COMMERCIAL JUSTICE IN TANZANIA: ENHANCING THE CAPACITY OF THE COMMERCIAL COURT

1. The introduction of the Commercial Court in Tanzania

The reasons for the establishment of the Commercial Division of the High Court in Tanzania was summarized by one Tanzanian jurist and reported in a World Bank report,[1] which we quote as stating:

> *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." 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.*
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> *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*

[1] David Louis Finnegan (2004) DRAFT Report: BACKGROUND PAPER PREPARED FOR THE WORLD DEVELOPMENT REPORT 2005 JUDICIAL REFORM AND COMMERCIAL JUSTICE: THE EXPERIENCE OF TANZANIA'S COMMERCIAL COURT 8/12/04 at page 2. The Commercial Court was designed to address these deficiencies in the limited context of business dispute resolution in Tanzania. The high filing fees make Commercial Court lawsuits prohibitively expensive for many business firms and, admittedly, makes it a patent failure in addressing its mission (it injures that principle of access to justice).

general division of the High Court, and that cases involving more complicated issues of commercial or contract law can take much longer.

These reasons resonate, and are as valid today as in the pre-commercial court establishment days.

2. The concept of Commercial Justice

As regards Tanzania, a government report states:

> *With the creation of a market economy in Tanzania, commercial justice has developed slowly but surely over the past decade, though it still remains a major constraint to investment in the country. Tanzania scores very well on the World Bank's 2008 Doing Business indicators for contract enforcement where it is placed 35h in the rankings well before either of its East African Community neighbors Kenya (107th) and Uganda (119th)1. However, these statistics are based on procedures at the Commercial Court (where only a fraction of commercial cases in Tanzania are filed) and on qualitative interviews providing estimates of average days taken to get and enforce a judgment. The reality on the ground is that as of June 2007 there are 13,227 cases pending in the High Court of Tanzania alone, with an increasing filing rate and a dispute resolution rate that is increasing too, but at a slower pace2. 52 judges and just over 400 magistrates service a country with a population of approximately 37 million citizens. Clientelism and corruption are perceived by court users to be widespread and the Tanganyika Law Society, which represents the private bar, openly acknowledges that the profession is widely held in disrepute.*[2]

Commercial justice, like all other forms of justice must be fair, without delay, following due process of law, impartial and adequately addresses all the issues

[2] See Hagar Russ (2009) Role Of Judicial And Legal Sector Reforms In Business Environment Programmes- A Tanzanian Case Study, Legal Adviser - Business Environment Strengthening Programme for Tanzania (BEST) Ministry of Planning, Economy and Empowerment at p 2.

in which the parties are in dispute. Unfortunately, the perception by commercial clients in Tanzania as regards the courts is less that favorable on this score. I quote from the same government report:

> *Lack of confidence in the court system contributes in no small way to the high rates of commercial lending in Tanzania, which averaged 19% in 2006 and 17% this year so far. The Tanzania Bankers Association estimates that there is currently $100,000,000 of bad debt tied up in pending cases in the Tanzanian court system, which could otherwise be made available to private sector borrowers. Foreign investors often structure their commercial transactions off-shore, or exclude the jurisdiction of the Tanzanian courts even if transactions are drafted under Tanzanian law. Although there have been no recent perception surveys of court users in Tanzania, anecdotally, the majority of businesses have low confidence in the quality, transparency and verity of the Judgments of the Tanzanian courts, with the exception perhaps of the Commercial Court, which hears only a minority of cases of large value.*[3]

3. The Judicial System and introduction of the Commercial Court

The judicial system in Tanzania has also come out fighting in light of criticism leveled at it. Indeed a judge has addressed what is in the bosoms of their lords and ladyships and honorable magistrates manning the system by stating:

> *"We may, however, tend to forget some salient factors. We may for example, not want to accept that judges and magistrates are also human beings, who live and work in an environment similar to the rest of society. We may also wish not to agree that in order for a judge or magistrate to carry out his duties more effectively, he needs an equally devoted support staff. We may not be aware, perhaps, that a judge or magistrate plays a role similar to that of an umpire. The parties may assist in reaching an early resolution of their dispute or they may prolong it. The judge only has both statutory and inherent powers to see to it*

