WHAT IS THE LAW ON EXECUTION OF DEEDS UNDER SINGAPORE LAW AND HOW COULD THE LAW BE CHANGED TO ALLOW FOR ELECTRONIC DEEDS?

Posted on September 25, 2023

Category: CNPupdates

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Introduction

Many Singapore lawyers are conscious of the increasing demands of clients to allow the electronic execution of documents and the difficulties they face in advising on the execution of deeds under Singapore law. This note seeks to put the issues in the particular context of cross-border transactions, since it is in this context that the default reflex of Singapore lawyers that a deed needs to be executed in wet ink and physically delivered (and sealed, except in the case of a Singapore company) comes up against the harsh fact that this approach is fast becoming outmoded in a world that increasingly has done away with these formalities. To take England as an example, any requirements of form or seal in relation to a deed were removed as far back as 1989. The Law Society of England & Wales and the City of London Law Society published guidance on electronic execution of documents, including deeds, on 2 October 2022. Recently Australian banks have got comfortable with the electronic execution of financing documents, including security documents executed as deeds, and lenders in the US execute security documents as indentures using electronic signatures. It is, therefore, useful to understand as a Singapore lawyer a little about the extent of the constraints imposed by Singapore law as it stands and also the extent of the limited changes in the law that will be required to bring Singapore more into line with the digital world that increasingly is the norm outside its borders.

We will also comment on the treatment of foreign companies executing Singapore law deeds, as this is another area where not only is there some confusion (not without justification we may add) about the application of the law, but also there are some limited modifications to Singapore law that can be fairly easily made which will resolve the difficulties.

What is the law on execution of deeds under Singapore law and how could the law be changed to allow for electronic deeds?

Andrew Phang's "The Law of Contract in Singapore" (2012) at para says:

"At common law, a deed is a document that is signed, sealed and delivered. In determining whether a document is a deed, the critical test is whether the party executing the same has intended the document to take effect as a deed. If such intention exists, it is immaterial that no physical seal has been affixed to the document. Conversely, a document does not constitute a deed by reason only of the fact that it is executed under seal, although it may serve as evidence of the parties' intention to execute the document as a deed."

Singapore's Court of Appeal in *obiter* in *Lim Zhipeng v Seow Suat Thin and another matter* 2 SLR 1151 ("***Lim Zhipeng***") held that the sealing requirement could be satisfied notwithstanding the lack of a physical seal if the document was executed with the clear intention of delivering it as the deed of the party executing it. The Court of Appeal also cited the case of *First National Securities Ltd v Jones and another* CH 109 ("***First***

National Securities") where the defendant signed across a circle containing the letters "L.S." and the English Court of Appeal held that the document was executed as a deed notwithstanding the lack of a physical seal.

Deeds are also often considered by Singapore lawyers to require to be wet inked in physical form, as they consider this as a requirement under common law, and sometimes they refer to the old English requirement for deeds to be written on paper, parchment, or sheepskin formalised in the ruling of *Goddard's Case* (1584) 2 Co Rep 4b, 5a; 76 ER 396, 398–399. It may well be correct that, under common law, a deed needs to be in physical form and signed in wet ink, since to do away with the formalities around deeds under English law, it was felt necessary in the Law of Property (Miscellaneous Provisions) Act 1989 ("**Law of Property Act**") to abolish:

"Any rule of law which (a) restricts the substances on which a deed may be written; (b) requires a seal for the valid execution of an instrument as a deed by an individual; or (c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed".

Instead, under section 1(2):

"an instrument shall not be a deed unless (a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and (b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties."

For the purposes of 2(a) above, an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal.

For the purposes of 2(b) above, an instrument is validly executed as a deed by an individual if, and only if (a) it is signed (i) by him in the presence of a witness who attests the signature; or (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and (b) it is delivered as a deed.

"Sign", in relation to an instrument, includes making one's mark on the instrument, and "signature" is to be construed accordingly.

