Diploma in Law

Lecture 8: Judicial Procedure

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Diploma in Law (Malta)

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Today's lecture:

- The Civil Action
- Judicial Interest
- Parties to an action
- The Civil Proceeding - from application to appeal
- Desertion and Discontinuance of Civil Cases

The Civil Action

The civil action constitutes the basis of civil proceedings.
It is not merely the mechanism whereby a claim is advanced judicially. Rather it is a number of stages and acts that all work towards the matter in a judicial demand being given judicial recognition.

The underlying motives of the civil action are two:
(i) To restore certainty to the enforcement of a substantive right; and
(ii) to render the subject matter of the action undisputable - it becomes a res judicata upon judgment.

Essentially the civil action revolves around a conflict between parties holding opposing views on the same issue, with each party believing their stand is correct at law.

When the aggrieved party files an action, calling in the judicial authority to solve the conflict, the civil action begins.

The Civil Action

The judicial demand (within the rikors / application) presupposes a plaintiff making a demand and a defendant against whom it is made.

Other parties may be entitled at law to appear and participate in the civil action (e.g. intervenor and joinder).

The plaintiff kicks things off through their application - starting the written stage of proceedings. The defendant is then given the right to reply and file all please available to them at law.

Judicial Interest

A civil action cannot be exercised without **sufficient judicial interest** - the interest of the plaintiff in the claim allowing the court to take cognizance of the case.

Our courts define it simply as the plaintiff having to show that one of their rights has been violated, and that the civil action will bring him an advantage/remedy.

But interest must also be shown in all other parties to the case.

Without judicial interest, the party has no *locus standi* (right or capacity to appear) and the civil action fails.

The Plaintiff's interest

Judicial interest must be:

- judicial/legal; **and**
- personal and direct; **and**
- actual

The Plaintiff's interest

Judicial: plaintiff must allege that he has been deprived of a thing **and** that that thing derived from a right conferred upon him by law.

A purely ethical or moral interest is insufficient but the Courts accept claims that do not contain a request for damages, as long as the right claimed is not hypothetical (a declaratory action)

Personal: plaintiff must show the claim belongs to them: a connection between themselves and the subjective right specifically. *this is decreasing in rigidity - think class actions and Union suits (representative actions)*

Direct: plaintiff seeks to secure a right against the defendant who has violated that right, not anyone who is not to blame.

Actual: action cannot be hypothetical and plaintiff must show a direct benefit from the action.

The Defendant's interest

Crucial to determine by the plaintiff - or to successfully plead by the defendant - whether they are the **legittimu kontradittur** or otherwise, i.e. the correct person against whom the action is filed.

There must be a link between the claim and the defendant.

Similarly, if the defendant chooses to file a counter-claim, then they must also have the sufficient juridical interest to do so.

Parties to an action

The civil action presupposes a plaintiff and a defendant (may be more than 1 individual, may be a natural / legal person.

But third parties may also have a role to play:

- **The Intervenor** *(intervenut)*
- **The Joinder** *(kjamat)*

The Intervenor

Art. 960 COCP allows the admission of a party to a case at any stage (first or second instance).

What must be proven is that the intervenor has **sufficient interest** in the case. However, they will never be considered as a full party to the action.

This intervention is deemed voluntary and is a preventive remedy allowed to the intervenor to avoid damage that they may suffer as a result of the judgment, even if the judgment does not mention them directly.

If the Court is satisfied that they have sufficient legal interest, they will allow the intervention by means of a decree.

Such intervention does not suspend proceedings or cause them to restart.

An intervenor is neither plaintiff nor defendant, and is not bound by the judgment, but is obliged to participate in the case.

The Intervenor

Special judicial interest:

For the intervenor, the interest has to refer to a right, e.g. that is connected to the plaintiff's claim. It must be substantial and directly relevant.

The interest must also be personal in a way that it can only be safeguarded by that intervenor, i.e. without intervention the party would risk prejudice.

Interest must also be actual and real.

It is up to the intervenor to prove their interest.

The Joinder

Art. 961 COCP provides for **forced intervention** - a calling in of a party (kjamat in kawza).

The Court of first instance may by means of a decree call in a party at any stage **before judgment**. This may be brought about by either party's request or by the Court's own initiative - but this can be opposed by any party with just cause.

Due to its forced nature, the joinder has the right to request that the proceedings start afresh.

Calling in a party can avoid the institution of cases which are similar or even identical in nature.

The joinder is deemed to be a **defendant** for all purposes of the law.

The Joinder

Interest:

Once interest is proven, the Court is duty-bound to order the joinder. Interest must also be judicial, legal, personal, direct, and actual.

Interest must be in the outcome of the suit, but it must be an interest which is common with the interest of the party requesting that joinder.

