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LIABILITY IN TORT OF THE CARICOM?

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Introduction

The Caribbean Court of Justice (CCJ), in its original jurisdiction, delivered its first three judgments during the first three months of this year. All of them concerned applications made under Article 222 of the Revised Treaty of Chaguaramas (RTC) with a view to seeking special leave to commence proceedings before the CCJ. In one case the applicant, if successful, intended to claim compensation for loss caused by allegedly wrongful acts of the Caribbean Community (CARICOM)¹. In another case, the applicant, if successful, intended to claim compensation for an alleged tortious act of a Member State². In the third case, the applicant sought, if successful, judicial review of acts of a CARICOM institution, and if successful with that, almost certainly, intended to end up with a claim against the Community for damages³. Whilst it is still early days, the fact that two out of three of the applications were made with a view to claiming damages from the CARICOM suggests the relevance and importance to nationals of the CARICOM States, and to legal persons incorporated or registered in those States, of the opportunity for such claims to be dealt with appropriately. However, the RTC contains no express provisions relating to liability in tort of the CARICOM. In their absence many important, controversial, complex and fascinating issues arise. My purpose in this presentation is to explore them.

As the RTC is largely modeled on the European Community Treaty (EC Treaty) it seems appropriate that during this exploration considerable time should be spent examining how the European Community (EC) has dealt with the topic of non-contractual liability of its institutions⁴. It is to be noted that while the RTC contains no express provisions concerning liability in tort of the CARICOM, the EC Treaty contains two relevant, even if very sparse

¹ *Doreen Johnson v Caribbean Centre for Development Administration (CARICAD)* [2009] CCJ 3 (OJ). The judgment can be found at the official website of the CCJ:
<http://www.caribbeancourtsofjustice.org>

² *Trinidad Cement Limited (TCL), TCL Guyana Incorporated (TGI) v The State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ).

³ *Trinidad Cement Limited (TCL) v The Caribbean Community* [2009] CCJ 2 (OJ)

⁴ The concept of non-contractual liability relates to what under common law is described as liability in tort.

and vague, provisions concerning non-contractual liability of the EC. One confers on the European Court of Justice (ECJ)⁵ exclusive jurisdiction over disputes relating to non-contractual liability of the EC and the other sends the ECJ on a mission to discover general principles common to the laws of the Member States to be applied to such disputes. The ECJ has accomplished this mission with aplomb.

This presentation attempts to answer the following three questions:

- Why should the CCJ be the *forum* for dealing with private law claims for damages against the CARICOM?
- Can the provisions of the RTC be construed as allowing the CCJ to create and develop rules on non-contractual liability of the CARICOM? and
- Why is the task of establishing a coherent legal system governing non-contractual liability of the Community one of the biggest challenges facing the CCJ?

I intend, at the end of this presentation, to outline the current law on non-contractual liability of the EC and meanwhile to attempt to answer those questions.

Question 1
Why should the CCJ be the *forum* for dealing with private law claims against the CARICOM?

The main reason is that in the absence of jurisdiction being assumed by the CCJ there will be no *forum* for claimants to seek justice when they believe they have been wronged by the CARICOM. It must, of course be remembered that the CARICOM, being an international organization, enjoys immunity from the legal processes of the courts of its Member States. The immunity of international governmental organisations (IGOs) is not based on international customary law but derives from the terms of the particular treaty creating the IGO. These treaties, almost without exception, specify privileges and immunities accorded to the IGO which are shaped by the function that the relevant IGO was set up to fulfill⁶. With regard to the CARICOM, Article 229(2) of the RTC and the Protocol on Privileges and Immunities attached to the RTC states that the Contracting Parties have granted to the CARICOM immunity from the jurisdiction and execution of their national courts. Resulting from this, a refusal of the CCJ to entertain claims for damages against the CARICOM would amount to denial of any access to a court and thus be in breach of the fundamental human rights enshrined in the Charter of Civil Society for the Caribbean Community, the constitutional law of the Member States and the international human rights treaties to which the Member States of the CARICOM are Contracting Parties.

⁵ The official name of the ECJ is the Court of Justice of the European Communities.