Singapore law does not legislate in this way as regards deeds, and the requirement for an individual to execute a deed before a witness who attests to the document does not seem to feature in cases like *Lim Zhipeng*, but it is often mentioned by Singapore lawyers that it is advisable for a Singapore law deed executed by an individual to meet these requirements.

In relation to the delivery of Singapore law deeds, there is no requirement for physical delivery per *Unitrack Building Construction v GHL* 1 SLR(R) 967 ("***Unitrack Building Construction***"). At , the High Court stated in this regard:

"what is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first sealed it) shall by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained in it.

'Delivery' in this connection does not mean 'handed over' to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound, as by saying: 'I deliver this my act and deed.' He may, however, make the 'delivery' conditional: in which case the deed is called an 'escrow' which becomes binding when the condition is fulfilled."

In light of the above reforms, the position under English law seems to be that there is no insuperable obstacle to electronic execution of deeds, given English lawyers take the view that the common law's acceptance of electronic signatures may equally be applied to a deed as any other document (although, in the case of an individual, they should execute in the presence of a witness, who should attest their signature, by electronic signature to the attestation).

Given that Singapore seems disinclined (at least to date) to adopt an amendment to the common law on deeds along the lines of the Law of Property Act, how best can Singapore law be adapted to allow for the electronic execution of deeds?

The obvious answer is to remove the exclusion of indentures from the Electronic Transactions Act 2010 ("**ETA**"). As Infocomm Media Development Authority ("**IMDA**") noted in its 2019 Consultation Paper ("**Consultation Paper**"), it is in Singapore's interest to ensure that its laws continue to support and facilitate electronic communications and transactions in a digitalised future. As such, the functional equivalence provisions in the ETA should, in principle, apply to the excluded documents and transactions, unless there are overriding public interest considerations.

In the Consultation Paper, the IMDA said:

"An indenture is a type of deed, which is made between two or more parties. The formality requirements for deeds would therefore also apply to indentures. In Singapore, these are governed by the common law, which requires deeds to be signed, sealed, and delivered to be effective. In practice, deeds are also almost always attested, although this is not a legal requirement.

If indentures were removed from the exclusion list, this would facilitate the recognition of electronic indentures which is currently governed only by the common law. The current ETA amendments do not seek to amend or supplant these specific common law requirements for indentures or deeds (i.e., sealing and delivery). Given that indentures usually feature in the context of commercial transactions between sophisticated parties, there could be greater benefits from removing indentures from the exclusion list."

So where would it leave Singapore law on deeds, if indentures were removed from the exclusions in the ETA? The ETA dispenses with any rule requiring writing and recognises electronic records and signatures as functional equivalent of paper records and wet ink signatures.

In particular, section 6 of the ETA provides: "To avoid doubt, it is declared that information is not to be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic

record." If the ETA applied to indentures, this would displace any common law rule regarding the need for any particular form for a deed, provided the electronic record satisfied the requirements of the ETA.

Section 7 of the ETA provides that an electronic record satisfies any rule of law requiring information to be in writing if the information contained in the electronic record is accessible to be usable for subsequent reference. Section 8 of the ETA provides that:

"Where a rule of law requires a signature, or provides for certain consequences if a document or a record is not signed, that requirement is satisfied in relation to an electronic record if (a) a method is used to identify the person and to indicate that person's intention in respect of the information contained in the electronic record; and (b) the method used is either (i) as reliable as appropriate for the purpose for which the electronic record was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence."

