



## Canada-United States Law Journal

Volume 17 | Issue 2

Article 10

January 1991

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### Recommended Citation

Hans Smit, *Dispute Resolution in Europe: A Comparative Context for the Resolution of Disputes between Americans and Canadians*, 17 *Can.-U.S. L.J.* 281 (1991)  
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## **Dispute Resolution in Europe: A Comparative Context for the Resolution of Disputes Between Americans and Canadians**

*Hans Smit\**

### **I. INTRODUCTION**

**E**conomic integration and its inevitable concomitant, political and legal integration, are proceeding apace throughout the world. The European Economic Community (EEC) is moving full-stride towards its goal of eliminating all obstacles to free intra-Community trade by January 1, 1993. Other European states, including recently liberalized Eastern European states, are contemplating accession to the Community. The Canada-United States Free Trade Agreement has provided the impetus for the creation of a similar agreement between the United States and Mexico. These developments raise questions concerning the impact they may have on the resolution of disputes involving persons from different member states.

Thus far, only the European Economic Community has addressed a few of these questions by legislation. The European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 contains elaborate rules on the jurisdiction of, and the recognition of judgments rendered by, courts of member states regarding persons within and without the Community.<sup>1</sup> However, no attempt has been made to harmonize the procedural rules in member state courts. The motivation to create harmonized rules may be lacking since European procedural rules are to a great extent similar.

For the purpose of this comparative review, reference will be made to prototypical European rules of procedure. As will be seen, European approaches to problems of dispute resolution, as well as those developed in recent years by international arbitration tribunals, provide examples that merit serious consideration by those intent upon improving procedures for the resolution of disputes, especially disputes with international aspects.

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<sup>1</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, consolidated text in O.J. 1990 C. 1989/2, Common Mkt. Rep. (CCH) 03 [hereinafter Judgments Convention].

## II. RULES OF ADJUDICATORY AUTHORITY

European rules of *in personam* adjudicatory authority<sup>2</sup> differ from American rules in a number of respects. They are not supplemented by *in rem* or *quasi in rem* rules. Additionally, although they do provide for the same types of adjudicatory bases as American long-arm statutes, they also provide bases that are entirely lacking in, and indeed would be unconstitutional under, American law and are therefore often called extraordinary, or even exorbitant, by American scholars.

Just as European scholars regard as inappropriate the traditional American rule of *in personam* power based on presence, which was recently upheld by the United States Supreme Court, over constitutional objections,<sup>3</sup> Americans likewise regard as improper European rules that provide for *in personam* power over defendants who have no, or no significant, relationship to the forum. These European rules include: the nationality of the plaintiff in French law; the domicile or residence of the plaintiff in Dutch law; and the presence of property within the forum by a non-resident in German law.<sup>4</sup> These *in personam* bases of competence may strike Americans as being unreasonable, but it should be stressed that in the absence of *in rem* or *quasi in rem* bases, they serve to create a forum for the plaintiff near his home. Moreover, the effects of these rules are limited, since foreign courts, including European courts, normally refuse to recognize a foreign judgment rendered on such a basis. As a result, these rules create a basis for a judgment that can be enforced only against property the defendant has within the forum. In their practical effect, these rules come close to creating a form of *in rem* competence.<sup>5</sup>

As might have been expected, the European Judgments Convention eliminates the application of exorbitant bases of competence to residents of member states. Significantly, it eliminates the traditional common law basis of service on a person present within the forum.<sup>6</sup>

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<sup>2</sup> This is the term used to designate all forms of judicial authority. The term "jurisdiction" is used to designate constitutional power or judicial power under conflict of law rules; "competence" to designate all forms of judicial power; "International competence" is often used to designate judicial power under conflict of law rules. See generally Hans Smit, *The Terms Jurisdiction and Competence in Comparative Law*, 10 AM. J. COMP. L. 164 (1961).

