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Case Management Enhancement and Case Complexity and Case Delay Studies

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Executive Summary

CASE MANAGEMENT, AMENDMENTS AND ENHANCEMENTS

I. A Preliminary Observation

The Jordanian system was modeled on the first phase of an American system applied to the federal courts in the Northern District of California. There the Federal Magistrate takes over the initial management to a case, sorting out the issues in an early conference with the lawyers and their clients and attempting to settle the case. Since the Magistrate is not the trial judge he or she can talk settlement with the parties and their clients without danger of developing a bias in the trial of contested issues.

In the American system, partially copied in Jordan there is one major difference. The Magistrate has the full support of the trial judge who will try the case. The lawyers can be sure that if they are not cooperative in defining the real issues of dispute the trial judge will hear about it and inflict some sanction for non-cooperation. A lawyer in the copied system would not imagine that he or she could get by with not attending the case management conference.

In the copied system the Magistrate Judge would require that the lawyers not only attend but that they would arrive at the conference with a memorandum explaining each of their views as to the issues that need to be resolved and admissions. The memorandum would also include a description of any areas they think might require special attention such as the need for experts or extensive inquiry into records in the possession of third parties. In short the lawyers would come prepared for a working session which could control the way a case would be tried. They would have their personal schedules with them and expect that they would agree to deadlines for the progress of the case.

Though this system was sold to the attendant parties, which included lawyers and judges from Jordan, the system was only partially adopted. The authority implicit in the relation between the Magistrate Judge and the Trial Judge is not present in Jordan. If the system is to work it must be provided for.

II. Problems in Administering Article 59

In conversations with case management judges, presiding judges and several other judges with experience in case management in Jordan I find unanimous agreement that the following problems exist in administering the current case management rule.

1. Failure of lawyers to attend case management conferences.

2. Failure of the trial judge to honor the conclusions reached by the case management judge.
3. Incomplete pleadings – failure to include all of the evidence known to the parties.
4. Inadequate or false notification information.
5. Inadequate time to plead in complex cases.

Failure of lawyers to attend case management conferences.

The largest impediment to effective case management in Jordan is the failure of the lawyers to attend the case management meeting. In a large number of cases (perhaps 25%) there is a failure of direct service (jurisdiction is by publication) and no lawyer appears for the defendant. In cases where the defendant has an attorney, one or both of the parties often decide not to participate and await the transfer of the case to a trial judge.

There are several possible solutions to this problem:

1. Several of the judges interviewed suggested that the case management statute be amended to require attendance at and participation in the meeting. It was suggested that a fixed fine of 50 JD should be charged to a non-attending lawyer. If this were adopted it was thought that the fine should not be passed on to a client. (In some American jurisdictions the accumulation of fines in a year by a single lawyer or firm of lawyers must be reported to the bar discipline committee.)
2. The greatest approval among case management judges was to provide that failure to attend the case management meeting should be treated as any other failure to respond. A default judgment should be entered against the defendant or a dismissal of the case against the plaintiff. Where this solution is adopted in American systems the potential damage to the unsuspecting client is ameliorated by providing that the default or dismissal may be set aside within 30 days of the nonattendance by paying additional costs or fees to the system.
3. Almost all of the judges interviewed agreed that in all case the Case Management judge should proceed on the scheduled conference date to analyze the pleadings and prepare a memorandum of the issues to be resolved stating, based on the pleadings and accompanying documents, that no other evidence than is described or included in the pleadings will be admissible. This process would require an amendment to the present Article 59 to the effect that the memorandum based on the case management judges analysis will be conclusively binding on the trial judge to whom the case is assigned, unless a party wishing to be relieved of the strictures of the memorandum makes a motion accompanied by supporting affidavits stating why it was

impossible to participate in the meeting and why the interests of justice require that any specific part of the memorandum to be disregarded.

