

Arbitrarily speaking ...

Athenian Democracy and Arbitration

By Clement Chigbo, the Bahama Journal

The success of early arbitration by the famous Athenian lawmaker Solon, laid the foundation for the Athenian democracy. By early 6th Century, as a result of generational subdivision of family land, most individual farms could not sustain single families. The result was that, enormous wealth was concentrated in the hands of a few large landowners who demanded that loans to peasants be secured by land and personal freedom.

Solon launched arbitration services to arbitrate the growing crisis between debtor peasants and the creditor landowners, by maintaining the existing land distribution, but, ending the securing of debt with land or personal freedom. It is accepted that, the freed peasant majority who emerged from Solon's arbitration practice became the seed of the Athenian democracy.

By 5th Century, arbitration had become universally accepted among Greek states. Evidence for this is found in historians like Plutarch, Thucudides, Tacitus etc. This is also evident in that, although

Greek literature gloried war and warriors, they also recognised war's wastefulness. As a result, they relied on arbitration to solve their territorial boundaries, breached treaty obligations disputes etc.

Just like today, due to the absence of recognition of arbitration as part of customary international law, any arbitration in ancient Greece had to be proceeded by consent of the parties. This consent was granted on an ad hoc basis or through the mechanism of a clause compromissum in a pre-existing treaty. For instance, in the 50 years of peace

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Upcoming Events

Johannesburg

12 July 2011

A seminar on negotiation skills training presented by John Brand of Conflict Dynamics. There are a few spaces left so please contact the Secretariat if you are interested.

13 July 2011

An evening lecture presented by Dr David Klatzow entitled: What is truth? Asked jesting Pilate, but wouldn't stay for an answer.

17 August 2011

An evening lecture by Donald Joubert on Mock Arbitrations.

KwaZulu-Natal

21 July 2011

Presentation titled: Construction Conundrums. Presented by Alastair Hay and Richard Hoal.

Western Cape

25 July 2011

A workshop to be held. Details to follow.

01 August 2011

Western Cape branch Committee meeting.

The AGM

The AGM took place on 25 May 2011. Presentations were given by:-

Judge Fergus Blackie, the present Chairman, who addressed the members present on the AoA's expansion strategy for 2011, 2012 and 2013.

Professor Butler, the present Deputy Chairman and Course Director for the AoA, who advised that the AoA was in discussion with the Chartered Institute of Arbitrators (CI Arb) in an attempt to bring its courses in line with those of the CI Arb and in this way, in line with international standards.

Ms Kellerman, the Executive Director, who talked to her plans to expand the organisation and to cater to the needs of its members and branches. She set out the proposed strategy to

achieve these goals over the next two years.

Members may view the proceedings online at www.arbitrators.co.za/events.

4 of the 9 Executive Committee posts were open for election and the 4 members elected onto the Committee were as follows:-

Judge Fergus Blackie, Advocate Patrick Lane SC, Advocate Lee Harding and Ms Zarina Kellerman.

In terms of clause 8.6 of its Constitution, at the most recent Executive Committee meeting, the following members were re-elected to posts as follows:-

Chairman – Judge Fergus Blackie
Deputy Chairman – Professor David Butler
Treasurer – Professor Ronnie Schloss •

of 418 between Sparta and Argos a compromissum reads: It seems good to the Lacedaemonians and to the Argives to make peace and alliance for fifty years on the following conditions: They shall submit to arbitration on fair and equal terms according to their ancestral customs.

However, the need for specific procedural provisions in the compromissum instead of

relying on the customary practice was shown by mediator Pergamum who mediated the Sardinian Ephesian accord. For instance, it provided that, in case of a breach, the wrong party shall announce the charge by means of an embassy to the people accused; those who were appointed to represent both sides shall meet for trial before the mediating people, within 30 days from the date the charge was announced; the mediating people

shall appoint by lot within five further days, the people which is to arbitrate.