<sup>3</sup> *Burnham v. Superior Court of California*, 495 U.S. —, 110 S.Ct. 2105 (1990). It should be noted, however, that, although Justice Scalia's opinion is cast in broad terms, the case adjudicated was not one of transient presence.

<sup>4</sup> Note that the presence of any such property is sufficient to create *in personam* competence. There need not be a relation between the property and the claim presented, and the value of the property may be minimal as compared with the amount of the claim presented. The so-called *Auslanderforum* rule is sometimes called the "umbrella" rule so as to indicate the absence of a relationship between the value of the property and the recovery sought.

<sup>5</sup> These rules differ from American rules in that enforcement may also be had against property subsequently brought into the forum.

<sup>6</sup> Judgments Convention, *supra* note 1, art. 3. The Convention thus eliminates this basis in regard to residents of other member states, although the English and American courts have thus far refused to outlaw this basis generally.

The Convention also contains other provisions that Americans may, with justification, regard as most unfair. These provisions not only permit recourse to exorbitant bases of competence in regard to non-residents of member states, but, also, require the recognition of judgments based on such bases in all member states.<sup>7</sup> Thus, the Convention substantially broadens the impact of judgments premised on such bases, so that they are no longer effective only in the forum state. It is commonly known that the inclusion of these provisions was inspired by a desire to compel the United States to enter into treaties with member states regulating the recognition of foreign judgments. However, there is no justifiable reason for wanting to force the United States into entering such treaties, since, under generally prevailing laws, the United States already grants at least as broad a recognition to foreign judgments as would be required by the type of convention contemplated.

While the European Judgments Convention, insofar as it permits exorbitant bases and requires recognition of judgments rendered on such bases, is definitely not worthy of emulation in the Canada-United States context, it does deserve serious consideration insofar as it outlaws competence based on presence. Mere presence, without more, is no longer an acceptable basis of competence and should be prohibited at least in United States-Canada relations. In view of the recent Supreme Court ruling in the *Burnham* case,<sup>8</sup> this may require action by statute or treaty. In the meantime, if mere presence is the only available basis of competence, American and Canadian courts should readily dismiss such cases on *forum non conveniens* grounds.

### III. SERVICE OF JUDICIAL DOCUMENTS

Service of judicial documents abroad was greatly facilitated by the adoption in 1963 of Rule 4(i) of the Federal Rules of Civil Procedure.<sup>9</sup> The hallmark of Rule 4(i) is its flexibility. It permits service to be made, at the option of the party seeking to have the service made, in a number of ways, including personal delivery by a non-party over eighteen years of age, service pursuant to foreign law, service by registered mail (return receipt requested), service pursuant to court order, and service pursuant to letters rogatory. The overriding goal of the drafters of Rule 4(i) was to permit the party seeking the service to effectuate it in the simplest and least cumbersome way possible. An additional objective was to avoid involvement of, and possible objection by, foreign authorities.<sup>10</sup>

The improvements introduced by Rule 4(i) appeared so attractive

<sup>7</sup> *Id.* art. 3, in conjunction with art. 28, para. 3.

<sup>8</sup> See *Burnham v. Superior Court of California*, 495 U.S. —, 110 S.Ct 2105 (1990).

<sup>9</sup> On the amendments introducing Rule 4(i), see Hans Smit, *International Aspects of Federal Civil Procedure*, 63 COLUM. L. REV. 1031 (1963). Rule 4(i) was developed by the Columbia Project in International Procedure, of which the author was the Director and principal draftsman.

<sup>10</sup> See Smit, *supra* note 9, at 1041-43.

and worked so well that the United States took the initiative of making them universally available through the international convention of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents of 1965.<sup>11</sup> Unfortunately, the Convention does not provide for the simplest and most efficacious ways of making service permitted by Rule 4(i). Specifically, service by a non-party over eighteen years of age and service by registered mail are not included. This is of no great moment to litigants in American courts if they can simply forego recourse to the Convention and, instead, proceed pursuant to Rule 4(i).

