

Lending to a Company in Hong Kong: Legal and Documentation Issues

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A Practice Note providing an overview of the key legal and documentation considerations for a loan agreement which is subject to English law or the law of a US state where a borrower, guarantor or security provider is incorporated in Hong Kong.

This Note is intended to be used for a loan financing where a borrower, guarantor or security provider (**an obligor**) is incorporated in Hong Kong. While the issues to be considered in relation to an obligor when drafting a loan agreement, guarantee, or security document will be broadly similar regardless of an obligor's jurisdiction of incorporation, there will typically be jurisdiction-specific issues that will need to be considered.

It is important to identify any legal or documentation issues, specific practices or concerns early in a loan finance transaction which involves an obligor incorporated in a jurisdiction other than the governing law of the loan financing documentation. This will then make it easier to ensure that these issues, practices and concerns do not have a negative impact on the transaction timeline or lead to unnecessary transaction costs. Transaction-specific advice from lawyers in the appropriate jurisdiction should be taken in due course and appropriate amendments will need to be made to the documents used in the transaction.

This Note looks at the key legal and documentation issues for a corporate loan made under a loan agreement which is subject to English law or the law of a US state to an obligor incorporated in Hong Kong. It covers the following:

- Legal issues such as corporate authority and corporate benefit, laws of general application to lending, granting of security interests and guarantees, laws affecting the amount of interest charged and whether the concepts of facility agent and security trustee are recognised in Hong Kong.
- Documentation issues such as typical contractual terms (for example, representations, undertakings (or covenants) and events of default), jurisdiction and arbitration provisions, and execution formalities.

This Note assumes the following:

- The obligor is a company incorporated in Hong Kong.
- The loan agreement is subject to English law or the law of a US state.

Legal Issues

Corporate Authority

Broadly, the Companies Ordinance (Cap. 622) (the **Companies Ordinance**) does not impose specific restrictions on the powers of a Hong Kong company to borrow or to create guarantees or security. However, a company's constitutional documents may impose limits on its powers to give guarantees or security, or on its borrowing powers, for example, setting a maximum amount that can be borrowed. If a borrower has adopted Table A of Schedule 1 to the old Companies Ordinance (Cap. 32) as its articles of association, it will be subject to a borrowing limit in an amount equal to the nominal amount of its issued share capital. There is no such limit, if a borrower has adopted the Model Articles prescribed in Schedule 2 to the Companies (Model Articles) Notice (Cap. 622H) as its articles of association.

Arguably, these restrictions should not affect a lender's rights. Under section 116 and section 120 of the Companies Ordinance, for example, a loan to a borrower in excess of a limit stipulated in its articles of association does not necessarily render the loan invalid, and a lender is not presumed to have notice of the limit merely because it is disclosed in the borrower's articles of association.

In addition, even if the directors of a borrower are found to have approved a transaction in excess of a borrowing limit imposed in its articles of association, a lender may not be affected if one of the following protections is available:

- The common law rule in *The Royal British Bank v Turquand* (1856) 6 El. & Bl. 327, under which a person dealing with a company in good faith without knowledge to the contrary is generally entitled to assume that the company's internal procedures have been duly complied with.
- The statutory indoor management rule under section 117 of the Companies Ordinance, which provides that an outsider dealing with the company in good faith is entitled to assume that the power of the directors to bind the company, or authorise others to do so, is free of any limitation under its articles of association.
- The doctrine of apparent authority, under which a company will be bound by contracts purporting to be made on its behalf by a person who has apparent authority to bind the company.
- The statutory presumption under section 461 of the Companies Ordinance, which provides that the act of a director is valid even if a defect is discovered afterwards (for example, where the person was disqualified from acting as a director or the director was not entitled to vote on the matter in question).

Approval from the shareholders or members of a Hong Kong-incorporated borrower is generally not required for entering into a loan agreement if there are no relevant requirements in its articles of association or contractual arrangements with its shareholders.

