



## **Sergiusz Lenhardt**

Case law analysis as an instrument of underwriting  
management in surety bonds

Analiza orzecznictwa sądowego jako instrument  
zarządzania underwritingiem w gwarancjach  
ubezpieczeniowych

### **Doctoral dissertation summary**

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## **1. Research topic relevance**

Year by year, surety bonds are becoming a more and more popular form of securing the claim, which is caused by many factors of economic and legal nature. Very often they are an alternative to liability insurance or bills of exchange, which are usually required by law for carrying out a particular activity or are demanded to be presented at the stage of tender proceedings. Despite its simple structure, a surety bond is an instrument that provides wide possibilities of adjusting it to the type of secured transaction, as well as expectations of the creditor and its principal. This is mainly due to a narrow scope of statutory regulations concerning this instrument, which gives parties greater freedom in shaping the legal relationship between them. However, the above also entails negative effects, which are manifested especially in uncertainty as to the claims to which the guarantor, beneficiary or principal is entitled. In many cases, the solution is provided only by judgments of courts of general jurisdiction, The Supreme Court, administrative courts, or The National Appeals Chamber. In justifications of judgments the above-mentioned entities face problems to which the statutory law often does not find an answer and which require intervention of an independent and autonomous body. According to this, the following question arises: Can case law analysis be an instrument of managing underwriting in surety bonds? Pilot study conducted on a few people responsible for underwriting in the largest insurance companies (guarantors) in Poland indicate that an answer to this question would be of interest not only to the academic world but also to the practice.

Underwriting in surety bonds is understood as a process of risks selection and classification. It is usually determined by the experience of the entire team and an analysis of claims that have occurred in the past. Its shape is therefore dependent on the relationship between the principal or beneficiary and the frequency and intensity of the occurrence of a guarantee incident. In the literature, areas relevant for underwriting in surety bonds are referred to as the "3 Cs", which stands for capital, character and capacity. The high number of concluded contracts and complexity of insurers' structures demand to use various instruments of underwriting management, such as competence divisions or ethical norms. In the author's opinion, one of such instruments of managing underwriting in surety bonds can be also the case law analysis. The specificity of this instrument forces underwriting to take over many

activities that usually belong to other organizational units of the insurer, such as preparing and issuing surety bonds, which can be influenced by judiciary.

In the case of underwriting, not only financial standing of the principal and the current macroeconomic environment are important, but also the construction of the surety bond or possibility of raising charges against the principal or beneficiary. Currently, because of lack of statutory regulations concerning mentioned instrument, many doubts arise if it comes to the wording of individual provisions, or to the formal requirements for requesting payment of the guaranteed sum. The International Chamber of Commerce has created the so-called The Uniform Rules of Guarantees, but their application is optional and, despite their growing popularity, for a long time the market will be relying on national law. Despite the above, currently there is no compilation of juridical thesis in the context of underwriting. This situation causes many difficulties, mainly for brokers and insurance companies that offer surety bonds. Presumably this is due to the niche subject and the relatively difficult accessibility of historical judgments issued in surety bonds.

The above arguments support the main goal of the dissertation, which is to analyse judgments concerning surety bonds and to determine the usefulness of its use in underwriting management. In order to provide an answer, it was necessary to touch several areas like for example the legal status of surety bonds and the place of underwriting in the process of guarantor risk management. From the author's point of view, the shape of underwriting in surety bonds and the role of judgments in this process was also important.

## **2. Research problem**

Formulated in the form of the question:

**Can case law analysis be an instrument of managing underwriting in surety bonds?**

## **3. Research objective and hypotheses**

The main objective of the dissertation is:

**To analyse judgments concerning surety bonds and determine the usefulness of its use in managing underwriting at an insurance company.**

Achieving the main research objective requires the following research tasks:

1. Present the legal status of surety bonds;
2. Defining underwriting management in surety bonds and classifying its instruments;
3. To define instruments that lead to the uniformity of judicature concerning surety bonds;
4. To recognize categories of information provided by Polish case laws for the purpose of underwriting in surety bonds.

The dissertation adopts the following research hypothesis:

**Case law analysis provides information relevant to managing underwriting in surety bonds.**

#### **4. Sources and methods**

The topic of the dissertation, the research problem, its main and specific goals determined the choice of research methods. As it has already been mentioned, the realization of this dissertation was preceded by a pilot study conducted on a sample of 11 people responsible for underwriting in surety bonds in the largest insurance companies in Poland. According to the data of The Polish Chamber of Insurance, insurers represented by the respondents had over 80% of the surety bonds market share measured by the gross written premium. The survey itself helped to formulate the research problem, as well as to define the main objective of the thesis and the research hypothesis. The sample questionnaire that was used for the study is Appendix 1 to the dissertation.

The basic research method was a descriptive analysis of domestic literature extended by foreign literature, especially about surety bonds, underwriting and management. Due to the popularity of the mentioned instrument on the North American continent, a large part of the literature refers to English-language collections. Legal acts, judgments and regulations of international non-governmental institutions are also very important sources. This method was used mainly in the theoretical part of the dissertation (Chapters I, II and III).

