

**COMPARATIVE STUDY OF "RESIDUAL JURISDICTION"
IN CIVIL AND COMMERCIAL DISPUTES IN THE EU
NATIONAL REPORT FOR:**

FRANCE

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(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main legal Sources

Apart from the Brussels I Regulation and the Brussels/Lugano Conventions, whose importance, both in number of cases and in influence over case law and doctrine, are ever-growing, the main sources of French rules on jurisdiction in civil and commercial matters are based on legal provisions, case law and, in a more limited number of cases, international treaties.

a) The main legal provisions¹ applying in case of residual jurisdiction are :

- as a matter of principle, the rules on domestic jurisdiction, provided under the New Code of Civil Procedure (hereinafter "NCCP"), mainly in articles 42 to 46 thereof (see Annex 1) dealing with jurisdiction *ratione territoriae*, applicable to international disputes pursuant to case law;
- on a subsidiary basis, articles 14 and 15 of the Civil Code (see Annex 2), providing for a jurisdictional privilege to the benefit of French nationals (extended, as far as article 14 is concerned, to all persons domiciled in an EU-member state, whatever their nationality, in disputes against non-EU domiciliaries by virtue of article 4(2) of the Brussels I Regulation);
- several other provisions, less often used, specifically devised for determining international jurisdiction (cf. Section C.13).

Several multilateral treaties also provide for jurisdictional rules, in relation to specific matters, in particular:

- the International Convention on Civil Liability for oil pollution damage, concluded at Brussels on November 29, 1969;
- the International Convention for the unification of certain rules relating to Civil jurisdiction in matters of collision, concluded at Brussels on May 10, 1952;
- the Convention on the Contract for the International Carriage of Goods by Road, signed on 19 May 1956 in Geneva, amended by the CMR Protocol of Geneva of July 5, 1978;
- the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929;
- the Mannheim Convention on Rhine navigation, signed on October 17, 1868.

Some bilateral conventions also provide for jurisdictional rules, albeit most of them only deal with conditions of recognition and enforcement of foreign decisions, and do not provide for positive rules of jurisdiction (cf. Section B.8).

¹ Other more specific provisions, applying in case of employment or insurance contracts, will be dealt with under Section C.12.

b) French case law has been central in developing a set of rules determining international jurisdiction insofar as it has extended the rules on domestic jurisdiction to international disputes.

Thus, in a first landmark decision, the French *Cour de Cassation* applied "*the principle which extends French internal jurisdictional rules to the international order*"², prior to expressly stating that "*international jurisdiction is determined by extending the internal territorial jurisdictional rules*"³ (see Annex 3).

Case law has further created original rules of international jurisdiction, notably in case of denial of justice.

2. Specific Rules (or Not) for Transnational Disputes

French jurisdictional rules may be divided between those rules which are specific to international disputes and those which are derived from rules applying to domestic disputes.

Indeed, whilst most rules belong to the latter category, some have been specifically devised to apply only to transnational disputes.

This is notably the case for the highly disputed jurisdictional privileges of articles 14 and 15 of the Civil Code, for article L.121-73 of the Consumer Code, as well as for the law of 11 July 1934 applicable to certain specific company disputes.

This is also the case for case law-created rules, such as jurisdiction based on denial of justice.

3. Specific Rules (or Not) for Article 4 (1) Jurisdiction

There is no specific set of rules under French law, which govern residual jurisdiction pursuant to article 4(1) of the Brussels I Regulation.

Hence, if the said Regulation does not apply, and provided no bilateral treaty or international convention is applicable, jurisdiction will be determined pursuant to the traditional set of jurisdictional rules.

4. Influence of EU law

The influence of the Brussels I Regulation and/or the case law of the European Court of Justice on the application of national jurisdictional rules, if any, is hard to assess, at least with respect to substantive rules.

Indeed, save where the *Cour de Cassation* is to decide on the basis of the Brussels/Lugano Conventions or of the Brussels I Regulation, it does not refer to ECJ case law. In any case, most decisions of the *Cour de Cassation* are short and do not contain, as a matter of principle, reference to any case law to motivate their rulings.

Moreover, in many cases, the national rules of jurisdiction are identical to those provided for under the Brussels I Regulation⁴.

² Cass. Civ. 1^{ère}, 19 October 1959, *Pelassa*, D. 1960, p. 37.

³ Cass. Civ. 1^{ère}, 30 October 1962, *Scheffel*, D. 1963, p. 109, note Holleaux.

⁴ E.g. in matter of contracts, torts or immovable property.

One may, however, find one specific area where French law is, at least in part, influenced by ECJ case law, namely with regard to the binding character of a choice-of-court clause on third parties. Case law is divided over the issue of whether such a clause, stipulated in a charter party, may be opposed to the consignee of goods and, if case be, under what conditions. Whilst some decisions apply a substantive rule of international private law, i.e. with no reference to any applicable law, others apply conflict of law rules and decide the issue based on the law applicable to the contract⁵, as professed by ECJ case law.

In any case, there appears to be one area where the Brussels I Regulation (as well as the Brussels/Lugano Conventions) exerts a duly criticized influence: the procedure for recognition and enforcement of foreign judgments. Indeed, as a recent in-depth study has shown⁶, in view of the multiplicity of applicable rules (EU legislation, bilateral conventions, traditional national rules), errors are not uncommon: a number of non-EU judgments thus benefit from the simplified procedure, which should only apply to EU judgments, and hence partly escape judicial control.

It is finally of note that some authors would favor a deeper influence of Community rules, through a "*reflex effect*", i.e. the enforcement of article 22 of the Brussels I Regulation where exclusive jurisdiction is conferred upon courts of non-member states, the correlative refusal to enforce non-EU judgments, which violate the exclusive jurisdiction of another Member State (and not only France), as well as the refusal to enforce a choice-of-court clause conferring jurisdiction upon French courts over *in rem* rights in immovable property located abroad⁷.

5. Impact of Other Sources of Law

Other sources of law, in particular human rights principles and principles of public international law, also impact on national jurisdictional rules, either by constituting the basis of traditional rules (e.g. the principle of *actor sequitur forum rei* considered to be part of individuals' natural rights), by creating a new criteria for vesting jurisdiction in French courts (notably in case of denial of justice; cf. Section C.16), or by depriving them of the same where foreign states or foreign public service are involved, in which case French courts are considered to be deprived of *jurisdictio*⁸.

Both principles of a plaintiff's right to a judge and immunity from suit sometimes collide with each other, entailing differing solutions: the *Cour de Cassation* has thus recently decided to maintain French courts' jurisdiction to hear an employment dispute between an international organization, though normally immune from suit, and its employee for the said organization had not instituted a tribunal to hear such claims. Had the French judge not accepted to hear the case,

⁵ See Cass. Com., 4 March 2003, *JCP G* 2003, IV, no. 1786.

⁶ Study conducted by the Centre de droit civil des affaires et du contentieux économique de l'université Paris X-Nanterre, under the direction of Prof. M.-L. Niboyet and under the aegis of the Chancellery, published in *Gaz. Pal.*, 17 June 2004, no. 169, pp. 4 & foll.

⁷ See H. Gaudemet-Tallon, *Compétence et execution des jugements en Europe*, LGDJ, 3rd ed., no. 100 and 150. Although the *rapporteurs* of the Saint Sebastian Convention took the opposite stance, it would indeed make sense to have such a "*reflex effect*", for, as the author says, "*if the French judge has absolutely no jurisdiction to decide upon disputes over German immovable property or patent, there is no reason why he should be better armed to decide upon Argentinean rural tenancy or the validity of a Japanese patent*".

⁸ French case law has thus repeatedly held that foreign states and entities acting in their name or on their behalf are immune from suit for acts of governmental authority as well as for acts accomplished in the interest of public service (e.g. recently Cass. Civ. 1^{ère}, decisions of 27 April and 2 June 2004, *Rev. crit. DIP*, 2005, p. 75). This may also be the case where public service activities are carried out by commercial companies (see Cass. Civ. 1^{ère}, 2 May 1990, pourvoi no. 88-14.363). For an example relating to an international organization, see Cass. Soc., 4 March 2003, pourvoi no. 01-41.099.

the employee would have been deprived of his right to a judge, which is considered to be part of international public order⁹.

To the contrary, a state's jurisdictional immunity may be upheld even where its acts of governmental authority constitute a violation of *jus cogens*, as was ruled by the *Cour de Cassation* in a case involving forced labor¹⁰.

6. Other Specific Features

The most specific feature of French jurisdictional rules stems from the existence of the jurisdictional privilege of articles 14 and 15 of the Civil Code, which, albeit the number of cases where they apply have been drastically reduced by the virtue of Community rules and international treaties with third countries which exclude their application and now only apply on a subsidiary basis, still account for some refusals of recognition and enforcement of foreign judgments.

It is further of note that, as a matter of principle, when determining their jurisdiction, French courts pay no regard as to whether their decisions are likely to be recognized and enforced abroad¹¹.

Moreover, "*renvoi*" is unavailable under French law to determine jurisdiction, i.e. once French courts have been designated by international rules, they may not decline their jurisdiction on the basis of national jurisdictional rules¹².

7. Reform

Although the position of the French *Cour de Cassation* with respect to specific issues is criticized by some learned authors, as is the case with regard to some legal provisions (in particular articles 14 and 15 of the Civil Code), no legislative change is currently being contemplated.

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

Several multilateral conventions provide for positive rules on jurisdiction in specific matters (cf. Section A.1.a)).

As regards bilateral conventions, and although France is a signatory to numerous conventions relating to judicial matters, most of them have a less ambitious purpose than providing for positive rules on jurisdiction and mainly provide for limited grounds for refusing to recognize and enforce each other's judgments and/or for simplified procedures.

⁹ Cass. Soc., 25 January 2005, pourvoi no. 04-41.012. It should be noted that the dispute bore some connection with France, since the employee was a French national.

¹⁰ Cass. Civ. 1^{ère}, 2 June 2004, *Gimenez-Expositoy v. Federal Republic of Germany & BMW*, *Rev. crit. DIP*, 2005, pp. 75 & foll., note L. Sinopoli, in case of claim of damages for forced labor under the IIIrd Reich. This position is not in accord with the stance taken by other jurisdictions, notably in the UK (see *Jones v. The Kingdom of Saudi Arabia & Mitchell v. Al Deli*, 2004 *EWCA Civil* 1394).

¹¹ With some exceptions relating to immovable property and enforcement measures.

¹² Cass. Com., 11 December 2001, pourvoi no. 00-11.704.

Moreover, several bilateral treaties are no longer applicable to civil and commercial matters as defined by the Brussels/Lugano Conventions and the Brussels I Regulation since the conclusion of the latter and the enlargement of the European Union.

Hence, the main bilateral treaties providing for positive rules on jurisdiction are the following:

- the Convention on judicial cooperation in civil and commercial matters, concluded on June 28, 1972 with Tunisia;
- the Convention on judicial cooperation, concluded on March 29, 1974 with Senegal;
- the Convention on judicial cooperation in civil – including personal status – labor, commercial and administrative matters, concluded on March 15, 1982 with Egypt;
- the Convention on judicial cooperation, recognition and enforcement of decisions in civil and commercial matters, concluded on September 9, 1991 with the United Arab Emirates;
- the Convention on judicial cooperation in civil and commercial matters, concluded on September 16, 1997 with Uruguay.