[3] See Hagar Russ (2009), op. cit, at p 2

that things move . Such moves are always governed by the interest of justice "[4]

a. Shortcomings of the Tanzanian Judicial System on Insolvency law enforcement

The shortcomings in the enforcement of insolvency laws and creditor rights are due to the general weaknesses evident in the judicial system. These have been identified by Dr. Mary Nagu, the then Minister for Justice and Constitutional Affairs[5] as: i) delays in the disposition of civil cases, chronic adjournment of cases and civil litigation that take long or judgments to be delivered; ii) large backlog of both civil and criminal cases, with commercial disputes take more that four years; (iii) both previous points leading to rising levels of corruption; (iv) lack of adequate financing (the biggest problem); (v) acute shortage of judges, magistrates and supporting staff; (vi) those available lack motivation, regular training and vital amenities such as decent courtrooms and modern working tools. These can only be highlighted and noted by looking at some practical example of insolvency cases we have handled before the courts of law.

4. Nature of Commercial Disputes (insolvency) and their impact on the Commercial Court Case Management Capacities

It is noted that the nature of commercial cases may give rise to complex litigation. Unfortunately, most of the complex insolvency cases in Tanzania[6]

[4] Dr. Steven J. BWANA (2006) THE ROLE OF COURTS IN SUPPORTING FINANCIAL SECTOR REFORMS IN TANZANIA (A paper presented at the Public Lecture of the Tanzania Bankers Association 20 April, 2006) at page 2

[5] The CITIZEN Newspaper – *Investing in Judiciary will Boost Business (sic)*, Dar es Salaam, 30th May 2006 (PDF) See also, David Louis Finnegan (2005) JUDICIAL REFORM AND COMMERCIAL JUSTICE: THE EXPERIENCE OF TANZANIA'S COMMERCIAL COURT. BACKGROUND PAPER PREPARED FOR THE WORLD DEVELOPMENT REPORT 2005

[6] These include those that were instituted prior to the formation of the Commercial Court, the most notable being petitions for the winding up Kilima bottlers Limited[Pepsi Co]; the two insolvency complex cases

were not filed in the commercial Court. The WP reviewed each of the stages of litigation. It noted that a problem in one stage could lead to problems in other stages. For example long and complex statements of case could lead to problems with disclosure, witness statements, client accountability and length of trial. To take another example, some forms of judicial control of complex litigation could occur too late in the litigation to have a sufficiently useful effect. In respect of the discussing complex cases and their implication

a. The United Kingdom Judicial Experience

Nothing in the laws of Tanzania limit the nature of pleadings. As a result, the tendency has been for parties to provide courts with volumes of pleading that ultimately obfuscate material facts that will allow parties to agree to issues and assist courts to adjudicate the case with acceptable dispatch. In the United Kingdom[7], the commercial court has, on the management of complex cases, received recommendations to directing parties to plead only material facts and, instead, setting out detailed background facts and evidence, as well as law and argument. A client must be able readily to identify the key aspects of his case and the basis on which his opponent takes issue with them.

The Working Party recommended that: a. Statements of case should not exceed 25 pages in length without permission of the court and should (except in the case of very brief statements of case) include a short summary. b. The court should regulate whether further information on a party's statement of case is required; c. At the first Case Management Conference ("CMC") (equivalent of the 1st Pre-trial Conference in Tanzania) the court will settle judicially the list

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that were filed in the Commercial Court are The petition for the winding up of TRITEL and SCANDINAVIA Tanzania Limited. The other most notable case filed in the High Court main registry is the petition for the winding up of. Independent Power Tanzania Ltd (IPTL).

[7]Report and Recommendations of the Commercial Court Long Trials Working Party. Judiciary of England & Wales, December 2007

of key issues from an initial draft provided by the parties ("the List of Issues"). That list will thereafter become, effectively, a court document. The statements of case will thereafter increasingly have only secondary importance; d. "Pleading points" (termed preliminary objections in Tanzania) will be actively discouraged by the court. e. The List of Issues would be used to regulate subsequent disclosure, witness statements and expert reports, all of which must be framed by reference to the issues within the List; f. the court should recognize that a more flexible approach to the range of costs orders available where applications for summary judgment or to strike out a claim or defense had failed might encourage parties to explore the use of these powers more; g. The List of Issues should be used by judges to promote a consideration of whether particular issues were appropriate for summary judgment or strike out applications; c. In large cases which look likely to generate a large number of interim applications (which often include summary judgment/strike out applications) arrangements should be made for such applications to be taken as promptly as possible.

