Venture 2008
Legal and Tax Toolkit

Successfully mastering legal and tax challenges
3rd updated edition

VENTURE COMPANIES FOR TOMORROW
An initiative of McKinsey & Company and ETH Zurich
PREFACE TO THE THIRD EDITION

The third edition of this book is published in times of a crisis on the international and domestic credit markets and a gradual economic slow-down. Nevertheless, new companies have been founded continuously. Young entrepreneurs do not seem to be discouraged of risking the adventure and facing the challenges connected with a start-up or growth company. Indeed, these difficulties do not only include the successful launch of a new business idea or innovative product on the market; legal and tax issues must also be addressed. Questions ranging from the choice of the legal form to taxes or the financing by venture capitalists surge and need to be resolved. In order to successfully master these legal and tax challenges, we have updated the German book "Planen, gründen, wachsen" first published in 2004.

This new, revised edition is in English allowing anyone wishing to commence business in Switzerland can use this guide. In addition, it is characterized by the following:

- The book has been structured according to the "life cycle" of a company. The most important and relevant legal and tax issues are presented in accordance with this cycle.

- The main amendments and updates are subject to the revision of the law on several legal forms, in particular the limited liability company and the stock corporation in the Swiss Code of Obligations. The incorporation, organisation and auditing of most capital companies have undergone fundamental changes which are pointed out in this handbook.

- The revised version also reflects changes in the practise of authorities, recent case-law of courts as well as expected future amendments to the applicable legal regime. The numbers and data contained herein have been updated to the extent that more recent data was available.

The third edition has been jointly revised by certain lawyers of Baker & McKenzie, Zurich. The following persons were involved in the revision: Romina Carcagni, Alexander Fischer, Theodor Härtsch, Philippe Jacquemoud, Rino Siffert, Anette Weiner, Michael Widmer, Jacov Wirtz and Alexander Wyss.

The Authors
PREFACE TO THE SECOND EDITION

The book "Planen, gründen, wachsen" published in 2001 is now available in the second edition which we have supplemented, updated and improved. In particular, the developments in the law potentially concerning founders, start-up and growth companies have been addressed: The new edition is characterized by the following:

- The structure of the book has been generally maintained and reflects the first steps in the "life cycle" of a company.

- The matters that have been subject to the latest law review in particular the 4th revision of the Law on the Disability Insurance, the revision of the Law on Unemployment Insurance and the provisions of the Swiss Code of Obligations ("CO") concerning the accounting (art. 957 et seqq. CO). The new Law on Designs and the Law on Mergers have also been included; as well as the changes due to the entry into force of the Bilateral Agreements with the EU/EFTA.

- Planned revisions as for instance the preliminary draft of revising the law on limited liability companies, changes in the practise of authorities as well as the development of the law based on the jurisprudence of the courts are included in the revised version as far as deemed reasonable. The dates and numbers have been updated as far as changes have occurred or new data is available.

The second edition again is a teamwork of lawyers of Baker & McKenzie Zurich. Monika Dietrich, Christian Drechsler, Alexander Fischer, Suzanne Merz, Theo Härtsch und Alexander Wyss have contributed to the revision.

The Authors
PREFACE TO THE FIRST EDITION

Just as in the United States, more and more companies have been incorporated in Switzerland in the past years. These companies want to conquer markets with innovative products and services. In this respect, credit must be given to initiatives such as the business plan competition "Venture - Companies for tomorrow" which has been initiated by the ETH and McKinsey & Company. Without doubt, the most important aspect of success is an entrepreneurial team with qualified persons that support the project and propel it by their motivation, belief, competence and commitment. Experience shows that most foundation teams of start-up companies are very competent and innovative with regard to the technical aspects. By contrast, there are often deficiencies with regard to the business side of a project, its financing as well as the legal and tax issues.

The business aspects are covered comprehensively in the book "Planen, gründen, wachsen – Mit dem professionellen Businessplan zum Erfolg" by McKinsey & Company, Switzerland. In addition to business aspects, the following book addresses legal and tax concerns. It wants to raise the attention of start-up companies for legal and tax questions which will arise in the course of incorporating a company. A solid legal and tax basis of the project certainly does not guarantee its success. However, it is often observed that the lack of such solid basis may result in greater difficulties for the promising project and may even overthrow it. For this reason, it is essential to already set the legal and tax course in the right manner while incorporating the venture.

We are convinced that the prospective founders and entrepreneurs will be able to plan and implement their project with the help of this book. This book only addresses the main features of the different aspects without solving them in a concluding manner. Accordingly, it cannot substitute a comprehensive planning or external consultation with regard to the legal and tax issues. In this context, it must be pointed out that the book only covers the legal and tax principles of the Swiss law. With regard to the incorporation of the company, this is also sufficient. However, as soon as a company starts its business, it will usually become very active in an international environment. This also applies to start-up companies. Therefore, foreign legal and tax provisions can become applicable to the company very quickly. These aspects are not addressed by this book; it would go beyond the scope of this book. This book can also not address every legal and tax question which can arise in the context of incorporating a company. Issues that typically come up when incorporating a start-up company are dealt with. We rely on the long lasting experience of our Banking & Finance Teams which advises start-up companies as well as investors comprehensively with regard to legal and tax issues.

For the realisation of this book, we especially thank the ETH Zurich and McKinsey & Company, Switzerland which have supported the idea of creating this book with enthusiasm from the very beginning.
We wish the participants of the business plan competition "Venture - Companies for tomorrow" success and are convinced to contribute to their success with this book.

This book is a team work of the members of the Banking & Finance Group of Baker & McKenzie Zurich. The following authors have contributed: Martin Furrer, Marcel Giger, Markus Affentranger, Martin Frey, Lukas Glanzmann, Martin Epper, Guido Jud, Nicolas Passadelis, Beat Mathys, Thomas Peter, Theo Haertsch, Martin Liebi, Christine Forlin, Albert Comboeuf, Alex Roesch, Christoph Thumherr, Marcel Küchler and Mischa Kissling. Juliane Nicolier and Beatrice Frei were responsible for the layout.

The Authors
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   3. Foundation centres

   4. Incubators

   5. Advisors

   6. Plattforms
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AFMP</td>
<td>Agreement on the Free Movement of Persons</td>
</tr>
<tr>
<td>AG</td>
<td>stock corporation</td>
</tr>
<tr>
<td>AHV</td>
<td>Old-age and survivors’ insurance</td>
</tr>
<tr>
<td>AIA / UVG</td>
<td>Federal Law dated March 20, 1981 on accident insurance (SR 832.20) article</td>
</tr>
<tr>
<td>BVG</td>
<td>Federal Law dated June 25, 1982 on the occupational benefits (SR 831.40)</td>
</tr>
<tr>
<td>CBA</td>
<td>Collective Bargaining Agreement</td>
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<tr>
<td>cf.</td>
<td>confer</td>
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<tr>
<td>CH</td>
<td>Switzerland</td>
</tr>
<tr>
<td>CHF</td>
<td>Swiss Franc</td>
</tr>
<tr>
<td>CO</td>
<td>Federal Law dated March 30, 1911 regarding the supplement of the Swiss Civil Code (Fifth Part: Code of Obligations) (SR 220)</td>
</tr>
<tr>
<td>CRO</td>
<td>Ordinance dated June 7, 1937 on the Commercial Register (SR 221.411)</td>
</tr>
<tr>
<td>CTM</td>
<td>European Community Trademark</td>
</tr>
<tr>
<td>DCRPSFN</td>
<td>Directives and Commentary dated March 26, 1931 on the Residence and Permanent Settlement of Foreign Nationals (SR 142.20)</td>
</tr>
<tr>
<td>DTL</td>
<td>Federal Law dated December 14, 1990 on Direct Taxation (SR 642.11)</td>
</tr>
<tr>
<td>e.g.</td>
<td>exempli gratia</td>
</tr>
<tr>
<td>EFTA</td>
<td>European Free Trade Association</td>
</tr>
<tr>
<td>EL</td>
<td>Additional benefits</td>
</tr>
<tr>
<td>EPC</td>
<td>European Patent Convention</td>
</tr>
<tr>
<td>EPO</td>
<td>European Patent Office</td>
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<tr>
<td>et seq.</td>
<td>and the following (singular)</td>
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<tr>
<td>et seqq.</td>
<td>and the following (plural)</td>
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<tr>
<td>etc.</td>
<td>et cetera</td>
</tr>
<tr>
<td>ETH</td>
<td>Eidgenössische Technische Hochschule</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FC</td>
<td>Swiss Federal Constitution dated April 18, 1999 (SR 101)</td>
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<tr>
<td>FIIP</td>
<td>Federal Institute of Intellectual Property</td>
</tr>
<tr>
<td>GEA / GlG</td>
<td>Federal Law dated March 24, 1995 on the Equality of Men and Women (SR 151.1)</td>
</tr>
<tr>
<td>GmbH</td>
<td>Gesellschaft mit beschränkter Haftung</td>
</tr>
<tr>
<td>i.e.</td>
<td>id est</td>
</tr>
<tr>
<td>IAS</td>
<td>International Accounting Standards</td>
</tr>
<tr>
<td>ICANN</td>
<td>Internet Corporation for Assigned Names and Numbers</td>
</tr>
<tr>
<td>ICS</td>
<td>internal control system</td>
</tr>
<tr>
<td>IFRS</td>
<td>International Financial Reporting Standards</td>
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IIA / IVG  Federal Law dated June 19, 1959 on the invalidity insurance (SR 831.20)
IV  Invalidity Insurance
KMU  small and medium-sized business
LA  Federal Law dated March 13, 1964 on labour in industry, commerce and trade (SR 822.11)
LIBOR  London Internetbank Offered Rate
LLC  limited liability company
Ltd.  Limited
max.  maximum
No.  number
OHIM  Office of Harmonization for the Internal Market
p.  page
para.  paragraph
PCA / EOG  Federal Law dated September 25, 1952 on the pay compensation for members of the army, civil service and civil protection (SR 834.1)
PCT  Patent Cooperation Treaty
RLNFN  Regulation dated October 6, 1986 on Limiting the Number of Foreign Nationals (SR 823.21)
SARL  Société à responsabilité limitée
SEA  Standard Employment Agreement
seco  State Secretariat for Economic Affairs, Bern
SOGC  Swiss Official Gazette of Commerce
SR  Systematic collection of the federal law (published since 1970)
SUVA  Swiss Institute for Accident Insurance
SWX  Swiss Exchange
US-GAAP  American Generally Accepted Accounting Principles
USA  United States of America
VAT  Value-Added Tax
VATL  Federal Law dated September 2, 1999 on Value Added Tax (SR 641.20)
WHTL  Federal Law dated October 13, 1965 on Withholding Tax (SR 642.21)
WHTO  Federal Ordinance dated November 14, 2001 on Withholding Tax (SR 623.312)
WIPO  World Intellectual Property Organization

The full texts of the quoted statutes can be downloaded from [www.admin.ch](http://www.admin.ch).
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"The first thing we do, let's kill all the lawyers."

Shakespeare, Henry VI, Part 2, act iv: scene ii
OVERVIEW

This book is structured according to the life cycle of the company, starting with the choice of the legal form and going to the financing by venture capitalist with regard to the financing of the business' expansion.

**Part 1** addresses the incorporation of the company. First, the question regarding the appropriate legal form is discussed. In the following, the stock corporation is presented in more detail as it is the most common legal form and most appropriate for growth companies. In this context, the actual incorporation process, the different types of incorporations, the preparation of the articles of incorporation and the organisational regulations as well as the formalities of the incorporation are described. In a final section, the taxes at incorporation are outlined.

**Part 2** examines the organisation of the company. In this context, the corporate bodies are described, namely the shareholders' meeting, the board of directors and the executive management as well as the auditors. Part of a company's organisation are its accounting, the preparation of the balance sheet and the profit and loss accounts as well.

**Part 3** deals with the operative business. Legal issues, which the operating company should pay attention to, are described in this section: Remarks to general contract law, insurance and employment law, social security law, intellectual property law and taxes shall give a broad overview on relevant topics.

The financing of the company by third parties is outlined in **Part 4**. A brief overview on the different financing forms is followed by a description of the funding by venture capitalists. The most important documents and their content are outlined (including provisions venture capitalists would usually expect in these contracts). In addition, the so called "due diligence process" in the context of a financing by investors will be analyzed.

**Part 5** describes the basic principles of employee participation schemes. At the expansion stage at the latest, the question in which form employees can participate in the company needs to be resolved. This part identifies the most common forms.

**Part 6** includes several annexes, for instance standard forms of the incorporation documents, articles of incorporation, organisational regulations as well as employment contracts. In addition, several further addresses and links which are important for a start-up company are listed.
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Incorporation of the company
"Corporation: An ingenious device for obtaining profit without individual responsibility."

Ambrose Bierce
PART 1: INCORPORATION OF THE COMPANY

A. Choice of the legal form

1. Questions that need to be resolved prior to the incorporation

One of the most important steps towards entrepreneurial independence is the incorporation of a company. Before the actual incorporation, a number of questions must be resolved:

- Initial capital
- Risk and liability of the founders
- Development prospects of the company
- Entrepreneurial freedom
- Taxes
- Succession plan
- Social security issues

At first, the question must be addressed how much capital shall be placed in the company. Usually the law prescribes a certain minimum capital in case of capital companies (cf. part 1 A 4.a)). The minimum capital of the stock corporation amounts to CHF 100'000 whereas only CHF 20'000 are required when founding a limited liability company. Yet, it needs to be borne in mind that the statutory minimum capital often only covers the running costs and the operation expenses of few months.

Apart from the question of the initial capital, the company's founders must also consider what risks they bear and what liabilities they are prepared to bear. While the liability is not limited in the case of private companies (Personengesellschaften; sociétés de personnes), i.e. the entrepreneur is also responsible for the liabilities of the company with his entire private wealth, the liability is usually limited to the capital in case of capital companies (Kapitalgesellschaften; sociétés par actions). As a rule of thumb, the choice of a capital company is more advisable the higher the risks associated with a certain business are.

The development perspectives of the company also influence the choice of the legal form decisively. If the founders intend to borrow money (loans) for the financing of the growth, private companies are usually rejected. If they want to give shares of the
company to third persons – e.g. venture capitalists – at a later point of time, the stock corporation will be chosen most probably, as third persons can easily acquire shares by way of a **capital increase** or the **sale of existing shares**. If the founders already consider the suitability of the legal form for the financial markets, the limited liability company will usually be excluded because the minimum amount of a quota is CHF 100, compared to CHF 0.01 per share of a stock corporation. The same applies if they intend to obtain financing from investors, such as venture capitalists. In addition the decision making process can be very lengthy and extensive in the case of a limited liability company: as all or many quota holders can exercise a veto right on the resolutions of the quota holders' meeting, important decisions and developments can be delayed and lead to deadlock situations.

The **entrepreneurial freedom** depends – amongst other factors – very much on the choice of the legal form. As a rule of thumb, it can be said that a sole proprietor enjoys the greatest entrepreneurial freedom as he does not have to consider fellow partners or shareholders. In case of private companies (**Personengesellschaften**: **sociétés de personnes**), the founders can determine their individual contributions and investment freely in the contract. However, this greater entrepreneurial freedom is accompanied by a greater personal liability. In case of capital companies (**Kapitalgesellschaften**: **sociétés par actions**), the entrepreneurial freedom is limited for the benefit of the other stakeholders (shareholders, employees, business partners and other creditors of the company).

**Tax considerations** must also be made prior to the foundation (cf. part 3 F).

Even though the **succession planning** is hardly considered when founding a company (it seems to be very remote), it is a major aspect which needs to be taken into account when choosing the legal form. In case of private companies, the exit of a partner usually results in the dissolution of the company as the law assumes that the individual contributions of partners are important for the company. This is not the case with capital companies where the individual contribution of a shareholder is less important compared to the financial contribution. For this reason the company will usually continue existing after the exit of a shareholder.

Finally, **social security issues** must be addressed. The classic self-employed person (i.e. the sole proprietor or partner of a private company) is usually not insured for the consequences of unemployment whereas e.g. the founder of a stock corporation who is employed by the company and does not act as a director (cf. part 3 D) is ensured for the consequences of unemployment just like any other employee.
2. **What legal forms are there?**

The following scheme shows an overview of the several legal forms:

<table>
<thead>
<tr>
<th>Legal forms</th>
</tr>
</thead>
<tbody>
<tr>
<td>✗ Sole proprietorship (natural person; <em>Einzelunternehmer</em>; <em>raisons individuelles</em>)</td>
</tr>
<tr>
<td>✗ Private companies (<em>Personengesellschaften</em>; <em>société de personnes</em>)</td>
</tr>
<tr>
<td>- Simple partnership (<em>einfache Gesellschaft</em>; <em>société simple</em>)</td>
</tr>
<tr>
<td>- General partnership (<em>Kollektivgesellschaft</em>; <em>société en nom collective</em>)</td>
</tr>
<tr>
<td>- Limited partnership (<em>Kommanditgesellschaft</em>; <em>société en commandite</em>)</td>
</tr>
<tr>
<td>✗ Capital companies (<em>Kapitalgesellschaften</em>; <em>sociétés par actions</em>)</td>
</tr>
<tr>
<td>- stock corporation (<em>Aktiengesellschaft</em>; <em>société anonyme</em>)</td>
</tr>
<tr>
<td>- limited liability company (<em>Gesellschaft mit beschränkter Haftung</em>; <em>société à responsabilité limitée</em>)</td>
</tr>
</tbody>
</table>

Every entrepreneur must choose one of the mentioned legal forms. Legal forms other than the legally prescribed are excluded and hybrids are not permitted (*numerus clausus* of the legal forms).

Every natural person can found a **sole proprietorship** (*Einzelunternehmer*; *raisons individuelles*) at any time and start business. The owner is solely responsible and can dispose as he pleases. Many small entrepreneurs chose this form. However, it is not suitable for growing companies as a one-man company is founded and managed by a single person. The participation of other persons in the company and its capital is usually not possible.

In case of **private companies** (*Personengesellschaften*; *sociétés de personnes*), the individual contribution of a partner is decisive. This contribution can consist of actual work or money. Just like the one-man company, private companies are usually not suitable for growing companies. Even though private companies are very flexible and can be tailored to the specific needs, this flexibility is accompanied by the unlimited liability of the partners. As new business ideas often come with great uncertainties, the founders actually want to avoid an unlimited personal liability.
The **simple partnership** (*einfache Gesellschaft; société simple* according to art. 530 *et seqq.* CO) is not adequate for long-term companies as it is no entity. Based on the legal concept, it is not allowed to conduct commercial activities even though there are exceptions in practise. It can also not be registered in the commercial register.

The **general partnership** (*Kollektivgesellschaft; société en nom collective* according to art. 552 *et seqq.* CO) is a company composed of two or more natural persons joining together to conduct, under a common company name, a trading, manufacturing or other business conducted in a commercial manner, without limitation of their liability towards creditors (art. 552 para. 1 CO). Just like the simple partnership, the general partnership is no legal entity; however it is partially treated like a legal person. For instance, the general partnership has its own company name and can be registered *e.g.* as owner of real estate in the land register in the name of the company. It is legally capable of acting and of being prosecuted. The partnership can also be registered in the commercial register. However, only natural persons can join to a general partnership. Thus, the participation of a venture capitalist in form of a legal person is excluded and thus renders this legal form unsuitable for growing companies.

The **limited partnership** (*Kommanditgesellschaft; société en commandite* according to art. 594 *et seqq.* CO) is a company composed of two or more persons joining together to form, under a common company name, a trading, manufacturing or other business conducted in a commercial manner in such a way that at least one of the partners has unlimited liability and one or more limited partners have a liability which is limited to the amount of a fixed capital contribution (limited partners' contribution). Even though legal persons can participate in the company, art. 594 para. 2 CO stipulates that only natural persons may be unlimited partners whereas legal persons can participate as limited partners only in the company. This would clear the way for other legal persons such as *e.g.* venture capitalists to participate in the company. However, the unlimited liability of at least one partner as well as the complicated liability rules and provisions on the transfer of partnership interests usually render this legal form unsuitable for growing companies.

In the case of **capital companies** (*Kapitalgesellschaften; société par actions*), the individual contribution of the single shareholder is less important than its capital contribution. The liability of each shareholder is limited to its capital contribution. This limitation must be clearly identifiable for everyone engaging in business relations with the company. For this reason the law stipulates strict publication requirements (commercial register).

The stock corporation (*Aktiengesellschaft; société anonyme*) and the limited liability company (*Gesellschaft mit beschränkter Haftung, société à responsabilité limitée*) are the most important capital companies. In case of the limited liability company, individual contributions (*e.g.* actual work) of quota holders for instance are also of importance. The duty of a shareholder is limited to pay for his shares, *i.e.* to provide money or other assets to the company in the amount of the nominal value of his shares (art. 680 para. 1 CO).
The **limited liability company** (LLC; *Gesellschaft mit beschränkter Haftung, GmbH* or *société à responsabilité limitée, SARL*) is an individual-related capital company composed of two or several persons or commercial companies (art. 772 para. 1 CO) composed of at least one or several natural or legal persons or other commercial companies (art. 775 CO). Pursuant to the articles of association, the quota holders can be obliged to certain other contributions (*e.g.* job performance). The minimum company capital of a limited liability company is CHF 20'000 and must be fully paid up. The company's liability is limited to its capital. Each quota holder must have at least one quota of the company's capital. The amount of a single quota must be at least CHF 100. This renders this legal form very inflexible with regard to future-financing and activities on the financial markets and might require the conversion into a stock corporation. As such conversions lead to further expenses, the limited liability company is usually not suitable for young growing companies.

**Limited liability company**

- Capital company
- Company capital
  - Minimum capital of CHF 20'000
  - Liability limited to the company's capital
- Other statutory contributions of the quota holders (*e.g.* job performance), according to the company's articles of association

### 3. Limited liability company or stock corporation?

Start-up companies usually face the following question: Shall we establish our new venture in the form of a stock corporation or a limited liability company? The legal entities are governed by a different set of rules, yet the most recent revision of the law on limited liability companies becoming effective on January 1, 2008 has reduced these differences.

In start-up companies, the personal commitment of each member of the founder team is essential. It is not only about investing a certain sum of money, but also about contributing labour, skills and know-how. The strength of a start-up company is mainly determined by the underlying characteristics of the founder team and the ideas of each individual member of this team. As a result, the LLC is principally more suited than the AG as the LLC is more able to reflect these personal aspects. For instance, the articles of association of a LLC may lay down the personal and individual contribution duties in a detailed manner. Furthermore, the comparably low incorporation capital of
CHF 20'000 makes the LLC attractive. At the same time, the same provisions on auditing apply to both the LLC and the stock corporation. Hence, the LLC is a personalized capital company, i.e. it combines numerous personal and capital aspects.

Despite the basic advantages of a LLC, start-up companies chose the legal form of a stock corporation more often. If certain personal and individual duties of the founders are desired, these can be arranged in the form of a shareholders' agreement. The advantage of a shareholders' agreement is that it must not be deposited at the commercial register and thus remains confidential. By contrast, the articles of association of a LLC which contain such personal obligations can be reviewed in the commercial register, and the relationships between the founders become apparent. In addition, the minimum amount of CHF 100 per quota renders any employee involvement very difficult as employees often only hold a small percentage in shares and the quota capital is usually very small. Furthermore, it is not possible to agree to conditional or authorized capital resulting in a lack of flexibility.

These disadvantages could be overcome with the help of the Federal Law on Mergers, De-merger, Change of Corporate Form and Transfer of Assets, which facilitates the transformation from one legal form into another, e.g. from a LLC to a stock corporation. The challenge regarding the CHF 100 as minimum quota could be met with the introduction of phantom shares. Yet, such legal construction is usually quite difficult to implement. However, according to our experience, if ambitious start-ups intend to involve investors, the stock corporation is the state-of-the-art legal form.

For these reasons, we will focus on the stock corporation in the following.

4. The stock corporation

a) General concept envisaged by the legislator

(i) Is there only one form of stock corporation?

The legislator has not expressed the concept of a typical stock corporation. Apart from the big listed stock corporations with thousands of shareholders and a share capital of more than a billion Swiss francs, there also are several small stock corporations with only a single shareholder and a paid up share capital of CHF 50'000. Based on the legal definition of the stock corporation, it becomes clear that different types are possible:

The stock corporation is a company with its own company name whose predetermined capital (share capital) is divided into parts (shares) and whose liability is limited to the company's assets (art. 620 para. 1 CO).
Art. 620 para. 2 CO additionally stipulates that the shareholders are only liable for making the contributions as stated in the articles of incorporation and are not personally liable for the debts of the company.

(ii) How much share capital is required for the foundation?

The initial share capital shall amount to a minimum of CHF 100'000 (art. 621 CO) whereas a contribution of at least 20% of the par value of each share must be made (art. 632 para. 1 CO). In any case, the initial contributions made shall amount to at least CHF 50'000 (art. 632 para. 2 CO).

The following examples provide an overview on the statutory prescribed minimum capital of a stock corporation:

<table>
<thead>
<tr>
<th>Example: Share capital of CHF 100'000</th>
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</thead>
<tbody>
<tr>
<td>☐ Share capital of at least CHF 100'000 (art. 621 CO)</td>
</tr>
<tr>
<td>☐ Contributions:</td>
</tr>
<tr>
<td>– at least 20% (art. 632 para. 1 CO), <em>however</em></td>
</tr>
<tr>
<td>– at least CHF 50'000 (art. 632 para. 2 CO)</td>
</tr>
</tbody>
</table>

Accordingly, if a stock corporation with a share capital of CHF 1'000'000 is founded, the contribution must amount to at least CHF 200'000. The remaining CHF 800'000 will be booked as claim of the company towards its shareholders.

Even though the minimum capital for the foundation of a stock corporation of CHF 50'000 is temptingly low, it needs to be borne in mind that this capital is usually hardly enough for a company without positive cash flow (typically the case with start-up companies) to operate more than a few months. For this reason, companies are usually equipped more generously with equity.

If the share capital is not fully paid up, the company's board of directors is entitled to request the subsequent contributions on shares not fully paid in (art. 634a para. 1 CO).

(iii) Is the company allowed to return the share capital to its shareholders?

As it has been shown, the company capital is solely liable for the debts of the company in case of capital companies. If a shareholder fulfils his obligation to pay up the share capital, he has fulfilled all his duties. In case of insolvency of the stock corporation,
the shareholder is not required to make any additional contributions anymore. The shareholder cannot be obligated, even by the articles of incorporation, to contribute more for a share than the amount fixed at the time of issue (art. 680 para. 1 CO). As the share capital and certain profits that may not be distributed to the shareholders shall be maintained to respond to the company's creditors, it is prohibited to return the share capital to the shareholders (art. 680 para. 2 CO, prohibition of return of the company capital). In other words: The company is entitled to what has been contributed to the company and what the shareholder has agreed to contribute in form of possible later contributions to the company. Only under particularly strict conditions – which primarily ensure the protection of the company's creditors – the share capital may be returned to the shareholders.

If the company waives the full contribution of the share capital, the contributions not paid up are due to the latest in case of insolvency.

(iv) Types of shares

The share capital is divided into shares. The shareholder receives the shares for contributing money or assets to the company. Shares may only be issued at or above par value (the latter is referred to as agio in practise, art. 624 CO). Each share must have the minimum par value of one centime (CHF 0.01, art. 622 para. 4 CO). A maximum par value is not provided, however in practise, there are rarely shares with a par value of more than CHF 1'000.

Art. 622 para. 1 CO stipulates that shares shall be issued either in the name of a holder (registered shares) or to the bearer (bearer shares; art. 622 para. 1 CO). Both types of shares can co-exist. A start-up company will usually issue registered shares because on the one hand the shareholders are known and on the other hand the printing of shares can be abstained from.

<table>
<thead>
<tr>
<th>Types of shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>☑ Registered shares</td>
</tr>
<tr>
<td>☑ Bearer shares</td>
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</tbody>
</table>

Registered shares can be issued as so called "shares with privileged voting rights". Shares with privileged voting rights have an increased voting power. This is accomplished by providing in the articles of incorporation that every single share has one vote, but shares have different par values.
Example: Shares with privileged voting rights

- (Initial) share capital of CHF 100'000 (art. 621 CO): divided in 100'000 registered shares CHF 1 each.

- (Later) increase in the share capital, e.g. in case of the entry of a financial investor: CHF 500'000 divided in 50'000 registered shares CHF 10 each.

- The example demonstrates that the current shareholders would control the company with CHF 100'000 even though subsequently the financial investor contributes the fivefold of the original share capital to the company. This is possible because the shares of the original shareholder are issued as shares with privileged voting rights. Compared to the nominal value, these have a higher voting power. 100'000 votes of the "old shareholders" are faced by 50'000 votes of the investor.

When introducing shares with privileged voting rights, a number of statutory provisions must be observed.

On the one hand, the articles of incorporations must provide that the voting power of the shares is determined according to the number of shares owned by each shareholder irrespective of the par value (art. 693 para. 1 CO).

Furthermore, the shares with privileged voting right must be issued as registered shares and must be fully paid in (art. 693 para. 2 CO).

The nominal value of the remaining shares may not exceed the tenfold of the par value of the shares with privileged voting right. This shall ensure a minimum protection of the remaining shareholders. Hence, it would not be permissible in the above example to only issue 5'000 registered shares with a par value of CHF 100, as the original shares have a par value of CHF 1.

Furthermore, the voting right is always determined pursuant to the nominal value in case of matters falling within the competence of the shareholders' meeting (cf. the list in art. 693 para. 3 CO). This provision serves the protection of the non-privileged shareholders. Art. 704 CO has the same objective: certain important decisions of the shareholders' meeting require at least two thirds of the votes present and the absolute majority of the nominal value present at such shareholders' meeting.

Finally the law provides for so called preferred shares (art. 654 et seq. CO). By means of preferred shares, dividend privileges and special liquidation or preferential subscription rights can be granted to shareholders, which, in practice, is often the case, when financial investors participate in the company.
(v) **How are shares transferred?**

The transfer of shares is fairly simple. A sale and purchase contract is usually concluded prior to the transfer of the shares (cf. to the basics of contract law Part 3 A). This will usually be a **sale and purchase agreement** pursuant to art. 184 et seqq. CO because shares are transferred against a certain price. Apart from this contract in which the parties are obliged to transfer shares in return for payment, further conditions must be met in order to transfer the ownership of shares to the purchaser:

In case of **bearer shares**, the handing over of shares (art. 967 para. 1 CO) is sufficient. In this way, the ownership of the shares is transferred to the new bearer.

In case of **registered shares**, the **endorsing** of the certificate is required as well. This is a declaration aimed at the transfer of the rights endorsed in the shares which are usually indicated at the back of the certificate. The endorsement can name the new owner of the shares. If the new owner is not named, these are blank endorsements. In any case, the endorsement must be signed (art. 1003 para. 1 CO). If an endorsed registered share is handed over, the ownership passes on to the new possessor.

![The transfer of shares](image)

- Contract (e.g. sale and purchase contract)
- Transfer of the shares
- Additional endorsement of the shares (only in case of registered shares)

(vi) **How is the shareholders' group enlarged?**

In general, the shareholders' group can be enlarged in two ways:

![Extension of the shareholders' group](image)

- Transfer of shares
- Capital increase excluding the preferential subscription rights of the current shareholders

The **transfer** of shares is very simple which is one of the main reasons for the popularity of the stock corporation. Therefore, it is possible to extend the shareholders' group by the current shareholders selling a part of their shares to third parties.
Alternatively, the capital can be increased while excluding the preferential subscription rights of the current shareholders. Even though this decreases the portion of the current shareholders in the company (just as if they would sell a part of their shares), the increase in capital has the advantage that the company receives additional equity (cf. part 5 B).

(vii) Summary

<table>
<thead>
<tr>
<th>Characteristics of the stock corporation</th>
</tr>
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<tbody>
<tr>
<td>☑ Capital company</td>
</tr>
<tr>
<td>☑ Share capital of at least CHF 100'000 (art. 621 CO)</td>
</tr>
<tr>
<td>- Bearer shares</td>
</tr>
<tr>
<td>- Registered shares (possibly shares with privileged voting right)</td>
</tr>
<tr>
<td>- Preferred shares</td>
</tr>
<tr>
<td>☑ Contribution:</td>
</tr>
<tr>
<td>- at least 20% (art. 632 para. 1 CO), however</td>
</tr>
<tr>
<td>- at least CHF 50'000 (art. 632 para. 2 CO)</td>
</tr>
<tr>
<td>☑ Limited liability of the shareholders</td>
</tr>
<tr>
<td>☑ Prohibition of return of the share capital</td>
</tr>
<tr>
<td>☑ Unlimited number of shareholders</td>
</tr>
<tr>
<td>☑ Enlargement of the shareholders' group at any time by</td>
</tr>
<tr>
<td>- Capital increase (while excluding the preferential subscription rights of the current shareholders)</td>
</tr>
<tr>
<td>- Sale of shares</td>
</tr>
<tr>
<td>☑ No other duties of the shareholders</td>
</tr>
</tbody>
</table>
b) Deviation from the legislator's vision

(i) Is a one-person stock corporation admissible?

Pursuant to the revised art. 625 CO, a stock corporation can be composed of one or more natural or legal persons or other commercial companies. Therefore, this is perfectly possible. In practice, there are many single-shareholder stock corporations.

(ii) Shareholders' agreement between the founders

If the shareholder contributes his part of the share capital, he has fulfilled all his duties. The shareholder cannot be obliged to contribute more than the amount fixed at the time of issue even by the articles of incorporation (art. 680 para. 1 CO). This does not imply that the shareholder cannot oblige himself to further contribute to the company. These obligations must be agreed with the other shareholders in form of a separate contract, the so called shareholders' agreement.

Most important terms of the shareholders' agreement between the founders

- Duties of the individual shareholders of the stock corporation
- Decision making
  - Joint exertion of the voting right
  - Representation in the corporate bodies of the company
- Reciprocal rights of first refusal and right of first offer

(c) Corporate bodies of the stock corporation

(i) Overview

The stock corporation as legal person is represented by its corporate bodies. Their members are natural persons (individuals) that are responsible for in the decision making of the company and represent the legal person towards third parties. Before the foundation, the founders must consider what bodies the future company shall have and how these bodies shall be staffed. However, the founders are not completely free because the law provides certain statutory corporate bodies the stock corporation must have in any case:
(ii) **Shareholders' meeting**

The general meeting of the shareholders is the supreme corporate body of the stock corporation (art. 698 para. 1 CO; cf. part 2 B). It has the following inalienable powers:

<table>
<thead>
<tr>
<th>Inalienable powers of the shareholders' meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td>🟖 Election of the members of the board of directors and of the auditors</td>
</tr>
<tr>
<td>🟖 Adoption of and amendments to the articles of incorporation</td>
</tr>
<tr>
<td>🟖 Approval of the annual report and of the annual financial statements</td>
</tr>
<tr>
<td>🟖 Distribution of profits</td>
</tr>
<tr>
<td>🟖 Release of the members of the board of directors</td>
</tr>
</tbody>
</table>

The foundation meeting of the shareholders is a special form of the shareholders' meeting as all (future) shareholders that will found the company are present. Otherwise no further considerations must be made at this stage because all shareholders automatically participate and the powers of the shareholders' meeting are defined by law.

(iii) **Board of directors**

The board of directors is composed of one or more members (art. 707 para. 1 CO). The board of directors must be determined upon foundation; the members must accept the appointment.

The board of directors is an important corporate body as it has a number of non-transferable and inalienable duties (art. 716a CO, cf. part 2 C.3). In fact, it is the most important corporate body in smaller stock corporations as it is often responsible for the operational management of the company.
The articles of incorporation can authorize the board of directors to fully or partially delegate the management to certain individual members of the board of directors or to third parties in accordance with the organisational regulations (art. 716b para. 1 CO). As the "delegation provision" must be contained in the articles of incorporation, the founders should already consider upon the foundation of the company how they want to organise their company, i.e. whether they want to institute a separate executive management or not. The institution of the executive management is particularly advisable if not all members of the board of directors will effectively be involved in the business and single members will observe a supervisory function as it is common in many companies. By splitting the board of directors and the executive management, the liability of the members of the board of directors can be limited to due selection, instruction and supervision of the executive management. This is usually a condition of directors which are not involved in the operative business before accepting the appointment at all.

(iv) Auditors

The auditors are prescribed by law (art. 727 et seqq. CO). The auditors examine in particular whether the accounting and the annual accounts as well as the proposal concerning the use of the balance sheet profit (distribution of profit and loss) comply with the law and the articles of incorporation (art. 728 CO; regarding auditors cf. part 2 D).

B. Incorporation of the stock corporation

1. Overview

The law differentiates between different types of foundation:

<table>
<thead>
<tr>
<th>Overview on the possible types of foundation for the stock corporation</th>
</tr>
</thead>
<tbody>
<tr>
<td>☑ Foundation with cash subscriptions</td>
</tr>
<tr>
<td>☑ Qualified foundation</td>
</tr>
<tr>
<td>– Foundation with non-cash capital contribution</td>
</tr>
<tr>
<td>– Foundation with proposed acquisitions in kind</td>
</tr>
</tbody>
</table>

The foundation with founders' cash subscriptions is usually not problematic. The founders pay the share capital to a blocked account of a bank in favour of the new
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Incorporation of the company

21 stock corporation. After the successful registration of the stock corporation in the commercial register, the bank releases the money to the company.

In case of a **qualified foundation**, there is the danger of contributing assets to the company that are worth considerably less than the shares issued in return. Therefore, the legislator has stipulated certain **protective provisions** which shall ensure that the legal provisions regarding the minimum contribution are observed.

**Example of a prohibited foundation by non-cash contribution**

A founder of a stock company is not in the position to contribute his issued shares in cash. For this reason he decides to contribute his old car to the company. The other founders are prepared to transfer him shares in return for the car in the amount of CHF 15'000. However, the eurotax value of the car is only CHF 7'500. In the books of the stock corporation, the car has a worth of CHF 15'000, even though an amortisation of CHF 7'500 would be immediately necessary. Towards third parties, the company gives the impression it is the owner of a car worth CHF 15'000. This is why third persons potentially suffer damages because they enter into business relationships with the company based on its supposed solvency.

In this example, it becomes clear that the protection of the public primarily is ensured by requesting the founders to disclose their contributions and the respective valuation in the articles of incorporation and in the commercial register. In addition, the auditors must confirm the adequacy of the valuation.

Prior to describing the actual foundation process, two other conditions will be elaborated:

- Company name;
- Articles of incorporation.

2. **Company name**

a) **What principles must be observed when chosing a company name?**

Before the stock corporation can be founded, it requires a unique name or – in the words of the law – a company name. The company name serves to identify the company and can be chosen freely within certain limits. In order to avoid confusion, there may only be one single stock corporation with the same company name in Switzerland (art. 951 para. 2 CO).

The formation of a company name is governed by the following two principles:
Principles of the law on company names

- Principle of truth
- The company must not be misleading

The following types of company names are possible:

Types of company names

- Personal company name
- Objective company name
- Fantasy company name

In case of the **personal company name**, the name of one or all shareholders is decisive, whereas the **objective company name** indicates the object or purpose of the company.

There are a number of specific restrictions and provisions concerning the stock corporation:

Each company name must always include the **legal form** (art. 950 CO). However, it is permitted to not include the legal form in logos and graphic symbols (art. 954a para. 2 CO).

**Fantasy names** are the least problematic. Attention must usually be paid to **descriptive names**. Generally descriptive company names are prohibited: For instance, the company name "Chemical Ltd" would not be allowed because such general designations cannot be monopolized by a single company.

Certain restrictions concern single **parts of the company name**. For instance, the word "international" may only be used in the company name if the company effectively conducts an international business. By contrast, the part of the company name "Switzerland" must refer to specific Swiss activities.
In order to avoid at the foundation of the company that a company name is already used by a different company, it is advisable to check with the help of the Federal Commercial Register whether the same or a similar company names have been registered in the commercial register. The costs of such search amount to CHF 40. The according form can be downloaded from the following web site:

<table>
<thead>
<tr>
<th>Web site</th>
</tr>
</thead>
<tbody>
<tr>
<td><a href="http://www.zefix.admin.ch">www.zefix.admin.ch</a></td>
</tr>
</tbody>
</table>

The cantonal commercial registers do not control whether an identical company name exists; by contrast, they check whether the company has been formed correctly (e.g. evidence must be provided that the "ABC Chemical International Ltd" conducts an international business).

b) **May the company name act officially under a different name?**

The aim of the provisions regarding the formation of the company name is to clearly identify every legal person. The logical consequence is the duty to use the company name in business activities (**duty to use the company name**; art. 47 CRO). Only in this way it can be ensured that the business partners can be sure to conduct business with the intended legal person. However, there are exceptions to this principle. The company is allowed to also use a short version of the company name in advertising texts, adverts, mailings etc. – however only if there is no risk of confusing the company with a different company. For instance, Swisscom Ltd may act under the name Swisscom only because the risk of confusion with a different telephone operator is basically inexistent.

c) **What is the relationship between the company name and a trademark?**

The company name serves to identify of the company. By contrast, trademarks serve the identification of products and services (cf. part 3 E.2.b)). When forming a company name, the founders should pay attention to not violating third party
Successfully mastering legal and tax challenges
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trademarks, *i.e.* the company name must not be confused with a registered trademark. Even if the company name "Coca Cola SA" would still be available, it must not be used because there is a substantial risk of confusion with the trademark Coca Cola.

### 3. Articles of incorporation

Every stock corporation has its articles of incorporation. The articles of incorporation are the fundamental governing document of the company. In addition, the articles of incorporation summarize the most important provisions regarding the business activities.

<table>
<thead>
<tr>
<th>Content of the articles of incorporation of the stock corporation required by law</th>
</tr>
</thead>
<tbody>
<tr>
<td>‣ Company name</td>
</tr>
<tr>
<td>‣ Domicile</td>
</tr>
<tr>
<td>‣ Purpose of the company</td>
</tr>
<tr>
<td>‣ Amount of the share capital</td>
</tr>
<tr>
<td>‣ Contribution (in case of a contribution in kind)</td>
</tr>
<tr>
<td>‣ Type, number and par value of shares</td>
</tr>
<tr>
<td>‣ Calling of a shareholders' meeting</td>
</tr>
<tr>
<td>‣ Voting rights of the shareholders</td>
</tr>
<tr>
<td>‣ Corporate bodies</td>
</tr>
<tr>
<td>‣ Form in which notices are published</td>
</tr>
</tbody>
</table>

The **company name** and the **domicile** are included in the articles of incorporation to ensure the identification of the company. Certain legal consequences are attached to the domicile of the company (*e.g.* there is a place of jurisdiction at the domicile of the company, *i.e.* claims against the company must be raised at the courts of its domicile, or the insolvency procedure against the company takes place at the domicile of the company).

The **purpose** bears a particular meaning. It defines the context in which the corporate bodies of the company can act. The purpose is published in the commercial register and the Swiss Official Gazette of Commerce (SOGC). Hence everyone who engages in business relations with the company can clearly verify whether the corporate bodies
are entitled to conduct the planned business transaction in the name of the company (power and authority of representation).

The amount of the share capital must also be included in the articles of incorporation. In addition to the overall amount of the share capital, the type, the number and the par value of each share must be mentioned. Hence, every change of the capital and share structure of the company results in a mandatory adjustment of the articles of incorporation.

The voting rights are associated with the shares. When introducing shares with preferred voting rights, the respective provisions must be integrated in the articles of incorporation.

Furthermore, the articles of incorporation must include provisions on the individual corporate bodies. This is important because the articles of incorporation are a fundamental document of the company containing the most important governing principles of the company. Hence, it is consistent that the principles of organisation (calling and conduct of a shareholders' meeting, board of directors, auditors) are included in the articles of incorporation.

Finally, the company publishes notices on a regular basis that must be delivered to all shareholders. If a company has issued registered shares, the information is usually sent directly via mail to the shareholders registered in the shareholders' register. This is not possible for companies that have issued bearer shares as the company does not know its shareholders. In this case, the articles of incorporation determine that the company must publish its notices. The Swiss Official Gazette of Commerce is often chosen as the medium of publication.

Refer to part 6 A.2 for an example of the articles of incorporation.

4. Foundation with cash subscriptions

Art. 629 para. 1 CO briefly states: The company is incorporated by the founders declaring in a notarized deed the foundation of the stock corporation by adopting therein the articles of incorporation and by appointing the corporate bodies. In this deed of incorporation, the founders subscribe for the shares and confirm that:

1. all shares have been validly subscribed;
2. the promised contributions correspond to the total amount of the share issue; and
3. the requirements set forth by law and by the articles of incorporation concerning the contributions are fulfilled.

This requires a more detailed explanation:
At least one person must participate in the incorporation of the company (art. 625 CO). This person or these persons will usually be the future shareholder(s). It is also possible that someone participates in the incorporation that subscribes the shares in the name of a third person – e.g. one of the other shareholders – and participates in the foundation in the name of this person. Such a person is referred to as a "fiduciary founder".

Pursuant to Art. 629 para. 2 subpara. 1 CO, all shares must be validly subscribed. For its validity, the subscription must specify the number, the par value, the type, the class and the amount of the issue of the shares. The subscriber must commit unconditionally to make a contribution equal to the issue price (art. 630 CO). Once the (future) shareholder has subscribed his shares, he cannot retreat any more. In this moment, the company in foundation acquires an unconditional claim towards the subscriber. The declaration of subscription is attached directly to the deed of incorporation.

In order for the founder to provide evidence that the share capital has actually been paid in, the respective amount must be deposited on a blocked account at the exclusive disposal of the company. The bank will issue a certification and will only release the capital upon the instruction of the corporate bodies of the company (after the foundation and the company's registration in the commercial register, art. 633 CO).

In addition, the founders must appoint the company's corporate bodies (board of directors, auditors). The persons usually accept the office and sign the according declaration of acceptance.

Hence, the founders must present the following documents upon foundation:

<table>
<thead>
<tr>
<th>Overview on the foundation documents at the foundation with cash subscription</th>
</tr>
</thead>
<tbody>
<tr>
<td>✗ Notarial deed</td>
</tr>
<tr>
<td>✗ Articles of incorporation</td>
</tr>
<tr>
<td>✗ Certification that the founders have deposited the capital at a bank at the disposal of the company in foundation (so called capital contribution account)</td>
</tr>
<tr>
<td>✗ Declaration of acceptance by the members of the company's corporate bodies</td>
</tr>
</tbody>
</table>

5. Qualified foundation
a) **Foundation with contributions in kind**

In case of the foundation with non-cash capital contributions, the so called "contributions in kind", the contributions do not occur by means of cash, but by the contribution of assets. As mentioned the danger that objects without intrinsic value are contributed to the company and that the creditors of the company suffer damages shall be minimised.

The law provides two safeguards:

On the one hand, the founders must prepare a **founders' report** (art. 635 para. 1 CO). In this written report, the following aspects must be addressed:

1. The **nature** of the contributions must be described.

2. The **condition** of the contributions must be described. There is a considerable difference whether for example a new car or a car involved in an accident is contributed.

3. The **adequacy of their valuation** must be described and justified. For instance, if a second-hand car is contributed to the new stock corporation, the justification for the adequate valuation could consist in the reference to a eurotax list.

**Single entities** – e.g. already existing single companies – are often contributed to the company; in such cases, a **take-over balance sheet** is usually prepared. In such case, the founders' report must address the individual balance sheet items. If the company takes over for instance the claims against customers (accounts receivable) of the former single sole proprietor, the report must state whether provisions for the not-paid invoices have been made and why such provisions are considered to be adequate. In case of inventory and stock, the founders must specify according to which value these are included in the balance sheet (market value, acquisition value or the lower of the two values). In general, the valuation criteria for the individual items must be included. Patents as well as other intellectual property rights (cf. part 3 E) must be valued, too.

### Content of the founders' report

- Description of the objects that are contributed to the company
- Description of the **condition** of the objects that are contributed to the company
- **Valuation** of the items that are contributed to the company
- Description of the **valuation principles**
The founders' report must be signed by all founders. In addition, an auditor must examine the founders' report and confirm in writing its completeness and correctness (auditor's confirmation; art. 635a CO). The auditor must also examine the adequacy of the valuation of the items contributed. In practice, the auditor's confirmation is usually issued by the later authors.

If the founders' report does not reflect the truth and the company's creditors suffer damages for this reason, the founders are personally liable with their assets (founders' liability, art. 753 CO).

b) Foundation by prospective acquisitions in kind

In case of the incorporation by related acquisitions in kind, the contribution occurs in form of cash, but subsequently assets shall be taken over by the newly incorporated company from the founders or third persons shortly after the foundation. In this case, the danger that assets without intrinsic value are taken over by the company and that the company's creditors suffer damages shall be minimised and the provisions on the capitalization and the contributions are circumvented.

In this case, the law also stipulates two safeguards: on the one hand, the founders have to prepare and sign the founders' report (art. 635 para. 1 CO). On the other hand, the auditor must examine the founders' report and confirm in writing its completeness and correctness (auditor's confirmation, art. 635a CO). The auditor must also examine the adequacy of the valuation.

c) Foundation documents

Hence, the following documents must be presented to or prepared by the public notary in case of the qualified foundation prior to the incorporation of the company:

<table>
<thead>
<tr>
<th>Overview of the incorporation documents in case of the qualified incorporation</th>
</tr>
</thead>
<tbody>
<tr>
<td>☑ Notarial deed</td>
</tr>
<tr>
<td>☑ Articles of incorporation</td>
</tr>
<tr>
<td>☑ Confirmation that the founders hold the contributed assets at the disposal of the company in foundation</td>
</tr>
<tr>
<td>☑ Declaration of acceptance of the members of the company's corporate</td>
</tr>
</tbody>
</table>
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6. **Public notarisation**

The foundation of the company is an important act; it is the "hour of birth" of the company subject to the registration in the commercial register. For this reason, a formal procedure is required: The foundation is done in front of a **notary**; **in individual cantons, it is the authenticating person at the commercial register**. This results in an independent third person examining whether all conditions of the foundation of the company are fulfilled. The public deed, which the parties have to read again at the notary, shall ensure that the founders "know what they do". This is also important because the founders can be **personally liable** if the company has not been founded properly (art. 753 CO).

