Magister

Nadir Sehli

Increasing the Negotiating Power of the Founder in Fundraising

VI.409

EDITIONS WEBLAW

ISBN 978-3-03916-235-2

Editions Weblaw
Bern 2024

Zitiervorschlag:
Nadir Sehli,
Increasing the Negotiating Power of the Founder in Fundraising,
in: Magister, Editions Weblaw, Bern 2024

UNIVERSITY OF NEUCHÂTEL

FACULTY OF LAW

MASTER'S THESIS

BUSINESS AND TAX LAW

DOUBLE MASTER OF LAW NEUCHÂTEL AND LUCERNE

Increasing the Negotiating Power of the Founder in Fundraising

PRESENTED BY NADIR SEHLI

UNDER THE SUPERVISION OF AV. DR. JONATHAN BORY

“The most effective way to do it is to do it”

AMELIA EARHART

Acknowledgements

I would like to thank my thesis director, JONATHAN BORY, for his guidance, patience and expertise throughout the writing of this paper. His teaching in the negotiation lectures truly made me curious about the exploration of issues beyond the traditional field of law.

I would also like to express my appreciation to MAX-ANDRÉ HAAS, for his valuable insights into the day-to-day life of a startup lawyer, which have added a practical and insightful dimension to my understanding of Swiss entrepreneurial landscape.

Finally, I want to thank my family and those close to me for their constant support.

Table of contents

List of abbreviations

art.	article(s)
ATF	Recueil officiel des arrêts du Tribunal fédéral suisse (= Official collection of the decisions of the Swiss Federal Tribunal)
BA	Business angel(s)
CC	Swiss Civil Code of 10 December 1907 (RS 210)
CCIG	Chambre de commerce, d'industrie et des services de Genève
CEDIDAC	CEDIDAC Publications / Centre du droit de l'entreprise de l'Université de Lausanne
CEO	Chief executive officer
CHF	Swiss franc(s)
CO	Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part five: The Code of Obligations) (RS 220)
CR	Commentaire romand
Cst.	Federal Constitution of the Swiss Confederation of 18 April 1999 (RS 101)
ed.	editor
edit.	edition
eds	editors
e.g.	*exempli grata* (= for example)
ESOP	Employee Stock Option Plan
et al.	*et alli* (= and others)
etc.	*et cetera* (= and so forth)
ff.	and the following
GMBH	Die Gesellschaft mit beschränkter Haftung (= Limited Liability Company)
GP	General Partnership

IA	intelligence artificielle (= artificial intelligence)
Ibid.	*Ibidem* (= in the same place)
Id.	*Idem* (= the same)
N	marginal note(s)
no.	number(s)
ORC	Ordonnance sur le registre du commerce (RS 221 411)
p.	page(s)
para.	paragraph
pwc	PricewaterhouseCooper
SA	Société anonyme (= Company Limited by Shares)
SEC	The United States Securities and Exchange Commission
US	United States
USA	United States of America
VC	Venture capitalist(s)
vol.	volume
§	section

Bibliography

BALOVA ANASTASIA, *Should 10-year-old companies call themselves Startups?*, Linkedin.com, November 2018, https://www.linkedin.com/pulse/startup-definition-why-10-year-old-companies-call-startups-balova (quoted: BALOVA, *Startups*).

BLOCH OLIVIER, *Les conventions d'actionnaires et le droit de la société anonyme en droit Suisse*, 3rd edit., Zurich 2021 (quoted: BLOCH, *Les conventions d'actionnaires*).

BOCKLI PETER, *Schweizer Aktienrecht*, 5th edit., Geneva/Zurich/Basel 2022 (quoted: BÖCKLI, *Schweizer Aktienrecht).*

BONVIN JACQUES, *Capital-risque, ou comment financer les entreprises,* Letemps.ch, September 2000, https://www.letemps.ch/economie/capitalrisque-financer-entreprises (quoted: BONVIN, *Capital-risque*).

BRESLOW RYAN, *Fundraising*, 1st edit., Wroclaw 2021.

CCIG, *Guide du créateur d'entreprise – Informations pratiques sur les principaux aspects de la création dans le canton de Genève – édition 2020*, Geneva 2020 (quoted: CCIG, *Guide du créateur d'entreprise*).

CHENAUX JEAN-LUC, *Les plans d'intéressement dans le prisme du Corporate Governance – Du règne de l'opacité à celui de la transparence?*, in: L'Expert Comptable Suisse 05/2002, p. 445-455 (quoted: CHENAUX, *Plans d'intéressement*).

CHENAUX JEAN-LUC/DUMMERMUTH LISE, *Les plans d'intéressement*, in: CEDIDAC vol. 91, Lausanne 2014 (quoted: CHENAUX/DUMMERMUTH).

CIALDINI ROBERT, *Influence & manipulation*: comprendre et maîtriser les mécanismes et les techniques de persuasion, 3rd edit., Paris 2021.

CIALDINI ROBERT, *The Science of Persuasio*n, in: Scientific American 284, no. 2, February 2001, p. 76-81, http://www.jstor.org/stable/26059056 (quoted: CIALDINI, *The Science of Persuasion*).

CORNELL BRADFORD/SHAPIRO ALAN C., *Financing corporate growth*, in: Morgan Stanley (ed.), *Journal of Applied Corporate Finance*, vol. 1.2, Hoboken 1988, p. 6-22 (quoted: CORNELL/SHAPIRO).

COULON YANNICK, *Guide pratique de la finance comportementale,* 1st edit., Paris 2015 (quoted: COULON, *Finance comportementale*).

DELAYE FABRICE, *Comment convaincre des capital-risqueurs*, Bilan.ch, August 2017, https://www.bilan.ch/finance/comment_convaincre_des_capital_risqueurs (quoted: DELAYE, Capital-risqueurs).

DUPASQUIER ULYSSE, *Le financement d'une jeune société, Environnement légal et rapports entre les acteurs du financement de jeunes sociétés anonymes, dans le cadre du financement par fonds étrangers et fonds propres, du financement participatif et des ICO*, Basel/Neuchâtel 2019 (quoted: DUPASQUIER, *Le financement d'une jeune société*).

EBNER NOAM/EFRON YAEL, *Moving Up: Positional Bragaining* Revisited, in: Honeyman Christopher/Coben James/De Palo Giuseppe (eds), *Rethinking Negotiation Teaching; Innovations for Context and Culture*, Minnesota 2009, p. 251-261 (quoted: EBNER/EFRON).

FELD BRAD/MENDELSON JASON, *Venture Deals: Be Smarter Than Your Lawyer and Venture Capitalist,* 3rd edit., Hoboken 2016 (quoted: FELD/MENDELSON).

FISHER ROGER/URY WILLIAM/PATTON BRUCE, *Comment réussir une négociation*, 3rd edit. (epub version), Paris 2022 (quoted: FISHER ET AL.).

FORSTMOSER PETER/KÜCHLER MARCEL, *Aktionärbindungsverträge, Rechtliche Grundlagen und Umsetzung in der Praxis*, 1st edit., Geneva/Zürich/Basel 2015 (quoted: FORSTMOSER/KÜCHLER, *Aktionärbindungsverträge*).

FREI PATRICK, *Assessment and Valuation of high growth companies*, thesis Lausanne 2005 (quoted: FREI, *Assessment*).

FREY MARTIN, *Investment Agreement – Rechtsfragen und Ausgestaltung*, in: Gericke Dieter (ed.), *Private Equity – Veträge und Rechtsfragen bei Venture Capital Investments (auf Grundlage der SECA Musterverträge)*, 1st edit., Zurich 2011, p. 31-66 (quoted: FREY, *Investment agreement*).

FRICK JÜRG, *Private Equity im Schweizer Recht,* thesis Zurich/St-Gall 2009 (quoted: FRICK, *Private Equity*).

GANTENBEIN PASCAL/PEDERGNANA MAURICE/ENGELHARDT JENS, *Le capital-risque en Suisse – Principaux résultats des années 1999 à 2009*, 1st edit., Fribourg 2010 (quoted: GANTENBEIN ET AL.).

GERHARD FRANK, *L'exit vu au travers des yeux d'un fonds de private equity,* in: CEDIDAC vol. 81, Lausanne 2009 (quoted: GERHARD, *Exit).*

GERICKE DIETER, *Vorzugsrechte des Venture Capital-Investors*, in: Gericke Dieter (ed.), *Private Equity – Verträge und Rechtsfragen bei Venture Capital Investments (auf Grundlage der SECA Musterverträge)*, 1st edit., Zurich 2011, p. 101-146 (quoted: GERICKE, *Vorzugsrechte*).

GERICKE DIETER/HEUBERGER RETO/FRICK JÜRG, *Private Equity in Switzerland: Market and regulatory overview,* in: Practical Law Company (ed.), *Private Equity and Venture Capital Global Guide 2015/2016.*

GLANZMANN LUKAS, *Der Darlehensvertrag mit einer Aktiengesellschaft aus gesellschaftsrechtlicher Sicht*, thesis Bern 1996 (quoted: GLANZMANN, *Darlehensvertrag*).

GRONER ROGER, *Private Equity-Recht*, 1st edit., Bern 2007 (quoted: GRONER, *Private Equity-Recht*).

GUIRAUD CHRISTELLE/LOERINCIK YVES/PLAN ERIC, *Comment financer son projet start-up dans le domaine Cleantech,* admin.ch, https://pubdb.bfe.admin.ch/fr/publication/download/9019 (quoted: GUIRAUD ET AL.).

HAK FREDERIC R./SANDERS KARIN, *Principled negotiation: An evidence-based perspective,* in: Evidence – Based HRM, vol. 6, p. 66-76 (quoted: HAK/SANDERS).

HÉRITIER LACHAT ANNE, *Les conventions d'actionnaires ou la face cachée de la lune,* in: Bellanger François et al. (eds), *Le contrat dans tous ses états,* 1st edit., Bern 2004, p.101-124 (quoted: HÉRITIER LACHAT, *Conventions d'actionnaires*).

KAHNEMAN DANIEL, *Of 2 Minds: How Fast and Slow Thinking Shape Perception and Choice [Excerpt]*, scientificamerican.com, https://www.scientificamerican.com/article/kahneman-excerpt-thinking-fast-and-slow/ (quoted: KAHNEMAN, *Fast and Slow Thinking*).

KELLERHALS CARRARD, *Startup from incorporation to Exit, simple guide on selected topics*, kellerhals-carrard.ch, https://kellerhals-carrard.ch/de/expertise/taetigkeitsgebiete/startup-desk/kc-startup-guide (quoted: KC, *Startup guide*).

LOMBARD ARMAND/SOUTHAM-LINGJAERDE ANNE/DE LUCIA COLETTE/HEINZER JEAN-BAPTISTE, *GENILEM ET BISANGE - La création et le financement d'entreprises innovantes*, in: Pasquier-Dorthe et al. (eds), *Private Equity et Microfinance*, 1st edit., Zurich 2004, p. 111-127 (quoted: LOMBARD ET AL.).

LYNEDJIAN NICOLAS, *Négociation – guide pratique*, 1st edit., Lausanne 2005 (quoted: LYNEDJIAN, *Négociation*).

MARCHAND SYLVAIN*, Clauses contractuelles – du bon usage de la liberté contractuelle,* 1st edit., Bâle 2008.

MASON COLIN/STARK MATTHEW, *What do Investors look for in business plan? – A comparison of the Investment Criteria of Bankers, Venture Capitalists and Business Angels*, International Small Business Journal, vol. 22(3), London 2004, p. 227-248 (quoted: MASON/STARK).

