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**US and EU Legal Professions:
Two Lawyers Separated by the Same Justice.
Common Law and Civil Law Procedures Compared**

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US and EU Legal Professions: Two Lawyers Separated by the Same Justice. Common Law and Civil Law Civil Procedures Compared*

Ramon Mullerat, OBE ♦

I. Introduction

US lawyers and EU lawyers seek the same justice but through different alleys. I plan to describe the main differences between common law and civil law² civil procedures³.

II. Civil law and common law in general compared

Some of the main differences are the following:

1. Law making

A major difference between civil law and common law is that priority in civil law is given to doctrine over jurisprudence, while the opposite is true in common law⁴.

Civil law is principally made by professors and legislators. Common law is made by advocates and judges⁵. Some consequences have flowed from this difference in authorship. For example, in civil law, private law is classified and expounded substantively, by reference to

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² Black's Law Dictionary. “Common law” is all the statutory and case law background of England and the American colonies before the American revolution. “Civil law” is the system of jurisprudence held and administered in the Roman Empire, particularly as set forth in the compilation of Justinian and its successors. With regard to US law, see for instance, William E. Nelson, Americanization of the Common Law. The import of legal change on Massachusetts society, 1760-1880, Harvard University Press, 1975.

³ Simeon Djankov, Rafael La Porta, Florencio López-de-Silanes and Andrei Sheifer, “Courts”, The quarterly journal of economics, May 2003, say that Dawson (1960), Berman (1983), Damaska (1986) and Glaeser and Schleifer (2002) argue that the procedural differences between common law and civil law actually go back to the 12th and 13th centuries, and that Glaeser and Schleifer attribute greater formalism in civil law to the need to protect law enforcers from coercion by disputing parties through violence and bribes. This risk of coercion was greater in the less peaceful France than in the more peaceful England, where neighborly dispute resolution by juries was more feasible.

⁴ William Tetley, “Mixed jurisdictions: common law vs. civil law (codified and uncoded law)”; <http://www.unidroit.org/english/publications/review/articles/1999-3.htm>, 17 February 2006.

⁵ Konstantinos D. Kerameus, “A civilian lawyer looks at common law procedure”, Louisiana law review, 1987, pp. 493 and ss.: “The judge is considered to be not only the prime pronouncer of legal precepts, but also the most central actor in a common law jurisdiction – to be contrasted to the professor in the Germanic legal family, or the advocate in the Romanist legal family.”

persons, things, obligations and actions. In political terms, it was deemed to be a gift of the sovereign authority to the people. Common law, on the other hand, is marked by casuistry, a fascination with procedure, and an absence of system. In the constitutional struggles it is presented as the birthright of the people against sovereign authority.

2. Law separation

The civil law has separate private and public laws. Further, in private law it distinguishes between the law applicable to commercial and to non-commercial transactions.

On the other hand, the common law is monolithic. There is no difference in the law applicable to the relations state-private citizens and among citizens. Traders and private individuals are treated alike. There is no separate law of merchants; it is part of the common law.

3. Conceptual vs. detailed law

Civil law has a tradition of interpreting statutes in a manner that is in good faith or reasonable in all the circumstances rather than strictly literal. Conversely, statutes and private instruments are concise and tend to be written in broad terms and with what looks to the common lawyer like an absence of detail.

Common law statutes provide detailed definitions and each rule sets out lengthy enumerations of specific applications.

Common law focuses on fact patterns. The lawyer analyses cases presenting similar but not identical facts, extracting from the specific rules and then, from deduction, determines the scope of each rule.

Civil law focuses rather on legal principles. The lawyer traces their history, identifies their function, determines their domain of application, and explains their effects in terms of rights and obligations.

4. Source of law

The main source of common law is case law. Lawyers therefore focus their research on reviewing court decisions in the relevant jurisdiction, or those of another common law jurisdiction for comparative purposes. However, more legislation has been introduced in recent years.

