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J.D., Cornell Law School 2003

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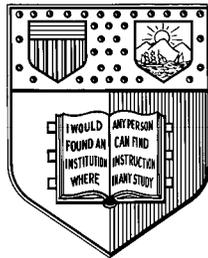
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French Article 14 Jurisdiction, Viewed from the United States

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JOHN R.B. PALMER**

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INTRODUCTION

In the U.S. headquarters of a large international corporation, a famous comparative law professor, retained as a consultant, has just explained Europe's exorbitant bases of jurisdiction to a shocked group of U.S. lawyers. Among other things, the professor has explained that French courts are willing to assert jurisdiction over defendants with no connection whatsoever to France as long as the plaintiff is French. The corporation's general counsel, confident just moments earlier that his company was safe from suit in a country with which it had few contacts, is the first to react:

"The bases of jurisdiction which you just outlined for us, strike me as being not only improper and exorbitant, but as totally uncivilized."

"Just as uncivilized," replies the professor, "as our assertion that

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a contactless forum can obtain personal jurisdiction over a transiently 'present' defendant on the sole ground that he was ambushed by a seedy-looking process server."

So goes, more or less, the fictional dialogue in a casebook that has been used to introduce generations of U.S. law students to comparative law.¹ The casebook's author, when he added this passage to the dialogue, could have been thinking of interchanges with one of his early students, Xavier Blanc-Jouvan.² After all, Professor Blanc-Jouvan, like the law professor in the dialogue, has long been a master of looking at legal problems from two sides, at the very least. As he recently told the Centennial World Congress on Comparative Law, "legal rules must be put back in their original context—social, economic, political, and cultural; they must be appraised not only from the point of view of their formal expression (notably in codes), but also of their actual implementation (hence the importance of case law), their real effectiveness, and their practical consequences."³ He stressed that it is the difference in peoples' perspectives on the law that nourishes debate and deepens our understanding. "More than any other jurist, the comparatist knows the value of confrontation."⁴

In tribute to Professor Blanc-Jouvan, we shall follow his advice in trying to elaborate on the classic dialogue. We thus shall endeavor to weigh French views while looking at France's exorbitant jurisdiction from a U.S. perspective.

Undeniably, France has sometimes succumbed to parochial impulses in jurisdictional matters. Its courts have read the Civil Code's Article 14 as authorizing territorial jurisdiction over virtually any action brought by a *plaintiff* of French nationality (while reading Article 15 to make excessive any foreign nation's exercise of jurisdiction over an unwilling French *defendant*).⁵ Thus, a French person can sue at home on any cause of action, whether or not the events in suit

¹RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 292-93 (3d ed. 1970). For comprehensibility out of context, we have modified the dialogue slightly from the original. The dialogue first appeared in the casebook's second edition in 1959, but the particular exchange paraphrased above did not appear until 1970. In the current edition, RUDOLF B. SCHLESINGER, HANS W. BAADE, PETER E. HERZOG & EDWARD M. WISE, *COMPARATIVE LAW* (6th ed. 1998), the casebook's authors have transformed this exchange to focus more on the effect of the Brussels Convention on U.S. parties sued in France.

²Blanc-Jouvan studied under Professor Schlesinger at Cornell Law School in the 1950s (using the first edition of the famous casebook), and it was Schlesinger who helped to inspire Blanc-Jouvan's lifelong study of comparative law. See Xavier Blanc-Jouvan, *Reflections on "The Common Core of European Private Law" Project*, 1 *GLOBAL JURIST FRONTIERS* No. 1, art. 2, at 1 (2001), at <http://www.bepress.com/gj/frontiers/vol1/iss1/art2> (last visited June 5, 2003).

³Xavier Blanc-Jouvan, *Centennial World Congress on Comparative Law: Closing Remarks*, 75 *TUL. L. REV.* 1235, 1237 (2001).

⁴*Id.* at 1235.

⁵See *CODE CIVIL* arts. 14-15 (Fr.); *infra* Part I.B.2.

related to France and regardless of the defendant's connections and interests. The forum-shopping potential of this jurisdiction based on the plaintiff's nationality is evident, whether or not that potential is realized in actual practice.

The French, however, are by no means alone in their exorbitant jurisdiction. Indeed, most nations appear to have succumbed to similar parochial impulses.⁶ While the details and phrasing of the world's exorbitant bases of jurisdiction differ among nations, there appears to be a common thread: nations tend to give their own people a way to sue at home, at least when the home country will be able to enforce the resulting judgment. French Article 14 jurisdiction fits into this pattern, yet manages to distinguish itself by overtly emphasizing the Frenchness of the plaintiff.

Still, the French are not alone in basing their brand of exorbitant jurisdiction on the plaintiff's nationality. Jurisdiction in the style of Article 14 emigrated with French law to a number of other countries, such as Belgium, Haiti, Gabon, Greece,

⁶As suggested in the dialogue, courts in the United States shock much of the rest of the world by asserting jurisdiction over a defendant based merely on the defendant's transient physical presence. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 111-12 (1999) [hereinafter *Jurisdictional Salvation*]. Also shocking is the U.S. version of attachment jurisdiction, or *forum arresti*, as well as its doing-business jurisdiction. See *id.* at 112-15.

The German code and its offspring take attachment jurisdiction to a whole other level, authorizing jurisdiction not only over the property that is physically present, as the U.S. courts do, but over the person of the defendant whose property it is, even if that defendant lacks any other contacts with the forum country. On the German use of this basis of jurisdiction (which is contained in their Code of Civil Procedure art. 23), or *forum patrimonii*, see KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 14-16 (1999) [hereinafter TERRITORIAL JURISDICTION]; Kurt H. Nadelmann, *Jurisdictionally Improper Fora*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321, 328-30 (1961).

Another exorbitant basis of jurisdiction that is more in line with the French approach is jurisdiction based on the plaintiff's domicile, or *forum actoris*. This basis is narrower than Article 14 jurisdiction in that it excludes nationals domiciled abroad, but also broader than Article 14 jurisdiction in that it includes the country's domiciliaries. This basis is employed in the Netherlands and elsewhere, as well as in France itself today as a result of the Brussels Regulation and Lugano Convention. On the Dutch use of this basis of jurisdiction (which is contained in their Code of Civil Procedure art. 126(3)), see 2 GEORGES R. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES (A STUDY IN CONFLICT AVOIDANCE) § 8.07, at 16-17 (1990); Brian Pearce, Note, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 539-40 (1994). On the French use, required by the Brussels Regulation and Lugano Convention, see *infra* Part I.B.3.

Finally, a number of countries assert exorbitant bases of jurisdiction, including jurisdiction based on the plaintiff's nationality, but only over the national of a country that would assert these bases of jurisdiction over their nationals. In other words, these countries employ exorbitant jurisdiction as a retaliatory measure, in what one author has termed "reactive or anticipatory reciprocity." Pearce, *supra*, at 540. On the Belgian use of this basis of jurisdiction (which is contained in their Code Judiciaire arts. 636 & 638), see 2 DELAUME, *supra*, § 8.07, at 17; Pearce, *supra*, at 540. On the Italian use of this basis of jurisdiction (which is contained in their Code of Civil Procedure art. 4(4)), see MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 89 (1965); 2 DELAUME, *supra*, § 8.06, at 16. On the Portuguese use, see Pearce, *supra*, at 540 (citing their Code of Civil Procedure art. 65(1)(c)).

Luxembourg, the Netherlands, Romania, and Senegal.⁷ However, the Belgians

⁷On Belgium's nineteenth-century adoption of this style of jurisdiction, see Nadelmann, *supra* note 6, at 323.

On Haiti, see Michael Akehurst, *Jurisdiction in International Law*, 1972-1973 BRIT. Y.B. INT'L L. 145, 173 (1975); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 39 (1964); Nadelmann, *supra* note 6, at 324 & n.4 (citing their Civil Code art. 16).

On Gabon, see Law of July 29, 1972, art. 27, *reprinted in relevant part in* 2 DELAUME, *supra* note 6, § 8.02, at 3 n.1.

On Greece, see ALBERT A. EHRENZWEIG, CHARALAMBOS FRAGISTAS & ATHANASSIOS YIANNOPOULOS, AMERICAN-GREEK PRIVATE INTERNATIONAL LAW 29 (1957); Pelayia Yessiou-Faltsi, *Jurisdiction and Enforcement*, in DOING BUSINESS IN GREECE §24.1, at 1 (Eugene T. Rossides et al. eds., 1996) (explaining that their Code of Civil Procedure of 1834 arts. 27 & 28 based jurisdiction on the plaintiff's nationality); Pearce, *supra* note 6, at 538-39.

On Luxembourg, see CODE CIVIL art. 14 (Lux.), which is identical to its French counterpart, aside from inserting references to Luxembourg in place of those to France.

On the Netherlands, see R.D. KOLLEWIJN, AMERICAN-DUTCH PRIVATE INTERNATIONAL LAW 30-31 (2d ed. 1961); RENÉ VAN ROOIJ & MAURICE V. POLAK, PRIVATE INTERNATIONAL LAW IN THE NETHERLANDS 53 (1987) (noting that their Code of Civil Procedure art. 127 formerly based jurisdiction on the plaintiff's nationality); Pearce, *supra* note 6, at 539.