However, the Supreme Court, relying on Convention language that does not compel the interpretation given it, and disregarding the ultimate purpose of the Convention to simplify methods of service, has held that the rules of Convention are exclusive when the service is to be made in a Convention State.<sup>12</sup> This ruling significantly limits the freedom that would otherwise have been available under Rule 4(i). For instance, it precludes service abroad by a non-party over eighteen years of age (one of the easiest and simplest means of making service) and service pursuant to court order. In addition, it precludes service by registered mail, service by diplomatic or consular agents of the state of origin on non-nationals of that state, and service by officials of the state of destination, whenever the state of destination objects.<sup>13</sup>

Fortunately, Canada has not objected to any of the methods of service to which, pursuant to the Convention, it could object.<sup>14</sup> Nonetheless, as long as the Convention is deemed exclusive, service by a non-party over eighteen years of age or pursuant to court order will not be available.

This problem can be overcome in a number of ways. The United States and Canada could terminate their adhesion to the Convention unless it is made non-exclusive. Another solution would be for the United States and Canada to enter into a bilateral agreement permitting service to be made pursuant to existing domestic law. It could be argued that such an agreement would run afoul of Canada's and the United States' obligations under the Convention. Article 11 of the Convention permits bilateral agreements relating to service, but only, it would appear from its text, in order to permit channels of transmission other than those provided for in the Convention.<sup>15</sup> States that are members of the Conven-

<sup>11</sup> For the text of this Convention, see MARTINDALE-HUBBELL LAW DIGEST, CANADIAN & INTERNATIONAL LAW DIGEST, IC 1 (1991).

<sup>12</sup> Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988). Article 1 of the Convention provides that it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial element for service abroad." This language by no means requires the conclusion that the Convention shall apply exclusively in the cases specified.

<sup>13</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, arts. 8 and 10, 20 U.S.T. 361; T.I.A.S. No. 6638 [hereinafter Service Convention].

<sup>14</sup> MARTINDALE-HUBBELL LAW DIGEST, *supra* note 11, IC-4.

<sup>15</sup> Service Convention, art. 11, reads: "The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels

tion could invoke the alleged breach as a ground for not applying the Convention to the breaching states. This result is not particularly likely, but even if this were to happen, it would not be a matter of significant concern. The United States may be better off if it were not a member of the Convention, and the same is likely to be true for Canada.

There is still another way of overcoming this problem, and it is by far the simplest and most efficacious way of all. The United States and Canada could adopt a rule that is firmly established in such European countries as Germany and Austria.<sup>16</sup> This rule holds that, as long as the defendant has actually received the service, it does not matter that it was not made in accordance with the applicable legal provisions. This rule is based on the common-sensical notion that the ultimate purpose of service rules is to ensure that the service actually reaches the addressee; once that goal has been achieved, it does not make any difference if the proper procedures were followed. Under this rule, regardless of whether service is made abroad under Rule 4(i) or in compliance with the Convention, it is valid and effective as long as it actually reached the addressee. In fact, a motion by the addressee attacking the service would be the best proof that the service reached the addressee. Indeed, this rule of validation of an otherwise defective service is so appealing that the rulemakers should consider adopting it for all forms of service, foreign as well as domestic.

The rulemakers are presently considering a proposal that would require a proposed addressee to waive service; if the waiver is improperly refused, it would result in saddling the addressee with the cost of making the service.<sup>17</sup> This proposal is likely to add to the problems of making service, for it creates another opportunity for *ad hoc* litigation on an issue not related to the merits. One would think that the experience with Rule 11 would have encouraged the rulemakers to avoid collateral disputes that only add to the litigation and cause additional expense and delay.

#### IV. OBTAINING PROOF IN ANOTHER COUNTRY

##### A. General Observations

In the early 1960s, American rules relating to obtaining proof in foreign countries were re-evaluated. As a result, significant reforms came about. The Federal Rules of Civil Procedure relating to taking depositions and obtaining documents and other tangible evidence abroad were revised,<sup>18</sup> a new rule on proving foreign official documents was

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of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities."

