

## HKEX LISTING DECISION

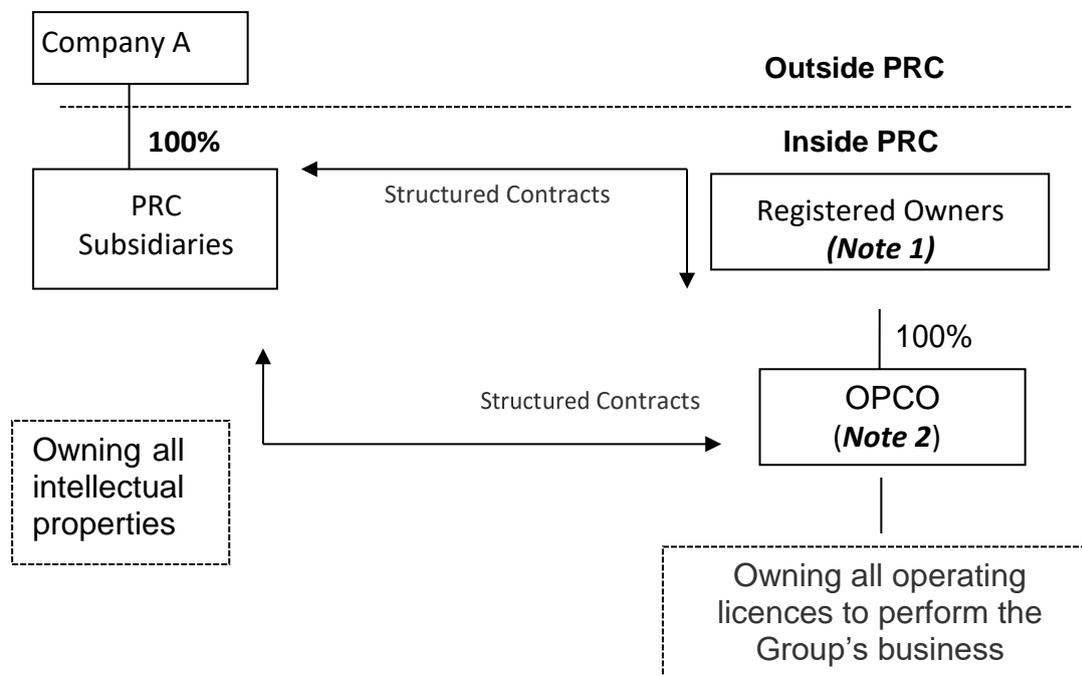
HKEX-LD43-3 (First Quarter of 2005, last updated in January 2022)

Summary	
<b>Name of Parties</b>	<b>Company A</b> – a Main Board listing applicant  <b>Group</b> – Company A together with its subsidiaries  <b>PRC Subsidiaries</b> – subsidiaries of Company A with substantially all operations in the PRC  <b>OPCOs</b> – companies owned by the Registered Owners and controlled by Company A through the Contractual Arrangements  <b>Registered Owners</b> – shareholders of the OPCOs
<b>Subject</b>	Whether, in view of the fact that, in the conduct of its business in the PRC, Company A was a party to a number of contract-based structures (“ <b>Contractual Arrangements</b> ” or “ <b>Structured Contracts</b> ”) between or among Company A, the PRC Subsidiaries, the OPCOs and the Registered Owners, Company A was unsuitable for listing due to legal questions associated with the Contractual Arrangements?
<b>Listing Rules</b>	Rules 1.01 and 8.04
<b>Decision</b>	The Exchange determined that the Contractual Arrangements would not render Company A unsuitable for listing.

### SUMMARY OF FACTS

1. Company A was incorporated outside Hong Kong. The Group operated a business in the PRC, and PRC regulations applicable to its industry sector limited foreign investment.
2. Therefore, the Group did not possess the licences required to operate its business in the PRC. However, the Group adopted Contractual Arrangements designed to give the various rights listed in paragraph 4. The Contractual Arrangements were binding on Company A, the PRC Subsidiaries, the OPCOs and the Registered Owners.

