

**HKEx LISTING DECISION**  
**HKEx-LD10-2011 (May 2011)**

<b>Issues</b>	Whether the Exchange would consider Guernsey an acceptable jurisdiction under Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules
<b>Listing Rules and Regulations</b>	<ol style="list-style-type: none"><li>1. Chapter 19 of the Main Board Listing Rules and Chapter 24 of the GEM Listing Rules (<b>Rules</b>)</li><li>2. Joint Policy Statement Regarding the 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, Ex-LD1-2011, HKEx-LD4-2011</li><li>4. Guidance Letter HKEx-GL12-09</li></ol>
<b>Decision</b>	<p>Guernsey is an acceptable jurisdiction of an issuer's incorporation if listing applicants incorporated there make certain revisions to their constitutive documents and demonstrate a reasonable nexus with Guernsey.</p> <p>These applicants 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 asked to consider Guernsey an acceptable jurisdiction under Chapter 19.
2. It was submitted that:
  - a. The Judicature of Guernsey is divided into three parts, namely the Magistrate's Court, the Royal Court and the Guernsey Court of Appeal. There is the right of petition to the Judicial Committee of the Privy Council in London.
  - b. There is no reciprocal arrangement for enforcement of judgments obtained in a Hong Kong court or a Guernsey court<sup>1</sup>, although a foreign judgment may still be enforced at common law in the respective courts if certain conditions are satisfied.
  - c. In 2008, a comprehensive new law governing companies was introduced in Guernsey – the Companies (Guernsey) Law, 2008 (**CGL**).

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<sup>1</sup> The Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 provides a mechanism to enforce a foreign judgment; however, a judgment of a Hong Kong court is not covered under this legislation.

- d. The Guernsey Financial Services Commission is a full member of IOSCO, a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information and it entered into a Letter on Intent with the Securities and Futures Commission (**SFC**) of Hong Kong in 2005.
3. The Exchange was provided with a comparison table (**Comparison Table**) comparing the Hong Kong Companies Ordinance (**HKCO**) with the CGL based on the JPS framework as supplemented by Guidance Letter HKEx-GL12-09.

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

4. All listing applicants must ensure that they are able to and will comply with the Rules, the Securities and Futures Ordinance (**SFO**) and 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 seeking a listing on the Exchange. In particular, under Main Board Rule 19.05(1)(b) and GEM Rules 24.05(1)(b), when considering the primary listing of securities of an overseas issuer, the Exchange may refuse the 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 makes the variations to its constitutive documents the Exchange requires (see Notes to Main Board Rule 19.05(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 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.
9. Guidance Letter HKEx-GL12-09 sets out Streamlined Procedures for listing overseas companies (**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.
10. Where an applicant proposes to change its corporate practices (e.g., by amending its constitutive document or administrative procedures) to achieve equivalence with the shareholder protection standards of Hong Kong or another recognised or accepted jurisdiction, there may be more than one acceptable way to do so. The Exchange does not prescribe the method used.

## ANALYSIS

### *Matters under the JPS*

11. The Exchange noted certain differences in shareholder protection standards between the HKCO and the CGL:
  - a. areas where the provisions under the CGL are considered either more stringent than or broadly commensurate with the HKCO;
  - b. areas where a Guernsey company's articles of incorporation (**Articles**) can mirror the HKCO standards of shareholders protection (see **Appendix**);
  - c. areas where the difference in shareholder protections standards under the CGL is not considered material (**Differences**); and
  - d. areas where it is not legally possible for the Articles to achieve shareholder protection standards at least equivalent to or broadly commensurate with those under the HKCO (**Legal Impossibilities**).
12. Where the JPS merely requires clearly stating the circumstances of a particular shareholder protection matter (e.g., Items 1(g) and 4(e) of the JPS), the relevant disclosures of any regulatory differences should be disclosed in a listing document.

