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**“Civil Law vs. Common Law – A Legal Risk
and Comparative Law Primer”**

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Civil Law vs. Common Law – A Legal Risk and Comparative Law Primer

I. Introduction

It is common knowledge that civil law is code based, yet many civil law jurisdictions look at judicial precedents as well as the code. Likewise, it is common knowledge that common law is judicial based, yet statutes trump judicial precedents in many common law jurisdictions. So, what exactly are the real-world differences between civil law and common law?

It is of critical importance to companies and their attorneys who operate globally to understand the risks of being a defendant in a civil law system and in a common law system. Is the old adage – that you do not want to get sued in a common law country, but it is okay to get sued in a civil law country – really true? Was it ever true? And, is examining the world of law through the old common law versus civil law distinction a valid way for companies to distinguish their legal risks by jurisdiction?

This panel discussion of two IADC members from different common law jurisdictions and two IADC members from different civil law jurisdictions, moderated by an IADC member from a civil law jurisdiction, address all these issues. To help illustrate the differences and similarities, the panel will discuss, among other things, the defense of a hypothetical product liability case. These written materials will provide a more in-depth examination using the hypothetical case as an illustration of the five different jurisdictions and how their law differs in addressing the same case factually.

II. Hypothetical Case

For the purposes of this exercise, we have thought it useful to proceed based on a hypothetical case. We will then analyze and compare various legal issues, both substantive and procedural, from the perspective of the various civil law and common law jurisdictions in which the authors practice.

Maria had been looking forward to her solo vacation for months. Early on the morning of July 10th, 2023, she loaded up her SUV and set off on the four-hour drive to the resort. Quickly she left the hustle and bustle of the city and started out

on the winding country road. The weather was perfect: sunny, warm but not hot, with a light breeze and not a cloud in sight.

Suddenly, after making a hairpin turn, María noticed that the car’s brakes were not responding properly, even when she exerted significant pressure. The vehicle gained velocity quickly. Before she realized it, she was speeding down the narrow road at over 80 km/h (50 mph). She attempted to activate the manual emergency brake, to no avail. María tried to slow the vehicle down by gradually running into the curb and base of the mountain. This proved to be a mistake, as the vehicle’s front right tire abruptly jumped the curb and then began swerve out of control until it rolled over fully. Due to the acceleration, the vehicle only stopped after rolling off the road at the next hairpin turn and falling over twenty meters (65 feet) to the ground below.

María sustained serious injuries and is paralyzed from the waist down. María is convinced that the vehicle’s brakes failed despite proper use on her part and regular maintenance. She is looking to bring a liability claim against the vehicle’s manufacturer, which operates and is based in her country.

III. Comparative Analysis

By way of illustration, we have chosen to review the main differences (and similarities) between common law and civil law systems using five jurisdictions as examples: Austria (Civil Law); British Columbia, Canada (Common Law); Colorado, United States (Common Law); Costa Rica (Civil Law); and South Korea (Civil Law). What follows is a succinct analysis of various legal issues and questions that arise in connection with the hypothetical case outlined in section II.

	Austria	British Columbia, Canada	Colorado, United States	Costa Rica	South Korea
Brief description of legal system	<p>Austria has a civil law legal system. Austria’s General Civil Code (<i>Allgemeine Bürgerliche Gesetzbuch</i>) from 1812 is one of the world's oldest codes of civil law.</p> <p>The legal system is structured according to a so-called tier</p>	<p>British Columbia (BC) has a common law legal system that is part of the federal system in Canada. The highest court of appeal for BC is the Supreme Court of Canada, so there is a significant amount of similarity in the</p>	<p>Colorado has a common law legal system. On state law questions, such as tort questions, the highest court and legal authority is the Colorado Supreme Court. However, the Colorado Legislature can enact statutes. If a statute</p>	<p>Costa Rica has a Civil Law legal system. It is based on the traditional separation of powers with three branches of government, where laws are formally enacted as statutes by the Legislative Branch and disputes are resolved by</p>	<p>Korea is a jurisdiction which is operated under the Civil Law system. Accordingly, the main authority to turn to would be the written statutes. Court precedents do not have the so-called stare-decisis effects over</p>

