

The U.S. justice system: reshaping access to civil justice in the global context

Lecture mini-series

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The U.S. justice system is unique for a number of reasons. The key features of the American justice are: the emphasis on private litigation (either in an individual or a group/class setting) as opposed to actions by public bodies, prevalence of jury trials, predominantly adversarial style of proceedings, the very vocal plaintiffs' bar, entrepreneurial lawyers paid on a contingency fee basis, and punitive damages. Litigation is the fundamental part of the U.S. legal system, used not only to rectify civil wrongs, but also to change the legal, political and social settings. Recently, however, this fundamental role of litigation has been challenged by a number of phenomena: the tort law reform, the Class Actions Fairness Act, and, most importantly, the increasingly prevalent arbitration clauses in many consumer contracts.

Indeed, civil justice systems are under transformation beyond the U.S., with the EU and other jurisdictions undergoing their own reshaping and rethinking of how best to deliver justice. Civil justice is becoming privatized, but on the other hand there are also steps to entrust the public authorities (specifically: regulatory bodies) greater roles in delivering justice, for instance to consumers. Can Europe learn from the U.S.? Can the U.S. learn from Europe? Are there any chances for greater convergence?

Using comparative law approach this mini-series of lectures explores the place of the U.S. civil justice system in the world., especially when compared to the EU civil justice system. It focuses specifically on the recent systemic reforms of civil justice, and other changes and reforms changing how justice is accessed and how it is delivered. The participants will be introduced to the fundamental concepts and principles of U.S. law. This should allow them to appreciate the intricacies of the U.S. legal system on the one hand, and contrast it with other legal systems, including the Polish system, on the other. The purpose is to allow the participants to appreciate the significance and main features of the reforms underway in the U.S. and contrast and compare them with the reforms taking place in the EU. The mini-series is a valuable starting point for those wishing to study U.S. law, but also to those whose research or practice draws on systemic design of civil justice systems and the policy of civil justice.

The classes will involve theoretical analyses as well as more practical, hands-on experience with the U.S. system. We shall examine the following judgements in depth: *AT&T Mobility LLC v. Conception*, 563 U.S. 333 (2011); *American Express Corp. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), and contrast the approach in those judgements with the European view of arbitration and access to courts. We shall also have a wider discussion on avenues for justice and redress in Europe and in the U.S. using a case study.

The mini-series consists of three sessions and covers the following:

1. The U.S. legal system – history, specific features and place among the legal cultures of the world today. The 'American exceptionalism'. A short introduction to the U.S. Constitution, the role of constitutional amendments, the Bill of Rights, the structure of the U.S. government. The U.S. justice system: judicial infrastructure, legal profession, civil procedure: structure of the proceedings, adversarial nature of the proceedings, other features of the U.S. civil procedure. Accessing the U.S. civil justice: the money, the lawyers.
2. The importance of litigation in the U.S. legal culture, 'adversarial legalism'. The phenomenon of the U.S. class action model and why Europe fears it so. Alternatives to litigation: ADR, regulatory enforcement. Examination of some current developments: the tort reform, changes in the class action system, mandatory ADR, and the challenges they present to the U.S. legal and justice system. Discussion of the following Supreme Court judgements: *AT&T Mobility LLC v. Conception*, 563 U.S. 333 (2011); *American Express Corp. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) and contrasting the approach in those judgements with the European view of arbitration and access to courts.
3. Comparing civil justice systems and access to justice in a selection of states around the world, and the advantages/disadvantages of the U.S. system, using consumer law as example. EU civil justice, and a short analysis of reforms of European and EU civil justice systems. Case study: searching for avenues of redress and justice in the U.S. and in Europe.

Reading:

1. Introductory reading for class (can be purchased on Amazon, but copies are available in the Law School Library):

J. M. Feinman, *Law 101: Everything You Need to Know about American Law*, Oxford University Press;

J. Humbach, *Whose Monet? An Introduction to the American Legal System*, Wolters Kluwer.

2. Specific readings and preparation for each Session:

For Session 1:

U.S. Constitution (<http://constitutionus.com>);

R. Freer, *Exodus from and Transformation of American Civil Litigation*, Emory Law Journal Volume 65, No. 6, 2016, available on: <http://law.emory.edu/elj/documents/volumes/65/6/freer.pdf>.

For Session 2:

D.R. Hensler, *The United States of America*, in C. Hodges, S. Vogenauer, M. Tulibacka (eds.) *The Costs and Funding of Civil Litigation. A Comparative Perspective*, C.H. Beck, Hart Publishing, 2010 (Photocopy to be distributed at Session One).

