

DEVELOPING A UNIFORM COMMERCIAL LAW POLICY IN GHANA.

Chris Adomako-Kwakye *

I. INTRODUCTION:

This paper discusses whether Ghana has a commercial law policy and whether the existing framework promotes domestic and international commercial transactions. The paper examines the state of the Commercial Law regime of Ghana and argues that there is the need for a viable Uniform Commercial law policy for Ghana.

Historically, commercial law developed from the law of the merchant - 'lex mercatoria' - which was practised by the merchants in the Middle Ages. The merchants traded among themselves in Europe and when disputes arose, the courts of the fairs and boroughs and the staple courts adjudicated between the parties by applying the lex mercatoria. The lex mercatoria¹ was basically an international law of commerce based on the customs and practices of the merchants at that period in Europe.

The Court of Admiralty² took over the merchant's court. Later, the Common Law Courts also took over the 'commercial jurisdiction' of the Court of Admiralty. The Common law modified its 'principles and practices' by adopting some of the rules of the lex mercatoria so as to cater for the needs of the merchants. Eventually, the lex mercatoria was incorporated into the Common Law³. The development of commercial law through common law was not without problems as it led to conflicting decisions. This eventually led to codification⁴ of some aspects of commercial law as against codification of the whole of Commercial Law.

Commercial Law as a discipline is not easy to define in view of the numerous units⁵ comprising it⁶. Numerous definitions have been given by writers on the

*B.A. (HONS), B.L. GHANA, LL.M (BRISTOL, U.K.), Lecturer, Faculty of Law, K.N.U.S.T.

This paper was presented at the Faculty Seminar Series in memory of the late Mr. A.K. Amankwaa, who was the Vice Dean and Head of the Commercial Law Department.

¹ The merchants voluntarily accepted it because of the fast way it settled disputes between them. The merchants' courts indeed did away with the technicalities. Speedy trial was very crucial among merchants. The same cannot be said today of the disputes arising from commercial transactions.

² This court is part of the Queen's Bench Division of the High Court in England whose jurisdiction covers civil actions relating to ships and the sea.

³ See Professor Roy Goode, *Commercial Law*, 2nd Edition, 1995, p. 6

⁴ See L.S. Sealy and R.J.A. Hooley, *Commercial Law, Text, Cases and Materials* 3rd Edition, 2003. Mackenzie Chalmers drafted the Bills of Exchange Act 1882, the Sale of Goods Act 1893 and the Marine Insurance Act 1906. The Partnership Act of 1890 was also drafted by Sir Frederick Pollock.

⁵ The units include Sale of Goods, Agency, Hire Purchase, Negotiable Instruments and Insurance.

⁶ Professor Roy Goode for example has posed the question does commercial law exist? Some have also argued that commercial law is a collection of subjects each with its own rules.

subject. For example, commercial law has been defined "... as an expression incapable of strict definition but it is used to comprehend all that portion of the law of England which is more especially concerned with commerce, trade and business"⁷. One of the leading Commercial Law academicians Professor Sir Roy Goode also described Commercial Law as "that branch of the law which is concerned with the rights and duties arising from the supply of goods and services in the way of trade"⁸. This definition covers a wider area. Professor Goode himself in his 1976 Hamlyn Lecture said among others that '*... it encompasses all the principles, rules and statutory provisions, of whatever kind and from whatever source, which bear on the private law rights and obligations of parties to Commercial transactions, whether between themselves or in their relationship with others*'.

From this definition, whenever parties engage in commercial transactions, the parties should not have any doubt in their mind as to what principles, rules and statutory provisions are going to govern their transactions. The essence of this is that where there is a breach, the rights of the party who has suffered will be remedied so that parties will live up to their contractual obligations.

Commercial Law thus generally concerns the law dealing with commercial transactions between parties in the area of business. This brings within its ambit a lot of issues and any attempt thus to get a one shot definition will be problematic.

II. ESSENCE OF COMMERCIAL LAW:

A major reason for the acceptance of the *lex mercatoria* was the speedy manner in which the court addressed disputes between merchants who appeared before the merchant's court. This assertion was confirmed by Lord Devlin in the case of *Kum V. Wah Tat Bank*⁹, when he stated that:

*'The function of the commercial law is to allow, so far as it can, commercial men to do business in the way they want to do it and not to require them to stick to forms that they may think to be outmoded. The common law is not bureaucratic'*¹⁰.