Corporate Benefit

A Hong Kong company has the same capacity and power to borrow or to give a guarantee or security as a natural person of full age (section 115, Companies Ordinance). However, when exercising the company's power to give a guarantee or security, its directors have a fiduciary duty to act in the best interests of the company. In particular, when considering the giving of an upstream or cross-stream guarantee or security by a company, the directors will have to consider whether such an act is in the best interests of the company, and whether the company derives any corporate benefit from it. Merely including the words "best interests" in board minutes will not cure what would otherwise be a breach of duty. The crucial factor is the reason why the directors made the decision they made. Where the benefit to the company is open to doubt (and particularly where the company is giving a guarantee or third-party security), the minutes should explain the reasons why the directors resolved to enter into the transaction.

A finance transaction can be set aside where it was entered into in breach of duty by the company's directors and the lender had actual or constructive notice of that fact. If a lender knew that a director was in breach of his fiduciary duty when the corporate guarantor entered into a guarantee, the guarantor may be able to set aside the guarantee.

Where there is any doubt, it is prudent to obtain shareholders' approval in respect of the relevant loan finance transaction.

Laws of General Application Relating to Lending, Granting of Security and Guarantees

Financial Assistance

A Hong Kong company is prohibited from providing financial assistance for the purpose of acquiring its own shares or the shares in its Hong Kong parent company before or at the same time as the acquisition takes place, as well as for the purpose of reducing or discharging the liability incurred for the purpose of the acquisition after the acquisition of shares has taken place (section 275, Companies Ordinance).

This prohibition is subject to various exceptions under sections 277 to 281 of the Companies Ordinance. For example, section 278 of the Companies Ordinance provides that a company can give financial assistance if the principal purpose is not to assist the acquisition of shares in the company or its holding company, and the assistance is given in good faith in the interests of the company.

A Hong Kong company may also provide financial assistance if it satisfies the solvency test and complies with one of the three alternative authorisation procedures described in sections 283 to 285 of the Companies Ordinance, which permits as follows:

- Financial assistance not exceeding five per cent of the paid-up capital of the company with directors' approval (section 283, Companies Ordinance).
- Financial assistance given with unanimous shareholders' approval (section 284, Companies Ordinance).
- Financial assistance approved by ordinary resolution of the shareholders, subject to the right of objection of dissenting shareholders holding at least five per cent of the voting rights of the company (section 285, Companies Ordinance).

Failure to comply with the rules prohibiting financial assistance is an offence for which the company and every responsible person (including an officer, a director or a shadow director of the company) may be liable to a fine of up to HKD150,000 and imprisonment for a maximum period of 12 months. A lender, including a bank, may constitute a "shadow director" if the directors of the company are accustomed to act in accordance with its directions or instructions.

Although a contract (such as a loan agreement) connected to financial assistance will not be invalidated only because of a contravention of the financial assistance provisions (*section 276, Companies Ordinance*), it may be set aside on other grounds. For example, if directors have breached their general duties owed to a company and have themselves received company assets resulting from the financial assistance, the company's general remedies against its directors for breach of duty could result in a contract being set aside.

Effect of Insolvency on Certain Antecedent Transactions

At the time of the winding up of a company, the liquidator may look back at a company's transactions and may be able to set aside certain transactions. These are broadly covered by the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (**CWO**) in section 265D (transaction at an undervalue), section 266 (unfair preference) and section 267 (avoidance of floating charge).

For further information, see *Practice Note, Lending to a Company in Hong Kong: Structuring the Transaction*.

Restriction on Interest Rates, Accrual of Default Interest and Other Fees Payable

It is generally a criminal offence on the part of a lender for a loan to have an effective interest rate exceeding 48% per annum (section 24, Money Lenders Ordinance (*Cap. 163*) (**Money Lenders Ordinance**)). If the interest rate exceeds this percentage, the loan and any underlying security could also be unenforceable.

