PRE TRIAL PROCEDURES AND ALTERNATE DISPUTE RESOLUTION

Geoffrey Alagaratnam
President's Counsel

The Pretrial process, speedy disposal of cases, Alternate methods of Dispute Resolution (ADR) have become topical once more

Specific pretrial procedures were incorporated by an amendment of the Civil Procedure Code (CPC) by Act No.08 of 2017.

This amendment aimed at speedy disposal of actions towards shortening the trial time apart from providing an alternate method of dispute resolution through the possibility of negotiating a settlement at the pre-trial stage.

BACKGROUND TO THE INTRODUCTION OF THE CPC AMENDMENT ACT AS PROVIDED BY THE MINISTRY OF JUSTICE IN 2016 DECEMBER:

The Ministry of Justice set out the basis for the proposed amendment as follows.

The long and undue delay encountered by the litigants in the course of administration of justice seriously undermines and subverts the public confidence towards the judicial process. Financial difficulties experienced by the litigants aggravate the desperate plight even further. Taking all these as matters of concern, to expedite trials, the Civil Procedure Code is sought to be amended to introduce pre-trial procedure.

The pre-trial procedure provides for the trial judge to reach certain inferences and take viable measures by which the procedure itself speeds up the disposal of trial proceedings. Such inferences are reached by obtaining recognition of facts and documents material to the case, refraining from redundant proof and undue delay, consolidation of two or more pending cases and any such other and further measures that becomes appropriate for quick disposal at low cost.

Process of Enactment:

The proposed Bill was initially submitted to the Cabinet Sub-Committee on Legislation. Upon incorporating its recommendations, the Legal Draftsman sent the Bill for which the certificate of the Attorney General had been obtained stating its constitutionality. **The Bill for which the approval of the Cabinet of Ministers to present same in Parliament had been granted was sent to the Sectoral Supervisory Committee on 04.04.2016.**

The pre-trial procedure section in the amendment provides for the trial judges to reach certain inferences and take measures by which the procedure itself speeds up the disposal of trial proceedings.

The Bill was passed by Parliament on 24-05-2017 as Act No. 08 of 2017.

The amendment has received mixed reactions quite apart from it encountering difficulties in its implementation.

Problems in Implementation

The profession has had several misgivings about the measures set out in the amending act, perhaps justifiably, but the time has come for us to explore measures for speeding up trials and procedures not merely due to the maxim justice delayed is justice denied (which can also meet with the counter that justice hastened is also justice denied), but principally because the law has to serve the people and should not be perceived by society as long drawn out, messy and stressful apart from being expensive.

Pretrial procedures as set out in the amendment should be looked upon as a welcome initiative notwithstanding any deficiencies it may have. The aim should be to iron out the creases and move forward rather than conveniently dump the whole amendment. Prior to considering aspects of the Pretrial procedure set out in the enactment we appear to have lost sight of the Pretrial steps already available in the Civil Procedure Code which in substance is older than a century.

The volume of litigation has increased exponentially over the years. Pre trial aims at shortening the otherwise lengthy and often unnecessarily lengthened trial procedure due to delaying tactics of both sides, and sometimes frivolous, unmeritorious and irresponsible objections that could baffle even the intelligence of the average man on the street!

CIVIL PROCEDURE CODE PROVIDED FOR PRE TRIAL STEPS EVEN PRIOR TO THE AMENDMENT

Old as it is (1899) the Civil Procedure Code even prior to this amendment related to pre-trials had its own mechanisms for shortening the time taken for trial and to elucidate the truth in the interests of justice through Pretrial provisions. There were various provisions which enabled avoiding a long drawn out trial.

Chapter XVI of the Civil Procedure Code provides for Interrogatories, Discovery, Inspection, Production and Impounding of Documents. In particular, provisions on Interrogatories, Discovery, Impounding of Documents can be used prior to the trial proper. Unfortunately these devices are seldom, if not ever, used. The allegation has been made that these mechanisms are avoided by members of the profession since they may shorten the number of trial dates!!

I recall the late Queen's Counsel Vernon Wijetunge articulating the virtues of Interrogatories stating that if such a device was properly and skillfully used, quite apart from speeding or shortening the trial it would often help to win the case or even secure a settlement. The point of emphasis is that even prior to the amendment related to pre-trial steps the Civil Procedure Code did provide mechanisms to expedite trials but perhaps there has to be a will, mainly in members of the profession, if one is to find a way to speed up trials!

