



Nick Oberheiden
Attorney at Law

**What U.S. Lawyers Should Know
about the Civil Law**

The Civil Law: Defined and Demystified

- **Definition: Legal System with Roots in Roman-Germanic Law**
 - 77% of all Countries are Civil Law Countries
 - Continental Europe; S-America; Korea, Japan, China; Russia
 - Louisiana, Quebec, Puerto Rico
- **Civil Law and Common Law Distinguished**
 - *Not* about Statutes v. Cases (More Codes in CA than in Italy)
 - *Not* about the Authority of Codes
 - Instead: It is about Differences in Thought and Practice of Law
- **Why Should the Civil Law Matter to U.S. Attorneys?**
 - Clients Operate Globally; So Do We
 - Common Law Practice is the Minority within W&C Network
 - Routine Dealing with Foreign Clients, Colleagues, and Foreign Legal Issues

A System of Scholars & Abstraction

- **Very Scholarly Driven**
 - **Following Roman Tradition: Academics are the Masterminds of the System**
 - **Draft Codes, Advise Judges, Serve as Intellectual Inspiration**
 - **Expert Opinions on the Law are very Frequently Cited in Briefs**
- **Laws as Science, Not as a Pragmatic Discipline**
 - **Law is Understood as “Science”, Legal Theories as “Objective Truth”**
 - **Hundreds of Legal Theories on Individual Subject Matters**
 - **No All-Embracing Concept; “Justice” is Not an Argument**
 - **Abstract Validity Trumps Functional Utility: Pragmatism Comes Second**
 - **Methodology, Structure, and Organization are Key**

The Role of Judges Compared

▪ How to Become a Judge

- Italy: Passing the Bar plus Application
- Japan & France: 2 Year Judge School
- Brazil: Possible at Age of 22

▪ Status of Judges

- Operate in Obscurity & Anonymity
- Legal “Heroes” are Scholars (e.g. Kelsen, Génny, Savigny)
- High Court Justices Continue to Teach

▪ Competencies

- Apply Laws, Do Not Create Laws
- Extraneous Arguments Only to Extent that They are Traceable to Legislator’s Will
- Goal: Methodologically Sound Result

▪ How to Become a Judge

- After Years of Practicing Law
- Crowning Career Achievement
- Entry Age Typically around 40-50

▪ Status of Judges

- Public Figures; Decisions are Discussed
- Legal “Heroes” are Judges (e.g. Holmes, Cardozo, Mansfield, Hand)
- Full-Time Judges

▪ Competencies

- Inherent Law-Making Power
- Legal Realism Offers Wide Judicial Discretion; Anything the Parties Suggest
- Goal: Just Resolution of the Case

Stare Decisis in Civil Law Countries

- Officially, Case Law is Not a Source of Law
 - Very Rigid Understanding of Separation of Powers in Europe & S-America
 - Judges are Formally Barred From Making Law
 - Courts of all Levels are Free to Decide Regardless of Precedents
- Reality is: Courts Do Follow Precedents
 - Important Institutional and Doctrinal Changes after 1945
 - Introduction of Judicial Review; EU Case Law; Rise of International Law
 - Since 1990: Steady Americanization of Legal Thought and Practice
- How Do Civil Law Countries Apply *Stare Decisis*?
 - Emphasis on Underlying Doctrine, Principles & Theories
 - Facts Play Almost No Role Since Doctrines are Abstract and General
 - Because Legal Principles Represent “Truth”, Overruling Very Rare
 - Horizontal *Stare Decisis*: Same Level Courts Pay Attention to Each other

Procedural Aspects I: Preliminary Practice

- **Higher Pleading Standard: More like FRCP 9 (Particularity)**
- **No “American Rule”: The Loser Pays it All**
- **Limited Motion Practice**
- **Flexible Common Law Jurisdictional Concepts are Rejected**
 - **“Doing business”, “Minimum Contacts”, “Fair play”: Insufficient**
 - **Civil Courts Do Not Claim to Have “Long Arms”**
 - **“Forum non conveniens” Inconsistent with EU-Law (ECJ 2005)**
- **Legal Certainty Considered Crucial to Limit Judicial Discretion:**
 - **Domicile; Place of Payment; Place of Performance**

Procedural Aspects II: Discovery

- **No Real Counterpart to U.S. Pretrial Discovery**
 - “Depositions” Unthinkable: Oath in Absence of a Judge
 - Document Requests are Moderate and Judge-Approved
 - No Motion Practice; No Summary Judgment; Less Pressure to Settle
- **Instead**
 - **Written Exchanges between Counselors**
 - **Common Misperception: Judges Do Not Gather Evidence**
 - Parties Collect, Select, and Present
 - Judge Studies, Examines, and Evaluates
 - **Absence of Discovery Limits Need for Privilege Protection**
 - Typically, Limited to Governmental Seizures
 - No In-House Privilege; Very Limited “Work Product” Protection

Procedural Aspects III: Trial

- **Evidentiary Rules**
 - Absence of Civil Jury Entails Important Ramifications
 - No Hearsay Rules; Opinion Evidence Admissible
 - No Cross-Examination Equivalent

- **Witnesses**
 - Witness Coaching and Out-of-Court Witness Contacts are Unethical
 - Witnesses are Selected by the Parties; Judge Approves Conservatively
 - In France, Virtual No Oral Evidence; Oral Witness Testimony Uncommon
 - Expert Witnesses are Court-Appointed to Ensure Impartiality

- **Character of a Trial**
 - Less Strategic Maneuverings; Judge is a Skilled and Trusted Professional
 - Overall: Trial Less of an Art: No “Clinics”, no “Drama”, less “Rhetoric”
 - Often Characterized as “Business Meeting”

Two Worlds of Testimonial Evidence

- European Continent

- Who: JUDGE Conducts Witness Examinations
- How: Objective Questions; Subjective, Narrative Testimony
- Why: **To Clarify & Amplify Issues from the Dossier**

In short: *quod non est in actis, non est in mundo*
(What is not in the file, is not in the world)

- United States

- Who: The Parties
- How: Confrontational, Persistent, Challenging
- Why: **To Introduce Evidence, to Test Credibility**

Cultural Sensitivities You Should Have

- **Most of the World's Commerce is Governed by Civil Law**
- **Often, Approaches Differ, Results Do Not**
- **Avoid Projecting Your Legal Understanding to a Foreign Legal Issue**
- **Don't Think in Terms of "Them" and "We"; Work Together**
- **After all: What Can You Expect When Working with a Civil Lawyer:**
 - **Civil Lawyers Prefer Deductive, Rational, Normative Arguments**
 - **"Good Law" Means Logical Result Through Syllogistic Reasoning**
 - **Expect High Degree of Abstraction (Contract Terms about 80% Shorter)**
 - **Relevant Legal Terms are Carefully Defined and Used as Terms of Art**
 - **Public Policy, Functional Utility, "Justice" Less Persuasive**



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