The assumptions underlying such recommendations are that there are legal powers allowing such strict control of the pleadings by parties. Further, that the counsels involved are predisposed to assist the court by: a. adequately informing their clients of the judicial system as well as standing up to all forms of pressure to compromise and or circumvent the system; b. courts capricious, vexatious and frivolous preliminary objections made by the Chief Justice issuing a direction on which points of *demurrer* will be entertained by the courts.[8]

[8] A disturbing trend is observed by legal practitioners as regards the practice (and penchant eagerness) of the Court of Appeal to entertain both raised and non-raised preliminary objections or points of law thus dismissing or striking out appeals before it. It is perceived by the public as a judicially concocted scheme of avoiding to discharge substantive justice (and the development of jurisprudence). Legal Counsels armed with this knowledge are abusing due process by resorting to raising such objections at every available 'first opportune moment'. When none is raised then they thank the court for assisting in raising it.

b. Methods of addressing corporate insolvency in Tanzania

The main corporate insolvency method has been liquidation. There are two main methods: Compulsory liquidation or winding up (or winding up by the court) ("CWU") and Voluntary liquidation or winding up. Te companies Act enhanced other forms which include:

1. Receivership
2. Administration ("ADMIN") (new procedure)
3. Company voluntary arrangement ("CVA") (new procedure)
4. Scheme of arrangement ("SOA")

a) Practical issues under the law

- Misuse by companies- Due to the ease of winding up a company voluntary it is often misused and companies are formed to undertake specific task and then wound up.

- Like all other areas of commercial laws under the new law, lack of modern regulations force parties to use the 1929 Rules that are rather dated.[9] Kibodya[10] provides the following specific problems of judicial enforcement of creditor rights in Tanzania:

a) Prolonged litigation:

As mentioned earlier, enforcement of a mortgage requires court intervention. The only fast track avenue available is summary procedure under the Civil Procedure Code. Nonetheless, experience has shown that

[9] Companies (Winding Up)Rules 1929

[10] Felix G. Kibodya (2006) THE TAKING AND ENFORCEMENT OF COLLATERAL – FINANCIAL SECTOR REVIEW Presented at World Bank Conference on Commercial Disputes and Enforcing Contracts: Improving the Legal Framework for Doing Business in Tanzania, New Africa Hotel May 29th 2006

even where a matter is initiated by way of a summary suit, in most cases, the other party would contest the process by applying to defend the case. As a result, the matter will be thrown back to the normal process and this means the attempt for a summary suit would have created additional delay. This problem is one of the reasons why mortgage finance is yet to be developed in Tanzania.

Again, our procedural laws afford the parties with unlimited avenue to prolong litigation. There is no limit as to the discovery of documents, the number of applications one can make and in some cases, time lines. As a result, a matter can stay pending in court for 5 years.

b) Injunctions:

Injunction is one of the interlocutory proceedings, which has the effect of ordering the parties to maintain status quo pending determination of the suit. This is an equitable remedy to be granted sparingly used. However, in all cases that I am aware of, a defaulting customer or guarantor is the one who would apply for the remedy. I do not recollect any case which it is a bank that had sought the remedy! The current legal set up permits abuse of this remedy thereby creating a huge backlog of cases in our courts.

c) Attachment and execution process:

Attachment and execution is the ultimate process of complying with a decree issued by a court. The Civil Procedure Code has a number of limitations. For instance, under Section 48, residential and agricultural properties cannot be attached. In addition, the absence of clear rules to be complied with by court brokers (sheriffs) together with lack of code ethics for advocates and the brokers have aggravated the problem

i. Company Creditor's Voluntary Arrangement (CVA)[11].

A proposal is put to creditors and shareholders for the repayment of some or all of a company's debts over an agreed period of time. Often allows the company to continue to trade; alternatively allows more orderly cessation of business than in Liquidation. Must be approved by 75% of creditors (by value); if approved binds all creditors with notice of it. Rights of secured creditors (e.g. banks) etc with a charge or debenture) largely are unaffected. These provisions only apply to a company incorporated and registered in Tanzania.

The main purposes are: To wind up an insolvent company, where the company is not capable of being rescued, to prevent further deterioration of its assets and proliferation of its liabilities and to ensure a fair distribution among creditors. In such instances a Members' Voluntary Liquidation (MVL) is not available because a declaration of solvency cannot be made; and a compulsory (court) winding up (CWU) is more long winded and is generally not appropriate if the members (shareholders) are willing to put the company into voluntary liquidation, although a CWU may be invoked by one set of shareholders where they have fallen out with the other set which is not willing to co-operate).

