Adjudication of Small Claims in the Countries of the South-West Mediterranean Basin:

A Technical Note

It may seem contradictory, but small claims are a big deal. They are a big deal for the judicial system, because in the Maghreb, Malta, and beyond such cases constitute a significant share of the courts' caseload. Their processing absorbs a sizeable share of resources. In the absence of a dedicated and effective small claims procedure, these claims are subject to the complexity of the same procedural rules and the same level of attention by judges and court staff as other claims. In countries that already pre-COVID have been struggling with efficiency of justice service delivery, e.g. in terms of delay and backlog, they tend to choke the system. They also divert scarce judicial resources from other cases and from much needed investments in improvements in ICT and infrastructure. Small claims are also a big deal for court users, especially for micro, small, and medium-sized enterprises as well as poor and marginalized populations. These claims in many ways constitute the daily face of justice to the population. Their trust in justice institutions is undermined if such claims are subject to the same procedural complexities, costs, and delays as more complex cases.

Accessible and efficient justice is key to the protection of the rights and freedoms of citizens and to a well-functioning economy. A mechanism that can further both the accessibility and the efficiency of justice is the small claims procedure (or, in some countries, the small claims court). Procedures for resolving low-value disputes come under different names: small claims, simplified, fast-track or written procedures. Regardless of the term, there is a common trait – for claims below a certain value threshold, some elements of procedure are simplified to make litigation easier, quicker and cheaper.

Small claims procedures can help make justice more accessible. Their rules often facilitate or encourage self-representation by limiting the role of lawyers, allowing oral filing of claims and empowering judges to take a more active role in guiding the parties and in searching for the truth, including evidence collection. With a view to improving accessibility, many small claims procedures also attempt to make justice less costly for the litigants. This can be achieved by lowering court fees, putting a cap on recoverable legal expenses and restricting costly procedural actions such as expert assessments.

At a time of constantly increasing demand for justice, small claims procedures can help judicial systems focus their resources more efficiently. In any country, judges are amongst the most qualified and highly paid public officials. Their time is valuable. Policy-makers go to great lengths to spare that time. Small claims systems do just that. They utilize the approach of differentiated case management to speed up and simplify the examination of low value claims so that judges can resolve the case with less time and effort. The introduction of small claims procedures is based on the acknowledgement that a mechanism for quick and inexpensive resolution of legal disputes with a low value allows courts to finalize such cases more swiftly and expediently, economizes on the resources of the judiciary, helps reduce backlog and allows judges to devote more time to complex cases. To further the goal of efficiency, small claims procedures use various mechanisms such as reducing procedural

timelines and even omitting entire stages of the judicial process (e.g. the hearing), simplifying the content of the court judgment, and limiting appeal.

The Doing Business report recognizes the existence of a small claims court or a simplified procedure for small claims as a good practice. When assessing the ease of doing business, the report's quality of judicial processes index acknowledges that "small claims courts or simplified procedures for small claims, as the form of justice most likely to be encountered by the general public, play a special part in building public trust and confidence in the judicial system. They help meet the modern objectives of efficiency and cost-effectiveness by providing a mechanism for quick and inexpensive resolution of legal disputes involving small sums of money. In addition, they tend to reduce backlogs and caseloads in higher courts." Currently, as many as 132 economies have either a stand-alone small claims court or a simplified procedure for small claims.

While the very existence of a small claims procedure or a small claims court indicates an effort at improving access to justice and more efficient distribution of judicial resources, small claims procedures vary greatly among jurisdictions. Some manage to achieve their goals, making justice more efficient or more accessible or, ideally, both. Others are less successful and the reasons may vary. A small claims procedure which comprises so few simplifications that it is almost identical to the general one would hardly achieve meaningful results. A procedure which is optional and not known to the parties may be underutilized and thus, not achieve its goals either. Therefore, an analysis of small claims procedures that goes beyond a mere registration of their presence or absence is warranted.

