcement proceeding: "Under no circumstances may a foreign judgment be reviewed as to its substance."<sup>26</sup> Additionally, the Convention provides for a simplified *exequatur* proceeding: "A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required."<sup>27</sup> It also outlined the restrictive grounds upon which a foreign judgment can be denied recognition:

A judgment shall not be recognized:

- (1) if such recognition is contrary to public policy in the State in which the recognition is sought;
- (2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or notice thereof in sufficient time to enable him to arrange for his defense;
- (3) if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;<sup>28</sup>

\* \* \*

In its examination of the grounds of jurisdiction referred to in the foregoing paragraph [Article 27], the court or authority applied to shall be bound by the findings of fact on which the court of the State in which the judgment was given based its jurisdiction.

Subject to the provisions of the first paragraph, the jurisdiction of the court of the State in which the judgment was given may not be reviewed; the test of public policy referred to in Article 27 (1) may not be applied to the rules relating to jurisdiction.<sup>29</sup>

The chief innovation of the Convention, however, consists of the fact that, in matters involving foreign parties, the Convention

The Convention shall not apply to:

- (1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
- (2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- (3) social security;
- (4) arbitration.

25. *Id.*

26. *Id.* art. 29, ¶ 6033.

27. *Id.* art. 26, ¶ 6030.

28. *Id.* art. 27, ¶ 6031.

29. *Id.* art. 28, ¶ 6032.



premises the jurisdiction of a court in a Contracting State upon the domicile rather than the nationality of the parties:<sup>30</sup>

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.<sup>31</sup>

The Convention thereby minimizes, if not eliminates, the obstacles to the recognition and enforcement of foreign judgments which arise from rules of exorbitant jurisdiction,<sup>32</sup> such as those contained in Articles 14 and 15 of the French *Code civil*.<sup>33</sup> Articles 14 and 15 have been interpreted to give French courts exclusive jurisdiction to hear matters involving French nationals.<sup>34</sup> They, therefore, can be invoked by a French judgment debtor to prevent the enforcement of a foreign money judgment in France on the ground that the foreign tribunal lacked international jurisdiction to render the judgment (the first *Munzer* requirement for the enforcement of foreign judgments in France<sup>35</sup>).

To dispel any doubt on this matter, Article 3 of the Convention specifically excludes the application of Articles 14 and 15 of the French *Code civil* against any person domiciled in a Contracting State.<sup>36</sup> Article 4, however, does permit a court in a Contracting

30. *Id.* 6003.01.

31. *Id.* art. 2, 6006.

32. See Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT'L & COMP. L. Q. 44, 49 (1975) [hereinafter cited as Bartlett]. See generally Hay, *The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments — Some Considerations of Policy and Interpretation*, 16 AM. J. COMP. L. 149 (1968); Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282 (1969).

33. The author's translation of Articles 14 and 15 appears in the text at notes 56 and 57 *infra*.

34. See text at and accompanying notes 55-61 and 71-88 *infra*.

35. See text at note 15 *supra*.

36. Article 3 of the Convention provides in relevant part:

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title. In particular, the following provisions shall not be applicable as against them:

\* \* \*

— in France: Articles 14 and 15 of the civil code (*Code civil*);

\* \* \*

State to apply rules of exorbitant jurisdiction to a defendant who is not domiciled in the EEC Community:<sup>37</sup>

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall . . . be determined by the law of that State.

As against such a defendant, any person domiciled in a Contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of Article 3 [*i.e.*, Articles 14 and 15 of the French *Code civil*], in the same way as the nationals of that State.<sup>38</sup>

Accordingly, in an enforcement proceeding in which an Italian court rendered a default judgment against a French defendant which the Italian plaintiff seeks to have enforced in France against the assets of the judgment debtor, Articles 14 and 15 of the French *Code civil* could not be invoked to deny recognition and enforcement of the foreign judgment in France. Yet, in a similar enforcement proceeding between a French defendant and a United States party in which the latter obtained a default judgment against the French national in a United States jurisdiction, the provisions of the Convention would be inoperative and the French exorbitant jurisdictional rules could be invoked to deny *exequatur* to the United States judgment. Arguably, Articles 14 and 15 would not be invoked against a United States party which had a subsidiary, hence a domicile, in a Member State. Article 5 (5) of the Convention reads, "A person domiciled in a Contracting State may, in another Contracting State, be sued: . . . (5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated."<sup>39</sup> The notion of domicile contained in Article 5 (5), however, has been interpreted by the drafters of the Convention to be applicable only when the corporate seat of the company is located in a Member State.<sup>40</sup> The Convention does not define the term

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37. See Bartlett *supra* note 32, at 53, 54.

38. 2 COMM. MKT. REP. (CCH) art. 4, 6008 (1978).

39. *Id.*, art. 5(5), 6009 (1978).

40. See Bartlett, *supra* note 32, at 54 n.556. Although it goes beyond the factual parameters of the hypothetical case, an additional jurisdictional complication might arise in the event that the European subsidiary of a United States company were a wholly-owned company under the laws of a Member State. In these circumstances, the European subsidiary conceivably would sue in the jurisdiction of its domicile, arguing that its corporate seat is within the EEC, and have that judgment enforced in France under the Convention, thereby avoiding the application of the French rules of exorbitant jurisdiction. This possibility, how-

“corporate seat,” rather, it leaves that determination to the national courts of the Contracting States.<sup>41</sup> Under the French rules of private international law, the corporate seat of a company is its corporate headquarters. Accordingly, in an enforcement proceeding in France, a United States company with its corporate headquarters in a United States jurisdiction would be unable to avail itself of the benefits of the Convention, despite the fact that it has a subsidiary in a Member State.