<sup>16</sup> See HANS SMIT, *INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE* (1965).

<sup>17</sup> Proposed Amendments to the Federal Rules of Civil Procedure, H.R. Doc. No. 102-77, 102d Cong., 1st Session (1991), revised Rule 4(d). The costs include, according to proposed Rule 4(d)(5), a reasonable attorney's fee for collecting the cost of service.

<sup>18</sup> See Smit, *supra* note 9, at 1053-59.

adopted,<sup>19</sup> and proof of foreign law was greatly facilitated.<sup>20</sup> These revisions were also presented to The Hague Conference and were embodied in the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters<sup>21</sup> and the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.<sup>22</sup> Canada has not ratified either of these Conventions. However, since the Public Documents Convention significantly facilitates proof of foreign official documents, Canada should ratify it.<sup>23</sup>

The same is not true of the Evidence Convention. This Convention provides procedures for obtaining proof abroad that are significantly less flexible than those available under American law. Not only does it not provide for the easiest and simplest ways of obtaining such evidence, *i.e.*, the taking of a deposition before a person authorized to administer an oath under American or foreign law or designated by stipulation, and the service of a notice to produce,<sup>24</sup> this Convention also enables states to object to other methods of obtaining evidence that are quite common under American practice.<sup>25</sup>

Fortunately, the United States Supreme Court has ruled this Convention non-exclusive;<sup>26</sup> but, unfortunately, it has encouraged American courts to give serious consideration to proceeding pursuant to the Convention before taking recourse to domestic law procedures.<sup>27</sup> This may well lead American courts to unduly favor Convention methods. Since American law provides liberal assistance to Canadian courts and litigants without any convention,<sup>28</sup> Canada would be well advised not to ratify this Convention.<sup>29</sup>

American procedures for determining foreign law are exceptionally flexible. An American court may look at any source it deems useful, without observing any rules of evidence.<sup>30</sup> To the extent Canada does not have similarly flexible rules, it should adopt them.

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<sup>19</sup> *Id.* at 1059-1071.

<sup>20</sup> See FED. R. CIV. P. 44.1.

<sup>21</sup> MARTINDALE-HUBBELL LAW DIGEST, *supra* note 11, 1C-14 (March 1970).

<sup>22</sup> *Id.* at 1C-24 (Oct. 1961).

<sup>23</sup> The Convention substitutes a uniform certificate for the sometimes quite complex authentication requirements imposed by domestic law.

<sup>24</sup> The Convention probably fails to provide for these methods, because they do not exist in civil law countries.

<sup>25</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, arts. 15, 16, 17, & 23, 23 U.S.T. 2555; T.I.A.S. No. 7444.

<sup>26</sup> *Société Nationale Industrielle Aerospatiale v. United States Dist. Court of S. Dist. Iowa*, 482 U.S. 522, 107 (1987).

<sup>27</sup> *Id.*

<sup>28</sup> See Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1019-1022 (1965).

<sup>29</sup> Of course, I do not here consider whether it would be advantageous for Canada to have the benefit of recourse to this Convention in its relations with countries other than the United States.

<sup>30</sup> FED. R. CIV. P. 44(10).

## B. Blocking Statutes

In recent years, there has been a significant increase in the enactment of blocking statutes in Europe.<sup>31</sup> These statutes, prohibiting the solicitation and provision of evidence for use in foreign proceedings, find their origin in a distaste for what are regarded abroad as unusually probing evidence gathering techniques, such as pre-trial depositions and document discovery. One of the earliest examples originated in Canada in response to American efforts to procure in Canada evidence of American antitrust law violations.<sup>32</sup>

The United States does not have blocking statutes. On the contrary, federal law broadly proclaims that anyone may seek evidence in the United States for use in foreign proceedings.<sup>33</sup> State law is generally in accord.<sup>34</sup>

Canada would do well to repeal its blocking statutes. First, these statutes lead to unseemly conflicts between judicial authorities. Second, they generally do not work. If the person from whom the evidence is sought is a party to the action or is otherwise subject to the American court's jurisdiction, the court can order the party to produce the evidence, either abroad or in the United States, regardless of the foreign prohibition. After all, an American court can hardly be expected to defer to foreign laws that are designed to frustrate its procedures.<sup>35</sup> If the person from whom the evidence is sought is not subject to the American court's jurisdiction, the blocking statute is still unnecessary because that person can refuse to provide the evidence if he is so disposed.

