

Diploma in Law

Lecture 9: Judicial Procedure - Pleas

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**Diploma in Law
(Malta)**

Today's lecture:

- The nature of Pleas
- Recusal
- Jurisdiction
- Competence
- Capacity
- Lis Alibi Pendens
- Connection of Actions
- Benefit of Discussion
- Falsification
- Change of Parties
- Nullity of Acts / Proceedings
- Res Judicata



What are Pleas?

No COCP definition, but from the forms listed (Art. 728 et seq COCP) and jurisprudence we understand them to be:

- **any submission of fact / law**
- **intended to neutralise the plaintiff's claim**
- **or act as an obstacle or bar to the claim**

Therefore it is always brought by the defendant to oppose, nullify, or limit the action.

Pleas may be **peremptory or dilatory** - they either affect the merits of the case or postpone the issue. Both can be of a substantive or procedural nature.

Substantive or procedural - attacking the substantive law of the action or a defect in the procedure followed by the plaintiff.



Peremptory pleas

Have a bearing on the merits of the case and can not only extinguish the proceedings but the civil action in itself.

May be raised at any time during the proceedings, even at second instance (barring pleas of desertion and jurisdiction).

Substantive peremptory pleas: intended to extinguish the demand, meaning the plaintiff cannot start the action afresh. If successful, the Court will not go into the merits of the case.

Procedural peremptory pleas: intended to extinguish the proceedings, arguing that the plaintiff failed to observe the proper formulation of the case. Here the plaintiff can start afresh. This can also be considered dilatory as it merely delays the eventual decision on the merits.

Dilatory pleas

Merely delay the eventual decision on the merits - so the plaintiff's action is not completely extinguished.

Substantive dilatory pleas: intended to delay the exercise of the right. E.g. a plea that the term of a payment that is 'due' has not yet lapsed.

Procedural dilatory pleas: intended to delay the proceedings until a particular procedure is observed. E.g. a defendant has not yet been properly notified of a judicial act, or a judicial act does not have the necessary requisites.



Dilatory v Peremptory pleas

The distinction lies in what the plea attempts to achieve, their temporal effect, and the order in which they may be raised.

Temporal effect:

Dilatory pleas on merits have a **temporary** effect (to postpone) and are raised at the beginning of the proceedings.

Peremptory pleas on merits can **permanently** extinguish an action and can be raised at any stage.

Dilatory pleas on proceedings also suspend proceedings **temporarily** until the issue is rectified.

Peremptory pleas on proceedings are also **temporary** as a fresh demand may be submitted.



Dilatory v Peremptory pleas

The distinction lies in what the plea attempts to achieve, their temporal effect, and the order in which they may be raised.

Order:

Peremptory pleas may be raised at any stage due to their permanent effect on the case.

Dilatory pleas (and peremptory pleas on proceedings) must be raised *in limine litis* - before the pleas on merits are filed, as they are temporary in nature.



Raising pleas

728. In actions instituted by sworn application, all pleas - dilatory or peremptory on the merits - must be raised in the sworn reply. Pleas on the merits are raised without prejudice to dilatory pleas. No other pleas can be raised at a later stage without the Court's permission if it is satisfied that there are valid reasons for them.

731. This shall not apply to pleas which by express provision of the COCP may be raised at any stage, or to pleas the reason for which arises during the trial.



The Pleas



Plea of Recusal - challenging judges / magistrates

Art. 733 et seq COCP

General rule: Judges may not be challenged / cannot abstain from sitting in any cause.

Exceptions:

- relation to any of the parties by consanguinity or affinity in a direct line
- relation by consanguinity or affinity in the degree of brother, uncle, nephew, grand-uncle, grand-nephew, cousin
- tutor, curator, agent, administrator, or presumptive testator or heir of any of the parties
- previously advised, pleaded, testified, or written on the cause or on any other matter connected therewith
- direct interest in the cause - theirs or their spouses
- where advocate is their offspring, sibling, spouse, or descendant
- where the judge / spouse have a case pending against any of the parties

Plea of Recusal - challenging judges / magistrates

The judge may choose to abstain from a cause by making a declaration before the trial either verbally in open court or in writing. The parties are free to consent to the judge to continue hearing the cause even if any element leading to recusal exists.

The plea of recusal must be raised by the parties in open court, with proof of the reasons alleged. It must be raised *in limine litis* unless the party declares on oath they were not aware of the issue before.

The judge shall decide on this plea and no appeal can be made. If three judges are presiding, they shall decide together.

