Federation of Defense & Corporate Counsel

I-3 Insurance Industry Institute, October 2-4, 2013

New York, NY

Window on the World – What is Different in Europe and Australia

by Stephen Carter, Christian Lang, and Chris Rodd

Historical Background

Legal systems are the result of a historical process of transforming values of a society into a set of rules and sanctions. Those that transgress the rules are subject to the sanctions as the ultimate means of enforcement of the rules. Society therefore empowers bodies to enforce those sanctions. The factors that have shaped each legal system are manifold. Military and economic power of a country have played as important a role as its geography, its climate, its ethnic mix and ancient traditions that had been passed on over decades and centuries. A major influence on the shape of the legal systems that exist in Europe today came, on the one hand, from the roman civil law and, on the other hand, from the church which for centuries was the only organization that studied and discussed science and educated people in a society otherwise mostly focused on

agriculture or distracted by wars and political turmoil[1]. In 1088, the University of Bologna (Italy) was one of the first independent universities in the world, and the first university to teach law (both church law and roman civil law)[2].

The big dividing line which splits Europe into a common law and a civil law part goes through the channel between continental Europe and Great Britain. On the western side of the line the common law system that goes back to the laws and directives promulgated by William the Conqueror (1027-1087) and his successors on the throne. The case law system is a dynamic system amenable to adaptations warranted by the change of the society. On the eastern side of the line, on the continent, the civil law systems prevailed. Today's civil law systems in continental Europe base or were substantially influenced by the French "Code Civil". The Code Civil was a result of the French Revolution (which started in 1789) and promulgated by Napoleon in 1804. Although Napoleon later on ruled as an emperor, it was based on the achievements of the French Revolution and its mantra of "*liberté, égalité, fraternité*" (liberty, equality, fraternity/brotherhood). The Code Civil included many legal concepts that were developed in the ancient roman civil law such as various concepts governing contractual relationships between equal parties (as opposed to tiefs granted by a liege lord in consideration for a part of the proceeds), or the legal concepts governing the passing of property and possession[3]. It was one of the first and clearly the most important codified body of law at the time, not at last because it was put into force by Napoleon in a growing number of territories across continental Europe during the rise of his empire.

These historical differences nowadays manifest themselves in various ways: in civil law systems, the law is codified in an abstract form and is intended to encompass all situations that matter in a society. As an example: Article 3 of the Swiss Code of Obligations ("CO") reads as follows: "*Whoever extends an offer to another person to enter into a contract, and sets a time limit for acceptance thereof, shall remain bound by the terms of his offer until the expiration of such time*

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[1] Senn, Rechtsgeschichte – ein kulturhistorischer Grundriss, Zurich, 2007, p. 51, 165/6.

[2] Senn, *supra*, p. 179, 183.

[3] Senn, *supra*, p. 293/4.

limit. The offeror shall be released therefrom if a declaration of acceptance has not reached him prior to the expiration of the time limit." Article 5 further sets forth that "*[i]f an offer is made […] without setting a time limit, the offeror shall remain bound until such time as he should reasonably expect receipt of a reply dispatched properly an in due time.*"

The body of common law, on the other hand, is the entirety of precedents, each of which applies certain general legal concepts to a specific set of facts. Common law systems, therefore, are an ever developing and "self adjusting" system of precedents which deal with the questions that matter in society and will bind future Courts. Obviously that is not to say that common law systems do not have statutory legislation – plainly they do. However, common law can go beyond the remit of statutes and is taken into account in interpreting statutes (especially where those statutes are in essence codification of the common law, such as the English Marine Insurance Act 1906). The judge in a common law system does not allocate facts to pre-existing categories by reference to a pre-existing map or scheme, but rather finds his decision by the operation of several concurrent and cumulative considerations. [4]

The English and Australian systems are both common law systems. The Australian legal system, not surprisingly, is very much modeled on the English system. As Australia is a British Commonwealth country originally settled in 1888, primarily as a penal colony, the English body of law was established shortly after colonization.

Both Australian contracts and tort law developed as an evolution of English law and much of the English law applied directly to the judgement of the various colonial courts. Upon the federation of Australian states (colonies) in 1901, Federal Courts were soon established and the Australian independent legal system gradually evolved, although, again, very much influenced by English law, in particular English common law, and procedures.

The Australian system therefore shares the same English common roots as does the US system, but both Australian and US systems have since evolved in their own different ways with the

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[4] Geoffrey Samuel, Elgar Encyclopedia of Comparative Law, M.A. 2006, p. 152.

result that, although they still share many characteristics as common law systems, they also importantly exhibit many differences.

