SMALL CLAIMS ADJUDICATION: AN ALTERNATIVE MODE OF DISPUTE RESOLUTION

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THE EXISTING SITUATION IN MALTA

A complaint often aired about litigation in Malta, is that cases involving small contested amounts prolong out of proportion, both to the importance of the issues and to the amounts involved. It is after all ridiculous to have a case involving a hundred Maltese Liri take over a year to be concluded. Ideally such a case should not take more than one to two sittings to be decided. Unfortunately reality dictates otherwise, and small claims can take years to be disposed of under the existing procedure. The blame for this state of affairs should not be laid exclusively upon the present system of court procedure. A multitude of factors have throughf the years contributed negatively to the present quandary.

Until a few years ago, the situation if anything was even worse. Then all claims exceeding fifty Maltese Liri fell within the competence of the Superior Courts. The result was that these claims were dealt with under a procedure ill-suited to dispose expeditiously of such petty litigation. This unsalutary situation was somewhat rectified following an increase in the civil competence of the Inferior Courts. The competence of the Inferior Court was increased to include claims of up to two hundred and fifty Maltese Liri. This measure had two positive results, first it alleviated the existing backlog of pending litigation before the Superior Courts, and second the more expeditious procedure which characterizes contested cases before the Inferior Courts was now applicable to a wider section of litigation.

Article 215 of the Code of Organization and Civil Procedure provides that the Inferior Court is to: "...proceed summarily and with the upmost despatch consistent with the due administration of justice...". At first glance this article seems to provide for a rapid disposal of civil litigation by the Inferior Courts. However the Law itself fails to elaborate further. Though the Law does use the term "summarily", the true import of this term is undefined, and hence open to conflicting interpretations.

Admittedly the situation has improved following the increase in the civil competence of the Inferior Courts. This however does not mean that the existing situation is beyond reproach. Civil cases can still take a considerable amount of time to be concluded. The Inferior Courts are, despite article 215, saddled with practically the same procedure used before the Superior Courts. The inordinate number of pending cases coupled with the litigious nature of the Maltese does not help to alleviate the situation. The mode of dealing with civil cases before the Inferior Courts remains essentially identical to that before the Superior Courts. The system of adjourning the case from one month to another (and occasionally even longer intervals), rather than in one continuous session applies also before the Inferior Courts. This despite the fact that article 195 (4) clearly states that a case may be adjourned only in exceptional circumstances, with the added precondition that the court must be satisfied that such

'exceptional circumstances' do exist and warrant an adjournment of the case.

The Magistrate when dealing with a contested suit, normally has two options open before him, either to hear all evidence directly or else nominate a legal or technical referee (or both) to hear all the evidence and present a report to the Court. Whatever method is utilized for hearing the evidence, the case is destined to take a long time. Even if the presiding Magistrate does decide to hear all the evidence himself, the case after the first hearing, in all probability, will be adjourned to another date. The problem is that the Court is itself hard-pressed to allocate sufficient time to be able to hear all the evidence. The end-result is that even a relatively straight-forward contested case can take months to be decided. This situation is not unique to the Maltese Civil Justice system, and other systems are faced with similar problems. What is however lacking under Maltese Law is a mode of adjudication to deal expressly with such small claims.

THE INTRODUCTION OF SMALL CLAIMS IN OTHER COUNTRIES

Many countries faced with prolonged delay in contested litigation have, in recent years been actively examining the feasibility of introducing a simplified system of court proceedings to deal with small claims. Scotland, for example in 1988 decided to impliment such a system of procedure in the Sheriff Court, the Scottish counter-part to the Inferior Courts of Civil Competence in Malta, having initially successfully tested the system on a voluntary basis in the Dundee jurisdiction. Similarly in some of the Canadian provinces such as British Columbia and Ontario there exists an efficient system of Small Claims Courts, where the litigant can present his own case simply and effectively.

