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INTERNATIONAL LAW AND PRACTICE

Show Me the Money: Enforcing Original Jurisdiction Judgments of the Caribbean Court of Justice

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Abstract

This article examines the challenges surrounding the enforcement of decisions of international courts, using the Caribbean Court of Justice (CCJ) as the fulcrum of the analysis. When sitting in its original jurisdiction, the CCJ adjudicates claims arising from the Revised Treaty of Chaguaramas and the operation of the Caribbean Single Market and Economy. However, there is no clear route for the enforcement of original jurisdiction decisions. The Agreement Establishing the CCJ leaves the issue of enforcement to the states themselves, who in turn have either failed to enact enforcement legislation or have provided for enforcement to be carried out 'in like manner' as the decisions of domestic courts. This phraseology raises the spectre of the Crown Proceedings Act and its legislative progeny which bar the pursuit of enforcement proceedings against the state. Several solutions to this enforcement conundrum are discussed, ranging from a regional enforcement treaty, akin to the New York Convention, to enforcement at common law using the Fick case, with the merits and demerits of each examined in turn.

Key words

Caribbean Court of Justice; original jurisdiction; recognition and enforcement; Crown Proceedings Act, Caribbean Single Market and Economy

1. Introduction

At the end of the long and winding journey of civil litigation, a judgment on paper is of precious little value to the successful litigant. More often than not, the victorious party wants his pound of flesh, much like Cuba Gooding Jr in the iconic scene in the movie 'Jerry Maguire'. However, in order to obtain the spoils of victory, the court judgment must be enforced. On the international plane, enforcement is no easy feat. Since the Second World War, international law has assumed greater significance on the legal landscape. There is currently a proliferation of international courts ranging from general international courts such as the International Court of Justice (ICJ), to economic courts such as the European Court of Justice (ECJ), the Organisation for the Harmonisation of Corporate Law in Africa (OHADA), the Southern African Development Community (SADC), the Mercosur Permanent Review Tribunal and

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the WTO legal system, to human rights courts such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the African Court on Human and Peoples' Rights (ACtHPR) and the Economic Community of the West African States Court (ECOWAS), and finally to international criminal law courts, such as the International Criminal Court (ICC) and the International War Crimes Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR).[1] These Courts no longer simply adjudicate state to state disputes but rather permit private individuals to file claims and have the ability to grant extensive remedies, including awarding compensation.

In a very real sense, we are witnessing the solidification of an international judiciary. However positivists, such as Austin[2] and Hart,[3] have consistently noted that international law is not 'law' in a real sense owing to its lack of strong enforcement mechanisms. Such critiques are likely to gain more traction given the fact that few international courts can secure compliance with their rulings. As such, an almost Herculean effort is required to transform the decision of an international court from a judgment on paper into tangible results. In the Caribbean context, the enforcement conundrum is fittingly exemplified in the jurisprudence of the Caribbean Court of Justice (CCJ). At the CCJ, the litigant may find that he/she has won the battle but lost the war as the regime for enforcement of CCJ original jurisdiction decisions is almost non-existent. In its original jurisdiction, the CCJ has handed down 18 decisions to date, awarding costs in eight cases.[4] Yet it has recently come to light that the costs order given in one of its very first cases remains unpaid.[5] The Court's most famous compensatory award of damages was only recently paid and only after much haranguing by the successful litigant.[6]

2. The importance of enforcement

In general, enforcement of a court decision is best viewed as a marathon, not a sprint, where slow and steady wins the race. The choice of enforcement method is often dictated by the nature of the assets held by the judgment debtor, the juridical character of the judgment debtor and the resources available to the judgment creditor.

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1 This categorization is taken from the Danish National Research Foundation's Centre of Excellence for International Courts University of Copenhagen, www.jura.ku.dk/icourts/research/institutionalisation/ (last visited 22 June 2015). For further information see R. Mackenzie, C. Romano, and Y. Shany, *The Manual on International Courts and Tribunals* (2010).

2 H. Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

3 M. Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart', (2010) 21 EJIL 967.

4 *Rudisa Beverages and Caribbean International Distributors Inc. (CIDI) v. Guyana* [2014] CCJ 1 (OJ) ('Rudisa'); *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) ('Myrie'); *Trinidad Cement Limited v. the Competition Commission* [2013] CCJ 2 (OJ); *Hummingbird Rice Mills v. Suriname and The Caribbean Community* [2012] CCJ 2 (OJ); *Trinidad Cement Limited and TCL Guyana Incorporated v. the State of the Co-operative Republic of Guyana* [2010] CCJ 1 (OJ) ('TCL 3'), [2009] CCJ 6 (OJ) ('TCL 2'), [2009] CCJ 5 (OJ) ('TCL 1'); *and Trinidad Cement Limited v. the Caribbean Community* [2009] CCJ 4 (OJ) ('CC').

5 C. Denbow, *The Privy Council and CCJ Debate – A Different Analysis* (2015) available at www.denbowlawoffice.com/atts/2015-04-29-The%20Privy%20Council%20-%20CCJ%20Debate%20-%20A%20different%20analysis.pdf (last visited 22 June 2015).

6 The Jamaica Gleaner, *Shanique Myrie gets Long- awaited Money from Barbados* (2014) www.jamaica-gleaner.com/power/53791 (last visited 22 June 2015).

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Enforcement assumes a different level of complexity on the international plane and navigating the legal waters in this area of law requires dogged determination. While there has been a proliferation of international courts with the power to issue binding judgments against sovereign states, there is no clear method for the enforcement of their decisions.[7]

Given the nuances of the 'international judicial system', enforcement of the decisions of international courts has traditionally been accomplished under the auspices of politics and diplomacy.[8] In general, an international court has no role to play in the matter of enforcement, owing to 'the separation of the adjudicative from the post-adjudicative phase [which] leads to the consequence that enforcement partakes of the quality of an entirely new dispute to be regulated by political means'.[9] This delineation of functions flowed naturally from the fact that traditionally, the players in an international dispute were invariably two sovereign states.

The enforcement of the decisions of international courts or tribunals has traditionally been secured through voluntary compliance by the state in accordance with the tenets of reciprocity. Non-compliance can also be remedied through political and economic measures such as ostracising the delinquent state, sanctions, countermeasures and retorsion. The enforcement of a judgment rendered in state to state litigation is a problematic matter. A further level of complexity arises where the judgment involves the payment of monetary compensation.

A classic example in this regard is the circuitous and lengthy process pursued by the United Kingdom against Albania in seeking to enforce the judgment of the International Court of Justice in the *Corfu Channel* case[10] which spanned the period from 1949 to 1992.[11] The ICJ awarded £843,947 to the UK as reparations for the damage caused by three separate incidents in the Corfu Channel which resulted in the destruction of UK naval assets as well as the loss of life of naval personnel. After unsuccessfully attempting to settle the payment of compensation, the United Kingdom had to resort to a series of legal manoeuvres. It began with an examination of whether Albanian property located in the UK could be seized to satisfy the judgment. When this strategy failed, the UK then sought the intervention of the Tripartite Commission for the Restitution of Monetary Gold to seize Nazi Gold belonging to Albania which has been stored in a vault in Italy. This order was made via the Washington Statement, triggering a fresh set of litigation. The order was challenged by Italy at the ICJ.[12] The ICJ declined jurisdiction leading to a virtual stalemate, with the gold being stored in a vault in London in the name

7 R. Frimpong Oppong and L. C. Niro, 'Enforcing Judgments of International Courts in National Courts' (2014) 5 *Journal of International Dispute Settlement* 344, Appendix I.
8 Ibid., at 346.
9 S. Rosenne, *The International Court of Justice: An Essay in Political and Legal Theory* (1957), at 102.
10 *Corfu Channel case* (*United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania)* Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4.
11 S. Rosenne and Y. Ronen, *The Law and Practice of the International Court 1920 – 2005* (2005), at 233–9.
12 [1954] ICJ 2. *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* Preliminary Question, Judgment of 15 June 1954, [1954] ICJ Rep. 19.

of the Commission. It was only with the end of Socialism in Albania in 1992 that compensation materialized.

