REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-01683
Claim No. CV2016-01684
Claim No. CV2016-01685
Claim No. CV2016-01686
Claim No. CV2016-01692
Claim No. CV2016-01693
Claim No. CV2016-01694
Claim No. CV2016-01695
Claim No. CV2016-01954

BETWEEN

EXECUTIVE BODYGUARD SERVICES LIMITED

Claimant

AND

NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO LIMITED

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. K. Taklalsingh and Mr. R. Rickhi instructed by Ms. D. Sankar for the Claimant
Mr. K. Garcia instructed by Ms. V. Jaisingh for the Defendant

Decision on Application

1. By Notice of Application filed on the 21st June, 2016, the Defendant seeks a stay of proceedings pursuant to section 7 of the Arbitration Act, Chapter 5:01 ("the Act") or in the alternative an order that the Defendant to be given leave to file its Defence pursuant to Rule 9.7 (7) (a) of the CPR.

2. The court will make the following order;

    i. Claim number CV2016-01694 is unconsolidated from claims number CV2016-01683, CV2016-01684, CV2016-01685, CV2016-01686, CV2016-01692, CV2016-01693, CV2016-01695 and CV2016-01954.
    ii. Claims number CV2016-01683, CV2016-01684, CV2016-01685, CV2016-01686, CV2016-01692, CV2016-01693, CV2016-01695 and CV2016-01954 are stayed for six months from the date hereof pending determination of mediation and/or arbitration proceedings between the parties.
    iii. In respect of claim number CV2016-01694 the application of the Defendant is dismissed.
    iv. The Claimants shall pay to the Defendant 75% of the costs of the application in relation to the stay on the consolidated claim to be assessed by this court upon determination of the claim in default of agreement.

Background

3. The Claimant is engaged in providing security manned guarding services. It is the case for the Claimant that between 2012 and 2015, it entered into nine (9) contracts with the Defendant to supply security services at various facilities of the Defendant. Eight (8) of the contracts were done in writing and one (1) was done orally. The written contracts were as follows:

i. Contract dated the 3rd May, 2012 for the provision of security manned guarding services at the Caroni Multi-Fuel Facility ("the Caroni Multi-Fuel contract");

ii. Contracts dated the 8th March, 2013 and 5th May, 2015 for the provision of Ancillary Security Services ("the Ancillary Security Services contracts");

iii. Contract dated the 8th May, 2013 for the provision of security manned guarding services at the Defendant's Facilities, Head Office; Julin Building ("the Head office contract");

iv. Contract dated 6th March, 2014 for the provision of security manned guarding services at the Union Industrial Estate Metering Station, Warehouse and Rousillac Launcher Station ("the Union Industrial Estate contract");

v. Contract dated the 6th March, 2014 for the provision of security manned guarding services at the Phoenix Park Valve Station ("the Phoenix Park contract");

vi. Contract dated the 16th July, 2014 for the provision of security manned guarding services at the CNG Company Limited ("the CNG contract").

vii. Contract dated the 28th October, 2014 for the provision of security manned guarding services at the Beachfield Facilities, Guayaguayare ("the Beachfield contract"); and

viii. Contract dated 5th May, 2015 for the provision of security manned guarding services at the Tobago Cove Estate ("the Tobago Cove Estate contract").

4. The ninth contract which was an oral one was entered into by the Claimant and the Defendant on the 28th April, 2015 and was for the provision of security manned guarding services at the WASA Beetham Water Re-Use Project, Beetham ("the Beetham Contract").

5. It is the case of the Claimant that the Defendant has failed and/or neglected to compensate it for the performance of certain security services provided under each of the nine contracts. Prior to the institution of separate claims (which have now been consolidated), the Claimant issued and delivered pre-action protocol letters. All claims were filed on the 18th May, 2016 save and except, the action in relation to the Caroni Multi-Fuel contract which was filed on the 15th July, 2016.

Stay of Proceedings

6. Section 7 of the Arbitration Act provides as follows;

"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

7. In exercising its discretion to stay proceedings under section 7 of the Act, Mendonca JA in ***LJ Williams v Zim American Shipping Services CA P059/14*** at paragraphs 19 and 20 stated as follows;

"In order for the Court therefore to exercise its discretionary power it must be satisfied of the two conditions set out in the "the plain and unambiguous language of section 7" namely, (1) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with agreement and (2) that the person seeking the stay was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. However before the Court may exercise its discretion to grant a stay there are certain mandatory or threshold requirements prescribed in the section. In the plain wording of the section these are: 1) there must be a concluded agreement to arbitrate. 2) The legal proceedings which are sought to be stayed must have been commenced by a party to the arbitration agreement or a person claiming through or under that party. 3) The legal proceedings must have been commenced against another party to the arbitration agreement or a person claiming through or under that person. 4) The legal proceedings must be in respect of any matter agreed to be referred to arbitration; and 5) the application for the stay must be made at any time after appearance but before delivery of pleadings or the taking of any other step in the proceedings."