The Initiation of a CVA: Although this procedure is called "creditors" voluntary winding up, and although the company is insolvent, the creditors have no say whether the company should be "voluntarily" wound up. Only the shareholders can decide whether to wind it up voluntarily; and it is they who initially choose a liquidator The *special* creditors only have a say in deciding whether the liquidator chosen by the shareholders should be replaced by one chosen by the creditors; and they have a say, through a committee of inspection appointed by

[11] See the Companies Act Cap 212 [RE 2002] Part VII Chapter 1 ss 240 – 246 and ss ss 267 to 274, 333 to 337, 347 to 404 ; (Rules 310 to 314)

them or by seeking appropriate orders of the court, in the conduct of the liquidation.

A Board meeting to resolve to (1) convene an EGM and a creditors' meeting (2) appoint one of the directors to chair the creditors' meeting. An EGM is then convened and special resolution to wind up is passed and other resolutions, including a resolution to appoint a named liquidator.[12] Conclusion of a CVA is by convening final meetings of shareholders and creditors.

ii. Administration Order

Administration Order. [13] An Administrator is appointed by the Court through a petition by the company. Secured creditors with a debenture must first be given the opportunity to appoint an administrative Receiver (see below). The Administration order prevents any legal action being commenced/continued against the company. The Administrator runs the company, and decides the best way to deal with its insolvency, usually through a CVA, a sale as a going concern or Liquidation. The role of an administrator is to get the company out of trouble and trading again if possible. We were involved in a case where the High Court granted an Administration Order against the assets of Independent Power Tanzania Limited (IPTL)[14]. The order was set aside in favor of a previous order by the same court to appoint an official receiver to investigate claims of fraud by the company[15].

[12] See the Companies Act Cap 212 [RE 2002] ss. 333(1)(c), 135, 136, 349)

[13] See the Companies Act Cap 212 [RE 2002] Part VII Chapter 2 ss 247 – 266

[14] Miscellaneous civil Application no 5 of 2009

[15] see below

Administrators can be appointed to a company that is unable, or is likely to become unable, to pay its debts. They can be appointed by any of the following[16]:

- the courts - on application from a creditor, directors or partners
- the holder of a qualifying floating charge over the assets of the business
- the company or its directors

An administrator's primary goal is to rescue the company as a going concern. If this isn't possible, the administrator will try to get a better result for the creditors than would be possible if the company was wound up. If neither of these is possible, the administrator will sell the company's property to make at least a partial payment to one or more secured or preferential creditors, such as employees or the bank. Administration can also apply to partnerships

Administrative Receivership[17]. Administrative Receivers are appointed usually by bank or other lending institution with a debenture (floating charge) over the assets of the company. They hold similar powers to an Administrator – and can continue to operate business and sell it as a going concern. They cannot deal with claims of unsecured creditors (with no charge or debenture), these are usually dealt with by subsequent liquidation. When a company borrows money, the lender is usually given some security over the company's assets to guarantee payment. If the company fails to keep the terms of the loan or encounters financial difficulties, the lender may be entitled to appoint an administrative receiver. An administrative receiver is an insolvency practitioner who has control of the whole, or a substantial part, of the company's property and wide powers over the business.

[16] See the Companies Act Cap 212 [RE 2002] Part VII Chapter 2 s. 248

[17] See the Companies Act Cap 212 [RE 2002] Part VII Chapter 2 ss. 416 –

The administrative receiver is mainly concerned with getting back the money owed to the secured creditor. The administrative receiver may sell the assets piecemeal, or sell the whole business as a going concern to pay off the secured creditor, and the costs of the receivership. The Tanzanian Companies Act is silent on if any or all the creditors of a company have the right to appoint an administrative receiver.[18]

Liquidation, this act usually signifies the end of the road for the company. The company can be solvent (Members Voluntary Liquidation - "MVL")[19] or insolvent (either Compulsory Liquidation through the Court or Creditors' Voluntary Liquidation - "CVL")[20]. In an MVL the Liquidator distributes assets amongst the shareholders ("members"). In a CVL the shareholders/directors agree to place the company in voluntary liquidation. Compulsory Liquidation – is instituted by a petition to the Court, usually by a creditor owed followed by a winding up order. The Liquidator normally realises the assets of the company and distributes any surplus monies raised by dividend to creditors. An administrative receiver is a receiver and/or manager of "the whole or substantially the whole of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge or by such charge and one or more other securities…" Thus, a "floating" element, and the "whole or substantially the whole of undertaking" element in a charge are essential to constitute a receiver appointed under it an administrative receiver.

