Bank Guarantees and Deeds of Release – tips to ensure enforceability

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With the start of the New Year, many are looking to close out and finalise construction contracts. Two key documents usually associated with the process are:

1. Deeds of Release; and
2. Bank Guarantees.

Sadly, there are a number of common mistakes or oversights in the provision and execution of these documents that can make them unenforceable or impractical to enforce. Generally it is too late to do anything about this at the end of the contract.

To help avoid this, we have set out some straightforward, but all too often overlooked, issues that should be checked each time a Bank Guarantee or Deed of Release is included in a contract.

Do you have the right parties?

If you are dealing with a company named for example, ABC Supplies Pty Ltd, then it may not be enough to simply refer to ABC or ABC Pty Ltd. The correct and unambiguous company name and ABN or ACN of all parties should be included to clearly identify the parties. A Bank Guarantee is like cash and if a party on the Bank Guarantee is different to the party on the contract, then a bank is likely to refuse payment. Similarly, for a Deed of Release, if the party is not correctly identified in the deed, it may not be fully enforceable.

Is the correct contract referenced?

Where parties are recycling documentation or have numerous contracts between them (such as under a standing order arrangement where each new work order is a new contract), then it is common to simply reuse the template. If this is done and the correct contract name and reference number is not updated and included each time, then, once again, the documents may not be enforceable. For example, when calling on a Bank Guarantee you may only do so where there is a right under the contract referenced in the Bank Guarantee. If the wrong contract is referenced then the bank is unlikely to honour the Bank Guarantee.

Are they executed correctly?

Often contracts are provided with template Bank Guarantees and Deeds of Release as annexures which then need to be executed once the contract is formed.
To be enforceable, Bank Guarantees must be an original that has been executed by the bank issuing the Bank Guarantee.

In terms of a Deed of Release, the deed must not only be executed, but must be executed correctly to be enforceable. While an individual can sign on his own behalf and a partner may sign on behalf of a partnership, for a corporation the deed must be executed by two directors or a director and secretary (or a single director in the case of a company with a sole director).

Unlike certain forms of contract, deeds cannot be executed by agents or delegated authorities or representatives.

Deeds may be executed under a Power of Attorney but the execution clause must specify that it is executed under a Power of Attorney and you should always obtain a copy of the Power of Attorney to be satisfied that it does provide the requisite authority to the attorney to execute such a deed.

Is it enforceable in the jurisdiction?

Both the Bank Guarantee and a Deed of Release are only as good as the ability to enforce the document where you are.

For a Deed of Release, if a party providing a release is a corporation not registered in Australia, then the release may not be enforceable with respect to that party.

With respect to a Bank Guarantee, firstly, it should be with a bank that is present in Australia (the guarantee must be presented as an original so it is not advisable to post the original off to a foreign bank never to be seen again). A more practical issue though is whether the bank has offices in the local jurisdiction where the contact is being undertaken. Many foreign banks have head offices only in Sydney or Melbourne. If the works are being carried out in North Queensland, then it may be a significant inconvenience to have to travel to Sydney or Melbourne to call on the Bank Guarantee. Even for Australian banks, commonly the Bank Guarantee will only be enforceable at the head office in Sydney or Melbourne.

Where possible, ensure that a Bank Guarantee is enforceable at a location or local branch that is convenient and accessible.

Is there an expiry date?

Deeds of Release should not have an expiry date.

However Bank Guarantees do commonly have an expiry date. Construction contracts often run over time. Therefore, if a Bank Guarantee is going to expire during the defects liability period, when it should still remain valid, then either the contract should have a reinstatement clause requiring the contractor to provide a new Bank Guarantee or you will need to take steps to convert the Bank Guarantee (and hold the funds in trust) or have the other party issue a replacement Bank Guarantee before it expires.

It should go without saying, but you should also have a process that gives you a call up or reminder before the expiry date so that you can take steps to make sure that the party providing the Bank Guarantee takes steps to renew or replace it. It may be too late after the Bank Guarantee has expired if the party providing it is in dispute with you or in financial difficulty and not willing or able to obtain another Bank Guarantee.

Do you have the original?

As noted above, banks treat a Bank Guarantee as cash and will only pay on provision of the original document. Originals of Bank Guarantees should preferably be kept in a secure location. Too often, parties have gone to call on the Bank Guarantee to simply not be able to find it, or only to be able to produce a copy which the bank will not honour.

Although an original Deed of Release is less critical, if contract claims do proceed to court, the court is likely to require an original of the document to prove a valid defence or claim involving the terms of the deed.

A simple review of compliance with these checklist items, at the time of contract execution, should ensure enforceability and save significant cost at the time that parties seek to enforce their rights under a Bank Guarantee or Deed of Release.

The same approach should also be applied to other forms of security or negotiable instruments, such as promissory notes, letters of credit and insurance bonds, to ensure that they are enforceable.

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