Therefore, if the validity of an electronic signature is challenged, the party seeking to rely on the signature may need to provide further evidence of its validity, which may include the means of authenticating the signer, evidence that the document is tamper-evident and has not been altered since it was signed, and an audit log that captures all actions taken by the signer during the signing session. The ETA includes a presumption that, unless evidence to the contrary is adduced, a "secure electronic signature" (a) is the signature of the person to whom it correlates; and (b) the secure electronic signature was affixed by that person with the intention of signing or approving the electronic record. A "secure electronic signature" has to meet the following requirements:

"18.—(1) If, through the application of a specified security procedure, or a commercially reasonable security procedure **agreed to by the parties involved**, **it can be verified** that an electronic signature was, at the time it was made (a) unique to the person using it; (b) capable of identifying such person; (c) created in a manner or using a means under the sole control of the person using it; and (d) linked to the electronic record to which it relates in a manner such that if the record was changed the electronic signature would be invalidated, such signature is treated as a secure electronic signature."

According to the Third Schedule of the ETA, when any portion of an electronic record is signed with a digital signature created using an asymmetric cryptosystem and a hash function **during the operational period of a valid certificate** accompanying them, and verified by reference to the public key listed in such certificate, which is considered trustworthy, the digital signature is to be treated as a secure electronic signature with respect to such portion of the record. The DocuSign integration with SingPass will meet this requirement since the SingPass integration uses signing certificates issued by the (Singapore) National Certification Authority.

The ETA also allows the courts to recognise electronic signatures as secure electronic signatures if they are accompanied by any other commercially reasonable security procedures so long as the resultant electronic signature meets the four criteria set out in section 18(1) ETA.

It is clear from cases such as *First National Securities* and *Lim Zhipeng* that the requirement for a physical manifestation of a seal is not an actual requirement of a deed under Singapore law, and it is submitted that it would be sufficient to include an electronic mark of a seal in the appropriate place beside the signature block of an individual to indicate an indication to seal the document (the notion of marking a document as sealed instead of actually affixing a physical seal was indeed recognised in *Lim Zhipeng*). Similarly, language may be included in the preamble to the execution blocks in the document to indicate the parties' intention to execute and deliver the document as a deed.

Thus, while it may be trite to say electronic execution of deeds under Singapore law could be achieved at the stroke of a pen, it does seem to be the case that all we need is for the ETA to be amended to remove indentures from the exclusions. That is not to say we will then be left without any documents which present problems for digital execution under Singapore law (notably powers of attorney and declarations of trust, which are also exclusions under the ETA which commonly occur in commercial transactions, often as part of a security document or other document such as a limited partnership agreement, which are executed as a deed) but we will have at least modernised Singapore's law on deeds and, who knows, powers of attorney and/or declarations of trust may also be removed from the exclusions at the same time (or at least in certain contexts, such as where they are executed as a deed).

Can a party be estopped from denying the validity of an electronic deed under Singapore law?

The answer would seem to be that this seems at least a possibility, although not one that is mentioned typically in discussions of electronic execution of documents. The judges in cases like *Lim Zhipeng* have been at pains to point out the possibility of mounting an argument based on estoppel (where if it is pleaded at the proper stage of proceedings) in a situation where a party claims a deed is invalid for want of a seal, and there would seem no reason in principle not to apply a similar approach to a claim of invalidity based on electronic execution. We will not say more than that, as one would not choose to rely on arguments of estoppel without a careful assessment of the potential risks in the particular case. It is however worth keeping in mind as an argument.

How does the ETA apply to foreign law deeds, where the foreign law allows for electronic deeds?

How should a Singapore lawyer advise when asked the question whether a Singapore company or other person may execute a foreign law deed (or power of attorney or declaration of trust) using electronic signatures, assuming the foreign governing law of the document is properly chosen and allows for electronic execution? Is the fact the ETA excludes an indenture/power of attorney/declaration of trust an issue, so that the Singapore lawyer should insist on the Singapore party executing the document in wet ink? Although this does not seem to be an issue that has been addressed by a Singapore court (and it should be mentioned that cross-border issues were seemingly not considered from a conflict of laws perspective in

