

## HKEx LISTING DECISION

HKEx-LD64-2013 (published in April 2013)

Withdrawn, superseded by Labuan Country Guide in December 2013

Summary	
<b>Issue</b>	Whether the Exchange would consider Labuan an acceptable jurisdiction under Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules
<b>Listing Rules and Regulations</b>	<ol style="list-style-type: none"><li>1. Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules (<b>Rules</b>)</li><li>2. Joint Policy Statement regarding Listing of Overseas Companies of 7 March 2007 (<b>JPS</b>)</li><li>3. Listing Decisions: HKEx-LD65-1; HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1, HKEx-LD80-1, HKEx-LD84-1, HKEx-LD108-1, HKEx-LD109-1, HKEx-LD110-1, HKEx-LD111-1, HKEx-LD1-2011, HKEx-LD4-2011, HKEx-LD10-2011, HKEx-LD11-2011, HKEx-LD24-2012, HKEx-LD36-2012</li><li>4. Guidance Letter HKEx-GL12-09</li></ol>
<b>Decision</b>	<p>The Exchange would consider Labuan an acceptable jurisdiction of an issuer's incorporation, if listing applicants incorporated in Labuan make certain revisions to their constitutive documents and demonstrate a reasonable nexus with Labuan. Listing applicants should give reasons for not changing their constitutive documents which the Exchange will assess on a case by case basis</p> <p>Future applicants incorporated in Labuan may follow the streamlined procedures in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS</p>

## FACTS

1. The Exchange was requested to consider Labuan an acceptable jurisdiction under the Rules.
2. It was submitted that:
  - a. Labuan was declared an international offshore financial centre in 1990 and later renamed to Labuan International Business and Financial Centre, and is administered directly by the Ministry of Federal Territories of the Federal Government of Malaysia;
  - b. the legal system in Labuan is, as in the rest of Malaysia, derived from the English Common Law, and specific legislation was enacted to separate the international financial services in Labuan from the domestic economy;

- c. there are two sets of company law operating in Malaysia, i.e. Malaysian Companies Act 1965 (**MCA**) and the Labuan Companies Act 1990, as amended (**LCA**). Whilst the MCA is applicable throughout Malaysia, it is not applicable to companies incorporated and registered under the LCA (**Labuan Companies** or **Labuan Company**). The constitutive document of a Labuan Company is its Memorandum and Articles of Association (**Articles**); and
  - d. the Labuan Financial Services Authority (**LFSA**), the sole regulatory authority in Labuan with jurisdiction encompassing, among other things, international financial services and the registration of Labuan companies, is the statutory securities regulator in Labuan. LFSA is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.
3. The Exchange was provided with a comparison table comparing the Hong Kong Companies Ordinance (**HKCO**) with the relevant Labuan laws and regulations, mainly the LCA, based on the JPS framework.

### **APPLICABLE RULES, REGULATIONS AND PRINCIPLES**

4. All listing applicants must ensure that they are able to and will comply with the Main Board Rules (or the GEM Rules), the Securities and Futures Ordinance (**SFO**) and, if they apply, the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Takeovers Codes**).
5. Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules provide a general framework for overseas companies to list on the Exchange. The Exchange may refuse a listing if it is not satisfied that the overseas issuer is incorporated in a jurisdiction which offers at least equivalent standards of shareholder protection to Hong Kong.
6. Where the Exchange believes that the overseas issuer's jurisdiction of incorporation does not provide shareholder protection standards equivalent to those in Hong Kong, it may approve the listing of the overseas issuer if it varies its constitutive documents to provide the necessary protection (see Notes to Main Board Rules 19.05(1), 19.30(1) and GEM Rule 24.05(1)).
7. The JPS formalises this process by setting out a list of shareholder protection areas the Exchange takes into account.
8. The standards in the JPS were compared against the standards of different overseas jurisdictions in Listing Decisions HKEEx-LD65-1, HKEEx-LD65-2, HKEEx-LD65-3, HKEEx-LD71-1, HKEEx-LD80-1, HKEEx-LD84-1, HKEEx-LD108-1, HKEEx-LD109-1, HKEEx-LD110-1, HKEEx-LD111-1, HKEEx-LD1-2011, HKEEx-LD4-2011, HKEEx-LD10-2011, HKEEx-LD11-2011, HKEEx-LD24-2012, HKEEx-LD36-2012.
9. Guidance Letter HKEEx-GL12-09 sets out the streamlined procedures for listing overseas companies on the Exchange (**Streamlined Procedures**). Under it, a potential applicant can benchmark the shareholder protection standards in its home jurisdiction to any one of the recognised or accepted jurisdictions, instead of benchmarking to Hong Kong, as long as it ensures that its shareholder protection standards are not lower than those indicated in the relevant Listing Decisions.