On Romania, see CODUL CIVIL art. 13 (1864) (Rom.), *available at* http://diasan.vsat.ro/pls/legis/legis_pck.frame (last visited June 24, 2003); MICHEL B. BOÉRESO, ÉTUDE SUR LA CONDITION DES ÉTRANGERS D'APRÈS LA LÉGISLATION ROUMAINE RAPPROCHÉE DE LA LÉGISLATION FRANÇAISE 326-29 (Paris, V. Giard & E. Brière 1899); Chr. J. Suliotis, *De la condition des étrangers en Roumanie*, 14 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 559, 565 (1887) (indicating that this provision of the Romanian Civil Code was interpreted expansively by the Romanian courts, much as the French Article 14 has been interpreted expansively by the French courts); *see also* Renee Sanilevici, *The Romanian Civil Code and Its Fate Under the Communist Regime*, in EUROPEAN LEGAL TRADITIONS AND ISRAEL 355, 357 (Alfredo Mordechai Rabello ed., 1994) (noting that the Romanian Civil Code of 1864 was modeled closely on the French Civil Code).

On Senegal, see 2 DELAUME, *supra* note 6, § 8.02, at 3 n.1.

According to Akehurst, *supra*, at 173, the Canadian Province of Quebec also bases jurisdiction on the plaintiff's nationality. However, this appears to be incorrect, both today and at the time Akehurst was writing. Akehurst supports his assertion by citing J.-G. CASTEL, CONFLICT OF LAWS 951, 953 (2d ed. 1968). That source simply reproduces the text of Quebec's Civil Code of 1866 art. 27, which read: "Aliens, although not resident in Lower Canada, may be sued in its courts for the fulfilment of obligations contracted by them in foreign countries." While this provision seemed to show the influence of France's Article 14, it nonetheless lacked any explicit reference to the plaintiff's nationality. More importantly, it was read not to confer jurisdiction, but merely to make clear that the fact of the defendant's being an alien did not oust jurisdiction. *See* JEAN-GABRIEL CASTEL, PRIVATE INTERNATIONAL LAW 240 (1960). Thus, courts had to rely on one of the jurisdictional bases provided in the Code of Civil Procedure, *see id.* at 240 & n.35, and these bases did not include a plaintiff's nationality rule, *see* CODE OF CIVIL PROCEDURE arts. 68-75 (2003) (Que.); CODE OF CIVIL PROCEDURE ANNOTATED arts. 94-104 (Philippe Ferland ed., Wilson & Lafleur 1964) (Que.); CODE OF CIVIL PROCEDURE OF LOWER CANADA arts. 34-42 (Ottawa, Malcolm Cameron 1867) (Que.); QUEBEC CIVIL LAW 701-04 (John E.C. Brierley & Roderick A. Macdonald eds., 1993). Moreover, while the text of art. 27 had remained essentially unchanged since it was first proposed by the drafters of the Civil Code of 1866, *see* CIVIL CODE 1866-1980: AN HISTORICAL AND CRITICAL EDITION 23 (Paul-A. Crépeau & John E.C. Brierley eds., 1981); *Second Report of the Commissioners Appointed to Codify the Laws of Lower Canada in Civil Matters*, in CIVIL CODE OF LOWER CANADA 139, 151, 253 (Quebec, George E. Desbarats 1865), it was entirely removed from the Civil Code during the revisions of the 1990s, *see* HENRI KÉLADA, CODE CIVIL DU QUÉBEC (2003).

abandoned this approach in 1876,⁸ the Romanians appear to have abandoned it in 1924,⁹ the Greeks¹⁰ and the Dutch¹¹ abandoned it in the 1940s, and the Senegalese limited its use in 1972.¹² France, therefore, remains the most significant country still to exert jurisdiction based on the plaintiff's nationality, and so it is the French who bear the brunt of this rule's criticism.

Accordingly, U.S. commentators love to use Article 14 as an example of exorbitant jurisdiction, one that illustrates how the law of the international jungle puts U.S. litigants at a disadvantage and creates a need for a jurisdiction and judgments treaty.¹³ A hypothetical serves to demonstrate the illustrative power of

⁸Although the Belgians did not formally abrogate their statutory provision until 1949, they ceased applying it in 1876, *see* Nadelmann, *supra* note 6, at 323, except as a retaliatory measure, *see supra* note 6.

⁹*See* CODUL CIVIL (Rom.) (indicating that art. 13 was abrogated by legislation on Feb. 24, 1924), available at <http://www.corpvs.org/> (last visited June 24, 2003). In contrast, much of the rest of Romania's Civil Code of 1864 appears to have remained intact to this day. *See* Flavius A. Baias, *Romanian Civil and Commercial Law*, in LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN 211, 213 n.3, 231 (Stanislaw Frankowski & Paul B. Stephan III eds., 1995) (indicating that the only change to the Civil Code of 1864 was made in "the part dealing with persons and family"); Samuel L. Bufford, *Romanian Bankruptcy Law: A Central European Example*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 251, 251-52 (1997); Sanilevici, *supra* note 7, at 358-59. *But see* John W. Van Doren, *Romania: Ripe for Privatization and Democracy? Legal Education as a Microcosm*, 18 HOUS. J. INT'L L. 113, 139 (1995) (citing H.B. JACOBINI, ROMANIAN PUBLIC LAW 7 (1987), for the proposition that the Romanian "codes of today are radically changed from those inherited from the nineteenth century").

¹⁰The Greeks abandoned such jurisdiction legislatively, by repealing their statutory provision in 1946. *See* EHRENZWEIG ET AL., *supra* note 7, at 30 (identifying the legislation that effected this repeal as the Introductory Law to the Civil Code of 1940); Yessiou-Faltsi, *supra* note 7, at 1 (stating that the Introductory Law to the Civil Code entered into force on Feb. 23, 1946); Pearce, *supra* note 6, at 538-39. *See also* Athanassios N. Yiannopoulos, *Historical Development*, in INTRODUCTION TO GREEK LAW 10 (Konstantinos D. Kerameus & Phaedon J. Kozyris eds., 2d rev. ed. 1993) (explaining that Civil Code of 1940 did not enter into force until 1946 because of the Axis invasion).

¹¹The Dutch abandoned such jurisdiction through a court decision in 1940, which effectively removed plaintiff's nationality as a basis for jurisdiction. *See* 2 DELAUME, *supra* note 6, § 8.06, at 15; KOLLEWIJN, *supra* note 7, at 30-31; J.P. Verheul, *Private International Law*, in INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 263, 280 n.88 (D.C. Fokkema et al. eds., 1978). The Dutch finally repealed their statutory provision in 1992. *See* Th.M. de Boer & R. Kotting, *Private International Law*, in INTRODUCTION TO DUTCH LAW 265, 270 n.21 (J.M.J. Chorus et al. eds., 3d rev. ed. 1999).

¹²The Senegalese have abandoned such jurisdiction in cases where "the judgment must necessarily be enforced abroad." Law No. 72-61 of June 12, 1972, *reprinted in* 2 DELAUME, *supra* note 6, § 8.02, at 3 n.1. Compare our discussion *infra* Part II.A., however, where it becomes apparent that such a limitation may not represent much of a change from the way the jurisdictional basis applies in practice.

¹³*E.g.*, TERRITORIAL JURISDICTION, *supra* note 6, at 13-14; Beverly May Carl, *The Common Market Judgments Convention—Its Threat and Challenge to Americans*, 8 INT'L LAW. 446,

Article 14:

Assume that Emily Sherwin, a New York law professor with property in London, had a car collision in Ithaca, New York, with Xavier Blanc-Jouvan, a law professor visiting from France. Imagine that Professor Blanc-Jouvan sues Professor Sherwin in Paris. This jurisdiction is okay under the French Civil Code's Article 14, being personal jurisdiction based on the plaintiff's French nationality. Moreover, a judgment for Blanc-Jouvan will be entitled under the Brussels Regulation to recognition and enforcement against Sherwin's property in England.

Now assume conversely that the collision was in Paris. Imagine that Sherwin sues Blanc-Jouvan in New York. This jurisdiction is impermissible under U.S. law. If a default judgment were rendered, neither France nor England (nor any U.S. court) would enforce it, because the lack of personal jurisdiction made the judgment invalid. Even a litigated judgment would enjoy far less than automatic recognition and enforcement abroad.

This hypothetical clearly shows the inequity that can result from exorbitant jurisdiction. In so doing, the hypothetical works to suggest the U.S. motivation for seeking a treaty with the Europeans. In short, U.S. interests are being whipsawed:

447-51 (1974); Kevin M. Clermont, *An Introduction to the Hague Convention*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 3, 4-5 (John J. Barceló III & Kevin M. Clermont eds., 2002); *Jurisdictional Salvation*, *supra* note 6, at 91-94; Nadelmann, *supra* note 6, at 321-28, 330-35; Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 59-60 (1993); Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 Alb. L. Rev. 1237, 1239-40 (1998).

Unsurprisingly, U.S. commentators have not been the only ones to attack Article 14 jurisdiction. For an early German criticism, see L. BAR, INTERNATIONAL LAW: PRIVATE AND CRIMINAL 510 n.12 (G.R. Gillespie trans., Boston, Soule & Bugbee 1883) (calling Article 14 jurisdiction "an invasion of the principles of international law . . . drawn [partly] . . . from the natural desire to protect the interests of [one's] own subjects, which is here carried too far"). For a more recent Dutch criticism, see L.I. De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706, 706-07, 717 (1968) (calling Article 14 jurisdiction the "most disreputable" of the world's "chauvinistic" jurisdictional provisions).

