專論

- **設立閉鎖性股份有限公司解決新創團隊出資問題**

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新創團隊（founders）設立新創公司（start-ups）的首要課題就是出資，相關問題包括新創團隊的出資方式、可取得的股份種類、股數以及股份轉讓限制等等。依目前創投實務，創投業者（venture capitalists）多半可以認同新創團隊本身的價值，並在這樣的理念下與新創團隊達成與出資相關安排的共識。

舉例而言，新創團隊以現金（或勞務、技術）出資一萬美金成立公司，取得普通股八百萬股，在新創團隊同意其股權受限制四年的前提下，創投業者投資兩百萬美金，取得百分之二十的股份（例如，兩百萬股特別股，可轉換普通股之比率為1:1），等同認定創業團隊持有的股份價值美金八百萬元，雖然，新創團隊實際上僅出資一萬美金。這個七百九十九萬美元的差距不會顯示在新創公司的財務報表中，但這就是「專業團隊的價值」，至少，對上述創投業者而言，這個新創團隊有這個價值。

設立新創公司於境外有其缺點

過往由於臺灣法令的限制，難以在承認新創團隊專業價值的理念下，妥適達成上述案例規劃，導致新創團隊及創投業者通常選擇在法令較有彈性的其他國家（例如開曼、BVI、新加坡等等）設立控股公司，再由境外的控股公司於國內設立子公司或分公司，實際執行公司業務。

不諱言，上述投資實務已行之有年，廣受

Focus

- **The Spring of Start-ups: Solving Funding Issues of Founders with Closed Company Limited by Shares**

Sean Liu

The primary issue facing the founders of a start-up is funding. Relevant issues include the manners of capital contribution by the founders, the types and number of shares that may be acquired, and share transfer restrictions. Under current venture capital practices, venture capitalists mostly recognize the value of the founders per se and could reach capital contribution arrangements with founders under such rationale.

To give an example, the founders set up a company by contributing US$10,000 in cash (or services or technologies) and obtain eight million common shares. Under the premises that the founders agree that their equity is subject to four-year restriction, a venture capitalist acquires 20% of the shares for an investment of US$2 million (for example, two million preferred shares convertible into common shares at a ratio of 1:1). This is tantamount to recognizing that the shares held by the founders are worth US$8 million, even though the founders only contribute US$10,000 in reality. The US$7.99 million gap will not show in the financial statement of the start-up. However, this is the "value of the professional team." At least, from the perspective of the venture capitalist, the founders carry such value.

Drawbacks of establishing start-ups overseas

In the past due to restrictions under laws and regulations in Taiwan, it was difficult to

國內外創投業者及新創團隊採納。但這樣的架構也有很明顯的缺點。首先，將新創公司設立於境外，所有與公司法務問題（包括但不限於各輪募資、併購、公司內部程序之進行等等）都必須適用境外當地的公司法，多數新創公司沒有辦法透過內聘人員處理相關問題。

其次，境外公司的法律諮詢費率遠高於國內水準，如所有法律疑義都必須求助於當地律師，長期累積下來的法律顧問費用也相當驚人，不利於須把錢花在刀口上的新創公司。

最後，一旦新創公司與股東，或者股東與股東間產生法律糾紛，很可能必須在境外聘請律師進行訴訟，不但聯繫不方便，費用也極為高昂，當事人可能因為潛在訴訟成本過高不敢興訟，導致爭議處理機制實質上失去作用，嚴重時可能使新創公司之營運陷入僵局。

因此，如果臺灣的公司法制已經容許相關投資安排，包括新創團隊及投資方都應該慎重考慮將新創事業設立於臺灣，以減低相關法律風險及成本。日前臺灣公司法修正通過新增閉鎖性股份有限公司專章（公司法第 356 條之 1～第 356 條之 14），並已於 2015 年 9 月 4 日施行。本次修法的目的，就是為了突破舊法下對於新創事業設立公司的種種不必要限制。限於篇幅，本文僅針對出資相關問題簡要介紹。