This Note examines the use of small claims procedures / courts in the countries of the South-West Mediterranean Basin, namely the Maghreb region (Algeria, Libya, Morocco, Tunisia) and Malta. Despite their geographical proximity, the Maghreb region is quite different from neighboring Malta both in terms of legal traditions and socio-economic development. The legal tradition in Malta is shaped by both common and civil law while Maghreb legal systems are based on the Napoleonic Code and the Islamic law tradition. Furthermore, Malta is a high-income country with a literacy rate of 95 percent while the Maghreb countries fall within the lower-middle income (Algeria, Morocco, Tunisia) and higher-middle income (Libya)[1] groups and have literacy rates below 90 percent.

These differences present both a caveat and an opportunity. The features of a small claims system need to be linked to its particular needs; hence, not all techniques highlighted in a comparative examination would be suitable in a different context. At the same time, with the intensification of globalization we are witnessing a gradual convergence and cross-fertilization between legal traditions and this is being reflected also in the development of small claims procedures around the world. Small claims procedures are universally considered as a suitable testing ground for novel approaches and techniques in the administration of justice. From this perspective, this diverse region offers a wealth of experiences to learn from.

[1] The classification is made by the World Bank, is updated each year on July 1 and is based on GNI per capita in current USD (using the Atlas method exchange rates) of the previous year (i.e. 2019 in this case).

Institutional Setup

There are two approaches to institutional set-ups. Low-value claims can be examined at dedicated small claims courts (typical of the Anglo-Saxon legal family) or by the courts of general jurisdiction under a simplified procedure (typical of the Roman legal tradition). In the countries of the South-West Mediterranean Basin, we witness both approaches.

Libya, Morocco and Tunisia have small claims procedures. They are conducted before professional judges at the lowest-level first-instance courts. In **Libya,** these are the summary courts. In the framework of the proximity justice system in **Morocco**, small claims are examined by judges from special court divisions with the first-instance courts (*juridictions de proximité)*. These judges travel and conduct court sessions at small localities so that citizens there could obtain justice accessibly. In **Tunisia,** minor claims are examined by one of the 89 district courts responsible for adjudicating minor disputes and frequently staffed by a single judge. A peculiar issue is present in those courts; in closely-knit communities, the monopoly of a single person over all low-value dispute resolution in the respective district could affect citizens' perception of the impartiality of rendering justice.

Malta has an approach that is different from the other countries in the region. It has a dedicated small claims tribunal staffed by adjudicators who are not professional judges but experienced advocates.

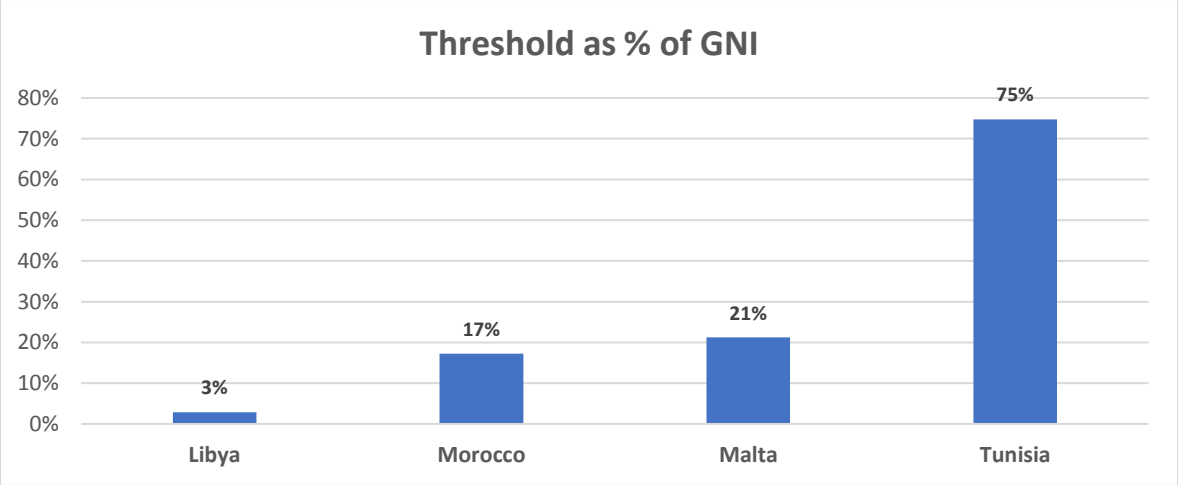
Algeria has neither a small claims procedure, nor a small claims court. The Rule of Law Index (ROLI) of the World Justice Project (WJP)[2] assesses that Algeria is below the regional and world average in ensuring access to civil justice. Introducing a small claims procedure could be one of the ways to address access to justice deficiencies there.