The founders provide the notary with all documents necessary for the foundation. He examines these documents. The notary provides the founders with the possibility to read the deed of incorporation again or he reads the document to them. Finally all founders sign the deed of incorporation and the articles of incorporation. At the end, the notary signs the deed himself, impresses his seal and lets it be tied (**public deed**). The foundation meeting is concluded with this act.

However, this is not yet sufficient to constitute the company. In fact, the board of directors is instructed to register the company at the commercial register. The company only **acquires the status of a legal entity at the time of entry in the commercial register** (entry in the journal, art. 643 para. 1 CO). From then on, it exists as a **legal person**.

7. **Entry in the commercial register**

The founders or the members of the board of directors register the company at the commercial register. The registration can be done in two different ways:

1. The company's board of directors itself prepares the application for the commercial register. In this case, all members of the board of directors must sign.

2. The members of the board of directors show up personally at the commercial register and the officer prepares the application in the presence of the founders. All
members of the board of directors must be present as they have to sign the application.

The board of directors will usually have to provide the same documents as to the notary. In addition, the notarial deed must be deposited at the commercial register.

Apart from these documents, the **signatures** must be deposited at the commercial register. Every person authorised to sign must produce two signature samples: a personal signature and a company name signature. The signatures must be legalized by the notary.

<table>
<thead>
<tr>
<th>Documents for the application at the commercial register</th>
</tr>
</thead>
<tbody>
<tr>
<td>❍ Application to the commercial register</td>
</tr>
<tr>
<td>❍ Foundation document (notarial deed)</td>
</tr>
<tr>
<td>❍ Articles of incorporation</td>
</tr>
<tr>
<td>❍ Legalized signatures</td>
</tr>
<tr>
<td>❍ Contract regarding the non-cash capital contribution or the proposed acquisition in kind, founders' report and auditor's confirmation</td>
</tr>
<tr>
<td>❍ &quot;Stampa&quot;-declaration (cf. part 6 A.4.)</td>
</tr>
<tr>
<td>❍ &quot;Lex-Friedrich&quot;-declaration (cf. part 6 A.3.)</td>
</tr>
</tbody>
</table>

The result of an application to the commercial register is the entry in the journal of the commercial register. The cantonal commercial register forwards the (still provisional) entry to the Federal Commercial Register which verifies the registration in the cantonal commercial register and publishes the foundation of the new company in the Swiss Official Gazette of Commerce (SOGC). This happens a couple of days after the application and therefore the effects (especially the formation of the company) are drawn back to the moment of the application.

The registration in private "commercial registers" or "mercantile directories" is not required.

8. **Expected duration of the foundation**
Depending on the complexity of the circumstances, the foundation can last from a few days up to several weeks. As a rule of thumb, foundations with non-cash contribution or acquisitions in kind take longer than a foundation with cash subscription as additional parties are involved and supporting documents (founders' report and auditor's confirmations) must be prepared.

From the moment of registering the company at the cantonal commercial register, it usually takes about ten days until the entries are checked and the publication in the SOGC is made. If the founders want to accelerate the procedure, they can choose the so called "express procedure". In such case, the journal extract is usually available two or three days after the registration in the cantonal commercial register.

9. **Costs of the foundation**

When founding a stock corporation, the following costs must be taken into account (Zurich):

<table>
<thead>
<tr>
<th>Costs of the foundation</th>
</tr>
</thead>
<tbody>
<tr>
<td>— Notary fee of approximately CHF 500 to CHF 20'000 (the fee depends on the amount of the share capital)</td>
</tr>
<tr>
<td>— Commercial register fee of approximately CHF 600 to CHF 1'000 for</td>
</tr>
<tr>
<td>— Registration</td>
</tr>
<tr>
<td>— Application (as far as it is not prepared by the board of directors itself)</td>
</tr>
<tr>
<td>— Extracts from the commercial register</td>
</tr>
<tr>
<td>— Registration of persons authorized to sign</td>
</tr>
<tr>
<td>— Fees for attorney/trustee of approximately CHF 3'000 to CHF 4'000 (for a standard foundation with cash contribution)</td>
</tr>
<tr>
<td>— Possibly:</td>
</tr>
<tr>
<td>— Additional fees of the commercial register for a preliminary examination of the documents</td>
</tr>
<tr>
<td>— Fee of CHF 40 for the examination of company names by the Federal Commercial Register</td>
</tr>
</tbody>
</table>

The fee of the **notary** for the execution of the public deed is determined by cantonal rates. In case of a foundation capital of CHF 100'000, the notary fees in Zurich will correspond to the minimum amount of CHF 500.
The fees of the commercial register amount to approximately CHF 600 to CHF 1'000 whereas these increase if a preliminary examination of the documents is requested. In order to avoid surprises, this is always recommendable if an extensive contract regarding the non-cash contribution or acquisitions in kind with the according founders' report and the auditor's confirmation are submitted.

The foundation is usually done by an attorney: The fees for a foundation with cash subscriptions in the canton of Zurich amount to CHF 3'000 to CHF 4'000. In case of additional documents, such as the contract regarding the non-cash contributions or the acquisitions in kind, additional fees incur.

C. Taxes at incorporation

1. Issuance stamp tax

a) Generally

An issuance stamp tax at a rate of 1% is levied on issuance of shares and other contributions to Swiss-domiciled companies in excess of the first CHF 1'000'000. The tax base corresponds to the amount paid in exchange for the remittance of the shares (cf. following example 1).

If there is a premium, i.e. if the subscription price exceeds the nominal value of the shares and the premium is credited to the so-called "agio", then the costs linked to the issuance of shares and the issuance stamp tax itself may be deducted (cf. following example 2).

The newly incorporated company must report the issuance of the shares and pay the issuance stamp tax to the Swiss Federal Tax Administration in Berne within 30 days after entry in the Commercial Register by completing "form 3". A deposit slip is attached to the form. Any delayed remittal entails interests on late payments and may cause a monetary fine. The contemplated form can be ordered on the homepage of the Swiss Federal Tax Administration (www.estv.admin.ch).1

The evaluation of the issuance stamp tax can be explained by the following examples:

b) Example 1: Incorporation of a company by money contributions

Example 1: Incorporation of a company by money contribution

- Shareholders X, Y and Z incorporate the Alpha Corporation with a share capital of CHF 1’300'000. They contribute the share capital by payment of money at 100%.
- A tax free amount of CHF 1'000'000 is deducted from the share capital.
- An issuance stamp tax of 1% is levied on the remaining capital of CHF 300'000.
- Issuance Stamp Tax = 1% of (CHF 1'300'000 – CHF 1'000'000) = CHF 3'000

c) Example 2: Subscription price exceeds the nominal value of the shares

Example 2: Subscription price exceeds the nominal value of the shares

- Shareholders X, Y and Z incorporate the Beta Corporation with a share capital of CHF 1’300'000, divided into 1’300 shares at CHF 1'000 each. A premium of CHF 500 has to be paid on every share at nominal CHF 1'000. The costs linked to the issuance of shares are CHF 10'000.
- The equity capital amounts to CHF 1’950'000, consisting of share capital of CHF 1’300'000 and a premium of CHF 650'000 from which the tax exempt amount of CHF 1'000'000 is deducted.
- As the subscription price exceeds the nominal value of the shares, any costs linked to the issuance of shares as well as the issuance stamp tax itself may be deducted.
- Issuance Stamp Tax = 1% of ((CHF 1’300'000 + CHF 650'000 – CHF 1'000'000 - CHF 10'000) x 100) / 101) = CHF 9’306

2. Contributions of inventions/patents

Especially at incorporation of a start-up company, inventions or patents are frequently contributed to the company.

If a shareholder contributes inventions or patents to a newly incorporated company, this may result in additional income taxes for the shareholders. The tax authorities may regard the value of a patent as income, which is subject to taxation. However, it is
Successfully mastering legal and tax challenges

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possible to avoid such taxation with diligent planning. For this reason, a contribution of inventions or patents must be planned diligently by consulting an expert. Furthermore, previous arrangements with tax authorities may be necessary.

Moreover, if inventions or patents are made as contributions in kind or as hidden capital contributions, then their market value is subject to issuance stamp tax of 1%.

3. Transformation of a sole proprietorship into a company

A founder of a company who has already been doing business, namely, in the form of a sole proprietorship, now forms the basis for the incorporation of a company such as a LLC or joint stock corporation.

Generally, the transformation of a sole proprietorship into a company can be tax-neutral as long as the company maintains the same book values as the sole proprietorship did. However, if a company is incorporated due to a transformation of a sole proprietorship, then an issuance stamp tax of 1% will be levied on the nominal value – after the deduction of the tax threshold of CHF 1’000'000 – provided that the existing legal entity existed for five years.

4. Tax considerations regarding the choice of a company's domicile

Generally, the basic principle can be applied: the domicile of a company is determined by the production location or by the location of the company's offices. At the stage of incorporation, questions on domicile are usually not relevant from a fiscal point of view. Furthermore, it is possible to transfer the domicile any time in order to optimize structures for fiscal matters.

5. Further tax considerations regarding the incorporation of a company

Following the incorporation, the company will be subject to various tax liabilities, namely, corporate income and corporate capital tax liability (cf. part 3 F.4 and F.5) and in the majority in a value-added tax liability as well (cf. part F.7).

D. Tax relief for venture capital companies

On May 1, 2001, the Federal Law on Venture Capital Companies came into effect. This law provides certain forms of tax relief for venture capital companies and private investors (so called Business Angels), which invest in new Swiss enterprises.

To benefit from a tax relief, an investment company as well as the projects of private investors need to be approved by the Federal Department of Economic Affairs.
Federal Department of Economic Affairs itself has entrusted the State Secretariat for Economic Affairs (SECO) with the examination of the applications. To be approved, venture capital companies must prove that they have invested at least 50% of their resources in Swiss companies with innovative, internationally focused projects, which are independent and less than five years old, or show that they are about to make such investments. More precise information on the recognition process can be found on the website of "seco-Task Force KMU" (http://www.kmuinfo.ch).

Every acknowledged venture capital company is exempt from the issuance stamp tax. Furthermore, according to art. 69 of the Federal Direct Taxation Law (DTL), the threshold for claiming a participation exemption is only 5% instead of the usual 20%. Thus, capital gains of venture capital companies with participations of less than 20% are nearly free from federal direct taxes. Furthermore, venture capital companies are generally exempt from cantonal and communal taxes due to their "status" as holding companies.

Private investors are subject to deferred taxes on the federal level if they award subordinate loans to Swiss corporations. They may deduct 50%, CHF 500’000 at most, of such subordinate loans awarded to Swiss enterprises from their taxable income. In the event of a loss, the amount of CHF 250’000, at most, can be deducted definitively from the taxable income.

E. "Shell transactions"

In any case, founders should **incorporate a new company**. Existing companies – so-called "shell companies" which are no longer operative – are often offered for sale. Purchasing such a "shell" is subject to **huge risks**. A "shell" should not be acquired in any case for the following reasons:

<table>
<thead>
<tr>
<th>Risks related to shell transactions</th>
</tr>
</thead>
<tbody>
<tr>
<td>❍ According to various decisions of the Swiss Supreme Court, the purchase of a &quot;shell company&quot; is void under the law, because in such case, the incorporation provisions of the Swiss corporate law will not be applied.</td>
</tr>
<tr>
<td>❍ Generally, the founders do not know in which field the purchased &quot;shell company&quot; has been active. Therefore, it is not possible to assess whether their acquisitions in the &quot;shell transactions&quot; are subject to any unknown burden.</td>
</tr>
</tbody>
</table>

Furthermore, the prices of such "shell companies" are higher than the costs necessary to incorporate a new company. Moreover, it is rarely possible to save time. Therefore, founders should **always incorporate a new company**.
Organisation of the company
"Man kann ein Unternehmen mit dem Aktienrecht ebensowenig führen wie eine Ehe mit dem Bürgerlichen Gesetzbuch."

Hans-Günther Sohl
PART 2: ORGANISATION OF THE COMPANY

A. Corporate governance

In the Swiss Code of Best Practice for Corporate Governance published in 2002, corporate governance is defined as the entirety of the principles, which are focused on the shareholders' interest and which seek transparency as well as a balanced proportion of leadership and control and is subject to decision making capabilities and efficiency on the highest company level. The control will be intensified upon the taking effect of the new rules on the auditor. The principles laid down in the Swiss Code of Obligations were primarily created for publicly held stock corporations. For instance, the appendix to the financial statement must include the rewards and loans granted to the company's highest bodies. However, due to the lack of resources, small and medium sized companies are often not able to implement the rules of the Swiss Code of Obligations to its full extent. Nevertheless, these principles also concern such companies as on the one hand they influence at least indirectly the standards that apply to the bodies of smaller companies. On the other hand, they can also give an indication of what the corporation between the bodies of a company and the company's organisation shall look like or how it can be improved. As far as these principles are considered to be helpful for start-up companies, reference is made in the following. The organisation and mode of operation of the board of directors are particularly concerned.

B. Shareholders' meeting

1. Introduction

By law, every stock corporation consists of three bodies: the shareholders' meeting, the board of directors and the auditors. The law stipulates that the shareholders' meeting is the supreme corporate body of a stock corporation (art. 698 para. 1 CO). Therefore, fundamental responsibilities and tasks are assigned to the shareholders' meeting. Indeed, the law on stock companies is based on the so called "principle of parity" according to which every corporate body has inalienable tasks that cannot be alienated from it by any other corporate body and thus also not by the shareholders' meeting.

The law differentiates between the ordinary and extraordinary shareholders' meeting (art. 699 para. 2 CO). The ordinary meeting shall take place annually within six months after the close of the business year. By contrast, extraordinary shareholders' meetings take place based on necessity. From a legal point of view, there is no difference between the two as both are assigned the same responsibilities and are conducted according to the same procedure and form.
2. **Powers of the shareholders' meeting**

The shareholders' meeting is the meeting of the shareholders. In particular, it has the power to adopt the articles of incorporation, to define the purpose of the stock corporation, to make decisions regarding the composition of the shareholders' equity as well as to hold elections of the board of directors and of the auditors. The inalienable powers and responsibilities of the general meeting are set out in art. 697 para. 2 subpara. 2 CO:

<table>
<thead>
<tr>
<th>The inalienable powers of the shareholders' meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Election of members of the board of directors and of the auditors</td>
</tr>
<tr>
<td>☐ Adoption and amendment of the articles of incorporation</td>
</tr>
<tr>
<td>☐ Approval of the annual report and of the consolidated financial statements</td>
</tr>
<tr>
<td>☐ Approval of the annual financial statement</td>
</tr>
<tr>
<td>☐ Resolution on the use of the balance sheet profit</td>
</tr>
<tr>
<td>☐ Release of the members of the board of directors</td>
</tr>
</tbody>
</table>

3. **Calling of the shareholders' meeting**

In general, the shareholders' meeting is called by the board of directors, if necessary by the auditors (art. 699 CO). Furthermore, one or more shareholders representing together at least **ten percent of the share capital** may request the calling of a shareholders' meeting.

The invitation to the shareholders' meeting shall be made at least 20 days prior to the day of the meeting (art. 700 CO). The calling shall state the **date, place and time of the meeting**, the **agenda items** as well as the **motions of the board of directors** (and of those shareholders representing shares of a par value of CHF 1'000'000). The shareholders' meeting shall be called in the form provided for by the articles of incorporation. Part 6 B.1 provides an example of a calling of the shareholders' meeting. In case of registered shares, the calling is usually made by mail and in case of bearer shares by publication in the Swiss Official Gazette of Commerce.

The **shareholders' meeting is prepared by the board of directors** (art. 716a para. 1 sub para. 6 CO). In particular, the preparation of the business report, the examination of the book-keeping and annual accounts by the auditors as well as the preparation of
the audit report must be coordinated with the calling and execution of the general meeting in due time. Practical tasks such as the booking of an appropriate meeting room and measures to determine the right to vote (for example by entry tickets) are also part of the preparation.

4. **Conduct of the shareholders' meeting**

a) **Chairing of the shareholders' meeting**

The shareholders' meeting is usually chaired by the chairman of the board of directors. It is his duty to ensure that the course of the meeting is as smooth as possible. This duty includes the execution of the agenda items, the holding of elections, the organising of the requests to speak (for example by limiting the time of speech) etc.

Every shareholder has the right to express his opinion on each individual agenda item and to make a motion in this context (art. 700 para. 2 CO). This right to express one's opinion does not depend on the number of the shares represented by the shareholder. However, the right to speak is limited by the following: the shareholders' opinion and vote must be made in the context of the agenda item and the shareholder must request the directions of the chairman (e.g. limitation of the speaking time). The only two motions which can be made without prior announcement are the motion for the calling of an extraordinary shareholders' meeting and the motion initiating a special audit (art. 700 para. 3 CO).

Within the scope of the shareholders' meeting, the board of directors shall arrange for the taking of minutes. The minutes shall particularly include the resolutions of the shareholders' meeting. Furthermore, the voting behaviour of individual shareholders may also be recorded in particular with regard to the preservation of evidence in case of a later challenge of the resolutions of the shareholders' meeting. Part 6 B.3 includes an example of the minutes of the meeting.

b) **Representation of the shareholders at the shareholders' meeting**

Every shareholder may be represented at the general meeting by any other person unless otherwise stated in the articles of incorporation (art. 689b CO). The representative has to follow the instructions of the shareholder. The company may suggest to those shareholders, who cannot or do not want to participate at the shareholders' meeting, a member of its corporate bodies as a proxy for the shareholders' meeting. This proxy will vote in terms of the board of directors. In this case, the company shall suggest an independent person at the same time, who may be commissioned by the shareholders if they do not wish to be represented by a member of its corporate bodies.
At the beginning of the shareholders' meeting, the proxies have to be determined by the board of directors and the shareholders' meeting has to be informed. If the board of directors fails to do this, the resolutions of the shareholders' meeting may be challenged (art. 689e CO).

c) **Right to information and inspection of the shareholders**

No later than 20 days prior to the ordinary shareholders' meeting, the business report and auditor's report shall be made available to the shareholders. As the information contained in these reports is often insufficient to form an opinion on the actual course of the business or agenda items, the shareholders are granted an additional right to information and inspection (art. 697 CO).

At the shareholders' meeting, any shareholder is entitled to request information concerning the business of the company. The information shall be given to the extent necessary for exercising the shareholder's rights. The information may be refused by the board of directors if business secrets or other interests of the company worth being protected are put at risk.

Company books and correspondence may only be inspected with the express authorization of the shareholders' meeting or by resolution of the board of directors. The exercise of the right to information is also subject to the protection of business secrets.

d) **Initiation of a special audit**

In case of a suspicion that the board of directors does not duly manage the company, the shareholders' meeting may pass a resolution to conduct a **special audit** in order to clarify certain circumstances (art. 679a et seqq. CO). Every shareholder may request a special audit at the shareholders' meeting even if the motion is not part of the agenda. However, the circumstances to be clarified must be necessary for the exercising of the shareholder's rights. In addition, the right to information and the right for inspection must have previously been exercised (without any success).

If the shareholders' meeting rejects the motion regarding a special audit, shareholders, who jointly represent at least ten percent of the share capital or who represent shares of a par value of CHF 2'000'000, may request the judge to appoint a special auditor. However, the judge must only comply with the request, if the shareholders show credibly that corporate bodies of the company have violated the law or articles of incorporation and, thereby, have damaged the company or the shareholders.
5. Passing of resolutions by the shareholders' meeting

a) Type of the resolution

The shareholders' meeting passes resolutions and holds its elections by absolute majority of the votes allocated to the shares represented, given that the law or the articles of incorporation do not provide otherwise (art. 703 CO). As the law does not require an attendance quorum, the shareholders' meeting constitutes a quorum even in the case of minimal attendance. However, an attendance quorum may be provided by the articles of incorporation. Furthermore, the articles of incorporation may stipulate that the chairman of the board of directors makes the casting vote in case there is an equal amount of votes for either side.

Motions regarding matters that have not been announced duly may be discussed, but no valid resolutions may be passed. If the chairman puts the motion to the vote the resolution is challengeable or even null and void.

Certain resolutions may only be passed by a qualified majority, i.e. at least two thirds of the votes represented and the absolute majority of the par value of the shares represented (art. 704 CO). The law requires such majority for those resolutions, which are considered to be highly important (e.g. change of the company purpose). The articles of incorporation may also require such a qualified majority for other resolutions.

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**Important resolutions of the shareholders' meeting**

- Change of the company purpose
- Creation of shares with privileged voting rights
- Restriction of the transferability of registered shares
- Increase of capital, authorized or subject to a condition
- Increase of capital out of equity, against contributions in kind or for the purpose of acquisitions in kind and the granting of special benefits
- Limitation or withdrawal of pre-emptive rights
- Change of the domicile of the company
- Dissolution of the company without liquidation

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A resolution by circulation is not possible for the shareholders' meeting. This prohibition cannot be circumvented even if all shareholders agree. A resolution passed in this way is null and void.

b) **Dismissal of the board of directors at any time**

Despite the term of office of three years (art. 710 para. 1 CO), the shareholders' meeting is entitled to dismiss individual members of the board of directors or the board of directors as a whole at any time without giving any reasons. This resolution may also only be passed by the shareholders if it is part of an agenda item.

The possibility of dismissal at any time implies that compensation claims might have to be paid due to the early dismissal. It is also possible that the employment agreement remains in effect until the contractual period of notice.

c) **Challengeable decisions of the shareholders' meeting**

Any shareholder and the board of directors may take legal actions against the company to challenge the resolutions of the shareholders' meeting which violate the law or the articles of incorporation (art. 706 et seqq. CO). The law enumerates the challengeable or even null and void resolutions in an exemplary manner:

<table>
<thead>
<tr>
<th>Challengeable resolutions of the shareholders' meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td>❍ Resolutions, which withdraw or limit the shareholders' right to participate in the shareholders' meeting, the minimum voting right, the right to sue and other laws granted by mandatory provisions of law</td>
</tr>
<tr>
<td>❍ Resolutions, which limit the shareholders' right to control in excess of the extent provided by the law</td>
</tr>
<tr>
<td>❍ Resolutions, which disregard the fundamental structures of the company or violate the provisions for the protection of the capital</td>
</tr>
<tr>
<td>❍ Resolutions, which withdraw or limit the shareholders' rights thereby violating the law or the articles of incorporation</td>
</tr>
<tr>
<td>❍ Resolutions, which do not violate the law or articles of incorporation but withdraw or limit the shareholders' rights and duties in an non-objective way</td>
</tr>
<tr>
<td>❍ Resolutions, which discriminate or disadvantage shareholders in a manner</td>
</tr>
</tbody>
</table>
6. **Plenary meeting of all shareholders**

If all shares are represented at a shareholders' meeting, *i.e.* all shareholders or their proxies are present a meeting, a so called plenary shareholders' meeting may be held (art. 701 CO). At such a meeting, all items within the powers of a shareholders' meeting may be validly discussed and decided upon without observing the usual formalities of the shareholders' meeting (*i.e.* time limits and agenda). The remaining legal provisions regarding the conduct of a shareholders' meeting remain in effect.

7. **Is it possible to abandon the shareholders' meeting?**

As the ordinary shareholders' meeting is required by law, it is not possible to abandon it. The board of directors would be liable for the breach of duty if it does not call a shareholders' meeting. In addition, certain resolutions have to be passed by the shareholders' meeting. It would not be possible for the board of directors to amend the articles of incorporation without a resolution passed by the shareholders' meeting.
8. Check list for the conduct of the shareholders' meeting

<table>
<thead>
<tr>
<th>Conduct of the shareholders’ meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ Preparation and calling of the shareholders’ meeting</td>
</tr>
<tr>
<td>☐ Preparation of the annual report and annual statement</td>
</tr>
<tr>
<td>☐ Obtaining of the auditor's report</td>
</tr>
<tr>
<td>☐ Appointing of the shareholder's representative(s)</td>
</tr>
<tr>
<td>☐ Invitation with agenda and motions at least 20 days prior to the meeting</td>
</tr>
<tr>
<td>☐ Shareholders' rights at the shareholders' meeting</td>
</tr>
<tr>
<td>☐ Shareholders' right to participate at the general meeting</td>
</tr>
<tr>
<td>☐ Right to a proper invitation and announcement of agenda and motions</td>
</tr>
<tr>
<td>☐ Right to representation</td>
</tr>
<tr>
<td>☐ Right to vote</td>
</tr>
<tr>
<td>☐ Right to speak and receive information in the context of the agenda</td>
</tr>
<tr>
<td>☐ Conduct of a special audit even without being part of the agenda</td>
</tr>
<tr>
<td>☐ Passing of resolutions</td>
</tr>
<tr>
<td>☐ In general, resolutions are passed regarding the agenda items</td>
</tr>
<tr>
<td>☐ In general, resolutions are passed by the absolute majority of the represented shares</td>
</tr>
<tr>
<td>☐ In exceptional cases a qualified majority is required for matters provided by the law or by the articles of incorporation</td>
</tr>
</tbody>
</table>
9. **Shareholder's liability and piercing the company's veil**

Shareholders are only **committed** to "their" company regarding **one matter**: They have to contribute the amount fixed at the time of issue for their shares, *i.e.* pay the entire issue price (art. 680 para. 1 CO). Nothing else is required from the shareholders. They are neither obliged to contribute additional capital in case of a balance sheet loss nor do they have any duty of care, duty of loyalty or duty of equal treatment. Shareholders cannot be held liable for any resolutions of the shareholders' meeting, even if these are in the interest of the shareholders and prove to be damaging to the company.

As the stock corporation is a legal entity, the shareholders cannot be made liable for obligations of the company to third parties. **Only in exceptional cases**, it is possible for creditors to **lift the corporate veil** of the company and affect the **shareholders**. This may be the case when shareholders invoke the separation between their assets and the company's assets in a matter abusing the law.

Abuse of law is given if for instance the shareholders have not adhered to the principle of separation of capital, *i.e.* when their own capital and the company's capital have been mixed in a way that it is not possible any more to separate the capital. This is an important issue at the stage of the incorporation of the company: Even if a company is held at 100% by the original members, who are members of the board of directors and the managing directors at the same time, the regulations in this chapter on the shareholders' meeting must necessarily be adhered to. If this is not the case and the company becomes bankrupt in the worst case, the shareholders may be liable for the liabilities that are not covered by the company's capital.

10. **"Liability" of the shareholder as a de facto body (effective body)**

A shareholder may be held liable as a company body (compare Part 2 C.8), if he/she interferes with the ultimate management and supervision or executive management of the company and thus appears as a body. This danger is especially high in case of a majority shareholder although he/she is not part of the company's board of directors, but controls the shareholders' meeting and the company de facto.

11. **Shareholders' agreement**

The constitution of a stock corporation very often leads the first shareholders to set up a shareholders' agreement. This agreement aims at regulating how the shareholders have to vote at the shareholders meetings. It is valid as long as it does not violate mandatory corporate law. By setting up such agreements, the shareholders must be
very careful. Otherwise, the validity of the shareholders' agreement could be undermined by the violation of mandatory law. For instance, the inalienable powers of the general meeting are deemed to be part of mandatory law. Therefore, a shareholders' agreement may not declare these powers as part of the powers of the board of directors. Furthermore, although it is challenged in the literature, the shareholders' agreement generally has no effect towards the stock corporation because only the articles of incorporation may affect the stock corporation. Resolutions of the shareholders' meetings passed in violation of the shareholders' agreement are legal and binding from a corporate point of view. However, the shareholders damaged by the breach of the agreement may file civil claims. As mentioned above, the articles of incorporation may affect the stock corporation and the validity of the resolutions of the shareholders' meeting. Therefore, the articles of incorporation shall, as far as possible, reflect the shareholders' agreement.

C. Board of directors

1. Introduction

Although the shareholders' meeting is the supreme corporate body of the stock corporation, it is not its head. The ultimate management of the stock corporation is the duty of the board of directors. The board of directors is the real centre of power of the stock corporation because due to its function as ultimate management body, it has all relevant information at its disposal first and in detail.

The board of directors manages the business of the stock corporation insofar as it has not delegated the management to individual board members or to the executive management; however, the supreme management of the stock corporation is a non-transferable and inalienable duty of the board of directors. The board of directors has to deal with the strategic objectives of the stock corporation and its implementation. Furthermore, it is responsible for the election of the executive management of the stock corporation, the identification of new business opportunities and the management of crisis situations. The board of directors must manage and lead the stock corporation with innovation and creativity. As a basic principle, the board of directors is not only responsible for the administration and management of the stock corporation but also for the strategic orientation.

Even though the board of directors is elected and controlled by the shareholders' meeting, it has considerable influence on the shareholders' meeting. In particular, the fact that the board of directors decides on the agenda items as well as the motions to the shareholders' meeting, allows the board to exert influence on the shareholders' meeting as no resolutions may be passed on motions concerning agenda items which have not been duly announced (except for a few cases). At the same time, the board of directors has more insight into the business of the stock corporation than the
shareholders generally have. The law tries to partially adjust this imbalance by granting the shareholders the right to request - under certain circumstances - the calling of a shareholders' meeting or to plea items to be included in the agenda. In addition, any shareholder is granted the right to request information from the board of directors concerning the business affairs of the stock corporation and to inspect the books and correspondence as well as the right to initiate a special audit.

2. **Election of the board of directors**

The election of the board of directors is one of the most important duties of the shareholders' meeting. The board of directors is composed of **at least one member** (art. 707 para. 1 CO). The following conditions have to be observed:

<table>
<thead>
<tr>
<th>Who can be elected as member of the board of directors?</th>
</tr>
</thead>
<tbody>
<tr>
<td>☒ Only <strong>natural persons</strong> are eligible, legal entities can not become members of the board of directors in Switzerland. Legal entities can exert influence over the board of directors by mandating a natural person to act as its representative on the board.</td>
</tr>
<tr>
<td>☒ Currently every member of the board of directors must hold at least one <strong>qualification share</strong>, whereas the shares are often transferred on a fiduciary basis for the duration of the term; however, this requirement will be abolished by January 1, 2008.</td>
</tr>
<tr>
<td>☒ At present the majority of the members of the board of directors need to be <strong>domiciled in Switzerland</strong> and have Swiss citizenship or citizenship of an EU/EFTA country. As of January 1, 2008, this requirement will be abolished. It will thus be possible in future that none of the board members is domiciled in Switzerland; however, at least one person empowered to represent the stock corporation will need to be domiciled in Switzerland whereby this can be either a member of the board of directors or a member of executive management. In the case of collective signature powers, at least two signatories must be residentially domiciled in Switzerland.</td>
</tr>
</tbody>
</table>

The members of the board of directors are **elected for three years** unless otherwise provided by the articles of incorporation (art. 710 CO). As this is often the case in practice and the members of the board can be re-elected, this statutory provision is of secondary importance. According to the Swiss Code of Best Practice the regular term of office should generally not exceed four years, the statutory legal term is six years.
3. Organisation of the board of directors and of the executive management

The board of directors is generally free to organise itself. The articles of incorporation have only limited influence on the organisation: they can provide the chairman of the board of directors to be elected by the shareholders’ meeting, they can, among other things deprive the casting vote of the chairman and they can define the representation rights of the board of directors.

The board of directors designates its chairman unless it is elected by the shareholders' meeting. Furthermore, the board of directors designates its secretary who keeps the minutes of the deliberations and resolutions of the board of directors. The secretary needs not to be a member of the board of directors (art. 712 CO).

The board of directors should issue organisational regulations which define the organisation of the board of directors, the frequency of meetings, the right of convocation, the inclusion of an item in the agenda, the holding of meetings and the passing of resolutions. The regulations can also determine which members of the board of directors are responsible for the preparation and the execution of resolutions or for the supervision of a business. The board of directors should review the regulations it has issued at regular intervals and amend them as required. Sample organisational regulations can be found in part 6 A.5.

One of the most important parts of the organisational regulations is the delegation of management responsibilities to individual members of the board of directors or to third parties. According to the law, the management of the stock corporation's business is the duty of the board of directors insofar it has not been delegated. Such delegation is only admissible if the board of directors is authorized by the articles of incorporation and the delegation is in accordance with the organisational regulations (art. 716b para. 2 CO).

In case of a delegation of management responsibilities the organisational regulations do not only determine the organisation of the board of directors but also define the scope of the powers conferred and the organisation of the executive management. For this purpose, the organisational regulations allocate management functions, define the individual tasks (i.e. operational management, responsibility for accounting or for human resources) and in particular the reporting of the executive management to the board of directors allowing the board of directors to comply with its supervisory duties. The clear definition of the powers conferred is of the highest importance for the board of directors since it cannot be made responsible for breach of duties of care or for defaulting performance if the respective powers have been delegated to third parties.
The board of directors has the following non-transferable and inalienable duties:

<table>
<thead>
<tr>
<th>Non-transferable and inalienable duties of the board of directors:</th>
</tr>
</thead>
<tbody>
<tr>
<td>☑ Ultimate management of the stock corporation (strategic goals, resources etc.) and giving the necessary directives</td>
</tr>
<tr>
<td>☑ Establishment of the organisation (corporate structure)</td>
</tr>
<tr>
<td>☑ Structuring of the accounting system and of financial controls as well as financial planning</td>
</tr>
<tr>
<td>☑ Appointment, removal and ultimate supervision of the persons entrusted with management and representation</td>
</tr>
<tr>
<td>☑ Preparation of the business report</td>
</tr>
<tr>
<td>☑ Preparation of the shareholders' meeting and implementation of its resolutions</td>
</tr>
<tr>
<td>☑ Notification of the judge in the case of overindebtedness</td>
</tr>
<tr>
<td>☑ Decision upon the subsequent performance of contributions on shares not fully paid in</td>
</tr>
<tr>
<td>☑ Decisions in connection with the increase of capital (decision to increase the capital, ascertainment of the increase and amendment of the articles of incorporation)</td>
</tr>
<tr>
<td>☑ Examination of the qualification of the auditors</td>
</tr>
</tbody>
</table>

According to the law, each member of the board of directors has the **power to represent the company** individually unless the articles of incorporation or the organisational regulation provide otherwise (art. 718 et seqq. CO). Thus, each member of the board of directors could conclude a contract in the name of the stock corporation. In practice however, it is usually provided that only two members of the board of directors can represent the stock corporation collectively.

According to the current art. 718 para. 3 CO, at least one member of the board of directors must be empowered to represent the company. This regulation will be abolished as of January 1, 2008. However, the Federal Commercial Register Office qualified the abolishment of this regulation as a mistake and plans to still require that at least one member of the board of directors must be empowered to represent the company.
4. **How frequent does the board of directors meet? Can the board of directors refrain from meeting?**

The board of directors decides how often it meets and in what form the meetings are held. The number of meetings of the board of directors depends on the activity of the stock corporation, on the volume of business the board of directors has to deal with and also on the question whether management responsibilities have been delegated. Even in case management responsibilities have been delegated, the board of directors should, as a rule, convene **at least four times a year** according to the requirements of the company. The chairman should ensure that deliberations are held at short notice whenever necessary. The Swiss Code of Best Practice also recommends at least four meetings per year.

It should be noted that a too little number of meetings could lead to a neglect of duties of management and supervision of the stock corporation which is considered as breach of duties of care and could ultimately lead to the liability of the board of directors.

In the same manner that the board of directors has the duty to manage the company, each individual board member must **participate in meetings** and contribute to the decision-making by taking part in debates and by voting. A member of the board of directors who absents itself repeatedly from meetings without good reason might possibly violate its duties of care.

5. **Convocation of meetings and passing of resolutions**

a) **Convocation of a meeting of the board of directors**

A meeting of the board of directors is **usually called by the chairman** of the board unless otherwise provided in the organisational regulations. According to the law, any member of the board of directors may, stating the reasons, request the chairman to immediately call a meeting.

The law does not regulate how meetings should be called. Meetings can for instance be called by fax or telephone. However, it is crucial that the members of the board of directors are duly invited to meetings as they have the right to participate in meetings. The proposed agenda should be part of the invitation in order to allow the board members due preparation of the meeting.

b) **Passing of resolutions**

According to the law, resolutions of the board of directors are adopted by the **majority of votes cast**. The chairman of the meeting has a casting vote unless otherwise
provided by the articles of incorporation. The organisational regulations may contain differing provisions (e.g. quorum, requirement of a qualified majority for important resolutions, no casting vote of the chairman).

Members of the board of directors cannot be represented at board meetings. Resolutions may also be adopted by way of written consent to a proposition, unless a member requests discussion (art. 713 para. 2 CO). Meetings of the board of directors using telephone or video conferencing are common practice and are considered as valid alternative to meetings in person.

The distribution of an agenda along with the invitation to the meeting of the board of directors is not required by law; however, an invitation which is considered to be insufficient may, in serious cases, lead to the nullity of resolutions. It is therefore advisable, to only discuss and adopt resolutions on motions concerning agenda items which have not been duly announced if all members of the board of directors are present at the meeting, unless the motions are urgent and the respective resolutions are not abusive.

According to the Swiss Code of Best Practice, each member of the board of directors and executive management should arrange his personal and business affairs so as to avoid, as far as possible, conflicts of interest with the stock corporation. Should a conflict of interest arise, the member of the board of directors or executive management concerned should not participate to that extent in decision-making and the taking of resolutions.

c) Right to information and right of inspection

The members of the board of directors have extensive rights to information and rights of inspection: any member may request information on all matters concerning the stock corporation. At the meetings, all members of the board of directors as well as the executive management, are obligated to provide the requested information (art. 715a CO). Outside of the meetings, any board member may request information from the executive management concerning the course of the business and, with the authorization of the chairman, also information concerning specific matters. To the extent necessary for the fulfilment of a duty, any member may apply to the chairman to be shown the books and the files of the stock corporation. In case the chairman declines a request for information, the board of directors has to decide. As an exception, requests for information may be refused if secrecy interests worth being protected are jeopardized.
d) Minutes

The minutes of the meetings of the board of directors serve different purposes: conservation of evidence, documentation for the absent members and business correspondence with a statutory retention period of ten years. For this reason, the taking of minutes is a statutory requirement. The minutes have to be signed by the chairman and the secretary.

The minutes should not only contain the resolutions of the board of directors but also the deliberations on the agenda items. The minutes should contain the arguments that have been brought-forward, the counter-arguments and the voting and election results. Upon request, all members voting against a resolution have to be listed individually. In case the board of directors is held liable for the violation of a duty of care, the members who voted against a certain resolution may under certain circumstances acquit themselves from liability.

The minutes have to be taken in writing. Video or audio recordings do not comply with statutory requirements.

6. Composition of the board of directors

According to art. 707 para. 1 CO, the board of directors should be composed of one or more members. The ideal size of the board cannot be determined generally as it should match the individual needs of the stock corporation. According to the Swiss Code of Best Practice the board of directors should be small enough in numbers for efficient decision-making and large enough for its members to contribute experience and knowledge from different fields. Given that the board of directors should be able to discuss in detail during its meetings, business issues and debate questions of principle, a reasonable size may be between five and nine members. If the number of board members is higher than that, the board of directors should appoint committees from amongst its members responsible for the management, insofar management responsibilities can be delegated, or responsible for carrying out an in-depth analysis of specific business-related or personnel matters for the full board in preparation for passing resolutions. According to the Swiss Code of Best Practice, the board of directors should allocate management and control functions among its members. Thus, the board of directors turns into a supervising body instead of a management body.
7. **Duties in case of financial difficulties**

Not every stock corporation is successful. If a stock corporation encounters financial difficulties, it is the duty of the board of directors to take action. The board of directors has the following duties:

a) **Loss of capital**

The law defines a loss of capital as situation where half of the share capital and the legal reserves are no longer covered by the assets of the stock corporation:

<table>
<thead>
<tr>
<th>Assets</th>
<th>Liabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Current Assets</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Fixed Assets</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Net Loss</strong></td>
<td>Equity</td>
</tr>
<tr>
<td>(=Capital Loss)</td>
<td>(Share Capital)</td>
</tr>
<tr>
<td></td>
<td>Legal Reserves</td>
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<td>(=Capital Loss)</td>
<td>(Share Capital)</td>
</tr>
<tr>
<td></td>
<td>Legal Reserves</td>
</tr>
</tbody>
</table>

If the last annual balance sheet shows a capital loss, the board of directors must **call a shareholders' meeting** without delay and propose a **financial reorganisation** (art. 725 para. 1 CO). Possible reorganisation measures are: balance sheet restructuring (revaluation of real estate or participations), operative measures (termination of employees, demerger or liquidation of non-profitable business units) or a modification of the capital structure (increase or decrease of capital).

In a crisis situation, the board of directors is **obligated to continue the business** in the first instance. The institution of bankruptcy proceedings immediately after the first manifestations of a crisis could constitute a violation of duties and result in the liability of the board members. Only in case a financial reorganisation is considered impossible, the board of directors is allowed to institute bankruptcy proceedings.

The members of the board of directors may be tempted to **resign from office** in a crisis situation; however, it is usually too late then. The mistimed resignation from office constitutes a violation of the duty of care and loyalty and the resigning board member may become liable.
b) **Overindebtedness**

In case of a substantial concern that the net loss is higher than the equity (so called overindebtedness), an interim balance sheet must be prepared (art. 725 para. 2 CO):

<table>
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<th>Liabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Current Assets</strong></td>
<td><strong>Debts</strong></td>
</tr>
<tr>
<td><strong>Fixed Assets</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Net Loss</strong> (=Overindebtedness)</td>
<td><strong>Equity</strong></td>
</tr>
<tr>
<td></td>
<td>(Share Capital)</td>
</tr>
<tr>
<td></td>
<td><strong>Legal Reserves</strong></td>
</tr>
</tbody>
</table>

If the interim balance sheet shows overindebtedness, the board of directors must notify the judge, unless creditors of the stock corporation subordinate their claims to those of all other creditors to the extent of insufficient coverage. In case no creditors subordinate their claims or if there is no prospect of a financial reorganisation, the board of directors must notify the judge who decides on the adjudication of bankruptcy.

8. **Liability of the members of the board of directors and of the executive management**

Members of the board of directors as well as third parties engaged with the management must carry out their duties with due care (duty of care) and must duly safeguard the interests of the stock corporation (fiduciary duty). In addition, they must treat shareholders equally under equal circumstances (duty of equal treatment).

a) **Duties of care**

Apart from the duty to manage the business of the stock corporation, the law contains numerous individual duties which need to be exercised with due care. The main focus for the board of directors should be on the non-transferable and inalienable duties according to art. 716a para. 1 CO. Additional duties may arise from the articles of incorporation.
Whoever damages the stock corporation by an intentional or negligent violation of its duties may become liable not only to the stock corporation, but also to each shareholder and the creditors of the stock corporation (art. 754 CO). In order to assess if the duty of care has been violated, the following question must be answered: *"How would a reasonable member of the board of directors or executive management have acted in the particular situation?"* Thus, the lack of experience is no exculpation for a violation of a duty of care.

On the other hand, it should be noted that not every wrong management decision leads to liability. A failed strategy will not lead to liability as long as the decision-making process has been carried out with due care.

b) **Fiduciary duties**

Members of the board of directors as well as third parties engaged with the management must duly **safeguard the interests of the stock corporation** and refrain from actions which are detrimental to the interests of the stock corporation. They must put the interests of the stock corporation first and put aside personal interests. Anyone who has interests in conflict with the stock corporation or is obligated to represent such interests on behalf of third parties is obligated to not participate to that extent in decision-making.

The fiduciary duties are a consequence of the concept of a stock corporation as separate legal entity. A member of the board of directors or of the executive management must always be aware that the well-being of the stock corporation must be safeguarded and not its own enterprise or assets.

The violation of fiduciary duties may make the members of the board of directors or of the executive management liable for damages.

c) **Duty of equal treatment**

Members of the board of directors as well as third parties engaged with the management must **treat shareholders equally under equal circumstances**. An unequal treatment is only legitimate for valid reasons. Unequal treatment may lead to liability for damages.
D. Auditor

1. Revision of the law

On December 16, 2005, the Swiss Parliament adopted an integrally revised law on Swiss limited liability companies. These revisions also involve amendments to the laws on stock corporations. The provisions concerning the auditor (art. 727 to 731a CO) have been completely revised in the course of this "minor revision of the stock corporation law". The new provisions will enter into force on January 1, 2008. The following section deals exclusively with the revised provisions.

According to the transitional provisions, the new provisions are directly applicable to existing companies as from January 1, 2008. If the current organisation of the company does not comply with the revised provisions of the law, an adaptation period of two years as from the effective date of the law will apply. The auditor – where required – is to be appointed as from the first fiscal year that begins on or after the effective date of the law (i.e. if the fiscal year begins on January 1, 2008, the new provisions will be applicable for the fiscal year 2008; if the fiscal year 2008 begins on July 1, 2008, the new provisions will be applicable as of July 1, 2008).

2. Regular or limited audit?

The new law provides for an overall auditing law, which no longer distinguishes the auditing obligations pursuant to the legal form of an entity but primarily differentiates between the economic size of a company and its individual auditing requirements (public company, larger and smaller enterprises). In this regard, a distinction is made between the regular and the limited audit. This distinction is drawn, on the one hand, based on the content and comprehensiveness of the audit (regular or limited audit), on the other hand, based on the technical requirements or qualification criteria of the auditor (licensed auditor, licensed expert auditor or auditing expert subject to public supervision).

a) Regular audit

The regular audit is required for all listed companies and for economically important companies. Pursuant to the revised art. 727 para. 1 CO, all companies, whose shares are listed on a stock exchange, which have outstanding bonds or which contribute at least 20% to the consolidated assets or revenue of such a company, qualify as listed companies.

Economically important companies are defined as companies which are either obliged to draw up consolidated financial statements or which exceed at least two of the following figures in two succeeding years (revised art. 727 para. 1 CO):
- balance sheet total of CHF 10 million;
- revenue of CHF 20 million;
- yearly average of 50 full time employees.

In the course of the regular audit the auditors are to examine whether the annual financial statements and the consolidated financial statements, if any, as well as the proposal of the board of directors concerning the use of the balance sheet profit comply with the law, the articles of incorporation and the chosen regulations. In addition, companies must also demonstrate the existence of an **internal control system (ICS)**. The ICS relates to all procedures, methods and measures introduced by company management to ensure a proper course of operative events (revised art. 728a CO). This means that companies subject to a regular audit face increased requirements regarding their control mechanisms and risk management.

The auditors are to submit a comprehensive report to the board of directors and a summary audit report to the shareholders' meeting. The **comprehensive report** to the board of directors shall contain statements regarding the accounting, the ICS and the execution and results of the audit (revised art. 728b para. 1 CO). The **summary report** to the shareholders' meeting shall contain a statement regarding the result of the audit, names the persons who have managed the audit, confirm that the requirements concerning the qualification and independence are fulfilled and recommend approval with or without qualification or rejection of the annual accounts (revised art. 728b para. 2 CO).

If the auditors discover violations of the law, the articles of incorporation or the organisational regulations, they are **obligated to notify** in writing the board of directors (revised art. 728c CO). In addition, the shareholders' meeting must be notified about violations of the law or the articles of incorporation if such violations are serious or if the board of directors takes no action after having been notified. Furthermore, the auditors are obligated to report bankruptcy to the judge in the case of obvious overindebtedness and if the board of directors takes no action.

**b) Limited audit**

Companies neither qualifying as listed companies nor as economically important companies do not need a regular audit; a limited audit by a licensed auditor is sufficient (revised art. 727a CO). The limited audit, the **so-called review**, introduces a new form of annual audit into Swiss company law, which consists of interviews with the executive management, analytical audit operations and appropriate detailed examinations (revised art. 729a CO).
The auditors are to submit a **limited summary audit report** to the shareholders' meeting. This report shall indicate the limited nature of the review, contain a statement regarding the result of the audit, name the persons who have managed the audit and confirm that the requirements concerning qualification and independence are fulfilled (revised art. 729b CO).

The auditors are **obligated to report** bankruptcy to the judge in the case of obvious overindebtedness and if the board of directors takes no action (revised art. 729c CO).

c) **Opting-up, opting-down, opting-out and opting-in**

Shareholders representing at least 10% of the share capital of a company neither qualifying as listed company nor as economically important company can require the carrying out of a regular audit (**opting-up**). In addition, an opting-up may be provided for in the articles of incorporation of a company or be resolved by the shareholders' meeting for a specific business year (revised art. 727 para. 2 and 3 CO).

Pursuant to the revised art. 727a para. 2 CO, the shareholders of companies with, in the yearly average, less than ten fulltime employees, may further downgrade the audit to be conducted by unanimous consent (**opting-down**) or even completely waive the audit (**opting-out**). In case the audit has been waived, any shareholder has the right to request a limited audit (**opting-in**). Such request must be made ten days prior to the shareholders' meeting at the latest (revised art. 727a para. 4 CO).

3. **Qualification and independence of the auditor**

The regular audit of listed companies has to be performed by an **auditing enterprise subject to public supervision**. Economically important companies are subject to a regular audit, which, however, does not need to be carried out by an auditing enterprise subject to public supervision, but may be carried out by a **licensed expert auditor** (revised art. 727b CO). Companies neither qualifying as listed companies nor as economically important companies, do not need a regular audit; a limited audit by a **licensed auditor** is sufficient (revised art. 727c CO).