9. Practical impact of international conventions with third states

The practical impact of multilateral and bilateral conventions is rather limited, for the former do not provide for general jurisdictional rules in civil and commercial matters, but rather apply to specific disputes (pollution damage, aircraft accidents, etc.) and the latter are but a few. Moreover, their application by French judges is rather influenced, at least as far as procedure is concerned, by the European legislation.

(C) Applicable National Rules Pursuant to Article 4 of Brussels I Regulation

10. Structure

Under French law, international jurisdiction for actions against defendants domiciled in non-EU states is determined by the combination of rules on ordinary jurisdiction and rules on privileged jurisdiction.

Whilst the latter consist of the exorbitant provisions of article 14 of the Civil Code, available to all French nationals and, by virtue of article 4(2) of the Brussels I Regulation, to all persons domiciled in a Member State of the EU, the former comprise all other rules which are not based on the parties' nationality, i.e. mainly the domestic rules extended, pursuant to case law, to transnational disputes.

With regard to the order of prevalence between these two categories of rules, French law has witnessed a major change. Indeed, when the Civil Code (the Napoleon Code) was first adopted, case law denied French courts any jurisdiction to hear cases involving only foreigners.

A series of exceptions later followed to this general principle of incompetence, with case law finally abandoning it altogether¹³. However, ordinary rules of jurisdiction first only came into play when privileged rules could not be applied.

¹³ Cass. Civ., 21 June 1948, *Patino*, JCP 1948, II, 4422: implicit admission that the jurisdictional privilege of article 15 of the Civil Code may be waived. The *Cour de Cassation* later ruled that “*the foreign*

Since 1985, the hierarchy has been inverted: the exorbitant rules of articles 14 and 15 of the Civil Code only apply on a subsidiary basis, i.e. where jurisdiction of French courts has no basis under ordinary rules¹⁴.

11. General Jurisdiction

Since the most basic rule of jurisdiction under French law is the *actor sequitur forum rei* principle, provided for under article 42 of the NCCP¹⁵, i.e. the competent court is the one of the defendant's domicile, there is no general rule of jurisdiction that may apply against defendants domiciled in non-EU states, save for article 14 of the Civil Code.

However, in the absence of domicile¹⁶, article 43 of the NCCP confers jurisdiction upon the courts of the defendant's residence: case law thus admits French courts' jurisdiction on the basis of the defendant's residence in France, provided the defendant has no domicile abroad¹⁷, or he proves unable to justify such a domicile¹⁸.

French courts may also have jurisdiction if the defendant "*appears*" to have a domicile in France and if he led plaintiff to believe that this was his actual domicile¹⁹.

With respect to legal persons, although the rule *actor sequitur forum rei* also applies, insofar as jurisdiction is determined on the basis of a defendant company's registered seat, a French judge may disregard a company's seat where it appears that the said seat is fictitious or fraudulent²⁰. French courts may further have jurisdiction, under certain circumstances, over a foreign company's branch established in France (cf. Section C.12.d)).

12. Specific Rule(s) of Jurisdiction

a) Contract

Pursuant to article 46, al. 1 of the NCCP²¹, the application of which has been extended to international disputes by case law, in contractual matters, the plaintiff may choose to either seize the court of the defendant's domicile, or the court of the place where actual delivery is to be made or where service is to be provided, depending upon the subject matter of the said contract.

origin of parties to the proceedings does not prevent French courts from having jurisdiction" (Cass. Civ. 1^{ère}, 30 October 1962, *Scheffel*, op. cit.).

¹⁴ Cass. Civ. 1^{ère}, 19 November 1985, *Cognacs and Brandies*, *JDI* 1986, p. 719.

¹⁵ Articles 42 and 43 only rarely apply to confer jurisdiction upon French courts, since, if the defendant is established or has its seat in France, the Brussels I Regulation will apply in most cases.

¹⁶ Domicile is defined by French law as the place where a person has his principal establishment (article 102, al. 1 of the Civil Code), evidenced by the actual character of such a domicile and the *animus manendi* of the defendant.

¹⁷ See Paris Court of Appeal, 18 February 1994, *D.* 1994, somm. p. 351.

¹⁸ Cass. Civ. 1^{ère}, 4 January 1984, *Bull. Civ.*, I, no. 4.

¹⁹ E.g. Cass. Civ. 1^{ère}, 31 January 1968, *Bull. Civ.* I, no. 41.

²⁰ E.g. Cass. Civ. 2^{ème}, 23 January 1958, *JCP G* 1958, IV, 30. See also Cass. Com., 12 May 1959, *JDI* 1960, p. 164, which appeared to accept the distinction, normally unknown to French law, between corporate seat and actual seat and to favor the latter when determining jurisdiction.

²¹ For specific rules applying to employment contracts, insurance contracts and contracts for carriage of goods and transport of passengers, cf. Sections C.12.g) and C.13.

Hence, a plaintiff may bring court proceedings in France against a defendant domiciled in a non-EU state if delivery or provision of service are to occur in France.

Case law has emphasized, with respect to the place of delivery, that regard should be given only to the place where delivery actually took place or was intended to take place, not to the one the parties may have contractually agreed upon²².

However, according to the latest case law²³, in case the contract has not been executed at all, the judge will determine jurisdiction on the basis of the agreed upon place of delivery.

Where the existence or validity of the contract is disputed, and contrary to its earlier ruling, the latest position of French case law is that article 46, al. 1 of the NCCP may nonetheless be relied upon to determine jurisdiction²⁴.

With regard to a contract for provision of service, definition thereof is purely a matter of case law. Although, it may seem extensive enough to account for a number of situations (all cases where a person performs works to the benefit of another, whatever the type or conditions of contract²⁵), it still causes some uncertainties: case law has thus considered that payment of a price does not qualify as a provision of service (or as delivery of goods) and that article 46, al. 1 of the NCCP is accordingly inapplicable²⁶. To the contrary, a bank's handling of an account does qualify as a provision of service and jurisdiction in that regard may therefore be determined according to article 46, al. 1 of the NCCP²⁷.

It should further be noted that jurisdiction may prove to be less easily determinable where the contract at stake is a complex one, with several obligations involved, the most characteristic one being hard to identify.

b) Tort

In tort matters, article 46, al. 2 of the NCCP provides for the following option: plaintiff may choose between the courts of the domicile of the defendant, those where the event causing the damage occurred and those where the said damage was suffered.

French courts therefore have jurisdiction to hear a claim against a non-EU domiciled defendant if either the harmful event or the damage occurred in France.

Case law makes a clear distinction in that regard between the domicile of the victim (or his heirs or beneficiaries of the estate) and the place where the damage caused by tortious conduct is suffered, with only the latter conferring jurisdiction upon French courts²⁸.

In case only part of the damage is suffered in France, case law is divided as to whether French courts have jurisdiction to adjudicate the entire case or only part of it²⁹, albeit the general trend

²² Cass. Civ. Civ. 2^{ème}, 18 January 2001, *Bull. Civ.*, II, no. 10.

²³ See Cass. Civ. 2^{ème}, 18 January 2001, *ibid*.

²⁴ Cass. Civ. 2^{ème}, 1 July 1999, *Bull. Civ.*, II, no. 128.

²⁵ See Toulouse Court of Appeal, 21 October 1982, *JCP G* 1984, IV, 13.

²⁶ Cass. Civ. 1^{ère}, 16 March 1999, pourvoi no. 96-22.016.

²⁷ Cass. Com., 9 March 1999, pourvoi no. 96-14.259.

²⁸ Cass. Civ. 2^{ème}, 11 January 1984, *Bull. Civ.*, II, no. 4.

²⁹ In favor of the first solution, see Paris *Tribunal de grande instance*, 23 June 1976, *Ms. Aga Khan v. Axel Springer & others*, *Rev. crit. DIP* 1978, p. 132; in favor of the second, see Paris Court of Appeal, 30 June 1984, *HRM Duchess of Windsor v. Sanchez Gomez*, *Rev. crit. DIP* 1985, p. 141. An author has

seems in favor of the latter solution. Hence where damage is suffered in several states, which is particularly so where the harm is caused by way of press or internet, proceedings will have to be split, thus triggering not only an increase in costs, but, more importantly, a risk of conflicting decisions.

c) Criminal Proceedings

Pursuant to article 3 of the Code of Criminal Procedure, civil proceedings may be instituted at the same time as criminal proceedings and before the same courts. Hence, as soon as French criminal courts have jurisdiction to prosecute criminal offenses, they also have jurisdiction to decide on the victims' claims for damages, even in those cases where civil courts would not, under French rules, have jurisdiction to adjudicate the same.

It remains to be decided whether French civil courts would have jurisdiction to hear such claims independently from criminal proceedings. Whereas some authors contend they would, on the basis of article 4 of the Code of Criminal Procedure which allows for civil claims to proceed separately from criminal prosecution³⁰, others take an opposite stance, relying, *inter alia*, on the absence of any case law enforcing such a theory³¹.

d) Secondary Establishment

Since the general rule is that French courts have jurisdiction when the defendant, whether a natural person or a legal entity, has his domicile in France, i.e. its seat when legal entities are concerned, French courts would have lacked jurisdiction to hear cases brought against local branches or establishments of foreign entities if case law had not provided for the "*gares principales*" (principal station) jurisprudence³².

Pursuant to this case law, French courts do have jurisdiction to hear claims against foreign companies' local branches, provided said branch is sufficiently autonomous and does not act as a mere go-between and the dispute relates to the branch's operations³³.

e) Trust

There is no specific ground of jurisdiction for trusts, which are unknown, as such, under French law.

Hence, where a trust-related claim is brought before a French court, the latter will examine whether it has jurisdiction by first identifying the dispute under one of its known legal

suggested that a French judge may adjudicate the entire case if the harmful event also occurred in this jurisdiction (see H. Gaudemet-Tallon, note under Orleans Court of Appeal, 6 May 2003, *Rev. crit. DIP* 2004, p. 139).

³⁰ C. Lombois, *Droit pénal international*, *Dalloz*, 1979, no. 5357, p. 470.

³¹ A. Huet & R. Koering-Joulin, *Droit pénal international*, *Thémis*, p. 248.

³² Found to be applicable to international disputes (Cass. Req., 15 June 1909, *S.* 1911, 1, p. 81, note Naquet).

³³ Cass. Civ. 1^{ère}, 18 June 1958, *Rev. crit. DIP*, 1958, p. 754, note Mezger. Recently, French courts of the place of an important branch, with a director having authority to represent it, were found to have jurisdiction where the claim was one for payment of a current account used for the branch's operations (Cass. Civ. 1^{ère}, 15 November 1983, pourvoi no. 82-12.626). See also Nancy Court of Appeal, 2 December 2002, *JCP G*, 2004, IV, p. 1808, insisting on the need for the branch to enjoy real autonomy.

classifications (indirect donation³⁴, right *in rem* in immovable property, agency, etc.³⁵), and then apply the relevant rules on jurisdiction.

In any case, trust-related litigations are but a few in France³⁶, since they involve immovable property situated abroad and, more often than not, a foreign settler and trustee.

f) Arrest and/or location of Property

French courts have jurisdiction in disputes relating to arrest of property involving a non-EU defendant if France is the place where the order is to be enforced (see article 9(2) of decree no. 92-755 of 31 July 1992), in compliance with the principle that such a ground of jurisdiction is justified by the need to have intervention of the authorities of the place of enforcement and the fact that the state's sovereignty is at stake³⁷. This is the case even where the merits of the case are submitted to a different jurisdiction³⁸.

