

Specialized Business and Commercial Courts Around the Globe: A Summary World View

By

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Prologue--The Judge Throughout History

The judge and the means to bring justice are not limited in space and time, but are recognized through human history and around the world. The qualities that make a judge stand out among people were described long before any modern court system existed, before U.S. or English Courts, before Coke and Marshall, Hand, Cardozo, or Brandeis. The aspiration to be judged by the wise in a fair and efficient adjudicative system is a social archetype.

Before Solomon's judicial wisdom prevented the *injustice* of "splitting the baby," Jethro, sage and father-in-law, saw an overwhelmed Moses judging every dispute among his desert people. He suggested that Moses look for others to share that work; advising Moses to "provide out of all the people able men, such as fear God, men of truth, hating covetousness; and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens: And let them judge the people at all seasons."

In the same corner of the world, over a thousand years ago, Ali ibn Abu Talib, the Prophet Muhammad's son-in-law, and an extraordinary person in his own right, wrote to one of his governor's about selecting judges. First, judges must be selected carefully. They should be people of excellent character and a proven merit. The volume of cases should not vex them; nor should the complexity of a case or parties' disputations be a source of anger for them. Judges should be those least likely to get disgusted at the litigants' quarrel.

Descriptions of judges and judicial systems in all faiths, in philosophy, in social theory and economics, and in history are a recurring, permanent, theme. The point is that justice is an ideal everywhere at all times; and, during some periods in our global history, that justice is actively sought in specific places in the world. Still, there are many who doubt the possibility of just decisions based on some form of wisdom, rather than rulings arising from conscious or subconscious bias, or worse; but for those seeking a reasoned system that aims toward principled and consistent treatment of litigants (even if subject to some biases), that is no reason to put aside the effort at pursuing justice.

Today, one aspect of this grand ideal is the effort to maintain and expand specialized commercial tribunals to contribute to more stable and fair lives where these courts serve their communities. Such courts are not limited to North America. Professor James Munson writes of tribunals of commerce reaching back to roots in 16th Century France, where juges-consuls developed their own legal principles and

procedures (including “the banishment of lawyers”) “to save merchant capital from the snake pit of ordinary civil justice.”¹ Commercial courts even survived the Revolution. In the 21st Century, commercial courts are still to be found in Europe, with new development in central and eastern Europe, in some of the old Soviet Republics, in the Middle East and in Asia. Moreover, the recent expansion of specialized commercial courts in Africa marks the important role these courts play in national growth, stabilization, and hopes.

International Business and Commercial Courts

In looking at the creation and development of business courts, it is important to understand and measure the foundations and trends following establishment of such courts, from an international baseline. We cannot, as those of us in the United States are wont to do, simply view business courts on a state-by-state or city-by-city basis, or even a regional basis. In the world economy, it is critical to view specialized business and commercial courts on a world basis.

The March/April 2008 volume of *Business Law Today* included an article, *Beyond the Border, An International Perspective on Business Courts*, by Professor Ralph Peeples of Wake Forest University Law School, and Norwegian lawyer Hanne Nyheim.² They observe that the “World Bank, in its 2007 *Doing Business* report, cited the creation of specialized courts as one of the most common reforms undertaken worldwide from 2005 to 2006.” These authors specifically address commercial courts in England and Wales,³ Ireland,⁴ France,⁵ the Netherlands,⁶ Tanzania,⁷ Canada,⁸

¹ James R. Munson, Business Courts and the Business Ethos in Revolutionary France, Society for French Historical Studies Annual Meeting, 1993, Chico, California.

² <http://www.abanet.org/buslaw/blt/2008-03-04/nyheim.shtml>.

³ For further detail on the multiple business courts in London, see, e.g., Judiciary of England and Wales, *Report of the Commercial Court and Admiralty Court* (2005-2006), http://www.judiciary.gov.uk/docs/annual_report_comm_admiralty_ct.pdf; Ince & Co., *The London Commercial Court keeps getting better!*, available at <http://www.incelaw.com/publications/ebriefapril2008/shippingebriefapril2008v1/londonscommercialcourtkeepsgettingbetter/>.

⁴ Terry Leggett, *Ireland's New Commercial Court*, available at http://www.efc.ie/publications/legal_updates/articles/litigation/irelands_new_commercial_court.htm.

⁵ See Jonathan Wise Pollier, *French-American Litigation, How to avoid being forced to litigate in France – How to understand French Commercial Litigation Practices* (Jan. 15, 2003), available at http://www.paris-law.com/articles/Fench_comercial_litigation-en.htm (addressing practices in French Tribunal of Commerce).

