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CONFLICTING LAWS IN A COMMON MARKET? THE NAFTA EXPERIMENT

H. PATRICK GLENN*

Globalization, it has recently been said, means the end not of history, but of geography, in the sense of the importance of geophysical boundaries. Like most statements on globalization, this one is also an exaggeration. Yet many close and familiar boundaries have recently declined in importance, whether they are geophysical, political, or legal. Regionalization is an important part of this process, since we define the new regions not so much in terms of geophysical boundaries, though in a large sense they are still present, but in terms of new political and legal boundaries that surpass those of the state. The European Union and the North American Free Trade Agreement (“NAFTA”) are only two examples of contemporary regionalization, yet they illustrate the diversity of structures it may represent. The remarks that follow bear principally on NAFTA and the law of the NAFTA countries, yet they also deal, less comprehensively though comparatively, with the structures of the European Union. It will be argued that NAFTA is not a lesser, weaker form of regionalization than that of the European Union, but rather a different type, based on different legal and political premises, and one that is in many ways to be preferred to the European model.

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NAFTA has been with us since January 1, 1994, and its coming into force immediately brought about comparison with the integrating mechanisms of the European Union. As a simple free trade arrangement, NAFTA has a primarily intraregional effect, removing or restraining tariff and nontariff barriers to trade in goods between the member countries. There is no effort to create a Fortress America, in the form of a common, external tariff wall. The European Union, however, is an integrating customs union and as such creates a common, external tariff wall. It also, more importantly for our purposes, creates an entire set of institutions to ensure uniformization or harmonization of national European laws. These include the European Council and Commission (which have extensive legislative authority, notably to enact pan-European, private law directives) and the European Court of Justice, charged with overseeing the application of the basic norms of the European Union. An additional stage of European legal integration is now proposed in the form of a European "judicial space," a geographical space in which the judgments of national European courts would be automatically recognized and executable in the other countries. This would take Europe a step beyond Full Faith and Credit. In contrast,


5. Sophisticated measures are, however, necessary to prevent goods imported into one NAFTA country from benefiting from NAFTA's guarantee of freedom of circulation. On the definition of national origins of goods, see NAFTA, supra note 3, art. 401.

6. On the European institutions, see generally, with references, STEPHEN WEATHERILL & PAUL BEAUMONT, EU LAW (Penguin Books 3d ed. 1999) (notably chapters two, three, four, and six); Fitzpatrick, supra note 4, at 24 ff.

7. See L'Espace judiciaire européen va voir progressivement le jour, LE MONDE HEBDOMADAIRE, Oct. 23, 1999, at 4. This measure would essentially eliminate the significance of national boundaries for the recognition of judgments, a step beyond "full faith and credit" as it is known in the national laws of North America. There, however, is no pan-North-American
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the remark has been made that NAFTA is characterized by an "institutional meagerness," which leaves the regulation of activities within the NAFTA territory to the discretion of the legal institutions and process of each of the member states.8

Does a common market require, however, a common or uniform law? It may depend on the common market. The European Union is composed mainly of unitary states—even in the Federal Republic of Germany private law is unified. So in these countries, federal-style judicial review has been the exception rather than the rule at the national level. No effective internal recourse exists against legislative overreaching. The law of the original common market states, moreover, is codified law, such that formal differences in codification are readily seen as conflicts of laws. Many European jurisdictions have therefore created a presumption of conflict of laws in private international cases, about which more will be said. So the common market of Europe is one in which the need for pan-European institutions could be seen as evident, given the absence of any other means of reconciling national legislative wills. Given conflict, uniformization or harmonization had to be imposed.

The North American situation is different. All three of the member states are federal or confederal9 in character. In each state there are judicial institutions that have long arbitrated between competing legislative units. The territorial reach of state or provincial legislation is necessarily limited by the national constitutions. Much of North America also adheres to the common law tradition and this equivalent to either "full faith and credit" or a transnational judicial space.


9. The United States and Mexico are both federations; Canada at its inception was considered a confederation and is still often designated as one. In recent years, the language of federalism has, however, become more frequent in Canada. For the consequences of the original confederal model on the Canadian court structure, see H. Patrick Glenn, Divided Justice? Judicial Structures in Federal and Confederal States, 46 S.C. L. REV. 819 (1995) [hereinafter Glenn, Divided Justice?]; and for the relations between U.S. state and Canadian provincial structures, see H. Patrick Glenn, Reconciling Regimes: Legal Relations of States and Provinces in North America, 15 ARIZ. J. INT'L & COMP. L. 255 (1998).
inevitably reduces conflicts of laws, either through the commonality of shared rules or through the submerging of conflicts in the mass of decisional law. All three North American states, moreover, constitute internal common markets, which have functioned with a diversity of internal laws. The "institutional meagerness" of NAFTA may thus be seen as an indication of continuing faith in the adaptability of federal structures and in informal processes of harmonization, and not simply as hostility or indifference to NAFTA objectives. The design principle of NAFTA would really be that of subsidiarity, and there would be no need, because of North American circumstance, for a central policy of uniformization or harmonization of laws.

The law of the European Union would therefore represent nineteenth-century thought cast forward into the twentieth and twenty-first centuries. Uniform national laws, which had replaced local customs, must in their turn be replaced by uniform European laws. NAFTA would represent a much older idea, well expressed by Gaius, to the effect that people are governed both by law that is particular to them and by law that is common to humanity, or at least to the NAFTA countries. There is therefore a necessary dynamic between the general and the particular, in law, and the general cannot be uniformly imposed because doing so will likely destroy the particular. The law of the NAFTA countries would be thus characterized by two broad phenomena: (1) an informal process of harmonization, as national institutions adjust to the increase in transborder flow brought about by NAFTA, and (2) ongoing unilateralism, particularity, or protection (it will be seen as many things) that in some measure is subject to existing federal limits or controls. This is what remains to be demonstrated. If it can be demonstrated, it would suggest that further movement in North

10. In contrast, the recent adoption of the principle of subsidiarity by the European Union would have been only an effort to "reassure Member State populations" against what has appeared as "an inexorable march toward greater legal and political integration." George A. Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 COLUM. L. REV. 331, 334 (1994) (the principle of subsidiarity permitting action at the level of the European Union only insofar as objectives cannot be achieved at the level of member states); Joel P. Trachtman, L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity, 33 HARV. INT'L L.J. 459 (1992).

11. THE INSTITUTES OF GAIUS 1.1 at 8 (W.M. Gordon & O.F. Robinson trans., 1988) ("Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur.").