The foregoing analysis of the Convention reveals that its provisions accord with the liberal doctrine established in *Munzer* - in that the Convention abolishes the prerogative of national courts of the EEC Community to engage in a substantive review of foreign judgments. It is equally evident, however, that the Convention is meant only to facilitate the free circulation of judgments which emanate from, and are to be enforced in, EEC jurisdictions. The rebuttable presumption that all judgments are to be recognized and enforced does not extend to foreign judgments rendered in non-EEC jurisdictions.<sup>42</sup> By failing to extend the full faith and credit principle to all foreign judgments, the Convention and, as the following analysis reveals,<sup>43</sup> the *Munzer* jurisprudence, in effect, have given new importance to the French rules of exorbitant jurisdiction.

## AN ANALYSIS OF THE MUNZER REQUIREMENTS FOR THE ENFORCEMENT OF A FOREIGN JUDGMENT IN FRANCE

### 1. *The Foreign Court Must Have Had Domestic And International Jurisdiction*<sup>44</sup>

Even after the *Munzer* decision, some controversy reigned over the question of whether the *exequatur* judge should review a foreign court's application of its own jurisdictional rules. Most French

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ever, would have no effect upon the enforceability in France of a money judgment rendered by a United States court.

41. *Id.*

42. *See id.* at 54-55.

43. *See* text at notes 55-61, 71-88 *infra*.

44. *See generally* BATIFFOL, *supra* note 1, at §§ 718, 720. For a discussion of the requirement that the foreign tribunal be competent (in the context of United States and French securities regulation), see Yates, *Substantive Law Aspects of Foreign Judgments Between Foreigners in France: The Competence Question*, 9 INT'L LAW. 251 (1975). For a summary of the law relating to the *exequatur* proceeding, see COUNCIL OF EUROPE, THE PRACTICAL GUIDE TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDICIAL DECISIONS IN CIVIL AND COMMERCIAL LAW 55-66 (1975).

courts and legal scholars, however, agreed that the judgment must have been rendered by the *proper* foreign tribunal (*i.e.*, one having domestic jurisdiction to hear the action). The satisfaction of this domestic jurisdictional requirement was considered indispensable to the granting of an *exequatur*. In *Bachir c. Dame Bachir*,<sup>45</sup> the *Cour de Cassation* announced that the scrutiny of the procedure followed by the foreign tribunal need not be as rigorous as it had been in the past: “[T]he *exequatur* judge must verify if the proceeding which took place before the foreign jurisdiction was regular, this requirement of regularity must be assessed solely in relation to French international public policy concerns and in respect to the right to be represented by legal counsel . . . .”<sup>46</sup> Legal scholars have applied the general substance of this holding by analogy to the domestic jurisdiction requirement, interpreting it to imply that the *exequatur* judge need no longer ascertain whether the foreign court had domestic jurisdiction to hear the matter and render judgment.<sup>47</sup>

The foreign court’s international jurisdiction raises a more problematic issue. As a preliminary matter, it should be noted that, although the *Munzer* decision effectively abolished the *exequatur* judge’s general prerogative to engage in a reassessment of the merits of a foreign judgment, it did not abridge his authority to determine whether the foreign judgment satisfied the requirements of international regularity. Most notably, it did not abrogate his authority to determine whether the foreign tribunal had international jurisdiction to hear the matter upon which it rendered judgment. Indeed, the *exequatur* judge’s discretion still is quite extensive in this area. Its legitimate exercise does not preclude a review of one or many of the legal elements touching, either directly or indirectly, upon the merits of a foreign judgment as they relate to the foreign tribunal’s jurisdiction.<sup>48</sup>

For example, in *Soc. Italiban c. Lux-Air*,<sup>49</sup> a Lebanese and a Luxembourg airline company entered into an exclusive agency agreement containing a compromissory clause. The latter provided that any disputes arising under the contract would be submitted to a single arbitrator or, in the event that the parties failed to agree on a common arbitrator, to the *Tribunal de commerce* of the Grand

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45. *Bachir c. Dame Bachir*, DALLOZ *Jurisprudence* 95 (1968) (Cass. civ. 1re 4 Oct. 1967).

46. *Id.* (author’s translation).

47. See Mezger, *id.* at 96-97.

48. See text at notes 51-54 *infra*.

49. *Soc. Italiban c. Lux-Air*, 67 *Rev. Crit. Dr. Int’l Pr.* 367 (1978) (Cass. civ. 1re 3 May 1977).

Duchy of Luxembourg. Alleging reasons of commercial reorganization, Lux-Air rescinded the contract unilaterally, whereupon Italiban named an arbitrator and requested that Lux-Air do likewise. In the event that Lux-Air failed to designate an arbitrator within a week, Italiban declared that it would initiate an action before the "competent tribunal." Accordingly, when Lux-Air did not name an arbitrator, Italian brought an action before a Lebanese court. The latter rendered a default judgment against Lux-Air which Italiban sought to have enforced in France.