It should be noted that French jurisdiction is limited to the ordering of such measures and does not extend to adjudicating the merits of the case, save where jurisdiction is based on other admissible grounds³⁹.

French courts also have jurisdiction to order provisional and conservatory measures in summary proceedings in case of emergency⁴⁰, on the basis that, in such circumstances, jurisdiction conforms to "*the general interest of ensuring public peace and justice*"⁴¹.

However, French courts will only have jurisdiction where the object to be seized or protected is located on French territory, or the person needing protection is in France, if only temporarily.

g) Additional developments

(i) French law further provides for rules on jurisdiction for "*actions mixtes*" (mixed claims), i.e. causes of action which involve both rights *in rem* and rights *in personam*.

A topic example of "*actions mixtes*" is one for annulment of the sale of a building brought by either party to the sales contract, or for specific performance brought by the buyer of immovable property⁴².

³⁴ E.g. Cass. Civ. 1^{ère}, 20 February 1996, pourvoi no. 93-19.855.

³⁵ On these issues, see J.-P. Dom, *Le Trust et le droit français: Aspects de droit privé*, *Rev. dr. bancaire* no. 56, 1996, pp. 137 & foll.

³⁶ For a recent example, see Cass. Civ. 1^{ère}, 17 December 1996, *Rev. crit. DIP*, 1997, p. 725, note M. Goré: pursuant to the Hague Convention of 5 October 1961, French courts were found to have jurisdiction to order an inventory of the assets of a Caiman island trust constituted by the deceased father of a child domiciled in France.

³⁷ Some authors also favor French jurisdiction in case the defendant is domiciled in France, notwithstanding the fact that the measure ordered is to be enforced abroad, by extension of rules on domestic jurisdiction. Whilst such a solution does not directly infringe upon the foreign state's sovereignty, protected by the need for an *exequatur*, the efficiency thereof is highly questionable.

³⁸ Cass. Civ. 2^{ème}, 29 February 1984, *Rev. crit. DIP*, 1985, pp. 545 & foll.

³⁹ Cass. Civ. 1^{ère}, 17 January 1995, *JCP G* 1996, II, 2430, note H. Muir-Watt.

⁴⁰ See articles 808 and 809 of the NCCP, applying to international disputes (Cass. Civ. 1^{ère}, 20 March 1989, *JDI* 1989, p. 1045, note B. Oppetit). The requirement that the matter call for the urgent intervention by a judge seems to be hardly ever denied.

⁴¹ Cass. Civ., 23 March 1868, *S.* 1868, 1, p. 328.

In such a case, article 46, al. 3 of the NCCP provides for the alternative jurisdiction of the courts of the place of domicile of the defendant and those of the place of situation of immovable property.

Hence, in case the buyer of a building, which the seller refuses to hand over, seeks specific performance of the sales contract, he may either seize the courts of the seller's domicile, or those of the location of the building.

(ii) Other provisions, rarely used as such, may also serve to establish jurisdiction by analogy. For instance, on the basis of article 1431 of the NCCP, pursuant to which the action for the reconstruction of foreign deed destroyed by reason of war or natural disaster is brought before the court of the domicile of the requesting party or before the *Tribunal de grande instance* of Paris if the requesting party is domiciled abroad, a court has determined its jurisdiction with respect to a claim by foreigners for establishing filiation with a French national⁴³.

(iii) In case of ship collision, decree no. 68-65 of 19 January 1968 provides the plaintiff with an option between the courts of the domicile of the defendant, the courts of the port where one of the ships found refuge or was seized after the collision, or the courts of the place of collision if within French maritime territory.

(iv) In case of contracts for carriage of goods or passengers, articles 54 and 73 of decree no. 66-1078 of 31 December 1966 add to the ordinary jurisdictional rules by conferring alternative jurisdiction on the tribunal of the port of loading/unloading of goods or embarking/disembarking of passengers if the said port is situated in French territory.

13. Protective Rule(s) of Jurisdiction

a) Consumer Contracts

There are no specific jurisdictional rules that apply, as a matter of principle and in all cases, to consumer contracts⁴⁴.

French law however provides for protective rules on jurisdiction applying to some specific types of consumer contracts.

Hence, according to article L.121-24 of the Consumer Code, a contract signed between a consumer and a professional pursuant to solicitation by the latter may not provide for a choice-of-court clause: hence, a judge, seized of a dispute involving such a contract, will disregard the said clause and apply the traditional rules on jurisdiction.

⁴² In case the claim is brought by the seller, it does not qualify as "*action mixte*", for it is purely based on contract and does not involve any right *in rem*.

⁴³ See Paris Court of Appeal, 18 May 1994, *Rev. crit. DIP*, 1995, p. 563.

⁴⁴ Albeit the Commission on abusive clauses has recommended that clauses derogating from legal rules on jurisdiction be eliminated from consumer contracts (see Recommendation no. 79-02 of 30 January 1979, *BOCC*, 13 June 1979), the indicative and non-exhaustive list provided under article L.132-1 of the Consumer Code merely refers to clauses which remove or restraint a consumer's right to sue, notably by forcing him to submit to arbitration (where such proceedings are not instituted at law), by unduly limiting admissible evidence or by putting the burden of proof on the consumer whereas it should be borne by the other party under applicable law.

With respect to time-share contracts, article L.121-73 of the Consumer Code provides that a clause providing for the jurisdiction of courts of states which are not parties to the Brussels/Lugano conventions is null and void in case either the consumer has his domicile or usual residence in France or the immovable property is located on the territory of a state party to the said conventions.

A consumer domiciled in the EU may therefore bring a claim before French courts against a professional domiciled in a non-EU state, and vice-versa, on the basis of French rules on jurisdiction, be it rules applying to contract matters, or of rules on privileged jurisdiction (article 14 of the Civil Code, save where it has been excluded by treaty).

b) Individual Employment Contracts

As far as employment contracts are concerned, French case law has extended the application of domestic rules under article R.517-1 of the Labor Code to international disputes.

Pursuant to the said provision, the labor court which has territorial jurisdiction in case of disputes over employment contracts is the court of the place of the establishment where work is performed. If work is performed outside any establishment or at home, the courts of the employee's domicile have jurisdiction. The employee may however choose to seize the court of the place where the employment contract was entered into or where his employer is established⁴⁵.

As a consequence, an employee may bring a claim before French courts against an employer domiciled in a non-EU state and vice-versa, if:

- the establishment where the work is performed is located in France, or
- in case the work is performed outside any establishment or at the employee's home, if the latter is located in France.

The employee further has the option to seize French courts if the contract was entered into in France or if his employer is established in France.

c) Insurance Contracts

With respect to insurance matters, the principle of extension of domestic rules on jurisdiction to international disputes also applies.

Hence, pursuant to article R.114-1 of the Insurance Code, where an action is brought for determination and payment of insurance proceeds, jurisdiction is vested in the courts of the domicile of the insured, whatever the type of insurance (save in case of immovable property or movable property "*by nature*"⁴⁶, where defendant is to appear before the court of the place where the insured objects are located).

⁴⁵ Moreover, pursuant to article R.517-1 of the Labor Code, any clause providing, either directly or indirectly, for the contrary, is deemed null and void. Case law has evolved as to how this provision was to be adapted to international disputes, its final view being far from settled (cf. Section E.19.a)).

⁴⁶ Movable property "*by nature*" is defined under article 528 of the Civil Code as objects or animals, which can be moved, either by their own motion or by outside action.

In case of accident liability insurances, the insured may further choose to seize the court of the place where the event causing damage has occurred.

As a consequence,

- (i) an insured, policyholder or beneficiary may bring a claim before French courts against an insurer domiciled in a non-EU state in the following circumstances:
 - in case the dispute relates to determination and payment of insurance proceeds, as long as the insured is domiciled in France or, in case immovable or movable property by nature is concerned, the same are located in France;
 - in case of accident, if the said accident occurred on French territory;
- (ii) an insurer may bring a claim before French courts against an insured, policyholder or beneficiary domiciled in a non-EU state if the claim relates to the determination and payment of insurance proceeds for immovable property or movable property by nature and the same are located in France.

In any case, if domiciled in the EU, the plaintiff may avail himself of article 14 of the Civil Code (if application thereof has not been excluded by treaty).

d) Distribution Contracts

There are no protective jurisdictional rules for distribution contracts, where the traditional rules on jurisdiction over contract disputes apply. Distribution contracts nevertheless entail some specific issues, in particular when determining the characteristic obligation, which, in turn, determines jurisdiction.

Indeed, although case law has decided that, in case of concession contracts, jurisdiction is to be vested in the courts of the place of the beneficiary of the concession⁴⁷, doctrine⁴⁸ points to the fact that it may not take the same stance with regard to other types of distribution contracts, such as franchises.

e) Protective Rules in Other Matters

There are very few other specific matters that are subject to protective rules on jurisdiction:

- requests for reimbursement of securities or coupons issued by foreign companies or territorial entities.

Pursuant to article 1 of the law of 11 July 1934, the courts of Paris have jurisdiction to hear such claims, unless the said company or territorial entity has elected domicile elsewhere in France, in which case the courts of its elected domicile have jurisdiction;

- in case of over indebtedness of individuals, articles L.333-3-1 and R.333-3 of the Consumer Code provide that French courts have jurisdiction where the debtor, whatever his

⁴⁷ Cass. Com., 19 July 1988, *Bull. Civ.*, IV, no. 257.

⁴⁸ See V. Heuzé, *Contrats internationaux*, Livre IX, *Conflits de juridictions et contrats internationaux*, ed. Joly, no. 24.

nationality, has his domicile in France, or where the debtor, although domiciled abroad, is French and his debts, not related to his professional activity, have been contracted in France.

14. Rule(s) for the Consolidation of claims

a) Co-Defendant

A defendant domiciled in a non-EU state can be sued before French courts as a co-defendant in a proceeding brought against a defendant domiciled in France.

Case law has indeed decided that article 42, al. 2 of the NCCP, which allows a plaintiff to sue several defendants before the courts of the domicile of one of them, should also apply to determine international jurisdiction⁴⁹.

However, in such a case, for French courts to indeed have jurisdiction, the following criteria need to be met:

- (i) the claims against co-defendants have to bear "*close connected links*": the object of the dispute thus has to be identical, even though causes of action need not, nor is it required that the claims arise from the same contract;
- (ii) jurisdiction has to be based upon one of the defendants having his domicile in France: French courts therefore lack jurisdiction if the only basis thereof lies in a choice-of-court clause or in one of the defendant's being a French national (i.e. article 15 of the Civil Code)⁵⁰;
- (iii) defendant upon whom jurisdiction is based has to be an actual, serious defendant, in order to avoid any fraudulent choice of jurisdiction by initiating a fictitious claim against a French resident;
- (iv) where disputes between a codefendant and plaintiff are to be submitted to a foreign court pursuant to a choice-of-court clause, French courts only retain jurisdiction where claims against defendants are indivisible, in order to ensure good administration of justice. In order to assess whether claims are indivisible, French courts will determine if the ensuing decisions could be conflicting⁵¹. In any case, practice shows that French courts take a broad view as to indivisibility.

This solution is not applicable in case the co-defendant and the plaintiff have agreed on an arbitration clause, which deprives judicial courts of their jurisdiction, even where claims are indivisible⁵².

Moreover, article 42, al. 2 of the NCCP is inapplicable where jurisdiction is based on article 14 of the Civil Code⁵³.