12. The original ius commune of Europe was thus of informal creation, through doctrinal writing, and did not bind. See generally MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE 1000-1800 (Lydia G. Cochrane trans., 1995).
America, towards European-type structures, is neither necessary nor desirable. We would already have struck the proper balance.

I. INFORMAL HARMONIZATION OF LAWS IN THE NAFTA COUNTRIES

There is already a large process of informal harmonization of laws in the world. NAFTA itself may be seen in large measure as a result of this worldwide process. To this then must be added the effect of NAFTA on the NAFTA countries. While much of the NAFTA debate has been over the effect of specific provisions of NAFTA itself, there is a related and more general phenomenon of national legal adjustment to the new NAFTA environment, which has gone largely unnoticed in the legal literature. NAFTA has created, as it were, a legal slipstream, a draft, the effect of which is arguably larger than that of NAFTA's specific provisions. National laws have to change, not because NAFTA requires change, but because NAFTA has changed the context in which national laws function. To continue to function as they should, in the new environment, they must be adapted.

The process of informal harmonization takes place both with respect to purely domestic law and with respect to domestic law relating to private international problems.

A. Informal Harmonization of Domestic Law

There is no Brussels in North America and there are no North American directives bringing about uniformization or harmonization of North American private law. Why should this not concern us? Because there are already powerful forces of harmonization of domestic, private law, and because diversity of law is an indicator of social diversity which, like biodiversity, is a desirable objective, no single set of uniform rules are capable of capturing all of the goods human beings will pursue.

14. See id. at 402 ("My thesis is that the proliferation of contacts between Canada, Mexico, and the United States encourages—sometimes consciously, and often unconsciously—a movement towards accommodations or mediation of legal differences across a broad spectrum of activities."). There is, of course, a still larger thesis, that the advent of regional trading blocs such as NAFTA could come about only by virtue of a still larger process of informal harmonization, which has already taken place in the region, such that understanding and agreement at the NAFTA level could become possible.
What does it mean to speak of harmonization of domestic law? In the European context, "to harmonize" is seen as a transitive verb. There is a harmonizer—the agent of harmonization, in the form of the European Commission—and there is an object of harmonization—the diverse national laws which must undergo a process of change or transformation to reduce or eliminate their differences. Dictionaries tell us, however, taking their cue from a much older, lyrical sense of harmony—known most popularly as that of the barbershop—that "to harmonize" is also an intransitive verb, which consists simply of being in harmony. What is it that simply is in harmony? Necessarily, that which is diverse is in harmony, since harmony in music is the aesthetically satisfying arrangement of different tones or pitches. Harmony in music thus presupposes and thrives on diversity, the elements of which are simultaneously cultivated and supported while being assured their place in a larger order. René David stated the basic requirement for this type of intransitive or informal harmonization, in law, as that of "effectuating an understanding" of different legal concepts. Given understanding, a harmonious arrangement of the diverse becomes possible. What is it then that allows us to understand the different legal concepts of North America, such that we may then assure their place in a larger order, in as agreeable and nonconflictual a manner as possible?

Understanding different legal concepts means recognition of their underlying commensurability. The concepts are different, but capable of explanation in terms of one another. Notions of incommensurability in law would thus overstate the extent of difference, which would not extend to mutual incomprehensibility. Why are the civil and common laws clearly commensurable today? Largely because the common law in the last two centuries has abandoned the writ system; adopted courts of appeal and hierarchical court structures; begun to think in terms of substantive law directly applicable to determination of the rights and obligations of citizens;


and even embraced legislation and codification. In turn, the dynamic of the new common law jurisdictions has had its impact on contemporary civil law, now structurally compatible with the common law, its reconfigured, junior partner in the Western tradition. Differences between the civil and common laws are thus today not found in basic, foundational concepts or in institutional structures. They are microdifferences, those found in the content of specific rules, the application of each of which in a given case is always arguable.

How can these microdifferences be seen as representing harmonious diversity, as opposed to the minefield of conflicts of laws that they were seen to represent for most of the nineteenth and twentieth centuries? As René David suggested, understanding their nature and source is the first and major requirement, and this process is facilitated in a number of particular ways in the NAFTA context. Above all, NAFTA facilitates and multiplies legal exchange, and legal understanding, between the NAFTA countries. In a way similar to the process of learning about different state laws in the United States, lawyers in the NAFTA countries will learn about the particularities, advantages, and disadvantages of the laws for each of the jurisdictions in the NAFTA territory. Choices will be made amongst these laws, for purposes of incorporating companies, regulating contracts, issuing securities, and creating trusts (where they are possible). The flow of legal transactions in a free trade area will accentuate the legal convergence already underlying the law of the free trade area. This is a well-known phenomenon in corporate law in the United States, variously described as the race to the bottom or the race to the top, as state laws are adjusted to reflect choices that parties make in the use of state laws. Formal harmonization has been said to be "a relatively undeveloped theme" in the U.S. debate, whatever benefits it might bring in terms of lower information and compliance costs,

since the level of existing diversity, "taken alone, costs little."\textsuperscript{20} Delaware provides a de facto national corporations model. In contrast to this low-key, effective means of informal harmonization, enormous effort has been expended in Europe to articulate a single, uniform corporate model, to little avail.\textsuperscript{21}

Law firms in North America will also play an important role in understanding and avoiding potential conflicts of laws. Law firms and law firm consortia now straddle political boundaries, such that their field of practice surpasses, for the first time in legal history, the law of a particular territory.\textsuperscript{22} We do not yet fully understand the consequences of this development, but it clearly indicates an expansion of the intellectual resources available to practitioners in dealing with multijurisdictional cases. Firms establish committees to deal with such cases, with expertise from different fields of law and in different laws. This helps in "effectuating an understanding" of the complexities of a case and the laws potentially applicable to it. It is true that the structures of NAFTA do not go far in establishing mobility of lawyers in North America, but talks continue and dialogue between firms accelerates.\textsuperscript{23} A recent survey showed that eighty-one percent of the top 250 U.S. law firms have retained Canadian counsel for U.S.-Canada cross-border work, and the figure rises to ninety-three percent for the Chicago firms and falls to seventy-eight percent for the apparently more parochial New York firms.\textsuperscript{24} Foreign legal consultants (practising their home law in a host jurisdiction) now are functioning between NAFTA jurisdictions while consultations continue on the subject of transnational firms.\textsuperscript{25} The

\textsuperscript{20} See Bratton, supra note 19, at 409.

\textsuperscript{21} See generally Véronique Magnier, \textit{RAPPROCHEMENT DES DROITS DANS L'UNION EUROPÉENNE ET VIABILITÉ D'UN DROIT COMMUN DES SOCIÉTÉS} (1999) (contrasting "contractual" and "organisational" corporate models and concluding that common law of European companies is likely to result only from informal convergence supported by extensive comparative studies).


