

**2016-HC-DEM-CIV-CD-977**

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE**

**CIVIL JURISDICTION**

**COMMERCIAL DIVISION**

**BETWEEN:**

**TCL TRADING LIMITED**

**Plaintiff**

**-and-**

**CARICOM CEMENT COMPANY INC.**

**Defendant**

**CARICOM CEMENT COMPANY INC.**

**Added Defendant**

***BEFORE THE HON. MR. JUSTICE NARESHWAR HARNANAN***

**Appearances:**

Mr. Jed Vasconcellos for the Respondent/Plaintiff

Mr. Sase Gunraj for the Applicant/Defendant

**RULING:** *Motion dated the 7<sup>th</sup> March, 2017:*

1. For the record, the substantive action was filed since the 22<sup>nd</sup> August, 2016, and service effected on the defendant on the 24<sup>th</sup> August, 2016. After appearing on 3 occasions in the Commercial Division of the High Court seeking leave to file an affidavit of defence between October 2016 to March, 2017, the defendant files the instant Motion contending

the action be dismissed on the ground that the Court has no jurisdiction to hear the action.

2. The plaintiff claims a liquidated sum owed by the defendant for the supply of cement which they ordered during the month of August 2014. The defendant has not filed an affidavit in defence, but claims in their affidavit in support of their motion and reply, that the amount owed arises out of a renewal of an agreement for the year 2014, which was initially entered into on July 4, 2013. In this agreement, there is a clause which indicates that the agreement shall be governed by the laws of Trinidad and Tobago.
3. The plaintiff denies the renewal of the agreement and relies on the defendant's alleged order of August 2014 as constituting a separate agreement under which they are now seeking to enforce. The defendant purports to rely on correspondence evidencing the renewal of the 2013 Agreement, but has failed to attach same to their reply.
4. Having been fixed for hearing before this Court, as constituted on the 7<sup>th</sup> November, 2017, leave was granted to the defendant to lay over their legal arguments in writing on two separate occasions. Up to the date of preparing this ruling, no submissions have been received from the defendant with respect to their instant motion.
5. Having considered the motion filed herein, together with their affidavits, and submissions by plaintiff, this Court makes the following observations, and conclusions, where stated:
6. The contention by the defendant of a renewal of the 2013 contract is a matter of evidence. Further, if the agreement of 2013 is found to have been renewed, the issue, by the defendant's motion, is whether the High Court of Guyana would have jurisdiction to hear and determine it.
7. In ***Bank of Montreal v Weston BB [1982] HC 52***, an action for a debt was brought by the Bank to recover a sum of Canadian currency due on a promissory note. Though the contract provided for it to be construed in accordance with the laws of Ontario, and that the courts of that province

shall have jurisdiction over all disputes arising therefrom, the Court refused the application for a stay of the action. The reasons given for this were that:

- (i) Once the claim has been properly filed and served on the defendant, the court has jurisdiction; and
- (ii) The defendant had failed to show that he would suffer inconvenience or expense or any other disadvantage if the case brought against him should continue in that Court (the test as stated by Lord Keith of Kinkel in ***Mac Shannon v Rockware Glass Ltd. [1978] A.C. 795***).

8. Here, the defendant has challenged this Court's jurisdiction on the basis of the choice of the applicable law clause in the agreement which they alleged governs the transaction being complained of. As the court in Barbados said, this does not in itself deprive another court of jurisdiction (***Wright v Lewis Silkin LLP [2016] EWCA Civ 1308***).

9. Further, the Defendant has not attempted to show that he will suffer any inconvenience or disadvantage, should the case be tried in this Court. In fact, there is nothing to suggest that such inconvenience exists for the Court to consider declining jurisdiction.

10. It is evident from the claim, and the affidavits filed by the defendant, that it is a company incorporated in Guyana, with its registered office in Guyana, and the subject matter of the claim was shipped to Guyana. It does appear therefore that Guyana is the most appropriate forum to hear and determine this claim. This observation is made *obiter*, since there is an expressed choice of applicable law clause in the contract being relied upon by the defendant as the governing agreement.

11. The applicable law and applicable jurisdiction are two fundamentally different concepts. The former is the law to be applied, whilst the latter is the country whose courts apply the applicable law.

12. ***Jaffey on the Conflict of Laws***, Oxford University Press, 2<sup>nd</sup> edition, 2005, at pages 203 – 204, states the position thus:

The general position is that every international contract has a governing law – known as the common law as the ‘proper law’ and by the statute as the ‘applicable law’ – *by reference to which most of the significant issues arising out of the contract are to be determined*. Subject to certain limitations, parties to a contract are free to choose the applicable law; if the parties fail to make a choice, the governing law will be the law of the country with which the contract is most closely connected.

...

A choice of law is express when the contract contains a provision which specifies the law by which it is to be governed. For example, a contract may include a clause which provides that the contract ‘shall be governed by the law of Brazil’ or which states that ‘any dispute arising out of this contract shall be decided according to Israeli law’. Parties to an international contract are wise to include such a clause in their agreement to avoid the uncertainty which may otherwise arise in ascertaining the applicable law.

13. In ***Companie Tunisienne de Navigation SA v. Companie d’Armement Maritime SA*** [1971] AC 572, the English House of Lords decided that a contract made in Paris between a French and Tunisian company with a choice of applicable law clause being the law of the flag of the vessel carrying the goods, to be French law. A question arose when it was shown that six different vessels flying five different flags were contracted. The majority of the House of Lords was of the view that the parties envisaged that the defendant would use French vessels in performing the contract and it was reasonable to conclude that the parties had chosen French law as the governing law.

14. ***Jaffey***, continues at page 206:

*A choice of jurisdiction is not, in itself, a choice of law. Similarly, the fact that parties agree to refer their disputes to*

arbitration in England does not necessarily entail a choice of English law. *It is important to keep distinct – at least for analytical purposes – the question of forum (where is the dispute to be resolved, whether by litigation or arbitration?) from the question of the applicable law (which law determines the substantive rights and obligations of the parties?).*

**Conclusion:**

15. The High Court of the Supreme Court of Judicature of Guyana has jurisdiction to hear and determine this claim. Even if at trial it is proved that the agreement being relied upon by the defendant is the applicable agreement, the applicable law choice contained in that agreement is immaterial. The Court simply applies the laws of the Republic of Trinidad and Tobago as the governing law. This clause cannot be interpreted to be a choice of jurisdiction.
16. The motion filed herein is dismissed as being unmeritorious. It is regrettable that the filing of this motion has caused a delay in the hearing of the substantive action for more than 9 months.
17. There will be costs to the plaintiffs in the sum of \$100,000.00 to be paid on or before the filing of the defendant's affidavit in defence, which this court orders to be filed and served on or before the 15<sup>th</sup> February, 2018. It is further ordered that leave is granted to the plaintiff to file and serve an Affidavit verifying claim on or before the 15<sup>th</sup> February, 2018. This matter stands adjourned for hearing on a date to be fixed by the Registrar.



**Nareshwar Harnanan**  
**Puisne Judge**  
**25 January 2018**