The enforcement problem in international law presents even greater challenges where a private individual has received a judgment against the state. An individual litigant is unlikely to have the resources, contacts or the *gravitas* to pursue enforcement through diplomatic or political channels. Rather he/she would need to resort to the national courts via enforcement proceedings as used regularly in domestic civil litigation. However the domestic legal order does not always adequately provide for the enforcement of the decisions of international courts. This conundrum is of pressing relevance to the Caribbean region given the fact that private individuals have *locus standi* before the CCJ when constituted in its original jurisdiction and yet, domestic law does not provide a clear avenue for the enforcement of these decisions.

3. Brief look at the Caribbean Court of Justice

The establishment of the CCJ represents a watershed moment in the evolution of the Caribbean region and its bifurcated jurisdiction is unique in the international arena.[13] In its original jurisdiction, the Court has exclusive domain over the interpretation and application of the Revised Treaty of Chaguaramas (RTC). In its appellate jurisdiction, the Court functions as the highest appellate tier within the domestic legal order of CARICOM member states. Thus, the establishment of the Court has been hailed as a 'bridge over troubled waters' through which the vision of the RTC can be fully realised.[14]

The RTC gives *locus standi* to individuals to bring an action to the Court in its original jurisdiction under Article 222 which provides that natural or juridical persons can appear as parties with leave of the Court where:

(1) the RTC intended that a right or benefit conferred on a Contracting Party shall enure for the benefit of a person directly;

(2) they have been prejudiced in the enjoyment of that right;

(3) the Contracting Party entitled to espouse the claim either fails to so do or agrees that the claim can be brought by the aggrieved individual; and

(4) the interest of justice requires that the individual be allowed to bring the action.

In the jurisprudence touching upon the import of Article 222 the Court has clearly signalled its intention to apply a generous interpretation to the four limb test. This liberal stance is evident in *Trinidad Cement Limited and TCL Guyana Incorporated* v. *the State of the Co-operative Republic of Guyana*, where the Court held that a claim could be pursued by an entity that was registered or incorporated within a Contracting

13 K. Malleson, 'Promoting Judicial Independence in the International Courts: Lessons from the Caribbean' (2009) 58(3) ICLQ 671, at 675.

14 'Bridge Over Troubled Waters: The Caribbean Community, The Caribbean Court Of Justice, Shanique Myrie And Community Law', Address delivered by the Right Honourable Ralph Gonsalves, Prime Minister of Saint Vincent and the Grenadines at the Norman Manley Law School, Jamaica on 17 April 2014.

Party and that the provisions in the Agreement Establishing the Caribbean Court of Justice (the CCJ Agreement) defining 'nationals' were irrelevant to the meaning of Article 222 of the RTC.[15] In relation to requirement (2), the Court observed that the rights and benefits under the RTC are not always expressly conferred but instead can be derived or inferred from its correlative obligations.

The Court's purposive approach was demonstrated in *Trinidad Cement Limited* v. *the Caribbean Community* in which it granted special leave to TCL to challenge a decision of the Secretary-General and the Council for Trade and Economic Development (COTED).[16] The CCJ held that Article 222 could be used 'to enable private entities to appear before it in all manner of disputes concerning the interpretation and application of the Revised Treaty including allegations that a body or organ of the Community acted *ultra vires*'.[17] It rejected COTED's argument that TCL ought to pursue its complaint through judicial review proceedings.[18]

The liberal attitude of the CCJ to Article 222 of the RTC was further consolidated in *Shanique Myrie* v. *Barbados*.[19] After granting Ms Myrie special leave on the basis, *inter alia*, that the Government of Jamaica refused to espouse her claim, the CCJ then allowed Jamaica to intervene in the proceedings.[20] This marked the first occasion in which a state was made an intervener in an original jurisdiction application.[21] This decision was made despite objections from Barbados that to permit such an intervention would allow Jamaica 'to exercise diplomatic protection "through the back door"' with the concomitant increased litigation costs.'[22] The Court reasoned that while Jamaica had surrendered its right to bring proceedings against Barbados, it would be erroneous to say that they had abandoned all interest in the claim, particularly considering that it involved one of its own nationals.[23]

4. Enforcement of original jurisdiction judgments

Under Article 215 of the RTC, there is an obligation of prompt and strict compliance placed upon all member states, organs, bodies of the community, entities or persons to whom a judgment of the Court applies. This obligation is bolstered by the general undertaking contained in Article 224 of the RTC which requires all member states[24] to take the necessary constitutional and legislative measures to fully participate in the legal regime created by the Court. Regional aspirations concerning

15 [2009] CCJ 1 (OJ), at 21–30.
16 [2009] CCJ 2 (OJ) ('CC 2').
17 Ibid., at 30.
18 Ibid., at 40–1.
19 [2012] CCJ 3 (OJ) ('Myrie 2').
20 Decision on Special Leave Application delivered on April 18, 2010.
21 See Myrie 2, *supra* note 19, at 28.
22 Ibid., at 14.
23 Ibid., at 25.
24 Antigua & Barbuda (24 July 2003); Bahamas (10 February 2006); Barbados (6 July 2004); Belize (17 February 2005); Dominica (8 April 2003); Grenada (1 July 2003); Guyana (2 July 2003); Haiti (8 February 2008); Jamaica (3 September 2003); Montserrat (29 January 2006) St. Kitts and Nevis (12 August 2004); St. Lucia (28 May 2003); St. Vincent & the Grenadines (12 August 2002); Suriname (9 June 2003); Trinidad & Tobago (3 July 2003).

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enforcement of the decisions of the CCJ are further demarcated in Article XXVI of the CCJ Agreement which must be set out in full for present purposes:

> Enforcement of Orders of the Court
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> The Contracting Parties agree to take all the necessary steps, including the enactment of legislation to ensure that:
>
> (a) all authorities of a Contracting Party act in aid of the Court and that any judgment, decree, order or sentence of the Court given in exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party;
>
> (b) the Court has power to make any order for the purpose of securing the attendance of any person, the discovery or production of any document, or the investigation or punishment of any contempt of court that any superior court of a Contracting Party has power to make as respects the area within its jurisdiction.

This provision was interpreted by the Court in *Trinidad Cement Limited and TCL Guyana Incorporated* v. *the State of the Co-operative Republic of Guyana*, to mean that the '[o]rders made in the original jurisdiction may require the assistance of the enforcement machinery of the national courts.'[25] The Court had previously observed in litigation involving the same parties that 'execution is not a matter for this Court.'[26]

The obligation to provide a mechanism for the enforcement of original jurisdiction decisions of the CCJ falls on the shoulders of the 12 states which are parties to the CCJ Agreement.[27] This obligation must be fulfilled in good faith in keeping with the maxim *pacta sunt servanda* (agreements must be kept).[28] Nonetheless it is an open-ended and imprecise obligation, capable of varied interpretation. Such is usually the case with treaty provisions which:

> invariably represent the fruit of many months, sometimes years, of discussion and negotiation. Invariably, a treaty's provisions reflect a compromise of conflicting national interests and divergent perspectives. To this end, despite the best efforts of skilled drafters, the language of a treaty's text is often imprecise and sometimes deliberately ambiguous in order to accommodate politically acceptable interpretations in different jurisdictions. This is particularly the case with multilateral treaties.[29]

This enforcement regime appears to be crafted to facilitate voluntary compliance on the basis that a decision of the Court creates a binding obligation in international law which must be observed. It is difficult to envisage that within the CARICOM legal

25 See TCL 3, *supra* note 4, at 51.
26 *See* TCL 2, *supra* note 4, at 7.
27 Antigua & Barbuda (14 February 2001); Barbados (14 February 2001); Belize (14 February 2001); Dominica (15 February 2003); Grenada (14 February 2001); Guyana (14 February 2001); Jamaica (14 February 2001); St. Kitts and Nevis (14 February 2001); St. Lucia (14 February 2001); St. Vincent & the Grenadines (15 February 2003); Suriname (14 February 2001); Trinidad & Tobago (14 February 2001). Source: CARICOM Secretariat.
28 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 26.
29 *Trinidad Cement Limited and TCL Guyana Incorporated v. the State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ), [9].

