serle court

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Written in code

For lawyers schooled in a common law tradition, the conduct of civil law disputes can be an uncomfortable experience, reports **Eduardo Reyes**

There are key aspects of litigation in a civil law jurisdiction that lawyers steeped in the norms of a common law tradition find baffling – and in some respects offensive to treasured principles. UK and US clients faced with a case that they have heard will be run without disclosure, cross-examination and reference to precedents could be forgiven for feeling like an 18-year old gap-year traveller presented with an indecipherable *haute cuisine* menu.

Faced with adapting to civil law norms, even hardened international trial lawyers seem to feel an instinctive hostility to the 'continental' way of doing things. Here's US lawyer Gregor Guy-Smith, defence counsel at the Yugoslav war crimes tribunal, bluntly relating his thoughts on the tribunal's adoption of civil law traditions to the *Gazette* last year: 'Unfortunately, over time it has moved from a culture of orality, to a way of bucketing information that disallows an objective, insightful, comprehensive analysis.'

At issue for Guy-Smith was the way that the tribunal, the procedures of which incorporated both common and civil law elements, responded to the scale of its task by leaning towards civil law norms. These included a heavy emphasis on documents and at times notions such as evidence being classed as 'accepted' by the court.

Disclosure

It is perhaps too easy to exaggerate the differences between the two traditions. But they are substantial and have a far-reaching effect on case management and, crucially, outcomes. For UK lawyers and their clients, the conduct of a dispute goes much further than the equivalent of 'driving on the other side of the road'.

The modern European civil law tradition is rooted in Roman law and was subsequently shaped by the Germanic and the Napoleonic codes. But its influence now stretches far beyond its European origins, with over 90 countries counted as de facto civil law jurisdictions on most measures. Common law jurisdictions trail in this numbers game, totalling around 40 states.

Disclosure, or discovery, is one of the most disconcerting areas of difference for a common law lawyer seeking to guide a client through a dispute that has arisen in a civil law jurisdiction. 'The way in which disclosure works is fundamentally different,' notes Serle Court barrister Michael Edenborough QC. 'In England and the US, you can get disclosure over most documents. It is a major exercise in the US, and is quite big in [England]. The continental system is very different – one [usually] needs to produce the document oneself.'

Philippa Charles, disputes partner at Stewarts Law, explains: 'The usual course in proceedings in civil law jurisdictions is that discovery or disclosure in the Anglo-American tradition - including, in particular, an obligation on both sides to produce all relevant documents, whether helpful or unhelpful to their case - does not exist.'

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"The usual course in civil law jurisdictions is that discovery or disclosure – including an obligation on both sides to produce all relevant documents – does not exist – Philippa Charles, Stewarts Law

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Civil law jurisdictions, Charles adds, tend to look at a much narrower range of documentation and to 'require much less in terms of witness evidence, cross-examination' and other similar aspects.

'Where a client's case depends on having access to and sight of the other party's documents,' she says, 'proceedings in a forum that does not permit broad disclosure can be significantly more challenging, though it probably leads to some cost savings relative to the extensive processes more common in the US or English courts.'

Some limited specific disclosure requests may be permitted by the foreign courts, but this usually requires the document to have been specifically identified by the party from which production is then sought, in a submission to the court. This, Edenborough notes, is a particular problem in fraud-related cases.

'There is scope to make requests for documents in some of the [EU] member states, including in jurisdictions such as Germany and the Netherlands,' says Boris Bronfentrinker, UK head of competition law at Quinn Emanuel Urquhart & Sullivan.

A challenge to these traditions will come in one area of disputes later this year. After December 2016, Bronfentrinker notes, all member states will need to have implemented the European Commission's Damages Directive, which introduces a form of disclosure for competition litigation.

For now, though, litigants must rely on a limited range of disclosure options. Constantin Achillas, head of dispute resolution in the Paris office of Bryan Cave, says: 'Parties can petition the court to obtain an injunction from the court against the other party to communicate, under late penalties, information and documents, provided they are sufficiently identifiable and are proved relevant to the case.'

Before commencement of a suit, Achillas adds, search or seizure orders can be obtained, upon ex-parte request, to collect information and documents from the other party.

Large companies in the US and UK will be well set up for the more extensive disclosure requirements they customarily work with – with internal systems and protocols to identify, preserve and search relevant documents when a dispute or investigation arises. Although these systems commonly go much further than is necessary for managing disputes in a civil law jurisdiction, the process must be managed with some care.

As Bronfentrinker notes: 'The one issue that clients will need to consider when it comes to their systems for disclosure is whether they meet the data protection and privacy requirements of the relevant member state in which they may have a dispute, as the protections offered in many go beyond what is available in the UK or US – where generally anything relevant needs to be preserved and made available.'

