

MARCH 2005 LEGAL ALERT: SECURITIES ? BONDS, GUARANTEES, ETC.

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SUBSCRIPTIONS & UN-SUBSCRIPTIONS.

We always welcome subscriptions to this Legal Alert, which is free, and for the benefit of our existing Clients and friends. We however recognise that not everyone may be interested in receiving it, or receiving it all the time.

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REACTIONS TO LAST LEGAL ALERT.

Reactions to our last Newsletter were primarily on firstly, the implications of remitting or not remitting pension contributions in the light of the directive by the Nigerian Pension Commission (NPC) that the collection of Pension contributions by the private sector should commence from the 1st day of January 2005; this is vis-à-vis the presently non registration of Pension Fund Administrators (PFAs) and Pension Fund Custodians (PFCs) who are to collect and keep custody of the pension contributions. Secondly is the role of Closed Pension Funds that are already in existence; that is before the coming into effect of the Pension Reform Act.

We have recommended to some of our Clients the need to act on the safe side of the Law by deducting pension contributions, placing them in a special account pending the appointing of PFAs and PFCs. Simultaneously with this is informing their employees, of the employer's decision and the advantage that accrues to the employees from this arrangement.

On Closed Pension Funds, it may be more profitable and administratively more convenient for the employer to out-source this service to a PFA when they are eventually licensed. The exception would of course be where the employer already has a cost efficient in-house Pension Department and comparatively, the licensing cost of registering as a Closed Pension Fund makes economic sense.

LEGAL NEWS.

The Federal Board of Inland Revenue (FIBR) through the Executive arm of government has sent an executive Bill to the National Assembly seeking to amend various Tax Laws in Nigeria. Most

of the existing tax Laws have being in existence for over three decades. Some highlights of these proposed amendments include an increase in Value Added Tax (VAT) from 5% to 10% for luxury goods, autonomy for the Inland Revenue Boards, more tax savings under the Personal Income Tax regime, more tax friendliness by the Inland Revenue Departments to the tax payers, etc.

This year's Annual Tax Conference, to which you are invited whether a tax Practitioner or not, is scheduled to hold at the Abuja NICON Hilton Hotel from the 11th to the 14th May 2005. Topics to be discussed include the tax implications of mergers and acquisitions especially as it relates to Banks, etc.

Finally worthy of mention is the Power Reform Bill which has been passed into Law. The implementation of the latter legislation should see an increase in investments in this sector of the economy, employment and increase in power supply which will be a huge catalsty of development.

LEGAL ALERT: SECURING THE PERFORMANCE OF CONTRACTS GUARANTEES, BONDS, ETC.

A pressing challenge for twenty first century businesses is their ability to enter into contracts in which all the parties meet their obligations. Where there is a default, the security or bond or guarantee to cover that default, if one is requested for and obtained, should not also fail.

Corporations have been known to issue supposed iron-clad securities which require that a default automatically entitled the primary party to call in the security and on first demand, without technical proof of default, the Guarantor or Surety must make good the default and or loss, by restitution. Unfortunately, many cases with these "iron-clad" securities still end up in Court with representing Lawyers smiling to the Bank. Large amounts of money and goods have also been lost to the "insecurity" in these securities.

What remedy therefore exist to you as a business person? First let us examine very briefly, the common types of bonds which is the commonest of securities and also very similar to Guarantees and the other types of securities. A few words will also be made on Guarantees.

Bonds.

The Blacks Law Dictionary, 7th Edition describes a Bond as ".. an obligation; a promise A written promise to pay money or do some act if certain circumstances occur or a certain time elapses; a promise that is defeasible upon a condition subsequent".

Common types of Bonds ? which are also described in the above book - include: -

1. A Bid Bond which is very similar to a Performance Bond.
2. Fidelity Bond which is a Bond to indemnify an employer against cases of employee fraud, stealing, embezzlement, etc.

3. Guarantee Bond which combines the responsibilities of both fidelity and the performance itself, of a contract.
4. Indemnity Bond which seeks to reimburse the holder for actual or claimed loss caused by the issuer's default.
5. Performance Bond which guarantees the timely performance of a contract.

Mention must be made of the fact that Bonds are also sometime used to refer to interest bearing instruments issued by the various governments of the world or by highly quoted companies.

Examples of these kinds of Bonds, which are convertible (tradable) include government treasury bonds, convertible bonds, corporate bonds, discount bonds, floating-interest bonds, municipal or state government bonds (some of which are listed on the Nigerian Stock Exchange), premium bonds, zero-coupon bonds, etc.

Guarantees.

A Guarantee is a commitment by a party to comply with the performance of certain obligation provided some characteristics exist as consideration for this commitment. Usually, the giver of the Guarantee may not be a party to the contract from which the claim may arise.

There are different types of Guarantees. Some Guarantees may be associated with the performance or non performance of a contract; some Guarantees may be linked to the operation or non operation of a particular event; whilst some may be linked to the credibility of the party being guaranteed.

Conclusion & Action.

It is recommended, from a practical stand point, that more time should be expended in conducting due diligence before entering into contracts. Most times, transactions that look too good to be true should be investigated more carefully. Investigating the values and business practices of the other party to the contract from people in similar industry including competitors is important.

Equally important is the physical location and confirmation of an issued guarantee or bond or surety as some parties have been known to claim that their security documents were forged and did not emanate from them. This event will also allow you to access the ability of the party giving the security to meet the liability in the event of a loss.

Remember to always take action and seek advice where in doubt. Information is critical to survival.

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