The Written Proceedings

Proceedings are always brought by means of an application (rikors) which must follow the formalities established in the COCP. *(reminder: sworn application before the superior courts, application before the inferior courts)*

The application is then served on the defendant/s who have to file their reply within the established timeframe. They also have a right to file a counter-claim or even admit to the original claim.

Once written pleadings have been concluded (i.e. a reply is filed or the time for the reply lapses), the case is then appointed for hearing.

The Trial

Once the defendant files his statement or the time for this lapses, the oral stage begins.

The Court registrar posts the list of cases in court, fixing the date for the first hearing, and notifying the parties. On the day:

- the officer shall call out the names of the parties 3 times outside of the courtroom;
- the court will note who has been notified and give orders to ensure that any missing notifications are made

If both parties fail to turn up, the court has the power to remove the case from its list at the plaintiff's expense.

If the defendant turns up, they may demand that the plaintiff bears their costs.

In both cases the plaintiff can request the restoration of the case within 10 days and this is subject to any costs incurred. The Court will allow this only if all costs are settled.

If the defendant does not turn up, the Court can continue to hear the case without them.

The Trial

If all parties are present, the court will consult with the parties and plan the sittings to be held and what is expected from the parties during said sittings.

If the defendant appears: the reply is inserted in the acts and the proceedings move to evidence stage.

If necessary, this is the stage where a **Referee** will be requested and appointed by the Court.

If the defendant fails to appear / reply without good cause: the plaintiff files the **kapitoli:** these are a list of questions or declarations which must be clear and concise in nature. The plaintiff submits them to court, asking the defendant to answer *in subizzjoni* / on oath.

If the defendant does not answer, then the questions are deemed to have been admitted by him.

Referees

A Referee is the Court's technical expert, appointed by the Court and not the parties.

They are appointed to guide the court on technical matters, and can gather and organise evidence as instructed. in this case the Referee will be the only sub-forum within which evidence on that technical matter can be presented, including on-site visits (barring exceptional cases).

Their work will be compiled in a report which is filed in Court and sworn on oath.

Parties can summon the Referee to testify on their findings and examine them.

They can also ask for additional referees, which is an implicit vote of no confidence in their findings. This must be done by means of a note filed within 10 days from the presentation of the report.

Referees

A referee is not the parties' expert witness - Referees enjoy the confidence of the Court.

However, the Court is never bound by the Referee's report and indeed it can discard it if it has good cause to do so. This is rarely the case.

Subizzjoni - reference to the oath

When a defendant is called upon to testify *in subizzjoni* in applications, we mean that the applicant is reserving the right to refer to that party's oath, that is to summon them and examine / interrogate them.

This is particularly relevant when it comes to the mentioned *kapitoli* - as here a confession may be brought out of the other party.

Reminder: if the defendant appears, or files a reply, or is not properly notified, the kapitoli do not apply.

Subizzjoni - reference to the oath

When a party is summoned *in subizzjoni* (on reference to the oath), they have to reply to the questions made in the kapitoli. Failure to do so will result in the Court inferring their admission and acceptance.

The questions made via the kapitoli must be filed before the Court and the Court has the discretion to review and reject any questions / declarations which it deems to be superfluous.

When no reply is filed - Contumacy - Kontumaċja

Where no reply is filed / filed late, the defendant shall be deemed to be in a state of contumacy **unless** they successfully give a reasonable excuse for their default.

Contumacy (meaning silence) means that the defendant cannot:

- cross-examine witnesses,
- present witnesses,
- present evidence,
- file pleas

They can only be present, receive copies of evidence produced, and make short submissions at the end of the proceedings, before the case is deferred for judgment. The right to appeal remains available.

The plaintiff however cannot rest on this ‘silence’ - the case must be proved to the court’s satisfaction.

When no reply is filed - Contumacy - Kontumaċja

Contumacy only exists in relation to the failure to file a sworn reply to a sworn application within the appropriate period.

Technically contumacy cannot be declared before the Inferior Courts / Tribunals / Boards - but this has happened before, so adherence to legal periods is paramount.

E.g. ***John Baldacchino et vs Bajada New Energy Ltd (Court of Appeal, Inferior) 8/3/2019:***
"Għall-Qorti hu evidenti li sabiex konvenut jopponi talba quddiem it-Tribunal għat-Talbiet Żgħar, għandu obbligu jippreżenta tweġiba fit-terminu kontemplat f'regolament 4 tal-L.S. 380.01.
Il-fatt li f'Kap. 380 m'hemmx dispożizzjoni simili għal dik tal-kontumaċja li hemm fil-KAp. 12 ma jsaħħaħx l-argument tal-konvenuta."

Continuation of proceedings

In some instances (not special summary proceedings) the Court may believe that the issue can be resolved in one sitting. This is discussed with the parties.

Normally however the evidence stage begins. The plaintiff first makes their case before the court, presenting all evidence (refer to Lecture 7) backing their claim and why the defendant is to be condemned.

