

Access to Civil Justice - Cross-border Civil Proceedings in the EU
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Issues on Comparative Civil Procedural Law

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Introduction

EU Funding programmes in the field of Justice (Comparative law related):

Fundamental Rights and Justice Framework
Program (543 million euros, 2007-2013)

- [Specific Fundamental Rights and Citizenship](#)
- [Specific Civil Justice Programme](#)
- [Specific Consumer Programme](#)
- [Specific Criminal Justice Support Programme](#)

Introduction

- EU funding for comparative law related research 2007/2013

543 million euros

Introduction

- Specific Programme Civil Justice 60 million + euros (2007/2013)

Comparative procedural law research

Comparative Law essential's

- What is Comparative Law?
- Why study Comparative Law in the EU context?
- How to do Comparative Law research?

The birth of Comparative law

- First Comparative Lawyers: Plato – comparison of the laws of Greek cities; Aristotle did the same (153 different jurisdictions, no less)
- Modern Comparative law: Lambert & Saleilles Congress for Comparative Law, Paris 1900
 - Goal: development of the common law of mankind (droit commun de l'humanité) through Comparative Law.

What is Comparative Law?

- Comparison of the different legal systems of the world (Zweigert & Kotz 1998): macro-comparison – spirit and style of the legal systems, methods and procedures.
- Comparison of legal institutions: micro-comparison, focusing in concrete problems, that is, how to solve actual problems or particular conflicts of interest. (Zweigert & Kotz 1998)
- Comparative law is NOT Comparative legislation (Rabel *apud* Rheinstein, 1935)

But, what is Law?

- Comparative law is NOT Comparative legislation (Rabel *apud* Rheinstein, 1935)
- Law in books, law in action (Erlich, 1903) (Pound, 1910) (Rheinstein, 1935)

Comparative law dominant paradigms

- Encyclopedic comparison
- Constructive comparison
- Comparative Historical Reconstruction
- Juxtaposition plus
- Comparative functionalism

(Frankenberg 1985)

Encyclopedic comparison

- Portrayal comparison of laws

(Frankenberg 1985)

Constructive comparison

- Prescriptive approach: update, unify and improve legal orders

(Frankenberg 1985)

Comparative Historical Reconstruction

- Search for the evolutionary principles of law

(Frankenberg 1985)

Juxtaposition plus

- Comparing cases, doctrine (jurisprudence) and statutes with interpretative, historic and systemic additives
 - Systematic approach: Starts with a conceptual framework setting the object and scope of the study
 - Casuistic approach (Cornel Studies, Schlesinger): How legal orders under study solve a concrete conflict
 - Law in action topic approach: Higher level than casuistic approach, but similar techniques.

(Frankenberg 1985)

Comparative functionalism

- “the function of a legal institution not its conceptual shape; the purposes it serves not its formal place in the legal system”

(Rheinstein 1935)

- “Function is the starting point and *tertius comparationis*”

(Zweigert & Kotz 1998)

Comparative Law Methodologies

- Common methodological principles:
 - Common sense
 - Tendency to be undertaken by multinational teams
 - Questionnaires technique

Why study Comparative Law in the EU context?

- Visionary goal of Lambert & Saleilles, applied, *mutatis mutandis*, to the EU: to develop the common law of the EU (droit commun de l'Union Européenne)

Comparative Procedural Law

- Specifics of European Procedural law
 - Often Law in books is harmonised/unified
 - Differences may arise in Law in action

But...

A small example

UK (England)
Judicial organization

One simple question

- How to start a small claim procedure in England and Wales?
 - No specific order for payment procedure in England and Wales
 - Normal civil procedure with a judgement *by default* (uncontested claim after 14 days of notification – default judgement must be asked)
 - Small claims track for claims under £5000. Possible use for claims above that amount in special cases

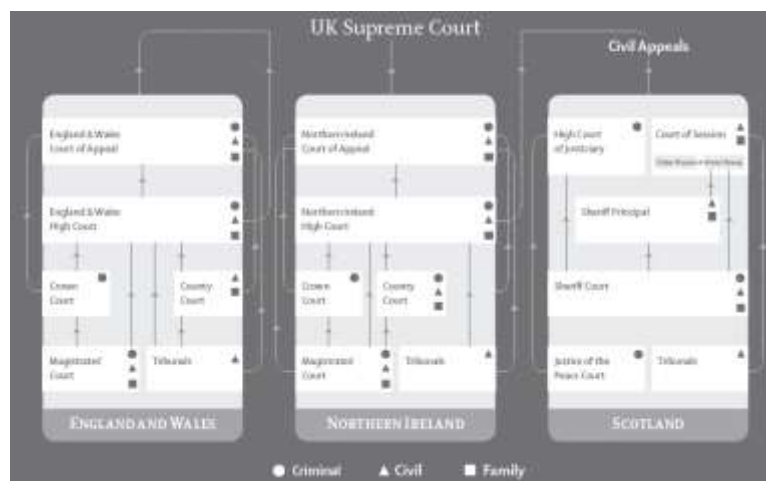
Not a small question... Where to file the claim?

- Civil and commercial matters: High Court and County courts. County courts may have Chancery division to deal with contract disputes...
- Claims over £15000 can be filed in the High Court or the County court
- Claims below £5000 can be filed with the small claims track
- All can be filed in the County court...

How was it answered?

- Functional methodology
- Could it be answered with any other methodology?
 - Yes, but...

English judiciary



Thank you very much