Indeed, the French themselves have often criticized Article 14 jurisdiction. *See, e.g.*, BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 316-17 (3d ed. 2000) (criticizing, while noting that the problem is not terribly serious). French scholars have questioned Article 14 almost from its inception, including in France's first treatise on private international law. *See* FOELIX, TRAITÉ DU DROIT INTERNATIONAL PRIVÉ 213-14 (Paris, Joubert 1843) (arguing that Article 14 is an extraordinary measure). Later, Jean-Paulin Niboyet was a major critic during the early twentieth century, *see* J.-P. NIBOYET, MANUEL DE DROIT INTERNATIONAL PRIVÉ 888-89 (2d ed. 1928) (arguing that Article 14 was bad enough as written, but even worse in the broad way it was construed), although he changed his views during the chaos of the 1930s and 1940s, *see* Nadelmann, *supra* note 6, at 322. Georges Droz is representative of modern France's moderate critics: the limited cure he proposes is to switch to domicile in order to eliminate the nationalist tone of Article 14 or to restrict the remedy to situations where property is in France (and maybe to limit the relief to that property). *See* Georges A.L. Droz, *Réflexions pour une réforme des articles 14 et 15 du Code civil français*, 64 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1, 16-18 (1975).

not only are U.S. citizens still subject in theory to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend in practice to receive short shrift in European courts. More broadly, Article 14 works nicely to illustrate the legal context in which the current negotiations on a world-wide convention are being carried out at The Hague.¹⁴

When invoking this illustration, typical U.S. commentators do recognize that French law differs little from what most other nations accomplish through other exorbitant bases of jurisdiction. Moreover, they acknowledge that this illustration is an extreme one, seemingly without much importance in actual practice, because the French do not use or at least do not abuse their nationality-based jurisdiction all that often.¹⁵ Still, as we can personally attest, some French persons (but not Xavier!) jump to counterattack any U.S. invocation of the illustration, no matter how qualified the invocation.

The issue posed by such unpleasant confrontations is this: Even if Article 14 provides a useful illustration, is that nevertheless an unfair illustration?

I. PAST USE OF ARTICLE 14 JURISDICTION

A. Background for jurisdictional study

France, of course, is a prototypical civil-law country in most respects,¹⁶ including its civil procedure.¹⁷

¹⁴See generally A GLOBAL LAW OF JURISDICTION AND JUDGMENTS, *supra* note 13.

¹⁵See, e.g., Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 115-16 (1998) (observing that anecdotal evidence suggests "European courts rarely render judgments against American citizens or enterprises that have no 'minimum contacts' with the foreign forum"); *infra* note 53. *But see* Russell, *supra* note 13, at 59-60, 78-80.

¹⁶See generally JOHN BELL, FRENCH LEGAL CULTURES (2001); JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW (1998); WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW (1995); CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM (2d ed. 1996); BRICE DICKSON, INTRODUCTION TO FRENCH LAW (1994); CATHERINE ELLIOTT, CAROLE GEIRNAERT & FLORENCE HOUSSAIS, FRENCH LEGAL SYSTEM AND LEGAL LANGUAGE (1998); CATHERINE ELLIOTT & CATHERINE VERNON, FRENCH LEGAL SYSTEM (2000); FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT (1991); ANDREW WEST, YVON DESDEVISES, ALAIN FENET, DOMINIQUE GAURIER & MARIE-CLET HEUSSAFF, THE FRENCH LEGAL SYSTEM (2d ed. 1998).

¹⁷See generally PETER HERZOG & MARTHA WESER, CIVIL PROCEDURE IN FRANCE (1967); Thierry Bernard & Hedwige Vlasto, *France*, in 2 TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE (John Fellas gen. ed., 2003); Robert W. Byrd & Christian Bouckaert, *Trial and Court Procedures in France*, in TRIAL AND COURT PROCEDURES WORLDWIDE 138 (Charles Platto ed., 1990); Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 247-51 (2002); Christine Lécuyer-Thieffry, *France*, in INTERNATIONAL CIVIL PROCEDURES 241 (Christian T. Campbell ed., 1995); Raymond Martin & Jacques Martin, *France*, in 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE (Piet Taelman ed., 2002); Renée Y.

As to jurisdiction, the civil law embraced the Roman idea of jurisdictional restraint, which reflected a spirit of fairness.¹⁸ *Actor sequitur forum rei* was a Justinian maxim pronouncing that the plaintiff follows the defendant's forum. Generally, then, the civil law required the plaintiff to go to the forum at the defendant's domicile, and that forum could entertain any cause of action against the defendant regardless of where it arose. Eventually, there was additional provision for long-arm-like jurisdiction in actions of tort, contract, and property, so that, for instance, a plaintiff could sue for a tort at the place of wrongful conduct. In other words, the civilian tradition somewhat differed, with telling consequences, from the U.S. tradition of tying jurisdiction to the power existing inside the sovereign's territorial boundaries.

Modern French jurisdictional law accepts most of these civilian ideas for its law applicable outside the coverage of the new European treaties.¹⁹ Domicile is thus the foundation of French jurisdiction. Yet socio-economic-political pressures similar to those prevailing in the United States, as well as the usual procedural policies of accuracy, fairness, and efficiency, have pushed France to reach defendants whose acts have caused harm in France.

In its Article 14, however, France went much further, providing:

An alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen.²⁰

At first glance, this statute seems wordy, using two clauses to accomplish what it could have easily accomplished with one. In addition, the statute appears to reach only claims involving contracts between foreigners and French nationals. As it turns out, while unnecessary wordiness does in fact exist, any limitation to contracts does not prevail.

Nauta & Gerard J. Meijer, *French Civil Procedure*, in ACCESS TO CIVIL PROCEDURE ABROAD 131 (Henk J. Snijders ed. & Benjamin Ruijsenaars trans., 1996).

¹⁸See SCHLESINGER ET AL., *supra* note 1, at 379-80, 405, 413-34 (illustrating the difference between civil and common law); Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1203-12 (1984).

¹⁹See NOUVEAU CODE DE PROCÉDURE CIVILE arts. 42-48 (Fr.); JEAN VINCENT & SERGE GUINCHARD, PROCÉDURE CIVILE 327-38, 354-55 (26th ed. 2001); Bernard & Vlasto, *supra* note 17, at FRA-10 to -22; Lécuyer-Thieffry, *supra* note 17, at 244-49 (comparing French rules with Anglo-American principles and explaining French rules of international jurisdiction); Nauta & Meijer, *supra* note 17, at 140, 142. On the treaties' impact, see *infra* Part I.B.3.

²⁰CODE CIVIL art. 14 (Fr.). This translation comes from Henry P. deVries & Andreas F. Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 317 (1959). The French reads:

L'étranger, même non résidant en France, pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français.

In order to understand Article 14's convoluted structure, and in order to appreciate its full scope, we must turn to its legislative history, judicial interpretation, and treaty treatment. By doing this, we shall show that Article 14 jurisdiction is largely a court-made edifice built on a drafting error but one lately extended by international agreement.

B. History of code provision

1. Napoleon's contribution

Article 14 is a product of Bonaparte's Civil Code of 1804.²¹ The Code attempted to unify the array of ordinances and customs in force in different parts of France, including those relating to international jurisdiction.²²

One basis of jurisdiction that existed in some parts of France at that time was jurisdiction to attach or garnish the assets of foreign debtors and even to secure a judgment against those assets in some cases.²³ The impulse underlying this old basis of *forum arresti* jurisdiction—the desire to let one's own people sue at home when enforcement is possible there—appears to have provided at least part of the inspiration driving Article 14.²⁴

The other part of the inspiration behind Article 14 appears to have been the fear that French nationals would be unable to receive fair treatment in foreign courts. This was a time when all of Europe not under French domination was at war with France. Beyond Europe lay barbarism. For the French, suing at home before French judges seemed far preferable to seeking justice abroad, indeed it seemed naturally just.²⁵

Interestingly, however, unrestrained pursuit of such broad aims was not evident in the original draft of what ultimately came to be Article 14. The version

²¹See generally JEAN-LOUIS HALPÉRIN, *THE CIVIL CODE* (David W. Gruning trans., 2000). There has been some debate as to whether French courts could assert jurisdiction based on the plaintiff's nationality prior to the Civil Code, see Nadelmann, *supra* note 6, at 323, but now the accepted view is that this jurisdictional basis was not generally available then, see HÉLÈNE GAUDEMET-TALLON, *RECHERCHES SUR LES ORIGINES DE L'ARTICLE 14 DU CODE CIVIL* 43-52 (1964).

²²See GAUDEMET-TALLON, *supra* note 21, at 75-86; Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 762-63 (1969); Charles Sumner Lobingier, *Napoleon and His Code*, 32 HARV. L. REV. 114, 115, 120-21 (1918).

²³See Nadelmann, *supra* note 6, at 324-26 (noting that this basis of jurisdiction was available in many French cities, including Paris, as early as 1134, and that in 1580 it appeared in the Custom of Paris arts. 173 & 174).

²⁴See GAUDEMET-TALLON, *supra* note 21, at 69-74.

²⁵See *id.* at 52-58; Louis Rigaud, *La conception nationaliste de la compétence judiciaire en Droit international privé: sa persistance et ses origines*, 33 REVUE CRITIQUE DE DROIT INTERNATIONAL 605, 606 (1938).

initially considered by the Conseil d'État read:

An alien, though not residing in France, can be cited before the French courts, for the performance of obligations contracted by him in France with a Frenchman; *and if he is found in France*, he can be brought before French courts for obligations contracted by him in a foreign country toward Frenchmen.²⁶

In other words, the draft did not provide for jurisdiction based merely on the plaintiff's nationality, but instead contained two different bases of jurisdiction, logically separated into two clauses. The first clause provided for jurisdiction based on the forum-directed act of incurring a contractual obligation *in France*. The second clause provided for what might be viewed as a limited form of jurisdiction based on physical presence: if the defendant is contractually obligated to a French national, then the French courts may base jurisdiction on the defendant's transient presence *in France*.

For unknown reasons, the key phrase in the draft—"and if he is found in France"—did not make it into the final version.²⁷ While one is left guessing as to how this occurred, the drafting history does, at least, explain Article 14's convoluted structure, which has remained unchanged in the precisely two hundred years since.

