Charltons - Hong Kong Law Newsletter - 06 December 2006

[online version](http://www.charltonslaw.com/hong-kong-stock-exchange-accepts-listing-of-companies-incorporated-in-australia-and-british-colombia/)

# Hong Kong Law Issue 42

## 1. Hong Kong Stock Exchange Accepts Listing Of Companies Incorporated In Australia And British Colombia

In two related decisions in October and November 2006, the Stock Exchange of Hong Kong Limited (the **Exchange**) has decided to accept the listing of companies incorporated in Australia and British Colombia, subject to certain conditions.

### Brief Facts

#### Australia

Company X, incorporated in New South Wales, Australia had been listed on the Australian Stock Exchange (**ASX**) for over three years and was considering an application for a secondary listing and a possible subsequent primary listing on the Exchange. The company made a pre-IPO enquiry seeking guidance on its listing in Hong Kong in respect of the acceptance of Australia under Chapter 19 of the Listing Rules. The company submitted comparisons of shareholder protection safeguards in Hong Kong and Australia covering (i) relevant provisions of the Listing Rules, the Companies Ordinance, the Securities and Futures Ordinance and the Codes on Takeovers and Mergers and Share Repurchases, and (ii) the Listing Rules on articles of association.

#### British Colombia

Company Y, incorporated in British Colombia, Canada had been listed on the Frankfurt Stock Exchange (**FSE**) and the NASDAQ National Market since 1997. The company was considering a primary listing on the Exchange for which it made a pre-IPO enquiry seeking guidance on its listing in Hong Kong in respect of the acceptance of British Colombia under Chapter 19 of the Listing Rules. The company also submitted comparative tables on shareholder protection safeguards in Hong Kong and British Colombia.

### Applicable Listing Rules

Companies that are not incorporated in an approved jurisdiction (ie. Hong Kong, Bermuda, the Cayman Islands and the PRC) are required to meet the requirements of Chapter 19 of the Main Board Listing Rules and are considered for listing on a "case-by-case" basis. Chapter 19 stipulates different requirements for primary and secondary listing.

#### Primary Listing

Rule 19.05 of the Main Board Listing Rules stipulates that the Exchange should be satisfied that the shareholder protection standards in the issuer's jurisdiction of incorporation are equivalent to those in Hong Kong.

#### Secondary Listing

Rule 19.30 of the Main Board Listing Rules states that in addition to being satisfied as to the shareholder protection standards in the issuer's jurisdiction of incorporation, the Exchange should be satisfied that the regulatory oversight offered by the primary exchange is equivalent to that of the Exchange.

#### Varying Constitutive Documents

Where the Exchange believes that the jurisdiction is unable to provide standards of shareholder protection equivalent to those provided in Hong Kong, but it is possible to provide them by varying the overseas issuer's constitutive documents, then the Exchange may approve the listing of securities of the overseas issuer subject to the overseas issuer making such variations to its constitutive documents.

#### Establishing Shareholder Protection Standards in Other Jurisdictions

The onus is on the overseas issuer to demonstrate to the Exchange that the relevant jurisdiction, and in the case of a secondary listing, exchange afford the requisite level of shareholder protection. The Exchange requires the applicant to submit:

* A comparative analysis of its constitutive documents against the articles requirements of the Listing Rules;
* An overview of the foreign regulatory regime, including its securities laws and stock exchange rules; and
* A comparative analysis of the foreign and Hong Kong laws governing areas relevant to investor protection

### Decisions

#### Australia (Exchange Listing Decision HKEx-LD57-1)

Applying the assessment criteria set out above, the Exchange accepted:

* Australia as an approved jurisdiction for the proposed secondary listing under Chapter 19 of the Listing Rules; and
* The ASX as an exchange where the standards of shareholder protection are at least equivalent to those provided in Hong Kong

Where a secondary listing is sought but the applicant's primary regulator is not the ASX, the Exchange would still need to be satisfied that the primary regulator's oversight is of a standard at least equivalent to that of the Exchange.

The Exchange also indicated that, in principle, Australia could be accepted as an approved jurisdiction for primary listing on the Exchange in appropriate future circumstances.

