

Developing a New Commercial Court in Ghana

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There has been a demand in Ghana for a Commercial Court for a long time. Indeed, while at the Commonwealth Secretariat in London, I led a team (in 1995-96) to undertake a diagnostic survey of the Ghanaian legal system with a view to identifying impediments to the development of the private sector. That team also came to the conclusion that a Commercial Court needed to be established for Ghana.¹

The Judiciary of Ghana responded to the growing pressure for a Commercial Court by establishing one in 2005.² Judicial power is vested exclusively in the Judiciary under the Constitution of Ghana.³ Accordingly, the Judiciary had the right, without primary legislation, to establish a Commercial Division of the High Court, the High Court being a constitutionally established superior court. The High Court in Ghana, as in England, is a court of first instance with unlimited jurisdiction.⁴ The current High Court is descended from a colonial High Court by which the British administration sought to replicate the English High Court in the Ghanaian jurisdiction.⁵

The establishment of the Commercial Court as a High Court was a step in the process of reforming the judicial sector. There has been such widespread dissatisfaction with the justice system in Ghana that the Government established the Legal/Judicial Sector Reform Project about a decade ago. One of the results of this Project was the establishment of an automated Fast Track Division of the High Court of Ghana to expedite the hearing of suits. To illustrate the need for this reform, it is useful to draw attention to the following passage from the Diagnostic Report of the Commonwealth Secretariat team of 1995-96:

A.1. The time taken by judicial processes has been a source of complaint by business people in Ghana for a long time. The perception is not held by

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1. Economic and Legal Advisory Services Division of the Commonwealth Secretariat [ELAS], *Diagnostic Survey of Laws Affecting Private Sector Development in Ghana: A Selective Analysis* (on file with author) [hereinafter ELAS Report].

2. Republic of Ghana Budget Statement and Economic Policy of the Government of Ghana (Feb. 21, 2002) at 118-22, available at <http://siteresources.worldbank.org/GHANAEXTN/Resources/bud2002.pdf>.

3. CONSTITUTION OF THE REPUBLIC OF GHANA (1992), available at http://www.parliament.gh/const_constitution.php.

4. *Id.* §130.

5. See Supreme Court Ordinance 1876 of the Gold Coast Colony, reprinted in LAWS OF THE GOLD COAST (1937).

business people alone; it is found with persons from all walks of life who have sought the assistance of the courts in the resolution of their disputes.

A.2. At the outset, it must be pointed out that the complaint is not directed at the intellectual content or correctness of judgments of the courts. No question has been raised about the basic fairness or justice of judicial decisions. The persistent complaint is over delays in the dispensation of justice. The causes of dissatisfaction are many and various: examples are the operation (and, in some cases the substance) of the procedural rules, especially the opportunities they give for obstruction and adjournment; the inability of court bailiffs, sometimes in incredible circumstances, to serve writs or other court process on parties to court actions; the manual recording of court proceedings, especially the evidence at a hearing; the number of judicial officers staffing the courts; the lack of specialised knowledge by the judges of the world of business; judicial working hours and the length of the legal term; the time judges take over the writing of their judgments; the quality and numbers of support staff; and the lack of appropriate equipment and their users for expedition of the judicial process.⁶

The automated Fast Track Division of the High Court of Ghana was established to enable modern information and communication technology to be applied to its processes and to relieve its judges from the drudgery of manual recording of evidence in long hand.

After the Fast Track Courts had been imbedded into the judicial system, it became clear that the next step in the improvement in the justice delivery system should be the establishment of a commercial court to enhance the relevance of the judicial system to the business community. Accordingly, the Ghana Judiciary sent a delegation, sponsored by DANIDA, the Danish development agency, to Tanzania in November 2002 to observe the Tanzanian Commercial Court which had been established a few years before.⁷ This mission, led by Justice Acquah, a Justice of the Supreme Court who later became the Chief Justice, was impressed by the Tanzanian precedent and, on its return, recommended the establishment of a Commercial Court in Ghana.