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order, coercive measures such as sanctions, countermeasures, retorsion or censure would materialize in the event of non-compliance with an original jurisdiction decision of the CCJ. CARICOM's record in relation to coercive action against its member states is virtually non-existent. In general, CARICOM has preferred to take a cautious, diplomatic approach to delinquent states even in cases where a stronger message would have been warranted. It can therefore be assumed that CARICOM is likely to adopt a similarly diplomatic approach in treating with the issue of non-compliance with a decision of the CCJ by a member state.

5. Caribbean legislative provisions

While 11 CARICOM states have passed legislation to enact the RTC into domestic law,[30] only five states have specific legislation providing for the enforcement of original jurisdiction judgments: Barbados, Dominica, Grenada, Saint Vincent and the Grenadines, and Jamaica.[31] In Barbados, the relevant provision is found in section 79(D)(4) of the Constitution, which provides that a decision of the Court concerning Barbados shall be enforced in Barbados 'in like manner' as if it were a decision of the High Court (emphasis added). The four other jurisdictions have passed legislation in the form of the Caribbean Court of Justice (Original Jurisdiction) Act to provide for the enforcement of decisions in the original jurisdiction 'in like manner' as a decision of their national domestic courts. For example the relevant provision from St Vincent and the Grenadines reads as follows:

> 'Any judgment of the Court given in the exercise of its original jurisdiction shall be enforced by all courts and authorities in Saint Vincent and the Grenadines as if it were a judgment of a superior Court of Saint Vincent and the Grenadines.'[32]

In tracing the route to enforcement of original jurisdiction judgments, the phrase 'in like manner' assumes central significance. In order to discover how CCJ original jurisdiction judgments can be enforced, one must look to the domestic enforcement regime throughout the various CARICOM member states. Unfortunately, this regime provides precious little comfort to the battle-worn CCJ litigant. To simply state that the original jurisdiction decisions of the CCJ will be enforced 'in like manner' as a decision of a domestic court does not provide the necessary framework for the construction of an enforcement regime. At best, the aforementioned Caribbean legislation providing for enforcement of decisions of the CCJ in its original jurisdiction appears purely aspirational in nature. The legislation does not provide adequate

30 Antigua & Barbuda: *Caribbean Community Act 2004*; Barbados: *Caribbean Community Act 2003*, CAP 15; Belize: *Caribbean Community Act 2004*; Dominica: *Caribbean Community Act 2005*; Grenada: *Caribbean Community Act 2006*; Jamaica: *Caribbean Community Act 2004*; St Kitts and Nevis: *Caribbean Community Act 2005*; St. Lucia: *Caribbean Community Act 2004*; St. Vincent & the Grenadines: *Caribbean Community Act 2005*, Suriname: *Act of March 10, 2003* containing approval of the Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy and Trinidad and Tobago: *Caribbean Community Act 2005* Chap 81:11.

31 Barbados: Constitution of Barbados, s 79D(4); Dominica: *Caribbean Court of Justice (Original Jurisdiction) Act 2005*, s 11; Grenada: *Caribbean Court of Justice Act*, Chap 39D, s 11; Saint Vincent and the Grenadines: *Caribbean Court of Justice Act*, Cap 18, s 11 and Jamaica: *Caribbean Court of Justice (Original Jurisdiction) Act 2005*, s 12.

32 *Caribbean Court of Justice Act 2004*, s. 11.

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protection against the harsh reality of the immunity granted to the state from enforcement proceedings in domestic law owing to the tenor of the *Crown Proceedings Act* or its progeny. This legislation operates to preclude enforcement of decisions in the original jurisdiction of the CCJ where one of the parties is a CARICOM member state.

6. The Crown Proceedings Act

Most member states[33] as well as the associate members of CARICOM[34] have enacted legislation based on the Crown Proceedings Act 1947 (UK). The origins of this legislation are found in English legal history, where no suit could be brought against the Crown owing to the maxim that 'the King can do no wrong'. Thus 'the King could not be compelled to submit against his will to the jurisdiction of his own Courts'.[35] Over time, various methods were developed to circumvent this hard and fast rule which, if left unchecked, had the potential to work injustice. By the thirteenth century, proceedings could be brought against the Crown by way of petition by right. However, a royal fiat had to be obtained first and there was no right of appeal against any such refusal. The procedure was further simplified by the Petitions of Rights Act 1860.[36] The death knell for absolute Crown immunity was sounded with the passage of the Crown Proceedings Act which paved the way for the Crown to be sued and held liable in tort for the actions of its employees. The Act also abolished the various procedural vehicles that were used to initiate suit against the Crown,[37] standardising the process by reference to the procedure governing civil litigation as contained in the Rules of Court Section 13.

Upon closer analysis, it becomes apparent that what the Act gives with one hand, it takes away with the other. Although the Act mitigated the harsh effect of Crown immunity, it contained a prohibition against the pursuit of enforcement proceedings against the state. No similar prohibition was extended to claims involving solely private individuals. This is apparent from the conjoint effect of Sections 25(4) and 26(1) of the Crown Proceedings Act which reads as follows:

> 25(4) ... no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment

33 Antigua & Barbuda: *Crown Proceedings Act*, Chapter 121; The Bahamas: *Crown Proceedings Act 1963*, C. 10; Belize: *Crown Proceedings Act*, Chapter 167; Barbados: *Crown Proceedings Act*, Cap 197; Dominica: *State Liability and Proceedings Act 1984*; Grenada: *Crown Proceedings Act*, Cap 74; Guyana: *State Liability and Proceedings Act*, Cap 6:05, Jamaica: *Crown Proceedings Act 1959*; Montserrat: *Crown Proceedings Act*, Chap 2:06; Saint Lucia: *Crown Proceedings Ordinance*, Chap 13; Saint Kitts/Nevis: *Crown Proceedings Act*, Cap 5.06; Saint Vincent and the Grenadines: *Crown Proceedings Act*, Cap 85; Trinidad and Tobago: *State Liability and Proceedings Act*, Chap 8:02.

34 Anguilla: *Crown Proceedings Act*, c 160; Bermuda: *Crown Proceedings Act 1966*, Title 8, Item 105; British Virgin Islands: *Crown Proceedings Act*, Cap 21; Cayman Islands: *Crown Proceedings Law* 1997; Turks and Caicos Islands: *Crown Proceedings Ordinance*, Chap 50.

35 H. Street, 'The Crown Proceedings Act 1947', (1948) 26(3) *Public Administration* 156.

36 W. Baker Clode, *The Law and Practice of Petition of Right Under the Petitions of Right Act 1860* (1887).

37 These procedures include Latin information, English information, writ of *capias ad respondendum*, writ of *subpoena ad respondendum*, writ of appraisement, writ of *scire facias*, writ of extent or of *diem clausit extremum*, writ of summons, petition of right and proceedings by way of *monstrans de droit*.

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> by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs . . .
>
> 26(1) Any order made in favour of the Crown against any person in any civil proceedings to which the Crown is a party may be enforced in the same manner as an order made in an action between subjects, and not otherwise.

These provisions are echoed in Caribbean legislation, such as Sections 27(4) and 28(1) of the State Liability and Proceedings Act in Trinidad and Tobago.[38] Under both UK and Caribbean legislation, where an individual litigant successfully sues the Crown/State the only avenue available to secure the fruits of their judgment is to apply for a certificate from the Court within 21 days of the award of costs and/or damages. Once issued by the proper Court officer, a copy of the certificate is then to be forwarded to the relevant state department for payment of the money lawfully owed to the successful litigant.[39] In the event that the payment is not forthcoming, the litigant has no recourse against the state. The protective armour of the Crown Proceedings Act shields the state yet again by debarring the issuance of an injunction or order for specific performance: Section 21. Thus for the litigant who prevails in legal proceedings against the state, the victory may be limited to the paper judgment, unless the state, guided by the tenets of the rule of law, decides to fulfil the obligations imposed by the court decision.

