

Drafting of Performance Bonds and Guarantees

The case of *Vossloh Aktiengesellschaft v Alfa Trains (UK) Limited (2010)* highlights the importance of ensuring that performance bonds are properly drafted. The court held that it would not determine a document to be a performance bond just by the label given to it; the court will construe the document in its factual and contractual context having regard to its commercial purpose. In this case the court held that the document in question was not a performance bond; it was a guarantee supported by indemnities. Where you, as a beneficiary, are seeking to create a performance bond - with a primary obligation payable on demand (irrespective of whether the primary obligor is liable or not) - it is important that you ensure that you use a document correctly drafted to create an on demand bond.

The case of *Fairstate Limited v General Enterprise & Management Limited (2010)* is yet another reminder of the pitfalls of bad drafting. In that case the court refused to rectify the drafting in a guarantee, holding that the guarantee was so flawed and unsuitable for the transaction that it could not be sufficiently cured either by construction or rectification. You should ensure that any guarantees you enter into are drafted properly: do not rely on the court to proofread and rectify your drafting mistakes.