Among the recommendations made by the mission on its return were the following:

- Six High Courts should be set aside to constitute the Commercial Court of Ghana;
- The Commercial Court should handle general commercial disputes involving investments, tax, and banking matters, among others;
- Special rules should be enacted for the use of the Commercial Court;
- Alternative Dispute Resolution processes should be integrated into the adjudication process of the Court;

6. ELAS Report, *supra* note 1.

7. Judicial Service of Ghana, Mission to Tanzania.

- Judges and supporting staff should be selected immediately to undergo training; and
- Information and communication technology, including the use of audio recording, should be integrated into the court's processes.⁸

These recommendations were accepted by the Judicial Service and implemented. DANIDA provided support to the implementation process.⁹ It funded a study tour by the six High Court judges selected to start the Commercial Court and their key support staff.¹⁰ The tour took the selected judges to Tanzania, Uganda, Denmark, and the United Kingdom. The judges inspected the operations of the commercial courts in these countries and interacted with their judges and other staff. DANIDA also funded the construction of a modern purpose-built courthouse for the Commercial Court.¹¹ The Commercial Court was formally commissioned by the President of Ghana on March 4, 2005, and is now in operation.¹²

The court known as the Commercial Court is technically the Commercial Division of the High Court of Ghana. Its judges are therefore High Court judges. However, the new civil procedure rules for the High Court, which came into force on January 3, 2005, enacted some special rules which are applicable only to the Commercial Court.¹³

Order 58 of the new rules, which contains these special rules, provides, for instance, for compulsory pre-trial settlement procedures.¹⁴ It also authorises the use of not more than two assessors by a Commercial Court judge during a trial. At the end of the trial, the assessors may state their opinion, but their opinion is not binding on the judge. The 1995-96 team that prepared the Commonwealth Secretariat Report, invited by the Ghana Government (through the Ministry of Finance and Economic Planning), had a much broader focus than the judicial system.¹⁵ Nevertheless, the mission's report did have some observations relating to the courts. The Report recommended the use of assessors in commercial cases and recommended changes in the Rules of Court to achieve this. Clearly, this recommended reform has now been achieved with the promulgation of the new High Court (Civil Procedure) Rules, 2004 (CI 47), Order 58, rule 10, which authorises the judges of the Commercial Court to appoint not more than two assessors to assist them in any particular case.¹⁶ The Commonwealth Secretariat recommendation went a little further than the new rule, in that it recommended that the appointment of assessors should be mandatory, where the parties request it or, even without such application, in specialised and complicated cases. It may be that

8. *Id.*

9. DANIDA, Ghana Legal and Judicial Reform Component Fact Sheet, http://www.danidadevforum.um.dk/NR/rdonlyres/679FDE29-DCFA-41CD-956C-BDDFE118CD5C/0/LegalJudicialReform_FactSheet.pdf.

10. Justice George Kingsley Acquah, Lord Chief Justice of the Ghanaian Supreme Court, Speech of the Lord Chief Justice on the First Anniversary of the Commercial Court, *available at* http://www.judicial.gov.gh/archives/com%20court/cc_3.htm.

11. DANIDA, *supra* note 9.

12. Justice George Kingsley Acquah, *supra* note 10.

13. Ghana High Court Civil Procedure Rules, 2004 C.I. 47, Order 58.

14. *Id.*

15. *See* ELAS Report, *supra* note 1.

16. Ghana High Court Civil Procedure Rules, *supra* note 13.

after an initial trial period of the system of assessors, the Judicial Service ought to consider expanding the role of assessors along the lines of the Commonwealth Secretariat recommendation. Currently, the use of assessors is entirely dependent on the discretion of the judges of the Commercial Court.