From this, a commercial dispute before the court should be disposed of as soon as possible with the speed of light and this fact should underlie judge's reasoning, the conduct of lawyers and everybody involved in commercial disputes.

This position was also reinforced by Lord Goff when he said of judges presiding over commercial cases that:

⁷ H.W. Disney, *The Elements of Commercial Law* (1931), p1 cited by *supra* note 4.

⁸ Professor Roy Goode, *Commercial Law*, 2nd Edition, 1995, p.8 Penguin. See also other definitions offered by H.C. Cutleridge in *Contract and Commercial Law*, (1935) 51 LQR 117.

⁹ [1971] 1 Lloyd's Rep 439 at 444.

¹⁰ *Supra* note 4 at 8.

'Our only duty is to give sensible commercial effect to the transaction. We are to help businessmen, not to hinder them: we are to give effect to their transactions, not to frustrate them: we are here to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil'.¹¹

The decision in *Commercial Factors Ltd. V. Maxwell Ltd.*¹² by Hammond J. echoes this "that good commercial law should follow good commercial practice". Quite apart from these sentiments expressed, the function of commercial law will not be complete until the needs of businessmen are also considered. One can mention four¹³ basic needs of businessmen namely, upholding their agreements, predictable decisions in commercial issues, flexibility which factors in the latest business practices and faster resolution of disputes at less cost. When this is considered together, then a commercial court should be seen as the nationalized sector of the services for the resolution of disputes and anything contrary will adversely affect the interest of the parties involved. In addition to these there should be a viable commercial law policy whose main objective is to ensure that these aspirations of businessmen are achieved.

With such broad needs of businessmen, the question is does Ghana have laws in the commercial sector to meet the aspirations of the business community? For such aspirations to be met there is the need for a policy on commercial law. Further to the needs of businessmen and the business community being protected under the law, the interest of the direct beneficiaries of the services of the business community cannot be ignored. The law should also protect the interest of the consuming public. In a contract of employment for instance, there is the issue of restraint of trade and can an employer restrain an ex-employee not to set up business where the ex-employee chooses? What is the state of goods put out on the market? Is it safe for human consumption? Are some entities monopolising the system and thereby holding the consuming public to ransom? Take traders in the same area of operation; are there laws which ensure that there are no unfair trade practices? Is the state of the law as it stands now, able to protect the public? These are questions that should be answered positively if the country has a commercial law policy.

III. THE NEED FOR A UNIFORM COMMERCIAL LAW POLICY:

Looking at these questions, it is justifiable to conclude that when it comes to the law concerning commercial transactions it is a myriad of laws.¹⁴ So do the laws relating to commercial law as they stand now, linked together, serve the business community? Are they coherent and complement each other to the extent of serving the commercial needs of the country?

¹¹ Analysing the objectives of the judges when interpreting commercial contracts; [1984] LMCLQ 382 at 391.

¹² [1994] NZLR 724 at 727.

¹³ *Supra* note 4 at 10.

¹⁴ It involves the law of contract, property law, and laws of tort, equity, restitution, company and insolvency. See *supra* note 5.

Generally, commercial laws of Ghana are scattered in case law but gradually some of them have been codified.¹⁵ What has been done by this codification is just an aggregate of different rules of commercial law governing specific aspects of commercial law with no proper linkages. It is seriously contended that the present state of commercial law has no 'linking themes' because the case law and the various legislations are merely helping to implement the philosophy¹⁶ of commercial law and nothing more. For businessmen and the commercial sector to effectively enjoy the benefits of the law, it is advocated that a comprehensive commercial law code with necessary linkages be put in place along the lines of the American Uniform Commercial Code (UCC).

The American Uniform Commercial Code is a collection of recommended laws covering many *different issues* that arise during commercial transactions.¹⁷ The impetus behind it is to establish a uniform law to govern commercial transactions. Article 1¹⁸ titled general provisions sets out the stated purpose of the UCC as:

'to simplify, clarify, and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom usage and agreement of the parties; to make uniform the law among the various jurisdictions'.

The reason for the Uniform Commercial Code in the United States was for uniform laws in the different States. When a businessman moves from Washington D.C. to Los Angeles, his expectation should be same. When Ghana, which is a unitary State, has a Commercial law policy in place, it will help the business community and this will have an influence on the business community in the sub region. It might even eventually encourage the sub regional body the Economic Commission of West African States (ECOWAS), to encourage Countries in the sub region to all go that way.