⁴⁹ Cass. Civ. 1^{ère}, 10 March 1982, *Union des Banques suisses*, *Bull. Civ.*, I, no. 107.

⁵⁰ Whereas article 15 of the Civil Code may not be used as ground of jurisdiction against several codefendants, article 14 of the same code authorizes several plaintiffs, one of whom being French, to act jointly against a defendant domiciled abroad before French courts, provided the French plaintiff has a personal interest in the underlying operation and legitimate interest in the proceedings (Cass. Civ. 1^{ère}, 28 June 1989, *Rev. crit. DIP*, 1990, pp. 111 & foll., note H. Gaudemet-Tallon).

⁵¹ Cass. Com., 23 December 1957, *Rev. crit. DIP*, 1958, p. 385, note Mezger.

⁵² See recently Cass. Civ. 1^{ère}, 6 February 2001, *Peavy Company*, *JCP G* 2001, II, 10567.

b) Third Party Proceedings

A defendant domiciled in a non-EU state may be sued before French courts as a third party in an action on warranty or guarantee, on the basis of article 333 of the NCCP applying to international jurisdiction⁵⁴.

Case law has however set two conditions for such a "*forced joinder*" to be enforceable, which either add to the text of article 333 of the NCCP, or directly depart therefrom. Indeed, French courts have jurisdiction in such a case, provided:

- (i) the initial claim and the claim against the third party are dependent upon each other or are connected;
- (ii) disputes between the defendant and the third party are not subject to a choice-of-court clause conferring jurisdiction upon courts of another state⁵⁵ or to an arbitration agreement. Contrary to the solution under section C.14.a) above, in case of a choice-of-court clause, a French judge will not have jurisdiction where the claims are indivisible⁵⁶.

c) Counter-Claims

Case law has held that private international law allows a court seized of a plaintiff's claim to also hear the counterclaim brought by the defendant⁵⁷.

Thus, if a defendant, whether domiciled in France or not, has been sued before French courts by a party domiciled in a non-EU state, he can bring a counterclaim against the former party before the very same court.

If he has been sued before a foreign court, he may bring a counterclaim before a French court if French courts have jurisdiction under any of French international jurisdictional rules, subject to the plaintiff's requesting that the court decline jurisdiction on the basis of parallel proceedings (cf. Section E.19.b)).

However, no counterclaim is admissible where the main claim brought before French courts is one for exequatur of a foreign judgment, for any such counterclaim does amount neither to a defense to the main claim nor to a connected claim⁵⁸.

d) Related Claims

⁵³ Cass. Civ., 12 July 1950, *JDI* 1950, pp. 1206 & foll.

⁵⁴ Article 333 of the NCCP provides that a third party, summoned to appear before court by a party to the proceedings, who is entitled to bring a direct claim against this third party or who has an interest in making him a party to the judgment, has to appear before the court and cannot challenge the jurisdiction of the latter on the basis of a choice-of-court clause.

⁵⁵ Indeed, case law has considered this part of article 333 of the NCCP not to apply to international disputes (see Cass. Com., 30 March 1993, *Sté Comanav*, *Bull. Civ.*, IV, no. 122). As a consequence, a third party summoned to appear before a court may validly oppose jurisdiction on the basis of a choice-of-court clause.

⁵⁶ This is, at least, the latest position of the *Cour de Cassation* (Cass. Com., 30 March 1993, *op. cit.*). Doctrine still appears divided.

⁵⁷ See Lyon Court of Appeal, 2 July 1931, *Gaz. Pal.* 1931, 2, p. 502.

⁵⁸ See Paris Court of Appeal, 21 April 1967, *JDI* 1968, p. 345.

According to the position of French case law, French courts have jurisdiction to adjudicate a claim against a defendant domiciled in a non-EU state⁵⁹ where the said claim is connected⁶⁰ with another claim pending before French courts in two cases:

- (i) where there are several connected claims brought by one plaintiff against the same defendant⁶¹;
- (ii) where connected claims are brought by several plaintiffs against the same defendant⁶².

e) Any Problems Pertaining to Lack of Harmonisation

Lack of harmonization of these rules has created problems in practice, in particular where claims were directed against both EU domiciliaries and non-EU domiciliaries.

Indeed, in a case where a claim was brought before the court of the place of delivery of rotten fruit by the insurers of the buyer against the transporters, Australian and Dutch, the *Cour de Cassation* decided that, whereas the tribunal had, indeed, jurisdiction with regard to the Australian defendant (on the basis of article 46, al. 2 of the NCCP), it had not with respect to the other defendants for, pursuant to article 6(1) of the Brussels Convention, a consolidation was only possible if claims were indivisible, not merely connected⁶³.

15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

a) The rules listed in annex I

Articles 14 and 15 of the French Civil Code are listed among the special rules of jurisdiction of Annex 1 of the Brussels I Regulation.

⁵⁹ It is worth noting that French courts further have jurisdiction over a connected claim (as opposed to a counterclaim), which has been introduced by the defendant if the French court has jurisdiction to hear the plaintiff's claims (see Cass. Civ. 1^{ère}, 18 April 1972, *Rev. crit. DIP* 1972, p. 672).

⁶⁰ French courts also have jurisdiction, pursuant to article 49 of the NCCP, to hear any "preliminary claims" (e.g. the issue of nullity of marriage as a plea in defense against a request for divorce: Cass. Civ. 1^{ère}, 27 October 1993, *Rev. crit. DIP* 1995, p. 554), even if such claims are subject to the jurisdiction of a different court by virtue of a choice-of-court clause (Cass. Civ., 9 April, 1935, *JDI* 1936, p. 598) or currently submitted to a foreign judge (Paris Court of Appeal, 25 June 1959, *JDI* 1960, p. 474). Doctrine remains divided as to whether the terms of article 49 of the NCCP (which provides that a court having jurisdiction over a claim also has jurisdiction to hear and decide upon defense pleas, even if it implies interpreting a contract, save in case the defense plea on are subject to the exclusive jurisdiction of another court) prevent a French judge, when seized with a preliminary claim, to stay the proceedings and refer the matter to a foreign court (in favor of the impossibility to stay the proceedings pursuant to article 49 of the NCCP: A. Huet, *Le Nouveau Code de Procédure Civile du 5 décembre 1975 et la compétence internationale des tribunaux français*, *JDI* 1976, p. 355, note 50; H. Gaudemet-Tallon (regretting the solution), *La compétence internationale à l'épreuve du Nouveau Code de Procédure Civile : aménagement ou bouleversement ?*, *Rev. crit. DIP* 1977, pp. 21 & foll. In favor of an opposite interpretation: B. Audit, *Droit international privé*, Economica, 4th ed., no. 379). With respect to "interlocutory issues", French courts also retain their jurisdiction easily (e.g. to decide on the validity of a foreign patent, on a challenge to the foreign nationality of a party, etc.), contrary to what they would do in purely domestic dispute.

⁶¹ E.g. a claim for patent infringement of a French patent by a Swiss company (for which French courts have jurisdiction) and one for drawing and model infringement (for which Swiss courts would normally have jurisdiction) (TGI Paris, 4 May 1971, *Rev. crit. DIP* 1974, p. 110).

⁶² By an *a contrario* interpretation of a decision by the Paris Court of Appeal, 23 March 1936, *Rev. crit. DIP* 1938, p. 491. One may however wonder if, in this case, the importance of another jurisdictional criteria, namely the French nationality of one of the plaintiffs, did not have a material bearing on the court decision.

⁶³ Cass. Com., 16 March 1999, pourvoi no. 95-12.136.

Under article 14 of the Civil Code, "an alien, even if he is not a French resident, may be called to appear before French courts with respect to the performance of obligations he has borne in France towards French nationals; he may be called before French courts with respect to obligations he has borne abroad towards French nationals".

Article 15, in turn, provides that "a French national may be called before a French court with respect to obligations he has borne abroad, even towards an alien".

Articles 14 and 15 form the so-called rules on "*privileged jurisdiction*": they have long been viewed as forming the natural right for any French national to have his claims heard by and to be sued before his own courts.

b) Practical use of the rules listed in Annex I

- (i) With respect to the scope *ratione personae*, articles 14 and 15 of the Civil Code apply to both natural and legal persons, provided they are of French nationality⁶⁴ (or EU-domiciled, as far as article 14 is concerned, by virtue of article 4(2) of the Brussels I Regulation). They also apply to refugees, pursuant to the Geneva Convention relating to the status of refugees of July 28, 1951⁶⁵.

The exorbitant character of these provisions is thus further reinforced by the fact that their benefit only depends on the nationality of either the plaintiff or the defendant, not on the nature or origin of the disputed rights, which runs counter to the principles of foreseeability and compliance with parties' expectations which should be of material importance, in particular in international relations. Hence, even where the said right has been transferred from a foreign national to a French national, the latter may still avail himself of the privileged jurisdiction of articles 14 and 15, save in two circumstances:

- (1) in case of assignment, where the right, whose enforcement is sought before the French court by the assignee, is being litigated before a foreign judge who has been seized by the assignor or whose jurisdiction was accepted by the same⁶⁶;
- (2) where the predecessor in title of the French plaintiff and the defendant had agreed on foreign jurisdiction by means of a choice-of-court clause⁶⁷.

Moreover, in case proceedings are initiated by several plaintiffs, it suffices that one of them be French in order for French courts to have jurisdiction⁶⁸.

- (ii) With respect to the scope *ratione materiae*, although it may be inferred from the terms of articles 14 and 15 of the Civil Code that their scope is limited to claims based on contract, these provisions in fact apply to all matters, save for a limited number of exceptions.

⁶⁴ Nationality of legal persons may become more difficult to determine in case of group of companies.

⁶⁵ See Paris Court of Appeal, 27 June 1957, *JDI* 1958, p. 124, obs. Sialelli; Paris Court of Appeal, 12 December 1967, *Rev. crit. DIP* 1969, p. 502, note Y. Loussouarn.

⁶⁶ Cass. Civ. 1^{ère}, 24 November 1987, *Bull. Civ. I*, no. 304.

⁶⁷ Cass. Civ. 1^{ère}, 25 November 1986, *Bull. Civ. I*, no. 224.

⁶⁸ See Cass. Civ. 1^{ère}, 28 June 1989, *Rev. crit. DIP*, 1990, p. 111. The *Cour de Cassation* specified that this solution was justified since the French plaintiff had legitimate interest in pursuing claims in his own name. It thus provided a criteria to avoid the artificial adding of a French plaintiff in order to defraud otherwise applicable rules.

They thus apply to:

- matters relating to natural persons' status: establishment of filiation, custody and visiting rights, divorces, nullity of marriage, etc.;
- patrimonial matters: alimony, contracts (including employment contracts, licenses, etc.), torts, company law, bankruptcy, rights *in rem* in movable property, succession, etc.

By exception, articles 14 and 15 do not apply to rights *in rem* in immovable property and claims for sharing of such immovable property (where said property is situated abroad). They do not either apply to disputes regarding measures to be enforced abroad⁶⁹, for they would otherwise infringe upon the foreign state's independence and sovereignty.

This very same principle, and its corollary of State immunity, further limit the scope of application of these exorbitant rules of jurisdiction. Indeed, unless the foreign state has waived its immunity, articles 14 and 15 may not be used to justify the state being either a plaintiff or a defendant before French courts where the said state has acted *juri imperii*. These provisions may not either be used in disputes relating to a foreign public service (e.g. claims for the annulment or rectification of foreign public records, for nullity of foreign licenses...).