It also required an arbitration award to be done in 60 days. In case a party refused to appear before the arbitrators or the city-state which was chosen as the seat of arbitration, judgment was to be given against those who failed to appear. •

Contractor cancels JBCC contract

by Alastair Hay, Chairman of the Kwazulu Natal branch of the Association of Arbitrators and partner at Cox Yeats Attorneys



In the JBCC cancellation clause there is a provision to the effect that neither the employer nor the contractor can cancel the contract if at the time the party wishing to cancel is itself in breach of a material term of the contract.

The old BIFSA White Form Contract had a similar provision which was the subject of judicial scrutiny in a court case which gave useful guidance on the practical effect of that provision. Unfortunately the case is of no help with the JBCC clause due to the wording being very different.

Importantly the case also dealt with the obligation of an employer to afford a contractor an opportunity of rectifying defective work.

In June 2011 the Supreme Court of Appeal delivered judgment in a case¹ in which the court had to consider amongst other things the provision in the JBCC contract.

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Background facts

MSC Depots (Pty) Ltd ("MSC") employed a joint venture, the partners of which comprised WK Construction (Pty) Ltd and Winfords Civil & Development CC ("the Joint Venture"), in terms of the JBCC Principal Building Agreement, to construct a container depot in Despatch in the Eastern

Cape. MSC required the depot to store containers of motor vehicle parts for use by Volkswagen South Africa at its motor manufacturing plant in Uitenhage. The works entailed bulk earthworks, paving, stormwater, water and sewerage reticulation and mast lighting.

MSC employed a firm of outside consulting engineers to carry out the necessary design work and to supervise the construction of the works.

The yard surface of the container depot had to be designed to handle heavy loads. MSC intended to use special reach stackers with a carrying or lifting capacity of 45 tons to move the containers around the depot.

Shortly after practical completion it was noticed that the reach stackers which were at the time being used to move empty containers onto the site for storage purposes were causing the depot surface to deflect in places.

The Joint Venture was at this stage in possession of an interim payment certificate for approximately R1m which had as yet not been paid.

A meeting was held on site between the Joint Venture, the engineer and the principal agent to discuss the problem. Certain remedial work was agreed upon and the Joint Venture agreed to undertake the necessary work. However, some two weeks later the engineer instructed the Joint

MSC sued for damages comprising the cost of remedying the defects in the depot surface and the Joint Venture counterclaimed for payment of the amount of the interim certificate.

Venture to stop the remedial work, apparently due to some uncertainty as to whether the design of the remedial work was sufficient or appropriate.

Three months passed without the Joint Venture being given instructions to resume the remedial work and without the outstanding interim certificate being paid.

The Joint Venture issued a notice in terms of the cancellation clause giving MSC 10 working days within which to pay the interim certificate. The letter was addressed to the principal agent and copied to MSC. Ten days passed and as no payment was forthcoming, the Joint Venture issued a letter to MSC and the principal agent cancelling the contract.

MSC sued for damages comprising the cost of remedying the defects in the depot surface and the Joint Venture counterclaimed for payment of the amount of the interim certificate.

Validity of cancellation

MSC challenged the validity of the Joint Venture's cancellation of the contract on two grounds.

Firstly, it complained that the 10 working day notice had been addressed to the principal agent and only copied to it as opposed to being addressed to it directly. The court rightly and promptly discarded this argument as spurious.

Secondly, MSC contended that the Joint Venture had been in material breach of contract at the time of its purported cancellation of the contract and as such was not entitled to cancel. The material breach relied on was the fact of the defect in the works which it contended was attributable to defective workmanship on the part of the Joint Venture.

Various expert investigations were undertaken by both parties with a view to identifying the cause of the failure. After analysing the relevant facts

¹ MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd and Ano, SCA Case No 157/10, date of judgment 8 June 2011.

At no time had the Joint Venture indicated that it was not willing to undertake the required remedial work.

and expert opinions, the court concluded that the proximate cause of the failure was defective design by the engineer. It seems that the pavement should have been designed to be much thicker in order to accommodate the poor in situ soil conditions. The weak subgrade was unable to carry the very large surface loads which caused bearing capacity failure in both the subgrade and in the overlying layers.

