

CONCLUSIONS OF THE CLAIMS PANEL - 2016 PASA REGIONAL SEMINAR - Legal claims management

QUESTIONS	PUERTO RICO	PANAMA	GUATEMALA
The most common types of surety bonds/ Terms and conditions			
Which are the most common types of surety bonds underwritten in the country?	Conventional, statutory and judicial bonds (gratuitous or for valuable consideration)	Bid, performance and payment bonds	Bid, contract performance, advance payment, maintenance bonds. Bonded receivables.
Which are the most common terms and conditions for surety bonds and claims management?	The surety shall not undertake any responsibility beyond the bonded obligation; the obligation is limited by the penal sum; the surety bond contract is separate, different and ancillary to the bonded contract.	The surety bond is accessory to the main contract and covers the same terms and conditions. It is in force for the contract term. An endorsement is required to accept any contract amendment. Claims should be notified within 30 days from the date on which nonperformance became known.	The surety bond is accessory to the main obligation. The surety shall not undertake any responsibility for an amount higher than that established in the main obligation. The beneficiary shall notify the surety of a claim within thirty (30) days from the date on which the main obligations expired or nonperformance occurred.
Which are the applicable laws, if any, regulating underwriting and surety bond types?	Civil Code of Puerto Rico (Part XIV, Chapters 371, 373, 375 and 377). Law No. 388 dated 9 May 1951.	Law No. 22 dated 27 June 2016.	Code of Commerce (Decree No. 2-70 of the Congress). Insurance Activity Law (Decree No. 25-2010 of the Congress). Civil Code (Decree-Law No. 106). Public Procurement Law (Decree No. 57-92 of the Congress as amended).
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?	Yes, the term to file claims, as well as the conditions precedent that the claimant must comply with, may be different; for example, the private sector has much more latitude to establish terms and conditions than the government sector in which the limitations and scope of the bonds are already established by law.	A claims term applies to the public sector.	In the private sector, the parties' will prevails. In the public sector, the policies are governed within the framework of the Public Procurement Law.
Who is entitled to recover under a surety bond?			
Who may claim the bond?	The beneficiary, as provided for in the surety bond contract; the works owner/supplier/materials supplier/worker.	The beneficiary only.	The beneficiary.
Does the bond wording define who may claim it? Or is it defined by the law or the case law?	It is defined in the bond wording.	It is defined in the bond wording.	It is defined in the bond wording.
May the beneficiary (the entity in whose favor the surety bond is issued) assign the indemnity benefit to a third entity without the consent of the insurer who wrote the surety policy/bond?	In general terms, it is not prohibited by the Civil Code; however, the applicable terms and limitations of the surety bond contract may prohibit the assignment of rights.	It is not allowed; the policy can be claimed by the beneficiary only.	The indemnity can be received by the beneficiary only. Any assignment must be included in the policy.
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?	Payroll bonds cover all wages and benefits; in other bonds coverage is subject to the contract wording.	No, the surety bond does not cover interests, penalties or fines.	No, it only covers nonperformance on a pro rata basis.
Are the claimants entitled to recover lawyers' fees in case of a lawsuit decision in their favor?	Yes, in case of fraud by the surety.	No, the surety bond does not cover professional fee recovery.	No
Are all claimants entitled to recover interests or penalties, or is this applied solely to certain types of claimants?	Yes, in case of fraud by the surety.	The surety bond does not cover interests, penalties or fines	No
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 ?	The surety may opt for completing the works with the principal or hire a third party.	Yes, the surety's subrogation may be stipulated in the contract. It has a thirty-day term to either pay or be subrogated to the contractor's rights and obligations. It is a common practice in the market.	Given that the surety and the main obligor are jointly and severally liable, it is legally authorized to complete or perform the main obligation. It is a common option in the market.
Is there any special aspect of the indemnity, namely, of the damage, for which the insurer/surety may be held liable?	If the court determined that the surety acted in bad faith in the adjustment process and then caused damage, the surety could be held liable for damages.	In state contracts, the beneficiary's noncompliance does not release the surety from its obligations under the bond. It does in private contracts provided that it has been stipulated in the contract.	The surety's obligations do not lapse because the obligee (beneficiary) does not claim compliance in court or because no lawsuit against the obligor is filed (Section 1031, Code of Commerce).
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?	Sometimes it is, in which case it will be specified in the surety bond contract.	Yes, the contract is an integral part of the surety bond, namely, performance, advance payment and civil liability bonds.	No, the contract wording is not an integral part of the bond.
May noncompliance by the beneficiary release the insurer/surety from its obligations under the surety bond?	Yes.	In state contracts, the beneficiary's noncompliance does not release the surety from its obligations under the bond. It does in private contracts provided that it has been stipulated in the contract.	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?	Yes, it is, but in case of the surety's bad faith, damages may be claimed. The surety's liability is limited to the bonded amount except in customs bond where penalties or fines are provided for.	It is limited to the bond amount.	Indemnity is limited to the bonded amount
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, an endorsement is necessary.	No
Required notices/communications in case of a claim			

