

# **THE ROLE OF THE CARIBBEAN COURT OF JUSTICE (CCJ) IN THE PRIVATE SECTOR'S LIFE**

**The Honourable Mr Justice Jacob Wit  
Judge of the Caribbean Court of Justice**

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Distinguished ladies and gentlemen,

In his 1939 book "Woe unto you, lawyers" Yale Professor of Law Fred Rodell commenced his first chapter as follows:

"In Tribal times, there were the medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day."

And so, I have to commend you on your courage to invite a representative of this seemingly powerful, secular and rather secretive priesthood specialized in legal mumbo jumbo to address you, all normal people, today. Now, do not be afraid. Let me assure you that I will keep this as simple and painless as possible and that, although the Law cannot exist without some measure of metaphysics, I will keep that within acceptable limits.

Let me first tell you something about the CCJ. As you all know, this court was inaugurated on 16 April last year. At that point in time the President and four other judges of the court had been sworn in. In July, two more judges followed. So the court now has seven judges. Not much was heard of the court in the months following the inauguration. This cannot really surprise anyone, considering the fact that the CARICOM Single Market (CSM) has only recently been launched and, although as many as nine (9) Caribbean countries have solemnly agreed that the CCJ will be their final court of appeal, only two, Barbados and Guyana, have succeeded in consummating that sacred obligation.

As you might know, the court has two very different fields on which to play. Firstly, there is the so-called original jurisdiction, where the court functions as an international, regional court and deals exclusively with disputes arising out of the CSM (as the first stage of the CSME), which is to be created and developed on the basis of the Revised Treaty of Chaguaramas. Secondly, there is the so-called appellate jurisdiction where the court functions as the final court of appeal of those CARICOM countries who so desire. Last year only one case was heard in that jurisdiction, a civil case from Barbados, although it was heard twice, first on the application to grant leave to appeal and after that on the appeal itself.

Now, that does not seem much work for a court with seven well-, experienced judges. And of course it is not, although more cases have now started to flow smoothly in. This does not mean, however, that the judges have been idle. Actually, they have been working very hard. So, you might wonder, what have they been doing?

To set up a court of this magnitude, it is not sufficient to find and select judges with the necessary distinction and experience. That is only the first step. Do not forget that these judges come from different countries and even different legal systems and their daunting task, as far as the original jurisdiction is concerned, is nothing less than creating from scratch a unique and indigenous legal system of

CARICOM law which does not exist as yet. Of course, in exploring the seas and shores of the CSME, the court will have some instruments to find its way and map out its course, such as the principles and rules of international law, the case-law of the European Court of Justice (ECJ) and academic writings on international and European Union (EU) law, but this does not take away the fact that most of these waters are uncharted. The charting of these yet unknown waters will have to be done by the pioneer judges of the CCJ.

And so we have been studying and discussing legal matters we think might be important in our coming exciting enterprise. Thus we have been preparing ourselves for the things to come, along the way establishing an *esprit de corps* that is both needed and satisfying. And in order to be able to set sail when the time shall come we have been creating and molding our court rules, first the relatively easy ones of the appellate jurisdiction (which do not deviate yet very much from the existing rules of the Privy Council) and subsequently the more difficult court rules for the original jurisdiction, which are now in their final draft. These original jurisdiction rules will, I dare say, prove to be very interesting, because they are influenced by the three major legal systems which have their representatives in the court: the Common Law, the Civil Law and International Law. The rules have been designed in such manner that they can be understood easily by lawyers from each of these systems and even and, I would add, more importantly so, by normal, sensible people like yourselves.

If you would have a look on the CCJ's website, you would see that it is our vision to be, amongst other laudable things, an accessible and innovative court. That is why we designed our original court rules in such a way that they establish accessible, relatively simple and court-driven procedures. Court-driven is the opposite of party-driven and it means that the procedures and their pace will be controlled by the court itself and not by the parties or their lawyers. Thus, the court hopes to ensure that litigation in the original jurisdiction will be as expedient and efficient as possible.