MAURISSE MARIE, *Comment financer sa start-up?*, PME.ch, August 2017, https://www.pme.ch/actualites/2017/08/31/financer-startup (quoted: MAURISSE, *Financer sa start-up*).

MICHEL BARBARA, *GMBH OR AG?,* embark.law, https://embark.law/en/ag/ (quoted: MICHEL, *GMBH or AG*).

MICHEL NADIA, *Liquidation Preferences in Startup Financing,* embark.law, https://embark.law/en/liqpreferences/ (quoted: MICHEL, *Liquidation Preferences*).

MILHABET ISABELLE/DESRICHARD OLIVIER/VERLHIAC JEAN-FRANÇOIS, *Comparaison sociale et perception des risques : l'optimisme comparatif,* in: Perspectives cognitives et conduits sociales (vol. 8), Rennes 2002, p. 215-245 (quoted: MILHABET ET AL.).

MORO-VISCONTI ROBERTO, *Startup Valuation: from strategic business planning to digital networking,* Cham 2021 (quoted: MORO-VISCONTI, *Valuation*).

MÜLLER CHRISTOPH, *Contrats de droit Suisse*, 1st edit., Neuchâtel 2021 (quoted: MÜLLER, *Contrats de droit Suisse*).

OULEVEY XAVIER/LEVRAT JÉRÔME, *La société anonyme, Collection Guide pratique des personnes morales et des sociétés,* 1st edit., Zurich 2023 (quoted: OULEVEY/LEVRAT).

PAIR LARA M., *Participations de collaborateur*, in: TREX 2020 p. 32 ff. (quoted: PAIR, *Participations de collaborateur*).

PLANCADE JOAN, *Levées de fonds: dans la peau d'un business angel*, Bilan.ch, November 2017, https://www.bilan.ch/finance/levees_de_fonds_dans_la_peau_d_un_business_angel (quoted: PLANCADE, *Levée de fonds*).

PRUNAS BRICE, *IA et pharma: la révolution en marche*, allnews.ch, January 2022, https://www.allnews.ch/content/points-de-vue/ia-et-pharma-la-révolution-en-marche (quoted: PRUNAS, *Pharma*).

PWC, *Equity compensation in high-potential companies*, pwc.ch, July 2018, https://www.pwc.ch/de/publications/2018/pwc-equity-compensation-booooklet_p&o_en_web.pdf (quoted: PWC, *Equity Compensation*).

REINFELD PATRICK, *Start-up valuation*, thesis Paris 2018 (quoted: REINFELD, *Start-up valuation*).

RIFFELMACHER MARTIN, *Erfolgreiche Zusammenarbeit von Business Angels und Start-Ups in der Schweiz*, thesis Zurich 2006 (quoted: RIFFELMACHER, *Erfolgreiche Zusammenarbeit*).

SAHLMAN WILLIAM A., *The structure and governance of venture-capital organizations*, in: Journal of Financial Economics, Vol. 27, issue 2, 1990, p. 473-521 (quoted: SAHLMAN, *Structure and governance of VCs)*.

SCHERER LUKAS/NEDI RAHEL, *Participations de collaborateur - Les pièges au regard du droit du travail et du droit fiscal*, in: TREX 2021, p. 148 ff. (quoted: SCHERER/NEDI).

SCHRÖTER NINA, *La Suisse : une nation de startups?*, experis.ch, https://www.experis.ch/fr/blog/2019/10/la-suisse-une-nation-de-startups (quoted: SCHRÖTER, *Suisse startups*).

SECA, *Yearbook 2023*, Zoug 2023 (quoted: SECA, *Yearbook 2023*).

SÖDING JUDITH VERENA*, Private Equity Minority Investments, Sharing Control in Closely Held Private Family Firms*, 1st edit., Zurich/St.Gall 2012 (quoted: SÖDING, *Private Equity*).

STARTUPTICKER.CH WITH THE COLLABORATION OF SECA, *Swiss Venture Capital Report 2023* (quoted: STARTUPTICKER.CH, *Swiss Venture Capital Report 2023*).

STREET STEPHEN, *Préfère-t-on l'Entrepreneur ou l'Investisseur lors du financement d'une start-up?*, LeTemps.ch, November 2016, https://www.letemps.ch/opinions/prefereton-lentrepreneur-linvestisseur-lors-financement-dune-startup (quoted: STREET, *start-up*).

SPANGLER BRAD, *Positional Bargaining*, Beyondintractability.org, June 2003, https://www.beyondintractability.org/essay/positional_bargaining#:~:text=Positional%20bargaining%20is%20a%20negotiation,regardless%20of%20any%20underlying%20interests (quoted SPANGLER, *Positional Bargaining*).

TERCIER PIERRE/AMSTUTZ MARC (eds), *Commentaire romand – Code des obligations II*, 2nd edit., Basel 2017 (quoted: CR CO II-AUTHOR, art. x N y).

THÉVENOZ LUC/WERRO FRANZ (eds), *Commentaire romand – Code des obligations I*, 3rd edit., Basel 2021 (quoted: CR CO I-AUTHOR, art. x N y).

TORRES VILCHES MELISSA, *La négociation comme mode amiable de résolution des conflits – l'exemple du droit collaborative*, thesis Neuchâtel 2022 (quoted: TORRES, *négociation*).

URY WILLIAM, *Getting Past No – Negotiating in Difficult Situations*, 1st edit. (epub version), New York 2007.

VON SALIS-LÜTOLF ULYSSES, *Funktionen einzelner Vertragsklauseln bei Venture Capital und Private Equity Finanzierungen*, in: *Private Equity, Verträge und Rechtsfragen bei Venture Capital Investments* (*auf Grundlage der SECA Musterverträge*), Zurich 2011, p. 269-296 (quoted: VON SALIS-LÜTHOLF, *Vertragsklauseln*).

VON SALIS-LÜTOLF ULYSSES, *Private Equity Finanzierungsverträge*, 1st edit., Zurich 2002 (quoted: VON SALIS-LÜTOLF, *Finanzierungsverträge*).

WASSERMAN NOAM, *The founder's Dilemma*, Hbr.org, February 2008, https://hbr.org/2008/02/the-founders-dilemma (quoted: WASSERMAN, *The founder's dilemma*).

WEINSTEIN NEIL, *Unrealistic Optimism About Future Life Events*, in: *Journal of Personality and Social Psychology, 39* (5), p. 806-820 (quoted: WEINSTEIN, *Unrealistic Optimism*).

WENGER CHRISTIAN, *Die Welt des Venture Capital*, in: Gericke Dieter (ed.), *Private Equity – Veträge und Rechtsfragen bei Venture Capital Investments (auf Grundlage der SECA Musterverträge*), 1st edit., Zurich 2011, p. 1-29 (quoted: WENGER, *Venture Capital).*

WENGER CHRISTIAN/HONOLD PASCAL, *Legal Due Diligence in Venture Capital Transaktionen,* in: Gericke Dieter (ed.) *Private Equity V*, *Fundraising, Investition, Realisation, Reinvestition – Aktuelle Entwicklungen und Herausforderungen im Ökosystem Private Equity*, 1st edit., Zurich 2016, p. 141-182 (quoted: WENGER/HONOLD).

WENGER CHRISTIAN/SCHAFFNER TOM, *Schranken für Konkurrenzenzverbote im Venture Capital und Private Equity*, in: Gericke Dieter (ed.), *Private Equity II – Rechtliche, steuerliche und regulatorische Aspekte von Buy-out bis Exit*, 1st edit*.,* Zurich 2012, p. 115-140 (quoted: WENGER/SCHAFFNER).

WENGER CHRISTIAN/SPECK BEAT, *Musterveträge SECA light – eine Diskussions-grundlage*, in: Gericke Dieter (edit.), *Private Equity IV – Entwicklungen, Themen und Spannungsfelder,* 1st edit., Zurich 2014, p. 173-199 (quoted: Wenger/Speck).

WILHELM CHRISTOPHE/VARRIN OCÉANE, *L' « exercice mesuré des droits » et l'abus de majorité en droit suisse de la société anonyme*, 1st edit., Geneva/Zurich 2022 (quoted : WILHELM/VARRIN).

Precisions: **1.** References to the documents used appear in the bibliography. Authors are listed alphabetically by name.

2. All Internet references were last accessed and verified on the 17th December 2023**.**

1 Introduction

This paper aims to strengthen the founder's position in the fundraising process of his company. This is done through an overview of the Swiss legal framework regarding fundraising, the analysis of the key contracts and clauses involved in the process and finally with the incorporation of powerful negotiation concepts alongside psychological concepts such as cognitive biases in contractual negotiations.

Within Switzerland's innovation-friendly environment, innovative enterprises are increasingly taking center stage in the country's economic tissue. These dynamic firms, commonly known as "startups"[1] have an unquenchable thirst for funding and growth, leading their founders towards the complex process of fundraising. While more than 300 newly are created startups each year[2], only half of them survive past 5 years of existence[3]. While the reasons for this low survival rate are diverse, we believe that poorly conducted contractual negotiation during the funding process plays a major role. Founders often lack sufficient legal comprehension and underestimate the importance of certain clauses present in the plethora of contracts they sign. Furthermore, they are afraid to seek legal advice because of the costs associated with them[4]. This paper aims to address this specific issue.

Moreover, in the intricate path to creating the next *Uber* or *Airbnb*, we believe that incorporating a basic understanding of the Swiss legal framework and pertinent negotiation strategies is key to successful fundraising and balancing the power discrepancy between founders and investors. The Swiss legal system provides a significant level of autonomy regarding contract elaboration, and entrepreneurs should be mindful of this to safeguard their interests effectively. Effective contractual negotiation serves as a proactive means of resolving potential problems before they arise. Hence, it is essential for founders not to underestimate the process that accompanies the many contracts connected with their company. Additionally, founders frequently face numerous disadvantages when dealing with large investors. Limited resources, relative inexperience, and a lack of information are

---

1 Innovative companies are often called "startups", even though the terminology is more a reference towards a specific stage of the company's development. The term is analyzed in detail in *infra*: Chapter 2.3.

2 SCHRÖTER, *Suisse startups.*

3 LOMBARD ET AL., p. 117 ; also see: OFFICE FÉDÉRAL DE LA STATISTIQUE, *Démographie des entreprises, analyse sur les données 2013 à 2020, « https://www.bfs.admin.ch/bfs/fr/home/statistiques/industrie-services/entreprises-emplois/demographie-entreprises/taux-de-survie.html ».*

4 More and more major law firms are setting up alternative companies to support innovative companies throughout their development process (e.g. Seedup.ch by KELLERHALS CARRARD). The pricing modalities are also often adapted to the specific structure a young company.

some of the primary challenges that they need to overcome. By familiarizing founders with specific concepts outlined in this study we aim to address these vulnerabilities and to empower them to navigate the fundraising landscape more effectively.

In the first part[5], this paper analyzes the key stakeholders involved in the fundraising process, highlighting their respective interests. The second part[6] provides founders with a better understanding of the relevant intricacies of Swiss law and concludes with the presentation of multiple documents that inevitably arise during fundraising, explaining how specific clauses work in relation to fundraising and common pitfalls associated with them. The intentionally simple terminology ensures accessibility to all founders, regardless of their legal expertise. The final part[7] of this paper incorporates an overview of negotiation concepts and some of their interactions with selected aspects discussed in the paper. The aim is to make the founder aware of his inherent biases and address his vulnerabilities regarding specific clauses present in Shareholders' agreements or Investment agreements.

We believe that a combination of pragmatic negotiation strategies and a thorough understanding of the Swiss legal framework is the most formidable asset for founders who want to succeed in their fundraising efforts, build long-term relationships with investors and foster their companies' expansion.