4. The least intrusive solution would be to provide that the memorandum of the Case Management Judge shall be followed by the trial judge unless an objecting party applies within ten days of the transfer to the trial judge to have specific provisions set aside on the basis that the case management judge has incorrectly reported the agreements and disagreements of the parties.
5. The practice now in effect in Central Amman interprets the Case Management Article (59) to require that any evidence listed in the pleadings, sought from third parties, must be requested at the case management meeting or otherwise will not be obtainable by action of the court. This rule if followed by the trial court effectively precludes the introduction of such evidence. Since the lawyers do not at the time of the case management meeting know to whom the case will be assigned for trial, many lawyers choose to attend the meeting because they do not want to risk its assignment to a judge who will follow the case management judge's ruling.
6. It was suggested by several judges that the clients or (in the case of a business entity) a qualified representative should be required to attend the case management meeting. In most places throughout the world where case management meetings are held the clients are required to be present or immediately available for consultation with their lawyers

The process would be greatly enhanced if this suggestion were adopted. It would eliminate a pervasive practice reported by the case management judges and trial judges of adjourning a meeting so that the lawyer can confer with a client. This is particularly important in a meeting intended to provide an opportunity to reach agreements and explore the possibility of settlement.

It is my view, after studying the process in Jordan for many years, that numbers 3 and 6 will do the most to establish an effective case management system in Jordan

Failure of The Trial Judge To Honor The Conclusions Reached By The Case Management Judge.

The second major impediment to effective case management in Jordan is the failure of the trial judges to implement the decisions made by the case management judge.

An amendment to Article 59 providing that, in any case where a trial judge declines to follow the memorandum of the case management judge, the judge will write a memorandum for the record stating why it would have caused an injustice

to honor the contents of the memorandum. A copy of this memorandum shall be sent to the Chief Judge. The possibility that the Presiding Judge would review and record these decisions would provide a real incentive for compliance with a policy necessary to make Article 59 more effective.

Incomplete pleadings.

Some of the judges believed that the registrar has no authority to reject an incomplete pleading. Two of the presiding judges have directed the registrars office to review the proffered pleading and require its completion before it is accepted for filing. If this is a legally acceptable practice it should be adopted nationwide. If not the law should be amended to permit it. Any dispute between the lawyer presenting a pleading for filing and the registrar should be taken to the Case Management Judge for resolution.

Inadequate or False Notification Information

The principle problem in initial defendant notification is an inadequate place identification system in Jordan. With modern satellite mapping system available it would seem that this problem should be solved. The solution should have many obvious benefits to the government and is worthy of immediate attention.

Inadequate Time to Plead in Complex Cases

This subject is addressed separately in the description of the complex case study. Though the issue is involved in a small number of cases, those case have a large economic impact on the operation of business within Jordan and would be more expeditiously disposed if the following amendment to Article 59 were adopted.

1. In complex cases (as defined below) the case management judge shall have the authority to hold three or more meetings within a period of 120 days from the date the answer is served on the plaintiff to clarify the issues in the pleadings and to prepare a memorandum covering the points of agreement and disagreement.
2. The case management judge shall have the authority to designate a case as complex as soon as the file is received and will prepare a memorandum listing the criteria applied in designating the case as complex.
3. The case management judge shall have the authority in any case designated as complex to allow the defendant or any defendant to have an additional 60 days to answer the complaint. The case management judge may allow the government involved as a responding party to have an additional 90 days to answer the complaint. If additional parties are brought in to the case by third party procedures the case management judge may allow up to 90 days for the third parties to plead from the time they are served or intervene.
4. A case may be designated as complex and subject to the provisions of this article if, in the discretion of the case management judge, any one of the following factors is present: (*included for illustrative purposes*)

- a. There are four or more independently represented parties to the case.
- b. There are more than three international witnesses
- c. There are more than 10 national witnesses
- d. There are more than three factually unrelated claims
- e. There is a probability that there are three issues in the case requiring the appointment of an expert.
- f. There is a probability that there will be multiple applications to the court for special rulings as to evidence or jurisdiction.
 - i. There is a need for significant amounts of evidence from persons or entities not parties to the case.
- g. The subject matter of the case which experience indicates will involve more than 20 hearings before it is ready for judgment.
- h. The amount in controversy is such that the case will be broadly contested.

