REVIEWING A DEED OF RELEASE FOR A CHARGOR: CHECKLIST

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A checklist of key points for a chargor's lawyer to consider when reviewing and negotiating a deed of release prepared by the lender's lawyers.

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SCOPE OF THIS CHECKLIST

A deed of release is often sought by a chargor at the end of the security period (that is, when the liabilities for which the charge was originally granted are discharged), or when specific assets subject to a charge are released from the security in question (for example, in connection with a disposal of assets). The deed of release sets out the terms on which the chargee agrees to release its security over the assets in question.

Releases are also commonly seen on a refinancing, where an incoming lender will expect to see the outgoing lender release any security upon financial close. Equally, on any acquisition of a specific asset subject to security, a purchaser of that asset will want to see a release of any security over that asset.

This checklist provides an overview of the key considerations for a chargor's lawyer to bear in mind when reviewing and negotiating a release for a chargor.

This checklist assumes that:

- The deed of release has been prepared by the lender or its counsel.
- The security in question relates to English law security only that has been granted by an English company or limited liability partnership.
- The security in question was granted in connection with a finance transaction.
- The deed of release does not need to deal with the terms on which any related debt is being paid off (which matters are often dealt with by way of a separate pay-off letter).

In this checklist, unless otherwise indicated, references to:

- The chargor are to the person or entity that granted the security in question.
- The chargee are to the beneficiary or security holder in respect of the relevant security.

For a form of deed of release, see *Standard document, Deed of release: full release*.

PRACTICAL CONSIDERATIONS

- Is a deed of release required?

  It is a common misconception (at least amongst non-lawyers) that Companies House Forms *MR04* and *MR05* constitute a release of security. However, these forms do not constitute a release of security.

  A charge can only be released by the chargee executing an appropriate deed of release, and further formalities may be required to release charges over certain assets, for example, real estate.

  For more information on filing forms MR04 and MR05, see *Practice note, Registration of charges created by companies and limited liability partnerships on or after 6 April 2013: Does a company have to register satisfaction of the secured debt or release of a charge?*.

- Is a deed of release required where the security being released is a legal charge over real estate?

  A lawyer acting for a purchaser of the property in question (rather than the security provider), may be satisfied with obtaining HM Land Registry Form DS1 alone without any other form of release. Form *DS1* includes a clear statement that *"The lender acknowledges that the property identified in [the form] is no longer charged as security for the payment of sums due under the charge"*. If the charge is the only security outstanding over the property (that is, the property is not subject to security under, say, a debenture), then a purchaser of the property in question could take comfort that the Form DS1 is evidence enough that the property has been released from security.

  Nevertheless, the Form DS1 is unlikely to be wide enough for the chargor, which will want to be released from all of its obligations under the legal charge. For this purpose, a deed of release will be necessary.

  For more information on this issue, see *Practice note, Security over property: FAQs: Is a deed of release required in addition to form DS1 where the security is solely over property?*.

- Were the underlying secured obligations satisfied a long time ago?

  If this is the case, this can make it practically difficult to obtain a deed of release. This scenario often arises when a borrower is entering into a new loan transaction and the lawyers acting for the incoming lender ask for a release in respect of security that is listed as "outstanding" on the company's charges register at Companies House, but that entry refers to a historic charge which has been satisfied.

  This security could have been formally released (using a deed of release) without a Form MR04 being filed at Companies House. If this proves to be the case, then a form MR04 can be filed at Companies House to bring the register up to date in relation to the charge.

  If, however, the secured debts were discharged without a formal release being obtained, it may be practically impossible to obtain a release after the event (particularly if, for example, the chargee has been wound up). However, provided the chargor is confident that the secured obligations have been fully discharged, an officer of the company may feel comfortable filing Form MR04 at Companies House to state on the register of charges that the charge has been satisfied.