2 The Main Characters

The following is an overview of the key players usually involved in the fundraising process of an innovative company. While the key players include the founder[8], investors[9] and the innovative business itself[10], it is important to recognize that the fundraising process is complex and extends beyond these roles[11]. Therefore, each scenario requires careful consideration of all parties involved.

---

5 See *infra:* Chapter 2.

6 See *infra:* Chapter 3.

7 See *infra:* Chapter 4.

8 See *infra:* Chapter 2.1.

9 See *infra:* Chapter 2.2.

10 See *infra:* Chapter 2.3.

11 FELD/MENDELSON, p. 5.

2.1 The Founder

2.1.1 Definition and Scope

The founder[12] stands at the epicenter of the entrepreneurial universe[13], initiating the creation of the delicate structure that embodies an innovative company[14]. The Swiss Code of Obligations grants at art. 629 CO the status of founder to anyone who subscribes to shares in the incorporation of a company. As DUPASQUIER points out[15], this implies that an investor who acquires shares alongside the founder at the company's inception aligns with the legal definition of a "founder." In this context, the Swiss Code of Obligations offers a formal delineation of the term "founder"[16]. To better meet the scope of this study, it becomes imperative to refine the definition of a "founder" as follows.

The founder embodies several key characteristics. Initially, having conceived an idea for a product or service[17], the founder's intention is to commercialize and develop this concept, which consequently requires securing funding[18]. As one of the first shareholders in his company, the founder will have significant decision-making power in the early stages[19], being inevitably the first member of his board of directors[20]. As the company grows, he will need to work with a wide range of investors and partners. The decisions he makes in these early stages will have a profound impact on the future development of the company. The typical founder often has a technical background that enables him to create innovative applications or technologies[21]. However, he often also faces significant challenges in terms of management and legal skills[22]. It is therefore crucial for founders to address these shortcomings by assembling a multidisciplinary team from the outset. Each of the founding members of the team plays a key role in the development of the company and in any financing that

---

12 The terms *founder* and *entrepreneur* will be used interchangeably throughout this study.

13 FELD/MENDELSON, 5.

14 LOMBARD ET AL., p. 116.

15 DUPASQUIER, *Le financement d'une jeune société,* N 78.

16 CR CO II-LOMBARDINI/CLEMETSON, art. 629 N 2, 3 and 4.

17 DUPASQUIER, *Le financement d'une jeune société,* N 79.

18 Ibid.

19 WASSERMAN, *The founder's dilemma*.

20 DUPASQUIER, *Le financement d'une jeune société,* N 79.

21 WENGER, *Venture Capital,* p. 5.

22 FREI, *Assessment*, p. 94 ; DUPASQUIER, *Le financement d'une jeune société,* N 79.

might occur[23]. While the founder may lack certain skills, he or she is often the person most familiar with the intricacies of the product and has a strong motivation to see it succeed[24]. Throughout the lifecycle of his venture, the founder takes on multiple roles and undergoes a fascinating evolution. Starting as an inventor, he creates his product, then becomes a strategist, shaping his business approach, and finally emerging as a leader, taking critical decisions[25].

2.1.2 The Pitfall of Having Multiple Founders

When several founders are involved in a business, a strong camaraderie often develops[26]. However, this dynamic evolves over time and occasionally certain founders may leave the company, either amicably or under less favorable circumstances[27]. It is vital for the company to anticipate such scenarios and to put in place an appropriate legal framework to deal with them, while minimizing disruption to the company[28]. This highlights the significance of incorporating provisions such as vesting or drag along[29] which are of considerable importance to investors[30]. BRESLOW offers a compelling alternative when establishing a company with multiple individuals[31]. Rather than appointing several co-founders, consider bringing in founding teammates who receive a more substantial share of equity and control than regular employees, but less than co-founders[32].

2.1.3 Identifying the Founder's Goals

A crucial aspect for any founder is the ability to clearly define his long-term goals. Put simply, these goals can be divided into two categories: to create and lead his company, and to generate revenue[33]. Yet, research by Harvard Business School Professor WASSERMAN suggests that it is not possible to

---

23 FELD/MENDELSON, p. 5.

24 FREY, *Investment agreement*, p. 60 ; DUPASQUIER, *Le financement d'une jeune société,* N 81.

25 LOMBARD ET AL., p. 116.

26 FELD/MENDELSON, p. 6.

27 Ibid.

28 Ibid.

29 See *Infra*: Chapters 3.6.3 and 3.6.5 where we discuss drag along and vesting clauses.

30 FELD/MENDELSON, p. 6.

31 BRESLOW, *Fundraising*, p. 32.

32 BRESLOW proposes to reward them with titles such as "Founding Head of Engineering" or "Founding Head of Operations," acknowledging their early commitment to the company while enabling the founder to retain maximum control.

33 WASSERMAN, *The founder's dilemma*.

maximize both goals at the same time[34]. Indeed, funding is essential for the development of a business, but the founder's own resources are often insufficient[35]. As a result, founders typically seek outside investment from investors who provide funds in exchange for a stake in the company's equity[36]. While this funding is essential[37], it poses a significant challenge to founders who wish to retain maximum control over their company[38]. Certain specific categories of investors seek to secure decision-making influence within the company, often by appointing a representative to the board of directors[39]. Granting an investor a seat on the board has been likened in the literature to entering a marriage[40], because these investors are likely to remain on the board until the company goes public[41]. While relinquishing control isn't inherently detrimental, it does involve the potential loss of entrepreneurial autonomy[42]. It should be considered only if it brings a genuinely valuable asset to the company. For instance, a knowledgeable investor well-versed in both the company's intricacies and the market[43] can prove to be an invaluable asset in facilitating the company's growth[44].

Furthermore, more than half of the young companies created in 2015 did not survive past 2020[45], which makes for a survival rate of less than 50%. Improving this survival rate is key for the founder, independently of his initial goal. Funds and investors are necessary to improve this probability of survival[46]. The difficulty is to integrate them without relinquishing too much control. The desire of investors to acquire a degree of control over the companies in which they invest is based on a simple

---

34 WASSERMAN, *The founder's dilemma*.

35 CCIG, *Guide du créateur d'entreprise*, p. 95 ; DUPASQUIER, *Le financement d'une jeune société*, N 83.

36 WASSERMAN, *The founder's dilemma*.

37 DUPASQUIER, *Le financement d'une jeune société*, N 87.

38 WASSERMAN, *The founder's dilemma.*

39 FELD/MENDELSON, p. 68 ; WASSERMAN, *The founder's dilemma.*

40 BRESLOW, *Fundraising*, p. 31.

41 Ibid.

42 SÖDING, *Private Equity*, p. 28 ; DUPASQUIER, *Le financement d'une jeune société*, N 87.

43 Such investor is in the jargon called « smart money ».

44 DUPASQUIER, *Le financement d'une jeune société*, N 86 ; FELD/MENDELSON, p. 67.

45 LOMBARD ET AL., p. 117 ; OFFICE FÉDÉRAL DE LA STATISTIQUE, *Démographie des entreprises*, analyse sur les données 2013 à 2020, « https://www.bfs.admin.ch/bfs/fr/home/statistiques/industrie-services/entreprises-emplois/demographie-entreprises/taux-de-survie.html ».

46 DUPASQUIER, *Le financement d'une jeune société*, N 88 ; SÖDING, *Private Equity*, p. 28.

rationale. Founders are typically deeply involved in building their businesses[47], having invested significant effort, time, capital and emotion. This emotional attachment to their business can potentially cloud their objectivity when it comes to making important business decisions. Investors understand that while the founder's unwavering passion and dedication are critical to the initial success of the business, these very attributes can subsequently impede the company's growth. This is precisely why investors often emphasize the appointment of a professional CEO[48] as the company gains momentum[49]. Balancing control and growth is a delicate process that depends on several factors, including the industry and the financing model. Some companies opt for a more gradual approach to growth, retaining as much control as possible at the expense of a smaller amount of financing. The primary focus of these companies differs from that of startups seeking rapid global expansion, so in our view they don't quite fit the traditional definition of a startup. These companies often have a social mission at the heart of their operations, as exemplified by companies such as Yuka in France[50]. Ultimately, this is a decision that each founder must evaluate individually depending on his company's needs.

2.2 The Investors

2.2.1 Definition and Scope

An investor is an individual or entity that invests capital with the expectation of a financial return, often through the purchase of assets, securities or interests in companies or projects[51]. Investors always play a pivotal role in the life of a company and its growth[52]. Although this term covers different categories of financiers, it is important to distinguish between them because of their different objectives and resources[53]. Certain types of investors not only provide funding for the company, but also a network and valuable expertise[54]. Moreover, founders need to effectively identify and target the right type of investor based on their company's current stage of development. Fundraising is a full-

---

47 WASSERMAN, *The founder's dilemma*.

48 A seasoned CEO typically excels in navigating the intricate financial dynamics that accompany business growth.

49 WASSERMAN, *The founder's dilemma.*

50 See podcast: Tech 45', Sebastien Couasnon, *45 minutes avec Julie Chapon (Yuka)*.

51 CCIG, *Guide du créateur d'entreprise*, p. 97 ; DUPASQUIER, *Le financement d'une jeune société*, N 171.

52 DUPASQUIER, *Le financement d'une jeune société*, N 172.

53 GUIRAUD ET AL., p. 2.

54 Referred to as "smart money" in the jargon ; DELAYE, *Capital-risqueurs* ; DUPASQUIER, *Le financement d'une jeune société*, N 172 ; FELD/MENDELSON, p. 67 ; PLANCADE, *Levée de fonds.*

time job that takes at least three months[55], therefore, it is important not to waste resources on investing firms not susceptible to commit to a pre-seed/seed stage financing[56]. In the early life of the company, founders should avoid raising from a Series A/B firm and focus on pre-seed/seed specialized funds, alongside the three F's and Business angel[57] . Institutions such as banks, which tend to invest in the later stages of a company's growth[58], are not fond of the high risk inherent to startup companies. However, some opportunities should not be overlooked as some banks have specialized departments dedicated to financing young companies[59]. In addition, some banks choose to set up separate entities that focus exclusively on providing financial support to young companies[60]. Depending on the founder's geographical location, these institutions can be a viable alternative to BAs or VCs.

2.2.2 Business Angels

Business angels are wealthy individuals or experienced entrepreneurs who choose to invest their own funds[61] in an emerging company[62]. This group of investors is highly involved in the first round of funding, coming soon after the involvement of the three F's[63], making them a key source of early-stage financing[64]. Although they often maintain a close relationship with the founders[65], business angels do not usually get involved in the day-to-day running of the company[66]. They do, sometimes,

---

55 BRESLOW, *Fundraising*, p. 35 ; GUIRAUD ET AL., p. 1.

56 FELD/MENDELSON, p. 9 ; GUIRAUD ET AL., p. 1.

57 More details on why: BRESLOW, *Fundraising*, p. 34.

58 DUPASQUIER, *Le financement d'une jeune société*, N 197.

59 Id., N 196.

60 For example: The STI foundation founded by the Berner Kantonalbank and the University of Bern ; see: https://sti-stiftung.ch/wcms/fr/accueuil/.

61 DUPASQUIER, *Le financement d'une jeune société*, N 179 ; PLANCADE, *Levée de fonds* ; WENGER, *Venture Capital,* p. 13.