If the effective rate of interest on a loan exceeds 36% per annum (but does not exceed 48% per annum), there is a rebuttable presumption that the loan transaction is extortionate (section 25, Money Lenders Ordinance). In such circumstances, a Hong Kong court could re-open the transaction and hold the loan to be unenforceable.

A money lender (that is, a person whose business is that of making loans, but excluding certain categories of lender (such as subsidiaries of an authorised institution) and certain categories of loan (such as intra-company loans)) must not charge compound interest or impose a "step-up" in the contractual interest rate following a borrower's payment default (section 22, Money Lenders Ordinance). This prohibition, however, generally does not apply to simple interest charged by a money lender on an overdue amount from the date of default until it is paid in full. It also does not apply to banks within the meaning of the Banking Ordinance (*Cap. 155*) (companies holding a Hong Kong banking licence), which may therefore charge compound interest.

A provision for the payment of a sum in the event of a breach of contract is unenforceable if it is construed as a penalty. A contractual clause may provide for the payment of a sum by the party in breach to the other party and purport to compensate the innocent party for damages and loss suffered. Generally, if the sum is a reasonable estimate of the probable loss that the innocent party may suffer as a result of a breach it will be a valid clause. On the other hand, if the clause aims to punish the party in breach, instead of protecting the legitimate interests of the innocent party, it will be an invalid penalty clause.

Subject to the above restrictions, a loan agreement specifying that interest accrues from day to day and is calculated on the basis of the actual number of days elapsed, and a year of 365 or 360 days, is generally enforceable under Hong Kong law.

Is the Concept of a Facility Agent or Security Trustee Recognised?

Facility Agent

The agency concept is recognised in Hong Kong. In a typical loan agreement, the obligations of an administrative agent are stipulated in the agreement and generally include the following:

- Examining utilisation requests from a borrower.
- Checking conditions precedent.
- Transferring funds.
- Calculating interest, exchange rates and additional costs.
- Notifying the lenders of any actual default and acting in accordance with the instructions of majority lenders.
- Distributing information received pursuant to the terms of the loan agreement.
- Administering transfers of loans and commitments.

In addition to the contractual obligations, an agent owes certain implied duties, such as a duty to exercise reasonable skill and care, as well as fiduciary duties including the following:

- A duty not to put itself in a position in which there would be a conflict.

- A duty not to make a secret profit.
- A duty to act with its undivided loyalty.
- A duty of confidentiality.

It is market practice to include in a loan agreement wording specifying that some general implied duties of an agent or fiduciary shall not apply to the facility agent and to permit it to continue commercial relations with the borrower outside the loan finance transaction.

Security Trustee

Generally, security can be granted by a borrower to a security agent or trustee who holds the security rights and deals with them on behalf of the members of a group of lenders from time to time. An original lender or the arranger is commonly appointed as the security agent or trustee. In more complex transactions, a third-party security agent or trustee may be appointed.

The powers and duties of a security agent or trustee are usually set out in the finance documents and include the power to transfer and manage the assets which are subject to the security and the power to enforce the security and apply the proceeds to the lenders' claims, acting on the instructions of the lenders.

Unless the finance documents provide otherwise, certain statutory powers are conferred on the security trustee by the Trustee Ordinance (Cap. 29), such as the power of investment and the power to retain the security based on the trustee's discretion. Furthermore, the security trustee is generally subject to a statutory duty of care under the Trustee Ordinance (Cap. 29) and the fiduciary duty at common law.