There is no place in today's world for blocking statutes of the kind now prevalent. States should accord each other all possible cooperation in procuring evidence for use in their courts. Such cooperation should be refused only when the purpose for which the evidence is sought violates basic values endorsed by the state in which it is sought. For example, if the evidence is to be used in secret political trials or in a prosecution of a person for his belief, religion, or race, cooperation should be denied. But the mere circumstance that pre-trial depositions or document discovery is unknown in domestic law is no reason for denying its benefits to a

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<sup>31</sup> See, e.g., Law No. 68-578 of July 26, 1968, as amended by Law No. 80-538 of July 16, 1980 (France); Protection of Trading Interests Act 1980, ch. 11 (U.K. (1980)). See generally Westbrook, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the U.S.*, 13 INT'L LAW. 5 (1979).

<sup>32</sup> Business Records Protection Act, ONT. REV. STAT. ch. 54, § 57 (1970). See also Business Concerns Record Act, QUE. REV. STAT. ch. 278 (1964); Can. Stat. O.&R. 644 (Sept. 21, 1976, as amended, Can. Cons. Reg. c 366).

<sup>33</sup> 28 U.S.C.A. § 1782 (1966).

<sup>34</sup> Uniform Interstate and International Procedure Act § 2.04, 3.02, 13 U.L.A. 357, 386, 391-92 (1962).

<sup>35</sup> See, e.g., *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (2d Cir. 1982), cert. denied, 103 S.Ct. 3086 (1982); *In re Anschuetz & Co. G.m.b.H.*, 754 F.2d 602 (5th Cir. 1985), cert. granted and remanded, 474 U.S. 812 (1987).



litigant or court to whom it is an essential ingredient of the adjudicatory process.

## V. THE ADJUDICATORY PROCESS

### A. *European Systems*

In civil law countries, pre-trial discovery, as known in common law countries, does not exist.<sup>36</sup> This may surprise common law lawyers, for whom pre-trial discovery is the heart of the civil litigation process. They may find it difficult to comprehend how civil law systems can achieve just adjudication without permitting discovery of all information relevant to the dispute.

The answer is simple. Civil law systems also seek to enable litigants to discover the information needed to adjudicate the dispute. However, they use different methods to achieve this goal. Since these methods are largely effective, they deserve serious consideration by those intent upon improving the U.S. system of civil adjudication. A particular advantage of civil law methods is that they avoid the *ad hoc* adjudications that typically fragment an American lawsuit and result in the delays and excessive expense that characterize contemporary discovery practice. The principal means of gathering information needed to adjudicate a civil case include: detailed pleadings, the requirement of a reasoned denial, and, especially in French practice, the *expertise*.

#### (1) Elaborate Pleadings

In European countries, pleadings are not used solely to draw the boundaries of the dispute and to define the issues to be resolved, but are also the principal means for putting the whole dispute before the court. As a consequence, they contain not only allegations of fact, but also legal theories, and evidence. It is not unusual for the law to require that the pleader not only state his claim for relief, but also identify and describe, and if possible submit with his pleading, all pertinent evidence, and state the legal basis for his claim or defense with reference to proper statutory and other authoritative sources. In a real sense, the pleader is expected to fully inform the court and his opponent of all relevant information.

