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WENFEI ATTORNEYS-AT-LAW LTD.

SWISS INVESTMENT REPORT

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The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

The Swiss Investment Report provides background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor's perspective.

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The New Swiss Company Law

The Parliament adopted the revision of company law, which in Switzerland is regulated by the Code of Obligations, on 19 June 2020. The revisions include, among other things, the implementation of the 2013 Executive Pay Initiative adopted by the Swiss voters in 2013 at the legislative level, new provisions for more flexible incorporation and capital regulations, the introduction of gender benchmarks, and stricter transparency rules for companies active in the extraction of raw materials. The Federal Council has already enacted the last two amendments as well as the extension of the moratorium on debt restructuring, which was adopted as part of the revision of the company law. The Federal Council will bring all other provisions into force on 1 January 2023. The following article will analyse and show the most significant changes.

I. More flexible capital rules

The share capital may now also be issued in USD, EUR, GBP or JPY, if the respective currency is essential for the business activity of the company. This means more flexibility and saves more time. It is only possible to change the share capital to another currency at the beginning of a business year. However, this positive change at least allows for adjustments to the stronger currency and this can mean stability, security, and profit in the long run. The bookkeeping and the accounts must then be kept in the same currency. These changes also apply to the share capital of limited liability companies.

At the moment, there are no indications that RMB Yuan could also be included in this list alongside USD, EUR, GBP and JPY. However, this does not rule out future changes, as there are already calls to expand this catalogue. But until now, the Federal Council refrains from expanding the list of permissible foreign currencies.

Another change, which supports more flexible capital rules is, that the minimum par value of CHF 0.01 per share is abolished. The nominal value can now be any value greater than zero. This means a greater attractiveness for share purchases and thus additional capital and the possibility for the company to grow further.

In the revision of company law, parliament has also adopted new provisions for more flexible formation of companies and capital regulations. Specifically, a new legal institution is introduced: **the capital band.** The board of directors may be authorised to change the share capital within a range (capital band) for a maximum period of five years. They shall determine the limits within which the board of directors may increase and decrease the share capital. At the same time, however, legal regulations for an upper and lower limit are standardised as well. The upper limit of the capital band is 1.5 times the share capital as stated in the articles and thus entered in the commercial register. The lower limit of the capital band is half of the share capital. Therefore, this new capital band can be seen as an instrument that creates more flexibility for capital increases and decreases.

In comparison, the PRC Company Law provides, depending on the type of enterprise, the registered capital shall be the amount of capital contributions subscribed for by all its shareholders as registered with the company registration authority (Art. 26 and Art. 80 (1)). The registered capital is calculated as the subscribed contributions, which indicates no responsibility to actually deposit the capital contributions at the formation of the company. The exception is a joint stock limited company established by stock floatation, where the registered capital shall be the total actually paid capital stocks registered with the company registration authority (Art. 80 (2)).

According to Art. 37 (7), 43, 46 (6) and 103 PRC Company Law, two-thirds or more of the shareholders' voting rights are required to make a resolution to increase or reduce the share capital. The board of directors should implement the resolutions made at the shareholders' meetings.

In December 2021, the National People's Congress Standing Committee issued a new draft of the Company Law which proposes changes regarding the capital. A simplified capital reduction procedure is introduced, allowing companies to reduce registered capital without individually notifying all creditors. Instead, a public announcement through the uniform enterprise information publicity system is considered enough.

II. Greater flexibility in the conduct of the General Assembly

It will now also be possible to hold the General Assembly ("GA") **virtually** or **abroad**. The possibility of a virtual GA was already introduced during the Corona pandemic through various COVID ordinances and extended until the new company law came into force. However, under the new company law, an explicit basis for the possibility of a virtual GA and a GA abroad in the company's articles is required and, in principle, an independent representative of the voting rights must be appointed.

According to the new Company law, the GA of shareholders may be held by electronic means without a meeting place if the articles of association so provide and the board of directors designates an independent representative of the voting rights in the notice convening the meeting *(Art. 701d Code of Obligations ("CO"))*. In the case that the GA may be held at different locations at the same time, the votes of the participants must be transmitted directly in picture and sound to all meeting locations *(Art. 701a CO).*

The GA of shareholders may also be held abroad, but only if the articles of association provide so and the board of directors appoints an independent representative of the voting rights in the invitation. In the case of companies whose shares are not listed on a stock exchange, the board of directors may dispense with the appointment of an independent representative of the voting rights, provided that all shareholders agree thereto *(Art. 701b CO).*

The prerequisite is that the board of directors monitors the use of the electronic funds. It must be ensured that the identity of the participants is known; the votes at the general meeting are transmitted directly; each participant can make motions and take part in the discussion and that the voting results cannot be distorted *(Art. 701e CO)*.