The following factors were considered to be favourable:

* Two previous permissions for secondary listings where the ASX was also accepted by the Exchange as a primary listing venue having an acceptable level of regulation comparable to that of the Exchange;
* The federal regulatory regime and the Corporations Act 2001;
* Australia's rule of law, the independence of its judiciary;
* Australia's well established accounting profession operating to international standards;
* The provisions of ASX's listing rules and Corporate Governance Principles;
* Regulation of the ASX by the Australian Securities and Investments Commission

#### British Columbia (Exchange Listing Decision HKEx-LD58-1)

The Exchange considered the following factors:

* British Columbia's common law protection of rights;
* British Columbia's well developed accounting profession which is in the process of converging to international standards;
* The Exchange's recognition of Canada as an overseas jurisdiction for listing;
* Its securities regulation strategies;
* With the introduction of the Sarbanes-Oxley Act, NASDAQ has adopted more stringent corporate governance rules;
* The company's listing on the FSE which is a highly regulated entity

However, the Exchange felt that the British Colombia Business Corporations Act (**BCA**) and British Colombia Securities Act (**SA**) failed to provide adequate protection in the following areas:

* Prohibition of financial assistance;
* Variation of class rights;
* Special resolutions;
* Information on directors and certain shareholders;
* Consent of shareholders for subscription for shares;
* Allotment of shares;
* Right to demand poll;
* Investigation of affairs; and
* Management contracts

Taking all this into account, the Exchange accepted British Columbia as an approved jurisdiction for the proposed primary listing under Chapter 19 of the Listing Rules, but subject to specified variations to the company's articles of association which address the above issues.

Where a secondary listing is sought, the Exchange would still need to be satisfied that the primary regulator's oversight is of a standard at least equivalent to that of the Exchange.

The Exchange also indicated that, in principle, British Columbia could be accepted as an approved jurisdiction for primary and secondary listings on the Exchange in appropriate future circumstances where future applicants adopt similar variations to their articles of association.

### Future Listing Applications

Our understanding from the Exchange is that, in the case of an application to list a company whose jurisdiction of incorporation and/or exchange of primary listing has already been approved by the Exchange for the purposes of Chapter 19, it will require the sponsor to submit a confirmation that there has been no significant change to the standards of shareholder protection offered by the relevant jurisdiction and exchange.

## 2. Hong Kong Stock Exchange Considers Accepting More Overseas Issuers

According to a recent policy address by Chief Executive, Donald Tsang, the Hong Kong government is considering accepting issuers from more overseas jurisdictions. The Chief Executive expressed the desire and the need to consolidate Hong Kong's position as an international finance centre in Asia. "We should quickly amend existing Listing Rules to enable well-established and qualified foreign enterprises from different parts of the world to list in Hong Kong," Tsang said. The Exchange's October Status Report adds that the issue has also been considered by the Listing Policy Committee who are supportive in principle and that developments are likely in the next few months. Media reports have suggested that changes to the Listing Rules are likely to allow the Exchange to consider applications from companies based in any country whose securities regulator is a member of the International Organization of Securities Commissions.

Tsang also said in his policy address that Hong Kong should continue to enhance its regulatory regime to keep it in line with international standards. To address this, the government plans to set up the Financial Reporting Council next year which will help in strengthening corporate governance and investor protection.

These proposals reflect the increasingly widespread view that if Hong Kong is to establish itself as a truly international finance centre, it must make it easier for overseas companies to list in Hong Kong. Currently, for a company incorporated in a jurisdiction other than Hong Kong, the PRC, Bermuda or the Cayman Islands to list on either the GEM or the Main Board of the Exchange, it has to satisfy the Exchange that the standards of shareholder protection in its jurisdiction are at least equivalent to those provided in Hong Kong. Furthermore, in order to fulfill additional qualifications for secondary listing on the Main Board, the Exchange has to be satisfied that the company's primary listing is on an exchange where the standards of shareholder protection are at least equivalent to those provided by the Exchange.

A major disadvantage of these rules is that it makes the outcome of applications uncertain, even for listing applicants from well-developed legal jurisdictions. Another downside is the cost and time implication associated with proving to the Exchange that the relevant law and exchange provide the same level of shareholder protection. Although, in practice, this issue can be overcome by the overseas company restructuring with a holding company in Hong Kong, Bermuda or the Cayman Islands, there will always be overseas companies who, for tax or other reasons, do not wish to be forced into such restructuring. In cases where the company is seeking a secondary or dual primary listing in Hong Kong, a restructuring is likely to be wholly impracticable. It seems incongruous that, for a company from a well established legal jurisdiction, it is quicker and cheaper to restructure in Hong Kong or a tax haven jurisdiction than it is to get a listing under the current rules. This is an anomalous aspect of the current Listing Rules and the government's proposals to facilitate the listing of companies incorporated in other jurisdictions are to be welcomed.

This newsletter is intended as a summary only of recent regulatory developments in Hong Kong. It does not constitute legal advice and specific advice should be sought in relation to any particular situation.

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