



On-demand bonds claims

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I. Most common types of surety bonds (in Chile: pólizas de garantía o caución):

Most common types of surety bonds (in Chile, pólizas de garantía o caución):

- ▶ Bid bonds
- ▶ Advance payment bonds (construction contracts, public advance payments for consultancy or innovation projects, social programs or public procurement, etc.)
- ▶ Performance bonds (for the same purposes of the above-mentioned bonds)
- ▶ Legal Bonds (off-plan property sales, urbanizations, customs bonds, etc.)
- ▶ Professional Services bond: (Insurance and reinsurance brokers, Customs agents, Regulated entities, etc.).

Laws applicable to the issuance of surety bonds and types of bonds:

- ▶ a) Insurance Law (Act N° 20,667 replaces and amends Title VIII of Book II and Title VII of Book III of the Code of Commerce, in relation to surety policies: Section 582 (Concept) and 583 (Insured's obligations).
- ▶ b) Decree (D.F.L.) 251°, "Insurance Companies Law."
- ▶ c) Administrative regulations issued by the regulating authority (Financial Market Commission "CMF").

Note: The wording for policies and clauses the companies use shall be previously filed with the CMF. If the amount of the premium is equal to or exceeds 200 "Unidades de Fomento" and the beneficiary and the insurer are legal persons this regulation will not apply.

Differences between public and private policies:

Principle: The law or the contract establishes the type of policy to be used. If they do not, and only the words “insurance policy” appear, the Insurer will decide which type of surety product it will write according to the type of risk.

Types of policies:

- a) Subject to adjustment procedures
- b) First demand or immediate enforcement:
 - b.1) First demand (simple)
 - b.2) Conditional first demand

Note: the payment term is established in the general conditions of the policy ; the most frequent term is “at sight” or “at 30 days sight”

Who are entitled to recovery under the surety bond?

In Chile, the insured is entitled to call on the bond

- ▶ Section 513 a): The person affected by the risk that is transferred to the Insurer is called Insured.
- ▶ The surety policy wordings add: “the Insurer, as creditor, is entitled to request performance of the Principal’s obligations, under the law or contract and to be indemnified in case of loss.”
- ▶ 513 b) The Beneficiary, though he is not the Insured, is entitled to receive the indemnification in case of loss.

- ▶ The special conditions of the policy establish who will receive the indemnification. If the wording does not specify it, the indemnification will be paid to the insured ; otherwise the beneficiary will receive it.

ASSIGNMENT:

- ▶ However, the insured may assign the policy rights by giving notice of its acceptance, which is normally a policy endorsement:
- ▶ Section 522. Policy assignment. The insurance policy may be nominative or to the order. The assignment of the nominative policy or of the rights arising from it requires the insurer's acceptance. The assignment of the policy to the order may be made by simple endorsement. However, the insured credit for the indemnification of an already occurred loss may be assigned in accordance with the general rules on credit assignment. The insurer may raise the defenses it may have against the insurer or beneficiary to the assignee or endorsee. The assignment of the policy transfers from the insured to the assignee all his rights arising from the contract and the law.

Covered damage (obligations to do)

- ▶ Damage arising from legal or contract nonperformance established in the special conditions of the policy. In general, fine or penalty clauses are excluded, unless the company agrees to include them.
- ▶ Interests are not covered
- ▶ Legal costs are not covered.

Alternative indemnifications: Our legislation does not include them, however, it is always possible to agree with the insured some other indemnification, e.g.; that the company completes the works. But the right of the insurer to request a monetary indemnification prevails.

- ▶ The principal cannot oppose his own exceptions to avoid the payment of the surety policy. “The exceptions or defenses the principal may oppose against the insured alleging nonperformance of the obligations covered by the policy will not prevent the insurer from paying the requested indemnification“ (Section 582, paragraph 2).

Indemnification limit

The indemnification limit is fixed according to the insured amount and may not exceed the amount established in the special conditions of the policy.

Notices requested in case of claim .

There are two types of notices:

- a) Conditioned first demand claim: those policies which require to give prior notice to the Principal with copy to the Insurer explaining the reasons why the claim is made and the amount of the requested indemnification.
- b) On-demand claim (simple): the claim will only include the number of the policy and the name of the principal.

Nonperformance of the policy general conditions prevents the loss event from being verified, so the company is not obliged to pay until loss occurrence is proved.

Claim term:

- ▶ The claim for indemnification may be submitted within the policy period and up to four years following its expiration. Any provision which differs from the general conditions of the policy will be considered invalid by the CMF.
- ▶ Section 541 will always prevail. Lapsing. The actions arising from an insurance contract will be extinguished after four years from the date in which the respective obligation becomes callable.

Claim handling and management procedure

This subject is not regulated, except for those policies subject to adjustment, in which case the procedures will be governed by the insurance assistants rules (Decree 1055).

On demand policies (conditional or not) are governed by their wording filed with the CMF.

Arbitration

This procedure is not common in our market, but our legislation regulates it.

Section 543 of the Insurance Law “Resolution of Disputes. Any dispute between the insured, the policyholder or the beneficiary, as may correspond, and the insurer, in relation to the validity or nullity of the insurance contract or due to the construction or application of its general or special conditions, its performance or nonperformance, or the legitimacy or the amount of an indemnification claimed will be resolved by one arbitrator appointed by mutual agreement between the parties at the moment the dispute arises.”

Warning



More legal actions



More regulations

(Circular 972, dated
13 January 2017).

It limited the term “immediate
enforcement” or “on-demand”
only to the SIMPLE type of
policy (b.1., slide 4)

Insurer/Surety's opposable defenses

Principle of inability to raise a defense:

The exceptions or defenses the principal may raise shall not be invoked to refuse payment of the indemnification.

Fraud

A) In on-demand policies defenses are raised after payment (the following rules are applied after payment).

B) The following sections will be applied to policies subject to adjustment procedures:

▶ **Section 539. Contract nullity:**

A) If the insured knowingly gives the insurer substantially false documentation

B) Section 470. Insurance fraud:

The provisions of Section 467 will also be applied to: 10) Those who maliciously obtained for themselves or for a third party the undue total or partial payment of an insurance policy, either through an intentional loss claimed to the Insurer as occurred under different circumstances than the real ones, by hiding the insured object or through fraudulent increase in the amount of the losses really borne. If the undue payment attributable to causes beyond the insured's will is not proved, the minimum penalty or the minimum degree of penalty shall be applied. The penalty shall be fixed in relation to the undue amount claimed.

Application or enforcement of counterguarantees

- ▶ Counterguarantees are execution papers which grant the right to execute on collection (they are enforced through a summary proceeding)
- ▶ Autonomous
- ▶ Defenses raised against enforcement (legal measures in a meeting of creditors proceeding/ liquid, due and payable debt)

Subrogation

Insurer's right

- ▶ Section 534. Subrogation. In respect of a claim, the insurer shall be subrogated to the insured's rights and actions against third parties arising from the loss event
- ▶ This regulation applies to the Principal, who is a third party to the policy effects.

Gracias