3. A brief diagram illustrating the Contractual Arrangements is set out below:-



**Note 1:** The Registered Owners were PRC nationals and controlling shareholders of Company A

**Note 2:** The OPCO was incorporated in the PRC

4. The Sponsor submitted that the Contractual Arrangements were designed specifically to confer upon the Group:-

- a. the right to enjoy all the economic benefit of the OPCOs, to exercise management control over the operations of the OPCOs, and to prevent leakages of assets and values to shareholders of the OPCOs;
- b. the right to all intellectual properties through assignments from the OPCOs;
- c. the right to consolidate the financial results of the OPCOs as if they were wholly-owned subsidiaries of the Group under prevailing accounting principles;
- d. the right to acquire, if and when permitted by PRC law, the equity interests in and / or assets of the OPCOs for a nominal price or a pre-paid amount; and
- e. a first priority security interest in the OPCO shares owned by the Registered Owners, as security for the proper performance of the Contractual Arrangements.

5. The Sponsor confirmed that Company A had satisfied all conditions for listing under the Listing Rules (save for waivers sought) and no alteration of the confirmation was

necessary by reason of the existence of the Contractual Arrangements. The Sponsor intended to disclose full details of the Contractual Arrangements in the listing document.

6. The PRC legal adviser of Company A issued an opinion that the Contractual Arrangements complied with PRC laws, rules and regulations, including those applicable to the business of Company A, the PRC Subsidiaries and the OPCOs, and complied with the articles of association of the PRC Subsidiaries.
7. The reporting accountants of Company A confirmed that it had the right to consolidate the financial results of the OPCOs as if they were wholly-owned subsidiaries of the Group under prevailing accounting principles.

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

8. Whether, in view of the fact that, in the conduct of its business in the PRC, Company A was a party to the Contractual Arrangements between or among Company A, the PRC Subsidiaries, the OPCOs and the Registered Owners, Company A was unsuitable for listing due to legal questions associated with the Contractual Arrangements?

### **APPLICABLE LISTING RULES OR PRINCIPLE**

9. Rule 1.01 states that 'subsidiary' includes 'any entity which is accounted for and consolidated in the audited consolidated accounts of another entity as a subsidiary pursuant to applicable Hong Kong Financial Reporting Standards or International Financial Reporting Standards'.
10. Rule 8.04 provides that in the opinion of the Exchange both the issuer and its business must be suitable for listing.

### **THE ANALYSIS**

11. When considering Company A's suitability for listing under Rule 8.04, the Exchange reviewed whether the Group's business operations, including the use of the Contractual Arrangements, complied with all applicable laws and regulations.
12. In the review, the Exchange continued its established practice of utilising a disclosure-based approach. Under this approach, the sponsor and the directors of Company A had to demonstrate, by a clear preponderance of the materials submitted for review, that it had complied in fact and in good faith with all relevant PRC laws and regulations. If Company A could meet this burden it would not be treated as unsuitable for listing on the Exchange by reason of the Contractual Arrangements.
13. In this case, the Exchange adopted the following standard of review:-

- a. the Listing Rules and Listing Division policies would be strictly construed;
  - b. the Contractual Arrangements should be narrowly tailored to achieve the listing applicant's business purposes and minimise the potential for conflict with relevant PRC laws and regulations. Wherever possible, the listing applicant would be required to demonstrate genuine efforts to comply with applicable laws and regulations. Evidence to the contrary would indicate a higher risk of the Contractual Arrangements being deemed in breach of relevant laws and regulations;
  - c. a broad review of all relevant facts and circumstances concerning the listing applicant would be undertaken by the Exchange, including a review of its legal and compliance history (if any), its management systems and corporate governance practices, its records in protecting shareholder interests and its financial resources to ensure compliance with the applicable laws and regulations. If material uncertainties were identified in the areas of the listing applicant's business, a higher level of assurance with respect to the arrangements would be required; and
  - d. subject to availability and practicability, appropriate regulatory assurance should be obtained from the relevant regulatory authorities. In the absence of such regulatory assurance, the listing applicant's legal adviser would be required to make a statement to the effect that in its legal opinion all possible actions or steps taken to enable it to reach its legal conclusions had been taken. In consultation with the listing applicant and the sponsor, other relevant forms of assurance could be considered.
14. Based on the submissions of the Sponsor which were supported by professional opinions from the PRC legal advisers and the reporting accountants, Company A had demonstrated that it had satisfied the above requirements. Consequently, the Exchange determined that the Contractual Arrangements were legal and binding and that Company A had the ability to ensure the sound and proper operation of the Contractual Arrangements. Given that there would be full disclosure of the Contractual Arrangements in the listing document, the Exchange determined that Company A or its business would not be rendered unsuitable for listing by reason of the use of the Contractual Arrangements.