Thresholds and Their Relationship to the Scope of Small Claims Procedures

Small claims procedures apply when the value of the claim is below a certain monetary threshold. The level of the threshold determines the scope of the procedure. If the threshold is low, the procedure would be applicable to fewer claims. By contrast, if the threshold is high, many cases, including ones of relatively significant value, would qualify for the special rules. There is no international standard of the level of the threshold for small claims. Still, international examples demonstrate that the value of the threshold is usually well under 50 percent of the Gross National Income (GNI) per capita for the respective country.

The thresholds for the small claims procedure in the examined region vary widely. In **Libya**, it is at the equivalent of USD 220; in **Morocco** – at USD 550; in **Tunisia** – at USD 2520; and in **Malta** – at USD 5950. However, the same amount may be considered substantial in one country and negligible in another. Therefore, it is more informative to compare thresholds as percentages of GNI per capita. Based on this criterion, **Libya** still has the lowest threshold, at 3 percent of its GNI per capita, followed by **Morocco** at 17 percent; **Malta** – at 21 percent and **Tunisia** – at 75 percent. Thus, the scope of the small claims procedure is the narrowest in Libya and the broadest in Tunisia.

[2] See https://worldjusticeproject.org/rule-of-law-index/country/2020.



All these policy choices are legitimate and have their analogues in international benchmarks. Although the threshold in **Libya** is an outlier in the region, standing at only 3 percent of GNI, worldwide, it is not unique (e.g. in **Germany** the threshold is at 1 percent of GNI). However, this low threshold does mean that the small claims procedure in Libya has a very narrow scope. It may be helpful to collect statistical information and assess what the level of utilization of the procedure is and, if only a negligible number of cases can benefit from it, consider expanding it.[3]

A very high threshold makes the scope of the procedure very broad. This may, in turn, mean that most civil and commercial claims would qualify as small claims. Thus, the small claims procedure, rather than being an option for cheap and quick justice in low-value cases, could turn into the standard procedural route for the majority of cases. This does not necessarily have an adverse effect on justice but it poses some risks.

There are some risks that need to be managed when establishing a small claims procedure. The first risk is that some simplifications typical of small claims procedures may represent a compromise with procedural guarantees for fair trial. When the value of the claim is small, the risk that this compromise poses may be justified. However, when the value of the claim is relatively high, then this risk to the right to fair trial might be heightened. Another risk concerns the efficiency of the procedure. If, due to a high threshold and lack of optionality, the majority of civil and commercial cases are channeled through the small claims track, it might be overwhelmed. In such a scenario, one can hardly expect swift resolution of low-value cases. The third risk associated with a high threshold relates to the evolution of the procedure. If the threshold is low, the procedure allows for a certain degree of experimentation whereby policy makers can use it as a testing ground for novel simplifications that seek to further increase procedural efficiency and access. However, if a small claims procedure has a very high threshold and consequently a very broad scope, a high level of caution would be exercised in adding new simplifications lest they affect significant pecuniary interests. This could make the procedure quite rigid.

[3] In Germany, the use of the small claims procedure with a threshold of EUR 600 is very limited not least because of the existence of a well-functioning and digitalized order for payment procedure which allows for quick enforcement of many low-value claims which are not contested by the debtor.