While the common law system strives to achieve justice and fairness through the application of general legal concepts to each individual case, civil law focuses more on the certainty and predictability of the law by establishing a set of rules which, on an abstract basis, define the consequences of certain actions or omissions. Where codified law applies, the average person from the street will be able to get a basic understanding of how the law works by simply reading the applicable code. (While this is the general idea of codifying the law, the major problem for a layperson nowadays is to find out which code or codes apply to a specific issue.) The judge in a civil law country is held to interpret the law and apply it to the individual case, but is not called to develop it in a way better to meet the necessities of a developing society. Developing the law is exclusively reserved to the lawmaker and not the Courts. Decisions from higher Courts, technically, are often not binding on lower Courts although they have persuasive authority as they are in common law countries. The concept of *stare decisis* is not applied in civil law jurisdictions.

As Europe consists of 47 sovereign states with, although interacting, but nevertheless independent legal systems, this paper will focus on the legal system of the authors' home countries Switzerland (civil law system),and the United Kingdom (common law), with some general references to the laws of Australia. On the one hand, English law is the most important common law system in Europe. On the other hand, the Swiss Civil Code of 1907 and the Swiss Code of Obligations of 1911 were two of the early modern codifications of civil law in Europe and influenced the lawmakers in various other countries in continental Europe[5].

The Judiciary

In continental Europe, the methods of election of judges vary from country to country. While for lower Courts it is not uncommon that the judges are elected by the people of the relevant district,

[5] After Turkey had become a republic in 1923, it adopted the entire Swiss Civil Code and Code of Obligations (with only minor changes) in 1926 in order to support the creation of a secular civil society.

judges of the higher Courts are often elected by parliament or appointed by the government or the head of state. While some judges are elected for lifetime, a number of countries have fixed and sometimes non-renewable terms, especially for judges of the Constitutional Courts (e.g. Germany France or Spain). While in some countries (e.g. Germany) there is a defined career path to become a judge, other countries' systems allows more political influence on the election or appointment of judges.

In Switzerland, although most of the law is federal law, the organization of the judiciary is left to the states[6]. Only the organization of the Federal Supreme Court is governed by federal law. Accordingly, the system for the appointment of judges can vary from one state to another. However, there are no longer substantial differences between the states. District judges are usually elected by the people of the relevant district. While any full age Swiss citizen can run in such an election, in practice it is the major political parties that propose their candidates following a voluntary system mirroring more or less the political strength (percentage of votes in last election of parliament) of the respective parties. In many states it is still not a requirement for a district judge to be a lawyer. Judges of the Courts of Appeal (which are organized at a state level, not at the federal level) are usually elected by the parliament of the respective state, and the judges of the Federal Supreme Court are elected by the national parliament. All judges are elected for a fixed term, which in the case of the Federal Supreme Court is six years[7], with the possibility of re-election.

In the UK, the Judicial Appointments Commission is responsible for selecting judges in England and Wales. It is a non-departmental public body which was created on 3 April 2006 as part of the reforms following the Constitutional Reform Act 2005. It took over a responsibility previously that of the Lord Chancellor and the Department for Constitutional Affairs (previously the Lord Chancellor's Department), although the Lord Chancellor retains responsibility for appointing the

[6] At least, since 1 January 2011, all the state level Courts operate under the same Federal Civil Procedure Code. Before that, each state had its own code of civil procedure.

[7] Art. 9 of the Swiss Federal Act on the Supreme Court (SR.173.110)

selected candidates.[8] The judges of the Supreme Court of the United Kingdom are formally appointed by the Queen on advice of the Prime Minister after completion of a defined selection process.[9] They are appointed for life tenure.

In England first instance Judges are assigned to a particular division of the Court system. International insurance and reinsurance cases will generally be heard in the Commercial Court by Judges who, before their appointment, practiced as barristers in Commercial Court cases. Any Court proceedings relating to international arbitrations are also heard in the Commercial Court. Appeals lie to the Court of Appeal (usually a three Judge panel) and to the Supreme Court (usually a five Judge panel). In both cases, leave to appeal must first be obtained either from the Court the decision of which is being appealed, or from the appellate Court.

In Australia, each state appoints its own judges and magistrates to the Magistrates Courts, County /District Courts, Supreme Courts.

Appeals from a single judge of the Supreme Court are adjudicated by Court of Appeal, (the appellant division of the Supreme Court). The highest appellant court for judicial review is the High Court of Australia , consisting of Judges appointed from each of the Australian states and appointed by the Federal Government.