\textsuperscript{23} See NAFTA, supra note 3, annex 1210.5 (each Party to "encourage its respective competent authorities, where appropriate, to implement" recommendations concerning foreign legal consultants and forms of partnership that may exist in national territories).


North American situation again contrasts sharply with that of Europe, where radical mobility has been imposed by Brussels and efforts to free legal practice from national forms of control has opened legal practice to large conglomerates controlled by accounting firms. Formal harmonization is not without its costs.

How can transnational firms or consortia of such firms act positively to reduce conflicts of laws? They can do so most effectively through conceptualizing a case in such a way that potential conflicts are avoided. Canadian and U.S. law most clearly authorizes this, through ongoing adherence to the common law rule that private international law and foreign law are not obligatory by the judge, such that foreign law must be proved and applied only where the parties have chosen to plead it. Quebec law also follows this rule, and Mexican law is not clearly opposed to it. Potential conflicts may thus be buried by the parties and different laws can be presumed to be in harmony, since no difference in content of laws justifies displacement of the law of the forum, where the parties agree on its application. In contrast, the law of a number of European countries insist on obligatory application of private international law rules, on the judge’s initiative (d’office, von Amts wegen). This is
said to be justified in order to ensure equal treatment of foreign law, but it essentially constitutes a presumption of conflict of laws, given an overriding notion of national sovereignty and formal differences in the articulation of national laws. All litigated trans-border cases must therefore go through a complex, second-order process of determining their applicable law, even in the absence of clearly established conflict. This is another reason for the perceived necessity of harmonization of European law; given omnipresent conflict, formal, top-down measures must be taken for their elimination. The North American way is one that allows conflict avoidance, where the parties and their lawyers understand how to bring it about.

Since conflict avoidance and informal harmonization appear largely to be matters of understanding, it is striking how developments in legal education appear to lag behind those of legal practice in adapting to the circumstances of NAFTA. There are no pan-North-American textbooks, no standard criteria for recognition of North American law degrees, and no widely accepted courses in the law of the different NAFTA countries. Of all the legal professions, the academic may be the most impervious to important legal developments—those that would really require, if acknowledged, a change in lecture notes. Yet informal harmonization will eventually come about, even if it requires generational change! Already there is a North American Consortium for Legal Education, involving nine North American law faculties.\(^3\) NAFTA courses have proliferated; there is some experimentation with pan-North-American courses involving the law of all three countries;\(^3\) and a NAFTA law degree has been proposed.\(^3\)

The laws of the NAFTA countries can therefore be treated as being in harmony. There will, however, still be conflicts. These can be dealt with more harmoniously if there is adjustment of national rules of private international law in order to bring about harmonious national treatment of them.

ZEuP 6 (1999); and for further references, see The Comparative Colloquium of the Institut de Droit Comparé, Université de Strasbourg, Les problèmes actuels posés par l’application des lois étrangères, 1988 ANNALES DE LA FACULTÉ DE DROIT DE STRASBOURG.


32. At McGill Faculty of Law, the basic course in private international law was converted in 1999 to a course in North American litigation, involving teaching of Canadian, U.S., and Mexican law.

B. Informal Harmonization through Adjustment of Rules of Private International Law

In Europe the harmonization of private international law rules has been a large undertaking as the Brussels Convention on Jurisdiction, the Enforcement of Judgments in Civil and Commercial Matters, and the Rome Convention on the Law Applicable to Contractual Obligations well illustrate. Again, however, harmonization is here a transitive verb. Nothing is taken as being in harmony; conflict is presumed; harmony (or rather uniformity) must be imposed. The North American experience suggests again the effectiveness of intransitive or informal harmonization, though there is here a dimension of it which was not previously discussed in dealing with harmonization of domestic law. Harmonization of private international law rules in the NAFTA countries has occurred through voluntary change—not imposed by a supranational organization—but spontaneously by independent national institutions, in order to respond to the NAFTA environment. In order to be in harmony, changes are made, but they are spontaneous and voluntary rather than imposed. How has this occurred in the NAFTA countries? There are a large number of examples.

A first group of examples relates to jurisdiction of courts and recognition of foreign judgments, a field seen as so important to the functioning of a common market in Europe that it was the object of one of the first, major, private law conventions of the European Community, the 1968 Brussels Convention. There is nothing equivalent to the Brussels Convention in North America, and until approximately a decade ago, the law of the NAFTA countries was sharply divergent. Recognition of foreign judgments in the United States is controlled largely by the judgment of the U.S. Supreme

34. See Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, 1978 OJ (L304) 1 [hereinafter Enforcement of Judgments].


36. See Enforcement of Judgments, supra note 34. The technique of the Brussels Convention has now been extended to family law with the signature in 1998 of “Brussels 2,” the French text of which may be found in J.C.P. 1998.III.20099 and which is commented on in Bruno Sturlèse, Premiers commentaires sur un événement juridique: La signature de la Convention de Bruxelles 2 ou quand l'Europe se préoccupe des conflits familiaux, J.C.P. 1998.I.145. There is no glimmer of any such text in anyone's eye in North America.
Court in *Hilton v. Guyot*, which established a primary and liberal rule of recognition of judgments of foreign courts, at least where jurisdiction of the foreign court was established; no fraud was proved; and where reciprocity existed, to enable recognition of U.S. judgments in the foreign jurisdiction. In the circumstances of *Hilton*, recognition of a French judgment was refused because of the French rule of revision on the merits (*révision au fond*), which allowed French courts to reopen the merits of a decision sought to be recognized in France. This overly inquisitive attitude, in the view of the U.S. Supreme Court, indicated a lack of reciprocity in the treatment of U.S. judgments, justifying refusal in the precise circumstances of the case. The application of the general principle of *Hilton* to Canadian judgments was affirmed, however, by the U.S. Supreme Court on the same day *Hilton* was decided, in *Ritchie v. McMullen*. In *Ritchie* the Court, in granting recognition to an Ontario judgment and in language welcome to Canadian lawyers, stated: "By the law of England, prevailing in Canada, a judgment rendered by an American court under like circumstances would be allowed full and conclusive effect." The United States in the late nineteenth century thus declared itself in favour of a liberal principle of recognition and Canada fell under this broad umbrella of recognition.