In civil law countries, the first step is generally to review the applicable codes and statutes. Lawyers refer to court decisions only to interpret that legislation.

5. Function of statutes

Common law statutes complete the case law, which later constitutes the core of the law expressed through specific rules applying to specific facts.

Civil law statutes provide the core of the law –general principles are systematically exposed in codes and particular statutes complement them⁶.

6. Dynamism of adaptation

Both traditions differ in terms of their abilities to adapt to changing conditions. Common law is

⁶ William Tetley, *op.cit.*: “The English word “law” means all legal rules whatever their sources, while the French word *loi* refers only to written statutory rules. The word *droit* in the French civil law is the equivalent of law in the common law”.

more dynamic since judges respond case-to-case to the changing needs of society, and there is less probability of a large gap forming between the economy's needs of the law.

In contrast, the French Civil Code was born out of the Revolution and had the utopian goal of creating a perfect immutable legal code. Thus, in theory, there is a static nature to the French Code, although France has adapted to practical commercial realities and Germany, building on Savigny's vision of legal science, sought to create a more dynamic code⁷.

7. Rights and remedies

Civil law focuses on rights and obligations, while common law is oriented towards the jurisdiction of particular courts to grant the sought-after remedy ("remedies precede rights")⁸.

III. Civil procedure⁹

1. Judicial system

a. The structure of the judicial system

In the US, a simple set of courts (state and federal) hears both public and private law matters, while the typical civil law system contains two separate sets of courts for administrative law and private law matters.

In common law systems, lower courts are bound by the decision of higher courts. The court system is integrated with courts detaining a general jurisdiction and therefore able to regulate most matters. Consequently, the judicial hierarchy is pyramid-shaped. For example, in England, the House of Lords is composed of 12 judges who would be at the summit of the pyramid.

In contrast, within civil law systems with several court systems, a case falling under the jurisdiction of one court is usually immune from jurisdiction in all others. The court system is more square-shaped than pyramid-shaped as a result. For example, the French *Cour de Cassation* is composed of around 100 judges who sit in six rotating specialized panels. Another example is found within the German model in which there are several different court systems.

b. Appointment of judges

In the common law system, judges tend to be appointed from experienced practitioners in the legal profession. In the US, some judges are elected by voters who may make donations to their campaigns like politicians¹⁰.

In civil law jurisdictions, judges are never elected by the public. They tend to be career judges (but not civil servants) selected among law graduates through a law special examination. Their job it is to apply the provisions of the law (*la bouche de la loi*). In some countries there are special schools for training of judges.

2. Role of judges. Inquisitorial vs. adversarial

Common law systems use the adversarial process. It is lawyers who control the procedures in the introduction of evidence and interrogation of witnesses. Each lawyer represents his client's position in the case. The judge acts as an "impartial referee" and has no knowledge of the facts of case before trial begins, he can decide what evidence to admit into the record or reject. Some

⁷ Thorsten Beck, Asli Dimirgüç-Kunt and Ross Levine, "Law, policies and science", 26 February 2001.

⁸ W.W. Buckband and A. D. McNain, Roman law and common law: A comparison in outline, 1952, p. 399.

⁹ Mauro Rubino-Sammartano, "Language and the law: Civil and common law", *Jurisdiction of Legal Practitioner*, March 2000, pp. 21 and ss.

¹⁰ John Grisham, The appeal, 2008.

criticize that the judge may give biased decisions, which would render obsolete the judicial process in question.

Contrarily, the civil law approach is inquisitorial. The role of the judge is therefore more active than in common law systems. The judge is responsible for the questioning of the parties and witnesses, but is prohibited from inducing them to testify on facts other than those for which they were named. He is responsible in appointing expert witnesses, and has knowledge of the facts of the case before trial.

3. Rule of precedents

In common law systems, judicial decisions form the body of case law¹¹. Lower courts must follow decisions rendered by higher courts. Precedents must then be applied according to the rule of *stare decisis* (the decisions made in previously judged cases presenting similar facts must be followed). When the courts are requested to interpret a legislative text, the final published decision will add judicial authority that may influence the outcome of subsequent disputes.

