



THE REPUBLIC OF UGANDA

**THE RELEVANCE OF COMMERCIAL COURTS TO
THE MODERN JUDICIARY**

A CASE STUDY FROM UGANDA

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Introduction

The World Bank Doing Business Report 2009¹ reported that the most popular reform feature over the last five or so has been the introduction of specialized commercial courts or commercial divisions within their existing courts. This is a significant observation that requires reflection especially as Judiciaries in Africa grapple with the whole question of modernization. In this paper both specialized commercial courts and commercial divisions within existing courts shall be reviewed together as one and the same reform. In most common-law jurisdictions court work is done in separate divisions so the concept of Court Divisions is not new. In East Africa, for example, traditionally there were 2 divisions of the Courts - the civil and criminal division. All civil work was done in civil division, while naturally all criminal work was done in the criminal division. For purposes of defining the work, all non criminal work was deemed civil work. That gave the civil division wide jurisdiction to handle what was deemed civil work. Matters related to tort, land, family, contracts, company, financial institutions intellectual property and others all came up before the Civil Judge.

The current trend on the other hand, as part of the process of judicial reform taking place in many jurisdictions is to create specialized divisions that can deal more specifically with these subjects hence the establishment of Commercial Courts to deal with commercial disputes.

The idea of a Commercial Court, however, is not really new. The Commercial Court in England has existed for a very long time. It grew out of a notice issued to Judges of the Queens Bench division in February 1895² which created a separate commercial list to handle cases of a commercial business nature. It is important to note that the Commercial Court in England was not a distinct court of the High Court, but rather a particular Judge was dedicated to handling commercial business. The main purpose of the commercial list at that time was to bring speedy determination to such cases. This deemed as important because commercial played a pivotal role in the British economy and especially in the city

¹ World Bank Doing Business Report 2009 p. 52

² Commercial Court from Wikipedia retrieved from "http://en.wikipedia.org/wiki/commercial_court" accessed 27/07/06.

of London. The Commercial Court as it later became known particularly under Lord Justice Mathew (d.1908) was very successful in bringing cases to a speedy and satisfactory determination without undue technicality or unnecessary expense.

This paper will attempt to show that these reforms like in England are in Africa (and Uganda in particular) playing a major role modernizing the judiciaries. A modern judiciary is not only tested against the traditional bench marks of independence, fairness, affordability, accessibility and timeliness. Today a modern judiciary must also be seen to be efficient and cost effective; accountable and streamlined in its processes and administration. To meet these expanded set of bench marks a modern judiciary must have the confidence of the public; be properly funded and resourced; focus on dispute resolution as a whole; embrace technology; have well trained and qualified staff and operate a modern case flow management system³. These bench marks are what the public and court users are now expecting of modern judiciaries and in Uganda the Constitution of Uganda 1995 has gone further to emphasize in Article 126 (1) that judicial power is derived from the people and shall be exercised in the names of the people and in conformity with law and with the values, norm and aspirations of the people.

The creation and impact of Commercial Courts in Africa

In order to understand the role of Commercial Courts, it is necessary to see how these Courts have evolved. A review of selected jurisdictions which have in the last decade or so created Commercial Courts reveals some common threads. On the 6th January 2004, Michael McDowell T.D. the Minister of Justice, Equality and Law Reform of the Republic of Ireland announced the creation of a Commercial Division of the High Court (popularly called the Commercial Court) to begin on the 12th January 2004. Minister McDowell described it as

“...a very significant development of the Irish Court system...”

³ Characteristics of the modern civil justice system-Ministry of the Attorney General of Ontario
[Http://www.attorneygeneral.jus.on.ca](http://www.attorneygeneral.jus.on.ca) accessed 09th August 2010

The Court and the new commercial list cover a wide range of business transactions. The Court has introduced new fast track and pre-trial procedures to speed up trials. The Case Management System is such that core issues, agreed evidence and the use of techniques like witness statements are all agreed to in advance. Electronic evidence and the use of standardized IT formats are also in place.

Available feedback from Irish Lawyers indicates that the Irish Commercial Court has lived up to its expectations - resolving commercial cases effectively, efficiently and quickly.

On the other hand Ghana celebrated the first anniversary of its commercial division (established on the 4th March 2005) under the theme *"The development of Commercial law and resolution of disputes through the Commercial Court"*.⁴ The Chief Justice of Ghana, Lord Chief Justice George Kingsley Acquah R.I.P (as he then was), at the anniversary pointed out that The Government of Ghana's declaration of a *"golden age of business"* for the country, placed a responsibility on the judiciary to sustain and maintain a high level of investor confidence in the administration of Justice and that the commercial division of the High Court must radiate that confidence. He further stated that the court would in addition to general commercial claims, extend its jurisdiction to commercial crimes and investment related land disputes.

In South Africa, in a bid to beat white collar crimes, specialized commercial crime courts were established to quickly and efficiently deal with such cases. Opening one such court at Port Elizabeth, the Deputy Minister of Justice and Constitutional Development, Adv. J. de Lange MP said in his speech (27th June 2005).

