

CONCLUSIONS OF THE CLAIMS PANEL - 2017 TECHNICAL SEMINAR/ Legal claims management

QUESTIONS	EL SALVADOR	MEXICO	DOMINICAN REPUBLIC
The most common types of surety bonds/ Terms and conditions			
Which are the most common types of surety bonds underwritten in the country?	<p>a. Bid bond (valid for 90-180 calendar days, 5% of the bid amount). b. Performance bond (valid for up to 1 year, 10% of the contract price). c. Advance payment bond (valid for up to 1 year, up to 30% of the contract price). d. Warranty bond (valid for up to 2 years, 10% of the contract price). e. Maintenance bond (valid for up to 2 years, 10% of the contract price).</p>	Administrative bonds; both advance payment and performance bonds.	Bid, advance payment and performance bonds.
Which are the most common terms and conditions for surety bonds and claims management?	<p>Section 32, paragraph 3, Public Administration Procurement and Contracting Law (LACAP): "...Such guarantees shall not be subject to any condition other than those required by the contracting institution, shall be granted on a joint and several liability, irrevocable and on-demand basis."</p>	In administrative performance bonds: proportionate liability waiver; automatic consent to extensions and/or waiting periods. In administrative advance payment bonds: both the advance payment investment (good use) and its amortization should be guaranteed; automatic consent to extensions and/or waiting periods.	Surety bonds are not on-demand. The insurer undertakes to indemnify any lawful party against damages arising from the principal's nonperformance of contractual obligations up to the bond amount and provided that it has been established that it can be called on pursuant to Private Insurance Law No. 146-02 of the Dominican Republic. The insurer shall only be obliged to make payments on a surety bond claim when it has been notified of a final court decision.
Which are the applicable laws, if any, regulating underwriting and surety bond types?	<p>Code of Commerce. Sections 1538 to 1550. Enacted in 1970; last amended in 2008. Civil Code. Enacted in 1985; last amended in 2011. Insurance Company Law. Passed in 1996; last amended in 2006. Public Administration Procurement and Contracting Law (LACAP). Chapter 4, Sections 32 to 38. Passed in 2011.</p>	Insurance and Surety Institutions Law.	Insurance and Surety Law No. 146-02 of the Dominican Republic.
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?	No, except that in El Salvador, in most of the surety bonds written, the beneficiary is a public sector entity. Over 90% of the bonds are issued for the public sector.	There are significant differences in the claims procedure between the public and private sectors. As to the surety bond content and scope, the public sector usually has preestablished wordings imposing strict conditions on the surety.	There are no substantial differences unless a special clause is agreed to.
Who is entitled to recover under a surety bond?			
Who may claim the bond?	Only the beneficiary of the surety bond to whom the indemnity is paid in case the principal fails to perform.	The bond beneficiaries.	The beneficiary named in the surety bond.
Does the bond wording define who may claim it? Or is it defined by the law or the case law?	As provided for in the El Salvador Code of Commerce, the surety bond may be claimed by the beneficiary only.	The bond wording clearly states to whom the institution is obliged, which is the one entitled to claim the bond.	The surety bond wording clearly indicates who the bond beneficiary is.
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, since only the beneficiary can file a claim.	No, precisely because through the surety bond the institution assumes an obligation to a natural or legal person, which could only be changed with the surety's consent.	No, only the beneficiary is entitled to make a claim.
What kind of damage is covered by a surety bond?			