On the other hand, civil law, being the natural evolution of Roman Law, opted for codification of the general law (for example: the Napoleonic Code, the "Code Civil du Quebec", etc). Consequently, the judiciary must interpret and fill the gaps of the legislative texts. There are no binding precedents since the conclusion arrived to by the court only applies to the facts in the case at bar. Jurisprudence, in civil law jurisdiction, is a secondary source of law and has only an interpretative value when it comes to their application on subsequent cases.

4. Judicial formalism

A group of legal investigators¹² carried out an analysis of legal procedures triggered by resolving two specific disputes –the eviction of a nonpaying tenant and the collection of a bounced check- in 109 countries. They found that judicial formalism is greater in civil law countries and especially French civil law countries than in common law countries; formalism is also lower in the richest countries; the expected duration of dispute resolution is higher in countries with more formalized proceedings, but is independent of the level of development; formalism is universally associated with lower survey measures of the quality of the legal systems; however, greater formalism is efficient in some countries because it may reduce error, advances benign political goals and protect the judicial process from subversion from powerful interests.

5. Jurisdiction

In the US, locating the proper court does not always depend on pre-established abstract concepts, but often requires a painstaking inquiry into whether, in the particular case, there exist minimum contacts between the forum, the cause of action, and the defendant. Since the prevailing test focuses on “sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations”, then jurisdiction over the defendant is not a self-evident link established on general lines, but rather a highly individualized structure of authority, which requires in each case verification in accordance with the particular factual context.

¹¹ Rupert Cross and J.W. Harris, Precedent in English law.

¹² Thorsten Beck, Asli Dimingüç-Kunt and Ross Levine, “Law, politics and finance”, 26 February 2001.

In contrast, in the Continent, adjudicatory jurisdiction is based either on the domicile of the defendant (general jurisdiction) or, in special cases, on other connections between the cause of action and the territory of the court (special jurisdictions)¹³.

6. Case management by judges

a. Oral vs. written

Cases are mostly dealt with orally in common law systems and in written form in cases of civil law, although today the rigidity of such distinction tends to be softened.

b. Organization of the process

In common law, judges have power to regulate the process. In the US, they can oblige parties to resort to mediation (in the UK they cannot oblige parties to submit to mediation, but they can penalize the party who has refused mediation if invited by another party).

In civil law, the judge cannot impose prediction and has to strictly follow the prescriptions of the procedural law.

7. Evidence and its admissibility

As Richard Posner¹⁴ says, “the law of evidence is the body of rule that determines what, and how, information may be provided to a legal tribunal that must resolve a factual dispute.” Through the evidence, both parties seek to find the truth.

In both traditions, the *onus probandi* (burden of proof) rests with the party articulating certain facts according to the principle “he who asserts must prove”.

However, there are different approaches with regard to evidence and its admissibility. In the common law systems the “rule of hearsay” (rule excluding weak or prejudicial evidence), linked to the jury system, is fundamental of the evidentiary system. In the Continent legal culture, the principle of “free evaluation of evidence”, which empowers judges to ponder, in each particular case, the contrasting means of proof, prevails.

8. Disclosure, discovery and presentation of evidence

In common law systems, it is obliged to disclose information and pre-trial discovery is a salient feature of litigation. The US Rules of Civil Procedure allow the most extensive form of discovery. In the UK, on the other hand, legislation limits discovery to a “standard disclosure”, that is, to documents which directly support the claim or defense.

The purpose of pre-trial discovery is to allow the finding of evidence before the hearing with the objective that the efficiency of the hearing itself is increased. As the underlying facts are fully disclosed in pre-trial discovery, an extensive finding of facts during the hearing is not required. Further, after pre-trial discovery has been completed, the parties are in a good position to evaluate their cases, which in turn may increase their willingness to settle.