The defendant then presents all evidence to convince the Court that the plaintiff's claims would be a miscarriage of justice.

Following the presentation of evidence, the cross-examinations are held.

Continuation of proceedings

The final stage is the legal submissions (trattazzjoni) made by the lawyers of the Parties. These can be made in writing, orally, or both, at the Court's discretion.

The submissions bring together the legal and factual arguments of each Party, in an attempt to convince the Court of their side of the facts and summarise proceedings which may have been going on for several years.

As a rule, it is the defendant who has the last word in Court.

The case is then closed and left for judgment.

The Judgment

The judgment must:

- premise the reasons on which the decision is based
- refer to the proceedings, claims, and pleas
- include every declaration intended by the court to be binding
- include a decision on costs
- if it is a judgment on an uncontested / admitted debt, it must be delivered within 90 days from the lodging of the action
- if it is a judgment on a specific performance of an act, it must state the time within which that act must be performed, together with the manner of execution by the plaintiff in case of non-performance

A note on the inferior courts

Exceptionally before the Court of Magistrates, during the first hearing the Court can after examining the facts of the case, refer the case to mediation before proceeding with the trial.

This is done by means of an *in camera* decree which cannot be appealed from.

The written proceedings are deemed to be closed once the defendant has been notified.

The inferior courts, as a rule, proceed summarily.

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The Appeal

A judgment can be appealed from within 3**0 days** from the date it is given (exceptionally this can be shortened)

The appeal is filed by means of an application for reversal, variation, or annulment.

If the formalities are not followed by the appellant, the appeal is **not** null, but the Court will order rectification to be filed within 2 days at their cost. A guarantee for costs must be filed in the Registry.

Irrespective of against whom it is filed, all parties must be notified of the appeal, but it is only the party against whom the appeal is directed who must file their answer within the established time period.

The Appeal

Application for Reversal:

Must contain:

- a reference to the original claim and the judgment appealed from
- detailed reasons for the appeal - grievances / aggravji
- a request that the original claim be allowed (if filed by the plaintiff) or dismissed (if filed by the defendant)

This appeal is deemed to include a request for annulment (and vice versa)

The Appeal

Application for Variation:

Must contain:

- a reference to the original claim and the judgment appealed from
- detailed reasons for the appeal - grievances / aggravji
- specific reference to what variations are being sought

The Appeal

The appeal and reply shall be supported by all relevant documents. Additional documentation may only be presented with the Court of Appeal's permission.

New witnesses at this stage are not allowed:

- unless the other party consents
- it is proven that the witness could not have been produced at first instance
- the witness was deemed irrelevant by the first court and the appellate court disagrees
- the appellate court is satisfied of their necessity

Once the written proceedings are closed, the parties make oral submissions during the hearing, and then the appeal is deferred for judgment.

The Cross-Appeal - Appell Inċidentali

Art. 240 COCP

This is an appeal from heads (sections) of the judgment which are not appealed from in the original appeal.

May be filed by any party as long as that party has not already filed an appeal.

Parties intending to use this procedure must declare it in their reply to the original appeal.

Considered a stand-alone appeal.

Served on parties who are given 30 days to reply.

E.g.: The First Hall Civil Court has decided on Joe Borg v Mary Attard. Borg is not too happy with the decision but does not appeal. Attard on the other hand appeals requesting a partial variation. Upon receiving the appeal, Borg decides to not only reply to the appeal, but also file his own cross appeal on the sections of the judgment which Attard did not appeal from.

The Cross-Appeal - Appell Inċidentali

Art. 240 COCP

If the original appeal is abandoned / dropped, the cross-appeal may continue.

However, if the original appeal is deemed null, then so is the cross-appeal, as it is contingent on the original appeal's existence - the Courts consider it as an extension to that original appeal.

Desertion of Cases

Desertion: A means by law to punish the inaction of the plaintiff / appellant, which would lead to unnecessary delays in proceedings.

Needs no formality from the parties - the Court can decide on it alone by means of a decree.

Effects: In the first instance it operates as abandonment of proceedings but not a loss of the right of action. In the second instance it leads to an automatic res judicata.

Happens either when the written pleadings take more than 6 months / 1 year (first / second instance) or when the case is adjourned *sine die* - i.e. after the plaintiff fails to appear for at least 3 consecutive sittings.

Discontinuance of Cases

This is known as ċessjoni / rinunzja tal-atti

It is essentially the plaintiff withdrawing their acts, but it can also happen if the defendant remains not notified due to the plaintiff's inaction (*latter is more akin to desertion*).

Happens by means of a note at any stage before judgment declaring that they are renouncing to the case.

Effects: Same as desertion, and case is closed without judgment; expenses are (automatically) borne by the plaintiff; plaintiff loses the right to initiate another case on the same subject-matter before expenses are paid.

If the withdrawal is not unconditional, the defendant can object and ask the Court to continue with the proceedings.

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