閉鎖性股份有限公司可發行無面額股份，使新創團隊以小額資本取得大量股權

長期以來，國內非公開發行公司股票的最低面額是新台幣壹元，且由於認購股份價格不得低於面額，新創團隊無法以低價認購大量股份。

以上述規劃架構為例，新創團隊要取得八百萬股普通股，最少也要出資新台幣八百

achieve the above-mentioned case properly by recognizing the professional value of founders. As a result, start-ups and venture capitalists usually set up in other countries which have more flexible laws and regulations (such as Cayman Islands, BVI, Singapore, etc.) controlling companies, which then set up subsidiaries or branch offices in Taiwan to actually carry out the business of the companies.

Frankly speaking, the above-mentioned investment practices have lasted for many years and have been followed by domestic and overseas venture capitalists and start-up founders. However, such a structure has very obvious drawbacks. To begin with, if a start-up is set up overseas, all corporate law issues (including but not limited to all rounds of fundraising, mergers and acquisitions, and corporate internal procedures) have to be governed by local overseas laws. Most start-ups cannot resolve relevant issues through their internal staff.

In addition, legal consultation fees paid by overseas companies are far higher than those charged in Taiwan. If all legal issues have to be resolved by consulting local overseas lawyers, the cumulative legal consultation fees over a long time would be staggering. This is unfavorable to start-ups whose capital should be spent wisely.

Finally, in case of any legal dispute between a start-up and its shareholders or between its shareholders, it is very likely that lawyers will have to be engaged overseas for litigation. Not only communication is inconvenient but also the cost is very high. The parties may dare not engage in any legal battle due to potentially prohibitive litigation costs. As a result, dispute resolution mechanisms lose their functions in reality. In worst cases, the operation of start-ups may be ground into a halt.

Therefore, if Taiwan's corporate law regime

萬元，才符合最低面額新台幣壹元且不能低於面額認購的規定，顯然，這樣的安排並不可行。此外，由於員工認股價格也不能低於面額，在價格無法壓低的情況下，員工認股權方案的誘因及激勵效果較低，新創公司規劃員工獎勵方案的空間也顯然受限，影響優秀人才的招募。

雖然，一個可能的變通方法是：新創公司總發行股數減少。例如，新創團隊出資壹萬美金僅取得八萬股普通股，每股 0.125 美元（約合台幣 3.75 元），創投公司投資兩百萬美元取得特別股二萬股，每股 100 美元，仍僅佔百分之二十。但如此一來，公司股份的流通性會大幅降低，未來要申請上市、櫃前，勢必要再進行股份分割（按，我國目前上櫃標準之一即公司募集發行普通股股數達五百萬股以上，上市標準則更嚴格）；此外，亦不可輕忽股數過低對於投資方無形的心理影響，尤其，部分對創業投資未必十分瞭解的天使投資人（例如親戚、朋友）可能會想：壹股壹佰塊美金？台股股王也沒那麼貴啊！因此，刻意降低總發行股數在實務上並非妥善的解決方法。

所幸，閉鎖性股份有限公司專章已通過，其中第 356 條之 6 第 1 項即容許閉鎖性股份有限公司發行無票面金額股，解決上述因面額最低為新台幣壹元且不能低於面額認購股份所產生的難題。未來，新創團隊設立閉鎖性股份有限公司，在發行無票面金額股之情況下，只要全體股東同意，新創團隊就可以極低的出資，取得大量的股份；另外在提供認股權給員工時，也無需顧慮面額，可直接訂定適當的執行價格。

以技術出資設立閉鎖性股份有限公司無須鑑價

在閉鎖性股份有限公司專章通過前，除現金出資有上述困難，新創團隊如擬以技術（即智慧財產權）出資，舊法下也有重重

has allowed relevant investment arrangements, both start-up founders and investors should seriously consider setting up start-ups in Taiwan to reduce relevant legal risks and costs. Currently, the dedicated chapter for closed companies limited by shares has been added to the Company Law of Taiwan (Articles 356-1 through 356-14 of the Company Law) and has become effective on September 4, 2015. The purpose of the amendments is to lift all kinds of unnecessary restrictions on the establishment of start-ups under the old law. Due to length limitation, this essay only briefly explores issues relating to capital contribution.