Legal Representation

The possibility for self-representation in low-value first-instance cases is essential to access to justice. It is even more important in jurisdictions where no legal aid is available or it is available solely in criminal litigation. If self-representation is not allowed, a party with inadequate financial resources loses not only the opportunity to file a claim in court but also to make its depositions and statement in defending against a claim. Thus, an impossibility to self-represent coupled with unavailable or limited legal aid could result in victimization of the most vulnerable members of society. For this reason, the ability to self-represent is one of the most typical and most important features of small claims procedures. Its availability in the small claims system is one of the aspects that is being specifically evaluated by Doing Business.

Recognizing the importance of self-representation for ensuring access to justice, all jurisdictions in the examined region allow parties to low-value claims to appear before the court without a lawyer. However, self-representation is not a panacea for resolving access to justice issues. Many persons would not be able to self-represent adequately, even if given the chance, due to a variety of reasons such as level of literacy, educational status, level of fluency in the local language, etc. For parties that do not have access to a lawyer but are also unable to self-represent adequately, some small systems (e.g. **Malta**) allow representation by persons who are not lawyers but are better prepared to do so than litigants are themselves. To further expand access to justice for vulnerable parties, small claims systems from the Maghreb region could also allow litigants to choose a trusted representative who is a non-lawyer but whom they deem able to defend their rights and interest in court better than if they were to appear on their own.

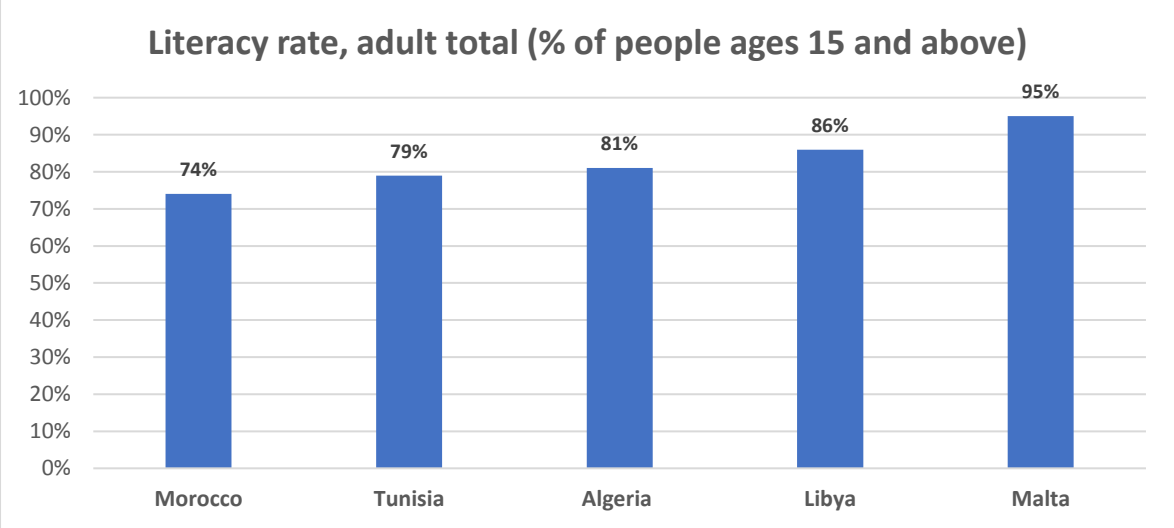
Filing a claim

Filing a small claim should be as simple as possible. This would make the procedure accessible to citizens and businesses and, ideally, allow them to launch simple claims without resorting to legal services. To achieve that, many countries introduce user-friendly forms (e.g. EU small claims procedure); allow electronic filing (e.g. Portugal, Singapore); or admit oral claims recorded by court personnel or by judges (e.g. Austria, Germany, Hong Kong). Filing options depend on the particular circumstances of the jurisdiction: a low level of literacy may mean that oral filing would be a good choice; high internet penetration may mean electronic filing would be appropriate; and certainly, the budgetary costs of training court personnel to assist claimants could not be ignored in a country where the judiciary is operating under a tight budget. In the examined region, oral filing is allowed in **Libya** and **Morocco**; and mandatory filing forms and electronic filing are available only in the Small Claims Tribunal of **Malta**.