Before you read the judgements below, please read: O. Kerr, *How to Read a Judicial Opinion: A Guide for New Law Students*, available at: <http://euro.ecom.cmu.edu/program/law/08-732/Courts/howtoreadv2.pdf>;

Also, for helpful reviews and other information about judgements see: www.oyez.org

AT&T Mobility LLC v. Conception, 563 U.S. 333 (2011)
(<https://supreme.justia.com/cases/federal/us/563/333/opinion.html>);

American Express Corp. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)
(<https://supreme.justia.com/cases/federal/us/570/12-133/opinion3.html>),

For Session 3:

H. Kotz, *Civil Justice Systems in Europe and the United States*, 13 *Duke Journal of Comparative and International Law*, 2003 (available on https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2580&context=faculty_scholarship)

Case Study:

Discussion of the possible avenues of redress for 1) Mr Z – a U.S. national and 2) Mr Z – an EU national.

Mr Z signed a new cell phone contract with X Mobile, a mobile network. He received his iPhone and used it for a few months.

During a conversation with the X Mobile Customer Service concerning his bill, he was advised to switch to e-billing. It is paper-free billing, with a login and password access to all the account details and itemised bills. Mr Z switches to e-billing and after three months he notices that his bills are somewhat higher than they used to be. He logs in to his account for the first time and looks at his bills. A number of small charges appear as administrative charges. When confronted about this, X Mobile Customer Service, and later their Finance Office, maintain the legitimacy of the charges which are to cover 'the switch from paper to e-billing, the administrative costs of an e-account, and the costs of additional benefits which come with an e-account'.

Mr Z contacts his local consumer association and is advised by their lawyer that the best way to proceed is to bring a case before a local court. When Mr Z brings the case before the court, he is confronted with the response of X Mobile denying participation in the proceedings and referring him to clause 19.2 of his contract, by virtue of which he is required to submit any disputes concerning account and billing before the Arbitration Tribunal for the New Media and Telecoms (ATNMT). It is an industry-established arbitration body. Mr Z is not happy about this requirement. He considers the fee for lodging the case before the ATNMT disproportionately high (20% of the value of the claim or \$/Euro 250, whichever is higher) and has doubts as to independence of this industry-established dispute resolution mechanism.

The court faced with X Mobile's objections refuses to consider the case and suggests that Mr Z indeed uses the ATNMT arbitration. The court justifies its decision by pointing out that it lacks jurisdiction in the

face of the valid arbitration clause in Mr Z's contract with X Mobile. Mr Z's lawyer advises him to appeal the decision to the court of appeal.

3. Further useful readings:

Reference:

The Bluebook: A Uniform System of Citation, Harvard Law Review Association, Seventeenth Edition;
B.A. Garner, *Garner's Dictionary of Modern Legal Usage*, 3rd edition, Oxford University Press, 2011;
R.A. McKinney, *Reading like a lawyer: time-saving strategies for reading law like an expert*, Carolina Academic Press, 2005;

Further reading (only a recommendation for exploring topics of interest, web links provided when available):

American Society of International Law, *Uses of International Law in U.S. Courts*, in *Benchbook on International Law*, ed. by D.M. Amann, 2014, available at: <https://www.asil.org/sites/default/files/benchbook/uses.pdf>;

P. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons* (<http://scholarship.law.duke.edu/dlj/vol36/iss6/3/>);

O. Chase, H. Hershkoff et al., *Civil Litigation in Comparative Context*, Thomson West, 2007;

P. R. Dubinsky, *United States: Harmonisation and Voluntarism. The Role of Elites in Creating an Influential National Model, the Federal Rules of Civil Procedure*, in: X.E. Kramer, C.H. van Rhee (eds.) *Civil Litigation in a Globalising World*, Asser Press, 2012;

N. Feldman, *The Supreme Court's Mixed Signals on International Law*, 2008, available at: <https://www.cfr.org/interview/supreme-courts-mixed-signals-international-law>;

L.M. Friedman, *American Law in the 20th Century*, Yale University Press, 2002;

D.R. Hensler, *The United States of America*, in C. Hodges, S. Vogenauer, M. Tulibacka (eds.) *The Costs and Funding of Civil Litigation. A Comparative Perspective*, C.H. Beck, Hart Publishing, 2010;

J.A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, *The International and Comparative Law Quarterly*, Vol. 52, No. 2, 2003, pp. 281 – 195 (analysis with regard to English and French civil procedures, but relevant more generally);

R.A. Kagan, *Adversarial Legalism. The American Way of Law*, Harvard University Press, 2003;

J.H. Langbein, *The German Advantage in Civil Procedure*, *The University of Chicago Law Review*, Vol. 52, No 4, 1985 (available on Jstor);

J.P. Lomio, H.S. Spang-Hanssen, G.D. Wilson, *Legal Research Methods in the Modern World: A Coursebook*, 3rd Edition, Djoerf Publishing, 2011 (available on Amazon);

B.S. Markesinis, *Litigation-Mania in England, Germany and the USA: Are we so very different?*, 49 *Cambridge Law Journal*, No.2, 1990, pp. 233 – 276 (<https://www.jstor.org/stable/pdf/4507415.pdf>);

M.P. Socarras, *International Law and the Constitution*, *The Federal Courts Law Review*, Vol. 4, Issue 2, 2011, available at: <http://www.fclr.org/fclr/articles/html/2010/Socarras.pdf>.