If, for example, the company has charged (even by way of floating charge) only a small part of the company's assets, a receiver appointed in respect of that

[18] Since 15 September 2005 in India the right to appoint an administrative receiver is generally limited to debenture holders whose charge existed at that date

[19] See the Companies Act Cap 212 [RE 2002] Part VIII, Chapter 3, especially ss. 339-346

[20] See the Companies Act Cap 212 [RE 2002] Part VIII, Chapter 3, especially ss. 347-355

small part is not an administrative receiver. Further, even if the company has charged a substantial part of its undertaking, but solely by way of fixed charge, a receiver appointed in respect of that is not an administrative receiver. It would seem that the court has equitable jurisdiction (and statutory jurisdiction under the law of property legislation) to appoint a receiver even if there is no express power given to the chargee in the charging instrument to appoint one. It would also seem that whether a receiver is appointed out of court by the holder of the charge pursuant to the express powers contained in the instrument or is appointed by the court on the application of the holder of the charge (for example, because due to poor drafting the chargee has no express power to appoint a receiver out of court) is not decisive of the question of whether the receiver is a "limited" receiver or an administrative receiver (see Ss. 408 and 405(b)). However, this is a moot point on which views differ

A receiver appointed under a general charge created by an overseas company would not be an administrative receiver (even if the company is registered in Tanzania as an overseas company or has a place of business in Tanzania and the charge is over assets in Tanzania and even though he would be an administrative receiver if the company was incorporated and registered in Tanzania.

• *Main features of appointment*: A receiver (whether "limited" or administrative) usually obtains an express indemnity from his appointor to protect himself against any unforeseen liability. A limited discretionary indemnity is available to him in section 410 against invalid appointment. A "limited" receiver is personally liable on contracts entered into by him or contracts of employment adopted (beyond 14 days after his appointment) by him subject to his right of indemnity out of the charged assets.[21]

[21] See the Companies Act Cap 212 [RE 2002] s. 413

An administrative receiver is deemed to be the company's agent until the company goes into liquidation, is personally liable on any contracts entered into by him (unless the contracts otherwise provide) or any contracts of employment adopted (beyond such 14 days) but is entitled to indemnity out of the charged assets.[22] An administrative receiver may with the leave of the court dispose of any asset comprised in a charge which ranks ahead of the charge under which he is appointed, subject to his obligation to account to the holder of the prior charge for the net realized value or market value (whichever is the higher of the asset.[23]

The primary function of a receiver ("limited" or administrative) is to realize the charged assets for the benefit of his appointor. He owes no duty to the company or any other creditor apart from

(a) his duty to discharge (if the company is not already in liquidation), or allow to be discharged (if the company is already in liquidation), preferential creditors out of any floating charge assets , to the extent that uncharged assets (if any) are not sufficient to discharge them,

(b) his duty to act in good faith in trying to obtain a proper price for the charged assets,

(c) his duty to account to the company or any subsequent ranking secured creditor for any surplus assets remaining after his appointor's claim is discharged in full and

(d) (if he is an administrative receiver) his new statutory reporting obligations to the unsecured creditors or their meeting or a creditors' committee appointed by the meeting. He is free to choose the moment in time when to

[22] Ibid s.418

[23] See the Companies Act Cap 212 [RE 2002] s. 417

sell the charged assets even if that moment is not propitious for obtaining the best price.

However, there have been cases in the past where an administrative receiver, content that the claim of his appointor is going to be discharged in full, has gone out of his way to use his professional skills and extensive powers of management contained in the charging instrument and the Act (see eg Ss 416 and 253

iii. Scheme of Arrangement ("SOA")

This applies to both a company incorporated and registered in Tanzania and an overseas company[24]. These provisions also apply to banks and insurance companies. The main purpose is to seek the approval and implementation of a rescue scheme. The scheme may be promulgated either during an administration (where available), liquidation, or administrative receivership (so as to take advantage of the "freeze" operating during that process or it can be promulgated as a "free-standing" scheme. It can be a bipartite scheme between the company and all or one or more of the classes of its creditors or it can be a tripartite scheme, with all or one or more of the classes of shareholders also involved where they are to bring in or give up any financial stake. The scheme requires the approval of both the court and the meetings of the relevant classes of creditors and/or shareholders, as the case may be.