Consequently, the lawyers who will be involved in this kind of litigation will constantly have to be “on the ball” and will have to work in a concentrated and disciplined way in order to keep up with the proceedings. It is to be expected that this will lead to a positive change in mentality and professional attitude of private practitioners, in short a change in legal culture. Once this is fully realized in the daily practice of the original jurisdiction, it will undoubtedly also have its effect in the appellate jurisdiction of the court in the sense that it will lead the court to cut down on much of the legal deadwood and judicial humbug which still abounds in many Caribbean justice systems and thus inspire the lower or other courts in the region to follow more strongly on this path of reform and modernization.

I would think that this is all very necessary. After all, the law and the justice systems do not exist just to give lawyers a playground where they can make a lot of money. They are there for you, the citizens of this region. And what should you legitimately expect from any justice system? I would say: sound and fair decisions within a reasonable time. If every now and then some brilliance can be added to these decisions, that is fine. But it is not strictly necessary, first things first. We need to have our priorities right.

You are business people and so you know what I am talking about. Although virtually all Caribbean constitutions guarantee a fair hearing (and imply a decision by the courts) within that mysterious “reasonable time”, that is exactly what you too often do not get. It must and will be one of the priorities of the CCJ to use its influence and prestige to attempt to turn that around. It cannot be done by us alone. Legislatures will have to reform many procedural laws and approve appropriate budgets for their judiciaries. Governments will have to assist in reorganizing and modernizing the courts. But the CCJ, being at the centre and pinnacle of the Caribbean judiciaries, is in a position to lead the way. It will lead the way by example and by using its influence and power to ensure the

necessary changes, which could, for example, be done by gradually developing remedies and sanctions that would effectively lead to limiting unjustified delays.

Let us be honest, the regional justice systems will have to get their acts together, both in civil and in criminal cases. There is still too much inefficiency. It takes much too long to get a decision even in rather simple cases. There are too many longwinded procedures, too much orality, too much leeway for attorneys to be accommodated with unnecessary adjournments. And judgments are sometimes delayed for too long. You do not need that and certainly not from first instance courts. What you need are expeditious decisions by competent and fair judges who give their reasons in an understandable and succinct manner. Justice is as plain as that and there is nothing fancy about it.

As things are going now, the justice systems often do not inspire confidence among the citizens in general and the business sector in particular. With such a state of affairs, the region is not very attractive for foreign investors either. They, of course, would bring more business and more jobs, which would greatly enhance our economies. And even if some of these investors do come to our shores despite the deficiencies of our legal systems, they are advised by our own lawyers (that is, the responsible ones) to add arbitration clauses to their local contracts in order to avoid ending up in the local courts. In short, it would also be better for the lawyers themselves to function adequately in a disciplined and efficient justice system, where they could have more work and more valuable work instead of brilliantly displaying the tricks of a trade which only seems to be keeping Caribbean societies hostage and impotent.

Expedition and efficiency are, of course, equally important in the criminal justice system. Justice must not only be fair, it must not only be seen to be fair, but most of all, it must work. And if anything is clear, then it is this: that Caribbean justice systems are in crisis. And if they are not effective, then they cannot give any protection to the citizen, which is the perfect recipe for societal chaos and

injustice. It is very important that urgent and fundamental measures be taken in order to shore up the criminal justice system. It is also important for you, as citizens and business people of this region. Only in peaceful and orderly societies can business bloom and can prosperity be elevated to a state of wellbeing.

These measures, though, do not, or not in the first place, necessarily mean draconian sentences. That is the popular belief and, usually, the easy way out for the politicians. It does mean that the criminal justice system will have to be made efficient without making it unfair. That can be done, even within the adversarial justice system and trial by jury. To do that, however, we will have to cast off the heavy chains of legalisms, to escape from the lawyer-made labyrinths and go back to the basics of what the Law is supposed to be and achieve. The interesting paradox and dilemma is that that can only be done by .... lawyers.