## **THE DECISION**

15. The Exchange continued to adopt a disclosure-based approach in considering Company A's listing application. Based on the material facts and the PRC legal opinion as submitted, the Exchange determined that Company A had demonstrated the legality of the Contractual Arrangements and its ability to ensure the sound and proper operation of the Contractual Arrangements. Subject to appropriate disclosures in the listing document of the Contractual Arrangements and the risks associated

therewith, the Exchange determined that Company A was suitable for listing.

## **SUBSEQUENT DEVELOPMENT**

- 15A. This listing decision is in part based on the conclusion that the Structured Contracts comply with PRC laws, rules and regulations, and are legal and binding. This is evident in paragraphs 6, 13(d), 14 and 15 above.
16. In a review in 2011, the Listing Committee confirmed the practice of allowing Contractual Arrangements (also commonly known as structured contracts or VIEs) on a case-by-case basis after full consideration of the reasons for adopting such arrangements and subject to the conditions in this listing decision **(Added in November 2011)**.
- 16A. All listing applicants without exception (including applicants transferring its listing from GEM to the Main Board) must narrowly tailor their Contractual Arrangements regardless of materiality of the business, in terms of revenue or profit or otherwise, to the listing applicant. This means that Contractual Arrangements may only be used to the extent necessary to address any limits on foreign ownership, except as provided in paragraphs 16B and 16C. The listing applicant must otherwise directly hold the maximum permitted interest in the OPCO. For the avoidance of doubt, even if the listing applicant is able to control OPCO through the direct equity interest held by it in OPCO (e.g. by holding a direct equity interest of more than 50%), the remaining equity interest that is not permitted to be directly held by it may still be held through Contractual Arrangements **(Added in November 2013 and amended in April 2018)**.
- 16B. If the OPCO, as a result of having foreign ownership, is required to obtain approval and fulfil additional eligibility standards ("**Other Requirements**"), the listing applicant must fulfil such Other Requirements. The listing applicant must seek and obtain such regulatory approval to directly hold the maximum interest in the OPCO prior to submitting its listing application, unless the approving regulatory authority confirms that it will not or cannot give approval even if the listing applicant fulfilled the Other Requirements:
- a. because no procedures or guidance for granting approval are available; or
  - b. for policy reasons.

**(Paragraph 16B added in April 2014 and amended in April 2018)**

- 16C. If clear procedures or guidance from the approving regulatory authority is not available, the listing applicant can directly hold less than the maximum permitted interest in OPCO if it demonstrates to the satisfaction of the Exchange that it has, as advised by its legal advisers, reasonably assessed the requirements under all applicable rules, committed financial and other resources and implemented all the legal adviser's

recommendations prior to submitting its listing application. A mere intent, undertaking or plan to implement such recommendations is not sufficient **(Added in April 2018)**.