Section 94(1) reads:

> *Any party may at any time before hearing, by leave of the court to be obtained on motion ex parte, deliver through the court interrogatories in writing for the examination of the opposite party, or where there are more opposite parties than one, any one or more of such parties, with a note at the foot thereof stating which of such interrogatories each of such persons is required to answer;*
>
> *Provided that no party shall deliver more than one set of interrogatories to the same person without the permission of the court, and that no defendant shall deliver interrogatories for the examination of the plaintiff unless such defendant has previously tendered his answer, and such answer has been received and placed on the record.*

Interrogatories therefore can be sought ex-parte and before the hearing. It is significant to note that the Civil Procedure Code uses the words Hearingand not Trial. Hearing in its strict sense is where evidence is heard by the auditory senses (oral evidence heard by the ear). Trial usually commences upon the Admissions and Issues being recorded. The Pretrial amendment, Section 80A(2) and 142G, has however relegated recording of admissions and issues to a Pretrial as contrasted to Trial stage and repealed Sections 146, 147 and 148 of the Civil Procedure Code which envisaged recording of Admissions and Issues at the commencement of the Trial proper. Yet Section 94(1) permitting interrogatories to be served on the opposite party appears to permit invoking Section 94(1) service of interrogatories after conclusion of Pretrial steps but before evidence is heard at the trial.

Answer obtained consequent to service of interrogatories can be used towards Admissions and Issues and thus notwithstanding Section 80A(2) and 142G it is arguable that parties may be able to suggest amendments to Issues or Admissions pursuant to Interrogatories served after Pretrial but before hearing.

Sections 95 to 100 of the Civil Procedure Code deal with the types of interrogatories that may be served/not served and the right to refuse to answer and consequence of wrongful refusal to answer (Section 109, CPC). The Plaint can be struck off or Answer rejected with consequence of dismissal or ex-parte trial.

Sections 104 to 105 provide for ex-parte applications before hearing to notice opposite party to provide documents referred to in opponents' pleadings or affidavits and for obtaining copies of same. It provides for Court ordering such production where a party refuses to and the modalities and procedure involved. The consequences of wrongful refusal to comply are spelt out in Section 109 of the Civil Procedure Code(similar to consequences for failing to answer interrogatories).

Section 101 of the Civil Procedure Code reads as follows:

> *(1) Either party may, by a notice issued by order of court to be obtained on motion ex parte within a reasonable time not less than ten days before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document*

in evidence) the genuineness of any document material to the action.

(2) The admission shall also be made in writing, signed by the other party or his registered attorney, and filed in court.

(3) If such notice be not given, no costs of proving such document shall be allowed, unless the court otherwise orders.

(4) If such notice is not complied with within four days after its being served, and the court thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the action.

Section 102 of the Civil Procedure Code is as follows:

(1) The court may, at any time during the pendency therein of any action, order any party to the action to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the action, and any party to the action may, at any time before the hearing, apply to the court for a like order.

(2) Every affidavit made under this section shall specific which, if any, of the documents therein mentioned the declarant objects to produce, together with the grounds of such objection.

Section 103 of the Civil Procedure Code reads:

The court may, at any time during the pendency therein of any action, the production by any party thereto or such of the document in his possession or power relating to any matter in question in such action or proceeding as the court thinks right; and the court may deal with such documents when produced in such manner as appears just.

The above cited provisions of the Civil Procedure Code disclose vital Pretrial steps and even steps to be taken during trial (Vide Sections 102(2) and 103 of the CPC) towards expediting the process with provision for some consequences such as dismissing a case or proceeding ex-parte for non-compliance.

Pre Trial Enactment of 2017

By Act No. 08 of 2017 Chapter XA was introduced as a new Chapter in matters related to pre-trial and pre-trial steps.

This amendment was enacted after views of the Judges Training Institute and the Bar Association were obtained. The views of the Bar Association were forwarded after conducting a seminar for which wide participation was called for.

A close look at these provisions confirms the objective of avoiding a long trial apart from providing the possibility of mediation and settlements at various stages of the action.

Section 142D of the Civil Procedure Code (Amendment) Act No. 8 of 2017 reads:

At the Pretrial hearing, the Judge conducting the Pretrial hearing shall have power to question the parties or call upon them to state their respective cases with a view to –

a) Ascertaining jurisdictional issues;

b) Elucidating the matters in dispute;

c) Obtaining admissions of facts and of documents;

d) Consolidating two or more pending cases;

e) Identifying the number of witnesses based on admissibility and relevancy inclusive of expert witnesses;

f) Appointing a court Expert;

g) Assisting the parties to arrive at an adjustment, settlement, compromise or other agreement, with regard to the matter in issue in such action and may, for that purpose, suggest terms of settlement which in his view is reasonable, having regard to all the circumstances of the case;

h) Ascertaining and recording any other matters which would be helpful in the speedy disposal of the action; and

i) To take all steps and make all such orders as may appear to him to be necessary or desirable, for the expeditious and inexpensive disposal of the action.