2. Doctrine's development

One might be tempted to read the murky Article 14 narrowly. One might, for instance, assume that it should apply only to contract disputes, or that the defendant must have incurred obligations directly to the French plaintiff. Not so. In a series of cases beginning in 1808,²⁸ the French courts have interpreted the code provision expansively, such that it now merely requires a person currently holding any right to sue to be a French national at the time of commencing suit.²⁹ Thus, in

²⁶See 7 P.A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 12 (Otto Zeller 1968) (1827) (emphasis added) ("*L'étranger, même non résidant en France, peut être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français; et s'il est trouvé en France, il peut être traduit devant les tribunaux de France, même pour des obligations contractées par lui en pays étranger envers des Français.*"); deVries & Lowenfeld, *supra* note 20, at 318 & n.47.

²⁷See 7 FENET, *supra* note 26, at 606, 622; FOELIX, *supra* note 13, at 215 & n.2 (noting that the clause was removed after discussion between the Conseil d'État and the Tribunal); GAUDEMET-TALLON, *supra* note 21, at 75 ("*un inexplicable accident de rédaction*"); deVries & Lowenfeld, *supra* note 20, at 318 & n.47; Nadelmann, *supra* note 6, at 323.

²⁸Ingelheim v. Fridberg, Cass. req., Sept. 7, 1808, 2 Sirey Jur., I, 579 (holding that there is no difference between " *cité* ," in the first clause of Article 14, and " *traduit* ," in its second clause, and that therefore French courts can take jurisdiction over alien defendants regardless of where they have incurred their obligations to French nationals).

²⁹See generally AUDIT, *supra* note 13, at 315-26; 2 DELAUME, *supra* note 6, §§ 8.02-8.05; YVON LOUSSOUARN & PIERRE BOUREL, DROIT INTERNATIONAL PRIVÉ 489-97 (4th ed. 1993); PIERRE MAYER, DROIT INTERNATIONAL PRIVÉ 198-203 (4th ed. 1991); deVries & Lowenfeld, *supra*

our hypothetical above, Professor Blanc-Jouvan could sue Professor Sherwin in France for a tort arising entirely in New York.³⁰ This would be so even if Blanc-Jouvan were domiciled in New York.³¹ Moreover, if Sherwin got into a car accident with anyone who happened to have a French insurer, the French insurer could sue her in France.³²

If Sherwin were a domiciliary of France or had some other significant link to France, or if Blanc-Jouvan were a member of some disadvantaged group, then France's asserting jurisdiction would not seem so unreasonable, and could even be accomplished using one of France's now multifold bases of international jurisdiction. The real significance of Article 14, then, lies in settings where no such special justification exists. Indeed, the French courts now see Article 14 as applying *only* when no other jurisdictional basis exists.³³

In interpreting Article 14, the courts often appear to have focused their reasoning on legislative intent. The Cour de cassation held early on that the legislature clearly intended to undercut the principle of *actor sequitur forum rei* when it adopted the code provision.³⁴ Subsequent cases involved textual analysis also, with broad readings given to such key phrases as "obligations contracted by him"³⁵ and "toward Frenchmen."³⁶ To the extent that the courts have articulated a policy justification for their expansive readings, they appear to have followed some of the same impulses that initially inspired the statute. In an early holding that the French plaintiff need not be domiciled in France, the Cour de cassation reasoned

note 20, at 318-30.

³⁰See *Cie du Britannia v. Cie du Phénix*, Cass. req., Dec. 13, 1842, 43 Sirey Jur., I, 14 (interpreting Article 14's "*obligations par lui contractées*" to include tort obligations incurred when an English ship collided with a French ship on the high seas).

³¹See *Bertin v. de Bagration*, Cass. civ., Jan. 26, 1836, 36 Sirey Jur., I, 217.

³²See *Cie La Métropole v. Soc. Muller*, Cass. 1e civ., Mar. 21, 1966, D. 1966, 429; see also *Wieldon v. Hébert*, Cass. req., Aug. 18, 1856, 57 Sirey Jur., I, 586 (allowing suit by the French holder of a negotiable instrument, even though the instrument was originally made out to an alien); *Forman & Cie v. Pugh*, Cass. civ., Mar. 9, 1863, 63 Sirey Jur., I, 225 (allowing suit by a French widow for debts owed to her deceased husband, even though the husband had not been a French national, and even though she had not herself been a French national during the marriage). Corporations as well as individuals can invoke Article 14. See AUDIT, *supra* note 13, at 319.

³³See AUDIT, *supra* note 13, at 300-01, 317 (citing sources); MAYER, *supra* note 29, at 201; H. Gaudemet-Tallon, *Nationalisme et compétence judiciaire: déclin ou renouveau?*, 1987-1988 TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 171, 177 (1989).

³⁴See *Ingelheim v. Fridberg*, Cass. req., Sept. 7, 1808, 2 Sirey Jur., I, 579.

³⁵See *Cie du Britannia v. Cie du Phénix*, Cass. req., Dec. 13, 1842, 43 Sirey Jur., I, 14; *Cie d'ass. Industrie française v. Rydes & Cie*, Cass. civ., Aug. 12, 1872, 72 Sirey Jur., I, 323.

³⁶See *Arnold v. Fontaine*, Cass. vac., Sept. 25, 1829, 9 Sirey Jur., I, 373.

that the statute was designed to protect the foreign commerce of French nationals.³⁷ A leading French treatise today infers that the courts' justification must be that French courts should always be open to French nationals, perhaps because all foreign courts do not offer sufficient guarantees of justice.³⁸

This is not to say that Article 14 jurisdiction has no limits, for the courts have carved out some exceptions. It does not apply in real property actions when the immovable lies abroad³⁹ or in cases that require foreign official action.⁴⁰ More significantly, it does not apply when the French plaintiff has clearly renounced the privilege of invoking it in a particular case, either expressly or impliedly; such renunciation can come in advance by contract, such as by including a forum selection or arbitration clause, or after the fact by act, such as by choosing to sue abroad on the claim.⁴¹ Finally, Article 14 jurisdiction is overridden in some cases by particular treaties, which include not only specialized treaties such as the old Warsaw Convention on air transportation⁴² but also the general agreements known as the Brussels Regulation⁴³ and the Lugano Convention.⁴⁴

3. Brussels Regulation's impact

The Brussels Regulation, along with the similar Lugano Convention, deserves special attention not only because of its broad substantive application to ordinary kinds of litigation and because of its wide territorial application in Europe,⁴⁵ but also because it expands Article 14 jurisdiction even while abrogating it within the Brussels and Lugano world.

³⁷See *Bertin v. de Bagration*, Cass. civ., Jan. 26, 1836, 36 Sirey Jur., I, 217.

³⁸AUDIT, *supra* note 13, at 315 ("*que les nationaux devraient toujours pouvoir demander justice devant les tribunaux français; ou encore que les tribunaux de tous les pays n'offrent pas des garanties suffisantes*").

³⁹See *id.* at 318 (citing modern sources).

⁴⁰See *id.* at 318-19 (citing modern sources).

⁴¹See *id.* at 322-25 (citing modern sources); MAYER, *supra* note 29, at 202-03.

⁴²See HERZOG & WESER, *supra* note 17, at 196 & n.168; GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 293 (1977).

⁴³No. 44/2001, 2001 O.J. (L 12) 1, *as amended* 2002 O.J. (L 225) 1 [hereinafter Brussels Regulation]. On the preceding Brussels Convention, see ALAN DASHWOOD, RICHARD HACON & ROBIN WHITE, A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION (1987).

⁴⁴The Lugano Convention extended the Brussels Convention scheme to the EFTA countries, and today still offers an avenue for other countries to affiliate with the Brussels regime. See PETER STONE, CIVIL JURISDICTION AND JUDGMENTS IN EUROPE 4-6, 25-28 (1998).

⁴⁵See Brussels Regulation, *supra* note 43, ch. I; *infra* text accompanying notes 90-92.

From the point of view of a U.S. defendant like Professor Sherwin in our hypothetical, the most frightening thing about these two agreements is that they expose her property all over Europe to the risk of seizure if a judgment is entered against her in France. Prior to these agreements, she might not have cared so much about being sued by Professor Blanc-Jouvan in a French court on the basis of Article 14 jurisdiction. Because other countries would have refused to enforce any resulting judgment, she would have risked losing only property in France. If her heavily mortgaged pied-à-terre in Paris was falling apart anyway, she might have simply ignored the suit, and spent her summers at the villa in Tuscany or the chalet in the Swiss Alps instead. With the Brussels and Lugano scheme in effect, however, Sherwin had better defend and win in the French court, or else she can kiss both the Tuscan villa and the Swiss chalet goodbye. For while France can no longer use Article 14 jurisdiction against domiciliaries of fellow signatories to the Brussels and Lugano agreements,⁴⁶ France can still use it against defendants domiciled elsewhere.⁴⁷ And France's fellow signatory countries must give effect to French judgments, even those based on Article 14 jurisdiction if rendered against an outsider.⁴⁸

Another effect of the Brussels Regulation is to extend the remaining privilege of suing in French courts based on Article 14 jurisdiction to all domiciliaries of France, not just French nationals.⁴⁹ While this *forum actoris* may be somewhat less shocking than the old *for nationaliste français*, it does, of course, broaden the pool of potential plaintiffs that Sherwin needs to watch out for.⁵⁰ And that Article 14 privilege still remains available to French nationals domiciled abroad.⁵¹

II. CURRENT USE OF ARTICLE 14 JURISDICTION

A. Limited uses

For all of the criticism that Article 14 suffers in academic circles,⁵² one could be forgiven for assuming that it is regularly used to bludgeon unsuspecting foreign defendants, and U.S. defendants in particular. In fact, Article 14 appears

⁴⁶See Brussels Regulation, *supra* note 43, art. 3.