## ANALYSIS

10. An overseas applicant's suitability for listing does not only depend on whether its home jurisdiction provides comparable shareholder protection as required by the JPS, but also the overseas applicant's ability to comply with the Main Board Rules or the GEM Rules, unless specific waivers are granted by the Exchange. In relation to shareholder protection matters set out in the JPS, an applicant may adopt any method (e.g. by amending its constitutive documents or administrative procedures) to address shortfalls in shareholder protection identified in the relevant Listing Decisions to achieve equivalence. The Exchange does not prescribe the method used but recommends that the applicant first consider passing a shareholders' resolution amending its constitutive documents to provide for the protection expected under the JPS. The applicant must give reasons for not changing its constitutive documents and the Exchange will assess them on a case by case basis. An applicant may apply for appropriate waivers of any Main Board Rules or GEM Rules which will be considered by the Exchange on a case by case basis.
11. Based on the comparison table, the Exchange notes certain differences in shareholder protection between the HKCO and Labuan laws and regulations:
  - a. areas where the LCA is considered comparable with or even more stringent than the HKCO (Items 1(a), 1(b) (voting threshold), 2(e), 3(b), 4(a), 4(b) (voting threshold), 4 (c) and 4(d) of the JPS);
  - b. an area where the differences in shareholder protection are immaterial (Item 4(b) (court confirmation of the share capital reduction) of the JPS) (see **Appendix**); and
  - c. areas where the differences in shareholder protection can be remedied through amendments to the Articles (Items 1(b) (court petition to cancel class rights variation), 1(c), 1(d), 1(e), 1(f), 2(a), 2(b), 2(c), 2(d), 2(f), 3(a), 3(c), 3(d) and 3(e) of the JPS) (see **Appendix**).
12. Where the JPS merely requires clearly stating the circumstances of a particular shareholder protection matter (e.g. Items 1(g) – buy-out provisions and 4(e) – provision of financial assistance for the acquisition of the Labuan Company's shares), the Labuan Company will make relevant disclosure of any regulatory differences in its listing document.

## CONCLUSION

13. The Exchange considered Labuan an acceptable jurisdiction for an issuer's incorporation on the basis that, in an actual application:
  - a. a Labuan Company applying for listing on the Exchange will have to address any shareholder protection deficiency based on its individual circumstances, if a Labuan Company cannot ensure that its Articles are amended to satisfy a particular shareholder protection requirement, it should provide alternative methods of shareholder protection acceptable to the Exchange;

- b. a Labuan Company must provide in its listing document specific disclosure against each topic by reference to its Articles, the law of its jurisdiction of incorporation or any applicable regulations, and highlight the major differences from the Hong Kong requirements and the arrangements to address them;
  - c. if there are any subsequent major changes in Labuan laws and regulations that significantly worsen shareholder protection standards in Labuan compared to those in Hong Kong, the Labuan Company applying for listing on the Exchange must inform the Exchange and the Exchange would consider imposing further conditions or reconsider accepting any future listing applications from Labuan Companies;
  - d. there are no specific circumstances that render the acceptance of Labuan as an issuer's jurisdiction of incorporation inappropriate;
  - e. a Labuan Company applying for listing on the Exchange needs to demonstrate to the Exchange that there is a reasonable nexus between its operations and Labuan; and
  - f. a Labuan Company, once its securities have been admitted to listing on the Exchange, must comply with the Main Board Rules or GEM Rules from time to time in force (except for waived provisions).
14. The Exchange requires a Labuan Company to submit the following confirmations in accordance with the practice set out in the Listing Decisions endorsed by the Listing Committee for other overseas jurisdictions:
- a. a sponsor's confirmation that it has considered and reviewed all material shareholder protection areas identified in the JPS in its due diligence review under Practice Note 21 to the Main Board Rules and Practice Note 2 to the GEM Rules, and that it is independently satisfied that the protection afforded by Labuan laws to the Labuan Company's shareholders is broadly commensurate with that in Hong Kong; and
  - b. a legal opinion and the sponsor's confirmation that the Labuan Company's Articles do not contain provisions preventing it from complying with the Rules, the Securities and Futures Ordinance – Disclosure of Interests, and the Hong Kong Codes on Takeovers and Mergers and Share Repurchases.