Closed companies limited by shares allowed to issue no par value shares to allow start-up founders to obtain massive equity with a small capital

For a long time, the lowest par value of a stock issued by a non publicly offered company in Taiwan is NT$1. In addition, since the share subscription price should not be lower than the par value, start-up founders cannot subscribe to a large number of shares for low prices.

Take the above-mentioned plan structure, for example. The start-up founders have to contribute at least NT$8 million in order to acquire eight million common shares so that they can meet the requirement that the lowest par value should be NT$1 and the shares cannot be subscribed for a price below their par value. Obviously, such arrangements are not feasible. In addition, the share subscription prices for employees should not be lower than the par value, either. When the prices cannot be reduced, the incentives and encouragements in the form of employee stock option plan are not as effective, and the room for a start-up to plan employee reward arrangements is obviously limited, undermining the recruitment of excellent talents.

阻礙。

首先，以技術出資必須要找專業機構出具鑑價報告，這對新創團隊而言是一筆不小的開銷，部分冷門的專業技術甚至找不到鑑定機構；再者，如果該技術欠缺可比較的實例，在沒有可參考的財務數據情況下，鑑定出來的價值很可能與新創團隊及創投公司的預設天差地遠，進而影響資本結構的安排。

雪上加霜的是，2014 年中小企業發展條例修法前，以技術出資者必須按其因此取得股份之面額，經扣除實際成本或以三成推估成本後，納入當年度所得額計算個人綜所稅（但符合特定條件可延緩課稅）。以上述案例而言，如新創團隊是以技術出資方式取得八百萬普通股，每股面額新台幣壹元，如以三成推估為成本，代表新創團隊當年度個人所得額要加計新台幣五百六十萬元，據以計算所得稅。但新創公司此時仍百廢待舉，新創團隊通常也僅領取微薄薪資，甚至未支薪，卻須立刻繳納高額所得稅款，顯然不合理，實務上因此鮮聞以技術出資案例。

2014 年中小企業發展條例第 35 條之 1 修正通過後，已規定「個人以其享有所有權之智慧財產權，讓與非屬上市、上櫃或興櫃之公司時，該個人所得之新發行股票，免予計入其當年度綜合所得額課稅。」因此，目前新創團隊以技術出資已不需要擔心須在出資時繳納所得稅，而是等到將來公司市價成長，股票出售後才有繳稅義務。

此外，新通過的閉鎖性股份有限公司專章中第 356 條之 3，大幅放寬閉鎖性股份有限公司發起人得出資的種類，除現金出資外，新創事業如設立閉鎖性公司，只要經全體股東同意，並於章程載明其種類、抵充之金額及公司核給之股數，即可以公司事業所需之財產、技術、勞務或信用抵充出資。

However, one possible way around this hurdle is to reduce the total outstanding shares of a start-up. For example, the founders of a start-up contribute US$10,000 and only acquire 80,000 common shares for US$0.125 per share (equivalent to around NT$3.75), while a venture capitalist invests US$2 million and acquires 20,000 preferred shares for US$100 per share, holding merely 20% shares. However, the circulation of the company's shares will be greatly reduced. If the company is going to be listed at Taiwan Stock Exchange or the Taipei Exchange in the future, the shares will have to be split (Note: currently in Taiwan, one of the requirements for a company to be traded at the Taipei Exchange is that the company has issued over five million common shares, not to mention that the requirements for listing at Taiwan Stock Exchange are even more stringent). In addition, the intangible psychological impact of an excessively small number of shares on investors, particularly angel investors (e.g., friends and relatives), who may not necessary excel at investmentn and may think that the price of US$100 per share is too high because it is more expensive than the most expensive stock at Taiwan Stock Exchange. Given the above, reducing the total outstanding shares is not an appropriate solution in practice.