Previously , as a member of the British Commonwealth Australia had the right to appeal beyond the High Court , to the English Privy Council (a judicial arm of the House of Lords). However, rights of appeal to the Privy Council were abolished in a 2 stage process . Rights of appeal to consider matters in respect of states and federal rights and powers were abolished in 1975 and in relation to ALL other matters (including criminal appeals)in 1986.

Overlayed with the state courts are courts exercising Federal Jurisdiction – The Federal Court which operates at both state and federal level, and in addition courts exercising exclusive federal jurisdiction such as the Family Court (applying Federal law).

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[8] See: http://en.wikipedia.org/wiki/Judicial_Appointments_Commission

[9] See Sections 25 to 31 and Schedule 8, of the Constitutional Reform Act 2005.

All judges at every level are appointed by the Government of the day (state or federal) and cannot be removed from office unless found incapable of performing their duties (by illness, mental incapacity, etc.) or for acts of dishonesty, commission of a crime, etc. Their period of tenure is limited only by age. Judges are required to retire at age 70.

Legal Proceedings

In Europe, Courts hearing civil cases are usually composed of either one, three, or five judges, depending on the type of claim and the amount at dispute. In contrast to the U.S. jury system, the Court is the fact finder in European civil proceedings. Today, juries can only be found in criminal proceedings in a small minority of European countries, including the UK. In England defamation cases are the only form of civil claim heard by a jury.

In Switzerland, it is up to the Court to decide what evidence it considers necessary to decide a case, and it will freely assess the reliability and weight of the evidence introduced into the proceedings by the parties[10]. Thus, not all evidence offered by the parties will be taken by the Court.

The Court applies the law to the found set of facts *ex officio*. It is deemed to know the relevant law (concept of *iura novit curia*)[11]. The parties are therefore not obliged to plead the applicable law (although a diligent lawyer will do so) and the Court is free to base its decision on a legal provision the applicability of which has not been pled by any party[12]. However, it obviously is crucial for legal counsel to know what legal provisions may apply to the respective case in order to gather and submit all the relevant evidence[13].

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[10] Article 157 of the Federal Civil Procedure Code ("CPC").

[11] Article 57 CPC.

[12] However, if a court intends to base its decision on a legal provision which has not been made an issue in any party's pleadings, the right to be heard requires the court to bring this to the parties' attention and to give them the opportunity to comment on it. See Hotz, N 28 Art. 29 in: Ehrenzeller/Mastronardi/Schweizer/Vallender, Die schweizerische Bundesverfassung, Kommentar, Zürich 2002.

[13] Staehelin/Staehelin/Grolimund, Zivilprozessrecht, Zürich 2008, p. 118.

This system leads to a structure of legal proceedings which is fundamentally different from U.S. and other common law based litigation, where both facts and law are argued in full by the parties' lawyers at trial (including full cross-examination of witnesses). In Switzerland, the parties are held to fully plead their case in their first brief[14]. This will usually include comprehensive allegations with regard to the relevant facts, the identification of the pieces of evidence which are submitted with the brief or which are requested to be taken by the Court in the course of the proceedings, the specific prayers for relieve (including the amounts claimed) and the legal arguments that justify the claim. It is then up to the Court to decide what evidence it considers necessary to decide a case and it will only hear such relevant evidence. Swiss legal proceedings in civil cases, therefore, include the following there phases: (i) first and often section round of briefings with full pleadings by the parties, (ii) taking of evidence by the Court, and (iii) final pleadings by the parties, including pleadings on the result of the taking of evidence. The Judges' role is much more inquisitorial than that in common law countries, where Judges decide cases on the basis of the arguments and evidence that the parties, through their lawyers, choose to present.

Accordingly, in Swiss and other European proceedings, a plaintiff must be reasonably certain to have a case and should be in possession of most of the relevant information before he or she starts legal proceedings. It is not possible to "build up" a case in the course of pre-trial discovery proceedings because such proceedings do neither exist in the Swiss nor in other continental European legal systems (see below). Filing a claim prematurely might not only result in substantial costs for the plaintiff (Switzerland, like most other European countries, generally applies the "loser pays" rule), but will also lead to *res judicata* which prevents the plaintiff from bringing another claim regarding the same subject matter. While this system evidently is an effective way to keep frivolous claims out of the courtroom, it also allows that decisions are made based on an incomplete set of facts because the party burdened with the onus of proof was not able to provide all necessary evidence to prove its case.