⁶ On this topic see K. Wellens, Remedies against International Organizations, 21 Cambridge Studies in International and Comparative Law, Cambridge: Cambridge University Press (2002), 114-135.

Other matters supporting this position are:

- Only the CCJ can ensure a balance between, on the one hand, the interests of individuals seeking judicial protection and on the other, the CARICOM seeking to preserve its functional independence;
- The main function of the CCJ, although this is not expressly stated in the RTC, is to ensure that law is observed by Member States, Community institutions, and enterprises and nationals of the Member States. As Member States have transferred certain powers to the Community institutions, they expect the Community to be accountable when exercising those powers. Therefore, they expect that their nationals will be protected against unlawful conduct of the Community, that they will have access to the CCJ and that the CARICOM will provide compensation.

Question 2

Can the provisions of the RTC be construed as allowing the CCJ to create and develop rules dealing with non-contractual liability of the Community?

The lack of express provisions establishing liability in tort of the CARICOM does not mean, however, that liability in tort cannot be inferred from some provisions of the RTC. In this respect Article 187(b) of the RTC provides that disputes concerning:

“...allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CSME”

are to be settled in accordance with the modes of dispute settlement specified in Chapter 9 of the RTC. One of these modes is the bringing of proceedings before the CCJ under Article 211(d) which states that the CCJ has compulsory and exclusive jurisdiction to deal with applications brought by “persons in accordance with Article 222”. This article provides that natural and juridical persons are allowed to seek special leave from the CCJ with a view to appearing as parties in proceedings before the CCJ. Under this Article natural or juridical persons may seek leave from the CCJ if the following conditions are met:

- The CCJ has determined that the Treaty intended to confer a right or a benefit directly on them;
- They have been prejudiced in respect of the enjoyment of the right or benefit specified above;
- The Contracting Party to the RTC omitted or declined to espouse the claim of prejudice or expressly agreed to the person concerned bringing a claim before the CCJ instead of the Contracting Party;
- The CCJ has determined that the interests of justice so require.

It is submitted that the combined effect of Articles 187(b), 211(d) and 222 shows that the CCJ is allowed, if not required, to hear and determine applications brought by natural or

juridical persons for damages suffered by them as a consequence of a wrongful act or omission on the part of the CARICOM. The above submission is supported by the statement made by the CCJ in *TCL, TCL Guyana Incorporated v Guyana*⁷. The CCJ stated that it does not intend to place undue reliance on a literal approach and that it will give preference to the teleological method which focuses on the context, object and purpose of the RTC whilst paying attention to such factors as the intention of the contracting parties, historical context, the subsequent conduct of the contracting parties etc. Obviously, in the context of the CARICOM, the teleological approach is certainly the most appropriate as it infuses common sense and flexibility in the interpretation of a very complex treaty. If one places Articles 187(b), 211(d) and 222 in the general context of the RTC and interprets them in the light of the provisions of the RTC as a whole, paying regard to the purpose and considerations that led the Contracting Parties to conclude the RTC as expressed in its Preamble, and in particular to:

- The desire of the Contracting Parties to establish and maintain a sound and stable macroeconomic environment that is conducive to investment;
- The affirmation that the original jurisdiction of the CCJ is essential for the successful operation of the CSME; and
- The commitment of the Contracting Parties to the Charter of Civil Society of the Caribbean Community which reaffirms the human rights of their people

one can reasonably argue that a legal regime dealing with non-contractual liability of the CARICOM should be created. With regard to the intention of establishing and maintaining an environment conducive to investment it may be thought that no wise investor is likely to be attracted to a region where the CARICOM is a “sacred cow” and he will therefore have no remedy against unlawful conduct of the CARICOM. As to the second and third above mentioned intentions, it is submitted that the CCJ will fail in its mission if it does not ensure that natural and legal persons have access to a court for the determination of their rights in a situation where the CARICOM is the alleged culprit.

