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[online version](http://www.charltonslaw.com/hkex-admits-brazil-japan-and-the-isle-of-man-as-acceptable-jurisdictions-of-incorporation-for-overseas-listing-applicant/)

# HKEx Admits Brazil, Japan and The Isle Of Man as Acceptable Jurisdictions of Incorporation for Overseas Listing Applicants

## Introduction

Hong Kong Exchanges and Clearing Limited (HKEx) published three listing decisions last month, October 2010, increasing to thirteen the number of acceptable jurisdictions of incorporation for overseas companies seeking to list on the Hong Kong Stock Exchange. These are additional to the three overseas jurisdictions specifically provided for in the Listing Rules, the People's Republic of China, Bermuda and the Cayman Islands. The full list of overseas jurisdictions that the Listing Committee has accepted as an issuer's place of incorporation for the purposes of Chapter 19 of the Main Board Rules is as follows: Australia, Brazil, the British Virgin Islands, Canada-British Columbia, Canada-Ontario, Cyprus, Germany, the Isle of Man, Japan, Jersey, Luxembourg, Singapore and the United Kingdom. This list is updated from time to time and is available on [the HKEx's website](http://www.hkex.com.hk/eng/rulesreg/listrules/listsptop/listoc/list_of_aoj.htm).

The decisions mean that future listing applicants from Brazil, Japan and the Isle of Man can follow the streamlined procedures set out in [Guidance Letter HKEx-GL12-09](http://www.hkex.com.hk/eng/rulesreg/listrules/listguid/iporq/documents/gl12-09.pdf) and need not provide a detailed line-by-line comparison of the laws of their jurisdiction of incorporation with those of Hong Kong in order to demonstrate the necessary equivalence of shareholder protection standards. Instead, the listing applicant can take the same steps as the previous listing applicant from that jurisdiction to ensure equivalent shareholder protection levels as set out in the relevant Listing Decision (subject to any further steps necessitated by its own constitutive documents and circumstances). The applicant must also demonstrate to the Exchange that there is a reasonable nexus between its business operations and the relevant jurisdiction.

This note contains a summary of the requirements for listing applicants from the three new acceptable jurisdictions.

## 1. Brazil: HKEx Listing Decision 109-1 (October 2010)

HKEx noted at the outset of its analysis of the application by the Brazilian Company (Company X) that there is no set way to ensure equivalence with Hong Kong shareholder protection standards and a number of methods may be used. This flexible approach on the part of HKEx was demonstrated when it accepted that as Company X was already a publicly listed company, requiring it to amend its articles of association in order to achieve equivalence would be too onerous a task.

### Undertakings in respect of Shareholder Protection Matters

It was agreed instead that Company X could meet the equivalence requirement by giving undertakings on certain matters specified in the "Schedule of Shareholder Protection Matters that the SEHK expects overseas companies to address when seeking a primary listing on the SEHK" attached to the 2007 Joint Policy Statement Regarding the Listing of Overseas Companies (JPS) which is available on [the HKEx website](http://www.hkex.com.hk/eng/newsconsul/hkexnews/2007/documents/044_joint_statement_e.pdf).

The undertakings given by Company X were required to be disclosed in the prospectus and in the manner required by HKEx to ensure that investors were made aware of them. They were as follows:

1. Auditors' Annual Appointment
* JPS attachment item 1 (e) requires the appointment, removal and remuneration of auditors to be approved by shareholders in a manner comparable to that required of a Hong Kong company. Under Brazilian law and the regulations of the BM&FBOVESPA, a public limited company may appoint auditors for terms of up to five years, while in Hong Kong they are appointed annually, at the AGM. Company X therefore gave an undertaking that its fiscal council (a concept of Brazilian corporate governance which is not unlike a non executive director's committee and is responsible for monitoring management and reviewing financial statements) would review the performance of its auditors each year and make a recommendation to the board as to their retention/removal.
1. Notice of Shareholders' Meetings
* Company X undertook to give at least 30 days' notice for any general shareholders' meeting and where any general meeting is adjourned, to give at least 15 days' notice to reconvene it. This was to meet the JPS attachment item 2 (c) requirement for at least 21 days' written notice of an AGM or an EGM at which a special resolution is to be passed and at least 14 days' written notice for other general meetings. Brazilian laws and the BM&FBOVESPA regulations allow shorter notice periods in some circumstances.
1. Appointment of Proxies
* Company X undertook to include in notices of shareholders' meetings a prominent statement of the right of shareholders to appoint a proxy to attend and vote in their place, which is a requirement of Hong Kong law but not of Brazilian law. The statement would not however be required to state that the proxy need not also be a member, as is required for a Hong Kong company. Instead, the proxy would need to fall into one of the categories required under Brazilian law and the BM&FBOVESPA regulations: in the case of a public limited company, a shareholder's proxy must be a shareholder, a director or executive officer of the company, a Brazilian attorney or a financial institution.
1. Loans to Related Parties
* Company X undertook to restrict the making of loans and comparable benefits to related parties of its directors, subject to the same exceptions as exist under the Hong Kong Companies Ordinance (HKCO). The extension of the restriction on loans to directors to their relatives and other related persons under Hong Kong law has no Brazilian equivalent.

### HKEx's Conclusion

Other major differences between Hong Kong and Brazilian law were examined in the HKEx decision, including those relating to voting thresholds, appointment of directors and the provision of information to shareholders. However the conclusion reached was that the two regimes achieved the same level of protection using different methods in relation to these matters.

HKEx therefore considered Brazil to be an acceptable jurisdiction under Chapter 19 of the Main Board Listing Rules on the basis that the shareholder protection standards set out in the applicant's submission, supplemented by the Undertakings and the rule requirements of the BM&FBOVESPA, should provide a shareholder protection level at least equivalent to that of Hong Kong. The major jurisdictional or regulatory differences between the Brazilian and Hong Kong requirements on the aspects set out in the JPS would also be required to be disclosed in Company X's prospectus.

The applicant had also satisfied the requirement under the JPS that there should be a sufficient nexus between the applicant's jurisdiction of incorporation and its principal business operations by demonstrating that it principally operated in Brazil and the majority of its employees were based there.

### HKEx's Requirement for Sponsor's Confirmations and Legal Opinion

At the time of submission of the listing application, HKEx required the submission of:

* 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 of the Listing Rules and that it is independently satisfied that the shareholder protection provided in Brazil is at least equivalent to that in Hong Kong or and any one of the recognised or accepted jurisdictions; and
* A legal opinion and the sponsor's confirmation that the applicant's constitutive document does not contain provisions which will prevent it complying with the Listing Rules, Part XV of the Securities and Futures Ordinance and the Hong Kong Code on Takeovers and Mergers and Share Repurchases, to the extent applicable.

## 2. Japan: HKEx Listing Decision 110-1 (October 2010)

HKEx commenced its analysis by stating that where an overseas company had to ensure that its constitutional documents complied with specific requirements of its place of incorporation, requirements which did not apply to Hong Kong, shareholder protection is maintained if the company discloses those special requirements in the listing documents and emphasizes any risk inherent in those requirements.

The applicant Japanese Company, Company Y, stated that for the purposes of compliance with the JPS it would amend its constitutive document to enhance shareholder protection save where the differences with Hong Kong were immaterial or where it was legally impossible to do so.

The immaterial differences for which no amendments were proposed consisted of:

### Item 2 (a) of the JPS attachment - power of members to request the court to call a shareholders' meeting

Under the Hong Kong Companies Ordinance, any shareholder can petition the court for a general meeting; in Japan only shareholders holding at least 1% of the votes for the last 6 consecutive months may do so.

### Item 2 (e) of the JPS attachment - Right of a shareholder to appoint a proxy

Company Y noted in its submissions that it is standard practice for Japanese companies to place restrictions on who can be appointed as proxy, often to lawyers, other shareholders or accountants, in order to ensure orderly members' meetings. There is no such restriction in the HKCO.

### Item 4 (b) of the JPS attachment - Court confirmation of reduction in share capital

There is no requirement in Japan to match the Hong Kong requirement for court confirmation of a share capital reduction. However, nor is there such an obligation in other accepted jurisdictions such as Germany, Luxembourg, China and Bermuda.

