

## Quick Guide on Performance Guarantee in Construction Disputes

The pandemic has had a major effect on cash-flow in the construction industry. An easy way to free up cash flow is by making demand on a performance guarantee as it must be paid out on demand regardless of any objections raised by the other party.

A performance guarantee is a financial instrument that secures, at least in part, a Party's financial exposure associated with another Party's failure to perform its obligations under a contract. In the construction industry, they usually take the form of an on demand bank guarantee but can also take the form of a cheque.

### How Does a Performance Guarantee Work?



In the case of an on demand bank guarantee, the bank providing the guarantee undertakes to pay the guaranteed amount upon demand from, in our scenario, the employer.



Such a guarantee usually stipulates that payment must be made on demand, notwithstanding any objections raised by the main contractor. In other words, it is a pay now argue later system.



Each bank guarantee is a self-standing contract and the wording of the particular bank guarantee must be carefully considered.

### What Happens if My Performance Guarantee is Called?

Practically, this involves injuncting or legally restraining the Bank from making payment of the guarantee amount.

#### Step 1: Seek Immediate Legal Advice

Try to avoid this by means of constructive engagement with the employer.

If this is not possible, a Party is able to approach the Courts for an attachment of the performance guarantee amount.

#### Step 2: Act Promptly

When demand is made on a performance guarantee, the bank is under an obligation to make payment of the funds immediately.

Practically, the Bank usually gives 24 hours' notice before making payment so the window in which to bring an application to attach the performance guarantee is extremely limited;

#### Step 3: Gather Evidence

Attachment applications are extremely difficult to succeed with and generally require evidence that the demand on the guarantee is made in bad faith or is unsubstantiated.

#### Step 4: Be Prepared

Within 8 days of the attachment, the attaching party is required to institute legal proceedings before the competent court or arbitration forum.

This is an incredibly short amount of time to prepare the necessary claim documents.

#### How We Can Help

- Fast and effective review and advice on the legal position regarding a call on your Guarantee;
- Urgent assistance with injunctive proceedings to halt payment of the Guarantee;
- Expert legal representation in subsequent proceedings (arbitration and/or onshore Court litigation).

### Key Contacts



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