What of the rest of North America? Quebec, of course, and *pace* the U.S. Supreme Court, was not governed by the law of England and had received the French rule of *révision au fond*. To the extent Quebec judgments were recognized in the United States through the twentieth century by virtue of the broad language of *Ritchie*, it was all a mistake, but no one in Quebec appears to have complained. The situation in common law Canada is even more *piquant*. The received English common law contained no principle of *révision au fond*, so Canadian common law decisions were recognizable in the United States. In reality, however, Canadian courts would recognize and enforce U.S. judgments only in exceptionally rare situations, those in which the jurisdiction of the U.S. court was established through service on the defendant in the territory of the U.S. court, or through attornment to jurisdiction by the defendant. Canadian defendants

37. 159 U.S. 113 (1895).
38. 159 U.S. 235 (1895).
39. Id. at 242.
were generally intelligent enough to avoid both of these heads of U.S. jurisdiction, with the result that U.S. judgments were essentially never recognized or enforced in Canada, though Canadian judgments were open to recognition in the United States under *Ritchie*. Again, no one in Canada appears to have complained, so a deservedly discreet, and uniquely Canadian, jurisprudential concept of unilateral reciprocity was born. With some sadness, however, I have to report that this interesting concept has not survived in the NAFTA era.

In a voluntary and spontaneous manner, Canadian courts and legislatures have responded to the circumstances of NAFTA by radically revising Canadian rules on recognition of foreign judgments. For the common law provinces, the Supreme Court of Canada swept away received English law in 1990 in its decision in *Morguard Investments Ltd. v. De Savoye*, a decision which caused and continues to cause considerable consternation in Canadian business and legal circles. Henceforth, foreign decisions are recognized in the common law provinces where a "real and substantial connection" exists between the case and the adjudicating forum, and U.S. decisions are now routinely recognized in those provinces. Why did the Supreme Court of Canada reach this conclusion? In its words, because "[m]odern states...cannot live in splendid isolation" and because "the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner." This is the language of the NAFTA environment, and the Quebec legislature reacted in similar fashion in enacting the Quebec Civil Code in 1994. Book Ten of the new Quebec Code provides a comprehensive statement of private international law and the new rules on recognition of foreign judgment eliminate révision au fond, eliminate any requirement that the foreign court apply the law that the Quebec court would have applied to the case, and greatly expand the circumstances in which jurisdiction of the foreign court will be recognized.

41. *Id.* The decision was given at the time of the FTA, the U.S.-Canada Free Trade Agreement which preceded NAFTA.
44. C. civ. art. 3158 (Que.).
45. *Id.* art. 3157.
46. *Id.* art. 3168 (accepting foreign jurisdiction notably where the defendant has an
Mexican legal reaction to the circumstances of NAFTA has been more pronounced than that of Canadian courts and legislators. Until the last decade, Mexico adhered largely to the idea of an “import-substitution” economy and this economic closure was largely replicated in law.47 Foreign judgments were therefore not recognized in Mexico.48 In the late 1980s, however, a series of important amendments to the Mexican Federal Code of Civil Procedure were adopted, which generally indicated Mexico's willingness to participate more actively in international judicial collaboration. Article 569 established a basic presumption in favor of recognition of foreign judgments, and article 564 provided for recognition of the jurisdiction of foreign courts when the grounds of jurisdiction are “compatible or analogous” with those of Mexican law.49 Mexican law on recognition of foreign judgments today appears similar to the law of Canada and the United States; this harmonious result has been reached without imposition of uniform rules. Participation, even foreseeable participation, in a free trade arrangement changes the context in which national rules must operate, thereby bringing about changes to national rules.

There has been further informal harmonization of North American rules relating to the initial assumption of adjudicative competence. Everywhere in North America courts will now stand down in order to respect the terms of an arbitration agreement, and establishment in the adjudicating country and the dispute relates to its activities in that country (falling short of recognizing many instances of “general” jurisdiction in the United States) and also where prejudice has been suffered in the adjudicating country resulting from a fault or injurious act that occurred in that country). Quebec courts will, however, refuse recognition where the foreign court should have declined to exercise its jurisdiction on the ground of forum non conveniens. See Cortas Canning Co. v. Suidane Bros. Inc. [1999] R.J.Q. 1227 (recognition of Texas judgment refused where only minor and incidental sales had occurred in Texas and Texas court gave judgment for nine million dollars).

47. See Héctor Fix-Fierro & Sergio López-Ayllón, The Impact of Globalization on the Reform of the State and the Law in Latin America, 19 HOUS. J. INT'L L. 785, 791 (1997) (“To a closed economy corresponded a ‘closed’ legal system. Since economic exchanges were limited, the room for interaction between the domestic and the international legal systems was also limited.”).


49. For the texts, see Vargas, Enforcement of Judgments in Mexico, supra note 48, at 398, 400.
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all North American jurisdictions have now bound themselves to the United Nations (New York) Convention on the Recognition of Foreign Arbitral Awards. The late-nineteenth-century attitude of judicial hostility towards arbitration has therefore been largely overthrown, with the change coming about in Canada in the 1970s and in Mexico in the late 1980s and early 1990s. There remains litigation on the question of whether arbitration is compatible with particular local laws, but the general principle of the ability to arbitrate is now accepted on a continent-wide basis. This has enormous consequences for nonconflictual resolution of inter-jurisdictional disputes. Arbitration itself would be undergoing an informal harmonization process, and in North America there is now a Commercial Dispute Resolution Center of the Americas. In addition, the exorbitant ground of jurisdiction that was the simple location of property of the defendant in the adjudicating jurisdiction—the law of some U.S. states and Quebec—appears now largely eliminated on constitutional grounds in the United States, and through legislative reform in Quebec. North American courts now generally accept choice-of-jurisdiction clauses, both to derogate from jurisdiction authorized by law and to confer jurisdiction that would not otherwise exist.


52. See 2 VARGAS, MEXICAN LAW, supra note 48; see generally Claus von Wobeser, Enforcement of Arbitration Agreements in Latin America: Mexico, in ENFORCEMENT OF ARBITRATION AGREEMENTS IN LATIN AMERICA 55 (Bernardo M. Cremades ed., 1999).

53. In Canada, for example, see BWV Investments Ltd. v. Saskferco Products Inc., [1995] 2 W.W.R. 1 (agreement to arbitrate not contrary to Saskatchewan Builder's Lien Act).


57. See C. CIV. art. 3148 (Que.); cf. id. art. 68 (retaining the situs of property as head of jurisdiction in choice of judicial districts within Quebec).

58. See id. art. 3148. In the United States, see Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); and in Mexico, see C. CIV.
and the United States to enjoin litigation begun abroad; such an injunctive power does not exist in Mexico. The harmonization that has occurred thus reduces challenges abroad to jurisdiction that has been assumed.