Fortunately, the dedicated chapter for closed companies limited by shares has been adopted. In particular, Article 356-6, Paragraph 1 allows a closed company limited by shares to issue non par value shares to resolve the above-mentioned issues that the lowest par value is NT$ 1 and that shares may not be subscribed for a price below the par value. In the future, the founders of a start-up may set up a closed company limited by shares so that when non par value shares are issued, the founders can acquire a massive number of shares with the consent of all shareholders. In addition, when a stock option right is provided to employees,

更重要的是，立法說明中明示「於會計師查核簽證公司之登記資本額時，就非現金出資抵充部分，公司無須檢附鑑價報告」，因此新創團隊以技術或其他非現金出資時，只要全體股東同意，就可以決定其出資額，新創團隊不再需要被鑑價問題干擾，相關考量回歸到對實收資本額及公司資產的允當表達，畢竟這才是投資人關心的重點。

閉鎖性股份有限公司得以章程限制股份轉讓，確保新創團隊與投資人利害與共

除股份面額及出資種類外，閉鎖性股份有限公司有關出資的重要革新，還包括准許公司章程得限制股份之轉讓。

新創公司就像是一艘在風雨飄搖中出航探索海底寶藏的小船，新創團隊是船員，負責船務及尋寶，出的是專業與力氣，彼此須同心協力，投資人則在瞭解可能血本無歸的高度風險下，砸下重金，期盼新創團隊可為其帶來數倍乃至數十倍之投資報酬。如果小船出航沒多久，新創團隊就說「不好意思，家裡有事，先走一步」(更糟的情況：跳槽到另一艘尋寶船)，徒然荒廢整船用投資人資金購買的尋寶設備，投資人豈非傻眼？又或者，新創團隊某個成員已經中途離開，如果在團隊千辛萬苦找到寶藏後，這個離開的成員仍可按原約定比例分享成果，顯然也很不公平。

為了解決上述問題，使新創團隊與投資人可以同舟共濟，創投實務上通常對新創團隊取得之普通股設有限制，例如「一定期間內不得轉讓第三人」、「一定期間內離職應按約定比例或數量將股份低價賣回給公司」等，另外加上競業禁止條款，限制新創團隊於任職於新創公司及離職後一定期間內，不得從事競爭業務，確保新創團隊在投資人投入資金後，心無旁騖地按原訂計畫推動公司成長，且如果部分新創團隊

it is not necessary to consider the par value and can set an appropriate exercise price directly.

No appraisal required for contributing capital with technology to closed companies limited by shares

Before the dedicated chapter for closed companies limited shares is adopted, capital contribution was subject to the above-mentioned difficulties, and if the founders of a start-up intended to use technology (i.e., intellectual property rights) as capital stock, there were still several hurdles under the old law.

First, for technology invested as capital stock, it is necessary to find a professional agency to issue an appraisal report, which is not a small expenditure for start-up founders. For certain rare professional technology, it is even impossible to find an appraisal agency. In addition, if there is no actual example comparable to the technology, the appraised value may be tremendously different from the expectation of the founders and venture capitalist in the absence of referential financial data, thus affecting capital structure arrangements.

To make matters worse, before the Statute for the Development of Small and Medium-sized Enterprises was amended in 2014, the face value of the shares obtained by investors offering technologies as capital stock should be included in their personal income for that year to assess personal income taxes (such income may be deferred if specific conditions are satisfied) after the actual cost or the cost estimated at 30% of such face value is deducted. In the above case, for example, when the founders obtain eight million common shares by providing technology as capital stock with a par value of NT$1, if the cost is estimated at 30%, the personal income of the founders will be NT$5.6 million, and their income taxes will

成員真的必須先離開，最終成果的分享比例也會比較公平。

在閉鎖性股份有限公司專章通過前，公司法規定股份有限公司之章程不得禁止或限制公司股份之轉讓，雖然股東間還是可以契約限制，但契約只存在於特定股東與特定股東之間，一旦股份被轉讓到非契約當事人之第三人手上，固然違約轉讓的股東有違約責任，但受讓股份的第三人原則上不受該契約限制。換言之，相較於章程，契約的限制效力較弱，較可能衍生爭議，如在股份有限公司的架構下去作上述股權轉讓限制安排，法律風險較高，這也是投資人之所以對直接投資臺灣公司有疑慮之處。