the recent UK industry working group paper on electronic execution of documents), in a Singapore context, this question would seem to be answered by applying common law conflicts of law principles (and, generally, we would suggest the issue may be approached considering the private international law applying in the jurisdiction of the executing party, as well as the law of evidence, if proceedings are anticipated there). Application of those common law conflicts of law principles, in a Singapore context, would normally lead to the mode of execution of the document being valid if it complied with the governing law of the document or the law of the place where the contract was made. If the governing law of the document does not require writing or signatures, there is no rule applying to the validity of the document on which the exclusions in Schedule 1 of the ETA may bite (unless, for example, the document is intended to be used as some kind of transfer or mortgage of assets in Singapore, in which case it may still need to comply with Singapore law requirements for such a document, since on common law conflicts of laws principles the relevant law for determining the validity of such documents would be the *lex situs* of the asset). Section 4 of the ETA reads: "The provisions of this Act specified in the first column of the First Schedule do not apply to any rule of law requiring writing or signatures in any of the matters specified in the second column of that Schedule." In other words, the relevant rules here are the rules under the governing law, not the rules under Singapore law.

Can one use section 41(8) Companies Act 1967 of Singapore ("Companies Act") to argue for the validity in Singapore of a power of attorney in the foreign law deed?

Section 41(8) reads:

"Authority of agent of a corporation need not be under seal, unless seal required by law of foreign state

(8) The fact that a power of attorney or document of authorisation given to or in favour of the donee of the power or agent of a corporation is not under seal does not, if such power of attorney or document of authorisation is valid as a power of attorney or document of authorisation in accordance with the laws of the country under which such corporation is incorporated, affect for any purpose intended to be effected in Singapore the validity or effect of any instrument under seal executed on behalf of that corporation by such donee of the power or agent, which is for all such purposes whatsoever as valid as if such authority had been under seal."

In the case of a foreign law deed, the power of attorney would be valid as a power of attorney under the laws of Singapore, applying common law conflicts of law principles as described above, which are not excluded under section 41(8) Companies Act.

This is possibly a contentious interpretation, and it might be sensible to advise that the Singapore party should be required to execute a separate power of attorney as a Singapore law deed, if the intention is the counterparty should have the power to execute Singapore law deeds as attorney for the Singapore party.

Likewise, it should be noted that the foreign law deed may not constitute a mortgage deed under the Conveyancing and Law of Property Act 1886, which provides for certain statutory rights (although these are normally contracted for anyway in a security document).

Challenges faced by foreign corporations in executing deeds governed by Singapore Law

In Singapore, while locally incorporated companies are statutorily empowered to execute deeds by way of the signature of director(s) and/or secretary as an alternative to affixing a seal on the document under section 41B of the Companies Act, the position for foreign corporations remains unclear.

As the dispensation with the need for a seal is limited to "companies," which section 4 defines as, inter alia, companies "incorporated under the ," this alternative method of execution has not been extended to foreign corporations seeking to execute Singapore law deeds.

Where a foreign corporation's objects require or comprise the transaction of business outside of Singapore, section 41(7) contemplates that a foreign corporation may possess an official seal which, on the face of the seal, specifies, the place where the seal is to be used. To be frank, this whole sub-section seems an odd construction, imagining as it does that a foreign corporation carrying on business outside Singapore (as they mostly do) will have a seal that indicates on its face the place that the corporation executes Singapore law deeds (or documents generally, perhaps). The reasons underlying this requirement are unclear and it is doubtful this specific type of seal is encountered often in practice, although it may be encountered in relation to a foreign corporation that is frequently using Singapore law deeds, such as a foreign bank serving Singapore customers. Section 41(5) of the Companies Act permits the foreign corporation to authorise the execution of the document by its agent (who would usually be a director) or attorney as a deed on behalf of the corporation by signing and sealing the document under his or her own seal. Such a requirement poses several difficulties for corporations.