#### **NOTES TO ISSUERS AND MARKET PRACTITIONERS**

**For any questions relating to this Listing Decision please feel free to contact the Listing Division.**

**Labuan Companies applying for listing on the Exchange are expected to address the shareholder protection differences as follows**

Item	Shareholder protection matters under HKCO and Labuan laws	Exchange's observation/ Action required
1(b)	<p><u>The HKCO requirement</u> Shareholders of a concerned class holding not less than 10% of the nominal value of the issued shares of that class may petition the court to cancel the variation of the class rights.</p> <p><u>Labuan requirement</u> No equivalent requirement.</p>	A Labuan Company must provide in its Articles for a shareholders' right to petition to court to cancel any class rights variation.
1(c)	<p><u>The HKCO requirement</u> Under the HKCO, any increase of an existing member's liability to the company is not binding unless such liability increase is agreed by such member in writing.</p> <p><u>Labuan requirement</u> No equivalent requirement.</p>	A Labuan Company must provide in its Articles for a requirement of a written agreement by a member to increase his/her liability.
1(d)	<p><u>The HKCO requirement</u> Under the HKCO, a voluntary winding-up must be approved by a three-quarter majority of shareholders present in a general meeting. Under the Streamlined Procedures, the Exchange regards a voting threshold of two-third as acceptable although not strictly equivalent.</p> <p><u>Labuan requirement</u> Labuan laws provide for various procedures to voluntary wind-up a Labuan Company, including procedures that do not require approval by a three-quarter majority of shareholders present in a general meeting.</p>	A Labuan Company must provide in its Articles that any voluntary winding-up must be approved by members by a three-quarter majority vote in general meeting.
1(e)	<p><u>The HKCO requirement</u> Appointment, removal and remuneration of auditors must be approved by shareholders (i.e. majority vote in general meeting).</p> <p><u>Labuan requirement</u> The method of appointment is not prescribed in the Labuan laws, although an auditor's removal must be made in a general meeting. Under Labuan laws, the remuneration of an auditor may be determined by the directors but it can also be determined by the members at the meeting upon request by the auditor.</p>	A Labuan Company must provide in its Articles that the auditors are appointed and their remuneration is approved by way of an ordinary resolution in general meeting.

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1(f)	<p><u>The HKCO requirement</u> Under the HKCO, a register of shareholders must be open for inspection by members free of charge and by any other person upon the payment of an appropriate fee.</p> <p><u>Labuan requirement</u> The Labuan law is silent on allowing the inspection of the register of members by any other person except by the members themselves due to the secrecy provision restricting the disclosure of any information relating to a Labuan Company.</p>	A Labuan Company must amend its Articles to allow for inspection of the register of its members by any person on terms comparable to those under the HKCO (i.e. such as terms of closure of the register for inspection).
2(a)	<p><u>The HKCO requirement</u> Under the HKCO, a general meeting must be held each year as the company's annual general meeting (AGM) and no more than 15 months shall elapse between the date of one AGM of the company and the next.</p> <p><u>Labuan requirement</u> The Labuan laws do not specify the exact time frame that should be adopted for an AGM.</p>	A Labuan Company must provide in its Articles that a general meeting will be held each year as its AGM and no more than 15 months shall elapse between the date of one AGM of the Labuan Company and the next.
2(b)	<p><u>The HKCO requirement</u> Under the HKCO, members holding not less than 5% of the paid up capital of the overseas company may require the company to convene an extraordinary general meeting and may request the company to circulate a resolution proposed by the requisitionists to members entitled to receive notice of that meeting. If the directors fail to duly convene a meeting, the requisitionists may themselves convene a meeting in accordance with prescribed procedure.</p> <p><u>Labuan requirement</u> Under the Labuan laws, the directors shall convene the meeting upon request of either ten or more members, or of members holding 10% of the total paid up of the company.</p>	A Labuan Company must provide in its Articles for a lower threshold of 5% of the paid up capital to require directors to convene an extraordinary general meeting, and for the right of members to convene the meeting themselves upon directors' failure to do so.
2(c)	<p><u>The HKCO requirement</u> The notice period for a meeting approving a special resolution must be at least 21 days, and for any other shareholders' meeting at least 14 days.</p> <p><u>Labuan requirement</u> Labuan laws provide for a notice period of at least seven days for a general meeting, with some modifications and exceptions.</p>	A Labuan Company must provide in its Articles that any annual general meeting or any extraordinary general meeting at which a resolution that requires approval of members by three-quarter majority vote will be proposed shall be convened on at least 21 days' notice, and that any other general meeting shall be convened on at least 14 days' notice.