### Legal Restriction: Item 1 (f) of JPS attachment - the availability of the shareholders' register for inspection

Under Japan's Personal Information Protection Law stock companies are not allowed to disclose the shareholders' register to non-members. The Hong Kong Companies Ordinance requires shareholders to be able to inspect the register of members free of charge and other persons to be allowed to inspect it for a fee. Company Y suggested a compromise whereby it would amend its constitutive document to permit inspection of the register of members by creditors, government bodies and regulators, free of charge. However it would remain inaccessible to all others.

### Paragraph 14 of Appendix 3 to the Listing Rules: Restriction of voting on certain transactions

Paragraph 14 of Appendix 3 to the Listing Rules requires a listing applicant's articles of association to provide that votes will not be counted if they have been cast in contravention of any Listing Rules' requirement that a shareholder should abstain from voting or be restricted to voting only for or against a particular resolution. Company Y submitted that the Japanese Companies Act prevented it from altering its constitutive document to restrict its shareholders from voting on any particular resolution. Company Y proposed to address this inconsistency by amending its board of directors' regulations to ensure that the votes of the members restricted from voting under the Listing Rules would not be counted.

The amended board regulations would state that if a transaction is required under the Listing Rules to be approved by the shareholders, the board would put the matter before the general meeting on the basis that Company Y would not enter into the transaction unless it is approved in accordance with the Listing Rules' requirements. The applicant company also agreed that any further alterations to its board regulations would be in accordance with the Takeover Codes and subject to the approval of HKEx and other relevant regulators.

Company Y also stated that it would apply for a waiver from Paragraph 14 of Appendix 3 and other relevant Rules when lodging its listing application.

The HKEx concluded that Japanese law could ensure an equivalent level of shareholder protection to Hong Kong law. This conclusion was reached as a result of the changes made to Company Y's constitutive document, its willingness to disclose any regulatory differences as required by the JPS, its disclosure in the listing document and its demonstration that there was a reasonable nexus between its place of incorporation and its operations.

### HKEx's Conclusion and Requirements

HKEx determined that Japan was an acceptable jurisdiction of incorporation subject to the revision of its constitutive document.

At the time of submission of the listing application, HKEx required the submission of:

* 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 of the Listing Rules and that it is independently satisfied that the shareholder protection provided in Japan is at least equivalent to that in Hong Kong or and any one of the recognised or accepted jurisdictions; and
* A legal opinion and the sponsor's confirmation that the applicant's constitutive document does not contain provisions which will prevent it complying with the Listing Rules, Part XV of the Securities and Futures Ordinance and the Hong Kong Code on Takeovers and Mergers and Share Repurchases, to the extent applicable.

## 3. The Isle Of Man: HKEx Listing Decision 108-1 (October 2010)

HKEx determined that the Isle of Man would be an acceptable jurisdiction of incorporation for the purposes of Chapter 19 of the Listing Rules provided that listing applicants made certain revisions to their constitutive documents and were able to demonstrate a reasonable nexus between their operations and the Isle of Man.

### Amendments to Constitutive Documents

The amendments proposed to make up the shortfall in the level of shareholder protection provide alternatives depending on which of two co-existing sets of company law, the Companies Acts 1931- 2004 or the Companies Act 2006, the applicant is incorporated under. Although there are slight differences, the two sets of proposed amendments attached to the listing decision are broadly similar.

The proposed amendments were as follows:

### Annex I to the Decision: Amendments to be made to articles of a potential applicant's constitutive document, for companies incorporated under the Companies Acts of 1931-2004