⁶ An August 2006 paper by Professor Maarten J. Kroeze of Erasmus University in Rotterdam compares the Dutch Companies and Business Court with Delaware's courts. Maarten J. Kroeze, *The Dutch Companies and Business Court as a Specialized Court*, published in *The Quality of Corporate Law and the Role of Corporate Law Judges* (2006), and available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976277.

⁷ David Louis Finnegan, *Judicial Reform and Commercial Justice* (Draft 8/12/04), Background Paper Prepared for the World Development Report 2005, available at <http://www->

Thailand,⁹ and Uganda,¹⁰ while noting the existence of others and development of still more.¹¹

wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2005/02/09/000090341_20050209092736/Rendered/INDEX/313520judicial11bkgd0paper0WDR20051.txt. “The Commercial Division of the High Court of Tanzania . . . was established in 1999 with express purpose of improving the efficiency and fairness of commercial dispute resolution in the country.”

⁸ The web page for Toronto’s Commercial List can be found at <http://www.ontariocourts.on.ca/scj/en/notices/pd/toronto/commercial.htm>.

⁹ International Trade Court, <http://www.thailawforum.com/articles/ipvichai.html>.

¹⁰ *The Commercial Court of Uganda*, 1996-2006, available at <http://siteresources.worldbank.org/PSGLP/Resources/commercialcourts.pdf>. Decisions of the Commercial Court of Uganda can be found on the Uganda Law Information Institute website at <http://www.ulii.org/ug/cases/UGCommC/> or Southern African Legal Information Institute at <http://www.saflii.org/ug/cases/UGCommC/>.

¹¹ In addition, at a minimum, the following countries have commercial courts of some type or have pursued a commercial court (though the quality and reliability of these courts may vary):

Argentina (Commercial Courts, including an appellate level commercial court, Centro de Estudios de Justicia de las Américas, Argentina, available at http://www.cejamericas.org/reporte/muestra_pais.php?Idioma=NGLES&pais=ARGENTIN&tipreport=reporte2&seccion=INST_137).

Austria (Commercial Court of Vienna, http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_aus_en.htm);

Belarus (Supreme Economic Court and Economic Courts, <http://www.court.by/en/economic-justice/jurisdiction/>);

Belgium (Tribunal of Commerce, for some cases see, <http://www.cisg.law.pace.edu/cisg/text/caselit.html#belgium>);

Cambodia (*The Establishment of Commercial Court in Cambodia: Key issues and Challenges*, Economic Institute of Cambodia (November-December 2003, available at http://www.eicambodia.org/downloads/files/ER2_establishing_ofcommercialcourt.pdf. Cambodia had committed to establishing a commercial court as one step in joining the World Trade Organization);

Croatia (Commercial Courts, first instance and appellate, Dunja Kuecking and Milivoje Zugi, *The Croatian Legal System*, GlobalLex (July 2005, updated May 2007, available at <http://www.nyulawglobal.org/globalex/Croatia.htm>);

Denmark (Copenhagen Maritime and Commercial Court, established in 1862, available at <http://www.domstol.dk/om/otherlanguages/english/thedanishjudicialsystem/maritimeandcommercialcourt/Pages/default.aspx>);

Egypt (commercial courts, USAID/Egypt, <http://egypt.usaid.gov/Default.aspx?pageId=580>);

Guyana (commercial court established in 2006 per U. S. State Department, <http://www.state.gov/e/eeb/efd/2007/80671.htm>, also reporting efficient case disposition);

Kenya (Milimani Commercial Court in Nairobi, International Intellectual Property Alliance, 2003 Special 301 Report, Kenya, <http://www.iipa.com/rbc/2003/2003SPEC301KENYA.pdf>, questioning improvements in hearing commercial cases after its creation in 1999, and see Southern African Legal Information Institute website for decisions of this court, available at <http://www.saflii.org/ke/cases/KEHCMCC/>);

Justice Kofi Date-Bah of Ghana's Supreme Court recently wrote of the developing Commercial Court in his country.¹² Reflecting how business courts in one jurisdiction can impact another, he writes that in 2002 "the Ghana Judiciary sent a delegation, sponsored by DANIDA, the Danish development agency, to Tanzania . . . to observe the Tanzanian Commercial Court which had been established a few years before."¹³ Also in Africa, subsequent to the Rwandan genocide, one aspect of change in the country was the development of commercial courts, which became operational on May 15, 2008.¹⁴