Privilege

A more substantial challenge to in-house legal teams comes in the area of privilege. As Edenborough pithily observes: 'In this country, if you are a lawyer, you have got it. Non-lawyers in most circumstances, do not.'

By contrast, 'on the continent, the principle is different and is predicated on the first [difference] – that there is no disclosure, so no privilege is needed. That's a problem when dealing with cross-border matters'.

In the UK, because privilege is so powerful 'it is also narrowly defined', Edenborough says. 'On the continent, you have "confidence" [which] extends to doctors and priests. In this country, the confidence of the confessional is no justification.'

Adoption of civil law norms by Yugoslav war crimes tribunal 'disallowed objective analysis'

While in-house legal privilege is recognised in jurisdictions such as the UK, Germany, the Netherlands and Belgium, the fact that it is not universally available has meant that European law has consistently taken the position that there is no such thing. A further complication is that some bars do not accept in-house lawyers as members, meaning they are not covered by 'professional secrecy'. 'This is something that many clients from the US are not always aware of,' Bronfentrinker notes, 'and yet [it] is very important if clients find themselves involved in a European Commission investigation. Where this is the case, clients need to take steps to avoid documents being created internally with the in-house legal department that may then need to be produced to the commission.'

Charles notes that where proceedings are ongoing in those jurisdictions, the in-house team's advice to the business may be required to be produced, subject to the limitations on document production in civil law proceedings cited above. 'In addition,' she adds, 'there may be different approaches to the treatment of "without prejudice" communications in civil law jurisdictions, such as in the UAE, where the fact of correspondence being labelled as "without prejudice" will not preclude its use before the local courts.'

Local advice, she adds, should be taken as early as possible regarding both the categories of protected communication that the client may have with its external and internal legal advisers; and the protected status of any settlement communications, to avoid embarrassing disclosures as a case progresses.

Evidence

After disclosure and privilege, the third major area of difference identified by Edenborough relates to the status and treatment of evidence. 'In the UK,' he notes, 'it is perfectly acceptable for a party to give evidence in their own favour because it can be subject to cross-examination. If the tribunal feels that the evidence in favour is not lying, it has confidence in that evidence.

'On the continent, you cannot challenge and assess in the same sort of way. You can't assess the probity and values of a witness. On the continent, they think you're lying. So there is no weight on oral evidence or evidence given in favour. Weight is placed on documents and on independent experts.'

The greater emphasis placed on written submissions over oral advocacy, Bronfentrinker observes, means that 'it is common in jurisdictions such as Germany and the Netherlands for there to be multiple rounds of pleadings and written submissions, with much shorter oral hearings'.

Civil law systems very often use a process of 'memorialisation' of cases – submitting arguments, together with documents, witness and expert evidence, simultaneously. Says Charles: 'This is significantly different to the layering of cases in the English courts, which involves a progression from pleadings, to document production, to witness evidence of fact and expert evidence, and finally to an oral hearing at which the evidence is tested by means of cross-examination.'

The impact of this, Charles adds, is that 'procedural levers that may prompt settlement discussions arise at different points in the process, and because cross-examination is not commonly undertaken in civil law jurisdictions, all the emphasis is on what the documents show. In a contract case, this process of interpretation involves

establishing what the parties' intentions were, rather than an analysis of what the words in the contract naturally mean'.

Time and money

Calculations on recovery are core to any litigation strategy but the UK's 'loser-pays' principle is often absent. As Achillas notes: 'In many civil law jurisdictions... there is no rule that costs follow the event, which is quite discouraging for claimants.'

Even where costs recovery exists, Charles says, for a winning party it will be less extensive than in the UK: 'Although both France and Germany will permit the successful party to recover some of its costs from the losing party, in France in particular the recoverable costs may be significantly less than the successful party's actual costs.' As with certain procedural differences, she says, 'this may well influence strategy'.

In general, though, key civil law elements work to reduce the overall cost of litigation in many jurisdictions. Achillas explains: 'Costs in a civil law jurisdiction are substantially less than those incurred by court proceedings in the US and in the UK mainly because of the absence of massive pre-trial discovery proceedings.'

The treatment of evidence and witnesses also tends to reduce cost. With reference to our nearest civil law neighbour, Clifford Chance partner Julian Acratopulo, vice-president of the London Solicitors Litigation Association, explains: 'The important thing to remember in relation to litigation in France is that cases are determined at very short trials, typically without live witness testimony. Witness evidence is given in the form of statements... The process relies very heavily on the contemporaneous documents.'

Also mitigating against higher costs is a feature that is controversial for lawyers schooled in the common law tradition – cases are not decided with reference to precedents, but by reference to codified law.