在閉鎖性股份有限公司專章通過後，公司法第 356 條之 5 已明文規定可以在閉鎖性股份有限公司之章程中記載對公司股份轉讓之限制。股東如果違反記載於章程中之限制而轉讓股份，其轉讓對公司而言應不生效力。另我國實務上本即容許公司可以無償取回公司股份（有償買回則限制於法定情形），因此也可以有效架構其他股權限制約定（如「一定期間內離職應按約定比例或數量將股份無償轉讓給公司」），使新創團隊成員間及其與投資人間得齊力同心、共創雙贏。

臺灣的新創事業在臺灣設立

每一個國家的新創事業原則上都應該在當地創設公司，畢竟人親土親，語言與制度的隔閡，無一不造成經營上有形、無形的成本。以矽谷的新創事業為例，即絕少有刻意選擇設立境外公司之例。據天下雜誌引述全球創業觀察（GEM）調查結果，臺灣創業人口佔勞動人口比例位居世界第二，僅次於美國，卻鮮少有新創事業直接了當設立在臺灣，這其實是僵化制度導致的畸形發展，絕非常態。

be assessed accordingly. At this stage, however, the start-up still requires a lot of proper measures to be taken, and the founders usually only receive meager salaries or no salary at all. It is obviously unreasonable that they have to pay high income taxes immediately. Therefore, technology provided as capital stock is quite rare in practice.

Nevertheless, the amendment to Article 35-1 of the Statute for the Development of Small and Medium-sized Enterprises was adopted, and it has been stipulated that "if an individual assigned his own intellectual property rights to a company which is not listed on Taiwan Stock Exchange or Taipei Exchange or is not an emerging stock, the newly issued shares obtained by such individual will be excluded from his consolidated income for taxation for that year." Therefore, founders who provide technology as capital stock no longer need to worry about paying income taxes upon capital contribution but rather are obligated to pay taxes only after they sell their shares after the company's market price grows in the future.

In addition, Article 356-3 of the newly adopted dedicated chapter for closed companies limited by shares greatly relaxes the permitted types of capital contribution. In addition to cash contribution, if a start-up seeks to set up a closed company, the property, technology, services or credit needed by the company may be used in lieu of cash contribution with the consent of all shareholders and with the types of contribution, offset amounts and the number of shares provided by the company clearly stipulated in its articles of incorporation.

More importantly, it is clearly indicated in the legislative explanation that "when a certified public accountant certifies a company's registered capital, the company is not required to provide an appraisal report

甫施行的閉鎖性股份有限公司專章，就是為了解決上述問題而生，其立法理由也已挑明了是要鼓勵新創事業發展。從本文上述說明看來，確實閉鎖性股份有限公司專章已解決不少新創事業先前面臨的制度性問題。雖然，在閉鎖性股份有限公司專章施行後，由於細部法令解釋的緣故，大概還會有一段時間的陣痛期，但新創事業在台灣設立，已經是不可逆的大方向，我們相信所有新創團隊及創投業者，都應該密切關注閉鎖性股份有限公司的制度發展，因為，以閉鎖性股份有限公司設立新創事業的時機業已逐漸成熟。

for the non-cash contribution." Therefore, if the founders of a start-up contribute technology or anything other than cash as capital stock, the amount of capital contribution can be determined with the consent of all shareholders, and the founders can avoid the troubling issue of appraisal and, instead, can focus on the fair representation of the paid-in-capital and company assets, which is what really matters to investors.

Share transfer restrictions via articles of incorporation by closed companies limited by shares to ensure aligned interest between founders and investors

In addition to par value of shares and types of capital contribution, major reforms on capital contribution to a closed company limited by shares also include the permission to restrict share transfer in the company's articles of incorporation.