Such is the policy behind the American Uniform Commercial Code; it is to regulate commercial activities. The Federal states and legal pluralism dictated the need for a Uniform Commercial Code.

The salient headings of the Uniform Commercial Code will be set out: Article 1 is entitled "General Provisions," and sets forth general definitions and principles of interpretation for all of the articles.

Article 2 discusses "Sales," controls every stage of a transaction for the sale of goods, from general obligations, construction of a contract, and performance under

¹⁵ Examples include Sale of Goods Act, 1962 (Act 137), the Mortgages Decree, 1972 (N.R.C.D. 96), the Bills of Exchange Act, 1961 (Act 55) and the Hire Purchase Decree, 1974 (N.R.C.D. 292) among others.

¹⁶ Professor Roy Goode, *The Codification of Commercial Law* (1988) 14 Mon LR 135, suggested party autonomy, predictability, flexibility, encouragement of self-help, the facilitation of security aspects and the protection of vested rights as the principles of philosophy of Commercial law.

¹⁷ Examples are sales, contracts, leases, negotiable instruments, letters of credit, bank collections and secured transactions.

¹⁸ 1-103(1) of the UCC

that contract to breach, repudiation, and excuse of a sales contract. Article 2 also provides remedies for problems that may occur during a sales transaction.

Article 3 covers negotiable instruments, which include checks, cashiers' cheques, travellers' cheques, promissory notes, and certificates of deposit. This article regulates all transactions involving negotiable instruments, such as negotiation and endorsements; payment on the instruments; liability of parties such as the endorser, drawer, and acceptor; and dishonour of the instrument.

Article 4, "Bank Deposits and Collections," regulates collect items and post deposits, and governs the relationship among depository, collecting, and payer banks, and between a payer bank and its customer.

Article 5 addresses letters of credit, including the issuer's obligations, warranties that arise, and remedies that are provided for problems during the issuance process or after a letter of credit has issued.

In 1989, Article 6 was revised and changed from covering bulk transfers to governing bulk sales. It regulates the obligations of a buyer of a bulk sale. A bulk sale generally involves the sale of more than half of the seller's inventory, not in the ordinary course of a seller's business, when the buyer has (or after inquiry would have had) notice that the seller is not going to continue to operate a similar business after the sale, including auction and liquidation sales. There are specific provisions for notice to claimants (such as creditors of the seller), distribution of the sale's proceeds, filing notices of bulk sales, and liability for non-compliance. This ensures that creditors are not bypassed when a company decides to end its business.

Article 7 governs warehouse receipts, bills of lading, and other such documents relating to ownership and transportation of goods.

Article 8, "Investment Securities," includes rules regulating the issuance of security certificates, the transfer and registration of securities, and the obligations of an intermediary who holds them.

Article 9 covers secured transactions, which occur when one party gives another a secured interest in a piece of property, usually to secure payment of a debt. The provisions of this article determine when a security interest may arise, the types of property that may be covered, the validity of the underlying security agreement, and the issue of default. Article 9 also covers the rights of third parties through a process called perfection of a security interest, which occurs when the holder of the security interest files notice of it with the state, so that other creditors know of the existence of the security interest.

Since the creation of the first nine articles, two more articles have been added to the UCC. Article 2A, approved in 1987, covers leases of personal property (not apartments or offices). Article 4A, added in 1989, regulates the issuance, acceptance, and payment of electronic funds transfers.

Among others, the proponents of codification have argued that it simplifies the law and makes it easily predictable. How is this achieved? Basically codification simplifies the law through the use of illustrations. This really helps because in most cases, the language of the statute is not clear and such illustrations and the examples so given helps students, lawyers and the judges in getting the meaning clearer. If the illustration is absent and the judge in interpreting the code errs, a party dissatisfied with such an interpretation will launch an appeal against the judgment and the time and energy to be dissipated really does not make 'commercial sense'.

In Ghana's Criminal Code¹⁹, there are as many as thirty two illustrations of various sections²⁰ of the code. The question may be asked thus why these numerous illustrations? These sections of the code are perceived to be difficult hence such large volumes of illustrations.

