In-House Lawyer Talks 2023

Demystifying Guarantees and Indemnities

28 November 2023



1 What we're going to cover



Contents

01	Is it a Guarantee?	4
02	Or an Indemnity?	6
03	Why does it matter?	10
04	A Guarantee by any other name	12
05	The fun bit	14
06	Some practical tips	20



1 Guarantees



Is it a Guarantee?

Probably, if it looks like this:

- A contract
- A contract subject to the Statute of Frauds
- A promise
- A secondary obligation
- A contingent obligation (co-extensive)



"A guarantee is an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated"

Halsbury's Laws of England

2 Indemnities



Or is it an Indemnity?

Maybe, if it looks like this:

- A contract
- A promise
- A primary obligation



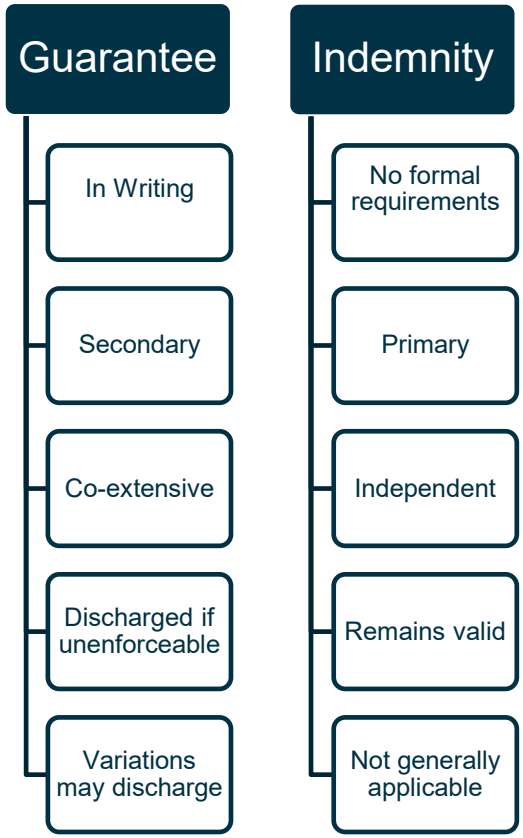
" An obligation imposed by operation of law or contract on one person to make good a loss suffered by another "

Law of Guarantees 7th ed, Geraldine Andrews and Richard Millett

Or maybe it's both?



And how do we tell?



But watch out for clauses that blur this distinction.

3 Why does it matter?



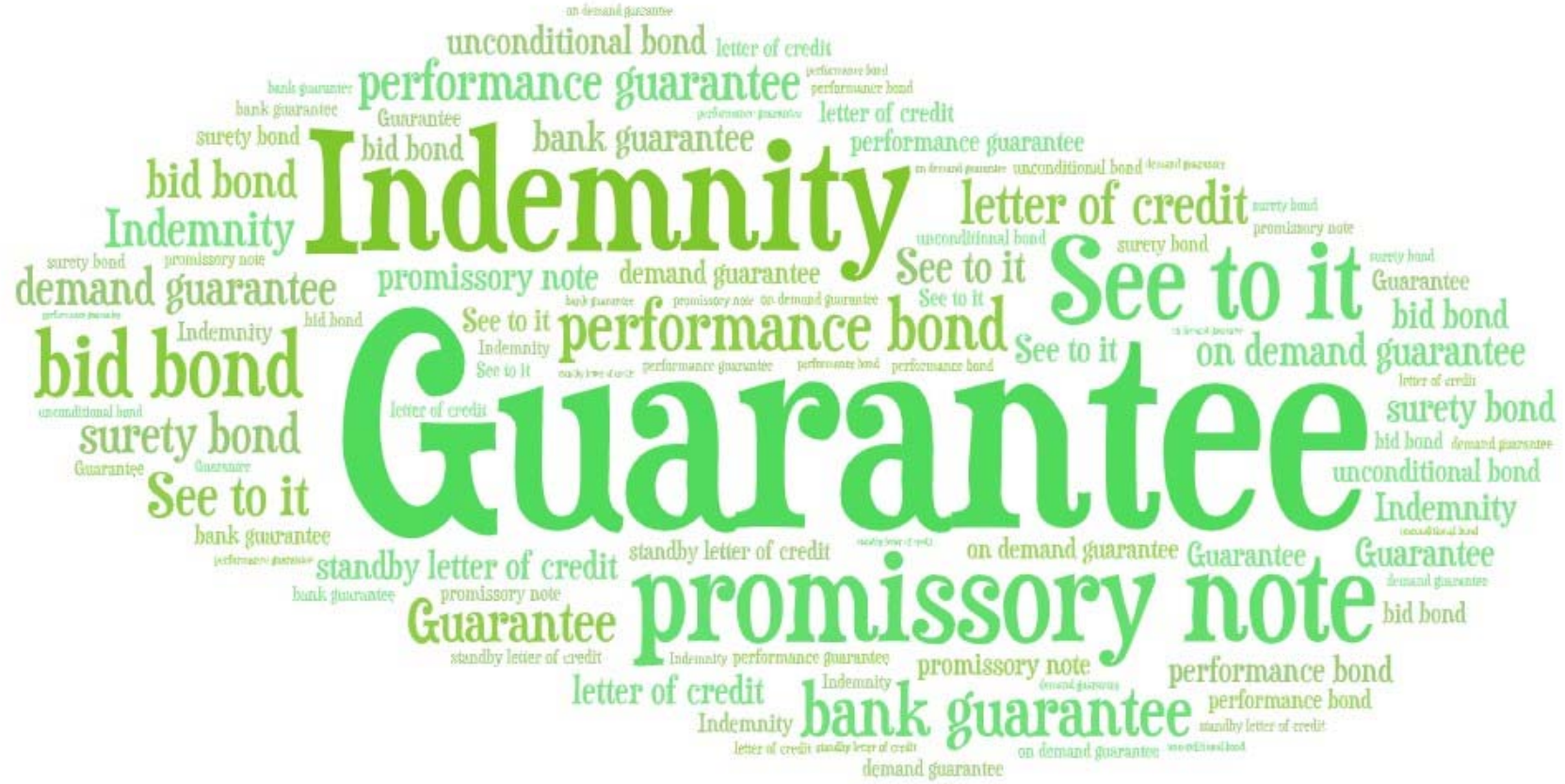
Why does it matter?