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	<p>system of laws, which means that laws and regulations must comply with the standards set by the higher tiers. In the top tier are the Austrian Federal Constitution and individual constitutional laws as well as the European Union (EU) Acts of Accession. General federal laws and laws of the federal provinces are in the lower tiers. Statutory authorities can enact regulations or individual administrative rulings in accordance with these.</p> <p>There is no case law system in Austria. This means that the judge is free to reach his own decision or ruling, although previous decisions may be adduced in hearings.</p> <p>With entry to the EU on 01.01.1995, Austria adopted the EU legal framework. Austria is also a member of numerous international legal conventions such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the United Nations Convention on Contracts for the International Sale of Goods of 1980.</p>	<p>common law among Canadian provinces except Quebec, which is a civil law jurisdiction). However, Canada's <i>Constitution Act, 1867</i> specifies the areas in which each level of government can enact legislation, and provides authority to the provinces over property and civil rights and the administration of justice. Accordingly, tort law is a matter in which each province can enact statutes that modify or alter the common law and each province has its own rules of civil procedure and court system.</p>	<p>conflicts with common law, the statute controls as long as the statute is constitutional.</p>	<p>the courts (Judicial Branch). At the center of this code-based system is the Civil Code of 1888, which was influenced most directly by the <i>Code of Carrillo</i> of 1841 (so named after President Braulio Carrillo). This code, in turn, was influenced by the <i>Code Napoléon</i> of 1804 and the <i>Siete Partidas</i> ("Seven-Part Code") enacted by Alphonse X of Castille in the 13th Century, still in use in much of Hispanic America in the early 19th Century. The <i>Siete Partidas</i> can trace its origins to the <i>Codex Justinianus</i> (Code of Justinian), the 6th Century code developed under Bizantine Emperor Justinian that codified Roman law.</p>	<p>other court cases, but court precedents are more than often useful resources.</p>
How much does case law vs. statutory	<p>In general, causes of action for product liability claims have their basis in civil law, such as the Product Liability Act</p>	<p>Many of the claims that the plaintiff could bring would arise primarily from the common law,</p>	<p>Some of the claims that the plaintiff can bring (for example, strict liability for design</p>	<p>The rules governing a product liability claim such as María's are set forth in statutory law,</p>	<p>The main authority always are the written statutes. However, since the laws are</p>

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law play into the case?	<p>(<i>Produkthaftungsgesetz</i>, PLA), general tort law, contract law, and the concept of contract and laws with protective effect (for third parties). The placing of a defective product on the market or violations of product safety requirements may also constitute a criminal offence under the Austrian Criminal Code (<i>Strafgesetzbuch</i>).</p> <p>Most commonly, cases are brought under the PLA, which covers injuries and property damages caused by defects that a product already had when it was placed on the market. The PLA implemented European Directive 85/374/EEC on liability for defective products into national law. In line with the European Directive, the PLA provides for a strict (i.e. no-fault) liability scheme. Liability for damages under the PLA can be neither excluded nor limited in advance.</p> <p>In addition, a plaintiff may base the claim on contractual liability or warranty.</p> <p>For claims based on general tort law, contract law, and the concept of contract with protective effect for third parties (mainly used for cases where</p>	<p>for example, tort claims for negligent design or manufacturing would arise at common law. As all provinces , However, BC has a <i>Negligence Act</i> that modifies the common law in some respects (primarily the apportionment of liability and damages as well as rights of contribution and indemnity). Other claims would arise only by way of statute, most notably consumer protection claims arising from the <i>Business Practices and Consumer Protect Act</i> (which creates a cause of action against any “supplier” of a good or service, broadly defined, without privity) or the <i>Sale of Goods Act</i> (less expansive but provides cause of action for breach of warranty, requires privity). Notably, BC does not have strict liability in tort or pursuant to consumer protection statutes.</p>	<p>defect or manufacturing defect, negligence, etc.) are common law derived claims, while other claims she can bring are statutory derived claims (for example, breach of express warranty, breach of implied warranty, etc.). Colorado also has a product liability statute that addresses some product liability issues (for example, the comparative fault of the plaintiff, evidentiary presumptions, etc.) but not other product liability issues (for example, standard of care, definition of defect, etc.)</p> <p>Much of Colorado’s common law on product liability follows the Restatement (Second) of Torts and the Restatement (Third) of Product Liability, which arguably represent the general consensus of case law of courts around the United States on product liability law. However, the Colorado courts are not bound by</p>	<p>specifically under the <i>Consumer Protection Act</i> (Law 7472 of 1994 as amended). This statute set forth a strict liability system for merchants and manufacturers, such that claimants need only show that they suffered damages resulting from the goods/services. Manufacturers, in turn, can disclaim liability if they can prove that there lacks a causal link between their activity and the damages (i.e., Act of God, actions of a third party or actions of the claimant).</p> <p>Except on matters of constitutional law (where the Constitutional Courts precedents are binding <i>erga omnes</i>), court precedent is not binding upon other courts. The legal doctrines reiterated in Supreme Court judgments have value as means of interpreting the law, but are not binding <i>per se</i>. Having said this, in practice lower courts often look to Supreme Court precedent and will usually follow such</p>	<p>inevitably stipulated in an abstract style, gray areas always appear which are filled in by court precedents.</p> <p>Maria will design her claim against the manufacturer based on the Civil Act and the Product Liability Act. However, the details of her claim (e.g. nature of loss, amount of loss, how to calculate the loss etc) should be determined by case law.</p>