INITIAL STEPS

- Notify the chargee of the requirement for a release as early as possible ahead of the closing date and ensure they understand any timing requirements. Often, the chargee will want to engage its own counsel to prepare any release. There will typically be a provision in the original security document obliging the chargee to release the security once the secured obligations have been discharged in full, so the request should not be controversial.
- Ask the chargee to locate any original documents of title it will need to return to the chargor following the release of security.

  Documents of title may be difficult to locate, in which case it is best to know this early and address any problems ahead of completion. For example, lost original share certificates will need to be cancelled and new share certificates issued, particularly where a new lender requires original share certificates in connection with share security that it is taking as part of a refinancing. The chargor may also ask the outgoing chargee for an indemnity in relation to any lost original share certificates (see *Standard document, Indemnity for lost share certificate*).

- Obtain copies of the security document(s) for which the release is to be provided.

  Refer to the security document(s) to ensure the release accurately describes those security document(s), including the security granted, relevant parties and the date on which the security was granted.

- Check the records for the relevant chargor(s) at Companies House to identify registered security that might need to be covered by the release.

  However, it may be difficult to determine conclusively what security has been granted previously (for example, the chargor could have granted security which was not required to be registered at Companies House). In such circumstances, a chargor's lawyer might want the deed of release to list and expressly release the security created under any known security document and also include catch-all wording stating that the release extends to any other security interest granted by the chargor in favour of the chargee in connection with the relevant liabilities. However, a lender's lawyers may push back on such wording. In practice, it is usually up to the chargor's lawyers to conduct all checks necessary to ensure the release correctly refers to all relevant security interests.

FORM OF DEED OF RELEASE AND TIMING PRACTICALITIES

- Although the form and content of a security release can vary widely, deeds of release in syndicated loan transactions generally follow a relatively common form and will include provisions along the lines discussed in this checklist.

  Chargees often insist on using their own form of security release, which will typically be very short and presented on a "take it or leave it" basis. The most important thing from a chargor's perspective is to ensure the document includes a release of the correct security (see *What should the deed of release say?*).

- Consider the timing of the release of security.

  A security release is often required as a condition precedent in connection with a new acquisition or financing, particularly if the new lender requires security over the shares in a business that is being acquired. Request the release well ahead of completion, as the exiting chargee will need time to arrange this internally (and the security team within a bank may operate from a different location to the credit team).

  Sometimes a chargee will refuse to give a release at completion, because its security desk will only start the security release exercise once they receive redemption funds. In this case, the release cannot take place until after completion. Many incoming lenders will not accept this, as it means holding second-ranking security while the prior-ranking security remains in place (even if no debt is outstanding to the prior-ranking chargee during the intervening period). In such cases, it may be necessary to make the delivery of the release a condition subsequent, supported by an undertaking from the outgoing lender's or chargee's counsel to provide the release within a specified period after completion. The continuing existence of any outgoing charge pending the provision of the necessary release should be treated as "permitted security" in the finance documents for the new transaction until such time as the release is obtained.

WHO SHOULD BE PARTY TO THE DEED OF RELEASE?

- Check the deed of release against the underlying security document(s) to ensure the chargee is correctly identified in the deed of release as the releasing party. Ensure the parties to the deed of release are correctly identified by name, registered address and company number.

  On a syndicated finance transaction, the chargee is often a security agent or trustee. A security agent or trustee may refuse to give the release until authorised to do so by the instructing group of creditors. Any such instruction should ordinarily be a formality and will usually be obtained well in advance of any release being provided. For more information on security trustees and their role, see *Practice note, Security trusts in finance transactions: overview: Security trustee*.

- Check whether the chargor needs to be party to the deed of release.

  In most cases the chargor will not need to be a party to the deed of release unless:

  - the chargor is undertaking to do something under the deed of release (for example, to pay the chargee's costs and expenses) or it is giving certain confirmations (such as, in the case of a partial release, in relation to the continuance of security over assets that are not being transferred); and/or
  - the security concerns an interest in land and the release constitutes an agreement for the disposition of an interest in land.