The small claims procedures of Libya, Morocco and Tunisia could benefit from introducing filing forms. Such forms are helpful because they structure the lawsuit. If these forms include simple instructions, they could help self-representing parties develop the claim themselves. Forms could also ensure that claimants do not omit anything of importance. For the court, forms also bring benefits in that they structure lawsuits in a predictable and clear manner and make it easier for the judge to familiarize herself/himself with the claim quickly. Forms could at first be introduced by way of guidance and once litigants have become accustomed to using

them and their structure has been optimized based on experience, they could become mandatory.

The possibility to file a claim orally also facilitates access to justice. That is especially true for people who are illiterate, have poor command of the local language or have certain types of disabilities. A claim, which is filed orally, still needs to be recorded on paper. In **Libya**, oral claims are authorized only for cases with extremely low value (not exceeding 10 Libyan dinars or appr. 2,25 USD) and are recorded by judges.[4] By contrast, in **Morocco**, oral filing is allowed for all small claims and is recorded by court clerks on a template issued by the Minister of Justice. Given Morocco's low literacy rate and the fact that according to various estimates approximately 40 percent of the population are not fluent in Arabic[5], which is the official court language, an opportunity for oral filing is welcome. Local legal professionals however, report that the template used by court clerks is not sufficiently detailed, which can lead to difficulties when the judge examines the case. Furthermore, if the Arabic-language skills of the claimant are very poor, the court clerk may not be able to understand and record the claim at all.

