

**HKEx LISTING DECISION**  
**HKEx-LD109-1 (October 2010)**

<b>Parties</b>	Company X - a company incorporated in Brazil proposing to list on the Main Board
<b>Issue</b>	Whether the Exchange would consider Brazil an acceptable jurisdiction under Chapter 19 of the Main Board Listing Rules
<b>Listing Rules and Regulations</b>	<ol style="list-style-type: none"> <li>1. Chapter 19 of the Main Board 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 and HKEx-LD84-1</li> <li>4. Guidance Letter: HKEx-GL12-09</li> </ol>
<b>Decision</b>	<p>Based on the Undertakings, the Exchange considered Brazil an acceptable jurisdiction of an issuer's place of incorporation under Chapter 19 of the Rules</p> <p>Future applicants incorporated in Brazil may follow the streamlined procedures set out 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 invited to consider whether Brazil is an acceptable jurisdiction under Chapter 19.
2. Company X submitted that:
  - a. Its shares were currently primary listed on BM&FBOVESPA in São Paulo, Brazil (**Foreign Primary Exchange**). It proposed to secondary list on the Exchange by way of depositary receipt (**HDR**).
  - b. It principally operated in Brazil and the majority of its employees were based in Brazil. It therefore satisfied the nexus factor required under the JPS.
  - c. Brazil is a full signatory of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information, and therefore there is a reasonable regulatory co-operation between the securities regulators in Brazil and Hong Kong.
  - d. Brazil adopts a civil (statutory) law system, under which all legal matters and relationships are primarily governed by statutory laws rather than court judgments. Foreign judgments and arbitration awards must be ratified by the Superior Tribunal de Justica in order to be enforceable in Brazil. Brazil has ratified various conventions to enhance execution of foreign judgments and arbitration awards.

3. Company X submitted a comparison table (**Comparison Table**) of the Hong Kong Companies Ordinance (**HKCO**) and Brazilian laws and regulations, mainly the Brazilian Federal Law 6.404/76 (**Corporations Act**) on shareholder protection matters based on the JPS framework as supplemented by Guidance Letter HKEx-GL12-09.

## **APPLICABLE LISTING 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 and the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Takeovers Codes**).
5. Chapter 19 provides a general framework for overseas companies seeking a listing on the Exchange. In particular, under Rule 19.05(1)(b), when considering primary listing of securities of an overseas issuer, the Exchange reserves the right to be satisfied that the overseas issuer is incorporated in a jurisdiction which offers at least equivalent standards of shareholder protection in Hong Kong.
6. Where the Exchange believes that the overseas issuer's jurisdiction of incorporation does not provide standards equivalent to Hong Kong, it may approve the listing of the overseas issuer if it makes the variations to its constitutive documents the Exchange requires (see Note to Rule 19.05(1)).
7. The JPS formalised 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 and HKEx-LD84-1.
9. Guidance Letter HKEx-GL12-09 sets out streamlined procedures for listing overseas companies. 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.

## **ANALYSIS**

10. Where an applicant proposes to change its corporate practices (e.g., by amending its constitutive document or administrative procedures) to achieve equivalence with Hong Kong shareholder protection standards, there may be more than one acceptable way to do so. The Exchange does not prescribe the method used.

### ***Matters under JPS***

11. As Company X was already a publicly listed company, the Exchange accepted that requiring it to amend its articles of association (**Articles**) to achieve equivalent shareholder protection standards would be too burdensome. The Exchange agreed that Company X could satisfy the equivalence requirement by providing undertakings (**Undertakings**) (on JPS matters Items 1(e), 2(c), 2(e) and 3(d), please see Attachment I) which would be disclosed in the prospectus and in

- the manner as required by the Exchange to ensure that investors would be fully informed of those Undertakings after listing.
12. Although there would remain certain differences (stated in paragraphs 12 to 23 below) in the shareholder protection standards under Hong Kong and Brazilian laws, Company X considered that shareholder protection standards under Brazilian laws were comparable to those in Hong Kong.
  13. Company X submitted the differences between the Hong Kong and Brazilian legal regimes under the JPS framework. Some of the major differences are highlighted as follows:

*Items 1(a), (b) & (d) of the JPS - Voting threshold*

14. Under the HKCO, certain shareholder resolutions require not less than three-quarter majority vote of shareholders (**Special Resolution**). These include amendment to the constitutive documents (Item 1(a) of the JPS), variation of rights to a class of shares (Item 1(b) of the JPS) and voluntary winding up (Item 1(d) of the JPS).
15. Under Brazilian laws:
  - a. For Item 1(a) of the JPS - Corporations Act provides that any amendment to the articles of a company may be approved by shareholders in a general meeting by way of a Simple Approval<sup>1</sup> under a Special Quorum<sup>2</sup>. Where the amendment relates to material matters (defined in Corporations Act), a Special Approval<sup>3</sup> under a Special Quorum is required.
  - b. For Item 1(b) of the JPS - If the proposed variation of class rights is prejudicial to the interests of the shareholders of that class, it must also be approved by a Special Approval under a Special Quorum at a separate class meeting.
  - c. For Item 1(d) of the JPS - For voluntary winding up, a Special Approval under an Ordinary Quorum<sup>4</sup> in a general meeting is required under the Corporations Act.
16. Notwithstanding the above differences, Company X considered that there would be a comparable level of shareholder protection under Brazilian laws on the basis that:
  - a. the Special Quorum is a more stringent requirement than would normally be required in Hong Kong; and

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<sup>1</sup> Simple Approval means approval by a simple majority of more than 50% of the votes cast by shareholders attending the meeting in person or by proxy.

<sup>2</sup> Special Quorum means the attendance of shareholders holding at least two-thirds of the total voting shares in issue of the company who are entitled to attend and vote at the general shareholders' meeting, whether in person or by proxy.

<sup>3</sup> Special Approval means the approval by a simple majority of more than 50% of the total voting shares in issue of the company.

<sup>4</sup> Ordinary Quorum means the attendance of shareholders holding at least one-quarter of the total voting shares in issue of the company who are entitled to attend and vote at the general shareholders' meeting, whether in person or by proxy.

- b. where an amendment to the Articles concerns material matters defined under the Corporations Act, a Special Approval would be required. This threshold provides equivalence, and possibly is a more stringent requirement than the Special Resolution requirement under the HKCO.

*Item 3(a) of the JPS - Appointment of directors*

17. Under the HKCO, the appointment of a director is required to be voted on individually. In Company X's case, where more than one director is to be appointed, the appointment of all the directors is approved under a single resolution and not voted on individually.
18. The Corporations Act provides that shareholders representing 5% of a company's voting share capital shall have the right to request a Multiple Voting System<sup>5</sup>. Under the Multiple Voting System, the minority shareholders may have more influence over the appointment of individual directors as they could place all the votes on one candidate.

*Items 1(f), 2(b) & (d) & 3(c) of the JPS - Information to shareholders*

19. Under the HKCO, shareholders are entitled to certain information rights, including:
  - a. Item 1(f) - inspection of the Hong Kong share register;
  - b. Item 2(b) - circulation of members' resolutions upon request;
  - c. Item 2(d) - service of notices of meeting to be sent by post or given in person; and
  - d. Item 3(c) - disclosure of directors' interest in notices of general meeting.
20. While these matters are provided for differently under Brazilian laws, Company X considered that shareholder protection would be safeguarded as:
  - a. any shareholder may inspect his own record in the register of shareholders and that HDR holders will have similar rights to inspect the HDR register under Rule 19B.16; and
  - b. Company X would be required by the rules of the Foreign Primary Exchange to publish:

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<sup>5</sup> Where the multiple voting system is used, each shareholder is entitled to exercise the number of votes equal to the number of board members being appointed for each share held multiplied by the number of shares held by this shareholder (for example, if there are six board seats to be filled, a shareholder who has 10 shares will be entitled to exercise 60 votes). Shareholders are free to allocate their votes to one candidate or divide them among some or all candidates. As a result of this, the multiple voting system allows, under certain circumstances, minority shareholders to appoint directors to the board as a minority shareholder could place all his votes on one candidate which is likely to guarantee the appointment.

- information relating to (a) any shareholder who holds 5% or more of the its shares; (b) directors and executive officers' interests in its shares; and
- notices of general meeting which include explanatory information on each resolution proposed to be passed and any information about directors' conflicts of interests.

*Item 4(b) of the JPS - No court process for capital reduction*

21. Under the HKCO, any reduction of share capital in a company must be subject to court confirmation. Under Brazilian laws, a Simple Approval by shareholders is required for a capital reduction resolution. There is no equivalent requirement under Brazilian laws and Brazilian courts do not have an established process in respect of capital reduction of companies.
22. There is also no provision for any court process for capital reduction in the PRC, Bermuda and Luxemburg, which are also accepted jurisdictions. Besides, Company X submitted that its shareholders also have the right to apply to court for the capital reduction to be cancelled if the principle of equal treatment of all shareholders is not followed.