62 FELD/MENDELSON, p. 11 ; WENGER, *Venture Capital*, p. 13.

63 The three F's stands for « Family, friends and fools », this source of financing is discussed in *infra:* Chapter *3.3.3.*

64 FELD/MENDELSON, p. 11.

65 DUPASQUIER, *Le financement d'une jeune société*, N 180 ; FREY, *Investment Agreement*, p. 60 ; MASON/STARK, p. 231.

66 DUPASQUIER, *Le financement d'une jeune société*, N 172 ; FREY, *Investment Agreement*, p. 60.

have entrepreneurial experience that can benefit the company they are working with[67]. Business angels can usually invest up to CHF 500'000 in Switzerland[68]. BAs often come together in clubs[69] known as "syndicates", which enables them to pool more funds and simplify the management aspects of their investments. This also allows them to invest alongside bigger investors such as VC funds in investment rounds going past seed stage[70]. It is advisable to set up a special legal structure, controlled by one of the angels, for their investments, which will help to streamline financing or acquisition processes and avoid the need to obtain multiple signatures[71]. Finally, some states like the USA have a system that encourages wealthy individuals to become investors, as they can qualify as "accredited investors" and enjoy legal and tax benefits in their activities[72] (criteria issued by the SEC). Switzerland does not currently grant an effective similar status[73], but investors in Switzerland benefit from the private capital gains tax exemption[74] which the Swiss Federal Council considers to be a sufficient incentive for investment[75].

2.2.3 Venture Capitalists

Venture capital funds are private equity funds[76] that invest in young, innovative companies with high growth potential[77]. The choice to invest in such companies comes with an inherent risk, but also a greater reward[78]. VCs often decide to invest based on the valuation of the target company or the reputation of the founders[79]. Venture capital firms exhibit diversity in both size and investment capacity. Smaller VC entities typically invest up to 2 million, mid-sized VC firms allocate funds ranging

---

67 PLANCADE, *Levée de fonds*.

68 CCIG, *Guide du créateur d'entreprise*, p. 97 and 98 ; DUPASQUIER, *Le financement d'une jeune société*, N 172.

69 In Switzerland for example: A3 Angels, BAS – Business Angels Switzerland, Go Beyond and Investiere.

70 DUPASQUIER, *Le financement d'une jeune société*, N 181.

71 FELD/MENDELSON, p. 13.

72 WENGER, *Venture Capital,* p. 14.

73 Ibid.

74 DUPASQUIER, *Le financement d'une jeune société*, N 179.

75 Ibid.

76 WENGER, *Venture Capital*, p. 2.

77 CCIG, *Guide du créateur d'entreprise*, p. 98 ; DUPASQUIER, *Le financement d'une jeune société*, N 202.

78 DUPASQUIER, *Le financement d'une jeune société*, N 202 ; SÖDING, *Private Equity*, p. 18.

79 DUPASQUIER, *Le financement d'une jeune société*, N 203.

from 2 to 5 million, while larger VC[80] firms surpass these amounts[81]. Funds also operate within distinct lifespans, which vary from one fund to another. Generally, a fund dedicates approximately one-third of its lifespan to identifying investment opportunities, another third to deploying capital, and the final third to realizing exits[82]. Before engaging with a fund, it is crucial for founders to understand the current stage of that particular fund's lifecycle.

In Switzerland, a significant portion of venture capital investment comes from overseas[83], often headquartered in fiscal havens like Ireland[84]. Therefore, it can prove useful for founders to familiarize themselves with the most common foreign legal structures behind these firms. The Limited Partnership (LP) structure is the most prevalent globally[85]. This structure comprises a management company owned by senior partners[86], the LP housing the investors (limited partners)[87] participating in the fund[88], and the General Partnership (GP) overseeing multiple funds. Each managing director is at the head of a GP that oversees multiple funds[89]. The key point is to understand that within the VC fund, there are distinct entities with divergent interests and motivation[90]. Regarding the decision power in VC firms, founders should typically cultivate a direct relationship with individuals with the title of managing director or general partner[91]. These roles usually have ultimate authority[92] over investment decisions and sit on the boards of the companies in which they invest[93]. Finally, gathering comprehensive information about the particular VC founders want to work with is crucial, as there is

---

80 Such as corporate ventures from Nestle or Philip Morris.

81 Interview with M. HAAS.

82 Interview with M. HAAS.

83 DUPASQUIER, *Le financement d'une jeune société*, N 205 ; also: https://www.kmu.admin.ch/kmu/fr/home/savoir-pratique/finances/financement.html.

84 DUPASQUIER, *Le financement d'une jeune société*, N 205.

85 FELD/MENDELSON, p. 130 ; WENGER, *Venture Capital*, p. 15.

86 FELD/MENDELSON, p.129 ; SAHLMAN, *Structure and governance of VCs,* p. 487.

87 FELD/MENDELSON, p.130 ; WENGER, *Venture Capital*, p. 15.

88 FELD/MENDELSON, p.130 ; SAHLMAN, *Structure and governance of VCs,* p. 487.

89 FELD/MENDELSON, p. 130.

90 Id., p. 131.

91 SAHLMAN, *Structure and governance of VCs,* p. 488.

92 BRESLOW, *Fundraising*, p. 30 ; FELD/MENDELSON, p. 9.

93 FELD/MENDELSON, p. 7.

no one-size-fits-all approach[94]. What appeals to one VC may put off another. This information is best acquired by seeking input from entrepreneurs who have worked or are currently working with the VC[95].

2.3 The Startup

2.3.1 Definition and Scope

Firstly, the term “startup” poses a challenge in its definition, given its widespread use and lack of consistent clarity. In our perspective, a company should be regarded as a startup only if it meets specific predefined criteria. Furthermore, the startup status should also only be considered as a distinct stage in the company's lifecycle[96], this means that at some point, all startups cease to be startups and become something else. In the following chapters, we will discuss the key characteristics that are commonly shared by companies in the startup stage.

2.3.2 Young and Disruptive

A startup is the result of the founding process done by its founders[97]. The startup encapsulates the founder’s idea and serves as a tangible realization of their partnership. There is no doctrinal consensus on the age limit for a company[98], as its development depends on more than just a metric. It is also reliant on the product it develops and the market it intends to reach[99]. What unites all startups, however, is their disruptive influence on their industries[100]. This transformative impact is often driven by technological innovation[101], allowing services to be accessed through new mediums, such as booking taxis or accommodations via mobile devices. This innovation is made possible because of the inherent youth of these companies. Their fresh perspectives, willingness to take risks, and agility in adapting to changing landscapes set them apart and empower them to challenge conventions and

---

94 FELD/MENDELSON, p. 19.

95 BRESLOW, *Fundraising*, p. 13.

96 DUPASQUIER, *Le financement d’une jeune société*, N 91.

97 RIFFELMACHER, *Erfolgreiche Zusammenarbeit*, p. 9.

98 DUPASQUIER, *Le financement d’une jeune société*, N 92 ; RIFFELMACHER, *Erfolgreiche Zusammenarbeit*, p. 9.

99 DUPASQUIER, *Le financement d’une jeune société*, N 92 ; RIFFELMACHER, *Erfolgreiche Zusammenarbeit*, p. 9.

100 BALOVA, *Startups* ; for e.g. Airbnb with the hotel sector, Snapchat with social networking, Uber with transportation.

101 BALOVA, *Startups*.

drive progress[102]. As beautifully said by LOMBARD ET AL[103] : "*The whole challenge of a dynamic economy is there: accepting as a principle that the medium and large companies of tomorrow start today with the creation of a very small, fragile, unknown but dynamic and creative entity. Everything always begins with innovation, entrepreneurial determination, a sense of commerce, and a lot of hard work"*. The startup's key advantage is her agility to adapt to the market and pivot when necessary[104].

2.3.3 Private Owned Company

A startup is often a private company[105], which leads to more advantageous negotiation dynamics among the various stakeholders compared to a publicly traded company[106]. However, a private company does not have the same publicity obligations as a publicly traded one, which can result in a longer and more expensive investment process[107]. Most of the initial capital invested by investors in the company serves the essential purpose of rebalancing the information gap between founders and themselves. This is done through the due diligence process[108]. As discussed in earlier chapters, the primary motivation for investors is to generate a return on their investment[109]. Normally, they bet on the anticipation that the company will undergo rapid growth and generate value, allowing them to cash in on their investment when the company is eventually sold[110]. This is also the underlying reason why exit strategies hold immense significance for them. In Switzerland, a VC typically invests in around ten to twenty companies per fund[111]. Experience has shown that only two or three of these companies will ultimately achieve success and offset the losses from the others[112].

---

102 BALOVA, *Startups.*

103 LOMBARD ET AL., p. 116 (free translation from french).

104 BALOVA, *Startups.*

105 DUPASQUIER, *Le financement d'une jeune société*, N 92.

106 BALOVA, *Startups* ; DUPASQUIER, *Le financement d'une jeune société*, N 92 ; GERHARD, *Exit*, p. 85.

107 DUPASQUIER, *Le financement d'une jeune société*, N 92 ; GERHARD, *Exit*, p. 85.

108 GERHARD, *Exit*, p. 85.

109 DUPASQUIER, *Le financement d'une jeune société*, N 531.

110 GERHARD, *Exit*, p. 85.

111 WENGER, *Venture Capital*, p. 4.

112 Ibid.

2.3.4 Growing Financing Needs

One notable attribute of a fast-growing company is its considerable demand for capital[113]. While pre-seed/seed financing enables the development of the company's concept and the creation of a prototype[114], the subsequent stage typically signifies that the company has a fully developed product ready for sale[115]. To achieve sales, the company must then invest in various new positions, such as marketing and commercialization. If the company plans to launch worldwide, these new costs can be extremely high[116]. As DUPASQUIER points out, time is of the essence when it comes to securing financing for a startup[117]. The urgency stems from the potential risk of the newly created company quickly becoming undercapitalized as defined in Art. 725 CO[118]. As a result, entrepreneurs often find themselves in a position where they need to secure investment quickly, even under less favorable conditions[119]. In this context, the ability to plan and employ effective negotiation strategies becomes paramount for founders, making it key to correctly plan and devote time to the fundraising process[120].

3 Legal and General Framework for Fundraising in Switzerland

Given Switzerland's significant innovation potential, there is an opportunity that has yet to be fully exploited[121]. Despite this untapped potential, the economic landscape for young companies in Switzerland shows promising signs, with a sustained long-term growth trend. Notably, this positive trajectory continues even in the face of challenges posed by disruptions in global supply chains due to the ongoing effects of COVID-19 and the conflict in Ukraine[122]. In 2022 alone, Swiss startups experienced a surge in financial activity, with more than 383 funding rounds and investments totaling more than CHF 3.069 billion[123]. Given the vibrant startup ecosystem, founders need to effectively

---

113 BALOVA, *Startups* ; CORNELL/SHAPIRO, p. 13 ; DUPASQUIER, *Le financement d'une jeune société*, N 96.

114 FREI, *Assessment*, p. 94.

115 Ibid.

116 DUPASQUIER, *Le financement d'une jeune société*, N 96.

117 Id., N 98.

118 For the consequences of under-capitalization see: GLANZMANN, *Darlehensvertrag*, p. 133 ff.

119 DUPASQUIER, *Le financement d'une jeune société*, N 97 ; WENGER/HONOLD, p. 146.

120 BRESLOW, *Fundraising*, p. 35.

121 DUPASQUIER, *Le financement d'une jeune société*, N 100.

122 STARTUPTICKER.CH, *Swiss Venture Capital Report 2023*, p. 7.

123 Ibid.

navigate the regulatory framework. In the following section, we will, among others, examine aspects of contract law[124], explore the optimal choice of legal entity for startups[125], and highlight the key documents that come into play throughout the fundraising process[126].

