



501 Common Differences between Civil & Common Law Jurisdictions

Bertrand J. Alexis
Vice President
Cable & Wireless plc

Tijen Sensebat-Cirtma
Noerr Stiefenhofer Lutz

Anne-Rose E. Stouthuysen
Associate General Counsel, Europe, Middle East & Africa, Bedrijfsjurist - Juriste d'Entreprise
Sun Microsystems, Inc.

Faculty Biographies

Bertrand J. Alexis

Vice President

Cable & Wireless plc

Tijen Sensebat-Cirtma

Noerr Stiefenhofer Lutz

Anne-Rose E. Stouthuysen

Ann Rose E. Stouthuysen is the assistant general counsel within the EMEA legal department of Sun Microsystems Inc., located in Brussels. Her responsibilities include providing legal counsel for EMEA related matters and contracts of the Global Customer Services (GCS) and Global Strategic Sourcing (procurement) divisions and as the lead attorney supporting global contract negotiations with one of Sun's major customers in the telecom sector. She is a member of the Sun EMEA GCS executive team and the Sun Legal Diversity Council.

Prior to joining Sun Microsystems Inc. Ms. Stouthuysen has worked both in industry and private practice. She has approximately 19 years legal experience in contract and commercial law. Ms. Stouthuysen served two years as European legal counsel for Dell Inc. providing legal counsel to the sales and management teams of the Benelux and France, and one year as in-house counsel for Aviapartner N.V. While working in private practice, Ms. Stouthuysen was a senior associate with Morgan, Lewis & Bockius and Akin, Gump, Strauss, Hauer & Feld, based in Brussels, and completed the European Young Lawyers course of the British Council at the University of Edinburgh, Scotland. She began her career as a commercial litigator.

Ms. Stouthuysen is a graduate of the Catholic University of Leuven School of Law, Belgium, holds a postgraduate certificate in Finance from the Catholic University of Leuven School of Economic Sciences and is an alumni of the Center for Creative Leadership – Europe.

Variations between Common and Civil Law Legal Systems

Some Quick Facts

With a few exceptions, legal authors generally divide the legal systems in the world into two main groups: the common law and the continental law or civil law system, the latter being the most wide spread. Within the common law jurisdiction variations exist between the different common law countries. Likewise, between the many civil law countries. This leads some authors to more narrowly define the legal families in the world as follows: the Romance, the Germanic, the Anglo-American and the Nordic legal families, law in the Far East (China and Japan) and religious legal systems.

While common law countries increasingly adopt statutory law and the civil law countries work with a growing number of jurisprudence (cases), the fundamental distinctions between the two legal systems, i.e., the mode of thought in legal matters and the legal position towards statutes, case law and jurisprudence, have not gone away.

This summary intends to outline these fundamental distinctions.

1. Common Law Legal System

- Legal system in England and in many countries with a history as British territories or colonies.
- A legal rule is judge made. Common law originally developed from rulings of judges that were based on tradition, custom and precedent.
- Primary source of law: cases.
- Methodology: case based system of law which functions through reasoning by analogy and precedent.
- Doctrine of precedent or *stare decisis* (Lat., = stand by the decided matter), i.e., the previous decision of the highest court in the jurisdiction is binding on all other courts in the jurisdiction. A case is authority for what it actually decides.
- Common law may be unwritten or written in statutes. A common law statute does not propose completely to supersede the pre-existing traditional law governing topics covered by it, nor does it propose to lay down general principles of its own. General principles underlying the statute are to be found within the realm of the traditional unwritten law. Statutes may leave a number of things unsaid because they are already understood from the point of view of pre-existing case law.
- The main function of a statute is that of clarifying doubtful points and implementing pre-existing rules and principles. Some statutes are purely statutory and may create a new cause of action beyond the common law.
- The courts have recourse to doctrines of common law in statutory interpretation.
- Procedure practiced in common law courts is the accusatorial (adversarial) system, i.e., a regulated confrontation between the parties. Extensive law of evidence and trial methods have been developed. The judge is passive. The leading role comes to the parties and their lawyers.

- Right to trial by jury.
- Disclosure : general duty to disclose all information and documents relevant to the trial.
- Typical institutions of common law: trust, tort law, estoppel and agency.
- Countries with common law systems: England and Wales, the Republic of Ireland, the United States of America (except Louisiana), Canada (except Quebec), Australia, New Zealand, Malaysia, Singapore, Hong Kong.
- Pluralistic or mixed legal systems: Scotland (basis in Roman law), South Africa (following Roman Dutch law to some extent), India (mixture of English law and local Hindu law).