Set-Off

Excluding insolvency proceedings, rights of set-off can be, and frequently are, either extended or limited by contract. It was held in an English case (*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689) that there is nothing to prevent the parties to a contract from extinguishing, curtailing or enlarging their ordinary rights of set-off, provided they do so expressly or by clear implication. Accordingly, parties may generally contract out of the right of set-off, provided that this is done by clear and unequivocal words. This principle has been applied by Hong Kong Courts in, for example, *Cheong Nin Investment Co Ltd & Anor v Tokyo Shop Ltd* [2004] HKCU 1442, where the tenant was not able to set off the expenses and loss incurred as a result of water leakage against the landlord's claim for arrears of rent, since the terms of the tenancy agreement provided that rent was payable without any deduction or right of set-off.

However, if the borrower is insolvent and there have been mutual dealings between the borrower and the lender, a contractual right of set-off may not be enforceable. In this type of situation, statutory mandatory set-off rules, which cannot be contracted out of, applies. Accordingly, the insolvency rules regarding set-off may prevail over contractual provisions.

Unlawful or Illegal Purpose of Loan

Loan agreements usually set out the purpose of a loan and the borrower is obliged to apply the loan proceeds for the specified purpose. The borrower would be in breach of its obligations under the loan agreement if it applied the loan proceeds for another purpose, allowing the lender to accelerate the repayment of the loan. Accordingly, including an express purpose clause in the loan agreement mitigates the risk that the loan proceeds will be used for an illegal purpose.

In the situation where the loan agreement specifies a legal purpose but the borrower uses the loan proceeds for an illegal purpose, whether a loan agreement will remain enforceable depends on the knowledge of the lender. If a lender has knowledge that the

borrower intends to apply the loan proceeds for an illegal purpose but nonetheless proceeds to make the loan, a loan agreement may be unenforceable. Depending on the circumstances, the lender may also face liability for abetting the illegal purpose.

A loan agreement with an express illegal purpose, such as for the purpose of circumventing sanctions or bribery rules or for the avoidance of tax regimes, will be deemed an illegal contract and will be unenforceable even if the lender is unaware of the illegality.

Documentation Issues

Finance Documentation: Mandatory Clauses and Layout

Requirement for a Written Contract

Very few types of contracts need to be in writing as a matter of Hong Kong law, although the evidential advantage means that in practice most agreements are in writing.

Loan agreements can be entered into as simple contracts. In the case of banks and other persons that are not money lenders (see *Restriction on Interest Rates, Accrual of Default Interest and Other Fees Payable*), there is no specific requirement as to the form or layout of the agreement. However, as a matter of practice, the forms of documents prepared by the Asia Pacific Loan Market Association have been widely regarded or adopted as the benchmark for commercial loan facilities. Under Hong Kong law, there is no requirement to enter into a promissory note in addition to a loan agreement.

In the case of money lenders, certain criteria must be fulfilled for a loan agreement to be enforceable (section 18, Money Lenders Ordinance). The loan agreement must be in writing and signed by the borrower and the loan agreement must contain all material terms, including:

- Name and address of the money lender, the borrower and any surety.
- Amount of principal, in words and figures.
- Date of entering into the loan agreement.
- Date of making the loan.
- Terms of repayment of the loan.
- Form of security for the loan, if any.
- Rate of interest charged on the loan, expressed as a percentage rate per annum.
- A declaration as to the place of negotiation and completion of the loan agreement.

Security documents other than mortgages of land do not need to be in writing, as a matter of law, however, if a document has to be presented for registration at the Hong Kong Companies Registry it is required to be in writing. In practice, all security documents are in writing.

Other agreements which are relevant to banking transactions and must be in writing include as follows:

- Statutory assignments, which must be signed by the assignor (*section 9, Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)*).
- Assignments of copyright, which must be signed by the assignor (*section 101(3), Copyright Ordinance (Cap. 528)*).
- Contracts for the sale or disposition of an interest in land and declarations of trust relating to land, which must be signed by the person effecting the contract or disposition or establishing the trust (*sections 3 and 5, Conveyancing and Property Ordinance (Cap. 219) (CPO)*).

