

CONCLUSIONS OF THE CLAIMS PANEL - 2015 PASA TECHNICAL SEMINAR - Legal claims management

QUESTIONS	ECUADOR	PARAGUAY	ARGENTINA
The most common types of surety bonds/ Terms and conditions			
<i>Which are the most common types of surety bonds underwritten in the country?</i>	Performance bond and advance payment bond.	Surety insurance .	Contract bonds (public and private) and customs bonds.
<i>Which are the most common terms and conditions for surety bonds and claims management?</i>	Unconditional, irrevocable and on-demand.	Conditional for contract bonds. Unconditional and on-demand for customs bonds.	Conditional policies, except for judicial bonds (which are to be paid on-demand).
<i>Which are the applicable laws, if any, regulating underwriting and surety bond types?</i>	Procedure: Public and private sector, Organic Law of the National Procurement System/ General regulation of the LOSNCP/ Monetary and Financial Organic Code.	Civil code, Public Procurement Law, Customs Code.	Regulations on surety contracts (Section 1594 and subsequent ones of the Civil and Commercial Code) and Insurance Law.
<i>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?</i>	Yes.	There are no fundamental differences; they are usually conditional.	Public sector: a final decision is required in the local area. Private sector: notice to the policyholder and proof of the damage are required.
Who is entitled to recover under a surety bond?			
<i>Who may may claim the bond?</i>	The insured	The beneficiary. Subrogation, Section 1616 of the Civil Code.	Beneficiary.
<i>Does the bond wording define who may claim it? Or is it defined by the law or the case law?</i>	Yes, it appears in the policy.	It is defined in the bond wording.	It is defined in the bond's general conditions.
<i>May the beneficiary (the entity in whose favor the surety bond is issued) assign the indemnity benefit to a third party without the consent of the insurer who wrote the surety policy/bond?</i>	It is not possible.	It is not possible to name a different beneficiary without the insurer's consent.	No.
What kind of damage is covered by a surety bond?			
<i>For instance: Does the surety bond cover interests, penalties, fines, etc., in addition to the main purpose set out in the risk description?</i>	The performance bond covers fines.	Noncompliance with contractual or legal obligations. In general, contract bonds do not cover penalties. Customs bonds usually cover penalties and fines.	The performance bond covers penalties and fines up to the insured amount. It covers interests in case of a legal action.
<i>Are the claimants entitled to recover lawyers' fees in case of a lawsuit decision in their favor?</i>	Yes, they are entitled to claim court costs.	Yes, they are. The losing party pays court costs.	Yes.
<i>Are all claimants entitled to recover interests or penalties, or is this applied solely to certain types of claimants?</i>	Yes, they have the right to claim against the principal.	It applies to any beneficiary.	They could only claim interests in case of the insurance company's default
<i>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?</i>	Yes, the statute of limitations exists; neither the insurer nor a third party can complete the works.	The covers usually establish a salvage clause which makes it possible that insurers complete the works that are the object of the insurance if this allows the insurer to reduce the loss effects.	It is not a usual practice due to its complexity. It will be applied in a very few cases.
<i>Is there any special aspect of the indemnity, namely, of the damage, for which the insurer/surety may be held liable?</i>	None.	No, there is not.	No. The insurer and the policyholder are jointly and severally liable.
<i>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?</i>	Yes, the contract is an integral part of the policy.	The insurance contract or policy issued identifies the policyholder and the beneficiary of the cover in all cases.	The surety policy mentions the bonded contract, but it is not an integral part thereof.
<i>May noncompliance by the beneficiary release the insurer/surety from its obligations under the surety bond?</i>	It cannot release them.	Noncompliance by the beneficiary with the obligations established in the policy allows the insurer to refuse payment of the indemnification.	Yes, noncompliance on the part of the policyholder is always required. In addition, deviations from the contract amount higher than 10% which were not notified, or failure of the insured to give notice to the insurer release the latter from its obligations under the surety bond.
Variations in the maximum indemnity amount from the bonded/insured amount:			
<i>Is the insurer/surety's liability limited to the total insured amount or may they be obliged to pay amounts in excess of coverage?</i>	It is limited to the insured amount.	The amount of the indemnification is limited to the insured amount, except for customs bonds, where penalties or fines are established.	Yes. It is limited to the total insured amount
<i>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?</i>	No .	No .	No.
Required notices/communications in case of a claim			
<i>Which are the legal requirements to notify an insurer/surety of a surety bond claim?</i>	A prior official notice by the beneficiary is required and then, unilateral termination.	Final and enforceable decision. Prior notice to the policyholder. Submission of claim supporting documents to the insurer.	The insured should notify the insurer of the policyholder's acts or omissions due to which the bond may be called on within a 10-day period of their occurrence.
<i>If the notification requirements established are not complied with, could the insurer/surety be considered exempt from paying the indemnity?</i>	It constitutes a due process violation.	If the insured fails to comply with the requirements established, the insurer will consider it as an unasserted claim and thus, it is exempt from paying the indemnity.	Yes, this is expressly clarified in the surety bond.
Term established to file a lawsuit or a demand			
<i>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?</i>	The limitation period is two years and besides, a lawsuit may be filed within a five-year period.	The time limit to file a demand is ten days from the date on which the administrative procedures have been exhausted.	The limitation period to file a lawsuit against the insurer is the same as that for filing an action against the policyholder in public works bonds. The limitation period is one year for bonds written to private entities and five years for customs bonds.
Claims handling and management procedure			
<i>Are there any regulations on the statute of limitations or administrative parameters affecting claims management in your company, the market or your country?</i>	Yes.	Yes, fraud, breach of insurance contract provisions, contract amendments not notified to the insurer.	Statutes of limitations derived from the Civil and Commercial Code in general, and a Customs Code rule for these surety bonds. "Limited" expiration applies to surety bonds between private entities.
<i>Are there any regulations on the handling or management of claims that are the subject of a legal action?</i>	Yes.	No.	No.