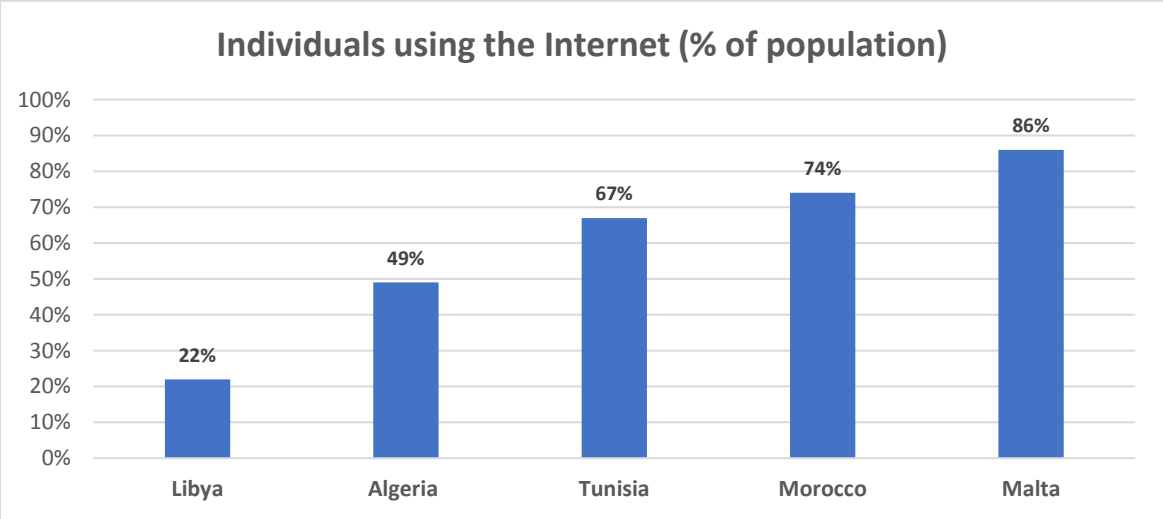


Other jurisdictions that wish to improve access to justice for vulnerable litigants could also consider allowing oral filing of small claims. This would be very appropriate for **Tunisia** (with a literacy rate of 79 percent) and **Algeria** (with a literacy rate of 81 percent). **Libya** (with literacy rate at 86 percent), too, could raise the threshold for oral filing and make this option available for all small claims. Given the high literacy rate of Malta (at 95 percent), the introduction of oral filing is not particularly important for that jurisdiction. This measure is resource-intensive as it requires trained court clerks or junior judges who could record the oral claim. Having a form to fill out would facilitate the recording of an oral claim. Furthermore, in jurisdictions with a large numbers of residents who are not fluent in the local language, translation assistance would contribute greatly to ensuring that these persons are not prevented from defending their rights in the local courts.

[4] Art. 124 of the Code of Civil and Commercial Procedure of Libya.

[5] The majority of the population in Morocco speaks Moroccan Arabic; however, appr. 30% to 40% speak Tamazight (Berber).

Finally, the possibility of electronic filing would be beneficial. That is especially true with internet use increasing all over the world and the COVID-19 pandemic limiting physical interactions. Certainly, the level of internet penetration in **Morocco** and **Tunisia**, albeit lower than in **Malta**, justifies the introduction of a possibility for e-filing of claims. It could be particularly beneficial for micro, small and mid-sized enterprises.



Evidence

Evidence collection is central to any litigation and is the main mechanism for establishing the truth; it however, can be expensive and slow. The time needed to summon and interrogate numerous witnesses may discourage citizens and businesses from even trying to defend their rights in court. Furthermore, in low-value litigation, the cost of an expert assessment may even exceed the value of the claim. To ensure a balance between the cost of examining the claim and the need to establish all facts, small claims procedures often simplify evidence collection. Simplifications of evidentiary rules usually fall under several categories: introducing a stricter relevance assessment for the admissibility of evidence; simplifying the form of evidence; applying shorter deadlines for the presentation of evidence; limiting expert assessments; and giving judges a proactive role in establishing the truth in the case.

In the examined region, only Malta has introduced meaningful simplifications to the process of evidence collection at its Small Claims Tribunal. It takes a more informal approach towards the collection and assessment of evidence and limits the use of expert assessments. In particular, its rules stipulate that in examining the case, *the adjudicator shall (i) inform himself in any manner he thinks fit and shall not be bound by the rules of best evidence or the rules relative to hearsay evidence if he is satisfied that the evidence before him is sufficiently reliable for him to reach a conclusion on the case before him; and (ii) shall refrain as far as possible from appointing referees to give expert evidence, and shall where experts are appointed make out a list of facts upon which the expert is to give evidence.*[6]

To achieve further procedural efficiencies, it is recommended that Maghreb jurisdictions consider simplifying evidence collection in their small claims procedures. These could

[6] Article 9, (2), (b-c), Chapter 380, Small Claims Tribunal Act, Malta.

include limiting the use of costly expert assessment, alleviating the requirements to the form of evidence and giving judges more discretion to disregard evidence that would be repetitive or too costly to procure. Giving the judge more initiative in seeking the truth in small claims procedures could enhance not only efficiency but also access to justice as it would ease the task of non-represented litigants.

Hearings

Court hearings heavily impact case processing. The associated summoning of participants, cancellations and postponements as well as the pressure they put on the use of often limited court premises, tend to be among the most resource-intensive and time-consuming elements of dispute resolution. Therefore, foregoing a hearing or reducing the number of hearings needed to resolve a dispute can have a positive effect on the efficient use of judicial resources. At the same time, hearings give judges the opportunity to obtain first-hand impressions of the case and may be more accessible than a written process to citizens who have no legal representation and no good writing skills. For these reasons, the policy decision of whether to have court hearings within the framework of a small claims procedure and how many of those to have needs to strike a careful balance between efficiency and access to justice.