If the plea is upheld, the judge/s will order the surrogation of another judge in their stead.
If the plea is rejected, the judge will carry on hearing the trial.



Plea of Jurisdiction of the Court

Art 741 et seq COCP

Jurisdiction is the power with which each authority exercises its functions. **Competence** is the measure according to which such power is distributed.

The Court / Board / Tribunal's **jurisdiction** can be contested where:

- the action is not within the jurisdiction of the courts of Malta
- the action is brought before the wrong court (in which case the acts are transferred)
- the privilege of being sued in a particular court is granted to the defendant



Plea of Jurisdiction of the Court

a) the action is not within the jurisdiction of the courts of Malta

The Maltese courts have jurisdiction on:

- all citizens of Malta, unless they have their fixed domicile elsewhere
- all persons domiciled / residing in Malta
- persons with property in Malta
- persons who have contracted obligations in Malta, as long as the action is related to that obligation, and the person is physically present in Malta
- persons who have contracted obligations abroad but agreed to carry them out in Malta and are physically present in Malta
- persons who have carried out obligations in favour of a subject of the Maltese courts, if the judgment can be enforced in Malta
- persons who voluntarily submit to the jurisdiction of the Courts (expressly/tacitly)

Anything beyond this list cannot be heard by the Maltese courts.

Plea of Jurisdiction of the Court

a) the action is not within the jurisdiction of the courts of Malta

This jurisdiction is not extinguished if a foreign court also has jurisdiction. In this case our courts may choose to stay the proceedings.

This plea cannot be raised because the parties had agreed to submit to arbitration, and the court may stay proceedings as it deems fit. It may still decide on precautionary acts.



Plea of Jurisdiction of the Court

b) the action is brought before the wrong court

This refers to arguments on the specific civil jurisdiction, which can refer to:

- the domicile of the parties;
- the value of the claim (ratione valoris)
- claims of an uncertain or indeterminate value (e.g. tutorship)



Plea of Jurisdiction of the Court

c) the privilege of being sued in a particular court is granted to the defendant

This is what is known as the *privilegium fori* - generally only applicable to Gozo courts. Residents of Malta are sued in Malta, while residents of Gozo are sued in Gozo. If more parties live in Malta, then Gozo may deny jurisdiction (and vice-versa).

Privilegium fori is inapplicable if:

There is an equal number of parties from Malta and Gozo; or

The action concerns an obligation in a particular island (may be claimed but if not, it is waived)

Plea of Jurisdiction of the Court

The plea of jurisdiction is **dilatory** (delays) so it must be raised in limine litis and only at first instance.

If it is not brought up at that stage then the party is deemed to have renounced to that plea, and the Court is given jurisdiction by submission.

This plea may also be raised by the court ex officio, but it must still do so in limine litis. If several courts decline jurisdiction, the Court of Appeal decides on the matter.



Plea of Competence of the Court

Art 741 et seq COCP

Competence is the power of the particular court to decide the case before it.

The Court / Board / Tribunal's **competence** can be contested where:

- the action falls outside the jurisdiction of the courts of Malta
- the action is brought before the wrong court (in which case the acts are transferred)
- the privilege of being sued in a particular court is granted to the defendant

If the Court agrees that it is not competent, the plaintiff will have to file the action afresh.
Competence may be raised at any stage of the proceedings.

Plea of Capacity of the Parties

Art 780 et seq COCP

An action must be directed against whom the interest lies - *il-legittimu kontradittur*. The general rule is that there is capacity, and incapacity must be proved.

A plea challenging the procedural capacity of a party is **procedural** in nature, but it is **peremptory**, as if it is upheld, the action is extinguished.

Plea of capacity can be raised where the other party:-

- is under a legal disability and cannot sue / be sued;
- are suing / being sued on behalf of a third party without the proper authorisation.

Plea of capacity cannot be raised against:

- the Curia
- the Attorney General / State Advocate
- Gozitan public officials re. matters pertaining to their office
- bodies with a distinct juridical personality

Plea of Capacity of the Parties

Who cannot sue or be sued?

- **Minors:**

- unless they have been emancipated to trade, or
- have been given express consent by their parents / guidance to proceed without them; or
- who are bringing an action against their parent, as long as they are represented by a tutor / curator *ad litem*

Minors can be sued through the person exercising parental authority / tutor / curator

- **Persons who are declared insane**

- **Persons who do not have the free exercise / administration of their rights**

Both can be sued through their tutor / curator / curator ad litem



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CAMILLERI PREZIOSI
ADVOCATES

Plea of Lis Alibi Pendens

Art 792 et seq COCP

The Lis Alibi Pendens plea argues that another court has already been seized with the same action, and that therefore there should not be two suits pending before two different courts on the same matter.