III. Roll Out of the Case Management to All Jordanian Courts

The process of providing case management to all of the courts of Jordan is progressing well. My visits to meet with the Chief Judge, Case Management Judge and Backup Case Management judges in North, East, South and West Amman as well as in Zarqa were very encouraging. The Judges seemed to be well informed about their work and have taken it on responsibly. It probably reflects on the training they have received and the support given them that the judges are going to the case management meeting prepared and that the Chief Judges are encouraging their efforts.

The communication between the case management judges and the trial judges who are receiving their cases is being encouraged by the Chief Judges. Notifications are being supervised and settlements are occurring in all of the courts where implementation has occurred.

It would be wise at this point in time to anticipate problems arising in the courts across Jordan as lawyers test the authority of the judges and as some lawyers challenge the limits of the system. A free and open discussion of problems among the case management judges from all locations would help to avoid confrontations and disputes. I strongly urge the Chief Justice and the Judicial Counsel to take the initiative in this matter and appoint a Standing Committee on Case Management to oversee the implementation and development of Case Management in the Kingdom. Without a central clearing point case management will get involved in disputes about how it should be used to be most effective. If such a committee were instituted it should meet regularly (perhaps quarterly) with case management judges to discuss and agree upon policies that will be consistent throughout the system.

IV. Planning for the Future

Perhaps it is time for all judges to begin thinking of themselves as Case Management Judges.

As noted above Jordan case management was partially adopted from an elaborate system that assumed that case management would not only begin with control of the case scheduling but would continuously control the process through the completion of the trial. Adoption of the full program would bring Jordan into the 21st Century and provide its citizens with one of the modern systems in the world.

Jordan is already in advance of many systems including the United States by providing a fact disclosure rather than a fact discovery system. If the Jordanian rules of Civil Procedure are followed it is possible to narrow the issues at an early stage and have the judges control the pace at which they are resolved. By introducing case management concepts at all stages of the proceeding it would be possible to cut the average time in half within a relatively short period of time. If every judge took responsibility for the scheduling of cases within the basic concepts of case management (as some already do) Jordan could be in the forefront of the international movement to provide for a fair and expeditious system of dispute resolution.

The ultimate system would differentiate between cases involving different processing needs. The proposal here is to recognize as soon as is feasible the fact that there are complexity factors that make a case predictably more difficult to schedule and manage. By creating a system to assign such cases to a judge who will manage the scheduling of all hearings around the time necessary to bring the evidence before the court, the unnecessary waiting times now present in such cases can be minimized. The presentation of evidence in a complex case needs to be planned and scheduled if justice is to be expeditiously attained. If the pattern follows the process in America, the recognition of the need for judicial management in complex cases will lead to the recognition that it is useful in the application to all cases. It is the first step in bringing the advantages of management to the whole system.

Two Proposed Case File Studies

Introduction

Closed case studies have been used for two purposes, to discover recurring problems that might be address systematically in the justice system and to assist in the design of case management systems. By discovering patterns of occurrence in the history of substantial numbers of cases problems can be identified that may be subject to interventions that reduce delay, mitigate injustices or otherwise make justice system run better.

Overcrowding in jails, backlogs caused by understaffed clerks offices, the dysfunctions in paying police overtime, attorneys who consistently come to court unprepared, and many other kinds of dysfunctional behavior are discovered and remedied as a result of counting the recurrence of problems generally not seen in ordinary operations.

Commonly today the reason for a closed case study is to provide the information necessary to design a functioning case management system. When the practices and culture of a particular legal community are carefully studied and documented it is possible to divide cases into processing categories in accord with their complexity. Difficult cases can be given a rational case management treatment different from easier cases. The amount of time allowed for necessary preparations and hearings can be fixed if the factors contributing to their complexity is understood.