Which are the legal requirements to notify an insurer/surety of a surety bond claim?	For some types of bonds a written notice is required as a condition precedent for filing a claim.	Notice with a detailed account of the facts is to be given within thirty (30) days from the date nonperformance has been known to occur. Administrative termination of the contract will be pursuant to the terms and procedures of Law No. 22.	A regular written notice is to be given. A well-grounded claim on nonperformance is necessary to file a lawsuit.
If the notification requirements established are not complied with, could the insurer/surety be considered exempt from paying the indemnity?	Yes	Yes	Yes
Term established to file a lawsuit or a demand			
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?	A six-month term for public works bonds; it varies in the case of private bonds.	The limitation period is five (5) years from the date on which the surety bond becomes enforceable.	The limitation period is two (2) years from the date on which the surety bond becomes enforceable.
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?	Yes, the Code of Insurance of Puerto Rico establishes parameters for terms and claims management.	Yes, Section 1650 of the Code of Commerce.	Yes, the Code of Commerce (Decree No. 2-70 of the Congress), Section 1037.
Are there any regulations on the handling or management of claims that are the subject of a legal action?	When a court claim is filed, Civil Procedure Regulations apply.	Yes, Section 1650 of the Code of Commerce.	In case of a court claim, the simple executive process applies as provided for by Decree-Law No. 107, Civil and Commercial Code of Procedure.
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?	No	Yes, it is commonly used in private contracts provided that arbitration is established in the contract wording. It is not common in public contracts.	It is used only if established in the bond wording.
Is the mediation between parties commonly used in your country or market as a prior step to arbitration?	Yes.	Yes, but prior mediation is necessary.	Yes
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. They are: extinction of the bonded obligation; noncompliance with conditions precedent; acts of the creditor (beneficiary) to hinder subrogation efforts; lapsing or forfeiture; nullity of the surety contract; novation.	Yes, these causes may be alleged in the lawsuit provided that the surety participates in it as third party.	Yes, provided that the surety is a party to the lawsuit or a when the claim is analyzed to establish whether it may be admitted.
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, according to the terms of the indemnity agreement (counter guarantee)	Yes	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.	No, except for those cases which are established in the indemnity agreement (counter guarantee).	Notarization of the counter guarantee document signatures is recommended; however, it is not required.	No, except when it is mandatory or has been agreed.
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).	No	No	Yes, the request for real guarantees (e.g., mortgage) is a common practice. A mortgage execution process may take about five (5) years.
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. If the guarantee is real property, the Mortgage Law regulations apply. If the guarantee is personal property, the Law on Commercial Transactions of Puerto Rico applies.	Yes, it is commonly used and they are foreclosed. The term is established in the Code of Procedure; it normally takes about two (2) years depending on the type of process.	No
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?	Yes	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?	Defect in lien perfection, principal's bankruptcy and fraud.	A nullity action applies in case of first-priority tax or payroll debts. In case of creditors' meeting or bankruptcy of the principal, the counter guarantee, unless it is attached to real property, loses validity and the insurer will have a pro rata share with all the other creditors.	Yes, in case of creditors' meeting or bankruptcy of the policyholder (principal), the counter guarantee, unless it is attached to real property, loses validity and the insurer will have a pro rata share with all the other creditors.
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	Yes	Yes
May the insurer/surety be subrogated to the rights of the other policyholder's creditors if it pays the claim?	Yes	No	Yes
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	Yes	Yes
Could there be other considerations related to subrogation and recovery that could limit the insurer's/surety's potential for recovery from third parties?	Applicable insurance policies could contain clauses expressly prohibiting third parties' recoveries or subrogation.	No	No

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