### *Differences*

#### Item 4(a) – change in share capital

13. The HKCO provides that, if authorised by its articles, a company may alter the capital clause in its memorandum by an ordinary resolution in a general meeting. A Guernsey company no longer requires an authorised share capital clause. There is no statutory mechanism for a company incorporated under the CGL to increase its authorised share capital. The Articles may provide a mechanism for changes to be made to a share capital clause. (There is a statutory mechanism for a company incorporated under earlier Guernsey companies law to increase its share capital by ordinary resolution.)
14. As regards the power to allot shares, the CGL provides that a company's memorandum or its Articles or a shareholders' resolution may grant power to directors to issue shares in a company. The Articles can provide that no shares may be issued by the board of directors without the prior approval of an ordinary resolution by shareholders, subject however to the Listing Rules requirements. As regards other changes to the issued share capital (e.g. consolidation or subdivision), a company's memorandum or its Articles may provide that such changes be authorised by an ordinary resolution.

#### Item 4(b) – reduction in share capital

15. The HKCO requires a reduction of share capital to be approved by a three-quarter majority vote in a general meeting and subject to court confirmation.

16. As the concept of capital maintenance no longer exists under the CGL, a reduction of capital constitutes a “distribution”. Under the CGL, distributions are permitted if (a) a statutory solvency test is satisfied; and (b) the company has complied with relevant provisions in its memorandum or its Articles. The Articles may require that a special resolution is also obtained for a reduction of issued share capital.

*Item 4(c) – redemption and repurchase of shares*

17. The HKCO requires a company to redeem its shares out of distributable profits or fresh proceeds from a new issue of shares. The CGL provides no requirement for shares to be redeemed (or repurchased) out of a particular account or source of the company. As a redemption or a repurchase of shares is treated as a distribution under the CGL, a redemption or repurchase will be subject to satisfying the statutory solvency test and any relevant provisions in the company’s memorandum or Articles, as discussed in Item 4(b) above.

*Item 4(d) – distribution and dividend*

18. The HKCO requires a distribution of a company’s assets to its members to be made out of realised profits and, if out of assets, the remaining net assets must not be less than the share capital plus undistributable reserves. In Guernsey, a dividend can be paid from any available source of the company, as long as the statutory solvency test and any relevant provisions in the company’s memorandum or Articles are satisfied. The Articles of a Guernsey company may provide that the company may, by ordinary resolution, authorise and declare a dividend which shall be payable out of profits available for the purpose.

***Legal Impossibilities***

*Item 1(b) – Court petition to cancel class rights variation*

19. The CGL provides that a variation of class rights may be effected (i) in accordance with the Articles; or (ii) in accordance with the CGL, if the Articles do not contain provisions to vary class rights. The CGL further provides that members holding not less than 15% of the relevant share class, and who did not consent or vote for the variation in accordance with the CGL, may object by making an application to the Guernsey court.
20. The threshold of 15% under the CGL is higher than the required threshold of 10% under the HKCO. It would be in contravention of the CGL for the Articles to include a lower threshold for this statutory remedy. Under the CGL, if any member can demonstrate that a company’s affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of members, the Guernsey court may order the company to do, or refrain from doing, a particular act.

*Item 2(a) – Not more than 15 months shall elapse between 2 AGMs*

21. The CGL provides that AGMs should be held no more than 15 months apart (except for the first AGM which may be held no more than 18 months after incorporation). This is comparable to the HKCO.

22. However, under the CGL, members may waive the requirement to hold an AGM by passing a waiver resolution, which requires members holding 90% of the voting rights to approve it. It is legally impossible to amend the Articles to exclude this provision. However, given the high threshold required to pass the resolution, it is unlikely that a listed company would dispense with the requirement to hold an AGM by passing a waiver resolution. Besides, the CGL provides that members holding 10% of voting rights can request that such a waiver resolution be rescinded.