8. Insofar as the Defendant seeks to stay the proceedings in furtherance of arbitration, clauses 16 and/or 20 incorporated respectively into the written contracts provides as follows:

"In case any dispute or difference shall arise between the Parties hereto touching or relating to any matter arising under this Contract or the construction or meaning thereof and such dispute or difference cannot be resolved by mutual agreement witin thirty (30) days from the date of the dispute

or difference, such dispute or difference shall be referred at the option of either Party to mediation through the Dispute Resolution Centre of Trinidad and Tobago Chamber of Industry and Commerce for a period of sixty (60) days or such other time agreed by the Parties. If the dispute or difference is not resolved by mediation within the said time aforesaid the dispute or difference shall be referred to arbitration in accordance with the provisions of the Arbitration Act Chapter 5:01 of the Laws of Trinidad and Tobago or any statutory variation, modification or re-enactment thereof for the time being in force."

9. The grounds of the Defendant's application are as follows;

    i. The Defendant entered into a binding agreement with the Claimant to resolve all disputes by means other than through litigation;
    ii. The subject matter of the actions is a dispute or difference touching or relating to any matter arising under the Contracts;
    iii. The Beetham contract which was done orally, was executed pursuant to the understanding that it was done according to the same terms as contained in the Defendant's standard form of contract (including the arbitration agreement). Further, that the CNG contract continued to be performed by the Claimant on the terms of the expired contract which included the arbitration agreement.
    iv. The Defendant is and remains ready and willing to do all things necessary to conduct arbitration.

10. The Claimant opposes the Application for the stay of proceedings on the following grounds:

    i. There is no dispute within the meaning of the arbitration agreement;
    ii. The Defendant had sufficient time to respond to the pre-action protocol letters,

iii. The parties can only proceed to arbitration after the option of mediation has been explored and failed to resolve the dispute;
iv. The Defendant was unwilling to arbitrate; and
v. There was no arbitration agreement in relation to the Beetham Contract and the CNG contract.

11. It is to be noted that not all of the threshold requirements set out in ***LJ Williams*** are in dispute. Consequently, the issues that arise for this court's determination in relation to the threshold requirements are as follows;

i. Whether there was a concluded legal agreement to arbitrate in respect of each contract;
ii. Whether the legal proceedings are in respect of any matter agreed to be referred to arbitration; and
iii. Whether the Defendant was, at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of arbitration.

The Evidence

12. The parties have filed and relied on the following affidavits respectively:

i. Affidavit in Support of the Application of Vishma Jaisingh sworn to and filed on the 21st June, 2016 ("the affidavit of Jaisingh");
ii. Affidavit in Opposition of Desiree E. Sankar sworn to and filed on the 5th October, 2016 ("affidavit of Sankar") and;
iii. Affidavit in Reply of Alicia Neebar sworn to and filed on the 26th October, 2016 ("affidavit of Neebar").

13. Pre-action Protocol letters dated the 25th February, 2016 ("the first pre-action protocol letter") were sent to the Defendant in relation to the Union Industrial Estate contract, the

Beachfield contract, the Ancillary Service contract, the Phoenix contract, the Tobago Cove contract, and the Head Office contract. These letters were received at the Offices of the Defendant in March, 2016. According to the affidavit of Jaisingh, by the time first pre-action protocol letters were received the time for responding had expired.

14. Further letters dated the 22nd March, 2016 ("mediation letters") were sent to the Defendant in relation the Union Industrial Estate contract, the Beachfield contract, the Phoenix contract, the Tobago Cove contract, and the Head Office contract. According to the affidavit of Sankar, this letter proposed mediation. These letters were also received by at the Offices of the Defendant in March, 2016.

15. In relation to the Caroni Multi Fuel contract and the CNG contract per-action protocol letters dated the 17th March, 2016 were sent to the Defendant. These letters were received at the offices of the Defendant in March, 2016.

16. In relation to the Beetham contract a pre-action protocol letter dated the 10th March, 2016 was sent to the Defendant. This letter was received at the offices of the Defendant in Aril, 2016.