It involves a three stage process:

(1) an application to the court with full proposals set out, followed by a preliminary hearing where the court gives directions as to the holding of meetings and composition of different classes (if more than one) and the information to be provided in the circular,

[24] See the Companies Act Cap 212 [RE 2002] ss. 229 to 232

(2) the holding of meeting of and approval by each of the classes and

(3) a substantive hearing before the court for reporting the approval by the class meetings and inviting the court to grant its approval as well.

The requisite majority at each class meeting is a majority in number representing three-fourths in value. If such majority is not achieved at any of the meetings, the scheme fails. If it is approved by all the classes, it is binding even on those who had voted against or had not voted at all. Therefore they cannot take any enforcement action against the company. Where the scheme involves the transfer by the shareholders of their shares to another party in return for consideration in cash or kind coming from the transferee, then, provided that it has been approved at least 90% in value of the shareholders, the shares of the dissenting or non-voting minority can be compulsorily acquired by the transferee on the same terms as those offered to the assenting shareholders.

Exit from the scheme of arrangement: The routes may vary considerably according to the complexity of the scheme. Where it fails to be implemented fully, the creditors/shareholders may no longer be bound by the scheme and may take enforcement action unless the directors, consistently with their general duty to do the best for the company and its creditors and shareholders, themselves take steps to put the company into liquidation

3. **Case Management of a Complex Insolvency Case: The VIP Engineering Tanzania Limited versus Independent Power Tanzania Limited/Mechmar Corporation Bhd of Malaysia (the case will be abbreviated herein as "IPTL") as a sample insolvency case in Tanzania**

Facts

IPTL is a 100 megawatt thermal power supply company with a generating plant built at Salasala in Dar es Salaam. It has a power purchase agreement (PPA) with TANESCO and a government guarantee in the form of an implementation agreement (IA). For the supply of electricity under the PPA, IPTL was to be paid U$ 4.2 million per month and a capacity charge of U$ 2.8 million per month[25]. IPTL has two shareholders being Mechmar Corporation Bhd of Malaysia (holding 70% shares) ("*Mechmar*") and VIP Engineering & Marketing Co Ltd of Tanzania ("*VIP*") (holding 30% shares). In 2002 VIP filed a petition for the winding up of IPTL on grounds of minority shareholder oppression by the majority shareholder. Preceding that application the following legal disputes had arisen:

1. TANESCO vs IPTL ICSID arbitration registered in December 1998

2. Application to the High Court for an interim injunction to stay the payment of U$ 3.623 million monthly capacity charge by TANESCO pending the issuance of an arbitral award an order was granted in July 1999

3. Application for interim orders similar to the interim injunction order was sought by IPTL but was not granted in June 1999 for lack of jurisdiction of the ICSID arbitration panel to so grant

[25] In comparison the deal was considered better that that with Songas of U$ 6.2 million supply charge for a 112 Megawatt generator and U$ 6.0 million as capacity charge

4. Application for discovery orders were sought by TANESCO in the ICSID arbitration for the provision of the electronic financial model and was granted

5. The arbitral award in the ICSID arbitration was granted allowing capital costs of U$ 127,149,000/- against IPTL

6. Petition for winding up of IPTL Miscellaneous Civil Application No 49 of 2002 filed by VIP on 25th February 2002 in the High Court Dar es Salaam together with an application for the appointment of a provisional liquidator

7. Order of the High Court (Chipeta, J) granting an oral application by VIP for the appointment of an interim Liquidator or the deposit into court of U$ 19 million by IPTL

8. Order of the High Court (Chipeta, J) dated 12th March 2002 granting an oral application by VIP for the deposit into court of U$ 19 million by IPTL

9. Application by IPTL in IPTL Miscellaneous Civil Application No 49 of 2002 filed on 1st March 2002 for an order to stay the Petition for winding up of IPTL as the disputants had agreed to refer their disputes under their shareholders agreement to arbitration

10. Order of the Court of Appeal (Mroso, JA.) of 16th April 2002 staying the execution of the order and ruling of the High Court (Chipeta, J.) dated 12th March 2002

11. Application to set aside the LCIA Arbitral Award and to appoint a Official Receiver of the assets of IPTL filed by VIP on 24th September 2003

12. Order of the Court of Appeal (Ramadhani, JA., Mroso, JA. AND Munuo JA.) of 24th November 2003 allowing an appeal by Mechmar against the order and ruling of the High Court (Chipeta, J.) dated 12th March 2002

13. Order of the Court of Appeal Made in Civil Appeal No. 163 of 2004 remitting the records to the High Court (Oriyo, J) to proceed with the application to consolidate Civil Cause No 254 of 2003 and Civil Cause No 49 of 2002 among other prayers.

