

CONCLUSIONS OF THE CLAIMS PANEL - 2018 TECHNICAL SEMINAR/ Legal claims management

QUESTIONS/ COUNTRIES	PERU	CHILE	BOLIVIA
The most common types of surety bonds and terms and conditions			
Which are the most common types of surety bonds underwritten in the country?	Performance and advance payment bonds for state procurement (project execution, acquisition of goods and service hiring). Bonds for the entertainment (casinos and slot machines) and mining (mine closure) sectors.	Bid, performance and advance payment bonds for the state and private sectors covering project execution, the procurement of goods and services. Policies for the real estate sector called "off-plan sales."	Bid, performance and advance payment bonds.
Which are the most common terms and conditions for surety bonds and claims management?	All bonds are on-demand, except for those issued for the private sector, which may be conditional if agreed to by the parties.	The most widely used are on-demand and conditional bonds, currently called "without a claim adjuster"; for the retail real estate sector, they are subject to claim adjustment.	A bond is accessory to a contract, renewable and irrevocable. For public beneficiaries, bonds are on-demand. The bonded amount is the maximum coverage value and the beneficiary is not entitled to claim court expenses.
Which are the applicable laws, if any, regulating underwriting and surety bond types?	The framework law is the Insurance Law, the Civil Code and, depending on the type of bond, the State Procurement Law, Customs Law, Mine Closure Law and the law regulating the exploitation of casinos and slot machines apply.	Insurance Law (Code of Commerce), Decree-Law No. 251 on insurance companies.	Law No. 365, Supreme Decree No. 2036, Code of Commerce (Law No. 14379).
Are there any substantial differences in the contents and/or scope of the bonds issued for the public sector and those issued for the private sector?	By law, bonds issued for the public sector are on-demand. For the private sector, they are conditional on payment and damage assessment.	They are similar and are registered in the Registry of Policies kept by the Financial Market Commission (they are called general conditions), except for large risks whose conditions may be agreed to by the parties and have a premium exceeding CLF 200.	For the public sector, bonds are on-demand and for the private sector, conditional. However, some private sector beneficiaries currently require that the bonds be on-demand. An important difference is the indemnity period: surety bonds for the public sector are indemnified within 15 working days and for the private sector, 60 days after the date on which the claim was admitted. Claims management also differs between private and public beneficiaries.

<b>Who is entitled to recover under a surety bond?</b>			
Who may claim the bond?	The bond beneficiary.	The insured (beneficiary).	The beneficiary only.
Does the bond wording define who may claim it? Or is it defined by the law or the case law?	The beneficiary is named in the bond.	The insureds (beneficiaries) are named in the policy schedule. The insured (beneficiary) is entitled to claim indemnity. The beneficiary is entitled to collect.	In the policy wordings and in accordance with the regulations, it is established that in policies for the private sector the beneficiary/claimant is the insured contracting party, in whose favor the bond is issued. In the policies for the public sector, the beneficiary/claimant is the public entity that awarded the contract to the principal.
May the beneficiary (the entity in whose favor the surety bond is issued) assign the indemnification benefit to a third entity without the consent of the insurer who wrote the surety policy/bond?	No	The beneficiary must be named in the policy; so the insurer's consent is required.	No
<b>What kind of damage is covered by a surety bond?</b>			
For instance: Does the surety bond cover interests, penalties, fines, etc., in addition to the main purpose set out in the risk description?	The surety bond does not cover interests or penalties; it only guarantees the obligations stated in the bond in compliance with the law. If the entity fails to pay within the period established by law, interests and penalties shall apply.	Interests are not covered, but fines may be covered up to the insured amount.	The insured amount is the maximum coverage, so policies do not cover interests, penalties, fines, etc., except for customs bonds.
Are the claimants entitled to recover lawyers' fees in case of a lawsuit decision in their favor?	No, they are not entitled to recover them under a surety bond.	No	No
Are all claimants entitled to recover interests or penalties, or is this applied solely to certain types of claimants?	No, they are not entitled to recover them under the surety bond, unless it is expressly indicated in the bond wording and the entity fails to pay within the period established by law.	They may submit a claim for penalties but not for interests.	No