## **CONCLUSION**

23. We consider that Guernsey is an acceptable jurisdiction of a company's incorporation on the basis that:-
- a. in an actual case, if a Guernsey company cannot meet a particular requirement in the Articles, it should provide alternative measures of shareholder protections acceptable to the Exchange;
  - b. the nexus requirement will be satisfactorily demonstrated in an actual case;
  - c. there are no specific circumstances that render the acceptance of Guernsey inappropriate;
  - d. a Guernsey company will disclose in its listing document the jurisdictional and regulatory differences between Hong Kong and Guernsey, especially on the aspects of the JPS; and
  - e. if there are any subsequent major changes in Guernsey laws which significantly worsen the shareholder protection standards as compared to those in Hong Kong, the Exchange may impose conditions as we see appropriate or reconsider Guernsey as an acceptable jurisdiction for a company's incorporation.
24. Expected confirmations to the Exchange when filing a formal listing application are:-
- a. a confirmation from the sponsor that it has considered and reviewed all material shareholder protection areas in its due diligence review under Practice Note 21 to the Main Board Rules or Practice Note 2 to the GEM Rules, and that it is independently satisfied that the protection afforded to the applicant's shareholders by Guernsey laws and regulations is at least equivalent to or broadly commensurate with that in Hong Kong; and
  - b. a legal opinion and the sponsor's confirmation that the applicant's constitutive documents do not contain provisions preventing it from complying with the Rules, the SFO – Part XV, and the Takeovers Codes.

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

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

**Summary of areas where the provisions under the CGL are considered broadly commensurate with the HKCO after proposed amendment in the Articles**

<b>JPS Item</b>	<b>Differences</b>	<b>Proposed provision in the Memorandum or Articles of incorporation</b>
<i>1</i>	<i>Corporate structure that clearly protects principal shareholder rights</i>	
<b>1(a)</b>	<p><u>HK Requirement</u> Generally, change to a company's constitutive document needs a three-quarter majority vote in general meeting.</p> <p><u>Guernsey Requirement</u> Generally, change to a company's constitutive document needs a three-quarter majority vote in general meeting. However, in some circumstances, a lower threshold may be allowed to amend the constitutive document.</p>	The Memorandum and Articles can reflect Hong Kong requirements.
<b>1(b)</b>	<p><u>HK Requirement</u> Variation of class right requires a three-quarter majority vote in general meeting.</p> <p><u>Guernsey Requirement</u> Generally, variation of class rights needs a three-quarter majority vote in general meeting. However, in some circumstances, a lower threshold may be allowed to vary class rights.</p>	The Articles can reflect Hong Kong requirements.
<b>1(c)</b>	<p><u>HK Requirement</u> Alteration in the constitutive document to increase 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>Guernsey Requirement</u> No specific provision under CGL.</p>	The Articles can reflect Hong Kong requirements.
<b>1(d)</b>	<p><u>HK Requirement</u> Generally, voluntary winding up of a company must be approved a three-quarter majority vote in general meeting.</p> <p><u>Guernsey Requirement</u> Generally, a special resolution is required to voluntarily wind up a Guernsey company. However, in some circumstances, only an ordinary resolution is sufficient to approve the voluntary winding up: (a) if a period for the duration of the company is fixed in the company's constitutive documents and that period expires; or (b) if the company's constitutive documents specify an event which triggers the dissolution of the company and that event occurs.</p>	The Articles should not contain a provision specifying either a fixed duration of a company or the occurrence of an event, either of which would trigger a winding up of the company by passing an ordinary resolution only.

<b>JPS Item</b>	<b>Differences</b>	<b>Proposed provision in the Memorandum or Articles of incorporation</b>
<b>1(e)</b>	<p><u>HK Requirement</u> Appointment, removal and remuneration of auditors must be approved by a majority vote in a general meeting.</p> <p><u>Guernsey Requirement</u> Guernsey requirements are broadly commensurate with Hong Kong requirements. However, the CGL allows deemed re-appointment of auditors.</p>	The Articles can limit the deeming provision for re-appointment of auditors.
<b>1(f)</b>	<p><u>HK Requirement</u> Branch register of members in Hong Kong shall be open to inspection by members. Closure of the register shall be on terms comparable to Hong Kong requirements.</p> <p><u>Guernsey Requirement</u> Guernsey requirements are broadly commensurate with Hong Kong requirements. However, CGL does not expressly provide for a Guernsey company to have a branch register, nor contain specific provisions regarding closure of the members' register.</p>	The Articles can provide for directors' power to approve a branch register being available for inspection at a location outside of Guernsey. They can also reflect the Hong Kong requirements on open and closure of the members' register.
<b>2</b>	<b><i>Fair proceedings for general meetings to enable shareholders to utilise their rights in full</i></b>	
<b>2 (b)</b>	<p><u>HK Requirement</u> Members holding more than 5% of the paid up capital 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.</p> <p><u>Guernsey Requirement</u> The CGL provides that members holding more than 10% of the capital carrying the right to vote to requisition the directors to call a general meeting. Members representing 5% of the total voting rights may require the company to circulate a written resolution.</p>	The Articles can provide for a lower threshold for members to exercise their rights of requisition to reflect the Hong Kong requirements.
<b>2(c)</b>	<p><u>HK Requirement</u> At least 21 days' written notice is required for shareholders' meetings for approving special resolutions; other general meetings must be convened on at least 14 days' notice.</p> <p><u>Guernsey Requirement</u> At least 10 days' notice (or such longer period as the Articles may provide) is required for a general meeting, except where all members entitled to attend and vote agree to a shorter period.</p>	The Articles can provide for a longer notice period to reflect the Hong Kong requirements.

