

EXECUTION OF HONG KONG LAW DEEDS BY FOREIGN CORPORATIONS

1. Background

- 1.1 The execution formalities of a Hong Kong law deed by a non-Hong Kong incorporated company (**foreign corporation**) are unclear, which has caused divergent practice amongst practitioners. This issue often arises in the context of Hong Kong law firms giving legal opinions on the enforceability of a Hong Kong law deed to which a foreign corporation is a party.
- 1.2 Section 128 of the Companies Ordinance (Cap. 622) (**CO**) sets out the requirements for a Hong Kong incorporated company to execute a document as a deed, but is silent as regards foreign corporations.
- 1.3 The Conveyancing and Property Ordinance (Cap. 219) (**CPO**) contains statutory presumptions of due execution of a deed by a “corporation”. It is presumed that foreign corporations can benefit from these provisions. While the application of the statutory presumptions is fairly straightforward in cases where the foreign corporation has a corporate seal, the situation is less clear-cut where the foreign corporation does not have a seal. For the reasons outlined below, section 26 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) (**LARCO**) has not entirely addressed the uncertainties in this area.
- 1.4 For ease of reference, the Schedule sets out the following legislative provisions:
 - sections 127, 128 CO;
 - sections 19, 20 CPO;
 - section 26 LARCO; and
 - sections 2 and 3 of the Corporate Bodies Contracts Ordinance (Cap. 293).

2. The current position

- 2.1 In contrast to English law, Hong Kong law does not expressly state that foreign corporations can validly execute a deed in any manner permitted by the laws of its place of incorporation provided the document is expressed to be executed as a deed and is delivered as a deed.

- 2.2 Instead, section 20 CPO contains statutory presumptions that a deed is deemed to have been duly executed by a corporation in the following circumstances:
- (A) if the deed purports to bear the seal of the corporation affixed in the presence of and attested by its secretary or other permanent officer of the corporation and a member of the corporation's board of directors or other governing body or by 2 members of that board or body – section 20(1) CPO;
 - (B) where a person is empowered to execute a deed by the corporation, he may execute it as agent by signing the name of the corporation or his own name and by affixing his own seal – section 20(2) CPO; or
 - (C) where a corporation aggregate is empowered to execute a deed by another person, an officer appointed for that purpose by the board of directors or governing body of the corporation may execute the deed in the name of such other person – section 20(3) CPO.
- 2.3 Under section 26 LARCO, the fact that a power of attorney or document of authorization given by a foreign corporation in favour of a person is not itself under seal does not affect the validity of any instrument *under seal* executed on behalf of the corporation by the person, provided that the power of attorney or document of authorization is valid as such in accordance with the laws of the foreign corporation's place of incorporation.
- 2.4 Although section 26 LARCO on its face states that it applies only where the Hong Kong law deed (to which the power of attorney/authorization relates) is executed *under seal*, the statutory provisions on sealing contained in section 20 CPO (and, according to some, the presumptions in section 19 CPO where a natural person signatory acts under power of attorney) apply when determining whether or not the Hong Kong law deed has been executed under seal.

3. Areas of uncertainty

- 3.1 It is unclear:
- (A) whether board minutes or written board resolutions (or equivalent documents) authorising a person to execute a document on the foreign corporation's behalf could constitute "documents of authorization" under section 26 of LARCO and whether a person so authorised could fall within the scope of section 20(2) CPO as a person "empowered" to execute a deed by the corporation. Some practitioners may regard the minutes/written resolutions as "documents of authorization" whereas others may regard minutes/written resolutions as being internal corporate governance actions (and not documents of authorization given by the foreign corporation);
 - (B) precisely how a person should affix his own seal under section 20(2) CPO:

On the one hand, some practitioners take the view the sealing requirement under section 20(2) CPO for an individual executing on behalf of a corporation can be

met by (for example) the document bearing a *pre-printed* “LS” mark or circle (being a mark intended to represent a seal) next to the individual’s signature. This position would be consistent with: (a) the deeming provision for execution of deeds by individuals under section 19(2) CPO, which states a document shall be presumed to have been sealed by an individual if the document is signed by him/her and either: (i) describes itself as a deed; (ii) states that it has been sealed; or (iii) bears any mark, impression or addition intended to be or to represent a seal or the position of a seal; and (b) the English law case of *First National Securities Ltd v Jones and another* [1978] 2 All ER 221.