1. Corporate Structure which clearly protects key shareholder rights
* Item 1(b) of the JPS attachment covers the protection of rights attaching to any class of shares and the manner in which they may be varied. The articles of the applicant company would be amended to ensure commensurability with the HKCO on this issue by including a 75% majority voting threshold in order to effect a rights variation subject to the rights of members holding 10% or more of the nominal value of issued shares to petition the court to have the variation annulled.
* Item 1(e) of the JPS attachment relates to the appointment, removal and remuneration of auditors. The articles of the applicant company would be amended to ensure equivalence with the HKCO.
* Item 1(f) of the JPS attachment mandates the availability of the issuer's register of members for inspection by members. The articles of the applicant company would be drafted such that its register of members in Hong Kong would be open to inspection by members free of charge and by any other person for a fee, closure of the register would occur on terms similar to those under Hong Kong law and notice of closure of the register would be governed by Listing Rule 13.66.
* Item 1(g) of the JPS attachment demands that the circumstances in which the minority shareholders of an overseas company may be bought out or may require an offeror to buy them out after a takeover or share repurchase be clearly stated. Although these circumstances are clearly stated in the 1931-2004 Acts, to ensure full compliance with this requirement the articles of the applicant company would be altered to provide that sections 168 and 168 B of the HKCO will apply to all takeover offers for the applicant company and that the applicant company will adhere to the Takeover Codes where relevant.
1. Fair proceedings for general meetings to enable shareholders to enjoy their rights in full
* The applicant's articles would be amended to provide for members holding 5% or over of the paid up capital of the company to require the company to convene an EGM and to request the company circulate their resolution to members entitled to receive notice of the meeting. The applicant company's constitution would also be amended to ensure that where an EGM is requested, the company must comply with sections 113 and 115 A of the HKCO (Item 2 (b) of the JPS attachment).
* The articles of the applicant company would be revised to bring into force the notice period requirements of Hong Kong law for AGMs and EGMs called with the intent of passing a special resolution, a resolution appointing a director or a resolution of which special notice has been given by the company (Item 2 (c) of the JPS attachment).
* The applicant company would amend its articles to contain provisions equivalent or broadly commensurate with the HKCO's requirements in relation to the appointment of proxies, including the wording suggested in Paragraph 6 of Section 1 of Appendices 13A and 13B to the Listing Rules and explicitly stating the right of the nominees of a recognised clearing house to appoint representatives (Item 2 (e) of the JPS attachment).
* Item 2 (f) of the JPS attachment requires that the rights of members of an overseas company to demand a poll be comparable to those available to members of a Hong Kong incorporated company. The applicant company would draft its articles to ensure that this is the case.
1. Corporate governance measures that ensure the powers of directors are reasonably contained and subject to reasonable scrutiny
* Amendments would be made to the applicant's articles to provide for directors' appointments be voted on individually and for the appointment of two or more directors under a single resolution to require unanimous approval as is required under the HKCO (Item 3 (a) of the JPS attachment).
* The articles of the applicant company would be amended to contain provisions requiring the company to include in notices of its intention to move a resolution at a general meeting details of relevant interests of directors in the matter which the resolution concerns (Item 3 (b) of the JPS attachment).
* The applicant company's constitution would be altered to ensure that the applicant company is subject to the prohibitions and exceptions regarding loans to directors contained in section 157H of the HKCO (Item 3 (d) of the JPS attachment).
* The articles of the applicant company would provide that any payment to a director/former director of the company as compensation for loss of/retirement from office must be approved by members of the company in a manner comparable to that demanded of a Hong Kong company (at present a majority vote in a general meeting) (Item 3 (e) of the JPS attachment).
1. The notion of capital maintenance is enshrined in the company's corporate structure and with regard to all corporate actions
* The articles of the applicant would be amended to provide that distributions of assets to members may only be made out of realised profits and if made out of assets, the remaining net assets must not be less than the share capital plus undistributable reserves (Item 4 (d) of the JPS attachment).

### Annex II to the Decision: Amendments to be made to articles of the applicant company's constitutive document, which was incorporated under the Companies Act of 2006, in order to ensure compatibility with the JPS:

The second annex to the Decision repeats many of the requirements to amend the constitutive document imposed on companies incorporated under the Companies Acts of 1931- 2004 as summarised above. This repetition is a result of the similarity of the terms of the constitutive documents of companies incorporated under the older Acts and the 2006 Act. The amendments which are repeated in Annex II are not listed for a second time in this section.