Charles notes that where 'there is, in principle, no doctrine of judicial precedent, there is the possibility that decisions of lower courts may be inconsistent with previous higher-court decisions'. She adds: 'The extent to which the lower courts will have regard to previous authority varies. The approach to providing advice on the merits will likely be different to that in England or the US, where Supreme Court authority provides a fixed benchmark against which to examine the facts of the particular case.'

In this regard, though, the distinction between civil and common law jurisdictions is becoming less marked. A codified approach has been taken to legislation emanating from the Scottish Parliament, and the UK's 1,300-section, 700-page Companies Act 2006 broke new ground by taking a 'consolidating' approach that avoided the need to cross-reference with other sources and statutes to be understood.

As Edenborough concludes: 'In the UK we have so much legislation from Brussels, that we have to fall into line. My own field, intellectual property, is codified.' Under such pressures, he says, 'even the US is having to fall in to line.'

In the future, then, a firm grasp of the principles of civil law can only become more crucial to common law litigants, businesses and their advisers.

CIVIL *V* COMMON LAW

Disclosure: **full disclosure is not a feature of the civil law system. To get documents produced, parties may petition the court, commonly referencing a known document. Before proceedings, search and seize orders may be obtainable.**

Privilege: **privilege is a difficult issue in civil law jurisdictions. For in-house lawyers it may be limited, absent or unclear, and in many jurisdictions falls under the wider concept of 'confidence'. Some argue that with little or no disclosure, the issue of privilege is less important.**

Evidence: **there is more reliance on written evidence in civil law jurisdictions. Evidence provided by parties in their own favour carries much less weight, because it cannot be subject to thorough cross-examination.**

Precedent: **in a codified system there is, traditionally, no concept of judicial precedent – though the decisions of different courts may carry some weight.**

Costs: **the cost of litigation tends to be lower in civil law jurisdictions – largely as a consequence of the absence of extensive disclosure/discovery obligations and the treatment of evidence at trial. Recovery of costs from a losing party is less extensive than in the UK, or may be entirely absent.**

SHAPING THE LEGAL TEAM

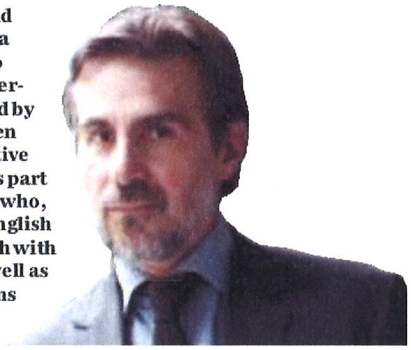
For a party based in a common law jurisdiction, considerations on the ideal shape and role of the legal team will differ when disputes arise in a civil law jurisdiction. We asked our experts for their advice.

'Beyond the obvious two requirements of needing core team members that have knowledge of the local laws of the relevant jurisdiction and are fluent in the language, there is also a need to consider whether to include team members with specialist legal skills such as data protection. Despite there being European Regulations on data protection and privacy, there remain significant differences between the regimes across the member states, with many – such as Germany and France – having more protectionist regimes than the UK.'

Boris Bronfentrinker, Quinn Emanuel Urquhart & Sullivan

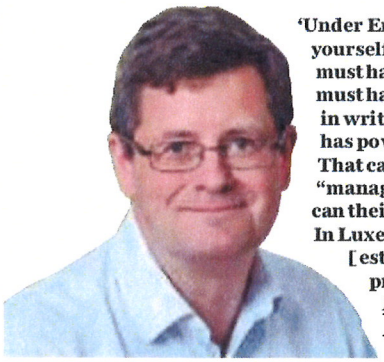
'In some civil law jurisdictions, local lawyers may not specialise in dispute resolution and often have a general practice encompassing both contentious and non-contentious work, though this tends not to be the case in the bigger firms. We will determine with the client the extent to which local advice is factored into a case predominantly run from London, including whether it is more appropriate to leave the day-to-day matters in the hands of the local lawyers, and to be involved as a liaison between them and the client, and/or to restrict our input to strategic matters or support work for the local team.'

Philippa Charles, Stewarts Law



'The perception in the UK and the US is often that you need a "home" interface to report to clients on France-based or German-based litigation handled by civil lawyers. In fact, it is often more efficient and cost-effective to put in front of the client, as part of the team, the civil lawyers who, in international firms, are English speakers and familiar enough with US and UK common law as well as with their local courts systems to make civil law and civil court systems understandable for clients.'

Constantin Achillas, Bryan Cave, Paris



'Under English law you can represent yourself. In a civil law jurisdiction, you must have a lawyer, and that lawyer must have power of attorney in writing, signed by the person who has power to give that authority. That can be difficult to prove. Is the "managing director" a director, and can their [signature] bind the board? In Luxembourg, for example, [establishing this] can be a real problem.'

Michael Edenborough QC, Serle Court