Requirement for a Deed

As a matter of Hong Kong law, a deed is only required in very few cases. Examples are:

- Mortgages of land (*section 44(1), CPO*).
- Powers of attorney (*section 2(1), Powers of Attorney Ordinance (Cap. 31)*).
- Transfers of a legal interest in land (*section 4, CPO*).

In practice, all security documents are generally executed as deeds because they contain security powers of attorney.

Conditions Precedent

Drawdown conditions vary depending on the nature, size and complexity of the particular transaction. Common conditions to drawdown include the following:

- Copies of the constitutional documents of each obligor.
- Copies of the corporate authorisations of each obligor, which may include resolutions of the board of directors and, where necessary, the shareholders.
- Director's certificate of each obligor, in which the director certifies the validity of documents and specimen signatures provided, and confirms certain representations and warranties.
- Security documents in connection with the loan agreement, duly executed by the parties, together with related documents such as notices to third parties, share certificates and instruments of transfer, for the purposes of perfecting the security interest.
- Other finance documents in connection with the loan agreement (such as an intercreditor agreement, fee letters or a subordination deed), duly executed by the parties.
- Legal opinions.
- Financial information in relation to each obligor.
- Evidence of the appointment of a process agent.
- Evidence showing that the borrower has complied with "know your client" and anti-money laundering requirements of the lenders.
- If the purpose of the loan is to finance the acquisition of a company or certain assets, copies of the acquisition documents and any shareholders' agreements.

- If the purpose of the loan is to finance the construction and development of certain projects, copies of the project documents.

Repayment and Voluntary Prepayment

A lender's right to require early repayment (that is, by acceleration or mandatory prepayment) is generally a matter of contract. A borrower's right to make an early repayment of a loan (voluntary prepayment) is also generally a matter of contract. The lender may set a minimum prepayment amount and request a prepayment fee. Further, in the case of money lenders' transactions, section 21 of the Money Lenders Ordinance entitles a borrower to make early repayment of such a loan by notice in writing to the money lender, even if the loan agreement itself is silent on this point.

There is no general statutory restriction preventing repayment of a loan by instalments. Whether a loan is repayable by a single payment or by instalments is generally a matter of contract. In money lenders' transactions, it is illegal to prohibit repayment of the loan in instalments (section 22, Money Lenders Ordinance).

Representations and Warranties

The representations of a borrower, guarantor or material subsidiary reflect the factual basis on which a lender is willing to enter into the transaction. They cover matters such as the legal validity of its obligations under a loan agreement and related documents (commonly referred to as “legal representations”) and its financial condition, business and assets (commonly referred to as “commercial representations”). The list of representations set out in the forms of documents prepared by the Asia Pacific Loan Market Association has been widely adopted.

Undertakings

Restriction on Undertakings

There are generally no restrictions on the types, duration, or geographical scope of undertakings that can be given by the borrower to the lender in a loan agreement, unless they are unlawful.

Environmental Undertakings

Generally, a lender does not incur liability by reason of the actions or omissions of a borrower, guarantor or security provider, because the debtor-creditor relationship does not give rise to liability for acts of the other party. A holder of security over assets is not liable for environmental damage, provided it does not take possession of the assets and does not itself cause, or knowingly permit, damage to the environment.

However, on the occurrence of an event of default, care must be taken if the security interest is enforced because the lender may be liable as a mortgagee in possession if it takes possession of the assets which are subject to the security.

In practice, loan agreements often include representations, warranties and undertakings with the aim of protecting the lender against potential environmental claims. For example, the borrower could represent that it has complied with, and undertakes to comply with, all environmental laws, and maintains all requisite environmental permits. The borrower may also be required to undertake that it will promptly inform the lender if there is any environmental claim which has been commenced or is threatened against it. A breach of these representations, warranties or undertakings is likely to constitute an event of default, allowing the lender to demand full repayment of the loan.