The auditors performing the regular audit are subject to **stringent independence requirements**. According to the revised art. 728 CO, the following is not permissible:

- membership on the board of directors, another management function in the company or a contractual employment agreement with the company;
- a direct or significant indirect participation in the share capital of the company, or a significant claim or debt with the company;
- a close relationship of the lead auditor to a member of the board of directors, to another person in management or to a significant shareholder;
- participation in the bookkeeping as well as providing other services for which there is a risk in the position of auditor to have to audit some of its own work;
- accepting work which would lead to economic dependence;
- entering into a contract which is not consistent with market conditions or a contract where the results of the audit are linked to the interests of the auditors;
- acceptance of valuable gifts or special advantages.

Reduced independence requirements apply to auditors performing the limited audit. Thus, the auditor can participate in the bookkeeping and provide other services for the audited company. As far as there is a risk of auditing its own work, suitable organisational and personal measures must be taken to ensure a reliable audit (revised art. 729 para. 2 CO).

4. **Election and rotation of the auditor**

The shareholders' meeting elects the auditors. One or more natural persons or legal entities as well as partnerships are eligible to be auditors. At least one auditor must have his domicile, registered office or a registered branch office in Switzerland (revised art. 730 CO). The maximum term of office is three years; it ends at the shareholders' meeting to which the last report is to be delivered. Re-election is possible (revised art. 730a CO).

The revised art. 730a para. 2 CO stipulates a mandatory rotation of the auditor in charge. The person in charge of the regular audit may only perform the mandate for a maximum period of seven years and may not resume the same mandate for the next three consecutive years.
Successfully mastering legal and tax challenges
E. Annual accounts

1. Accounting as a legal duty and instrument of control

The stock corporation and the limited liability company are obliged to accounting and thus have to keep the books properly. The books based on the kind and scope of the company are necessary in order to determine the financial standing of the company, the liabilities and claims in connection with the company as well as the results of each fiscal year. The CO clearly defines and completes the general rules applicable to all companies subject to registration in the commercial register by specific provisions.

The accounting provides the executive management with information, which is necessary for the management of the company and the shareholders with information necessary for exercising their rights. At the same time, the provisions of the accounting also protect the interests of third parties, particularly those of the creditors. The state is also included as in principle, it collects the taxes on the basis of the annual financial statements as required by commercial law.

Pursuant to art. 662 para. 1 CO, the board of directors has to prepare a written annual report for each fiscal year. This is composed of the following:

- **business report**
- **annual report**
- **annual financial statement**
- **(possibly) consolidated financial statement**
- **profit and loss statement**
- **balance sheet**
- **attachment**
- **profit and loss statement**
- **balance sheet**
- **attachment**

The individual elements have the following functions:

- The **annual financial statement** contains a verbal report of the board of directors on the business and financial situation of the company.
• The **balance sheet** shows the capital situation of the company at the end of the fiscal year.

• The **profit and loss statement** includes the profits and losses occurred within a fiscal year. The balance of these two shows the annual profit or loss.

• The **attachment** contains additional information, which is not apparent from the balance sheet and income statement.

• The **consolidated statement** illustrates the financial situation of the group (consisting of independent legal entities under a centralized management) while eliminating the relations within the group.

The general accounting regulations pursuant to art. 957 et seqq. CO also require the creation of an inventory upon the commencement of business and at the end of every fiscal year. The inventory proves that the assets and liabilities shown as accumulated items in the balance sheet really exist.

2. **Principles of accounting**

The annual financial statement shall be set up according to recognized commercial principles. The stock corporation shall devise its accounting in particular according to the principles stated below. However, the companies are free to choose the form of its accounting within the scope of the law.

<table>
<thead>
<tr>
<th><strong>Principles of accounting</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- The individual principles:</td>
</tr>
<tr>
<td>- Completeness of the annual financial statement</td>
</tr>
<tr>
<td>- Clarity and essentiality of statements</td>
</tr>
<tr>
<td>- Prudence</td>
</tr>
<tr>
<td>- Continuation of the Company's activity</td>
</tr>
<tr>
<td>- Consistency in presentation and valuation</td>
</tr>
<tr>
<td>- Prohibition of setting off assets and liabilities as well as expenses and income</td>
</tr>
</tbody>
</table>
The principles contain the following:

The principle of **completeness** implies that it is prohibited to ignore any assets or liabilities and commercial transactions in the annual financial statement.

The principle of **clarity and essentiality** of the statements requires that a statement allows a professional accountant to understand the annual fiscal statement on the one hand and that on the other hand all substantial statements for the assessment of the asset and revenue situation of the company have to be included.

The principle of **prudence** demands the inclusion of the most unfavourable option for the company.

The principle of **continuation of the company's activity** enables an assessment from the point of view of a timely unlimited continuation of the company's business.

The principle of **consistency in presentation and valuation** enables the comparability of the annual accounts as the company is obliged to basically present the annual account in accordance with the evaluation rules and in the same form of presentation as in the previous year and to indicate alterations to the accounting respectively.

In addition, the law provides the following explicit valuation rules for single items in the balance and the profit and loss account:

- **Costs of incorporation, capital increase and organisation** arising from the formation, the expansion or the reorganisation of the business can be included in the balance as asset. However, they have to be shown separately and amortized within five years.

- The **capital assets** may be valued at the acquisition values or the production costs at the most less the necessary depreciations. **Securities with market value** may be rated at the average price of the last month prior to the date of the balance sheet at the most. **Securities without market value** may be estimated at the acquisition values at the most less the necessary depreciations.

- **Raw materials, partially or completely finished products and goods** as part of the **circulating assets** may be assessed at the acquisition values and the production costs at the most.

- In addition, decreases in value of the circulating assets and of the capital assets have to be adapted by value adjustments (circulating assets) and depreciations (capital assets), as far as they are necessary in accordance with the general commercial principles. Uncertain obligations and impending losses have to be taken into account by setting aside **reserves**. The requirement of reserves arises for example in connection with probable tax liabilities from a completed accounting period, with
pending or impending lawsuits or with received contingent liabilities such as warranties or guarantees.

Apart from these substantial criteria, the following rules are applicable:

The annual account has to be prepared in Swiss francs and signed by the person in charge of the business management. In addition, last year's figures have to be included and it has to be presented within six months after the closing of the fiscal year. In connection with this time limit, it has to be considered that the business report has to be offered for examination at the place of business 20 days prior to the ordinary shareholders' meeting.

The account books, the correspondence and the accounting records must be kept for a period of ten years. The income statements and balance have to be preserved in a written and signed form. The remaining account books, accounting records and business correspondence can also be preserved in electronic or comparable form, if they can be accessed at any time.

3. **Minimum content of the balance, profit and loss account, annex and annual report**

The law provides the following minimum structure of the balance sheet (art. 663a CO):

<table>
<thead>
<tr>
<th>Assets</th>
<th>Liabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Circulating assets</strong></td>
<td><strong>Debt capital</strong></td>
</tr>
<tr>
<td>Liquid assets</td>
<td>Trade accounts payable</td>
</tr>
<tr>
<td>Trade accounts receivable</td>
<td>Accounts payable to third parties</td>
</tr>
<tr>
<td>Accounts receivable from third parties</td>
<td>Accounts payable to shareholders who hold shares and to companies of the same group</td>
</tr>
<tr>
<td>Accounts receivable from shareholders who hold shares and from companies of the same group</td>
<td>Other short-term liabilities</td>
</tr>
<tr>
<td>Other accounts receivable</td>
<td>Liabilities to third parties</td>
</tr>
<tr>
<td>Accounts receivable from third parties</td>
<td>Liabilities to shareholders who hold shares and to companies of the same group</td>
</tr>
<tr>
<td>Accounts receivable from shareholders who hold shares and from companies of the same group</td>
<td>Accrued liabilities</td>
</tr>
<tr>
<td>Unpaid capital stock</td>
<td>Long-term liabilities</td>
</tr>
<tr>
<td>Inventory stocks</td>
<td>Long-term liabilities to third parties</td>
</tr>
<tr>
<td>Accrued assets (prepayments)</td>
<td>Long-term liabilities to shareholders who hold shares and to companies of the same group</td>
</tr>
<tr>
<td><strong>Capital assets</strong></td>
<td><strong>Equity</strong></td>
</tr>
<tr>
<td>Fixed assets</td>
<td>Capital stock</td>
</tr>
<tr>
<td>Financial assets</td>
<td>Participation capital</td>
</tr>
<tr>
<td>Interests</td>
<td>Statutory reserves</td>
</tr>
<tr>
<td>Loans to shareholders who hold shares and to companies of the same group</td>
<td>General reserves</td>
</tr>
<tr>
<td>Intangible assets</td>
<td>Reserves for own shares</td>
</tr>
<tr>
<td>Costs of incorporation, capital increase and organisation</td>
<td>Revaluation reserves</td>
</tr>
</tbody>
</table>

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The law defines **interests** as shares of the capital in other companies, which are held with the intention of permanent investment and provide substantial influence. Voting interests of at least 20% are considered as interests.

For the **profit and loss account**, the following minimum requirements are provided (art. 663 CO):

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operating expenses</td>
<td>Operating income</td>
</tr>
<tr>
<td>Costs of materials and goods</td>
<td>Proceeds from trade accounts</td>
</tr>
<tr>
<td>Personnel costs</td>
<td>Financial income from operational activities</td>
</tr>
<tr>
<td>Financial costs</td>
<td>Income from the sale of operationally used capital assets</td>
</tr>
<tr>
<td>Depreciations on the core assets</td>
<td>Other operating income</td>
</tr>
<tr>
<td>Other operating expenses (e.g. reserves for taxes)</td>
<td>Non-operating income</td>
</tr>
<tr>
<td><strong>Non-operating expenses</strong></td>
<td>Extraordinary income</td>
</tr>
<tr>
<td><strong>Extraordinary expenses</strong></td>
<td>Annual loss</td>
</tr>
<tr>
<td><strong>Annual profit</strong></td>
<td>Total expenses</td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td>Total income</td>
</tr>
</tbody>
</table>

The **annex** of the annual account must include the following items (art. 663b CO):

- Total amount of guarantees, indemnity obligations and pledges in favour of third parties;
- Total amount of assets pledged or assigned for securing own obligations as well as assets with retention of title;
- Fire insurance values of the fixed assets;
- Liabilities to personnel welfare institutions;
- Amounts, interest rates and maturities of bonds issued by the company;
- Every interest which is essential for assessing financial and profit situation of the company;
- Total amount of the dissolved replacement reserves and of other hidden reserves exceeding it, to the extent that such total amount is larger than the total amount of newly formed reserves of that kind, if hereby the business result is considerably presented in a more favourable manner;
- Information on the object and amount of revaluations;
• Information on the acquisition, alienation and number of the shares held by the company, including shares held by other companies, in which it holds a majority participation; in addition, the conditions at which the company has acquired or alienated its shares have to be stated;

• Amount of the authorized or conditional capital increase;

• Other information required by the law.

In the **annual report**, the supervisory board makes a report on the course of the business as well as on the business and financial situation of the company. Furthermore, this report states the capital increase which occurred in the fiscal year and expresses the respective auditor's certificate.

### 4. Profit distribution and reserves

In general, the annual income is subject to distribution among the shareholders in form of dividends. However, the law prescribes that certain portions of the annual income are appropriated to the **general reserves** prior to the distribution of dividends. The articles of incorporation can provide the obligation of accumulating additional **statutory reserves**. In accordance with the law, 5% of the annual income have to be appropriated to the general reserves, until these reserves have accomplished 20% of the paid capital stock. After these 20% of the paid capital stock have been reached, additional 10% of the amounts, which are distributed after the payment of a dividend of 5%, have to be appropriated.

Furthermore, the following amounts go to the general reserves:

• Additional profits (Agio), resulting from the issuance of shares above nominal value less the expenses.

• The surplus of the rendered payments on cancelled shares once the (possible) loss of the shares issued in exchange has been covered (profit from the forfeiture of shares).

The general reserves may only be used as follows, as far as they do not exceed half of the capital stock:

• Coverage of losses.

• For actions suitable to make the company survive times of a poor course of business, to prevent unemployment or to reduce its consequences.

The portion of the general reserves exceeding 50% of the share capital can be used freely by the shareholders' meeting.
Apart from the general reserves, the reserves for own shares and the revaluation reserves also belong to the statutory reserves. The reserves for own shares must be made compulsory in the amount of the acquisition value, if the company acquires its own shares within the legally prescribed scope. Only in the event of sale or destruction of the own shares, this reserve can be dissolved on the scale of the acquisition reserves (art. 659 et seq. and art. 671a CO). The revaluation reserves (cf. part 2 E 5) can only be dissolved by the transformation in share capital as well as by the reamortization or sale of the revalued shares.

Apart from the reserves stated in the balance (described above), hidden reserves can be made in accordance with art. 669 para. 2 and 3 CO by authorizing the board of directors to make additional depreciations, value adjustments and reserves for the purpose of replacement and to refrain from dissolving reserves which have become redundant. Hidden reserves, apart from the reserves mentioned above, may only be made actively, as far as the constant growth of the company or the distribution of a constant dividend, if possible, justify this action while respecting the interests of the shareholders. Apart from this kind of intentionally made hidden reserves, the duty to value the assets at the acquisition value or the production costs at most inevitably results in the creation of hidden reserves. The board of directors has two duties of information in connection with the hidden reserves: The auditor must be informed, whenever hidden reserves are made or dissolved. In addition, the balance of the made and dissolved hidden reserves has to be stated in the annex, as far as the total amount of the dissolved hidden reserves exceeds the total amount of the newly made hidden reserves and, therefore, the realized profits are presented in a considerably more favourable manner. As far as these prerequisites are not fulfilled, the shareholders are not informed of the amount of the dissolved hidden reserves.

5. Dealing with losses

The stock corporation is liable for its liabilities exclusively with its own assets. Thereby the share capital and the legal reserves represent the amount guaranteed to the creditors. The CO allows the company to continue its business despite of losses until half of the share capital and of the legal reserves are no longer covered by the company assets. If such a loss of capital arises from the annual balance sheet or if there are justified reasons for concerns regarding loss of capital during a fiscal year (in this case an interim balance sheet has to be created), the board of directors has to call a shareholders' meeting immediately and this has to apply for reorganisations measures. The resolving of reserves, appreciation of assets, subordination of one or more creditors, capital reduction or capital increase with payment of securities subscribed by deposit and the provision of new capital or a waiver of debts are considered as reorganisation measures.
When revaluating assets, it is allowed for the fact that based on the principle of acquisition, real estate and interests are entered in the balance sheet at their acquisition value or production costs at the most. As a result, a company may be insolvent in term of accounting although the real value of its real estate or participations exceeds the balanced historic value by far. If half of the share capital and of the legal reserves is not covered any more, the law allows a revaluation of the real estate and participations up to a maximum of their real value as far as the auditor confirms that the provisions are adhered to for the attention of the shareholders' meeting. The total amount of the appreciation has to be stated separately and in addition to the appreciation reserve.

In case there is justified concern that the assets of the company will not cover the debt capital and that hence, the company is insolvent, art. 725 para. 2 CO obliges the board of directors to prepare an interim balance statement and forward it to the auditors for examination. If the interim balance statement shows that the debt capital of the company is neither covered at the valuation at a going-concern nor at the realization value, it is mandatory that the board of directors notifies the judge. This step may only be avoided if the creditors of the company agree to step back behind all creditors of the company to the extent of the deficient cover and by issuance of a letter of resignation. If the insolvency is stated, the judge adjudges the bankruptcy of the company according to the notification. It is possible for the judge to suspend the bankruptcy, if the board of directors or a creditor files an application for this and if there is a prospect of reorganisation.

The board of directors, which does not take any action or takes action too late in case of a capital loss or insolvency, can be made liable for the damages arising as a result. If the auditor is informed about the obvious insolvency, then it is also obliged to notify the judge in case the board of directors does not take any action.

6. **Accounting in accordance with other standards**

Besides the accounting regulations of the CO, there are various other standards. These are as follows:

- The Standards Swiss GAAP FER created by the committee for recommendations for the accounting (FER);
- The International Financial Reporting Standards (IFRS, the former International Accounting Standards [IAS]) created by the International Accounting Standards;
- The American Generally Accepted Accounting Principles (US-GAAP);
- The EU directives for accounting.
For the SWX Swiss Exchange companies listed at the principal segment, the regulation of the listing requires an accounting, which illustrates the true and fair view of the asset, financial and profit situation according to the Swiss GAAP FER, IFRS, US-GAAP etc. From 2005 onwards, only the IFRS and US-GAAP is allowed in the principal segment.

Finally, it has to be indicated that it is mandatory for every incorporated company to prepare an annual account in accordance with the commercial law and pursuant to the CO. This is used among others as a basis of the tax assessment.
"The only place success comes before work is in the dictionary."

Vince Lombardi
PART 3: THE OPERATIVE BUSINESS

A. Contract law

Beginning with the operational activities, a company will virtually conclude and fulfil contracts on a daily basis. Often, contracts will be concluded even before the beginning of the operational activities, e.g. a lease contract for the office space or the place of production or contracts to purchase office furniture, machines or other production means. The start-up company will conclude employment agreements and contracts which entitle it to use the desired software. Therefore, young entrepreneurs should know the main features of Swiss contract law as well as the most essential contracts.

1. Freedom of contract and conclusion of the contract

Swiss law is characterized by the principle of freedom of contract. This means that every individual as well as every company is basically free whether and with whom it will conclude a contract and with what content. Thus, the contractual parties are generally free to tailor the business relation to their needs. In doing so they can deviate from the rules as long as these are not mandatorily applicable by way of exception. The main contract types generally do not hinder the parties from combining the elements of different contract types as it is for example the case of a hire purchase agreement ("leasing").

A contract is concluded when the offer of one party is accepted by the other party. If it is "accepted" in a modified form, it is not an acceptance but a new offer from a legal point of view. The submitter of the first offer can accept it upon which the conclusion of the contract takes place. A valid and binding conclusion of the contract does not require the written form – subject to the specific exceptions enumerated by law. In other words: Verbal contracts are also valid. In practise, agreements are often concluded in writing. This is of importance with regard to possible disagreements and disputes. The claim based on the contract can only be enforced if it can be proven. For this reason a written contract is important. For such purposes the exchange of telefax notes or pdf-files is sufficient; fax documents can serve as suitable proof. Thereafter, people exchange the original signatures.

In exceptional cases, the law requires a certain form for the validity of the conclusion of a contract. Real estate and the related rights can only be transferred based on a publicly notarized contract. Furthermore, the conclusion of a guarantee (Bürgschaft) to secure liabilities of the company requires public notarization or – in case of a conclusion with a legal person – the so called regular written form. The latter implies – at least currently – that the contractual document must contain the original signatures of the parties; fax documents are not sufficient in this case.
Considering how easy contracts can generally be concluded pursuant to Swiss law, when negotiating complicated matters, it is important to clarify at the beginning that the binding effect shall only occur upon the mutual signature of the written contractual document. Such declaration is valid. Even so it must be borne in mind that in the course of negotiations and herewith associated correspondence the counterparty does not receive the impression that the conclusion of the contract is "agreed business". If the counterparty could rely on the conclusion of the contract (which – in case of dispute – would be decided by the judge in appreciation of all circumstances), the start-up company could become liable for all costs which occurred based on the counterparty acting on the assumption in good faith that the contract was concluded and based on the made investments in the face of the respective business. This risk of liability as a result of contract negotiations must always be borne in mind; apart from this, the parties can generally refrain from negotiations at any time and without any explanations.

### Freedom of contract and conclusion of the contract

- Principle of freedom of contract, *i.e.* everyone is free to decide with whom and with what content a contract shall be concluded.
- A conclusion of a contract requires an offer and its acceptance.
- Most contracts can also be concluded verbally.
- It is advisable to document contractual agreements in writing; the exchange of fax or pdf documents is generally sufficient.

### 2. Performance and termination of the contract

A contract must be performed. After the conclusion of the contract, one can only withdraw from its contractual obligations based on the corresponding provisions in the contract itself or statutory rules. If the respective provisions are not fulfilled, the performance of the contract is due, *i.e.* the parties must either deliver, perform or pay.

However, the liability to perform a contractual obligation can become time-barred. In such a case, it generally does not have to be performed any more. The limitation period generally lasts for ten years, it can also only last five or even merely one year, whereas the period can be suspended by filing a legal suit or prosecution; if so, a new limitation period starts with the original term.

If a party does not perform the contract, the other party must remind the defaulting party of the outstanding obligations to be performed (reminder). The belated party
hereby defaults in general. If no delivery or performance occurs consequently within the extension of time set by the other party, such party has the possibility to either insist on performance and demand compensation for delay or it can waive the performance and demand compensation. The respective party can also withdraw from the contract after the ineffective expiry of the extension period; in these cases it can also demand compensation, namely for the consequences of the expiry of the contract.

Disagreements or disputes often occur in the course of the contract's performance. With regard to an inevitable court proceeding, it must be ensured that all steps made are documented in an exhaustive manner. Especially in the digital age, it must be paid attention to possessing sufficient written correspondence; at least all e-mails which have been sent or received in connection with potential disputes should be printed and filed. This also applies to the entire correspondence concerning the conclusion of the contract. When assessing a dispute, a Swiss judge considers all circumstances of the conclusion of the contract and the behaviour and the declarations and any agreements made after the conclusion of the contract. In interpreting a contract, courts are not bound by the strict wording of the contract. It is essential how a contracting party could have understood – or should have understood – a contractual declaration or a conduct of the other party in good faith, given all the applicable circumstances at that point of time (principle of reliance or Vertrauensprinzip).

Contracts are terminated by means of fulfilment of the agreed obligations, by a termination contract or by the withdrawal provided by law or by a termination provided by law or the contract itself. If a contract shall be terminated based on a statutory rule or by withdrawal, it must be verified in advance whether the statutory withdrawal or termination provision has not been excluded by contractual agreement. In general it is possible – as mentioned before – to abolish statutory rules by means of contractual agreements; in such cases the contractually agreed has precedence over the regime set forth by law and applies irrespective of any contrary legal regime.

### Performance and termination of the contract

- Contracts concluded must be performed.
- After the conclusion of a contract, a withdrawal or a termination is only possible based on contractual or statutory rules.
- If no such rules exist, the contract must be performed (subject to prescription); the period of prescription generally lasts for ten years, partially also for five years or one year only.
- If a party does not perform its obligations in a timely manner, the other
party must remind the defaulting party; the reminder causes the delay.

- If no performance occurs within the extension of time, the following alternatives are available to the non-defaulting party:
  - Waiver of performance and claim of compensation for damages or withdrawal from the contract (including compensation for damages).
  - Insistence on performance (including compensation for damages).

3. Framework contracts and standard contracts

Often, the parties seek long-term business relationships. In such a case, it is advisable to conclude a framework agreement for all future businesses. It is not necessary to conclude a new contract for each individual transaction, but sufficient to determine the price, subject matter of the respective transaction and other particularities in writing. Warranties as well as delivery and payment terms are also regulated in the framework contract.

Often there is a need to conclude business with a significant number of partners with the same conditions. In such cases, standard form agreements are used which shall form the basis of all future business relations. This results in standard contracts. Such standardized contract conditions are also known as "General terms and conditions".

In the case of standardized contract conditions one must pay attention that these actually become subject matter of the contract in each individual case. It is of no use to refer to these conditions in a later dispute if they were not agreed between the parties. It is also not sufficient to enclose the general terms and conditions to the delivered goods or even the invoice. This is too late. Hence, it is important that the intent to only conclude an agreement based on the general terms and conditions is already expressed in the offer or the acceptance of an order in a clear manner. The standard contract conditions must be enclosed to the offer or the acceptance of the order and it must be clearly referred to the attached standard contract conditions in the respective letter. If this is only done when sending the order confirmation, it is advisable to demand a declaration from the counterparty that it agrees to the entire content of the mentioned order confirmation.
4. Types of contracts

The law explicitly provides for a number of standardised contracts as e.g. purchase contracts, lease contracts, employment contracts, mandate or loan agreements. These are supplemented by several types of contracts not specifically provided for by law which have been developed by business practise, as for instance leasing contracts or factoring contracts. As already mentioned the parties are generally free to determine the content of their contracts and may usually also deviate from the rules provided for the several types of contracts in a particular case. Only the mandatory provisions must be observed in any case and cannot be excluded by mutual agreement.

In the following, the most important types of contracts for the operational business shall be set out. For an outline of the employment agreement, please refer to part 3 C.2 of this book. Contracts regarding the assignment or the transfer of usage of intangible goods (trademarks, patents or copyrights) are described in part 3 E of this book.

a) Purchase contract

The law on purchase contracts is set out in a very detailed manner in the Swiss Code of Obligations. The parties must agree on the good(s) to be purchased and delivered; furthermore the price for the good(s) must be determined or must be at least determinable. However, these rules only apply to purchase agreements within Switzerland. The rules of the United Nations Convention dated March 1, 1991 on Contracts for the International Sale of Goods (CISG) generally apply to multi-jurisdictional purchase contracts, except the parties have excluded the applicability of the CISG in the contract. In the following, only Swiss law is described in further detail.
In a purchase agreement, the seller undertakes to transfer ownership of the good(s) to the buyer and the buyer undertakes to pay a defined or definable price. Yet, the ownership is not transferred automatically to the buyer upon the conclusion of the contract. The purchase agreement only includes the reciprocal obligations and rights of seller and buyer. In case of the sale of moveable property (thus not real estate), the ownership is only transferred to the buyer, when the seller – in performance of his contractual obligations – effectively transfers the possession of the good(s) to the buyer. When purchasing real estate, the transfer of possession (as a necessary condition for the transfer of ownership) is replaced by the registration in the land register. It is usually agreed that such transfer of possession shall occur at the same time as the payment of the purchase price; this also corresponds to the statutory regulation. However, it is indeed possible for the parties to determine that the possession of the good(s) must first be transferred to the buyer and that the buyer then pays the purchase price. The opposite can also be agreed: The buyer pays first and only after the receipt of the purchase price the seller must transfer the possession and thus the ownership of the good(s) to the buyer.

If it is provided that the seller must deliver before receiving the purchase price, he can – when selling moveable property – request and agree upon a so called retention of title in this case and despite the transfer of possession, ownership to the good(s) is only transferred to the buyer when the purchase price has been completely paid. Such retention of title must not only be agreed in the contract but must also be registered in the register of retention of title, which is kept at the domicile of the buyer.

The question when the risk of damage or loss of the good(s) is transferred to the buyer is important in sales law. If this risk is transferred to the buyer before the transfer of possession of the good(s), the buyer must pay the full purchase price even if the good(s) perishes due to damage or destruction before the transfer. Pursuant to the statutory provision, the risk is transferred to the buyer at the time of the conclusion of the contract. However, the parties can agree that the risk is only transferred to the buyer simultaneously with the transfer of the good(s) (and thus with the transfer of ownership).

The parties to a purchase agreement are generally also free to determine their reciprocal rights and obligations. This is of special importance in sales law and is particularly relevant when addressing the question of warranty for the good(s). The parties can provide for instance that upon delivery of a deficient good the buyer can only demand the repair of the delivered good or a replacement instead of the rescission of the purchase contract or the decrease of the purchase price. Furthermore, from a seller's point of view, all warranties, except for fraudulent behaviour, should be excluded.
In addition, warranty rights become time-barred very quickly, i.e. after only a year. The buyer must examine delivered good(s) immediately upon receipt and notify possible defects without delay to the seller.

**Purchase contracts**

- The seller undertakes to transfer the ownership of the good(s) to the buyer and the buyer must pay a determined or determinable purchase price.
- Transfer of ownership of moveable property requires the transfer of possession; in case of real estate, the transfer of possession is substituted by the registration of the buyer in the land register.
- In case of credit buying, an agreement regarding the retention of title is possible; yet the retention of title must be registered in the register of retention of title at the domicile of the buyer.
- The risk of destruction or loss of the good(s) is generally transferred to the buyer at the time of conclusion of the contract, regardless whether the price has already been paid or the good(s) have been delivered.
- Upon delivery of deficient good(s), the rescission of the purchase contract or the decrease of the purchase price can be requested by the buyer; these rights can be contractually modified or excluded (only repair or replacement of the delivered good).
- The warranty rights already become time-barred after a year; the buyer must immediately examine the good(s) and notify possible defects.

**b) Contracts regarding the performance of services**

This type of contract particularly includes the employment contract, the contract for services as well as the so called ordinary mandate.

Please refer to part 3 C.2 regarding the employment contract. Contrary to the initially mentioned freedom of contract, the employment contract is subject to a significant number of mandatory provisions for reasons of protecting the employees.

If for instance the production of certain machines pursuant to the instructions of the buyer is part of the business activities of the start-up company, the **contract for services** (*Werkvertrag, contrat d'entreprise*) is very important in the daily business. If the contract is performed as so called general contractor, the entrepreneur is liable towards the customer for the due provision of the service (*e.g.* machine, construction),
even if he employs a number of subcontractors for the performance of the work. These subcontractors are only in a contractual relation with the general contractor, but not with the final customer of the product. If the services or the work product are deficient, the customer generally has the same remedies as the buyer. He can also demand the rescission of the contract or the decrease in the purchase price. But he can also request the contractor to repair the deficient product free of charge. The contract can also provide that given certain conditions the deficient product is repaired by a third party on account of the contractor.

The **ordinary mandate** (*Auftrag, mandate*) encompasses the performance of a business activity conducted on instructions or in the interest of a third (mandatory) which does not qualify as employment contract or contract for services (*Werkvertrag, contrat d'entreprise*); the differentiation can be difficult in the individual case.

Typical mandates include to the hiring of consultants, external marketing specialists, public relations advisors, asset managers as well as lawyers or trustees. The entire payment transactions of a company with its bank are also governed by mandate law.

The mandate is characterized by **mutual trust**. The mandatory exclusively and especially represents the interests of the principal and undertakes to do anything to achieve the principal's goals. Hence, strict principles are applied to the required diligence which needs to be considered by the mandatory.

Any mandate can **compulsorily** be terminated with immediate effect. The right of withdrawal at any time and the right to resign from the mandate cannot be validly waived by contract. The only limitation of the right to withdrawal includes that the withdrawal shall not occur at a very inconvenient point in time e.g. if a lawyer would resign immediately prior to a court meeting. If the mandate relationship is terminated nevertheless, the terminating party is liable for the damages incurred by the other party due to the termination which was not justified by the conduct of the counterparty. The right to terminate at any time appears inappropriate in many long-term relations. The parties often agree upon a term of notice in the contract despite the mentioned compulsory rule. Such provisions are risky as in case of a dispute the judge will deem the provision as violating the compulsory right of withdrawal and will deem it null and void; however such termination rules include the chance to argue in a dispute that the termination period represents the will of the parties that a termination of the contract **before** the end of the "termination period" must be qualified as a **termination at an inconvenient point in time** triggering the mentioned liability for damages.

<table>
<thead>
<tr>
<th>Contracts regarding the provision of performance on the job</th>
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<tr>
<td>⊗ Employment contract (<em>Arbeitsvertrag, contrat individuel de travail</em>)</td>
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</table>
Successful mastering legal and tax challenges

Part 3: The operative business

- Contract for services (*Werkvertrag, contrat d'entreprise*)
- Ordinary mandate (*Auftrag, mandat*)
- Contract for services: making of a specific good e.g. production and assembly of a machine based on the instructions of the orderer.
- In the case of a deficient good, the customer generally has the same remedies as the buyer of a deficient good. However, the entrepreneur can be obliged to repair the good free of charge.
- Mandate: Every business activity conducted on instructions or in the interest of a third party; in individual cases the differentiation between an ordinary mandate and a contract for services can be difficult. Typical mandates include: contracts with marketing specialists, public relations advisors, lawyers, trustees or a bank (payment transactions).
- The mandate can be terminated at any time. A differing contractual provision would not be enforceable.

**c) Lease contract**

Just like the law on employment contracts, the law on lease contracts is governed by mandatory rules with the goal of protecting the lessee. In other words, many provisions of the law on lease contracts cannot be excluded or changed by mutual consent; the limitation of the freedom of contract is considerable. A start-up company will usually have to conclude at least one or two lease contracts for offices (and for protection facilities) in order to conduct its operative business.

The content of a lease contract includes the handing-over of an object such as office space for a definite or indefinite time in return for periodical payments. The main obligation of the lessor is – as the word lease suggests – to hand over the lease object for use; the lease object must be handed over and maintained in a condition to be used for the intended purpose at the agreed point of time (e.g. as office space or production facility). The lessor must remedy deficiencies, whereas the usual small maintenance – approximate value of CHF 150 – must be borne by the tenant. Larger reparations must be conducted by the lessor. The lessor must also bear the charges and fees in connection with the leased space such as taxes, premiums for the fire insurance, public law fees etc., but he can pass these on to the lessee as utilities.

If the lease object is deficient and the deficiency is not remedied, the lessee can annul the lease contract; the lessee is only entitled to exercise this right in case of severe deficiencies that preclude the lessee from the contractual use. However, the lessee can...
also request to decrease the rent. Decreasing the rent unilaterally can be harmful as in case of a too large decrease, a termination due to payment delay of the rent is risked by the lessee. The right to reduce the rent should be handled carefully until the court determines the admissible amount of the reduction. Given certain circumstances, the lessee is entitled to deposit future rents at a court in case of deficiencies; then it is the duty of the official mediation agency to determine the amount of the actual decrease in rent. The disturbance in the use of a lease object and a deficiency in the lease object have the same consequences. This could be the case when the business activities are impaired by construction noise. Disturbances can also emerge from the co-lessees dumping inventory goods or garbage and thus impairing the entry to leased space. In such a case the lessor must intervene and remedy the disturbance.

The tenant's obligation to pay the rent corresponds to his rights of use. Furthermore, he must use the object carefully and in accordance with the contract and must return the lease object in the agreed condition after the termination of the lease. In this context it is particularly important to determine in the contract whether changes may be made to the leased object (e.g. constructional modifications) and what happens to these modifications after the termination of the lease.

A lease contract ends after termination. Lease contracts on offices can be terminated with a term of six months as of a date customary in the specific place (thus e.g. March 31 and September 30) and for lack of such custom on the end of a three month term. The termination periods can be extended, but they cannot be shortened. The termination of office space must be in writing.

If the building in which the leased space is located, is sold, the lease contract is automatically assigned to the buyer along with the ownership of the relevant building as well. The sale of the lease object does not lead to an extraordinary termination of the lease contract.

There are a number of individual cases in the context of the law on lease contract and a comprehensive, but hardly concise practise. There are e.g. detailed rules on the determination of rents, the increase of rents and the extension of lease contracts. In this context please refer to the following address:

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**Web site**

__________

[www.mieterverband.ch](http://www.mieterverband.ch)
Lease contracts

相似 to the law on employment contracts, the law on lease contracts is governed by many mandatory rules.

Lease contract: Handing-over of the lease object for a definite or indefinite time in return for (regular) lease payments.

The lessor must remedy deficiencies of the lease object, the common small maintenance – approximate value of up to CHF 150 per repair – is borne by the lessee, and larger maintenance works are borne by the lessor.

In case of a deficient lease object, the lessee can annul the lease contract – however only in case of material deficiencies. The lessee can also decrease the rent, whereas caution is required as the lessor could argue that the decrease is unjustified and he could terminate the contract due to the delay in payment.

The lease contract must provide whether the lessee is allowed to make modifications to the leased object and what happens to these modifications after the termination of the lease contract.

Lease contracts can be terminated with a term of six months on the date customary to the place (e.g. March 31 and September 30). If there is no customary date, the termination occurs at the end of a three months term. The termination notice must be given in writing.

d) Leasing contracts

The leasing contract is a transfer of usage contract of its own kind, which is similar to the lease contract in many respects. In fact, the term "leasing" is partially used for contracts which are merely ordinary lease contracts upon closer inspection.

In case of a proper leasing, the leasing company undertakes towards the lessee to transfer an investment good (machinery, tools, equipment) for use and for the performance of the obligations typically connected to the ownership of the good (service, maintenance, insurance etc.). Very often – especially in case of a finance lease of investment goods – these obligations are passed on to the lessee. Nevertheless, property remains with the leasing company. Thus, the lessee must pay the agreed leasing payments which are usually calculated in a way that the sum of the instalments during the term of the contract reaches the amount of the acquisition costs of the object plus a premium for financing (capital return, administrative costs, risk premium and
entrepreneurial profit of the leasing company). In case of a finance lease, the term of the contract corresponds with the estimated life of the leased object.

At the end of the contractual term, the lessee is generally obliged to return the object as the leasing contract — as mentioned — is not a purchase contract, but a transfer of usage only. However most leasing contracts provide that the lessee can acquire the object either free of charge or for a premium.

### Leasing contracts

- Three partite agreement
- Leasing contract: transfer of usage contract of its own kind.
- The leasing company hands over for usage the investment good to the lessee.
- The lessee must pay the agreed leasing instalments.
- The leasing instalments are calculated in a way that the sum of the payments reaches the amount of the acquisition costs of the object plus a financing premium (capital return, administrative costs, risk premium and entrepreneurial profit).
- The term of the leasing contract usually corresponds to the estimated life of the leased object.
- Leasing contracts usually provide that the lessee can acquire the object either free of charge or for a premium at the expiry of the contract.

e) Financing contract

The finance leasing described in the previous section also belongs to the financing contracts. A start-up company usually covers its financing needs by means of investments of venture capitalists or by means of traditional bank loans. Part 5 of this book addresses the investments by venture capitalists (equity financing). Therefore, the following only describes the traditional bank borrowing (debt financing).

The bank borrowing typically includes that the bank grants the company a credit limit up to a certain amount. Up to this amount, the company is entitled to draw money from the current account or by means of fixed tranches with a predefined term. In the loan agreement, it should be agreed that any credits repaid during the term of the agreement can be redrawn up to the amount of the credit limit (revolving credits).
The interest rate payable for the credit is usually determined by the bank based on the prevailing circumstances on the financial markets. In case of fixed advance payments, the interest rate corresponds to the LIBOR-rate in the respective currency and term plus a margin.

Furthermore, the loan agreement typically provides that drawdowns are only granted upon the fulfilment of certain payment conditions. These regularly include the existence of an elaborated and meaningful business plan, the submission of audited financial statement as well as the existence of sufficient securities for the bank. In addition, these conditions to drawdown are supplemented by ongoing obligations of the company, as for instance the provision of certain information in regular intervals which include the submission of all "updates" to the business plan, the audited financial statement as well as the unaudited semi-annual or quarter figures.

As already mentioned, such financing by a bank is usually not granted without the existence of securities. In the current context, this particularly concerns guarantees of principal shareholders or the pledging of shares of the start-up company in favour of the bank. Contrary to the principle of the freedom of contract, the granting of a guarantee requires compliance with certain formal requirements.

Natural persons must notarize the guarantee. In certain cases, the approval of the spouse is necessary. Furthermore, a guarantee is only valid if the contract itself contains a maximum amount.

The pledging of shares requires that the effective possession of the certificates is transferred to the bank. In this way, the bank is in a position to sell the shares in case of default. However, the bank does not become the owner of the shares. Thus, subject to a differing agreement in the pledge agreement, the shareholder as pledgor of the titles retains the voting rights at the company's shareholders' meeting.

This type of security is mostly supplemented by a global assignment of claims (accounts receivable) in favour of the bank. This implies that the company assigns its existing and future accounts receivable to the bank by means of a written declaration of assignment.

Regarding the termination of bank loans, it must be borne in mind that the banks usually reserve the right to immediately terminate the contract at any time. This is admissible pursuant to Swiss law. However, this can lead to serious consequences for the start-up company. Therefore it is important to agree to a termination notice period with the lending banks and to establish a relationship of mutual trust at least; the latter should be especially achieved if the company complies with its contractual obligations in time.
5. **Contracts in international relations**

If one of the contracting parties has its registered office or residence abroad, these are international circumstances which are assessed according to own legal rules. In particular the following questions must be addressed in international circumstances:

<table>
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<tr>
<th>International circumstances</th>
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<tr>
<td>❍ What courts of which country shall deal with the possible disputes (international jurisdiction)?</td>
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<tr>
<td>❍ What law shall be applicable to and govern the relationship between the parties (applicable law)?</td>
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</tbody>
</table>

There is usually the possibility to determine the applicable law and the court of jurisdiction in contracts even though there is no agreement among the parties. It is always of advantage for the start-up company if Swiss courts at the own domicile are
competent and if these competent courts apply Swiss law. This must be agreed in the contract.

Choice of jurisdiction/law clause

- The exclusive jurisdiction is [domicile of the company].
- This contract is governed by Swiss law.

B. Insurance law

Start-up companies mostly pay attention to the social security insurances. Apart from social security insurances, it may be advisable to also insure further risks relevant to the company's business. An insurance for additional risks is generally – apart from the statutory obligations for certain industries – voluntary. Only the motor vehicle liability insurance is mandatory.

Risks which can be insured but not necessarily have to be insured include for instance:

- **Product liability insurance** for damages which occur in the context of the company (example: the manufactured drug causes health damages to customers; the made software leads to a data loss of the customer);
- **Vehicle insurance** (the known comprehensive and [mandatory] auto liability insurance);
- **Property Insurance** (example: the insurance pays compensation for damages in case of fire and water leakage if equipment is damaged);
- **Business interruption insurance** (reimbursement for the financial losses [in particular the lost profit] in case of a business interruption due to fire, water etc.);
- **Legal assistance insurance** (the insurance pays for a lawyer for the representation in court or compensates the costs which result from the court proceedings); and
- **Sickness insurance** (in case of the illness of the employee, the insurance pays the salary and discharges the employer from the obligation of continuing salary payments after an agreed deferral period of e.g. 30 days, cf. part 3 C.2.b).
1. **Product liability insurance**

Product liability insurances are very common. Claims against a company as well as the employees and auxiliary persons are insured if third persons claim compensation based on a defective product. The insurance compensates third persons for the damages incurred by death, injury etc. or the destruction or damage of objects and it also compensates financial losses such as lost profits.

There is no standard product liability insurance for all industries as the risks differ in each industry. The manufacturer of drugs must insure different risks than the operator of an internet portal. Correspondingly, custom-made insurance solutions for various industries are available.

The product liability insurance is a voluntary insurance. Accordingly certain risks can be included and others excluded.

In case of an international business, the company should carefully consider to which countries the product liability insurance shall be extended. Western Europe is usually included in the product liability insurance; there often is an exclusion if products are offered in the USA or Canada (reason: high indemnifications in the USA).

Similar to other insurances, a decrease of the premiums can be achieved by accepting a higher excess. Given this saving, the insured sum (maximum payment of the insurance, if a third person suffers damages) can be increased accordingly. The insured sum often amounts to several million francs.

A risk analysis should be conducted before concluding an insurance contract in order to avoid not insuring insignificant risks.

2. **Vehicle insurance**

The owner of a vehicle mandatorily requires a vehicle insurance. Personal damage and/or damage to objects that have occurred due to the operation of a vehicle, no matter who drove the vehicle at the time of the event causing the damages, are covered. Insurances often offer comprehensive insurance policies; the comprehensive insurance policies are not mandatory. The voluntary comprehensive insurance policies cover material damages to the own vehicle.

A comprehensive coverage excluding collision includes theft, hail/storm, natural hazards, glass, fire, snow slide and animal damage to the own vehicle. The comprehensive coverage including collision additionally covers damages to the own vehicle as a result of a collision. Comprehensive coverage is especially recommendable if vehicles are used very often in the business. It is advisable to
compare the various different offers. The website www.comparis.ch is a possibility to conduct this analysis.

3. **Property insurance**

While the product liability insurance covers damages suffered by third persons, the **property insurance** covers damages that originated from the injury, destruction or removal of own objects (goods, property etc.).

As owner of a building, one must necessarily conclude a building insurance covering certain damages to the building. As lessee storing equipment and products in a leased building, one should conclude a property insurance. The risks fire, theft, water leakage and breakage of glass are usually insured.

When concluding a property insurance, the insured person should decide whether he or she wants to insure the **replacement value** or the **current value** only. The replacement value insurance is a kind of insurance of property that will also compensate the difference between the current value and the replacement value. The replacement value is the amount that is necessary for the new acquisition and the reconstruction. The current value only covers the actual value of the insured objects (which can be significantly below the replacement value).

If the insured person wants to obtain the entire replacement value in the case of damage, the scope of coverage must correspond to the acquisition value of all insured objects. Otherwise it can happen that the insured person is underinsured, *i.e.* the insurance sum is smaller than the replacement value and the insured person is not compensated for the entire damages.

The insurance of property is also voluntary. Accordingly, depending on the risks the business is exposed to, additional special insurances can be concluded. These include for instance:

- **Business interruption insurance** This insurance is primarily suitable for production companies, not always for trading or service companies;

- **Machine insurance** This insurance is again primarily intended for production companies.

There are a number of special insurances such as data processing insurances, transport insurances, construction risks insurance, epidemic risks insurance (important in the grocery industry), guarantee insurance etc. Only a consultant usually has a comprehensive overview. Every larger insurance company will advise
free of charge; alternatively insurance brokers (agents who offer policies of different insurance companies) will also advise on adequate insurance coverage.

4. **Legal assistance insurance**

Mainly the larger insurance companies also offer (voluntary) **legal assistance** insurances for businesses. This insurance will cover costs for instance if an employee sues the company or disagreements occur with the lessor. Often, the costs of legal assistance in case of claims for the compensation of damages, criminal allegations, employment law proceedings and lease proceedings are covered.

The insurances always assess the legal situation, clarify the trial perspectives and pay the court fees, attorney's fees and a possible compensation to the counterparty.

In case of small claims, emerging disputes can often be resolved much cheaper if the parties try to settle the dispute amicably without involving attorneys.

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<th>Web sites</th>
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<tr>
<td>❌ <a href="http://www.comparis.ch">www.comparis.ch</a> (Comparison of vehicle insurances)</td>
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<tr>
<td>❌ <a href="http://www.svv.ch">www.svv.ch</a> (Swiss Insurance Assocation, extensive FAQ-list)</td>
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<tr>
<td>❌ <a href="http://www.siba.ch">www.siba.ch</a> (Swiss Insurance Brokers Assocation)</td>
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C. **Labour law**

1. **Principle sources of labour law**

   a) **Public labour law**

   The **CO** is the most important source to determine the rights and obligations of the parties in private labour law. However, the private law relationship is subject to the restrictions of public law, most importantly to the Labour Act (LA). The provisions of the LA are mandatory and the competent authorities are mandated to enforce them *ex officio*, *i.e.* regardless of potential claims by private parties; if necessary by imposing substantial penalties which may range up to the closure of business. As work may have detrimental effects on the health of employees, the LA imposes minimum working standards. The provisions on working and resting periods are the core of the Act. For instance, the LA provides maximum working hours, minimum resting periods,
overtime restrictions and prohibitions of night and Sunday work which may only be allowed by a special authorisation.

### Working and resting periods according to the LA

- Maximum presence (incl. resting periods and overtime) 14 hours per day;
- Weekly maximum working time of 45 or 50 hours, extendable under certain conditions;
- Maximum yearly overtime of 170 hours in the case of 45 maximum weekly working hours and 140 hours in case of 50 maximum weekly working hours and maximum 2 hours of overtime per day;
- Financial compensation of overtime based on the hourly wage plus an additional 25% if no agreement over compensation by time off is concluded. However, in the case of office, technical and other white-collar employees, compensation is only due for overtime exceeding 60 hours per year;
- Daily minimum resting period of eleven consecutive hours and weekly resting period which includes, in principal, Sunday and an additional half day off.

The scope of the LA is limited. Its provisions do not apply to every enterprise and not to every employee. In particular **high level executives** are not subject to the LA. High level executives in the sense of the LA are employees with important decision making competences or employees who may influence decisions of considerable scope and, as such, effectively influence the course of business and development of a company. Employees with **scientific activities** are also excluded from the scope of application of the LA. Therefore, employees working in science, whether in basic or applied research, are not covered by the provisions of the LA. But employees involved in the implementation of the results of scientific activities, such as the development and the production of a product, remain subject to the LA.

### Example

- The maximum weekly working hours of secretary S. amount to 45 hours. On Friday, her boss must finalize an urgent report and requests S. to work more than 9 hours on Thursday. This is admissible because the LA provides that in cases of urgency, the maximum working hours may be extended by a maximum of 2 hours per day. In cases of emergency, working time may even exceptionally exceed the limit of 11 hours.
At the end of the year, S. has accumulated 160 overtime hours. This overtime is admissible in the case of a secretary to which the maximum overtime limit of 170 hours applies.

The monthly salary of S. amounts to CHF 4'000. As S. and her employer have not agreed on the modalities of compensation of overtime and a compensation by time off, the employer must compensate the overtime by salary payment to be calculated as follows:

- Monthly salary: CHF 4'000.00
- Hourly salary: CHF 22.25
- 160 Overtime hours, of which:
  - 60 at ordinary rate (100%): CHF 1'335.00
  - 100 at special rate (125%): CHF 2'781.25

Total overtime payments: CHF 4'116.25

b) Private labour law

While the LA sets the mandatory framework for contractual arrangements of the parties, the provisions of the CO on the employment contract (art. 319 - 343 CO) set out the rights and obligations of the parties. The provisions of the CO only apply in absence of an agreement between the parties. The employment contract is part of private law which in principal allows the parties to freely arrange their private relationship. In labour law, however, the contractual freedom of the parties is not only limited by the public law provisions of the LA, but also by provisions in private law which protect the employee and may not be amended by the parties. These mandatory provisions are listed in art. 361 and 362 CO. The provisions listed in art. 361 CO may never be amended by an agreement of the parties. In case of the provisions listed in art. 362 CO the parties may deviate from the legal provisions if such deviation is made in favour of the employee. Provisions of the CO not listed in art. 361 or 362 CO are not mandatory and may be changed – always within the general restrictions of the law – based on the free will of the parties. The freedom of the parties may, however, find its limits in a Collective Bargaining Agreement (CBA) which has been declared to be generally applicable.