The use of such procedure has not been limited to countries influenced by the Anglo-Saxon legal tradition. The Dutch parliament is currently considering a simplification of the existing procedure before the 'Kantonrechter' (the Dutch equivalent to an inferior court of civil jurisdiction) in an effort to eliminate expense and waste of precious judicial time, facilitating a rapid disposal of small claims. Similarly the procedure used before the Amtsgericht in the Federal Republic of Germany in relation to such claims is moulded in such a manner as to allow the litigant to defend his case whilst minimizing the undue prolongation of court proceedings.

In England this procedure has already proven its worth, to such an extent that the Review Body on Civil Justice in its report to the Lord Chancellor recommended that the competence of the tribunals administering the 'Small Claims Arbitration' scheme be increased from £500 to £1000. Following the recent recommendations made by the RBCJ, it would appear that more innovations will be implimented in the present system of 'Small Claims Arbitration' in England and Wales.

The English Court administrators must be considered as being among the most successful in having implimented a relatively novel system of adjudication which initially was viewed with considerable sceptism.

Until some years ago the English Courts were confronted with a situation where cases involving relatively small amounts could drag indefinitively,

involving legal and court expenses which were often disapportionate to the contested amounts. There was considerable public disillusion with the existing court mechanism. As a result many potential litigants were deterred by the prospect of proceeding before the competent Court for a redress of their rights, however well-founded were their claims. Serious doubts were raised as to the fairness of the then existing system of adjudication in relation to small claims, a system which was supposed to provide an easy access to Justice.

The English legislator confronted with this situation started to consider seriously the feasibility of introducing a mode of court adjudication tailor made to deal purposely with small claims. Eventually in 1973 a scheme was introduced on a voluntary basis to deal with small claims. This scheme was built upon existing statutory power whereby a County Court Judge could refer such claims to arbitration provided the litigants approved of such a measure. This explains why the English legislator included the term 'Arbitration' in the nomenclature 'Small Claims Arbitration'. Later this mode of adjudication became automatically applicable for most disputed claims under five hundred sterling. In reality the continued inclusion of the term 'Arbitration' is today somewhat of a misnomer, once most contested cases under £500 are dealt with under this scheme.

THE RAISON D'ETRE OF 'SMALL CLAIMS PROCEDURE'

The raison d'etre behind small claims procedure is to avail the litigant of a procedural system which is cheap, simple to comprehend, speedy, informal and efficient. Obviously it is impossible to have a flawless procedural system and undoubtedly small claims procedure, like any other procedural system does have its shortcomings. These however must be evaluated in the light of the basic premise that the Courts of Justice are there to provide an important, indeed vital service to the country, that of administering justice, a fact which some unfortunately seem to forget. It was precisely with this in mind that small claims procedure has been introduced in various countries.

One of the principle characteristics of small claims procedure in England is the relative cheapness of the system. Previously an obstacle for most litigants was the prohibitive expense of going to court over disputed small claims. One of the factors which does contribute towards a substantial diminution of expenses is that the litigant can, if he so desires, defend his own case without having to incur the expenses of the services of a soliciter. This however begs the question, as to whether the unassisted litigant is then at a disadvantage with regard to the other legally assisted litigant. This apparent inbalance has been overcome by two measures. First the winning litigant is in most cases not entitled to recover from the other side the expenses paid for legal assistance. This obviously encourages potential litigants to defend their own cases. Second, the adjudicator, normally the District Registrar in the case of the English County Courts, plays an 'interventionist' role in the course of the hearing.

The District Registrar assumes a role similar to his counterparts on the Continent, asking questions directly to the litigants, dispensing if necessary with the formal rules of evidence and procedure.

