

HKEx LISTING DECISION
HKEx-LD84-1 (December 2009)

Summary	
Subject	Whether the Exchange would consider the British Virgin Islands (BVI) an acceptable jurisdiction under Chapter 19 of the Listing Rules?
Listing Rules and Other Reference Materials	<ol style="list-style-type: none">1. Chapter 19 of the Listing Rules;2. Joint Policy Statement Regarding the Listing of Overseas Companies (JPS);3. Listing Decisions: HKEx-LD65-1; HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1 and HKEx-LD80-1; and4. Guidance Letter: HKEx-GL12-09.
Decision	<p>Subject to a BVI incorporated applicant revising its constitutional documents to address differences on shareholder protection matters and demonstrating a reasonable nexus with the BVI, the BVI is an acceptable jurisdiction for an issuer's place of corporation under Chapter 19.</p> <p>Future BVI applicants may follow the streamlined process in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS.</p>

SUMMARY OF FACTS

1. The Exchange was invited to consider the BVI an acceptable jurisdiction under Chapter 19.
2. It was submitted that:
 - a. BVI law, like Cayman Islands law, has a common law system based on the English model. English common law and equitable principles form part of the substantive laws of the BVI. The BVI courts will look to English decisions for guidance in interpreting these principles;
 - b. more than 60 BVI-incorporated companies are listed on major stock exchanges, including New York Stock Exchange, Nasdaq, AIM market of London Stock Exchange, the Toronto Stock Exchange and the Singapore Stock Exchange; and

- c. British Virgin Islands Financial Services Commission is a signatory of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information.
3. Based on the streamlined procedures in Guidance Letter HKEx-GL12-09, a comparison table (see Annex) was provided showing how shareholder protection matters identified in the JPS could be dealt with under BVI Business Companies Act (**BVI Act**), benchmarking them against Cayman Islands Companies Law (**Cayman Islands Law**):
 - Part I sets out the differences between the BVI Act and Cayman Islands Law on those shareholder protection matters and what a BVI applicant could do to provide at least the same protection level as that provided by a Cayman Islands applicant.
 - Part II sets out those protection matters where there are no generally equivalent provisions in the BVI Act or Cayman Islands Law but the memorandum and articles of association (**M&A**) of a BVI applicant could be amended to incorporate provisions that are substantially the same as those commonly adopted by a Cayman Islands applicant.
 - Part III sets out those shareholder protection matters where the BVI Act and Cayman Islands Law afford generally equivalent protection; hence no action is required.

THE ISSUES RAISED FOR CONSIDERATION

4. Whether the Exchange would consider the British Virgin Islands (**BVI**) an acceptable jurisdiction under Chapter 19 of the Listing Rules.

APPLICABLE LISTING RULES OR PRINCIPLES

5. Chapter 19 provides a general framework for all overseas companies seeking a listing on the Exchange. In particular, under Rule 19.05(1)(b), when approving 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 to those in Hong Kong.
6. Where the Exchange believes that the jurisdiction in which the overseas issuer is incorporated does not provide standards at least equivalent to those in Hong Kong, the Exchange may approve listing of the overseas issuer subject to it making variations to its constitutional documents the Exchange requires (see note to Rule 19.05(1)).

7. The JPS has formalised this process by setting out a list of shareholder protection which the Exchange will take into account.
8. The shareholder protection standard of an overseas issuer's jurisdictions of incorporation is explained in Listing Decisions HKEx-LD65-1, HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1 and HKEx-LD80-1.
9. Guidance Letter HKEx-GL12-09 sets out streamlined procedures for listing overseas companies. It provides that a potential applicant can show that the shareholder protection standards in its home jurisdiction are comparable to the standards of any one of the recognised or accepted jurisdictions, instead of benchmarking directly to Hong Kong standards.
10. Cayman Islands is one of the recognised jurisdictions under the Listing Rules.

THE ANALYSIS

Benchmarking to Cayman Islands

11. The Exchange noted that the proposed amendments to a BVI applicant's M&A in the table are substantially similar to those commonly adopted by a Cayman Islands applicant.
12. Based on the proposed amendments to the BVI applicant's M&A with respect to the shareholder protection matters in the JPS, the Exchange was of the view that shareholders of a BVI applicant should be afforded a comparable level of protection as that provided by a Cayman Islands applicant.
13. The Exchange also noted there is reasonable regulatory cooperation between regulators in the BVI and Hong Kong.
14. If there are any subsequent major changes in the BVI law which significantly lower shareholder protection standards, the Exchange would impose further conditions or reconsider accepting any future BVI applications.