<b>JPS Item</b>	<b>Differences</b>	<b>Proposed provision in the Memorandum or Articles of incorporation</b>
2(d)	<p><u>HK Requirement</u> Overseas companies must adopt general provisions as to meetings and votes on terms comparable to a Hong Kong incorporated public company.</p> <p><u>Guernsey Requirement</u> Guernsey requirements are broadly commensurate with Hong Kong requirements.</p>	The Articles can provide for meeting and votes on terms comparable to Hong Kong requirements (e.g. notice, quorum, means of service of documents).
2(e)	<p><u>HK Requirement</u> Proxies/corporate representatives may be appointed by recognised clearing house for attending general meetings and creditors meetings; such proxies/corporate representatives should enjoy statutory rights of a shareholder, including the right to speak in such meetings.</p> <p><u>Guernsey Requirement</u> If a clearing house is the legal owner of shares then it would have the right to appoint a proxy or a corporate representative.</p>	The Articles can reflect Hong Kong requirements.
2(f)	<p><u>HK Requirement</u> Members' rights to demand a poll must be comparable to that available to members of a Hong Kong incorporated public company.</p> <p><u>Guernsey Requirement</u> Any provision contained in the Articles restricting members' right to demand a poll shall be void unless in certain circumstances.</p>	The Articles can provide that a resolution put to a shareholders' meeting shall be decided by way of a poll or otherwise in accordance with the Listing Rules.
3	<i>An overseas company is expected to adopt corporate governance measures that ensure the powers of directors are reasonably contained and subject to reasonable scrutiny.</i>	
3(a)	<p><u>HK 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>Guernsey Requirement</u> Appointments of directors shall be voted on individually except in certain circumstances.</p>	The Articles can reflect Hong Kong requirements.
3(b)	<p><u>HK Requirement</u> A director is required to declare any material interest in a contract with the company at the earliest meeting of the board of directors.</p> <p><u>Guernsey Requirement</u> A director shall make disclosure to the board of any interest in a transaction or proposed transaction with the company, immediately after becoming aware of the fact that he is interested in a transaction</p>	The Articles can reflect Hong Kong requirements.

<b>JPS Item</b>	<b>Differences</b>	<b>Proposed provision in the Memorandum or Articles of incorporation</b>
	or proposed transaction. However, there are exceptions to this requirement (e.g. a transaction or proposed transaction is in the ordinary course of the company's business and on usual terms and conditions).	
<b>3(c)</b>	<u>HK Requirement</u> A notice to move a resolution at a shareholder meeting shall include particulars of the director's interest.  <u>Guernsey Requirement</u> No equivalent provision.	The Articles can reflect Hong Kong requirements.
<b>3(d)</b>	<u>HK Requirement</u> A company may only make loans, including quasi loans and credit transactions, to a director in certain circumstances.  <u>Guernsey Requirement</u> No equivalent provision.	The Articles can reflect Hong Kong requirements.
<b>3(e)</b>	<u>HK Requirement</u> Ordinary resolution is required for payment to a director or past director as compensation for loss of office or retirement from office. <u>Guernsey Requirement</u> No equivalent provision.	The Articles can reflect Hong Kong requirement.