2. Employment contract

a) Rights and obligations of the parties

The main obligation of the employee is the provision of work within the working organisation of the employer. When performing his work the employee must follow
the instructions of the employer. The main obligation of the employer is the salary payment for the work performed. Other important obligations include the duty of loyalty of the employee and, as its counter piece, the duty of care of the employer. Based on the duty of loyalty, the employee must safeguard the legitimate interest of the employer. For instance, he has to follow the employer's instructions, must refrain from other paid occupations during his employment and must keep confidential business and fabrication secrets. Based on his duty of care, the employer must take appropriate measures to protect the employee's health and grant sufficient vacation and time off.

b) Salary payment obligation

(i) Amount, type and date of salary payment

The parties are free to determine the amount of the payment to the employee. The freedom of the parties may, however, be restricted by a CBA or a Standard Employment Agreement (SEA) applicable to the respective professional category and containing minimum wages. If this is not the case, the payment may be fixed based on the rate usually applied for comparable positions customary in the specific business, branch or place. Full-time employees are usually paid on a monthly basis. Mandatory law prohibits any gender discrimination with regard to pay and compensation and women have a claimable right for equal pay for equal work.

The parties are free to determine the type of salary to the employee. To set incentives they may, for instance, provide that besides a fixed base salary a variable, performance-based salary is paid (participation in business profit, commission). It is even admissible to pay a variable salary only. The employer may not, however, shift the entire burden of business risk to his employees. This is why the employee must in any event be entitled to an adequate remuneration. Variable salary schemes are increasingly popular. But many employers are not familiar with the legal risks associated with variable salary schemes. It is usually advisable to seek professional advice before implementing such schemes.

The salary must be paid by the end of the calendar month at latest. The payment on the 25th of each month has become common practice. If the employer fails to pay the salary, the employee has the right to deny the performance of work.

(ii) Salary continuation despite lacking work performance

If, for reasons related to the employer, the employee can no longer provide his workforce, the claim for salary payment remains intact (art. 324 CO). The claim for salary continuation also persists during a specific period of time in the event that the employee is prevented from performing his work without his fault and for reasons
inherent to his person (e.g. sickness, accident or pregnancy) provided, however, that the employment relationship has already lasted for at least three months or the employment relationship has a fixed duration of more than three months (art. 324b CO). This means that the majority of employees employed for an unlimited term do not have a claim for continuation of pay in case of sickness during the first three months of employment.

The amount of the salary to be paid under salary continuation is to be calculated on the basis of the salary, including any allowances, commissions etc. which the employee would have earned, had he not been prevented from work. The duration of continuation of pay is three weeks in the first year of service and is increased thereafter. Considerable cantonal differences exist regarding the duration of salary continuation starting from the second year of service. According to the relevant guidelines which are, however, not binding for the courts, the claim for continuation of salary extends to 4 – 8 weeks starting from the second year of service, 11-13 weeks from the 5th year of service and 13-15 weeks from the 10th year of service. As the following example shows, different events of work prevention are added together when calculating the claim for salary continuation:

![Calculation of claim for salary continuation](image)

**Calculation of claim for salary continuation**

During her first year of service, an employee has been sick during two weeks. Before this first year's end, she is incapacitated once more for a period of 12 weeks due to her pregnancy (before birth). With the employer already having paid the salary during the period of sickness, only one week of the employee's absence related to her pregnancy must be paid.

(iii) **Salary continuation and mandatory insurance**

The employee has no claim for salary continuation towards the employer if the employer is insured against the risk of prevention from work by no fault of the employee, provided that such insurance is made based on a mandatory legal scheme (based on the AIA [Accident Insurance Act = UVG] [part 3 D.7]; PCA [Pay Compensation Act = EOG] [part 3 D.5]; daily allowances based on the IIA [Invalidity Insurance Act = IVG] [part 3 D.4] or based on the Military Insurance Act) and that the insurance covers at least 80% of the salary. If the insurance payments are lower than 80% of the salary, the employer has to pay the difference up to this quota to the employee.

In Switzerland, all employees are mandatorily insured against the risk of salary loss due to an accident (art. 16 and art. 18 AIA). There is no such mandatory insurance
scheme, however, in the case of sickness. An incapacity due to occupational diseases is however covered by the mandatory accident insurance. Occupational diseases are diseases related to the professional activity such as, for instance, an allergy to materials regularly used in the working process, in particular diseases listed in the respective list of the SUVA (Schweizerische Unfallversicherungsanstalt; Caisse nationale Suisse d'assurance en cas d'accidents).

The insurance protection of the mandatory accident insurance starts at the moment the employee is on his way to work for the first working day and ends 30 days after termination of employment. The maximum insurance payments amount to 80% of the so called insured salary which, in principal, corresponds to the actual yearly salary but is currently limited to a maximum of CHF 126'000 per year and CHF 346 per day respectively. The result is that although an employee may earn more than CHF 126'000, the insurance covers only 80% of this maximum amount. The difference between the insurance payment and 80% of the effective salary must be covered by the employer. Hence, the employee in any event receives 80% of his effective salary. It must be noted that insurance payments start only on the 3rd day after the accident (so called waiting period). During this waiting period the employer must pay 80% of the effective salary to the employee.

**Insurance Payment and Continuation of Pay in Case of accident**

The annual salary of the employee amounts to CHF 178'000. Due to an accident she is incapacitated from work for a long period. Starting from the 3rd day of incapacity the employee has a claim for insurance payments against the mandatory accident insurer in the amount of 80% of the insured income (CHF 126'000 per year), i.e. CHF 100'800 per year. As the insurance payments do not cover 80% of the effective salary (CHF 142'400 per year), the employer has to pay the difference of CHF 41'600. During the 3 day waiting period the employer has to pay 80% of the effective salary, i.e. CHF 312.10 per day.

Besides the salary loss due to accident working incapacity due to military (or civil) service and due to sickness or accident during military service are also covered by special mandatory insurance schemes.

**Maternity** (but not incapacity during pregnancy) is also covered by a special mandatory insurance. During 14 weeks after childbirth the mother is compensated for 80% of her salary, but no more than CHF 172 per day (maximum insured monthly salary CHF 6'450). The employee has no claim against the employer for additional benefits, unless the employer has voluntarily provided a more generous private insurance to complement the mandatory insurance payments.
For the case of incapacity due to **sickness** and **pregnancy**, there is no mandatory sick pay insurance. In this case, the employee is merely protected by the limited salary continuation obligation of the employer. With the conclusion of a voluntary sick pay insurance, the employer can increase the protection of the employee and, at the same time, limit his own risk of pay continuation which may otherwise become a considerable burden, especially in the case of sickness of several employees. With the conclusion of such voluntary sick pay insurance, the employer is exempted from his legal salary continuation obligation, provided the insurance respects the following benchmarks:

<table>
<thead>
<tr>
<th>Voluntary Sick Pay Insurance</th>
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</thead>
<tbody>
<tr>
<td>☐ The insurance covers a sufficient part of the salary (e.g. 80% of the salary) during a sufficient period of time; insurance policies usually cover 80-100% of the salary for a maximum of 720 days within a period of 900 consecutive days;</td>
</tr>
<tr>
<td>☐ the employer pays at least half of the insurance premiums;</td>
</tr>
<tr>
<td>☐ the insurance solution is provided in a written agreement, a SEA or a CBA.</td>
</tr>
</tbody>
</table>

If insurance payments are made only after the lapse of a certain number of days of sickness (so called waiting period), the employer must pay the entire salary during the waiting period, unless the obligation of salary continuation has been limited to the amount of the salary covered by the insurance (e.g. 80%) by written agreement. It is also admissible to agree in writing on 1-3 unpaid days (per event of sickness) during which no claim for a salary continuation exists.

Insurance coverage can vary considerably depending on the individually agreed insurance policy. It is therefore advisable to carefully evaluate the various insurance options with the insurance company.

c) **Working hours, vacation and time off**

(i) **Introduction**

The issue of working hours illustrates the interplay between private and public labour law. In absence of a CBA, the parties are free to determine the working hours within the mandatory limits of the LA. For employees of industrial enterprises, the working hours may not exceed 45 hours per week. The same limit applies to office, technical and other white-collar employees. Employees of manufacturing firms may not work
longer than 50 hours per week. No restrictions regarding maximum working hours exist for high level employees as the LA does not apply to them.

It is common to reduce the maximum working hours by agreement by providing, for instance, 42.5 regular working hours. Many companies have introduced flexible working hours by providing minimum presence hours of the employee (e.g. from 8.30 – 11.30 am and 1.30 – 4 pm) while the employee is free to allocate the remaining working time.

(ii) Overtime and LA-overtime

Overtime usually refers to hours worked in excess of the agreed regular working hours (e.g. 8.5 hours per day in the case of 42.5 hours per week). The employee is obliged to perform overtime work if required. Overtime work must be compensated. If it is not agreed that overtime is compensated by additional time off, the employee must be compensated based on his regular salary, including an additional 25%. The employer can, however, avoid such additional payments by an agreement with the employee providing that any special compensation for overtime is already included in the monthly salary. It is advisable to at least contractually waive the additional salary pay of 25%.

The possibilities to contractually regulate overtime compensations are limited by the mandatory overtime provisions of the LA. Overtime in the sense of the LA (hereinafter called LA-overtime) is overtime which exceeds the maximum working hours provided in the LA. Hence, LA-overtime are working hours performed in excess of 45 or 50 hours per week, depending on the category of employee. Such LA-overtime must be mandatorily compensated. If there is no agreement about compensation by time off, the compensation is calculated based on the hourly salary plus an additional 25%. In the case of office, technical and other white-collar employees compensation for LA-overtime is only due if it exceeds 60 hours per year. Again, these principles do not apply to high level employees. From high level executives, it is expected that they work more than regular working hours and it is assumed that their high wage already compensates for additional efforts.

Compensation for overtime

The contractually agreed regular working hours of secretary S. amount to 42 hours per week. The maximum working hours according to the LA are 45 hours. Last year she has accumulated 160 overtime hours.

- If the employment contract provides that the compensation for overtime is already included in the salary of CHF 4'000, S. can only claim a
compensation for LA-overtime amounting to CHF 4'116.25.

- If the employment contract does not mention overtime compensation, all hours worked in overtime (including any LA-overtime) must be compensated at a rate of 125%.

(iii) Vacation

The employee must be granted at least 4, until the 20th birthday at least 5 weeks of paid vacation. Vacation days falling on public holidays are not deducted from this entitlement. If the recreational purpose of the vacation has been prevented, for instance because of sickness or accident of the employee during vacation, additional vacation days must be granted. On the other hand, the employer has the right, according to the specific prescriptions of the law (art. 329b CO) to proportionally reduce the vacation entitlement due to an incapacity of the employee of a certain duration:

<table>
<thead>
<tr>
<th>Admissible vacation reduction by the employer</th>
</tr>
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</table>

- If the employee is incapacitated from work without his fault and such incapacity has lasted two full months during one year of service, the vacation entitlement may be reduced by one twelfth for each full month starting from the second month of incapacity;

- If the employee is incapacitated from work by his own fault for a duration of more than one month (e.g. unpaid leave, skipping work) during one year of service, the vacation entitlement may be reduced by one twelfth for each full month.

- No vacation reduction is admissible if a female employee is incapacitated during a period of up to two months due to her pregnancy or due to her maternity leave of 14 weeks.

The time of vacation is determined by the employer. He has to give due consideration to the preferences of the employee and grant him the necessary time to plan the vacation. In the event of a dispute, the employer has to prove if and how many vacation days the employee has drawn. Therefore, it is advisable to keep the necessary internal records.

To ensure the recreational purpose of the vacation, the law mandatorily provides that the employee must be granted **at least two continuous week of the vacation**. For the
duration of the employment contract, it is prohibited to compensate vacation entitlements by salary payments. The employee looses his right to paid vacation if he violates his duty of loyalty and frustrates the recreational purpose of the vacation by exercising another remunerated activity.

The employer may, in the interest of the employee, grant the employee a period of unpaid leave. The employee has, however, no right to be granted such leave.

(iv) Time off and short-time exemptions from work

All employees have the right to one weekly resting day (in principle Sunday). Employees, to which the LA applies, have the right to an additional half day off per week. Also, the employee must be granted the usual hours and days off. These are short time exemptions from work due to special occasion such as, for instance, medical visits, visits to public authorities, testimonies, residence changes, cases of death in the family or marriage of close relatives. After termination notice the employee must be granted the required time off to apply for a new job. With the spreading of flexible working hours, the importance of short time exemptions from work has decreased, as the employee can now be expected to arrange his personal affairs during time off.

d) Employee inventions

If the employee makes an invention or creates a design during his occupational activity and in fulfilment of his contractual duty, the right to the invention directly lies with the employer ("service invention"). If, on the contrary, the invention is made during the occupational activity of the employee but not in fulfilment of the contractual duty, the invention is considered as a so called "free invention" which pertains to the employee. This is the case when the employee makes an invention during the performance of work for the employer but in absence of a contractual duty to invest his efforts in the invention made. The employment contract may provide, however, the right of the employer to request the transfer of the rights in free inventions against a reasonable remuneration. The employee can thereby be forced to sell this invention to the employer. It is highly recommended to include such a transfer of rights in the employment contract. The same applies to inventions which are not made during the professional activity for the employer but relate to the products and services of the employer's enterprise.

It is essential that the employer not only ensures that the ownership in inventions (and the respective patent) is transferred, but also the intellectual property rights in connection with the invention (in particular copyright or software right; see part 3 E).
e) **Non-compete**

Based on the duty of loyalty, the employee must safeguard the employer's business secrets. **The duty of confidentiality** also persists after a certain period following the termination of the employment relationship.

For the duration of employment, the employee is prohibited from performing any competing activity; regardless of whether the employee has insight in business secrets or not. If the employee has insight in the customer base or business and fabrication secrets and the use of such information has the potential to seriously harm the employer, the employment contract can include a **non-compete** provision. The non-competition clause prohibits the employee to engage any activity **after termination** of the employment contract if such activity would compete with the employer's business.

A non-compete must not unduly burden the professional advancement of the employee. To protect the employee, the law provides the following restrictions to non-compete clauses:

- The non-compete must be agreed in writing and its scope must be defined. In particular, it must be limited in **terms of duration, territory and competing activity**. A non-compete may never exceed the duration of three years. This maximum duration is often reduced by courts along with a respective reduction of the agreed liquidated damages. Therefore, it is advisable in most cases to limit the non-compete to approximately 18 months. In terms of territory the non-compete cannot exceed the geographic area covered by the employer's business.

- The employer must have an **effective interest** in the non-compete.

- The consequences of the violation of the non-compete must be clearly defined. Employment contracts usually provide for **liquidated damages** in case of violation of the non-compete. The amount of the liquidated damages must be **reasonable** in relation to the employee's salary. If the employer's damage is higher than the punitive damages, the employee must cover the entire damage if it is shown that he violated the non-compete by his fault. The effective enforcement of the non-compete (by a court order prohibiting the competing activity) is only possible if this has been explicitly provided in the employment contract. Non-compete obligations are, however, rarely effectively enforced.

- The non-compete lapses if the employer terminates the contract without well-founded reasons on behalf of the employee or if the employee himself terminates the contract for well-founded reasons on behalf of the employer.
Checklist non-compete

- Written agreement with limitations in
  - time (approx. 18 months)
  - territory
  - prohibited activity
- Effective interest of the employer
- Consequences of violation: liquidated damages
- Right to effective enforcement to be agreed contractually

f) Data protection

The employer can only process data relating to the employee if such processing is necessary for the evaluation of the qualifications required for the employment or for the implementation of the employment contract. According to this principle, the employer may process data from diplomas and references to reasonably evaluate a job application or ask the employee to indicate his address and bank account details to administrate the employment relationship. It is also permissible to require information on the number and age of the employee's children to calculate the respective child allowances. More provisions and details regarding data processing are provided in the Data Protection Act. In contrast to the examples mentioned above, information on hobbies or familiar problems do not relate to the employment relationship and are therefore inadmissible. To avoid gender discrimination, questions regarding a possible pregnancy are also prohibited.

A candidate confronted with an inadmissible question may either deny a response or give a false response. The candidate has, as a justifiable self-defence, the "right to lie"; i.e. even a candidate in the third month of pregnancy is allowed to answer with a clear "no" to the question of pregnancy.

g) Termination of employment

(i) Overview

The employment relationship is either terminated by the lapse of a certain time period or by notice. If the employment contract has been concluded for a fixed duration, it
automatically ends with the lapse of the defined term. In contrast, employment relationships entered into for an indefinite term can only be terminated by due notice by either of the parties.

Employment relationships with unlimited terms start with a **probationary period** of one month which may be extended up to three months by written agreement. Unless the contract provides otherwise, during the probationary period the contract may be terminated by either party with a notice period of seven days.

**After the probationary period**, the employment contract may be terminated by the end of the month respecting the following notice periods:

- one month in the first year of service
- two months in the second until ninth year of service
- three months after the ninth year of service

The notice periods may be amended by written agreement. A notice period of less than one month is, however, only admissible for the first year of service and only if provided by a CBA. Termination periods must always be identical for both parties. The termination notice must reach the recipient at latest on the last day of the month, i.e. the *date of the post stamp* is **not relevant** in this case. A delayed termination notice becomes effective as of the following termination date. The termination notice must be unconditional and the termination notice is irrevocable once it has reached its recipient. A termination notice may therefore only be revoked with the consent of the recipient. For practical reasons, in anticipation of a possible evidentiary procedure in court, it is advisable to send the termination notice by registered mail.

A dismissal with the option of altered conditions of employment is possible under certain conditions.

<table>
<thead>
<tr>
<th>Notice periods</th>
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<tbody>
<tr>
<td>☑ Probationary period: termination at any time respecting a notice period of seven days</td>
</tr>
<tr>
<td>☑ First year of service: one month</td>
</tr>
<tr>
<td>☑ Second to ninth year of service: two months</td>
</tr>
<tr>
<td>☑ Starting from the tenth year of service: three months</td>
</tr>
<tr>
<td>☑ Within the restrictions of the law, termination periods may be contractually amended.</td>
</tr>
</tbody>
</table>
(ii) Time limitations to the right of termination (untimely termination)

The law provides certain restrictions in terms of time, so called blocking period during which the employer is not allowed to terminate the contract.

- **Blocking periods**

  - During mandatory military, civil and red cross service and, as far as such service exceeds eleven days, including 4 weeks before and thereafter;
  - in case of partial or complete incapacity to work by no fault of the employee in the event of accident or sickness: 30 days in the first year of service, 90 days in the second until fifth year of service and 180 days starting from the sixth year of service;
  - during pregnancy and 16 weeks after birth;
  - during participation in a rescue action of the confederation in a foreign country with the consent of the employer.

A termination notice issued during one of the aforementioned blocking periods is **ineffective** and must be repeated after the lapse of the blocking period. If the termination notice was issued before the start of blocking period but the notice period falls within such period, the termination remains valid but the notice period is extended by the duration of the blocking period.

- **Examples**

  - Employee X is in his second year of service and a termination notice of 2 months applies. From January 15 until January 30, he is incapacitated from work due to sickness (blocking period). His employer issues a termination notice on January 15. The termination is ineffective and must be repeated after the lapse of the blocking period.
  - Employee M is terminated by her employer in March and the notice period would lapse at the end of May. In April employee M realises her pregnancy. As a consequence, the notice period does not lapse by the end of May but is extended by the duration of her pregnancy and an additional 16 weeks after birth.
  - Employee S is in his fifth year of service and has been incapacitated from work for more than three months already. Despite his continued incapacity, his employer may terminate the contract as the blocking
In case of a (justified) immediate dismissal for cause, there is no protection from untimely dismissals and the blocking periods are irrelevant. The same applies to the case of termination of the contract by mutual agreement, provided that such termination agreement does not merely benefit the employer and circumvent the termination provisions of the law.

(iii) Material restrictions to the right of termination (abusive termination)

Terminations made for certain reasons specified in the law are considered as abusive. Examples of abusive terminations are terminations because of age, gender, homosexuality, race, religion, membership to a political party, or because the employee asserts his contractual rights (see list of abusive grounds in art. 336 CO and art. 3 et seq. GEA [= Gender Equality Act = GLG]). An abusive termination is effective, i.e. terminates the employment regardless of the abusive reason, but the terminating party may be condemned to pay a penalty of up to 6 months salaries to the terminate party.

(iv) Immediate termination (termination with cause)

Every employment relationship can be terminated immediately if the termination is made for cause, i.e. for severe misconduct of the other party. Such cause is only given if the continuation of the employment relationship until the next ordinary termination date (lapse of the fixed term or notice period) can not reasonably be expected from the terminating party. Events of misconduct justifying a termination for cause are, for instance, fraud, theft, misappropriation, forgery of documents, repeated and unexcused absence from work, disclosure of business secrets or activities competing with the employer. In case of less severe violations, the termination for cause may only be valid if it was preceded by a clear and explicit notice to the employee that in case of repeated violation, an immediate termination will be considered. No reason for an immediate termination is the incompetence or a bad performance of the employee. The courts are rather reluctant in approving terminations for cause. If an event of severe misconduct is given, the notice for immediate termination must be issued rapidly (usually within two to three working days). Otherwise, the court may conclude that the continuation until the next regular termination date can be reasonably expected from the terminating party.

An immediate termination without cause remains valid but the terminated party has a claim for salary continuation until the date on which the employment could have been
regularly terminated. In addition, the terminated party has a claim for a penalty payment of up to six months salaries. The courts rarely grant more than two months salaries.

Due to the consequences of an unjustified immediate termination and the uncertainty about whether the courts will qualify a specific misconduct to be sufficient to justify the termination for cause, in cases of doubt the ordinary termination of the employee with immediate exemption from work is preferable. Despite the employee's release from his duty to work, he remains entitled to all regular salary payments until the lapse of the termination period. Unless the parties have agreed otherwise, the remuneration received from another activity is deducted from such payments. The days of work exemption can, in principle, be cleared with remaining vacation and overtime entitlements. The employee has the right, however, to plan his vacation in order to guarantee the recreational purpose. Therefore, the period of exemption from work cannot be cleared with a vacation entitlement during the first weeks after termination.

3. Duties of the executive management and/or the board of directors

If a company is set up to operate a business, it is deemed as the employer. If the founders of the company intend to get involved in the management, they have to enter into an employment agreement with the company as executive managers or members of the board of directors. Therefore, the comments made on employment law in this chapter also apply to the executive managers and members of the board of directors. Further corporate duties applying to a specific group of persons is elaborated on in part 2 C.8.

4. Residence and permanent settlement of foreign nationals

a) Workers from EU and EFTA member states and their families

On June 1, 2002, the Bilateral Agreement on the Free Movement of Persons between the European Union (EU) and Switzerland and the Amendment to the Agreement of the European Free Trade Association came into force (hereinafter referred to as AFMP). The AFMP includes the following states: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Great Britain, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and Switzerland. The agreement governs the free movement of persons between Switzerland and these states. In all countries party to the AFMP, both employed and self-employed workers have the right to settle and take up paid work. This opening of labour markets is accompanied by the mutual recognition of diplomas and coordination of social security systems. People without employment such as pensioners and students also have the right to enter and reside providing they have a health insurance and sufficient financial means of their own. Short and long-term
residence quotas do no longer apply to parties of the AFMP since June 2007. However, until May 31, 2014, Switzerland may make use of a safeguard clause in case of an excessive increase in immigration. The safeguard clause allows it to reintroduce quantitative limits (quotas).

On April 1, 2006, the Protocol to the AFMP (hereinafter referred to as the Protocol) came into effect. The Protocol includes the following states: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. The free movement of persons does not apply to Bulgaria and Romania yet. Negotiations are conducted regarding the extension of the free movement of persons to these new member states. According to the Protocol, Switzerland is allowed to apply to the parties of the Protocol restrictions of access to its labour market until April 30, 2011. In addition, the safeguard clause mentioned above remains valid until May 31, 2014. The following restrictions are valid until April 30, 2011: National priority, prior control of wages and working conditions as well as quotas. Regarding the quotas, the number of long-term permits (5 years) and short-term permits (max. 364 days) is limited. However, the workers who come to Switzerland for less than four months are not subject to quotas, although further restrictions apply. The quota for long-term permits will be gradually raised from 1'700 in 2006/2007 to 3'000 in 2010/2011. In the same time period, the quota for short-term permits will be raised from 15'800 to 29'000. The principle of national priority provides that foreign workers may only be employed if the employer cannot recruit native workers with suitable qualifications. If an employer wishes to recruit a worker from abroad, he must inform the appropriate authorities of the reasons why the vacancy cannot be filled by a native worker. Finally, the control of wages and working conditions implies that the authorities control the compliance of the employment contract with the law before issuing the permit.

**Employees**

For workers coming from the states parties to the Protocol, a work and residence permit are required during the transition period. The work permit is granted as long as the requirements mentioned above (National priority, working and wages conditions as well as quotas) are fulfilled. However, short-term workers (up to four months) are not subject to quotas. The transition period lasts until April 30, 2011. For workers coming from the states parties to the AFMP, no work permit is required. A residence permit, however, is still necessary if the employee works in Switzerland for more than 90 days per year. The cantonal authorities will issue it if the worker presents an employment contract. After expiry of the transition period, citizens of the AFMP and the Protocol will be treated equal.

The length of the residence permit depends on the employment contract. If the employment contract lasts less than a year, a short-term resident permit is issued. If the employment contract runs for a year or more, or has no fixed term, the worker is
eligible for a long-term residence permit. Seasonal workers receive a short-term permit.

Short-term residence permits are issued for the period the employment contract runs. Upon presentation of a new employment contract, the residence permit will be extended for the period of the new contract.

Long-term residence permits are valid for five years. The permit will be extended for a further five years if the worker presents an employment contract running for a year or more. Upon the first renewal, however, the validity of the permit may be limited to one year if the employee has been involuntarily unemployed for more than twelve consecutive months.


- **Self-employed persons**

In general, citizens coming from a state party to the AFMP as well as citizens coming from a state party to the Protocol are entitled to work in Switzerland on a self-employed basis. The requirement is to pursue the economic activity at one's own costs and risks. The authority may require certain documents in order to check if the person fulfills the minimum conditions for a self-employed activity. It should be noted that the restrictions no longer apply to self-employed citizens coming from the new member states of the EU. As of May 31, 2007, they are treated the same as nationals from the EU.

The residence permit issued to self-employed people is valid for five years.

- **Cross-border commuters**

Since June 2007, cross-border commuters coming from a state party to the AFMP and cross-border commuters coming from a state party to the Protocol are entitled to complete geographical and occupational mobility. A previous stay in the frontier region of the neighbouring state is no longer required. In other terms, cross-border commuters need to get a work permit corresponding to the residence permit granted to citizens of the EU.

Until May 31, 2011, the restrictions such as the national priority, the controls on wages and conditions as well as the quotas will still apply to citizens coming from a state party to the Protocol.
• **Family reunification**

The family includes the wife, the husband and children under the age of 21 years or parents that are financially supported by the worker. The family of the worker is entitled to reside in Switzerland as long as the residence permit is valid.

The family members of a citizen coming from a state party to the AFMP are entitled to work in Switzerland regardless of their nationality. With regard to the family of workers coming from a state party to the Protocol, the same restrictions as for the workers (National priority, quotas as well as controls on wages and work conditions) apply until May 31, 2011.

**b) Workers from other states**

Persons coming from other states than EU and EFTA member states are admitted in Switzerland subject to rigorous provisions. The access requirements are listed in the Regulation on Limiting the Number of Foreign Nationals (RLNFN) and described in more detail in the Directives and Commentary on the Residence and Permanent Settlement of Foreign Nationals (DCRPSFN). In the following, only permits granted to people in employment will be examined as persons who wish to set up their own business in Switzerland are required to hold the C permit, which is granted after 10 years of residency in the country. Only in exceptional cases Swiss authorities may grant a residence permit prior this period.

First, the national priority applies to citizens of third states. They are granted access to the Swiss labour market only if an employer can prove that despite considerable efforts no suitable Swiss national or citizen from an EU or EFTA state could be found to fill a vacancy.

The employer has to register vacant positions with the Regional Employment Offices together with a request to register the vacancy in the European Employment System. As soon as a candidate has been put in contact with the employer and dismissed, the employer receives a questionnaire in which he can state the reasons why the potential employee was not hired. Furthermore, the employer must explain to the authorities why the usual recruitment was not successful. Suitable proof includes job advertisements and the registration with an employment agency.

Second, the employer must submit documentary proof of the applicant's qualifications. Only well-qualified workers are admitted. A person is deemed qualified if he has a degree from a university or a technical college and several years of work experience. The authorities review the person's qualifications on the basis of their curriculum vitae, their certificates and references. Original documents including a translation must be presented. The condition of being well-qualified applies to all industrial and services
sectors. However, in certain sectors more stringent qualification requirements may apply.

Third, the employer has to show any special reasons he may have for hiring a particular person. The Swiss authorities are used to treat the following reasons as special reasons complying with the law: joint ventures, service guarantee work for products from the country of origin, temporary duties as part of large projects for companies with headquarters in Switzerland, performance of special assignments, training programs, teaching position at a university, international businesses. This list is not exhaustive.

Fourth, the employment contract has to comply with the wages and work conditions of the region. The employer has to enclose to the application the contract which has been signed by the parties. The contract should present the following clause: "contract only valid upon the condition that the authorities grant a work permit".

Fifth, work permits are subject to yearly quotas which are divided into two categories: long-term permits and short-term permits. The following quotas are applicable: 4'000 long-term permits (2'000 for the Federal state and 2'000 for the cantons); 7'000 short-term permits (3'500 for the Federal state and 3'500 for the cantons). Residents for less than 4 months are not subject to quotas.

Finally, the residence permit is granted for one year (Permit B) and is yearly renewed by the authority unless the employee perpetrated criminal offences.

c) **Addresses recommended**

<table>
<thead>
<tr>
<th>Addresses</th>
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<tbody>
<tr>
<td><a href="http://www.bfa.admin.ch">www.bfa.admin.ch</a>: Homepage of the Federal Office for Migration</td>
</tr>
<tr>
<td><a href="http://www.europa.admin.ch">www.europa.admin.ch</a>: Homepage of the Federal Office for Integration. Questions regarding the relationship EU - Switzerland.</td>
</tr>
<tr>
<td>For further information, it is strongly recommended to consult the website of the local authority: <a href="http://www.auslaender.ch/kontakt/frepos/adressliste_d.asp">www.auslaender.ch/kontakt/frepos/adressliste_d.asp</a>.</td>
</tr>
</tbody>
</table>
D. **Social insurance law**

1. **Basics**

Various social risks are covered by different types of social insurance laws, namely old-age, death, illness, accident, unemployment, invalidity, maternity, loss of earned income resulting from military services and insufficient means for covering elementary living costs (partially). So far, based upon the Swiss Federal Constitution (FC), 10 social insurance federal laws have been decreed. The ones most important to businesses and the management thereof shall be briefly outlined in the following. As far as cantonal law is concerned, consideration has to be paid in particular to the regulation of children's allowances which are subject to different regulations depending on each canton (even though each canton must comply with certain federal provisions in the context of their own legislation).

2. **Three-pillar system**

The Swiss Social Insurances are based on the so-called three-pillar system (art. 111 para. 1 FC):

The three pillars of the Swiss Social Insurance Law

- **1\(^{st}\) pillar:**
  - old-age and survivors' insurance (*AHV; Alters- und Hinterlassenenversicherung; assurance-vieillesse et survivants*)
  - invalidity insurance (*IV, Invalidenversicherung; assurance-invalidité*)
  - additional benefits, *i.e.* pensions to cover basic living costs (*EL; Ergänzungsleistungen; allocations familiales*)

- **2\(^{nd}\) pillar:** occupational benefit plans concerning old-age, survivors and invalidity (*BVG; berufliche Vorsorge; prévoyance professionnelle*)

- **3\(^{rd}\) pillar:** individual savings to meet further needs

The basic idea of this concept is that the three pillars complement each other in order to provide a solid basis for each individual to receive the best possible insurance against the consequences of the social risks old-age, death and invalidity.
3. **Old-age and survivor's insurance (AHV; Alters- und Hinterlassenenversicherung; assurance-vieillesse et survivants)**

   **a) Basic principle of the AHV**

   Along with the invalidity insurance (IV) and the additional benefits (EL), the AHV constitutes the first pillar of the Swiss social insurance system. The AHV provides primarily old-age and survivor's pensions. The AHV is financed through premiums of the insured persons and employers as well as contributions of the Confederation and the Cantons.

   **b) Insured persons and benefits of the AHV**

   The AHV is a compulsory insurance primarily for persons with residence in Switzerland as well as persons who are employed in Switzerland. It is possible for Swiss citizens as well as citizens of the EU or EFTA-nations with residence outside of those nations to receive optional AHV insurance under certain conditions.

   Men are entitled to old-age pensions from the age of 65 on, women from the age of 64. Children up to the age of 18, or 25 if they are in full-time education, whose mother or father has died, are entitled to an orphan's pension. In addition to their old-age pension, men and women are entitled to receive a child's pension for each child that would be entitled to an orphan's pension in the case of their death. Women who have dependent children or women without dependent children who are over the age of 45 and have been married for at least 5 years at the time of their spouse's death are entitled to a widow's pension.

   The amount of the pension is calculated based on the allowable years of contribution and the average annual income (in the case of married insured persons, the split annual income for the duration of the marriage, including educational and care-taking bonuses). A full pension is issued only if the insured has paid his contributions consistently and without interruption. A minimal full pension amounts to CHF 1'105, a maximal full pension to CHF 2'210. In line with the introduction of the flexible retirement age, it is possible for men and women to receive their retirement pension 1 or 2 years earlier, or postpone it for 1 to max. 5 years, respectively (of course, resulting in a reduction or increase of the pension amounts, as the case may be).

   **c) Contributions**

   In case of employed persons, the contributions to the AHV currently amount to 8.4% of the income applicable according to AHV law. Said salary includes any compensations or benefits obtained by the employee from any existing or former employment. These contributions are to be paid in equal amounts by the employer and the employee. Anyone employing insured employees is considered to be an employer. The employer must deduct the amount owed by the employee from the employee's gross salary and pays it, along with the amount he owes himself, to the insurance.
Administrative charges to the AHV are to be paid exclusively by the employer. The contributions of the AHV have to be paid together with the contributions to the IV and the EO. Altogether these contributions amount to 10.1% of the salary. The employer is liable for the delivery of these contributions (including ALV contributions) personally and, according to the practice of the relevant courts, virtually regardless of negligence or fault. According to the practise of the Federal Court, it is possible, to call upon the board of directors as "employer" in the case of corporations (in practise, irrespective of any fault or negligence on their part).

The insured persons are primarily subject to contributions as long as they are employed in Switzerland. Exempt from the obligation to contribute to AHV are employed children until December 31 of the year in which they turn 17, as well as contributory family members, who do not receive money compensation, until December 31 of the year in which they turn 20.

d) Procedure for payment of contribution

The founder of a company is obligated to register the company with a compensation fund after the entry of the company in the commercial register. Further information concerning this matter is available at the respective district offices of the AHV.

The employer is obligated to register all employees with the AHV compensation fund.

As a general rule, the contributions (allotments of both employer and employee) are to be paid monthly, unless the annual sum of salaries does not exceed CHF 200'000 (or quarterly otherwise and, under certain restrictions as of January 1, 2008, even annually). The periodic contributions are only advance payments, the amount of which is determined by the compensation fund according to the estimated sum of salaries. The definite invoice is issued on the basis of the account of the employer at the beginning of the following year.

The latter is to be taken into consideration in particular if there is a material change in the number of employees or total amount of salaries over the course of the year. Such changes should be reported to the compensation fund in order to avoid "surprises" at the beginning of the following calendar year.

If a person or entity subject to contribution payments has failed to pay or has not paid the full amount of the contribution due, it is obligated to deliver supplementary payment in the same amount plus late interest.
4. Invalidity insurance (IV; Invalidenversicherung; assurance-invalidité)

a) Basic principle of the IV

As the AHV, the IV is also part of the first pillar of the Swiss social insurance system. The IV undertakes to deliver certain benefits and payments in the case of invalidity. Any insured persons are entitled to benefits from the IV in the event they are partially or entirely unable to pursue their previous employment or field of responsibility due to impairment to their health. Such health damage has to be permanent or at least persist for a longer period. However, it is not relevant whether such impairment to someone's health is of physical, psychological or mental nature, or whether the impairment is congenital or incurred as a consequence of illness or accident. The financing of the IV operates in the same way as the financing of the AHV.

b) Insured persons and benefits of the IV

Persons, who are insured with the AHV, be it optional or compulsory, are insured with the IV as well.

All insured persons under the IV are mainly entitled to rehabilitation measures, which are aimed at promoting the professional (re)integration of disabled individuals as well as improving/restoring their earning capacity. The guiding principle here is "rehabilitation before pension". In the course of this rehabilitation, the insured persons receive daily allowances regardless of their marital status, which normally amount to 80% of the recipient's income applicable to AHV law that was earned before the damage to the recipient's health occurred. Should the rehabilitation option have been exhausted, the insured is entitled to a pension, the amount of which is basically calculated in the same manner as the AHV pension. Under certain conditions, children's pensions are issued in addition.

Based on this calculation of the pension, the exact percentage, which the claimant is entitled to, is determined by the degree of disability. Regarding employees, this degree is assessed based on the ratio between the income without health impairment and the (reasonable) income after the incurrence of such impairment. Claimants with a degree of disability of at least 40 percent are eligible for a quarter pension. If their degree of disability is at least 50 percent, they will be eligible for a half pension and a 60 percent disability entitles them to a three quarter pension. Finally, only claimants with over 70 percent disability are entitled to a full IV pension. Helplessness allowances are awarded to claimants who require the help of a third person to perform day-to-day tasks such as dressing, eating and bathing, or who need permanent care or one-to-one supervision.

In order to be entitled to benefits from the IV, insured persons are required to register with the IV office of their canton of residence. Application forms are provided at the respective IV offices, as well as the AHV compensation fund offices and branch offices thereof. It is important, however, that the claimant applies immediately after the occurrence of the event insured. As a matter of principle, the application is to be
filed before integration measures are carried out. In case of a late application, as a rule, benefits are only reimbursed for up to 12 month prior to the date of the application.

c) Contributions

The contributions to the IV currently amount to 1.4% of the income applicable according to AHV law. Employee and employer are to pay contributions of equal amounts. The contributions are paid along with the contributions to the AHV. Commencement and termination of the obligation to contribute are based on terms equal to those pertaining to the AHV.

d) Procedure for payment of contribution

The procedure for payment of contribution is the same as those applicable to the AHV.

5. Fund for loss of earned income / maternity insurance (EO; Ergänzungsleistungen; allocations familiales)

a) Basic principle of the EO

Besides in the event of maternity, the fund for loss of earned income (EO) provides compensation for loss of earnings for those serving in the army, carrying out civilian and protection service (Zivilschutz; protection civile), or taking part in national or cantonal "Youth and Sport" leadership courses, in every case while the respective person is carrying out such services.

b) Insured persons and benefits of the EO (other than maternity insurance)

All persons carrying out such services are entitled to EO compensations regardless of their marital status. In case of continued salary payments through the employer, the compensation is paid directly to the employer.

The amount of the compensation is calculated in accordance with the table of compensation, which can be obtained at the office of the EDMZ or the appropriate AHV compensation fund office. In the case of employed persons, the total amount of compensation, consisting of a basic compensation plus child allowances, shall neither exceed the average income prior to the performance of the service, nor, at any rate, CHF 215 per day.

c) Maternity insurance

Since July 1, 2005, the EO also includes insurance coverage in the event of maternity. Under certain conditions, women are entitled to up to 80% of their previously earned salary, in any event not more than CHF 172 per day for a maximum duration of 14 weeks following giving birth. In principle, in order to be entitled for such payments,
women must comply with the following conditions: minimum insurance period of 9 months under AHV before giving birth; during at least 5 months of this 9 months period, the insured woman must have been employed by at least one employer, or, alternatively, must qualify as being self-employed. However, it is not necessary that women return to work after the maternity leave in order to receive such payments.

d) **Contributions and procedure of payment of contributions**

Contributions to the EO amount to 0.3% of the income applicable according to AHV law. Employee and employer are to pay contributions of equal amounts. The employer must transfer both contributions to the compensation fund. The contributions are charged along with the contributions to the AHV. Commencement and termination of the obligation to contribute to the EO are based on terms equal to those pertaining to the AHV.

6. **Unemployment insurance (ALV; Arbeitslosenversicherung; assurance-chômage)**

a) **Basic principle of the ALV**

Unemployment insurance provides benefits in the case of loss of employment, shortened working hours (*Kurzarbeit; chômage partiel*) or insolvency on the part of the employer. This insurance also pays for re-integration measures.

b) **Insured persons and benefits of the ALV**

Any employee who is insured under AHV is also subject to ALV. Self-employed persons are not entitled to ALV benefits.

However, it has to be taken into consideration that although the owner of an entity (*i.e.* the majority shareholder employed by the company) is generally seen as employee, due to his status similar to that of an employer, he is not entitled to short time or unemployment benefits unless the company has been liquidated.

Entitlement to benefits from the unemployment insurance requires full or partial unemployment as well as employability of the insured person. The unemployment has to result in loss of income. In addition, it is required that the insured has held a job liable for contributions for the duration of at least 12 months in the last two years prior to the application. An exception to this rule may be made if the claimant was exempt from the obligation to contribute due to schooling or illness exceeding such duration of at least 12 months.

Unemployment benefits are paid out after the lapse of a waiting period of normally 5 days by way of daily allowances. A full allowance corresponds to 80% of the insured income (usually the income applicable to AHV law that was earned through one or several employments during the last month prior to unemployment, but max.
Insured persons who are not obliged to support children, who receive a daily allowance amounting to more than CHF 140 and are not disabled, are entitled to a daily allowance in the amount of 70% of aforementioned income. Depending on the age of the insured as well as the accounted duration of contribution 260 to 520 daily allowances are disbursed.

In the event an employer files for bankruptcy and the employees' salaries remain unpaid, the insured is entitled to insolvency compensation pertaining to salary claims regarding the last 4 months of the employment. Persons who considerably influence the decision making of the employer, due to their status as an owner or as a member of its board of directors, are not entitled to insolvency compensation.

In case of a non-permanent reduction of working hours or a non-permanent, unavoidable and economically caused, complete cessation of employment for some time in a company, the insured (other than the owners or members of the board of directors of a company) is entitled to compensation due to short time work. The compensation is paid to the employer. Employers who plan to introduce short time work into their company shall apply in writing with the appropriate cantonal office at least 10 days prior to the commencement of the short time work.

c) **Contributions**

The contributions to the unemployment insurance amount to 2% of the income applicable to AHV law up to CHF 126'000. No contributions are charged for parts of income exceeding CHF 126'000. The contributions are to be paid to equal parts by the employer and the employee.

The beginning and termination of the obligation to contribute to the ALV are based on terms equal to those pertaining to the AHV.

d) **Procedure of payment of contributions**

The payment of contributions to the ALV is settled by the employer along with and based on equal terms as the contributions to the AHV.

7. **Accident insurance (UV; Unfallversicherung; assurance-accidents)**

a) **Basic principle of the UV**

The accident insurance provides benefits in case of economical consequences of work and non-work accidents and occupational diseases. In the case of part time employees, non-work accidents are only covered if the weekly working hours amount to at least 8 hours. However, even with a level of employment amounting to less than 8 hours per week, accidents incurred on the way to work count as work accidents. Any other kind
of accident – the non-work accidents – is to be covered by accident insurance through a health insurance company.

Certain employment sectors require that accident insurance be contracted with the SUVA. In any other case, the insurance company may be chosen freely. Regarding newly formed companies, it is advisable that such possible requirement are clarified as early as possible. The employer is to complete application with the insurance company no later than 14 days after the incorporation of the company.

b) Insurance persons and benefits of the UV

Accident insurance is compulsory for any person employed in Switzerland. An accident is defined as sudden and involuntary injury caused to the human body by an external factor with the consequence of impairment to physical or mental health as well as death. The distinction between accident according to law and illness is important because such distinction provides the basis for either payments under the UV or alternatively, under health insurance (the latter, however, does not know pensions concerning invalidity or death). In contrast, there is no such distinction between illness and accident in connection with the IV due to the fact that in that class of insurance, the cause of invalidity is of no importance.

Under the UV, the insured persons may primarily claim suitable treatment for the consequences of an accident; however, the cost of travel, transport and rescue as well as the transport of funeral costs are also covered, as well as other auxiliary measures (i.e. prosthesis). The insured is entitled to a daily allowance in case of full or partial inability to work as a consequence of the accident. In case of full inability to work, the daily allowance amounts to 80% of the insured income (usually the income applicable to AHV law during the last month prior to the accident, but max. CHF 10'500) and is disbursed from the third day after the day of the accident (for the first two days, the insured is entitled to a wage continuation in the amount of 80% of the regular income by the employer; see part 3 C.2.b)(iii)). In case of invalidity the insured is entitled to invalidity pension amounting to 80% of the insured income (full invalidity). The degree of disability of employed individuals is assessed based on similar terms as in connection with the IV. However, there is no gradation of pension based on the assessed degree of disability, but the pension, is paid according to the calculated degree starting from a degree of disability caused by accident of 10%. If the insured is also entitled to a pension from the IV or AHV, he is granted a complementary pension in the amount of max. 90% of the insured income. In case of permanent impairment to the mental or physical integrity (i.e. the loss of a finger), the insured is entitled to an integrity compensation. In the case of death of the insured, a survivor’s pension is provided and in case of incurred helplessness additional helplessness compensation.

In case of an accident incurred to an employee, the employer must notify the insurance company immediately.
Attention must be paid to the fact that the employee is responsible for accident coverage by a health insurance company in case of unemployment. Insurance coverage is terminated 30 days after the day on which the entitlement to at least half a salary ends. It is possible for the insurance company to offer the opportunity to prolong the insurance for up to 180 days by way of special agreement.

c) **Contributions and procedure of payment of contributions**

The premiums for the compulsory insurance regarding work accidents and work-related illnesses are to be paid by the employer, those for the compulsory non-work accident insurance by the employee. Of course, the parties may agree otherwise if to the benefit of the employee.

The employer must pay the total amount of the premium. Therefore, he shall deduct the employee's share from the employee's gross salary. The premiums are to be paid in advance for each financial year. At the end of the financial year, the insurance company determines the definitive premium according to the actual sum of salaries.

The amount of the insurance premiums varies in accordance with the risk level of the company.

8. **Occupational benefit plan of the 2\textsuperscript{nd}/3\textsuperscript{rd} pillar**

a) **Occupational benefit plan of the 2\textsuperscript{nd} pillar**

(i) **Basic principle of the 2\textsuperscript{nd} Pillar (BVG; *Berufliche Vorsorge*; *prévoyance professionnelle*)**

Along the same lines as in the 1\textsuperscript{st} pillar, the 2\textsuperscript{nd} pillar provides for old age, survivor's and invalidity benefits. Unlike the AHV/IV, however, the insured persons accumulate in the course of his or her career a personal fund, from which he or she will receive periodic benefits (funding principle) when reaching pension age. Such benefits typically exceed the benefits of the AHV and normally constitute an indispensable source of income after a person's retirement. Details are administered by the BVG and the corresponding regulations.

Young entrepreneurs who only employ a few employees are advised to join a collective BVG pension fund which exist for different industries. It is also possible to join a collective BVG insurance scheme of a bank or of an insurance company or to join the BVG recovery fund (*Auffangeinrichtung*). In any event, however, contracts are to be compared to each other regarding benefits, costs and administrative procedure.

The BVG explicitly provides for the possibility to pay out part or all of the accumulated funds in such BVG pension fund in the event an insured person decides to switch from dependent employment to self-employment (however, these withdrawn
monies will be taxed upon such payout). If an employee leaves his or her position in order to found a start-up company, he or she may require the provision funds to be paid out and invest these in the new enterprise. However, if in turn such entrepreneur re-employs himself through the newly formed or acquired AG or GmbH, he/she is once again considered an employee according to insurance law and therefore not entitled to such pay-out of 2nd pillar accumulated capital. Of course, it is advantageous for an entrepreneur to have non-interest bearing start-up capital available in the event of a payout from the BVG pension funds. However, should the enterprise fail to be successful – which does occur frequently – the young entrepreneur definitely loses any savings regarding his or her old-age capital. In addition, that capital is no longer safe from enforcement proceedings in the event of unpaid creditors. Therefore, such payout is only advisable if there is enough time to rebuild the old-age capital even in the event of a failure of the start-up. In such cases, however, the capital available for such a payout will typically not be very high. In the event that a person already has accumulated significant old-age capital but would be unable to rebuild such old age capital appropriately in the case of total loss, the payout of the old-age capital for the financing of a new enterprise is not advisable. Such course of action may endanger a person's financial existence after retirement. In addition, significant loss of insurance coverage may occur against the risk of disability and death, which are to be insured elsewhere.

(ii) **Insured persons and benefits of the 2nd pillar (BVG)**

BVG insurance is compulsory for employees with a gross salary of CHF 19'890 to CHF 79'560 per year. Employees are insured against the risks of disability and death from January 1 after they turn 17. In addition, they must contribute to old age pension benefits from January 1 after they turn 24. Outside of the mandatory scope, pension funds will frequently insure higher and sometimes even lower, incomes. The basis for the calculation of the BVG contributions is the **coordinated income** which shall ensure coordination between AHV/IV and BVG. That is, the gross salary will be reduced by the coordination deduction, which currently amounts to CHF 23'250 in order to calculate the insured salary under BVG. Self-employed persons may also be insured under BVG either by way of insurance under the 3rd pillar as further set out hereinafter, or, alternatively, by joining the same BVG pension fund as their employees.