14. Decision of the High Court dated 5th February 2008 setting aside the application by Mechmar to enforce the arbitral award granted by the London Chamber of Commerce.

15. Notice of Appeal against the decision of the High Court of 5th February 2008 filed in the Court of appeal by Mechmar on 13th February 2008

16. Application for leave to appeal to the Court of Appeal against a decision of the High Court of 5th February 2008 that dealt with a foreign arbitral award contrary to the provisions of the New York Convention.[26]

17. Ruling of the High Court dated 29th August 2008 wherein the learned judge recuses himself from addressing the application for leave.

18. Decision of the High Court (Oriyo, J) dated….November 2008 dismissing the petition by Mechmar to enforce the LCIA award with costs for failure to prosecute its case and ordering the filing of submissions with a ruling date set for 15th December 2008

[26] Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session. Ratified by Tanzania by accession on 13th October 1964 and came into force in Tanzania on 12th January 1965.

19. Application to restraining the hearing of the Petition for winding up of IPTL as sought was filed on the 21st November 2008 by Standard Chartered Bank (Hong Kong) Limited – the largest creditor to IPTL.

20. Application to withdraw the Petition for winding up of IPTL was filed on 12th December 2008 by Martha Renju the appointed receiver of the shares of both shareholders of IPTL

21. Ruling and Order of the High Court (Oriyo, J.) appointing the Official Receiver as the Provisional Liquidator of the assets of IPTL with specific powers issued on 15th December 2008

22. Notice of Appeal against the Decision of the High Court dated 15th December 2008 issued by Mechmar on 16th December 2009

23. Petition for the Appointment of an Administrator of IPTL was filed as Miscellaneous Civil Application no 5 of 2009 on 22nd January 2009 by Standard Chartered Bank (Hong Kong) Limited

24. After an *ex parte* hearing of Miscellaneous Civil Application no 5 of 2009, an Order appointing Charles Burchard Rwechungura as the Administrator of IPTL was delivered by the High Court (Mihayo, J.) on 27th January 2009

25. A complaint filed by the Official Receiver moved the Court of appeal to hear him *suo motu* on an application to determine the proper placing of the assets of IPTL since there are two orders of the same court appointing both the Provisional Liquidator and the Administrator in respect of the same assets

26. Ruling of the Court of appeal quashing the exparte decion of the High Court (Mihayo, J.) appointing Charles Burchard Rwechungura as the Administrator of IPTL and directing an *inter partes* hearing at the High Court

The matters are now at the High Court (Kaijage, J.) and there are still various matters that need to be addressed before the High Court as several applications have yet to be heard, come applications have been overtaken by events and new facts bring new issues to the fore. The High court has on 16th September 2009 admitted the interim report of the Provisional Liquidator which in itself brings other legal issues into the purview of the courts. This case (and others) illustrates the need for capacity building in the judiciary to address and update itself with international best practices in case management.

RECOMMENDED ACTION AND CONCLUSIONS

Enhancing service delivery capacity in key legal sector institutions, including the Judiciary, by improving management and institutional coordination, upgrading the motivation and competence of personnel, and improving the working environment of the Judiciary including the rehabilitation, expansion and construction of courts.[27]

The Tanganyika Law Society needs to ENCOURAGE policy makers, legislators and regulators to acknowledge the benefits of a well-functioning insolvency regime and work towards building and addressing the legal, regulatory and institutional frameworks necessary for sound insolvency regimes to protect

[27] KEYNOTE ADDRESS BY HON M. CHIKAWE, DEPUTY MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS, GUEST OF HONOUR, ON THE OCCASION OF THE WORLD BANK WORKSHOP ON COMMERCIAL DISPUTE RESOLUTION HELD ON 29TH MAY 2006

creditor rights. This can be done by using the media (columns and articles), professional journals and judicial activism;

Develop Policy on corporate insolvency regulation

Unless the government puts into place a deliberate policy and strategy to STRENGTHEN the institutional framework of regulators and the judiciary in order to enhance their capacities necessary for effective and efficient implementation of insolvency laws; the increase of judges and courts will have little effect of the delivery of justice in general, and insolvency cases in particular. There is clear need for regular training of practitioners and the enhancing of the judiciary's understanding of the negative impact of judgments that the public deem manifestly excessive and ill-thought out.[28] The Policy and attendant laws and regulations needs to address issues such as liquidation and re-organization procedures, informal work-out/court-led procedures; priority of claims; human/institutional capacities concerning insolvency practitioners and judges; special procedures for financial institution insolvencies and the role of regulators[29].