Continental Europe, English and Australian Courts all generally apply the rule that *"costs follow the event"*. The issue of costs is also referred to in the paper *"Window on the World – What is*

[14] Art. 221 CPC.

different in arbitration", and as arbitrations generally deal with costs in a similar manner to Courts, we will not repeat the points here. However, there are certain other cost considerations in Australian litigation that are worthy of comment.

Class actions in Australia are more commonplace than in England and continental Europe, where they do not exist in the same form. Australian costs orders apply to all civil litigation including, class actions, which means that lawyers for a proposed plaintiff needs to be very circumspect about issuing class action proceedings. In the event that the claim is unsuccessful the lead plaintiff can be made responsible to pay the defendants costs. In proceedings involving multiple defendants, such costs can be massive.

While contingency fees exist and are sanctioned by law, in Australia, rules apply governing the amount that a solicitor can charge their client in the event of a successful outcome. There remains a judicial power to vary or modify any unreasonable contingency fee arrangement. In England too, the possibility of contingency fees, again subject to constraints, has recently been introduced by a set of detailed procedural reforms, known as the *"Jackson Reforms"*. It remains to be seen how this will affect the broad practice of litigation.

One innovation peculiar to Australia is that in personal injury cases, the solicitor must attest to the prospects of success and in the event that a claim is unsuccessful a solicitor can in certain circumstances, be held to be personally liable for an adverse costs order. [15]

Litigation funders are having an increasing impact in both English and Australian markets. In Australia, litigation funding is also becoming increasingly prevalent in class action litigation and there are moves, afoot, to legislatively regulate the activities of litigation funders.

We should finally mention that both England and Australia have introduced similar procedural reforms, deriving from the enquiry carried out into the Civil Justice System in the UK by Lord Woolf. In England, these are generically referred to as *"The Woolf Reforms"*. The essential purpose of the reforms was to build a culture less adversarial, where Court was viewed as a

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[15] Consistent with most Australian states – See Civil Procedure Act 2010 (Vic)

measure of last resort and the parties encouraged to ensure that the issues in dispute at trial are narrowed by early exchange of documentation, the use of pre-trial negotiations[16] and pre-action protocols. Case management by the Court is a key element of the reforms.

No U.S. Style Pre-Trial Discovery

While some countries have moderate forms of pre-trail discovery proceedings, none of the continental European jurisdictions will allow a U.S.-style discovery.

Sitting between the narrow Swiss approach and the wide US approach, is the English approach to discovery. English discovery is based on relevance to the issues and proportionality. The Civil Procedure Rules set out pre-action protocol designed to ensure that a party is aware of the other parties' claims and the main documents relied on, before proceedings are commenced. Once in litigation, a party must disclose to its opponent documents (i) on which it relies, (ii) which adversely affect its own case or another party's case, and (iii) which support another party's case. Disclosure is not automatic and will usually take place after the Court makes an order for disclosure, but such an order is a standard part of the procedure. Usually, each party must conduct a "reasonable search" for documents, and set out the extent of the search undertaken[17]. It must certify in a disclosure statement that, to the best of its knowledge, it understands and has carried out its ongoing duty of disclosure.[18] It is the party's solicitors' duty as an Officer of the Court to ensure that searches are made and documents are disclosed.

The Australian approach is similar. There is an obligation to disclose to the other party … *"all documents in the person's possession custody or control of which the person is aware and which the person considers, are critical to the resolution of the dispute, such disclosure to occur at the*

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[16] Chief Justice Warren *"the duty owed to the court: the overarching purpose of dispute resolution in Australia (speech delivered to the Bar Association of Queensland annual conference, March 6th 2011).*

[17] A new practice direction (PR31B) including a recommended form of electronic documents questionnaire was issued on 1 October 2010. It provides clarification and guidance on the disclosure of electronic documents.

[18] Jonathan Speed and Rachael Bobin, in PLC Dispute Resolution Multi-Jurisdictional Guide, 2012, "Litigation and enforcement in UK (England and Wales): overview"

earliest time after the person becomes aware of the document or such time as the court may direct"[19]

The concept of pre-trail discovery is unknown in Switzerland (as in most of the continental European jurisdictions). In Switzerland, a party seeking to draw any legal conclusion from an alleged fact or circumstance must prove the existence of such fact or circumstance, unless otherwise provided for by law[20]. This legal provision requires the plaintiff to produce all necessary evidence in order to substantiate its claim. Only in special circumstances, may a potential plaintiff be allowed to ask the Court for evidence to be taken before a claim is formally filed with the competent Court[21].