Minimal benefits under BVG include an annual old age pension, which currently amounts to 7.1% of the cumulated old age capital for males and 7.15% for females, respectively (such percentage will be reduced gradually to 6.8% until the year 2014). In addition, invalidity and survivor's pension for widows, part and full orphans as well as child allowances are included in the compulsory benefits.

(iii) **Contributions and procedure of payment of contributions**

The contributions of employees must be paid half by the employer and half by the employee (except if agreed otherwise to the benefit of the employee between the
parties). The percentage amount of the coordinated income to be deducted is relatively low for the young insured (approximately 2 – 3% for the insured below 25). Thereafter, contributions increase gradually depending on the age of the insured (from 7% to 18% as regards contribution for old-age insurance coverage only whereas these funds bear annual interest in the amount of currently 2.5%).

b) Individual pension of the 3rd pillar

The benefits provided under the Pillar 1 and 2 plans are often insufficient to guarantee the accustomed standard of living when people retire. Accordingly, it is intended that pillar 3 fills this gap to the extent possible. Pillar 3 is divided into tied (Pillar 3a) and flexible pension provision (Pillar 3b). 3rd pillar investments are available as bank accounts (low charges, no tie-in, maximum flexibility), insurance policies (life or disability insurance only) or so called "combined insurance policies" with death cover and savings.

(i) Tied pension provision (Pillar 3a)

Pillar 3a is supported by the federal government by means of fiscal policy measures and promotion of home ownership. It enjoys a number of tax benefits, but is tied to statutory requirements. Employees may contribute - and deduct from taxable income in the tax period 2007 - up to CHF 6'365 into a 3rd pillar investment. For the self-employed who do not join the BVG funds of their employees, 20% of the taxable income up to CHF 31'824 (2007) may be contributed (such maximum amount to be adjusted periodically).

However, these contributed funds are blocked until five years before retirement-age or, alternatively, the start of self-employment, permanent disability, certain purchases of real estate or the permanent emigration from Switzerland. When the 3a investment is cashed in, tax is levied at a smaller rate than income tax and separate from the overall income (usually 3 – 15%).

(ii) Flexible pension provision (Pillar 3b)

Pillar 3b includes all savings, savings accounts, bonds, money market investments, equities, investment fund units, residential property etc. The saved capital can be withdrawn at any time. In contrast to tied pension provision, the flexible provision enjoys no tax privileges in principle (except for low maximum deductibles for insurance premiums in the amount of CHF 3'100 for tax subjects being married, CHF 1'500 for all others as regards federal income taxes).

9. Further information

Additional information on social security insurances is available on the following websites:
E. Intellectual property

1. Importance of intellectual property

The term Intellectual Property is used to identify patent, trademark, copyright and design law as well as the law relating to the protection of trade secrets and know-how. The specific characteristic of intellectual property law lies in the "Intellectual" nature of the protected subject matter as opposed to material goods. Thus, the term "intellectual property law" clarifies the distinction to the law concerning material property. In Switzerland, the Federal Office dealing with the protection of intellectual property is the Swiss Federal Institute of Intellectual Property (FIIP).

The legal protection of intellectual property is important, because the success of a modern economic system depends on innovations and investments. By affording comprehensive legal protection for intellectual property, the state creates the required framework and, thus, an incentive for new innovations and investments.

It compensates the efforts made, i.e. the time and money invested to create innovative products. Such a framework for legal protection is essential, because a large number of innovative creations today can be reproduced without any significant technological investments (e.g. software).

2. Specific areas of intellectual property

a) Patents

(i) Subject matter of a patent

Inventions are mainly protected by patents. An inventor may also use other laws to protect his invention without having a patent, e.g. the law on unfair competition or personal rights of the inventor which may give him certain claims. However, such claims are insufficient to protect the inventor's rights effectively for various reasons. To obtain effective protection, the inventor has to acquire a patent.
However, an invention has to meet certain patentability standards in order to be protectable.

<table>
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<tr>
<th>Standards for patentability</th>
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<tr>
<td>☐ The invention has to instruct how a technical result can be achieved by using natural forces. Therefore, e.g. a process to manufacture a medicine or the use of ultra-sound to permanently merge components is patentable. The invention is not the product itself, but the instruction on how to manufacture the product.</td>
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<tr>
<td>☐ The invention must be novel. An invention is novel, if at the time the patent application is filed, it was not publicly known and was not part of the prior art. All technical measures and knowledge made available to the public before the patent application has been filed are part of the prior art. For this reason, an invention has to be kept secret as far as possible until the application is filed. Therefore, a restrictive information policy is suggested and it is important to require signed confidentiality agreements, even when negotiating with potential partners or investors.</td>
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<tr>
<td>☐ The invention may not be obvious. This standard is met if the invention is not obvious to a professional taking into account the pertinent prior art. The standard is possibly met if certain processes lead to unexpected results or if a certain solution has been deemed impossible in science. However, if a professional would have expected a certain development based on the prior art, the invention is obvious and therefore not patentable.</td>
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<tr>
<td>☐ The invention has to be industrially applicable. Such applicability exists if the invention can be industrially used in a certain field.</td>
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</table>

Not all inventions that meet the standards of patentability above will be registered. There are various exceptions in patent law, e.g. in Switzerland, all inventions whose application would violate the public order or public morality will not be patented. In addition, computer programs, business methods, ideas, concepts, discoveries, scientific theories or mathematical methods as such are generally not patentable. Processes serving surgery, therapy and diagnostics on human or animal bodies are also excluded from patent protection. Finally, new varieties of plants and animals or biological processes to grow or breed such new varieties are not patentable in Switzerland.

(ii) How to acquire a patent

In order to get the patent, a patent application has to be filed with the competent patent office. When the application is filed, a proceeding is initiated; in the course of this
Successfully mastering legal and tax challenges

Part 3: The operative business

proceeding the respective patent will be granted by the patent office if all the legal requirements are met.

However, in a first step, even before the application is filed it has to be decided in which country patent registration protection shall be sought. When planning the protection of an invention this question is of strategic importance, since the related proceedings and, thus, decisions on the question of patentability of an invention may be different from country to country. The choice of where to file an application may have a positive influence on the protection of the invention. E.g. genetically altered plants or animals can generally not be protected by patents in Switzerland, whereas this may be possible with a European patent application. Therefore, it is recommended to seek the advice of a patent attorney before filing a patent application.

Also, it has to be kept in mind that an invention is not considered to be novel anymore, generally 12 months after the first application for a patent. The invention thereby loses its patentability and filing for additional patents in different countries will not be possible anymore. Therefore, it is important to decide from the start in which countries a protection of the invention will be necessary and economically appropriate in the long run. When making this decision, the costs of an extensive patent protection have to be weighed against its economical use.

There are different kinds of patent applications that may be filed, in particular national applications (application in each single country where protection is sought), European applications or applications under the Patent Cooperation Treaty (PCT; under the PCT it is possible to file a single application for a large number of countries).

National patent application

In national applications, the patent application is made in and (only) for the country in which the invention shall be protected after the patent is granted. In Switzerland, the FIIP is the office concerned with such applications. The patent application to the FIIP, *inter alia*, has to contain a description of the invention and the patent claims. In addition, drawings concerning the description of the invention and the patent claims have to be attached to the application. The necessary documents can be downloaded from the webpage of the FIIP (www.ige.ch).

The costs of an application are at least approx. CHF 2’300 (including search). The cost for the necessary advice can exceed these application costs considerably, depending on the complexity of the case.

After the application is filed, the FIIP examines whether the invention is industrially applicable or whether it comes under an exception. The FIIP does not examine whether the invention is novel. If the patent is granted and registered, the invention is protected in the territory of Switzerland from the date of the application for 20 years.
However, the protectability of an invention can be challenged by anyone with an interest to do so by filing a cancellation claim.

From the fifth year after the application an annual fee of at least CHF 100 and from the seventh year after application a fee of annually CHF 310 has to be paid.

It has to be noted that a revised Swiss Patent Act will likely enter into force on July 1, 2008.

**European patent application**

In Europe, protection for inventions may be sought through a European application that can be filed with the European Patent Office (EPO) in Munich or its branch in The Hague. If a person is domiciled in Switzerland, European applications may also be filed with the FIIP.

The advantage of a European application is that the invention can be protected in many European countries (including Switzerland and Liechtenstein), with only having to go through **one single proceeding**.

Unlike in the Swiss application proceeding, the EPO does examine the novelty of the invention in European applications. If the respective requirements are met, the EPO publishes the grant of the patent. Thereafter, anyone can file an objection against the grant within nine months, *e.g.* because of a lack of patentability. If no such objection is filed, or if a filed objection does not succeed, the patented invention is protected in each country named in the application, according to this country's applicable national laws.

The European patent is then protected for 20 years from the filing of its application.

It has to be noted that a revised European Patent Convention (EPC) will enter into force on December 13, 2007 and possibly not all former member states will be parties to this new EPC.

**PCT-application**

In addition, the PCT of the World Intellectual Property Organization (WIPO) also provides international applications. According to the PCT, the applicant has the possibility to file for the patent protection of his invention in more than 130 countries in a single application. Whoever has his domicile in Switzerland can file a PCT application either with WIPO or the FIIP.

The formalities to be observed in this context are similar to the ones for Swiss applications to a large extent. However, the patent office of each country designated in
the application will review the application. Accordingly, questions such as the patentability of an invention are subject to the applicable national law in each country and a patent shall be granted by each designated state where its requirements are met. National law also applies to issues concerning the validity/nullity of a PCT–patent in each country.

b) Trademarks

(i) Subject matter of a trademark

The main purpose of trademarks is to identify the source of goods and/or services and to distinguish them from identical or similar goods or services of other enterprises. Trademarks permit a business to create and protect goodwill for its goods or services. The consumers also benefit because trademarks help them to identify and obtain the products they want.

The designation for a product plays a considerable part in its success. In trademark law, finding a good designation for a product usually means finding a mark that is as fanciful as possible. When creating a mark, no platitudes or general terms should be chosen, if possible. Also, the trademark may not be descriptive for the products themselves, their function or their quality. If it is, the FIIP will not register it. Because a trademark shall not create a likelihood of confusion with any prior marks, it is of the utmost importance that the mark chosen sufficiently distinguishes itself from any prior trademarks. Therefore, one should proceed strategically when choosing a mark. This saves costs during the application process, the enforcement and administration of the mark.

In this context, it has to be noted that the FIIP is not the authority dealing with domain names. An application for a domain name can be made with one of the credited registrars of the Internet Corporation for Assigned Names and Numbers (ICANN) if it concerns a generic top level domain name such as, e.g., .com, .net, .org (www.icann.org/registrar/accredited-list.html). Assigning domain names with country codes (e.g., .ch, .de, .fr, .at) is the business of the respective country organisation. The registrar SWITCH assigns domain names ending in .ch (Switzerland) and .li (Principality of Liechtenstein).

The choice of the type or the content of a mark can be decisive for its success. The following types and contents of marks have to be distinguished:
(ii) Types of marks

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<th>Types of marks</th>
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| ♦ Individual trade- and/or service marks: These are the marks for which protection is sought in most cases. One business or person uses these marks to distinguish its products from those of its competitors. Examples for such marks are, *e.g.* COCA COLA, KNORR or SWATCH.
| ♦ Collective marks are marks of a collective organisation. Since collective marks do not identify a single business as source of the product, there have to be certain common characteristics of the goods covered by the mark, *e.g.* same origin or a special production process. An example for a collective mark is the Swiss crossbow device. It may only be used for products of Swiss origin.
| ♦ Certification marks are used to certify that the goods or services of others have certain characteristics. The owner of the mark controls whether the user of the mark actually meets the requirements set forth by the regulation. To avoid a conflict of interest, the owner of the mark may neither use the mark herself nor may she have any economic ties to the users of the mark. Due to the various disadvantages for the trademark owner many businesses register regular trade or service marks and grant licenses to other interested businesses, instead of registering a certification mark. An example for a certification mark is "Natürlich aus Graubünden".

(iii) Content of marks

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<th>Content of marks</th>
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| ♦ Two dimensional marks are most common. The following three forms of two dimensional marks may be distinguished.
| - A word mark only consists of words. These words can be in any language or can even be fanciful (*e.g.* LEGO, CIBA). A combination of words or short sentences are also possible (*e.g.* "Katzen würden Whiskas kaufen"). When filing a word mark no drawings are required. A word mark is filed in capitals. Most marks are word marks.
| - Figurative marks consist of drawings or other forms of art. A
figurative mark may not only be a picture, but any two dimensional mark not consisting solely of ordinary capital letters. Figurative marks have to meet certain requirements of independence of the goods and their packaging. The mark may not seem to be part of the good but must be a sign accompanying the good. Fancy colours may also be registered as marks (e.g. the colour lilac for Milka chocolate). Primary colours, however, cannot be monopolized as marks.

- Composite marks are comprised of word and figurative elements. The most common example for a composite mark is a logo which combines the word with a figurative element. A logotype or an underlined word already counts as a composite mark.

- *Three dimensional marks* are objects added to the goods they designate, (e.g. Coca Cola bottle). However, three dimensional marks may also be independent of the good they designate (e.g. Mercedes star). To file a trademark application for a three dimensional mark, the mark must be illustrated either in a drawing or in a photograph.

- *Acoustical marks* can only be perceived audibly. When filing such a mark, the sounds must be described by musical notes. An example for an acoustical mark is the tune used in MIGROS advertisement.

Not all marks which meet the above mentioned requirements can be registered as marks. Trademark law sets forth various exceptions from trademark protection (prohibitions on so-called absolute grounds). E.g. marks will not be registered if they are immoral, directly describe the goods for which they seek protection or describe their quality, nature, character or price or if they are deceptive.

Finally trade names may have the character of trademarks and should, therefore, be registered as marks, if they meet the respective requirements.

**(iv) How to acquire a mark**

To acquire ownership of a mark, it must be registered. (Please note that this is not true in the U.S. and other common law countries.) When a trademark is created, it should be filed with the respective authorities before the product is launched; otherwise there is the risk that a competitor will file a trademark application and have the mark protected for himself.

Even before filing a trademark application, however, it has to be decided what procedure shall be chosen for the application:
National application in Switzerland

A national trademark application grants the right to the trademark owner to use the mark exclusively as designation of the goods and services for which the mark is protected in Switzerland. The fee for the registration of a Swiss trademark is at least CHF 550 (or CHF 350, if the application is filed electronically).

There are additional fees to be paid, such as e.g. a fee, if the mark is registered in more than two classes of goods and/or services, other fees and consultancy fees. Guidelines and application forms are available on the FIIP's webpage.

Once the application has been filed with the FIIP, the FIIP then – in the course of its proceedings – examines whether the application contains the required information and whether the trademark can be registered or whether the registration has to be denied on absolute grounds. Once the mark has been registered the applicant receives a certificate of registration from the FIIP.

While the FIIP examines whether there are reasons for a refusal of the registration of the mark on absolute grounds, it does not examine whether the mark is identical or similar to marks already registered.

The registration proceeding generally takes between six and twelve months. In this time, the mark is either registered or the FIIP issues an office action in which it objects on certain grounds.

Once the registration of a mark is published, owners of identical or similar prior marks may file an opposition proceeding with the FIIP. The risk of oppositions can be significantly mitigated by choosing a mark which clearly distinguishes itself from already existing marks. In order to assess the risk of oppositions it is suggested to have a trademark search done before filing an application. Such search will examine whether there are identical or similar marks already registered.

Direct national application in other countries

As in Switzerland, trademark applications may also be filed in other countries. Such direct applications have to be filed in the respective country. Proceedings are usually in the language of that country. In addition, generally, a representative in that country has to be appointed.

International registration

There is also the possibility of an international registration, if one wants to file a trademark for one or more countries abroad. The application for an international registration can be filed with the FIIP. The registration itself is then made by WIPO.
in Geneva. A national registration is a pre-requisite as a basis for an international registration. There is a specific form for the international registration and the proceeding is conducted according to either the Madrid Agreement concerning the international registration of marks or the Madrid Protocol. These treaties have been joined by 81 countries as of July 2007, e.g. all EU countries, most Eastern European countries, the U.S., Russia, China, Japan and Australia.

**European Community Trademark**

A **European Community Trademark (CTM)** is a mark which designates and distinguishes goods and services that is valid in the whole European Union. Applications for such marks may be filed with the Office of Harmonization for the Internal Market (OHIM). Once a CTM is registered, the mark is protected in the whole territory of the 27 member states of the EU. The territorial extension of the CTM cannot be limited, e.g. to only a specific number of these member states.

The application for a CTM has to be filed directly with OHIM or one of the National Patent and Trademark Offices of the 27 member states of the EU. Residents of Switzerland have to file the application through a representative in one of the member states. A direct application of a CTM from Switzerland is not possible, because Switzerland is not a member of the EU. Unlike in the case of international registrations, the application procedure for and the protection of a CTM is not governed by national law but by community law.

(v) **Scope of protection of a trademark**

A trademark generally does not protect the goods and services themselves, but only the use of the mark for these goods and services. Therefore, anyone may manufacture or distribute the same products using a different mark. The mark is only protected for goods and services identical or similar to those for which protection is sought.

Therefore, when filing a trademark application it has to be specifically designated for which goods and services the application seeks protection in the future. To facilitate determining those goods and services, the applicant may want to refer to the international classification of goods and services (the so called Nice Classification), which helps with the wording of the list of goods and services.

(vi) **Duration of the registration**

It has to be noted that the mark is protected from the day the application is filed, but that this protection is subject to later registration. A Swiss registration is then valid for ten years. The calculation of the duration is based on the filing date. The
registration may be extended for a further period of ten years by filing an application for an extension.

After a grace period of five years the owner of the marks has to use it for the goods and services registered. If no such use is made during a continuous period of five years, the mark may be declared to be null and void. In that case, the trademark expires and cannot be enforced anymore.

c) Copyright

(i) Subject matter of copyright

Copyright on the one hand protects works of authorship and software. On the other hand, it also protects the so called neighbouring rights, e.g. of performing artists in their performance or of broadcasting organisations (radio, television). It is important to note that copyright only protects the form of the protected work (e.g. the text), but not the idea on which it is based.

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<tr>
<th>Examples of works of authorship</th>
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<tr>
<td>☑ Literary works</td>
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<tr>
<td>☑ Works of music</td>
</tr>
<tr>
<td>☑ Works of art (e.g. sculptures, graphics)</td>
</tr>
<tr>
<td>☑ Visual or audiovisual works (such as photographs or films)</td>
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<tr>
<td>☑ Computer software</td>
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Only individuals (natural persons) can be authors in the sense of the Swiss Copyright Act. If more than one person are authors of a work, they may acquire collective ownership in the copyright.

However, it has to be noted that only works meeting certain requirements are protected by copyright:

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<th>Requirements for copyright protection</th>
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<tr>
<td>☑ A work must be an intellectual creation. Only creations by humans are</td>
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</table>
protected by copyright, but not works that are discovered or created by animals. The author must have engaged in some intellectual endeavour and not just copied from a pre-existing source.

- The work has to be perceptible by senses, although not permanently.

- To be protected the work has to be original, *i.e.* it has to distinguish itself sufficiently from other works. A work is original, if it can be assumed that no other work in exactly the same form already exists.

- The Copyright Act explicitly protects works of literature and art. Those terms, however are interpreted very extensively. Therefore, works with scientific and technical character, such as plans or topographical maps as well as computer software are also covered by it.

The value and purpose of the work is without relevance for the question of whether or not the work can be protected by copyright.

In addition, there are various special types of works protected by copyright, such as, for instance

- The title of a work which may itself be a *work of literature* is protected, if the above mentioned requirements, particularly the originality requirements, are met.

- **Derivative works**, *i.e.* works that are based upon one or more pre-existing works, such as translations or the motion picture version of a book. A derivative work may only be made with the permission of the copyright owner of the original work.

- **Compilations** are works formed by collecting and assembling pre-existing works protected by copyright. Such compilations may be protected themselves, if the compilation is original in its choice or arrangement of the works that are part of the compilation. Compilations may only be made with the permission of the copyright owner of the original work.

Copyright law grants the owner of the copyright certain exclusive rights related to his work. In particular, the author has the exclusive right to decide on the use of the work, *i.e.* its reproduction, distribution, translation, performance, display etc. Moreover, the author has certain moral rights regarding her work, in particular the right of first publication, the right to be named as author and the right to integrity of the work.

The owners of neighbouring rights have established collection societies with the purpose of collectively exploiting their rights where an individual exploitation is not feasible, such as for the use of musical works in radio broadcasts (*e.g.* SUISA or
SUISSIMAGE). For certain rights the law even prescribes a collective exploitation through collecting societies.

(ii) How to acquire copyrights

The protection of a copyrighted work automatically begins with its creation, *i.e.* as soon as the requirements for protection mentioned above are met. In addition, parts of a work and drafts may be granted copyright protection, insofar as they meet the requirements, in particular originality. No registration is required to obtain protection.

(iii) Duration of copyrights

Copyright protection ends seventy years after the author has died (fifty years for computer software). In case of jointly authored works, the copyright endures for the last of the joint authors to die plus seventy years (or fifty years for computer software). Copyright protection for anonymous works lasts for seventy years after the first publication of the work.

(iv) Geographical extent of protection

Swiss law protects copyrights and neighbouring rights only in Switzerland. However, to afford protection on an international level, there are various international treaties which, in particular, provide that Swiss authors are granted the same protection in countries abroad as the authors in the respective country. To determine whether and to what extent the Swiss author's work is protected in a different country, it has to be examined whether this country and Switzerland are parties of the same international treaty. Most of the industrialized countries are members of the most important treaties regarding copyrights (Berne Convention) and neighbouring rights (Rome Convention).

d) Designs

(i) Subject matter of a design

Design law protects the design of products or parts thereof, which are in particular characterized by the arrangement of lines, contours, shapes or colours or by the material used; *e.g.* surprising forms, fancifully designed planes or innovative materials.
Requirements for design protection

- The design has to be new. It is not sufficient if the designer has designed it herself and has not copied it from a pre-existing source, but the design must be new according to a relatively objective standard, the "prior art".
- The design must have an individual character and has to distinguish itself in material elements from the overall impression of designs that can be known to the relevant consumers in Switzerland.

Designs violating the law or immoral designs are not granted design protection.

(ii) How to acquire a design

National application in Switzerland

In Switzerland, design protection is sought by filing an application with the FIIP. In addition to the application form, one or more representations per design have to be filed. The FIIP only formally examines the application – i.e. without actually examining the novelty etc. requirements – and only refuses registration, if there is an obvious ground for refusal.

The application fee currently amounts to CHF 200.

As soon as the design is registered, the new design application will be published with its representations. Such publications are made at regular intervals. The costs of publication have to be borne by the applicant and depend on the kind and number of the representations.

Although generally disclosure of the design destroys its novelty, there is a grace period of twelve month from the first use, if such use is only made by the designer or her assignee. If the design application is filed within this deadline, the actions of the designer do not destroy the novelty of the design.

Direct national application in other countries

Of course, there also is the possibility to file the design application directly in the country in which protection is sought.
International application

There is also an easy and cost-effective way to apply for designs abroad; the international design application, which permits to file a design application in the more than thirty member states of the Hague Convention. The application proceeding and the scope of protection are subject to the national laws. Such international applications have to be filed within six months after the first application is filed. International applications have to be filed with WIPO. The respective forms are available on WIPO's webpage. The application either has to be in French or English.

European community design

There also is the possibility to apply for a Community Design, which is a uniform design with protection for the territory of the European Community. Like the CTM, a community design is subject to community law, not to national laws.

e) Trade secrets and know-how

Trade secrets and know-how are usually also mentioned in connection with intellectual property rights. Although trade secrets and know-how are not granted protection similar to intellectual property rights such as patents, trademarks, copyrights or designs, the owner of these trade secrets or know-how can profit from a factual exclusivity, as long as his knowledge is kept secret.

The term secret in this sense means any knowledge of facts, which are neither obvious nor available to the public to which a manufacturer or business has a legitimate interest and which it in fact, wants to keep secret. Such secrets may be knowledge which is used for the manufacturing of goods or information concerning the business of an enterprise which may, e.g. be interesting for the competition.

The term know-how usually describes a connection of knowledge and experience of technical, commercial, administrative, financial or other nature, which has a practical application in a business or profession and which is secret.

f) Useful addresses

Useful addresses

Federal Institute of Intellectual Property (FIIP)
Stauffacherstrasse 65, CH-3003 Berne, Phone 031 377 77 77,
3. Protection of intellectual property rights

a) In general

The Acts concerning patents, trademarks, design and copyrights contain, to a large extent, similar provisions concerning enforcement of the respective intellectual property rights. In general, if an intellectual property right is infringed, the owner has two possible ways to enforce her rights: civil procedure or criminal procedure. She may also cumulatively proceed in both kinds of proceedings.

b) Civil proceedings

(i) Declaratory action and action for injunction

A declaratory action may be filed, e.g. to have the court determine that the registration of a right is invalid. In case the plaintiff succeeds she may have the registration of the right cancelled.

With an action for an injunction, the owner whose intellectual property right is infringed can request that the infringer ceases and desists from infringing his rights in
the future. If she succeeds with her claim, the infringer will be ordered to refrain from certain actions in the future and criminal sanctions are threatened should the infringer violate the order.

Also, the rights owner can request seizure and destruction of the infringing goods as well as information on the source/origin of any infringing goods.

(ii) Preliminary measures

Since the actions on the merits mentioned above usually take a lot of time, the court's help would sometimes be too late, if the infringer could continue with her actions during the court proceedings. Therefore, the law provides that the owner of an infringed intellectual property right may ask the court already before or after filing his complaint to order preliminary measures. Such preliminary measures usually order the infringer to cease and desist from her actions for the duration of the proceedings.

They are a strong weapon of the owner of the intellectual property right. To have a court order such preliminary measures, the owner of a copyright must make plausible that his intellectual property right is infringed or that such infringement is imminent, that there is a risk of irreparable harm to the plaintiff and that there is exigency.

(iii) Action for compensation of damages, reparations and disgorgement of profits

In cases of an intentional or negligent infringement, compensation of damages may be claimed. However, such a claim requires that there was damage in the legal sense of the term, i.e. an effective economic loss or a lost profit.

In addition, disgorgement of the infringer's profits may be claimed based on the provisions on conducting business without mandate (art. 419 et seqq. CO). Such a claim is independent of the intent or negligence of the infringer; it is disputed, however, whether disgorgement applies the same way to actors in good faith as it does to actors in bad faith.

Reparation can be claimed if it is justified by the intensity of the infringement and it has not been retrieved in a different way. Reparation has its practical relevance in particular in the context of copyright infringement.

(iv) Statute of limitations

The statute of limitations of claims for damages and reparation is one year after the damage and the infringer are known, however in any case ten years after the act
causing the damage took place at the latest. If an infringement was intentional and is also relevant under criminal law, the longer statute of limitations under criminal law applies.

c) Criminal proceeding

Criminal law is important in the context of intellectual property rights. The Acts on patents, trademarks, copyrights and designs all contain their own criminal provisions. Moreover, the Swiss Act on Criminal Law protects industrial trade and business secrets. Whoever infringes such a secret (trade secret) which he should keep secret based on a statutory or contractual obligation, is subject to punishment. It has to be noted that only deliberate infringements are relevant under penal law.

Criminal law is also important, because criminal procedural law often is an effective way to secure evidence. For instance, the police can, if certain requirements are met, enter and search premises and may seize documents or items.

Criminal infringements of intellectual property rights are punished by prison sentences of up to a year or fines of up to CHF 100'000. Where the infringements are committed on a commercial basis, they carry prison sentences of up to three years or fines of up to CHF 100'000.

4. Exploitation of intellectual property rights

a) General

The law grants an exclusive right to the inventor, author, designer or trademark owner in order to give her a possibility to recoup her investments and make an appropriate return through the commercial exploitation of her intellectual property rights. In the same way the owner of secrets or know-how can commercially exploit her knowledge as long as it remains secret. Since the commercial value of intellectual property is only realized through its exploitation, in practice the use of intellectual property is very important. There are various different types of use.

The owner of such an exclusive right can, e.g. use her intellectual property in her own business, in her manufacturing and market a certain product. If the rights owner, however, is not capable to exploit her intellectual property herself, maybe due to a lack of capital or other resources, she must look for other forms of exploitation. One such form is the assignment of intellectual property rights, others are licensing or pledge of the respective rights.
b) **Assignment of intellectual property rights**

Generally either the whole intellectual property or certain specific rights concerning the intellectual property may be assigned. In cases of assignment, the original owner of the intellectual property loses all rights to the respective property or to the assigned rights (where only certain parts of the intellectual property are transferred).

In the case of patents, however, a partial assignment is not permitted. Patents can only be assigned in their integrity. Furthermore, there are certain intellectual property rights closely connected to the inventor/author that cannot be assigned. Those are mainly personality rights of the inventor and the author. Finally, it has to be noted that not only intellectual property rights that have already been registered can be assigned. Such rights may also be assigned where an application has been filed but the registration has not yet been granted.

The assignment of an intellectual property right will usually only be made in return for compensation. Generally intellectual property rights are sold for monetary compensation. Where a business is sold, its intellectual property rights usually impact the price of the business. In many cases, intellectual property rights are assigned in the context of research and development agreements in which the customer usually requires that the rights to the intellectual property resulting from the research and development shall be assigned to it. It is also often the case that intellectual property rights are assigned as a contribution to a joint venture.

The assignment of a patent, a trademark or design has to be made in writing in order to be valid. Other intellectual property rights may be assigned without being subject to any formal legal requirements. Nevertheless, it is recommended to prepare all assignments in the form of a written agreement, particularly to have documentary evidence of the assignment. After the intellectual property has been assigned, the change of ownership should be noted in the respective register, in order for the assignment to have effect also towards third parties in good faith.

c) **Licensing of intellectual property rights**

Intellectual property rights may also be exploited by entering into license agreements. In a license agreement, the licensor grants the licensee certain rights to use his intellectual property in return for payment of a license fee. License agreements are usually concluded for an undefined term and generally no specific formal requirements have to be met to enter into such agreements. Therefore, it is sufficient to enter into a license agreement if the parties have agreed on its substantial terms. Nevertheless, it is highly recommended to conclude such agreement in writing, in particular for reasons of clarity and to better be able to prove the terms of the agreement. Unlike the transfer of intellectual property rights, the license agreement has the advantage that the owner
of the right can exploit his right commercially, without actually transferring the right itself.

There are various types of licenses. If the licensor undertakes neither to use the intellectual property herself nor to license it to a third party other than the licensee, this is called an exclusive license. A sole license is defined as a license where the licensor may also use the intellectual property, but undertakes not to license it to a third party. In a non-exclusive license, the licensor may grant further licenses and use the intellectual property herself.

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<th>Types of licenses</th>
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<td>☑ Sole license</td>
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<tr>
<td>☑ Non-exclusive license</td>
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The licensor may define the scope of the rights granted almost entirely at her discretion. Thus, the licensor may choose this licensee and may, in particular, prohibit her to assign the rights granted in any form to third parties or to grant sub-licenses. The licensor may also limit the rights granted to the licensee geographically. For instance the license may be limited to the territory of the European Community or of a specifically designated country or only parts thereof. On the other hand, it is also possible to grant a world-wide license. In any case it is important to make sure that the intellectual property is really protected in the countries for which the license is granted. Also from a temporal perspective, the licensor may limit the duration of the rights granted. However, the rights cannot be granted for a duration that exceeds the protection of the intellectual property which is licensed. Finally, the licensor may either grant the license for all possible fields of use or limit the rights of the licensee to certain fields of use. If the license is limited as regards fields of use, it is very important to be clear and careful when wording the respective limitation.
Checklist license agreement

- Grant of License / Subject Matter
  - Patents
  - Know-how
  - Trademarks
  - Designs
  - Option to extend license to new products / developments
  - Right to have the license registered
  - Limitation of the license to certain technical applications
  - Sub-licenses / Exclusion of sub-licenses

- Territory
  - Definition of territory
  - Exclusive / Non-exclusive
  - Option for extension of the territory

- License Fee
  - Lump sum, turnover, per piece, minimum license
  - Combination of the above
  - Amount / calculation
  - Due date, accounting
  - Audit to verify accounting

- Know-how Transfer
  - Disclosure of documents (defined language) and training at the beginning
  - Updates

- Services of the Licensor
  - Training
  - Technical assistance
  - Training and technical assistance to be borne by licensee (attached tariffs)

- Quality of Products
  - Standard of quality
  - Right of inspection

- Improvement and Developments by Licensee
  - Duty to notify licensor
  - Define who shall own the rights
  - Free license to licensee / exclusive / non-exclusive
  - Right of licensor to file patent application

- Warranties / Representations and Indemnifications
Duties of the Licensee
- Sales promotion
- Minimum turnover, possibly right of termination if minimum turnover is not met
- Confidentiality concerning know-how

Duties of Licensor
- Possibly supply of material (components)
- Sales promotion
- Sustaining the licensed rights
- Assistance in case of infringements by third parties

Duration / termination
- Duration of the contract
- Termination by licensee
- Termination by licensor
- Define what happens with rights etc. after termination of the contract

Assignability
- Admissibility of assignment
- Conditions regarding the assignment

Further possible content
- Confidentiality clause
- Applicable law
- Choice of jurisdiction or arbitration clause

**d) Intellectual property as a pledge**

All intellectual property rights may be given as pledge under the relevant rules of the Swiss Civil Code, except for know-how and trade secrets. A pledge of patents, trademarks, copy rights and design can be of advantage, particularly in cases, in which the pledge of intellectual property serves as collateral for the investment of a third party in the business of the right owner. The effects of the pledge are defined by the respective laws. In order for a pledge to an intellectual property right to be valid and effective, it has to be made in writing. Although there are registers for marks, patents and designs, it is not required that a pledge is registered. Nevertheless, such registration is highly recommended, because such pledges only take effect towards third parties in good faith, if they are registered.
F. Tax law

1. Who has to pay taxes and when should the taxes be paid?

Taxes of a company and its shareholders are levied in three "phases of life" of a company:

Taxes in the "phases of life" of a company

- Upon incorporation of a company
- While the company is doing business
- Upon sale or liquidation of a company

Additional taxes, relating to special circumstances, may be levied at irregular intervals:

Additional taxes

- Upon increase of capital or reduction of share capital
- Upon removal of assets from a company
- Upon purchase or sale of real estate
- Upon restructuring (e.g. merger, spin-off etc.)
- In financial reorganisations
- Upon borrowing of capital from the capital market (e.g. private placement or going public)

Furthermore, one must distinguish between taxes to be paid by the company on the one hand and taxes to be paid by the persons involved on the other hand:

Tax-Levels

- Taxes at the company level
2. **Tax system and tax types**

a) **Overview of the Swiss tax system**

The Swiss tax system is composed of a network of different taxing jurisdictions. Taxes are partly levied by the federation, partly by the cantons (states) and the municipalities. The different types of taxes are regulated by many federal laws as well as by 26 cantonal tax laws, many municipal tax laws and corresponding regulations, circular letters and guidelines. A rather detailed description of the Swiss tax system can be found on the homepage of the Federal Tax Administration.

It is often difficult to find the appropriate articles of law for a specific case as the Swiss tax system is extremely fragmented. Therefore, it may happen that articles of the tax laws are not observed in daily practice, which may cause additional tax charges and may even result in joint and several liability of the board of directors, members of the management and active shareholders who interfere directly in the daily management and who are considered as "factual bodies". The following chapters contain an overview of the taxes which are typically relevant for a company and its shareholders. This overview, however, cannot deny the complexity of fiscal aspects in special cases. Thus, in such cases, a competent consulting should be obtained in due time.

b) **Types of taxes at the company level**

Generally, on the company level, the following taxes must be taken into account:

<table>
<thead>
<tr>
<th>Type of tax</th>
<th>General area of application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issuance stamp tax</td>
<td>− Incorporation</td>
</tr>
<tr>
<td></td>
<td>− Subsequent capital increase</td>
</tr>
<tr>
<td>Corporate income tax</td>
<td>− Annual taxation of the income generated by a company</td>
</tr>
<tr>
<td>Corporate capital tax</td>
<td>− Annual taxation of the capital of a company</td>
</tr>
</tbody>
</table>

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2 A brochure can be downloaded in German, French or Italian at: [http://www.estv.admin.ch/d/dokumentation/publikationen/steuersystem.htm](http://www.estv.admin.ch/d/dokumentation/publikationen/steuersystem.htm).
c) Types of taxes at the shareholder level

On the level of shareholders who often are employees and members of the board of directors of the corporation, the following taxes must be taken into account:

<table>
<thead>
<tr>
<th>Type of tax</th>
<th>General area of application</th>
</tr>
</thead>
</table>
| Individual income tax | - Salary paid by the company  
                      | - Board of directors' fee  
                      | - Dividends from the company  
                      | - Interest payments from the company  
                      | - Stock option plans |
| Individual wealth tax | - Property of shares and options  
                      | - Loan credits against the company  
                      | - Loan debits against the company |

3. Taxes at incorporation of a company

Fiscal consequences at incorporation of a company are explained in part 1 C.

4. Corporate income tax

a) Tax liability and tax declaration

The company becomes responsible for ordinary federal, cantonal and municipal taxes when it starts doing business.
Successfully mastering legal and tax challenges

Part 3: The operative business

The company has to submit an annual tax return to the tax authorities of the canton where it is domiciled. The deadline is determined by the cantonal tax law.

In most cantons, the cantonal tax authorities are responsible for the assessment of the corporate income tax at the federal, cantonal and municipal level. Generally, the Federal Tax Administration supervises the various cantonal tax authorities and the municipal tax authorities levy taxes on private individuals. Thus, the cantonal tax authorities are the most important contact for a company regarding tax returns and tax assessments.

Today, nearly all cantonal tax authorities have an up-to-date overview regarding the newest fiscal developments at the cantonal levels on their homepage.3

b) Determination of the corporate income and tax rates

Corporate income tax is based on the worldwide income generated by the company. However, income derived from foreign real estate as well as income attributable to foreign enterprises or to foreign permanent establishments is generally exempt. Income shown in the annual balance sheets, established according to the CO, generally serves as the basis for determining the corporate income tax, but the tax authorities may require adjustments in case of excessive depreciation, corrections and provisions or any other book/tax differences. A precise description of what constitutes a profit for the purposes of federal direct taxation can be found, for instance, in art. 58 of the Federal Direct Tax Law (DTL).

At the federal level, the federal corporate income tax rate is a uniform proportional flat rate of 8.5%. Since the federal, cantonal and municipal income taxes are deductible, the effective federal tax rate is about 6.44%.

At the cantonal and municipal level, a cantonal and municipal corporate income tax is also levied. Due to the fragmentation of the Swiss tax system, only general statements can be made. Most cantons use a progressive corporate income tax rate, i.e. the higher the generated income of a company is, the higher the tax rate will be. However, many cantons have a corporate tax rate which depends on the yield of the company, i.e. the generated income will be compared with the invested capital. At the cantonal and municipal level, one may usually expect the tax rate to be between 15% and 25 % of the company's generated income.

In the meantime, many cantonal tax authorities have made available on their homepages calculating tools, which enables companies to obtain an estimation of the taxes.

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3 A list with the links to the homepages of all 26 cantonal tax administrations can be found in the following link at: http://www.steuerkonferenz.ch/d/links.htm.
to be levied. Furthermore, on the homepage of the Swiss Federal Tax Administration, detailed comparisons of the different tax rates in the different cantons may be downloaded.⁴

c) Start-up costs and losses in the start-up period

According to art. 664 CO, the costs for incorporating and organising that results from the establishment of the company may be included in the balance sheet. They must be shown separately and amortized within five years. This should prevent the company from being burdened by these costs in the first business year.

If the company generates losses in the first year (or in the following years), they may be used to offset any taxable income during the subsequent seven years. This carry-forward of losses is especially relevant for newly established companies.

5. Corporate capital tax

With the annual tax return, the company must provide information on its capital structure. This information is necessary to assess the corporate capital tax.

The taxable capital of a company contains:

- Share capital
- Retained earnings
- Open reserves
- Hidden reserves (they are not visible in the balance sheet but the tax authorities are aware of these since they have already been taxed)

There is no such tax at federal level. At the cantonal and municipal level, the average tax rate is between 0.4% and 0.6%. When compared to the corporate income tax, the corporate capital tax turns out to be quite moderate.

6. Tax relief for newly established companies

Various cantonal governments grant tax privileges on the cantonal and municipal level to newly incorporated companies (so-called "tax holidays"), upon fulfilment of certain

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⁴ Various documents may be downloaded in German, French or Italian at: http://www.estv.admin.ch/d/dokumentation/publikationen/andere_publikationen.htm.
conditions. The conditions for the relief and the exact modalities are usually not published. Normally, it is expected that the newly incorporated company creates a certain number of new jobs and operates in a sector with a promising future. Furthermore, it often helps if the company settles down in an economically underdeveloped region, since newly created jobs are particularly welcomed there. Tax holiday privileges are granted for a maximum of ten years. Within this limit, different types of agreements may be obtained (e.g. full exemption from cantonal and municipal taxes which will then annually decrease by 10% over a ten-year period).

From experience, both cantonal business development agencies and cantonal tax authorities are willing to provide information upon request. Numerous addresses can be found in part 6 D. Even if no "Tax Holidays" are granted, it is still possible to find other forms of tax relief solutions for newly established companies (e.g. granting higher depreciation rates than usual).

7. Swiss value added tax (VAT)

a) Functionality of the Swiss VAT

The Swiss VAT has the purpose to tax the domestic consumption. Thus, the VAT is a multistage consumption tax levied on all phases of production and distribution as well as on imported goods, domestic provision of services and on those services supplied by companies which have their registered offices outside Switzerland, regardless of whether the consumer is liable for VAT or not. Tax on turnover in Switzerland and on the provision of services from companies which have their registered domicile outside the territory of Switzerland, is levied by the Federal Tax Administration. The VAT on imported goods is levied by the Federal Customs Administration. Taxes due by VAT-registered persons correspond to the difference between the tax charged in the sale of goods or services (output tax) and the tax paid on purchases (input tax).

The supplier or the service provider will calculate the VAT on his turnover and will pass it on to the consumer in the retail price or note it separately on the invoice. The turnover and the VAT due must be declared in a periodic tax return to the Federal Tax Administration (e.g. usually quarterly). However, in the same VAT return, it is possible to make a so-called deduction of input tax, meaning that the supplier or the service provider can deduct the VAT in total or in part, which he had to pay himself on products purchased and services used from other suppliers or service providers. By virtue of this mechanism of input tax-relief, a cumulative tax effect is avoided (tax on purchases and tax on turnover). Depending on sectors or geographical markets, it is possible that a company receives a higher VAT refund than it has to pay. This applies especially to companies which export a considerable part of their turnover.
b) VAT liability

A company is liable to tax if it carries out a business activity independently, regardless of any intention to make profits, if its supply of goods, services and self-supply within Switzerland and Liechtenstein exceeds CHF 75'000 per annum. However, although the taxable supplies may exceed this threshold, there is no obligation to register if the turnover does not exceed CHF 250'000 and that after the deduction of the input tax the annual VAT liability does not exceed CHF 4'000. A questionnaire, which helps to determine whether a company is subject to VAT or not, can be found on the homepage of the Federal Tax Administration.\(^5\)

Companies, which meet the mentioned thresholds, must register themselves with the Federal Tax Administration within 30 days. The exact modalities are described on the above-mentioned website (in German, French and Italian).

c) "Opting" to be subject to VAT

Because of the possibility of claiming for the deductions of input tax, it could be useful for a company to register voluntarily in order to become VAT liable, even if the turnover does not exceed the aforementioned thresholds. Export-oriented corporations may profit from this because they would get a high VAT refund.

The homepage of the Federal Tax Administration provides information on the exact procedure for the "Opting" to be subject to VAT.\(^6\) The "registration package" can also be ordered by phone from the federal tax administration.

d) Types of turnover

The Federal Value Added Tax Law (VATL) distinguishes three types of turnovers:

- **VAT-liable turnovers (art. 6 and 7 VATL):**
  The VAT-liable turnovers include all those turnovers, which are not excluded or exempted.

- **VAT-excluded turnovers (art. 17 and 18 VATL):**
  The VAT-excluded turnovers include most of the turnovers in the banking and insurance business as well as in those which are made in connection with real estate,

\(^{5}\) Please take note that this questionnaire as well as a special-brochure titled "Tax liability for VAT" issued by the FTA are available only in three the official languages, namely German, French and Italian.

\(^{6}\) See [http://www.estv.admin.ch/e/themen/mwst.htm](http://www.estv.admin.ch/e/themen/mwst.htm).
but also many services in the domain of medicine (i.e. services of hospitals, doctors, dentists, physiotherapists etc.), education or culture.

- **VAT-exempt turnovers (art. 19 VATL):**
  The VAT-exempt turnovers include namely delivery and services sent abroad.

Every supplier and service provider must levy VAT on VAT-liable turnovers. No taxes must be levied on VAT-excluded and VAT-exempt turnovers. Such deliveries and services are provided without a VAT charge.

The difference between VAT-liable, VAT-excluded and VAT-exempt turnovers consists of the right to request a deduction of the input tax:

- Each VAT-registered supplier or service provider can request an input tax deduction with regard to his paid input tax, if he uses the purchased goods and services for the realization of a VAT-liable or VAT-exempt turnover.
- VAT-excluded turnovers are not subject to VAT and the "taxpayer" is not entitled to recover the input VAT.
- If the purchased deliveries are used partly for VAT-liable as well as VAT-exempt turnovers, the request of the input tax deduction will be reduced by a certain percentage.

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**Example: Input tax deduction**

- Corporation A purchases products for a total value of CHF 100'000 plus 7.6% VAT from Corporation B.
- The purchased products are processed. 60% of these products are exported as a VAT-exempt turnover. About 40% thereof are sold in Switzerland as a VAT-excluded turnover.
- On both turnovers, no VAT has to be levied.
- Corporation A can request for an input tax deduction regarding the initially paid VAT of CHF 7'600 only in the amount of CHF 4'560 (i.e. 60% of CHF 7'600). It is not possible to request a deduction of the input tax regarding VAT-excluded turnovers.
e) Rates

The VAT is calculated on the basis of the consideration or price paid for the supply of goods or services according to art. 34 VATL:

<table>
<thead>
<tr>
<th>VAT-rates in Switzerland</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4% for goods such as food, medicines, newspapers, magazines and books as well as a few additional turnovers terminally listed in art. 34 VATL.</td>
</tr>
<tr>
<td>3.6% for supply of accommodation.</td>
</tr>
<tr>
<td>7.6% for all remaining deliveries and services subjected to VAT.</td>
</tr>
</tbody>
</table>

f) VAT on import of services

With regard to the import of services, there is no tax liability if the services received do not exceed CHF 10'000 per annum. This threshold applies equally to VAT registered and non-VAT registered companies. A company has to declare this to the Federal Tax Administration in written form within 60 days of the end of the calendar year during which the services were rendered.

8. Withholding tax

Liability to pay withholding taxes occurs notably in connection with payments of dividends. A 35% withholding tax is levied on dividends distributed by a Swiss company to Swiss-resident or non-resident beneficiaries (art. 4 and 13 of the Federal Withholding Tax Law; WHTL). Thus, a company making dividend payments must deduct the 35% withholding tax from the payment and remit the tax to the Swiss Federal Tax Administration within 30 days of the payment date of the dividend. The form necessary for calculation and wiring of the withholding tax can be ordered on the homepage of the Federal Tax Administration or by phone.7

For Swiss resident beneficiaries, the withholding tax is reimbursed by way of cash refunds (corporate taxpayers) or as a credit against income tax payable (individual taxpayers) provided that the assets and income derived therefrom are correctly reported in the tax return for income tax purposes by the beneficiary and the reimbursement is not abusive.

7 See: [http://www.estv.admin.ch/d/vst/dokumentation/formulare.htm](http://www.estv.admin.ch/d/vst/dokumentation/formulare.htm)
If dividends are to be distributed by a Swiss company to a parent company, then it is possible to apply for the so-called reporting procedure (art. 20 WHTL and art. 24 of the Withholding Tax Ordinance; WHTO). If the reporting procedure is granted by the Swiss Federal Tax Administration, then the Swiss company will not have to pay the amount due as withholding tax to the Federal Tax Administration and the parent company will be able to request a reimbursement. In that case, the Swiss company can pay the dividend in total to the parent company and simply needs to notify the Federal Tax Administration by filing the "form 106".

For most non-resident beneficiaries, the Swiss withholding tax represents a final tax on investment income from Swiss sources. However, if the non-resident beneficiary is a resident of a state with which Switzerland has concluded an international tax treaty, the beneficiary may be able to request a partial or total reimbursement of the Swiss withholding tax.

Aside from dividend payments, there are other payments which/that are subject to the withholding tax:

- Acquisition of company's own shares;
- Transformation of reserves into bonus-share capital;
- Restructuring; and
- Complete or partial liquidation of a corporation.

9. **Income source tax on the salary of certain employees**

In numerous countries, the individual income tax owed by an employee is directly deducted from his salary. Generally, he or she will need to fill out a tax return after being taxed at the source and then may be reimbursed in part for the excess of tax paid at source or will need to make additional payments.