On the other hand, others regard the wording “affixing his own seal” under section 20(2) CPO as requiring a person to physically “affix” a seal. Under this interpretation, a pre-printed mark would not be sufficient. Some may require the individual to (for example) affix a red wafer seal. Some may regard the individual writing out or drawing a circle around an “LS” mark as sufficient because the document is indented by the person, though others disagree as it is unclear if a drawing created by way of indentation can be regarded as an affixation of a seal¹; and

- (C) whether the presumptions of execution set out in section 19 CPO apply where an individual signs a deed as donee under a power of attorney granted by a corporation.

4. Potential solution

- 4.1 A way to resolve the above uncertainties is to create an additional process for foreign corporations to execute Hong Kong law governed deeds and to clarify that section 19 CPO applies to an individual acting as a corporation’s attorney (the “**New Proposal**”). The additional process would be broadly modelled on the English law approach, namely the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009² (the “**Regulations**”), although containing language that reflects the drafting approach set out in Part 3, Division 7, Subdivision 2 of the CO and in the Corporate Bodies Contracts Ordinance (Cap. 293).
- 4.2 The additional process would be in addition to the existing methods by which a foreign corporation can execute a Hong Kong deed. Those who are comfortable with the existing options may continue to use them.
- 4.3 The New Proposal involves amending the CO and the CPO to include the following changes:

NEW DEFINITION: section 2 CO

¹ A drawing by indentation cannot be faithfully reproduced, which is a typical characteristic of the mark left by the affixation of a seal.

² <http://www.legislation.gov.uk/ukSI/2009/1917/contents/made>.

Adding a new definition of “foreign corporation” to mean “*any corporate body duly incorporated in accordance with the laws of any place outside Hong Kong*”.³

NEW SECTION: section 127A CO – Execution of documents by a foreign corporation

- (1) *A document may be executed:*
- (a) *subject to subsection (2), by a foreign corporation, under its common seal or in any manner permitted by the laws of its place of incorporation for the execution of documents by such a corporation; or*
 - (b) *on behalf of a foreign corporation, by any person signing on behalf of the foreign corporation provided that the person signing on the foreign corporation’s behalf is acting under its authority, express or implied.*⁴
- (2) *If a foreign corporation executes a document under its common seal, the seal must be affixed in a manner which is valid under the laws of its place of incorporation.*
- (3) *A document executed in accordance with subsections (1)(a) or (1)(b) has the same effect in relation to that foreign corporation as it would have in relation to a company incorporated in Hong Kong if executed under the common seal, and in accordance with the articles, of a company so incorporated.*
- (4) *In favour of a person specified in section 127(7), a document is to be regarded as having been executed by a foreign corporation if the document purports to have been signed in accordance with subsection (1)(b).*
- (5) *This section also applies to a document that is executed, or purports to be executed, by a foreign corporation in the name of or on behalf of another person whether or not that other person is a company, foreign corporation or other type of person.*

NEW SECTION: section 128A CO – Execution of deeds by foreign corporation

- (1) *A foreign corporation may execute a document as a deed by:*
- (a) *executing it in accordance with section 127A;*
 - (b) *having it expressed (in whatever words) to be executed by the foreign corporation as a deed; and*
 - (c) *delivering it as a deed,*

³ This definition is the same as the definition of a “*foreign corporation*” under s.26(2) LARCO.

⁴ This language aligns with the language used in section 2(1)(a) of the Corporate Bodies Contracts Ordinance (Cap. 293).

regardless of whether the laws of its place of incorporation has the concept of deeds.