Internationally, there are two distinct approaches to examining small claims. One is centered around an oral hearing while the other is aimed at resolving the case exclusively in writing. The choice of an approach depends on a number of factors, including legal tradition (e.g. Anglo-Saxon or Roman), types of cases that are usually examined (e.g. cases of individuals or commercial cases), priority goal of the small claims system (e.g. to improve access to justice or to improve the efficiency of courts), level of literacy of the population, etc. Generally, a system that expects to have mostly competent litigants and aims to improve the efficiency of courts might opt for a written-only examination of small claims; by contrast, a system that has as its priority goal to improve access to justice and is tailored towards vulnerable, self-represented litigants might put an emphasis on an oral hearing where both parties are obliged to appear in person.

The small claims systems in the examined region are centered around an oral hearing. In **Malta**, the law provides that the hearing shall take no longer than one sitting. Proximity justice in **Morocco** requires parties to appear at the hearing in person. Furthermore, proximity judges travel in order to conduct the session at a location which is convenient to the parties.

In order to optimize further small claims procedures, court hearings deserve a closer look. It is recommended that policy makers findr ways to reduce the number of court hearings needed to resolve a dispute, like **Malta** has done. In jurisdictions where numerous hearings are routinely held within the framework of a single low-value case, legislators and judicial authorities should take measures to reduce the number of those hearings, ideally to a single one. For business-to-business disputes, judges could be given discretion to decide the case without conducting a hearing, if they consider that the submissions and evidence presented in writing shed sufficient light on the circumstances of the case. Furthermore, parties could be allowed to agree that their case be examined only based on documents, possibly against a reduction of the court fee.

Content of the judgment

Simplifying the content of the judgment is a measure that promotes more efficient use of judges' time. While the efficiency gains stemming from it are not as sizeable as with other measures, still, for an overburdened judiciary with overly formalistic and cumbersome rules on the content of the judgment, easing these rules could help spare the time of judges. The content of the judgment has two principal functions. First, it helps the parties understand why the court has made a certain decision. Secondly, in case of appeal, it allows the second-instance judge to assess the reasoning of the first-instance court and the process it followed and, based on that, to decide whether the substantive and procedural laws have been applied correctly.

Such simplification is not yet common practice. In the region, **Malta** has simplified the content of the small claims judgment by authorizing the adjudicator to only list the main points upon which his decision is based.[7] With a view to the efficiency gains that a simplification of the content of the court judgment could bring, it is recommended that jurisdictions in the region which do not have such rules, consider introducing them. Especially when the small claims judgment is not subject to appeal, it would be more important to make it clear for the parties rather than overly long and formalistic. If a justice system is overburdened, has significant backlog and/or case delay, the simplification of the rules on the content of the judgment could help alleviate the work of judges and spare some of resources of the system.

Appeal

Appeal to small claims judgments is often limited. The rationale is that appellate courts tend to have fewer judges and their resources would be strained if they were to examine a multitude of minor claims. Thus, the limited appeal serves two principal functions: first, it spares the resources of second-instance justice, and second, it speeds up the final resolution of small claims. At the same time, the right to appeal is an essential part of fair trial and any limitations to it should be introduced with great care.

The approach that some countries in the region have taken in this regard is to stipulate that some low-value judgments shall not be subject to appeal at all. Thus, in **Morocco** small claims judgments are not subject to appeal[8]; in other jurisdictions, only those judgments of the small claims courts/procedures that have a particularly low value are exempt from appeal, e.g. in **Libya** – judgments up to 100 dinars are not subject to appeal.

[7] Article 9, (2), (d), Chapter 380, Small Claims Tribunal Act, Malta.

[8] Even though small claims judgments in Morocco are not subject to appeal, they can be subject to annulment by the president of the court in circumstances that are specifically enumerated in the law, namely: if the judge did not have *ratione personae competence*; if the judge did not attempt to resolve the dispute through conciliation first; if the judge has failed to rule on one part of the plaintiff's claim or if the judgment exceeded the claim or adjudicated on issues that were outside of the scope of the plaintiff's claim; if the judge gave his judgment without verifying beforehand the identity of the parties; if the judge convicted the defendant without having the proof that he was effectively summoned/notified to appear before court to the hearing; if there are contradictions in the same judgement; if, within the examination of the case, there was fraudulent misrepresentation; if the judge adjudicated despite the fact that one party had made a justified request for recusal.

