

Construction Disputes 2023: Hints, Tips, and Solution Focused Answers

How open to attack are performance bonds, parent company guarantees, and advance bank guarantees, and what legal strategies will gain an edge for your client in a dispute?

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A little bit about me:



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Shane O'Connor is a Partner in RDJ's Real Estate team. He specialises in advising on construction and procurement matters including initial tendering, contract drafting and negotiation, mid-stream contractual issues, regulatory advices, and all forms of alternative dispute resolution. He has both private practice and in-house experience across Ireland and England in addition to a number of years of pre-qualification experience in the construction industry.

Prior to joining RDJ Shane spent almost 6 years with a semi-state utilities provider as the lead legal adviser to a wide range of professionals across some of the largest construction contracts in the state including treatment plants, specialised buildings, and civil engineering projects. He has experience across all principal forms of construction contracts such as FIDIC, RIAI, NEC, government public works, and several bespoke forms used by local authorities and semi-state bodies.

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Agenda

Introduction

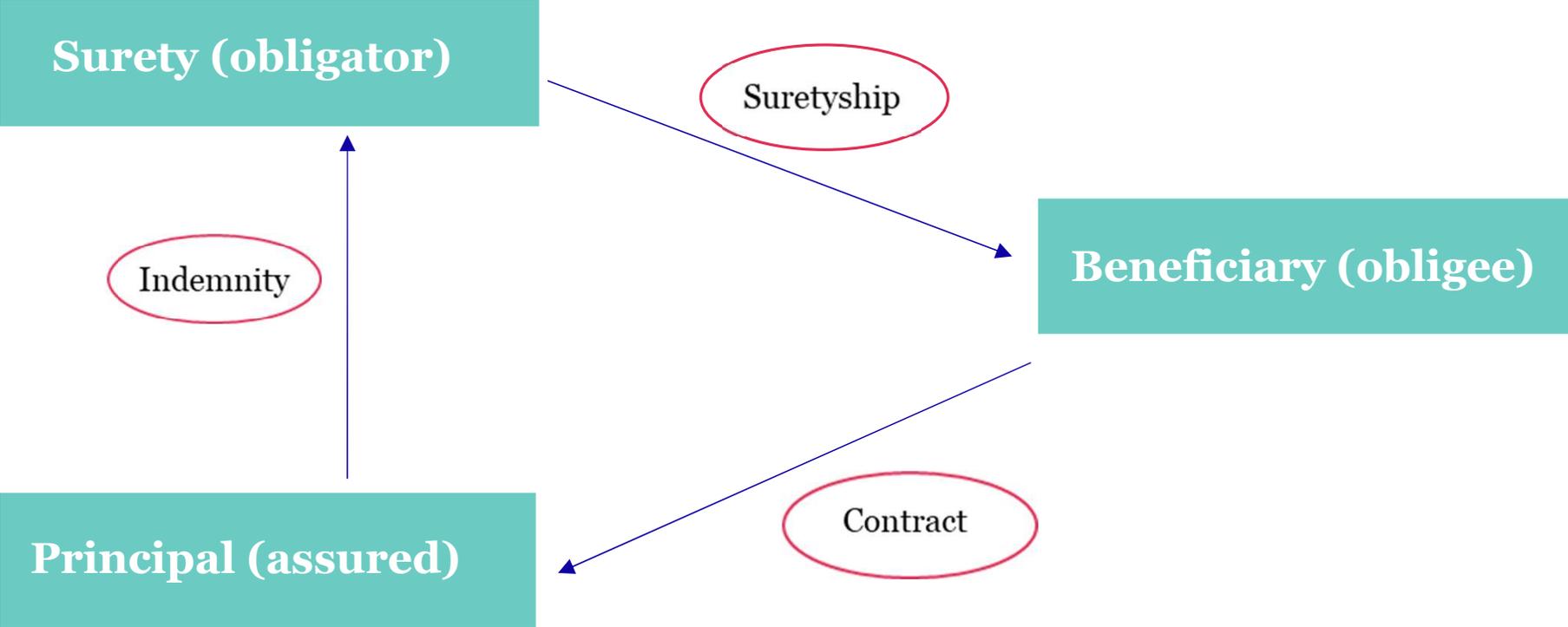
History

Areas of Focus

Key Takeaways



Background - Suretyship



Background History

Proverbs 17:18

“A man devoid of understanding shakes hands in a pledge: Wisdom guards us against foolish partnerships.