Recently in Australia, it was reported that the "Victorian Supreme Court will dramatically expand the way it handles commercial cases from February by allocating five judges to a specialist Commercial Court."¹⁵

Malawi, (<http://www.saflii.org/mw/cases/MWCommC/>);

Morocco (Supreme court has commercial division, and there are eight commercial courts and three commercial appeals courts, <http://www4.worldbank.org/legal/database/Justice/Pages/jsRole.asp?Country=2840&cD=Morocco&Year=2000&Role=20>);

Qatar (Civil and Commercial Court, <http://www.qfccourt.com/index.php>);

Russia (High Arbitrazh Court, which is the Supreme Commercial Court in Russia, <http://www.arbitr.ru/eng/sac/>; but see Arianne Lambert-Mogiliansky, Konstatin Sonin, Ekatarina Zhuravskaya, *Are Russian Commercial Courts Biased? Evidence from a Bankruptcy Law Transplant*, Center for Economic and Financial Research at New Economic School (March 2007));

Scotland (Commercial Court of the Court of Session, <http://www.scotland.gov.uk/Publications/2008/10/30105800/3>);

Serbia (Commercial Courts, <http://serbia.usaid.gov/code/navigate.php?Id=509>);

South Africa (South Africa Competition Tribunal, <http://www.comptrib.co.za/#>; the Competition Act can be found at <http://www.comptrib.co.za/docs/Comp%20Amendment%20Act.doc>);

Switzerland (commercial courts in cantons of Aargau, Berne, St. Gallen and Zurich, Gregor Bühler, *see Enforcing Intellectual Property Rights*, at http://www.buildingipvalue.com/05EU/299_302.htm);

Turkey (Commercial Courts, *see* Kjell Björnberg and Ross Cranston, *The Functioning of the Judicial System in the Republic of Turkey, Report of an Advisory Visit* (June 13-22, 2005); and

Ukraine (commercial courts, <http://www.hg.org/article.asp?Id=5682>).

¹² Justice Kofi Date-Bah, *International Academy of Commercial and Consumer Law Changing Law For Changing Times, 13th Biennial Meeting: Developing a New Commercial Court in Ghana*, 42 Tex. Int'l L. J. 619 (2007).

¹³ *Id.* at 620.

¹⁴ Sabine Hertvelt, *Pragmatism leads the way in setting up specialized commercial courts*, http://www.doingbusiness.org/documents/CaseStudies/Rwanda_CS2008.pdf.

¹⁵ Leonie Wood, *Supreme Court expands to cope with commercial disputes*, The Age.com.au, Business Day (Nov. 22, 2008), available at <http://business.theage.com.au/business/supreme-court-expands-to-cope-with-commercial-disputes-20081121-6e65.html>. The Supreme Court of Victoria has a commercial and equity division. *See* Department of Justice, Victoria, Australia, Supreme Court of Victoria,

Spain established commercial courts in 2004. Their jurisdiction includes, but is not limited to such matters as the following

Unfair competition, industrial property, intellectual property and publicity; Proceedings brought in relation to the legislation on commercial companies and co-operatives, such as those challenging corporate resolutions; Transport and maritime disputes; Disputes regarding standard term contracts; Appeals against decisions of the General Directorate of Registries and Notaries . . .; Procedures for the application of articles 81 and 82 of the European Community Treaty; and All issues arising from the application of Spanish legislation on arbitration to the above mentioned matters.¹⁶

Among other reasons, Spain created its commercial court for the oft-cited reason of gaining judicial expertise for complex matters, leading to efficiency, predictability, and certainty.

The judges sitting in these new courts are expected to have an in-depth knowledge of the matters brought before them, so that they may make fully informed decisions on matters of unquestionable technical difficulty, and do it more efficiently. The expected broader unity and understanding in the interpretation of law will also result in greater legal certainty.¹⁷

As to the purpose in creating these courts, the goals are familiar to those following the development of American business courts: “a reliable dispute resolution system and, for this reason, an in-depth understanding of certain areas of law is increasingly important in today’s society.”¹⁸ Like judicial expertise, such reliability adds value in the form of legal certainty and predictability, important elements in economic development.

Two authors in a recent article also suggest that well run business courts in one nation could conceivably provide forums for dispute resolution to litigants from countries where such courts are lacking.¹⁹ They observe that: “Effective courts are central to sustained economic development. Badly performing courts burden not only

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Courts/Victorian+Courts/JUSTICE+-+Supreme+Court+of+Victoria>.