If a party is not able to produce sufficient evidence to support a relevant fact, it has to bear the procedural disadvantage resulting from such lack of evidence.[22] Further, a party only needs to provide the evidence which supports its own position. Evidence which is detrimental to its case does not need to be submitted to the Court voluntarily. Thus, the opposing party might never become aware of the existence of such evidence. Should the opposing party, however, know of the existence of such helpful evidence, it can request the Judge to order its production. That request must specify the document and its relevance for the case with sufficient particularity (e.g. the approximate date of the document, its alleged content, materiality of the document for the respective case, etc). It is then up to the judge to decide whether he considers the requested document to be relevant to the question at issue and whether it is therefore justified to order its production.[23] The requesting party has to show that its request is not a mere "fishing expedition", which is not permitted, but that it has reliable indications that the requested evidence actually does exist (or at least establish that it should exist in the circumstance**s**)

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[19] Victorian Supreme Court Practice Note 1 of 2010.

[20] Article 8 Swiss Civil Code.

[21] Article 158 CPC.

[22] Federal Supreme Court, Decision 2C.662/2009, February 2, 2010, c. 2.

[23] Spühler/Vock, Urkundenedition nach den Prozessordnungen der Kantone Zürich und Bern, SJZ 95 (1999) Nr. 3, p. 42.

Should the party which is ordered to produce evidence fail to comply with the Court's order, the Court can take this behavior into account by drawing inferences when considering the evidence.[24] This can result in the Court accepting the requesting party's allegation as proven. For example: if the plaintiff alleges that the defendant had stated in a document addressed to a third party that its product had a design defect, and the defendant refuses to produce that document, the Court – in the absence of a contractual obligation of the defendant to give the plaintiff access to this document – cannot force the defendant to produce it. It will rather sanction the non-compliance of the defendant by accepting the alleged written admission of a design defect as being true.[25]

There are certain statutory obligations to submit evidence[26, 27]. If a party fails to comply with those obligations, the Court may issue a separate order to compel production of the documents, under penalty of a fine in the case of non-adherence. Further, in certain areas of law it is the statutory duty of the Court to establish the relevant facts itself (principle of judicial investigation, e.g. in divorce proceedings, in the field of child custody and support, in employment matters, and in landlord/tenant matters). Since civil courts are not as well equipped as the criminal prosecution authorities it is nevertheless required that the involved parties present their case and identify the necessary evidence to prove it. The difference is that under the principle of judicial investigation the Court can and has to request the production of additional evidence from the litigants or third parties if such evidence is considered as relevant for the outcome of the proceedings.

A third party may be obliged by procedural and sometimes also substantive law to produce, upon request by the Court or another judicial authority, all documents in its possession.[28] In addition,

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[24] Article 164 CPC.

[25] Thus, the defendant will quite likely only refuse to produce the requested document if it is even more detrimental to its case than plaintiff claims.

[26] E.g. Article 170 Swiss Civil Code, according to which a spouse has the right to request information on the other spouse's income, assets and acquired debts. This includes the production of related documents.

[27] Spühler/Vock, Urkundenedition nach den Prozessordnungen der Kantone Zürich und Bern, op. cit., p. 41.

[28] Vogel/Spühler, op. cit., p. 279; also Art. 160 CPC.

any person residing in Switzerland is obliged to testify if called on the stand by a Court.[29] Only in special circumstances are third parties allowed to withhold documents in their possession or refuse to testify (e.g. if the witness is related to one of the parties, if the witness is bound by professional secrets or if a specific privilege applies).[30] A third party's refusal to cooperate, to submit documents or to testify as witness may be sanctioned by fines and may result in criminal prosecution.[31]

The Court's freedom to assess the evidence submitted according to its own discretion is limited by Article 29 (2) of the Swiss Constitution and Article 8 of the Swiss Civil Code which provide that a party generally has a right to be heard in Court and to present evidence to support its claim in accordance with the applicable procedural rules. The Court may, however, nevertheless restrict the amount of evidence admitted and make an anticipatory assessment of the relevant evidence if it is convinced that any additionally or newly offered evidence is clearly superfluous, concerns a legally irrelevant fact, or if the additionally offered evidence would not be able to change the outcome of the proceedings in any way.[32]

Documents filed by the parties and their legal briefs are generally not accessible to the public. Thus, unlike in the U.S and England, court dockets are not public information and only accredited journalists can get access to selected documents from the file[33]. Accordingly, it is very difficult to find out what cases are on a Court's roll before a hearing in open court is scheduled, and almost impossible for an outside person to monitor what is going on in such cases. In practice, there is a high level of confidentiality, even if cases are litigated in state courts.