⁴⁷See *id.* art. 4(1).

⁴⁸See *id.* ch. III.

⁴⁹See *id.* art. 4(2); Droz, *supra* note 13, at 8.

⁵⁰See *supra* note 6.

⁵¹See Droz, *supra* note 13, at 8.

⁵²See *supra* note 13.

not to be regularly invoked in practice.⁵³ That is, while Article 14 makes a French forum generally available to the French, they nonetheless may end up not invoking that forum—for any of a number of reasons.

First, and foremost, French plaintiffs today need not, and indeed cannot, invoke Article 14 when another of France's now multifold bases of international jurisdiction applies.⁵⁴ Obviously, then, Article 14 jurisdiction has faded into the background.

Second, even when Article 14 is the French plaintiffs' only hope, a French forum may be unavailable in the particular case. As noted above,⁵⁵ French courts have held that the code provision does not apply to actions involving immovable property located outside of France, to claims requiring foreign official action, or to cases controlled by certain treaties. Even if the case does not fall within one of these categories, the French plaintiff may have already renounced jurisdictional privileges, for instance, by contract. Indeed, to the extent that Article 14 poses a

⁵³Although we lack empirical data with which to support this proposition, we can offer some circumstantial evidence. To begin with, a number of other commentators offer anecdotal evidence that Article 14 jurisdiction is rarely invoked against U.S. defendants. *See* Juenger, *supra* note 15, at 115-16 ("[T]he concededly anecdotal evidence I have been able to collect by reading foreign cases and literature suggests that European courts rarely render judgments against American citizens or enterprises that have no 'minimum contacts' with the foreign forum."); Juenger, *supra* note 18, at 1212 ("[T]here is no indication in reported decisions to suggest that the Brussels Convention's jurisdictional discrimination has posed much of a practical problem."); Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, LAW & CONTEMP. PROBS., Summer 1994, at 289, 303 (indicating that the author had heard of no cases in which a judgment based on exorbitant jurisdiction was enforced against a U.S. defendant's European assets under the Brussels Convention); Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 172 (1998) ("There is no evidence that [the E.U. countries' exorbitant bases of jurisdiction] are being used against U.S. defendants . . .").

Furthermore, a search of all U.S. federal and state court decisions reported on Westlaw turns up only six cases that even discuss French Article 14 jurisdiction, and these do so only in passing. *See* *Souffront v. La Compagnie des Sucreries de Porto Rico*, 217 U.S. 475, 483 n.1 (1910); *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95, 136 (E.D.N.Y. 2000); *Nippon Emo-Trans Co. v. Emo-Trans, Inc.*, 744 F. Supp. 1215, 1226, 1229 (E.D.N.Y. 1990); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161, 165 n.6 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435 (3d Cir. 1971); *Scott v. Middle East Airlines Co.*, 240 F. Supp. 1, 4 n.7 (S.D.N.Y. 1965); *Mitchell v. Garrett*, 10 Del. (5 Houst.) 34, 44-45 (Del. Super. Ct. 1875). These are the only cases that mention Article 14 jurisdiction, by name or otherwise, among the total of 168 cases retrieved from Westlaw's "ALLCASES" and "ALL CASES-OLD" databases on June 24, 2003, using the following search terms: [(jurisdiction! /s (france french france's) /s defendant /s foreign!) ("art. 14" "article 14") /s (france french france's "code civil" "civil code" "c. civ." "civ. c.")]. None of them involves a dispute over the effects of a French judgment rendered on such basis of jurisdiction. While this is by no means conclusive, one would expect that if U.S. defendants were regularly subjected to Article 14 jurisdiction, there would be at least some published opinions concerning the effects of the resulting judgments in the United States.

⁵⁴*See supra* note 33.

⁵⁵*See supra* Part I.B.2.

risk to foreigners who deal with French people via contract and are in a position to bargain over terms, one should expect to see these foreigners insisting that their French associates contractually waive their jurisdictional privileges.

Third, even in the situation where French plaintiffs could obtain a French forum, they may choose to avoid that forum and instead sue in foreign courts for reasons of convenience.⁵⁶ The French plaintiff may already reside in the foreign country or, in the case of a corporation, may have a branch office there. Witnesses and evidence may concentrate in the foreign country. If the dispute is expected to involve foreign law regardless of forum, the plaintiff may want to hire foreign lawyers and may calculate that they will be more effective in their own courts. If there are potential plaintiffs of other nationalities involved, the French plaintiff may want to join with them or share representation and cost, and a foreign court may be the best forum to meet everyone's interests.

Fourth, French plaintiffs may choose to sue in a foreign court because of a perceived legal advantage.⁵⁷ The French plaintiff may prefer a foreign court's choice-of-law rules, which may point to favorable causes of action and generous remedies. The plaintiff may prefer the foreign court's procedural rules, such as the availability of discovery devices and jury trials. The plaintiff may also prefer the rules and practices of the legal profession in the foreign jurisdiction, and may be especially drawn to contingency fee arrangements and nonreimbursement of fees. Finally, the plaintiff may perceive that the foreign court is favorably biased or prone to give out large damage awards. Many of these considerations are particularly relevant for plaintiffs choosing between a French court and a U.S. court.⁵⁸ Indeed, it is often U.S. defendants who are the ones fighting to get into

⁵⁶For some apparent examples of this phenomenon, see *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984) (involving plaintiffs from all over Europe and the United States who may have found the United States to be the most convenient forum in which to join suits); *Jackson v. Coggan*, 330 F. Supp. 1060 (S.D.N.Y. 1971) (involving a French plaintiff who was living and working in New York and who sued a U.S. defendant in New York over a car accident that had occurred while the two were visiting France); *De Sairigne v. Gould*, 83 F. Supp. 270 (S.D.N.Y.), *aff'd*, 177 F.2d 515 (2d Cir. 1949) (involving successful forum non conveniens motion).

⁵⁷For some apparent examples of this phenomenon, see *In re Air Crash Off Long Island NY, on July 17, 1996*, 65 F. Supp. 2d 207 (S.D.N.Y. 1999) (involving a large number of French plaintiffs suing two U.S. corporations, Boeing and TWA); *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764 (D. Kan. 1981) (involving air crash in France). In *Air Crash Off Long Island*, 65 F. Supp. 2d at 212, the plaintiffs argued that the Warsaw Convention prevented them from suing in France. This appears to have been a weak argument, however, because they offered meager evidence to support it, and because the defendants were doing everything possible to move the lawsuit to France, including consenting to suit there. *See id.* at 210, 212.

⁵⁸Accurate or not, there is clearly a perception that U.S. courts provide a favorable forum for European plaintiffs. One German scholar characterizes U.S. courts as "the plaintiff's heaven." Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 37 (1996). Citing contingency fees and sympathetic juries, Lord Denning writes: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs. Ltd. v.*

French courts, and French plaintiffs who are the ones fighting to get into U.S. courts.⁵⁹

Fifth, and significantly, French plaintiffs may determine that while Article 14 ultimately makes a French forum available, any resulting judgment would have limited value because courts outside of France would refuse to enforce it. Leaving aside the Brussels Regulation and Lugano Convention, a judgment rendered solely on the basis of Article 14 jurisdiction will generally not be enforceable outside of France.⁶⁰ In fact, courts outside of France are prone to cite that code provision as the paradigmatic example of exorbitant jurisdiction that is unworthy of international recognition.⁶¹ Indeed, it is probably because foreign courts are so hostile to this basis of jurisdiction that one seldom hears parties mention it outside of France. In short, if the French plaintiff wants a judgment that will be enforceable abroad and has no basis of jurisdiction in France other than Article 14, the plaintiff will likely sue directly in the foreign forum in which enforcement is desired.

Consequently, when Article 14 jurisdiction *is* invoked, the case typically involves a status suit such as a matrimonial matter⁶² or, more importantly for our purposes, a situation where the defendant has assets in France (or now, under the Brussels Regulation and Lugano Convention, in Europe).⁶³

This point about assets not only illustrates the continued link between Article 14 jurisdiction and the *forum arresti* jurisdiction that inspired it, but also goes a long way toward explaining the continued existence of Article 14 jurisdiction.⁶⁴ When the French government began a project to reform the Civil

Bloch, [1983] 1 W.L.R. 730, 733 (C.A. 1982) (Eng.).

⁵⁹See, e.g., *In re Air Crash Off Long Island NY*, on July 17, 1996, 65 F. Supp. 2d 207, 209 (S.D.N.Y. 1999); *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764, 777-81 (D. Kan. 1981); *De Sairigne v. Gould*, 83 F. Supp. 270, 271 (S.D.N.Y.), *aff'd*, 177 F.2d 515 (2d Cir. 1949).

⁶⁰See, e.g., *Schibbsy v. Westenholz*, 6 L.R.-Q.B. 155, 163 (1870) (Eng.) (refusing to enforce a French judgment rendered on the basis of Article 14 jurisdiction).

⁶¹See, e.g., *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161, 165 n.6 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435 (3d Cir. 1971).

⁶²See Droz, *supra* note 13, at 5-7 (approving of this use of Article 14); Gaudemet-Tallon, *supra* note 33, at 178-80; *but cf.* AUDIT, *supra* note 13, at 317 ("*il reste que l'application de la règle est plus contestable dans les relations de famille entre personnes de nationalité différente*"). This use does not result because the judgments from status suits will necessarily receive greater recognition abroad. Rather, it results because French plaintiffs in such suits often care about the effects only in France. See GEORGES R. DELAUME, *AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW* 170 (2d ed. 1961).

⁶³See Nadelmann, *supra* note 6, at 327; *supra* Part I.B.3.