17. If there are no limits on foreign ownership, the listing applicant must not use Contractual Arrangements to carry on its business **(Added in November 2011 and amended in April 2018)**.
18. In addition to the matters in paragraph 13, the Exchange requires any listing applicant using Contractual Arrangements and/ or its sponsor to:
  - a. provide reasons for the use of Contractual Arrangements in its business operation;
  - b. terminate the Contractual Arrangements as soon as the law allows the business to be operated without them. The OPCO's registered shareholders must undertake that, subject to the relevant laws and regulations, they must return to the listing applicant any consideration they receive in the event that the listing applicant acquires the OPCO's shares when terminating the Contractual Arrangements. The undertaking must be disclosed in the listing document **(Amended in November 2013)**;
  - c. ensure that the Contractual Arrangements:
    - (i) include a power of attorney by which the OPCO's shareholders grant to the listing applicant's directors and their successors (including a liquidator replacing the listing applicant's directors) the power to exercise all rights of the OPCO's shareholders, including the rights to vote in a shareholders' meeting, sign minutes, and file documents with the relevant companies registry. OPCO's shareholders should ensure that the power of attorney does not give rise to any potential conflicts of interest. Where OPCO's shareholders are officers or directors of the listing applicant, the power of attorney should be granted in favour of the listing applicant and actions in relation to the Contractual Arrangements must be decided by officers or directors of the listing applicant who are not shareholders of OPCO;
    - (ii) contain dispute resolution clauses that:
      - provide for arbitration and that 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;
      - provide the courts of competent jurisdictions with the power to grant interim remedies in support of the arbitration pending formation of the arbitral tribunal or in appropriate cases. The courts of Hong Kong, the listing applicant's place of incorporation, the OPCO's place of incorporation, and the place where the listing applicant or the OPCO's principal assets are located should be specified as having jurisdiction

for this purpose; and

- (iii) encompass dealing with the OPCO's assets, and not only the right to manage its business and the right to revenue. 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 listing applicant's shareholders or creditors.

***(Paragraph 18 added in November 2011)***

- 18A. Where the relevant laws and regulations specifically (i) restrict foreign investment in the PRC (e.g. the PRC Foreign Investment Law<sup>1</sup> (the "**FIL**")); or (ii) disallow foreign investors from using any agreements or Contractual Arrangements to gain control of or operate a foreign restricted business (e.g. on-line game business in the PRC which is subject to GAPP's Notice 13<sup>2</sup>), applicants which use Structured Contracts to hold interests in PRC businesses are required to demonstrate that they are able to comply with the FIL and any other relevant laws and regulations and are encouraged to contact the Exchange in advance to seek informal and confidential guidance on novel issues ***(Amended in April 2018 and January 2022)***.
- 18B. A listing applicant with Contractual Arrangements in the PRC should seek PRC legal advice and decide what measures to adopt (if any) to fully comply with the FIL. The legal adviser's opinion on the Contractual Arrangements must also include a positive confirmation that the use of the Contractual Arrangements does not constitute a breach of relevant laws and regulations or that the Contractual Arrangements will not be deemed invalid or ineffective under those laws and regulations. The legal opinion must be supported by appropriate regulatory assurance, where possible, to demonstrate the legality of the Contractual Arrangements ***(Added in November 2013 and January 2022)***.
19. A listing applicant using Contractual Arrangements for the entire or part of its business should disclose the following information concerning the Contractual Arrangements in its listing document ***(Added in August 2012)***:
- a. detailed discussion about the OPCO's registered shareholders and a confirmation that appropriate arrangements have been made to protect the listing applicant's interests in the event of death, bankruptcy or divorce of the OPCO's registered shareholders to avoid any practical difficulties in enforcing Contractual Arrangements.

---

<sup>1</sup> FIL was promulgated in March 2019 and became effective on 1 January 2020.

<sup>2</sup> "Notice Regarding the Consistent Implementation of the "Stipulations on 'Three Provisions'" of the State Council and the Relevant Interpretations of the State Commission Office for Public Sector Reform and the Further Strengthening of the Administration of Pre-examination and Approval of Internet Games and the Examination and Approval of Imported Internet Games" (Xin Chu Lian [2009] No. 13) published jointly by PRC General Administration of Press and Publication, National Copyright Administration, and National Office of Combating Pornography and Illegal Publications on 28 September 2009 (as amended from time to time).