Should there be any doubt as to the any doubt as to the soundness of the inference drawn with regard to the construction of the RTC, it may be appropriate to ask whether the CCJ is empowered to fill gaps in the Treaty. The CCJ has only the powers which have been attributed to it by the Member States. Therefore, if the Treaty is silent on an important issue, can the CCJ arrogate jurisdiction to itself to fill the void, i.e. judicially revise the Treaty? The answer is provided in Article 217(2) of the RTC which, by implication, gives the CCJ competence to revise the RCT. It states that the Court “may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law”. The term “non-*liquet*” derives from Roman law and means “it is not clear”. The result of a finding of *non-liquet* is that a court cannot decide the case because of the gap in the law. Obviously, the Contracting Parties to the RTC by imposing a duty on the CCJ to fill gaps in the RTC have assigned to it a wider

⁷ *Trinidad Cement Limited (TCL), TCL Guyana Incorporated (TGI) v The State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ).

role than that consisting merely of applying the RTC to the case at issue. They, on the one hand, have shown their great confidence in the judicial wisdom of the judges and, on the other, have recognized that the RTC is not all encompassing and therefore the CCJ should deal with a situation where the RTC is silent, unclear or inadequate. Consequently, they should not be surprised when the CCJ by reference, *inter alia*, to the general principles of international law, goes beyond its function of statutory interpretation and turns from law finding to law making.

There is perhaps potentially a slightly ironic twist to the possible situation of a Member State which finds itself unhappy with a judgment of the CCJ establishing CARICOM's liability in tort. Whilst that Member State may choose to bring proceedings before the CCJ challenging its interpretation of the RTC, that Member State's chances of being successful are rather slim bearing in mind that Article XVI (2) of the Agreement Establishing the Caribbean Court of Justice (CCJ Agreement) says: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be determined by decision of the Court". It is submitted that the prospect of the CCJ overruling itself is very unlikely. Further, under Article XXII of the CCJ Agreement, which provides that the CCJ's judgments constitute *stare decisis*, it is uncertain whether the CCJ would be within the law in overturning its previous judgment⁸. Accordingly, it seems that any Contracting Party will have to act in conformity with Article XXVI (a) of the CCJ Agreement which requires that judgments, decrees, orders or sentences of the Court are to be enforced by all courts and authorities in any territory of the Contracting Parties as if they were delivered by a superior court of that Contracting Party.

Obviously, Member States of the CARICOM will always be empowered to either accept or negate the "judicial activism" of the CCJ in any future revisions of the RTC. It is also important to emphasise that judicial revisions of the EC Treaty by the ECJ, have, to date, been accepted by the Member States in the subsequent revisions of the EC Treaty.

Question 3

Why is the task of establishing a coherent legal system governing non-contractual liability of the Community one of the biggest challenges facing the CCJ?

The task of the CCJ will, if it decides to establish a legal regime governing non-contractual liability of the CARICOM, be far from simple for the following reasons.

⁸ In this respect the Hon. Mr. Justice Duke E.E. Pollard, a judge of the Caribbean Court of Justice stated: "...the jury is still out regarding how the CCJ in the exercise of its original jurisdiction will construe and apply the doctrine of *stare decisis*. For example, will the Court regard the doctrine as a shackle to bind or as a guide to lead?" in *Interstate Disputes Resolution in the Caribbean Court of Justice*, a presentation delivered at the Brandeis Institute for International Judges Conference 2009, Port of Spain, Trinidad and Tobago, 5-8 Jan 2009, point.3.8.

A) The CCJ will have to establish a legal regime on non-contractual liability of the CARICOM which strikes a fair balance between the discretion of the administration and its accountability.

The issue of how to control administration is, in any context, fraught with controversies but this issue is even more controversial in relation to the administration of a regional organization such as the CARICOM which has, as its main objective, the task of deepening regional integration through the creation of an internal market. How should the CCJ hold the CARICOM (which has been given wide ranging discretionary powers in order to achieve the objectives set out in the RTC) accountable without unduly restricting the exercise of discretion by Community institutions and bodies or even paralyzing any action due to the prospect of numerous claims for damages? How should the CCJ avoid the accusation of itself usurping the role of decision maker and even worse, of passing judgment on the quality, style and effectiveness of the administration?

B) The CCJ will have to reconcile the need for the effective protection of individuals and the requirements of the general interest of the Community.