There have been suggestions that the harsh effect of the immunity granted by the Crown Proceedings Act may be mitigated under certain conditions. A poignant example is the decision of the Judicial Committee of the Privy Council in *Gairy* v. *the Attorney General*.[40] This case arose out of the revolution in Grenada which saw the Gairy Government overthrown by the People's Revolutionary Government (PRG). The PRG passed the People's Law No 95 of 1979 which operated to confiscate certain properties owned by the appellant. Subsequent to the restoration of democratic rule in Grenada, the estate of the appellant challenged the People's Law on the basis that it violated Section 6 of the Constitution which prevents the compulsory acquisition of property without the payment of full compensation. The State conceded that the legislation was unconstitutional and was ordered to pay compensation. The seized property was returned to the appellant but the compensation awarded was only partially paid. Thus the appellant sought a mandatory order against the Minister of Finance for the prompt payment of the outstanding balance. The Eastern Caribbean Court of Appeal, in a decision delivered by Byron CJ (as he then was), dismissed the appellant's claim, holding that under Section 21 of the Crown Proceedings Act (which is identical to the UK legislative equivalent reproduced above) a money judgment against the Crown could only be enforced by an order of *mandamus* against the Permanent Secretary (Finance) and not the Minister. The matter was appealed to the Judicial Committee with the state arguing that coercive relief could not be

38 Chap 8:02.
39 See section 25(3) of the *Crown Proceedings Act* (UK) and section 27(3) of the *State Liability and Proceedings Act* (Trinidad and Tobago).
40 [2001] UKPC 30, [2002] 1 AC 167.

issued against the state as established in *Jaundoo* v. *the Attorney General*[41] and *M* v. *Home Office*.[42] This argument was wholly rejected, with Lord Bingham pointing out that it 'is fallacious to suppose that the rights, powers and immunities of the Crown are immutable'.[43] His Lordship emphasized that a new legal order was established on the basis of a written Constitution which is the supreme law and the Courts have wide powers to secure the effective protection of fundamental rights. This led inevitably to the conclusion that the '[h]istoric common law doctrines restricting the liability of the crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the constitution'.[44] Thus the Judicial Committee held that where constitutional rights are at stake, there must be robust protection and therefore the orders sought against the Minister of Finance were restored.

However, it should be noted that the *Gairy* decision arose in the context of the Constitution. Lord Bingham's judgment does not indicate that the principles contained therein are of general application. In the context of the CCJ, a constitutional claim would likely arise in the appellate but not the original jurisdiction. Thus, the ameliorative effect of the *Gairy* case would have little or no impact upon the hurdles faced by a litigant in the original jurisdiction. Nonetheless the decision does lay the foundation for the creation of an effective mechanism for the enforcement of original jurisdiction decisions of the CCJ.

Most Caribbean Crown Proceedings legislation relates to civil proceedings by and against the state. Using the State Liability and Proceedings Act in Trinidad and Tobago as an example, the term 'civil proceedings' is defined as including proceedings in the High Court of Justice or a Petty Civil Court for the recovery of fines or penalties but not applying to proceedings analogous to proceedings on the Crown side of the Queen's Bench Division in England. At first blush, this definition might appear to render the Act inapposite in relation to the enforcement of CCJ original jurisdiction judgments. However, consideration of the entire scheme of the Act demonstrates that the enforcement provisions have a wide breadth. Section 27(1) of the Act which sets out the regime governing enforcement against the state as discussed above is couched in broad language. It applies to *any order made by any Court* including an award of costs in arbitration. The term 'order' is defined to include a judgment, decree, rule, award or declaration. It is interesting to note that the term 'Court' is not defined in the Act. Furthermore under Section 27(1), a successful litigant must make an application to a Court officer seeking to enforce the judgment rendered against the state. Such an application would fall within the definition of civil proceedings under the Act. As such, it is legitimate to conclude that Crown Proceedings legislation appears to cover CCJ original jurisdiction judgments.

The CCJ itself has recognized the relationship between the Crown Proceedings Act and the enforcement of its decisions rendered in its original jurisdiction. Most

41 [1971] AC 972.
42 [1994] 1 AC 377.
43 See Gairy, *supra* note 40, at 19.
44 Ibid.

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notably, the impact of the Crown Proceedings Act in relation to the enforcement of CCJ decisions in the original jurisdiction was hinted at in the case of *Trinidad Cement Limited and TCL Guyana Limited* v. *the State of the Co-operative Republic of Guyana*.[45] In this case, the CCJ heard arguments on the legal effect of Sections 11(3) and 11(4) of the Caribbean Court of Justice Act of Guyana in the context of contempt proceedings. The Court stated in no uncertain terms that local legislation cannot prescribe, delineate or limit the powers of the CCJ. However, the Court did note that the provisions of domestic law do bear some relevance to the issue of enforcement. The CCJ expressly noted that enforcement may prove problematic if the enforcement of its orders were pegged to those made by local courts. Their observations in this regard must be set out in full:

> Municipal law can neither confer powers on the Court in its original jurisdiction nor diminish the powers that the Court has. Municipal law may, however, recognize an international court within its national borders and give efficacy to its orders. For present purposes the interpretation of sub-sections (3) and (4) of section 11 is quite irrelevant and academic for the reason that domestic legislation cannot have any impact whatever on the powers which the Court does or does not have. The only purpose which can be achieved by incorporating into domestic law the powers of the Court is the enforcement of the orders which the Court makes in exercise of those powers. Incorporation into domestic law may make it possible to invoke the coercive powers of the State in support of orders made by the Court, but to facilitate this the local legislation must go further than sub-sections (3) and (4) of section 11 go, and state quite explicitly how and in what circumstances those coercive powers may be engaged. If the possibility of local enforcement is limited to orders made in exercise by the Court of only some of its powers i.e., those which correspond with powers exercised by the local courts, this complicates the matter greatly as it may raise issues which a court (presumably a local court) may be called upon to decide.[46]

Despite these observations, CARICOM states continue to enact legislation providing for enforcement using the '*in like manner*' phraseology, paying scant regard to the problems attendant thereto. No provisions have been enacted to set out the substantive and procedural law on enforcement of original jurisdiction decisions of the CCJ. No mention has been made of the impact of the immunity granted to the state from enforcement proceedings. No case has come to the CCJ challenging the adequacy of the enforcement regime in the original jurisdiction.

7. The enforcement problem

The Caribbean Court of Justice Original Jurisdiction Rules (OJR) do not advance the thorny issue of enforcement any further. Rather Rule 29.3(3) simply states that enforcement of a judgment shall be in accordance with Article XXVI of the CCJ Agreement and Rule 29.3(4) provides that the Registrar has the administrative task of recording in the register a note indicating that there has been compliance with the judgment. It is difficult to surmise that these internal administrative tasks can

45 See TCL 3, *supra* note 4.
46 Ibid., at 48–9.

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provide a solid foundation for clothing the Court with jurisdiction to monitor compliance with its orders. The *TCL* cases,[47] *Shanique Myrie* v. *Barbados*[48] and *Rudisa Beverages and Caribbean International Distributors Inc. (CIDI)* v. *Guyana*[49] all shone a much needed spotlight on a severe weakness in the apparatus of the Court: namely, the sparse, almost non-existent framework for enforcing original jurisdiction judgments. This can pose a considerable threat to the full acceptance of the Court by the people of the Caribbean region.

The reality is that no coercive action can be taken by a successful litigant to enforce a judgment given in the original jurisdiction against a state. This can operate as a significant source of frustration. The enforcement problem is even more vexing in cases where the CCJ awards damages for breach of the RTC, given that the natural compulsion to have the judgment enforced is heightened by the associated monetary benefits. Although under customary international law a state ought not to rely on its domestic law to evade its treaty obligations, this principle provides precious little comfort to a successful litigant. The enforcement of CCJ decisions is a matter of domestic law and therein lies the problem.

