

ELECTRONIC CASE MANAGEMENT AND MEDIATION – DRASTIC IMPROVEMENT FOR THE COURTS IN TONGA

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A low ranking in the ease of contract enforcement in the 2006 World Bank Doing Business report prompted Tonga's government to seek remedial action. This paper charts the range of activist measures, in particular the introduction of electronic case management and mediation, both of them instrumental in improving the legal process drastically.

Computerization, computer staff, and computer training

Shortly after I was named Chief Justice in September 2006, the Minister of Justice told me that the Cabinet had been discussing the Doing Business report; Cabinet ministers were not happy about Tonga's low rating. Of 175 countries, Tonga ranked 126 in the ease of contract enforcement, our worst performance in the Doing Business set of indicators. The Minister of Justice asked me to see what could be done to improve our ranking before the 2007 edition was released.



Chief Justice Ford (holding the t-shirt) with court staff.

It was clear that the minimal level of computerization was hampering commercial litigation. At the Supreme Court, the country's highest civil jurisdiction, computers were not made available to staff until 2002, and there was no computer training. Because staff were not taught to use the computers, they were not used except for computer games. All court records were compiled manually. Concurrently, tentative exchanges were taking place with the Federal Court of Australia about introducing electronic case management to help reduce our backlog of cases. With the publication of the Doing Business report, the computerization of our court filing system became an urgent priority. I contacted the Federal Court in Sydney, and we agreed on an appropriate protocol.

Seeking the motivated

At the beginning of 2007, we began computerizing the old files. I selected two court staff to travel to Australia for a one-week intensive course in computerized case management. The senior staff member, Sione Taione, did not have a traditional information technology (IT) background. He had been employed as a court interpreter and recently appointed Deputy Registrar. I had noticed his good understanding of computers; he also shared my desire for a computerized case management system. The other staff member, word processor operator Loma Lausii, had never been outside of Tonga, but the newness of the idea only motivated her further. Both selections proved inspirational. Sione now is an expert on computers and their capabilities for case management. Loma has led the team, working many hours without extra pay to have all the old files transferred onto computers.

Security for computers; equal comfort for staff

We needed to have a secure computer room built into the office, in the wake of rioting during November 2006. Finding a builder at this time could have been burdensome, but the donor, Australia, accepted the need to curtail the formal bidding process. The work was carried out in January 2007. The room and adjacent office were now air-conditioned and fitted with new computers, a printer, and new furnishings. Having an expert from the Federal Court of Australia give further on-the-spot training was an important follow-up.

Before long, it turned out that it was unsatisfactory for the staff in the computer room to have a pleasant air-conditioned workplace when the other staff did not. I decided to use my personal funds for the installation of an air-conditioning unit for the general office, as there was no further budget. In the overall scheme of things this may have been only a small gesture, but it resulted in a highly spirited workforce.

Weeding out dormant files

A significant aspect of computerization was that, in going through each individual file, we could detect scores of dormant cases, i.e. where no action had been taken by any of the parties for at least two years. The new Rules of Court provided that such cases could be struck out, but only after giving the plaintiff 28 days notice. It was obvious from the sheer number of files concerned that the notice procedure would be time-consuming. It was also clear that in many cases such notice would serve no useful purpose, because it was clear from the contents of the file that the litigation would not go forward.

In these circumstances, I exercised my powers under the rules in relation to time requirements to strike out all cases where no action had been taken for two years. I instructed that any such proceeding would be reinstated if the plaintiff complained about the lack of the 28-day notice. In the end, 518 actions were struck out, with 10 being reinstated upon request from the plaintiff – a net result of closing 508 files.

Having finished up with only current files in the system, we are now able to ensure through case tracking that cases do not remain inactive. The Registrar has strict instructions to refer to the Chief Justice any civil litigation file which has remained inactive for three months. In such cases, an order is issued which states that unless some further step is taken in the proceedings within 28 days, the action will be struck out.

Setting an objective for the disposition rate

Our computerized case management system is based on the one used by the Australian Federal Court. The court in Sydney maintains a goal of disposing of 98 percent of their civil cases within 18 months; eighteen months had been the average disposal time, and they had started off with a disposal goal of 95 percent. After a discussion with court staff, I defined the objective to dispose of 90 percent of all cases within a period of two years. This number takes into account the existing backlog of cases, and the quota has so far proven correct.

We continue to strive for proactive measures to introduce efficiencies into all aspects of the judicial process. Information on court decisions to the public was a field for further improvement. I recently ordered that the National Press Council receive copies of all decisions with relevance for the public, and slashed a rather prohibitive copy fee for journalists. We also continue to explore refinements to our system, such as building statistics, for example, on juvenile offenders, something in which UNICEF is interested.

Mediation – new, and successful

Toward the end of 2006 I redrafted the Supreme Court Rules to include a provision for mediation. Mediation was virtually unheard of in Tonga at the start of 2007. I believe some initial resistance to the rules from the Law Society must be contributed to this. Its president, whom I had informed of the proposed change, had struck alternative dispute resolution right out of the text. To accommodate his concerns, I made mediation, initially mandatory, contingent on the consent of both parties.