Nexus to be established

15. When considering future BVI applications, a potential applicant needs to demonstrate to the Exchange that there is a reasonable nexus between its operations and the BVI.

THE DECISION

16. The Exchange determined that BVI is an acceptable overseas jurisdiction subject to: -
 - a. a potential BVI applicant must amend its constitutional documents to address the differences in shareholder protection matters identified in the JPS;
 - b. a potential BVI applicant must demonstrate it has a reasonable nexus between its place of incorporation and its place of business operations;
 - c. the sponsor must provide a confirmation that it has considered and reviewed all material shareholder protection areas in its due diligence review under Practice Note 21 of Main Board Rules or Practice Note 2 of GEM Rules and it is independently satisfied with the conclusion that the shareholder protection in the BVI is at least equivalent to that in Cayman Islands; and
 - d. a legal opinion and a sponsor's confirmation must be provided to confirm that the BVI incorporated applicant's constitutional documents do not contain provisions which will prevent it from complying with the Listing Rules and there is nothing in them that will prevent it from complying with the Securities and Futures Ordinance – Disclosure of Interests and the Hong Kong Codes on Takeovers and Mergers and Share Repurchases.
17. Future BVI applicants may follow the streamlined process set out in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS.

Comparison Table referred to in paragraph 3 above

<i>Part I - items identified in the JPS where BVI Act and Cayman Islands Law are different</i>		
Item	Differences	Proposed amendments to the BVI's constitutional documents
1(a)	<p><u>Under the BVI Act</u> Alteration to the constitutional documents may be effected by majority vote of resolution of members or the directors if authorised by the memorandum.</p> <p><u>Under Cayman Islands Law</u> Alteration can only be made by special resolutions.</p>	To specify that directors do not have power to amend the constitutional documents and that any alteration must be approved by members' special resolution.
4(a)	<p><u>Under the BVI Act</u> The concept of share capital no longer exists and hence no mechanism for increasing share capital.</p> <p><u>Under Cayman Islands Law</u> Authorised share capital can be increased if permitted by a company's articles and effected by ordinary resolution.</p>	To state the maximum number of shares and provide for the increase of shares by majority vote.
4(b)	<p><u>Under the BVI Act</u> The concept of share capital and maintenance no longer exist. Hence, no mechanism for reduction of capital.</p> <p><u>Under Cayman Islands Law</u> Share capital can be reduced if permitted by the company's articles and effected by special resolution of members.</p>	In line with Cayman Islands Law, to specify that any distribution must be approved by special resolution of members the same way as that in the Cayman Islands Law.
4(c)	<p><u>Under the BVI Act</u> While the Act does not specify the funding sources for redemption and share repurchase, its Solvency Test provides that any company may only effect the repurchase if the value of its assets exceeds its liabilities and it is able to pay its debts.</p>	As the Solvency Test has limited the BVI company's funding sources for redemption and share repurchase, the position in BVI should be comparable to that of Cayman Islands. The mechanism of repurchase could be done by way of amending the BVI company's M&A in the same way as a Cayman Islands applicant does to its M&A.

	<p><u>Under Cayman Islands Law</u> Shares may be repurchased if permitted by the company's articles subject to the company being able to pay its debts.</p>	
4(d)	<p><u>Under the BVI Act</u> A company can make a distribution from any available source.</p> <p><u>Under Cayman Islands Law</u> Dividends may be paid out of profits or the share premium account.</p>	No amendments needed as the BVI company cannot make a distribution when insolvent under the Solvency Test. The company can only make a distribution when its assets exceed liabilities. Shareholder and creditor protection are in place.
<i>Part II - items identified in the JPS where no generally equivalent provisions can be found in the BVI Act or Cayman Islands Law</i>		
Item	Details	Proposed actions
1(b); 1(c); 1(d) - 1(f); 2(a) - 2(f); 3(a) - 3(e); and 4(e)	There are no generally equivalent provisions in both the BVI Act and the Cayman Islands Law.	Incorporation of the matters can be done by amending the company's M&A in substantially the same way as those commonly adopted by Cayman Islands applicants.
<i>Part III - items identified in the JPS where generally equivalent provisions can be found in the BVI Act and Cayman Islands Law</i>		
Item	Details	Proposed actions
1(g)	There are provisions under the BVI Act. Comparable protection can be found in provisions of Cayman Islands Law.	Current provisions under the BVI Act can provide protection. No alteration to a BVI company's M&A needed.