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?	Arbitration is an exceptional procedure, provided it is agreed to in the contract.	Due to its high cost, arbitration is not widely used yet, even though it is provided for in most of the private and public works contracts.	Only exceptionally.
Is the mediation between parties commonly used in your country or market as a prior step to arbitration?	Yes, it is.	Mediation is commonly used as a prior step to arbitration or legal action.	Occasionally.
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, in procedural matters.	Yes, fraud, breach of insurance contract provisions, contract amendments not notified to the insurer.	The surety/insurer may assert its own defenses on top of the one the policyholder (main obligor) is entitled to.
Application or enforcement of the counter guaranty/ 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	(No answer).	Yes, the insurer/surety is subrogated to rights of the insured when the bond has been paid.
Technically speaking, is there any other step or measure the insurer/surety should take when the counter guaranty 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, the beneficiary has to certify in an addendum to the policy that it has received payment and that the insurer is subrogated to its rights.	In Paraguay, the registry where the counter guaranty was notarized ensures the signer's identity and prevents it from alleging that it is not aware of the counter guaranty contents. This requirement is nowadays highly requested in the market because insurers' counter guaranty foreclosures were challenged on the grounds that the signatures were not authentic, among other cases.	No, only what is required for an ordinary lawsuit.
Is there any impediment that may hinder counter guaranty enforcement? (For example, a law in the country forbidding the advance payment of a debt before it is due and legally enforceable).	Yes, in case of constitutional violations	Not known.	There are no special impediments. Legal enforcement requires a final judgement.
Is it an acceptable practice in your market to include provisions in a counter guaranty 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, a lien may be created on the debtor's assets through precautionary measures	Security interests in real property are allowed. A mortgage foreclosure lawsuit may usually take about one year.	Assets may be taken as counter guaranty, but it is not a widespread practice. The foreclosure term may be long, depending on procedural matters.
May the same legal action be brought both to enforce the counter guaranty or indemnity agreement and to call on the surety bond claimed by the beneficiary?	No.	Yes.	It may be possible, even though usually no legal action is taken to claim a surety bond. In some cases, it would not be feasible because the recovery action would correspond to different jurisdictions.
Are there any special considerations or limitations that may affect the right of the insurer/surety to enforce the counter guaranty or indemnity agreement?	In case of preferred tax or labor liabilities.	Annulment actions.	In case the policyholder goes into insolvency or bankruptcy proceedings. The counter guaranty, unless it is supported by a security interest in an asset, will no longer be valid, and the insurer will participate on a pro rata basis 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, it can, in insolvency proceedings.	Yes, it can.	Yes, it can.
May the insurer/surety be subrogated to the rights of the other policyholder's creditors if it pays the claim?	No, it cannot, each one operates independently.	Yes, it can.	It is technically feasible.
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?	No it is not; the only recourse is through reimbursement and payment.	Yes, it is.	Yes, but evidence of responsibility is difficult to obtain.
Could there be other considerations related to subrogation and recovery that could limit the insurer/surety's potential for recovery from third parties?	No other considerations can limit recovery rights.	I do not know.	There are a few background cases of recovery from third parties that caused damage to the policyholder or forced its nonperformance.

Ecuador: Gabriel Mármol (Seguros Confianza S.A.)
Paraguay: Mario Colman (La Consolidada S.A. de Seguros)
Argentina: José de Vedia (Aseguradores de Cauciones Cía. de Seguros)

September 15, 2016.