- (2) *For the purposes of subsection (1)(c), a document is presumed, unless the contrary is proved, to be delivered as a deed on its being executed in accordance with section 127A.*
- (3) *If there is any conflict or inconsistency between this section and the provisions of any other Ordinance, this section prevails over those provisions to the extent of the conflict or inconsistency.*

AMEND SECTION: section 19 CPO – Execution of deed by individual

Adding the following as a new sub-section (6) to section 19 CPO:

- (6) *The presumptions in this section extend to any individual who signs on behalf of a person as donee under a valid power of attorney.*

4.4 The New Proposal would enable a foreign corporation to validly execute a Hong Kong law governed deed in any one of three ways:

- (A) by affixing its common seal in accordance with its constitutional arrangements or which is otherwise valid under the laws of the place in which the foreign corporation is incorporated;
- (B) in any manner permitted by the place in which the foreign corporation is incorporated for the execution of documents by such a corporation; or
- (C) by any person signing on behalf of the foreign corporation where the person signing is acting under the authority (express or implied) of that foreign corporation in accordance with the laws of its place of incorporation,

and, in each case, the document stating (in whatever words) that it is executed by the company as a deed and is delivered as a deed.

4.5 The New Proposal would also clarify that the individual presumptions of execution in section 19 CPO apply to an individual signing as donee under a power of attorney.

4.6 Consideration should be given on whether to extend the above to cover execution by a foreign unincorporated entity – the definition of which could be based on the definition of an “undertaking” in section 367(5) CO.⁵

⁵ Section 367(5) CO defines “undertaking” as “(a) a body corporate; (b) a partnership; or (c) an unincorporated association carrying on a trade or business, whether for profit or not”

- 4.7 Although the CO is the natural choice to house the proposed statutory provisions, an alternative choice is the Corporate Bodies Contracts Ordinance (Cap. 293).⁶

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⁶ The Corporate Bodies Contracts Ordinance (Cap. 293) governs contracts under hand made by a foreign corporation in writing signed by any person acting under its authority, express or implied.

Schedule

(Legislative Provisions)

CO (CAP. 622)

127 CO – Execution of documents by company

- (1) A company may execute a document under its common seal.
- (2) If a company executes a document under its common seal, the seal must be affixed in accordance with the provisions of its articles.
- (3) A company may also execute a document—
 - (a) in the case of a company with only one director, by having it signed by the director on the company's behalf; or
 - (b) in the case of a company with 2 or more directors, by having it signed on the company's behalf by—
 - (i) the 2 directors or any 2 of the directors; or
 - (ii) any of the directors and the company secretary of the company.
- (4) For the purposes of subsection (3), if a person is to sign a document on behalf of 2 or more companies, the person must sign the document separately in each capacity.
- (5) A document signed in accordance with subsection (3) and expressed (in whatever words) to be executed by the company has effect as if the document had been executed under the company's common seal.
- (6) In favour of a person specified in subsection (7), a document is to be regarded as having been executed by a company if the document purports to have been signed in accordance with subsection (3).
- (7) The person is a purchaser in good faith for valuable consideration and includes—
 - (a) a lessee;
 - (b) a mortgagee; or
 - (c) any other person who for valuable consideration acquires the property.
- (8) This section also applies to a document that is executed, or purports to be executed, by a company in the name of or on behalf of another person whether or not that other person is also a company.

128 CO – Execution of deeds by company

- (1) A company may execute a document as a deed by—
 - (a) executing it in accordance with section 127;
 - (b) having it expressed (in whatever words) to be executed by the company as a deed; and
 - (c) delivering it as a deed.
- (2) For the purposes of subsection (1)(c), a document is presumed, unless the contrary is proved, to be delivered as a deed on its being executed in accordance with section 127.
- (3) If there is any conflict or inconsistency between this section and the provisions of any other Ordinance, this section prevails over those provisions to the extent of the conflict or inconsistency

CPO (CAP. 219)

19 CPO - Execution of deed by individual

- (1) A deed by an individual shall be signed by him.
- (2) A document shall be presumed to have been sealed by an individual if the document signed by him—
 - (a) describes itself as a deed; or
 - (b) states that it has been sealed; or
 - (c) bears any mark, impression or addition intended to be or to represent a seal or the position of a seal.
- (3) Subsection (1) applies only to documents executed after the commencement* of this section.
- (4) Subsection (2) applies to a document executed before or after the commencement of this section.
- (5) This section does not affect any other law by which an individual may authorize another person to sign a deed on his behalf. (*Added 31 of 1988 s. 10*)

Editorial Note:

* Commencement date: 1 November 1984.