Soil investigations had however revealed that contrary to the specification, the Joint Venture

had left oversized material comprising boulders in the layer works. However, it was established that despite this, the compaction achieved by the Joint Venture exceeded the compaction required in terms of the specification. As such the court concluded that this breach of the specification by the Joint Venture had not contributed to the surface failure.

The court acknowledged that irrespective of who was to blame for the failure, there was an obligation on the Joint Venture to rectify the defects albeit that it would be entitled to be paid for that work.

At no time had the Joint Venture indicated that it was not willing to undertake the required remedial work. As such it could not be said to have been in breach of any of its contractual obligations at the time it cancelled. The cancellation was accordingly valid.

Conclusion

Despite there being defects in its works, a contractor will not be in breach where it is willing and tenders to attend to remedying the defects concerned. In this case the Joint Venture had tendered to do that but had been instructed to stop work pending the engineer deciding on what was required to remedy the defects.

Interestingly the court remarked that the Joint Venture's entitlement to payment of the interim certificate was not dependent or conditional on any reciprocal obligation on its part. In other words it was entitled to payment irrespective of whether any remedial work for which it was responsible was as yet incomplete. •

On-demand bonds wording and interpretation by Robert Scott, Director at ENS

On demand bonds - Interpretation of performance guarantee.

Minister of Transport and Public Works, Western Cape v Zanbuild Construction (Pty) Limited and ABSA Bank Limited (68/2010 [2011] ZASCA 10 (11 March 2011)).



Introduction

This is the fourth decision of our Supreme Court of Appeal in the last two years on the subject of "on-demand" bonds.

The three previous decisions (examined in the June and November 2010 Ensign Articles) dealt with the standard form JBCC 2000 Performance Guarantee, being an "on-demand" bond proper. This decision does not involve the standard form JBCC 2000 Performance Guarantee.

"On-demand" bonds are also referred to as "call bonds". They are unconditional stand-alone documents payable on presentation – all that is required for payment is a demand "stated to be on the basis of the event specified in the bond".

Background

This matter concerned the interpretation of two performance guarantees (identical in their terms).

The guarantees had been issued by ABSA Bank Limited ("the Bank") in favour of the Western Cape

Department of Transport and Public Works ("the Employer"), at the behest of Zanbuild Construction (Pty) Limited ("the Contractor").

The Employer had demanded payment from the Bank of the full amount of both guarantees. In doing so, the Employer attached to its demand notice a letter sent by the Principal Agent to the Contractor alleging that both the Employer and the Principal Agent were of the view that the Contractor was in breach of the construction contracts in that it had failed to execute the works "with due skill, diligence, regularity and the expedition".

Following the Employer's demand for payment from the Bank, of the full amount of the guarantees, the Contractor obtained an order, from the lower court interdicting the Bank from making payment. The Employer then appealed against that order to the Supreme Court of Appeal. While the Bank had been joined as a party to the proceedings, it did not oppose the Employer's application to court, electing rather to abide the decision of the court.

Following the Employer's demand for payment from the Bank, of the full amount of the guarantees, the Contractor obtained an order, from the lower court interdicting the Bank from making payment. The Employer then appealed against that order to the Supreme Court of Appeal.

The guarantees had been issued by the Bank with reference to two separate construction agreements (entered into between the Contractor and the Employer). While the construction agreements were based on standard form JBCC terms and conditions, the guarantees were not based on the standard form JBCC performance guarantee – rather they were based on a generic wording required by the Bank.

Guarantee Wording

The relevant part of the guarantee(s) provided :

"... whereas it is stipulated in the [construction] contract that the contractor shall provide the employer [i.e. the department] with a bank guarantee of 10% of the contract value ... as security for the compliance of the contractors performance of obligations in accordance with the contract, and whereas the bank is willing to agree to guarantee an amount ... which is equal to 10% of the contract value under certain conditions stipulated hereafter ...

Now therefore we the undersigned ... in our capacities as [employees of] the bank do hereby guarantee and bind the bank as guarantor for the due and faithful performance by the contractor of all its obligations in terms of the said contract subject to the following conditions ...