17. It should be noted that the Claimant did not send any mediation letters to the Defendant in respect to the Beetham contract, the Ancillary Services contract, the CNG contract and the Caroni Multi-Fuel contract.

Whether there was a concluded agreement to arbitrate

Submissions

18. According to the Defendant, eight of the written contracts contained an agreement between the parties to refer all disputes or differences to arbitration. The Defendant

submitted that an arbitration agreement may also be implied into an agreement: See ***Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd; The Athena [2006] EWHC 2530, Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL [2010] EWHC 29.***

19. Further, the Defendant submitted that the un-contradicted evidence of the parties having entered into previous written contracts, established a course of dealing from which each party was reasonably entitled to conclude the following:

    i. That the alleged continuation of the CNG contract (after its expiration) was agreed upon on the same terms of the expired contract; and
    ii. That the Beetham contract was executed pursuant to the same terms of the Defendant's standard form of contract: See ***Petrotrade Inc v Texaco Ltd [2001] 4 All ER 853.***

20. The Claimant submitted that upon a proper reading and construction of the arbitration clause relied upon by the Defendant, one would recognize that a mandatory obligation exists for the parties to meaningfully engage in mediation as a pre-requisite for invoking arbitration. Consequently, it is the contention of the Claimant that the Defendant ought not to be judicially allowed to rely upon arbitration as a means to delay payment having failed to engage in any meaningful attempt to mediate.

21. The Claimant further submitted that upon the monies becoming due and owing and particularly from the date of the Pre-Action Protocol letter sent to the Defendant for each of the matters, a series of conditions came into play under the aforementioned clause which are as follows:

    i. The parties ***"shall"*** go to mediation at the Dispute Resolution Centre of Trinidad and Tobago; and
    ii. Should the matter not be resolved at that stage then the parties ***"shall"*** go to arbitration.

22. The Claimant relied upon the cases of ***Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd (QBD) [2015] 1 WLR 1145*** and ***Climate Control Ltd v C.G. Services Limited CV2015-03486*** to emphasize the importance and enforceability of pre-arbitration conditions of dispute resolution.

23. Consequently, it is the submission of the Claimant that there was no concluded arbitration agreement as contemplated by Section 7 of the Act because the agreement to arbitrate only became activated or properly invoked if the pre-conditions of mediation were met.

24. Moreover, the Claimant submitted that an arbitration agreement cannot be implied into the Beetham contract (oral contract) and into the CNG contract which continued after its expiration since Section 2 of the Act clearly defines an arbitration agreement as a written agreement.

Finding on issue

25. The court has found that the threshold requirement of a concluded written agreement to arbitrate has been met in relation to the seven subsisting written contracts and the CNG contract but not in relation to the Beetham contract for the following reasons.

The seven written contracts

26. The fact that parties have agreed to another form of Alternative Dispute Resolution as a pre-requisite to arbitration does not in the court's view take the substance of the clause outside the realm of an agreement to arbitrate. The essence of an arbitration agreement lies not only with the provision of an opportunity to explore an alternative method of resolution of a dispute thereby saving costs and time which may be attendant upon litigation, but such a clause also acknowledges and attempts to preserve the business relationship and commercial goodwill between the parties which may otherwise be irrevocably destroyed in commercial court litigation. Such a clause is enforceable both as

a matter of public interest and of giving effect to the bargain entered into by the parties. The clause in this case clearly sets out that the parties shall proceed to mediation for a period of sixty days or such other time agreed by the parties and if the dispute is not then resolved, the dispute shall be referred to arbitration. The use of the word *"shall"* in the court's view demonstrates that the use of the mediation process is condition precedent to referral to arbitration.

27. The Claimant has quite helpfully set out the approach which a court ought to adopt when treating with this issue and it bears repeating. In **Emirates** (supra), the Applicant applied to the court under section 67 of the Arbitration Act 1996 challenging the arbitrators' award on jurisdiction, on the basis that clause 11.1 was enforceable and imposed a condition precedent to arbitrators' substantive jurisdiction to hear and determine the dispute which had not been met.

28. Justice Teale found that the clause was enforceable on the basis that the parties had engaged in "friendly discussions", but in so finding, he highlighted the public importance and enforceability of pre-arbitration conditions of dispute resolution when he stated at paragraphs 50, 63 and 64 as follows:

"50 However, where commercial parties have agreed a dispute resolution clause which purports to prevent them from launching into an expensive arbitration without first seeking to resolve their dispute by friendly discussions the courts should seek to give effect to the parties' bargain. Moreover, there is a public interest in giving effect to dispute resolution clauses which require the parties to seek to resolve disputes before engaging in arbitration or litigation.