Both case law and doctrine are not yet finally settled as to whether articles 14 and 15 of the Civil Code should also apply to jurisdiction in non-contentious proceedings, albeit they rather seem in favor of such a solution.

- (iii) Articles 14 and 15 are not considered "*d'ordre public*", i.e. they may not be raised *ex proprio motu* by a French judge in order to establish his jurisdiction.

They may also be renounced by their beneficiaries, provided their renunciation is unequivocal⁷⁰. This is obviously the case where the parties have agreed on a choice-of-court clause⁷¹ or an arbitration agreement. This is also the case where a French national brings a claim before a foreign court, provided he was not forced to do so (e.g. he acted on the basis of emergency⁷², to seek conservatory measures⁷³ or he had no other choice but to seize foreign courts since the defendant had no assets that could have been seized in France⁷⁴).

And even where foreign courts have been seized, the privilege revives if the said courts eventually find that they lack jurisdiction, or where the plaintiff eventually withdraws his action before the foreign judge⁷⁵.

⁶⁹ See Cass. Civ. 1^{ère}, 17 November 1981, *JCP G* 1982, II, 19920.

⁷⁰ It should be noted that waiving privileged jurisdiction under article 15 does not entail waiving the same under article 14: hence, in divorce proceedings, even though one of the spouses has accepted to appear as defendant in foreign proceedings, he/she may still initiate proceedings in France (see Cass. Civ. 1^{ère}, 6 March 1979, pourvoi no. 77-13.179).

⁷¹ Provided the choice-of-court clause was, indeed, valid (see Cass. Civ. 1^{ère}, 20 November 2001, pourvoi no. 99-18.395).

⁷² E.g. Paris Court of Appeal, 28 September 1979, *Rev. crit. DIP*, 1981, p. 109.

⁷³ E.g. Colmar Court of Appeal, 9 December 1960, *JDI*, 1961, p. 1096.

⁷⁴ E.g. Paris Court of Appeal, 22 November 1851, *S.* 1851, 2, p. 783.

⁷⁵ Cass. Civ. 1^{ère}, 27 January 1993, pourvoi no. 90-21.219.

Likewise, a French defendant will be deemed to have waived his privilege under article 15 in case he has not challenged the foreign court's jurisdiction⁷⁶. Should he choose to challenge foreign jurisdiction, French case law does not required for him to have expressly relied on article 15 of the Civil Code before the foreign judge⁷⁷.

However, case law considers that if a French defendant has entered into a discussion on the merits in order to safeguard his rights, faced with the threat of a rapidly enforceable judgment, he is not deemed to have renounced privileged jurisdiction⁷⁸.

Furthermore, a French defendant will be deemed to have waived his right under article 15 in case he has accepted to make a deposition in compliance with US procedural law⁷⁹. But entering into a plea for *lis pendens* before the foreign judge is not considered as a waiver of privileged jurisdiction⁸⁰.

It is of note that, since article 15 also works to the benefit of a plaintiff wishing to sue a French national before French courts, the latter may not unilaterally waive his right to privileged jurisdiction and thus escape suit in France⁸¹.

It is further of note that, according to case law, a party is not considered to have waived his right under articles 14 and 15 of the Civil Code by signing a choice-of-court clause prior to becoming a French national, for he was not aware of his privilege at that time⁸².

Finally, articles 14 and 15 may be excluded by virtue of international treaties⁸³.

- (iv) In practice, articles 14 and 15 are often used in proceedings opposing French to US nationals⁸⁴.

The most obvious consequence is that French court decisions, where jurisdiction is based on article 14 or 15 of the Civil Code, face the risk of being refused recognition and enforcement in the US.

c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

Although the situation rarely occurs, there is one famous case where French courts have applied article 4(2) of the Brussels I Regulation and accordingly extended the benefit of French exorbitant

⁷⁶ E.g. Paris Court of Appeal, 21 September 1995, *D.* 1996, somm. p. 168.

⁷⁷ E.g. Cass. Civ. 1^{ère}, 25 June 1974, *JDI*, 1975, p. 102.

⁷⁸ Cass. Civ. 1^{ère}, 5 December 1978, *D.* 1979, IR p. 38, obs. B. Audit.

⁷⁹ Paris Court of Appeal, 12 September 2002, *Gaz. Pal.*, 19 November 2002, no. 323, p. 16.

⁸⁰ Cass. Civ. 1^{ère}, 18 May 1976, pourvoi no. 75-12.300.

⁸¹ Paris Court of Appeal, 18 October 1972, *JDI* 1973, p. 371, note F. Deby-Gérard.

⁸² Versailles Court of Appeal, 27 February 1998, *JDI*, 2000, pp. 358 & foll.

⁸³ But a mere MFN clause, or a clause providing for free access to courts does not suffice.

⁸⁴ E.g. Orleans Court of Appeal, 24 January 2002, *Rev. crit. DIP*, 2002, pp. 355 & foll., note H. Muir Watt, where the court refused to grant exequatur to a Californian judgment in default proceedings; Cass. Civ. 1^{ère}, 30 March 2004, pourvoi no. 02-17.974, stating that, absent any treaty on judicial cooperation between France and the US, the use of the privileged jurisdictional rule of article 15 of the Civil Code is no more exorbitant than the legislation of Florida, conferring jurisdiction to its courts on the basis of a mere temporary residence.

rules on jurisdiction to non-EU nationals in view of their being domiciled in France: the Guggenheim case⁸⁵.

In this case, the US heirs of Peggy Guggenheim, who were domiciled in France, acted against the Salomon R. Guggenheim Foundation of New York before a Paris judge. Their claim was based on the Foundation's misusing the Barbier House in Venice and the art pieces it had been given, per will, by Peggy Guggenheim. The heirs thus requested that the palace with the art pieces be put back into the state they were in at the time of the donation and reserved their rights to request annulment of the donation and payment of damages.

The ruling of the Paris Court of Appeal leaves no room for interpretation: "*The Helion-Rumney brethren, domiciled in Paris, have validly seized the Tribunal de Grande Instance of this city on the combined basis of articles 3 and 4(2) of the Brussels Convention and article 14 of the Civil Code*" (see Annex 4).

16. Forum *necessitatis*

Denial of justice is, indeed, an admissible ground of jurisdiction for French courts.

Yet, in order for the system to remain balanced and for France not to become the "*last resort*" in any case, whatever the circumstances, case law has provided for two conditions to be met:

- the plaintiff relying on French courts' jurisdiction has to prove that it is impossible for him or her to bring his or her claim before a foreign court. Impossibility may be based on either factual (e.g. plaintiff facing major threats if putting foot on foreign soil⁸⁶) or legal grounds (e.g. the foreign court has already found it has no jurisdiction⁸⁷). French courts will also admit impossibility to seize a foreign court where, upon examination of foreign rules on jurisdiction of the states concerned, they find that no foreign court will retain its jurisdiction.

However, the mere fact that a foreign court would declare the plaintiff's claim inadmissible or dismiss it on the merits does not amount to a denial of justice and can therefore not justify French courts' jurisdiction⁸⁸;

- the dispute has to bear some link with France. How important this link has to be remains debated: whereas case law seems to be satisfied with the plaintiff's having a stable residence in France⁸⁹, some authors are in favor of retaining jurisdiction even if said link is more remote (e.g. presence of financial or other interests in France, obligation to be performed in France⁹⁰).

⁸⁵ The Paris Court of Appeal rendered an unequivocal decision on 17 November 1993 (*Rev. crit. DIP* 1994, p. 115), which was upheld by the First Chamber of the *Cour de Cassation* on 3 July 1996 (*JDI* 1997, p. 1016).

⁸⁶ Aix-en-Provence Court of Appeal, 31 May 1923, *JDI* 1924, p. 204.

⁸⁷ Paris Court of Appeal, 10 November 1960, *JDI* 1961, p. 426.

⁸⁸ Case law is less clear on the issue of whether the unavailability of some rights before the judge having jurisdiction is sufficient to justify French courts' jurisdiction on the basis of denial of justice (e.g. re. the prohibition of divorce: pro in a case where Brazilian law does not admit divorce (Paris Court of Appeal, 17 June 1948, *Rev. crit. DIP* 1949, p. 339); con in a case where Irish law does not admit divorce (Paris Court of Appeal, 23 September 1988, *D.* 1988, inf. rep. p. 252). Authors tend to be in favor of the latter solution, on the basis that it is basic principle of justice that everyone have access to a judge to have his case heard, not that he be granted his request.

⁸⁹ Paris *Tribunal de grande instance*, 1 October 1976, *JDI* 1976, p. 879.

⁹⁰ The "*denial of justice*" exception may also be used in arbitration related cases, e.g. to request a court to appoint an arbitrator where a party to the arbitration fails to do so. See Paris Court of Appeal, 29 March

Moreover, denial of justice will be insufficient to confer jurisdiction upon French courts in case they are completely deprived of any *jurisdictio*, for example in disputes over successions where immovable property is located abroad⁹¹.

The issue as to whether the fact that a foreign judge would render an unenforceable decision should justify French courts' jurisdiction on the basis of denial of justice is not yet finally settled, although recent case law may be interpreted as denying jurisdiction in such a case⁹².

(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

The fact that French courts have exclusive jurisdiction to adjudicate a case is one of the limited grounds for refusing recognition and enforcement of a non-EU judgment⁹³.

Indeed, a foreign judgment may be refused recognition and enforcement if the foreign court did not have jurisdiction, on the basis of "*special French rules on indirect international jurisdiction*"⁹⁴.

Hence, foreign jurisdiction will be denied by application of the exclusive jurisdiction conferred upon French courts in the following cases:

- involvement of the French State or of French public service,
- jurisdictional privilege by reason of French nationality of plaintiff or defendant (provided such privilege was not waived),
- *lex situs* in case of *in rem* rights relating to immovable property,

2001, *RTD Com.* 2001, p. 651; Cass. Com. 1^{ère}, 1 February 2005, *State of Israel v. NIOC*, pourvois no. 01-13.742 and 02-15.237 (the link between the dispute and France lay in the arbitration clause providing that the president of the ICC, located in Paris, was to be the appointing authority for the third arbitrator).

⁹¹ Cass. Civ. 1^{ère}, 7 January 1982, *Rev. crit. DIP*, 1983, pp. 87 & foll.

⁹² See Cass. Com., 11 June 2002, pourvoi no. 00-13.470, deciding that French "*ordre public international*", which may lead a French court to disregard an otherwise applicable law which would run counter to said "*ordre public international*", does not allow to deny a foreign court jurisdiction to the benefit of a French one.

⁹³ These limited grounds were listed by the First Chamber of the *Cour de Cassation* in the *Munzer v. Lady Munzer* case of 7 January 1964 (*Rev. crit.* 1964, pp. 334 & foll.), when a review on the merits was first abandoned. The five criteria that have to be met in order for a foreign decision to be recognized and enforced in France are: (i) the foreign court has jurisdiction; (ii) the procedure before the foreign court complies with due process requirements; (iii) the foreign court applies the appropriate law to the merits (this criteria is met if the law actually applied by the foreign judge entails results equivalent to those application of French conflict of law rules would have entailed); (iv) the decision thus rendered complies with *ordre public international*; and (v) the parties have not seized a foreign court in order to defraud otherwise applicable rules.