Given increased levels of informal harmonization, more positive or affirmative measures of regional judicial collaboration become possible. This has occurred notably in the fields of provisional remedies and international bankruptcy. Provisional remedies exist in all North American jurisdictions, though an important divergence exists between the United States and Mexico on the one hand, and Canada on the other. Mexico and the United States have both received the historic embargo or attachment of particular property and neither will admit injunctive relief to prohibit the movement or disposition of unspecified goods. Canada has received the English *Mareva* injunction, which may be used to enjoin removal of unspecified goods from the forum or even to enjoin movement of goods worldwide (the so-called worldwide *Mareva*). In some Canadian jurisdictions, both attachment and the *Mareva* are available. In spite of these important differences, it is now becoming clear that the provisional remedies of each jurisdiction are becoming available to enforce another country’s judgments, and this attachment-in-aid or *Mareva*-in-aid represents an important form of regional judicial collaboration and a powerful disincentive to spiriting away potential judgment assets. If U.S. creditors are unable to enjoin movement of their debtor’s assets but are able only to seize particular property, they are nevertheless entitled in Canada to enjoin movement of property in Canada and may even be able to obtain a


60. For rejection of injunctive relief in the United States, see Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 119 S. Ct. 1961 (1999); and for Mexican embargo proceedings, before and after judgment, see JOSÉ O. FAVELA, *DERECHO PROCESAL CIVIL* 295-98 (Harla 6th ed. 1994).

worldwide Canadian Mareva-in-aid to prevent dissipation of assets elsewhere in the world.62

In the field of international bankruptcy we are now witnessing elaboration of joint Canadian-U.S. bankruptcy protocols for coordination of bankruptcy proceedings underway on both sides of the border.63 These protocols are developed by lenders' and creditors' committees and are approved by the judges in Canada and the United States who are charged with the respective bankruptcies. It has been said that this arrangement permits emphasis "on the commercial and reorganizational aspects of the case rather than on the more obscure conflicts of law issues."64 A further level of collaboration has also been achieved through use of joint court hearings in the two countries, initially by telephone conference but now by advanced video-conference techniques.65 I am not aware of the use of any such collaborative judicial techniques within Europe.

Harmonization in jurisdictional terms is also accompanied by harmonization of choice-of-law rules or principles. In North America this takes place in the larger cadre of harmonization of such rules in the world, or harmonization of material rules for private international cases. Parties in North America, as elsewhere, may thus avoid problems of conflicts of laws through reliance on established techniques of the new lex mercatoria,66 or through reliance on multilateral conventions. Thus, all three North American jurisdictions have unilaterally implemented the Vienna Convention on the International Sale of Goods, which eliminates conflicts between them in the flow of goods which NAFTA is designed to encourage.67 Harmonization of choice-of-law rules also takes place informally, and this "quiet harmonization" has been seen in the


64. Leonard, supra note 63, at 145.

65. See id.


gradual convergence of choice-of-law rules in matters of contract.\textsuperscript{68} Mexico has moved furthest in this regard, accepting the principle of party autonomy in amendments to the Federal Civil Code in 1988.\textsuperscript{69} There is also a largely unsung process of collaboration between states and provinces in North America, often resulting in formal accords that are tolerated because of their utility, despite the formal constitutional principles of exclusive federal control over foreign affairs and treaty-making.\textsuperscript{70}

There is therefore a great deal of informal harmonization of laws in North America, all of which has been accomplished in the absence of a central North American authority. It remains to be seen whether the room that is thus left to national and subnational governments may still be disruptive of the harmonization necessary for common market purposes. This is our second large topic of discussion.

\section*{II. Unilateralism and Its Control in the NAFTA Countries}

What do we mean by unilateralism? What are the North American judicial institutions that serve to restrain and control its most aggressive forms? What are the legal concepts or principles that can be called into play in doing so? What residual forms of particularity or protection remain possible, even probable, in the North American future? Each of these questions merits further examination.

\subsection*{A. Forms of Unilateralism}

Laws may be formulated with no indication of how they are meant to be applied in space. They simply \textit{are}, and in spite of such a universal style of formulation, their authors cannot be criticized for legal imperialism or unilateralism. Given the existence of multiple jurisdictions in the world, the universal style is recognized as one that


leaves the problem of spatial delimitation to someone else, frequently the judges of particular cases. The universal style is thus legislatively modest, since it does not affirmatively and expressly claim application for a particular text, in a particular geographic situation. However, laws that seek to control their own application are unilateral in character. They would leave no room for even-handed determination of their claim to application, no room for consideration of competing claims, no room for development of overarching rules or principles of choice of law. So the problem we are dealing with is one in which difference or diversity does exist, and in which there is at least one claim for the imperative character of such diversity. Such claims are not made exclusively by legislators; judges too can be unilateralist in character in giving exaggerated territorial reach to the laws of their home jurisdiction.

The European response to this phenomenon is within the European tradition. If the conflicts that are seen as implicit in different laws must be eliminated through uniformization or harmonization, the explicit conflicts of competing claims of application must also be subsumed under larger, top-down, allocative rules. So the European attitude we examined earlier applies here with still greater force, and the European Union has moved much farther than North America in eliminating the potential for unilateralist claims. This has occurred most clearly in the European prohibition of indirect discrimination based upon residence within the European Union,\(^7\) a prohibition unthinkable in the North American context, where the vast majority of state or provincial legislative regimes use residence as a criterion for entitlement or preclusion.\(^2\) Here, discrimination, based upon residence, is a social good, allowing planning, structuring, and implementation of local forms of social assistance. Moreover, elimination of antisocial forms of discrimination, including that based on nationality, is left to national and subnational determination.\(^3\)


\(^2\) In the Canadian context, see H. Patrick Glenn, L'Étranger et les groupements d'États, 43 McGill L.J. 165, 171 (1998).

\(^3\) For national elimination of discrimination founded on nationality or citizenship for
North American law thus leaves much room for unilateralist efforts to determine the territorial reach of particular laws. It is possible here to mention only some of them. Each North American jurisdiction, however, will have protective or unilateralist law in some measure.