Breach of Negative Pledge

A negative pledge gives the lender no proprietary interest in the borrower's assets. It merely gives rise to a personal claim against the borrower if it is breached. Its effectiveness as a way to prevent other creditors from obtaining a proprietary interest in the borrower's assets depends largely on whether the borrower complies with it.

As a matter of contract between lenders and borrowers, however, a negative pledge is effective to restrict the borrower's authority to deal with its assets. If a negative pledge is breached, the most commercially important sanction is normally that there will be an event of default, entitling the lender to early repayment of the loan and to exercise other rights and remedies.

The extent to which a negative pledge will affect the rights of third parties depends on the knowledge of the third party. If another creditor takes security from the borrower knowing that the borrower will breach its negative pledge in granting that security, the lender might have a tortious claim against that creditor for inducing a breach of contract. However, this is unlikely to be straightforward. If a negative pledge is contained in a floating charge document, then, depending on the circumstances, the registration of the floating charge document at the Hong Kong Companies Registry may constitute notice (actual or constructive) to a third party. If this is the case, the knowledge of the third party might have an effect on the priority between that floating charge and any subsequent fixed charge over the same assets.

Events of Default

There is generally no restriction as to what events can be categorised as events of default, provided that the provision is clear and unambiguous. It is for the parties to decide what to include as events of default, and how they should be drafted. There is, however, a fairly typical basic list which includes:

- Non-compliance with the loan agreement or other finance documents (for example, non-payment, breach of obligations, misrepresentation or breach of financial covenants).
- Credit events affecting the borrower and (if appropriate) its corporate group (for example, default under other transactions, insolvency and insolvency proceedings, creditors' process and material adverse change).

Generally, a loan agreement will provide that, following an event of default, a lender is entitled to demand immediate early repayment, or declare that the loans are repayable on demand, and cancel its commitments so that no further drawdowns will be possible. This type of provision is generally enforceable against an obligor incorporated in Hong Kong and may operate automatically or by a notice from the lender to the borrower, although it is more common for loan agreements to provide for acceleration by notice.

Under Hong Kong law, limitations on a borrower's right to cure an event of default or a lender's right to waive an event of default are contractual in nature. For example, the borrower may only be able to cure an event of default within a grace period specified in the loan agreement.

Loan Transfers

There are no restrictions relating to a transfer of a lender's outstanding rights and obligations under a loan agreement, guarantee or security document unless the contract provides otherwise. There are essentially three mechanisms by which a lender may dispose of a loan asset:

- Novation, which is the most commonly used mechanism and is normally carried out by way of a transfer certificate already provided for in the underlying loan agreement. In the context of a loan agreement, this means that the loan purchaser is substituting the transferor in respect of the transferor's rights and obligations in relation to the loan

agreement. It involves discharging the original contract between the borrower and the transferor and replacing it with a new contract.

- Assignment, under which the assignor is able to assign only the benefit of the loan agreement to the loan purchaser but not any outstanding obligations, making this mechanism not practical in the context of facilities which are not fully drawn or which are revolving facilities.
- Sub-participation, which is not a true transfer of a loan asset, as the loan purchaser is reliant on the continued creditworthiness and solvency of the lender on record in order to recover amounts from the lender on record and amounts paid by the borrower under the underlying security package.

One of the main problems in relation to novation is its effect on existing security provided by the borrower in favour of the transferor. Security in favour of the transferor may be extinguished upon a novation because the novation has the effect of releasing the obligations which the security is expressed to secure. This is one of the reasons why many security documents for syndicated transactions provide for a security trustee to hold the security on trust for the benefit of all future lenders. Such security trust structures are enforceable under Hong Kong law (see *Security Trustee*).

In the case of bilateral loan agreements, transfer by way of novation requires consent of the borrower. Separate agreements need to be entered into at the time of transfer for that purpose and all the security for the loan is likely to need to be reconstituted.