¹³ Konstantinos D. Kerameus, *op. cit.*, p. 495: “The judge is considered to be not only the prime pronouncer of legal precepts, but also the most central actor in a common law jurisdiction –to be contrasted to the professor in the Germanic legal family, or the advocate in the Romanist legal family.

¹⁴ Richard A. Posner, “An economic approach to the law of evidence”, *Stanford law review*, vol. 51, 1999. Posner considers that from an economic perspective evidence in the common law is more efficient than in the civil law: “Neither cheap nor highly accurate, our adversarial system is radically imperfect from the Utopian standpoint so often, though mistakenly, used to evaluate social institutions. Yet even from a perspective concerned only with economic efficiency in the sense of wealth maximization or cost minimization, it may not be inferior to the feasible alternatives, including the Continental inquisitorial system, much touted in some quarters of the American legal academy”.

Pre-trial discovery is unknown in civil law jurisdictions. From an European perspective, pre-trial discovery is seen as prolonging the process of taking evidence and diluting the notion of a single concentrated trial¹⁵. In Europe, it is up to each party to decide whether or not to disclose documents. A party can only be forced to produce documents if the adverse party relies on these documents in his pleadings but does not submit them as an annex to the complaint, or if the requesting party has a claim for production of the documents in question.

Civil law procedures consist of a series of consecutive stages (meetings, hearings and writings) through which the evidence is introduced to the judge and consequently evaluated. The judge, as the proceedings progress, has the role of defining the issues to the case. The evidence therefore is not gradually discovered as the "trial" goes on. The judge determines, through the information received throughout the oral hearings or in the written statements, the relevance and admissibility of the evidence. The admissible evidence is only presented once in the final hearing or the civil law version of a "trial".

9. Attorney-client privilege

The right and duty of lawyers to keep confidential the information they receive when handling cases is a general rule in all world jurisdictions. However, in the US, this principle has three manifestations: attorney-client privilege (evidence), confidentiality (ethics) and work product¹⁶, while in the civil law tradition it is a solid concept "professional secrecy" (*secreto profesional*)¹⁷.

In addition, common law lawyers consider the privilege to belong to the client, who therefore can waive it, while in civil law countries, the professional secrecy is deemed to belong to society and it is absolute so that, even with the permission of the client, it cannot be revealed.

10. Jury trial

A salient difference in civil procedures is the jury trial in common civil law countries and particularly in the US system¹⁸, where it is considered "a symbol of popular participation in the administration of justice"¹⁹.

In both legal systems it is, of course, the court which has the power to decide a case. But which body within the court actually makes the decision: the judge or the jury?

In common law jurisdictions, cases are usually decided by juries consisting of 6 to 12 citizens who are resident in the court's district. During a trial, the facts are presented to the jury, which comes to a decision once the judge has instructed it on the applicable law. Jurors are selected from a cross-section of the community without systematic exclusion of any racial, economic, political or religious group. However, in the UK juries are not used in civil cases, and only in criminal cases.

In European civil law procedures there is no jury. In Europe it is considered that civil justice requires extensive legal training which makes necessary the entrustment of the whole judicial system to professional judges²⁰. It is the judge alone who decides a case. The facts are

¹⁵ Konstantinos D. Kerameus, *op. cit.*: pp. 493.

¹⁶ ABA Model Rules of Professional Conduct, Rule 1.6, comment 3.

¹⁷ CCBE Code of conduct for lawyers in the European Union, art. 2.3.

¹⁸ Glendon, Gordon and Osakwe, *Comparative legal traditions* 1982, p. 93: "The civil law countries have never felt the need to bring the parties, their witnesses, their lawyers and the judge altogether on one occasion because they have not had to convene a group of ordinary citizens to hear all the evidence, to resolve factual issues and to apply the law to the facts.

¹⁹ P. James and G. Hazard, *Civil procedure*, 1985, p. 69.