20 CPO - Execution of deed by corporation

- (1) In favour of a person dealing with a corporation aggregate in good faith, his successors in title and persons deriving title under or through him or them, a deed shall be deemed to have been duly executed by the corporation if the deed purports to bear the seal of the corporation affixed in the presence of and attested by its secretary or other permanent officer of the corporation and a member of the corporation's board of directors or other governing body or by 2 members of that board or body. (*Amended 31 of 1988 s. 11*)
- (2) Where a person is empowered to execute a deed by a corporation, he may execute the deed as agent by signing the name of the corporation or his own name and by affixing his own seal. (*Amended 31 of 1988 s. 11*)
- (3) Where a corporation aggregate is empowered to execute a deed by another person, an officer appointed for that purpose by the board of directors or other governing body of the corporation may execute the deed in the name of such other person; and where a

deed purports to be so executed then the deed shall, in favour of a person dealing with the corporation in good faith, be deemed to have been executed by an officer duly authorized.

- (4) This section applies to transactions wherever effected, but only to deeds executed after the commencement* of this section; except that, in the case of powers of appointment of an officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this section.

[cf. 1925 c. 20 s. 74 U.K.]

Editorial Note:

* Commencement date: 1 November 1984.

LARCO (CAP. 23)

26 LARCO - Validity of instruments under seal executed by persons not appointed under seal

- (1) The fact that a power of attorney or document of authorization given by a foreign corporation to or in favour of any person is not under seal shall not, if such power of attorney or document of authorization is valid as a power of attorney or document of authorization in accordance with the laws of the place under which such corporation is incorporated, affect, for any purpose intended to be effected within Hong Kong, the validity or effect of any instrument under seal executed on behalf of such corporation by such person, which shall for all such purposes be as valid as if such authority had been under seal.

- (2) In this section, **foreign corporation** (外地法團) means any corporate body duly incorporated in accordance with the laws of any place outside Hong Kong.

*(1 of 1920 ss. 2 & 3 incorporated. Replaced 53 of 1971 s. 3.
Amended 23 of 1998 s. 2)*

CORPORATE BODIES CONTRACTS ORDINANCE (CAP. 293) (CBCO)

2 CBCO – Cases where contracts need not be under seal

- (1) Contracts may be made on behalf of any body corporate, wherever incorporated, as follows-
 - (a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the body corporate in writing signed by any person acting under its authority, express or implied; and
 - (b) a contract which if made between private persons would by law be valid although made by parol only and not reduced into writing may be made by parol on behalf of the body corporate by any person acting under its authority, express or implied.
- (2) A contract made according to this section shall be effectual in law, and shall bind the body corporate and its successors and all other parties thereto.
- (3) A contract made according to this section may be varied or discharged in the same manner in which it is authorised by this section to be made.
- (4) Nothing in this section shall be taken as preventing a contract under seal from being made by or on behalf of a body corporate.
- (5) This section shall not apply to the making, variation or discharge of a contract before the commencement of this Ordinance but shall apply whether the body corporate gave its authority before or after the commencement of this Ordinance.

[cf. 1960 c. 46 s. 1 U.K.]

3 CBCO – Exclusion of companies under Companies Ordinance (Cap. 622)

- (1) This Ordinance shall not apply to any company formed and registered under the Companies Ordinance (Cap. 622) or to any existing company as defined in that Ordinance.

(Amended 28 of 2012 ss. 912 & 920; E.R. 2 of 2014)

[cf. 1960 c. 46 s. 2 U.K.]