It may also be argued that since there are no specialised²¹ courts presided over by specialized judges, codification will also help judges. In other jurisdictions²², these specialized courts exist and are manned by judges who are also experts in their areas. In Ghana, when a judge sits in court, all manner of cases²³ are brought for adjudication without recourse to the person's speciality. A judge may not be competent in all areas of the law. Such a judge invariably becomes jack of all trade and master of none. A bad judgment does not mean that the judge is incompetent but simply due to the fact the person's expertise is not in that area. However there is a new wave of change blowing. Her Lordship, the Chief Justice is now increasingly empanelling judges of the Supreme Court and the Court of Appeal in their specialised areas. It is hoped that this trend will be repeated in the courts below. Be that as it may, there are quite a good number of judges who are all round and have been delivering very good judgments.

¹⁹ 1960 Act 29

²⁰ Sections 11, 12, 13, 16, 18, 20, 21, 23, 26, 27, 29, 52, 54, 63, 68, 80, 82, 86, 87, 88, 95, 120, 121, 122, 127, 130, 133, 136, 151, 164, 174 and 280 of the criminal code.

²¹ In 2005, the commercial courts were officially inaugurated in Ghana but it is only in Accra followed by the land courts. The courts are to be replicated in the whole of Ghana and not in Accra. Commercial disputes occur all over Ghana and not only in Accra. What happens to the businessman who has a dispute outside Accra? Fortunately in 2008 commercial and land court have also been established in Kumasi.

²² At least speaking of the United Kingdom, there are specialized courts. Some of them are commercial, property, criminal and family law courts. This has also generated a large volume of specialised law reports all helping to develop commercial law. It is hoped that the establishment of specialised courts will be pursued by the legal community in view of the benefits associated with it.

²³ Civil, crime, landlord tenant, estates, matrimonial, commercial and other cases.

Predictability of the law, is yet another justification for codification in commercial law. In Ghana today, statutes on commercial law are scattered all over our statutes books to the extent that a law may exist but you may not be aware of it. It is difficult to easily access materials on commercial law. This is basically due to the fact that on the various commercial law topics, the subject area may be covered by a different Code, an Act or a Law, depending upon those in authority. Since all these laws came into being at different times under different dispensations, it is difficult to point to a particular theme running through these pieces of legislation. Statutes which are passed will depend upon the priority of the government in power.

This is in direct contrast to the Uniform Commercial Code of the United States of America. The Code was written by the American Law Institute and the National Conference of Commissioners on Uniform State laws. The main aim was to establish a uniform law to govern commercial transactions in the United States. The Uniform Commercial Code is a joint effort meant to "attack commercial problems with comprehensive legal solutions". Hence the formulation of the code is so coordinated and integrated, with all the articles having a bearing on the other. The drafting of the code started in 1940 and it was finally approved in 1951. Anyone who picks up the American Code can easily trace the various commercial law topics. Thus, looking up the law is not difficult.

This certainly cannot be said of laws covering our commercial law regime. Political instability has also to a large extent affected commercial law policy in Ghana. Having experienced this peaceful political stability²⁴, the nation should start thinking seriously about getting a Commercial Code in Commercial law.

Secondly, the process of codification highlights weakness in the existing law and codification also identifies the weakness and consequently allows outmoded laws to be modernized to do away with ambiguities and inconsistencies in the statutes. The paper will discuss these two issues together. In the United States when it was discovered that there were problems with their commercial transactions, the country resolved to tackle the problem. The idea of codification was mooted and immediately work began in 1940 till 1951 when the code was finally approved.

The problem in the United States so far as commercial transactions were concerned was discovered in 1933, when the great banking crisis occurred, gold was confiscated from the Americans and the United States of America became bankrupt. The richest country in the world became a nation of debtors. The medium of exchange was no longer gold and silver, but "notes" of credit.²⁵ This period revealed the weaknesses in laws regulating their commercial activities which prompted the nation to accelerate the process of codification.

²⁴ From 1992 to date.

²⁵ www.UniformCommercialCode.htm, on accessed 27th September 2006.

The state of the laws which brought the nation into this state was thus addressed. The process showed that not only were the laws weak but it also showed that some of their laws were outmoded and through the process of codification some were modernised. In Ghana certain laws regarding commercial transactions leave much to be desired. This has existed for sometime and although commentators have written and commented about them nothing has been done about it.