²⁰ Konstantinos D. Kerameus, *op. cit.*, p. 503, also mentions that to most European observers, lay involvement in adjudication tends to promote decision-making in accordance with the peculiarities and the needs of the particular case, yet often at the cost of insensibility to general legal precepts and to predictability of result. For example, if persuaded

presented to him directly. Legal arguments do not have to be explained in as much detail, given the judge's advanced legal knowledge.

Even in criminal cases, where the jury exists also in Europe, the system differs. While in the US the jury is deemed to be for the benefit of the defendant, who therefore can waive it, in some civil law jurisdictions (Spain) it is deemed to be a benefit for society so that parties cannot waive it.

11. Hearing

a. In general

In common law countries, the statement of claim tends to be brief, the hearing (trial) itself is far more complex. During the trial, the facts and evidence are presented to the ruling body in full detail. The judge's chief role is to ensure compliance with procedural rules. It is up to the parties to present their cases. The hearing normally ends with an award given by the court.

Unlike in the common law jurisdictions, where there is a clear distinction between pre-trial and trial stages, the civil law tends to consider the litigation as a single procedure, with a continuous series of meetings, hearings and written communications during which evidence is introduced, testimony is taken and motions are made and decided²¹.

In European civil law countries, a hearing must be open to the public and held orally. It pays less of an importance to the case than the statement of claim, statement of defense and subsequent pleadings. Its purpose is to give the public an opportunity to follow the proceedings. Discuss any open issues. Give the parties an idea of what the outcome may be. The judge controls the hearing and the parties only make statements if requested by the court.

b. Use of documents at hearings

In common law systems the lawyer's task is not only to find documents which support his pleadings (for example, by pre-trial discovery) but also to find a way of authenticating the document at trial. Each document must be identified, presented and explained by a witness.

In civil law, the lawyer usually files documents, which support the claim or defense (for example, correspondence, contracts) with the statement of claim. It is then up to the opposing party to comment on the authenticity or meaning of the documents filed. There is no general requirement that the documents be authenticated, for example, by witness testimony.

12. Witness testimony

In common law, deposition taking is critical. The parties generally "present" their witnesses, that is, the party who named him as witness first questions the witness. The opponent then has the opportunity to cross-examine the witness (a fundamental component of the adversarial system) with the aim of bringing any evidential weaknesses or contradictions to the jury's attention. The judge does not question the witnesses and only ensures compliance with procedural rules. A court reporter types in each word spoken by the witness, so that at later stage in the trial, a detailed account of what the witness has testified can be given.

In civil law systems, the judge is expected to have read the party's pleadings, which may include written statements. However, even without such statements, witnesses may be subpoenaed to testify at the hearing. In this event, the judge puts questions to the witnesses; the

on the merits of the claim, lay judges would probably be more prone to overrule an exception of liberative prescription, thus undermining the role of prescription in fostering legal certainty. The impact of such emotion-driven judgments on subsequent cases cannot be underestimated.

²¹ Glendon, Gordon and Osakwe, *op.cit.*, p. 91.

role of the lawyer is generally limited to suggesting questions to the judge that should be asked. The lawyer is, of course, given the opportunity to ask additional questions. Cross-examination however, is not part of witness questioning. Normally the judge does not dictate witness testimony word for word. Rather, he summarizes the testimony, restricting it to those issues that he considers as worth reading. In some jurisdictions it is prohibited to brief or “prepare” the witnesses.

13. Expert witness

The common law approach is that each party appoints its own experts. Generally, the expert should be independent from the appointing party. In practice, however, a party will only appoint an expert who will prepare a favorable opinion, as this evidence forms part of the party's pleadings. If the opinions submitted by the parties differ, the court must decide which opinion to follow. The parties plead their cases including expert opinions and the court decides which description of the case is more persuasive. In most cases, the court does not have the technical expertise to understand in detail the finding of the expert, but this is considered to be one of the court's main roles.