The *Tribunal de grande instance* and the *Cour d'appel* of Paris denied the request for *exequatur* on a number of grounds, including procedural "irregularity," violation of basic defense rights, and the misinterpretation by the Lebanese tribunal of its own procedural law.<sup>50</sup> On appeal before the *Cour de Cassation*, Italiban contended, *inter alia*, that the court of appeals had engaged in an impermissible review of the merits of the Lebanese judgment.<sup>51</sup> Although it deemed the technical legal grounds upon which the court of appeals denied *exequatur* to be superfluous, the Supreme Court nonetheless upheld its decision, reasoning that, by virtue of the language of the compromissory clause attributing jurisdiction to a Luxembourg tribunal, the Lebanese court lacked international jurisdiction to hear the matter.<sup>52</sup> By establishing a distinction between the review of the merits of a foreign judgment and the scrutiny applied to the foreign tribunal's international jurisdiction, the court minimized the doctrinal importance of the *Munzer* prohibitions against the *pouvoir de révision* of the *exequatur* judge by limiting their application to the later stages of the *exequatur* proceeding. As a consequence, to paraphrase Professor Alexandre,<sup>53</sup> while the *exequatur* judge cannot review the merits of a foreign judgment once it has satisfied the requirements of international regularity, to arrive at the latter determination, he can nonetheless challenge the foreign tribunal's substantive assessment of legal issues, including the grounds upon which it premised its jurisdiction.<sup>54</sup>

Under the *Munzer* conditions, the validity of the foreign tribunal's international jurisdiction is to be assessed according to the jurisdictional rules of the country in which enforcement is sought,

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50. 66 REV. CRT. DR. INT'L PR. 526 (1977) - (Cour d'appel Paris 14 Nov. 1975).

51. Soc. Italiban c. Lux-Air, 67 REV. CRT. DR. INT'L PR. at 367-68.

52. *Id.* at 368.

53. Alexandre, *id.* at 368-69.

54. *Id.* at 369.

namely France.<sup>55</sup> Under the provisions of Articles 14 and 15 of the *Code civil*, which have been construed as containing a grant of exclusive jurisdiction despite their literal language, the French courts have exclusive jurisdiction to hear matters in which the plaintiff or defendant is a French national:

Art. 14 The foreigner, whether or not residing in France, can be brought before the French tribunals, for the execution of obligations contracted by him in France with a French national; he can be brought before French tribunals, for the obligations he contracted in a foreign country with French nationals.<sup>56</sup>

Art. 15 A French national can be brought before a French tribunal, for the obligations he contracted in a foreign country, even with a foreigner.<sup>57</sup>

The exclusive jurisdiction of the French courts is premised solely upon the nationality of a French party, and is assumed regardless of the party's actual residence or domicile and despite the fact that the substance of the litigation and the conduct giving rise to it may be far removed from the French territory or juridical interests.<sup>58</sup> The jurisdictional rule in Articles 14 and 15 extends not only to actions arising out of contractual disputes, as the articles specify, but also has been interpreted to cover every other type of case—for example, torts, quasi-contract and inheritance claims.<sup>59</sup> The few exceptions to this general rule are: (1) actions *in rem* concerning immovable property located in a foreign country; (2) actions such as garnishment or attachment which are to take place in a foreign country; and (3) actions against foreign States acting in a sovereign capacity.<sup>60</sup> The provisions of Articles 14 and 15 apply to both physical and juridical persons. Under French law, as a general rule, the nationality of a corporation is determined by its *siège social*, i.e. the "seat" of its operations.<sup>61</sup>

Clearly, when a party seeks to enforce a foreign judgment in France against a French national, the latter's jurisdictional privilege under Articles 14 and 15 constitutes a significant, if not an insurmountable, barrier to the granting of an *exequatur*. At first

55. See BATIFFOL, *supra* note 1, at § 718.

56. C. Civ. (Fr.), art. 14 (DALLOZ 1977-1978) (author's translation).

57. *Id.* art. 15 (author's translation).

58. 1 G. DELAUME, *TRANSNATIONAL CONTRACTS — APPLICABLE LAW AND SETTLEMENTS OF DISPUTES (A STUDY IN CONFLICT AVOIDANCE)* § 8.02 (1978).

59. *Id.*

60. *Id.*

61. *Id.* at § 8.03.

blush, Article 46 of the *Nouveau Code de procédure civile*<sup>62</sup> appears to lessen the impact of the jurisdictional rule of Articles 14 and 15 by attributing concurrent jurisdiction to the national and foreign courts in tort or contract matters. The article includes the implicit caveat that there must be a sufficient nexus with the foreign jurisdiction:

Art. 46 The plaintiff has the choice of bringing an action either in the place where the defendant resides or:

- in contractual matters, the place of the effective delivery of the thing or the place where the services were performed;
- in tort matters, the place where the tortious act took place or the place in the province in which the injury was suffered;
- in matters mixed, the place where the property is located;
- in matters relating to support payments or contributions to the cost of marriage, the place where the creditor resides.<sup>63</sup>

Despite the apparent textual conflict between it and Article 46, the language of Article 42 of the *Nouveau Code de procédure civile*<sup>64</sup> reinforces the jurisdictional rule of Articles 14 and 15 by providing, or - more precisely - by having been interpreted to provide, that the French courts also have exclusive jurisdiction to hear matters in which the defendant is a French domiciliary. Article 42 of the *Nouveau Code de procédure civile* reads: "The jurisdiction which is territorially competent is, except where indicated otherwise, the place where the defendant resides."<sup>65</sup>

The grant of overwhelming jurisdictional authority that has been read into Articles 14 and 15 nonetheless can be challenged on a semantic basis, *i.e.*, by pointing out that the literal language of Articles 14 and 15 states that a French national *can* sue or *can* be sued in French courts, not that he *must* sue or *must* be sued before them.<sup>66</sup> Furthermore, the parties can waive their jurisdictional privileges by merely so stating in their agreement or by presenting evidence corroborating an intent to recognize the jurisdiction of a foreign tribunal.<sup>67</sup> The French courts, however, have been, and continue to be, extremely reluctant to imply a waiver of these jurisdictional prerogatives.<sup>68</sup> Finally, the *Cour de Cassation* has ruled that

62. Nou. C. Pr. Civ. (Fr.), art. 46 (DALLOZ 1977).

63. *Id.* (author's translation).