A. PAYMENT OF JUDGMENT DEBT:

One such area of the law is payment of judgment debt by instalment. Under the rules of court²⁶, where an application is brought for payment of judgment debt by instalment the order²⁷ gives the judge the discretion to order the judgment debtor to pay with or without interest. Rule two further says that where the order for stay is granted and instalment payment ordered, execution shall not issue until there is some default. What the order fails to do is that it fails to distinguish between personal judgment debt and commercial judgment debt and again does not set any parameters within which such payments are to be made. If it is a commercial judgment debt such an order should not be allowed to stand in our statute books. If the judgment creditor borrowed money from the bank, that person will be paying interest on the loan but the judge in granting instalment payment has discretion, whereas the payment of interest at the bank is not discretionary. In such circumstances, the judgment creditor's counsel's role is very crucial. Counsel's arguments should include bank statements indicating payment of interest which to a large extent, influence the judge's appreciation of the problem. It is submitted that this is a weakness in the existing law, and if the process of codification is implemented, such an outmoded piece of legislation will be modernized or even repealed. The order also does not state the parameters within which it should be paid.

In the case of the Republic v. High Court, Accra; Ex parte Kumoji²⁸, the Supreme Court by a 4-1 majority held that the High Court has jurisdiction to stay its own judgment and order instalment payment. However the court failed to order and define the parameters of the discretion of the judge to grant instalment payment.²⁹ This has an effect on the bank's operation as a whole and the depositors' interest. It makes room for all kinds of frivolous action to frustrate judgement creditors. Even more serious is the effect this judgment has on the general business and financial community. The tendency is that investors will lose confidence in the business sector.³⁰

²⁶ High Court (Civil Procedure) Rules, 2004. C.I.47, Order 41 rule 8

²⁷ Order 42 rule 8(1) of C.I. 47

²⁸ [2002] SCGLR 211

²⁹ This has been a subject of extensive discussion by Kofi Aboagye Esq., in the (2004) 1 Banking and Financial Law Journal of Ghana, pg. 21, under the caption Payment of Judgment Debt by Instalment: The Waterloo of Financial Institutions in Ghana.

³⁰ Ibid, page 29.

This concern was strongly expressed by her Ladyship Sophia Akuffo JSC, thus *"I also wish to observe that, at this stage of our national development, it would be a poor reflection on our legal system if, without any clearly laid down parameters, a judgment creditor's enjoyment of the fruits of his victory should be liable to be dished out piecemeal simply because the judgment debtor requested the court to do so, after entering judgment for the whole amount"*.³¹ This is indicative of the fact that the laws in the commercial sector need some form of reform.

Although the Supreme Court in the *Ex parte Kumoji* judgment cited supra, left a vacuum, because the court failed to give the parameters of payment by instalment, a reform in the rules of court will help streamline this unfortunate aspect of our commercial law jurisprudence which has a negative effect on our economy as well scaring foreign investors who are badly needed in the country.

Codification also makes commercial law an integrated body whereby the various branches are linked by common terminology and a coherent philosophy. It has been contended that the *"net effect of commercial codification will be to improve the law and also produce savings in time, effort and money for those who must advise on it and comply with it"*.³²

The issue is whether the commercial law policy in Ghana now is integrated and linked together by that common terminology which promotes coherence. Obviously with the discussion above in the few areas of the commercial law, the needed integration is absent and inevitably, the needed linkage between the various branches of the law is just not there.

If the point raised by Professor Goode is considered further, codification of the law will help do away with some of the inconsistencies which have been discussed above since the codification will involve looking at the whole law again. This will inevitably improve the law. Secondly, the statutes on commercial law are scattered and it takes time to search for them. If the statutes are codified, all that is needed is to get access to the code. It will help students, practitioners and the members of the bench since the law will be within the reach of everyone. Which one is preferable, spending time to look for laws that are scattered or having a comprehensive one which contains all the laws?

FOREIGN ARBITRAL AWARD:

It has been contended³³, that by section 37 of the Arbitration Act, 1961 (Act 38), a foreign arbitration award of a reciprocating state is enforceable in Ghana. The legislative instrument (L.I. 261) has listed some states as parties to the New York Convention which said states have thus become reciprocating states. Although a

³¹ Note 28 at 254

³² Professor Roy Goode, *Ibid* 137-140.