3.1 Overview of Swiss Contractual Law

3.1.1 Definition and Structure of Swiss Contractual Law

The concept of a contract in Swiss law is multifaceted. It may refer to a legal act signifying the mutual exchange of consensual intentions, a legal relation comprising a set of rights and duties derived from an agreement, or a legal document embodying the expressed will of the parties involved[127]. Furthermore, Swiss contractual law is composed of two sets of rules: legal rules, which serve as a general guideline for the establishment of contracts[128], but also specific dispositions[129] related to specific contracts[130]. Moreover, Switzerland's contract law is marked by a significant level of contractual freedom, stated in art. 19 para. 1 CO. This provision enables parties to freely decide the terms of a contract within legal boundaries. However, art. 19 para. 2 CO imposes a crucial restriction: the agreed terms must not violate mandatory legal provisions, public policy, morality, or personal privacy rights[131]. This freedom is the concretization of the principle of economic liberty, which can be found at art. 27 Cst. Another relevant disposition containing this freedom can be found at article 2 para. 1 CC, where the legislator requires the parties to act in good faith and in accordance with their true intentions. The outcome is that the parties are free to arrange their relationship in any manner they desire, provided they comply with the formal obligations imposed by the law[132].

---

[124] See *infra:* Chapter 3.1.

[125] See *infra:* Chapter 3.2.

[126] See *infra:* Chapter 3.5.

[127] MÜLLER, *Contrats de droit suisse*, p. 1 and the references cited.

[128] These rules can be found in articles 1-40f CO (obligations resulting from a contract), art. 68-113 CO (effects of the obligations), art. 114-142 CO (extinction of the obligations) and 143-163 CO (modalities of the obligations).

[129] Rules to specific contracts can be found in articles 184-551 CO and in specific laws ; in french the term used for this part of the CO is "*Partie spéciale du Code des Obligations*".

[130] MÜLLER, *Contrats de droit suisse*, p. 1.

[131] The outcome of a contract failing to abide by art. 19 CO is outlined in art. 20 CO, which stipulates that the contract is void.

[132] For further details see: CR CO I-MORIN, art. 1, N 33.

3.1.2 The Consequences of Contractual Freedom for Founders

The emphasis on contractual freedom in Switzerland enables founders and investors to create a diverse range of contractual arrangements tailored to their specific needs. It is worth noting that numerous templates widely used in the startup ecosystem have their origins in the United States. The significant expansion of Silicon Valley since the 1960s[133] has considerably influenced and disseminated these contractual frameworks, which have contributed to their extensive acceptance in the startup landscape in Switzerland[134]. In our modest perspective, the concept of contractual freedom in Switzerland presents itself as a double-edged sword. Although it benefits parties operating on an equal footing, it can create significant challenges in situations where there is an imbalance of power. Such imbalances can be particularly pronounced when founders, lacking legal knowledge, enter investment agreements/shareholders' agreements with investors, especially in settings where financial resources are scarce[135] or a company is at risk[136] of becoming undercapitalized[137]. In such cases, the unrestricted power to set contract terms may result in negative consequences for founders. This underscores the importance of thorough deliberation and negotiation to ensure impartial agreements where power imbalances may exist.

3.2 Overview of Swiss Legal Vehicles

3.2.1 Generalities

The Swiss Code of Obligations includes mandatory provisions, which cannot be waived, and optional provisions. As opposed to contractual forms, the Swiss legal system follows a *numerus clausus* of company forms. As a result, creating a company in Switzerland based on foreign law is not possible[138]. In the context of this paper, it is likely that entrepreneurs have not yet formally established their enterprise and therefore have not yet decided on the legal structure they will adopt. This chapter seeks to provide founders with an overview regarding the different legal structure available to them.

---

[133] More details on the expansion can be found on Wikipedia: https://en.wikipedia.org/wiki/Silicon_Valley.

[134] The development of the venture capital industry in Switzerland was slow, with the initial establishment of venture capital firms occurring relatively recently in the 1990s. See: DUPASQUIER, *Le financement d'une jeune société*, N 100 ; SÖDING, *Private Equity*, p. 19 ; WENGER/HONOLD, p. 142.

[135] DUPASQUIER, *Le financement d'une jeune société*, N 108 ; GANTENBEIN AND AL., p.18 ff.

[136] DUPASQUIER, *Le financement d'une jeune société*, N 108 ; GANTENBEIN AND AL., p. 12.

[137] For the consequences of under-capitalization see: GLANZMANN, *Darlehensvertrag*, p. 133 ff.

[138] KC, *Startup guide*, p. 10.

3.2.2 Partnerships and Corporations

Selecting the suitable legal structure is a crucial aspect of a startup's journey towards success. In practice, aspiring entrepreneurs often opt for legal vehicles such as sole proprietorship (*raison individuelle*), general partnership (*société en nom collectif*), limited liability company (*société à responsabilité limitée*) or public limited company (*société anonyme*)[139]. One important differentiation is made between "partnerships" and "corporations"[140]. The fundamental divergence between these categories lies in the extent of the owner's liability for the company's debts. In partnerships, partners bear unrestricted liability, putting their personal assets at risk for the firm's debts. Conversely, in corporations, shareholders' responsibility is limited to the company's assets, providing protection against personal financial exposure[141].

3.2.3 Sole Proprietorship and General Partnership

The sole proprietorship is not considered as a company and is therefore not specifically regulated by the CO. This type of structure doesn't have a distinct legal personality[142], meaning that the business is tied to the personality of the entrepreneur[143]. The sole proprietor is also directly exposed to his creditor, making this type of company unsuitable for startups and better suited for ventures which have a more manageable risk[144].

A general partnership closely resembles a sole proprietorship, with the primary distinction being that it must be established by two or more natural persons[145]. Another differentiating factor is the nature of liability for debts, which is subsidiary to the company's assets. In this arrangement, creditors are initially entitled to seek repayment from the company's assets, resorting to the partners only if the bankruptcy proceedings fall short[146]. For the reasons outlined, both the sole proprietorship and the

---

139 KC, *Startup guide*, p. 9 ; for the remainder of this paper, the term "Company limited by shares" will be shortened to "SA", which is the abbreviated form of the french appellation "*société anonyme*".

140 Sole proprietorships and general partnerships fall under the category of "partnerships," distinct from limited liability companies and companies limited by shares, which are categorized as "corporations."

141 KC, *Startup guide*, p. 10.

142 As opposed to corporations.

143 KC, *Startup guide*, p. 10.

144 Ibid.

145 Read art. 552 ff. CO which regulates general partnerships.

146 KC, *Startup guide*, p. 11.

general partnership are not suitable for fast growing companies and better suited for local businesses or tradespeople[147].

3.2.4 Limited Liability Company and the Company Limited by Shares

The limited liability company[148] may appear attractive at first due to its lower minimum share capital[149] and the limited liability of its shareholders in case of business failure. However, it provides fewer options for structuring the capital[150]. Therefore, the general perspective suggests that it may not be the optimal legal structure for a startup[151]. The SA[152], despite requiring a higher minimum share capital, emerges as a more appropriate option[153]. The benefits of creating an SA include more options for share capital organization, the ability to establish conditional capital (653 ff. CO) for employee incentives[154] and the advantage of shareholder anonymity[155]. These advantages are unavailable with a limited liability company, in which shareholders must be registered in the commercial register[156]. Professional investors and business angels typically prefer[157] the SA for these reasons[158]. Both types of corporations benefit from distinct legal personality. Following art. 52 para. 1 CC, the company acquires the legal personality upon being entered in the commercial register. This implies

---

147 For more detail regarding the characteristics of the various legal forms see: https://www.kmu.admin.ch/kmu/fr/home/savoir-pratique/creation-pme/differentes-formes-juridiques.html.

148 The limited liability company is regulated in articles 772-827 CO.

149 CHF 20'000 are necessary to fund a limited liability company (art. 773 para. 1 CO), as opposed to the CHF 100'000 necessary for an SA (art. 621 para. 1 CO).

150 KC, *Startup guide*, p. 11.

151 DUPASQUIER, *Le financement d'une jeune société*, N 132 and 142 ; MICHEL, *GMBH or AG*.

152 The SA is regulated by articles 620 ff. CO.

153 MICHEL, *GMBH or AG*.

154 These possibilities don't exist in limited liability companies, see: DUPASQUIER, *Le financement d'une jeune société*, N 140 and the references cited.

155 FREY, *Investment* agreement, p. 39 ; Michel, *GMBH or AG* ; KC, *Startup guide*, p. 11.

156 See articles 777 ff., 791 para. 1 CO and art. 10 ORC.

157 This tendency is further affected by the fact that professional investors, founders and lawyers now have a more thorough comprehension of the intricacies linked with the SA, thanks to its widespread usage ; DUPASQUIER, *Le financement d'une jeune société*, N 131.

158 DUPASQUIER, *Le financement d'une jeune société*, N 142 ; KC, *Startup guide*, p. 11.

that the company operates as a distinct legal entity, independent of its shareholders[159]. The corporation acquires the capacity to legal capacity (art. 53 CC) and the capacity to act (art. 54 and 55 CC). This allows the company to contract debt and obligations, act in justice and to be pursued and prosecuted[160].

Although transforming from a limited liability company to an SA is possible[161], the process involves certain costs[162]. Therefore, we recommend that founders secure funding diligently and directly establish a SA as it is better suited to the dynamic growth and operational objectives of a startup. Finally, an updated definition of the SA has been introduced in the light of recent legal adaptations done by the legislator[163]. These adaptations aim to enhance company governance and provide the SA with greater flexibility[164]. For a more in-depth exploration of the intricacies surrounding the SA, we recommend consulting specialized literature[165].

3.3 Key Fundraising Aspects

In the upcoming chapters, we examine the importance of cultivating the right mindset and building a robust network to lay the groundwork for successful interactions with potential investors. We finally discuss the importance of securing preliminary funding.

3.3.1 Mindset and Setting a Goal

Founders should perceive themselves as a valuable and limited resource when embarking on fundraising[166]. Acting with self-confidence and exhibiting a healthy ego conveys that they place trust in both their team and their company[167]. Furthermore, adopting an attitude of presuming success can

---

159 OULEVEY/LEVRAT, p. 2.

160 Ibid.

161 DUPASQUIER, *Le financement d'une jeune société*, N 142.

162 A significant drawback of a limited liability company is its inability to become a public entity and obtain a listing on the stock exchange, which negatively affects potential investors' exit options. See: DUPASQUIER, *Le financement d'une jeune société*, N 142 and art. 781 para. 3 CO.

163 For more detail on the recent changes, see: https://www.bj.admin.ch/bj/fr/home/wirtschaft/gesetzgebung/archiv/aktienrechtsrevision14.html.

164 DUPASQUIER, *Le financement d'une jeune société*, N 150 and the references cited.

165 DUPASQUIER, *Le financement d'une jeune société*, N 142 ff. for the SA as a legal vehicle for startups ; OULEVEY/LEVRAT, *La société anonyme* for the SA in general.

166 FELD/MENDELSON, 5 ; BRESLOW, *Fundraising*, p. 6.

167 BRESLOW, *Fundraising*, p. 6.

create a more favorable impression than merely stating an intent to raise funds[168]. Another important consideration for founders is to determine the specific amount of capital they intend to raise and to define its purpose[169]. There are several advantages to this approach. Firstly, setting a specific fundraising target enables founders to identify the most appropriate investors to approach[170]. It also makes it easier to structure the fundraising process, allowing precise amounts or mechanisms to be associated with each funding round and individual investment[171]. It also helps to determine the order in which potential investors should be approached. Founders have the possibility to select multiple price points for each funding round[172], allowing those who have supported the founder from the beginning to secure more favorable terms[173]. This is also known as "staggered valuation caps"[174]. Fundraising relies on building momentum[175], and reaching each fundraising milestone creates a sense of scarcity among investors[176], while showing simultaneously that the company is successful.