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	<p>damage is not recoverable under the PLA), fault has to be proven.</p> <p>Case law helps apply the statutory provisions (eg. case law of the Austrian Supreme Court on the assessment of whether a product is to be deemed defective stating that an objective standard is to be applied based on the safety expectations of an average product user).</p>		<p>the Restatement. They are only bound by Colorado statute (as interpreted by the Colorado courts) and the holdings of higher Colorado courts.</p>	<p>precedent, unless there is good reason to set it aside. In doing so, lower courts risk that on appeal their judgment may be overturned.</p>	
<p>How long does it take to resolve the case from filing of the lawsuit to the end of the trial? Appeals?</p>	<p>The duration of proceedings in Austrian courts is considered to be short in an international comparison.</p> <p>According to statistics published by the Austrian judiciary,¹ the average duration of civil court proceedings in 2021 was 9.4 months in District Courts and 17.3 months in Regional Courts. Only 2.2% of civil court proceedings lasted longer than three years.</p> <p>In civil matters, there are three instances, however, in order to appeal to the Supreme Court the legal question has to be material and leave to appeal needs to be granted.</p> <p>Claims with an amount in dispute over EUR 15,000 and certain</p>	<p>Plaintiffs have significant control over how fast or slow to move cases towards trial in BC. In theory, a case could proceed to trial within a few years, but typically cases involving product liability claims and significant injuries would take more than five years from filing to trial. An appeal to the British Columbia Court of Appeal (as of right) would take a further year to eighteen months and if leave to appeal to the Supreme Court of Canada were sought and granted, an appeal could add another one</p>	<p>A typical trial in Colorado state court involving product liability claims and significant injuries takes two to three years from filing to trial. Appeals with the Colorado Court of Appeals take on average an additional year. If the case is then brought to the Colorado Supreme Court (which retains discretion whether or not to take the appeal), that adds another year and a half to two years before a final opinion.</p>	<p>A trial may take three to four years. Subsequently, parties may file a motion to quash the trial court judgment (<i>casación</i> or cassation) before the Supreme Court. This may add another two to three years to have a final judgment.</p>	<p>Various scenarios happen based on the nature of the case of course, but in Maria's case, roughly, it will take 9 – 24 months until the written judgment of the court of 1st instance. Another 6 – 24 months for the appellate level, and the final stage at the Supreme Court will take not more than 6 months.</p>

¹ <https://www.justiz.gv.at/justiz/daten-und-fakten/verfahrensdauer.1e7.de.html>

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	<p>legal matters (e.g. business register matters) are handled by the Regional Courts and appeals in such cases by a Higher Regional Court (which decides appeals on fact and law).</p> <p>Claims with an amount in dispute up to EUR 15,000 and certain legal matters (e.g. maintenance matters, matrimonial matters) are handled in first instance by a District Court and the appeals by a Regional Court (which decides appeals on fact and law).</p>	<p>to two years before judgment was final.</p>			
<p>What is the “value” of the claim (likely damages award)? What types or categories of damages can María recover?</p>	<p>In cases of personal injury both under the PLA and fault-based liability under general civil law, compensation covers medical treatment costs, loss of income and appropriate damages for pain and suffering (which may also include mental damage and suffering owing to the loss of a close relative). In practice, the court applies certain measurement criteria for damages for pain and suffering, namely certain amounts for days of severe/moderate/mild pain and suffering, which are usually calculated by a court-appointed medical expert.</p> <p>Regarding damage to property, under the PLA, only damage</p>	<p>Damages available under BC law for this claim would typically be considered in the following categories: non-pecuniary damages (“pain and suffering”), pecuniary damages, and punitive damages. There is a cap on the extent of recovery of non-pecuniary damages for pain and suffering, which is adjusted for inflation but is currently estimated at \$440,000. Pecuniary damages include past income loss, future income loss, costs of past costs for health and other care,</p>	<p>Damages available under Colorado law are a creature of both common law (as to economic damages and pain and suffering damages) and statutory law (as to disfigurement and disability damages and exemplary (i.e., punitive) damages. In addition, prejudgment interest (9% per annum compounded annually) and costs are set forth by statute. Damages for a paraplegic claim are often greater than \$10 million USD.</p>	<p>In general terms, damages are divided into actual damages and loss of profit. Actual damages comprise “moral damages” as well, equivalent to “pain and suffering”. There is no set standard for valuing bodily injury or death. Those actual damages are subject to evidence, case by case (e.g., analysis of medical expenses incurred and projected). Loss of profit or future earnings is also subject to evidence and expert testimony. “Moral damages” are set by the court with no strict parameter or limit.</p>	<p>In general, damages are divided into three(3) major categories which are (1) actual monetary damages, (2) loss of profit, and (3) non-monetary damages(moral compensation).</p> <p>In Maria’s case, the three categories all will speak in assessing her damages.</p>