³³ Michael Gavett, *Enforcement of Foreign Arbitral Awards In Ghana: The Need to Amend L.I.261*, (2004) 1. *Banking and Financial Law Journal of Ghana* 185.

lot more states like the United States and the United Kingdom are signatories to the said Convention the legislative instrument has not been amended to take care of the Countries. The implication is that arbitral awards from such countries cannot be enforced in Ghana. What then becomes of the plea to lawyers to embrace alternate dispute resolution? Is it an act in futility?

This shortfall of the law has become evident in the case between David Andrews Hesse, a shareholder of Investcom Consortium and Scancom Limited operators of Areeba now MTN mobile phone network. The plaintiff in the case, David Andrews Hesse has sued the operators of the mobile among others to 'reverse the dilution of his shares from 6 per cent to two per cent, alleged capital increase and the alleged transfer of his shares to Investcom Consortium'. The operators of the mobile phone network had filed an application at the Commercial Court to stay proceedings in that case pending arbitration in London. The court presided over by Her Ladyship Mrs. Justice Cecelia H. Sowah dismissed the application. The court in its ruling held that the United Kingdom is not a reciprocating State and for that matter an arbitration award from London is not enforceable in Ghana³⁴.

C. INSOLVENCY & BANKRUPTCY:

Another area of commercial law in Ghana which needs a serious consideration is in the area of insolvency and bankruptcy laws. It has been argued³⁵ that Ghana needs a new law on insolvency and bankruptcy since the state of the law now is indeed outmoded.

The memorandum to the new Insolvency Bill stated explicitly that the lack of insolvency legislation is a major handicap to the expansion of indigenous business and the absence of such legislation was recognised to be detrimental to the Ghanaian entrepreneur. Although, there was a law on insolvency³⁶ in Ghana, the legislation had been dormant for forty years because until the new Insolvency Act, 2006, Act 708 was passed. Section 78(1) of the repealed Act³⁷ had not been complied with to the extent that the legislative instrument which was to give a date on which the Act was to become operational was never passed into law, thus technically that law only existed on paper.³⁸

The new Act, Act 708 has given opportunity to debtors to initiate insolvency petitions.³⁹ This makes the legislation fair to both creditors and debtors. Secondly this move will also help debtors in financial crisis to seek the protection of the law. The issue is how many debtors are aware of this provision. It is proposed that stakeholders will make it a point to educate the general public on how to take advantage insolvency petitions.

³⁴ Daily Graphic, Friday February 2, 2007, pg 3.

³⁵ B.J. da Rocha, *The Need for a Modern Insolvency Law in Ghana*, (2004) 1 Banking and Financial Law Journal, 133

³⁶ Insolvency Act, 1962, (Act 153)

³⁷ Ibid

³⁸ Supra note 35 at 135. Indeed the law was meant to protect creditors and debtors during insolvency.

³⁹ Insolvency Act, 2006 Act 708, section 10.

Act 180⁴⁰, on the other hand provides for the official winding up of a company where it is unable to pay its debts.

The passage of the Credit Reporting Act⁴¹ is a step in the right direction. When fully operational, any person who is not credit worthy cannot abuse the system in that the credit record of individuals can easily be accessed by the press of a button. This will help create a conducive atmosphere for business investment. The announcement by the Bank of Ghana of granting a licence to two companies to start operating a credit bureau is welcome news in the financial sector so far as lending by banks are concerned. These are developments which will help protect dealings in the financial sector of the economy.

D. CONSUMER PROTECTION:

Another aspect of commercial transactions which has been neglected for far too long is the protection of the rights of the consumer. The law cannot only look at the interest of the business community and ignore that of the consuming public. The consumer who is a direct beneficiary of goods and services produced under commercial transactions plays a very crucial part in every nation's⁴² economic life. In Ghana, to date, there is no legislation⁴³ on Consumer Protection and that speaks volumes of the attitude of the service providers towards consuming public. Service providers can disconnect their service without any prior information to the general public because the service provider knows that he can get away with it.

Take for example, what has been happening in Ashanti region for the past two and half months. Ghana Television goes off anytime after evening news and no reason is assigned for that. The public however pays television licence fees every year to the Ghana Broadcasting Corporation. For the sake of deriving benefit from the payment of the said fees, at least some reason should have been given to the public. Those who have paid for their advertisements to be shown are denied that right at least in the Ashanti region. Since Ghana television has a nation wide coverage, the party putting the advertisement out want the advertisement to be seen wherever there is transmission. In such a scenario, is the Ghana television going to refund part of the money that has been paid or not? All these go to show that because there is no policy on commercial law, the rights of consumers are treated with contempt.