⁹⁴ Courts of appeal had been interpreting in different ways this ground for non-recognition (application of foreign rules of private international law v. application of French rules on jurisdiction), when the *Cour de Cassation* finally decided on a middle-basis: "*whenever the French rules on jurisdiction do not provide for the exclusive jurisdiction of French courts, the foreign court is deemed to have jurisdiction provided the dispute bears a characteristic connection with the country of the court seized and the choice of court was not fraudulently made*" (Cass. Civ. 1^{ère}, 6 February 1985, *Mrs. Fairhurst v. Simitch*, *Rev. crit. DIP* 1985, pp. 369 & foll.).

- valid choice-of-court clauses,
- succession,
- mandatory character of some protective rules on jurisdiction, in particular as regards employment contracts⁹⁵,
- enforcement measures to be carried out in France⁹⁶.

Some authors consider that a foreign judgment should also be refused recognition and enforcement where courts of another EU Member State enjoy exclusive jurisdiction⁹⁷, albeit this has, to the best of our knowledge, hitherto not been sanctioned as such by case law.

(E) Declining Jurisdiction

18. Forum Non Conveniens

Apart from the possibility to raise a plea of *lis pendens* or connected claims (cf. Section E.19.b))⁹⁸, there is no general rule or practice in France which allows French courts to either decline jurisdiction or to stay the proceedings. In particular, the *forum non conveniens* doctrine is unknown under French law⁹⁹: French courts either have or do not have jurisdiction to adjudicate a claim. In the former case, they may not decline jurisdiction on the basis that another court would be better suited to hear the case.

⁹⁵ See Paris *Tribunal de grande instance*, 7 February 1986, *Rev. crit. DIP*, 1986, p. 547, note H. Gaudemet-Tallon, *JDI* 1986, note P. Mayer. However, case law may be interpreted as refusing to confer exclusive jurisdiction upon French courts where only the condition relating to the employee's domicile or the place of conclusion of the contract is met, whereas the work is performed abroad and the employer is foreign. See also the latest case law, which appears to liberally enforce choice-of-court clauses in international employment contracts. Case law is still evolving in this regard (cf. Section E.19a)).

⁹⁶ It is of note that, whilst French law generally considers that anti-suit injunctions infringe upon a state's sovereignty, there is at least one exception where French courts have ordered parties to refrain from requesting an arrest of property order on a building located abroad, on the basis that they had jurisdiction with regard to the merits of the case, i.e. bankruptcy proceedings (Cass. Civ. 1^{ère}, 19 November 2002, *Epoux Brachot*, pourvoi no. 00-22.334). It is further of note that French case law considers that Mareva injunction do not infringe upon a state's sovereignty and its jurisdiction, as opposed to anti-suit injunction (cf. Cass. Civ. 1^{ère}, 30 June 2004, pourvois no. 01-03.248 & 01-15.452).

⁹⁷ H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, no. 150, referring to *Gothot & Holleaux*, *JDI* 1971, pp. 774 & 775.

⁹⁸ Which may be interpreted as timid French applications of the *forum non conveniens* doctrine (see H. Gaudemet-Tallon, *Les régimes relatifs au refus d'exercer la compétence juridictionnelle en matière civile et commerciale : forum non conveniens, lis pendens*, *R.I.D.C.* 2-1994, p. 426).

⁹⁹ The Paris Court of Appeal once applied the *forum non conveniens* theory to decline jurisdiction in a highly criticized decision rendered on 14 December 1987 (*JDI* 1989, p. 96).

19. Declining Jurisdiction when the Defendant is Domiciled in a Third State

(a) Non-EU jurisdiction Agreements

Choice-of-court clauses are lawful, as a matter of principle, where they apply to international disputes and provided they are not contrary to the mandatory jurisdiction of a French court¹⁰⁰.

Case law thus decides that it would be inappropriate to extend article 48 of the NCCP, which prohibits choice-of-court clauses unless they bind persons acting as merchants, to international disputes.

Indeed, imposing that parties to a choice-of-court clause be merchants would not only be a needless burden, not in line with either parties' autonomy or compliance with parties' expectations, but also impracticable for many legal systems are not cognizant of the category of "merchants".

Hence, the prerequisite for enforcing choice-of-court clauses lies in the "international" character of the dispute, which may be difficult to assess, in particular where the domestic or international character of the contract, and of the dispute arising therefrom, changes after its conclusion, be it through a party's changing its nationality or the assignment of the contract to a third-party having a different nationality.

In such a case, learned authors consider that the validity of such a clause may only be determined in view of the conditions existing at the time it was entered into, in order to comply with the parties' expectations¹⁰¹.

The licit character of a choice-of-court clause is further subject to the condition that French courts do not enjoy mandatory jurisdiction.

In order not to deprive the principle of validity of choice-of-court clauses in international disputes of its effectiveness, the exceptions thereto have to be, and indeed are, construed restrictively.

Hence, rules on ordinary jurisdiction are not considered mandatory and may thus be departed from through a choice-of-court clause.

On the contrary, jurisdiction over disputes relating to personal status, *in rem* rights on immovable property, public service or enforcement measures should be considered mandatory and a choice-of-court clause depriving French courts of their jurisdiction be considered illicit.

Solutions appear to be less clear where protective jurisdictional rules apply:

¹⁰⁰ Cass. Civ. 1^{ère}, 17 December 1985, *CSEE v. SORELEC*, *Rev. crit. DIP* 1986, p. 537. The licit character of the choice-of-court clause is determined according to French law, being the *lex fori* (see Paris Court of Appeal, 14 June 1995, *D.* 1996, somm. p. 169, obs. B. Audit).

¹⁰¹ See H. Gaudemet-Tallon, *JDI* 1991, no. 3, p. 742. The position of this author seems supported by the *Cour de Cassation's* motivations, insofar as it considers that a choice-of-court clause is part of a contract's general equilibrium ("*économie générale*") and may therefore be opposed to an assignee (Cass. Civ. 1^{ère}, 20 November 1975, *Rev. crit. DIP* 1975, p. 668, note J.-M. Bischoff). Some decisions have taken a different view, under article 17 of the Brussels Convention (see Versailles Court of Appeal, 8 November 1990, *JCP G* 1991, II, 21672)

- with respect to international employment contracts, the French jurisdictional rules have undergone many changes in the past years and the position of the *Cour de Cassation* does still appear not to be clearly settled.

Indeed, whereas the *Cour de Cassation* decided, in 1974, that a choice-of-court clause inserted in an international employment contract was valid provided it did not derogate from the criteria provided for internal territorial jurisdiction under article R.517-1 of the Labor Code¹⁰², different chambers of the same *Cour de Cassation* have later taken differing views, or even changed their own jurisprudence¹⁰³.

According to the latest case law, a choice-of-court clause, since it is not in violation of French "*ordre public international*" may validly be opposed to the employee. The terms of this decision nevertheless leave room for interpretation as to the extent of such a principle of validity¹⁰⁴;

- with respect to international insurance contracts, authors seem generally to favor the extension of the principles applied by the *Cour de Cassation* in 1974 to insurance contracts, i.e. the exclusion of choice-of-court clauses which derogate from the criteria provided for domestic jurisdiction under article R.114-1 of the Insurance Code¹⁰⁵, although some note that the Brussels Convention (now the Brussels I Regulation) does not provide for an absolute prohibition, which may seem to mean that protection of the weak party does not necessarily entail barring choice-of-court clauses;
- as far as consumers are concerned, articles L.121-24 and L.121-73 of the Consumer Code prohibit choice-of-court clauses in some specific cases.

It is of note that case law does not require, for the clause to be licit, that the country upon whose courts jurisdiction is conferred bear any link to the dispute.

¹⁰² Cass. Ch. Mixte, 28 June 1974, *JDI* 1975, p. 82, note Holleaux.

¹⁰³ The Social Chamber, although it had first taken a more liberal view (see Cass. Soc., 8 July 1985, *Bull. Civ.*, V, no. 405: validity of a choice-of-court clause where the contract was performed abroad for a foreign employee), in line with that of the First Civil Chamber (see Cass. Civ. 1^{ère}, 16 June 1987 and 8 March 1988, *D.* 1988, somm. p. 314, obs. A. Lyon-Caen), it then retreated to the position of the *Chambre Mixte* (invalid clause, although the work was performed abroad, but the employee domiciled in France). This divergent positions gave rise to much debate among authors (see P. Mayer, *Les clauses relatives à la compétence internationale, insérées dans les contrats de travail*, in *Mélanges dédiés à Dominique Holleaux, Litec*, pp. 263 & foll.; H. Gaudemet-Tallon under Cass. Soc., 7 May 1987 and 16 June 1987, *Rev. crit. DIP*, 1988, pp. 78 & foll.). The Social Chamber then took, yet another, different stance, holding that if the work is performed in an establishment abroad, choice-of-court clauses are valid, whereas they are not if the work is performed outside any establishment or in France (Cass. Soc., 23 January 1996, *Gaz. Pal.*, 1997, jur. p. 10, concl. Y. Chauvy; Cass. Soc., 24 April 2001, pourvoi no. 98-46.424).

¹⁰⁴ See Cass. Soc., 21 January 2004, pourvoi no. 01-44.215. The *Cour de Cassation* indeed referred to the fact that the employment contract was governed by US law, which, if part of its motivation, would constitute a regrettable confusion of law applicable to the merits and jurisdictional rules. Moreover, it appears from the facts of the case that the work was, at least partially, performed abroad.

¹⁰⁵ This view is supported by a decision of the *Cour de Cassation*, ruling that these provisions were mandatory (see Cass. Civ. 1^{ère}, 17 June 1997, pourvoi no. 95-18.045).

It does not either require that these courts be specially identified, and thus enforces a clause providing for the jurisdiction of the courts of the country X, as long as the rules of the said country enable the special identification¹⁰⁶.

The choice-of-court clause, in order to be enforceable, further needs to be valid, i.e. it has to be known to and accepted by the party it is used against¹⁰⁷.

The law applicable to this issue remains debated, between authors as well as by case law¹⁰⁸.

Whether the defendant was aware of and consented to be bound by the choice-of-court clause is strongly fact-related and determined on a case-by-case basis. In this regard, judges seem to take into account various elements:

- the print size and language of the clause¹⁰⁹;
- the capacity in which parties are acting (professional or not)¹¹⁰: French courts tend to examine conditions of consent more thoroughly where the clause was entered into by a non-professional;
- previous business relationship between the parties¹¹¹;
- common trade usage¹¹².

However, the clause need not necessarily be signed in order for it to be binding; it may be incorporated in the main contract by reference¹¹³.

In any case, a choice-of-court clause conferring jurisdiction upon foreign courts does not prevent a French judge from having jurisdiction to order provisional measures in case of emergency, save where such measures are also expressly submitted to the jurisdiction of the foreign court.

(b) Parallel proceedings in a non-EU court

In order to manage positive conflicts of jurisdiction, i.e. cases where the courts of more than one state have jurisdiction to adjudicate a claim and are seized thereof, French case law has decided to apply the provisions on domestic *lis pendens* to international disputes¹¹⁴.

Under French law, *lis pendens* may occur in two situations: (i) pursuant to article 100 of the NCCP, "where a same cause of action is pending before two fora of the same hierarchy equally competent",

¹⁰⁶ Cass. Civ. 1^{ère}, 13 April 1999, SARL Les Grands Comptoirs Français de Djibouti, *Bull. Civ.* 1999, I, no. 128.

¹⁰⁷ See Cass. Com., 10 January 1989, C^{ie} Naviera Garcia Minaur, *Bull. Civ.*, IV, no. 20.