In *Trinidad Cement Limited and TCL Guyana Limited* v. *the State of the Co-operative Republic of Guyana*, the CCJ held that damages could be awarded for breach of the RTC. In this case, TCL challenged the decision of Guyana to remove the customs duties payable on building cement imported from outside of CARICOM.[50] Despite the silence of the RTC on the sanctions which attach to breach of its provisions, the Court was able to fashion a remedy in the form of damages, drawing on EU jurisprudence as set out in the famous *Francovich* case.[51] Ultimately the Court ruled that there was an insufficient evidentiary basis to sustain a claim for damages.[52] However Guyana was ordered to implement and maintain the CET 'within 28 days of the date of this order'.[53] In so doing, the CCJ drew upon its earlier proclamation in *TCL* v. *the Caribbean Community* that coercive remedies could be granted by the Court owing to the conjoint effect of Article XV and XXVI of the CCJ Agreement as well as the Court's duty to enforce the rule of law and render the RTC effective.[54]

In the face of this ruling, the Government of Guyana only applied the CET on cement imported after 15 October 2009. The CCJ's order was only fully complied with some four months later on 8 January 2010. With this unhappy state of affairs, TCL was prompted to seek the intervention of the CCJ once again. In *Trinidad Cement Limited and TCL Guyana Limited* v. *the State of the Co-operative Republic of Guyana*, the company sought an order from the CCJ for the Attorney-General of Guyana to appear in Court and show cause as to why he ought not to be held in contempt. The contempt proceedings were unsuccessful.[55] Instead, the Court made a declaration

47 See TCL 1, *supra* note 4 and TCL 1, *supra* note 4.
48 See Myrie, *supra* note 4.
49 See Rudisa, *supra* note 4.
50 See TCL 1, *supra* note 4.
51 Case C-6/90, *Francovich v. Italy* [1991] ECR-1-5357.
52 See TCL 1, *supra* note 4, at 32–4.
53 Ibid., at 45.
54 See CC, *supra* note 4.
55 See TCL 3, *supra* note 4.

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that the state had breached its obligation under Article 215 of the RTC to comply with all orders and judgments of the Court in a timely manner.[56]

For present purposes, the reasoning of the CCJ in relation to the contempt proceedings merits close examination. In making the case for contempt, counsel for TCL deployed a two-tier argument; first, that the Court had jurisdiction, either express or implied, to punish for contempt by virtue of Article XXVI (b) of the CCJ Agreement and; in the alternative, that the Court had an inherent jurisdiction to entertain contempt proceedings. Both submissions were rejected by the CCJ. The Court held that neither an express nor implied power to entertain contempt proceedings could be derived from the terms of Article XXVI, in particular subsection (b) by reason of the fact that the meaning of this provision was unclear.[57] The Court noted that contempt of court is a species of law unknown to the civil law world and there are various forms of contempt such as civil contempt and criminal contempt. When viewed against this backdrop, the true intention behind Article XXVI (b) became obscured. In relation to the inherent jurisdiction point, the Court noted that the cases referred to by Counsel all arose in the context of international criminal law; they did not deal with disobedience of a final order of the Court and are considered quite controversial.[58] Drawing on the tenets of legal realism, the Court also noted that there were practical considerations which mitigated against the contempt argument, such as the fact that the Court has no tipstaff or gaols, it cannot make an order for sequestration and it has no mechanism to enforce any putative sanction such as a fine.[59]

The problem of enforcement came to a head once again in the case of *Shanique Myrie*[60] which arose out of the decision of the immigration authorities to deny Ms Myrie entry into Barbados and proceed to question and detain her in a manner that fell far short of the standards of human decency. Ms Myrie successfully sued the state and the CCJ declared that all CARICOM nationals are entitled to an automatic stay of six months subject to the rights of member states to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds. This right was forged through a 2007 Conference Decision taken at the Twenty-Eighth Meeting of the Conference of Heads of the Caribbean Community.[61] The Court also made an award of damages as compensation for the degrading treatment to which Ms Myrie was subjected during her detention at the airport, for her medical expenses and for her unused airline ticket to return to Jamaica. This amounted to an award of Bds$2240.00 in pecuniary damages and Bds$75,000.00 for non-pecuniary damages.[62]

This decision was handed down on 4 October 2013 and Ms Myrie was only paid the sums due in June 2014. The *Myrie* case captivated regional attention, both in

56 Ibid., at 54.
57 Ibid., at 32–6.
58 For example *Prosecutor v. Tadić*, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-R77, A. Ch., 31 January 2000; and *Prosecutor v. Beqa Beqaj*, Judgment on Contempt Allegations, Case No. IT-03-66-T-R77, T. Ch. I, 27 May 2005.
59 See TCL 3, *supra* note 4, at 40.
60 See Myrie, *supra* note 4.
61 Ibid., at 43–4.
62 Ibid., at 93–100.

print and social media.[63] Therefore the failure of Barbados to comply with the orders of the CCJ became a topic which evoked spirited public debate.[64] At a public forum, one judge of the Court, in response to a question posed, was forthright in noting the problems of enforcement of decisions in the original jurisdiction.[65] Another Judge of the Court noted that states which signed on to the CCJ should be expected to fulfil the Court's decisions.[66] There was a political response to the non-payment. The Prime Minister of Barbados signalled his intention to fully comply with the CCJ's ruling and the Jamaican Minister of Foreign Affairs and Foreign Trade promised to make political representations on the matter, but later noted that the responsibility lay with Ms Myrie to make the Court aware of the non-compliance by Barbados in accordance with the decision in *Rudisa Beverages*.[67]

It is interesting that in attempting to enforce the *Myrie* decision, there was no recourse to Section 79D(3) of the Barbados Constitution which states that a decision of the Court concerning Barbados shall be enforced in Barbados 'in like manner' as if it were a decision of the High Court. The provision makes no distinction between decisions in the original and appellate jurisdictions leading to the inescapable conclusion that no such distinction was intended by the legislature. In any event, it is questionable whether this route would have provided any relief given the effect of Crown Proceedings Act of Barbados which forecloses the use of enforcement proceedings against the state.

The course of action pursued by Ms Myrie is perfectly illustrative of the inherent weaknesses in the enforcement scheme established by national legislation in relation to decisions of the CCJ. It is evident that political means, rather than the provisions of national law, were used by Ms Myrie to secure the fruits of her judgment. This approach harkens back to the traditional methods of enforcing the decisions of international courts during the era in which international disputes only involved state actors and not individual litigants. It hardly presents a satisfactory approach to enforcement. Political overtures may have benefitted Ms Myrie given the media spotlight shone on her case from its beginning. However another litigant is not guaranteed to enjoy a similar bounty. A matter as important as enforcement should not be dictated by a luck of the draw.

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63 *Shanique Myrie's Case: A Big Test For CARICOM And The CCJ* (2013) www.caribbean-events.com/article/shanique-myries-case-big-test-caricom-and-ccj#sthash.v1DFflEp.dpuf (last visited 22 June 2015); R. Saunders, *Shanique Marie (sic) Case before the CCJ - a landmark for free movement of Caribbean People?* (2013) www.sirronaldsanders.com/viewarticle.aspx?ID=353 (last visited 22 June 2015); The Barbados Advocate, *Myrie's move* (2013) www.barbadosadvocate.com/newsitem.asp?more=local&NewsID=24140 (last visited 22 June 2015); www.facebook.com/pages/Support-Shanique-Myrie/268231373312015 (last visited 22 June 2015).

64 Soren Waugh, *Illegal Cavity Search Victim Shanique Myrie Growing Impatient With Barbados* (2014) www.bessfm.com/illegal-cavity-search-victim-shanique-myrie-growing-impatient-with-barbados/ (last visited 22 June 2015); *Shanique Myrie threatens to head back to CCJ* (2014) www.nevispages.com/shanique-myrie-threatens-to-head-back-to-ccj/ (last visited 22 June 2015).

65 Martina Johnson, *No System in Place to Enforce Myrie Judgment* (2014) available at antiguaobserver.com/no-system-in-place-to-enforce-myrie-judgment-ccj-judge/ (last visited 24 November 2014).

66 Kyle Christian, *Retiring Judge says onus on Gov'ts to abide by CCJ Rulings* (2014) available at antiguaobserver.com/retiring-justice-says-onus-on-govts-to-abide-by-ccj-s-rulings/ (last visited 24 November 2014).

67 Caribbean 360, *Barbados Government Promises to Pay Shanique Myrie this Week* (2014) available at www.ieyenews.com/wordpress/?s=Shanique±Myrie (last visited 24 November 2014).