The alterations repeated relate to JPS attachment items 1 (b), 1 (e), 1 (f), 1 (g), 2 (b), 2 (c), 2 (e), 2 (f), 3 (a), 3 (c), 3 (d), 3 (e), 4 (d). The amendments to be made to the constitutive document which are listed only in Annex II may be summarised as follows:

1. Corporate Structure which clearly protects key shareholder rights
* Item 1 (c) of the JPS attachment notes that regardless of anything in the constitutional document of an overseas company, any alteration of the constitution in order to increase a member's personal liability to the company will not be binding unless agreed to in writing by the member in question. The articles of the applicant company would be amended to include equivalent provisions.
1. Fair proceedings for General Meetings to enable shareholders to enjoy their rights in full
* Item 2 (a) of the JPS attachment requires that overseas companies hold a general meeting annually (the AGM) and that there is no more than 15 months between the date of one AGM and the next. The articles of the applicant company would be would be amended to include provisions equivalent to the relevant HKCO provisions.
* Item 2 (d) of the JPS attachment obliges overseas companies to adopt general provisions related to meetings and votes on terms that are comparable to those applicable to a Hong Kong company. The articles of the applicant company would be amended accordingly.
1. Corporate governance measures that ensure the powers of directors are reasonably contained and subject to reasonable scrutiny
* Item 3 (b) of the JPS attachment stipulates that a director must declare any material interest in any contract with the overseas company at the earliest board meeting held by the company. The articles of the applicant company would be amended accordingly.
1. The notion of capital maintenance is enshrined in the company's corporate structure and with regard to all corporate actions
* Amendments would be made to the applicant's articles to comply with item 4(a) of the JPS attachment which requires that any alteration of share capital in an overseas company must be approved by the members on terms comparable to those currently applicable to Hong Kong incorporated public companies.
* Amendments would be made to the applicant's articles to comply with tem 4 (b) of the JPS attachment which requires that any reduction of share capital by an overseas company be confirmed by the court and approved by members on terms comparable to those currently applicable to Hong Kong incorporated public companies.
* Item 4 (c) of the JPS attachment states that an overseas company may only redeem its shares out of distributable profits, the proceeds of a fresh issue of shares or other circumstances similar to those under which a Hong Kong incorporated public company would be allowed to make such a redemption. In order to meet this requirement, the articles of the applicant company would be altered to provide that any shares shall only be redeemed from distributable profits, as defined in the HKCO, and the process followed shall be that set out in Section 49A of the HKCO.
* Item 4 (e) of the JPS attachment provides that the circumstances under which an overseas company can provide financial assistance for the purchase of its own shares must be clearly stated. As the CA 2006 is silent on this matter the applicant company would revise its articles to give effect to this requirement.

### HKEx Conclusion

HKEx considered that the Isle of Man is an acceptable overseas jurisdiction subject to the potential listing applicant making certain revisions to its constitutive document and demonstrating a reasonable nexus between its operations and the Isle of Man. HKEx would also require the submission with the listing application of a sponsor's confirmation as to the equivalence of shareholder protection standards and a legal opinion and sponsor's confirmation that the provisions of the applicant's constitutive document would not prevent its compliance with the Listing Rules, Part XV of the SFO and the Takeovers Code.

Future Isle of Man incorporated listing applicants would be able to follow the streamlined procedures in Guidance Letter HKEx-GL12-09 and would not need to provide a detailed line- by-line comparison.

## 4. Requirements For Future Listing Applicants From The Newly Accepted Jurisdictions

Future listing applicants from the three newly accepted jurisdictions will be able to follow the streamlined application process for companies from jurisdictions which have already been accepted provided for in paragraph 3.6 of the HKEx Guidance Letter of September 2009.

This means that applicants from the accepted jurisdictions need not supply the HKEx with a detailed line-by-line comparison of the shareholder protection standards under the laws of their home jurisdiction and the shareholder protection standards in Hong Kong identified in the JPS. Rather the new applicant may take advantage of the streamlined process and follow the steps taken by the original issuer to achieve equivalence (whether this be amendments to constitutive documents, specific undertakings et cetera). However when doing so the new applicant must also look to its own specific constitutional documents and circumstances in order to ensure equivalence. The applicant must also be able to show a reasonable nexus between its business operations and the relevant jurisdiction.

*This note is intended as a summary only of recent listing decisions published by HKEx in relation to the acceptability of Brazil, Japan and the Isle of Man as acceptable jurisdictions of incorporation of listing applicants for the purposes of Chapter 19 of the Listing Rules. Specific advice should be sought in relation to any particular situation.*

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