This requirement for a foreign corporation to authorise the document to be executed as a deed under seal is somewhat counterintuitive because the requirement of sealing, and indeed the concept of a deed itself, may be completely alien to the law of the foreign corporation's jurisdiction if its law is not based on the common law, since the notion of a deed (created under seal) is a common law concept. Further, this form of execution may not comply with the requirements of the foreign corporation's law of incorporation as to how it should execute documents. While it would usually be possible to combine modes of execution by the foreign corporation to satisfy section 41(5) and the corporation's own law, this may not always be a painless process. Indeed, the foreign corporation's lawyers may take issue with the very notion it needs to comply with section 41(5), and argue that, based on common law conflicts of law principles applying in Singapore, formalities such as mode of execution may satisfy either the governing law of the document or the law of the place the contract is made, and suggest the transaction should be arranged so it may rely on the latter mode of execution. From a Singapore lawyer's perspective, this poses some challenges. First, in making sure the contract is executed in a manner that means it may be said to be made in the counterparty's place of

execution (not possible to apply to more than one counterparty in more than one other place) and, secondly, in convincing themself that the Singapore law requiring a deed to be executed under seal (except in the case of a Singapore company) is no more than a formality (suggested in Dicey) and is not a substantive rule of Singapore law on deeds (suggested by cases like *Lim Zhipeng*, although admittedly cross-border aspects were not in the mind of that court).

Proposed amendments to section 41 Companies Act

Given such obstacles, this article suggests a few potential reforms to the law regarding the execution of deeds under Singapore law by foreign corporations to facilitate cross-border transactions involving Singapore law deeds.

Sections 41(5) and 41(7) of the Companies Act should be removed and replaced with provisions that enable foreign corporations to execute deeds without the use of a seal.

Inspiration can be taken from the UK.

The law was amended through the subordinate legislation of the Foreign Companies (Execution of Documents) Regulations 1994 and subsequently through section 4 of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 ("**OCR 2009**"). The OCR 2009 amends section 44 of the Companies Act 2006 ("**UK Companies Act**") to allow an overseas corporation to execute a document in two alternative ways to affixing a common seal.

First, it allows for the execution of deeds by the signature of authorised persons. Second, it allows for the execution of deeds in any manner permitted by the laws of the territory in which the foreign corporation is incorporated.

The OCR 2009 amends section 44(2) of the UK Companies Act 2006 as follows:

"(2) A document which:

(a) is signed by a person who, in accordance with the laws of the territory in which an overseas company is incorporated, is acting under the authority (express or implied) of the company, and

(b) is expressed (in whatever form of words) to be executed by the company,

has the same effect in relation to that company as it would have in relation to a company incorporated in England and Wales or Northern Ireland if executed under the common seal of a company so incorporated."

These regulations recognise that it may be impossible for a foreign corporation to execute deeds in the same manner as English companies because, for example, it has no seal or because under its constitution only one person may sign for the corporation. Moreover, the persons holding offices equating to director and secretary may have quite different titles, or the laws of the territory in which the foreign corporation is incorporated may not recognise the concept of deeds. Therefore, these regulations provide for needful

flexibility and commercial expediency by allowing foreign corporations to execute deeds in any manner permitted by the laws of the territory in which they are incorporated.

Singapore could adopt a similar approach by removing sections 41(5) and s 41(7) of the Companies Act and allowing foreign corporations to execute deeds through the signature of any person who, in accordance with the laws of the territory in which an overseas corporation is incorporated, is acting under the authority (express or implied) of the corporation, and in any manner permitted by the laws of the territory in which they are incorporated in.

Commercial and Practical Considerations

Singapore's law on the execution of deeds has been slow to change. In Parliament, the exclusion list was attributed to the public not yet being ready for such an immediate change, and the need to keep existing safeguards. In contrast to other jurisdictions, little progress has been made in respect of the electronic signing of Singapore law deeds. Such roadblocks may serve to divert businesses away from using Singapore law, especially in a post-Covid era where many facets of commerce have gone online. The electronic execution of Singapore law deeds would go a long way in facilitating cross-border transactions using Singapore law.