If, however, technical problems should arise so that the general meeting could not be properly conducted, it must be repeated. However, the resolutions passed by the general meeting before the occurrence of the technical problems remain valid *(Art. 701f CO).*

These changes mean a new and very significant flexibility in the conduct of the General Assembly. Participants can now – provided the articles of association allow it – also attend the General Assembly electronically without any problems and do not have to be on site. In particular, participants residing abroad will benefit from this arrangement.

III. The payment of an interim dividend

The revised company law provides clarity on whether a company can resolve to pay interim dividends, for example, dividends distributed from the profits of the current financial year. According to the Company Law in Art. 675a CO, the general meeting of shareholders may resolve to pay an interim dividend on the basis of interim financial statements.

These interim financial statements must be audited by the auditors prior to the resolution of the general meeting. No audit is necessary if the company is not required to have its financial statements audited by an auditor. The audit may be waived if all shareholders agree to the payment of the interim dividend and the claims of creditors are not put at risk thereby.

The legal basis for the interim financial statements required for this purpose can be found in Art. 960f CO. According to this, interim financial statements shall be prepared in accordance with the annual financial and shall include a balance sheet, an income statement and notes.

As a minimum, the headings and subtotals included in the most recent annual financial statements shall be disclosed. In addition, the notes to the interim financial statements shall include the following information:

1. the purpose of the interim financial statements

2. the simplifications and condensations, including any departures from the policies used for the most recent annual financial statements;

3. other factors that have had a significant effect on the financial position of the entity during the reporting period, including but not limited to, comments on seasonality.

The interim financial statements shall be signed by the chief executive officer and the person within the company responsible for the interim financial statements. Consequently, the interim dividends can be paid out once a year.

In comparison, according to the PRC Company Law in Art. 34, the Shareholders shall be distributed with the dividends based on the percentages of the capital that they actually contributed. However, the PRC Company Law has no specific provision for the distribution of the interim dividends. Usually, such detailed provisions can be found in the Articles of Association of the company, as agreed between the shareholders themselves.

IV. Capital reserves may be paid back to shareholders

Until a leading decision by the Federal Supreme Court in 2014, it was long disputed whether capital reserves may be distributed to shareholders. The revised Company Law codifies the practice that has existed since this decision.

According to the revised Company Law, Art. 671 CO, the Companies whose purpose is mainly to participate in other companies (holding companies) may repay the legal capital reserve to the shareholders, but only if the legal capital and profit reserves exceed 20 per cent of the share capital entered in the commercial register.

The new company law also introduces a distinction between capital reserves and retained earnings. In the future, voluntary retained earnings may only be created if this is justified by the long-term prosperity of the company, taking into account the interests of all shareholders.

In comparison, according to Art. 35 and 91 of the PRC Company Law, the founders and shareholders shall in general not withdraw their share capital after making payments for the shares they have subscribed to or after making capital contributions by using non-monetary properties. In the case of joint stock limited companies, only if the public offer shares have not been fully subscribed within the time limit, the promoters fail to convene the establishment meeting within the time limit, or the establishment meeting has

decided not to set up the company, the share capital is allowed to be withdrawn.

V. Outlook

The new Swiss Company Law brings many new and interesting changes. Very significant and striking, however, are the significant increase in flexibility from which entrepreneurs worldwide can benefit. In particular, more flexible capital regulations and significantly greater flexibility in the conduct of the general meeting of shareholders not only offers business-friendly changes, but also an incentive for new investments.

Interim dividends can now also be paid out during the financial year, which could be particularly interesting for investors, as this allows a continuous flow of capital. In addition, statutory capital reserves may be paid back to shareholders. This also allows flexibility that did not exist before.

All in all, it does not seem outlandish that the new motto of the Swiss Companies Law is "flexibility".

The revision will make a Swiss company more interesting for investors from China, because they can design their vehicle in Europe more flexibly and also because more influence will be possible directly from abroad.

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