To determine the amount to be raised, it is advisable to link these figures to the achievement of certain milestones[177]. For example, raising CHF 500'000 to enable shipment of the first product, or CHF 100'000 to hire two full-time marketing employees[178]. The duration and amount of funding required for the fundraising process varies significantly by industry. For example, a pharmaceutical

---

168 FELD/MENDELSON, p. 19.

169 Id., p. 20.

170 FELD/MENDELSON, p. 20 ; GUIRAUD ET AL., p. 1.

171 FELD/MENDELSON, p. 20.

172 BRESLOW, *Fundraising*, p. 24.

173 Ibid.

174 Ibid.

175 BRESLOW, *Fundraising*, p. 10.

176 The principle of scarcity, as described by CIALDINI in the context of social psychology, posits that people tend to place higher value on opportunities, resources, or items that are perceived as limited or scarce. The idea is that the fear of missing out on something desirable can significantly influence decision-making and behavior. For a deeper dive see: CIALDINI, *The Science of Persuasion*, p. 80.

177 FELD/MENDELSON, p. 20.

178 Ibid.

company typically takes between 8 to 12 years to bring a product to market due to regulatory approvals[179], whereas a software company may be able to develop a product faster[180].

Recognizing the significant time commitment required for effective fundraising, it is advisable to designate a founder to concentrate fully on this aspect[181]. Fundraising is a skill that develops and matures over time and benefits from focused attention[182]. By having one person take the lead in fundraising, the other founders can focus their efforts on the operational aspects of the business and play a supportive role in the fundraising process[183]. This division of responsibilities ensures that the business continues to run smoothly while fundraising efforts are pursued with precision and effectiveness.

3.3.2 Networking

The likelihood of having a competent BA or VC in one's circle of friends is relatively low. Therefore, a strong introduction to one is paramount[184]. Using the principles of social validation[185] and liking[186], the likelihood of an investor taking a proposal seriously increases significantly if the recommendation comes from another investor who has already invested in the company[187]. Founders should avoid seeking introductions from investors who haven't already invested in the company[188]. This is because a lack of prior investment can send a potentially negative signal[189]. Instead, consider seeking

---

179 PRUNAS, *Pharma*.

180 The average time to build an app ranges from 7 to 12 months depending on the app's complexity.

181 BRESLOW, *Fundraising*, p. 31.

182 Id., p. 5.

183 Id., p. 32.

184 Id., p. 10.

185 The principle of social validation is the tendency to follow the actions or opinions of others, particularly in situations of uncertainty, seeking validation through conformity to perceived social norms. For a deeper dive see: CIALDINI, *The Science of Persuasion*, p. 78.

186 This principle highlights the importance of being influenced by those who are known and liked. Objective evaluations are preferred over subjective ones. The principle of liking suggests that personal connections, attractiveness, and similarity have a significant impact on social influence and decision-making. For a deeper dive see: CIALDINI, *The Science of Persuasion*, p. 78 and 79.

187 BRESLOW, *Fundraising*, p. 10 ; FELD/MENDELSON, p. 20.

188 FELD/MENDELSON, p. 30.

189 BRESLOW, *Fundraising*, p. 11 ; FELD/MENDELSON, p. 30.

introductions from entrepreneurs who have worked with the VC in the past[190]. These entrepreneurs can offer valuable insights into the VC's working style and provide a more favorable introduction[191].

Founders are typically easier to meet than investors, which is why we recommend active participation in the entrepreneurial community. While prizes and competitions can be demanding in terms of time and effort, they provide an excellent opportunity to increase your visibility and connect with like-minded individuals[192]. This approach holds far more advantages than simply sending a cold email or initiating contact out of the blue[193]. BRESLOW, a successful entrepreneur and fundraiser, expanded his network by organizing gatherings where founders and investors came together, and he encouraged each participant to bring a friend to the next gathering[194]. Over time, some of the VCs attending these meetings offered to sponsor the costs of the event, making them more financially invested in the event. This alignment with the principle of consistency[195] also increased their likelihood of investing in the startups hosted by the event participants.

Once the network is established, founders need to start engaging with it. It is advisable to engage without actively asking for funds[196]. The focus is on building relationships and exploiting the scarcity effect[197], as investors are unable to invest at this stage. As BRESLOW points out, the advantage of this strategy is that it is incredibly unlikely to get a “no” because founders aren't making explicit requests[198]. Conversely, they may encounter enthusiastic investors who show strong signs of interest in investing. In such cases, founders can focus their efforts on nurturing the relationship, selecting the right investor[199] and positioning themselves to be ready for potential offers. This puts them in a

---

190 BRESLOW, *Fundraising*, p. 10.

191 FELD/MENDELSON, p. 28.

192 GUIRAUD ET AL., p. 5.

193 FELD/MENDELSON, p. 30.

194 BRESLOW, *Fundraising*, p. 10.

195 The principle of consistency posits that individuals have a strong inclination to remain consistent with their past commitments and actions. This principle highlights the human inclination to maintain alignment with prior choices and beliefs, leading to a tendency to fulfill commitments and follow through with established behaviors. For a deeper dive see: CIALDINI, *The Science of Persuasion*, p. 77.

196 BRESLOW, *Fundraising*, p. 12.

197 CIALDINI, *The Science of Persuasion*, p. 80.

198 BRESLOW, *Fundraising*, p. 12.

199 GUIRAUD ET AL., p. 1.

more advantageous position than simply asking for funds[200]. The key to this strategy is to present the startup and its founders as a scarce resource, akin to a guest list where only a select few investors with whom the founders have developed strong relationships and who share the company's ethos are invited.

3.3.3 Securing Preliminary Funding

While BAs and VCs are prevalent options for startup financing, it is essential not to disregard other potential funding avenues. Typically, even before considering funds, founders reach out to friends and family for financial support[201]. The often-used term "friends, family, and fools" or “love money”[202] originates from this practice. Friends and family typically invest due to their personal connection with the founder[203], whereas individuals who invest at such an early stage without knowing the founder are humorously referred to as "fools". The help provided by the three F’s extends beyond financial support: it often involves moral encouragement, accommodations, or general assistance in the daily life of the founder[204]. Founders should look at this group, alongside prizes for investments under CHF 100’000[205]. Having access to funding before starting fundraising can be a significant advantage. As mentioned above, fundraising relies on momentum[206] and stopping operations during the process is detrimental to the growth of the company.

Finally, depending on the company's sector, there are many awards and competitions that founders can enter[207]. Participating in these awards and competitions not only provides recognition, but also allows founders to showcase their innovations and gain valuable exposure. This can help maintain the company's visibility and market presence, even while fundraising efforts are taking place in the background. It is a strategic way of balancing the demands of fundraising with the need to develop and promote the company.

---

200 BRESLOW, *Fundraising*, p. 12.

201 DUPASQUIER, *Le financement d’une jeune société*, N 175 ; MAURISSE, *Financer sa start-up.*

202 Also called « the 3 F’s ».

203 DUPASQUIER, *Le financement d’une jeune société*, N 175 ; FREY, *Investment Agreement,* p. 60.

204 Interview with M. HAAS.

205 MAURISSE, *Financer sa start-up*.

206 BRESLOW, *Fundraising*, p. 10.

207 For example: AXA Innovation Award (CHF 50’000 per year) ; Prix Climatique Zurich Suisse & Liechtenstein (CHF 150’000 per year) ; Young Entrepreneur Award, devigier.ch (CHF 100’000 per year).

3.4 Board, Valuation and Option Pool Dynamics

3.4.1 Board of Directors

The overall management of the company is exercised by the board of directors. The board is usually responsible for organizing the company, developing strategic goals and determining the means to achieve them (art. 716a para. 1 CO). The board also represents the company externally (art. 718 para. 1 CO) and can only consist of natural persons (art. 707 para. 3 CO). The board is elected and dismissed by the general meeting of shareholders. In principle, the board is made up of the company's founders and various investors[208]. The individuals on the board should provide specific expertise that is beneficial to the company. The board is a crucial component when it comes to investing in or selling the company[209]. The quality of its composition is a key element in convincing potential investors. For this reason, founders must choose its composition[210] carefully[211].

3.4.2 Valuation

In the following section, we briefly describe the issue of valuation in the context of startup fundraising. Our aim is to present a basic understanding and draw attention to some of the possible traps. It is crucial to acknowledge that our analysis is not meant to deal with the numerous valuation techniques available for companies. We therefore recommend that interested readers consult the relevant technical literature for a more comprehensive and technical overview of the various valuation methodologies[212].

3.4.2.1 Generalities

Valuation is often the main source of disagreement in early negotiations between investors and founders[213]. It plays a key role in determining the proportion of the company's equity that an investor will secure through his investment[214]. Considered by the literature as part science, part dark art,

---

208 DUPASQUIER, *Le financement d'une jeune société*, N 297.

209 DUPASQUIER, *Le financement d'une jeune société*, N 298 and the references cited.

210 See *supra:* Chapter *2.1.3* regarding the inclusion of investors on the board.

211 For more details regarding the specific terminology, the mechanisms related to the seat attribution see: DUPASQUIER, *Le financement d'une jeune société*, N 290 ff.

212 For a detailed examination on valuation methodologies for startups, see: MORO-VISCONTI, *Startup Valuation*, p. 213 ff ; REINFELD, *Start-up valuation,* p. 1 ff.

213 DUPASQUIER, *Le financement d'une jeune société*, N 565 ; FREI, *Assessment*, p. 99 ; REINFELD, *Start-up valuation,* p. 2 ; VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 19.

214 FREI, *Assessment,* p. 10.

there is no real consensus on the most appropriate valuation method[215]. As FREI points out, the primary purpose of valuation is to provide entrepreneurs and investors with a quantitative framework for the negotiation process that considers the perspectives of each party[216].

However, the interests of founders and investors often conflict concerning valuation[217]. Founders typically seek the highest possible valuation for the company[218]. This is because a high valuation may result in less dilution of their equity stake, thus preserving their control over the company. In addition, a higher valuation may appear as a sign of success and can open the door to future financing opportunities on favorable terms. Conversely, investors seek to minimize the valuation because a lower valuation means that they acquire a larger share of the company for the money invested[219]. This can increase their potential for financial returns in the future as their ownership percentage increases. In addition, investors often have financial return requirements that drive them to seek lower valuations to optimize their overall profitability.

These opposing dynamics create a complex negotiation landscape in the early stages of fundraising, where founders and investors must agree on a mutually acceptable valuation. Skillful and balanced negotiation is essential to protect the interests of both parties and to build a solid foundation for a successful long-term relationship. Additionally, the valuation of a startup involves a higher degree of complexity, mainly because the value of the start-up is closely linked to its potential for significant growth and is not solely dependent on the current economic situation of the company[220] which is often not even profitable. As pointed out by VON SALIS-LÜTOLF, it is only after the investment that both the investors and the founders will see their interests aligned, seeking the highest valuation possible for the company[221].

---

215 DUPASQUIER, *Le financement d'une jeune société*, N 565 ; FREI, *Assessment,* p. 98 and 211 ; REINFELD, *Start-up valuation,* p. 1.

216 FREI, *Assessment,* p. 99.

217 DUPASQUIER, *Le financement d'une jeune société*, N 565 ; FREI, *Assessment,* p. 211 ; VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 19.

218 DUPASQUIER, *Le financement d'une jeune société*, N 565 ; FREI, *Assessment,* p. 210 ; VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 19.