- It impacts when the beneficiary can sue.
- It impacts the evidence the beneficiary will need.
- It impacts the range and type of defences available to the surety.
  - The principal obligation is unenforceable.
  - A guarantee may be discharged by a variation to the terms of the underlying contract (*Holme v Brunskill*). Note the use of indulgence clauses.
  - Creditor's duty to disclose to the guarantor in advance any 'unusual features' of his relationship with the debtor (*North Shore Ventures*)
- It impacts the recourse that the surety has against the principal (remember that missing arrow?)

4 Other contracts



A guarantee by any other name?


Guarantee
Indemnity
promissory note
performance bond
See to it
bid bond
surety bond
demand guarantee
letter of credit
bank guarantee
standby letter of credit
on demand guarantee
unconditional bond
performance guarantee
Guarantee
Indemnity
promissory note
bid bond
surety bond
demand guarantee
letter of credit
bank guarantee
standby letter of credit
on demand guarantee
unconditional bond
performance guarantee
See to it

5 Over to you



Can you spot one?

Each Guarantor irrevocably and unconditionally jointly and severally guarantees to each Finance Party punctual performance by each other Obligor of all that Obligor's obligations under the Finance Documents.

Is it a Guarantee, an Indemnity, both or neither?

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Can you spot one?

Each Guarantor irrevocably and unconditionally jointly and severally undertakes with each Finance Party that whenever another Obligor does not pay any amount when due under or in connection with any Finance Document, that Guarantor shall immediately on demand pay that amount as if it was the principal obligor.

Is it a Guarantee, an Indemnity, both or neither?

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Can you spot one?

Each Guarantor irrevocably and unconditionally jointly and severally agrees with each Finance Party that if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal, it will, as an independent and primary obligation, indemnify that Finance Party immediately on demand against any cost, loss or liability it incurs as a result of an Obligor not paying any amount which would, but for such unenforceability, invalidity or illegality, have been payable by it under any Finance Document on the date when it would have been due.

Is it a Guarantee, an indemnity, both or neither?

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Can you spot one?

You agree and confirm that you are personally liable for and guarantee ... all of the payments set out in this letter [and] accordingly you hereby, jointly and severally, unconditionally and irrevocably, guarantee ... the prompt and complete performance when due in full of all payments owed by [X,Y and Z] to us.

Is it a Guarantee, an Indemnity, both or neither?

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Can you spot one?

An oral promise by Mr Abbhi that if a solicitor continued to act for his father-in-law, Mr Abbhi would pay the legal fees and disbursements on his father-in-law's behalf.

Is it a Guarantee, an Indemnity, both or neither?

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6 Some practical tips



What to look out for when reviewing a guarantee

- Are the guaranteed obligations wide enough?
- Should an agreed cap be included?
- What practical steps does the creditor have to take to enforce?
- Does the creditor have to pursue the principal first?
- Does it include an unexpected indemnity?
- Should we be pressing for an indemnity?
- Have any agreed termination rights been included?
- Is the surety an individual?
- Does the signatory have capacity?
- Is the guarantor good for the money?
- Who is it in favour of?
- Are the terms of the underlying contract likely to change?
- Statute of frauds compliant?
- Signed, sealed, delivered?