

A CASE FOR BOND INSURANCE AND CONTRACT BONDS: Keeping the Contractual Balance

Carlos Hoyos¹

The owner of a small print shop reads in the local newspaper that the Town Council will invite offers by public tender for printing a new model form for property tax. The tender offers a 30 per cent prepayment of the total amount. This is good news for the print shop proprietor. Securing this contract could be a great commercial success, because it promises to be a profitable business without running the risk of non-payment as the client is the local authority.

While making inquiries regarding the tender the printer learns that three conditions must be fulfilled:

- When tendering, the printer must present a "bid bond". This is a guarantee in favor of the Town Council that the printer will enter into a contract if the contract is awarded to him;
- The printer must also present a "performance bond". This is a guarantee of the faithful performance of the contract as required by the tender conditions; and finally
- The printer will also have to present an "advanced payment bond" as guarantee for the 30 per cent prepayment, as defined in the tender.

How can the printer obtain these bonds? The print shop business is not exactly an over-capitalized enterprise, even though hard-earned profits have been continuously ploughed back into the business. Like many small and medium-sized enterprises, there is a substantial reliance on bank credit to finance short-term requirements. Therefore, the printer cannot readily ask the bank for additional assistance as this would heavily reduce the print shop's credit line. This, in turn, would hamper the current operation of the business. In addition, the bonds requested by

the tender are so-called "first demand bonds". The party in whose favor the bonds are issued, i.e. the Town Council, can obtain payment on demand. If such a bond was to be issued by the bank, it would certainly ask the printer to provide collateral.

Faced with all these problems, the printer decides to forget about tendering for the business after all. Competing for the tender proves to be a frustrating exercise and a serious loss of opportunity.

This is not a fictitious example. In virtually all countries, local and national governments - and increasingly private companies - require a bond from building contractors or suppliers of goods or services to guarantee the fulfillment of their contractual obligations. Generally, this is a legal or regulatory requirement and, in those cases where it is not, it is usually an established contractual practice.

For many companies, and particularly for smaller enterprises, these bonds are very onerous. However, there are two possibilities which, if implemented, would lighten this load considerably.

1. Bond Insurance

In many countries, and particularly in developing countries, the possibility of specialized insurance companies issuing bonds, as an alternative to the traditional bank guarantees, has not been explored.

This activity, known as *bond insurance*, significantly increases the bond-granting potential of the financial market by adding the

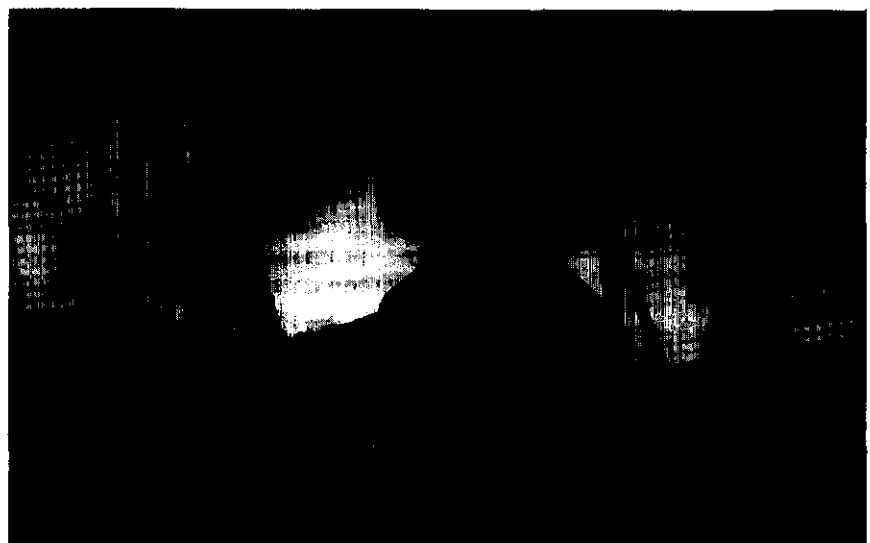
capacity of the national insurance and international reinsurance markets to that of the banks. Furthermore, the bond applications placed in the insurance market may contribute significantly to national economic growth.

Bonds issued by the insurance companies normally do not involve lodging collateral. Since these bonds are not a bank risk, the companies requiring such bonds are spared from utilizing their much-needed bank credit.

2. Contract Bonds

The International Credit Insurance Association (ICIA) is striving to prevent contractual clauses being imposed that give one contractual party an unfair advantage over the other. In the world of bonds the tool developed to achieve this worthy objective is the Uniform Rules for Contract Bonds.

In 1993, after several years of work, the International Chamber of Commerce (ICC) adopted the Uniform Rules for Contract Bonds (publication No. URCB 524), which became operational on 1 January 1994. By way of these rules, the ICC seeks to offer the business community a type of bond that will enable a contractual balance between the parties to be maintained, without either party being in a situation of superiority over the other. The rules provide for a type of bond that provides adequate protection for public or private beneficiaries and prevents the misuse that unscrupulous beneficiaries could theoretically make of so-called "first demand bonds". As mentioned, "first



demand bonds" exist separately from the main contract, guaranteeing that it will be fulfilled, and which are payable at first call, in most cases without any prior justification.