219 DUPASQUIER, *Le financement d'une jeune société*, N 565 ; FREI, *Assessment,* p. 210.

220 DUPASQUIER, *Le financement d'une jeune société*, N 567 ; FREI, *Assessment,* p. 99 ; REINFELD, *Start-up valuation,* p. 5.

221 VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 19.

3.4.2.2 Pre-money and Post-money Valuation

VCs commonly use two different methods to discuss valuation: pre-money and post-money valuation[222]. Pre-money valuation represents the valuation of the company before the investment, while post-money valuation is a simple sum of the pre-money valuation and the expected total investment amount[223]. As FELD/MENDELSON point out, understanding valuation is a key challenge for founders[224]. When a VC says he's willing to invest CHF 2 million at a valuation of 10, it is important to understand that this is usually a post-money valuation[225]. In practice, this means that the VC expects to acquire a 25% stake in a company valued at 10 million after the investment (equivalent to a pre-money valuation of 8 million). However, it is important to note that founders may interpret the CHF 2 million investment differently[226]. They may see it in the context of a pre-money valuation of CHF 10 million, which results in the VC acquiring a one-sixth stake in the company post-investment (equivalent to a post-money valuation of CHF 12 million). This difference can lead to significant discrepancies in ownership expectations and financial outcomes. Usually, all these terms are detailed in the term sheet, but often, the initial proposals might be formulated verbally in a meeting[227]. Therefore, we advise founders to proactively clarify these aspects at the outset to avoid any potential confusion or disappointment when the term sheet is finally presented[228]. Finally, it is key for founders to not over evaluate[229] their company due to the risk of seeing a down round happen in the future[230].

---

222 FREI, *Assessment,* p. 211.

223 DUPASQUIER, *Le financement d'une jeune société*, N 667 ; FELD/MENDELSON, p. 38 ; MORO-VISCONTI, *Valuation*, p. 217.

224 FELD/MENDELSON, p. 38.

225 Id., p. 40.

226 FREI, *Assessment,* p. 211.

227 FELD/MENDELSON, p. 40.

228 FREI, *Assessment,* p. 211.

229 Founders are subject to the bias of "unrealistic optimism". This bias leads the individual to believe that he's less likely to experience a negative event and more likely to experience a positive outcome related to that particular event. For more detail on unrealistic optimism see: MILHABET ET AL., p. 5 ff.

230 See *infra:* Chapter 3.6.2.3 for some of the consequences and risks of a down round.

3.4.3 Option Pool

3.4.3.1 Generalities and Impact on Valuation

Another key aspect of early negotiations around valuation is the allocation of the option pool[231]. The option pool is a portion of the company's equity that is set aside for the primary purpose of incentivizing and retaining key employees[232]. The option pool poses several challenges. First, its size has a direct impact on the valuation of the company. If an investor says that his investment is conditional on a 10% increase in the option pool, he would normally expect that increase to be reflected in the pre-money valuation[233]. Increasing the option pool by the same percentage would result in a lower pre-money valuation. Investors want to minimize the risk of future dilution[234] as much as possible by making the option pool as large as possible up front[235]. FELD/MENDELSON recommend that an option budget be prepared, listing all the potential hires the company intends to make between now and the next round of funding[236]. This budget should also estimate the option grants required to attract each of these hires[237]. Such a comprehensive list plays a crucial role in strengthening the company's position when determining the size of the option pool. Additionally, tax and labor law considerations form an integral part of establishing various employee incentive plans that should not be overlooked[238].

In the following chapter, we provide a brief overview of a commonly used incentive plan, referred to as the “Employee stock option plan” or “ESOP”. For a deeper dive on the multitude of available incentive plans and the considerations outlined above, we recommend that readers refer to specialized literature[239].

---

231 CHENAUX, *Plans d’intéressement*, p. 446 and 448 ; DUPASQUIER, *Le financement d’une jeune société*, N 1099 ; FELD/MENDELSON, p. 41.

232 CHENAUX/DUMMERMUTH, p. 1 ; DUPASQUIER, *Le financement d’une jeune société*, N 1098 ; FELD/MENDELSON, p. 41 ; PAIR, *Participations de collaborateur*, p.32.

233 FELD/MENDELSON, p. 41.

234 CHENAUX, *Plans d’intéressement*, p. 446 ; DUPASQUIER, *Le financement d’une jeune société*, N 1105.

235 FELD/MENDELSON, p. 41.

236 Ibid.

237 Ibid.

238 These aspects are not addressed in the paper, nonetheless founders should make themselves familiar with the related literature.

239 See: CHENAUX/DUMMERMUTH, p. 1 ff. ; SCHERER/NEDI, p. 148 ff.

3.4.3.2 Employee Stock Option Plan

It is common for founders to remain actively involved in the startup post-financing. In order to maintain alignment of interests with investors, the implementation of an Employee Stock Option Plan (ESOP) is often employed[240]. This form of remuneration involves the issue of profit-sharing rights, option rights or dividend-right certificates[241]. This tool not only prevents excessive use of the young company's scarce liquidities but also fosters the company's intellectual capital by incentivizing key employees[242]. Establishing an ESOP usually requires the creation of conditional share capital (art. 635 ff. CO)[243], which offers many advantages, such as the flexibility to issue shares as needed, without time constraints[244]. DUPASQUIER emphasizes that simplifying the capital structure is essential in order to facilitate future investment rounds with the entry of new investors[245]. Therefore, it is advisable to introduce conditional capital early, ideally during the founding of the company, in order to avoid additional complications of introducing an ESOP later on[246]. The choice of an employee incentive structure by investors and founders has many implications. Founders should be aware of these effects because they not only directly affect the company's value, but also involve issues related to employment law and taxation which are not addressed in this paper. The support of a legal expert is essential for managing these intricacies.

3.5 Investment Process and Documents

In this chapter, we outline the typical timeline of a transaction leading to the term sheet[247] and provide an overview of the investment agreement[248] and the shareholders' agreement[249]. Serving as essential components of the corporate legal framework, these documents play a crucial role in defining the

---

240 DUPASQUIER, *Le financement d'une jeune société*, N 1098.

241 CHENAUX/DUMMERMUTH, p. 1 ; DUPASQUIER, *Le financement d'une jeune société*, N 1099.

242 CHENAUX, *Plans d'intéressement*, p. 446 and 448 ; DUPASQUIER, *Le financement d'une jeune société*, N 1099.

243 CHENAUX, *Plans d'intéressement*, p. 448 ; DUPASQUIER, *Le financement d'une jeune société*, N 1104.

244 DUPASQUIER, *Le financement d'une jeune société*, N 1104.

245 Ibid.

246 Ibid.

247 See *infra:* Chapter 3.5.1.

248 See *infra:* Chapter 3.5.2.

249 See *infra:* Chapter 3.5.3.

relationships between founders and investors. Our aim is to furnish founders with an initial understanding of the fundraising process and offer insights into the essential features and functions. For a more in-depth comprehension, we recommend consulting literature dedicated specifically to each type of agreement[250].

3.5.1 Investment Process and Term Sheet

The process of investing in equity capital is characterized by its protracted and resource-intensive nature[251], posing challenges for all parties. Although convertible loans are increasingly replacing traditional priced equity rounds[252], particularly for companies requiring immediate liquidity[253], it remains valuable to understand the more conventional steps involved in a fundraising transaction. DUPASQUIER highlights three usual phases during a transaction: preparation, negotiation and execution[254].

3.5.1.1 Preparation

During the preparation phase, founders typically prepare a business plan before seeking investors[255]. Founders may carry out an initial valuation of their business to provide a quantitative basis for negotiations[256]. It is advisable to compile and structure due diligence materials to streamline the process for potential investors. When this groundwork has been completed, the founders initiate contact with potential investors to present their proposition[257].

---

250 For the shareholders' agreement: BLOCH, *Les conventions d'actionnaires*, p. 1 ff. ; for the investment agreement: FREY, *Investment Agreement,* p. 31 ff.

251 DUPASQUIER, *Le financement d'une jeune société*, N 540.

252 SECA, *Yearbook 2023*, p. 10.

253 DUPASQUIER, *Le financement d'une jeune société*, N 540.

254 Id., N 544 ff.

255 Id., N 546.

256 DELAYE, *Capital-risqueurs.*

257 DUPASQUIER, *Le financement d'une jeune société*, N 546 ; WENGER, *Venture Capital,* p. 19 ff. ; WENGER/SPECK, p. 182.

3.5.1.2 Negotiation

Once suitable investors have been identified, the negotiation phase begins, during which the parties agree on the content and details of the clauses in both the shareholders' agreement and the investment agreement. In certain cases, a non-disclosure agreement[258] may be concluded during this phase[259], which culminates in the signing of a term sheet[260]. Although not legally binding[261], the term sheet is the culmination of the preparation and negotiation process. The parties usually adhere closely to its content[262]. Some authors refer to the term sheet as "effectively binding"[263] because of the legal certainty it provides to the parties. Occasionally, parties may opt for a Letter of Intent/Memorandum of Understanding to emphasize key negotiation points[264]. The term sheet typically outlines the key elements of the transaction, while also alluding to certain clauses that will be formalized in subsequent agreements. These clauses may include, among others, anti-dilution provisions or liquidation preferences. Once the term sheet has been signed, investors will begin the due diligence process[265]. Therefore, founders must ensure that all necessary documents are readily available to facilitate and expedite this critical phase. The due diligence process enables the investor to assess various aspects of the business, including technological, legal, tax, commercial, ecological and financial considerations[266].

3.5.1.3 Execution

Upon the signing of the term sheet by both parties, the transaction advances into the execution phase. In this crucial stage, the investment agreement and the shareholders' agreement are signed, marking the official conclusion of the financing round. This process, often referred to as "signing and

---

258 FELD/MENDELSON believe that such agreement is not necessary at this stage of financing and that it even may rebut some VCs from investing. In the same sense see: DELAYE, *Capital-risqueurs* § 9 and WENGER, *Venture Capital*, p. 21.

259 VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 40.

260 DUPASQUIER, *Le financement d'une jeune société*, N 546 ff.

261 DUPASQUIER, *Le financement d'une jeune société*, N 552 ; VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 47.

262 DUPASQUIER, *Le financement d'une jeune société*, N 552.

263 WENGER/HONOLD, p. 146 use the german term « *faktisch binded* ».

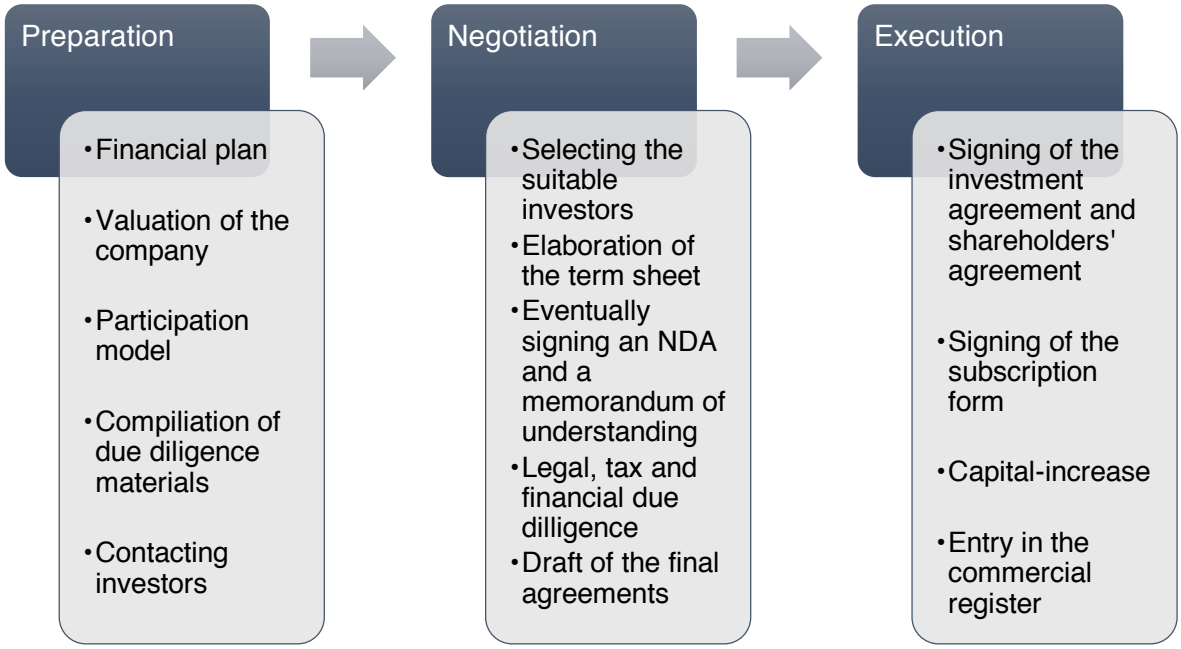
264 DUPASQUIER, *Le financement d'une jeune société*, N 549 ; FREI, *Assessment,* p. 10.

