



Panel: Comparative Judicial Practice

Honorable Peter J. Messitte

Overview

Foreign Legal/Judicial Systems – Differences and Similarities

A) Common Law and Civil Law Systems

1) Common law - England

a) U.S., Canada, Australia, New Zealand, South Africa, India

2) Civil law - Roman law (Code of Justinian) and canon law (law of Catholic Church)

a) France, Germany, Italy, Spain and Other European countries

b) Latin America, Japan and China

c) Turkey - influences

1) Civil Code: Swiss

2) Commercial Code: German

3) Code of Civil Procedure: Neuchatel (Swiss)

4) Penal Code: Italian

5) Code of Criminal Procedure: German

6) Administrative Courts: French

- B) “ Differences” between common law and civil law systems (found in varying degrees)
- 1) Codes v. case law
 - 2) Specialized courts (Supreme Court, Constitutional Court, Administrative Court) v. courts of general jurisdiction
 - 3) Cases as persuasive authority (if cited at all) v. binding precedent
 - 4) Career judges v. judges appointed from ranks of attorneys
 - 5) Judge has primary responsibility for development of evidence and articulation of legal concepts v. lawyers having that responsibility
 - 6) Closed hearings v. open hearings
 - 7) Series of short hearing sessions v. concentrated proceedings
 - 8) Primary reliance on documentary evidence v. oral proceedings
 - 9) Brief, formal opinions (claims of parties, code citations, decisions) v. often lengthier opinion (factual development, discussion of precedents)
 - 10) Appeals courts review facts as well as law v. review of law

C) Unique features of American system v. other common law systems

- 1) Jury trial – no other country routinely uses
- 2) Discovery – wide latitude for exploration of potentially relevant evidence
- 3) Attorneys have more latitude in presentation of case
- 4) Experts are engaged by parties rather than appointed by counsel

- 5) Judges are selected in variety of ways, including election, in which political affiliation may be important
- 6) Each party (including prevailing party) ordinarily pays that party' s own lawyer and cannot recover from a losing opponent. In almost all other countries (except Japan and China) the winning party, whether plaintiff or defendant, recovers at least a portion of litigation costs

D) Similarities between common law and civil law systems

- 1) Standards governing assertion of personal jurisdiction and subject matter jurisdiction
- 2) Neutral adjudication
- 3) Procedure for notice to defendant
- 4) Rules for formulation of claims
- 5) Applicable substantive law
- 6) Manner of proving facts
- 7) Expert testimony
- 8) Rules for deliberation, decision, and appellate review
- 9) Rules as to finality of judgments