Using a contract bond instead of an unconditional "first demand bond", brings the following advantages to contracting suppliers, (the print shop, in our example):

- It is likely that suppliers will not have to provide collateral - such as cash deposits - which would curtail their borrowing capacity;
- They will have the possibility of applying to an insurance company for the bond. It should be noted that insurance companies are usually unwilling to issue "first demand bonds";
- They will benefit from an increase in credit capacity, as indicated in the first bullet;
- They will probably obtain the required bonds at a lower cost, since the risk of unfair calling of a bond under the Uniform Rules for Contract Bonds 524 is much less than under a "first demand bond";
- They will have a viable alternative to the cash deposit that certain beneficiaries sometimes ask for, and which cause serious financial problems for contractors.

While all of these advantages are important for any company, they are particularly beneficial for small- and medium-sized enterprises, whose credit requirements and borrowing capacity become severely limited when they are required to provide a "first demand bond".

For the reasons given, government authorities responsible for the financial sector, internal revenue and insurance, in particular in developing countries, should authorize and promote the creation of insurance companies interested in specializing in bond insurance. The authorities should facilitate the administrative procedures required for establishing and transacting this type of insurance business and should promote the use of contract bonds. ■

Notes

1. Mr. Carlos Hoyos is the General Manager of MAPFRE Caucion y Credito S.A. and the Chairman of the Guarantee Insurance Committee of the International Credit Insurance Association (ICIA).

Standing Committee on Insurance Holds Successful Third Session

(continued from page 1)

It urged UNCTAD to continue its analytical and technical cooperation activities in insurance and supported the work of the secretariat in promoting transparency through the development of its electronic database of insurance statistics.

Two topics dominated the work of the third session: insurance regulation and supervision in a liberalizing insurance environment and catastrophe insurance in developing countries and countries in transition.

The discussion on the first topic was led by panelists Steve Butterworth (Insurance Superintendent of Guernsey and Chairman of the Group of Experts on regulation and supervision of insurance markets of UNCTAD), Mónica Cáceres Ubilla (Insurance Superintendent of Chile), Mario Kakabadse (WTO), and Harold Skipper (Professor of International Insurance, Georgia State University). The meeting proceeded to debate a number of regulatory issues among which were consumer protection and education, cross-border trade in insurance services and the necessity of a parallel development of financial infrastructure, capital markets and the liberalization of the insurance market. The third session concluded that the future activities of the Insurance Programme of UNCTAD could focus on promoting stable financial environments, improving market and corporate transparency, improving human resources in supervisory authorities and in insurance companies and organizations, promoting the improvement of public awareness of insurance and studying the linkages between development and life and long-term insurance, free

trade in insurance, and export credit and credit guarantee insurance.

The second topic on international and national catastrophe insurance was introduced through presentations and discussions led by expert panelists Mohamed Elteir (Egypt Re), Herbert Haag (Partner Re), Ernst Leffelaar (Cologne Re), Leslie Lucas (Pool Re) and Werner Schaad (Swiss Re). The meeting discussed the necessity of cooperation between governments and the private sector in this field. It also pointed out that the available non-proportional catastrophe insurance in the international market addresses risks that are very large and not yet applicable to many developing countries. Their catastrophic risks and losses are relatively small, from the point of view of the international market, however great the impact may be on their economic development. The meeting concluded that the Insurance Programme of UNCTAD could focus on developing closer cooperation between the State, insurers and reinsurers, providing training on prevention and loss control, setting up catastrophe risk information networks, developing insurability criteria and developing catastrophe insurance capacity and pooling solutions at the local level.

Focus was also given to the topic of the establishment of credit guarantee funds in developing countries. Jean Bastin (Technical Credit Insurance Consultants) gave a presentation on the technical requirements for establishing credit guarantee funds and explained the various country experiences in this field of insurance.

The outcome of the meeting was transmitted to the Trade and Development Board of UNCTAD, which will review the work of the Standing Committee with a view to making recommendations to the ninth session of the UNCTAD Conference. UNCTAD IX will be held in South Africa, from 27 April to 11 May 1996.¹ The Conference is the ultimate body from which the UNCTAD secretariat receives its mandates. A session of the Conference is held once every four years. ■

Notes

1. See related article on page 15.

Un pequeño empresario dueño de una imprenta ha conocido que el Ayuntamiento de su localidad va a convocar un concurso para los impresos de los nuevos modelos del Impuesto sobre bienes inmuebles. Se trata de una gran oportunidad para él. Es un contrato importante y sin riesgo a la hora del pago. Cuando el empresario va al Ayuntamiento para conocer cuáles son las condiciones del concurso, observa que junto a la oferta le solicitan un "bid bond" y que si gana el concurso deberá presentar un "performance bond" en garantía del cumplimiento del contrato y que, además, también deberá presentar un "advanced payment bond" para poder recibir el anticipo previsto en el contrato.