Limiting the ability to appeal needs careful consideration. While prohibiting appeal to low-value judgments altogether can spare the resources of second-instance justice, more nuanced limitations and simplifications to the appeals process, such as limiting the admissible grounds for appeal, introducing mechanisms to limit frivolous or vexatious appeals or otherwise economizing on the time of the appellate court, could often be preferable to an outright prohibition because they limit the right to re-examination of the case to a lesser extent. **Malta** displays such a nuanced approach. While appeal is always allowed in Malta for judgments with a value above EUR 1500, it is also allowed for some judgments with a lesser value, but based on very limited grounds.[9] Furthermore, appeals against judgments of the Small Claims Tribunal are decided by a single judge, as opposed to a panel of three judges.[10] To further limit appeals, the law of Malta stipulates that if the appellate court considers the appellate claim frivolous or vexatious, it shall dismiss the appeal and order the applicant to pay a penalty between EUR 250 and EUR 1250.[11]

Simplifications to the appeal process may be worth considering. Countries in the region facing challenges with overburdened second-instance courts or wishing to spare the resources of these judges for other reasons, could look into this based on international benchmarks. Thus, jurisdictions where challenges to small claims judgments are examined by a panel of judges could stipulate that they should be examined by a single appellate judge. Furthermore, countries where the second-instance procedure entails a full-blown re-examination of the case, including repeated evidence collection, could limit appeal in small claims only to grave procedural violations and incorrect application of the law and accept the factual findings of the first-instance courts as a given. A third mechanism that could be employed to limit appeals without unduly affecting the right to fair trial is to impose moderate financial penalties for frivolous or vexatious appeal.

The role of data

The data situation is not satisfactory and needs improvement. To conduct a deeper analysis of the functioning of various small claims procedures/courts in the region and determine potential needs for improvement, it is necessary to have extensive statistical data. A procedure which successfully improves the efficient processing of small claims would be able to demonstrate shorter disposition times and an ability to process more cases per judge than the general procedure. A procedure which makes justice more accessible would boast lower costs for the litigants. To better tailor the procedure to the needs of users, it would be necessary to collect and analyze data on the types of users (e.g. natural persons versus legal entities; consumers versus businesses) and their specific needs (e.g. level of literacy; extent to which users rely on self-representation; extent to which users have access to information

[9] Appeal shall always lie in the following cases: (a) on any matter relating to the jurisdiction of the Tribunal; (b) on any question of prescription; (c) on any non-compliance with the provisions of article 7(2); (d) where the Tribunal has acted in a serious manner contrary to the rules of impartiality and equity according to law and such action has prejudiced the rights of the appellant. See Article 8 (2), (d), Chapter 380, Small Claims Tribunal Act, Malta.

[10] Article 8 (1) Chapter 380, Small Claims Tribunal Act, and Article 41 (9) of the Code of Organization and Civil Procedure, Malta.

[11] Article 8 (5) Chapter 380, Small Claims Tribunal Act, Malta.

and communication technologies). The types of data outlined above can be collected by sophisticated statistical systems and sometimes by court user surveys.

Too few countries in the region publicize statistical data on the work of their court system. When such statistics are made available, they rarely contain disaggregation to a level that would allow for a juxtaposition between the small claims procedure of the country and its general procedures. Therefore, an overarching recommendation is that jurisdictions having small claims systems should collect and publicize data that shed light on the share of small claims relative to the overall caseload, the average processing time, whether the number of small claims cases or the speed of their resolution has increased or decreased over time, how legislative changes affect caseload and disposition times, etc. This would allow for rigorous analysis of the existing procedure and informed decision making regarding its evolution.