This places the Judge in a somewhat proactive inquisitorial position – not a mere silent umpire or arbiter passively hearing a case and delivering his order whether it shocks either party or not! This also permits a persuasive role in reaching (not forcing) a compromise or settlement. (Subsection g))

Section 142E of the CPC Amendment Act reads:

At the Pretrial, the Judge conducting the Pretrial hearing may exercise the powers conferred on him by Section 142D and shall make an order –

a) Regarding any question of fact determined by a written report from a person having special and independent knowledge of that fact;

b) For the issue of a commission under Chapter XXIX of the Code inclusive of an order for the appointment of an independent expert to inquire and report on any question of fact or opinion; and

c) An order to issue certified copies of any documents in the custody of any Public Office, Public Corporation, Provincial Council or any Local Authority.

Section 142F of the Amendment Act reads:

(1) At the Pretrial, the Judge conducting the Pretrial hearing shall record:-

a) The admissions by the parties of facts or documents or contents of documents;

b) The agreement of the parties with regard to any matter;

c) The agreement of parties to accept and abide by:

i. Any decision of the judge conducting the Pretrial hearing arrived at in such manner as may be agreed upon between the parties and entering of judgment in accordance with such decision;

ii. Any decision of the Judge conducting the Pretrial hearing on any or all issues of fact or law and entering of the judgment in accordance with such decision;

d) Any agreement of the parties:

i. With regard to the mode of proof of any fact or document;

ii. As to the number of witnesses to be called;

i. To consolidate two or more pending actions;

e) Withdrawal of actions; and

d) Adjustment, settlement or compromise of actions.

(2) When the Judge conducting the Pretrial hearing records an agreement of the parties under paragraph (c) of subsection (1) such Judge shall also read out and explain the effect of such agreement to the parties concerned and record the fact that the parties do understand the contents of such agreement and the effect thereof. The parties shall be required to sign the agreement.

The above provisions disclose extensive powers of the Judge towards sorting out many matters related to evidence, modalities of proof and estimating the time to be taken if not to shorten such time.

However, in most Courts what passes off for pre-trial today is a mere filing or settling of Admissions and Issues and fixing for trial. The result is that an extra day is taken whereas previously even without pre-trial steps the trial proper may have commenced on the very day Admissions and Issues were recorded !!.

Apart from the need to have a positive attitude in implementing Pre Trial steps effectively there is a question of infrastructure. It is best if pretrial steps are handled by a Judge other than the judge Conducting the trial proper. This would prevent the possibility of any bias or pre conceived notions affecting the trial proper if the pretrial judge handles the trial as well. The Pre Trial Judge has to go through the documentation of both parties, admissions and issues among other matters and is best advised to be proactively involved especially in mediation towards early resolution. If mediation fails especially after the pre trial judge has looked at all aspects then the trial is best left to another judge. To achieve this most courts may require more than one judge where one handles the pre trial and the other the trial or where there are two available Judges both of them handle pre trials on an agreed basis and pass on the trial to the other.

At present the Ministry of Justice (MOJ) is studying the existing pre trial steps to consider its successes and failures and the way forward.

ALTERNATE DISPUTE RESOLUTIONS (ADR)

Pre trial also encourages mediation and settlement. This brings to focus the need for Alternate Dispute Resolution (ADR). In many jurisdictions ADR has been successfully adopted to significantly reduce the trial roll or number of cases going to trial and to and speed up resolution of disputes. It's only the hard core cases that go for trial where pretrial is properly resorted to. A few years back I happened to meet the then Chief Justice of Trinidad and Tobago – a friend of the Lawyers for Cricket in Sri Lanka of which Late Supreme Court Justice Suresh Chandra was actively involved especially as an Official. This Chief Justice informed a body of the Commonwealth Lawyers Association that at least 60 percent (60%) of the cases instituted in his country are resolved through mediation.

Forms of ADR

Alternate Dispute Resolution can take many forms such as mediation, conciliation and Arbitration. In Sri Lanka we have Arbitration mainly for commercial disputes. The 1996 statute though useful would require amendments to be more effective. Our Mediation Act deals with small money claims and issues and perhaps could be expanded to cover a wider area. The Chamber of Commerce has been exploring the setting up of an effective mediation mechanism towards amicably resolving commercial disputes. Sri Lanka therefore though it does have mechanisms for ADR related to various areas or matters, yet ,not enough has been done to make ADR truly effective.

Culture and thinking on ADR needs a Paradigm Shift

This is compounded as in the case with most laws by a deficient if not diffident attitude and culture which pervades the various stakeholders. Lawyers in particular are accused of thriving or living on dates or flimsy postponements or on minimum or deficient hearings due to heavy workloads in courts or for other reasons which end up in postponements to a distant date.