- b. the extent to which the listing applicant has arrangements in place to address the potential conflicts of interest between the listing applicant and the OPCO's registered shareholders, particularly in cases where these shareholders are officers and directors of the listing applicant.
- c. bases why the directors believe that each of the agreements conferring significant control and economic benefits from the OPCO to the listing applicant is enforceable under the relevant laws and regulations.
- d. the economic risks the listing applicant bears as the primary beneficiary of the OPCO, in what way the listing applicant shares the losses of the OPCO, the circumstances that could require the listing applicant to provide financial support to the OPCO, or other events or circumstances that could expose the listing applicant to losses.
- e. a discussion on whether the listing applicant has, to date, encountered any interference or encumbrance from any governing bodies in operating their business through the OPCO under the Contractual Arrangements.
- f. the limitations in exercising the option to acquire ownership in the OPCO, include a separate risk factor explaining these limitations, and clarifying that ownership transfer may still be subject to substantial costs.
- g. the Contractual Arrangements as material contracts in the "Statutory and General Information" section and make them available on the listing applicant's website **(Amended in November 2012)**.
- h. corporate structure table in the "Summary" section for the purpose of illustrating the Contractual Arrangements and facilitating investors' review and understanding of the arrangements.
- i. details of any insurance purchased to cover the risks relating to Contractual Arrangements, or a prominent disclosure that those risks are not covered by any insurance **(Added in December 2012)**.
- j. a separate disclosure of revenue from Structured Contracts if the listing applicant generates revenue from other subsidiaries apart from the OPCO **(Added in November 2013)**.
- k. if the OPCO's operations are in the PRC, a positive confirmation from the PRC legal advisers that the Contractual Arrangements would not be deemed as "concealing illegal intentions with a lawful form" and void under the PRC contract law **(Added in November 2013)**.

- l. description of the FIL pursuant to our Guidance Letter HKEX-GL86-16 (and highlighted in the “Summary” and “Risk Factors” sections).
  - m. a clear description and analysis of the FIL, specific measures taken by the listing applicant to fully comply with the FIL supported by a PRC legal opinion and any material impact of the FIL on the listing applicant’s operations and financial position (and highlighted in the “Summary” and “Risk Factors” sections).
  - n. irrespective of whether the listing applicant decides to adopt any measures set out in this listing decision or any other alternative measures, the reasons for taking that approach.
20. The relevant disclosure on Contractual Arrangements in the listing document should follow the following guiding principles (***Last updated in November 2013***):
- (a) **Various sections** – To avoid repeated disclosure in various sections, such as those relating to connected transactions arising from the Contractual Arrangements, the basis of consolidation of the OPCO, and the terms of the Contractual Arrangements, disclosure on Contractual Arrangements (other than risk factors) should be consolidated into one standalone section. Appropriate cross references should be sufficient.
  - (b) **Risk Factors** – Cluster all related risk factors under an appropriate heading, such as “Risks relating to Corporate Structure”. In addition, the listing document should include at least the following Contractual Arrangements-related risk factors:
    - (i) The government may determine that the Contractual Arrangements do not comply with applicable regulations;
    - (ii) The Contractual Arrangements may not provide control as effective as direct ownership;
    - (iii) The domestic shareholders may have potential conflicts of interest with the listing applicant; and
    - (iv) Contractual Arrangements may be subject to scrutiny of the tax authorities and additional tax may be imposed.

21. to 26. (***moved or deleted in January 2022***)

27. If the listing document indicates that the listing applicant will acquire or establish a business operated through Contractual Arrangements after listing, then the above guidance will apply to the listing applicant. (***Amended in January 2022***)

*On-going developments*

28. The Exchange recognises that the PRC laws and regulations over Contractual Arrangements are subject to change. All listed issuers with Contractual Arrangements must monitor future changes in the relevant laws and regulations that apply to these Contractual Arrangements and ensure compliance. ***(Amended in January 2022)***