⁶⁴Of course, other explanations circulate. For example, some believe that the French preserve Article 14 in order to have something to surrender in international negotiations on jurisdiction and judgments. See Gaudemet-Tallon, *supra* note 33, at 176 (criticizing this explanation).

Code at the end of the 1940s, the question arose whether to scrap Article 14. The commission in charge of the effort decided against doing so based in part on the assumption that plaintiffs invoke such jurisdiction in practice only when the defendant has property in France.⁶⁵ The president of the commission noted that the benefit of Article 14 jurisdiction is that it allows French courts to hear cases in which French interests are involved.⁶⁶ He continued:

It can be taken for granted that the judgment will not be given an exequatur in the foreign country, but the rule is of practical importance when the alien has property in France.

. . . .
The fact that the stranger has property in France justifies, to a certain extent, the taking of jurisdiction by French courts; it makes it possible to avoid the delays and complications involved in getting an exequatur for a foreign judgment. Therefore, a valid reason exists for maintaining the principle.⁶⁷

Viewed in this light, Article 14 jurisdiction is really not that different from what other countries accomplish in other ways,⁶⁸ such as by tag jurisdiction, attachment jurisdiction, or even doing-business jurisdiction in the United States.⁶⁹ In practice, Article 14 acts as a form of general jurisdiction in personam based on assets in France—a form much like Germany's property-based jurisdiction,⁷⁰ although more explicitly restricted to certain plaintiffs and legally enforceable even if the first assets appeared in France only after judgment. Each country's exorbitant jurisdiction constitutes a way to allow its own people to sue at home when they can recover at home, which is usually so much easier than suing abroad.⁷¹

In sum, Article 14 is basically similar to all the other countries'

⁶⁵See Nadelmann, *supra* note 6, at 327; Kurt H. Nadelmann & Arthur T. von Mehren, *Some Remarks on the Proposed Codification: The Draft of the Commission for the Reform of the Civil Code*, 1 AM. J. COMP. L. 407, 415 (1952) (translating part of the exchange).

⁶⁶See Nadelmann & von Mehren, *supra* note 65, at 415.

⁶⁷*Id.*

⁶⁸See LOUSSOUARN & BOUREL, *supra* note 29, at 491; Droz, *supra* note 13, at 3-5.

⁶⁹See *supra* note 6.

⁷⁰See *id.*

⁷¹In a well-known essay on this subject, Kurt Nadelmann argued that the French rely on Article 14 jurisdiction as a substitute (albeit an imperfect one) for attachment jurisdiction. In other words, because the French have not maintained jurisdictional rules that allow plaintiffs to sue foreign property in France in order to satisfy unrelated obligations, they keep this overly broad basis of jurisdiction that allows the same result in practice. See Nadelmann, *supra* note 6, at 324. Our point is slightly different. We suggest that rather than existing specifically to fill in for attachment jurisdiction, Article 14 exists to serve the same underlying desire that attachment jurisdiction and most other exorbitant bases of jurisdiction exist to serve: the desire of courts to let their own people sue at home.

exorbitancies, except that it is more nationalistic in expressing who can invoke it and that it does not utilize the subterfuge of expressly linking to property in France or to some other defendant contact. So perhaps Article 14 mainly *sounds* bad, just as do U.S. tag and attachment jurisdictional bases. There is, after all, a long tradition of foreigners' overemphasis of "exorbitant" jurisdictional bases. Certainly the French pick on U.S. jurisdictional bases. So U.S. commentators in picking on Article 14 may simply be taking advantage of France's poor phrasing of its brand of exorbitant jurisdiction.

B. Extensive effects

It may be, however, that Article 14's flaws extend beyond the tone of its phrasing. After all, French plaintiffs do sometimes use it to go after foreigners' assets, and they surely use it for settlement pressure in many more cases. Such *forum arresti* jurisdiction, when invoked or threatened against a defendant having no other contacts with the forum and on a claim wholly unrelated to the assets, is not especially fair—particularly today when, under modern jurisdictional law, it is not especially needed by deserving plaintiffs.⁷² Therein lies the reason that the Brussels Regulation outlaws the English version of attachment jurisdiction.⁷³

Furthermore, to the extent that Article 14 jurisdiction tries to play the role of *forum arresti* jurisdiction, it clearly is an oversized and clumsy substitute. Although Article 14 jurisdiction may, in practice, be used mostly against defendants with local assets, it is by no means limited to such defendants as a matter of law. And whereas a judgment obtained on the basis of *forum arresti* jurisdiction reaches only the attached or garnished assets, the French judgment purports to bind the defendant personally.

In fact, the mere existence of Article 14 jurisdiction may have stunted France's development of more refined and precise bases of jurisdiction. As during the reform debates at the end of the 1940s, the operation of the code provision may have long given the legislature the sense that there is no need to act. And the courts until recently tended to look to Article 14 jurisdiction before looking at other bases of jurisdiction, thus failing to address the other bases and delineate their scope.⁷⁴

⁷²See *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977) (holding ordinary use of attachment jurisdiction unreasonable as a constitutional matter, but leaving open its use in some cases against foreigners); Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 426 (1981).

⁷³See Brussels Regulation, *supra* note 43, annex I. A more subtle criticism of Article 14 is that a French plaintiff who has chosen first to sue abroad may take advantage of the code provision to avoid *res judicata* when suing anew at home, arguing that the earlier suit was not really voluntary because suing abroad was necessary to chase assets and so did not constitute a waiver. See *AUDIT*, *supra* note 13, at 324-25; *Droz*, *supra* note 13, at 19-21; *supra* Part I.B.2. In addition to being unfair to the defendant, this loophole would seem to burden France's judicial resources wastefully.

⁷⁴See *Nadelmann*, *supra* note 6, at 326-27 (making this point with regard to the *saisie forcaine* jurisdiction that used to appear in the French Code of Civil Procedure).

In this respect, the current judicial approach of relying on Article 14 only as a last resort⁷⁵ may be an improvement. But from the perspective of a foreign defendant, the current approach may be disadvantageous. Given the choice between a French judgment entered on the basis of Article 14 and a French judgment entered on some other basis of jurisdiction, a foreign defendant should prefer the former, as it renders more promising a collateral attack upon any attempted enforcement outside of Europe. Today French courts must search out another basis of jurisdiction when possible, but in that process they may be marginally more willing to uphold that other basis of jurisdiction because they know that Article 14 exists as a backup. When the plaintiff seeks to enforce the resulting judgment abroad, the foreign court will see a nonexorbitant basis of jurisdiction underlying the judgment, and further may be unwilling to reexamine the factual support for this basis, and so will tend to enforce the judgment. Article 14 jurisdiction may in this way lurk in the background of numerous cases, causing harmful effects that are not readily apparent.

As an illustration of the shadow cast by Article 14 jurisdiction, consider the recent and celebrated litigation in Paris against Yahoo!, the U.S. Internet corporation. Two French nonprofit organizations sued Yahoo! for allowing access through its auction site to Nazi-related propaganda and memorabilia, the display for sale of which is illegal in France.⁷⁶ The court ordered Yahoo! to block access by French users.⁷⁷ Although the physical location of Yahoo!'s conduct was outside France, the court had based jurisdiction on Article 46 of the New Code of Civil Procedure, relying on the fact that Yahoo!'s conduct had caused effects in France.⁷⁸ This sparked an uproar in the Internet community and a veritable flood of law journal commentary.⁷⁹ Among other things, commentators focused on how

⁷⁵See *supra* note 33.

⁷⁶See *Assignment* [Summons], *L'Union des Étudiants Juifs de France v. Yahoo Inc, T.G.I. Paris*, Apr. 12, 2000 (No. 00/05308), available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522-asg.htm#texte> (last visited July 21, 2003).

⁷⁷See *Ordonnance* [Order], *Yahoo, T.G.I. Paris*, May 22, 2000 (No. 00/05308), available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte> (last visited July 21, 2003), translation available at <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited July 21, 2003), confirmed on reconsideration, *Ordonnance* [Order], *Yahoo, T.G.I. Paris*, Nov. 20, 2000 (No. 00/05308), available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf> (last visited July 21, 2003), translation available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited July 21, 2003). On the unsuccessful, related criminal case, see Scarlet Pruitt, *Yahoo Freed in Nazi Memorabilia Case*, PCWORLD.COM, Feb. 11, 2003, at <http://www.peworld.com/news/article/0,aid,109307,00.asp> (last visited July 31, 2003).

⁷⁸See NOUVEAU CODE DE PROCÉDURE CIVILE art. 46 (Fr.).

⁷⁹For references to much of this commentary and a brief overview of the major issues raised, see Mathias Reimann, *Introduction: The Yahoo! Case and Conflict of Laws in the Cyberspace*, 24 MICH. J. INT'L L. 663, 668 n.21, 665-72 (2003).

territorial jurisdiction doctrines should apply to the Internet,⁸⁰ and some were quick to suggest that there was an insufficient connection between Yahoo! and France to warrant jurisdiction under the effects test of Article 46.⁸¹ While this is a debatable point, what they entirely missed was that even if Article 46 did not apply, the French court could have simply asserted jurisdiction under Article 14 of the Civil Code. The commentary reads as if the advent of the Internet combined with a new reading of Article 46 suddenly allowed French courts to judge a U.S. citizen with whom they had few contacts.⁸² As we know, of course, for two hundred years French courts have been able to judge a U.S. citizen with whom they had no contacts whatsoever.