At the Second Reading of the Electronic Transactions (Amendment) Bill, on 1 February 2021, the then Minister for Communications and Information, Mr. S Iswaran, said:

"Where an item is feasible for digitalisation, the Government will work towards the implementation of the necessary legislative and regulatory frameworks and corresponding safeguards. … we do not have a specific estimated time of arrival for the Electronic Transactions Act's exclusion list to be reduced or removed completely, but as a general move, as part of the Government's larger effort, we are seeking to remove as many of these exclusions as possible by 2023."

In light of these considerations, and the fact that Singapore has developed more secure methods of identifying domestic signatories like the DocuSign integration with SingPass, we respectfully submit the time is now right for the Singapore legislature to consider further amendments to the ETA that allow for a more seamless way to execute deeds under Singapore law and, similarly, to adapting the Companies Act provisions on execution of Singapore law deeds by foreign corporations.

Law of Property (Miscellaneous Provisions) Act 1989 at s 1(1).

The Law Society of England and Wales Company Law Committee & The City of London Law Society Company Law & Financial Law Committees, *Note on the Execution of a Document Using an Electronic Signature* (2 October 2022).

Andrew Phang, *The Law of Contract in Singapore* (SAL Academy Publishing, 2012) at para 4.003, citing *First*

National Securities Ltd v Jones and another CH 109 ("*First National Securities*") and *Cytec Industries Pte Ltd v Asia Pulp & Paper Co Ltd* 2 SLR(R) 806.

Lim Zhipeng v Seow Suat Thin and another matter 2 SLR 1151 ("*Lim Zhipeng*") at -.

UK Law Commission, *The Execution of Deeds and Documents by or on behalf of Bodies Corporate* (March 2015) <https://www.lawcom.gov.uk/app/uploads/2015/03/cp143_Execution_of_Deeds_and_Documents_Consultation.pdf>.

Law of Property (Miscellaneous Provisions) Act 1989 (c 34) (UK) at s 1(1).

Id, at s 1(2).

Id, at s 1(2A).

Id, at s 1(3).

Id, at s 1(4).

Unitrack Building Construction v GHL 1 SLR(R) 967 ("*Unitrack Building Construction*").

Id, at .

Electronic Transactions Act 2010 (Cap 88, 2020 Rev Ed) ("*ETA*").

Infocomm Media Development Authority, *Consultation Paper issued by the Infocomm Media Development Authority on Review of the Electronic Transactions Act (ETA) (CAP.88)* (27 June 2019) <https://www.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Consultations/Consultation-Papers/Public-Consultation-on-the-Review-of-the-Electronic-Transactions-Act/Public-Consultation-Paper-on-the-Review-of-the-Electronic-Transactions-Act-27-Jun-2019.pdf> (accessed 16 May 2023).

Id, at para and .

ETA, *supra* n 13, at s 6.

Id, at s 7.

ETA, *supra* n 13, at s 8.

Id, at s 19.

Id, at s 18.

Government of Singapore, *SingPass {api}* (6 July 2023) <https://api.singpass.gov.sg/library/sign/business/introduction>.

ETA, *supra* n 13, at s 4.

Companies Act 1967 of Singapore ("Companies Act").

Id, at s 41(8).

Id, at s 4.

Id, at s 41(7).

Companies Act, *supra* n 23, at s 41(5).

Dicey and Morris, *The Conflict of Laws* (Sweet & Maxwell, 8th Ed, 1967) at p 754.

Ernest G. Lorenzen, "*The Validity of Wills, Deeds and Contracts As Regards Form in the Conflict of Laws*" 1991; 20(6): 427-462, at 445.

Foreign Companies (Execution of Documents) Regulations 1994 (SI 1994 No 950) (UK).

Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI 2009 No 1917) (UK) at s 4.

Companies Act 2006 (c 46) (UK) s 44. ("Companies Act (UK)")

Companies Act (UK), *supra* n 32, s 44.