For most Swiss residents, the income tax is assessed on the basis of a tax declaration filed annually. However, the income tax is deducted directly from the salary of certain foreign nationals. The company is responsible as the employer for levying the income tax at the source and for calculating properly the amount owed by the employee and paying the cantonal tax authorities on behalf of the employee.
The following salary components are subject to taxation at the source in particular:

<table>
<thead>
<tr>
<th>Salary components subject to taxation at the source</th>
</tr>
</thead>
<tbody>
<tr>
<td>• &quot;Ordinary&quot; monthly salary</td>
</tr>
<tr>
<td>• Gratuity</td>
</tr>
<tr>
<td>• Bonus payments</td>
</tr>
<tr>
<td>• Board of directors’ fees</td>
</tr>
<tr>
<td>• Payments in kind</td>
</tr>
<tr>
<td>• Income derived from stock option plans</td>
</tr>
</tbody>
</table>

Every company whose employees or members of the board of directors are subject to source taxes must register itself with the tax authorities in the canton of its domicile. The tax authorities will then issue to the company the necessary package for calculating the taxes to be levied at the source including all forms to fill in.

10. **Double taxation of a company and its shareholders**

Income generated by a company is primarily subject to corporate income tax to be paid by the company (section 4). However, the income distributed by the corporation to the shareholder is subject to taxation for the beneficiaries, i.e. the shareholders. Thus, there is a so-called "double taxation of distributed corporate profits".

**Example: Double taxation of distributed corporate profits**

- Peter Abt is the sole shareholder of the Alpha Corporation which generated a profit (before taxes) of CHF 100'000 in the past year.
- The Alpha Corporation distributes the whole profit (after having paid corporate income taxes) as a dividend to Peter Abt.
- The double taxation of distributed corporate profits is as follows:

<table>
<thead>
<tr>
<th>Taxable profit of Alpha Corporation</th>
<th>100'000</th>
</tr>
</thead>
<tbody>
<tr>
<td>- corporate income tax of Alpha AG</td>
<td>- 25'000</td>
</tr>
</tbody>
</table>
A similar pattern can be observed in the double taxation of the invested capital. This invested capital is initially subject to a corporate capital tax to be paid by the corporation (section 5) and then is subject to an individual wealth tax to be paid by the shareholder.

Further information regarding individual income and wealth tax of shareholders can be found on the homepages of the cantonal tax authorities.\(^8\)

11. **Taxation of a subsequent sale of shares**

   a) **Basic principle: capital gains are tax exempt**

   Generally, it can be held that, in Switzerland, capital gains realized by individuals on the sale of privately held assets are exempt from income tax, contrarily to most of the other countries. Therefore, if a shareholder sells his shares as part of his private assets with a profit, then the whole sale proceeds (i.e. the initial investment costs as well as the capital gain) will be exempt from individual income tax.

   Thus, for example, the majority shareholders employed by the company will often prefer to pay themselves low salaries, not receive any dividend payments, accumulate the profits and then sell the company with the accumulated profits in the form of reserves, in order to realize a non-taxable capital gain.

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8 A list of the links to the homepages of all 26 cantonal tax authorities can be found at: [http://www.steuerkonferenz.ch/d/links.htm](http://www.steuerkonferenz.ch/d/links.htm).
b) **Exceptions: capital gains may be taxable under certain circumstances**

In specific situations, a person's capital gains can be taxed as individual income. Therefore, in any of the following situations, a tax expert should assess the risks of such taxation before any potential sale of shares:

*Qualification as professional security dealer*

In the view of the Swiss Supreme Court, gains from the disposition of securities are taxable as income from independent gainful employment if the taxpayer buys and sells shares in a manner that goes beyond the simple management of his private assets. Since June 21, 2005, the Circular Letter No. 8, issued by the Swiss tax authorities, has provided guidance for differentiating between professional securities trading from private asset management. Specifically, it establishes a "safe harbour": if a taxpayer meets all the conditions of the safe harbour, the gains from the disposition of securities will be tax-exempt (except for the "indirect partial liquidation" theory). These conditions are:

- The holding period of the securities is at least one year;
- The total volume of the transactions per year does not exceed five times the value of the portfolio at the beginning of the tax period;
- There is no need to compensate missing earnings by selling securities to make a living from capital profits (as a general rule, this condition is fulfilled if the capital gains represent less than fifty percent of the taxpayer's annual earnings);
- The securities are publicly available and not closely connected to the taxpayer's occupation;
- No leverage is employed in acquiring the securities or, if leverage is employed, the expected yield on the investment exceeds interest payments; and
- Derivatives transactions are entered into only for hedging purposes.

Thus, if all of these conditions are met, the taxpayer will not be deemed a securities dealer and gains from the disposal of securities will be deemed private capital gains.

If these conditions are not met, professional securities trading cannot be excluded and the usual analysis based on the jurisprudence of the Swiss Supreme Court will be applied (*e.g.* indicators for the independent gainful employment are systematic or methodical trading, frequent transactions and short holding periods. etc.).
**Transposition**

According to art. 20a para. 1 (b) DTL, transposition is assumed and the capital gain realized by individuals will be taxed if cumulatively:

- at least 5% of a company's participation rights are contributed from a private seller to a purchaser, who holds the participation rights as business assets and the seller is the owner of at least 50% of the purchaser's shares after the transaction; and
- the total remuneration exceeds the nominal share capital of the transferred shares.

**Indirect partial liquidation**

According to art. 20a para. 1 (a) DTL, indirect partial liquidation is assumed and the capital gain realized by individuals will be taxed if cumulatively:

- at least 20% of a company's participations rights are transferred from a private seller to a purchaser, who holds the participation rights as business assets;
- within five years after the sale, non-operational assets are distributed in cooperation with the seller; and
- the non-operational assets existed and could have been distributed in accordance with Swiss commercial law at the time of disposal.

c) **Loss of capital**

Not only private capital gains but also capital losses on personal movable assets are tax-neutral. If the shareholder sells his shares below the initial investment costs (*i.e.* below the purchase price), then the resulting loss cannot be offset with other taxable income (*e.g.* salary).
Financing
"Business, that's easily defined it's other people's money."

Peter F. Drucker
PART 4: FINANCING

A. Classes of financing

There are two basic classes of financing:

- Debt financing; and
- Equity financing.

The main difference between the two classes of financing is that debt financing usually bears interest and must be repaid at a given point in time. In contrast, equity financing leads to the financing parties' participation in the company's share capital, including all rights and obligations such as in particular the right to participate in the shareholders' meeting. In practice, equity financing providers also expect a consideration for the money invested either by way of dividend payments – or more often in case of venture companies – in form of an increase of the value of the invested share capital.

There is another form of financing combining debt and equity financing, the so called "mezzanine financing". It is possible to for example agree on a loan with interest payments depending on the profit of the company (partiarisches Darlehen). In addition, debt-financing providers very often reserve certain rights to participate in or veto the most important decisions of the company in order to secure their position. These control and participation rights result in the fact that debt financing may be considered as equity from a corporate law point of view. Important decisions, which require the approval of the financing providers, could be for instance changes to the articles of incorporation, profit distribution or the entering into important agreements (such as co-operation or license agreements). Another form of mezzanine financing provides for the grant of options instead of interest payments. In practice, mezzanine loans have fewer securities compared with a traditional loan. In any event, there are numerous different forms of mezzanine financing, which are usually tailored to the specific case at hand.

Often, one class of financing is replaced by another type of financing. This is particularly the case if in a first step, investors provide a loan in form of a bridge loan in order to secure the company's liquidity in the short term. In a second step, the bridge loan is then converted into equity of the company.

B. Capital increase (equity financing)

If investors participate in the share capital (equity) of the company, the company usually increases its capital. To complete an ordinary capital increase, the board of
directors must ensure that all resolutions and acts comply with the mandatory provisions of Swiss law. In particular, any capital increase requires a shareholders' meeting, approving the capital increase. Given the fact that new investors shall participate in the company, the preferential subscription rights of the existing shareholders must be waived, which requires the approval of at least two thirds of the votes represented and the absolute majority of the nominal values represented at such shareholders' meeting (art. 704 para. 1 CO). In a second step, the board of directors has to implement the capital increase within a term of three months. Usually, this three months term is only required if the shareholders' meeting approves the capital increase and the board of directors seeks for additional investors. More often, investors are already known and have committed themselves at the time of the shareholders' meeting. Therefore, the resolution of the shareholders' meeting can be implemented by the board of directors within a few days after the shareholders' meeting. Both resolutions require a public deed, which means that a notary must be present in the respective shareholders' meeting and the meeting of the board of directors respectively. Besides the ordinary capital increase, Swiss law provides for an authorized share capital as well as for a conditional share capital. By way of an authorised share capital, the shareholders of a company authorize the board of directors to increase the share capital by up to 50% of the existing share capital without any additional shareholders' meeting. This authorised share capital shall ensure more flexibility and shall, in particular, allow the board of directors to increase the company's share capital to acquire other companies, divisions thereof, or for the financing of such transactions. The possibility to exclude the preferential subscription rights of the existing shareholders is of particular importance in this regard. This is only possible if there are valid reasons (sachliche Gründe). Such valid reasons include the acquisition of another company, divisions thereof or the financing of such transactions (art. 652b para.2 CO).

The conditional share capital is also created by way of a resolution of the shareholders' meeting. The conditional share capital may amount to up to 50% of the company's existing share capital. The conditional share capital can be used for certain specific purposes defined by law (art. 653 para. 1 CO), such as the issuance of shares in connection with conversion rights or option rights (e.g. convertible bonds) or employee participation schemes (employee share plans, employee stock option plans).

Similar to the incorporation of a company (cf. part 1 B), the capital increase requires compliance with additional legal requirements in certain cases: if the new shares are issued against a consideration in kind (Sacheinlage), the provisions of art. 652e CO and art. 652f CO have to be observed. Where the capital increase is against cash, the company has agreed to acquire or intends to acquire certain assets from an existing shareholder after the completion of the capital increase. In such case, the specific provisions regarding (intended) acquisitions in kind (Sachübernahme, beabsichtige Sachübernahme) must be observed. In case the company intends to acquire certain assets from a third party, which is independent from the company's existing shareholders, no further formalities must be observed.
as from January 1, 2008. In case the company does not comply with the formal requirements set forth in the CO, the respective transaction are null and void (nichtig). In addition, the involved persons bear the risks of criminal liability (for example forgery according to art. 251 Swiss Criminal Code).

### Checklist for an ordinary capital increase

- **Timeline**
  - Invitation to the shareholders' meeting (board of directors)
  - Shareholders' meeting approving the capital increase
  - Resolution of the board of directors implementing the capital increase
  - Application to the commercial register
  - Publication in the Swiss Official Gazette of Commerce (Schweizerisches Handelsamtsblatt)
  - Resolution of the board of directors approving the issuance of new share certificates and the registry of the new shareholders in the shareholders' register (in case of registered shares)
  - Issuance of new share certificates
  - Entry of the new shareholders in the shareholders' register (in case of registered shares)

- **Most important documents**
  - Public deed regarding the resolution of the shareholders' meeting approving the capital increase
  - Subscription form
  - Confirmation regarding payment of nominal amount
  - Capital increase report of the board of directors
  - Auditor's confirmation (which is not necessary in case of a capital increase against cash granting the existing shareholders' preferential subscription rights)
  - Amended articles of incorporation
C. Venture capital provider

In case of start-up companies, equity financing is usually provided by venture capitalists. Negotiations between the company or its shareholders and the venture capitalists are divided into separate phases:

- Negotiation of term Sheet
- Due diligence review
- Negotiation of investment agreement (Beteiligungsvertrag)
- Negotiation of shareholders' agreement (Aktionärbindungsvertrag)

In the first phase, both parties express their mutual interest. The principles of the venture capitalist's participation in the company are negotiated and agreed, the so-called "Term Sheet" is signed. In a next step, the investor will conduct a more or less extensive due diligence review of the company. He will verify business, technological, legal and tax aspects of the company in order to decide whether or not to invest in the company. In case of positive results of the due diligence review, the venture capitalist, the company and the company's shareholders start negotiations of the investment agreement as well as the shareholders' agreement. The most important aspects of these steps will be described in the following paragraphs.

1. Term sheet

The fundamental aspects of the investor's participation in the company are outlined in the term sheet. The term sheet reflects the negotiation between the investors and the company's existing shareholders. Points to be recorded in the term sheet are, among others, the valuation of the company, the envisaged investment, anti-dilution protection of the investors, participation rights of the investors', representations and warranties of the company as well as its existing shareholders, the exit strategy etc. These points will be reflected again in the documents to be negotiated subsequently, i.e. the investment agreement and the shareholders' agreement. Even though the term sheet is legally not binding, the parties should already mention their key points and key considerations, as the term sheet serves as guidance for the subsequent negotiations.
Usually, the term sheet does not contain any legally binding commitment of the investors to invest in the company. Any such investment is usually conditional upon a series of conditions precedent such as a due diligence review satisfactory to the investors as well as the conclusion of an investment agreement and a shareholders' agreement satisfactory to the investors.

2. Due diligence review

The so-called "due diligence" review is a detailed analysis of the company. The existing shareholders who are involved in the company's operative management have an advantage over the investors as they thoroughly know the company. The due diligence shall ensure that the investors have sufficient information to decide whether or not to invest in the company. During the due diligence process, investors try to understand the risks associated with their investment and try to find ways to minimise these risks. From the company's as well as the company's existing shareholders' perspective, the due diligence review has the advantage that they must give less representations and warranties as the investor already knows the company very well. The due diligence review serves to limit their liability towards the investor. Basically, investors cannot base a claim on facts they knew. In addition, a comprehensive information exchange during the due diligence is a sound bases for the future cooperation between investors, the company and its existing shareholders. The company's business secrets can be protected by way of confidentiality agreements.

The following areas are analysed during the due diligence:

- Operations, in particular products, services and markets (business due diligence);
- Accounts of the company (financial due diligence);
- Taxes (tax due diligence);
- Legal aspects (legal due diligence); and
- Environmental aspects (environmental due diligence)

The following aspects of the legal due diligence are of particular relevance:

a) Corporate law

In the area of corporate law, the investors analyse whether the company and its subsidiaries are validly incorporated and existing. In addition, they will verify whether shareholders' resolutions as well as resolutions of the board of directors comply with
legal requirements. The investors will analyse the shareholder structure as well as any restrictions on the transfer of the company's shares.

b) **Material agreements**

Investors will analyse those agreements, which are of major importance to the company's business and which directly influence the valuation of the company (the so-called "material" agreements). Investors will focus on the agreements' term, the most important terms, conditions and the consideration paid by the company. Investors will verify whether the agreements contain a change of control provision, as such provision could result in the termination of the agreements, which would be detrimental to the investors' interests.

Furthermore, investors will analyse the company's standard terms and conditions as they can significantly influence the risks associated with the investment.

c) **Pending and threatening litigation**

Pending and threatening litigation can constitute a significant risk for the company and can influence the company's valuation. Investors will focus on the question whether any risks associated with legal or administrative proceedings are adequately reflected in the company's financial statements (provisions).

d) **Legal risks associated with the company's business**

Investors will analyse the legal risks associated with the company's business, in particular product liability issues. Any such risk can significantly influence the company's valuation. Investors will analyse whether legal risks are adequately insured.

e) **Permits and authorisations**

As a part of the legal due diligence, investors will verify whether all necessary permits and authorisations required to conduct the company's business have been obtained and whether the company complies with the condition for authorisation. In particular, the investors will verify whether a particular ownership or management structure is required to maintain the permits and authorisations.
f) **Employment law aspects**

Investors will analyse the standard employments agreements as well as the individual employment agreements with key employees. In its entirety not only the standard employment agreements but also collective bargaining agreements are of relevance. All these agreements are important for the company's success. Investors are, for example, interested in keeping the key employees. They will analyse whether new employment agreements with key employees must be negotiated.

Finally, investors will check whether there is pending employment litigation. A series of pending employment litigation can constitute a problem for the company.

g) **Intellectual property rights**

In start-up companies, intellectual property rights are very often a key competitive factor and are of considerable value, in particular if they are patents or trademarks. As a result, investors will verify whether the intellectual property rights, which are used to conduct the company's business, are validly existing and registered and belong to the company. If the company uses third party intellectual property rights, investors will check whether there are appropriate licence agreements in place. In case of material intellectual property rights, investors will analyse whether they belong to the company or whether they can be challenged by third parties. Change of control clauses can play a role and investors will try to avoid that license agreements are terminated in case of an investment and participation in the company.

h) **Information technology**

Software used by a start-up company can be a key success factor. Very often, information technology is an important cost factor as well. Therefore, investors will try to determine whether the intellectual property rights related to software developed by the company really belong to the company and whether the company has secured appropriate license rights for software developed by third parties. Again, change of control clauses need to be analysed to prevent the third parties' termination of key license agreements.

i) **Real estate**

Real Estate owned by the company if any, can be an important factor as well. Very often, real estate is of considerable value. In addition, real estate can serve as a security for loans granted to the company. Therefore, investors will carefully analyse the real estate owned by the company as well as the rights and obligations connected therewith
(such as mortgages or *beschränkte dingliche Rechte*). Environmental risks can be a key investment consideration.

**j) Insurance coverage**

Investors will verify whether the company has appropriate insurance coverage covering the most important business risks. Depending on the company's business, insurance coverage can vary. Adequate product liability coverage is of particular importance as any such claims can negatively affect the value of the company.

**k) Related party transactions**

The relationship between the company and its existing shareholders will be critically reviewed by the investors for two main reasons:

- The relationship between the company and the existing shareholders will show the investors the general attitude of the shareholders towards the company.
- Furthermore, investors will analyse whether the agreements need any modifications because, for example, the remuneration of the services provided by existing shareholders is considered excessive.

Ideally, the relationship between the shareholders and the company is exclusively governed by the shareholders' agreement and, if possible, all other agreements are terminated. To the extent that there are other agreements, such as employment agreements, they should be independently negotiated and be at arm's length terms.

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**Checklist Legal Due Diligence**

- Corporate law
- Material agreements
- Pending and threatening litigation
- Legal risks associated with the company's business
- Permits and authorisations
- Employment law aspects
3. **Investment agreement (Beteiligungsvertrag)**

The following points are usually contained in the investment agreement:

a) **Subscription of shares**

The investment agreement contains provisions on the acquisition of shares in the company by the investors. The content of the investment agreement will differ and depend on whether the investors acquire shares from the company's existing shareholders or whether the investors subscribe for new shares which are issued by way of a capital increase. In practice, a combination of both, the purchase of existing shares as well as the subscription of newly issued shares in the company, is frequent. In any case, the investor will conclude the investment agreement with the company's existing shareholders.

In case of the acquisition of existing shares, the investor(s) and the company's existing shareholders enter into a share purchase agreement. The purchase price will be paid to the selling shareholders and the company will, in this case, not receive any new funds, as there is no capital increase.

This is different in case the investor(s) subscribe for newly issued shares. The subscription price for these shares will directly go to the company. In this case, the investor undertakes in the investment agreement to subscribe for the new shares issued in the capital increase at the issuance price. The existing shareholders undertake to increase the company's share capital and to adopt the necessary corporate resolutions. In practice, it is more frequent to have capital increases, as the investor's money will go to the company. This corresponds to the venture capital or private equity investors' intentions, bearing in mind that they intend to finance companies' growth and expansion. Nevertheless, the investment agreement is concluded with the company's existing shareholders as they need to adopt the necessary corporate resolution and must waive their preferential subscription rights. The company, however, must not necessarily be a party to the investment agreement, unless where the investors provide...
for a bridge loan, which shall be converted into equity of the company, when the company itself must necessarily become a party to the investment agreement.

b) **Representations and warranties (Zusicherungen und Gewährleistungen)**

Representations and warranties shall protect the investor against problems of the company or events negatively affecting the company's business and financial results, which the investor has not detected even though it has conducted a due diligence review. Furthermore, representations and warranties shall protect the investor against any occurrences negatively affecting the company's business and financial results already known to the investor. Therefore, representations and warranties usually cover the same areas which are addressed by the due diligence. The representations and warranties are regularly given by the company's existing shareholders, in particular the shareholders which are actively involved in the operative management of the company. In the event that the existing shareholders are not involved in the operative management of the company, they are well advised to carefully verify with the company's management whether or not certain representations and warranties can be given. In practice, it is not frequent that the company itself gives some representations and warranties because any payment under a breach of a representation or warranty is problematic. As a result of the respective payment to the investor, the value of the company would further decrease which does not correspond to the parties' intentions. In practice, financial investors do not give representations and warranties with respect to the company's business.

c) **Indemnities (Schadloshaltungen)**

Indemnities shall cover the investors' losses in case of a breach of representations and warranties or other breaches of the investment agreement. There are basically three types of indemnities:

- The existing shareholders can indemnify the investor by way of cash payments.

- In practice, the existing shareholders very often are not in a position to indemnify the investors by way of a cash payment. In this case, the parties agree that the investor is entitled to receive from the company's existing shareholders as many shares without any consideration which equal the value of the investor's claims. Usually, the parties will already agree in the investment agreement on the value of the shares to be transferred.

- Contrary to the two possibilities outlined, it is also possible that the parties agree that any payment shall directly go to the company. This provision makes sense: it ensures that the company itself is put in a position corresponding to the position the company would be in, if the representations and warranties were true and correct.
The company's financial position corresponds, as a result of this payment, more or less to the business case presented to the investor. In addition, any damage of the investor is compensated on a pro rata basis.

We do not recommend that an investor shall receive compensation for damage from the company. This makes no sense, as the value of the investor's participation in the company is further reduced in the amount of the payment. Such payments are problematic from a corporate law point of view as they usually violate the prohibition to repay the company's capital. Such payments are only allowed to the extent the company has freely distributable reserves. In practice, the company most likely will not have any freely distributable reserves. Furthermore, any such payment would require compliance with the formalities regarding the distribution of profits.

d) Price adjustment mechanisms

The financial situation of the company can exceed the investor's expectations. In practice, the contrary is the case very often. For both cases, the investment agreement contains price adjustment provisions. Where the financial performance of the company is better than expected, the investor can undertake to make additional payments (to further finance the company's growth). Usually, such payments are subject to the company's compliance with certain financial key figures or the fulfilment of other important operative goals (so-called milestones). In the event that the company reaches these milestones, additional payments of the investors are due. These payments can either go to the company's existing shareholders or, in order to further finance the company's business, to the company itself.

In case of an adverse financial performance of the company or in case the company does not reach defined operative goals, investors can protect themselves by clauses which require the company's existing shareholders to repay part of the purchase price to the investors. In case the company's existing shareholders do not have the cash necessary to compensate the investors, which is usually the case, the parties can agree on the transfer of shares in the company, without any consideration, from the company's existing shareholders to the investors. In any case, it is important that the details of the necessary calculations as well as the valuations are set out in the investment agreement.

Key points of the investment agreement

- Acquisition of shares (purchase of existing shares, subscription of new shares)
4. **Shareholders' agreement**

In practice, the existing shareholders and the new investors usually conclude a shareholders' agreement together with the investment agreement. Whereas the investment agreement deals with the investment in the company and the corresponding representation and warranties (which essentially relate to the company's past), the shareholders' agreement deals with the common future of the parties.

Investors try to secure their investment case by means of the shareholders' agreement. This is necessary because the investors enters into the transaction based on a specific business plan. Therefore, it is essential for the investors that the company and its management pursue and implement this business plan. As a shareholder, the investor has only limited influence on the operative management of the company, in particular, if the investor only holds a minority stake. This is due the facts that the investor only has limited participation rights in the shareholders' meeting and that he cannot directly make operative decisions. This is one of the inalienable and non-transferable duties of the board of directors (art. 716a CO). Therefore, the investors will try to secure their influence on the company by way of the shareholders' agreement which shall ensure that the investors have certain rights which go beyond the usual shareholders' rights.

In addition, according to mandatory corporate law, shareholders cannot have any other obligation than paying the nominal value of their shares. Therefore, any additional obligations must be agreed to in a separate agreement – the shareholders' agreement. Examples of these additional obligations would be the obligation to pursue and implement the business plan, the obligation to participate in further capital increases or any other duties of loyalty.

Once the investor is involved in the company's operative management, the investor bears the risk of liability in the case of wilful misconduct or (gross) negligence. The investors will, therefore, try to limit their risk of being liable towards the company's other shareholders and/or creditors. Therefore, the shareholders' agreement will usually contain provisions which shall balance the relationship between influence and responsibility (factual corporate body cf. part 2 B.10 of the investor).

Finally, the shareholders' agreement will usually contain provisions on the exit from
the investment (trade sale or initial public offering, (IPO)) as well as the dealing with a corporate crisis.

The following issues are usually included in the shareholders' agreement.

a) **Articles of incorporation and organisational regulations**

The articles of incorporation as well as the organisational regulations (cf. part 6 A.2 and part 6 A.5) are the two most important documents with regard to the company's organisation. Given this, the shareholders' agreement usually contains provisions regarding these two documents. The articles of incorporation as well as the shareholders' agreement mutually influence each other: The articles of incorporation contain provisions on the company's purpose as well as on the capital structure. The articles of incorporation will reflect the various categories of shares such as voting shares or preferred shares foreseen in the shareholders' agreement. In case that the shareholders' agreement provides for voting rights or for preferred shares, the articles of incorporation will be amended accordingly, in order to further secure the investors' preferred economic or participation rights.

The organisational regulations contain the distribution of tasks, competences and responsibilities within the board of directors as well as the distribution of tasks, competences and responsibilities between the boards of directors on the one hand side and the executive management on the other hand side.

By means of the appropriate articles of incorporation and organisational regulations, it is possible to further secure the minority rights agreed in the shareholders' agreement. For example, it is possible to include a provision in the company's articles of incorporation which requires the presence of a certain number of shareholders such that a shareholders' meeting can validly adopt resolutions. In case the respective presence is not observed, the relevant resolution of the shareholders' meeting is not only a breach of the shareholders' agreement but it also violates corporate law. Hence, the resolution is null and void or can be challenged by another shareholder. The same applies for the organisational regulations with regard to resolutions of the board of directors. Such quorums have the disadvantage of less flexibility and the parties will have to find the balance between deal security and organisational flexibility. When drafting the articles of incorporation as well as the organisational regulations, the parties should bear in mind that protecting investors' rights or other parties' minority rights could lead to a certain operational inflexibility. From time to time, the operative management requires decisions which are taken on short notice. Therefore, in case of a heterogeneous shareholder structure the parties are well advised to ensure that a single shareholder does not have the possibility to prevent the board of directors and the executive management from adopting certain resolutions. The parties should, on a case-by-case basis, agree upon the relevant quorum. Usually, investors will reserve the
right to explicitly approve any changes to the company's articles of incorporation and the organisational regulations. If various investors participate in a company, it is also possible that a majority of the investors who jointly hold a certain percentage of the share capital can approve changes to the company's articles of incorporation or organisational regulations.

b) Composition of the board of directors and the executive management

The board of directors is the most important corporate body. The board of directors has certain inalienable and non-transferrable duties, such as the ultimate management and the supervision of the company. Therefore, the parties will usually agree on the composition of the board of directors in the shareholders' agreement. Minority shareholders will try to ensure that they have at least one representative in the board of directors. The same applies to the investors. Given the fact that the members of the board of directors are elected by the shareholders' meeting, it is essential that the shareholders' agreement contains an undertaking of each party to elect the members proposed by the other parties. In case of a corporate crisis, investors might want to delegate additional members to the board of directors or the executive management. This will allow the investors to establish an effective crises management. This, however, bears the risk of additional liability. The shareholders' agreement should contain detailed provisions on the definition of the corporate crises, *i.e.* a significant deviation from the business plan or failure to achieve defined milestones.

c) Auditors and accounting standards

The auditors as well as the applicable accounting standards form essential aspects of corporate governance (*cf.* part 2 A). Therefore, the shareholders' agreement usually contains provisions on the election of the auditors. In case of significant investments, investors will usually request that one of the "big-four" accounting firms acts as auditors. Furthermore, applicable accounting standards directly influence the quality of financial information which can be provided to the investors. Nowadays, investors will request the application of international financial reporting standards (IFRS) or US generally accepted accounting principles (US GAAP) (*cf.* part 2 E).

d) Information of the shareholders

Shareholders can only exercise their participation rights if they receive meaningful information about the company and its business on a regularly basis. According to Swiss corporate law, shareholders only receive very basic information. Furthermore, such information comes only sporadically. Therefore, the parties usually agree in the shareholders' agreement upon additional information to be spontaneously provided by
the company to its shareholders. In principle, the investors shall receive the same information as the members of the board of directors. is Timely information is of particular importance. Usually, investors should receive the following information:

- Unaudited monthly accounts within 15 days after the end of each month;
- Unaudited quarterly accounts within 30 days after the end of each calendar quarter;
- Audited annual accounts within 90 days after the end of a physical year; and
- Forecasts and comparisons with the budget.

In addition to the periodical information, investors should receive ad hoc information with regard to all events which materially affect the company, its business and its financial situation. In this context, investors should have the right to request additional information from the board of directors in addition to the right of inspection and information set forth in art. 697 CO. In particular, the company and the board of directors should not be allowed to deny information based on the argument that such information contains business secrets of the company. To protect the company's business secrets adequately, it might be necessary to sign a confidentiality agreement or to include a confidentiality clause in the shareholders' agreement.

e) Minority protection

One of the corner stones of good corporate governance is the protection of minority shareholders. This is of particular importance for investors if they hold less than 50% of the shares in the company. In this case, the shareholders' agreement usually provides for specific quorums for important resolutions of the shareholders' meeting, as well as the meetings of the board of directors. These quorums shall ensure that the minority shareholders or their representatives in the board of directors can participate in the respective resolutions and that, therefore, their rights are adequately protected. The specific quorums depend on the shareholder structure in a given case. The parties should take into account that quorums can also restrict the company's operational flexibility. In case the shareholder structure is very heterogeneous, minority protection rights in favour of one shareholder also apply in favour of all other shareholders. Typically, the following resolutions are subject to adoption by a specific quorum:

- Changes to the company's articles of incorporation and organisational regulations;
- Definition of the strategy and business plan;
- Adoption of and changes to the investment and financial plan or the budget;
- Appointment and removal of members of the executive management and designation of authorised signatories;
• Incorporation and liquidation of subsidiaries;
• Purchase and sale of participations as well as real estate;
• Pledge of participations and real estate;
• Grant of loans to third parties and entering into financial commitments exceeding a certain threshold amount;
• Grant of guarantees;
• Conclusions of, changes to and termination of employment agreement with key employees;
• Conclusion of, amendments to and termination of other material agreements;
• Commencement of litigation;
• Conclusion of, amendments to and termination of related party transactions;
• Conclusion of, changes to and termination of agreements outside the ordinary course of business.

f) Related party transactions

The relationship between the company and its existing shareholders (related parties) will be critically analysed by any investor. Normally, the shareholders' agreement will contain comprehensive provisions dealing with the relationship between the company and its existing shareholders. Very often, the first participation of "outside" or financial investors leads to significant changes in the relationship between the company and its existing shareholders. Investors will make sure that the two spheres are strictly separated, which is not necessarily the case in a closely held company. Investors will, for example, want to make sure that any related party transactions are on an at arm's length basis. Furthermore, investors will make sure that the existing shareholders' role in the company is clearly defined from the outset. Therefore, the shareholders' agreement may contain provisions on the composition of the executive management, specifying that one or more of the company's existing shareholders shall become member(s) of the executive management. The respective employment agreements usually will be an annex to the shareholders' agreement. The remuneration should be at arm's length. Very often, the employment agreement contains a covenant not to compete.

g) Further financing

Very often, the shareholders' agreement contains provisions on the future financing of the company. The parties will agree upon a financial plan, which will be attached to
the shareholders' agreement or to the investment agreement. In case that future financing shall be provided by way of equity, investors usually agree to participate in future financing rounds, whereas the existing shareholders waive their preferential subscription rights. Depending on the terms of the capital increase, the investors' participation as well as the number of voting rights and their share in the company will be shifted towards the investors. The specific extent of this shift depends on various factors such as the number of shares, nominal value as well as issuance price of such shares. The higher the agio – i.e. the difference between issuance price and nominal value – the lower the shift in the participation from the existing shareholders to the investors. Interest of the company's existing shareholders as well as the investors are opposed. Therefore, the shareholders' agreement should contain provisions on future capital increases and the conditions of such capital increases. The shareholders' agreement should contain provisions on milestones, the number of shares to be issued in future capital increases as well as the issuance price. In addition, the parties must undertake to resolve upon the necessary capital increases and to implant them accordingly. This obligation is regularly subject to the condition precedent that the company evolves according to the business plan and achieves the defined milestones. In case an investor does not wish to participate in future capital increases, the shareholders' agreement could contain anti-dilution provisions. Another topic which requires agreement among the parties is the dividend policy. The parties must make the fundamental decision on whether they want to use the funds generated by the company's business to refinance future expansion or whether they want to distribute such funds among the shareholders by way of dividends payments or the repayment of the nominal value. In case the parties wish to distribute dividends, they should specify in the shareholders' agreement whether investors should have preferred dividend rights. Such preferred dividend rights can either be based on the shareholders' agreement only and/or be based on a specific category of preferred shares according to art. 654 et seq. CO. In the case of recently incorporated companies or typical growth companies, the shareholders will usually use the funds to expand business.

h) Right of first refusal and right of first offering

Very often, the parties agree in the shareholders' agreement that a party, who is willing to sell its shares, shall offer such shares to the other shareholders before selling the shares to a third party. Respective rights of first refusal and rights of first offer are part of the shareholders' agreement and shall ensure that the existing shareholders have the opportunity to purchase such shares and to control the circle of shareholders.

i) Tag-along right

The so-called tag-along right ensures that minority shareholders can, subject to certain conditions, sell their shares to a third party at the same terms and conditions
as the controlling shareholders do. The tag-along right shall protect the minority shareholders from a change of the majority shareholder and provide them with a respective exit right (together with the majority shareholder).

Usually, the contract provides for such a right if the majority shareholders sell a defined number of shares (e.g. 331/3% or 50% of the shares). The shareholders' agreement contains detailed provisions with respect to the exercise of the tag-along right, such as written notice, terms etc.

To the extent that there are rights of first refusal or rights of first offer, tag-along rights can only be exercised to the extent that none of the parties has exercised any right of first refusal or first offer. Furthermore, the shareholders' agreement contains provisions on whether a tag-along right can only be exercised in the event of a sale of 100% of the shares in a company held by a particular shareholder or whether it can be exercised on a pro rata basis, if less than 100% of the shares in a company held by a particular shareholder are sold.

j) Drag-along right

The so-called drag-along right is the opposite of the tag-along right. The drag-along right is very important for a financial investor because it ensures that he can sell 100% of the shares in a company, even though, he does not hold 100% of such shares. This is particularly important in case of a trade sale, because the purchaser usually wishes to acquire 100% of the shares in a company. Otherwise, he would have to deal with minority shareholders, which is usually not desired. This is particularly the case when an industrial buyer intends to integrate the company within a larger group of companies. Minority shareholders could disturb this process because they have certain minority protection rights such as information rights, participation rights in the shareholders' meeting or the right to request a special investigation. Given this minority protection rights, a sale of less than 100% of the shares in a company would usually negatively affect the purchase price.

To avoid these problems, the shareholders' agreement contains a so-called drag-along right. The financial investors can decide to force the other shareholders to sell their shares at the same terms and conditions to a third party as the financial investors do. Usually, the decision is subject to certain conditions (inter alia, qualified majority, expiry of a term during which no IPO was possible or termination of key employees in the company).

The financial investors will usually try to have no restrictions with respect to the negotiations of the terms and conditions of the sale of the shares in the company to the third party.
Prior exercise of rights of first refusal and rights of first offer of other shareholders are typically excluded. The exercise of such rights would unnecessarily delay the exit process. Furthermore, the protection of the other shareholders is ensured as the drag-along right is subject to certain conditions. Very often, the shareholders' agreement provides a pro rata drag-along right in case the financial investors do not sell 100% of their shares in the company.

k) Redemption

The term redemption originates from the Anglo-Saxon legal systems and implies that the company can, subject to certain conditions, be obliged to repurchase the shares from its shareholders. Financial investors would often like to see such a redemption right, because it allows them an exit in case of an unsuccessful investment. Redemption rights shall limit the investors' risks.

However, as the repurchase of shares is limited under Swiss law, redemption rights are of little practical use. Nevertheless, the shareholders' agreement usually contains such a clause – in particular in case of early stage financing of start-up companies. Based on such clauses, the investor usually will have the right to redeem up to 10% of the shares where there has been no other exit. Thereafter, the company will make a capital decrease. The redemption price usually corresponds to the initial purchase price for the shares.

l) Registration rights

Most shareholders' agreements regarding private equity investments contain a clause specifying the parties' intentions to either list the shares in a company on a stock exchange within a certain period of time or to sell the shares in the company to an investor within such time period (trade sale). Usually, financial investors can request an initial public offering more than once. In addition, the clauses contain provisions requiring the company to pay the respective fees and expenses and requiring the shareholders to accept certain lock-up periods.

m) Anti-dilution

Very often, the shareholders' agreement contains provisions designed to protect the investors against the dilution of his shares. These provisions apply if there is a future financing round at terms less favourable compared to terms of investment of the financial investors. In this case, the investor is entitled to purchase additional shares at a lower price, with the effect that the average purchase price of the investor is equal to the purchase price of the third party investor in the subsequent "lower" financing
round. The same result can be achieved by a transfer of shares from the existing shareholders to the financial investors (such transfer usually occurs). After the transfer, the overall number of shares held by financial investor corresponds to the number of shares he would have obtained if he had invested at a lower price in the subsequent financing round.

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D. Alternatives

As an alternative to the financing methods outlined in the previous sections, friends and relatives can provide financing, in particular, at an early stage (so-called "friends, family and fools financing"). However, even if capital is raised among personal acquaintances, the parties should conclude a written agreement with regard to the terms and conditions of the investment. Otherwise, there is a risk that the personal relationships are endangered in the event that the company does not evolve as initially expected.
So-called "Business Angels" can be very helpful in connection with the search for financing. Business angels are usually people with good relationships in a particular industry sector. Business angels can, depending on the specific situation, be bound to the company by way of an advisory agreement. Business angels can be contacted under the following link: www.bandofangels.ch.

Other potential points of entry to obtain financing are specialised foundations as well as the institutes of economic development. In part 6 D there is a list with the respective contact details.
Employee participation schemes
„Leichtfertig ist die Jugend mit dem Wort und bar jeden Sinnes für geschäftliche Dinge!"

Dagobert Duck in "Das Goldschiff"
PART 5: EMPLOYEE PARTICIPATION SCHEMES

A. Introduction

Employee participation schemes, which allow the employee's participation in the company's profits, become more and more popular in Switzerland. Following a trend which originated in the U.S., Swiss companies have started to introduce either employee participation schemes (employee stock plans, employee stock option plans) or bonus schemes (partially variable salary depending on the employee's performance and other factors). The basic idea behind these concepts is the following: the employees' participation in the company's success shall ensure that they have a genuine interest in the performance of the company and, therefore, the interests between the shareholders as well as the employees are aligned. Employees shall be incentivised. Furthermore, employees shall be bound to the company.

As start-up companies are often not in a position to pay high salaries, it is difficult to attract and retain highly qualified employees. By introducing employee participation schemes, the company can ensure that these employees have the possibility to participate in the company's up-side potential.

The following description will primarily focus on employee stock option plans. Alternatively, the company could introduce an employee stock plan (where the employee receives shares instead of options). In such case, similar issues would arise, in particular with regard to taxes and social security contributions, however, in general employee stock plans are less complicated than employee stock option plans.

B. "Hot issues"

The following topics must be taken into consideration when establishing an employee participation scheme:

- Key issues of the employee participation scheme;
- Hedging: where do the necessary shares come from?;
- Taxes/social security payments;
- Valuation for tax purposes; and
- International expansion.

The following chapter will focus on the first three items. Given the complexity of valuation questions for tax purposes, the company is well advised in any case to obtain...
a tax ruling from the competent tax authorities in order to avoid any unpleasant surprises.

1. Key issues of the employee participation schemes

The introduction of an employee participation scheme is of strategic importance to the company. Therefore, it is the company's board of directors who adopts such employee participation scheme. The board of directors has the possibility to delegate the implementation of the employee participation scheme either to the executive management or to a committee consisting of certain members of the board of directors and others.

The employee participation scheme is the basis of the employee stock option plan or the employee stock plan. Once resolved by the board of directors, it is binding for the company, its corporate bodies as well as the company's employees.

Typically, the employee participation scheme is handed out to the employees which shall receive shares or options. The respective employees will have to confirm in writing that they have received the employee participation scheme, they have read and understood it as well as that they are willing to accept the terms and conditions of the employee participation scheme.

The company's board of directors will take into consideration the following key-issues when designing an employee participation scheme:

a) Eligible employees

Typically, the board of directors or a committee will define the eligible employees, which shall participate in the employee participation scheme and which shall receive stocks or options. Typically, employee participation schemes contain a provision that so-called "key employees" who are important for the future performance of the company, shall be entitled to receive shares or options.

We do not recommend that the employee participation scheme contains a provision which entitles every employee of a certain hierarchical level to participate in the employee participation scheme. Such provision could potentially grant rights in favour of employees who do not contribute to the company's success and therefore, there is no reason why they should participate in the employee participation scheme.
b) Grant of options or shares

The grant of options or shares is usually the responsibility of the board of directors or a committee. The number of options or shares should not be set out directly in the plan in order to ensure that there is the necessary flexibility at the time of granting options or shares to eligible employees. When granting options or stocks, the board of directors or the respective committee must ensure that such grant is not arbitrary. In particular, the board of directors must not apply criteria which are prohibited by law such as a grant of options or stocks based on the employees' gender.

c) Exercise price

Usually in the case of an employee stock options plan, the exercise price is not directly determined by the plan document itself but by the respective option grant notices to employees. Again, this shall ensure that the board of directors or the committee has the necessary flexibility to adjust the employee participation scheme to the specific circumstances.

Basically, there are the following possibilities to determine the exercise price:

*Fixed exercise price equal to the share price*

In case of start-up companies, employee stock option plans provide for an exercise price which is "at the money", which means that the exercise price of the options is equal to the price of the underlying shares at the time of granting the options. As a result, the employee will benefit from every increase of the share price, even if the increase is only limited.

*Fixed exercise price above the current share price*

In particular in those cases, when options are not only granted as a compensation for past performance, but are considered to be an incentive for future performance, the board of directors will set the exercise price of the employee stock options above the current share price at the time of granting the options. If the options are "out of the money", the participating employee will only benefit from the options, if the value of the underlying shares exceeds the exercise price.

The following example shall illustrate how this works in practice: The current share price of a company at the time of granting the option is CHF 100. The employee stock options have a term of 4 years and cannot be exercised during the first 3 years. If the company expects to have an annual increase of the share price of 15%, the exercise price of the options should correspond to at least CHF 152 (CHF 100x1.15³). As a
result, the option would, after the laps of the vesting period of 3 years, only be "in the money", if the share price of the company had risen by 15% per annum effectively.

Indexed options

By using so-called indexed options, the company can ensure that employees do not receive compensation for a performance which is below average. In case of indexed options, the exercise price is not fixed but is increased continuously. The following example shall illustrate this:

If investors expect an annual return of 15%, the company could equally increase the exercise price by 15% p.a. If, for example, the share price at the time of grant is CHF 100, the indexed exercise price would be defined as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Exercise Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>after 1 year</td>
<td>CHF 115</td>
</tr>
<tr>
<td>after 2 years</td>
<td>CHF 132</td>
</tr>
<tr>
<td>after 3 years</td>
<td>CHF 152</td>
</tr>
<tr>
<td>after 4 years</td>
<td>CHF 175</td>
</tr>
<tr>
<td>after 5 years</td>
<td>CHF 201</td>
</tr>
</tbody>
</table>

Alternatively, the exercise price of the option could be linked to a market or industry sector index. In this case, employees would benefit from the out-performance of the company compared to a market or a specific industry sector (benchmark). Other factors, such as macroeconomic factors would have no influence on the exercise price of the options.

d) Vesting

In order to retain the employees, employee stock options or employee stocks are usually subject to a vesting period. During this period, the options may neither be exercised nor sold and shares cannot be sold either.

e) Exercise methods

Most employee stock option plans provide for a physical exercise of the options, which means that the employee will receive shares against payment of the exercise price. Very often, employee stock option plans provide for a sale of the options to the company. This method is particularly attractive as the employee can realise the internal value as well as the time value of the option by selling it to the company. Often, employee stock option plans contain a provision which allows the so-called
"cashless exercise": The employees receive shares which are immediately sold to the company.

Start-up companies typically provide for the physical exercise of the options. The main reason for this is the simple fact that most start-up companies do not have sufficient cash for a repurchase of options or a cashless exercise.

f) Transfer restrictions

Typically, employee participation schemes contain transfer restrictions. Other than by way of a trade sale or an initial public offering, shares or options cannot be transferred to third parties. In case of start-up companies, such transfer restrictions are essential: If employees had the possibility to transfer options or shares to third parties which are not working for the company or are otherwise not bound by the terms of the employee participation scheme, the main shareholders of the company would not be in a position anymore to sell 100% of the shares in the company by way of a trade sale. As industrial buyers typically intend to acquire 100% of a company, a trade sale could potentially fail or the fact that a purchaser cannot acquire 100% of the company would lead to a significant reduction of the purchase price for the company.

g) Leaver rules

Most employee participation schemes contain detailed provisions with regard to the termination of the employment relationship. Typically, employee participation schemes distinguish between "Good-Leavers" and "Bad-Leavers".

Good-Leavers are persons who leave the company for reasons such as retirement, disability or death, or employees who are terminated by the company without any valid reason.

Bad-Leavers are employees who decide to leave the company after a short period of employment or employees who are terminated by the company for a valid reason.

In both cases, the company must ensure that it is in a position to repurchase options or shares of the leaving employees. Otherwise, a trade sale (sale of 100% of the shares in the company) could become much more difficult.

The repurchase price for options or shares, respectively, from a Good-Leaver is equal to the fair market value of the shares or options. In case of a Bad-Leaver, the repurchase price is equal to the price at the time of the grant. As options usually are granted free of consideration, this means in practice that they expire without any consideration.
h) **No right of continued employment and continuous grant of shares or options**

Usually, the employee participation schemes contain a provision that the scheme does not grant any right for continued employment or continuous grant of shares or options. The provision shall ensure that the company is free to terminate the employment agreement with an eligible employee at any time. Furthermore, the provision shall ensure that the company can discontinue the grant of options or shares at any time.

i) **"Change of Control" and liquidation**

Extraordinary situations such as a trade sale (sale of 100% of the shares in the company), a merger or a restructuring require extraordinary solutions and a high degree of flexibility. To ensure that an employee participation scheme does not become an obstacle to any such transaction, employee participation schemes usually provide for an immediate exercise of all options granted under the plan. Alternatively, they contain a provision allowing the company to repurchase the options. In the event that an employee receives shares, it is usually contractually agreed that the employee must sell the shares to a third party acquirer in case of a trade sale. These solutions ensure that the employee stock options or the employee shares do not become an obstacle to a transaction.

### Key issues in the employee participation scheme

- No determination of the eligible employees in the employee participation scheme
- Physical exercise (as start-up companies usually do not have the necessary cash for a cashless exercise)
- Transfer restrictions to retain control over the group of option holders or shareholders
- Call-option in case of a termination of the employment relationship as well as in case of a change of control, a liquidation or a similar event
- Expiry of options in case of "Bad-Leavers"
2. **Hedging – where do the necessary shares come from?**

There is no "best practice" with regard to the hedging of employee participation schemes. The company's board of directors and the shareholders must determine the hedging method to be used for each individual case.

In case of start-up companies, the best hedging method is typically the creation of a conditional share capital. It is simple, because it only requires the respective resolution of the shareholders' meeting. Furthermore, the creation of a conditional capital does not bind any liquidity and is in line with international standards generally accepted by venture capitalists.

Alternatively, it would be possible that a third party investor sets aside a portion of its shares. Typically, the investor would receive a premium (option premium) for doing so. Therefore, this solution is particularly attractive for a physical person who wants to reduce the shareholding and who provides the necessary shares. The option premium received would be considered as a tax free capital gain.

<table>
<thead>
<tr>
<th>Hedging of employee participation schemes</th>
</tr>
</thead>
<tbody>
<tr>
<td>❍ Set aside shares required for the employee participation scheme at the time of introducing such scheme</td>
</tr>
<tr>
<td>❍ Eliminate risks for the company to the extent possible (by creation of a conditional capital or by hedging via a third party investor)</td>
</tr>
<tr>
<td>❍ Use a simple hedging method</td>
</tr>
<tr>
<td>❍ Check implications on balance sheet and profit and loss statement.</td>
</tr>
</tbody>
</table>

3. **Taxation / Social Security Contributions of Employee Stock Option Plans**

a) **1997 Regulations**

On April 30, 1997, the Federal Tax Administration issued a regulation (the "1997 Regulation") dealing with the taxation of employee stock purchase and stock option plans. One of the main changes introduced by the 1997 Regulation, effective with respect to options granted on or after April 30, 1997, is that the mere grant of options generally will be a taxable event.
Under the 1997 Regulation, options are taxable at the date of grant, unless certain modifications are made to the terms and conditions of the option, as further discussed below under "Deferral of Taxation".

The taxable income is equal to the value of the options at grant as determined with reference to the value of the underlying stock. To assess the value of an option, the company must submit a valuation report prepared by an independent firm with experience and expertise in the valuation of financial instruments such as options. If taxed at grant, the exercise of the option and subsequent sale of the stock generate a tax-free capital gain (or non-deductible loss, if applicable).

If the options are subject to a vesting requirement or a restriction on exercisability, the value of the underlying stock may be reduced by a discount to take into account the blockage period as follows:

<table>
<thead>
<tr>
<th>Blockage Period (Years)</th>
<th>Discount (Percentage)</th>
<th>Residual Value (Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>5.660</td>
<td>94.340</td>
</tr>
<tr>
<td>2</td>
<td>11.000</td>
<td>89.000</td>
</tr>
<tr>
<td>3</td>
<td>16.038</td>
<td>83.962</td>
</tr>
<tr>
<td>4</td>
<td>20.791</td>
<td>79.209</td>
</tr>
<tr>
<td>5</td>
<td>25.274</td>
<td>74.726</td>
</tr>
</tbody>
</table>

For example, if the options vest or may be exercised only after five years from the date of grant, 74.726% of the value of the underlying stock is taken into consideration to value the options.