This point may not have been lost on Yahoo!, which challenged jurisdiction in the French trial court, but then declined to appeal the trial court's adverse decision.⁸³ While it may have declined because it considered the jurisdictional challenge weak under Article 46, it also may have declined because it recognized that Article 14 was lurking in the background, ready to step in the moment Article 46 wavered. While a judgment based on Article 14 would have been easier to collaterally attack in a U.S. court, Yahoo! already had a strong First Amendment argument on which to base such an attack. Instead of sinking its resources into a French appeal, it made limited attempts to comply with the French order and then sought a judgment from a U.S. court declaring that the French order would be unenforceable in the United States.⁸⁴

⁸⁰See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Margaret Khayat Bratt & Norbert F. Kugele, *Who's in Charge?*, MICH. B.J., July 2001, at 43; Brendon Fowler, Cara Franklin & Bob Hyde, *Can You Yahoo!? The Internet's Digital Fences*, 2001 DUKE L. & TECH. REV. 12, at <http://www.law.duke.edu/journals/dltr/articles/2001dltr0012.html> (last visited Aug. 22, 2003); Daniel Arthur Laprès, *Of Yahoos and Dilemmas*, 3 CHI. J. INT'L L. 409 (2002); Caitlin T. Murphy, Note, *International Law and the Internet: An Ill-Suited Match*, 25 HASTINGS INT'L & COMP. L. REV. 405 (2002). See generally TERRITORIAL JURISDICTION, *supra* note 6, at 43-47.

⁸¹See Fowler et al., *supra* note 80, at ¶¶ 7-9; Laprès, *supra* note 80, at 418, 427; Murphy, *supra* note 80, at 415-16.

⁸²See Fowler et al., *supra* note 80, at ¶¶ 7-9; Laprès, *supra* note 80, at 418, 427; Murphy, *supra* note 80, at 415-16.

⁸³See Memorandum of Points and Authorities at 8 n.11, *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001) (No. 00-21275) (indicating that Yahoo! did not appeal the Paris court's final order); *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 169 F. Supp. 2d 1181, 1188 (N.D. Cal. 2001) (noting that Yahoo! withdrew its appeal of the Paris court's initial order, and did not appeal its final order).

⁸⁴Yahoo! successfully induced the U.S. court to exercise jurisdiction over the two French defendants, see *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001) (questionably finding that defendants' California-directed acts constituted minimum contacts and that jurisdiction was not unreasonable), and then obtained the declaratory judgment at the trial-court level, see *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (granting Yahoo!'s motion for summary judgment). However,

Concededly, this was a case in which there was an arguable basis of jurisdiction besides Article 14. What would have been the effect of Article 14 if the alternative basis had been weaker? Very likely Yahoo!—as well as Yahoo!'s liability insurer—would still have been in a difficult situation, and so would have inclined to defend in France. There would still have been a risk that the French court would assert the weak alternative basis of jurisdiction, knowing it had Article 14 as a backup, and thus render a judgment that might then be enforced in the United States.

Even if the French court had been asserting only Article 14 jurisdiction, the resulting judgment could still have been harmful. First, while Article 14 does tend to raise a red flag in U.S. courts, it remains possible that a U.S. court would enforce an Article 14 judgment if the facts supported an alternative but unarticulated jurisdictional basis recognized by the United States. In other words, if the U.S. court were to find that jurisdiction over the defendant did not offend due process, then it might enforce the French judgment even though it expressly rested on Article 14.⁸⁵ Second, even aside from this uncertainty over future U.S. enforcement, any U.S. defendant would want to avoid becoming a judgment debtor at all. An unpaid judgment adversely affects the defendant's ability to borrow money and damages the defendant's reputation; and it hangs over the defendant's head, threatening any property that the defendant later decides to bring into Europe.⁸⁶

Given such a predicament when sued by a French plaintiff, a U.S. defendant with a good jurisdictional argument, even one who has assets only in the United States, may well choose to enter an appearance in France and then push its insurer to cover the costs of the defense in France, just as Yahoo! did.⁸⁷ It may also push its insurer to cover the costs of a declaratory judgment action in the U.S., as Yahoo!, whose insurer refused coverage for this proactive strategy, is currently doing in court.⁸⁸ All of this is expensive, and all of this is therefore likely to affect insurance

the court of appeals reversed for lack of personal jurisdiction, *see* 2004 WL 1873646 (9th Cir. Aug. 23, 2004).

⁸⁵*See* Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1230-31 (E.D.N.Y. 1990); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(b) cmt. c (1987); DELAUME, *supra* note 62, at 170 & n.744; RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 803 n.2 (4th ed. 1980); Peter Hay, *International Versus Interstate Conflicts Law in the United States*, 35 *RABELS ZEITSCHRIFT* 429, 449-50 & 450 n.101 (1971).

⁸⁶*See* Connecticut v. Doehr, 501 U.S. 1, 13 (1991); Rush v. Savchuk, 444 U.S. 320, 333 n.20 (1980); Street v. Honorable Second Court of Appeals, 756 S.W.2d 299, 301 (Tex. 1988); Montfort v. Jeter, 567 S.W.2d 498, 499-500 (Tex. 1978); Hernandez v. Great Am. Ins. Co., 464 S.W.2d 91, 94 (Tex. 1971).

⁸⁷*See* Second Amended Complaint for Damages at ¶ 15, Yahoo! Inc. v. Gulf Underwriters Ins. Co., No. 02-3066 (N.D. Cal. filed June 26, 2002).

⁸⁸*See id.* at 7; Shannon Lafferty, *Yahoo Sues Its Insurer over Nazi Case Fees*, LAW.COM, May 30, 2002, at <http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArtic>

premiums, settlement rates, and even primary conduct by anyone who so fears somehow ending up in a French court.⁸⁹ In other words, the shadow cast by Article 14 may be a long one.

III. FUTURE USE OF ARTICLE 14 JURISDICTION

As the French like to point out, there is greater use of U.S. exorbitant jurisdiction than there is of Article 14 jurisdiction. This is not only because the U.S. bases are easier to invoke but also because more defendants have assets in the United States and more plaintiffs, in numbers and kinds, can invoke it. Nonetheless, France may be ready to close the gap.

Since the Brussels Convention of 1968, an increased variety of plaintiffs can use Article 14 jurisdiction, and more significantly there has been an ever-greater extension toward pan-European enforcement.⁹⁰ The Convention entered into force in 1973, obligating Belgium, Germany, Italy, Luxembourg, and the Netherlands to enforce French judgments. By the end of the 1980s, it had extended to Denmark, Greece, Ireland, and the United Kingdom. By the end of the 1990s, either the Brussels or Lugano Convention had also obligated Austria, Finland, Iceland, Norway, Poland, Portugal, Spain, Sweden, and Switzerland to enforce French judgments.⁹¹ With the anticipated expansion of the European Union in 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, the Slovak Republic, and Slovenia are expected to join this list of obligated states.⁹²

As mentioned above, Yahoo! has tried to comply with the Paris court's order, even though the U.S. court has ruled that it is unenforceable within the United States. Presumably it is worried about protecting its assets in France, including its interests in its subsidiary, Yahoo! France. But it is also presumably worried about protecting its assets in Denmark, Germany, Italy, Norway, Spain, Sweden, and the United Kingdom, all of which are required to enforce French

le&cid=1022788124580&t=LawArticleTech (last visited July 21, 2003).

⁸⁹See Droz, *supra* note 13, at 13 ("*Il nous a été confié que dans certains contrats internationaux des hommes d'affaires s'engageaient de manière formelle à ne jamais contracter une assurance auprès d'une compagnie française afin d'éviter le risque d'une subrogation entraînant la compétence du tribunal français.*").

⁹⁰See *supra* Part I.B.3.

⁹¹For a convenient table showing the dates on which the Brussels Convention and its progeny entered into force as between each state party, see ADRIAN BRIGGS, CIVIL JURISDICTION AND JUDGMENTS 449-50 (Peter Rees ed., 2d ed. 1997). For a list of the most recent accessions, see *Conventions*, 2003 INT'L LITIG. PROC. 279.

⁹²See Treaty of Accession to the European Union 2003, Apr. 16, 2003, arts. 2, 20, annex II, *available at* http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/index.htm (last visited Aug 22, 2003).

judgments against it.

Another illustration of the effect of the Brussels Regulation and Lugano Convention is a less well-known lawsuit over a museum in Venice. The Solomon R. Guggenheim Foundation is a New York nonprofit corporation that manages its late benefactor's large art collection.⁹³ Known to New Yorkers by its spiral-shaped museum on Fifth Avenue, the Foundation began aggressively marketing an expanding array of museums around the world in the 1990s.⁹⁴ One of these museums was the Peggy Guggenheim Collection in Venice, which Solomon's niece Peggy had given to the Foundation near the end of her life in 1979.⁹⁵ Housed in Peggy's palazzo, which was included in the gift, the museum soon underwent some renovations that were not to the liking of three of Peggy's grandchildren.⁹⁶

So the grandchildren sued the Foundation in 1992, arguing that Peggy had given away her collection on the condition that it not be modified, and seeking a court order to restore the palazzo to its original condition as well as compensatory damages reportedly in the dollar range of six-figures.⁹⁷ Although they easily could have sued the Foundation in Venice or New York, the grandchildren happened to be domiciled in France, and so they took advantage of the combined power of Article 14 jurisdiction and the Brussels Convention to sue in Paris.⁹⁸

The Foundation did not seem to have had any connection to France. It was not incorporated there, and none of its museums were there. Although Peggy Guggenheim had spent time in France,⁹⁹ there was no connection between France and the cause of action. The case involved a gift made in Italy and the U.S.

⁹³See Guggenheim Museum Website, at http://www.guggenheim.org/exhibitions/past_exhibitions/new_guggenheim/index.html (last visited Aug. 1, 2003).

⁹⁴See Alex Prud'homme, *The CEO of Culture Inc.*, TIME, Jan. 20, 1992, at 36.