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2(d)	<p><u>The HKCO requirement</u> The HKCO provides for specific notice content requirements.</p> <p><u>Labuan requirement</u> There is no provision under the Labuan laws that requires specific contents to be included in the notice of a meeting.</p>	A Labuan Company must provide in its Articles for a specific content of the notice to include specific nature of the business to be transacted, as under the HKCO.
2(f)	<p><u>The HKCO requirement</u> Under the HKCO, the right of members to demand a poll must be comparable to that available to members of a Hong Kong incorporated public company.</p> <p><u>Labuan requirement</u> There is no express provision under the Labuan laws that provides for the right of members to demand a poll.</p>	A Labuan Company must provide in its Articles for the right of its members to demand a poll on terms comparable to that available to members of a Hong Kong incorporated public company.
3(a)	<p><u>The HKCO requirement</u> Appointment of a director is required to be voted on individually. Unanimous approval of members is required to pass a resolution permitting appointment of two or more directors by a single resolution.</p> <p><u>Labuan requirement</u> No equivalent requirement.</p>	A Labuan Company must provide in its Articles that appointment of a director is required to be voted upon individually, and that a unanimous approval of members is required to pass a resolution permitting appointment of two or more directors by a single resolution.
3(c)	<p><u>The HKCO requirement</u> Notices of intention to move a resolution at a general meeting or class meeting must include the particulars of the relevant directors' interests in the matter dealt with by the resolution.</p> <p><u>Labuan requirement</u> No equivalent requirement.</p>	A Labuan Company must provide in its Articles that notices of the intention to move a resolution at a general meeting or class meeting must contain particulars of the relevant interests of directors in the matter dealt with by the resolution.
3(d)	<p><u>The HKCO requirement</u> Subject to certain exceptions, a public company generally shall not make loans, including quasi loans and credit transactions, to its directors and their associates.</p> <p><u>Labuan requirement</u> There is no provision under the Labuan laws which prohibits loan transactions between a Labuan Company and its directors.</p>	A Labuan Company must provide in its Articles for circumstances under which a Labuan Company may make loans, including quasi loans and credit transactions, to a director no less stringent than those permitted under the HKCO (i.e. general prohibition with the exception of ordinary business, group of companies, funds to meet expenditures etc. as per the HKCO).
3(e)	<p><u>The HKCO requirement</u> Under the HKCO, any payment to a director or past director of an overseas company as compensation for loss of office or retirement from</p>	A Labuan Company must provide in its Articles that a payment to a director or a past director as a compensation for loss of office or retirement from office must be approved by

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	<p>office is required to be approved by members of the company in general meeting.</p> <p><u>Labuan requirement</u> There is no provision under the Labuan laws which provides for the payment upon loss or retirement from the office.</p>	<p>members in a majority vote in general meeting.</p>
4(b)	<p><u>The HKCO requirement</u> Any reduction of share capital must be subject to confirmation by the court.</p> <p><u>Labuan requirement</u> The Labuan laws provide that a Labuan Company may by special resolution reduce its share capital if so authorised by its Articles, subject to confirmation by the court. However, the reduction of share capital without court's confirmation is allowed under certain circumstances including submission of a solvency declaration by the directors.</p>	<p><u>Exchange's observation</u> We consider the difference immaterial. The solvency test is considered acceptable and has been accepted in other jurisdictions (such as BVI).</p> <p><u>Action required</u> Where not unduly burdensome, a Labuan Company should provide in its Articles for a requirement of a court confirmation of the share capital reduction without exceptions.</p>