

APPEAL BONDS FOR INTERNATIONAL COMPANIES

August 2019



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To many, appeal bonds can be mysterious and the process for getting one utterly confusing.

When the bond is required by an international company based in a foreign country, it can add to the complexity of the process and requirements, and there are certain things the lawyers representing these clients should be aware of given the limited automatic stays in most jurisdictions.

Where are the assets?

The first step in the underwriting process for a surety is to determine where the company's operations and assets are located. If the appellant is a subsidiary of an international parent and domiciled in the United States, the place to start is by obtaining a financial statement for that subsidiary. If the subsidiary has substantial assets located in the United States and qualifies for the bond without the need for surety to hold collateral, the surety may be able to simply take the indemnity of that entity by having a local authorized officer sign an indemnity agreement.

In some instances where companies file consolidated financial statements, it is not always easy to obtain financial statements for just the U.S. subsidiary. In that situation or when the subsidiary does not qualify on their own for the bond, it is necessary to review the financial statement for the international parent company.

Financial Qualifications

Appeal bonds in general are underwritten conservatively by surety companies. When it comes to determining whether they will provide a bond to

a large company without requiring any collateral, the surety is looking to see that the company has the liquid resources to easily pay the judgment themselves if an adverse decision is reached on appeal. "Easily" is an important word, because it denotes that the surety wants the liquid resources of the firm to be far in excess of the judgment, so that there is no question that a year or two down the road the judgment can be satisfied by the appellant.

The bar can be even higher for international companies especially if they have very little assets in the United States. This is due to the greater challenge of enforcing the indemnity agreement should the surety have to pay out a claim under the bond and seek reimbursement from the appellant.

Indemnity

When it has been determined who the primary indemnitors are for the bond, the next critical



step is ensuring there is a surety company that is willing and capable of perfecting indemnity for that foreign country. As one can imagine, the laws and political stability largely follow whether sureties will take indemnity in a particular country. Most Western European and North American countries are acceptable, but as of the writing of this article, places like China, Russia and many South American

countries are generally not accepted by sureties.

Collateral

If the company is either based in a country where the surety won't accept just the indemnity or they are not financially strong enough for the surety to write the bond with just their guarantee, then sureties often require collateral in the form of cash or a letter of credit.

The letter of credit almost always needs to be issued by a bank domiciled in the United States and approved by the surety. Generally, approval in these instances is not an issue, because most international companies bank with the larger, well capitalized banks.

Each surety has their own required letter of credit format, which the bank will need to use. There is often some negotiation on minor terms, and it's important to know that the process can take some time depending on how quickly the bank and surety can come to an agreement.

It gets trickier when you have an international company with no U.S. operation, because they may not have a U.S. banking relationship. In that case, their bank may have a counterparty relationship with a U.S. based bank through which they can issue a counter standby letter of credit.

We have, in very limited circumstances, been successful in getting a surety to agree to accept a letter of credit directly from a foreign based bank that could not issue a letter of credit through a U.S. counterparty. The quality of the bank and country play a primary role in determining whether that arrangement is possible.

Conclusion

The surety industry is very small and appeal bonds represent only about 1% of the industry. The pool gets even smaller when it comes to international appeal bonds, and there are only a handful of surety insurers that operate internationally. As a result, it's important to talk to an expert and start the process as early as possible. As Benjamin Franklin said, "An ounce of prevention is worth a pound of cure.", so remember it's never too early even if that means having a conversation before a judgement has been entered.

Dan Huckabay is president of Court Surety Bond Agency (CSBA), one of the leading providers of appeal bonds in the nation. He has underwritten appeal bonds in almost every state and federal district court for clients ranging from individuals to Fortune 500 companies. Mr. Huckabay is a frequent presenter, author, and expert witness on the topic. Dan can be reached at (877) 810-5525 or at Dan@courtsurety.com