3 elements are required for this plea:

- the action on the same claim is already pending before another court - *the date of filing of the action determines which court has been seized first*
- the identification of the two actions - *there cannot be more than 1 judicial relation between the same persons on the same merits at the same time*
- the competence of the first court - *the second court will defer to the first only if it is satisfied that the latter is competent to hear and decide the case.*

This is a **peremptory** plea that may be raised at any stage.



Plea of Connection of Actions

This plea can be raised if:

- two or more actions;
- are brought before the same court; and
- are connected in respect of their subject-matter; **or**
- the decision in one will / may affect the other/s.

If this plea is upheld, the Court can order that the cases are tried simultaneously. Separate judgments will however still be given at both first and second instance.

This plea is **peremptory** in nature.



Plea of Benefit of Discussion

Art 795 et seq COCP

This is a **dilatory plea** that can be raised against the payment of a debt for which the defendant is not personally or principally bound, but is bound only as a third party in possession or as a subsidiary surety.

Therefore the defendant must be only liable in subsidium and to the extent of the shortfall from an enforcement against the principal party.

If the plea is upheld, the defendant deposits a sum fixed by the court that meets the costs of the procedure and the proceedings are suspended to allow the plaintiff to bring the action against the principal debtor.

If those actions do not satisfy the full claim, then the cause against the third party may continue for the remaining amount. If the claim is satisfied, the defendant will be discharged.



Plea of Falsification

Art 802 et seq COCP

Raised when it is believed that a document produced in judicial proceedings is claimed to be false. This plea may be raised by any party against whom it is produced / the party to whom it is attributed. If the Court believes there are strong grounds to uphold this plea, it shall order the party who produced it to be brought before the Court of Magistrates to be dealt with according to criminal law. Irrespectively, if the Court believes the document has no effect on the merits of the case, it may continue to hear the case normally.



Plea of Change of Parties (Death / Status)

Art 806 et seq COCP

Death (trasfuzjoni):

Where a party to a suit dies, their heir or executor or any other interested party may make an application requesting the Court to allow them to continue the suit in substitution of the deceased.

Where this is not done, the other party may request that the case is continued in the name of the presumptive heir/s, if known, who then have a month to declare their intentions.

In their absence, the Court will appoint a curator ad litem to represent the deceased, who will attempt to identify and locate the heir/s, and will be asked to declare their intentions.

If after 6 months from the death no application is made, the case shall continue in their name, and judgment shall then be enforceable against the heir/s.



Plea of Change of Parties (Death / Status)

Art 806 et seq COCP

Status (Legittimazzjoni):

Where the status of a party to a suit changes, then that party may be replaced - e.g. a director resigns and a new person acts in that position.

The person wishing to take up the case files an application requesting authorisation from the Court to be considered as an addition or replacement of the concerned party.



Plea of Nullity of Acts and Proceedings

Art 789 et seq COCP

The law imposes **nullity** where a procedure laid down by the law is not observed. Generally speaking, if an act / proceeding can be remedied, the plea is not upheld.

Jurisprudence has made the following rules on nullity:

- plea cannot be raised if it concerns a res judicata judgment (other remedies are available, e.g. retrial)
- nullities cannot be through jurisprudence, but must reflect a specific law
- something null from the start cannot be validated by the passage of time
- judicial acts are null if they lack the necessary conditions as expressly stated by law



Plea of Nullity of Acts and Proceedings

Art 789 et seq COCP

The judicial acts which can be challenged by this plea include **judgments, writs of summons, judicial letters and protests, and warrants.**

The plea of nullity of judicial acts is admissible if:

- the nullity is expressly declared by law
- the act emanates from an incompetent court
- contains a violation of the form set by law and the violation has caused the party prejudice which cannot be remedied
- the act is defective in any of the essential particulars declared by law

and the defect cannot be remedied.



Plea of Res Judicata

For this plea to be upheld, three elements must subsist:

- *eadem personam* - same parties / juridical identity

This is crucial because a judgment generally impacts the parties to the case only (not third parties)

- *eadem res* - same object

This requires the same merits

- *eadem causa petendi* - same cause

There must also be the same demand. A new case for a different demand is not bound by a previous judgment.

Res judicata means that the judgment is an established truth; irrevocable, valid, and definite, and cannot therefore be subject to fresh proceedings.



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