64. *Id.* art. 42.

65. *Id.* (author's translation).

66. See Batiffol, *supra* note 1, at § 718.

67. See *id.*

68. See G. DELAUME, *supra* note 58, at § 8.07. In this regard, Mr. Delaume adds the

the French courts will apply neither Article 14 nor Article 15 *ex officio*;<sup>69</sup> the French party must invoke these provisions expressly before the courts in order to avail himself of the jurisdictional prerogatives.<sup>70</sup>

These arguments, however, are unavailing. In litigation, the *Cour de Cassation* has construed the substance of Articles 14 and 15 to carry a jurisdictional privilege greater than that indicated by their literal language. For example in *Consorts Sempère c. Crédit Lyonnais*,<sup>71</sup> the court reversed a lower court decision granting *exequatur* to an Algerian judgment rendered against two French nationals. It reasoned that Article 15 of the *Code civil*

gave the French defendant *the right* not to be brought before any but the French tribunals . . . even if the French debtor is held with or for another who does not have the same nationality, the jurisdiction of the French courts being premised on the French nationality of the parties or one of them . . . .<sup>72</sup>

The holding in *Sempère* affirmed the precedent set in *Dame Huret c. Sieur Huret*<sup>73</sup> in which the same court ruled that the provisions of Articles 14 and 15 "exclud[ed] . . . any concurrent jurisdiction by [a] . . . foreign jurisdiction."<sup>74</sup>

Arguments contesting the absolute jurisdictional prerogative of French nationals under Article 15 have been raised in other contexts, namely in cases involving claims against French insurance companies. Although under certain exceptional circumstances the plaintiff can contend that the French defendant's conduct

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significant qualification that "the conditions required to substantiate a waiver under Article 14 are not the same as those concerning a waiver under Article 15. Since Article 14 constitutes a unilateral privilege granted to any Frenchman to bring action in a French court, all that is required in order to establish the existence of a waiver is some positive manifestation of intent by the French plaintiff that he surrendered his right to sue in a French court. On the contrary, Article 15 has been construed as a double-barreled rule, which does not only give the French defendant the right to defend in a French court, but also assures the foreign plaintiff the right to have access to a French forum. Under the circumstances, the action of one of the parties may not be sufficient to operate as a waiver of Article 15 unless it is established that the other party somehow concurred in waiving the benefit of that provision." *Id.*

69. See *id.*, cases cited in § 8.07 note 6.

70. *Id.*

71. *Consorts Sempère c. Crédit Lyonnais*, 64 REV. CRIT. DR. INT'L PR. 299 (1975) (Cass. civ. 1re 10 Dec. 1974).

72. *Id.* at 300 (author's translation) (emphasis added).

73. *Dame Huret c. Sieur Huret*, 102 J. DR. INT'L - CLUNET 102 (1975) (Cass. civ. 1re 25 June 1974).

74. *Id.* at 103 (author's translation). See also *Dame Camus c. Camus*, 61 REV. CRIT. DR. INT'L PR. 314 (1972) (Cass. civ. 1re 9 Nov. 1971).



amounted to an implied waiver of Article 15, the French courts have insisted that that assertion be corroborated to their satisfaction. The *Cour de Cassation's* recent holding in *C.R.M.A. c. consorts Duport*<sup>75</sup> to the effect that a French defendant's simple failure to appear before the foreign tribunal is not sufficient proof of an implied waiver,<sup>76</sup> makes that evidentiary requirement particularly onerous, if not impossible, to satisfy.

In *Duport*, the widow of an accident victim obtained a default judgment from an Algerian court against her deceased husband's insurer, a French company. Since the mishap took place in Algeria, the Algerian Tribunal took jurisdiction on the basis of the Law of 9 April 1898 which provides that the court of the situs of the accident has jurisdiction over litigation arising therefrom.<sup>77</sup> The *Cour d'appel* of Paris upheld a lower court decision granting an *exequatur* to the Algerian judgment, affirming the foreign tribunal's jurisdiction. The court of appeals went on to state that in any event, the plaintiff's choice of forum had not been fraudulent and that the French defendant had had ample notice of the proceeding. By not making an appearance, the insurance company could only blame itself for the failure of the foreign court to consider jurisdictional objections on the basis of Article 15 of the French *Code civil*.<sup>78</sup>

The *Cour de Cassation* reversed and remanded the decision, taking exception with the *Cour d'appel's* interpretation of the legal presumptions that flowed from a French defendant's failure to appear in a foreign proceeding<sup>79</sup> and thereby thwarting its effort to introduce some notion of fairness and international reciprocity into the judicial construction of Article 15. Reiterating the now-familiar phrase that the text of Article 15 "gives the French defendant *the right* not to be brought before any but the French courts,"<sup>80</sup> the court held explicitly that "the failure to make an appearance before the foreign tribunal does not constitute a waiver . . . of the rules of judicial competence set forth by French law . . . ."<sup>81</sup>

The *Cour d'appel's* attempt to undermine the rigorous nationalistic interpretation of Article 15 was anchored, as it were, in a

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75. *C.R.M.A. c. consorts Duport*, 66 REV. CRIT. DR. INT'L PR. 137 (1977) (Cass. civ. 1re 5 May 1976).