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	<p>over the amount of EUR 500 is recoverable (i.e. EUR 500 will be deducted from the damage) and damage to the defective property itself is not covered. Furthermore, under the PLA, pure financial losses are not recoverable.</p> <p>Austrian law does not allow for punitive or exemplary damages.</p>	<p>future care costs, and special damages for other reasonable recoverable expenses. There is no cap for pecuniary damages and they are often substantially higher (perhaps exponentially higher) for seriously injured plaintiffs. Punitive damages are available, but reserved for the most egregious, high-handed or malicious conduct that is a marked departure from the standard of care. Pre- and post-judgment interest is also available, pursuant to statutes.</p>		<p>The law on damages is an example of statutory law that has been developed over the years by Supreme Court case law.</p>	
<p>Roughly, what are the attorneys' fees and costs to defend through trial?</p>	<p>Reference attorney fees are set by a statutory tariff (<i>Rechtsanwaltstarif</i>), however, in practice clients and attorneys agree on a fee arrangement, and most commonly the hourly rates charged by attorneys exceed those in the statutory tariff.</p> <p>The actual fees payable depend on the rates agreed. The more complex the case, the higher the legal fees will be, however, usually nowhere close to the</p>	<p>Defending a complex product liability case is quite expensive, particularly if the case proceeds through expert report disclosure and to trial. Lawyers fees for a case with a lengthy trial would likely exceed \$1 million Cdn and expert fees could be hundreds of thousands of Cdn dollars.</p>	<p>Defending a complex product liability trial is quite expensive, especially if the case goes to trial. Attorneys fees are often more \$1 million USD if the case goes to trial. Expert costs are usually in the hundreds of thousands of USD.</p>	<p>Reference attorneys' fees are set by the Costa Rican Bar Association at approximately 12% of the value of the claim. However, in practice clients and attorneys negotiate fee arrangements freely.</p>	<p>Depends on the complexity of the case etc and could be freely negotiated between the client and the attorney.</p> <p>Korea adopts the loser-pays-for system, but the statutory ceiling is quite low and doesn't reflect reality. It is roughly 1% of the claim amount per each level of the lawsuit.</p>

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	amounts mentioned herein for Canada and the USA .				
Is María entitled to a jury trial or are there judges only?	Austria does not have jury trials in civil proceedings. Product liability claims are determined in civil court proceedings before state courts by professional judges.	Either party can serve a notice for a jury trial (for a jury of eight jurors), subject to the ability of the other party (or parties) to seek to strike the jury notice.	A jury trial of six to eight jurors is the standard in Colorado if either side requests a jury. Typically both the plaintiff and the defendant request a jury, albeit for different reasons.	There are no juries in Costa Rica.	No jury trials for civil cases.
Does the prevailing party get their attorneys' fees?	<p>The “loser pays rule” applies, thus, legal costs are – to a certain extent – recoverable. At the end of proceedings, the court will make a decision on costs, generally ordering the unsuccessful party to compensate the other party.</p> <p>Legal costs and fees consist of court fees, attorney fees, and actual expenses such as expert/translator costs and travel costs of witnesses. The parties’ own costs, such as the costs to prepare the proceedings, are not considered as reimbursable.</p> <p>The recoverable amount of attorney fees is set by a fixed statutory tariff (<i>Rechtsanwaltstarif</i>), which sets rates based on the amount in dispute and the procedural steps taken by the attorney. As mentioned above, the actual fees that an attorney charges a client</p>	Subject to certain exceptions, the prevailing party can recover their costs, which are set by a statutory tariff, and reasonable disbursements (for example, <u>expert</u> fees).	The prevailing party does not get its attorneys’ fees. However, the prevailing party is entitled to its costs from the losing party. As costs include expert fees, this amount can often be quite significant.	Yes. By statute, the prevailing party is entitled to attorneys’ fees by default. Depending on the circumstances, a court can decide otherwise if it properly justifies the decision.	Yes, but only up to the statutory ceiling.

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	<p>often exceed the tariff, as they are based on the hourly rate agreed by the attorney and client. Consequently, the winning party may not recover all of its cost.</p>				