There is no universal methodology or standard list of variables (data elements) that should be explored. The main question is, “What is one trying to find out? If delay reduction is the object of the inquiry the questions to be answered are what part of the process is taking too long. If the question is “how difficult will it be to bring all of the evidences and parties together to resolve the dispute.” the variables may be different. In both instances, however, the time between significant events is helpful in answering both questions. One sometimes starts the inquiry with an assumption that if any phase of the process appears to take more time than necessary complexity is the cause. It is equally probable without more information that delays are not the result of complexity but may just as well be results of intentional interference with the process. Discovering the delay points may assist in defining places that need more time but they also unveil dilatory practices that need to be separately addressed. Closed case studies do not solve problems, they help to define them.

Qualified person walk the track

A person or persons must observe the system and identify, based on experience with multiple systems, what causes cases to pass through the system. Though a thorough systems analyst can identify all of the decision points and the data that goes into each point it takes a procedural specialist to recognize the significance of the events and the way the principals (judges, lawyers and the parties) employ the rules to reach a disposition.

Not all of the processes are in the court record. Many cases are settled between the parties after they are filed with no court activity recorded. Third parties sometimes intervene and complicate an otherwise simple case. An awareness of the practices of the local legal community is important and is not readily available. The absence of this awareness can, however lead to the omission of factors that need to be taken into account in designing the study.

The effort described here as “walking the track” is not a system analyst’s diagram of everything that can happen. It is not a tracing of the paper flow through the system. It is an understanding of the dynamics of litigation in its broadest sense. If gratuities are extended to process servers to delay process or lawyers wait to file their case to get an odd or even number the practice needs to be understood before the data elements are defined and the actual study commenced.

In the process of walking the track the investigator should follow the information trail as it now exists. Reports are available on case activity. The investigator must understand the reports in detail. Definitions of the data entered into the system should be taken from the persons who enter the data not from a book of definitions found in the office. When the recorder records a court activity the investigator needs to watch the activity recorded so that the existing reports can be understood.

Objectives of the Two Proposed Studies

1. To identify quantifiable factors that make a case complex
2. To identify systemic causes of delay in Civil Actions in First Instance Courts.

Study 1, To Identify Case Complexity

1. My inquiries and observations in earlier years led me to conclude that while the civil judicial process was well designed to deal with routine cases it was somewhat dysfunctional in more complex cases. The requirement that there be full disclosure of the parties evidences in the pleadings works well when the matters in dispute are clear at the time the complaint is filed. An answer can be provided within the thirty days allowed.

When, however, the full nature of the claims and defenses are not known at the time of filing the pleadings the pleadings may be intentionally ambiguous requiring a substantial amount of time to make specific. The result in such cases is large number of hearings in which little progress is made toward resolving the important issues. An effective use of Case Management techniques can bring these cases to a more rapid and efficient resolution.

The first step in creating a special process for these cases is to identify the factors that indicate the need for early intervention in the fact gathering process so that the cases can be assigned for special proceedings.

Methodology

By interview and observation identify practices that lead to the delay of civil actions. This includes interviewing lawyers, judges and clerical personnel to record their observations. It also includes the review of a number of files to gain insights about interruptions in the continuity of proceedings.

Earlier inquiry (2006) generated the following list of factors that contribute to complexity.

Complexity Factors

1. Number of Parties
2. Subject Matter
3. Number of experts required
4. Motions
5. Evidence in the hands of a third party
6. Multiple loosely connected claims
7. Amount in Controversy

The question to be researched is whether there is information recordable at the inception of the case to provide knowledge of these (and possibly other) complicating factors.

After consultation with MASAQ, statistician, Radad, a two phase program appears to be the best approach. To get a sufficient number of complex cases to provide predictions that a particular factor or combination of factors will be significant, a review of 5000 cases based on a small number of factors is desirable. Based on the Case Management Assessment Study completed in 2006 it appears that 10% of the cases have 22 or more hearings, that their duration is more than two years and that the amount in controversy is more than 30,000 JD. By using these three factors to screen through 5000 cases, a sample of 500 closed cases drawn proportionately from all part of Jordan should provide a basis for analysis of complexity. Using these 500 as a sample the characteristics of these cases would be mapped using the following file items:

1. Case type
2. Experts required
3. Third party documents required
4. Number of motions
5. Number of claims
6. Appeal decision

Each of these items would be further recorded in the study with respect to whether the cases involved businesses, government agencies or private parties. An example or a questionnaire to be used by the data collectors is attached as exhibit A.

