V. Interesting incidents or issues relating to company incorporation over the years

Registration of similar names

A number of of cases have concerned the registration of similar names. *In Computer Land Ltd v Registrar of Companies* [1986] HKC 49, Computer Land Ltd (Company A) was a company incorporated in Hong Kong in 1979, and Computerland Corp (Company B) was an American company incorporated in the US in the early 1970s and registered in Hong Kong as an oversea company under the Companies Ordinance in 1980. Company B then applied for the reservation of company names "Computerland Corp of California (China) Ltd" and "Computerland Corp of America (China) Ltd", and the Registrar reserved these two names. Company A contended that the reservation was improper, but the Registrar rejected the argument. In the judicial review commenced by Company A, the court held that the Registrar had fully borne in mind the provision of Section 20(1)(a) of the Companies Ordinance. There was no likelihood of deception between the applicant's name and the proposed names sought to be reserved by Company A in view of all of the surrounding circumstances. The addition of "Corp" in "Computerland Corp of California (China) Limited" made it sufficiently distinctive from "Computer Land Limited".

In *Land Power Intl Holdings Ltd v Inter-land Properties (HK) Ltd* [1995] 2 HKC 146, the appellants were a major group of real estate companies whose Chinese names started with the words "Chi Yip [志業]" International. The respondent company was also a real estate company named "Chi Yip [志業]" Real Property HK Ltd. The appellants complained about the respondent's use of "Chi Yip [志業]" as the first two characters of its name, and applied for an interlocutory injunction to restrain the respondent from carrying on its business under that name. The appellants reckoned that the words "Chi Yip [志業]" gave rise to the effect that the respondent was passing itself off as being connected or associated with the appellants. The issue was around whether the respondent had used the words "Chi Yip [志業]" in such a way that would likely cause confusion and deceive the trade and the public into the belief that the respondent was a member of the appellants' group.

The court held that the characters "Chi Yip [志業]" were descriptive words in common use, and that the respondent's use of the further two characters "real property" could differentiate the two names sufficiently to avoid confusion. Furthermore, all of the appellants except one used the word "International" in conjunction with "Chi Yip [志業]" as part of their trade names. The respondent, on the other hand, did not use "International" but "Real Property" with "Chi Yip [志業]" as part of its trade name. Such distinguishing features made it impossible to hold that the respondent was passing off its business as that of any of the appellants.

Piercing the corporate veil

A number of cases involved the court piercing the corporate veil, i.e. denying the shareholder the privilege of limited liability by treating the company and its shareholders as one (for example *A-G v Chan Nai Keung, Daniel* [1988] 1 HKLR 70, [1987] 2 HKC 41; *China Ocean Shipping Co v Mitrans Shipping Co Ltd* [1995] 3 HKC 123; *Good Profit Development Ltd v Leung Hoi* [1993] 2 HKLR 176, [1992] 2 HKC 539; *Concorde Construction Co Ltd v Colgan Co Ltd (No 2)* [1984] HKC 253; *Bakri Bunker Trading Co Ltd v Owners and persons interested in the ship "Neptune"* [1986] HKLR 345; *L Derochemont SA v Kent International Films Ltd* [1987] 2 HKC 271; *Good Profit Development Ltd v Leung Hoi* [1993] 2 HKLR 176, [1992] 2 HKC 539.

Place of business

There has also been an issue concerning what constitutes a place of business for a company. In *Elsinct (Asia Pacific) Ltd v Commercial Bank of Korea Ltd* [1994],3 HKC 365 a writ was served on the Commercial Bank of Korea (C Bank) at the office of its wholly owned subsidiary, which had a sign indicating that it was the representative office of the C Bank. C Bank argued that its activities there were of a non-business nature which included research, promotion and participation in meetings concerning international banking, and it had no bank account in Hong Kong, did not offer banking facilities in Hong Kong and did not pay tax in Hong Kong. It was held that C Bank's activities there did not create any legal obligations between potential customers and the representative office, and that therefore the representative office was not a place of business, and so the service of writ there on C Bank was invalid.

More recently, in *Kam Kwan Sing v Kam Kwan Lai* (2012) HCCW 154/2010, the court held that where the parent company was incorporated overseas, in order for it to establish a place of business in Hong Kong, it was not sufficient to hold shares in a company that ran a business in Hong Kong or to hold meetings in Hong Kong: evidence of concrete business activities carried out by the parent company at a particular location in Hong Kong was needed. It was not possible to treat the affairs of its subsidiaries as those of the parent company.

V. Interesting incidents or issues relating to company incorporation over the years

Company seal

There was also an issue about the use of company seals. In *On Hong Trading Co Ltd v Bank of Communications* (2000) HCMP 3099 of 1999, a mortgage was signed by the directors of a company, and sealed with a rubber chop. It was held that where a deed had to be executed by a Hong Kong company, it could only do so validly if it used its common seal, which by Section 93 of the Companies Ordinance had to be a metallic seal; a rubber stamp was not sufficient.

(Note: To facilitate business operations, the keeping and use of a common seal becomes optional under the new Companies Ordinance scheduled to be implemented in the first quarter of 2014.)

Validity of additional provisions in the articles of association

In *Lee Tak, Samuel v Chou Wen-hsien and others* [1982] HKLR 350, the articles of association of a company contained inter alia an additional clause providing that the office of a director could be vacated in certain circumstances including "if he is requested in writing by all his co-directors to resign". One of the directors received such a notice duly signed by all seven of his co-directors and in due course issued a writ against them and the company as the 8th defendant, seeking a declaration that the notice was null and void. It was held that apart from the required statements, a company may include in its articles any provision that it considered desirable for the regulation of its internal administration. Thus, the notice issued in pursuance of the additional clause was valid.

Mitigation of the ultra vires doctrine

The company memorandum used to contain an objects clause. Under the doctrine of ultra vires, a company could not enter into activities that were beyond the objects clause. In order to mitigate the harshness of the ultra vires doctrine, drafters of company memoranda often used the following devices to ensure as broad and unfettered a corporate capacity as possible:

(a) By listing a wide variety of objects (often extending for pages) with a concluding clause indicating that each clause was to be treated as a "separate and independent object" and not to be construed restrictively as ancillary to any other clauses (e.g. *Pearl Island Hotel Ltd v Li Ka-yu et al* [1988] 2 HKLR 87);

(b) By including a "subjective objects" clause which authorised the company or its directors to enter into any transactions ancillary to the company's business which the directors from time to time thought advantageous (e.g. *European Asian Bank v Reicar Investments Ltd* [1988] 1 HKLR 45);

(c) By listing what were essentially powers of a company (e.g. to grant pensions to former directors) as the company's objects.

However, the Companies (Amendment) Ordinance 1997 (Ordinance No. 3 of 1997) partially abolished the doctrine of ultra vires by providing that it was no longer compulsory for a company (other than a Section 21 company) to state its objects. Such a company may state its objects in its memorandum. It further provides that a company has the capacity and the rights, powers and privileges of a natural person. Thus, as long as the company does not state its objects, any transactions entered into by the company will not be ultra vires.