Proper and correct technical assistant

SEEK specific direct technical assistance to: (1) Improve insolvency legislation; (2) Build frameworks for out of court resolution of insolvency cases; and (3) Increase domestic capacity to effectively regulate insolvency practitioners all of which has the aim of, *inter alia*, reducing the time and cost associated with insolvency proceedings. . The Legal Sector reforms currently being undertaken

[28] An example is the recent Tanzania Court of Appeal judgment in the case of Blueline Transporters Ltd vs. East African Development Bank whereby the court awarded U$ 100 million against the Bank when it is clear that the capital of the bank is half that amount and it cannot pay. Government of all five member states have refused to contribute to pay a private party such colossal sum. Unless issues such as this are expediently addressed judgments such as these will certainly bring embarrassment to the court. See: The East African of 3rd week of July 2009

[29] It should be noted that the Government notice that embodies the Insolvency Regulations has yet to be enforced by the Minister. This is rather awkward as to move the court the Companies (Winding-Up Rules) 1929 are still applicable. It does lead to embarrassment when advising foreign clients and does not reflect well on the workings of government.

under the auspices of the World Bank do not yet seem to have the requisite impact in Tanzania. Unless there is a serous and critical review of the whole program to ascertain if it provides value for money, it is our opinion, that Tanzanians are just being saddled with unnecessary and otherwise, ill-used monetary debt by multilateral financial institutions; and

Reduce Court involvement

One quick solution is to MINIMIZE the involvement of judges. In some economies with efficient bankruptcy, courts play only a limited role, if any. In Australia, Hong Kong (China), Singapore and the United Kingdom secured creditors can appoint a receiver to take control of a distressed company. This happens without any court involvement. The receiver then manages the company in preparation for selling its assets. More often than not the business is sold as a whole unit.[30]

Specialization

IT has been proved that SPECIALIZATION increases efficiency[31]. Judges can more easily gain expertise in bankruptcy and will be better equipped to deal with issues of insolvent businesses. The creation of the commercial division of the High Court in Tanzania finds that the establishment of such courts reduced delinquency in loan repayment by between 3 and 10 percent. Furthermore, interest rates on loans sanctioned after the reform are lower by 1-2 percentage points.

[30] The Scandinavia case has proven that in Tanzania, despite court intervention, insolvent companies can and do divide and rule secured creditors as some of these creditors are of the opinion that the biggest creditor doe not wish to 'play ball' and until today Scandinavia has not complied with the order of the court to file its arrangement with creditors.

[31] This is deemed in countries such as the Dominican Republic, Georgia, Moldova, Tanzania, Thailand and Uganda—where it is claimed to have made it easier to process bankruptcy cases by creating specialized commercial or even bankruptcy courts. Bosnia and Herzegovina, FYR Macedonia and Ghana have created bankruptcy sections within commercial courts with specially trained judges and innovative management systems to deal with court backlogs.

Limit appeals

Another solution is to limit procedural appeals. In El Salvador the wait for a first-instance court to hand down its decision in a debt enforcement case can last up to 3 years. Appeals may drag the litigation out for another year or more. In both El Salvador and Slovenia, where the initial decision can be appealed to 2 higher levels of courts, restricting appeals to just 1 would speed bankruptcy proceedings. In Spain appeals no longer suspend debt recovery. Restricting the number of appeals, or allowing debt recovery to proceed even when there is an appeal, is a simple way to make bankruptcy more efficient. When used as a delay tactic, appeals reduce recovery rates, which depend on how quickly the business or its assets are sold.

Introduce time limits

FYR Macedonia, Poland, Portugal, Serbia, Slovakia, Spain and the United States have all either introduced or shortened statutory deadlines for bankruptcy proceedings. Imposing time limits also makes bankruptcy cheaper: reforms in Bulgaria, Estonia and the United Kingdom have halved bankruptcy costs. Colombia's 2007 insolvency law tightens time limits for negotiating reorganization agreements. Before, the term allowed was 6 months, with a possible extension of 8 months. The new law limits the term to 4 months, and the extension to 2.