#### (2) The Reasoned Denial

Another effective means of compelling a litigant to disclose relevant information is the requirement that denials be reasoned. A simple denial is insufficient to create an issue: the pleader must state the reasons for his denial. If he fails to do so, the allegation is admitted. The reasoned de-

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<sup>36</sup> See generally HEROG, CIVIL PROCEDURE IN FRANCE 7.22-7.57 (Smit ed. 1967); CAPPELLETTI & PERILLO, CIVIL PROCEDURE IN ITALY 8.01-8.50 (Smit ed. 1965). In exceptional circumstances, when a prospective witness is likely to depart, die, or otherwise be unavailable at an oral hearing, the court may order his testimony to be taken earlier.

nial is a most potent incentive to make full disclosure. Since the pleader cannot risk that the court will find the denial insufficiently reasoned, he is likely to provide more reasoning than necessary.

Of course, a litigant is not likely to disclose in his pleadings information that does not serve his cause. However, his opponent is likely to do so. A problem arises if the opponent does not have information that only the adverse party possesses. The usual practice is to challenge the party that has the information to produce it. If the court is persuaded that the party has the information, it can draw an adverse inference from the party's failure to produce it. But there generally is no other way to compel its production. To that extent, European rules may fall short of American-style discovery.

### (3) Expertise

The French courts have developed an additional method for obtaining discovery. They routinely order an *expertise*, a report by experts, when facts are to be ascertained. Originally intended as a method for obtaining information on matters on which special expertise is required, the French courts have used it as a device for gathering factual information for which no special expertise is necessary.<sup>37</sup> The expert simply gathers the information from all likely sources and renders his report to the court. The parties are then afforded an opportunity to comment on the report, and the court renders its decision.

The advantages of these methods are significant. They are self-implementing and need no judicial supervision. They do not require *ad hoc* adjudications, do not add significant additional expense, and cause no undue delay. However, they fall short of compelling discovery in all situations in which it can be obtained under American practice.

## B. The American System

While the American system of pre-trial discovery is likely to produce all relevant information that can properly be discovered, it has significant drawbacks. It is in large measure conducted by the parties, requiring *ad hoc* adjudication whenever the parties cannot agree on the propriety of a particular step in the process. It is expensive and time-consuming, and is in many instances duplicative. Moreover, when the case goes to trial, the trial itself is in large measure a replay of the discovery stage. At the heart of these problems is that discovery is conducted by the parties, rather than by the court, and the parties or their lawyers are not necessarily intent upon achieving just, inexpensive, and efficient adjudication.<sup>38</sup>

Recently proposed amendments to the Federal Rules of Civil Proce-

<sup>37</sup> On the *Expertise*, see Herzog, *supra* note 36, 7.54, at 349.

<sup>38</sup> Rule 1 of the Federal Rules of Civil Procedure states that the rules shall be construed to secure the "just, speedy, and inexpensive" determination of every action." FED R. CIV. P. 1.

sure seek to import a greater measure of automatism into the process. Under these amendments, each party must, of its own accord, disclose documents and certain other information without being asked to do so by the other party. Failure to comply results in the party being precluded from presenting the evidence at the trial and the party may be subject to other sanctions.<sup>39</sup> The proposed amendments do not go as far as the European rules, under which a party who fails to disclose information which would make his pleading reasoned, may find that the court rules against him on the merits.

### C. *International Arbitration*

It is in international arbitration that the two systems of civil and common law have met and produced an amalgam that appears worthy of emulation. Increasingly, in international arbitration, especially when the arbitration tribunal is composed of civil and common law lawyers, a procedure is adopted that combines elements of both civil law and common law. The parties are instructed to submit elaborate pleadings alleging not only ultimate facts, but also identifying and describing all evidence on which reliance is placed and stating the legal theories relied upon with reference to supporting authorities. Copies of documentary evidence must be submitted with the pleadings, as well as the written statements of all witnesses to be proffered. Normally, each party submits two pleadings: the plaintiff a complaint and a reply; the defendant an answer and a rebuttal. At the subsequent oral hearing, the parties may not rely on any evidence or legal theory not submitted with the pleadings, unless the tribunal, for good cause shown, directs otherwise. This encourages the parties not to withhold information before the hearing.