Recently, the Foods and Drug Board unilaterally banned the airing of advertisement on drugs both in the electronic and the print media. What was surprising was that

⁴⁰ The Bodies Corporate (Official Liquidation) Act 1963 Act 180.

⁴¹ Act 726 of 2007.

⁴² In developed countries, there are Consumer Protection Laws which seek to safeguard the rights of the consumer. See also Guide book on the Rights and Duties of Bank Customers, 1st Edition (2002) where Dr. Kwaku Addeah has expressed the same sentiments.

⁴³ The 13th May, 2008 edition of the Daily Graphic put out an advertisement in which the Ministry of Trade, Industry, Private sector Development & P.S.I. is requesting for an expression of interest in drafting a framework for the Law for Consumer Protection in Ghana.

the same body had approved some of the advertisements which were also affected by the ban. There would have been nothing wrong if the body had gone ahead to ban only those advertisements they had not approved. This was a clear contradiction.

Further the manufacturers had entered into contract with various media houses for these advertisements to be aired when the ban was announced. Media houses were compelled to stop the advertisement fearing a collision with the Foods and Drugs Board. The Food and Drugs Board should however be patted at the back for having that boldness to deal with an intractable lingering problem. Because it is absurd for some of the drugs claim to be able to cure nearly. The Foods and Drugs Board should work closely with the Standards Board and the Advertising Association of Ghana to streamline the market instead of such unilateral orders which may affect those that the board itself has approved.

If such unilateral actions continue, it will be a clear case where a party's right under a commercial transaction has been flouted with impunity by a regulatory body which should have known better. Such is what happens where a country does not have a commercial law policy which caters for the interest of all the parties. The list can go on.

It is particularly important to mention that the absence of legislation dealing with specific aspects of consumer protection is very fatal. These rights are left to be determined by the normal common law rules. But not all of these rights are covered by the common law. Especially latest innovations⁴⁴ in the commercial world. If consumer rights are left to be determined only by contracts, it will be to the disadvantage of the consumer⁴⁵.

The Ghana Television evening newscast⁴⁶ aired the formation of the Consumer Protection Agency. According to the bulletin, the said agency is meant to mediate between consumers and producers. Speakers at the inauguration all expressed the fact that the rights of consumer in Ghana are not respected and the formation of the agency is very timely.

E. CONSUMER AND AUTOMATED TELLER MACHINE CARD:

A glance at the use of ATM cards indicates that those who patronises these cards sign contracts which are standard form contracts titled 'TERMS AND CONDITIONS'. Under liability of card holder it is expressly stated that the cardholder should not hold the bank 'liable, responsible or accountable' in any way whatsoever for any loss, injury or damage arising out of the use of the ATM. From this the bank assumes no responsibility whatsoever when someone other

⁴⁴ Internet and telephone banking, automated teller machines and rechargeable cards for mobile phone subscribers.

⁴⁵ It is not so in other jurisdictions. In the United Kingdom for example quite apart from the common law, the Consumer Credit Act 1974 and the Banking Code offers protection to the consumer in case of loss, misuse and theft of cards.

⁴⁶ On 7th of June 2008.

than the card holder misuses the card.⁴⁷ The banks know that electronic fraud now abounds and this is most unfair when it is viewed against the backdrop that the banks themselves encourage the customers to sign on to these cards to help ease congestion in the banking hall and also make money accessible at all times. This situation cannot continue and there is the need to have a second look at this area again.

On the other hand opponents of codification have argued that codification will result in stagnation in the law and it will also tie the judge's hands. Since the United States Uniform Commercial Code was passed, it has been amended twice to cater for new developments. Hence any new development can be catered for.

IV. CONCLUSION:

The discussion just concluded points to one fact and that is, if the government's aim of making the private sector an engine of growth is to be meaningful, then there is the need to ensure that obsolete laws are amended and a comprehensive review of all existing laws in the commercial sector is taken. This is where the writer is advocating that a comprehensive commercial law policy along the lines of the Uniform Commercial Code be adopted.