76. *Id.* at 138.

77. *Id.*

78. *Id.* Obviously, where a French defendant appears and makes a jurisdictional objection, no waiver can be implied. See R. SCHLESINGER, *COMPARATIVE LAW* 608-09 (3d ed. 1970).

79. 66 REV. CRIT. DR. INT'L PR. at 138.

80. *Id.* at 137 (author's translation) (emphasis added). See also text at note 72 *supra*.

81. 66 REV. CRIT. DR. INT'L PR. at 138 (author's translation).

rather porous conceptual analysis. A French defendant's failure to make an appearance before a foreign tribunal attests, *inter alia*, to his intent not to recognize that court's jurisdiction. A presumption to the contrary could only be a legal fiction applied for public policy considerations. The French defendant may have no incentive to make an appearance challenging the foreign tribunal's jurisdiction on the basis of French law. An appearance not only would be costly, but also, given the extraordinary scope of Article 15, would be unnecessary in most instances.<sup>82</sup> In *Hadjab c. Cie d'assurances Le Secours*,<sup>83</sup> the *Tribunal de grande instance* of Paris reached the same result as the *Cour d'appel* in *Duport*. Its conclusions concerning waiver, however, were not pronounced *ex cathedra*, but rather in response to the uncontrovertible facts of the case.

As in *Duport*, the plaintiff in *Hadjab* obtained a default judgment from an Algerian court for injuries resulting from an accident in Algeria against a French insurance company. Although the insurance company did not appeal this first judgment, it did inform the plaintiff's counsel by letter that it was unwilling to settle the judgment pending an *exequatur* proceeding. In its correspondence it did not advance any jurisdictional objection to the enforcement of the judgment. This first judgment was voided on a statute of limitations issue, whereupon the plaintiff obtained another default judgment against the defendant. On the basis of a medical report which was ordered in the second judgment, the Algerian court rendered still a third default judgment against the French insurance company. The plaintiff subsequently filed an action to have the judgment enforced in France, and the defendant opposed its enforcement on the basis of Article 15.<sup>84</sup>

The *Tribunal de grande instance* reasoned that the defendant's "persistent failure to appear"<sup>85</sup> in any of the proceedings when it was capable of retaining counsel and advancing its jurisdictional objections in the foreign proceedings

[bore] witness less to the concern to challenge the jurisdiction of the Algerian courts than to that of delaying the settlement of an indemnity in a case in which the civil liability of its client . . . [could not] be contested . . . [its actions] reveal[ed] its intention to wait until the end of a long procedure to invoke . . . [its jurisdictional objections] . . . before the *exequatur* judge . . .<sup>86</sup>

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82. See Huet, *id.* at 141-42.

83. *Id.* at 138 (Trib. gr. inst. Paris 1re Ch. 20 May 1976).

84. *Id.* at 138-39.

85. *Id.* at 140 (author's translation).

86. *Id.* (author's translation).

In view of its analysis of the defendant's conduct, the court held restrictively that

*under the particular circumstances of the case, the defendant company's failure to make an appearance must be considered as implying a waiver of the benefit of the provisions of Article 15 of the French Code civil, which must not be side-tracked from their purpose and must not be used solely for dilatory ends . . . .*<sup>87</sup>

At first blush the holding in *Hadjab* could be interpreted as heralding a new judicial construction of the jurisdictional rule of Article 15 of the *Code civil*. In the last analysis, however, it represents no more than one lower French court's response to the particularly egregious facts of a single case. Moreover, its already limited precedent-setting value might be restricted even further in subsequent litigation involving similar circumstances were the courts to consider the consequences of a completely forthright attitude on the part of the French defendant.<sup>88</sup> For example, raising jurisdictional objections before a foreign tribunal could result in a substantially longer and more costly foreign procedure which would end by the foreign tribunal assuming jurisdiction in the majority of cases. Also, in systemic terms, the provisions of Article 15 enable French jurisdictions to ward off any unwanted or unwarranted foreign interference in domestic legal matters solely on the basis of the defendant's French nationality. Finally, it would seem that, especially in transnational commercial matters, a foreign plaintiff who deals with a French concern should bear the burden of ascertaining the legal implications of initiating a law suit against a French national in a foreign jurisdiction.

The cases concerning the waiver of the Article 42 jurisdictional rule have been decided in the same vein. Unless the French domiciliary accepts the jurisdiction of the foreign tribunal, French courts will deem themselves to have exclusive jurisdiction over matters to which he is a party. For example, in *Dame Patino c. Patino*,<sup>89</sup> the *Cour de Cassation* upheld a decision denying *exequatur* to two United States judgments on precisely that basis. There, the plaintiff, who had been separated from her husband, a French domiciliary, filed an action seeking to have two United States judgments rendered by the New York Supreme Court enforced in France.

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87. *Id.* (author's translation) (emphasis added).

88. See Huet, *supra* note 82, at 142-44.

89. *Dame Patino c. Patino*, 58 REV. CRTT. DR. INT'L PR. 546 (1969) (Cass. civ. 1re 5 Mar. 1969).

