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**JUDICIAL REFORM AND COMMERCIAL JUSTICE:
THE EXPERIENCE OF TANZANIA'S COMMERCIAL COURT**

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Abstract

Policymakers in developing and transition economies have increasingly recognized the important role played by judiciaries in creating an institutional environment conducive to robust private sector activity. It was this recognition that prompted the government of Tanzania, with the support of local business groups, international investors, and the donor community, to create a specialized court dedicated to considering and resolving commercial and financial cases. The Commercial Division of the High Court of Tanzania (the "Commercial Court") was established in 1999 with the express purpose of improving the efficiency and fairness of commercial dispute resolution in the country. This Note examines the background behind the creation of the Commercial Court, summarizes the Court's structure and operation, and offers a brief assessment of its performance and impact. Although it is too early in the life of the Court to draw definitive conclusions about its overall long-term impact, to date the Court has demonstrated an ability to resolve commercial cases in a relatively efficient manner.

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Commercial Dispute Resolution in Tanzania

Tanzania established the Commercial Court to address perceived deficiencies in the judicial resolution of business disputes in the country. The government believed that a speedy and reliable vehicle for commercial dispute resolution would facilitate private sector development and improve investor confidence.

A number of factors combined to create a perception among the domestic and international business communities of significant delays in the administration of justice and unfairness within the Tanzanian judicial system, even at the High Court level where high-value disputes are litigated. As one Tanzanian jurist observed, “[a]larming delays and backlog of cases in existence in the general registries of the High Court were and are not a secret.”¹ Tanzanian courts, including the High Court, have suffered from and continue to suffer from poor case management practices, corruption, low levels of remuneration within the judiciary, lack of adequate physical infrastructure, and inadequately funded operating budgets. In addition, members of the judiciary have in the past exhibited fairly casual attitudes toward the granting of adjournments and temporary injunctions, which only serve to increase delays and compound the backlog problem. Finally, there has been a general perception that members of the judiciary lack a sound understanding of applicable commercial laws and legal principles, a problem that specialization is designed to address.

Taken together, these factors contributed to considerable case backlog and significant delays in the administration of justice. There is a widespread perception among Tanzanian lawyers and business people that even routine commercial debt recovery cases take four to five years on average to be resolved in the general division of the High Court, and that cases involving more complicated issues of commercial or contract law can take much longer. A review of High Court registrar files prior to the creation of the Commercial Court is instructive: a sample of commercial cases filed in 1997 reveals that 56% of them were still pending and had yet to be resolved as of December 2000, more than three years later. The 44% of cases that had been resolved took an average of more than 15 months to be resolved.

Creating a New Court

The Commercial Court was designed to address these deficiencies in the limited context of business dispute resolution in Tanzania. Several domestic and international factors combined to make the establishment of the Court politically and financially viable. The idea for a specialized commercial court began to germinate in the early 1990s as the Tanzanian government contemplated legislative and regulatory reforms designed to enhance on-going economic liberalization efforts. During this period, the government convened a task force to identify areas of legal reform required to bring the legal system in closer conformity to the requirements of a functioning market economy. One of the recommendations adopted by the task force was the creation of a specialized court to hear commercial and financial cases. This recommendation was accepted at the highest levels of government and formally approved in 1997.

The recommendation received the enthusiastic support of the late Francis Nyalali, then Chief Justice of Tanzania. Chief Justice Nyalali took a personal interest in the Commercial Court project and was instrumental in bringing it to fruition. He made fact-finding tours of several countries that had established specialized commercial courts, consulted with judges and lawyers around the world, and participated in the subsequent formulation of a concrete proposal for the creation of the Court.

At the same time, the business community, both locally through various chambers of commerce and internationally via investor pressure, worked with the donor and international financial communities to push for the Commercial Court project. Local business and financial communities lobbied the government for the creation of a specialized commercial court. The business community also used the newly liberalized media as an outlet to voice concerns about the state of the judiciary. International investors who had acquired shares of newly privatized Tanzanian banks and business firms added a significant measure of support for the Commercial Court project. When these investors realized the sizeable amount of debt held by newly privatized enterprises, they pushed for a swifter judicial mechanism for recovering debts.

Finally, the creation of the Commercial Court was consistent with the increasing emphasis among donors and the international financial institutions on creating an enabling institutional environment for expansion of private market activity in developing and transition economies. Beginning in 1998, DANIDA, the Danish overseas development agency, took a specific interest in the Commercial Court project. DANIDA provided financial support for the

establishment of the Court, including training of Court staff, refurbishment of a permanent Commercial Court building, and provision of office equipment and supplies. In early 1999, the Tanzania government adopted a final proposal and the Court began operation in September 1999.