With each payment under this guarantee the bank's obligation shall be reduced pro rata. Each claim by the employer must be made in writing accompanied by a signed statement that the contractor has failed to fulfil his obligations in terms of the contract and

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shall be sent to the bank's domicillium address as indicated below

The bank reserves the right to withdraw the guarantee after the employer has been given 30 (thirty) days written notice of its intention to do so, provided the employer shall have the right to recover from the bank the amount owing and due to the employer by the contractor on the date the notice period expires."

Employer's Argument

The Employer argued that the guarantees constituted "on-demand" bonds; that the guarantees were independent of the underlying construction contracts "in a manner comparable to irrevocable letters of credit issued by banks where the obligation of the bank is wholly independent of the underlying contract of sale". Accordingly the Employer argued that the guarantees could be invoked without any evidence of a claim against the Contractor (in terms of the underlying construction contracts); that all it had to do in order to procure payment (in accordance with the terms of the guarantee/s) was to submit a statement to the Bank that the Contractor had defaulted on the contracts, and to demand payment of the (total) guaranteed amounts. This it argued it had done. Importantly it did not contend that it had an identifiable monetary claim under the construction contract.

Contractor's Argument

The Contractor argued that the guarantees were "inextricably linked to the construction contracts in a manner akin to a suretyship agreement", such that the Employer had to demonstrate a monetary claim against the Contractor (in other words a liability based on the underlying contract). The Contractor argued that because the Employer had failed to do so, it had no claim against the Bank under the guarantees.

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Decision of the Supreme Court of Appeal

The question before the Supreme Court of Appeal was then whether the guarantees constituted "on demand" bonds, entitling the Employer to claim the guaranteed amounts purely by alleging that the Contractor was in default of the terms of the construction contracts.

The Supreme Court of Appeal held that the guarantees did not constitute "on-demand" bonds, "but rather that they give rise to liability on the part of [the Bank] akin to suretyship", such that the employer had in addition to making the demand it had made, to demonstrate a monetary claim or liability against the Contractor in terms of the underlying contract, its reasoning being:

The language of the guarantee is associated with suretyships. In this regard the guarantee provides "security for the compliance of the Contractor's performance of obligations in accordance with the Contractor" and further provides that the guarantee binds "the Bank as guarantor for the due and faithfully performance by the Contractor of all its obligations in terms of the said contract" The court accepted however that the language of the document was not necessarily decisive.

The document contemplated more than one claim under the guarantee/s, regard being had to the provision "with each payment under this guarantee the bank's obligation shall be reduced pro rata". The document necessarily contemplated a referral to a claim/s or a liability (in monetary terms) in terms of the underlying contract.

The provision that reserves the right of the bank to withdraw from the guarantee after 30 days notice expressly limits the liability of the Bank,

in the event of such withdrawal to the amount owing by the Contractor to the Employer on the date the notice period expires. Once again the document contemplated a referral to a claim/s or a liability (in monetary terms) in terms of the underlying contract.

Accordingly, since the Employer had not demonstrated/established a claim/s or a liability on the part of the Contractor in terms of the underlying contract, the Supreme Court held that the Employer was not entitled to demand payment in terms of the guarantee.

Comment

The decision of the Court turned on the interpretation of the wording of the guarantee. The guarantee did not state that it was payable provided only that the conditions specified in the guarantee are met, or that all that is required for payment is a demand stated to be on the basis of an event specified in the bond. On a proper interpretation of the wording of the guarantee it contemplated a reliance, external to the document, on a valid claim (in monetary terms) in terms of the underlying contract. The Employer had therefore to demonstrate a valid claim independently of the guarantee – it had not done so.

Had the Employer demonstrated a valid claim (for instance with reference to a payment certificate), the Bank would have been obliged to make payment.

However, given that the guarantee was not an "on-demand" bond payable provided only that the conditions specified in the guarantee are met, its entitlement to payment would depend on the validity of the claim on which it sought to rely – thus payment might be trumped by a challenge to the validity of the claim based on the underlying contract.

In the case of an "on demand" bond, the validity of any underlying claim or stated event would be irrelevant, as it would be payable provided only that the conditions specified in the guarantee are met. That is the material and significant difference between an "on demand" bond and a suretyship. •

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