Depending on the valuation, in certain cases, the approach of the 1997 Regulation could be deemed favourable, i.e. the appreciation over and above the stipulated value taxed at grant would not be taxable. On the other hand, the imposition of a tax payable up front is normally not a good design characteristic of an option scheme.

Please note that a new tax law that would affect the tax treatment of options has been proposed and is pending in the Swiss parliament. According to this proposed law, the employee would have a choice to be taxed at the time of vesting on the value of the option at this point of time or to be taxed at exercise on the spread. It is, however, uncertain if and when the proposed law would come into effect.

b) **Deferral of Taxation According to the 1997 Rules**

The company may be able to avoid the impact of the 1997 Regulation and have the options taxed at exercise by modifying the terms and conditions of the grant. One
approach is to modify the terms so that the value of the option at grant cannot be easily determined. For example, the company could make the option term ten years and six months or restrict exercisability for at least five years and six months.

Another possible method of deferring taxes until exercise is to mandate the cashless sell-all method of exercise for the employees in Switzerland who are granted options under the stock option plan. According to this method of exercise, the employees will have to immediately sell all of the stock acquired upon exercise of their options. They will receive the sale proceeds less the exercise price and any tax withholding and brokerage fees. It appears that the tax authorities may view this as tantamount to a stock appreciation right, taxable on the spread upon exercise. We recommend that the company consults its auditors/accountants to determine whether imposing mandatory cashless exercise may raise accounting issues.

c) 2003 Regulations

On May 6, 2003, the Federal Tax Administration issued a new circular letter with respect to the taxation of options with vesting clauses ("Rundschreiben betreffend die Besteuerung von Mitarbeiteroptionen mit Vesting Klauseln"). The new rules based on this 2003 circular letter are as follows:

Basically, the 1997 Regulations are still applicable for options which are not subject to a vesting period. However, if the options are subject to a vesting period, the options may only be regarded as an expectation right ("Anwartschaft") which is not taxed at grant, but only at vesting. Again the taxable income is equal to the value of the options at vesting as determined with reference to the value of the underlying stock. To assess the value of an option, the company must submit a valuation report prepared by an independent firm with experience and expertise in the valuation of financial instruments such as options. Please note that not all of the Swiss cantons follow the 2003 regulations; some still apply the 1997 rules.

d) Deferral of Taxation According to 2003 Rules

If the stock option plan provides that the terms and conditions of the grant might be changed if the employee leaves the company after vesting (e.g. if the employee must exercise the options within a shortened period of time after he/she leaves the company), then the options shall only be taxable at exercise.

These new rules are basically applicable for grants made from 2003 and later. Therefore, even if the stock option plan is not changed but new grants are made in the year 2003 (or later) the 2003 rules will apply to such grants.

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It should be noted that not all the Swiss cantons apply the 2003 rules. Some of the cantons still only apply the 1997 rules while others apply the 2003 rules. Therefore, in each case, it must be determined whether the 1997 rules or 2003 rules are applicable. As a practical matter, if a company wants to keep all Swiss grants consistent, it may continue making grants as if all cantons still followed the 1997 rules (e.g. by continuing to mandate cashless exercise).

Regardless of the approach the company takes in a particular canton, the company should seek a formal, written tax ruling by the canton's tax authority providing that the taxable event is delayed until exercise and that the taxable amount is the spread at exercise by using one of the approaches described above. If the company does not obtain a ruling, there is a risk that the cantonal tax authority may change its practice and subject the employee to tax at grant, regardless of the option terms. In this case, the local subsidiary and the employees may be subject to interest charges for late tax payment and penalties for failure to pay or withhold taxes.

To the extent that a tax ruling is obtained, it would be valid with respect to the options granted at the time of the ruling. Subsequent grants may require additional approvals. If, however, subsequent grants are made under the same conditions (i.e. mandatory cashless exercise, extended option term or restriction on exercisability) as the previous grants, it should be sufficient to file a notice of the new grants with the applicable cantons to inform them that the grants are made in reliance on the previous tax ruling and that the same conditions still apply. The names of all employees who are granted options must be included in the notice and the notice must be filed each time a new grant is made. In this case, it will not be necessary to obtain a new tax ruling for the new grants.

In most cantons, taxation of the options may be deferred until exercise if the employees are restricted to the cashless-sell all method exercise.

e) Social Security Contributions

The income derived under the employee stock option plan is subject to social security contributions. The employer is responsible for paying the total social security contributions (i.e., the Old Age and Survival Insurance, Disability Insurance, and Insurance on Loss of Gain), but approximately 50% of the burden is borne by the employee (through a withholding on salary). The employer must withhold the employee's social insurance contributions regardless of whether the employee is subject to ordinary tax assessment (i.e., Swiss nationals and "C" permit holders) or subject to tax at source (i.e., "B" permit holders and employees working cross-border). Social security contributions are paid in accordance with the following rates:
Income derived from the employee stock option plan is subject to social security contributions in the month in which the taxable event occurs (i.e., as outlined before either at grant, at vesting or at exercise, as the case may be).

As far as contributions to a compulsory pension plan are concerned, the benefits realized under the employee stock option plan are not necessarily subject to pension plan contributions, but this conclusion depends on the terms of the employers compulsory pension plan (extraordinary items of income are often not subject to contributions). By law, contributions to compulsory pension plans are required only with respect to a yearly salary between CHF 23,205 and CHF 79,560 (dates as of July 2007), but many employers provide for contributions on compensation in excess of this minimum amount. Thus, if the local subsidiary's pension plan expressly provided for pension contributions based on all income (including occasional income derived from employee stock option plans), pension plan contributions would need to be paid on the option benefits.

It is prohibited under Swiss social securities laws to transfer the employer's portion of social insurance contributions to the employee. If the employer were to charge its portion or part of its portion of social insurance contributions to the employee, the employee can ask the competent labor law court to order the employer to pay a refund for the wrongfully charged contributions, even if the employee has since left the company.

Noncompliance with the social insurance contribution filing or withholding requirements may represent an administrative or criminal offense subject to penalties.
Part 5: Employee participation schemes
Annex
"Informed decision-making comes from a long tradition of guessing and then blaming others for inadequate results."

Scott Adams
PART 6: ANNEX

The subsequent annexes can also be downloaded from the following web site:

www.venture.ch/service_downloads_d.asp
A. Documents of incorporation

1. Deed of incorporation

The deed of incorporation must be signed in an official language, *i.e.* either German, French or Italian.

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**Public Deed**

concerning the

**Incorporation**

of

[company name]

with domicile in [place]

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Before the undersigned notary public of the notary [Hottingen Zurich, Zurich], appears on [date]

1. [Full names], [date of birth], citizen of [place of origin], residing in [address], acting in his own name and with powers of attorney and excerpt from the commercial register, duly legalized and apostilled for the incorporators *Certificate of incorporation/good standing*

2. [company name and address main shareholder],

3. [full names], [date of birth], citizen of [place of origin] residing in [address]

and declare:

I.

Under the name of

[company name]

we incorporate, pursuant to the provisions of the Swiss Code of Obligations ("CO"), a corporation with domicile in [place].

II.

We declare the submitted draft of the Articles of Incorporation as definite Articles of Incorporation of the corporation. The Articles of Incorporation are appended to this deed as an integral part.
III.
The capital of the Corporation amounts to CHF [amount] (minimum amount CHF 100'000) and is divided into [number] registered/bearer shares of CHF [amount] nominal value each, which have been taken over at par as follows:

a) [number] shares by [company name shareholder]
b) 1 share by [name 2nd incorporator]
c) 1 share by [name 3rd incorporator]

Total [number] shares

Each incorporator commits unconditionally to make the contribution equal to the issue price of the share(s) which he has subscribed to.

IV.
The following deposits have been made to the exclusive disposition by the Corporation:

CHF [amount] in cash deposited with [name and place of Swiss bank], as an institution subject to the Federal Act on Banks and Saving Banks, in accordance with the present confirmation of [date].

By this deposit the full contribution equal to the issue price of all shares has been made.

V.
We confirm that

1. all shares have been validly subscribed;
2. the promised deposits correspond to the entire amount of issue; and
3. the depositions have been made in accordance with the legal provisions and the Articles of Incorporation.

VI.
We elect as

A. **Board of Directors**

[Full names, date of birth, citizenship and residential address of each board member]

B. **Auditors**

[Name of Swiss auditors], which have accepted their mandate in writing.
VII.

The domicile of the Corporation is at [full Swiss address]

VIII.

We herewith declare the Corporation as incorporated pursuant to the provisions of the law.

We authorize the Board of Directors to have the Corporation recorded in the Register of Commerce.

Zurich, [date]

[signatures of incorporators]

The undersigned notary certifies that all documents mentioned in this deed have been submitted to him and the incorporators (Art. 631, Para. 1 CO).

The present deed and the Articles of Incorporation reflect the declaration of will communicated to the notary by the aforementioned incorporators. It has been perused, agreed as correct and signed.

Zurich, [date]

[signature and stamp of the notary public]
Öffentliche Urkunde
über die
Gründung
der
[Firma]
mit Sitz in [Ort]

Im Amtslokal des Notariats [Hottingen-Zürich, Zürich], sind am [Datum] erschienen:

1. [Vorname Name], [Geburtsdatum], von [Bürgerort] wohnhaft [Adresse], handelnd im eigenen Namen und als Bevollmächtigter, gestützt auf die amtlich beglaubigten und apostillierten Vollmachten der Gründer evtl. Certificate of incorporation/good standing

2. [Firma der Aktionärin], [Adresse]

3. [Vorname Name], [Geburtsdatum], von [Bürgerort] wohnhaft [Adresse]

und erklären:

I.

Unter der Firma [Firma]
gründen wir gemäss den Bestimmungen des Schweizerischen Obligationenrechtes (OR) eine Aktiengesellschaft mit Sitz in [Ort].

II.

Den uns vorliegenden Statutenentwurf legen wir als gültige Statuten der in Gründung begriffenen Gesellschaft fest. Sie sind Bestandteil dieser Urkunde.

III.


a) [Anzahl] Aktien Von [Firma der Aktionärin]
b) 1 Aktie Von [Vorname Name 2. Gründer]
c) 1 Aktie Von [Vorname Name 3. Gründer]

Total [Anzahl] Aktien
Jeder Gründer verpflichtet sich hiermit bedingungslos, die dem Ausgabebetrag seiner von ihm gezeichneten Aktien entsprechende Einlage zu leisten.

IV.

Es sind folgende Einlagen geleistet worden:

CHF [Betrage] in Geld, durch Hinterlegung bei der [Name und Adresse der Bank], als dem Bundesgesetz über die Banken und Sparkassen unterstelltes Institut, gemäss deren vorliegender schriftlicher Bescheinigung vom [Datum], zur ausschliesslichen Verfügung der Gesellschaft.

Dadurch sind die dem Ausgabebetrag aller Aktien entsprechenden Einlagen vollständig erbracht.

V.

Wir stellen fest dass:

1. sämtliche Aktien gültig gezeichnet sind;
2. die versprochenen Einlagen dem gesamten Ausgabebetrag entsprechen, und
3. die gesetzlichen und statutarischen Anforderungen an die Leistung der Einlagen erfüllt sind.

VI.

Wir bestellen als:

A. Verwaltungsrat
   [Vorname Name, Geburtsdatum, Bürgerort, Wohnort, 1. Mitglied]
   [Vorname Name, Geburtsdatum, Bürgerort, Wohnort, 2. Mitglied]
   [Vorname Name, Geburtsdatum, Bürgerort, Wohnort, 3. Mitglied]

B. Revisionsstelle:
   [Name, Sitz Revisionsstelle]
   Die Annahmeerklärung liegt vor.

VII.

Das Domizil der Gesellschaft befindet sich an [volle Adresse (eigene Büros oder c/o)]

VIII.

Abschliessend erklären wir die Gesellschaft den gesetzlichen Vorschriften entsprechend als gegründet.

Der Verwaltungsrat hat die Gesellschaft zur Eintragung ins Handelsregister anumelden.
Die unterzeichnende Urkundsperson bestätigt im Sinne von Art. 631 Abs. 1 OR, dass den erschienenen Personen alle in dieser Urkunde einzeln genannten Belege vorgelegen haben.

Diese Urkunde (mit Statuten) enthält den mir mitgeteilten Parteiwillen. Sie ist von den in der Urkunde genannten erschienenen Personen gelesen, als richtig anerkannt und unterzeichnet worden.

[Ort, Datum]

[Unterschrift des Notars]
[Stempel des Notars]
2. Articles of incorporation

ARTICLES OF INCORPORATION

of

[...] AG

in [...]

STATUTEN

der

[...] AG

in [...]

1. Name, Registered Office, Duration and Purpose of the Company

1.1 Name, Registered Office and Duration

Under the name of [...] AG, there exists a corporation with unlimited duration which is governed by these Articles of Incorporation and by the provisions of chapter 26 of the Swiss Code of Obligations (the "Company"). The domicile of the Company shall be in [...].

1.2 Purpose

The purpose of the Company is to [...] AG

The Company may establish branch offices and subsidiaries in Switzerland and abroad and also acquire participations in other enterprises in Switzerland and abroad. The Company may acquire, administer and transfer patents, trademarks and technical as well as industrial know-how. The Company may acquire, hold and sell real estate in Switzerland and abroad and engage in any commercial, financial or other activities which are directly or indirectly related to the purpose of the Company.

1. Firma, Sitz, Dauer und Zweck der Gesellschaft

1.1. Firma, Sitz und Dauer

Unter der Firma [...] AG besteht eine Aktiengesellschaft mit unbestimmter Dauer, welche die vorliegenden Satzungen und die Bestimmungen des 26. Titels des Schweizerischen Obligationenrechts (die "Gesellschaft") unterliegt. Der Sitz der Gesellschaft ist in [...].

1.2 Zweck

Die Gesellschaft ist [...] AG

2. Share Capital

2.1 Capital and Shares

The share capital amounts to CHF [...] and is divided into [...] registered shares with a par value of CHF [...] each, fully paid in.

2.2 Conditional Share Capital

The share capital shall be increased, under exclusion of the preferential subscription rights of shareholders, by not more than CHF [...] through the issue of a maximum of [...] registered shares with a par value of CHF [...] each, fully paid in, to be effected by the exercise of subscription rights granted to the Company's employees and management pursuant to one or more stock option plan(s) to be established by the Board of Directors. Such shares shall be subject to the transfer restrictions set forth in the Company's Articles of Incorporation.

2.3 Authorized Share Capital

The Board of Directors is authorized, at any time until [...], to increase the share capital up to a maximum aggregate amount of CHF [...] through the issuance of a maximum of [...] registered shares, which shall be fully paid-in, with a par value of CHF [...] per share. Increases by underwriting as well as partial increases are permissible. In each case, the issue price, the date for entitlement to dividends and the type of contribution shall be determined by the Board of Directors. After their acquisition, the newly issued registered shares shall be subject to the transfer limitations foreseen in art. 2.5 of the Articles of Incorporation.

The Board of Directors is authorized to exclude the rights of the shareholders to subscribe shares in priority and to convey them to third parties, provided that such new shares are to be used (1) for the takeover of enterprises through share swaps or (2) for financing the acquisition of enterprises or divisions thereof, or participations or of newly-planned investments of the Company or (3) for employee participations. Shares for which rights to subscribe in priority exist...
but are not exercised shall be sold by the Company at market conditions.

2.4 Share Register

The Company maintains a share register in which the names and addresses of the shareholders and the usufructuaries shall be entered. Vis-à-vis the Company, only those persons registered in the share register are recognized as shareholders.

2.5 Transfer limitations

The transfer of shares, be it for ownership or usufruct purposes, requires the approval of the Board of Directors.

The Board of Directors may refuse such authorization stating one of the important reasons mentioned below, or without giving the reasons therefore by offering the transferor of shares to take over such shares (for the account of the Company, certain shareholders, or third parties) at their true value at the time of the request for approval.

The following constitute important reasons:

- the acquisition or the holding of shares in the name or in the interest of third parties.

If shares have been acquired by way of inheritance, division of estate, matrimonial property law or forced sale, approval may be refused only if the Company offers to the acquirer to take over the shares at their true value.

The Company may, after consultation with the affected shareholder, cancel entries in the share register if such entry was based on untrue information given by the acquirer. The acquirer must be informed of the cancellation immediately.

den, sind zu Marktbedingungen zu veräussem

2.4 Aktienregister


2.5 Übertragungsbeschränkungen

Die Übertragung von Aktien, ob zu Eigentum oder zur Nutzniesung, bedarf der Zustimmung durch den Verwaltungsrat.

Der Verwaltungsrat kann diese Zustimmung verweigern, wenn er hierfür einen der nachfolgenden wichtigen Gründe bekanntgibt oder, ohne Angabe von Gründen, sofern er dem Veräusserer der Aktien anbietet, die Aktien (für Rechnung der Gesellschaft, bestimmter Aktionäre oder Dritter) zum wirklichen Wert im Zeitpunkt des Gesuches zu übernehmen.

Als wichtige Gründe gelten:

- der Erwerb und das Halten von Aktien im Namen und oder im Interesse Dritter.

Sind die Aktien durch Erbgang, Erbteilung, eheliches Güterrecht oder Zwangsvollstreckung erworben worden, so kann die Gesellschaft das Gesuch um Zustimmung nur ableh- nen, wenn sie dem Erwerber die Übernahme der Aktien zum wirklichen Wert anbietet.

2.6 Share Certificates and Share Conversion

The Company may issue share certificates which embody several shares. The General Meeting of Shareholders may convert through an amendment of the Articles of Incorporation registered shares into bearer shares and vice versa.

3. General Meeting of Shareholders

3.1 Right and Duty to Call a Meeting

General Meetings of Shareholders are called by the Board of Directors and, if necessary, by the Auditors. The Liquidators are also entitled to call a General Meeting of Shareholders.

The Annual General Meeting of Shareholders shall be held within six months following the close of the business year; at least twenty days prior to the Annual General Meeting of Shareholders, the annual business report and the auditors' report must be submitted for examination by the shareholders at the Company's registered office. Any shareholder may request that a copy of these documents be immediately sent to him. The shareholders are to be notified hereof by letter.

A General Meeting of Shareholders is also to be called upon a demand of one or more shareholders representing at least ten percent of the share capital. The demand to call a meeting shall be in writing and shall specify the items and the proposals to be submitted to the meeting.

3.2 Form of the Convocation

The General Meeting of Shareholders shall be called not less than twenty days prior to the meeting. The notice shall be given in writing by mail, if the names and addresses of all shareholders are known, otherwise by publication in the Swiss Official Commercial Gazette.

2.6 Zertifikate und Aktienumwandlung


3. Generalversammlung

3.1 Recht und Pflicht der Einberufung

Die Generalversammlung wird durch den Verwaltungsrat, nötigenfalls durch die Revisionsstelle einberufen. Das Einberufungsrecht steht auch den Liquidatoren zu.


3.2 Form der Einberufung

Die Generalversammlung wird mindestens zwanzig Tage vor der Versammlung einberufen. Die Einberufung erfolgt durch gewöhnlichen Brief an die Aktionäre, sofern deren Namen und Adressen bekannt sind, andernfalls durch Publikation im Schweizerischen Handelsamtsblatt.
The notice shall specify the place, date and time of the meeting, as well as the items and proposals of the Board of Directors and the shareholders who demanded that a General Meeting of Shareholders be called.

3.3 Meeting of All Shareholders

Shareholders or their proxies representing all shares issued may hold a meeting of shareholders without serving the formalities required for calling a meeting unless objection is raised. At such meeting, discussion may be held and resolution passed on all matters within the scope of the powers of a General Meeting of Shareholders for so long as the shareholders or proxies representing all shares issued are present.

3.4 Right to Vote and Proxy

Each share entitles to one vote. Voting by proxy is permitted under a written proxy. The Board of Directors shall decide whether a proxy is to be accepted.

3.5 Organisation of the General Meeting of Shareholders and Adoption of Resolutions

The General Meeting of Shareholders shall be chaired by the Chairman, or, in his absence, by another member of the Board of Directors. The Chairman designates a secretary for the minutes and a scrutineer for the counting of the votes who need not be a shareholder.

The Board of Directors is responsible for the keeping of the minutes which are to be signed by the Chairman and the Secretary.

Unless otherwise provided by law or the Articles of Incorporation, the General Meeting of Shareholders passes its resolutions with the absolute majority of the votes cast at the General Meeting of Shareholders. If a resolution cannot be passed upon the first voting there shall be a second voting at which the relative majority shall decide, unless otherwise provided by law or the Articles of Incorporation.

The notice shall specify the place, date and time of the meeting, as well as the items and proposals of the Board of Directors and the shareholders who demanded that a General Meeting of Shareholders be called.

In der Einberufung sind Ort, Datum und Zeit der Generalversammlung sowie die Verhandlungsgegenstände und Anträge des Verwaltungsrats und der Aktionäre bekannt zu geben, welche die Durchführung einer Generalversammlung verlangt haben.

3.3 Universalversammlung


3.4 Stimmrecht und Stellvertretung

Jede Aktie gibt das Recht auf eine Stimme. Stellvertretung ist zulässig aufgrund einer schriftlichen Vollmacht. Der Verwaltungsrat entscheidet über deren Anerkennung.

3.5 Organisation der Generalversammlung und Beschlussfassung

Den Vorsitz der Generalversammlung führt der Präsident, bei dessen Verhinderung ein anderes Mitglied des Verwaltungsrats. Der Vorsitzende bezeichnet den Protokollführer und einen Stimmenzähler, die nicht Aktionäre sein müssen.

Der Verwaltungsrat sorgt für die Führung des Protokolls, das vom Vorsitzenden und vom Protokollführer zu unterzeichnen ist.

Sofern nicht zwingende Vorschriften des Gesetzes oder die Statuten etwas anderes bestimmen, erfolgt die Beschlussfassung mit der absoluten Mehrheit der abgegebenen Aktienstimmen. Kommt in einer ersten Abstimmung ein Beschluss nicht zustande, so ist eine zweite durchzuführen, in welcher, sofern nicht zwingende Vorschriften des Gesetzes oder die...
wise provided by law or the Articles of Incorporation.

3.6 Powers

The General Meeting of Shareholders has the following inalienable powers:

1. to adopt and amend the Articles of Incorporation;

2. to elect the members of the Board of Directors and the Auditors;

3. to approve the annual report and the consolidated financial statements;

4. to approve the annual accounts and to determine the allocation of profits as shown on the balance sheet, in particular with regard to dividends and bonus payments to members of the Board of Directors;

5. to discharge the members of the Board of Directors;

6. to pass resolutions concerning all matters which are reserved to the authority of the General Meeting of Shareholders by law or the Articles of Incorporation.

4. Board of Directors

4.1 Constitution and Term of Office

The Board of Directors consists of not more than [...] members who are elected by the General Meeting of Shareholders for a term of [one] year. The term of office of a member of the Board of Directors shall, subject to prior resignation or removal, expire upon the day of the next annual General Meeting of Shareholders. Newly appointed members shall complete the term of office of their predecessors.

The Board of Directors shall constitute itself. It appoints a chairman, a vice-chairman and a secretary who needs not be a member of the Board of Directors.

4. Verwaltungsrat

4.1 Zusammensetzung und Amtsdauer


Der Verwaltungsrat konstituiert sich selbst. Er bezeichnet einen Präsidenten, einen Vizepräsidenten und den Sekretär, der nicht Mitglied des Verwaltungsrats sein muss.
4.2 Convocation

The Board of Directors meets as often as the business and affairs of the Company require a meeting. The meeting is called by the Chairman or the Vice-Chairman. Each member of the Board of Directors may request that the Chairman or the Vice-Chairman call a meeting.

4.3 Organisation, Resolutions, Minutes

The organisation of the meetings, the presence quorum and the passing of resolutions of the Board of Directors shall be in compliance with the organisational regulations.

The Chairman shall have no casting vote.

4.4 Duties

The Board of Directors is authorized to decide all matters which are not reserved by law or by the Articles of Incorporation to the General Meeting of Shareholders or the Auditors. The Board of Directors has the following non delegable and inalienable duties:

1. the ultimate management of the Company and the issuance of the necessary directives;

2. the determination of the organisation of the Company;

3. the administration of the accounting system and of the financial controls, as well as the financial planning to the extent necessary to manage the Company;

4. the appointment and removal of the persons responsible for the management and representation of the Company;

5. the ultimate supervision of the persons responsible for the management of the Company, namely in view of compliance with the law, the Articles of Incorporation, organisational regulations directives;

4.2 Einberufung


4.3 Organisation, Beschlussfassung, Protokoll

Die Organisation der Sitzungen, die Beschlussfähigkeit (Präsenz) und die Beschlussfassung des Verwaltungsrates richten sich nach dem Organisationsreglement.

Der Vorsitzende hat keinen Stichentscheid.

4.4 Befugnisse

Der Verwaltungsrat erledigt alle Angelegenheiten, die nicht gemäss Gesetz oder Statuten der Generalversammlung oder Revisionsstelle vorbehalten sind. Er hat folgende unübertragbare und unentziehbare Aufgaben:

1. die Oberleitung der Gesellschaft und die Erteilung der nötigen Weisungen;

2. die Festlegung der Organisation;

3. die Ausgestaltung des Rechnungswesens, der Finanzkontrolle sowie der Finanzplanung, sofern dies für die Führung der Gesellschaft notwendig ist;

4. die Ernennung und Abberufung der mit der Geschäftsführung und der Vertretung betrauten Personen;

5. die Oberaufsicht über die mit der Geschäftsführung betrauten Personen, namentlich im Hinblick auf die Befolgung der Gesetze, Statuten, Reglemente und Weisungen;
6. the preparation of the annual business report and the General Meeting of Shareholders and to carry out the resolutions adopted by the General Meeting of Shareholders;

7. the notification of the court in case of insolvency.

The Board of Directors shall be authorized to fully or partially delegate the management of the Company to individual members or third parties who need not be shareholders. The Board of Directors shall enact the organisational regulations.

The Board of Directors shall appoint the persons authorized to sign on behalf of the Company and determine their signature power.

4.5 Compensation

The members of the Board of Directors are entitled to reimbursement of their expenses and compensation as determined by the Board of Directors.

5. The Auditors

The Auditors shall be elected by the General Meeting of Shareholders for a term of one year.

The Auditors shall have the powers and duties provided by the law.

6. Financial Year and Allocation of the Net Profit

The Company's financial year shall be determined by the Board of Directors.

Subject to the statutory provisions regarding the distribution of profits, the net profit may be allocated by the General Meeting of Shareholders at its discretion.

7. Dissolution and Liquidation

The Auditors shall have the powers and duties provided by the law.

6. die Erstellung des Geschäftsberichtes sowie die Vorbereitung der Generalversammlung und die Ausführung ihrer Beschlüsse;

7. die Benachrichtigung des Richters im Falle der Überschuldung.

Der Verwaltungsrat kann im Rahmen der gesetzlichen Bestimmungen die Geschäftsführung ganz oder teilweise an eine oder mehrere Personen übertragen, die nicht Mitglieder des Verwaltungsrats sein müssen. Der Verwaltungsrat erlässt dazu ein Organisationsreglement.

Der Verwaltungsrat bestimmt die für die Gesellschaft zeichnungsberechtigten Personen und die Art ihrer Zeichnung.

4.5 Vergütung

Die Mitglieder des Verwaltungsrates haben Anspruch auf Ersatz ihrer Auslagen und eine Vergütung wie vom Verwaltungsrat festgelegt.

5. Revisionsstelle

Die Revisionsstelle wird jeweils für ein Jahr von der Generalversammlung gewählt.

Die Revisionsstelle hat die im Gesetz umschriebenen Aufgaben.

6. Geschäftsjahr und Verwendung des Bilanzgewinnes

Das Geschäftsjahr wird vom Verwaltungsrat festgelegt.

Vorbehaltlich der gesetzlichen Vorschriften über die Gewinnverteilung steht der Bilanzgewinn der Generalversammlung zur freien Verfügung.

7. Auflösung und Liquidation
Should the Company be dissolved, the Board of Directors shall carry out the liquidation unless the General Meeting of Shareholders decides otherwise.

8. Notices and Announcements

Official publications of the Company shall be made in the Swiss Official Gazette of Commerce. Notices to shareholders shall be given by mail if their names and addresses are known and not otherwise described by law.

The English version is a translation of the German original and shall not have binding effect.

Wird die Gesellschaft aufgelöst, so führt der Verwaltungsrat die Liquidation durch, sofern die Generalversammlung nicht etwas anderes beschliesst.

8. Mitteilungen und Bekanntmachungen

Publikationsorgan ist das Schweizerische Handelsamtsblatt. Mitteilungen an die Aktionäre erfolgen durch gewöhnlichen Brief, so weit deren Namen und Adressen bekannt sind und das Gesetz nichts anderes vorschreibt.

Die englische Fassung ist eine Übersetzung des deutschen Originaltextes und ohne rechtliche Verbindlichkeit.

[...], [...], 20XX

[...], [...], 20XX
3. **Lex-Friedrich-Declaration**

The Lex-Friedrich-Declaration may only be signed in German, for this reason the standard declaration in German is included.

**Lex-Friedrich-Declaration**

In order to acquire real estate, foreign persons need a permit from the competent cantonal authority (article 2 para. 1 of the Federal Act on the Purchase of Real Estate by Foreigners [hereinafter called "Federal Act"]). The participation in a corporation or the participation in a capital increase of a corporation can also be considered an acquisition of real estate if the factual purpose of the corporation is the acquisition of real estate which is subject to a permission according to article 2 para. 2 lit. a Federal Act. Also the take-over of real estate together with a fortune or a business enterprise (article 181 Code of Obligations, CO) or through merger (article 748 et seq., 941 CO), change of corporate status or division of corporations can be considered as acquisition of real estate (article 1 para. 1 lit. a and b Federal Decree on the Purchase of Real Estate by Foreigners [hereinafter called "Federal Decree"]) If the commercial registrar cannot conclude, from the outset, that a permit is not required, he/she shall not perform the registration and shall instead refer the applicants to the competent authority (article 18 para. 1 and 2 Federal Act).

Concerning the Federal Act and the Federal Decree, the undersigned declare(s) with respect to the hereinafter listed company

<table>
<thead>
<tr>
<th>Company name and domicile</th>
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And with regard to the content of the application to the commercial register (mark where appropriate; withholding information will cause transfer to the authorization authority):

<table>
<thead>
<tr>
<th></th>
<th>yes</th>
<th>no</th>
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</table>

Please answer the following questions, if applicable:

3. The above mentioned corporation acquires real estate in Switzerland which is **not used as permanent establishment** by contribution in kind, acquisition of assets, merger, change of corporate status or division of corporation.

4. Foreign persons or persons acting on behalf of foreign persons have a dominating position after a capital decrease pursuant to article 6 Federal Act.
1 Foreign Person (Article 5 Federal Act):

- individual domiciled abroad;
- individual domiciled in Switzerland without a valid Swiss residence permit, who is neither a citizen of one of the member countries of the European Union (EU) nor the European Free Trade Association (EFTA);
- entities of any kind domiciled abroad;
- entities of any kind domiciled in Switzerland, but dominated by foreign persons pursuant to article 5 Federal Act.
- natural persons with permit C or any entity domiciled in Switzerland, which are not underlying the Federal Act, acquiring real estate on behalf of a foreign person.

2 Real estate used as a permanent establishment (article 2 para. 2 lit. a and para. 3 Federal Act):

Real estate used as a permanent establishment of any kind of business (including, if required by law, apartments used for private purposes).

Signatures of the persons signing the application for registration in the register of commerce:

_______________________________
Place and date

_______________________
Name of the founder 1

_______________________
Name of the founder 2

_______________________
Name of the founder 3
**Erklärung II** (Lex-Friedrich-Erklärung)

Personen im Ausland\(^1\) bedürfen für den Erwerb von Grundstücken einer Bewilligung der zuständigen kantonalen Behörde (Art. 2 Abs. 1 BewG). Als Erwerb eines Grundstückes gelten auch die Beteiligung an der Gründung und, sofern der Erwerber damit seine Stellung verstärkt, an der Kapitalerhöhung von juristischen Personen, deren tatsächlicher Zweck der Erwerb von Grundstücken ist (Art. 4 Abs. 1 lit. e BewG), die nicht nach Art. 2 Abs. 2 lit. a BewG ohne Bewilligung erworben werden können, sowie die Übernahme eines Grundstückes, das nicht nach Art. 2 Abs. 2 lit. a BewG ohne Bewilligung erworben werden kann, zusammen mit einem Vermögen oder Geschäft (Art. 181 OR) oder durch Fusion (Art. 748 ff., 914 OR), Umwandlung oder Aufspaltung von Gesellschaften, sofern sich dadurch die Rechte des Erwerbers an diesem Grundstück vermehren (Art. 1 Abs. 1 lit. a und b BewV).

Kann der Handelsregisterführer die Bewilligungspflicht nicht ohne weiteres ausschliessen, so setzt er das Eintragungsverfahren aus und verweist die Anmeldenden an die Bewilligungsbehörde (Art. 18 Abs. 1 und 2 BewG).

Im Hinblick auf die Bestimmungen des Bundesgesetzes und der Verordnung über den Erwerb von Grundstücken durch Personen im Ausland erklären die Unterzeichnenden bezüglich der Gesellschaft

[...]

mit Sitz in [...]

folgendes zum angemeldeten Eintragungsgeschäft (Zutreffendes ankreuzen; fehlende Angaben können die Verweisung an die Bewilligungsbehörde zur Folge haben):

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<tbody>
<tr>
<td>☐</td>
<td>☐ 1. Personen im Ausland(^1) bzw. Personen, die für Rechnung von Personen im Ausland handeln, sind an obgenannter Gesellschaft beteiligt.</td>
</tr>
<tr>
<td>☐</td>
<td>☐ 2. Personen im Ausland(^1) bzw. Personen, die für Rechnung von Personen im Ausland handeln, erwerben im Zusammenhang mit dem angemeldeten Eintragungsgeschäft an obgenannter Gesellschaft neu eine Beteiligung.</td>
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</tbody>
</table>

Folgende Fragen nur beantworten, falls vorausgesetzter Sachverhalt erfüllt:

| ☐  | ☐ 4. Personen im Ausland\(^1\) bzw. Personen, die für Rechnung von Personen im Ausland handeln, haben nach der **Kapitalherabsetzung** an obgenannter Gesellschaft eine beherrschende Stellung gemäss Art. 6 BewG inne. |
1 Person im Ausland (Art. 5 BewG):
   a) natürliche Person, die nicht das Recht hat, sich in der Schweiz niederzulassen (ohne gültigen
      Auländerausweis C);
   b) juristische Person oder vermögensfähig Gesellschaft ohne juristische Persönlichkeit mit Sitz im
      Ausland;
   c) juristische Person oder vermögensfähige Gesellschaft ohne juristische Persönlichkeit mit Sitz in der
      Schweiz, in der Personen im Ausland eine beherrschende Stellung gemäss Art. 6 BewG innehaben;
   d) natürliche Personen mit dem Recht auf Niederlassung oder juristische Personen oder vermögensfä-
      hige Gesellschaften ohne juristische Persönlichkeit mit Sitz in der Schweiz, wenn sie ein Grund-
      stück für Rechnung von Personen im Ausland erwerben.

2 Betriebstätte-Grundstück (Art. 2 Abs. 2 lit. a und Abs. 3 BewG):
   Grundstück, das als ständige Betriebsstätte eines Handels, Fabrikations- oder eines anderen nach
   kaufmännischer Art geführten Gewerbes, eines Handwerkbetriebes oder eines freien Berufes dient
   (inkl. durch Wohnanteilvorschriften vorgeschriebene Wohnungen oder dafür reservierte Flächen).

____________________________
Ort und Datum
____________________________
Name des Gründers 1          Name des Gründers 2          Name des Gründers 3
4. **Stampa Declaration**

The Lex-Friedrich-Declaration may only be signed in German, for this reason the standard declaration in German is included.

**Stampa-Declaration**

The applicants are obliged to declare to the Commercial Register that no other assets according to article 628 para. 1 and 2 or 778 para. 1 and 2 or 833 fig. 2 and 3 Swiss Code of Obligations ("CO") have been acquired or are to be acquired during the incorporation, the capital increase or the subsequent payment (Federal Supreme Court 83 II 284 et seq.), that there exist no other compensation circumstances and that no other particular benefits according to article 628 para. 3 CO have been agreed upon, with the exception of those listed in the documents for the Commercial Register (article 78 para. 1 lit. g, article 80 para. 1 lit. d, article 81b para. 1 and article 83 para. 1 lit. e Register of Commerce Regulations ["RCR"]).

All entries in the register of commerce must be true (article 38 RCR). Punishable are persons who submit untrue information about trade corporations or co-operative societies or who direct third parties to submit such untrue information or who, by means of fraud, achieve the untrue official certification of a legally relevant fact (article 152 and 253 Criminal Code; BGE 81 IV 243 et seq.).

Regarding the aforementioned regulations, the undersigned declare, with respect to the hereinafter mentioned share corporation, limited liability company, co-operative society or limited share partnership the following about the incorporation, capital increase, subsequent payment, establishment of a co-operative society capital through co-operative society shares (coupons), increase of nominal value of coupons, increase of minimum number of the coupons which are to be taken over by the members of the co-operative society:

<table>
<thead>
<tr>
<th>Company name and domicile</th>
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1. **Investment in Kind and Acquisition of Assets**
   The corporation has not taken over nor is it obliged to take over, neither from participants nor from third parties, any kind of assets (e.g. real estate, movables, securities, patents, claims, businesses or property with assets and liabilities) with the exception of such values as listed in the Articles of Incorporation.

2. **Intended Transfer of Assets**
   The corporation does not intend to acquire from participants or third parties certain assets of a particular significance, except for assets listed in the Articles of Incorporation. A certain or firm expectation, due to circumstances, of a realization of the intention constitutes an intended transfer of assets.

3. **Set-Offs**
   There is no set-off situation unless listed in the documents for the register of commerce.

4. **Founder's Advantages and Special Privileges** (concerning share corporations only)
The corporation has not granted or pledged special advantages to either participants or other persons (e.g. participations in net profit or excess liquidity surpassing the participations which the shareholders receive as such, or benefits with respect to business transactions with the corporation), unless such advantages are specified in the Articles of Incorporation.

Personal signatures of the persons undersigned on the application to the register of commerce:

Date:

| Name of the founder 1 | Name of the founder 2 | Name of the founder 3 |
Stampa Erklärung

Die Anmeldenden haben dem Handelsregisterführer zu erklären, dass bei der Gründung, der Kapitalerhöhung oder der nachträglichen Liberierung keine anderen Sachwerte im Sinne von Art. 628 Abs. 1 und 2 oder 778 Abs. 1 und 2 oder 833 Ziff. 2 und 3 OR übernommen worden sind oder unmittelbar nach der Gründung, der Kapitalerhöhung oder der nachträglichen Liberierung übernommen werden sollen (BGE 83 II 284 ff), dass keine anderen Verrechnungstatbestände bestehen und dass keine anderen besonderen Vorteile im Sinne von Art. 628 Abs. 3 OR ausbedungen worden sind als die in den Handelsregisterbelegen genannten (Art. 78 Abs. 1 lit. g, Art. 80 Abs. 1 lit. d, Art. 81b Abs. 1 und Art. 83 Abs. 1 lit. e HRegV).

Alle Eintragungen in das Handelsregister müssen wahr sein (Art. 38 HRegV). Wer unwahre Angaben über Handelsgesellschaften oder Genossenschaften macht oder machen lässt oder wer durch Täuschung bewirkt, dass ein Beamter oder eine Person öffentlichen Glaubens eine rechtlich erhebliche Tatsache unrichtig beurkundet, kann bestraft werden (Art. 152 und 253 StGB; BGE 81 IV 243 ff.).

Im Hinblick auf die genannten Bestimmungen erklären die Unterzeichneten bezüglich der nachgenannten Aktiengesellschaft

| [...] AG |
| mit Sitz in [...] |
olgendes zum angemeldeten Eintragungsgeschäft:

1. **Sacheinlagen und Sachübernahmen**

2. **Beabsichtigte Sachübernahme**

3. **Verrechnung**
   Es bestehen keine anderen Verrechnungstatbestände als die aus den Handelsregisterbelegen ersichtlichen.

4. **Gründervorteile und Sonderrechte** (betrifft nur Aktiengesellschaft)
   Die Gesellschaft hat weder Beteiligten noch anderen Personen besondere Vorteile gewährt oder zugesichert (z.B. Beteiligungen am Reingewinn oder Liquidationsüberschuss über die Anteile hinaus, die den Aktionären als solchen zukommen, oder Begünstigungen hinsichtlich des Geschäftsverkehrs mit der Gesellschaft), die nicht in den Statuten aufgeführt sind.
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<th>Ort und Datum</th>
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| Name des Gründers 1 | Name des Gründers 2 | Name des Gründers 3 |
5. Organisational Regulations

**ORGANISATIONAL REGULATIONS**

of

[...] AG

in [...]  

**ORGANISATIONSREGLEMENT**

der

[...] AG

in [...]  

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<tr>
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<tbody>
<tr>
<td>1.1 These organisational regulations are</td>
<td>1.1 Dieses Organisationsreglement basiert</td>
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<tr>
<td>based on the articles of incorporation of</td>
<td>auf den Statuten der [...] AG (die „Gesellschaft“) sowie den angewendbaren Bestimmungen des Schweizerischen Obligationenrechts.</td>
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<tr>
<td>[...] AG (the &quot;Company&quot;) as well as the</td>
<td>1.2 Dieses Organisationsreglement regelt</td>
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<td>pertinent provisions of the Swiss Code of</td>
<td>die Kompetenzen und Funktionen der ausführenden Organe der Gesellschaft.</td>
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<tr>
<td>Obligations.</td>
<td>1.3 Die ausführenden Organe der Gesellschaft sind:</td>
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<tr>
<td>1.2 These organisational regulations regulate</td>
<td>a) der Verwaltungsrat</td>
</tr>
<tr>
<td>the competencies and functions of the</td>
<td>b) die Geschäftsleitung</td>
</tr>
<tr>
<td>executive authorities of the Company.</td>
<td>2. Der Verwaltungsrat</td>
</tr>
<tr>
<td>1.3 The executive bodies of the Company</td>
<td>2.1 Kompetenzen und Aufgaben</td>
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<tr>
<td>are:</td>
<td>2.1.1 Der Verwaltungsrat ist befugt, über</td>
</tr>
<tr>
<td>a) the board of directors</td>
<td>alle Angelegenheiten Beschluss zu fassen, die nicht der Generalversammlung vorbehalten oder anderen Gesellschaftsorganen übertragen sind.</td>
</tr>
<tr>
<td>b) the management committee</td>
<td></td>
</tr>
</tbody>
</table>

2. Board of Directors

2.1 Powers and Responsibilities

2.1.1 The board of directors (the "Board") has the power to resolve all matters which are not expressly reserved to the general meeting of shareholders (the "Shareholders' Meeting") or other bodies of the Company.
2.1.2 Unless the pertinent law, the articles of incorporation or provisions hereafter provide otherwise, the Board fully delegates the management and representation of the Company to the management committee.

2.1.3 The following are non-transferable and inalienable powers and responsibilities of the Board:

a) the ultimate management of the Company and the issuance of the necessary directives;

b) the determination of the organisation of the Company;

c) the administration of the accounting system and of the financial controls, as well as the financial planning to the extent necessary to manage the Company;

d) the appointment and removal of the persons responsible for the management and representation of the Company;

e) the ultimate supervision of the persons responsible for the management of the Company, namely in view of compliance with the law, the articles of incorporation, organisational regulations and directives;

f) the preparation of the annual business report and the Shareholders' Meeting and to carry out the resolutions adopted by the Shareholders' Meeting;

g) the notification of the court in case of insolvency.

2.2 Constitution

The Board elects the chairman of the Board (the "Chairman") and the vice-chairman (the "Vice-Chairman").
2.3 Authority to Sign

The members of the Board bind the Company with their signature in conjunction with the signature of another person authorized to sign.

2.4 Calling and Agenda of Board Meetings

Board meetings shall be called whenever needed.

Board meetings shall be called by the Chairman or the Vice-Chairman. Each member of the Board may request that the Chairman or the Vice-Chairman call immediately a board meeting by stating the cause of the request.

Notice of the meeting shall be given in writing (which includes the means of telegram, telex, or telexcopy) at least ten days before it is held. The notice shall include the proposed agenda of the meeting.

The Chairman or, in the Chairman's absence, the Vice-Chairman presides over the meeting.

If requested by a member of the Board, members of the management committee may attend the meeting without having the right to vote.

2.5 Quorum, Resolutions and Minutes of Board Meeting

The presence of at least half of the members of the Board shall constitute a quorum. The presence of a single member shall be sufficient for resolutions according to sections 651a, 652g and 653g of the Swiss Code of Obligations.

Subject to the following paragraph, a resolution shall be deemed passed when adopted by the majority of all the members present. In case of a tie, the Chairman shall have no casting vote.

In general, resolutions shall be taken by open vote. The Chairman, the Vice-Chairman or the
majority of the members present may request a secret vote.

Resolutions of the Board may also be passed by circular letter, cable, telex or telecopy, unless a member requests oral deliberations. Any resolutions thus adopted shall be deemed as binding as resolutions adopted at an actual meeting.

Provided that all members agree, board meetings may be held by telephone-conference.

All resolutions shall be recorded. The minutes of the meetings shall be signed by the Chairman or the Vice-Chairman and by the secretary or another member of the Board. The minutes must be approved by the Board.

3. **Chairman of the Board**

3.1 **Powers and Responsibilities**

The Chairman shall ensure that he is informed by the management committee and the controller on a current basis about the business situation of the Company, all important transactions and organisational changes within the Company.

In particular, the Chairman has the following responsibilities and duties:

a) determination and preparation of the agenda of Shareholders' Meetings and of board meetings;

b) calling of board meetings;

c) presiding over Shareholders' Meetings and board meetings; and

d) supervision of the observance and implementation of board resolutions.
3.2 Reporting

The Chairman shall report to the Board on the performance of his responsibilities and duties and on information received from the management committee and the controller.

4. Management Committee

4.1 Responsibilities and Duties

4.1.1 Unless the pertinent law or the articles of incorporation provide otherwise, the management committee is responsible for the management and the representation of the Company.

4.1.2 The management committee with delegated authority shall, in particular, have the following responsibilities and duties:

   a) day-to-day management, organisation and supervision of the business of the Company;

   b) motion to the Board on the appointment of managers, holders of procurement and other commercial powers of attorney;

   c) organisation, management and supervision of the activities of the persons mentioned in preceding art. 4.1.2 b), including ascertainment of an efficient reporting;

   d) organisation, management and supervision of the accounting, controlling and financial planning of the Company;

   e) preparation of the resolutions of the Board with respect to the duties mentioned in art. 2.1.3 and 2.1.4; and

   f) periodic reporting to the Board pursuant to art. 4.4.

3.2 Berichterstattung

Der Präsident erstattet dem Verwaltungsrat Bericht über die Erledigung seiner Aufgaben und die Informationen, die er von den mit der Geschäftsführung sowie den mit der internen Finanzkontrolle betrauten Personen erhalten hat.

4. Geschäftsleitung

4.1 Kompetenzen und Aufgaben

4.1.1 Soweit gesetzlich und statutarisch zulässig, obliegt die gesamte Geschäftsführung und Vertretung der Geschäftsleitung.

4.1.2 Zu den Kompetenzen und Aufgaben der Geschäftsleitung gehören insbesondere:

   a) Organisation, Leitung und Überwachung der täglichen Geschäftstätigkeit der Gesellschaft;

   b) Antragstellung an den Verwaltungsrat zur Ernennung von Direktoren, Prokuristen und Handlungsvollmächtigten;

   c) Organisation, Leitung und Überwachung der Tätigkeit der in Art. 4.1.2 b) hiervor genannten Personen, einschliesslich Regelung ihrer Berichterstattung;

   d) Organisation, Leitung und Überwachung des Rechnungswesens, der Finanzkontrolle und der Finanzplanung;

   e) Vorbereitung der Beschlussfassung des Verwaltungsrates bezüglich der weiteren in Art. 2.1.3 und 2.1.4 hiervor genannten Geschäfte;

   f) regelmässige Berichterstattung an den Verwaltungsrat gemäss Art. 4.4 hiernach.
4.2 Organisational Chart

The responsibilities and duties of the employees shall be stated in an organisational chart to be issued by the management committee.

4.3 Authority to Sign

The members of the management committee bind the Company with their signature in conjunction with the signature of another person authorized to sign.

4.4 Reporting

The management committee shall report to the Board periodically without specific demand thereby furnishing the Board with all relevant information regarding the business of the Company and the performance of his responsibilities and duties. Reports can be made in writing to all members of the Board individually or orally at a board meeting. Reports shall be supplemented by the necessary documentation.