Jurisdiction Clause

The High Court of England and Wales has confirmed the validity of a jurisdiction clause permitting the lender to commence proceedings in any jurisdiction but restricting the borrower to one specific jurisdiction if it wishes to commence legal proceedings (*Commerzbank AG v Liquimar Tankers Management Inc [2017] EWHC 161 (Comm)*).

The principles involved were considered and accepted by the Hong Kong courts in *Industrial and Commercial Bank of China (Asia) Ltd v Wisdom Top International Ltd [2020] 5 HKC 537*, [2020] HKCFI 322 and *Union Bank Of India v Glory Universal Group Inc and others [2020] HKCU 4326*.

Arbitration

Hong Kong is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the *New York Convention*) by virtue of China's accession to the same. An award of an arbitral tribunal seated in a foreign country that is a signatory to the New York Convention may be enforced in Hong Kong in the same manner as a judgment of the Hong Kong court, with the leave of the court under sections 84 and 87 of the Arbitration Ordinance (Cap. 609). It is not open to the Hong Kong court to revisit the issues in the arbitration unless there are allegations of fraud. With the exception of fraud, the Hong Kong Court will not permit a respondent to argue the merits of its case for a second time.

Execution Formalities

Loan Agreements

Typically, a loan agreement governed by Hong Kong law can be entered into as a simple contract (under hand). Unless there are specific requirements set out in its constitutional documents, there are no particular signing, witnessing or notarisation requirements for a company in relation to a loan agreement.

Guarantees and Security Documents

Deeds are common, but not required, for guarantees and security documents.

The former requirement for a Hong Kong company to have a metallic common seal no longer exists under the Companies Ordinance. However, Hong Kong companies may still use a common seal if they wish. Since having a common seal is optional under the Companies Ordinance, a Hong Kong company which has a common seal will have a choice of whether to use its common seal when executing a deed.

If a common seal is affixed to a deed, the general rule is that, in order to be binding on the company, the deed must be executed in accordance with the formalities set out in the company's articles of association. It is therefore essential for a lender to check the articles of association if a company chooses to execute a deed by affixing its common seal to it. Articles of association of Hong Kong companies can vary in this respect. Under Article 81 of the Model Articles (for private companies limited by shares) in Schedule 2 to the Companies (Model Articles) Notice (Cap. 622H), the common seal can be used only by the authority of the directors. Article 81 also states that, unless otherwise decided by the directors, if the company chooses to affix its common seal to a document, the document must be signed by at least one director and one authorised person of the company (a second director, the company secretary or some other person appointed by the directors for the purpose). Such a requirement for two signatures is not satisfied by a director who is also the secretary signing in two capacities.

Since a common seal is no longer compulsory under the Companies Ordinance, section 127 of the Companies Ordinance sets out how a document can be executed without a common seal but having the legal effect as if executed under common seal. A company may execute a document by having it signed by two directors, or by a director and the company secretary. In the case of single-director companies, signature by that one director is sufficient. Where a document is signed in accordance with section 127 of the Companies Ordinance and expressed to be executed by the company, the document takes effect as if it was executed under the company's common seal.

The Companies Ordinance also contains express provisions dealing with execution of deeds. Under section 128(1) of the Companies Ordinance, a company may execute a document as a deed by doing all of the following:

- Executing it in accordance with section 127 of the Companies Ordinance.
- Having it expressed to be executed by the company as a deed.
- Delivering it as a deed.

A document is presumed, unless the contrary is proved, to be delivered as a deed on it being executed in accordance with section 127 of the Companies Ordinance.

Witnessing

In the case of contracts and deeds executed by companies, witnessing is generally not required unless it is required by law. By statute, certain contracts and deeds must be witnessed. This is the case for bills of sale and also powers of attorney if they are not signed by the donor but by a representative in the presence of the donor.

Registration of security and notarisation

For information in relation to registration of security and notarisation, see *Practice Note, Lending to a Company in Hong Kong: Structuring the Transaction*.

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