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The problems relating to enforcement may have played an underlying role in the order issued by the CCJ in the case of *Rudisa Beverages*, which was decided on the heels of *Myrie*.[68] Rudisa, a Surinamese beverage company, and CIDI, its Guyanese distributor, challenged the environmental tax imposed on non-returnable beverage containers imported into Guyana. Guyana admitted that the environmental tax violated the RTC as it was discriminatory given that it did not apply to Guyanese manufacturers. It sought to excuse the breach on the basis that it brought legislation to the National Assembly to remedy the discriminatory impact of the tax but the law was rejected. The CCJ held that the environmental tax was inconsistent with Article 87 of the RTC which prohibits the imposition of customs duties on CARICOM goods.[69] It ordered that the state to refund the tax collected from CIDI which amounted to US$6,047,244.47 together with such further tax paid from 25 October 2013 to the date of the judgment.[70] To date the money has not been paid.[71]

Perhaps owing to the sizable amount of the tax refund being ordered, the Court ordered that if CIDI did not notify the Court that Guyana has complied with the orders of the Court by 30 October 2014, then the State of Guyana must file a report on compliance on or before 15 November 2014. Upon the filing of this report the parties shall have the liberty to apply in respect of any matter contained therein.[72] The order as expressed was doctrinally rooted in the fundamental principles of Community law, including access to justice and the rule of law, prompting the CCJ to note that '[c]ommunity rights under the RTC would be illusory if the orders of the Court are not executed. The Court therefore has a responsibility to monitor compliance with its orders'.[73]

This line of reasoning warrants closer analysis. As previously noted, the CCJ Act of Guyana does not provide for the enforcement of CCJ judgments delivered in the original jurisdiction. Rather Section 18 of the Act speaks to the issue of enforcement in relation to appeals and provides that any judgment or order of the Court made in respect of a matter which is the subject of an appeal shall be enforced 'in like manner as any judgment of the Supreme Court'.[74] Furthermore under the domestic law of Guyana, the enforcement of a judgment against the state is not available. Rather a certified copy of the judgment is transmitted to the Minister of Finance to take the appropriate action to 'cause it to be carried into effect' in accordance with Section 14 of the State Liability and Proceedings Act.[75]

As previously noted Rules 29.3(3) and 29.3(4) of the OJR do not discuss enforcement. It is worth noting that the monitoring of compliance also comes perilously close to the spectre of enforcement proceedings; a matter which the Court already

68 See Rudisa, *supra* note 4.
69 Ibid., at 22.
70 Ibid., at 39.
71 Rudisa and CIDI has since notified the Court of the non-payment and a hearing has been tentatively scheduled for 22 July 2015. See *Schedule of Court Sittings April 2015, May 2015, June 2015 and July 2015* www.caribbeancourtofjustice.org/judgments-proceedings/judgments-sittings (last visited 22 June 2015).
72 See Rudisa, *supra* note 4, at 40.
73 Ibid., at 38.
74 Guyana: *Caribbean Court of Justice Act 2004*, Cap 3:07.
75 Cap 6:05.

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signalled in the *Trinidad Cement Limited and TCL Guyana Incorporated* v. *the State of the Co-operative Republic of Guyana* cases was a concern of the domestic courts. Furthermore the involvement of courts in monitoring compliance with its orders and judgments, even where it has jurisdiction so to do, is tricky business. Perhaps the most famous example in this regard is *Brown* v. *Board of Education*.[76] After striking down school segregation as a violation of the 14th Amendment, the US Supreme Court deferred the issue of the appropriate remedy. In *Brown II*, the Court mandated that desegregation should proceed 'with all deliberate speed'.[77] The district courts were charged with the supervision of school de-segregation. This supervisory role proved exceedingly difficult and spawned litigation before the Circuit Courts and the Supreme Court for 16 years.[78] Approximately 200 school districts remain under federal supervision and still operate under desegregation orders.[79]

The precedential effect of the making of an order for the filing of a report on compliance also warrants consideration. In the original jurisdiction, the doctrine of *stare decisis* reigns supreme.[80] The Court can only *revise* its judgments in limited circumstances.[81] The conflict between domestic legislation and the RTC is a matter which will frequently engage the attention of the Court given the level of inaction which seems to characterize legislative reform in the Caribbean region. The order made in *Rudisa* may create the expectation that the Court will monitor and supervize compliance as a matter of routine. The Court does not have the power to penalize states for non-compliance. This begs the question that if no report is filed or if a report is filed stating that the state has not been able to comply with the orders made, what then?

From the scheme as set out above, it is apparent that enforcement is predicated on a degree of co-operation and good faith by the Contracting parties. There is no specific provision empowering the Court to take action to monitor the level of compliance with its orders and judgments. The jurisdiction of the Court to make an order requiring a report on compliance to be filed by Guyana can therefore legitimately be called into question. The provision of such reports is not unknown in international law, as evidenced by the practice of the Committee of Ministers of the Council of Europe which monitors compliance with the decisions handed down by the European Court of Human Rights.[82] This monitoring function is expressly provided for in Article 65 of the European Convention on Human Rights and the first such

76 (1954) 347 U.S 483.
77 (1955) 349 U.S. 294, at 301.
78 See for example *Cooper v. Aaron* (1958) 358 U.S. 1, *Shuttlesworth v. Birmingham Board of Education* (1969) 394 U.S. 147, *Kelly v. Board of Education of Nashville* 270 F. 2d 209 (6th Circuit), cert. denied, (1959) 361 U.S. 924 (the federal court in Nashville had jurisdiction over the suit in January 1997), *Goss v. Board of Education* (1963) 373 U.S. 683, *McNeese v Board of Education* (1963) 373 U.S. 668, *Griffin v. Country School Board* (1964) 377 U.S. 218, *Green v. Country School Board* (1968) 391 U.S. 430, *Swann v. Charlotte-Mecklenburg Board of Education* (1970) 402 U.S. 1. See also M. Minnow, *In Brown's Wake: Legacies of America's Educational Landmark* (2010) and C. Ogletree, *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* (2004).
79 See, e.g., *McFerren v. County Board of Education of Fayette County* (2013) available at www.justice.gov/opa/pr/2012/August/12-crt-1030.html (last visited 15 January 2015).
80 Art. 221 of RTC.
81 Art. 219 of RTC, Part 31 of OJR.
82 1998 Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, CETS No 155 (1994).

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report was published in 2008.[83] The Inter-American Court of Human Rights (IACtHR) also supervizes the level of compliance with its decisions, as famously laid out in *Baena Ricardo et al.* v. *Panama*.[84] Article 65 of the American Convention requires the Court to submit to the General Assembly of the Organisation of American States, an annual report on its work which shall 'specify, in particular, the cases in which a state has not compiled with its judgments, making any pertinent recommendations'.[85] In *Baena Ricardo*, the Court rejected the argument advanced by Panama that under Article 65 the monitoring of compliance rests with the General Assembly.[86] Instead the IACtHR marshalled Article 65 together with Articles 33, 62(1), 62(3), the *travaux préparatoires* of the American Convention and Article 30 of the Statute of the Court to construct its jurisdiction to monitor compliance with its decisions.[87] A similar function had been performed in the *Velásquez Rodríguez* and *Godínez Cruz* cases.[88]

In searching for a solution to the enforcement problem with respect to CCJ decisions in the original jurisdiction, the law governing recognition and enforcement of foreign judgments and arbitral awards as well as the principles on enforcement at common law may prove instructive. This body of law provides useful guidance as to the substantive principles governing recognition and enforcement of a decision made outside of the national judicial system as well as the procedural avenues to enable such decisions to be enforced on the domestic plane.

8. Recognition and enforcement of foreign judgments

The theoretical underpinnings of the law on the recognition and enforcement of foreign judgments can be traced to two doctrinal bases: comity and the theory of obligations or vested rights. Traditionally, foreign judgments had no force beyond their territorial border owing to a strong adherence to the notion of sovereignty, typified by the Statute of Como (1219) and Article 121 of the Code Michaud (1629) of France.