The CCJ is the judicial institution par excellence to do that job. Why? Because, as I said, the CCJ is in the centre of this all; its judges are selected on their merit and for no other reason; and they have come from different countries and legal systems, which makes it possible to have a fresh and at the same time experienced look at the respective justice systems in the region. Another asset of the Court is, of course, the very fact that it is a regional court with its judges, mostly sons and one daughter of the soil, living in the region itself. This means that the CCJ Judges will not only know better what everybody in a case before them is talking about but also that they themselves will eventually feel the consequences of their decisions. This will not make them less independent and impartial, as some people seem to think, but it will make them more involved and realistic.

In other words, this court will be both a careful and a caring court. And this makes the court better suited for its task not only as a regional trade-court but also as a court of final appeal, much more so than any far-away court, how ever

well respected that court might be. It is better for a court of this stature to have its feet on the ground than to be a court of “Olympian aloofness.” This is so because, contrary to what many people seem to believe, a Supreme Court or a court of final appeal is not a Delphic Oracle, which is only capable of uttering words of infallibility, be it sometimes incomprehensible, wisdom, henceforth to be added to the heavenly gallery of The Law, but is or should be an institution of eminence, independence, impartiality and fairness with competent judges capable of bridging the gap between the law and the society where that law is to be given form by interpretation or application.

That can only be done by a court which is at least familiar with that particular society and shares its basic values. Law develops only through the facts of the cases that are brought before the courts, therefore it is essential for a court at the pinnacle of a justice system to know these facts and to understand their context. This is an important point which has found its ultimate recognition in the acceptance of the so-called Brandeis brief by the US Supreme Court, which comes down to an approach to advocacy that provides the court with as much factual background as possible.

Coming back to our subject of today, the role of the CCJ in the private sector’s life, it will be clear that the CCJ is fully aware of what is needed in the justice sector to enable you, Caribbean business people and, more generally, Caribbean citizens, to function in a better way. It is also clear that this a daunting task which cannot be fulfilled by the CCJ alone, but in which the CCJ can be a leading and inspirational force.

That, however, is not all that can be said. There is also an important role to be played by the private sector in the life of the CCJ. You are the ones who can bring cases to the court, not only in the appellate jurisdiction (after all, this is still limited to only two countries until you see the value of including your country and

insist that your legislators bring your final court home) but also and especially in the original jurisdiction, which is now wide open for further development.

Now, you might ask “how is this possible?” Is the original jurisdiction not about CSME-disputes between States or between one or more States and the Community, in short about regional conflicts? At first sight, that is indeed the case. Prima facie, as the lawyers say, this jurisdiction is all about international disputes.

But at a closer look you will find that both the Revised Treaty of Chaguaramas and the Agreement establishing the Caribbean Court of Justice (the CCJ Agreement) offer perspectives for others to enter the arena of the CSME-litigation, be it, so it seems, only in exceptional cases and through the backdoor. These “others” are not only private companies but also private citizens. Article 222 of the Revised Treaty makes it clear, though, that these private parties cannot file a case with the Court just like that. Firstly, they have to apply for special leave. And in order to get that special leave, they would need to comply with certain conditions.

They would have to show (1) that the State they seek to bring before the CCJ has deprived them of the (full) enjoyment of a benefit which, although basically bestowed on their State, is such that it could actually be seen as a benefit directly given to them and (2) that their own State, although entitled to sue the allegedly delinquent State, has omitted or declined to do so, or has expressly agreed that they, the applicants, may sue that State themselves. And on top of that all these private applicants will have to convince the CCJ that the “interest of justice” requires that they should be allowed to “espouse the claim”, as the Treaty calls it. At first sight these conditions seem to form a very high threshold for private parties, which emphasizes the exceptional character of this possibility.