Legislatively, one may note Quebec’s refusal to allow dumping in Quebec of extraprovincial refuse, NAFTA providing no barrier to local measures to strengthen environmental protection. All Canadian provinces, which adhere to the “world” rule of shifting of costs in litigation, thereby penalizing losers, provide for security for costs to be paid by nonresident plaintiffs in advance of litigation, ensuring ease of recovery by victorious locals. Many Canadian jurisdictions tax or prohibit acquisition of real estate by nonresidents, whether Canadian or foreign, in the effort to prevent or lessen absentee landholding. More targeted measures are found in Canadian blocking statutes, two of which are prominent in legal relations between the United States and Canada. Both Quebec and British Columbia have enacted legislation blocking recognition and enforcement of foreign judgments that impose liability for damage caused by asbestos produced in those provinces. Both Quebec and Ontario have enacted blocking statutes aimed at preventing removal of local corporate documents pursuant to orders for discovery made by out-of-province courts, notably those of the United States. Mexican law is also hostile to acceptance of foreign discovery

Canada, see Andrews v. Law Soc’y of B.C., [1989] 1 S.C.R. 143 (requirement of Canadian citizenship as condition of access to legal profession in violation of equality guarantees of Canadian Constitution); for the United States, see In re Griffiths, 413 U.S. 717 (1973) (state cannot deny membership in bar to alien otherwise fully qualified to practice law); and for Mexico, see MEX. CONST. arts. I, V, XXXIII.

75. See, e.g., C. CIV. PRO. art. 477 (Que.) (“The losing party must pay all costs . . . unless by decision giving reasons the court reduces or compensates them, or orders otherwise.”).
76. In Quebec, see the Land Transfer Duties Act, R.S.Q. ch. D-17, §§ 1, 4, 8 (1979); and for Canadian Supreme Court review of prohibitive legislation in Prince Edward Island, see Morgan v. Attorney General of P.E.I., [1976] 2 S.C.R. 349.
77. For Quebec, see C. CIV. arts. 3129, 3151, 3165(2) (Que.); H. Patrick Glenn, La guerre de l’amiante, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 41 (1991); and for British Columbia, see The Court Order Enforcement Act, 2 R.S.B.C. ch. 75, § 40 (1978).
78. For Quebec, see the Business Concerns Act, R.S.Q. ch. D-12; and for Ontario, see the Business Records Protection Act, R.S.O. 1990, c. B-19. For the relation of these laws to Canada’s new Full Faith and Credit Clause, however, see infra notes 106-08 and accompanying text. The Canadian blocking legislation would appear to explain Canada’s reluctance to sign and implement the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, open for signature Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231, to which both the United States and Mexico are parties. See LAWRENCE W. NEWMAN & DAVID ZASLOWSKY, LITIGATING INTERNATIONAL COMMERCIAL DISPUTES 138 (West 1996).
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Techniques in Mexico, both because of the absence of discovery in Mexican civil procedure and because of more particular protective policies.9

Courts in North America may also engage in expansive interpretation of local law or hostile treatment of foreign law or judgments. Predominant forms of unilateral interest analysis may encourage this in the United States.80 In Mexico it is said that the recent reforms may not yet have overcome the "extreme territorialism" of prior law.81 Canadian courts have exercised discretionary authority to refuse attempts to effect U.S. discovery depositions in Canada,82 while courts in Quebec are legislatively invited to give effect to local rules that would displace normal private international law rules by virtue of their particular (local) social objectives.83

The existence of such legislative or judicial measures is not, however, conclusive as to their application in North American legal relations. The effectiveness of such local efforts towards particularity or protection is subject to residual measures of control that exist within the federal and confederal structures of North American states. To what extent do North American circumstances render the threat of such measures less disruptive than they might be, for example, in Europe?

B. Control and Integration of Unilateralism in North America

In the context of U.S. law it appears appropriate to speak of control of unilateralism, since U.S. constitutional and judicial structures—those of a federal state—appear to reflect ongoing dialogue or tension between state unilateralism and federal measures of control. The same can largely be said for Mexican constitutional and judicial structures, and in the last century Mexican law has reinforced federal means of control over state authorities. The

80. For the "innate homing tendency" of interest analysis, see FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 147 (1993).
81. See 2 VARGAS, MEXICAN LAW, supra note 48, at 253.
83. See C. CIV. art. 3076 (Que.) ("The rules contained in this Book apply subject to those rules of law in force in Québec which are applicable by reason of their particular object.").
situation in Canada is more difficult to describe, since Canadian constitutional and judicial structures remain in some measure faithful to the idea of confederation that prevailed at the time of the Canadian union in 1867. In each case, however, or so it will be argued, North American jurisdictions offer acceptable fora for intraregional disputes. These fora are ones that are not locally biased and where appropriate measures of control can be exercised over the unilateralism that NAFTA implicitly authorizes. How does each North American jurisdiction provide this type of judicial resource, the equivalent of which is largely lacking in the unitary states of Europe?

Why should Canadian and Mexican litigants have confidence in the U.S. judiciary and its ability to control the forms of unilateralism, protective of U.S. interests, which may emerge in U.S. law? Seen from the outside, U.S. law does not suggest that foreign litigants should place much confidence in state judicial structures. The vision of an elected judiciary, beholden to local electors for enjoyment of office and presiding over local juries with authority to grant punitive damages, is Kafkaesque for the Canadian or Mexican defendant. "I'm cooked" was the recent conclusion of one of them to the author of these lines. Yet U.S. law does not present a "take-it-or-leave-it" option to the foreign litigant, any more than it does to U.S. litigants themselves. For large historical and political reasons, U.S. federal structures have been extended to the judiciary, yielding great potential for unilateralism on the part of state courts, yet U.S. law then provides the remedies and control that are necessary to protect nonlocal interests from these same forces of unilateralism. Canadian defendants and lawyers are now, given the NAFTA environment, learning rapidly about U.S. federal jurisdiction and how it provides an alternative to state courts, through diversity jurisdiction and removal, supplementary jurisdiction, and even submission of state judges to the Bill of Rights. Canadian or Mexican litigants, opposed to U.S. litigants, are not obliged to pursue their case before a state judge, even if that is the initial choice of a U.S. plaintiff. Diversity jurisdiction may be the object of ongoing controversy in the United States, but it has only enthusiastic supporters in Canada and Mexico.

What is the importance of these well-known notions of federal

84. See generally CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 141, 223 (West 5th ed. 1994).
85. See id. at 33 ff.
jurisdiction for litigation in the NAFTA environment? They do something that cannot be done in Europe, in spite of all measures of uniformization or harmonization of law in Europe. In Europe, substantive law and the law of jurisdiction may be harmonized, but its application remains largely in the hands of national, uniform judiciaries that are institutionally those of the unitary state that is the source of national law. This is not to suggest systemic, institutional bias, since European judiciaries are of great talent and integrity, though of varying levels of independence. It does suggest that decision making is more diffused in the federal structure of the United States, and that the federal judiciary in the United States is placed in a secured position in order to exercise control of unilateralism at either state or federal levels. The means of control will be examined in the next section of this Article, but the reality and efficiency of such control flows above all from the position of the federal judiciary and its ability to hold foreign litigants free from the prejudicial effect of local law. It is true that U.S. federal judges remain U.S. judges, and that under the *Erie* doctrine they are obliged to decide according to state law in diversity cases,\(^87\) but they exercise constitutional control in so doing and have long been accustomed to distancing themselves from legislative authority—whether state or federal—and from local judicial bias. A general principle might thus be advanced that, given the level of informal harmony of laws in any common market, an independent and detached judiciary in all participating jurisdictions is of more consequence than formal measures of harmonization of law. Formal harmonization, it is well known, does not in any way affect litigation rates, so it then becomes essential to ensure dispute resolution with approximately equal integrity in all participating jurisdictions. U.S. law provides major guarantees in this direction.