¿Qué hacer?, ¿a quiénes pedir las fianzas?. ¿Al banco?. No puedo, mi capacidad crediticia se vería seriamente mermada y la necesito para el día a día de mi negocio. Además se trata de una fianza a primer requerimiento y eso supone que deberé dar una contragarantía, reduciendo, por lo tanto, mi capacidad de endeudamiento.

Esta situación no es anormal. En la práctica totalidad de los países del mundo, las administraciones públicas o locales y cada vez con más frecuencia también las empresas privadas, exigen a los contratistas de obras o a los suministradores de bienes o servicios, la presentación de una fianza para garantizar el cumplimiento de sus obligaciones contractuales. En la mayoría de los casos se trata de una exigencia legal o reglamentaria, y allá donde no existe como obligación legal es habitualmente una práctica contractual.

La presentación de estas fianzas supone, para muchas empresas, fundamentalmente para las más pequeñas, una pesada carga. Existen sin embargo dos posibilidades que, de llevarse a la práctica, aliviarían en gran medida esa carga, y que detallamos a continuación:

1. En muchos países, principalmente los no desarrollados o aquellos en vías de desarrollo, pero también en los llamados países emergentes, se desconoce la posibilidad de que las compañías de seguros especializadas, emitan fianzas como alternativa a la tradicional fianza bancaria.

Esta actividad, denominada **seguro de caución**, supone:

- a) Incrementar notablemente la capacidad del mercado para la concesión de fianzas, al añadir a la capacidad bancaria, la del mercado asegurador nacional, y la del reaseguro internacional.
- b) Al mismo tiempo, la petición de fianzas al mercado asegurador puede significar una importante contribución al ritmo de desarrollo del país.

En efecto, las fianzas que se solicitan a las compañías de seguros no se computan, por razones obvias, como riesgo bancario, por lo que las empresas que las requieren aumentan su capacidad crediticia al no consumir su crédito bancario que tan importante es para su actividad empresarial.

2. Después de algunos años de trabajo, la ICC adoptó en 1993 las **Reglas Uniformes para Fianzas Contractuales** (publicación n° 524) cuya puesta en marcha tuvo lugar el 1° de Enero de 1994.

Con estas reglas, la ICC trata de ofrecer al mundo de los negocios un tipo de fianzas que permiten mantener el equilibrio contractual de las partes, sin que ninguna tenga una situación de superioridad sobre la otra; de unas fianzas que dando adecuada protección a los beneficiarios, públicos o privados, que las solicitan, no dan cabida a los teóricos abusos que beneficiarios poco escrupulosos pueden hacer de las llamadas "fianzas a primer requerimiento", instrumento desvinculado del contrato principal cuyo cumplimiento garantizan, y pagaderos a simple requerimiento sin necesidad, en la mayoría de los casos de justificación alguna.

Ante no importa qué tipo de contrato, el contratista o suministrador encontraría a la hora de presentar las fianzas las siguientes ventajas, utilizando las URCB's en lugar de una fianza incondicional:

- a) No tendría, muy posiblemente, que dar contragarantías, en algunos casos depósitos en efectivo, o garantías reales, que disminuyen su capacidad de endeudamiento.
- b) Posibilidad de pedir la fianza a una compañía de seguros que, habitualmente, se muestra recelosa a la emisión de "fianzas a primer requerimiento".
- c) Incremento de su capacidad crediticia, tal y como mencionamos en el apartado 1, a).

- d) Un precio más económico, ya que el riesgo de ejecución indebida de una fianza, según las URCB's es infinitamente menor que el de una "fianza a primer requerimiento".
- e) Las fianzas al amparo de las URCB's son una alternativa a los depósitos en efectivo que, en ocasiones, solicitan algunos beneficiarios y que representan un grave quebranto para los contratistas.

Si todas estas ventajas son importantes para cualquier empresa, el efecto es extraordinariamente positivo para las pequeñas y medianas empresas, cuyas necesidades crediticias y capacidad de endeudamiento se ven peligrosamente mermadas, cuando se les exige la presentación de una "fianza a primer requerimiento".

Desde este artículo llamamos la atención a los responsables de las áreas de Economía, Hacienda, y Seguros de cada país, para que primero autoricen y luego promuevan la creación de compañías de seguros interesadas en desarrollar esta actividad, facilitando la información y agilizando los trámites para ello necesarios.

Todas las instituciones supranacionales luchan por la protección al consumidor, tratando, a través de la legislación pertinente, de evitar la imposición de cláusulas contractuales que supongan posiciones de privilegio a una de las partes. En el mundo de la fianza, el instrumento para ello son las **Reglas Uniformes para Fianzas Contractuales**.

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Carlos Hoyos
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