Institutional Features

Although formally established as a specialized division of the High Court of Tanzania, the Commercial Court operates in practice as a distinct, stand-alone court. The Court operates out of its own recently refurbished courthouse and does not share facilities with other divisions of the High Court, it maintains a separate registry and case management system, and its management staff and operating personnel are not shared with other divisions of the High Court. Three judges presently serve on the Commercial Court on a full-time and exclusive basis, each responsible for a share of the Court's caseload. For the time being, the Commercial Court maintains a single registry located in Dar es Salaam, although there are plans to expand the Court to several additional regions within the next year.

In order for a case to qualify for consideration by the Commercial Court, it must be deemed to have "commercial significance." The applicable court rules broadly define the scope of this subject matter jurisdiction to include, *inter alia*, cases involving the formation and governance of business firms, the contractual relationships of firms, the restructuring or payment of commercial debts, and liabilities arising out of a firm's business activities.

As a division of the High Court, the Commercial Court is intended to have jurisdiction over disputes that involve relatively large sums of money. In its first three years of operation, the Court had pecuniary jurisdiction over cases involving amounts in controversy of at least Tsh. 10 million (about US\$9,425). This statutory minimum was raised substantially by legislative amendment in 2002 so that now disputes must involve at least Tsh. 100 million (about US\$94,250) before they are eligible for consideration by the Court. The change in the High Court's pecuniary jurisdiction has noticeably reduced the number of cases that are being brought before the Commercial Court, and an effort is under way to revise the current statutory minimum. Cases involving commercial claims valued at less than Tsh. 100,000,000 must be filed in lower courts, principally the Resident Magistrate or District Magistrate courts.

The Commercial Court's subject matter jurisdiction is not exclusive; instead, the Court shares jurisdiction over commercial matters concurrently with the general division of the High

Court. A plaintiff thus may choose to file its commercial case in either court (but not both). Under certain conditions, cases filed with the general division of the High Court may be subsequently transferred to the Commercial Court.

There are several important operational and procedural differences between the Commercial Court and the High Court's general division: First, the Commercial Court has a much higher filing fee structure and, unlike the general division, there is no ceiling on fee amounts. Fees are significantly lower for cases filed in the general division of the High Court and are capped. The high filing fees make Commercial Court lawsuits prohibitively expensive for many business firms. Second, pursuant to a fee retention policy, the Commercial Court may retain fees paid by litigants. The Court is required to remit fees to the treasury only after it has collected an amount equal to its annual operating budget. The Court uses the retained fees to pay for budgeted expenses. The general division of the High Court, on the other hand, is not entitled to retain fees and instead must remit all fees collected to the treasury. It is dependent upon payments authorized and made by the Ministry of Justice and Constitutional Affairs to meet expenses. Such payments are frequently delayed and the High Court often runs short of essential supplies, including the stationery used to create trial records.

The Commercial Court received its first case on September 16, 1999. The number of cases filed with the Court increased steadily in its first several years of operation. In 1999-2000, 116 cases were filed and the Court decided or otherwise resolved 66 cases; in 2001, 301 cases were filed and 227 were resolved; in 2002, 351 cases were filed and 234 were resolved; and in the first 11 months of 2003, 158 cases were filed and 242 were resolved. The decline in the number of cases filed with the Court in 2003, as mentioned above, is largely attributable to the substantial increase in the Court's pecuniary jurisdiction in 2002.

A sizeable majority of cases filed with the Court involve debt recovery claims or other types of contract disputes. The balance of the Court's docket is comprised of cases involving a wide range of legal issues, including tort, trademark, property, insurance, tax, and company law claims. Banks and financial institutions are the heaviest users of the Court's services – in the Court's first year of operation, for example, banks were plaintiffs in 37% of the cases and were involved as parties in almost 45% of the cases. One bank alone, CRDB Ltd., filed 18 cases with the Court in its first year of operation. Before the Court's pecuniary jurisdiction levels were

raised in 2002, cases filed with the Court had an average value of approximately Tsh. 52 million (about US\$49,000).

In the first 11 months of 2003, a total of 158 new cases were filed with the Court, or an average of 14.4 per month. During this time period, 242 cases were resolved, or an average of 22 per month. Of these completed cases, 24% were resolved by judgment following trial; 13% were resolved by settlement following mediation; 10% were resolved by consent judgment, judgment on admission, or were withdrawn; and 53% were resolved in other ways, including settlement by means other than formal mediation.²

Assessing Performance

From the start, the Commercial Court has demonstrated a high degree of efficiency in handling and resolving cases, particularly as compared to the general division of the High Court. Recall that even the most routine commercial cases take on average four to five years to be resolved in the general division. By contrast, in its first four years of operation, commercial cases filed with the Commercial Court took an average of 4.1 months to be resolved, either through some form of pre-trial settlement (e.g., negotiation, mediation) or by judgment following trial. In 2003, the Court had on average 247 pending cases each month. Of these pending cases, an average of 74% remained pending six months from the date of filing. Only an average of 46% remained pending after 12 months from the date of filing.