And becomes surety for his friend: It is responsibility enough to honour our own debts.”



Background - History

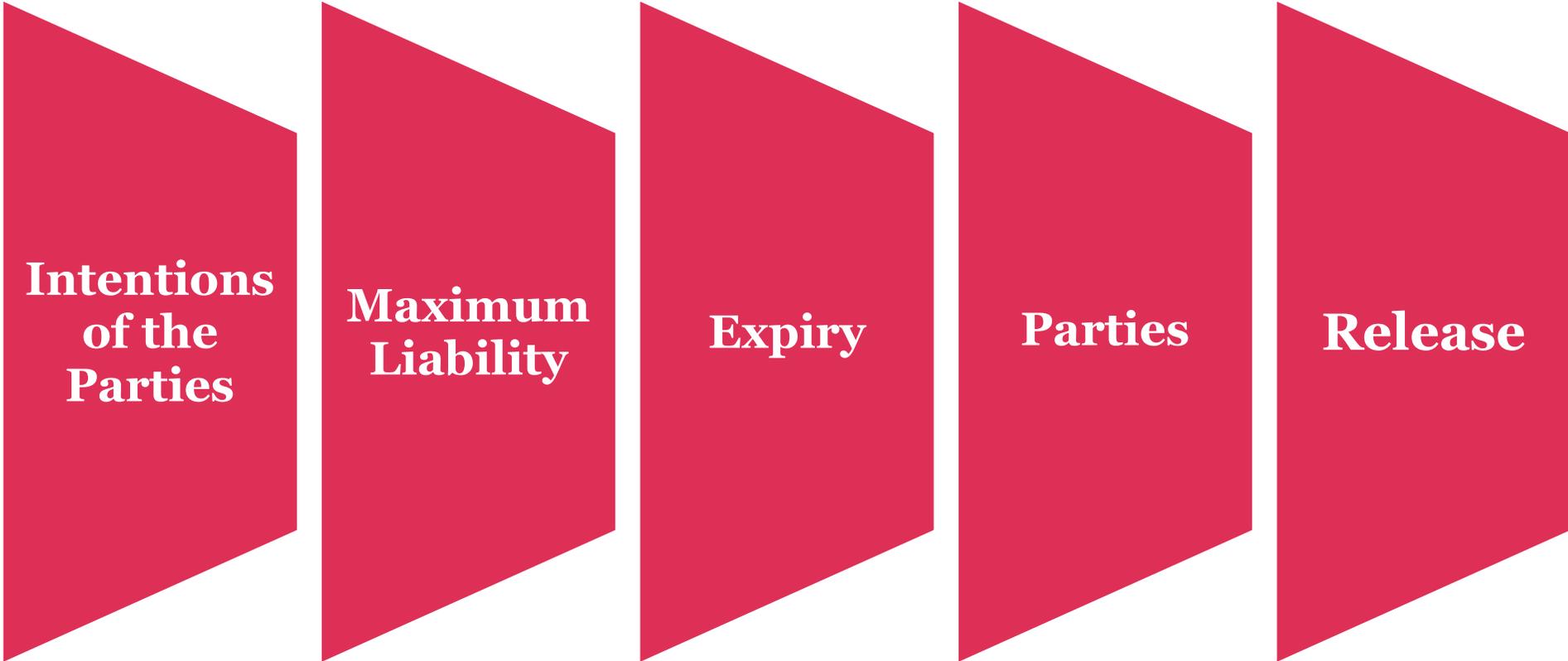
SHYLOCK

*“This kindness will I show.
Go with me to a notary, seal me there
Your single bond; and, in a merry sport,
If you repay me not on such a day,
In such a place, such sum or sums as are
Express'd in the condition, let the forfeit
Be nominated for an equal pound
Of your fair flesh, to be cut off and taken
In what part of your body pleaseth me.”*