For instance: Does the surety bond cover interests, penalties, fines, etc., in addition to the main purpose set out in the risk description?	No, only when it is stipulated in the bond wording.	By law, in case the institutions delay payment on a bond, they are imposed penalties for late payment: updated amounts and late payment interests. These sums may exceed the maximum bonded amount; they are independent. In relation to penalties, fines, etc., they may be guaranteed provided that they are expressly stipulated in the the bond wording.	Surety bonds cover damages arising from nonperformance, but always up to the contract price. No payment shall ever exceed the surety bond amount.
Are the claimants entitled to recover lawyers' fees in case of a lawsuit decision in their favor?	They are only entitled to recover the bonded amount.	They may be entitled to recover lawyers' fees, but subject to the provisions of the applicable procedural law.	Yes, but it is always agreed to in case of a claim.
Are all claimants entitled to recover interests or penalties, or is this applied solely to certain types of claimants?	No, only when they are in arrears. In the case of El Salvador, it is applicable after 10 days from the date a written claim was filed.	All claimants are entitled to collect late payment charges in case of delinquency .	They can be recovered provided that the total amount to be paid does not exceed the bonded amount.
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 ?	Section 1544 of the Code of Commerce provides that: "Surety institutions will be in arrears ten calendar days after the beneficiary has requested in writing that the surety bond be paid. Any agreement to fix a term other than the one stipulated in this section or another rate rather than the legal interest rate on late payment shall be null and void."	Yes, the statute of limitations is regulated: 3 years or the bonded obligation lapse period, whichever is shorter. For tax bonds, a 5-year term applies. These terms are calculated from the date on which the authority has received a valid payment request or an individual may assert its rights before courts of competent jurisdiction, following the completion of a previous claims process. However, the applicable law allows for the "substitution" with the surety to perform the bonded obligations, if possible. It is not a common practice.	The statute of limitations applies from the date a claim has been filed; according to Law No. 146-02, a three-year term is provided for third parties. At its sole discretion, the insurer may also undertake the project execution and complete it on its own.
Is there any special aspect of the indemnity, namely, of the damage, for which the insurer/surety may be held liable?	According to the Code of Commerce, the beneficiary is not obliged to demonstrate the nonperformance of the contract.	Late payment charges only (amounts due updated for inflation and late payment interests), provided that it is demonstrated that the surety should have paid and was in arrears.	The legislation does not provide for any special aspect in this regard.
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?	Yes it applies to any type of surety bond.	In administrative performance bonds it is usually stipulated that "any and all of the principal's obligations" are guaranteed. Other types of bonds specifically guarantee certain obligations. However, the aforementioned wording, which is normally included in a performance bond, may be construed in different ways, so it is advisable to specifically stipulate the bonded obligations.	Yes, it applies to any type of surety bond.
May noncompliance by the beneficiary release the insurer/surety from its obligations under the surety bond?	No.	Yes. The sureties are expressly allowed by law to file a complaint for breach of contract against the beneficiary.	Yes.
Variations in the maximum indemnity amount from the bonded/insured amount.			
Is the insurer/surety's liability limited to the total insured amount or may they be obliged to pay amounts in excess of coverage?	No, to the bonded amount only.	Except for late payment charges, all surety bonds include a maximum bonded amount.	It is limited to the bonded amount only.
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?	Yes, due to hidden defects.	No.	No.
Required notices/communications in case of a claim			

Which are the legal requirements to notify an insurer/surety of a surety bond claim?	The beneficiary is required to give written notice of the claim only.	The existence and enforceability of the guaranteed obligations have to be proved. The basic identification requirements have to be complied with in all cases. When the claimant is an authority, the pertinent requirement has to be duly grounded and justified.	The beneficiary is required to give written notice of the claim
If the notification requirements established are not complied with, could the insurer/surety be considered exempt from paying the indemnity?	The surety, after having received the written claim from the beneficiary, has a ten calendar day term to pay the indemnity.	It depends on the type of noncompliance; but if it is serious, yes.	Theoretically yes, but the beneficiary may also file a court claim if he deems it necessary.
Term established to file a lawsuit or a demand			
	The surety, after having received the written claim from the beneficiary, has a ten calendar day term to pay the indemnity. The surety is not entitled to request evidence of the principal's noncompliance to pay the claim.	For private parties, three years or the period of limitation of the guaranteed obligation, whichever occurs earlier. The authorities do not need to file a claim, the surety has to demand the nullity of the requirements. Authorities refer to the Federation, Federated States, Municipalities and Mexico City (Federative Entities) provided that, under the laws in force, they are entitled to request that the surety policies be called on. In these cases, the surety demands the nullity of the payment requirement before an Administrative Litigation Court, which is under the Executive Power but has jurisdictional powers.	Three years as from the date of the claim.
Claims handling and management procedure			
Are there any regulations on the statute of limitations or administrative parameters affecting claims management in your company, the market or your country?	The surety has a 10 calendar day term to pay the claim pursuant to the written notice filed by the beneficiary to this effect.	Yes	Yes, Law 146-02 has a Section on the statute of limitations
Are there any regulations on the handling or management of claims that are the subject of a legal action?	The surety is not entitled to request evidence of the principal's noncompliance to pay the claim.	Yes	Yes
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?	There is no arbitration procedure because the bonds are on-demand and there is no right to investigate or to produce evidence of the alleged noncompliance.	It is uncommon.	Though Section 101 of Law 146-02 regulates it, it is unusual.
Is the mediation between parties commonly used in your country or market as a prior step to arbitration?	Mediation is not necessary because the bonds are on-demand; i.e., the beneficiary gives a written notice and the surety is obliged to pay the bonded amount within ten calendar days from the date the claims notice was received.	It is uncommon.	It is uncommon.
Defenses asserted by the insurer/surety			
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. When there are amendments to the main contract and fraud committed in the bond issuance. Technical problems are not opposable.	Yes. The sureties may assert their own and the principal's defenses.	Yes, provided that there is evidence to be produced.
Application or enforcement of the counter guarantee/indemnity agreement submitted by the policyholder to the insurer/surety			
May the indemnity agreement signed by the parties be enforced by the insurer/surety?	Yes. When there are amendments to the main contract and fraud committed in the bond issuance. Technical problems are not opposable.	Yes	Yes. In the Dominican Republic the surety always participates in the process to reach an agreement. If the parties had come to an agreement, the surety would recognize or apply it even though it has not been involved in it.