The question is whether it will really prove to be that difficult in practice. Take for example the free movement of skilled labour. It would seem that this could very well be a subject with a direct impact on companies and their employees. And it could very well be that the States will not be very eager to enter into litigation before the court on such a subject. They would like to live in peace with each other in stead of seeking trouble, they might even be inclined to avoid litigation on broader issues and instead present their differences in the form of a request for an advisory opinion by the court (which would have the same force as a final judgment). The future will tell whether the States will be glad to leave part of the CSME-litigation in the hands of their national private parties, companies or persons. It might very well be so.

It will also depend on the approach the CCJ itself will choose to take. The approach might be restrictive or it might be such that not many difficulties will be put in the way of the private litigants. That last approach might very well be taken if one realises that the CCJ will have to apply the rules and principles of international law, one of them being the principle of effectiveness, which means that the Court will have to give effect to the Treaty as much as possible. In other words: the CCJ will have to make it work. And in order to do so it might feel compelled to open this door as wide as possible and thus convert a backdoor into a front door.

Another hidden backdoor can be found in Article XVIII of the CCJ Agreement. This provision makes it possible for a private party to intervene in current proceedings on a CSME issue if that party can show that it has a substantial interest of a legal nature which may be affected by a decision of the CCJ in that particular case. In a way this is an easier entrance than the one of article 222 of the Treaty, because no special leave is necessary. Provided that the private party can show its substantial legal interest in the outcome of the case it will be granted leave to intervene in the proceedings, which means that it will have the opportunity to side with one of the parties in the proceedings, either on the side

of the applicant or on that of the defending party. As such it will be possible for that party to provide its own arguments in the current proceedings and thus to influence the outcome thereof.

There is also a downside to this procedure, though. If the applicant decides not to pursue the case any further and to withdraw it before any judgment is given, the intervener may not have the right to continue the case. If he really wants a decision, the private party should try to get special leave to initiate a proceeding himself and then, if leave is granted, file his own case and then ask the court to join his case with the current one. Only then can the party be sure that he will get a decision of the court. Nevertheless: depending on the circumstances of the case, intervention alone might be a good way to enter such a proceeding.

There is a third way whereby a private party might find itself before the CCJ in its original jurisdiction. In a domestic procedure between private parties or a private party and a State (including its own State of which he is a national) a matter might come up which concerns the interpretation and application of the Treaty and which is deemed crucial for the outcome of that particular case. In such a procedure the domestic court (which normally will be a court of first instance but in an exceptional case might well be the Privy Council) will have to refer the case to the CCJ to give a ruling on that particular point, after which the case will go back to the domestic court in order to deliver its final judgment which should be in accordance with the CCJ's ruling: this is the so-called referral procedure (mentioned in article 214 of the Treaty). Theoretically speaking there might even be a referral from the CCJ (in the appellate jurisdiction) to itself (in the original jurisdiction), but I am confident that the CCJ will find a way to avoid indulgence in such judicial schizophrenia.

All in all, there seems to be a fair chance that we, the CCJ and the private sector, will soon meet again. And personally I would favour a broad and intensive involvement of the private sector in the CSM and CSME litigation. Litigation that

is much needed to further develop the Single Market as it was envisaged by the Caribbean States that have brought it into life. I say that to make it very clear that what the Heads of State of recently launched is not what you would call, an “end product”. It is as with humans. They are not born as adults. They start their lives as helpless babies. They need to be nurtured, they need to be fed, and they need to be educated as they slowly grow up to become toddlers, children, teenagers, adolescents and finally adults. So it is with the CSME. And in order to develop and nurture that Single Market and Economy we need all hands on deck. I hope you will be on board to help us sail into the future. We cannot know what that future will bring. But we know for sure that bright futures do not fall from the heavens like manna. We have to work for it. The CCJ is ready to lift anchor and go forward. I would hope you are too.