Order 58 also incorporates court-based alternative dispute resolution (ADR) processes into commercial dispute resolution.¹⁷ After the close of pleadings, the Administrator of the Commercial Court is obliged, within three days, to refer the case to one of the Commercial Court judges to conduct a pre-trial settlement conference.¹⁸ The pre-trial judge is, in turn, obliged to invite the parties, within thirty days, to settle the issues for trial and to endeavour to achieve a settlement of the dispute.¹⁹ At the pre-trial settlement conference, the parties may be represented by their counsel.²⁰ Experts may be invited by the pre-trial judge to assist the settlement process.²¹ All disclosures made or documents presented at the pre-trial conference are without prejudice.²² Where a dispute is settled at the pre-trial settlement conference, the settlement is entered as the judgment of the court.²³

The special Order 58 rules apply to commercial claims, which are defined as “any claim arising out of trade and commerce and includes any claim relating to:

- i. The formation or governance of a business or commercial organization.
- ii. The winding up or bankruptcy of a commercial or business organization or corporate person.
- iii. The restructuring or payment of commercial debts by or to business or commercial organization or person.
- iv. A business document or contract.
- v. The export or import of goods.
- vi. The carriage of goods by sea, air, land or pipeline.
- vii. The exploration of oil and gas reserves.
- viii. Insurance and re-insurance.
- ix. Banking and financial services.
- x. Business agency.
- xi. Disputes involving Commercial Arbitration and other settlement awards.
- xii. Intellectual property rights, including patents, copyrights, and trademarks.
- xiii. Tax matters.
- xiv. Commercial fraud.
- xv. Application under the Companies Code, 1962 (Act 179).
- xvi. Other claims of commercial nature.”²⁴

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Ghana High Court Civil Procedure Rules, *supra* note 13.

23. *Id.*

24. *Id.*

The Commercial Court's jurisdiction over these claims is not compulsory. Litigants may still go to the ordinary High Court with commercial claims if they wish. Indeed, the fees payable for the use of the Commercial Court are higher than in the ordinary courts. The belief, nevertheless, is that businessmen will pay a premium for the quicker and more focused service provided in the Commercial Court. This belief has in fact been borne out by experience. The statistics from the first year of operation of the Commercial Court show a healthy patronage by the business community and expeditious disposal of cases by the judges.

An innovation, in relation to the Ghanaian jurisdiction, that has been introduced in connection with the Commercial Court is the Users Committee of the Court. The Users Committee consists of a Supreme Court Judge, representing the Chief Justice (who is the Chairman of it and who happens to be the current author); all the judges of the Commercial Court; one representative from the Attorney-General's Office; one representative of the Ghana Bar Association; one representative of the Revenue Institutions in Ghana; one representative from the Ghana Investment Promotion Council; one representative from the Association of Non-Banking Financial Institutions; one representative of the Bank of Ghana; one representative of the Ghana Association of Bankers; one representative of the Association of Ghana Industry; three representatives of the private sector, nominated by the Private Enterprise Foundation; the Administrator of the Commercial Court; the Registrar of the Commercial Court and the Director, Judicial Reform Programme of the Judiciary. The Committee is intended to operate as a watchdog of the Commercial Court and to liaise between the Court's Management Committee on the one hand and the Court's users and the general public on the other.

This institutional framework for a feedback on the work of the Commercial Court is an interesting model which may repay study for more general incorporation into the Judicial Service. It is, of course, not intended as a forum for redress or complaint on individual cases before the Court. There are other avenues in the Judicial Service for that. Rather, its task is to serve as a channel for mobilizing the support of the commercial community and the general public in facilitating the activities of the Commercial Court, while at the same time ensuring that such community support does not infringe the independence of the judiciary and the impartiality of the learned Commercial Court judges. This task implies a role in providing feedback to the administrators of the Commercial Court of community impressions and reactions to the justice delivered by the Commercial Court. Reciprocally, the Committee has a role in communicating to the commercial community and the general public the essence of the concept of a Commercial Division of the High Court and what may be expected of it and what may not be expected of it. There should thus be a two-way flow of communication between the Commercial Court and its stakeholders, with the Users Committee, hopefully, facilitating this vital interactive process.

The establishment of the Commercial Court in Ghana and its development thus far are steps in the right direction with regard to the evolution of an appropriate institutional framework for economic development. While it is still early, it is already an institutional development worth drawing attention to.