The first phase would capture the data from the entire country as a proportion of annual filings. The 500 cases would be taken on the basis of their probable complexity based on age at the time of disposition, total number of court sessions to reach a disposition and on the amount in controversy. The correlation of factors believed to be relevant to complexity that can be identified at or near the commencement of the case will provide the basis for separating such cases for the special processing attention they may need.

Study 2, Systemic Processing Problems

A number of delay causing problems exist in the practices and cultures of all legal systems that can best be dealt with at a system level. They are problems that can potentially occur in all cases and can best be solved by adopting uniform policies and procedures for their solution. A classic example has been the notification problem in First Instance Courts. The decisions by individual judges in individual cases does not address the problem at its source. It addresses the problem after it has been allowed to be extended in hundreds of cases. The solution is to monitor the progress of notification from its inception and intervene the first time there is a failure. This system solution was built into the case management act with substantial success. There are many such problems subject to system solutions. It is important to find these problems and to address them on a system basis.

Interviews with lawyers and judges combined with reviewing files revealed several areas where a systemic approach might solve delay problems.

1. Lawyer manipulation of the process to delay the obligation of their client to pay is pursued in a large number of the cases
2. The identification of and appointment of experts in cases where they clearly will not be needed.
3. Cases where the government is a party are often protracted because of lack of authority in the counsel representing the government.
4. Appeals of interlocutory matters are taken even when known to be improper to delay the action while it goes to the appeals court and returns.
5. Long lists of witnesses are presented even when there is no intention of using them.
6. Intentional provision of wrong addresses for witnesses.
7. Intentional failure to attend a hearing.
8. Alleging the possible settlement when no effort has been made.
9. Gratuities paid to staff personnel to avoid notice of hearings. (“you didn’t see me today” may accompany a favor bestowed)
10. Lack of a central address system for the Cities.
11. Lack of comprehensive intake screening.
12. Failure to pay the fees for expert witnesses often prolongs the time necessary to obtain an expert report

Not all of these can be specifically identified by a closed case study. Some will need system wide inspection to identify. In the most egregious situations good police investigation techniques may be required. Many of them can be detected by studying the reasons given for specific adjournments and their repetition. Such a study will provide the information necessary to isolate the problem and look for systemic solutions that go beyond a case by case approach.

A review of a number of files indicates that by studying the minutes of each session and recording the reasons given for adjournments patterns of lawyer and judicial behavior can be documented that will provide a basis for pursuing systemic solutions to problems. Using a mixture of automated case record and actual case files system behaviors not ordinarily detected can be mapped and analyzed so that specific measures can be taken to correct the problem and reduce delay.

The information about specific practices and behaviors will not solve problems but it will provide clear evidence that there are problems that need to be addressed.

Attached, as Exhibit B, is a format of the questionnaire that might be used to conduct a case file study of adjournments. It should be first used in Central Amman where the courts have had automated files for a sufficient time to provide easy access to minute entry information. It should be expanded to include samplings in courts outside of Amman when the useful nature of the information garnered is established.

The sample size for the first effort should be determined as information is gathered and processed to note the frequency of reasons for adjournment by several factors involved in predicting delay. In my experience dealing with the volume of cases involved in Amman, there will be a high proportion of cases involving “adjournments to consider” and adjournments “based on conflicting engagements”. A sample of 300 cases will establish the existence of these areas as major problems. The frequency of adjournments for change of attorney or judge will be much lower and will require a larger sample to quantify as to type of case or other variable. In short the size is dependent on testing for useful correlations and should be left open for review as data is entered and analyzed.