¹⁰⁸ E.g. Cass. Com., 10 January 1989, C^{ie} Naviera Garcia Minaur, op. cit., deciding that the validity of a choice-of-court clause is subject to *lex fori*. Contra: Cass. Civ. 1^{ère}, 3 December 1991, *Cie Alliance*, applying conflict of law rules (*Rev. crit. DIP* 1992, p. 340, note H. Gaudemet-Tallon).

¹⁰⁹ E.g. Aix-en-Provence Court of Appeal, 4 February 1982, *DMF* 1983, pp. 531 & foll.

¹¹⁰ E.g. Paris Court of Appeal, 1 March 1983, *DMF* 1983, pp. 550 & foll.: a professional is bound to pay attention to general conditions, even when in small print, whose importance he is well aware of.

¹¹¹ E.g. Cass. Civ. 1^{ère}, 3 December 1974, *Bull. Civ.* 1974, no. 321. More recently, the same Chamber of the *Cour de Cassation* has been less liberal and refused to consider that a party is bound by a choice-of-court clause on the mere basis that it had been aware of its existence through previous business relationships where the parties' contract did not refer to the said clause (see Cass. Civ. 1^{ère}, 30 June 1992, *Bull. Civ.*, I, no. 203; Cass. Com., 22 June 1993, *Juris-Data* no. 1993-001604).

¹¹² E.g. Bordeaux Court of Appeal, 27 February 1979, *JDI* 1979, pp. 162 & foll. (stamp of the forwarding agent on a charter-party).

¹¹³ Cass. Civ. 1^{ère}, 16 February 1999, *Bull. Civ.*, I, no. 51.

¹¹⁴ See Cass. Civ. 1^{ère}, 26 November 1974, *JDI* 1975, p. 108.

in which case the court seized last shall, if so requested by a party, or may, *ex proprio motu*, relinquish jurisdiction and refer the case to the court first seized (*lis pendens stricto sensu*); and (ii), pursuant to article 101 of the NCCP, "where the matters currently pending before different fora exhibit such links between them that it is in the interest of justice to manage and determine them together", in which case any one of the courts seized may relinquish jurisdiction, upon request of a party, and remit the matter to the other court (*lis pendens lato sensu*).

A plea for *lis pendens stricto sensu* was first admitted in cases where it was opposed to a French party who had brought a claim before a foreign court¹¹⁵.

International *lis pendens* is now admitted as a matter of principle by the French judge, although it is subject to stricter conditions than in a purely internal *lis pendens* situation. Indeed, apart from the regular conditions of two current and ongoing¹¹⁶ proceedings involving the same parties, with disputes having the same object and based upon the same cause of action¹¹⁷, and of the French judge being the last one seized, the party entering into an international *lis pendens* plea shall, notably, establish that any decision the foreign court, which is also currently seized of the matter, may render is capable of recognition and enforcement in France¹¹⁸.

Since the foreign judgment is, by definition, not yet rendered, the French judge will have to carry out an anticipated control thereof, with all risks inherent to such an exercise. This explains why some authors favor the possibility for the French judge to stay the proceedings pending the outcome of the foreign litigation. Others advocate that the judge should only be allowed to order such a stay and should not be able to relinquish jurisdiction pending the outcome of foreign proceedings.

In any case, since *lis pendens* is based on the existence of concurrent jurisdiction, it is inadmissible where French courts have exclusive jurisdiction¹¹⁹.

Moreover, a plea for *lis pendens* will fail when used by one of the defendants to escape French jurisdiction on the basis that his co-defendant is subject to a different jurisdiction¹²⁰.

Since French judges are vested with discretionary power when deciding upon a plea for *lis pendens*, they may take into account more "subjective" elements in their ruling, e.g. the fact that a French decision, applying French law, will provide more guarantees or protection to the plaintiff than a foreign one¹²¹.

¹¹⁵ Cass. Civ., 21 March 1950, *D.* 1951, p. 395.

¹¹⁶ The date of institution of proceedings before the foreign court is determined according to its own law (TGI Dunkirk, 18 April 1984, *JDI* 1985, p. 846), as is the date such proceedings end (Cass. Civ. 1^{ère}, 6 December 2005, *Rev. crit. DIP* 2006, p. 428, note E. Pataut).

¹¹⁷ The condition of identity of object and cause is frequently denied, which explains why few pleas of *lis pendens* succeed in France.

¹¹⁸ See Cass. Civ. 1^{ère}, 7 January 1964, *Munzer*, 1964 *Rev. crit. DIP* 1964, p. 344, op. cit. It is of note that a party may not oppose a plea for *lis pendens* by claiming that the foreign judge lacks jurisdiction where he initiated the foreign proceedings himself (see Cass. Soc., 7 May 1996, pourvoi no. 93-43.771).

¹¹⁹ E.g. where the French defendant has not waived his right under article 15 of the Civil Code or where a French national is a plaintiff in France under article 14 of the Civil Code, which excludes any concurring jurisdiction (see Cass. Civ. 1^{ère}, 25 June 1974, *JDI* 1975, p. 102, note Huet; Cass. Civ. 1^{ère}, 3 June 1997, *Rev. crit. DIP* 1998, p. 452, note B. Ancel). This position of French case law, which has been met with criticism, constitutes the main barrier to findings of international *lis pendens* by French courts.

¹²⁰ See Orleans Court of Appeal, 6 May 2003, op. cit. (codefendant not subject to French jurisdiction pursuant to Brussels I Regulation).

¹²¹ See in case of divorce, for the possibility of the wife to prove that she is not the only one at fault: Paris Court of Appeal, 21 November 1978, *D.* 1979, IR p. 341.

In any case, relinquishing jurisdiction is a mere faculty for the French judge last seized¹²², never an obligation.

As for *lis pendens lato sensu*, it was first admitted, albeit implicitly, in 1987¹²³. It was explicitly endorsed in 1999¹²⁴, under the condition that there be such a link between the two proceedings as to create a risk of irreconcilable decisions.

Contrary to *lis pendens stricto sensu*, it is not subject to the French judge being the last seized.

(c) "Exclusive" jurisdiction in a non-EU state

If the subject matter of the dispute is closely related to a non-EU state, but French courts have jurisdiction to hear the case pursuant to French rules on international jurisdiction, they will not decline jurisdiction in favor of the foreign court, for neither the *forum non conveniens* theory, nor the "reflex effect" are, for the time being, admitted as such in French law.

However, the existence of such close links will weigh in favor of French courts admitting to either stay the proceedings or decline jurisdiction when so requested on the basis of the existence of parallel proceedings¹²⁵.

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

a) Non-EU Jurisdiction Agreements

When examining validity of choice-of-court clauses, French judges pay no regard to the country whose courts are to have jurisdiction pursuant to such a clause. Indeed, albeit this position is criticized by some authors¹²⁶, French case law does not require that the said country bear any link to the dispute in order for the clause to be valid, thus endorsing the choice of a neutral forum¹²⁷.

And it does so even where the designated forum is situated in a non-EU state¹²⁸.

Hence, where French courts have jurisdiction under the Brussels I Regulation, but where such jurisdiction is not exclusive under the same or mandatory under French law, a French judge will decline his jurisdiction if the parties to the dispute have validly agreed on a choice-of-court clause.

(b) Parallel Proceedings in a non-EU court

In case of parallel proceedings, the *lis pendens* rules described above apply no differently whether French jurisdiction is based on national rules or on the Brussels I Regulation.

¹²² A plea for *lis pendens* is inadmissible if the French judge was first seized of the matter, in which case the plea has to be brought before the foreign judge (see Cass. Civ. 1^{ère}, 5 May 1962, *D* 1962, p. 718).

¹²³ Cass. Civ. 1^{ère}, 20 October 1987, *JDI* 1988, p. 446.

¹²⁴ Cass. Civ. 1^{ère}, 22 June 1999, *Bull. Civ.* 1999, I, no. 208.

¹²⁵ See e.g., Cass. Civ. 1^{ère}, 15 June 1994, *Bull. Civ.* I, no. 214.

¹²⁶ P. Mayer & V. Heuzé, *Droit international privé, Montchrestien*, 8th ed., no. 304, pleading in favor of "parties' legitimate interest in seizing such a court".

¹²⁷ See Cass. Com., 19 December 1978, *JDI* 1979, p. 366, note H. Gaudemet-Tallon; Paris Court of Appeal, 10 October 1990, *D*. 1990, IR p. 274.

¹²⁸ E.g. Switzerland (Cass. Com., 19 December 1978, op. cit.).

(c) "Exclusive" Jurisdiction in a non-EU State

As mentioned above, although some authors advocate that French courts should decline jurisdiction when non-EU states enjoy exclusive jurisdiction, pursuant to a "*reflex effect*" of article 22 of the Brussels I Regulation, there is no discernable trend in French case law in that regard.

However, French courts will decline their jurisdiction in situations where they lack any *juridictio*, notably where the dispute relates to foreign public service or to *in rem* rights in immovable property located abroad.

(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

In case of concurring jurisdiction, French courts will not only retain their jurisdiction, but also refuse to enter into a plea for *lis pendens* where the subsequent foreign judgment is proven to be incapable of recognition and enforcement. This is particularly so where due process requirements are not complied with. Although, depending upon the stage of the said foreign proceedings, breach of due process may prove difficult to establish, this difficulty is overcome by the discretionary power vested in a French judge who has been requested to decline jurisdiction.

If there is no national rule vesting jurisdiction in France, doctrine is divided as to whether denial of justice would constitute a valid ground of jurisdiction in case a foreign judgment would not be recognized in France, with most authors admitting such a ground where due process requirements are not met¹²⁹.

However, the *Cour de Cassation* has recently decided that considerations of "*ordre public international*" are not sufficient to ground French courts' jurisdiction¹³⁰.

¹²⁹ See in favor thereof: D. Holleaux, *JDI* 1975, p. 98 & 1976, p. 149; T. Civ. Seine, 1 December 1932, *JDI* 1933, p. 84, concl. Picard, note Tager. Not in favor: A. Huet, *JDI* 1988, p. 138; A. Sinay-Cytermann, *L'ordre public en matière de compétence judiciaire internationale*, th., Strasbourg, 1980, no. 340 & foll., with the exception of violation of due process requirements.

¹³⁰ Cass. Com., 11 June 2002, op. cit.

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

(a) Claims from EU Consumers against non-EU defendants

We are not aware of any such reported cases.

(b) Claims from EU Employees against non-EU Employers

This has been repeatedly the case where parties had entered into a valid choice-of-court clause (cf. Section E.19.a)).

(c) Claims from EU Plaintiffs in Community Regulated Matters

We are not aware of any such reported and commented upon cases.

It is worth noting in this regard that, save for some limited exceptions¹³¹, issues of jurisdiction and of applicable law are entirely different under French law.

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

We are not aware of any such reported case.

It is of note that, as a matter of principle, and as case law has emphasized, where jurisdiction is based on the defendant's domicile, the latter has to be taken into consideration on the basis of its location at the time proceedings were initiated, even if it later changed (including on appeal)¹³². However, in such a case, and provided the defendant is not an EU-national, a French national or EU domiciled still has the possibility to avail himself of article 14 of the Civil Code, save where he is prevented from doing so by an international treaty.

24. The Risk that EU Rules and Principles be Put in Jeopardy Because of the Application of National Jurisdictional Rules

As a matter of principle, jurisdiction and applicable law are two entirely different issues under French law¹³³.