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[29] Art. 160 para. 1 lit. a CPC.

[30] Vogel/Spühler, op. cit., p. 281-282; see also Art. 163 f. CPC.

[31] Art. 167 CPC.

[32] Federal Supreme Court, Decision 4A.71/2009, March 25, 2009, c. 3.5.

[33] In England, the Claim Form as filed is publicly available and trials are open to the public. Pleadings and other documents filed in a case are not generally available unless referred to in an open Court. All High Court and Appeal judgments can now be accessed on the Court's website.

If evidence located in Switzerland is to be obtained by a foreign party for the use in foreign proceedings, such party needs to proceed according to the rules of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("the Hague Convention") of 1970. Not adhering to the rules of this convention may lead to criminal prosecution for illegal activity for a foreign state as stipulated in Article 271 (1) of the Swiss Penal Code (PC) which reads as follows:

> *"Whoever, without being authorized, performs acts for a foreign state on Swiss territory that are reserved to an authority or an official , whoever performs such acts for a foreign party or another foreign organization, whoever aids and abets such acts, shall be punished with imprisonment and, in serious cases, sentenced to the penitentiary."*

However, Article 271 (1) PC does not apply to the gathering of evidence in connection with foreign arbitral proceedings because arbitral proceedings are not considered state proceedings, and the taking of evidence to be introduced in arbitration is therefore not an act on behalf or at the behest of a foreign state. Therefore, one is not required to obtain official authorization to gather evidence in Switzerland for the use in arbitral proceedings.[34]

The performance of an act for a foreign state includes the collection of any evidence, be it through witness statements (e.g. the taking of depositions[35]) or by means of documents. Article 271 (1) PC does not apply if documents are offered voluntarily.[36] Hence, if a Swiss witness has to give a witness statement in accordance with the procedures of English litigation, it is best done outside Switzerland to avoid falling foul of these provisions. Informal contacts intended to determine whether a possible witness could be helpful regarding future proceedings are

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[34] Schramm, Entwicklung bei der Strafbarkeit von privaten Zeugenbefragungen in der Schweiz durch Anwälte für ausländische Verfahren, AJP / PJA 2006 p. 491 f; p. 492.

[35] Donatsch, Art. 271 Ziff. 1 StGB und das Recht auf Befragung von Entlastungszeugen, p. 590 in: Festschrift für Stefan Trechsel, Zürich 2002.

[36] Hopf, Nr. 15 to Article 271 in: BSK-Strafrecht II, Art. 111-392 StGB, 2nd edition, Basel 2007.

admissible as long as the information received during such meetings is not submitted as evidence in foreign proceedings.[37]

In Australia, documentary evidence including experts reports that a party intends to rely upon at trial are required to be exchanged prior to trial. [38] Fast tracking procedures apply to ensure the expeditious hearing of cases (case management). The procedures are applied to litigation and limitations imposed on interlocutory processes such as Discovery and Interrogatories. [39]

[37] Hopf, Nr. 15 to Article 271 in: BSK-Strafrecht II, Art. 111-392 StGB, 2nd edition, Basel 2007

[38] Victorian Law Reform Commission ,Civil Justice Review Report no 14 (2008)

[39] Ibid

The Judgment

In the tradition of civil law, judgments usually follow a more or less similar structure. They should clearly distinguish between procedural history of the case, the parties' allegations, the facts as established by the Court, the Court's application of the law to the relevant facts, and the reasons for the Court's decision. The decision should deal with all material arguments raised by the parties in order to enable the losing party to challenge the Court's findings on appeal.

Court sessions are generally open to the public. However, proceedings in matrimonial and family law matters a never open to the public[40] and the public can be excluded if protected interest of the parties so request. The deliberations amongst the judges of the Federal Supreme Court are held in open court, while only in a minority of the states the deliberations of the Courts of lower instance can be attended by the public. In practice, however, many legal proceedings are conducted as written proceedings with no oral argument in open Court, in particular in commercial matters[41].

In both Australia and England, many cases are referred to mediation and conciliation with compulsory pre trial conferences to encourage settlement negotiations.