¹⁶ Manuel Garcia Villarrubia, Spain Creates Specialist Commercial Courts, Mondaq, Corporate/ Company Law (Feb. 1, 2005), available at <http://www.mondaq.com/article.asp?articleId=30631>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Jens Dammann and Henry Hasmann, *Globalizing Commercial Litigation*, 94 Cornell L. Rev. 1 (2008).

litigants, but also nations as a whole.”²⁰ A recent article in a Frankfurt, Germany newspaper, addressing the potential for promotion and development of Germany as an international legal venue, extolled the merits of the New York Supreme Court’s Commercial Division as a model for an international commercial adjudication forum that might be created in Germany.²¹

Finally, in considering specialized adjudication forums to resolve commercial disputes internationally,²² the prevalence of international commercial arbitration providers and laws must also be considered.²³ Well regarded venues for international arbitration outside of the United States include London, Geneva, Stockholm, Cairo, Kuala Lumpur, Singapore, and Hong Kong.²⁴ There are also international courts, but these are arguably less successful in terms of enforcing results, than are private arbitration forums.²⁵

In mentioning these international arbitration or judicial forums, however, there remains a significant distinction between them and the business and commercial courts

²⁰ *Id.* at 3. They continue: “An obvious implication is that countries with underperforming courts should reform them. Yet experience has shown reform to be both difficult and slow, especially where the independence and integrity of the judiciary are in question. There is, however, another approach to dealing with a dysfunctional court system - one that can go hand in hand with domestic judicial reform. The law can enable litigants from countries with ineffective judicial systems to have their cases adjudicated in the courts of other nations that have better-functioning judicial systems.” 94 Cornell L. Rev. at 3 (footnotes omitted). Whether or not this will become a reality, it reflects the idea that reliable court systems can attract litigants looking for reliability, including businesses.

²¹ Corrina Budras, *Wirtschaftsrichter in Amerika sind Spezialisten für Unternehmen*, Frankfurter Allgemeine (Jan. 13, 2009), available at <http://www.faz.net/IN/INtemplates/faznet/default.asp?tpl=common/zwischenseite.asp&dx1={CB7F77EC-022A-2B16-8171-D8F6D1CE77F}&rub={DA9C3181-E1CF-41D7-B497-9A992A1DEC6D}>. This is roughly translated as “Commercial judges in the U.S. are experts for enterprises.” That panel also stressed that there is not only competition among arbitration forums for the resolution of international commercial disputes, but among courts as well. Galf-Peter Callies and Hermann B. Hoffman, *Judicial Services for Global Commerce—Made in Germany?*, 10 German Law Journal No. 2 (Feb. 2009), available at <http://www.germanlawjournal.com/print.php?id=1080>. An interesting New York times article from 1913 discusses how a German model to resolve business disputes provided an excellent model that could be followed in New York. Davis Edwards, *Business Courts Needed to Resolve Commercial Quarrels*, New York Times (Oct. 12, 1913), available at <http://select.nytimes.com/gst/abstract.html?res=F30B10F63A5D13738DDDAB0994D8415B838DF1D3&sctp=1&sq=business%20courts%20needed%20to%20&st=cse>.

²² Of course, private commercial arbitration is commonly used with the U.S. as well.

²³ As one author states: “In the last fifty years, arbitration has become the most important mechanism for resolving international commercial disputes.” Mark L. Movsesian, *Symposium: Public and Private Law in the Global Adjudication System: Article: International Commercial Arbitration and International Courts*, 18 Duke J. Comp. & Int’l L. 423 (2008) (“Movsesian”).

²⁴ William F. Fox, *How to Think About International Commercial Dispute Resolution*, ALI-ABA Course of Study Materials, Fundamentals of International Business Transactions § 2.02(b)(3)(3) & n. 15 (May 2008). For a lengthier list of international arbitration centers see <http://www.chinalawblog.com/InternationalArbitrationCenters.pdf>.

²⁵ Movsesian, *supra* note 23, at 424.

discussed above. A nation's business and commercial courts provide a venue for disputes that are more likely to be between litigants within a nation (region/city/state); at least in larger nations with large numbers of businesses. Thus, at least to some extent, forums primarily designed to resolve disputes among parties from different nations are not competing with business and commercial courts where litigants may be either intra-national (regional/state/city) or international.

In sum, the development and evolution of a specialized judiciary to resolve commercial and business disputes is a dynamic international reality, worthy of our close attention in the coming years.