These judgments, rendered on 15 July 1949 and 14 July 1951, required the husband to pay his wife \$203,355.34 and \$66,397.75. An agreement dated 10 July 1944, which governed the dealings between the parties, contained an arbitration clause which provided that "all controversies or claims resulting from the . . . execution [of the agreement] would be settled by arbitration under the laws of New York State."<sup>90</sup> On appeal, the plaintiff contested the French lower court's ruling that the United States court lacked international jurisdiction, arguing that it could not so rule without first ascertaining whether, according to New York jurisdictional rules, the United States courts' special lack of jurisdiction in matters normally pertaining to arbitration was absolute or simply relative.<sup>91</sup> The *Cour de Cassation*, however, disregarded the plaintiff's contentions and upheld the lower court's decision on other grounds, namely that the defendant-husband, who had been domiciled in France since 1946, refused to recognize the New York court's jurisdiction. He had contested its jurisdiction in the first proceeding and failed to make an appearance in the second proceeding (a default judgment).<sup>92</sup>

The outcome of these cases points to an evident conclusion. Unless the French party expressly waives the provisions of Articles 14 and 15 of the *Code civil*<sup>93</sup> or those of Article 42 of the *Nouveau Code de procédure civile*,<sup>94</sup> a foreign judgment, involving either a French national or domiciliary, very likely will be denied an *exequatur* in France on the ground that the foreign tribunal lacked international jurisdiction to hear the action. As the *Cour d'appel* of Paris observed recently in *Dame Chartrand c. Giroux*,<sup>95</sup> the French courts will recognize the jurisdiction of a foreign tribunal only when the French jurisdictional rules, as construed by the French judiciary, do not give exclusive jurisdiction to the French courts. Even in the absence of exclusive French jurisdiction, there must be a "sufficient nexus" between the litigation and the foreign jurisdiction which rendered the judgment:

[I]n every instance in which the French rule to the conflict of jurisdiction does not attribute exclusive jurisdiction to the French

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90. *Id.*

91. *Id.*

92. *Id.* See Generally Gaudemet-Tallon, *id.* at 547-49.

93. See text at notes 56-57 *supra*.

94. See text at note 65 *supra*.

95. Chartrand c. Giroux, 104 J. DR. INT'L - CLUNET 880 (1977) (Cour d'appel Paris 5 Mar. 1976). See also Société Mack Worldwide et Mack Trucks c. Compagnie financière pour le commerce extérieur (COFICOMEX), 100 J. DR. INT'L - CLUNET 239 (1973) (Cour d'appel Paris 10 Nov. 1971).

courts, it suffices, for a foreign tribunal to have jurisdiction, that there be a sufficient nexus between the litigation and the country in which the action is brought, that is to say, that the choice of the forum be neither arbitrary, nor artificial, nor fraudulent.<sup>96</sup>

In light of the foregoing analysis of the jurisprudence, it is impossible to take exception with Professor Droz's summary of the legal consequences of Articles 14 and 15 on the enforcement of foreign judgments in France:

[W]e can state today that all foreign judgments rendered against a French national who has not waived his prerogative under Article 15 will be refused recognition and enforcement [in France] if the interested party [the French national] demands it . . . [the denial of an *exequatur*].

As a consequence, except in the case in which the foreign judge was the object of a choice of regular forum implying a waiver of Article 15, *all foreign default judgments rendered against a French national can have no effect in the French juridicial order. In fact, the failure to appear constitutes the best proof of [an intent] not to waive [its provisions]*.

Moreover, even if the French national makes an appearance before the foreign tribunal, his waiver of Article 14 must appear to be certain and unequivocal, and it is well-established that if he argues the merits abroad while reserving the competence of the French courts, recognition and enforcement again can be denied on the basis of Article 15.<sup>97</sup>

## 2. *The Foreign Judgment Must Have Been Rendered According To A Regular Procedure*

This requirement is similar, if not identical, to the first requirement concerning the domestic jurisdiction of the foreign tribunal.<sup>98</sup> The regularity or due process character of the procedure is determined by reference to foreign law, the law of the forum. The *exequatur* judge must ascertain whether the judgment satisfies all the procedural requirements of the foreign jurisdiction, *i.e.*, whether, in fact, it is enforceable in that forum.

The more flexible procedural review standard announced in

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96. 104 J. DR. INT'L - CLUNET (author's translation).

97. Droz, *Réflexions pour une réforme des articles 14 et 15 du Code civil français*, 64 REV. CRIT. DR. INT'L PR. 1, 18 (1975) (author's translation) (emphasis added). For a historical assessment of articles 14 and 15 and a discussion of the case law interpreting them, see O. HOLLEAUX, *COMPÉTENCE DU JUGE ÉTRANGER ET RECONNAISSANCE DES JUGEMENTS* (1970).