63 I have therefore concluded that I am not bound by authority to hold that a dispute resolution clause in an existing and enforceable contract which requires the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute may be referred to arbitration is unenforceable.

64 In my judgment such an agreement is enforceable. My reasons (which largely echo those of Allsop P in the United Group Rail Services case) may be summarised as follows. The agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction on their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time consuming arbitration."

29. In the court's view therefore the seven contracts all contain concluded agreements to arbitrate.

30. Further, the evidence on affidavit filed in relation to the application demonstrates that the mediation letters sent to the Defendant stated as follows;

"3. Therefore, in keeping with the terms of ***Clause 20*** *kindly inform me within* ***seven (7) days*** *of receipt of this letter, whether you are:*

(a) willing to settle this matter; or
(b) prepared to enter into Meditation through the Dispute Resolution Centre of Trinidad and Tobago Chamber of Industry and Commerce; or
(c) prepared to engage in Arbitration.

Kindly, forward the names of any three (3) mediators from the Dispute Resolution Centre of Trinidad and Tobago Chamber of Industry and Commerce or three (3) Arbitrators that you would prefer, should you select either of these options.

I am instructed that should you fail to respond to this request or refuse to choose any Mediators or to go to Arbitration, that legal proceedings will be commenced against you in keeping with the issues set out in the initial pre-action protocol letter."

The CNG contract

31. The Defendant has asked this Court to imply arbitration clauses into the Beetham contract, as well as into the CNG contract. The evidence demonstrates that the allegation is that the parties to the CNG contract, having previously operated under a written contract continued to so operate. Should this be true, it must mean that the parties intended the arbitration clause to apply in the same manner.

32. The Defendant submitted that an arbitration agreement may be implied into an agreement applying the usual test of implied term: See ***Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd; The Athena [2006] EWHC 2530.*** Further, the Defendant submitted that the un-contradicted evidence of the parties having entered into previous written contracts, established a course of dealing from which each party was reasonably entitled to conclude that the alleged continuation of the CNG contract (after its expiration) was agreed upon on the same terms of the expired contract: See ***Petrotrade Inc v Texaco Ltd [2001] 4 All ER 853***

33. It is clear to the court on the evidence that the arbitration clause contained in the written contract with CNG continued after the expiration of that contract as the parties treated their contractual relationship as having been continued on the basis of the earlier written expired contract. In those circumstances it would be improper to isolate and exclude the arbitration clause from the contract as there is no legal basis for so doing. Just as the other

terms have formed the basis for the continuation of the relationship so too must the arbitration clause.

The Beetham contract

34. In the court's view, the position here is somewhat different as there had been no written prior contract between the parties which would have contained an arbitration clause prior to the creation of the oral contract. Also, there would have been no earlier or continued course of dealings in relation to this contract. The submission of the Defendant that the Claimant would have dealt with it in relation to other written standard contracts and therefore the court could reasonably conclude that the parties would have adopted the same terms for the Beetham contract is in the court's view flawed. The fact that the Defendant prefers its standard form contract which contains an arbitration clause and has managed to obtain agreement in respect thereof in the past in no way derogates from the fact that in this case there has been no meeting of the minds in respect of an arbitration clause either expressly in writing, or by implication through a course of dealings between the parties. In those circumstances, it would be improper to impose such a term on the parties.

35. The court therefore finds that there was no concluded agreement to arbitrate in relation to the Beetham contract. In this respect therefore the threshold has not been met and a stay will not be granted.

36. The matters set out hereafter all refer to the other eight contracts inclusive of the CNG contract.

Whether the legal proceedings are in respect of any matter agreed to be referred to arbitration

Submissions

37. It is the submission of the Defendant that the Claimant's claim that the Defendant has refuted and/failed to pay the monies due and owing to the Claimant is a dispute within the meaning of the arbitration agreement. The Defendant submitted that the non-payment of an amount which is not admitted constitutes a dispute within the meaning of an arbitration agreement and within section 7 of the Act: ***Halki Shipping Corp v Sopex Oils Ltd - [1998] 2 All ER 23.***

38. The Claimant submitted that a mere statement that the Defendant does not admit the sum owed is not sufficient to spawn a dispute for the purposes of invoking arbitration. The Claimant further submitted that Defendant's failure to make a clear statement of the specific dispute must be construed against it: See ***Climate Control*** supra, paragraph 10.