In particular, the management committee shall forward the following information to the Board:

- audited annual financial statements within 90 days after the end of the respective business year;
- unaudited quarterly financial statements along with a management commentary within 30 days after the end of the respective calendar quarter;
- annual budgets at the latest 60 days before the end of the running business year;

Apart from the regular reports, the management committee shall immediately inform the members of the Board of any and all events which have or may have a substantial impact upon the business or the financial situation of the Company. In particular, the management committee must report on the following events without delay:

- revidierte Jahresberichte innerhalb von 90 Tagen nach dem Ende des betreffenden Geschäftsjahres;
- nicht revidierte Quartalsabschlüsse zusammen mit einem Managementkommentar innerhalb von 30 Tagen seit dem Ende des betreffenden Kalenderquartals;
- Jahresbudget spätestens 60 Tage vor dem Ende des laufenden Geschäftsjahres;

Unabhängig von der oben erwähnten regelmäßigen Berichterstattung benachrichtigt die Geschäftsleitung umgehend schriftlich alle Mitglieder des Verwaltungsrates über Vorgänge, die erheblichen Einfluss auf den Geschäftsbetrieb haben. Insbesondere ist über folgende Ereignisse umgehend zu berichten:
a) envisioned changes in the management of the Company;

b) events substantially deteriorating, or threatening to substantially deteriorate, the financial situation of the Company, in particular, threatened legal actions, a situation whereby half the capital is no longer represented by assets or if the liabilities of the Company exceed its assets and;

c) observation of substantial irregularities in the management of the Company at any level.

In addition, the members of the board shall have access to the members of the management committee to obtain such additional information as they may reasonably request in connection with their duties.

5. **Final Provisions**

These provisions shall become effective on […] They replace the organisational regulations of […].

Place and date: ______________________

The chairman of the board of directors:

[...]

The secretary of the board:

[...]

The English version is a translation of the German original and shall not have binding effect.

5. **Schlussbestimmungen**

Dieses Reglement tritt am [...] in Kraft. Es ersetzt das Organisationsreglement vom [...].

Ort und Datum: ______________________

Der Präsident des Verwaltungsrates:

[...]

Der Sekretär des Verwaltungsrates:

[...]

Die englische Fassung ist eine Übersetzung des deutschen Originaltextes und ohne rechtliche Verbindlichkeit.
B. Documents concerning the shareholders' meeting

1. Invitation and agenda

Einladung zur ordentlichen Generalversammlung der Aktionäre
der [...] AG

Zeit: Mittwoch, 15. Mai 20XX, 11.00 – 12.00 Uhr

Ort: Zürich

Eröffnung:

- Feststellung des vertretenen Kapitals;
- Bestimmung des Protokollführers.

Traktanden:

1. Erläuterung des Geschäftsberichtes 20XX (Jahresbericht sowie Jahresrechnung per 31. Dezember 20XX)

2. Bericht der Revisionsstelle

3. Genehmigung des Geschäftsberichtes 20XX, bestehend aus Jahresbericht und Jahresrechnung

Der Verwaltungsrat beantragt der Generalversammlung die Genehmigung des Geschäftsberichtes

und der Jahresrechnung.

4. Verwendung des Bilanzgewinnes

Der Verwaltungsrat beantragt der Generalversammlung den Gewinn von CHF [...] (Vortrag

1.1.20XX CHF [...] und Gewinn 20XX CHF [...] wird wie folgt verwendet:

- Zuweisung an die allgemeine Reserve CHF [...] 
- Festsetzung einer Dividende von CHF [...] 
- Vortrag auf neue Rechnung CHF [...] 

Variante:

Der Verwaltungsrat beantragt der Generalversammlung den Bilanzverlust von CHF [...] [...] mit
den gesetzlichen Reserven zu verrechnen]/[...auf die neue Rechnung vorzutragen].

5. Entlastung der mit der Geschäftsführung betrauten Organe
Der Verwaltungsrat beantragt der Generalversammlung den mit der Geschäftsführung betrauten Organen Entlastung zu erteilen.

6. **Wahl der Mitglieder des Verwaltungsrates**
Der Verwaltungsrat beantragt die Wiederwahl von [...] , [...] , [...] und [...] für eine weitere Amtsperiode von einem Jahr. Der Verwaltungsrat beantragt ferner, [...] als Präsident des Verwaltungsrates zu bestätigen.

7. **Wahl der Revisionsstelle**
Der Verwaltungsrat beantragt, [Revisionsgesellschaft] für eine weitere Amtsperiode von einem Jahr als Revisionsstelle zu wählen.

8. **Verschiedenes**

**Jahresbericht und Jahresrechnung**

**Vollmachten**
Die Aktionäre können sich an der Generalversammlung mittels schriftlicher Vollmacht durch Bevollmächtigte vertreten lassen, die nicht selber Aktionäre sein müssen. Ausserdem können sich die Aktionäre durch

- die [...] AG,
- eine Bank oder einen anderen gewerbsmässigen Vermögensverwalter als Depotvertreter im Sinne von Art 689d OR oder
- [unabhängiger Stimmrechtsvertreter], als unabhängigen Stimmrechtsvertreter im Sinne von Art. 689c OR

vertreten lassen. Ohne ausdrücklich anders lautende Weisung üben diese Vertreter das Stimmrecht im Sinne der Zustimmung zu den Anträgen des Verwaltungsrates aus.

Für die Vollmachterteilung ist das Vollmachtsformular, das dieser Einladung beiliegt, zu verwenden.

Depotvertreter werden gebeten, der Gesellschaft die Anzahl der von ihnen vertretenen Aktien frühzeitig bekannt zu geben, spätestens bis 13. Mai 20XX, 12.00 Uhr.

Das Aktienbuch wird am 13. Mai 20XX, 16.00 geschlossen.

Zürich, den 23. April 20XX
Für den Verwaltungsrat:

[Verwaltungsratspräsident]
2. **Power of authority**

**Vollmacht**

Aktionäre, die nicht an der Generalversammlung teilnehmen, können ihre Stimmrechte mittels Stellvertreter wahrnehmen, indem sie diese Vollmacht wie folgt ausfüllen:

1. Durch einen **Bevollmächtigten, der selber nicht Aktionär sein muss**: bitte füllen Sie die Vollmacht aus und übergeben Sie diese dem Bevollmächtigten.


Der Unterzeichnete

__________________________,

[Name, Firma]

[Adresse]

Inhaber von _____ Aktien der […] AG, einer Schweizer Aktiengesellschaft mit Sitz in Zürich, erteilt

☐ [Organvertreter]

☐ [unabhängiger Stimmrechtsvertreter]

mit dem Recht auf Substitution die Vollmacht, (ihn/sie) an der Generalversammlung der vorgenannten Gesellschaft, die am 15. Mai 20XX in Zürich stattfindet, zu vertreten und in (seinem/ihrem) Namen gemäss den folgenden Instruktionen Beschlüsse zu fassen und abzustimmen:
Für den Antrag des Verwaltungsrats | Gegen den Antrag des Verwaltungsrats | Stimmenthaltung

| Abnahme des Berichts der Revisionsstelle gemäss Traktandenpunkt 2 | | |
| Genehmigung des Geschäftsberichtes 20XX, bestehend aus Jahresbericht und Jahresrechnung gemäss Traktandenpunkt 3 | | |
| Beschlussfassung über die Verwendung des Bilanzgewinnes gemäss Traktandenpunkt 4 | | |
| Beschlussfassung über die Entlastung der mit der Geschäftsführung betrauten Organe gemäss Traktandenpunkt 5 | | |
| Wahl der Mitglieder des Verwaltungsrates gemäss Traktandenpunkt 6 | | |
| Wahl der Revisionsstelle gemäss Traktandenpunkt 7 | | |

und so zu handeln, wie der Unterzeichnete handeln könnte, wenn er persönlich anwesend wäre, und anerkennt und bestätigt hiermit alles, was der genannte Bevollmächtigte bzw. sein Vertreter oder seine Vertreter aufgrund dieser Vollmacht rechtsgültig tun oder veranlassen können.

Ort, Datum: ________________________

Unterschrift

Falls Sie wünschen, Ihre Stimmrechte mittels Vollmacht auszuüben, senden Sie bitte dieses Vollmachtsformular per Post **bis 13. Mai 20XX, 12 Uhr**, an die obengenannten Adressen.
3. Minutes of the shareholders' meeting

Protokoll der ordentlichen Generalversammlung
vom 15. Mai 20XX
für das Geschäftsjahr 20XX

Anwesende Aktionäre:

- [Name]
  vertreten durch [Name] [... Aktien
- [Name] [... Aktien
- [Name]
  vertreten durch [Name] [... Aktien

Weitere Anwesende:

- [Name]

Vorsitzender: [Verwaltungsratspräsident]

Protokollführer: [Name]
I.

Der Vorsitzende stellt fest:

- Es sind [...] Aktien vom gesamten Aktienkapital von [...] Namenaktien an der Versammlung vertreten.


Gegen diese Feststellungen wird kein Widerspruch erhoben.


II.

1. Der Vorsitzende erläutert der Versammlung den Jahresbericht sowie die Jahresrechnung per 31. Dezember 20XX (Beilagen C und D).

2. Die Versammlung nimmt Kenntnis vom Revisionsbericht [und den folgenden, darin enthaltenen Vorbehalten: [...]].

3. Die Versammlung genehmigt einstimmig den Jahresbericht sowie die Jahresrechnung per 31. Dezember 20XX.

4. Die Versammlung beschliesst:

   Der Gewinn von CHF [...] (Vortrag 1.1.20XX CHF [...] und Gewinn 20XX CHF [...] wird wie folgt verwendet:
   - Zuweisung an die allgemeine Reserve CHF [...]  
   - Festsetzung einer Dividende von CHF [...]  
   - Vortrag auf neue Rechnung CHF [...]

   Variante:

   Die Generalversammlung beschliesst mit knappem Mehr ( [...] zu [...] Stimmen) den Bilanzverlust von CHF [...] [...] mit den gesetzlichen Reserven zu verrechnen] / [...] auf die neue Rechnung vorzutragen].


7. Als Revisionsstelle für das Geschäftsjahr 20XX wird wieder gewählt: [Revisionsstelle]

8. Nachdem keine weiteren Geschäfte zur Behandlung vorliegen, schliesst der Vorsitzende die Versammlung.

Zürich, den [...] 

Der Vorsitzende: [Verwaltungsratspräsident] 

Der Protokollführer: [Protokollführer] 

Verteiler: 
- Domizil 
- alle Verwaltungsratsmitglieder 
- Revisionsstelle
C. Employment Agreement

EMPLOYMENT AGREEMENT

between

.................... [name], ................................................................................... [address]

("Employer")

and

.................... [name], ................................................................................... [address]

("Employee")

1. POSITION AND RESPONSIBILITIES

1.1 The Employer hereby employs the Employee and the Employee accepts employment as [position].

1.2 The tasks to be discharged by the Employee are the following: [tasks]. The Employee's responsibilities are specified by the Employer. The Employee's responsibilities may, from time to time, be modified by the Employer to perform other assignments or assume further responsibilities. The Employee’s other rights and obligations shall not be affected by such modification.

[The tasks as well as the obligations of the Employee are set out in detail in the management regulations. The Employee has to perform his tasks and his obligations in accordance with the management regulations and the instructions given by the board of directors.]

1.3 The Employee reports to [reporting officer] or such other person designated by the Employer from time to time.

1.4 Place of work is [ ........ ]. The Employer reserves the right to relocate the Employee
to another appropriate place of work but without lowering the Employee's salary entitlement. [Optional: It is understood that the above mentioned position of the Employee includes a high level of travel activities and customer visits.]

[1.5 This Employment Agreement is contingent upon the issuance of the legally required work and residence permit authorizing the Employee to work for the Employer.]

2. REMUNERATION

2.1 Salary
The Employee shall receive an annual gross base salary of [currency and amount] paid in 13 equal installments. 12 installments shall be paid on the final day of each month. The 13th installment shall be paid together with the salary for the month of December. Provided that a contract year is shorter than the calendar year, the 13th installment shall be paid pro rata. The remuneration shall compensate for all overtime, if any (cf. para. 6.2 hereafter).

2.2 Bonus Payments
In addition to the fixed regular salary in accordance with para. 2.1 above, the Employee shall be entitled to annual bonus payments [based on operating profits].

2.3 Deductions
The salary and bonus payments are gross payments. The Employee's share in the prevailing premiums for social security insurances mandatory under Swiss law such as "AHV", "IV", "ALV", "EO" etc., as well as for the pension plan maintained by the Employer (cf. para. 4 hereafter) shall be deducted from the payments made to the Employee. [In addition, the source tax shall be withheld and deducted from the payments made and advantages granted to the Employee.]

2.4 Further Payments
Unless otherwise expressly agreed upon in writing, the payment of any other gratuities, profit shares, premiums or other extra payments shall be on a voluntary basis, subject to the provision that even repeated payments without the reservation of voluntariness shall not create any legal claim for the Employee, either in respect to their cause or their amount, either for the past or for the future.

3. EXPENSES / COMPANY CAR
3.1 The Employer shall reimburse the Employee upon submission of appropriate vouchers for reasonable and customary business travel expenses in accordance with
the applicable Employer's guidelines as in force from time to time. The Employee shall submit such expense vouchers monthly.

3.2 The Employer shall reimburse the Employee’s use of the private car for business purposes at a rate of CHF 0.60 per km in case the Employee uses the car for more than 10,000 km per year for business purposes and at a rate of CHF 0.70 per km in case the Employee uses the car for less than 10,000 km per year for business purposes. [Or: A company car is handed over to the Employee. The Employer will pay for all running costs (fuel, oil, regular servicing, insurance, taxes) of such car. It is understood that no further compensation for the vehicle's operation and maintenance shall be paid. The Employee acknowledges that an amount equal to 0.8% of the purchase price of the car (excluding VAT but in the minimum amount of CHF 150) will be considered for tax purposes to be the value for the private use of the car and will be taxed. The Employee shall return the company car to the Employer upon termination of this Agreement or any time upon request of the Employer.]

3.3 Optional: The Employer shall pay to the Employee for the use of his home office facilities a fixed fee of [currency and amount] per month plus any telephone or data transmission charges incurred through business activities.

3.4 The Employer shall provide the necessary electronic equipment to allow the Employee to be fully integrated into the Employer's world-wide network and to access the Employer's facilities. Any such equipment shall remain the property of the Employer.

4. PENSION FUND
The Employer agrees to establish a pension plan for the Employee at terms corresponding at least to the mandatory requirements of the Federal Law on Occupational Old Age, Survivors and Disability Benefit Plan ("BVG"). Employer and Employee shall pay their shares in the pension plan according to the applicable pension regulations.

5. SICKNESS / INSURANCE
5.1 If the Employee is prevented from work due to sickness or accident, he shall inform the Employer without delay and [at the Employer's request] submit within three days a medical certificate. [The Employer shall have the right to ask for a medical certificate as from the first day of absence.] In case the Employee is prevented from work for a longer period of time than stated in the medical certificate, he shall so inform the Employer and at the Employer's request submit another medical certificate.
5.2 The Employer shall, at any time, be entitled to demand a physical exam by a medical referee.

5.3 [ONLY IF THE APPROPRIATE INSURANCE COVERAGE EXISTS]
If the Employee is by no fault of his own and due to reasons inherent in the Employee’s personality, such as for example sickness, accident or military service, prevented from performing work, the Employee has, rather than the statutory claims, a claim against the Employer for salary continuance during a [30] day period. After the expiry of this [30] day period the Employee will, in case of sickness or accident and as long as this Agreement is in force, be covered by the accident insurance or the sick pay insurance taken out by the Employer. The accident insurance and the sick pay insurance taken out by the Employer cover, during the term of the employment but in no event during more than [700] days, [80]% of the Employee’s salary up to an annual gross salary of CHF [100'000].

The premiums for this accident insurance as well as for the sick pay insurance are borne by the Employer.

OR:

5.3 If the employee is by no fault of his or her own and due to reasons inherent in the Employee’s person, such as for example sickness, accident or military service, prevented from performing work, the Employer will, after the first three months of employment, continue to pay the Employee’s salary according to the "Zürcher Skala" according to the Employee’s years of service:

- during the first year of service: 3 weeks
- during the second year of service: 8 weeks
- during the third year of service: 9 weeks
- during the fourth year of service: 10 weeks
- during the fifth year of service: 11 weeks

(to be further increased in subsequent years of service according to the following formula: years of service plus six weeks)

provided, however, that no payment shall be due after the date on which the employment terminated.

AND:

If the Employee gave birth to a child she will be entitled to the maternity payments of
the state run maternity insurance and this paragraph 5.3 shall not apply.

Nothing in this paragraph 5.3 shall in any way limit the parties’ freedom to give notice of termination.

6. WORKING HOURS / VACATIONS

6.1 The Employee agrees to exercise his best efforts to successfully and carefully accomplish the duties assigned to him and further agrees that he shall devote at least \[40\] hours per week to service on behalf of the Employer. The Employee agrees to perform overtime work if necessary to properly fulfill his employment duties.

6.2 If the Employee performs overtime work he shall neither be entitled to a financial compensation nor to a compensation by free time. [Should the Employee work more than 45 hours in a given week, he has to obtain the prior written approval of his superior or, if that is not possible, in the week thereafter. Overtime in the sense of the Federal Labor Statute that exceeds 60 hours per year shall be compensated by time off of identical duration within a 12 months period provided, however, that if the Federal Labor Statute does not apply to the Employee no overtime compensation shall take place.]

6.3 The Employee shall be entitled to [if a week has 5 working days: at least 20] days of paid vacations per calendar year.

7. DUTIES OF LOYALTY AND CONFIDENTIALITY

7.1 The Employee shall devote his efforts exclusively to the Employer in furtherance of the Employer's interests. Any engagement in additional occupations for remuneration or any participation in any kind of enterprise requires the written consent of the Employer. This shall not apply to the usual acquisition of shares or other stocks for investment purposes. Membership in the board of directors or supervisory board of other companies shall also require the written approval of the Employer.

7.2 The Employee shall during the period of employment with the Employer and at any time thereafter, keep secret any confidential information concerning the business, contractual arrangements, deals, transactions or particular affairs of the Employer or its affiliates and will not use any such information for his own benefit or the benefit of others. This obligation shall also exist with respect to any protected data and confidential information of third parties that the Employee gets to know while performing the obligations under this Agreement.

7.3 Upon termination of this Agreement for any reason, the Employee shall return to the Employer all files and any company documents concerning the business of the
Successfully mastering legal and tax challenges

Employer and its affiliates in his possession or open to his access, including all designs, customer and price lists, printed material, documents, sketches, notes, drafts as well as copies thereof, regardless whether or not the same are originally furnished by the Employer or its affiliates.

7.4 During the term of this Agreement as well as for a period of two years after the termination of this employment relationship, the Employee shall not entice away or solicit any employees of the Employer or offer them a job or have them offered a job or to try to do any of these activities. Upon each violation of his obligations under this paragraph 7.4, the Employee shall pay to the Employer liquidated damages in the amount of CHF \[100'000\]. Payment of the liquidated damages does not relieve the Employee from his obligations under this paragraph 7.4. The Employer is, furthermore, entitled to seek judicial enforcement of the Employee's obligations under this paragraph 7.4 and/or to claim damages exceeding the amount of the liquidated damages.

7.5 During the term of this Agreement as well as for a period of two years after the termination of his employment relationship, the Employee shall not entice away or solicit or try to entice away or to solicit any customers of the Employer for whom the Employee was active or with whom the Employee was in contact during the last 12 months prior to the effective termination of his activity for the Employer (hereinafter the "Customer"). During the term of this Agreement as well as for a period of two years after the termination of his employment relationship the Employee shall neither directly nor indirectly act on behalf of a Customer, for example as an employee, consultant, agent, corporate body or employee of a third party nor submit an offer for such an activity. Upon each violation of his obligations under this para. 7.5 the Employee shall pay to the Employer liquidated damages in the amount of CHF \[100'000\]. Payment of the liquidated damages does not relieve the Employee from observing his obligations under this paragraph 7.5. The Employer is, furthermore, entitled to seek judicial enforcement of the Employee's obligations under this paragraph 7.5 and/or to claim damages exceeding the amount of the liquidated damages.

8. INTELLECTUAL PROPERTY RIGHTS

8.1 All intellectual property rights including but not limited to patent rights, design rights, copyrights and related rights, database rights, trademark rights and chip rights as well as any rights in know how ensuing from the work performed by the Employee during the term of his/her employment (hereinafter the “Intellectual Property Rights”), shall exclusively vest in the Employer. The Employee may not, without the Employer’s written consent, disclose, multiply, use, manufacture, bring on the market or sell, lease, deliver or otherwise trade, offer, or register the results of his work.
8.2. Insofar as rights that are mentioned in section 8.1 above and are related to the Intellectual Property Rights are not vested in the Employer by operation of law or based on section 8.1 above, the Employee covenants that he will transfer and, insofar as possible, hereby transfers to the Employer such rights provided, however, that the Employer may renounce such transfer or transfer back to the Employee any such Intellectual Property Rights at any time. If a transfer should not be possible under the applicable law, then the Employee shall grant to the Employer a perpetual, transferable, royalty-free license to use such Intellectual Property Rights.

8.3. The Employee acknowledges that his salary includes reasonable compensation for the loss of Intellectual Property Rights.

8.4 The Employer is entitled to transfer the Intellectual Property Rights in full or in part to any third party. The Employer and such third parties are not obliged to mention the Employee as the author if they publish any inventions, computer programs or other works. They are free to make any modifications, translations and/or other adaptations and/or can refrain from making any publications.

9. DATA PROTECTION
By signing this Agreement, the Employee agrees that the Employer may process personal data concerning the Employee to the extent such data relates to the Employee’s suitability for the employment or is necessary to perform the employment relationship. The Employee agrees that personal data may be transferred to companies outside Switzerland affiliated with the Employer, in particular to …… in ……

10. NON-COMPETITION
In view of the fact that the Employee in the course of his employment under this Agreement will acquire knowledge of the Employer's trade secrets and/or will have insight into the Employer's customer base, the Employee undertakes not to perform any activity competing with the Employer in the field of [scope] during the term of this Agreement as well as after the term of this Agreement for a period of [maximum three years]. After the termination of this Agreement the non compete covenant shall be limited to [Switzerland].

In particular, the Employee agrees:

– not to have, directly or indirectly, any financial or other interest in a business or company which develops, produces, markets or distributes products substantially similar to the products of the Employer or its affiliated companies or to render services similar to those rendered by the Employer or its affiliated companies (a
“Competitor”);

- not to accept any part or full time employment in a Competitor or to act as consultant or representative of a Competitor;

- not to directly or indirectly establish a Competitor.

11. SANCTIONS
The Employee understands that a violation of the obligations under article 10 of this Agreement might cause serious damage to the Employer. In the event the Employee violates an obligation under article 10 of this Agreement, the Employer shall be entitled to seek judicial enforcement of such obligation. Furthermore, the Employee agrees to pay to the Employer an amount of ……[currency and amount] as liquidated damages upon each violation of a duty or obligation under article 10. The payment of the liquidated damages does not relieve the Employee from the obligations under article 10 of this Agreement. The Employer's right to claim damages exceeding the amount of liquidated damages is expressly reserved.

12. DURATION AND TERMINATION

12.1 This Employment Agreement shall be effective as of [date] and last for an indefinite period of time.

12.2 The first three months of the employment relationship shall be the probation period. During the probation period, this Agreement may be terminated by either party at any time by respecting a notice period of seven days.

12.3 After the end of the probation period this Agreement may be terminated by either party by respecting a notice period of [one month in the first year of service, of two months in the second up to and including the ninth year of service and of three months as from the tenth year of service] always with effect to the end of a calendar month.

12.4 This Agreement terminates without notice at the end of the month on which the Employee reached the ordinary retirement age.

12.5 The Employer has at any time the right to relieve the Employee from his obligation to work at full pay provided, however, that any income that the Employee receives from any activity during such release period shall be deducted. The Employee shall compensate any overtime and/or vacation during such release period and shall not engage in any competing activity.
13  MISCELLANEOUS

13.1 This Employment Agreement replaces all prior understandings and/or contracts between the parties.

13.2 Amendments and additions to this Agreement including this clause must be in writing to be effective. This form requirement does not apply to the notice of termination which does not require a particular form.

13.3 Should one or several provisions of this Agreement prove invalid, in part or in whole, such invalid provision(s) shall not affect the validity of the other provisions in this Agreement. The invalid provision(s) shall be replaced by such valid provision(s) that best meet(s) the parties’ intention when agreeing on the invalid provision(s).

14.  APPLICABLE LAW

14.1 This Employment Agreement shall be governed by Swiss law.

Place and date

_________________________  ______________________

The Employer

The Employee

______________________________  ________________________________

by:  [name of Employee]
ARBEITSVERTRAG

zwischen

........................ [Name], .......................................................... [Adresse]..........................
("Gesellschaft")

und

........................ [Name], .......................................................... [Adresse]..........................
("Arbeitnehmer")

1. FUNKTION UND PFLICHTEN

1.1 Der Arbeitnehmer wird von der Gesellschaft als [Funktion] eingestellt.


[Die Aufgaben sowie die Pflichten des Arbeitnehmers sind im Organisationsreglement festgelegt. Der Arbeitnehmer hat seine Aufgaben sowie seine Pflichten in Übereinstimmung mit dem Organisationsreglement sowie den Instruktionen des Verwaltungsrates auszuüben.]

1.3 Sofern die Gesellschaft nicht anderes bestimmt, berichtet der Arbeitnehmer an [Vorgesetzter] oder eine andere von der Gesellschaft bezeichnete Person.

1.4 Arbeitsort ist [.......]. Die Gesellschaft behält sich das Recht vor, den Arbeitnehmer an einen anderen geeigneten Arbeitsort zu versetzen unter Beibehaltung des
Lohnanspruchs des Arbeitnehmers. [Eventuell: Die oben erwähnte Tätigkeit umfasst Reisen und Kundenbesuche in grossem Umfang.]

[1.5 Dieser Vertrag steht unter der Bedingung, dass der Arbeitnehmer die rechtlich erforderlichen Arbeits- und Aufenthaltsbewilligungen erhält, die es ihm erlauben, für die Gesellschaft tätig zu sein.]

2. VERGÜTUNG

2.1 Gehalt


2.2 Bonuszahlungen

Zusätzlich zum vereinbarten regulären Gehalt gemäss Ziff. 2.1 hat der Arbeitnehmer Anspruch auf jährliche Bonuszahlungen [basierend auf dem erzielten Gewinn].

2.3 Abzüge

Das Gehalt und die Bonuszahlungen sind Bruttozahlungen. Die jeweils geltenden gesetzlichen und reglementarischen Arbeitnehmerbeiträge an AHV, IV, EO, ALV sowie an die Nichtbetriebs-Unfallversicherung und an die Pensionskasse sind von den Zahlungen an den Arbeitnehmer in Abzug zu bringen. [Zusätzlich wird die Quellensteuer von den Zahlungen an den Arbeitnehmer in Abzug gebracht.]

2.4 Sonstige Zahlungen

Ohne anderweitige ausdrückliche schriftliche Vereinbarung erfolgen Zahlungen von sonstigen Gratifikationen, Tantièmen, Boni oder andere Zuwendungen auf freiwilliger Basis mit der Massgabe, dass auch durch eine wiederholte Zahlung ohne ausdrücklichen Vorbehalt der Freiwilligkeit ein Rechtsanspruch des Arbeitnehmers weder dem Grunde noch der Höhe nach und weder für die Vergangenheit noch für die Zukunft begründet wird.
3. AUSLAGEN / FIRMENWAGEN

3.1 Die Gesellschaft erstattet dem Arbeitnehmer angemessene und belegte Reisekosten entsprechend den jeweils gültigen Richtlinien der Gesellschaft. Der Arbeitnehmer hat die entsprechenden Belege monatlich vorzulegen.

3.2 Die Gesellschaft zahlt dem Arbeitnehmer für den Gebrauch des Privatwagens für berufliche Zwecke einen Betrag von CHF 0.60/km, falls der Arbeitnehmer den Privatwagen pro Jahr mehr als 10'000 km für geschäftliche Zwecke benutzt bzw. einen Betrag von CHF 0.70/km bei einer jährlichen Nutzung für geschäftliche Zwecke von weniger als 10'000 km. [Oder: Dem Arbeitnehmer wird von der Gesellschaft ein Fahrzeug zur Verfügung gestellt. Sämtliche anfallenden Kosten [Benzin, Öl, Service, Versicherung, Steuern] werden von der Gesellschaft übernommen. Es wird keine weitere Vergütung für den Gebrauch und den Unterhalt des Fahrzeuges erstattet. Dem Arbeitnehmer ist bewusst, dass ihm der private Gebrauch steuerlich mit 0.8% des Kaufpreises (exkl. MWSt) pro Monat belastet wird. Der Arbeitnehmer hat das Fahrzeug auf Verlangen der Gesellschaft, spätestens aber bei Beendigung des Arbeitsverhältnisses, der Gesellschaft zurückzugeben.]


4. BERUFLICHE VORSORGE

Die Gesellschaft verpflichtet sich, den Arbeitnehmer zumindest für den obligatorischen Teil gemäss Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge ["BVG"] zu versichern. Die Gesellschaft und der Arbeitnehmer bezahlen die Beiträge für die berufliche Vorsorge gemäss dem anwendbaren Vorsorgereglement.

5. KRANKHEIT / VERSICHERUNG

5.1 Der Arbeitnehmer ist verpflichtet, jede durch Krankheit oder Unfall verursachte Arbeitsverhinderung unverzüglich der Gesellschaft anzuzeigen und [auf Verlangen der Gesellschaft] innerhalb von 3 Tagen ein Arztzeugnis vorzulegen. [Die Gesellschaft
kann auch bereits ab dem ersten Tag der Abwesenheit ein Arztzeugnis verlangen.] Dauert die Arbeitsunfähigkeit länger als im Zeugnis angegeben, so ist der Arbeitnehmer verpflichtet, die Gesellschaft unverzüglich zu informieren und auf Verlangen der Gesellschaft ein neues ärztliches Zeugnis einzureichen.

5.2 Die Gesellschaft ist berechtigt, vom Arbeitnehmer jederzeit eine Untersuchung durch einen Vertrauensarzt der Gesellschaft zu verlangen.

5.3 [NUR BEI VORLIEGEN DER ENTSPRECHENDEN KRANKENTAGGELDVERSICHERUNG:


Die Prämien für diese Unfallversicherung sowie für die Krankentaggeldversicherung werden von der Gesellschaft getragen.]

ODER:

Hat das Arbeitsverhältnis mehr als drei Monate gedauert oder ist es für eine feste Dauer von mehr als drei Monaten abgeschlossen worden und ist der Arbeitnehmer aus Gründen, die in seiner Person liegen, wie Krankheit, Unfall oder Militärdienst unverschuldet an der Arbeitsleistung verhindert, so hat ihm die Gesellschaft während der Dauer des Arbeitsverhältnisses den Lohn während angemessener Zeit weiterzubezahlen. Die Berechnung der Lohnfortzahlungspflicht erfolgt nach der "Zürcher Skala" und ergibt sich in Abhängigkeit der Dienstjahre:

- erstes Dienstjahr (ab dem 4. Monat) 3 Wochen
- zweites Dienstjahr 8 Wochen
- drittes Dienstjahr 9 Wochen
- viertes Dienstjahr 10 Wochen
- fünftes Dienstjahr 11 Wochen
(Formel: Anzahl Dienstjahre plus sechs Wochen),

wobei nach Beendigung des Arbeitsverhältnisses keine Zahlung mehr erfolgt.

UND
Während des Mutterschaftsurlaubes besteht ein Anspruch gegenüber der Mutterschaftsversicherung während maximal 14 Wochen nach erfolgter Geburt gemäß den gesetzlichen Vorschriften und diese Ziff. 5.3 findet keine Anwendung.

Die vorliegende Ziffer 5.3 schränkt die Kündigungsfreiheit der Parteien in keiner Weise ein.

6. ARBEITSZEITEN / FERIEN

6.1 Der Arbeitnehmer verpflichtet sich, die ihm übertragenen Aufgaben bestmöglich und sorgfältig auszuführen. Die wöchentliche Arbeitszeit im Dienste der Gesellschaft beträgt mindestens [40] Stunden. Der Arbeitnehmer verpflichtet sich, im Falle betrieblicher Notwendigkeit Überstundenarbeit zu leisten.


6.3 Der Arbeitnehmer hat Anspruch auf bezahlte Ferien von /bei einer 5-Tage-Woche von mindestens 20/ Arbeitstagen pro Kalenderjahr.

7. TREUE- UND VERSCHWIEGENHEITSPFLICHT


7.2 Der Arbeitnehmer ist verpflichtet, während der Dauer dieses Vertrages und auch nach Beendigung desselben alle vertraulichen Informationen über das Geschäft,
insbesondere die Vertragsbeziehungen, Abschlüsse, Geschäfte oder besondere Angelegenheiten der Gesellschaft oder von verbundenen Unternehmen geheimzuhalten und diese Informationen nicht für seinen eigenen oder den Nutzen anderer zu verwenden. Dies gilt auch für geschützte und geheime Daten Dritter, die der Arbeitnehmer in der Erfüllung seiner Pflichten unter diesem Arbeitsvertrag erfährt.


7.5 Der Arbeitnehmer verpflichtet sich, während 2 Jahren nach Beendigung des Arbeitsverhältnisses keine Kunden der Gesellschaft, für die er während der letzten 12 Monate vor dem effektiven Ende seiner Tätigkeit für die Gesellschaft tätig war oder mit diesen in diesem Zeitraum in Kontakt stand, abzuwerben, eine Abwerbung zu versuchen oder für solche Kunden in irgendeiner Weise direkt oder indirekt tätig zu sein, beispielsweise als Arbeitnehmer, Beauftragter, Agent, Organ oder als Arbeitnehmer eines Dritten oder sich für eine solche Tätigkeit zu bewerben. Für jede Verletzung dieser Verpflichtung gemäss dieser Ziffer 7.5 hat der Arbeitnehmer der Gesellschaft eine Konventionalstrafe in Höhe von CHF [100'000] zu bezahlen. Zahlung der Konventionalstrafe entbindet den Arbeitnehmer nicht von der Einhaltung seiner Verpflichtungen unter dieser Ziffer 7.5. Die Gesellschaft ist überdies berechtigt, die Herstellung des vertragskonformen Zustandes und Ersatz des über die Konventionalstrafe hinausgehenden Schadens zu verlangen.

8. IMMATERIALGÜTERRECHTE

8.1 Rechte an Immaterialgütern jeglicher Art, namentlich Rechte an Patenten, Designs, sowie Urheberrechte und damit verbundene Rechte, Rechte an Datenbanken, Markenrechte und Rechte an Chips sowie irgendwelche Rechte an Know-How, welche
sich aus Arbeiten des Arbeitnehmers während der Dauer des Arbeitsverhältnisses mit der Gesellschaft ergeben (nachfolgend „Immaterialgüterrechte“), entstehen ausschliesslich und originär im Eigentum der Gesellschaft. Der Arbeitnehmer darf die Resultate seiner Arbeit nicht ohne schriftliche Zustimmung der Gesellschaft offenlegen, vervielfältigen, gebrauchen, herstellen, vermarkten, verkaufen, vermieten, ausliefern oder anderweitig handeln, namens irgendeines Dritten offerieren, oder diese Resultate registrieren.


8.3 Der Arbeitnehmer bestätigt hiermit, dass die seitens der Gesellschaft unter diesem Vertrag zu leistenden Zahlungen ihn für den Verlust der Immaterialgüterrechte angemessen entschädigt.


9. DATENSCHUTZ

Der Arbeitnehmer anerkennt, dass die Gesellschaft sämtliche seine Person betreffenden Daten bearbeiten darf, soweit diese seine Eignung für das Arbeitsverhältnis betreffen oder zur Durchführung dieses Arbeitsvertrages notwendig sind. Der Arbeitnehmer ist damit einverstanden, dass die Gesellschaft, ihn betreffende Daten an verbundene Gesellschaften auch ausserhalb der Schweiz, namentlich an die ...... in ......... überträgt.

10. KONKURRENZVERBOT

Mit Rücksicht darauf, dass der Arbeitnehmer Einblick in den Kundenkreis, die Fabrikations- und Geschäftsgeheimnisse der Gesellschaft hat, verpflichtet er sich, während der Dauer des Arbeitsverhältnisses sowie während [maximum drei] Jahren

Insbesondere verpflichtet sich der Arbeitnehmer:

- sich weder direkt noch indirekt finanziell oder anderweitig an einem Unternehmen oder einer Gesellschaft zu beteiligen, welches dieselben oder im wesentlichen ähnliche Produkte entwickelt, herstellt, anbietet oder vertreibt oder Dienstleistungen hinsichtlich solcher Produkte erbringt wie die Gesellschaft oder die mit ihr verbundenen Unternehmen;

- weder ganz noch teilweise für eine solche Gesellschaft oder ein solches Unternehmen tätig zu werden oder als Berater oder Vertreter eines solchen Unternehmens oder einer solchen Gesellschaft zu fungieren oder in einer sonstigen Weise für eine solche Gesellschaft oder ein solches Unternehmen tätig zu sein;

- weder direkt noch indirekt ein derartiges Unternehmen zu gründen.

11. SANKTIONEN


12. VERTRAGSDAUER UND KÜNDIGUNG

12.1 Dieser Vertrag tritt am [Datum] in Kraft und wird auf unbestimmte Zeit abgeschlossen.


12.4 Das Arbeitsverhältnis endet, ohne dass es einer Kündigung bedürfte, am letzten Tag des Monats, an dem der Arbeitnehmer sein ordentliches AHV-Pensionierungsalter erreicht.

12.5 Der Arbeitgeber hat das Recht, den Arbeitnehmer jederzeit unter voller Wahrung der Lohnansprüche des Arbeitnehmers freizustellen, wobei ein etwaiges Einkommen aus anderer Tätigkeit des Arbeitnehmers während dieser Zeit in Abzug gebracht werden kann. Der Arbeitnehmer ist verpflichtet, während der Dauer der Freistellung allfällige Überzeit und/oder Ferien zu kompensieren und sich jeglicher konkurrenzierender Tätigkeit zu enthalten.

13. VERSCHIEDENES


13.2 Änderungen und Zusätze zu diesem Vertrag inklusive dieser Klausel müssen schriftlich erfolgen, um Gültigkeit zu erlangen. Dieses Schriftformerfordernis bezieht sich nicht auf die Kündigung, die auch formlos erfolgen kann.

13.3 Sollten eine oder mehrere Bestimmungen dieses Vertrages ganz oder teilweise unwirksam sein, so berührt dies nicht die Wirksamkeit der übrigen Bestimmungen. Die unwirksame Bestimmung soll durch diejenige wirksame Bestimmung ersetzt werden, die dem Willen der Parteien bei Vertragsschluss am nächsten kommt.

14. ANWENDBARES RECHT

Auf diesen Arbeitsvertrag findet Schweizer Recht Anwendung.

Ort und Datum

_________________________ \____________________

Der Arbeitnehmer \ Die Gesellschaft

_________________________ \____________________

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D. Further addresses and links

1. Foundations

<table>
<thead>
<tr>
<th>NAME</th>
<th>PURPOSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stiftung FUTUR Postfach 82 8640 Rapperswil</td>
<td>Support of start-up companies by providing rooms free of charge, advice from an experienced entrepreneur in the foundation board and the transfer of technology from the Hochschule Rapperswil.</td>
</tr>
<tr>
<td>Gebert-Rüf Stiftung Bäumleingasse 22 4051 Basel</td>
<td>Enhancing Switzerland as commercial centre by supporting the collaboration between educational establishments with enterprises from the business and the social sector, with the goal of transforming scientific knowledge into economic and social benefits.</td>
</tr>
<tr>
<td>Stiftung Grünau Erlenstrasse 89 8805 Richterswil</td>
<td>Promotion and support of projects and institutions aimed at the professional and social integration of teenagers and young adults. The foundation runs a foundation centre including the relevant infrastructure and services to systematically promote incorporations.</td>
</tr>
<tr>
<td>Hans Eggenberger-Stiftung Stüssihofstatt 8 8001 Zürich</td>
<td>Apart from other purposes, the support of initiative start-ups: operation of a management and financing platform for technology companies. Pre-selected start-up entrepreneurs are brought together with business angels or investors (according to need) in order to create a partnership.</td>
</tr>
<tr>
<td>UCS Kompass Stiftung IEI Neuausstrasse 4 8044 Zürich</td>
<td>Support of small and medium-sized companies by providing information on individual companies based on personal visits.</td>
</tr>
<tr>
<td>Novartis Stiftung für medizinisch-biologische Forschung Herr PD Dr. med. W.H. Aellig Lichtstrasse 35 4002 Basel</td>
<td>Promotion of the medical-biological sciences by financial support of research projects which are realized at Swiss universities in the area of medicine and medical oriented biology-biochemistry.</td>
</tr>
</tbody>
</table>

Apart from the foundations under the supervision of the Federation, there are several cantonal foundations subject to the supervision of the relevant canton.
## 2. Business development

### Federation

- Federal Office for Professional Education and Technology Initiative CTI Start-up
  Effingerstrasse 27
  3003 Bern
  [www.ktistartup.ch](http://www.ktistartup.ch)

- State Secretariat for Economic Affairs
  seco/ Task force KMU
  Bundesgasse 8
  3003 Bern
  [www.kmuinfo.ch](http://www.kmuinfo.ch)

### Cantons

<table>
<thead>
<tr>
<th>Canton</th>
<th>Name</th>
<th>Address</th>
<th>Website</th>
</tr>
</thead>
<tbody>
<tr>
<td>AG</td>
<td>Aargau Services</td>
<td>Telli-Hochhaus 5004 Aarau</td>
<td><a href="http://www.ag.ch">www.ag.ch</a></td>
</tr>
<tr>
<td>AI</td>
<td>Volkswirtschaftsdepartement Appenzell Innerrhoden Wirtschaftsförderung Marktgasse 2 9050 Appenzell</td>
<td><a href="http://www.ai.ch/de/gewerbe/">www.ai.ch/de/gewerbe/</a></td>
<td></td>
</tr>
<tr>
<td>BE</td>
<td>WFB Wirtschaftsförderung Kanton Bern Münsterplatz 3 3011 Bern</td>
<td><a href="http://www.berneinvest.com">www.berneinvest.com</a></td>
<td></td>
</tr>
<tr>
<td>FR</td>
<td>Wirtschaftsförderung Kanton Freiburg Avenue de Beauregard 1 1700 Fribourg</td>
<td><a href="http://www.promfr.ch">www.promfr.ch</a></td>
<td></td>
</tr>
</tbody>
</table>
Successfully mastering legal and tax challenges

Part 6: Annex

GE Département de l'économie, Promotion Economique
Case postale
1211 Genève 3

GL Wirtschaftsförderung des Kantons Glarus
Sandstrasse 29
8750 Glarus

GR Amt für Wirtschaft und Tourismus
Grabenstrasse 8
7001 Chur

JU République et Canton du Jura, Département de l'Économie et de la Coopération
Promotion économique
12, rue de la Préfecture
2800 Delémont

LU Volkswirtschaftsdepartement des Kantons Luzern
Bahnhofstrasse 15
6002 Luzern

NE Conseiller à la promotion industrielle et commerciale
Rue de la Collégiale 3
Le Château
2000 Neuchâtel

NW Stiftung zur Erhaltung und Förderung der Wirtschaft
Nidwalden/Engelberg
Dorfplatz 7a
6370 Stans

OW Wirtschaftsförderung Obwalden
Güterstrasse 3
Postfach
6061 Sarnen

SG Amt für Wirtschaft, Abteilung Wirtschaftsförderung
Davidstrasse 35
9001 St. Gallen

SH Wirtschaftsförderung Kanton Schaffhausen
Gewerbestrasse 8
8212 Neuhausen am Rheinfall

SO Wirtschaftsförderung des Kantons Solothurn
Untere Sternengasse 2
Postfach 16
4504 Solothurn
Successfully mastering legal and tax challenges

Part 6: Annex

SZ  Volkswirtschaftsdepartement des Kantons Schwyz
    Bahnhofstrasse 15
    Postfach 16
    4504 Schwyz

TG  Amt für Wirtschaft und Arbeit des Kantons Thurgau
    Wirtschaftsförderung
    Zürcherstrasse 183
    8510 Frauenfeld

TI  Sezione del promovimento economico e del lavoro
    Viale Franscini 17
    6500 Bellinzona

UR  Volkswirtschaftsdepartement des Kantons Uri
    Klausenstrasse 4
    6460 Altdorf

VD  Développement Economique Canton du Vaud
    Avenue de Gratta-Paille 2
    Case postale 452
    1000 Lausanne 30

VS  Société pour le Développement de L'Economie Valaisanne (Sodeval)
    Maison du Valais
    Rue Pré-Fleuri 6
    1950 Sion

ZG  Kontaktstelle Wirtschaft Zug
    Verwaltungsgebäude 1
    Aabachstrasse 5
    Postfach 857
    6301 Zug

ZH  Amt für Wirtschaft und Arbeit, Bereich Wirtschaftsförderung
    KMU-Dienst
    Kaspar-Escher-Haus
    Postfach
    8090 Zürich

www.sz.ch
www.tg.ch/wifoe
www.ti.ch
www.ur.ch/wfu/
www.dev.ch
www.sodeval.ch
www.zug.ch/economy/01_00.htm
www.awa.zh.ch
Canton and City of Zurich

- Business development of the City of Zurich
  Information, advise and support in case of newly settling in
  the City of Zurich
  www.wirtschaftsfoerderung.stadt-zuerich.ch

- Greater Zurich Area (former The Zurich Network)
  Promotion of the location; everything regarding the
  incorporation of companies in the canton Zurich
  www.gza.ch
3. **Foundation centres**

- Gründerzentrum Bern
- Gründerzentrum Kanton Bern
- Gründerzentrum Biel
- Gründerzentrum Burgdorf-Emmental
- Gründerzentrum Gurten
- Gründerzentrum Oberraargau

- Espace (former project GrüFa)

  Specific support of start-up companies with infrastructure and other services in Richterswil

- Gründerorganisation Wädenswil (*grow*)
- Gründerzentrum Kanton Solothurn
- HTC High-Tech-Center Tägerwilen
- Industrie- und Technozentrum Schaffhausen
- Regionales Gründerzentrum Reinach
- START Gründungszentrum Zürich
- Club der schweizerischen Technologieparks und Gründerzentren
- Technologiezentrum für die Euregio Bodensee TEBO
- Technopark Zürich
- Gründerzentrum TENUM Liestal
- Technologiezentrum Linth TZL
- Y-Parc Yverdon, Parc Scientifique et Technologique

[www.grueze.ch](http://www.grueze.ch)
[www.gruefa.ch](http://www.gruefa.ch)
[www.grow-waedenswil.ch/](http://www.grow-waedenswil.ch/)
[www.gyz.ch](http://www.gyz.ch)
[www.high-tech-center.ch](http://www.high-tech-center.ch)
[www.its.sh.ch](http://www.its.sh.ch)
[www.businessparc.ch](http://www.businessparc.ch)
[www.start-gzz.ch](http://www.start-gzz.ch)
[www.swissparks.ch](http://www.swissparks.ch)
[www.tebo.ch](http://www.tebo.ch)
[www.technopark.ch](http://www.technopark.ch)
[www.tenum.ch](http://www.tenum.ch)
[www.tzl.ch](http://www.tzl.ch)
[www.y-parc.ch](http://www.y-parc.ch)
4. **Incubators**

In the incubators, start-up companies can gain experience and based on the special closeness of the start-up company, a mutual motivation shall be fostered and infrastructure shall be provided.

- Internet Business Park, Birrfeld  
  Focus: Internet-companies  
  Assistance: by experienced entrepreneurs and department of economics of the Canton Aargau, currently especially with regard to human resources.

- Business Incubateur, EPFL  

- Stiftung Futur  
  Support: rooms free of charge during the start-up stage, advise from experienced entrepreneurs from the foundation board, technology transfer from the Hochschule Rapperswil. Selection: by the foundation board's committee of six people based on a business plan.
5. Advisors

- Adlatus Schweiz
  Association of experts and former executive managers
  www.adlatus.ch

- Bernische Genossenschaft für Technologievermittlung (BETECH)
  Platform for technology and knowledge transfer
  www.innobe.ch

- Eidgenössische Technische Hochschule
  ETH Transfer, Support and advise at incorporation of the company
  www.transfer.ethz.ch

- Ecole Polytechnique Fédérale de Lausanne
  Service des relations industrielles
  www.epfl.ch/sri

- Institut pour la création d'Entreprises
  www.creation-entreprise.ch

- Institut für Jungunternehmer
  www.ifj.ch
  Advise regarding all aspects of incorporation

- Universität Basel and Fachhochschule Basel
  Knowledge and technology transfer center at the Universities of Basel and FHBB
  www.unibas.ch/wtt/

- Universität Bern and Zürich
  Technology transfer organisation of the Universities of Berne, Zurich and SPP Biotech
  www.unitectra.ch

- Universität Freiburg
  Polygon
  www.polygon.ch

- Université de Genève
  Unitec- Bureau des Transferts de Technologies et des compétences de l'université de Genève
  www.unige.ch/unitec

- Universität Lausanne
  Pactt - transfer of technology
  www.pactt.ch
6. Plattforms

- Business plan-competition www.venture.ch
  Initiative of McKinsey & Company and the ETH Zürich

- Community for innovative Start-up www.estarter.ch
  and internet companies

- Swisseconomic forum www.swisseconomic.ch
  Discussion for start-up entrepreneurs, politics and society

- Neuunternehmer www.neuunternehmer.ch
  Promotion of start-up entrepreneurs in north eastern Switzerland

- Verlag Boom AG www.boom.ch
  Magazine especially concerned with the independence and
  incorporation of companies

Business Angel networks

- Band of Angels Schweiz (BOAS) www.businessangels.ch
  Birmensdorferstrasse 318
  8055 Zürich

- Brains-to-Ventures www.b-to-v.com
  Neumarkt 4
  9001 St. Gallen

- Start Angels Verein www.startangels.ch
  Zürichbergstrasse 150
  8044 Zurich

- Start up Angels www.startupangels.ch
  Technoparkstrasse 1
  8005 Zurich