After completion of the pleading stage, either party may apply to the tribunal for further discovery. The tribunal then determines whether any further discovery is needed. If it finds this to be the case, the tribunal specifies what information is to be sought and how it is to be obtained.<sup>40</sup>

The advantages of this procedure are obvious. Most of the relevant information is discovered automatically through the pleadings. At the conclusion of the pleading stage, the tribunal is in an excellent position to judge whether and what additional discovery is needed and how it can best be obtained. Its position in this regard differs markedly from that of an American judge who, in the pre-discovery conference, must seek to regulate discovery in a case of which he knows very little.<sup>41</sup>

This procedure also achieves considerable savings of time and effort

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<sup>39</sup> Amendments to the Federal Rules of Civil Procedure Proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, August 1991, Proposed Rules 26 and 37(c).

<sup>40</sup> The parties do not have a choice as to which discovery devices are to be used; the tribunal makes that determination.

<sup>41</sup> This is the main drawback of the judicial supervision of the discovery process in the United States.

at the hearing. Direct testimony can be limited to asking the witness to affirm the correctness of his written statement and little time is spent on introducing documentary evidence. Of course, this procedure cannot be followed without modification to cases tried before a jury, but even in these cases the discovery phase needs no alterations.

The procedure here discussed may be used in cases arising under the Canada-United States Free Trade Agreement, in arbitrations involving American and Canadian parties, and, eventually, in cases adjudicated in the ordinary courts.<sup>42</sup>

## VI. RECOGNITION OF JUDGMENTS

American rules relating to the recognition of foreign judgments are quite liberal. As a general rule, foreign judgments are recognized, unless the foreign court lacked a proper basis for its adjudicatory authority or failed to accord the defendant due process, including proper notification and reasonable procedures.<sup>43</sup> To the extent Canadian rules follow the common law and English rules, they provide a similar regime.

As already indicated, it would appear desirable to eliminate transient presence of both persons and things as a proper basis of adjudicatory authority in the relations between Americans and Canadians.<sup>44</sup> It would also be desirable to facilitate mutual recognition of judgments through simple registration rather than bringing an action on the foreign judgment.<sup>45</sup>

## VII. CONCLUSIONS

The European context offers a fruitful perspective from which to consider improving litigation rules relating to disputes between Americans and Canadians. The European Judgments Convention sets a proper example by eliminating adjudicatory authority based on mere presence. In any event, in the relations between the United States and Canada, appropriate recourse should be taken to the doctrine of *forum non conveniens* to ensure adjudication in the more appropriate forum.

The Hague Service Convention, as construed by the United States Supreme Court, does not offer a proper regime for regulating service, but European rules that declare service sufficient once it actually reaches the addressee provide a most worthwhile source of inspiration.

Fortunately, Canada does not appear to have ratified the Evidence

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<sup>42</sup> The procedure here described could be tested, by way of experiment, in actions involving American and Canadian litigants.

<sup>43</sup> See generally Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962).

<sup>44</sup> See text, *supra* note 6.

<sup>45</sup> The registration procedure of 28 U.S.C.A. § 1963 may provide an example. See also the Uniform Enforcement of Foreign Judgments Act, 13 U.S.A. 149 (1986), providing for an accelerated type of summary judgment, preceded by registration, in regard to sister state judgments.

Convention, so that this Convention will not impede Canada and the United States from obtaining evidence in one country for use in the other. However, Canada would do well to ratify The Hague Official Documents Convention and to repeal the blocking statutes it has, for these statutes do not achieve the desired result and add undesirable frictions.

The actual process of adjudication in the United States is in dire need of reform. European approaches and those developed in international arbitration provide admirable guidance to those intent upon implementing such reform.

The rules relating to recognition of foreign judgments prevailing in the United States and Canada are quite adequate. A bilateral convention, in addition to eliminating mere presence as a basis for adjudicatory authority, could further facilitate mutual recognition of judgments by providing for enforcement through simple registration.