If the judgments of the CCJ are too generous to individuals they may, in the worst case, cause the destruction of the CARICOM by making it bankrupt. However, if the criteria for liability are moulded so as to protect the Community institutions from damages claims in every instance and thus, in fact, make any recovery almost impossible, natural and juridical persons, especially potential foreign investors, will have no confidence in the Community legal system.

C) The CCJ will have to decide whether one set of rules on non-contractual liability of the CARICOM or its servants is appropriate to deal with all types of action for damages or if different rules should be created for each type of action.

Rules on non-contractual liability of the CARICOM must deal with three types of action for damages: liability for failures of administration, liability for legislative acts and liability for negligent acts by servants of the Community in the pursuit of their duties.

D) The CCJ will have to decide what are the most appropriate conditions for non-contractual liability of the CARICOM.

Article 217(1) of the RTC will be of assistance as it states that the CCJ, in exercising its original jurisdiction under Article 211, that is, in respect of contentious proceedings, "shall apply such rules of international law as may be applicable".

E) The CCJ will have to decide whether the CARICOM's liability should be based exclusively on fault or whether, in some circumstances, the CARICOM could be held liable for lawful acts which nevertheless cause damage to natural or juridical persons.

The current EC law on non-contractual liability of the Community.

The ECJ in Case 4/69 *Alfons Lütticke GmbH v Commission*⁹ set out the conditions for non-contractual liability. These conditions are:

- Unlawfulness of the conduct
- The existence of damage; and
- The existence of a causal connection between the conduct and the damage in question.

All conditions governing the Community's liability must be satisfied. If one of them is not fulfilled any application for damages will be dismissed in its entirety without the necessity for the Community courts to examine the remaining conditions for such liability¹⁰. It is for the applicant to produce before the Court the evidence to establish the unlawfulness of the conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the damage suffered¹¹.

The manner in which the ECJ has interpreted each of the above conditions has dramatically changed over the years. Perhaps, the most recent substantial change was in Case C-352/98 *Laboratoires Pharmaceutique Bergaderm SA v Commission*¹², in which the ECJ held that the time had come to unify the conditions governing the non-contractual liability of the Community and that of the Member States in like circumstances. This, according to the Court, was necessary to ensure that the protection of the rights of individuals remains the same irrespective of whether a Member State or the Community is responsible for the damage. Further, the ECJ decided that the same conditions for Community liability under Article 228(2) EC should apply to different types of action for damages under Community law, i.e. whether the action concerns a case of maladministration or liability for an act of a legislative nature.

The above conditions are examined below.

A) Unlawfulness of the conduct, which requires that the applicant must establish the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals.

The key element is set out in the first condition which requires that an applicant must establish the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. The requirement that a rule of law must confer rights on individuals is easily satisfied. It suffices that a person can derive some benefit from the application of the relevant provision. The second requirement of this condition, on which most claims have

⁹ [1971] ECR 325.

¹⁰ Case C-146/91 *Koinopraxia Enóseón Georgikon Synetairismon Diacheiríséos Enchorion Proïonton Syn. PE (KYDEP) v Council and Commission* [1994] ECR I-4199.

¹¹ Case 26/74 *Roquette Frères v Commission* [1976] ECR 677; Case T-271/04 *Citymo v Commission* [2007] ECR II-1375.

¹² [2000] ECR I-5291.

floundered, is that a breach of EC law must be sufficiently serious. This will only be satisfied in special circumstances where the institution in question has “manifestly and gravely exceeded the limits of its discretion”. However, not only is the margin of discretion enjoyed by the relevant institution important as to the establishment of the seriousness of the breach but other factors, such as whether the breach was excusable, or intentional and whether the matter under consideration was complex, come into play. As a result, most illegal measures will not be illegal enough to justify the payment of compensation!

Many claims have been rejected on the ground that the case at issue was so complex that a Community institution’s violation of EC law could not be considered as being sufficiently serious¹³. It appears that in respect of competition cases claims based on non-contractual liability of the Commission will be often, or perhaps always, dismissed on the basis of the complexity/difficulties in applying the relevant provisions of EC law.

B) Damage.

The damage suffered must be actual and certain, regardless of whether it is present or future. It must not be purely hypothetical or speculative. The loss must be “quantifiable” .i.e. it must be determinable in terms of money.