**The Merchant of Venice –
William Shakespeare
Act 1 Scene 3
Venice. A public place.**

Areas of Focus



Areas of Focus – Intention of the Parties

“I may be allowed to remark that it is difficult to understand why business persist in entering upon considerable obligations in old-fashioned forms of contract which do not adequately express the true transaction”

Lord Atkin in *Trade Indemnity v. Workington Harbour and Dock Board*, [1937] AC 1, 17

“It is lamentable that an 18th century English concept should be used in this jurisdiction to confuse everybody, as we think it has confused a lot of people in this case”

Hunter J.A. in *Tins Industrial Co Ltd. v. Kono Insurance Ltd.*, (1987) 42 BLR 110, 120

Areas of Focus – Intention of the Parties

“Now the condition of the above written bond is suet [sic] that if the subcontractor shall duly perform and Observe all the terms provisions conditions and stipulations of the said subcontract on the subcontractor's part to be performed and observed according to the true purport intent and meaning thereof or if on default by the subcontractors the surety shall satisfy and discharge the damages sustained by the main contractors thereby up to the amount of the above written bond then this obligation shall be null and void but otherwise shall be and remain in full force and effect but no alteration in terms of the said subcontract made by agreement between the main contractor and the subcontractor or in the extent or nature of the subcontract works to be constructed and completed thereunder and no allowance of time by the main contractor under the said subcontract nor any forbearance or forgiveness in or in respect of any matter or thing concerning the said subcontract on the part of the main contractor shall in any way release the surety from any liability under the above written bond.” [emphasis added]

**Trafalgar House Construction (Regions) Ltd v. General Surety and Guarantee Co Ltd
[1995] C.L.C. 925**

Areas of Focus – Intentions of the Parties

What form to choose?

- Performance Bond
 - Given by a surety ensure the performance of ongoing contractual obligations
- Advance Bank Guarantee
 - Given by a surety to secure repayment of advance payments made to a contractor
- Parent Company Guarantee
 - Given by a surety ensure the performance of ongoing contractual obligations
 - Parent will give the project additional pre-contract scrutiny
 - Parent's obligations are typically co-extensive to that of the child
 - Parent organisation is engaged in the project

Areas of Focus

Maximum Liability

- Check documents pre-execution
 - Limits
 - Reducing amount
- Use of funds
- Claims for over compensation?
- AES-3C v. Credit Agricole and Alstom Power [2011] EHC 123 (TCC)



Areas of Focus – Maximum Liability

Clarington Developments Ltd v. HCC International Insurance Company Plc [2019] IEHC 630

- *“The Contractor and the Surety are hereby jointly and severally bound to the Employer in the sum of €1,200,000.00 (one million two hundred thousand euro) [hereinafter called ‘the Bond Amount’] provided that if the Contractor shall subject to Clause 3 hereof duly perform and observe all the terms, conditions, stipulations and provisions contained or referred to in the said Contract which are to be performed or observed by the Contractor or if on default by the Contractor the Surety shall satisfy and discharge the damages sustained by the Employer **as established and ascertained pursuant to and in accordance with the provisions of the said Contract and taking into account all sums due or to become due to the Contractor** thereunder and all retention monies held thereby up to the amount of this Bond then this agreement shall be of no effect but otherwise shall remain in full force and effect.” [emphasis added]*
- Ziggurat (Claremont Place) LLP v. HCC International Insurance Company PLC (2017) EWHC 3286 (TCC)
- Yuanda (UK) Company Ltd v. Multiplex Construction Europe Ltd and another [2020] EWHC 468 (TCC)