*Item 2(f) of the JPS - Right to demand a poll*

23. Under the HKCO, shareholders can demand a poll when it is demanded by (i) four or more shareholders; or (ii) shareholders representing 10% or more of voting shares.
24. The method of voting by poll is not adopted for Brazilian companies. Nonetheless, votes in general meetings of Brazilian companies are counted on the basis of 'one vote for each voting share' held by each shareholder present and voting at the meeting. This method of vote counting is similar to the arrangement of voting by poll under Hong Kong laws even though voting is conducted by a show of hands. It would have the same effect of ensuring accurate vote counting as in the case of voting by poll.

## **CONCLUSION**

25. The Exchange considered that Brazil is an acceptable jurisdiction under Chapter 19 of the Rules on the basis that the shareholder protection standards set out in the Comparison Table, supplemented by the Undertakings and the rule requirements of the Foreign Primary Exchange, should provide a shareholder protection level at least equivalent to Hong Kong. Disclosure would be made in Company X's prospectus of the major jurisdictional or regulatory differences between the Brazilian and Hong Kong requirements on the aspects set out in the JPS.
26. It would be required to submit at the time of filing its listing application:
  - a. a confirmation from the sponsor that it has considered and reviewed all material shareholder protection areas in its due diligence review under Practice Notice 21 of the Rules and that it is independently satisfied that the

shareholder protection offered in Brazil is at least equivalent to that in Hong Kong or and any one of the recognised or accepted jurisdictions; and

- b. a legal opinion and the sponsor's confirmation that its constitutive document does not contain provisions which will prevent it from complying with the Rules, the Securities and Futures Ordinance – Part XV and the Hong Kong Codes on Takeovers and Mergers and Share Repurchases, to the extent they apply.
27. Future applicants incorporated in Brazil may follow the streamlined procedures set out in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS.

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

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

Company X gave the following undertakings to the Exchange to address the shareholder protection differences so long as Company X remained secondary listed on the Exchange.

Item	Shareholder protection matters	Undertaking
1(e)	<p><b><u>Hong Kong</u></b> A company shall appoint auditors at each annual general meeting to hold office from the conclusion of that meeting until conclusion of the next annual general meeting.</p> <p><b><u>Brazilian laws &amp; regulations of the Foreign Primary Exchange</u></b> A public company may appoint auditors for a term of up to five years.</p>	The fiscal council <sup>6</sup> of Company X would review and evaluate the performance of its auditor on an annual basis and make a recommendation to the board of directors on whether Company X should remove its existing auditors and re-appoint new auditors.
2(c)	<p><b><u>Hong Kong</u></b> A company must give at least 21 days' written notice for all annual general meetings and general meetings in which a special resolution is proposed to be passed, and at least 14 days' written notice for other general meetings.</p> <p><b><u>Brazilian laws &amp; regulations of the Foreign Primary Exchange</u></b> In some circumstances, Company X is required to give shorter notice than the Hong Kong requirement.</p>	Company X would (i) give at least 30 days' notice for any general shareholders' meeting; and (ii) where any general shareholders' meeting is adjourned, give at least 15 days' notice to reconvene the meeting.
2(e)	<p><b><u>Hong Kong</u></b> A recognized clearing house who is a member of a company can appoint multiple proxies to attend general meeting. Shareholders are entitled to appoint another person as his proxy to attend and vote in general meetings. In every notice of meeting, there must appear with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy or, where that is allowed, 1 or more proxies, to attend and vote instead of him, and that a proxy need not also be a member.</p> <p><b><u>Brazilian laws &amp; regulations of the Foreign Primary Exchange</u></b> Any depositary or clearing house can appoint more than one proxy to attend general meeting. A shareholder is entitled to appoint proxy to attend and vote in shareholders' meetings. In the case of a public company, the proxy must be a shareholder, a manager (director or executive officer) of the company, an attorney-at-law registered with the Brazilian Bar Association or a financial institution. There is no requirement for a statement of the shareholders' right to appoint proxies to be prominently included in the notice of the meeting.</p>	Company X would include a prominent statement in notices of shareholders' meeting about the right to appoint proxy, but the proxy must be either a shareholder, a manager (director or executive officer) of the company, an attorney-at-law registered with the Brazilian Bar Association or a financial institution.
3(d)	<p><b><u>Hong Kong</u></b> Under s157 of HKCO, the prohibition of loans and comparable benefits to director is expanded to certain relatives and other related parties of the director.</p> <p><b><u>Brazilian laws &amp; regulations of the Foreign Primary Exchange</u></b> There is no equivalent provision under Brazilian laws.</p>	Company X agreed to restrict loans being made to related parties of its directors subject to the exceptions that are available to a Hong Kong company as set out in the HKCO.

<sup>6</sup> A council established under the Brazilian company law. It is responsible for monitoring the activities of the executive management, reviewing financial statements and reporting its findings to shareholders. Company X's fiscal council comprised three to five members and also performed the role of an audit committee.