In personal injury cases both verdict and damages awards are determined by the trial judge. Few jury trials exist for personal injury claims. This is part of a trend towards restricting the right to a civil jury trial. It has been abolished in South Australia and restricted to claims for defamation, fraud, malicious prosecution, false imprisonment, and breach of promise of marriage in Western Australia. In Tasmania it exists for most claims except MV personal injury, but is rarely used. Civil jury trial are rarely used in Queensland. In NSW, significant statutory limitations are applied. In ACT, Northern Territory and the Federal Court, there is no *prima facie* right to a civil trial. Victoria is the one state of Australia in which the right to a jury trial still exists, but consistent with the national trend, is in decline.

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[40] Article 54 CPC.

[41] The parties have a right to at least a final oral argument but can waive it, which is often done in complex litigations; Article 232 CPC.

Punitive and exemplary damages awards are extremely rare and in any event are not covered by policies of insurance. There have been few cases in which awards have been made, notably in an asbestos litigation case and a case against a tobacco company (subsequently the verdict was overturned on appeal).[42]

Awards of damages in personal injury cases are now capped as a result of significant tort law reform in Australia in 2004. For example in NSW general damages for a personal injury claim is limited to $385,000, with entry thresholds applying. To obtain an award of general damages a plaintiff must establish a threshold of disability of 15% (loss of bodily function) of a maximum of $385,000 ie $57,800. If they cannot do so they have no right to any general damages (ie pain and suffering , loss of enjoyment of life) They must reach the threshold to have a right to claim , but still have a right to claim for special damages such as loss of earnings , medical and like expenses etc.

The result of these changes is that there has been a dramatic reduction in personal injury litigation, particularly in the area of medical malpractice and public liability slip and fall cases.

An observation of Justice Ipp in the Ipp report of 2007 was that as a result of the reforms many people significantly suffering a disability, have no right to sue and receive compensation for general damages. Allied to the costs indemnity rules, Australia has observed a dramatic reduction in personal injury litigation.

One of the significant results of Tort Law Reform in Australia was the change that occurred in the area of joint and several liability and proportionate liability. One of the consequences of the changes to the proportionate liability laws is that for non personal injury claims , plaintiffs are now very careful as to who they sue .ie only sue defendants with assets or insurance. Failure to do so could result in a Pyrrhic Victory, with unsatisfied costs orders. This reform has resulted in a genuine benefit to insurers in relation to property damage and economic loss claims as there as their exposure is no longer to a joint and several liability.

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[42] Mc Cabe v British American Tobacco Australia Services Ltd [2002]VSC73 and see also XL Petroleum(NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155CLR 448

Appeal Proceedings

In Switzerland, there is usually one layer of appeal on a state level, with the Federal Supreme Court above them as the highest Court in Switzerland. A few states also have Commercial Courts which hear commercial cases only. Where there is a Commercial Court, it is the only instance on a state level and there is only one instance of appeal, the Federal Supreme Court.

In most states of the Swiss confederation, first instance cases which are open to an appeal are heard by a panel of three or five district judges[43]. Appeals on the merits on the state and the federal level are heard by a panel of three or five judges as well. The Court speaks with one voice. Dissenting opinions are only given in very exceptional cases.

Conversely, it is not unusual for there to be a dissenting opinion in an English Appeal Court. Both in the Court of Appeal and in the Supreme Court, it is the practice for each Judge to set out his judgment. This may simply be to agree with the leading judgment. It may expressly agree with the leading judgment, but adding comment on certain issues, or additional issues. It may even be a full judgment reaching the same conclusion as one or more of the others, but for different reasons. It may also, of course, be a dissenting judgment.

In a monetary dispute, a decision from a Swiss first instance Court can be appealed if the amount in dispute is at least CHF 10'000 (currently approx. USD 10'700). The threshold for an appeal to the Federal Supreme Court is CHF 30'000 (currently approx. USD 32'000), and CHF 15'000 in employment or tenant/landlord cases. Some exceptions to these rules apply for cases of general importance and interest. Unlike many common law jurisdictions, no leave from the Court is required to appeal a case to the next higher instance.

While the second instance can review a case in its entirety, including the proper finding of the facts[44], the Federal Supreme Court is bound by the facts as established by the trial Court and will only review the proper application of the law[45].

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[43] There are, however, states where all first instance cases are hear by a single judge (e.g. Geneva).

[44] Article 310 CPC.