A start-up is like a small boat setting sail under a stormy weather to explore treasury at the bottom of the ocean. The founders are the crew in charge of the operation of the ship and treasure hunt and contribute their expertise and efforts. They should collaborate with each other closely in order to succeed. In comparison, investors invest heavily in the company with the understanding that the risks are high because they may get nothing in return and with the expectation that the founders will bring an investment return several times or tens of times of investors' original investment. If shortly after the sailing starts the founders quit for personal matters (or even worse, jumping ship to another treasury hunting boat), the investors will be dumbfounded because all treasury hunting equipment of the ship purchased using the capital of the investor will be wasted. Or if a certain founder has left halfway through, it will be obviously very unfair if the member of the founding team who has left can still share the

results by the originally agreed-upon percentage after the treasury is found at the end of the painstaking journey.

To resolve such issues and to align the interest of the founders and the investors, the number of common shares that may be obtained by the founders is subject to certain restriction in practice, i.e., "no transfer to a third party within a certain period," "sale of shares back to the company for a low price based on the agreed-upon percentage or quantity when a founder leaves within a certain period," etc. In addition, non-competition clauses may be stipulated to restrict the founders from engaging in competitive business when they work for the start-up company or during a certain period after they leave the company to ensure that after investors make their investment, the founders can focus on growing the company as originally planned. In addition, if some founders truly have to leave first, the ultimate results will be shared at a fairer percentage.

Before the dedicated chapter for closed companies limited by shares was adopted, the Company Law stipulated that the articles of incorporation of a company limited by shares shall not prohibit or restrict the transfer of the company's shares. Although the transfer could still be restricted by way of contract between shareholders, still such contract only existed between specific contracting shareholders. Once shares were transferred to a third party, who is not a party to such contract, although the transferring shareholder was liable for breach of contract, still the third party receiving the transfer was basically free from the restriction of the contract. To wit, the restrictive effect is weaker as compared with articles of incorporation and is more prone to disputes. Arrangements for such share transfer restriction under the structure of a company limited by shares entail higher legal risks. This is another reason why investors hesitate

to invest start-ups by Taiwan.

After the dedicated chapter for closed companies limited by shares is passed, Article 356-5 of the Company Law specifically stipulates that a closed company limited by shares may restrict the transfer of the company's shares in its articles of incorporation If a shareholder transfers shares in violation of the restriction under the articles of incorporation, such transfer shall not be effective to the company. In addition, basically the Republic of China allows companies to retrieve their shares without compensation (or with compensation only under statutory circumstances). Therefore, other equity restriction can also be effectively structured (for example, "assignment of shares to the company without compensation by the agreed-upon percentage or quantity in case of departure from the company within a certain time period") to align the interest of the founders and the investors and create win-win situations.

Establishment of Taiwanese start-ups in Taiwan

Basically a start-up should set up a company locally because of geographic and interpersonal proximity. Linguistic and institutional barriers both cause tangible and intangible costs to business operation. Take start-ups in Silicon Valley, for example. It is very rare to see an example where a company is intentionally set up in a foreign country. According to the survey of the Global Entrepreneurship Monitor cited by the Commonwealth Magazine, the percentage of entrepreneurs to the workers in Taiwan ranks the second in the world, next to the US only. However, there are very few examples where start-ups are set up directly in Taiwan. This is an unnatural development caused by Taiwan's rigid system and is by no means a norm.

The newly adopted dedicated chapter for closed companies limited by shares is formulated to resolve the above-mentioned issues. The legislative reasons also suggest that the purpose is to encourage the development of start-ups. Based on the above explanation in this essay, the dedicated chapter for closed companies limited by shares has indeed resolved many institutional issues facing start-ups in the past. Although there may be a period of painful adjustment after the effective date of the dedicated chapter for closed companies limited by shares due to the interpretation of detailed laws and regulations, still setting up start-ups in Taiwan is an irreversible megatrend. We believe that all start-up founders and venture capitalists are advised to pay close attention to the implementation progress of closed companies limited by shares, because the time for establishing start-ups in the form of closed companies limited by shares will arrive very soon.