2. Civil Law Legal System

- Legal system in the majority of countries, especially in continental Europe and former colonies of those countries.
- A legal rule is laid down in the form of a legislative enactment based on the doctrine of legislators and legal scholars rather than on the practice of the courts. Legislation comprises express legal rules in a general and comprehensive manner.
- Primary source of law: legislation.
- Methodology: codification.
- Legislation developed out of the Roman law of Justinian's Corpus Juris Civilis. During 17th, 18th and 19th century enactment into separate national codes. The most influential codes are the Napoleonic Code and the German Code. The code provisions have been implemented by an increasing number of statutory provisions.
- Civil law principles: (i) solution of each case is to be found in the provision of the written law, (ii) precedents, however authoritative, are not binding, and (iii) the deciding court must demonstrate that its decision is based on provisions of the written law and not merely on precedent.
- Decisions of the civil court - *jurisprudence* - are the illustration of general principles. Precedents may be highly persuasive but they are never conclusive.
- Procedure practiced in the civil law courts is inquisitorial. The judge is given a strong role. The judge can adopt the role as examiner, counselor and advisor, as insistent promoter of settlements. He is entitled and bound to question, to inform, encourage and advise parties, lawyers and witnesses and counteract any mistake.
- Disclosure of those documents which support own case. Subject to the fulfillment of certain legal conditions specific disclosure orders for documents held by counterparty may be obtained from the court.
- Branches of civil law: law of property, law of persons, law of family, law of succession, law of obligations (contractual, quasi-contractual and extra-contractual), law of evidence, law of prescription, law of publication of rights, private and international law.
- Three distinct subgroups:
 - French civil law: France, Benelux, Italy, Spain, Portugal and former colonies of those countries, such as Latin American countries, Quebec, Louisiana.
 - German civil law: Germany Austria, Switzerland, Liechtenstein, Japan, South Korea, Republic of China (Taiwan).
 - Scandinavian civil law: Denmark, Sweden, Finland, Norway, Iceland. These countries have no codes like the civil codes of France and Germany. Customary law was superseded by statute law.

3. Socialist Law

- Legal system used in Communist States.
- Based on a civil law system with major modifications and additions from Marxist-Leninist ideology, e.g., notion of private property, special courts and laws for state enterprises.

4. Comparison: tort law in a civil law and a common law jurisdiction

France.

Law of torts (extra-contractual obligations) is part of the French civil code. The code deals with principles and standards of tort. It makes no efforts to cover the details. Law of torts are disposed of in five (5) brief sections. Abundant jurisprudence illustrates the legal principles.

The United States of America.

Law of torts is collected in four (4) sturdy Volumes of Law of Torts. Class actions and punitive damages are typical features of US tort law. Punitive damages are awarded over and above the amount of compensatory damages. Punitive damages are not awarded in order to compensate the plaintiff, but in order to reform or deter the defendant from pursuing a course of action such as which damaged the plaintiff.

General comparison between the USA and the Western European tort system.

A recent article in Business Week gives the historic and economic reasons behind the USA tort system, makes a comparison with the Western European tort system, explains the recent USA reform and proposes solutions to further weed out the excesses and parasites, such as payment of the lawyers for performance.

- FRANCE, M., WOELLERT, L., MANDEL, M.J., 'How to fix the tort system', *Business Week*, March 14, 2005, Issue 3924, p. 70

5. Selective bibliography

- DE CRUZ, P., *Comparative law in a changing world*, United Kingdom, Cavendish Publishing Limited, 1995
- DE CRUZ, P., *A modern approach to comparative law*, Belgium, Kluwer, 1993
- RIESENFELD, S., PAKTER, W.J., *Comparative law casebook*, New York, Transnational Publishers, Inc., 2001
- SCHWARTZ B., (ed.), *The Code Napoleon and the common law world*, Connecticut, Greenwood Press, 1977
- TREITEL, *Remedies for breach of contract. A comparative account.* (1988), *International Encyclopedia Comparative Law*, VII, Ch.16, (1976)
- ZWEIGERT, K., KOTZ, H., *An introduction to comparative law*, Oxford, Clarendon Press, 1988