98. See generally Batiffol, *supra* note 1, at § 723. See text at notes 44-47 *supra*.

*Bachir*<sup>99</sup> focused directly on this requirement for enforcement. As a result, substantive French law will be relevant to the assessment of the regularity of the foreign procedure only at two very general levels: on the basis of (1) French international public policy concerns and (2) basic defense rights.<sup>100</sup> Moreover, the foreign judgment need not be final in order to be granted an *exequatur*—a judgment which has not been appealed can be enforced in France. If it is on appeal or is appealed after the *exequatur* has been granted, the *exequatur* judge will stay the proceedings or will suspend the effect of the *exequatur* pending the outcome of the appeal.<sup>101</sup>

3. *The Foreign Tribunal Must Have Applied the Law Designated by French Choice of Law Rules as the Law Governing the Merits of the Litigation*<sup>102</sup>

Since the foreign judgment is to be enforced in France, the *Munzer* jurisprudence, although it does not prohibit the foreign tribunal from having recourse to its own conflicts rules, nonetheless demands that the merits of the foreign litigation have been decided according to the law designated as the governing law by the choice of law rules under French private international law. Obviously, this unbending nationalistic conflicts requirement will result in the denial of an *exequatur* to those foreign judgments in which the foreign choice of law rules designate a law other than the one required by French rules as the law governing the merits of the litigation.

Two developments in the jurisprudence have attenuated the inequities that would otherwise inhere in the literal application of this requirement. First, the notion of *equivalence* has been applied to cases in which the foreign tribunal applied a different law than that designated by French choice of law rules. Accordingly, the *exequatur* judge may render a foreign judgment enforceable despite the “erroneous” selection of the governing law by a foreign court, provided the outcome of the decision conforms to the result that would have been reached under the law designated by French choices of law rules.<sup>103</sup> Second, since the *pouvoir de révision* of the *exequatur* judge has been eliminated, the severity with which this

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99. See text at notes 45-47 *supra*.

100. See text at note 46 *supra*.

101. See, e.g., *Epoux Tahon c. Tahon*, DALLOZ *Sommaires* at 71 (1967)) (Cour de Douai 7 Feb. 1967); *Le Guichaoua c. Vincent et al.*, DALLOZ *Informations Rapides* 205 (1974) (Cass. civ. Ire 7 June 1974).

102. See generally BATIFFOL, *supra* note 1, at § 726.

103. *Id.*

choice of law requirement was applied has been lessened considerably. In fact, it will be applied only in a case presenting a blatant misconstruction of the substance of the governing law.<sup>104</sup>

4. *The Foreign Judgment Must Not Be Tainted by Fraud*<sup>105</sup>

The prohibitions against fraud and violations of French public policy concerns speak to the general integrity of the French legal system. As such, they constitute an extremely general ground for review of foreign judgments, and given the wide latitude they afford the *exequatur* judge, they can serve as a fertile source of possible objections to the enforcement of foreign judgments. In a sense, these general notions of fairness fulfill a "backstop" function, permitting the denial of an *exequatur* on other than technical, procedural or substantive grounds. They can be invoked, for example, if the foreign court was particularly lax in applying its jurisdictional, evidentiary or procedural rules.

In short, this condition requires that neither the substance nor the procedure of a foreign judgment violates certain fundamental principles of fairness and justice. These general concerns are of less moment in proceedings involving foreign litigation since the French courts are unable to scrutinize foreign legal procedures closely, and are not faced with rights acquired in a French jurisdiction. The notion of *ordre public* that is to be applied to an *exequatur* matter will be the one existing at the time of the proceeding and not the one which was in effect on the date the foreign judgment was rendered.<sup>106</sup>

With regard to the enforceability of foreign judgments, French public policy requires, for example:

- (1) that the defendant had notice of the action instituted against him - that he was actually and fairly brought before the court;<sup>107</sup>
- (2) that the defendant was regularly represented by legal counsel - that he had a fair chance to present his case;<sup>108</sup>
- (3) that the evidentiary procedure used conform to basic legal standards;<sup>109</sup>

104. *Id.*

105. *Id.* at §§ 725, 727.

106. *Id.* at § 727.

107. *See, e.g.,* Dame Perusin c. Persuin Jovan, 1 GAZ. PAL. *Jurisprudence* 57 (1975) (Trib. gr. Inst. de Nanterre 2 July 1974).

108. *See, e.g.,* Scamnakis c. sa femme, 2 LA. SEMAINE JURIDIQUE [1974] J.C.P. *Tableaux de Jurisprudence* 156 (Trib. gr. Inst. de Nanterre 10 July 1973).

109. *See, e.g.,* Office municipal de la jeunesse de Moenchengladbach c. T. . .; and Office

(4) that the documentation submitted to the *exequatur* judge be substantial enough to enable him to assess the decision according to the requirements for the enforcement of foreign judgments, including *ordre public*;<sup>110</sup>

(5) that the foreign judgment not conflict with a previously-rendered French judgment.<sup>111</sup>

5. *The Foreign Judgment Must Be Enforceable in the Country in Which It Was Rendered*<sup>112</sup>

This requirement overlaps with the domestic jurisdictional procedural requirements already discussed.<sup>113</sup> Suffice it to say that the enforceability of the foreign judgment in the country in which it was rendered is a *sine qua non* of its enforcement in France.

## APPLICATION OF THE LAW TO THE INSTANT CASE

The hypothetical character of Fortem's United States judgment against Docile does not allow for a consideration of how the *exequatur* judge would assess the procedural regularity of the proceeding, the possible *ordre public* obstacles to its enforcement in France or the choice of law problems to which it may give rise. At this preliminary stage, it is possible, however, to evaluate the enforceability of the default judgment in terms of the validity of the international jurisdiction of the New Orleans court according to French jurisdictional rules. The obstacles to enforcement on these grounds are indeed considerable and stem from the fact that the defendant to the action is not only domiciled in France, but also is a French national.