<p>Do the law or regulations on statute of limitations, if any, provide the insurer/surety with options or alternatives other than the payment of indemnity to comply with the obligation? For instance, is the insurer/surety authorized to complete the works or make repairs on account of a third party other than the principal (policyholder) to comply with the bonded obligation? If yes, is it a common practice in your country's surety market ?</p>	<p>No</p>	<p>If agreed to with the insured (beneficiary), indemnity payment may not be in the form of cash but otherwise, for instance, by completing the project.</p>	<p>Under the regulations, the insurance company does not have any other option than to pay the loss.</p>
<p>Is there any special aspect of the indemnity, namely, of the damage, for which the insurer/surety may be held liable?</p>	<p>No</p>	<p>No</p>	<p>No, the indemnity is only intended to cover the damage caused by the principal's failure to perform.</p>
<p>Is the contract between the parties (policyholder and the entity to which the surety bond or surety insurance is written) an integral part of the wording of the bond issued, so that the insurer/surety may be held liable for all damage detailed in the contract? If yes, should this apply to performance bonds or to any other type of surety bond as well?</p>	<p>Yes, the contract between the parties is an integral part of the bond wording, and the cases in which the beneficiary may call on the bond are detailed in both the contract and the applicable law.</p>	<p>No</p>	<p>The "purpose of the main contract" and the full name of the project/insured contract are stipulated in the policy and in the contract between the insurer and the principal. Coverage is understood to include what is stated in the bond and may be in the form of bid, performance or advance payment bonds.</p>
<p>May noncompliance by the beneficiary release the insurer/surety from its obligations under the surety bond?</p>	<p>Yes, in case the insured (beneficiary) does not submit the claim to the insurance company within the periods established by law and the Civil Code.</p>	<p>No</p>	<p>Yes, for performance bonds when the contract is terminated by causes attributable to the beneficiary or by mutual agreement.</p>
<p><b>Variations in the maximum indemnity amount from the bonded/insured amount:</b></p>			

Is the insurer/surety's liability limited to the total insured amount or may they be obliged to pay amounts in excess of coverage?	The maximum amount to be paid by the entity is limited to the bonded amount. If the insurer refused to pay the enforced amount and the claim for payment is then made to the insured, the latter could claim interests and penalties, so the indemnity could be higher than the bonded amount.	It is limited to the bonded amount.	The bonded amount is the maximum coverage.
May the insurer/surety liability increase in any way during the bond period if the insurer/surety has not issued an addendum or endorsement to increase the amount of the existing bond?	No	No	No
<b>Required notices/communications in case of a claim</b>			
Which are the legal requirements to notify an insurer/surety of a surety bond claim?	The beneficiary has to give written notarized notice within 15 calendar days following the bond expiry date.	a) On-demand bond: Just the submission of the claim including the bond number and amount. b) A bond without a claim adjuster: the principal has to be given notice of nonperformance and informed that payment has been claimed; then, the notice together with the details about the nonperformance and the amount of the damage have to be reported to the insurer. c) Bond subject to claim adjustment: the insurer will appoint a claim adjuster—generally an official one—who will determine whether nonperformance occurred or not, whether it is attributable to the principal and the amount of the indemnification claimed.	For public sector policies, submission of the original or legalized copy of the "notice of nonperformance" signed by the responsible officer or the Highest Executive Authority. For advance payment bonds the "debit and credit balances" are also required. The insurer will pay the indemnity within fifteen (15) calendar days upon receipt of the "notice of nonperformance." Any additional request by the insurer should be submitted within fifteen (15) calendar days upon receipt of the "notice of nonperformance." When the beneficiary is a private company, it has to submit a notice signed by its legal representative reporting the principal's nonperformance and attach the necessary documentation and information, and explain the reasons for nonperformance of the main contract. A court decision is not necessary. The documentation submitted by the beneficiary should unequivocally and sufficiently prove nonperformance by the principal. The insurer, after proving that the claim is admissible, will have to pay the indemnity within a 60-day term.
If the notification requirements established are not complied with, could the insurer/surety be considered exempt from paying the indemnity?	If the insured does not comply with the provisions of the law for bond enforcement, the entity will be released from the obligation to pay. The reasons for nonpayment should always be reported.	If the insured (beneficiary) fails to comply with the requirements established in the policy, the claim will not be admitted.	The insurer may refuse to pay the indemnity until the provisions established by law are complied with.
<b>Term established to file a lawsuit or a demand</b>			

<p>Which is the time limit established for filing a demand or any other legal action related to a surety bond claim? If such time limit is prescribed in the statute of limitations applied in the country, may it alter or change those established in the surety bond for filing a demand?</p>	<p>Ten (10) years from the submission of the claim to the insurer</p>	<p>The general limitation period is four (4) years as from the expiry date of the policy.</p>	<p>The regulations establish that every claim or call on a bond received by the insurers may be answered according to the following terms: for public entities beneficiaries, for whom bonds are on-demand, insurers have 15 calendar days to answer or pay; for private entities, they have 30 working days to answer and 60 working days to pay. In any case, the principal, before the expiration of those terms, may request an order to stay proceeding to enforce a judgement while an appeal is pending. So, the payment of the enforced bond amount is not made until the lawsuit is adjudged or the judge orders its lifting. In Bolivia, the issuance of an order to stay proceeding to enforce a judgement while an appeal is pending is not common, but the legal option exists and there are a few cases in the local doctrine where the petition is admitted under grounded assumptions. In these cases, the policy has to remain in force for the time the judge fixes; then, the surety is obliged to renew it and the principal to pay the premium; otherwise the policy will be enforced.</p>
<p><b>Claims handling and management procedure</b></p>			
<p>Are there any regulations on the statute of limitations or administrative parameters affecting claims management in your company, the market or your country?</p>	<p>Yes.</p>	<p>Yes</p>	<p>According to the law, claims lapse two years after loss occurrence or as from the date on which the company formally asks the beneficiary to fulfill some requirements without obtaining an answer; such period may be suspended through any act of the beneficiary.</p>
<p>Are there any regulations on the handling or management of claims that are the subject of a legal action?</p>	<p>No</p>	<p>No.</p>	<p>Yes, the legal and arbitration provisions establish that up to the moment the dispute is resolved and the decision issued, the claim will remain suspended.</p>
<p>Is arbitration commonly used in surety bond claims in your country? If so, which are the particular rules applied that may affect the claim in these arbitration procedures?</p>	<p>Yes. Legislative Decree No. 1071, which governs arbitration rules and regulations .</p>	<p>It is not a contentious market; however, arbitration alternatives exist, except for public bonds.</p>	<p>Currently, the most commonly used method is a judicial recourse .</p>
<p>Is the mediation between parties commonly used in your country or market as a prior step to arbitration?</p>	<p>No</p>	<p>No.</p>	<p>It is an option that does not generally work out.</p>
<p><b>Defenses asserted by the insurer/surety</b></p>			