A number of factors help explain why the Commercial Court has out-performed the general division of the High Court in decision-making efficiency in the first five years of its existence: First, the Court started with a clean slate. It did not inherit commercial cases that were pending at the general division at the time. As a result, the three judges on the Court were not swamped by cases all at once. A combination of the Court's novelty, the relatively high filing fees, and the general division's concurrent jurisdiction over commercial matters has resulted in a manageable case load to date. The Commercial Division, with three judges, receives an average of 231 new cases per year. By comparison, the general division, with nine judges, handles between 350 and 400 new *civil* cases per year. This is in addition to the new criminal and miscellaneous matters filed each year plus the 1,100 or so matters pending from previous years.

Second, the judges and staff at the Court have tried to build a culture of timeliness among advocates and parties. The judges have insisted on strict adherence to time schedules and only permit adjournments when absolutely justified. The judges are much more proactive in case management than their counterparts in the general division. Because it started with a clean slate, the Court had time to establish and implement an effective case management system, a system that has so far helped streamline movement of cases through the judicial process.

Finally, the Court is well funded and enjoys superior facilities. Outside funding from DANIDA, coupled with a fee retention scheme, has to date ensured that the Court has sufficient funds to meet its annual operating budget. Unlike conditions at the High Court's general division, Commercial Court judges do not have to share chambers and office space is sufficient. All of this translates into a favorable work environment.

The Court's Impact

Despite the undeniable decision-making efficiency of the Commercial Court, there is little evidence that it has meaningfully affected either the environment for commercial dispute resolution or the overall business climate in Tanzania. This is not terribly surprising given that the Court only five years old. Only a small number of litigated commercial disputes are currently filed before the Commercial Court; most still end up at the High Court's general division or in courts with lower pecuniary jurisdictional thresholds. The Commercial Court's high filing fees might have something do so with this – although 68% of Tanzanian lawyers surveyed recognize that it takes less time to resolve a case in the Commercial Court compared to the general division of the High Court, 61% also understand that it is more expensive to resolve matters in the Commercial Court. If this situation continues, the Commercial Court will likely have little trouble maintaining decision-making efficiencies, but its impact on the local business community will necessarily remain quite limited. According to one Tanzanian lawyer experienced in handling commercial disputes, the Court “will fail in its objectives if it continues to be a commercial court for only *a small fraction of cases*.”³

To date, the creation of the Commercial Court appears to have had little impact on business decision-making among private sector firms and banks. Although several business firms interviewed felt that the creation of the Commercial Court has given them more confidence in their business operations, a majority of firms surveyed felt that the existence of the Court is

simply not very important to their business decision-making. Similarly, within the financial sector, there is no evidence that the existence of the Court has positively affected the process by which banks decide to extend credit or issue loans or make other business decisions.

Conclusion

Ultimately, the manner in which the business community perceives the Commercial Court is the critical factor. After all, private sector actors are intended to be the primary consumers of the Court's services. If these actors perceive the Court to be too expensive or, all things being equal, not much more fair and efficient than the High Court's general division, the Court will not be perceived as a worthwhile vehicle for commercial dispute resolution. The Court's services will remain unused and Tanzania will miss out on any contribution the Court may have made to private sector growth or stability.

More than anything else, the Court's ability to attract users will depend on the extent to which it is able to maintain performance levels over time. This in turn depends on whether the Court remains sufficiently well staffed and well funded so that it is able to handle increasing caseloads efficiently. Finally, the Commercial Court is but one part of a broader legal system reform initiative. The ability of the Court to serve as an effective vehicle for commercial dispute resolution over time will depend on the extent to which other deficiencies in the Tanzanian legal system are identified and addressed. Time will tell whether these deficiencies – for example, inefficient government administration of regulations, poor enforcement of judgments, inefficient appellate review – will operate to confound the very purpose of having an efficient commercial court in the first place.

ENDNOTES

¹ L.B. Kalegeya, The Role and Place of an Advocate in the Administration of Justice in the Commercial Court of Tanzania – One Year After its Establishment (Nov. 2000).

² High Court of Tanzania (Commercial Division), The State of Commercial Cases at This Court (2003).

³ Hawa Sinare, *An Advocates Overview of the Commercial Court's Performance One Year After Establishment* (Nov. 2000).