Compensation may be obtained for all damage suffered, which comprises *damnum emergens* (the actual loss) and *lucrum cessans* (the income/profit which would have been earned/made). However, the ECJ has always been more reluctant to compensate for loss of profit than for actual loss.

Both, material and non-material damages can be claimed by the applicant.

If the loss has been passed on to third parties, the applicant will not be entitled to recover it¹⁴. Also, there is a duty to mitigate damage.

C) The existence of a causal link.

A direct, immediate and exclusive causal link must be established between the damage suffered and the unlawful conduct¹⁵. Therefore “only if the damage arises directly from the conduct of the institution and does not depend on the intervention of other causes, whether positive or negative”¹⁶ will the requirement of causality be satisfied.

It is also important to note that Community law recognises contributory negligence.

¹³ Case C-198/03P *Commission v CEVA Santé Animale SA and Pfizer Enterprises Sarl* [2005] ECR I-6357.

¹⁴ Joined Cases 261 and 262/78 *Interquell Stärke-Chemie GmbH & Co. KG v European Economic Community* [1979] ECR 3045.

¹⁵ Case 18/60 *Louis Worms v High Authority* [1962] ECR 195.

¹⁶ A.G. Toth, *The Concepts of Damage and Causality as Elements of Non-Contractual Liability*, in T. Huekels and A Mc Donnell (Eds), *The Action for Damages in Community Law*, The Hague: Kluwer Academic Publisher, 1997,192.

Conclusion

The CCJ, a young court endowed with the ambitious task of administrating and helping to create a new legal order in the Caribbean region faces great challenges. One of them is to decide whether it has jurisdiction to deal with private claims in tort against the CARICOM. If it decides that it has such jurisdiction then it must establish coherent rules on such liability. Bearing in mind the many similarities between the EC Treaty and the RTC, it may be that the European experience will be of some assistance to the CCJ.

While it can be said that the ECJ's conditions for liability in this relatively new and very controversial area are innovative, it is also correct to say that, at first glance, they give the impression of being generous to applicants. Nevertheless, the fact is that because the ECJ has adopted a restrictive notion of unlawful conduct, of damage and of causation, applicants have rarely been successful under Article 288(2) EC. Further, even if applicants are successful¹⁷ they are almost never awarded the full amounts claimed. It is to be noted that applicants tend to be more successful when the administration has failed to perform to the required standards than in cases where the Community has been exercising its discretion when making choices of economic policies. The restrictive approach of the ECJ to the determination of non-contractual liability of the Community has, for differing reasons, been criticized by many¹⁸. It is submitted that the main criticism is that the ECJ has taken the side of the Community at the expense of individuals. As a result, individuals have to suffer the consequences of not always sound and reasonable choices of economic polices made by the Community institutions. As the late Judge Mancini stated, the Community had, in this area, let the individuals down¹⁹. However, it can also be said that the ECJ has not let down the EC. Perhaps, on reflection, the Court's restrictive approach to non-contractual liability is the best an organization such as the EC can ever achieve? Certainly, the restrictive approach keeps the number of cases against the Community down to an acceptable level and ensures that Community institutions are not put off making decisions in the interests of the Community. Indeed, the creation of a defencive Community where decisions necessary for the attainment of the objectives of the Community are not taken in order to avoid liability would lead to stagnation and inertia. Further, the restrictive approach ensures that damages awards have not had a debilitating effect on the limited resources of the EC. Finally, one must always remember that, at the end of the day, the bill for damages paid by the Community is ultimately paid by nationals of the Member States.

¹⁷ Advocate-General Tesouro stated in his Opinion delivered to the ECJ on 26/11/95 in Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* ([1996] ECR I-1029) that, as at that date, only eight awards of damages against the Community had been made. Subsequently, successful cases have also been few.

¹⁸ See J. Coppell and A. O'Neill, *The ECJ: Taking Rights Seriously?* (1992) 29 CMLRev 669.

¹⁹ F. Mancini, *Democracy and Constitutionalism in the European Union*, Oxford: Hart Publishing, 1999, in particular Chapter 3 on Democracy and the European Court of Justice.