The District Registrar is duty bound to ensure that the unassisted litigant is not at a disadvantage, and is able to present his case adequately. One of the cardinal points raised by Review Body on Civil Justice was the need for a set of self-contained norms emphasising the role of the adjudicator, in particular his power to dispense with the formal rules of evidence and assume the questioning of the parties and their witnesses, if he considers that the circumstances of the case do so require. One criticism levelled by the RBCJ was in fact that the 'District Registrars' were not uniform in administering justice under this system and some were rarely intervening to direct the questioning.

The necessity that the adjudicator assumes an active role during the conduct of a hearing is also a salient feature of small claims proceedings under Scottish Law. Scotland like England and other Anglo-Saxon countries has traditionally always adhered to an adversarial system of court procedure and hence the requirment that the court assumes an active or 'interventionist' role is somewhat of a novelty. This notwithstanding the very structure of small claims implicitly necessitates an active role by the adjudicator, otherwise the system then will not be fulfilling its proper purpose. It is precisely this consideration which has motivated both the RBCJ and the Scottish Court Administrators to emphasise the interventionist role of the District Registrar and Sheriff respectively.

A PLACE FOR 'SMALL CLAIMS PROCEDURE' IN MALTESE LAW?

Is there any need for small claims procedure within the ambit of Maltese Civil Justice?

Considering that other countries have already successfully implimented this system there is no reason why some form of small claims tribunal should not also be introduced in Malta. There are various issues to be considered before this system can be truly integrated as part of Maltese Civil Justice. One probable consideration, would be whether these proceedings should be handled by the Magistrates' Court in addition to the existing cases of civil competence currently dealt with by this Court, or alternatively should a court officer distinct from the Magistrates be created to deal expressly with small claims? If the Magistrates' Court is to be conferred with the function of deciding such claims, then ideally a magistrate or magistrates should be expressly appointed to deal exclusively with this type of litigation to the exclusion of other judicial responsibilities. The aforesaid judicial officer would hence acquire a certain expertise in dealing with this sort of litigation, moreso since the procedure to be applied would in certain respects be dissimilar from that employed in ordinary civil litigation.

Additionally there is the remote danger that if small claims proceedings were to be integrated with the existing system, these would gradually follow the same procedural fate currently reserved for pending civil litigation.

If on the other hand an entirely new 'class' of court officers were to be trained to deal expressly with this type of litigation then such a system would have a much better chance of succeeding, if only because there would be a

specialized group of individuals to supervise over the proper adjudication of such claims.

Another important issue is whether the litigant should be allowed to defend his own case. Many seem to forget that under Maltese Law the litigant in Commercial cases can sign the written pleadings himself and technically can even defend himself with the court's consent (vide articles 178, 204 and 205 COCP). There should not after all really be any difficulties in extending this norm to a category of litigation which involves relatively small disputed amounts of money. The litigant must however always have the faculty to engage a lawyer if he so deems fit, a rule which has been retained even in those systems which in implimentating 'small claims procedure' have been moulded in such a manner as to encourage the litigant to defend himself.

The obstacles are of course manifold, some apparently insurmontable. The success of the system depends on how this will be implimented. It is imperative that an efficient advisory bureau is created to assist all those who decide to commence litigation under this system. In Scotland considerable effort was made in assisting the litigants, not only by providing detailed but simple manuals but also by providing an advisory service in conjunction with the various consumer socities. Ideally this system should first be experimented on a voluntary basis during an initial period of trial. This will give the competent authorities the opportunity of evaluating the feasibility of introducing such a system. If implimented correctly this system can provide the country with an inexpensive and yet efficient mode of adjudication and at the same time ease some of the pressure on the existing edifice of Civil Justice.

REFERENCES:

Capalletti M. & Garth B. : "Access to Justice" Vol. II (1978);
Civil Justice Review: "A Report of the Review Body on Civil Justice" (1988)
Ervine W.C.E. : "Small Claims: Recent Developments in Scotland" (1986)
Scottish Courts Administration: "A Guide to Small Claims in the Sheriff Court" (1988).
Ministry of the Attorney General - British Columbia "Your Small Claim Court Trial" (1988)

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