As the discussion of the general doctrine has made apparent, the international jurisdiction of the New Orleans court would be assessed by the *exequatur* judge according to French jurisdictional rules, namely Articles 14 and 15 of the *Code civil* and Articles 42 and 46 of the *Nouveau Code de procédure civile*.<sup>114</sup> Although Article 46 gives the plaintiff, under certain conditions, a choice of fora in

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municipal de la jeunesse de Cassel c. R. . ., DALLOZ *Jurisprudence* 661 (1974) (Cass. civ. 1re 19 Dec. 1973).

110. See, e.g., Cie l'Union c. consorts Ben Lounis, 61 REV. CRIT. DR. INT'L PR. 302 (1972) (Cass. re civ. 1re 21 Apr. 1971).

111. See Batiffol, *supra* note 1, at § 727.

112. See *id.* at § 723.

113. See text at notes 44-47, 98-101 *supra*.

114. See text at notes 56-57, 63, 65 *supra*.



which to bring his action, Article 42 places restrictions on the exercise of his option by providing that the territorially competent jurisdiction is the defendant's place of residence. The subordinate clause in Article 42 stipulating "except where indicated otherwise" might lead the *exequatur* judge to apply the provisions of Article 46 which state that "in contractual matters" the plaintiff may bring the action in "the place of the effective delivery of the thing or the place where the services were performed." In the instant case, were the apparent conflict between the texts of Articles 42 and 46 resolved in favor of the application of Article 46, the proper forum for bringing an action would be either Washington, D.C. or New York City - in any event, a United States jurisdiction. Should Article 42 be deemed applicable, however, it must be recalled that only an explicit and unequivocal waiver of the exclusive jurisdiction of the French court by the French domiciliary would affirm the jurisdiction of the United States tribunal.<sup>115</sup>

On the facts of the instant case, the crucial factor, however, is not the defendant's domicile, but rather his nationality. Despite the theoretical merit of the semantic argument mentioned previously (based on a literal interpretation of the word "can"),<sup>116</sup> the French courts have interpreted the text of Articles 14 and 15 to confer exclusive jurisdiction on the French courts in matters involving a French national who has not waived his jurisdictional prerogatives under these provisions.<sup>117</sup> The meaning of the *Cour de Cassation's* holding in *Consorts Sempère* is unmistakable: Article 15 gives "the French defendant *the right* not to be brought before any but French tribunals."<sup>118</sup> The meaning of *Dame Huret* is equally plain. There, the court ruled that Articles 14 and 15 "excluded . . . any concurrent jurisdiction . . . [of a] foreign jurisdiction".<sup>119</sup> Moreover, from the holdings in *Duport*<sup>120</sup> and *Hadjab*,<sup>121</sup> it is apparent that a French defendant's simple failure to make an appearance before the foreign tribunal to contest its jurisdiction does not amount to an implied waiver of the Article 15 jurisdictional rule, save in the most exceptional case.<sup>122</sup> The strict interpretation and rigorous application of Articles 14 and 15 by the French courts would militate against the

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115. See text at notes 89-92 *supra*.

116. See text at note 66 *supra*.

117. See text at notes 71-92 *supra*.

118. See text at note 72 *supra* (emphasis added).

119. See text at note 74 *supra*.

120. See note 75 *supra* and accompanying text.

121. See text at note 83 *supra*.

122. See text at notes 87-88 *supra*.

enforcement of Fortem's United States default judgment against Docile in France. In fact, the relevant French jurisprudence leads to the unequivocal conclusion that the judgment would not be granted an *exequatur* since the defendant is a French national whose nationality carries with it a privilege of being sued only before the courts of his country.

Although the facts as developed do not permit consideration of the other conditions for enforcement, it goes without saying that the United States court would have to have applied the governing law designated by French choice of law rules to the merits of the litigation and have followed United States procedural prescriptions. The jurisdictional hurdles, however, appear to be dispositive. The relevant provisions of French law, interpreted as attributing exclusive jurisdiction to the French courts in matters involving French nationals and domiciliaries, would defeat the United States court's international jurisdiction to hear the action and would render the United States judgment unenforceable in France.

## CONCLUSION

The liberal development instituted by the *Munzer* decision, in terms of facilitating the recognition and enforcement of foreign judgments in France, appears to have been attained at the price of giving a new doctrinal importance to the French rules of exorbitant jurisdiction—at least for judgments rendered by non-EEC jurisdictions. As illustrated by the facts and probable outcome of the hypothetical case, the inequities which result from the continued application of these rules serve to prevent international reciprocity in a non-EEC context, and also stand as an impediment, indeed a not inconsiderable obstacle, to transnational commercial activity.

Articles 14 and 15 of the French *Code civil* do not pose a policy dilemma. Their principal, if not their sole, justification appears to lie in an obsolete attitude of uncompromising nationalism. United States and other non-EEC parties should take notice of the reach of the French rules of exorbitant jurisdiction and insist that their French co-contractants explicitly waive any jurisdictional prerogative which attaches to their nationality as a result of these provisions. In a more optimistic vein, one would hope that the *Cour de Cassation* or the French Parliament would take an enlightened view of the systemic and practical inequities which inhere in the court's interpretation of Articles 14 and 15 and extend the principle of full faith and credit, embodied in the EEC Convention, to all foreign

judgments irrespective of their jurisdictional origin. Limiting the grounds for the denial of recognition and enforcement to matters of essential public policy not only would promote more secure transnational commercial activity, but also would eliminate one more frustrating technical intricacy in the international administration of justice—adding a much needed degree of basic and broadminded fairness to the resolution of international commercial disputes.