    In relation to the second point above, there is an argument that both chargor and chargee should execute a deed of release which concerns an interest in land. *Section 2* of the Law of Property (Miscellaneous Provisions) Act 1989 (the LPMPA 1989) requires that a contract for the sale or other disposition of an

interest in land be signed by or on behalf of each party to the contract. A "disposition" for this purpose has the same meaning as in section 205(1)(ii) of the Law of Property Act 1925, which includes a release. It follows that a 'disposition' for the purposes of the LPMPA 1989 includes a release.

On one analysis, if the deed of release contains further assurance (or similar) provisions including an agreement to execute other necessary documents to implement the release, the deed of release could be construed as a contract for the disposition of an interest in land (rather than the disposition itself), and so both chargor and chargee would need to execute the deed of release to satisfy section 2 of the LPMPA 1989. Another analysis is that the deed of release (depending on its wording) constitutes the disposition itself and therefore, like a mortgage deed, would be exempt from the requirements of section 2 of the LPMPA 1989 and need only be executed by the chargee.

In any event, this is a technical and nuanced area and the most prudent course is to require both chargor and chargee to execute a deed of release. Chargors do not typically see this as controversial as the release operates in their favour.

WHAT SHOULD THE DEED OF RELEASE SAY?

- Crucially, a deed of release should release the security created pursuant to the security document.

  The nature of the release wording is often informed by the nature of the security in question. For example, a charge will be released and rights which were assigned by way of security would be a re-assigned. However, in most cases it is common to see a catch-all phrase such as a "release, surrender, re-transfer, re-assignment and re-conveyance" of relevant rights created by the security document, particularly where the security document(s) include a debenture that creates various types of security interests.

- Release the chargor from related covenants.

  Any release obtained at the end of a finance transaction should (in addition to a surrender of the chargee's security interest(s)) include a contractual release of the chargor from all of its covenants, liabilities and other obligations under all relevant finance documents and not just those arising under the relevant security document(s). For example, a borrower may be obliged under a loan agreement to hedge its interest rate liabilities under a loan agreement using an interest rate swap arrangement. Such liabilities can fluctuate materially over a short period and the borrower should ordinarily be released from its requirement to hedge at the end of the financing.

  Care should be taken when considering which obligations to release as there may be situations where it is appropriate to release the security and obligations arising in connection with a specific loan, but not the obligations under the borrower's day-to-day banking facilities (such as overdrafts and credit card arrangements) which should remain in place.

- Check whether the deed of release contains wording to the effect that the chargee grants the release "without recourse, warranty or representation".

  Chargees may include this language to exclude the incorporation of certain warranties as to title etc. under the *Law of Property (Miscellaneous Provisions) Act 1994* (LPMPA 1994). This should not be controversial to a chargor in most cases as the chargee has little to do with the charged assets, and so for the chargor to expect the chargee to grant the release subject to implied warranties or covenants under the LPMPA 1994 is unrealistic. Provided the chargor obtains the release it requires, it is unlikely to want to preserve any claims it might have against the chargee for anything done to those charged assets during the security period.

- Check whether the release of security is subject to anti-avoidance provisions.

  Anti-avoidance provisions (typically found in the underlying security document) entitle the chargee to reinstate its security, for example, in the event that a payment made to it has to be repaid on the insolvency of the chargor (for an example of an anti-avoidance provision, see *Standard document, Debenture: clause 30.3*). A chargor or incoming lender will push back on such wording, as each will want a clean release. Chargees often accept the deletion of anti-avoidance wording because the efficacy of such provisions is uncertain and, in the case of a security release granted in connection with a refinancing, the risk of insolvency clawback is usually low.

- Check whether the release is granted "unconditionally and irrevocably".

  This is "nice to have" from the chargor's perspective, but is not crucial so long as the release clearly captures the correct assets.

- Consider when the deed of release becomes effective.