In civil law jurisdictions, the expert is a neutral person who assists the court in its findings. Parties can also attach witness experts. But since they are often contradictory, the judges appoint a neutral expert. The court relies on the expert's opinion to be convincing and without contradictions. If a party submits an expert opinion and the other party denies its content, the court cannot assess which argument is more convincing. In this case, the judge must appoint a neutral expert and rely on his findings.

14. Appeal

Appeal in common law systems only concerns questions of law, unless there is a gross error in the appreciation of the facts. Therefore, parties are less likely to appeal a judgment since a jurisprudential precedent from a higher court is usually applied.

In civil law tradition, an appeal contains a *de novo* review of the presented issues and appreciation of the facts (“double jurisdiction”). In some cases there may be additional testimony, evidence, and expert opinions presented in the appeal. In addition, because there is no doctrine of precedent, it is a much more frequent practice to appeal the decisions of judges in the lower courts and take them all the way up to the top.

In addition, the role of the Supreme Courts is double everywhere: to review the appeal court decisions and to unify the interpretation of law. However, unlike the US where the final resort depends on judicial discretion and the Supreme Court decides which cases chooses to hear (*certiorari*), in civil law systems the second resort is a right of the parties and the Supreme Court is obliged to hear cases that meet certain conditions (like a certain amount in discussion, etc.).

15. Costs

In common law jurisdictions, a plaintiff can request a decision on costs in its pleadings; a jury is not compelled to include such a decision in the judgment. In fact, there are very few cases where the losing party bears the winner's costs. In some instances, a winning plaintiff may actually make a financial loss if its procedural costs exceed the amount awarded. Conversely, a losing plaintiff may not be required to bear the defendant's costs. This partly explains the high number of lawsuits in the US²².

²² In my own view, there are several reasons for the US litigiousness: class actions, punitive damages, jury trial,

In civil law systems, an award also includes a cost decision, which often complies with the "loser pays" principle. A prospective plaintiff will therefore think carefully before filing a claim.

IV. Conciliable or irreconcilable

The two legal systems are slowly converging. One may mention several international conventions such as the Convention on International Sales of Goods, the Convention on the Applicable Law no Contractual Obligations, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the Lugano Convention on the same subject, the Model Law on Commercial International Arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which have unified important areas.

In the civil law family, legislation on divorce has been basically accepted. A typical common law institution, the trust, has also been digested by civil law countries.

The EU directives on company law have acted as catalysts of both the EU common law countries (UK, Ireland) and the civil law ones. Civil law countries, by giving up their deep notion that for a *societas* to exist, one needs two parties, have accepted that companies with limited liability may be formed by a sole party. Oppressive or burdensome clauses, have been the object of an EU Directive of specific consumer protection.

Civil law countries have also accepted institutions like factoring, franchising, forfeiting which have been revised by common law, by adjusting old notions common to the two legal systems (such as the assignment of credits and licensing of know-how) to the needs of modern trade.

In the real estate area, common law long-term leases have become more frequent in several civil law systems and the sale of the mere right of surface is commonly used even in the latter²³.

The convergence is also shown by the increasing number of written statutes in the common law jurisdictions and orality growing in the civil law ones.

There is also a continuous interchange of legal concepts like the increasing use of the "reasonability" concept in civil law or of *bona fides* in the common law.

In particular, with regard to civil procedures, as professor Kerameus has rightly pointed out, although there exist some apparently irreducible differences between the two systems (and mainly in trial by jury, and in the conception of jurisdiction), other reveal some signs of convergence particularly in the scope of appellate review or even in discovery devices²⁴.

Therefore, it is my view that in the future, not a near future, but the future, our descendants will witness the unification of the legal systems of a globalized world, first in commercial law and finally on family and succession law. As the Romans said, "*certus and, incertus quando*".

contingency fees and the not application of the "loser pays" principle.

²³ Mauro Rubino-Sammartano, "Language and the law: Civil and common law", *International Legal Practitioner*, March 2000, pp. 21 and ss.

²⁴ Konstantinos D. Kerameus, *op. cit.*, pp. 497.