The doctrine of comity was introduced into English law via Lord Mansfield,[89] but ultimately failed to take root in English common law, as illustrated in *Buchanan* v. *Rucker*, which involved an attempt to enforce a judgment from Tobago in the courts of England, prompting Lord Ellenborough to enquire: 'Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?'[90] Instead, the recognition and enforcement of foreign judgments became founded on the theory of obligation or vested rights. Under this

83 Council of Europe, Committee of Ministers, Supervision of the Execution of Judgments of the ECHR, First Annual Report 2007, Strasbourg, March 2008.
84 Judgment (Competence), 28 November 2003, IACtHR.
85 1969 American Convention on Human Rights, "Pact of San Jose", 1144 UNTS 123.
86 See Baena Ricardo, *supra* note 8, at 58 et seq.
87 Ibid., 84 et seq.
88 L. Burgorgue-Larsen & A. Úbeda De Torres, *The Inter-American Court of Human Rights Case Law and Commentary* (2011), at 179.
89 *The Case of James Sommersett* (K.B. 1772) 20 *How. St. Tr.* 1, 3–4.
90 9 East 192, (K.B.1808) 103 Eng.Rep. 546.

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theory what is enforced is not the foreign judgment but rather the obligation it produces.[91]

9. Recognition and enforcement under domestic law

In modern times, there is domestic legislation governing the recognition and enforcement of a foreign judgment such as the Administration of Justice Act 1920 (UK)[92] and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).[93] Under the Administration of Justice Act, a judgment will be registered if it is a judgment of a superior court of a foreign country for a sum of money and the application is made within 12 months of the judgment.[94] There is also an overarching requirement that it is just and convenient that the judgment be registered in the UK.[95] Under the Foreign Judgments (Reciprocal Enforcement) Act, a foreign judgment from a recognized court for a specified sum of money which is final and conclusive can be enforced in the UK.[96] Most Commonwealth Caribbean countries have legislation modelled on the 1933 Act which provides for the registration of judgments from the UK, Commonwealth countries and specially designated foreign countries.[97] No specific designation has been made under these legislative regimes to provide for the recognition and enforcement of CCJ original jurisdiction judgments.

10. Recognition and enforcement at common law

Foreign judgments, including those of international courts, can also be enforced at common law, as occurred in the decision of the South African Constitutional Court (SACC) in *Government of the Republic of Zimbabwe* v. *Louis Karel Fick*.[98] The *Fick* case arose out of the land reform policy of the Zimbabwean Government where land was compulsorily acquired by the Government without compensation. The South African Development Community Tribunal (SADC Tribunal) ruled in favour of the land owners and ordered the Government to pay compensation for acquired land, to halt its compulsory acquisition program and to pay costs. This judgment was not

91 *Schibsby v. Westenholz* (1870) LR 6 QB 155 (QB, England).

92 Applies to judgments from Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Botswana, British Indian Territory, British Virgin Islands, Cayman Islands, Christmas Island, Cocos (Keeling) Islands, Dominica, Falkland Islands, Fiji, The Gambia, Ghana, Grenada, Guyana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Mauritius, Montserrat, New Zealand, Nigeria, Territory of Norfolk Island, Papua New Guinea, St Christopher and Nevis, St Helena, St Lucia, St Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, Sri Lanka, Swaziland, Tanzania, Tasmania, Trinidad and Tobago, Turks and Caicos Islands, Tuvalu, Uganda, Zambia and Zimbabwe.

93 Applies to judgments from India, Pakistan, Australia, Australian Capital Territory, Tonga, Guernsey, Isle of Man, Jersey, Israel, Surinam and Canada.

94 Part II, Section 9.

95 Ibid.

96 P. Hopkins, *International Enforcement of Foreign Judgments*, International Business Law Consortium (2006).

97 See, e.g., The Bahamas: *Reciprocal Enforcement of Judgments Act*, Chap 77; Barbados: *Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act*, Chapter 201; Belize: *Reciprocal Enforcement of Judgments Act*, Cap. 171; Guyana: *Foreign Judgments (Reciprocal Enforcement) Act*, Cap 7:04; Trinidad and Tobago: *Judgment Extension Act*, Chap 5:02

98 [2013] ZACC 22.

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complied with. The land owners were able to successfully enforce the costs order made by the SADC Tribunal against the Government of Zimbabwe in the South African courts.[99]

The SACC acknowledged that the costs order was not covered by the statutory regime for the enforcement of foreign judgments as set out in the Enforcement of Foreign Civil Judgments Act 1988. The Court therefore looked to the common law regime for the enforcement of foreign judgments. It held that all the common law requirements regarding the enforcement of a foreign judgment were satisfied, i.e., the SADC Tribunal was internationally competent, it had jurisdiction and its decision was final and conclusive. The Court further held that a costs order properly fell within the ambit of the term 'foreign judgment'. It was deemed necessary to 'develop the common law' to provide for the 'enforcement of judgments and orders of international courts and tribunals based on international agreements that are binding on South Africa'.[100] The SACC noted that it is specifically tasked with the mandate to develop the common law under Article 39(2) of the South African Constitution. The Court's decision to extend the meaning of the term 'foreign judgment' to include decisions of the tribunal was also predicated on upholding respect for the rule of law, for access to justice, for the observance of international commitments and for the duty imposed under Article 32 of the SADC Tribunal Protocol.[101]

The *Fick* decision can usefully be contrasted with the decision of the Supreme Court of Ghana in *Republic* v. *High Court of Accra (Commercial Division), ex parte Attorney General, NML Capital and the Republic of Argentina*[102] where the Court held that Ghana was a dualist country[103] and therefore the decisions of the International Tribunal on the Law of the Sea had no effect in the absence of legislation providing for their enforcement. Also worthy of note is the decision of *Gramara (Private) Limited* v. *Government of the Republic of Zimbabwe* where the court refused to enforce a decision of the SADC Tribunal on the grounds of public policy, namely that the land reform program had already been given constitutional imprimatur by the Supreme Court of Zimbabwe.[104]

Enforcement of a foreign decision at common law has also been predicated on the principle of comity as reflected in the decision of Justice Eldad Mwangusya sitting in the High Court of Uganda in the recent case of *Christopher and Carol Sales* v. *the Attorney General*.[105] This case arose out of an application seeking the enforcement of a judgment handed down in the Southern District of New York against the Permanent Mission of the Republic of Uganda to the United Nations amounting to US$2 million. The plaintiffs founded their claim on the common law principles of reciprocity, international comity and the theory of obligation. The action was resisted by the state on the basis that there was no reciprocal enforcement

99 Ibid., at 2–4.
100 Ibid., at 53.
101 Ibid., at 54–70.
102 Civil Motion No J5/10/2013 (Supreme Court, Ghana, 2013).
103 One in which an international obligation must be incorporated or transformed into domestic law in order to have binding legal effect.
104 Case No: X-ref HC 5483/09 (High Court, Zimbabwe, 2010).
105 Civil Suit No 91 of 2011.

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arrangements between Uganda and the United States. The learned judge upheld the claim, citing with approval the following iconic passage on the legal meaning of comity by the US Supreme Court in *Hilton* v. *Guyot*:

> Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[106]

Justice Mwangusya also went on to distinguish common law enforcement from the regime spelt out under the Foreign Judgments (Reciprocal Enforcement) Act[107] which provides for registration of a decision of a foreign court. Based on the principles of comity as well as the fact that the judgment was the product of a 'full and fair trial abroad before a court of competent jurisdiction' he concluded that the judgment could be enforced in Uganda.