Often a deed of release will be immediately effective upon being dated and formally released. However, a smoother completion process can be achieved by employing an "effective date" concept. In this scenario, the deed of release is executed by the chargee before completion but only becomes effective, for example, in accordance with the redemption mechanics set out in a related pay-off letter.

Where an effective date concept is not used and the deed of release only becomes effective upon being dated and released, it may be necessary for the chargor to seek an undertaking from the chargee's lawyers in which they agree to date and circulate the deed of release to the transaction parties at the appropriate time. For an example of an undertaking to hold a deed of release, see *Standard document, Undertaking to hold a deed of release*.

PARTIAL OR FULL RELEASE?

- Check the release captures the correct assets and whether they are all of the assets over which security was granted, or just some of them. There are typically two kinds of security release as a matter of English law: a deed of release and a deed of partial release.
- A deed of release will usually be used on a refinancing, where all of the secured obligations are being discharged in full. In this scenario, the chargor will want to ensure the deed of release includes a contractual release of any undertakings and covenants in the relevant finance documents as well as a surrender of the security interest. There should be no need to include a list of specific assets in the release document, since all of the assets subject to the relevant security should be released. For an example of a deed of release, see *Standard document, Deed of release: full release*.
- By contrast, a deed of partial release may be used where, for example, a permitted disposal of specific assets is taking place and where the existing financing continues. In this scenario, a deed of partial release will be used so that the assets to be disposed of are released from the security, but the security continues over the remaining assets of the chargor. For an example of a deed of partial release, see *Standard document, Deed of release: partial release*.

  A deed of partial release will likely include a specific description or list of the assets that are to be released from the security. It is very important from a chargor's perspective to ensure that the assets are correctly identified. This will be particularly so where those assets are the subject of an onward sale by the chargor to a third party purchaser immediately following the release (in which case the chargor should ensure that the assets subject to the release mirror those to be sold in any relevant business or asset transfer agreement).

  A deed of partial release will also likely include a statement that nothing in the deed of release shall prejudice or affect the continuing nature of the security as regards any assets that are not subject to the release (including, for example, continuing security over the proceeds of sale of the released assets) or the obligations of the chargor under the security document with respect to those other assets. Releases may be granted in respect of contractual undertakings regarding the assets over which security is being released, but any undertakings that go beyond that and/or apply to other assets should remain in force. This should not be controversial.

  A deed of partial release may include a non-crystallisation confirmation. This is a confirmation by the chargee that no event has occurred that has caused any floating charge under the relevant security document to crystallise into a fixed charge over the assets subject to the release. A purchaser of the assets in question may insist on the inclusion of such a confirmation, where:

  - the release relates to assets purportedly subject to a floating charge only; and
  - the purchaser requires comfort that the security over those assets has not been elevated to a fixed charge.

  For an example of non-crystallisation wording, see *Standard document, Letter of non-crystallisation of floating charge*.

OTHER PROVISIONS TO LOOK OUT FOR

- Statements of consideration.

  A chargee may include a statement of consideration in the deed of release in order to clarify why the release has been provided (for example, "in consideration of the irrevocable and unconditional discharge of the secured indebtedness, the Chargee hereby...").

To the extent a statement of consideration is included, ensure it accurately reflects the position. If not, the wording might cast doubt as to whether the deed of release is valid.

- Further assurance.

  A chargor will also expect a deed of release to include a further assurance undertaking on the part of the chargee to take all steps reasonably necessary or desirable to give effect to the transactions contemplated by the deed of release. This is useful, particularly where the deed of release is prepared and entered into on short notice and additional steps (such as the return of original documents of title or the giving of notices to third parties) are likely to be required at a later stage. For information on some procedural steps that may be necessary after security has been released, see *Practice note: overview, Releasing security: Procedural issues*.

- Costs.