Due to the fact that in Polish literature there is not much space devoted to underwriting management in surety bonds, the author decided to conduct three in-depth individual interviews (IDI) with directors of departments of insurance companies responsible for this part of the insurer's activity. Among the interlocutors there were people representing the key insurance companies in terms of their share in the surety bonds market in Poland measured

by the gross premium written. These interviews supported mainly the part of the dissertation which is about the underwriting process and its management (Chapter II). Interviews were semi-structured, and the questionnaire that was a starting point for the interviews is attached as Appendix 2 to the dissertation.

The Author also relied on his own research conducted on a sample of 56 judgments of The Supreme Court, 34 judgments of The Supreme Administrative Court, 30 judgments of courts of appeal and 65 judgments of The National Appeals Chamber (Chapter IV). The sample was selected on the basis of verifying whether the given justification for the specific case law referred to the subject of surety bonds, and whether these bonds were one of the main objects of the dispute. The study had three stages:

1. Selection of case laws - from 06.2018 to 12.2020;
2. Selection of theses or relevant parts of the judgments - from 03.2020 to 01.2021;
3. Verification of the usefulness of the conclusions of the study in the management of underwriting in surety bonds - from 01.2021 to 12.2021.

Finally, the author conducted another survey that helps to verify the possibility of using the case law analysis by the guarantor (Chapter IV). Seven directors responsible for underwriting in surety bonds in insurance companies took part in this survey and, according to The Polish Chamber of Insurance, they represented over 70% of the market share measured by the gross written premium. The questionnaire used for the survey is attached as Appendix 3 to the dissertation.

## **5. Dissertation structure**

The main part of the dissertation consists of four chapters, preceded by an introduction and followed by a conclusion.

The introduction presents the topic, explaining why it is important from the point of view of science and economy. It also describes the subject of the work, the research problem, the main and specific objectives of the thesis and the hypothesis. Moreover, the sources of data used in the study and the research methods applied are presented.

The first chapter presents the concept and classification of surety bonds as an insurance product. The structure of the instrument is described, as well as the role of the contract for

granting the surety bond and its influence on the later shape of the mentioned security. Moreover, the national and international legal regulations concerning surety bonds were indicated, especially the activity of The International Chamber of Commerce. To the necessary extent, the author has also presented regulations concerning bank guarantees.

The second chapter is devoted to underwriting in surety bonds. It describes definition problems connected with risk and its classification, as well as the specificity of insurance company (guarantor) activity. The above enables to locate underwriting management in the area of operations of mentioned entity and to cover the introduction to the underwriting process itself. This section also presents particular instruments of underwriting management in surety bonds and the so-called "3C" concept.

The third chapter presents the role of jurisdiction in surety bonds and describes the characteristics and classification of judgments in civil and administrative cases. The author presented the subject of the uniformity of jurisdiction from the theoretical and practical point of view. The author also pointed out the types of instruments used to maintain the uniformity of jurisdiction concerning surety bonds.

The fourth chapter is divided into four parts, where the first one is devoted to the assumptions for the case law analysis of The Supreme Court, The Supreme Administrative Court of appeal courts, as well as The National Appeals Chamber. The second part presents a set of the most important theses or the most significant, in the author's opinion, statements quoted in the given rulings. The third part presents conclusions from the analysis of the judgments concerning surety bonds, where the information provided by mentioned rulings is divided into five thematic groups. The last part of the dissertation evaluates the usefulness of the information provided by judgments in surety bonds underwriting management.

In the conclusion, results of the conducted research are presented. It presents the results of the research hypothesis verification and describes the conclusions. Moreover, the contribution of the research results to the development of theory and their application to market practice has been outlined. Limitations of the conducted research and areas for further development are also described.

## **6. Research results and final conclusions**

Before starting work on this dissertation, the author conducted a pilot study. Eleven directors responsible for the underwriting process in surety bonds in insurance companies, who are also members of The Financial Insurance Subcommittee of The Polish Chamber of Insurance, responded to asked questions. These insurers represented by the respondents had over 80% of share in the surety bonds market measured by the gross written premium. The purpose of questions was, to identify problematic issues in the area of surety bonds. Results of the survey indicated that there is a need to analyse judgements concerning surety bonds and to organize provided information. The above was the basis for the formulation of the research problem, the main objective of the thesis and the research hypothesis.

Achieving the main objective of the dissertation was preceded by the presentation of the characteristics of the guarantee relationship in Chapter I, as well as the description of the legal status of surety bonds. Realizing the first specific goal, the disputable issues in this field, which appear both in literature and judgments, were pointed out and appropriate solutions were proposed. While describing the legal status of surety bonds, the national law, the law of The European Union and the activity of non-governmental organizations were taken into account. Moreover, a synthesis of the division of the described instruments was made and their types were indicated.

Chapter II of the dissertation was preceded by research, in which the method of individual in-depth interview (IDI) was used. The interlocutors included representatives of the key insurance companies in Poland in terms of their share in a surety bonds market, measured by the gross premium written. It gave a completer and more up-to-date picture of rules and principles concerning underwriting in surety bonds. It distinguished its stages and described the general scheme according to which risk assessment is performed. The steps in the underwriting process described above include:

- risk identification,
- determining the scope of coverage
- risk assessment
- verification of collaterals,
- tariffing or rejection of the application,
- determination of the need for reinsurance,

- quotation of premium,
- establishing collateral and drawing up the contract,
- payment of premiums and issuance of bond.