May the insurer/surety assert defenses different from the arguments the policyholder may present? (For instance, fraud committed in the surety bond issuance, technical problems in the compliance with claims submission or notification requirements, amendments to the source contract on which the surety bond is based which have not been notified to the insurer/surety, etc.).	Yes	No	If the insurer who paid considers that there are unresolved <i>de facto</i> or <i>de jure</i> aspects, it may recourse to arbitration. In the case of a public beneficiary, the controversy will not delay the indemnity payment, unless there is an order to stay proceeding to enforce a judgement while an appeal is pending . If the arbitration award is favorable to the insurer, it may use the judicial recourse to pursue the indemnity from the beneficiary.
<b>Application or enforcement of the counter guarantee/indemnity agreement submitted by the policyholder to the insurer/surety</b>			
May the indemnity agreement signed by the parties be enforced by the insurer/surety?	Yes	No	Yes
Technically speaking, is there any other step or measure the insurer/surety should take when the counter guarantee or indemnity agreement is enforced? (For example, registration or notarization of the signatures in an indemnity agreement, deduction of the amount that can be used to pay the claim from the aggregate amount of the indemnity agreement.	Yes, e.g., to grant evidenciary proof of the date on which the documents were signed (notary public's signature).	The counterbond normally contains a mandate to sign an execution paper. It has to be issued.	There is not another step, all contracts are private or public (depending on the amount and the guarantees) and all guarantees have been previously registered with the authorized regulators, depending on their type.
Is there any impediment that may hinder counter guarantee enforcement? (For example, a law in the country forbidding the advance payment of a debt before it is due and legally enforceable).	Yes, the debt is not enforceable before the maturity date.	Only a court order forbidding the insurer to pay the indemnity.	Only when the principal has problems with the Tax Authority or under Law 1008 (Drug Trafficking)
Is it an acceptable practice in your market to include provisions in a counter guarantee document allowing for the inclusion of property assets that may be foreclosed if necessary? (For example, by creating a lien on an asset). If the answer is yes, how long would it take to foreclose such assets?	Yes, it will take from 6 months to 2 years.	Yes, it will take from 6 months to 2 years.	Most contracts which guarantee the issuance of a surety bond have counter guarantees which are registered in the respective Registry (a lien). The contract may be enforced through a summary proceeding, which may take from 6 months to 3 years, depending on the defenses the defendant may assert.

May the same legal action be brought both to enforce the counter guarantee or indemnity agreement and to call on the surety bond claimed by the beneficiary?	No.	No	No.
Are there any special considerations or limitations that may affect the right of the insurer/surety to enforce the counter guarantee or indemnity agreement?	Yes, that there is a priority right on the property offered as counter guarantee, e.g., in the case of a second mortgage. Another case would be an insolvency proceeding	No	None, if the contract has been properly signed taking into account the authorities of the interested parties.
<b>Subrogation and other recovery actions</b>			
May the insurer/surety be subrogated to the rights of the other policyholder's creditor if it pays the claim?	Yes	It may participate in the creditors' meeting if the principal enters an insolvency proceeding; in this case it ranks with all other creditors according to its priority right.	No
May the insurer/surety be subrogated to the rights of the other policyholder's creditors if it pays the claim?	Yes	Yes, if it opts for subrogation	No
Is the insurer/surety entitled to recovery due to professional negligence or malpractice by professionals appointed to the case if it has caused economic damage to the insurer/surety's in the loss/claim event?	Yes	No	No
Could there be other considerations related to subrogation and recovery that could limit the insurer's/surety's potential for recovery from third parties?	Yes, third party's payment capacity, regulations in its jurisdiction if it is not within the territory in which the bond was written.	No	No, given that for each policy issuance, a contract establishing the conditions and the recovery procedure in case of enforcement is signed.

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