  A deed of release may include a costs undertaking whereby the chargor agrees to discharge any costs reasonably incurred by the chargee in connection with the execution and implementation of the deed of release. Such provisions are not unusual but should be aligned where appropriate with any equivalent costs provision in the underlying security or facility agreement.

- Notice to third parties.

  At the time the security was taken, notice may have been provided to third parties (for example, to an insurer where security was taken in connection with an insurance policy). A chargor may therefore seek authorisation from the chargee, within the deed of the release, to allow the chargor to notify such third parties of the release of the relevant security.

- Revocation of rights.

  A chargor may request the release of any rights relating to any power of attorney contained with the relevant security document(s) (without prejudice to anything done by the chargee under that power of attorney before the effective date of the deed of release).

SHOULD THE DEED OF RELEASE BE EXECUTED AS A DEED?

- A release of a legal mortgage over land (or an interest in land) must be executed as a deed. In theory, a release of any security other than a release of mortgage over land (or an interest in land) does not need to be a deed, provided there is consideration for the release.
- In any event, market practice is for security releases to be made by deed to avoid any argument over any lack of consideration and to ensure any third party dealing with the chargor can be comfortable that the release is effective.

POST-EXECUTION CONSIDERATIONS

- Once security has been released, there will likely be certain filings that can be made at various registries to reflect that the release has been given. It is important from a chargor's perspective that any such filings are made so that it is clear to third parties, such as investors and lenders, that the relevant security has been released.

  Filings may need to be made at the following:

  - Companies House.

    It is not mandatory to send confirmation to Companies House of the release of security (or a copy of the deed of release itself) in relation to security granted by an English company or limited liability partnership. That said, as a matter of good house-keeping it is a good idea from a chargor's perspective to submit to Companies House a statement about the release to ensure the chargor's charges register is clean or up to date (which any new funder will want to see). There is no time limit within which such filings need to be made, nor any fee or other penalty associated with failing to do so.

    Note that there are two different forms of Companies House release filing: *Form MR04* (for where the debt for which the charge was granted has been satisfied in full or in part); and *Form MR05* (for where part or all of the property charged (a) has been released from the charge or (b) no longer forms part of the company's property or undertaking).

    A charge can be released in full in circumstances where the underlying debts for which the security was provided remain outstanding. In such cases, the debt is unsecured and it would be appropriate to file Form MR05. Note, however, that Form MR05 cannot be filed if Form MR04 has already been filed.

For more information on filing release statements at Companies House, see *Practice note, Registration of charges created by companies and limited liability partnerships on or after 6 April 2013: Does a company have to register satisfaction of the secured debt or release of a charge?*.

- Land Registry.

  Where the charge that is being released concerns any interest in land that is registered with the Land Registry, a Form DS1 should be filed to cancel any entries relating to that registered charge at the Land Registry. If the discharge related only to part of a registered title, a Form DS3 should be used. For more information on filing releases at the Land Registry, see *Practice note, Releasing security: Land Registry*.

- Intellectual Property Office.

  If the security that has been released was registered at the Intellectual Property Office (IPO) (for example, where the security extended to any patent, trade mark or design mark registered at the IPO), then the IPO should be notified that the security has been released. For more information on filing releases at the IPO, see *Practice note, Releasing security: UK Intellectual Property Office*.

- The chargee may have in its possession certain original documents of title (such as original share certificates, stock transfer forms, title deeds or insurance policies). These should be returned to the chargor at the same time as the deed of release is provided or alternatively (in the case of a refinancing with equivalent security taken over those same assets) handed over to the new chargee or its nominee. For more information, see *Practice note, Releasing security: Shares and securities*.

- If the security that has been released was over a chose in action, notice of the release may need to be given to the relevant counterparty.

  This is because when security is taken over a chose in action, notice of that security interest is usually given to the relevant counterparty in order to protect the chargee's position. So, if notice of a security interest was given to a counterparty, it is good practice to notify that counterparty that the security has been released. For more information, see *Practice note, Releasing security: Choses in action*.