Areas of Focus

Expiry

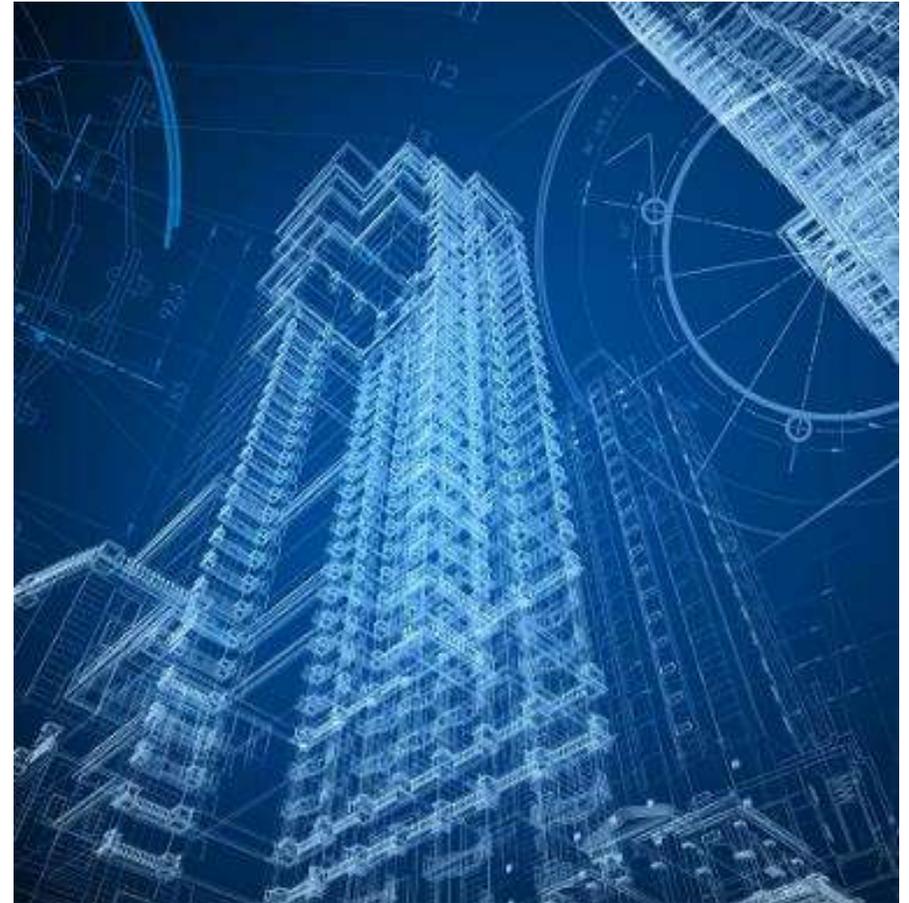
- Expiry on practical completion or at the end of the defect's liability period
- Pre-execution checks
 - Duration of defects liability period aligns with reductions
 - Sectional completion catered for?
 - Counter indemnity dates align with the bond
- Notice provisions within the instrument



Areas of Focus

Parties

- How does a contractor get a security?
 - Capability (ability to perform the works)
 - Capacity (financial)
- Assignment of a guarantee
- Statute of Frauds 1695
- Identity of the surety
- Security agent



Areas of Focus Release

- Indulgence clause? Get consent!
- Injunctive relief
- Drafting for variances in bond language
- Unauthorised actions, illegality, mistake, and fraud
- Insurance or suretyship



P.R.I.M.E.

- 1. Parties** – in writing & surety checks
- 2. Release** -Indulgence clause & variances
- 3. Intentions** - Ensure the text reflects your needs, not just the title
- 4. Maximum Liability** – pre-execution-checks & claims
- 5. Expiry** – align expiry with the contract & no notification

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**Thank you for your time.
Any Questions?**

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