The new rules came into effect on April 12, 2007. To assure parties, they require mediation to be exercised by trained or sufficiently experienced persons. We needed to train mediators. With assistance from the Federal Court of Australia, the Deputy Registrar was able to travel to Sydney and complete a one-week, world-recognized mediation training program (LEADR). Subsequently, the Registrar traveled to Wellington, New Zealand, for similar training. Because court registrars are well-respected members of Tongan society, they are particularly suited for the task.

To encourage parties to give their consent, nothing said in mediation can be used in a later trial, should mediation fail. The mediators may report to the judge only about the progress and the outcome of the process. Order 45 also states that reference to mediation is neither justification for staying the proceedings nor for causing delay in the trial preparation.

Do well, and talk about it

The introduction of mediation was extensively publicized, and the opportunity was taken to increase public awareness through Tonga's Inaugural Law Week in November 2007. On its opening day I spoke on a radio show, in the press, and on television. With assistance from the Federal Court of Australia and the World Bank, we produced a mock mediation DVD in the local language which was screened nightly on Tongan television during Law Week. We made 100 copies of the DVD for distribution to every village committee and church committee in the Kingdom of Tonga. I cannot stress enough the tremendous impact this DVD had in getting the mediation message to the Tongan public.

Mediation has been growing into a recognized form of alternative dispute resolution; most litigants declare their consent. It helps us free court resources. Since the first mediation hearing, there have been another 10, with eight resulting in out-of-court settlements. In December 2007, the Tongan government as the country's largest litigator, declared its agreement with mediation; it had initially been opposed. We are currently exploring the possibilities of having a building solely dedicated to mediation.

Reforming – all staff on board

In adapting systems or approaches used in other countries, cultural characteristics must be navigated. In attempting to introduce a new system into the workplace, I have found that it is critical to have all the staff with you. This is particularly true when coming from a different country – New Zealand in my case. Nobody, and certainly not Tongans, likes to have foreigners come over and use a high hand to get changes made. On the contrary, respect will always be reciprocated. It helped me to have a good sense of humor, as Tongans have a great one themselves.

From the outset, the staff was excited over the new case management program and the heightened atmosphere of efficiency around the office. At one stage I had received a complaint from the Head Office of the Ministry of Justice that staff were working until up to 9 p.m. on some nights. (They were not getting paid for the overtime.) I transmitted the message and told staff to knock off work just like other public servants. The following Saturday morning I went into the office, only to see some transferring files into the computers. When I confronted them with our earlier conversation, their response was: "No one said anything about Saturdays."

Next in line: the Magistrate's Court

At the end of 2006, Tonga increased the jurisdiction of the Magistrate's Court civil cases from \$1,000 to \$10,000. This took many cases into the less formalized Magistrate's Court, alleviating the burden on the higher jurisdiction. Parliament had at first been hesitant, but increased responsibility for the judges was finally won against better learning possibilities for the judiciary. And as for professional requirements – the Judicial Services Commission is in the process of making a formal legal degree mandatory for all judges at the Magistrate's Court.

In November 2007 we began extending the Supreme Court case management system to the Magistrate's Court to gain equal efficiency there. Next, I would like to see mediation introduced into the Magistrate's Court. That is not going to be easy because, unlike the Supreme Court, the jurisdiction of the Magistrate's

Court is derived completely from statute. A workaround, until Parliament considers a change in the law, is to propose mediation on an informal basis whereby the initiative will come from the parties rather than from the court. We have recently been able to train three more Tongans as mediators. They will commence working on civil cases in the Magistrate's Court within the very near future.

The right time for reform

The implementation of the reforms comes at a time when the courts in Tonga have never been busier, with approximately 500 extra criminal cases coming through the system arising out of the riots of November 2006. The reform procedures have enabled us to handle the huge influx of additional cases with reasonable diligence. Once this unexpected case load is out of the way, I am confident we will be able to make further significant inroads into the time taken to enforce contract claims. The Tongan judicial system is on its way of becoming recognized as one of the most up-to-date and efficient of all case management systems in the Pacific Island jurisdictions. And just to be on the safe side, we will soon be conducting a survey of user satisfaction; we intend to repeat the survey every three years to gauge progress over time.

Results

In October 2007, the World Bank highlighted in its Doing Business report that Tonga's Supreme Court had cut the average time to enforce contracts from 510 days to 350. While this does not make the court the world's fastest, the vast improvement ensured the country the title of top reformer in the category of contract enforcement. Striking out close to 100 percent of dormant cases, placing others on a strict timetable, introducing mediation, and increasing the jurisdiction of the Magistrate's Court – all this was achieved in just more than a year.

About the Author

Anthony D. Ford was appointed Chief Justice of the Kingdom of Tonga on September 11, 2006. He is now in his 8th year as a Judge in Tonga. Before that he worked with Bell Gully, one of the largest law firms in New Zealand, for more than 30 years.

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