Included in this study is an item that, according to our brief file review, is important to know more about. The system needs to keep track of the number of cases in which notification is achieved by publication. This number correlated with the number of cases in which no power of attorney is filed on the defendants behalf would indicate a possible path to “virtual presence” adjudications that might be singled out for special case management handling. If virtually all of the collection cases of a certain size go through this process a special handling rule might be adopted that reduces the number of sessions required for them to reach a final disposition.

Appendixes

EXHIBIT A

Phase I, **Identification of Complex Factors Sample** Questionnaire Form

Case Number _____ Text
Filing Date _____ Date
First Instance Judgment Date _____ Date
Number of Hearings _____ Numeric
Amount in Controversy _____ Numeric
Power of Attorney for Defendant _____ Logical

Phase II, **Complex Factors Sample** Questionnaire Form

Case Type _____ Text (code)
Experts Required _____ Numeric
Third Party Documents
 From Government _____ Numeric
 From Business _____ Numeric
 From Private Parties _____ Numeric
Number of Motions _____ Numeric
Number of Parties
 Government _____ Numeric
 Business _____ Numeric
 Private _____ Numeric
Number of Claims _____ Numeric
Appeals
 Interlocutory _____ Numeric
 Final _____ Logical

**Adjournments Study
To Identify and Quantify Systemic Problems**

Proposed Questionnaire

Case Number _____ *Text*
Filing Date _____ *Date*
First Instance Judgment Date _____ *Date*
Service on Defendant by Publication _____, *Logical*

Number of Sessions Scheduled _____ *Numeric*

Adjournments

Judge announced

Prepare Judgment, _____. *Logical*
Rule on motion, _____. *Logical*
Appoint an Expert _____. *Logical*
For New Judge _____, *Logical*

Plaintiff or Defendant requested to provide for

Admissibility of evidence

Consider objection to _____ P or D
Present objection to _____ P or D

Expert,

Request for, _____, P or D
No Report, _____, P or D
Not present, _____ P or D

Wait for Witness,

Not Present _____, P or D
Not Summoned _____ P or D

Third Party Document,

Request for _____ P or D
Not received _____ P or D

Wait for Document _____ P or D

Motion

To Prepare _____
To Submit _____

Absent, Without explanation _____, P or D

No notice of hearing _____ P or D

Conflicting engagement _____ P or D

Replace Counsel _____ P or D

Exhibit C

File Available Data

Duration

- Filing - Date
- Holds - Dates
- Disposition - Dates

Number of Hearings - Count

Reasons for postponement of hearings – See below

Length of Postponements – Series of dates

Parties - Code

Character (Business, Government, Corporate, Private)

Attorneys - Code

Individual or Group

Claims – Codes

Substantive law basis

Experts - Code

Government or private

Area of expertise - code

Motions - Logical

Substance or procedural

Witnesses - count

Government or private

Documents - Count

Possession

Appeals - Logical

Interlocutory or Final

Reasons for Postponements - code

Change of Counsel

1. Adjournment to replace counsel
2. Adjournment for new counsel to become familiar with the case

Change of Judge

3. Adjournment to become familiar with the file

Conflicting engagements of counsel

4. Adjournment to accommodate responsible counsel

Wait for expert report

5. Adjournment to wait for expert to finish report
6. Adjournment to wait for expert to be appointed
7. Adjournment to wait for receipt of expert report

Failure of witness to appear

8. Adjournment for (plaintiff or defendant) to produce a named witness

Failure to summons witness

9. Adjournment to wait for party to summon a witness

Failure of expert witness to appear

10. Adjournment to summon an expert

Failure to request a document from a third party

11. Adjournment to have the court request a document from a third party

Failure to receive a document from a third party

12. Adjournment to wait for a document already requested from a third party

13. Adjournment for a party to prepare a motion

14. Adjournment for a party to consider whether he will oppose the motion

15. Adjournment for the judge to consider how he will rule on the opposition

16. Adjournment to consider whether a party will appeal the judges rule on a motion

17. Adjournment until after the summer recess