England also has two layers of appeal. Leave to appeal to the Court of Appeal can be given by the first instance Judge. He may do so, for example, if he considers the issues to be finely balanced and important or if he would like to have decided otherwise but could not because of a precedent set by a previous Appeal Court decision in another case involving like issues. If the Judge does not give leave, the party can apply for leave to the Court of Appeal. Likewise, the Court of Appeal can give leave to appeal to the Supreme Court, failing which the party can apply to the Supreme Court for leave. By way of example, in AFG and WASA v Lexington[46], a leading international reinsurance case, AFG and WASA won at first instance. The Judge refused leave to appeal, but the Court of Appeal granted it and overturned the decision unanimously (3-0). The Court of Appeal refused leave to appeal, but the House of Lords (the final Court of Appeal until replaced by the Supreme Court in 2009) granted it and unanimously (5-0) overturned the Court of Appeal (although not on entirely the same grounds as the first instance Judge). Two of the five Judges gave full judgments. The other three judgments followed one or other (or both) of the full judgments, but also made additional comments.

Rights of appeal to the High Court are not automatic in Australia either. Special leave application is required and if granted a party may apply to the High Court by way of appeal. Many applications are unsuccessful.

Summary and Conclusions

The common law and the civil law systems are very different and have led to different legal cultures in the respective countries. It had been said that common law lawyers think in pictures rather than in abstract concepts and systematic[47]. In the pure form of civil law, however, there is only one way to come to the just solution – and it is found in a process of deduction.

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[45] Pursuant to Article 97 of the Federal Act on the Supreme Court ("SCA") the Supreme Court may correct facts which are obviously wrong.

[46] AGF Insurance Co Ltd & WASA International Ins Co Ltd v Lexington Ins Co [2009 UKHL 40]

[47] Zweigert and Kötz, cited by Geoffrey Samuel, Elgar Encyclopedia of Comparative Law, M.A. 2006, p. 149.

The fact that the United States have become a much more litigious place than Europe, however, has little to do with the distinction between common law and civil law, but much to do with higher or lower barriers to carry a dispute into the courtroom. The European combination of the loser pays rule and the fact that one must have the most important pieces of evidence in one's had before starting legal proceedings is generally a disincentive to start legal action in a European civil law jurisdiction. Of course, the same loser pays philosophy applies in England, to similar effect. In Australia, tort law reform lead to a dramatic reduction in litigation. This operated in one way or another to the benefit of the insurance industry, and has encouraged international participation in the liability market.

In the United States, on the other hand, the absence of a substantial financial risk in starting legal proceedings combined with the possibility of finding relevant evidence during discovery to further develop the case after it is filed, encourages a potential plaintiff to at least try to get something with the help of the Courts. Similar considerations apply to the nature of damages. In England and continental Europe, it is extremely exceptional to have a case where punitive damages are sought, let alone awarded. Damages are assessed by Judges on a restitutionary basis, to put a party in the position he would have been had the wrong not occurred. On the other hand, the prospect of a U.S. jury awarding high punitive damages is an enticing one to the U.S. plaintiff bar, whose contingency fees mean they will probably share in their client’s good fortune.

What continental Europeans struggle most with in the United States is that they can be sued by people who do not have a good case, nevertheless have to disclose an abundance of documents and finally end up picking up their own costs even if they win.

What Americans struggle with most in continental Europe is that they might have a case, but do not have the evidence to prove it and only limited means to get a hold of such evidence, although it might exist.

Whilst litigating in England will at least be more familiar to Americans, as a common law system, the restrictions on discovery, lack of juries, lack of punitive damages and very different

ways of obtaining and presenting witness evidence, mean that even litigating in another common law country can seem a very foreign experience.[48]

Which system is to be preferred is a judgment call and a decision for each democratic society to take on its own. However, history has demonstrated that a democratic society is usually reluctant to change the legal system in which it has grown up and, unfortunately, does not even question its system unless it produces terribly unsatisfactory results. This is a pity, because there is an unused potential for the different legal cultures to learn from each other and improve their respective judicial systems in an evolutionary process – just another reason to continue to discuss international topics at the events of the Federation of Defense and Corporate Counsel.

Stephen Carter
Partner
Carter Perry Bailey LLP
London, UK
stephen.carter@cpblaw.com

Christian G. Lang
Partner
Prager Dreifuss Ltd.
Zurich, Switzerland
Christian.Lang@prager-dreifuss.com

Chris Rodd
Technical Counsel
CGU Insurance
Melbourne, Australia
chris.rodd@cgu.com.au

[48] The procedures for obtaining and presenting witness evidence in English Courts are similar to those adopted in English arbitrations, and are discussed in *"Window on the World – What is Different in Arbitration"*.