Even where parties desire a settlement lawyers are accused of delaying same on the basis that "time is not yet ripe for settlement" i.e. let the case run a few more dates before settling as with each date "the clock is ticking", and a fee earned with each tick!!

Be it Pretrial or ADR unless our thinking or culture changes the entire legal system, if not the trial process, will cease to be meaningful or worthwhile to society which the law is expected to serve.

The Late Thiagalingam QC is said to have often relied on the quote "A good victory is better than a bad settlement." A victory after a long drawn out trial produces a winner and a loser! The parties perhaps leave the court with enmity. The trial also has its toll on human emotions and time quite apart from substantial expenditure.

The aim of ADR is for early informal settlement with perhaps a win-win situation for both sides.

ADR may seem to take the bread and butter away from the profession! Yet there is a failure to realise that pursuit of effective ADR mechanisms apart from avoiding laws delays and providing speedy informal and perhaps friendly resolution of the problem demands a different attitude and a specialized skill for negotiations etc providing new avenues for lawyers to enhance their skills and to also think differently.

In Alternate Dispute Resolution especially Mediation and Conciliation a lawyer requires skills at negotiation. The lawyer cannot think traditionally with the determination of winning at all costs, hopefully not by hook or crook!? There has to be a willingness to negotiate or bargain with sincerity (not to pull a fast one !). The need for some compromise ,give and take or sacrificing or ceding of some positions may be called for. One cannot be rigid. The whole purpose of ADR is to avoid time consuming and expensive litigation with its pitfalls of uncertainty by having an early informal resolution, with a win-win situation for both parties.

Arbitration proceedings presently conducted in Sri Lanka are replete with technicalities and tardiness with short and distant settings,

Mediation and Arbitration should demand very short adjournments if not sittings on consecutive dates if all stakeholders are truly committed toward early resolution. In other jurisdictions lawyers involved in mediation, negotiation or arbitration have a greater source of income due to the special skills, speedy disposals and clients' willingness to pay extra for quick disposals.

Traditional Litigation Outdated?

Rather than indulge in standard traditional forms of litigation in courts, lawyers willing to take up the challenge of acquiring special skills for ADR processes should find themselves to be of greater meaningful service to the profession and clients. The legal profession should be willing to adapt to the demands of changed circumstances and be willing to acquire new skills towards stepping up to new demands.

The rates of disposals of cases in Sri Lanka is appalling. Criminal cases especially High Court proceedings could take ten (10) years to conclude inclusive of appeal.

Commercial cases/trials could take two to three years for conclusion quite apart from further time taken where an appeal is preferred. Other civil trials too take a similar period. These

periods are well behind the disposal rates of many other jurisdictions.

Attitudes of the Public and Stakeholders to the Profession

There is also the common belief that successful lawyers are gauged by the number of cases they have per day as well as the fact that they are in courts every day! This fails to realize that the volume of cases affects quality of professionalism as well as the fact that taking on an excessive number of cases by a single lawyer may necessitate postponements in some, with no work done and a general frustration of the client with the profession and the system.

A Canadian lawyer who I happened to meet stated the converse. He stated that a successful lawyer should not be in court every day. He should have either negotiated the matter or resorted to speedy ADR mechanisms which will earn him the gratitude of his client who has been spared the hassle and costs of traditional tardy court procedures and is willing to pay well for a speedy resolution. This Canadian lawyer informed me that if a lawyer is in court everyday he is not considered a successful lawyer as he has caused more inconvenience and expenses to his client! It is therefore a question of attitudes or the thinking of lawyers and society as to who is a successful lawyer.

The fundamental question we need to ask ourselves is whom does the legal system serve? Is it society or the legal profession? Does society look at the legal system as an exclusive privileged set up for the profession and perhaps also only for the rich in which if lucky the less privileged may get justice? Is Justice one big gamble?

Law should be People Friendly

We think it great if a mobile or computer is user friendly. How client or society-friendly is the legal system? Consider the complex procedures and laws made more complicated by the Profession. Consider the costs, long drawn out trials or hearings, postponements, growing uncertainty (for whatever reasons) in outcome. Consider the perhaps confused or physically, financially and emotionally washed out client or litigant?. Are we in a happy or comfortable present state of affairs?

Pre Trial procedures and ADR mechanisms can alleviate all this and go a long way in making the law more people friendly, and truly of service to society ,the stakeholder for which the legal system and for whose benefit the end result is intended.

ARE WE UP TO IT ?

Author can be contacted at email:
gjta@sltnet.lk