

## HKE<sub>x</sub> LISTING DECISION

Cite as HKE<sub>x</sub>-LD63-4 (November 2008) (Updated in July 2010) (Withdrawn in July 2014)

*[see Main Board Rule 14A.12(2)(b)]*

Summary	
<b>Name of Party</b>	Company A - a Main Board listed company  Company B - another Main Board listed company  Company C - a party independent of Company A and Company B  Mr. A – the Chairman and controlling shareholder of Company A, and a brother of Mr. B  Mr. B – the Chairman and controlling shareholder of Company B, and a brother of Mr. A
<b>Subject</b>	Whether the Exchange would exercise its power to deem Company B as a connected person of Company A in respect of the Transaction under Main Board Listing Rule 14A.06.
<b>Listing Rules</b>	Main Board Listing Rules 14A.06, 14A.11
<b>Decision</b>	The Exchange decided not to exercise its power under Main Board Listing Rule 14A.06 to deem Company B as a connected person of Company A in respect of the Transaction.

### SUMMARY OF FACTS

1. Company A, Company B and Company C proposed to enter into an agreement (the “**JV Agreement**”) to establish a joint venture company (the “**Joint Venture**”) (the “**Transaction**”) for the purpose of an intended bid for certain development rights of a terminal project (the “**Project**”). Company A, Company B and Company C would own 30%, 30% and 40% shareholding in the Joint Venture respectively.
2. In summary, the JV Agreement provided that:
  - a. the Joint Venture would prepare and submit a bid for the Project and, if the bid was successful, would develop and operate the Project;
  - b. the number of directors of the Joint Venture would be appointed by the

partners in proportion to their respective shareholdings in the Joint Venture; and

- c. the Joint Venture partners would provide shareholders' loans to the Joint Venture in proportion to their respective shareholdings. If required, they would also provide corporate guarantees to secure any loans provided by a third party to the Joint Venture pro rata to their respective shareholding in the Joint Venture.

3. At the relevant time of the Transaction,

- Mr. A was a connected person of Company A under Rules 1.01 and 14A.11(1) as he was a director of Company A and was interested in over 50% of the issued share capital of Company A;
- Mr. B, being the brother of Mr. A, was a connected person of Company A under Rule 14A.11(4)(b); and
- Mr. B was interested in over 50% of the issued share capital of Company B. Company B was an associate of Mr. B under Rule 1.01.

#### **THE ISSUE RAISED FOR CONSIDERATION**

- 4. Whether the Exchange would exercise its power to deem Company B as a connected person of Company A in respect of the Transaction under Rule 14A.06.

#### **APPLICABLE LISTING RULE OR PRINCIPLE**

5. Main Board Listing Rule 14A.06 provides that:

The Exchange has the specific power to deem a person to be connected (see rule 14A.11(4)) ...

6. Main Board Listing Rules 14A.11 provides that for the purposes of Chapter 14A:

... the definition of "connected person" includes:

- (1) a director, chief executive or substantial shareholder of the listed issuer;

...

- (4) any associate of a person referred to in rules 14A.11(1) (2) or (3). ... In this Chapter, an "associate" of a person

referred to in rules 14A.11(1), (2) or (3) includes the following additional persons:

- (b) ... any child, ..., brother, ... and step-sister of, a person referred to in rules 14A.11(1), ...

## ANALYSIS

7. The connected transaction rules seek to ensure that the interests of shareholders as a whole are taken into account by a listed issuer when it enters into transactions with connected persons, in particular to safeguard against connected persons (such as the listed issuer's directors, chief executives or substantial shareholders or their associates) taking advantage of their positions to the detriment of minority shareholders of an issuer.
8. The general definition of "connected person" is contained in Rule 1.01. For the purpose of the connected transaction rules, the definition of "connected person" is extended by Rules 14A.11 and 14A.12. Accordingly, a "connected person" in Chapter 14A includes:
  - a director, chief executive or substantial shareholder of the listed issuer, any person who was a director of the listed issuer within the preceding 12 months; and a promoter or supervisor of a PRC issuer (see Rules 14A.11(1), (2) and (3)); and
  - an associate of a person referred to in Rule 14A.11(1), (2) or (3) (see Rule 14A.11(4)).
9. An associate of a person referred to in Rule 14A.11(4) does not fall under the definition of "connected person" pursuant to Rule 1.01 or 14A.11.
10. In the present case, Mr. A was a director and substantial shareholder of Company A and therefore a connected person of Company A under Rule 14A.11(1). Mr. B (being a brother of Mr. A) was an associate of Mr. A under Rule 14A.11(4)(b) and therefore a connected person of Company A. Nevertheless, as Company B was only an associate of Mr. B but not Mr. A, Company B was not a connected person of Company A under Rule 14A.11(4).
11. Rule 14A.06 provides that the Exchange has the specific power to deem a person to be connected. The power is usually exercised by the Exchange in respect of a particular transaction. In making the determination, the Exchange will consider all relevant facts and circumstances surrounding the transaction and whether the interests of shareholders as a whole are taken into account by the listed issuer when it enters into the transaction. Particular regard would be given to the substance rather than the form of the transaction and any arrangements that are

designed to circumvent the spirit and intent of the connected transaction rules. Certain specific circumstances where the Exchange may exercise the power to deem a person to be connected are set out in Rules 14A.11(4)(a) and (c).

12. The present case did not fall under the circumstances described in Rules 14A.11(4)(a) and (c).
13. When determining whether the deeming provision should apply in this case, the Exchange had taken into accounts the following factors:
  - Company B was itself a listed company with genuine business activities. It was not a vehicle set up by Mr. B for the sole or dominant purpose of entering into transactions with Company A.
  - The Transaction involved the formation of a joint venture for bidding a development project from the Hong Kong Government and one of the joint partners was a party independent of both Company A and Company B. The Transaction was approved by the board of Company A where Mr. A had abstained from voting on the relevant board resolution. Company A's independent non-executive directors also opined that the terms of the JV Agreement were fair and reasonable and the Transaction was in the interest of Company A and its shareholders as a whole.
14. The facts of the case did not suggest that the Transaction involved arrangements designed to circumvent the connected transaction rules. The relationship between Mr. A and Mr. B was not sufficient to deem Company B as a connected person of Company A in respect of the Transaction under Rule 14A.06.

## **DECISION**

15. The Exchange decided not to exercise its power under Rule 14A.06 to deem Company B as a connected person of Company A in respect of the Transaction.

### *Note:*

1. *After amendments to Main Board Listing Rules 14A.11(4)(b) in June 2010, the definition of "associate" includes a company which the connected person's relative can control more than 50% of the voting power at the company's general meetings or the composition of a majority of the company's board of director. Company B is a connected person as it is an associate of Mr. A under the amended Rule 14A.11(4)(b)(ii). The Exchange may grant a waiver in view of the particular circumstances described above. (Added in July 2010)*