"White collar crime has become a serious problem and to deal with it decisively we have set up a dedicated commercial crimes court. The first court established in Pretoria 1999 has successfully led a government initiative to act decisively against white collar crime. The performance of the existing dedicated Commercial Court centres has been impressive..."⁵

⁴ Judiciary of Ghana Website http://www.judicial.gov.gh/commercial_court/home.htm accessed 27/07/06.

⁵ South African Department of Justice website http://www.doj.gov.za/2004_doj/site/m_speeches/sp_2005/2005_06-27_commercial_court accessed on 27/07/06

In Lesotho, the Central Bank of Lesotho has assisted The Government of Lesotho to accelerate establishment of a commercial court⁶. In providing this assistance the Central Bank of Lesotho believed that delays in adjudicating commercial cases will be avoided and thus promote sound financial intermediation.

Other African countries that have introduced commercial courts include Uganda (probably the oldest in Africa established in 1996), Kenya, Tanzania, Madagascar, Zambia, Burkina Faso, The Democratic Republic of the Congo (DRC), Mauritania, Mozambique, Nigeria, Rwanda and Mauritius. It can be observed that in most African countries, commercial courts while predominantly civil in nature are also in some jurisdictions clothed with criminal jurisdiction.

The impact of these specialized courts has been throughout Africa phenomenon. The World Bank reports that in seven African countries that introduced commercial courts namely Burkina Faso, The DRC, Ghana Mauritania, Mozambique Nigeria and Rwanda the average time to resolve a commercial dispute dropped by 19% from 604 to 495 days⁷. In Mauritius which set up its commercial court in January 2009 as a division of its Supreme Court in just five months it was able to dispose of 593 cases out of a total of 959 cases of which 657 were old cases transferred to the new division⁸.

From the literature reviewed it can be said that the driving force behind the creation of Commercial Courts is the desire by judiciaries to facilitate the resolution of business/commercial disputes in a quick, efficient and effective manner that ensures the judiciaries in effect becomes a catalysis for economic growth.

The development of Commercial Courts in Africa however has not been without criticism. It has been argued that some of these courts have been specifically designed to deal with the financially most important cases⁹ while others have

⁶ Central Bank of Lesotho website http://www.centralbank.org.ls/projects/commercial_court.htm

⁷ Opt cit World Bank Report 2009 P 52

⁸ World Bank Report Doing Business 2010 P. 56

⁹ World Bank Report Doing Business 2009 P. 52

argued that justice should be administered equally to all without regard to economic or social standing.

The History of the Commercial Court in Uganda

The history of the Commercial Court in Uganda is no different from other jurisdictions that have established commercial courts. The establishment of the Commercial Court in Uganda as a division of the High Court was a direct recommendation of the 1995 Justice Platt Commission of Inquiry Report on ***“Delays in the Judicial System”***.¹⁰ During its hearings, the commission received views from the business community in Uganda. Some of the major concerns were that the Courts at the time were unable to fully neither appreciate specialized commercial disputes nor handle such cases in an efficient and expeditious manner. These concerns were raised in the mid 1990's when the business landscape in Uganda was rapidly changing as a result of the government driven programme of liberalization and privatization of the economy. This had led to a shift of emphasis from state to privately owned businesses which placed greater expectations on the judicial system.

The President of Uganda, during a nation wide address on the 26th January, 1995 charged the judiciary to put in place measures to facilitate investors in their court disputes.

The Ugandan judiciary then started to re organize itself with a view to creating a commercial division of the High Court. On the 20th of June 1996, the then Chief Justice S. W. W. Wambuzi issued Legal Notice No. 5 of 1996, entitled ***“Constitutional Commercial Court (Practice) Directions 1996”*** (now **Statutory Instrument-Constitution No 6**), creating the Commercial Division of the High Court as a Commercial Court. Paragraph 2 of the Legal Notice states;

“...it has been decided to establish, a Commercial Court capable of delivering to the commercial community an efficient, expeditious and cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life in Uganda...”

¹⁰ Established, under Legal Notice No. 3 of 1994.

The Commercial Court began its work in 1996 but did not get its distinct character until the 15th January 1999 which it moved to separate premises from the High Court and more importantly started its own independent registry. The court has dedicated Judges which helps to specialize the bench because they concentrate in the area of commercial law. It is also easier to ensure continuous judicial training in the dynamic area of commerce and the complex disputes that arise in business.

The role of the Commercial Court in Uganda in economic development

It is not easy to measure the role that the Court has played in the economic development of Uganda. However, I would like to discuss this role from two perspectives. The first from an attempt to provide an efficient, expeditious and cost effective mechanism for the resolution of disputes and second, based on feedback from surveys.

The first role for the court has been to be pro active. Historically, Judges had seen their role as umpires in the disputes and rarely descended into the dispute arena. However, paragraph 5(2) of Statutory Instrument-Constitution No 6 significantly charges this. It provides as follows;

“...The procedure in and progress of a commercial action shall be under the direct control of the commercial Judge who will, to the extent possible, be pro active...”