The chapter also provides a definition of underwriting management understood as planning, organizing, motivating and controlling the process of risk identification and pricing, which is aimed at preserving the continued existence of the insurance company (guarantor), as well as achieving its business objectives by maintaining a state of functional balance. Moreover, instruments of insurance companies of managing underwriting in surety bonds were classified, which was the second specific objective of this dissertation. These instruments were divided into organizational (competence divisions, underwriting policy, training programs, code of ethics) and analytical (macroeconomic environment analysis, automated underwriting, statistical analysis, analysis of legislative changes, analysis of judgments).

Chapter III characterizes the decision-making activities of courts of general jurisdiction, administrative courts, The Supreme Court and The National Appeals Chamber. Realizing the third specific objective of this dissertation, a catalog of instruments for the realization of the uniformity of judgments has been described, and resolutions of The Supreme Court in surety bonds have been analysed. Additionally, the quasi-legislative activities of courts in the field of surety bonds were indicated, which included, for example, application of the so-called *analogia legis*, referring to general clauses or the very essence of a surety bonds.

Chapter IV analyses the case law on surety bonds and bank guarantees. The result of the above was, the identification of the categories of information provided by Polish judgments for the purpose of underwriting in surety bonds, which was the last of the specific aims of this dissertation. As a result, selected case law theses were presented, and the information obtained in the course of the analysis was divided into those which referred mainly to the guarantor relation with a beneficiary, guarantor relation with a principal, tax law, deposit, and those which concerned other issues. The vast majority of rulings carrying value for the underwriting process concerned the construction of the contract itself. Often, they concerned the way of interpreting certain terms, such as "receivables" or "proper performance of the contract". Moreover, they informed about the scope of freedom of the parties to shape the surety relationship while maintaining its specific character e.g., abstract and non-accessory bonds. Another group of information provided by Polish judgments did not concern the

content of the surety bond itself, but focused mainly on the claims area. For example, they concerned circumstances existing on the side of the debtor from the relationship with beneficiary (e.g. declaration of bankruptcy), or the beneficiary itself (e.g. the manner of delivery of the demand for payment). The analysed decisions of The National Appeals Chamber concerned almost exclusively the issue of rejecting a contractor's bid from a tender organized under The Public Procurement Law. Although they provided some interpretative guidelines regarding the provisions contained in the surety bond document, they were mostly useful for the entity submitting a bid in the tender procedure. Decisions of The Supreme Administrative Court concerned only tax proceedings with participation of beneficiaries or ordering parties of such bonds and are of little value from the underwriting point of view.

Answering the question which is the main research problem, the usefulness of information obtained from judgments from the perspective of the underwriting process in surety bonds and its management was indicated. The above conclusions were based on a survey conducted by the author, in which the respondents were seven directors responsible for underwriting in surety bonds in insurance companies. According to the data of The Polish Chamber of Insurance, the insurers represented by the experts participating in the survey had a 70% share in the market of these insurance products. By conducting this survey, the author also realized the main goal of the thesis, which was not only to analyse judgments concerning surety bonds but also to determine the usefulness of its use in the underwriting management in insurance companies. The respondents confirmed the relevance of the information provided by judicial decisions for the purposes of underwriting management in surety bonds. They also unequivocally pointed to the possibility of using this information in the underwriting process itself, in particular at the stage of identifying risks, deciding whether to tariff or reject an application, or drafting a contract. Moreover, they also noticed the usefulness of this information in other areas of insurance company activity, such as loss adjustment or product creation.

As a result of the multi-stage research conducted and described above, the dissertation confirmed the research hypothesis stated in the introduction. It was proved that the case law analysis provides information relevant for the management of underwriting in surety bonds. Thus, the main research problem was answered, proving that the analysis of case law can be an instrument of managing underwriting in surety bonds.

In the course of realization of the thesis, some limitations of the conducted research were noticed, as well as areas for further development. It is worth to notice that the market of surety bonds, especially in terms of the number of companies offering these products, is relatively small. Just to remember, seven insurers, participating in one of the studies presented in this thesis, account for more than 70% of the market share measured by gross written premium. This translates into a lack of possibility to apply advanced methods of quantitative analysis and the need for greater use of qualitative analysis. Another limitation is the obsolescence of the research results due to the continuous issuance of new judgments. If we wanted to analyse all the decisions of courts of general jurisdiction on the subject of surety bonds, we would be talking about several hundred judgments per year, which significantly exceeds the capabilities of a single researcher. It may also be difficult to reach for historical data, because recently (differently for each type of court) judgments are published in greater numbers in widely available electronic databases.

However, the research conducted by the author can provide a basis for further analysis. Further areas of development of the author's research may include, for example, issues related to the convergence of the positions of courts of different instances. It also seems obvious that the results indicated in the dissertation should be periodically updated due to the possibility of formation of new case-laws.