Finding on issue

39. The issue between the parties is whether there is a breach of contract and therefore whether damages should be awarded for the breach in the terms of the sum alleged by the Claimant. So long as the breach and/or the sum has not been admitted, its existence remains in dispute and is therefore an issue in dispute between the parties as is the case here. The court is therefore of the opinion that the dispute in this case falls squarely within the four corners of the arbitration agreement as demonstrated by the dicta in ***Halki Shipping*** supra at page at 741 which states as follows;

"Again by the light of nature, it seems to me that s 1(1) is not limited either in content or in subject matter, that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say, "I don't agree." If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the

arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."

40. It follows that the court has found that all of the threshold requirements have been met in relation to the eight contracts and will therefore consider the exercise of the discretion in due course.

Whether the Defendant was, at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of arbitration

Submissions

41. According to the Defendant, there is no sufficient reason for the dispute not to be referred to arbitration. The Defendant submitted that the parties herein having agreed to settle their disputes by way of arbitration should be held to it. The Defendant further submitted that there are no points of law which arises in this matter which require determination by a court. That the relief the Claimant sought are relief which can be granted by an arbitrator and therefore the dispute should be referred to arbitration.

42. The Defendant submitted that the Claimant took no steps to settle the dispute in accordance with the arbitration agreement. That by letter dated the 22nd March, 2016, the Claimant threatened the Defendant with legal action if it failed to inform the Claimant within seven (7) days whether it was willing to settle the matter, was prepared to enter into mediation or engage in arbitration. It is the contention of the Defendant that by this letter, the Claimant merely asked what the Defendant's position was on mediation or arbitration without stating its own.

43. The Defendant further submitted that it was and still remains ready and willing to do all things necessary to the proper conduct of arbitration. According to the Defendant, its

failure to respond to the pre-action protocol letter does not suffice to draw the conclusion that it was unwilling to engage in arbitration: ***Leighton Chin- Hung v Wisynco Group Ltd. [2013] JMCA Civ 19.***

44. It is the submission of the Defendant that by the time it received the Claimant's pre-action protocol letter and further pre-action letter dated the 22nd March, 2016, the stipulated time for responding had expired but that its Legal Officer nevertheless requested an extension of twenty eight days to respond. The Claimant extended the Defendant's time to respond by ten days instead of the twenty eight days requested by the Defendant. It is the submission of the Defendant that the Claimant's refusal to give more time than it did, was not evidence of the Defendant's un-readiness and unwillingness to do all things necessary to the proper conduct of arbitration: See ***Quantum Construction v Newgate CV2014-00338.***

45. The Claimant also relied on the authority of ***Leighton*** supra. At paragraph 21, Justice Phillips JA stated as follows;

"….According to the text Law and Practice of International Arbitration, a party initiating recourse to arbitration must give to the other party a notice of arbitration. The notice of arbitration, it states, shall include, among other things: a demand that the dispute be referred to arbitration and a reference to the contract out of which the dispute arises; the general nature of the claim, and an indication of the amount involved, if any; the relief and remedy sought; and a proposal relating to the number of arbitrators, if not already agreed. This is a step which could have been taken by the appellant to put in motion arbitration proceedings. This would have served as formal notice to the respondent of his intention to have the matter arbitrated. The appellant failed to take this step and to that extent, may also be viewed as being inactive in having the matter resolved by arbitration. The respondent's lack of response or its failure to give a positive indication or statement to the effect that it objected to the notice of arbitration would have been a clear indication that it was not interested in arbitration. It would have provided cogent evidence of the respondent's unwillingness."

46. The Claimant submitted that it wrote a pre-action letter and mediation proposal letter (further pre-action letter) to the Defendant and that when these two documents are considered together they set out the following;

    i. The dispute (if any) be referred to arbitration;
    ii. A reference to the contract out of which the dispute arose;
    iii. The general nature of the claim;
    iv. An indication of the amount involved, if any, the relief and remedy sought;
    v. A proposal relating to the number of arbitrators, if not already agreed.

47. The Claimant further submitted that the words in the Mediation Proposal letter, referred to by the Defendant as further Pre-Action Protocol letter are quite clear. That it was passing strange that the Defendant could not understand from the clearly worded correspondence that the Claimant was attempting to settle the matter amicably or engage in mediation.