The control of judicial proceedings by the Commercial Judge strikes out adventurism by counsel and improves efficiency. One indicator that this initiative is bearing results is the average number of adjournments before a case is completed has greatly reduced. In the case of the commercial court these have been brought down to an average of 5.0 adjournments with some judicial officers having as low an adjournment rate as 1.0.

In addition, all cases brought before the Court have to go through a rigorous pre trial case management procedure called scheduling. This has been made

possible by an amendment to the Uganda Civil Procedure Rules¹¹ which introduced a new order 10B that requires all cases to be scheduled and take account the possibility of using alternative Dispute Resolution (ADR). Case scheduling allows for better efficiency and allocation of judicial time to any particular case. Priority can, therefore be given to cases which are better prepared to go to trial as opposed to handling cases on a first come and first serve basis, which was the procedure in the past.

Further, the court has improved on access to justice for its users by converting itself into a multi door court house. This is by adding ADR through mediation, to the services it provides. This is made possible by the appointment of both an in house Mediation Registrar and lawyers who appointed as court accredited mediators, who handle disputes before they are placed before a Judge¹². This also gives parties an opportunity to try out mediation before the case comes for trial. The Court is targeting that at least one third of all cases filed at the Court can be resolved through the process of court annexed mediation

Another initiative that the court has put in place is the creation of a Court Users Committee¹³ (CCUC). The CCUC meets quarterly and acts as a forum where the court and the court users can evaluate the work of the Court. This allows the court to make quick responses to any matter of concern.

The improvement of court room technology, especially the recording of court proceedings and e-based legal research is another initiative of the commercial court. Most courts in Uganda still record evidence by long hand writing and this has made the process inefficient.

The Commercial Court has a custom built court house that can better facilitate the activities of the court. This has also been one of the many initiatives of the commercial court. Many Court houses in Uganda predate independence and

¹¹ The Civil Procedure (amendment) Rule 1998 statutory instrument 26 of 1998.

¹² Since mediation started in October 2005 results have been encouraging with the period January-May 2006 posting a 60% success rate.

¹³ Its membership includes Judges of the Court, the Courts Registrars, the Uganda Law Society, The Attorney General's Chambers, The institute of Bankers/Uganda Bankers' Association, Uganda insurance Association, Uganda National Chamber of Commerce, Uganda Manufacturers Association, Uganda Investment Authority, The Faculty of Law Makerere University to mention but a few.

are not easily adapted to suit new initiatives like IT and a multi door court house activities like mediation. Custom built court houses have gained popularity in Africa where many countries share the Ugandan experience of having very old court houses. As a result of this Tanzania, Kenya and Ghana have all dedicated special court houses to the commercial court.

Last but not least, is the creation of statistical records to track the work of the Court, its Judges and other non judicial officers? In this regard a data base called Computerized Case Administration System (CCAS) has been developed to generate the required statistics. This allows for greater transparency and accountability within the court.

These reforms in the area of commercial justice delivery are important because they give the business community confidence in the judiciary. The business world is very dynamic and a modern judiciary therefore must also be able to match this with modern service delivery.

The relevance of the Commercial Court in Uganda can be gauged from the feed back that the judiciary in Uganda gets.

Dr. Margaret Kigozi, the Executive Director of the Uganda Investment Authority (Member of the Commercial Court Users Committee) in a paper to the CCUC dated 27th February 2004 said;

“The operations of the Commercial Court have had a positive effect on commerce and promotion of business and investment prospects, and have made our work of marketing Uganda as an investment destination easier... Uganda Investment Authority commends the reforms of the Commercial Court...”

The role of the Commercial Court of Uganda has even received positive feed back in international reviews. The International Finance Corporation (IFC) in 2004¹⁴, expressed the following view;

¹⁴ Developing business and infrastructure in Africa enhancing the role of the private sector, May 2004 – IFC.

“...In Tanzania and Uganda, Judicial dispute resolution has been streamlined recently and is now more efficient than in many industrialized countries...”

The USAID Business Climate Legal and Institutional Reform Project (Uganda BizCLIR) 2008 (having interviewed over two hundred representatives from the government, private sector, the courts, the bar, NGOs, students, donors, and others) found that the commercial Court was perceived in Uganda as fair and efficient.

Conclusion

It can be argued the relevance of commercial courts in the modern judiciary in the recent past and even before has been to promote commercial development which is central to a nation's economic growth. The role of the commercial courts in commercial development, from the Ugandan perspective, is to deliver to the commercial community an efficient, expeditious and cost effective mode of adjudicating disputes that directly affect the economic, commercial and financial sector in Uganda.

The commercial court in Uganda is constantly trying to be innovative and to adopt best practices to ensure that its objective and role is fulfilled hence contributing to investor confidence, in promoting sound business practices and the resultant economic growth. These best practices are now being rolled out to other divisions of the High Court and indeed the entire judiciary as a whole.

The big challenge in ensuring that the role of commercial courts is not lost remains adequate funding to the courts and training of its judicial and non judicial staff. Given the limitation of the resource envelope available to judiciaries in most African countries this a challenge that has to be meet head on if commercial courts are to remain relevant.