Most of the laws in Ghana's commercial law are identical with that of England. Their laws have undergone tremendous amendment⁴⁸ but most of our statutes are still in the same form they were passed in the 1960's. Certainly, the situation that existed in the 1960's is quite different from the present economic dispensation. The way of doing things has changed. The commercial transactions which were carried out in the 1960's are not the same in the twenty first century.

So that if the laws passed in the 1960's are what are regulating the commercial sector of the Country then such unfair treatment will continue to be exhibited by some of the players .

It has been argued⁴⁹ in England that how does the English feel in doing commercial transactions in the 21st Century with statutes passed in the 19th Century?

"How can we seriously expect to confront the problems of modern commerce with legislation enacted in the era of the steam coach, which had to be preceded by a man with a red flag; when the aeroplane, television, the computer and spacecraft were all in the future?" It is the same situation Ghana finds itself in and I hope the observation by Professor Roy Goode will give us some food for thought.

⁴⁷ In the first Ghanaian electronic banking case, *S.A.X. TSEGAI V. STANCHART BANK*, dated 15th March, 2001, the presiding judge remarked that the contract which excludes liability on the part of the bank is the most unreasonable and unfair terms in this era of electronic fraud. See (2004) 1 BFLJG, 51 at 65.

⁴⁸ Amendment of the Bills of Exchange Act, the Sale of Goods Act and others.

⁴⁹ *Commercial Law in an International Environment: Towards the Next Millennium* Chapter 4 in *Commercial Law in the Next Millennium*, pages 96-104 cited by LS Sealy and RJA Hooley, *ibid* page 55

A Commercial Code also brings together in one place the rules governing the major forms of commercial transaction which makes the law accessible to lawyers, the bench and even laymen.

V. RECOMMENDATIONS:

This paper will end by recommending the following measures which will help the nation achieve commercial law policy which is all embracing:

- i) There should be major comprehensive reforms in the laws governing commercial transactions. This is where the Law Reform Commission should rekindle itself to ensure that suggestions like those in the present paper and earlier suggestions are followed through. The Commission may also want to invite papers from stakeholders⁵⁰ in the sector and then hold discussions on what should be done.
- ii) A joint committee comprising Lawyers, and other professionals as mentioned above should be tasked to draft a viable commercial law along lines of the Uniform Commercial Code of the United States. Currently there are two bodies who are working on new laws for the Insurance sector and Companies in Ghana. This is an admission that the state of the commercial laws is not that well. This approach is laudable though, it is a piece meal approach which will not take a holistic view of the problem since committees will be set up often to cater for the problems. The preparation of a commercial code needs a lot of time, resources and several years of work nevertheless it is the price to be paid for quality product which is worth it.
- iii) There is also the need to encourage the establishment of specialised courts so that commercial disputes will not join the main stream courts with its attendant delays and frustration. It is in this direction that this paper will advocate that Commercial Courts should not only be established in Accra but in all the regions because commercial disputes abound in all part of the country. This will eventually call for specialisation on the part of the bench and the bar which will inevitably, encourage research, shape and develop the law.
- iv) It is also strongly advocated that, the practice of just selecting a few people to work on laws is not helpful. It is better to get draft bills debated extensively by stakeholders so as to get diverse views and blend them. This will eventually lead to a good law which will stand the test of time. This can be the starting point for getting a comprehensive Commercial code.
- v) The various academic institutions teaching law should also be given the enabling environment to make an input into the law as well as the business community and the members of the bar and bench. This calls for the necessary linkages between the Attorney Generals Department in charge

⁵⁰ Members of the Bench, Bar, Members of the Business Community, Banks, and Think Tanks like Institute of Economic Affairs among others.

of drafting as most of the problems in the field have been identified through research papers. Such researches should not be allowed to gather dust on the shelves but rather be implemented to benefit the society. The tenure of the Attorney General is another problem that the Country should address. Since under the present dispensation, the two positions⁵¹ are fused together, not much⁵² can be done. This is another reason for separating the two positions to allow the Attorney General to work on some of these issues.

The big question is, is the political will there to commit the process of codification into motion? Indeed if one listens to statements like private Sector is the engine of growth, creating an enabling environment for business, the call to reform businesses, then there is every need for the government to ensure that codification is not relegated to the background. I hope the debate has just begun and will continue hereafter.

⁵¹ Attorney General and Minister of Justice.

⁵² This is due to frequent cabinet reshuffle.