¹³¹ E.g. protection of children, issues involving state sovereignty, etc.

¹³² See Cass. Civ. 1^{ère}, 31 May 2005, pourvoi no. 03-11.732.

¹³³ Although, and notwithstanding the limited exceptions already referred to *supra* 131, the former may nevertheless directly bear on the latter, for a French judge will apply its own law with respect to conflict of law rules, the admissibility of "*renvoi*", the classification of deeds or facts and the definition of international public order.

Although, some authors have expressed their favor to closer links between applicable law and jurisdiction, by conferring jurisdiction upon French courts as soon as French laws relating to public policy and safety apply to the merits¹³⁴, case law has not seemed inclined to follow that path.

Hence, French courts may indeed decline their jurisdiction, even where application of such rules, be they purely domestic or European, are at stake, provided they do not have exclusive jurisdiction, and provided articles 14 and 15 of the Civil Code are of no avail¹³⁵.

Such a situation has notably occurred in international employment contract disputes, where, under certain circumstances, a choice-of-court clause conferring jurisdiction upon a non-EU court, applying its own labor law which may not provide adequate protection to an employee, has been enforced¹³⁶.

This has also been the case in a dispute between a contractor and a subcontractor, where the parties, both French, had agreed on conferring jurisdiction to Libyan courts, Libya being the place of execution of the works, including for the taking of provisional measures in case of emergency, although French law provides for mandatory protection to the benefit of a subcontractor¹³⁷.

French case law however provides for some safeguard, namely in case the choice of a foreign judge was fraudulent¹³⁸, or if the recognition or enforcement of the decision is considered to be contrary to French "*ordre public international*". This would notably be the case for a foreign judgment allowing the unilateral repudiation of a wife, which is contrary to the principle of equality between spouses¹³⁹.

(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

Parental responsibility is one of those areas where jurisdiction and applicable law intermingle for states have an obvious interest in providing adequate protection to children. Hence the natural extension of rules on domestic jurisdiction, which confer jurisdiction upon French courts as soon as the child resides in France¹⁴⁰.

French courts may further be seized on the basis of rules on privileged jurisdiction, albeit learned authors stress that they should decline their jurisdiction in order to ensure good administration of

¹³⁴ See J.-P. Niboyet, *Traité de droit international privé français*, S., 1947, t. VI, vol. 1, no. 1718; Y. Lequette, *Protection familiale et protection étatique des incapables*, LGDJ, 1976, no. 339; P. Mayer, *Rapports de la compétence judiciaire et de la compétence législative dans le droit international privé de la famille*, thèse, Paris, 1972, no. 44 and 94; E. Patout, *Principe de la souveraineté et conflits de juridictions (Etude de droit international privé)*, LGDJ, 1999, no. 263 & foll.

¹³⁵ I.e. their benefit has been validly waived.

¹³⁶ See Cass. Soc., 8 July 1985, *op. cit.*, accepting the jurisdiction of courts of Colombia.

¹³⁷ Cass. Civ. 1^{ère}, 17 December 1985, *pourvoi* no. 84-16.338.

¹³⁸ See Cass. Civ. 1^{ère}, 6 June 1990, *D.* 1990, *somm. com.* 263, *obs. Audit.*

¹³⁹ Cass. Civ. 1^{ère}, 17 February 2004, *JDI* 2004, pp. 1200 & foll., note L. Gannage (both spouses were domiciled in France).

¹⁴⁰ See article 1211 of the NCCP.

justice if the child does not reside in France (ordering enquiries into family situations would indeed be ineffective if the child does not reside within the realm of the judge's *imperio*)¹⁴¹.

Furthermore, in cases where the child is in need of educational measures, his interest is not the only one at stake, for such measures also involve the state of the child's residence's interest in preserving security and public order.

Finally, where issues of parental responsibility arise during divorce proceedings, article 1070 of the NCCP provides for the jurisdiction of French courts if:

- the residence of the family is located in France,
- in case there is no common residence between the parents, if the parent with whom the child lives, in case of joint custody, or who has sole custody has his residence in France, or
- in all other cases, if the party who has not initiated the proceedings has his residence in France.

Jurisdiction of French courts may also be based on The Hague Convention concerning the power of authorities and the law applicable in respect of the protection of infants, concluded on October 5, 1961¹⁴².

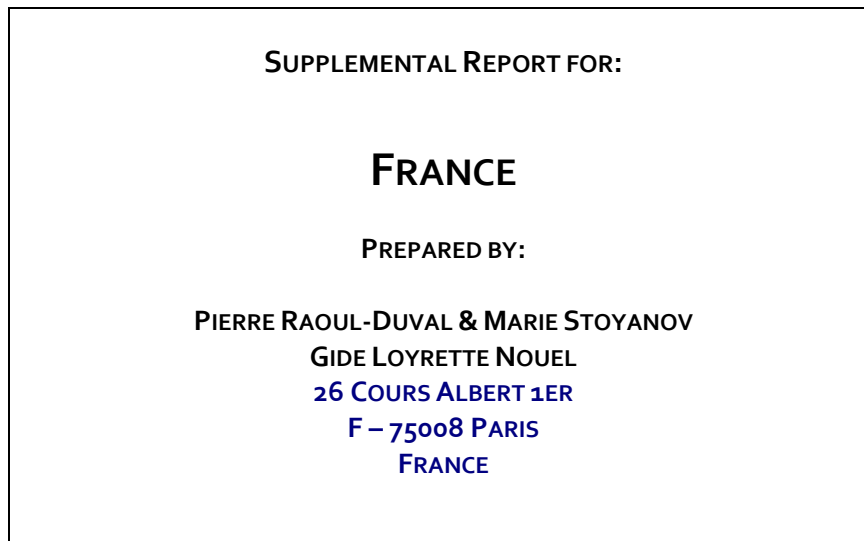
However, its application is increasingly limited, for it is largely superseded by the Brussels II bis Regulation.

In those rare cases where it still applies, the Convention provides for traditional rules, such as the principal jurisdiction of the state of the infant's habitual residence, with the alternative jurisdiction of the state of the infant's nationality or of the location of its property or of the infant's temporary presence, under certain defined circumstances.

These rules will further evolve once The Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, concluded on 19 October 1996, will be ratified by France.

¹⁴¹ See P. Mayer & V. Heuzé, *Droit international privé*, Montchrestien, 8th ed., 2004, no. 534.

¹⁴² Which a French judge is bound to apply *ex proprio motu* (see Cass. Civ. 1^{ère}, 6 February 2001, *JCP G* 2002, p. 339).



26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?

1.1 Multilateral conventions¹⁴³

France is a party to - and has ratified - the following multilateral conventions concluded with non-EU countries that include rules of jurisdiction in matters of parental responsibility:

- The Hague Convention of 5 October 1961 concerning the power of authorities and the law applicable in respect of the protection of infants; and
- The European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

¹⁴³ “Parental responsibility” is defined herein in accordance with the New Brussels II Regulation and thus excludes matters of alimony, establishment of filiation and adoption.

1.2 Bilateral conventions

France has further concluded and ratified bilateral conventions¹⁴⁴ regarding the same matters with the following non-EU countries:

- Algeria : Convention of 21 June 1988 relating to the children of separated Franco Algerian couples;
- Djibouti: Convention of 27 September 1986 on Judicial Cooperation in civil matters, including personal statute, commercial, social and administrative matters;
- Egypt: Convention of 15 March 1982 on judicial cooperation in civil matters, including personal statute, social, commercial, and administrative matters;
- United Arab Emirates: Convention of 9 September 1991 relating to judicial mutual aid, recognition and enforcement of decisions in civil and commercial matters;
- Morocco: Convention of 10 August 1981 on personal and family statute and judicial cooperation;
- Tunisia: Convention of 18 March 1982 on Judicial mutual assistance in matters of guardianship, visitation right, alimony (supplementing an earlier convention of 28 June 1972);
- Uruguay: Convention of 16 September 1997 on judicial mutual aid in civil and commercial matters.

28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these "exclusive" rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

As recalled above (cf. section G), jurisdiction relating to parental responsibility is closely linked to the interest a state may have in deciding upon matters with respect to children residing on its territory¹⁴⁵.

As a consequence, a foreign judgment deciding that an endangered child should be subject to educational care measures cannot be enforced in France if the measure requires the intervention of a French state entity (for example, a public rehabilitation centre), for such measures are within the exclusive jurisdiction of each state¹⁴⁶.

¹⁴⁴ These conventions provide for rules on "indirect international jurisdiction", i.e. for the grounds on which a foreign judgment can be denied recognition and enforcement for lack of jurisdiction. However, according to the *Cour de Cassation's* position, some of these rules may also, depending on their wording, be interpreted as providing rules on "direct international jurisdiction", and therefore be used to exclude the application of article 14 of the French Civil Code (see B. Audit, *Private International Law*, 2006, n° 499; Cass. Civ. 1^{ère}, 2 March 1999, *JCP G.* 1999.II.10220, which ruled that article 11 of the Morocco Convention of 1981 providing for rules on "indirect jurisdiction" in relation to divorce matters prevents the French national, as a matter of principle, from availing himself of article 14 of the French Civil Code. The importance of the wording and of the interpretation of each rule is stressed by Cass. Civ. 1^{ère} Civ.1, 20 May 2003, *Gaz.Pal.* 16-18 November 2003, p.20, where the same Convention, with respect to guardianship and visitation rights, was found to provide only rules on "indirect jurisdiction".)

¹⁴⁵ See P. Mayer and V. Heuzé, *Droit privé international*, 2001, n° 375.

¹⁴⁶ On the contrary, if the measure does not require any state intervention (e.g. decisions relating to the allocation of a child's guardianship to one of the parents), case law seems to consider that there is no ground for exclusive jurisdiction and the foreign decision is therefore recognized and enforceable in France (Cass. Civ. 1^{ère}, 25 June 1991, n°90-05006).

There is presumably no other specific ground for exclusive jurisdiction in matters relating to parental responsibility¹⁴⁷.

It is however of note that the jurisdictional privilege granted to French nationals on the basis of article 15 of the French Civil Code is no longer considered as an exclusive jurisdictional rule as regards parental responsibility matters¹⁴⁸.

Moreover, a foreign judgment will be denied recognition and enforcement in France on the basis that the foreign court seized bears no “characteristic connection” (or no “dominant link”¹⁴⁹) to the dispute, for the divorcing couple and their children reside in France¹⁵⁰.

*
* * *

¹⁴⁷ For instance, the rules on jurisdiction applicable to divorce matters and provided for under article 1070 of the NCCP, which also apply in case the judge has to decide by the same token on parental responsibility issues, are not considered to be rule on exclusive jurisdiction (see Cass. Civ. 1^{ère}, 6 February 1985, Mrs. Fairhurst v. Simitch, *Rev. crit. DIP* 1985, pp. 369 & foll.).

¹⁴⁸ Cass. Civ. 1^{ère}, 23 May 2006, *D.* 2006.1846.

¹⁴⁹ Paris Court of Appeal, 15 March 1990, *D.* 1990, somm. p. 263.

¹⁵⁰ Paris Court of Appeal, 15 November 1988, *D.* 1989, somm. p. 257. Yet, when the foreign judgment was rendered by a court of the couple’s common nationality, and provided that the choice of court was not fraudulently made, case law has accepted to recognize and enforce said decision (see Cass. Civ. 1^{ère}, 15 June 1994, *D.* 1994, p. 352).