What of Mexican law? Like U.S. law, Mexican constitutional and judicial structures acknowledge the potential for unilateralism in the Mexican state and seek to provide appropriate remedies. Mexico is a federal state that has followed the U.S. model in important respects, including the federalization of its judiciary. The Mexican state judiciary is not, however, an elected one, so Mexican law provides no immediate access to the federal judiciary by way of diversity jurisdiction and removal. Mexican state courts, however,

have presented problems of their own, which have been described in terms of lack of training and being "subject to the political influence of the state governors." Corruption has also played a role. As a result, great pressure developed to secure access to Mexican federal courts. This was eventually brought about when the Mexican Supreme Court decided to allow application of the federal writ of *amparo* against state court decisions. *Amparo* is a many-faceted remedy, having great importance in administrative and criminal law, but for NAFTA purposes its importance lies in its "casación" function, by virtue of which state decisions can be challenged in federal courts on substantive grounds. It is true that this access is not prior to judgment, as is the case with removal to federal courts in the United States, but access is guaranteed and it is unlikely in any event that successful challenges to local law can always be accomplished without some form of appellate review.

The Mexican judiciary does present ongoing problems of inefficiency and corruption, as is the case with almost all developing countries. The previous president of Mexico acknowledged this and, given the NAFTA environment, put into operation a program of judicial reform. Mexico thus represents, in the circumstances of NAFTA, the worldwide phenomenon of restructuring and reforming of national judiciaries of developing countries in order to meet the needs and standards of international adjudication. Would imposition of uniform rules of law on Mexico by a supranational North American authority bring about, in itself, a form of adjudication in Mexico that would meet the needs of participants in NAFTA? The problem in Mexico is not a lack of substantive law, since Mexico shares fully in the rich civilian tradition of codified legislation. What are required in Mexico, as elsewhere, are procedural guarantees that ensure fairness in legislative and judicial treatment for the nonlocal litigant. Mexico is wisely concentrating its attention on judicial reform and in no way calling for European-style


90. See id. at 324.


legislative uniformization of North American law.

The Canadian judicial structure is less easy to explain than those of the United States and Mexico, yet it too offers guarantees to the foreign litigant and an effective means to overcome legislative or judicial unilateralism. The Canadian judicial model has been described as confederal in character, since it, in principle, leaves judicial authority with a single court of general jurisdiction, which is administered by the provinces as constituent elements of the confederation. The provinces thus retain more judicial authority and in this more decentralized arrangement one sees the essential characteristic of confederation as opposed to federation. It is not the case, however, that foreign litigants in Canada find themselves before a local judge, as before a U.S. state court judge. The Canadian judicial system is also designed as a collaborative one, and if the provinces administer each provincial system, the judges of the provincial superior courts are appointed, paid, and pensioned by the federal government. Discipline is also exercised by a federal judicial council. It has been stated by the Supreme Court of Canada that

[when a Court is called upon to choose as between the laws of two countries the proper laws to be applied for the solution of some private dispute, it must in the end be guided by the laws of the State that created it. But the superior Courts of the Canadian Provinces are not State courts.]

The Canadian judicial system thus deals with the problem of unilateralism essentially by smothering or integrating it. Provincial legislatures may create provincial law, but its application is not left to provincial judges, and there is no provincial judiciary comparable to the state judiciary in the United States. U.S. litigants in Canada therefore need not “make a Federal case out of it” to get before a federally appointed judge. They will, in almost all cases, be already where they prefer to be. Canadian superior court judges, moreover, like U.S. federal judges, exercise judicial review over the constitutionality of all legislation in the country, and no provincial authority can therefore simply assert unilateral control over an interjurisdictional case.

It would be incorrect to think that Canada has succeeded in creating a single, collaborative judiciary in a federal or confederal

93. For an effort to describe the Canadian model in comparative terms, see Glenn, Divided Justice?, supra note 9.
III. MEANS OF CONTROL OF UNILATERALISM IN NORTH AMERICA

In all North American jurisdictions there are detached and authoritative fora, in which relief from unilateralism may be sought. Such relief must, however, be justified, which means that control of unwarranted measures of protection or particularity is ultimately a question of national law. In North America, however, unlike most of Europe, this means that broad principles of federalism or confederalism, already in place to control regional tensions within the NAFTA countries, may be invoked in furtherance of NAFTA objectives. What are some examples of this adaptability of existing North American constitutional principles to the NAFTA environment?

A first and basic principle is found in the territorial limitations of state and provincial legislative authority in all NAFTA countries. This legislative authority is necessarily limited in space; otherwise state or provincial law would run in an unrestricted manner through national territory. In Canada, provincial authority is therefore
limited to matters or property and civil rights "in the province." 95 In the United States, the Due Process Clause is invoked to prevent territorial overreach, either in terms of jurisdiction or choice of law. 96 In Mexico, the constitution allows state law to have effect only within the territory of the state, expressly denying any binding authority outside of state limits. 97 In the NAFTA context the essential feature of these constitutional principles is that they constitute abstract or universal limitations on state or provincial authority. Anyone may invoke them. They do not provide benefits particularly to nationals of the country, sister states or provinces, or federal authority. Any private party engaged in North American exchange of any kind may pray them in aid, if they are prejudiced by unilateral measures. It is true that this will involve litigation but, once again, we know that even uniform legislation does not obviate litigation.