⁹⁵See Thomas M. Messer, *The History of a Courtship*, in KAROLE P.B. VAIL, PEGGY GUGGENHEIM: A CELEBRATION 127, 127-51 (1998) (providing a first-hand account of the Foundation's campaign to acquire Peggy's collection).

⁹⁶See Prud'homme, *supra* note 94, at 37 (quoting one of the grandchildren as complaining that the Foundation had "robbed the museum of all its originality and personality"). The renovations started in 1982, and animosity between the grandchildren and the Foundation appears to go back even earlier. See ANTON GILL, ART LOVER: A BIOGRAPHY OF PEGGY GUGGENHEIM 432-33 (2002).

⁹⁷See Georges R. Delaume, *Introductory Note to France: Court of Cassation Decision in Foundation Solomon R. Guggenheim v. David Hellion, Nicholas Helion and Sandro Rumney*, 37 I.L.M. 653, 654 (1998). The reported six-figure number in pounds comes from Georgina Adam, *Art Sales: Charity in Court*, DAILY TELEGRAPH LONDON, Apr. 25, 1994, at 16.

⁹⁸See *Fond. Solomon R. Guggenheim v. Helion*, Cass. 1e civ., July 3, 1996, 124 JOURNAL DU DROIT INTERNATIONAL 1016 (1997), *aff'g* CA Paris, Nov. 17, 1993, 121 JOURNAL DU DROIT INTERNATIONAL 671 (1994) (rejecting jurisdictional defenses).

⁹⁹See generally GILL, *supra* note 96, at 71-259.

defendant's subsequent conduct in Italy. Moreover, part of the relief sought was a court order that would have to be carried out in Italy. In the absence of the Brussels Convention or any similar treaty,¹⁰⁰ the Foundation might have worried less about the suit, because neither Italy nor New York would have been likely to enforce a French judgment rendered in these circumstances. So the Foundation could have ignored the suit and happily gone about its business of creating museums around the world, provided it was willing to avoid bringing assets into France. With the Convention in place, however, the Foundation had to respond. Any French judgment not only could be enforced against its Venice museum, but also could be enforced against its assets elsewhere in Europe. Peggy's discontented grandchildren consequently had no problem dragging the Foundation into an unfamiliar, distant courtroom in a country with which the Foundation had no contacts. This case, then, provides a nice example of the growing power of Article 14.¹⁰¹

Really to comprehend Article 14's potential, one must also consider the huge quantity of U.S. assets that are exposed to French judgments. Although it is probably impossible to calculate anything close to an accurate total, the following figures help to convey the order of magnitude. In 1999 U.S. investors had almost \$600 billion in net financial claims (both equity and debt) on business enterprises located in countries that are obligated to enforce French judgments under the Brussels Regulation or Lugano Convention; by 2001, this amount had increased by 18 percent to surpass \$710 billion.¹⁰² Many of these interests are likely exposed to

¹⁰⁰See SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS 54-66 (2003) (describing predecessor treaties).

¹⁰¹Another reason for defending in France was reputational, as the Foundation wished to address the merits immediately. Telephone Interview with Judith Cox, former General Counsel, Solomon R. Guggenheim Foundation (Jan. 15, 2004). The Foundation ultimately prevailed in the case, but it incurred significant expenses in doing so. See Roger Bevan, *French Court Dismisses Case Against Guggenheim*, ART NEWSPAPER, Jan. 1995, at 3. The extent to which Peggy had actually placed legally enforceable conditions on the gift was not entirely clear, which may be why the plaintiffs' case ultimately fell apart. According to a recent book by the wife of one of the plaintiffs, Peggy had "stipulated that the Peggy Guggenheim Collection should remain intact and complete in the Palazzo Venier dei Leoni, 'without addition or deletion'; that certain works were never to be loaned, and that the rest of the collection could only leave the *palazzo* during the winter." LAURENCE TACOU-RUMNEY, PEGGY GUGGENHEIM: A COLLECTOR'S ALBUM 171 (1996) (footnote omitted). Another author similarly states that Peggy had "deeded the ownership of her . . . collection . . . [with] the provision that . . . [it] must remain intact, 'as is—without additions or deletions,' in her Venetian palazzo." JOHN H. DAVIS, THE GUGGENHEIMS 1848-1988: AN AMERICAN EPIC 389 (1988). According to JACQUELINE BOGRAD WELD, PEGGY: THE WAYWARD GUGGENHEIM 421 (1986), however, there was an initial agreement that provided that Peggy's collection should remain in Venice, but Peggy subsequently gave her collection to the Foundation with no strings attached. See also GILL, *supra* note 96, at 433 (discussing the continuing struggle between the grandchildren and the Foundation over the management of Peggy's collection).

¹⁰²These figures derive from the data presented in Jeffrey H. Lowe, *U.S. Direct Investment Abroad: Detail for Historical-Cost Position and Related Capital and Income Flows, 2001*, SURV. CURRENT BUS. (U.S. Dep't of Commerce, Bureau of Economic Analysis), Sept. 2002, at 68, 75

French judgments. Consider also the U.S. tax return data on the 7500 largest foreign corporations in which major U.S. corporations own controlling shares.¹⁰³ In 1998 (the latest year for which data are available) at least 307 major U.S. corporations controlled such foreign corporations that were incorporated in countries obligated to enforce French judgments under the Brussels Regulation or Lugano Convention.¹⁰⁴ While each country's rules on grabbing stock to satisfy judgments vary, much of this foreign stock owned by U.S. corporations is likely exposed to French judgments.¹⁰⁵ Moreover, even to the extent that the stock itself is not exposed, various transactions between the controlled corporations and their parent corporations should expose significant U.S. assets to French judgments. For example, the controlled corporations, having over \$1.7 trillion in assets by the end of 1998, paid over \$53 billion to their U.S. owners that year.¹⁰⁶ Given this growing

tbl.10.1, 77 tbl.10.3, available at <http://www.bea.doc.gov/bea/ARTICLES/2002/09September/0902USDIA.pdf> (last visited June 30, 2003). The figures are calculated by adding the "U.S. Direct Investment Position" in the fifteen E.U. countries with that in Norway and Switzerland (the only Lugano Convention member states for which data are listed). "U.S. Direct Investment Position" is defined as the value of U.S. direct investors' equity in, and net outstanding loans to, their foreign affiliates. "U.S. direct investors" are, in turn, defined as U.S. residents who own at least 10 percent of the voting securities of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise, with "foreign affiliates" being defined as those business enterprises. *See id.* at 69.

¹⁰³*See* John Comisky, *Controlled Foreign Corporations, 1998*, STAT. INCOME BULL. (IRS), Winter 2002-2003, at 47, 47, available at <http://www.irs.gov/pub/irs-soi/98cfcart.pdf> (last visited June 30, 2003). For the purpose of these statistics, a foreign corporation is considered to be "controlled" if one U.S. corporation owns more than 50 percent of its outstanding voting stock or more than 50 percent of the value of all its outstanding stock (directly, indirectly, or constructively) for an uninterrupted period of at least 30 days during a given year. "Major U.S. corporations" are defined here as those with total assets of at least \$500 million. *See id.*

¹⁰⁴This figure represents only the U.S. corporations that controlled corporations incorporated in certain E.U. countries. *See id.* at 67 tbl.2. The figure ignores controlled corporations incorporated in France and Italy because the IRS statistics lump these two countries with Andorra and San Marino, neither of which are obligated to enforce French judgments under the Brussels Regulation or Lugano Convention. In addition, the figure ignores controlled corporations incorporated in Norway and Switzerland—both of which are obligated to enforce French judgments under the Lugano Convention—because the data do not indicate how many of the U.S. corporations also controlled corporations incorporated in the E.U. countries, and thus whether or not they were already counted in the first figure. *See id.* at 67 tbl.2, 76 n.1. In sum, 307 is really the bare minimum number of U.S. corporations with such assets.

¹⁰⁵On the use of stocks to satisfy judgments in France, see HERZOG & WESER, *supra* note 17, at 577-78. For an example of a German court attaching foreign-owned stock in a German corporation, see Christof von Dryander, *Jurisdiction in Civil and Commercial Matters Under the German Code of Civil Procedure*, 16 INT'L LAW. 671, 682 (1982) (discussing the attachment of the Iranian government's stock in Friedrich Krupp GmbH); Lawrence W. Newman, *A Personal History of Claims Arising out of the Iranian Revolution*, 27 N.Y.U. J. INT'L L. & POL. 631, 637 (1995) (same).

¹⁰⁶These figures are calculated from Comisky, *supra* note 103, at 67 tbl.2, by adding the

pool of assets exposed to French judgments, one may see an increase in the use of Article 14 jurisdiction in the coming years.

French plaintiffs' lawyers may soon wake up and start using Article 14 more aggressively, maybe with U.S. lawyers' advice. While Article 14 jurisdiction will continue to lurk in the background of numerous cases, having its main effects by casting a shadow, it may increasingly move into the forefront, applying expressly. Therefore, in evaluating Article 14, one should contemplate not only the past and present, but also the possibly more troublesome future.

CONCLUSION

Although Article 14 works to illustrate the international legal context for the United States, is this nevertheless an unfair illustration? Yes and no, but mainly no.

A closer examination of French nationality-based jurisdiction, with comparison to other countries' practices, admittedly makes it look less shocking. Anyone who cites it for shock value is in the wrong.

Still, Article 14 exists and, going well beyond any appropriate jurisdiction for status suits, has real and pernicious effects. Like any exorbitant jurisdiction, then, it merits illustrative use in showing the need for international agreement to eliminate it.

reported data for all E.U. countries combined with that for Norway and Switzerland, and then subtracting the reported data for France and Italy because of the reasons explained *supra* note 104.