11. Recognition and enforcement under international law

The international regime governing the recognition and enforcement of foreign judgments is comprised of a series of bilateral and multilateral arrangements that have been concluded within certain geographic zones.[108] This position can be usefully contrasted with that which obtains in respect of arbitral awards,[109] which are widely enforced under the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). This convention has been described as the most successful treaty in private international law in light of its acceptance by almost 140 nations.[110] The New York Convention has been ratified by several CARICOM states.[111] Under Article III of the Convention, there is an obligation to recognize and enforce arbitral awards. Recognition and enforcement can only be refused on clearly specified grounds, contained in Article V. The burden of proof in relation to the five grounds justifying refusal rests on the party resisting enforcement. In general, these grounds have been narrowly

106 (1895)159 US 113 at 163–4.
107 Cap 9 Laws of Uganda.
108 See for example the Bustamante Code 1928; the 1979 Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards; the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments between Mexico and Uruguay; Brussels I Regulation (2000) and the Brussels II Regulation (2003) in the European Union; the 1952 Agreement on the Execution of Judgments (Arab League Judgments Convention) and the 1983 Arab Convention on Judicial Co-operation (Riyadh Convention).
109 L. Brilmayer, J. Goldsmith & E. O'Hara O'Connor, *Conflict of Law: Cases and Materials* (2011), at 535.
110 J. Fry, 'Desordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8(1) *Chinese Journal of International Law* 81, at 82.
111 Antigua and Barbuda: *Arbitration Act*, Cap 33; The Bahamas: *Arbitration (Foreign Arbitral Awards) Act 2009*; Barbados: *Arbitration (Foreign Arbitral Awards) Act 1985*, CAP 110A; Belize: *Arbitration Act*, Cap. 125; Dominica: *Arbitration Act 1988*; Jamaica: *Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001*; Saint Vincent and the Grenadines: *Arbitration (New York Convention Awards and Agreements) Act 2000*, Cap 119; Trinidad and Tobago: *Arbitration (Foreign Arbitral Awards) Act 1996*, Chap 5:30.

construed.[112] Even where the grounds have been duly proved, the Court still has discretion to allow enforcement to proceed as the *chapeau* to Article V is drafted in discretionary and not mandatory terms.

12. A PROPOSED SOLUTION

There are three distinct options to construct a framework to provide for the enforcement of CCJ decisions in the original jurisdiction. The first option would be to establish a regional treaty providing for enforcement much like the New York Convention. Just like an arbitral award, a CCJ decision would be recognized and enforced in any contracting state upon presentation of an official copy of the decision bearing the seal of the Court, in the jurisdiction where enforcement proceedings are being pursued. Similar to the New York Convention, recognition and enforcement could only be refused on clearly specified grounds, such as irregularity in the proceedings before the CCJ, that the decision falls outside the remit of the Court's original jurisdiction or that enforcement would be contrary to public policy. The burden of proof would lie with the judgment debtor and it may not be easily discharged. Owing to the status of the CCJ and the exclusivity of its jurisdiction in the interpretation and application of the RTC, enforcement will surely follow as a matter of course in most cases.

However, the 'New York Convention' approach suffers from two significant drawbacks. First, as most Caribbean countries are dualist states, an international treaty on providing for enforcement of CCJ decisions would still have to be transformed by domestic legislation. This will lead to the same problem which presently persists where contracting states have agreed under the CCJ Agreement to provide for enforcement but the requisite domestic laws have not been forthcoming. Secondly, the New York Convention provides for enforcement to be pursued 'in accordance with' domestic rules of procedure. This phraseology is closely aligned to the 'in like manner' wording in the CCJ Acts throughout the Caribbean. It is apparent that this form of words is insufficient to overcome the immunity from enforcement granted to the state under the *Crown Proceedings Act* or its legislative equivalent.

The second approach would be to pursue enforcement at common law, such as obtained before the SACC in *Fick*. Upon receipt of the CCJ decision, the litigant can commence civil proceedings on the basis that the judgment is a debt due and owing by the state. Upon satisfaction of the tripartite test of competency, jurisdiction and finality, the local Court can proceed to enforce the decision. The problem with common law enforcement is that it is a tedious process which requires the litigant to commence further litigation to reap the tangible benefits of the paper judgment. Common law enforcement is a species of satellite litigation. Given the problems of backlog and delay plaguing Caribbean judiciaries, the use of common law enforcement proceedings to enforce CCJ original jurisdiction decisions may prove lengthy, cumbersome, frustrating and expensive. It may also prove unrealistic

112 A. van den Berg, *The New York Arbitration Convention of 1958* (1981), at 268.

as the litigant may not have the resources to commence a second set of proceedings after expending resources to ventilate his matter before the CCJ. It is also important to note that the approach laid out in the *Fick* decision is not widely accepted and, in fact, it was not adopted by the Ghanaian courts. It could be that *Fick* is the product of both the unique powers of the SACC and the political climate surrounding the land reform policies of the Zimbabwean government. In sum, the utilisation of common law proceedings to enforce a CCJ original jurisdiction decision does not present an attractive solution.

The third option would be to amend the Foreign Judgments (Reciprocal Enforcement) Act to include decisions of the CCJ. Thus, the enforcing court would first register the judgment of the CCJ upon satisfaction of the four prong test under the Act. However this approach is fraught with conceptual difficulties given that the original jurisdiction of the CCJ has been accepted by all member states. It may be unseemly for these same states to treat the CCJ as a foreign court. In fact, the Court is anything but. After all, the Court was set up by Caribbean countries to facilitate the advancement of the Caribbean Single Market and Economy (the CSME). The seat of the Court is in the Caribbean. It is staffed by CARICOM nationals. Its motto is One People, One Region, One Court.

Whatever solution is chosen, all efforts to provide an enforcement scheme will come to naught if the existing regime of state immunity from enforcement proceedings in national law is left intact. In any attempt to fortify the enforcement scheme through the passage of national legislation, through a regional treaty or at common law, express provision must be made to ensure that the immunity granted to the state against enforcement proceedings under domestic law does not apply in relation to CCJ decisions in its original jurisdiction. Upon cursory examination, this move might seem difficult to reconcile with the traditional understandings of the concept of state sovereignty. However, as the CCJ observed, in *Trinidad Cement Limited* v. *the Caribbean Community* a dogmatic approach to sovereignty cannot be easily reconciled with the rule of law and the growing dictates of accountability and transparency in public affairs.[113] In fact, the strictures of sovereignty also run counter to the very aims and objectives of the RTC which envisions the creation of a single economic space predicated on a high degree of co-operation among member states and the harmonisation of legislative and economic policies. This point is evident from the following observations of the Court in TCL:

> By signing and ratifying the Revised Treaty and thereby conferring on this Court ipso facto a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the Member States transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law. A challenge by a private party to decisions of the Community is therefore not only not precluded, but is a manifestation of such a system. Therefore it is not correct to say that by such challenge the functioning of the Community will be greatly hindered or that the exercise of state sovereignty by Member States parties to the Revised Treaty would be

113 See CC, *supra* note 4.

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> unduly constrained. The rule of law brings with it legal certainty and protection of rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty.[114]

This waiver of immunity may also be criticized on the basis that it strikes against conventional notions of equality to create a legal framework where a litigant would fare better in terms of enforcement if he/she sued the state before the CCJ and not before their local courts. However, it is noteworthy that the original jurisdiction of the CCJ is of crucial importance to regional economic development. As noted in *Rudisa*, the effectiveness of Community law depends to a large extent on the enforcement of the decisions of the CCJ given in the original jurisdiction. The boundaries of Crown immunity are not cast in stone, as suggested in the *Gairy* case. Thus it can be argued that robust protection should exist for a breach of the RTC and it would be unseemly for the state to invoke the protections granted against enforcement proceedings in the face of a decision of the CCJ in its original jurisdiction.

13. Conclusion

There is a serious problem with the enforcement of CCJ decisions in its original jurisdiction which requires urgent attention on the part of all contracting states. The response of most CARICOM states to this problem has been woefully inadequate. Most states have neglected to enact domestic legislation providing for the enforcement of CCJ decisions; a patent breach of Article XXVI of the CCJ Agreement. Those states which have enacted legislation, have constructed a regime that is inherently problematic, in that it provides for enforcement of a CCJ decision to be pursed 'in like manner' as a decision of their national courts. This phraseology naturally raises the spectre of the Crown Proceedings Act and its progeny. CARICOM member states must craft an effective enforcement regime which addresses the immunity from enforcement granted by domestic law in order to fulfil their obligations under the RTC and the CCJ Agreement. The CCJ is the lynch-pin to the full realisation of the vision, promise and tangible benefits offered by the CSME. In the enforcement of CCJ original jurisdiction judgments, the stakes are high and action is imperative. For the people of the Caribbean region, the CCJ and the CSME are too big to fail.

114 Ibid., at 32.

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