In each NAFTA country these principles of territoriality of due process have already received a great deal of amplification. We know that territorial jurisdiction in the United States requires minimal contacts, 98 or even purposive activity, 99 and that state law cannot be applied absent significant contacts with the particular state. 100 In Canada, we have learned that a province cannot impose strict liability for environmental damage derived from pollution originating outside of its territory, 101 or expropriate a provincial hydro company in order to destroy extraprovincial rights to power produced by the company. 102 In Mexico, the full sweep of amparo proceedings is available to ensure respect for territorial limits. 103

There are more than territorial limits, however, on legislative activity in North America. Discrimination based on nationality or national origin falls within heavily scrutinized or prohibited forms of human differentiation. These texts have had particular application with respect to lawyers, and everywhere in North America access to

96. See U.S. Const. amend. XIV, § 1; see also Scoles & Hay, supra note 27, at 78-88.
97. See Constitución Política de los Estados Unidos Mexicanos art. 121(1); see also W. Frisch Philipp et al., Derecho Internacional Privado y Derecho Procesal Internacional 82-84 (1993).
103. See Zamudio, Mexican Writ, supra note 88.
the legal profession cannot be denied because of lack of citizenship.104 States or provinces are also limited by federal competence, notably with respect to trade and commerce, and in the United States this notion has been developed to the point where even a "dormant" federal authority may be invoked to challenge state control over interjurisdictional trade.105

A further dimension of North American laws is the Full Faith and Credit Clause, explicitly stated in the U.S. and Mexican constitutions, recently discovered in Canada by the Canadian Supreme Court, lurking in hitherto unappreciated principles of Canadian federalism.106 Full faith and credit, however, unlike principles of territoriality or due process, requires a national beneficiary, in the person of another state or province whose judgment is entitled to full faith recognition. No North American Full Faith and Credit Clause thus avails the foreign (nonnational) judgment, and if full faith is to have continental importance it will require more imaginative use of its existence.

Unilateralism may also beget unilateralism, a phenomenon well known to NAFTA itself. Under NAFTA and the GATT, a finding of violation of the terms of these trade agreements will not give rise to orders of compensation or performance of obligations, but will rather open the possibility of retaliatory measures. Similarly in domestic North American law, any jurisdiction is free, subject to its own law, to take measures designed to penalize another jurisdiction that has originally taken unilateral measures. So reciprocity is an underlying principle of private, international legal relations, as it may be an underlying principle in public, international relations. The threat of reciprocal, retaliatory behavior, in the circumstances of NAFTA, may in itself be enough to forestall original unilateral measures.

How do these general principles, and possibilities of retaliation, work out in specific cases? Let us take Canadian blocking statutes as an example. How can a U.S. party challenge the effect of provincial legislation refusing recognition of a U.S. judgment imposing liability for damage for asbestos produced in Quebec or British Columbia?

106. In the United States, see U.S. Const. art. IV, § 1; in Mexico, see Constitución Política de los Estados Unidos Mexicanos art. 121 ("Entera fe y crédito."); and in Canada, see Hunt v. Lac D'Amiante du Québec Ltée, [1993] 4 S.C.R. 289 (declaring Quebec discovery-blocking statute constitutionally inapplicable in relation to the other provinces).
How can a U.S. lawyer obtain effective discovery in Canada even given Ontario and Quebec legislation prohibiting use and removal of Canadian corporate documents?

Three means of challenge appear possible. The first has been graciously suggested by the Supreme Court of Canada itself, in deciding that Quebec's discovery-blocking legislation was "constitutionally inapplicable" between Canadian provinces, by virtue of Canada's newly discovered Full Faith and Credit Clause.107 Reviewing the Quebec legislation, the Court stated:

It is inconceivable that in devising a scheme of union comprising a common market stretching from sea to sea, the Fathers of Confederation would have contemplated a situation where citizens would be effectively deprived of access to the ordinary courts in their jurisdiction in respect of transactions flowing from the existence of that common market.108

This language can be easily transposed to NAFTA. Full faith and credit does not, however, privilege judgments other than Canadian ones, so another means of control must be sought. The Supreme Court of Canada appears to have contemplated this in making the following remarks concerning the effect of Quebec's legislation:

The essential effect, then, and indeed the barely shielded intent, is to impede the substantive rights of litigants elsewhere. It would force parties to conduct litigation in multiple fora and compel more plaintiffs to choose to litigate in the courts of Ontario and Quebec.109

This is the language of unacceptable extraterritoriality. Quebec and British Columbia, in requiring refusal of recognition of foreign judgments in Quebec, would not be legislating over property and civil rights "in the province." The primary objective of the legislation would be to deter litigation elsewhere. The circumstances of NAFTA may assist Canadian courts in reaching this conclusion.

A second means of challenge is found in Canada's Full Faith and Credit Clause. It is admittedly the case that a U.S. judgment does not benefit from the protection of this clause, yet there is no blocking legislation applicable to U.S. asbestos judgments in, for example, Ontario, and major producers of asbestos in Canada are likely to have judgment assets situate in Ontario. Execution is thus possible in Ontario and, in language already used in the context of U.S.-Mexican

107. See Hunt, 4 S.C.R. at 289.
108. Id.
109. Id.
judicial relations, the Ontario judgment then becomes a "transformative" one, which would be protected by the Full Faith and Credit Clause and itself capable of further execution in Quebec.\(^{110}\)

The route may be longer than one would prefer, but initial execution in another province or state will not be fruitless in itself.

North American lawyers also should not abandon too rapidly the notion of reciprocity articulated in *Hilton v. Guyot*.\(^{111}\) Can a Canadian province pick-and-choose amongst the judgments of other NAFTA jurisdictions that it is willing to recognize. The doctrine of reciprocity would say no, or at least only at the cost of seeing its own judgments refused recognition in other NAFTA jurisdictions. Which judgments? At least those in the field of original refusal, but reciprocity is a fluid context, and if one jurisdiction is entitled to engage in selective refusal, the reciprocal privilege should be enjoyable by other jurisdictions. So U.S. refusal to recognize Canadian judgments in fields other than asbestos may be a justifiable proposition before U.S. courts.

What of Canadian antidiscovery blocking legislation? This too may be seen as extraterritorial, for the same reasons indicated above. It may also be justification for refusal to provide reciprocal discovery privileges in the United States to parties to litigation in Canada. U.S. courts also have the more immediate remedy of applying sanctions to Canadian parties to U.S. litigation who avail themselves of Canadian blocking legislation. Thus far, U.S. courts have been remarkably discriminating in this process, applying sanctions only where it may be concluded that the foreign party is acting in bad faith.\(^{112}\)

**CONCLUSION**

There may well remain areas in which the combined resources of North American law will not eliminate measures of particularity or

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111. 159 U.S. 113 (1895).

protection on the part of individual North American jurisdictions. North American jurisdictions may therefore be able to legislate against absentee landlords,\(^{113}\) or in favor of local distributors or franchisees.\(^ {114}\) This conclusion emerges, however, only once powerful forces of informal harmonization have exhausted themselves, and all potent means of attack of North American law have proved to no avail. There remains therefore, in North America, a dialogue between the general and the particular. This is how Gaius said it should be, and this element of European teaching should perhaps continue to guide us.

