



HAN KUN LAW OFFICES

Legal Commentary



CHINA PRACTICE • GLOBAL VISION

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HKEx Updated Listing Decision on Contractual Arrangements

In 2005, the Hong Kong Exchanges and Clearing Limited (the “**HKEx**”) issued a listing decision (cited as HKEx-LD43-3) regarding a listing applicant incorporated outside Hong Kong (the “**Applicant**”), which controls an entity that is incorporated inside China (“**OPCO**”) to actually run the business via contractual arrangements. According to the decision, the HKEx, while adopting a disclosure-based regulatory approach, determined that in principle, the contractual agreements would not render the Applicant unsuitable for listing, as long as the financial results of the OPCO can be consolidated into the Applicant’s and the Applicant and its business satisfy all conditions for listing [1] under the Listing Rules.

In November 2011, the HKEx adopted an amendment to the foregoing listing decision (the “**Amendment**”), confirming that in principle, when assessing the listing application submitted by the relevant Applicant, the HKEx will give full consideration of the reasons for adopting the contractual arrangements and will “allow such arrangements on a case-by-case basis”, should the Applicant satisfy other conditions in the listing decision. If the business in relation to the contractual arrangements doesn’t fall into the scope of the industry sectors where applicable PRC regulations limit foreign investment, the Listing Division will normally refer the case to the Listing Committee. Meanwhile, This Amendment, based on the existing regulations in relation to the listing decisions, added the following specific requirements and limitations on the listing applications submitted by the Applicants adopting contractual arrangements.

Compulsory Disclosure of the Reasons for Adopting the Contractual Arrangements

The Amendment expressly requires the Applicant and its sponsor to disclose to the HKEx and explain the reason for adopting contractual arrangements in its business operation.

Limitation on the Adoption of Contractual Arrangements

The Amendment sets forth limitations on the Applicant's adoption of contractual arrangements, requesting the Applicant to unwind the contractual arrangements as soon as the law allows the business to be operated without them. In other words, the Applicant will not be allowed to use contractual arrangements if the business run by the Applicant doesn't fall into the scope of industry sectors where foreign investment is restricted by PRC regulations.

Ensuring the Implementation of Contractual Arrangements

To ensure the proper implementation of contractual arrangements adopted by the Applicants, the Amendment includes the following provisions:

- (i) Power of attorney granted by OPCO's shareholders to the Applicant's directors and their successors. The Amendment provides that the Applicant and its sponsor should submit a power of attorney by which the OPCO's shareholders grant to the Applicant's directors and their successors (including a liquidator replacing the Applicant's directors) the power to exercise all rights of the OPCO's shareholders, including, among others, the rights to vote in a shareholders' meeting, sign minutes, file documents with the relevant companies registry;
- (ii) Adding dispute resolution clauses in compliance with the HKEx's requirements. The Amendment requests the Applicant to enter into an arbitration clause with the OPCO, under which "the arbitrators may award remedies over the shares or land assets of OPCO, injunctive relief (e.g. for the conduct of business or to compel the transfer of assets) or order the winding up of OPCO". Meanwhile, the arbitration clause should provide the courts of Hong Kong, the Applicant's place of incorporation, the OPCO's place of incorporation, and the place where the Applicant or the OPCO's principal assets are located, to have the competent jurisdictions to the effect that such courts are empowered to grant interim remedies in support of the arbitration, pending formation of the arbitral tribunal or in appropriate cases; and
- (iii) The Applicant shall be entitled to deal with the OPCO's assets. The Amendment requests that the Applicant should be granted not only the right to manage the OPCO's business and the right to the OPCO's revenue, but also the right to deal with the OPCO's assets. This is to ensure that the liquidator, acting on the contractual arrangements, can seize the OPCO's assets in a winding up situation for the benefit of the Applicant's shareholders or creditors.

Footnotes:

[1] If, based on the main facts and the PRC legal opinion submitted by the Applicant, the HKEx determines that the Applicant has proved the legitimacy of the contractual arrangements and that the Applicant has the ability to ensure the sound and proper operation of the contractual arrangements, the HKEx would then determine the Applicant and its business are suitable for listing as long as the Applicant fully discloses the contractual arrangements and associated risks in the prospectus.

If you have any questions regarding the above, please feel free to contact us. Thanks.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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