48. The Claimant submitted that the case of ***Quantum Construction*** supra is highly distinguishable from the instant case for the following reasons;

    i. The pre-action protocol letter in Quantum Construction supra made no mention of arbitration and therefore the letter did not fall within the category that would make it a Notice to Arbitration, whereas the pre-action protocol letter and further pre-action protocol letter in the instant case met the criteria of sufficient notice and/or offer of arbitration; and
    ii. In Quantum Construction supra, the first time the issue of arbitration was mentioned was by the Defendant whereas in the instant proceedings arbitration was first raised by the Claimant and it was ignored by the Defendant.

49. It should be noted that the Claimant did not send any mediation letters to the Defendant in respect to the Beetham contract, the Ancillary Services contract, the CNG contract and the Caroni Multi-Fuel contract.

50. The Claimant submitted that the Defendant has tactically chosen to remain silent and simply request further extensions of time without giving the Claimant a preliminary position with respect to the outstanding payment. Further, that there was nothing stopping the Defendant from either stating and/or invoking mediation as an option while obtaining instructions.

51. Finally, the Claimant submitted that the conduct and actions and/or lack of action by the Defendant demonstrate that it was not ready and willing to arbitrate this matter and therefore, there is sufficient reason for this dispute not to be referred to arbitration.

Finding on issue

52. The court does not agree with the submissions of the Claimant on this issue. It is pellucid that the arbitration clause contained in the agreement is exercisable at the option of either party so that the attempt of the Claimant to ascertain from the Defendant whether it was willing to enter into mediation or arbitration is wholly irrelevant and unnecessary. The ADR process under the agreement is triggered by either party electing to go to mediation so that what was required of the Claimant was the issuance of a Notice that it was exercising its entitlement to go to mediation if they so chose. The mediation proposal letter in no way suggested that the Claimant had in fact triggered the arbitration clause and its argument by implication at this stage that it had done so is wholly unmeritorious and is in the court's view an attempt to unfairly saddle the Defendant with refusal to arbitrate.

53. Further, the court accepts that the grant of a period of ten days only by the Claimant, upon a request by the Defendant in relation to an extension of time to respond to the pre-

action protocol letter was unreasonable having regard to the number of contracts with which they were to treat. Although the arbitration clause would have been the same, the factual issues to be dealt with in relation to each contract may have been different so that more time would have been needed to obtain instructions. In the context of the refusal of the Claimant to extend the time to a reasonable period the effect of the pre-action protocol letter was illusory at the highest. The spirit and intent of the CPR admits of a genuine attempt on the part of the parties to settle prior to embarking on litigation. This imports the concept of reasonableness on the part of the parties when treating with the issue of response times to pre-action letters. Failure to act reasonably derogates from the spirit and intent of the CPR philosophy and serves to hinder rather than facilitate genuine settlement.

54. It is also clear to the court that neither of the letters amounts to a Notice of Arbitration and the court so finds. As a consequence, it cannot be said that the Defendant has been unwilling to mediate or arbitrate and the court finds that at the time when the proceedings were commenced the Defendant was and still remains ready and willing to do all things necessary to the proper conduct of arbitration.

Sufficient reason why the matter should not be referred to arbitration in accordance with agreement.

55. In short there is no sufficient reason having regard to the court's finding above and to discretionary considerations of fairness and prejudice. In relation to prejudice, the court could see no prejudice real or potential to be suffered by the Claimant should the claim be stayed pending mediation and/or arbitration. Considering the fact of eight separate contracts with different facts, the volume of evidence required, the possible issues at trial, length of trail and possible trial dates, it makes good sense that ADR is explored prior to embarking on the expensive process of continued litigation. This approach is also in keeping with the philosophy of the CPR as set out above.

56. In relation to fairness, it is fair and just that the claim be stayed for the parties to explore ADR for the following reasons;

    i. Although the Claimant had the opportunity to trigger the arbitration clause it failed so to do. This applies equally to the Defendant.

    ii. In the interest of the both parties, the court ought to give effect to the commercial bargain made by the parties at the time they entered into the contract. That commercial bargain encompassed the voluntary submission to an ADR process at the behest of either party so long as a dispute between them remains unresolved. This bargain would have been negotiated between them as contracting parties on equal footing.

    iii. The opportunity to avail the ADR process is consistent with the philosophy encapsulated by the CPR to give parties the opportunity to settle matters before proceeding to litigation which will amongst other things result in consumption of the court's resources for matters which may otherwise have likely been settled thereby depriving other litigants of the opportunity to have their matters heard sooner rather than later. It is therefore in the public interest that the arbitration clause be given full effect and the stay be granted for that purpose.

Dated the 15th day of December 2016

Ricky Rahim

Judge