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).	There is no other technical step or measure.	No.	No.
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, causation, i.e., the relationship between an independent and autonomous instrument with a specific obligation. For instance, a promissory note.	No. Impediments are normally practical and economic.	There are no impediments unless the property to be foreclosed is registered under homestead exemption to protect the rights of the spouse and minor children.
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 is an acceptable practice and the term for asset foreclosure varies. In many cases, it depends on the complexity of the lawsuit or dispute.	Yes. There exists a tool known as pledge as security which is similar to a mortgage.	It is an acceptable practice. The court proceeding is long and cumbersome, so the surety market prefers a liquid guarantee (financial certificate) instead of a pledge.
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, because the defendant is not the same natural or legal person, and therefore there is no identity of parties, which is necessary to accumulate lawsuits.	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?	Causation only, e.g., in those cases in which a promissory note is linked to the surety bond.	The surety has to give notice of the claims received to the principal and joint obligors. The lack of notice may hinder the recovery. The law provides for this notice, and the doctrine says that the lack of notice makes privileged judicial recovery impossible.	There are no grounds for limiting the counter guarantee enforcement.
Subrogation and other recovery actions			
May the insurer/surety be subrogated to the rights of the other policyholder's creditor if it pays the claim?	Yes, provided that the subject and object of the attachment are clearly identified. Its legal right is governed by the Code of Commerce.	The surety that pays the indemnity is subrogated to the beneficiary's rights, actions and privileges against the principal, up to the paid amount. However, the sureties normally base their recovery right on the indemnity agreement, which includes the joint and several obligors.	A legal maxim says: the debtor of my debtor is my debtor; therefore, if at the counter guarantee enforcement the amount is lower than the indemnified amount, the surety may file an action for the difference against the policyholder's creditors.
May the insurer/surety be subrogated to the rights of the other policyholder's creditors if it pays the claim?	Yes, provided that the claimant (the beneficiary of the surety bond) agrees to it.	If the surety pays a claim, by operation of law, it is subrogated to the creditor's rights, actions and privileges against its debtor.	Yes, the recovery action will be limited to the indemnified amount.
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 in the loss/claim event?	Yes, provided that a security interest in real property has been granted as counter guarantee and can be enforced to make recovery possible.	If the surety pays a claim, it has the right to recover the amounts paid regardless of the principal's right to request reimbursement from the beneficiary of any undue payment made by the surety, if any.	Yes, provided that such negligence or malpractice can be proved.
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, for example, ungrounded debtors' defenses.	The applicable law provides that, if the beneficiary of a surety policy hinders or makes the subrogation to the surety impossible, the surety will be released from its liability.	Yes, but if at the moment of a recovery action against a mortgage (real estate), the property is also encumbered by another mortgage, the amount to be recovered could not be the desired amount; this is why the best guarantee is the liquid or financial one.

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