265 VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 48.

266 Ibid.

closing"[267] requires careful attention and greatly benefits from the engagement of a legal professional that usually wields a better understanding of the relevant documents[268] and the legal intricacies[269].

Following is a graphical representation of the timeline and the steps involved[270].



3.5.2 The Investment Agreement

The investment contract is the agreement through which the investor acquires shares in the company[271]. This contract, being a *sui generis*[272] contract, is subject to the typical limits of Swiss contractual freedom[273]. It commonly regulates aspects such as the company's valuation, terms of the capital increase, share issue price, and warrants[274]. As pointed out by DUPASQUIER, the investment

---

267 VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 50 ; WENGER/SPECK, p. 183.

268 For an example list of the pertinent documents that need to be drafted for the smooth progression of the transaction, refer to: DUPASQUIER, *Le financement d'une jeune société*, N 556.

269 DUPASQUIER, *Le financement d'une jeune société*, N 555 ; WENGER/SPECK, p. 187.

270 Inspired by: KC, *Startup guide*, p. 61 and 62.

271 DUPASQUIER, *Le financement d'une jeune société*, N 600 ; WENGER, *Venture Capital,* p. 26.

272 GRONER, *Private Equity-Recht*, p.198. A contract is said to be sui generis when it cannot be reduced to a pre-existing category.

273 DUPASQUIER, *Le financement d'une jeune société*, N 601 ; GRONER, *Private Equity-Recht*, p.198.

274 BONVIN, *Capital-risque* ; DUPASQUIER, *Le financement d'une jeune société*, N 601 ; WENGER, *Venture Capital,* p. 26 ; WENGER/HONOLD, p. 147.

agreement primarily addresses the provision of capital by the investor to the company[275]. Consequently, the contract doesn't govern the coexistence between founders and investors once they become shareholders. This aspect is specifically covered in the shareholders' agreement[276]. Therefore, after the capital increase and the shares are released in accordance with art. 633 CO, the contract is considered executed[277].

As mentioned, the investment agreement typically contains warranties offered by the founder to the investors. These warranties are a response to the inherent risk associated with financing young companies[278]. In addition, they address the significant information asymmetry between founders and investors regarding the state and health of the company[279]. Although a wide range of warranties are possible, they are not as exhaustive as when the company is sold[280]. In the context of young companies, they often imply that the founder has provided investors with full and accurate information about the firm[281]. However, these warranties will vary from case to case, depending on the industry and the founders involved[282].

Given its focus on the terms of the capital increase and establishment, the investment contract holds less practical significance compared to shareholders' agreements, which are more frequently sources of legal disputes[283]. Therefore, we won't delve further into the investment contract due to the limited litigious situations in practice[284].

---

275 DUPASQUIER, *Le financement d'une jeune société*, N 602.

276 Ibid.

277 Ibid.

278 Id., N 682 and 683.

279 FREY, *Investment agreement*, p. 58 ; GERHARD, *Exit*, p. 85.

280 DUPASQUIER, *Le financement d'une jeune société*, N 685.

281 RIFFELMACHER, *Erfolgreiche Zusammenarbeit*, p. 174.

282 BONVIN, *Capital-risque ;* DUPASQUIER, *Le financement d'une jeune société*, N 686.

283 DUPASQUIER, *Le financement d'une jeune société*, N 602 ; WENGER/SPECK, p. 190 ff.

284 For further details on the investment agreement: DUPASQUIER, *Le financement d'une jeune société*, N 600 ff.

3.5.3 The Shareholders' Agreement

The shareholders' agreement[285] is the tool used within the SA to formalize the exercise of rights and obligations in connection with the current or future shareholder position of one or more of the contracting parties in the company[286]. In other words, shareholders' agreements allow current shareholders and future shareholders to horizontally structure their relationships in relation to the company in which they invested or plan to invest[287]. The structuration of their relationships must be within the limits of the contractual liberty imposed by the Swiss Code of Obligations (19 CO)[288]. The need for shareholders' agreement stems from the fact that the Swiss Legislator only allows limited[289] customization[290] of the shareholder relationships within the law[291]. As pointed out by FORSTMOSER, the significance of any definition should not be overestimated. Since Swiss contract law isn't based on a *numerus clausus* of permissible contract, a wide variety of structures are conceivable in terms of type and content[292]. Every agreement must be classified based on its material content[293]. Moreover, shareholders' agreement are often of confidential nature and are therefore in practice accompanied by non-disclosure agreements and arbitration clauses[294]. This practice results in very limited and

---

285 Called "*convention d'actionnaires"* in french or "*Aktionärbindungsvertrag"* in german.

286 FORSTMOSER/KÜCHLER, *Aktionärbindungsverträge*, p. 5 and the references cited.

287 BLOCH, *Les conventions d'actionnaires*, p. 5.

288 BLOCH, *Les conventions d'actionnaires*, p. 6 and the references cited.

289 BLOCH, *Les conventions d'actionnaires*, p. 5 ; DUPASQUIER, *Le financement d'une jeune société*, N 725 ; HÉRITIER LACHAT, *Conventions d'actionnaires*, p. 104.

290 HÉRITIER LACHAT, *Conventions d'actionnaires*, p. 101 uses the expression "*créer des sociétés anonymes à la carte*" to describe the use of Shareholders' Agreement.

291 BLOCH, *Les conventions d'actionnaires*, p. 5 ; see art. 656 CO on the Status of preference shares or art. 693 CO on shares with privileged right to vote for e.g.

292 FORSTMOSER/KÜCHLER, *Aktionärbindungsverträge*, p. 6.

293 Ibid.

294 BLOCH, *Les conventions d'actionnaires*, p. 9 ; HÉRITIER LACHAT, *Conventions d'actionnaires*, p. 122.

infrequent case law[295] and poses a challenge in the legal field regarding their interpretation[296]. Finally, despite its frequent use, the shareholders' agreement is an innominate contract[297]. This means that it is not covered by the special part of the CO.

The effect of a shareholders' agreement is deployed only between the parties involved in the agreement[298]. This agreement alters the capitalist structure of the SA, granting for example shareholders the ability to change for example the voting rights' nature or enforce obligations upon all parties subscribed to the agreement[299]. From a temporal perspective, the shareholders' agreement enables the relationship between investors and founders to be structured throughout the entire life of the company, from investment to exit[300]. In the context of fundraising, it is within shareholders' agreements that patrimonial rights[301] and control rights[302] are concretized[303]. Additionally, Swiss law imposes one key obligation on the shareholders of an SA. In fact, art. 680 para. 1 CO solidifies the duty for the shareholder to contribute the amount fixed for the subscription of the share when the share capital is issued[304]. This means that without the conclusion of a shareholders' agreement, the investors and founders won't have any further obligation toward each other or the company after this contribution[305].

---

295 BLOCH, *Les conventions d'actionnaires*, p. 9 ; HÉRITIER LACHAT, *Conventions d'actionnaires*, p. 122.

296 BLOCH cites the published federal case law regarding Shareholders' Agreements: ATF 109 II 43 ; ATF 91 II 298 ; ATF 90 II 235 ; ATF 88 II 172 ; ATF 81 II 534 ; ATF 31 II 896. The list is taken from BLOCH, *Les conventions d'actionnaires*, p. 9.

297 DUPASQUIER, *Le financement d'une jeune société*, N 725.

298 KC, *Startup guide*, p. 16.

299 It is possible for the shareholders to introduce a qualified majority for votes ; DUPASQUIER, *Le financement d'une jeune société*, N 723 ; HÉRITIER LACHAT, *Conventions d'actionnaires*, p. 112.

300 DUPASQUIER, *Le financement d'une jeune société*, N 724 ; WENGER/HONOLD, p. 148 ; WENGER/SPECK, p. 199.

301 Such as liquidation preferences or dividend distribution modalities.

302 Such as specific voting rights, anti-dilution clauses, information rights, exit modalities.

303 DUPASQUIER, *Le financement d'une jeune société*, N 728.

304 Ibid.

305 DUPASQUIER, *Le financement d'une jeune société*, N 728 speaks from "*aucune obligation statutaire"*, in that sense, the shareholders' agreement tops off the void regarding shareholders' obligations present in the articles of association.

It is worth mentioning that a shareholders' agreement may include a penalty clause[306], designed to subject a party who fails to comply with the terms of the contract to the payment of an indemnity to the company or other shareholders, independent of any actual damage incurred[307]. However, implementing a penalty clause can be challenging in practice. For such a clause to be effective, it must be dissuasive, necessitating an excessively high amount to discourage a party from breaching the agreement[308]. Art. 163 para. 3 CO allows the court, at its discretion, to reduce penalties deemed excessive. While the Swiss federal court permits such reduction with restrictions, it introduces a potential risk regarding the preventive aspect that a penalty clause aims to achieve[309]. Breaching the clause then becomes a simple weighing of interests against the cost it would entail.

3.5.4 Subscription Form

Under Swiss law, the formalization of the investment can only occur upon the signing of the subscription form (art. 652 CO). This document indicates the number of shares subscribed, their nominal value, their type, their issue price and the unconditional commitment to pay the issue price[310]. The subscription form must also contain a reference to the decision on the capital increase taken by the company's competent bodies (art. 652 para. 2 CO). The share subscription is valid only when an unconditional commitment is given to pay up the capital corresponding to the issue price (art. 630 CO). However, as DUPASQUIER points out, the subscription in relation to an investment agreement is usually subjected to multiple execution conditions[311]. The unconditional commitment is however solidified upon the full payment of shares and the occurrence of the capital increase[312]. Finally, the subscription form is a document required by Swiss company law. Consequently, if investors neglect their obligation regarding the payment of shares, the enforcement provisions outlined in art. 97 CO should come into effect[313]. The subscription form is usually annexed to the investment agreement[314].

---

306 HÉRITIER LACHAT, *Conventions d'actionnaires*, p. 117 ; KC, *Startup guide*, p. 22.

307 KC, *Startup guide*, p. 22.

308 HÉRITIER LACHAT, *Conventions d'actionnaires*, p. 117 and 118.

309 For case law regarding penalty clauses we redirect to the decisions of the Swiss Federal Tribunal 4C.143/2003 of 14th October 2003 and 4C.5/2003 of 11th March 2003.

310 CR CO II-ZEN-RUFFINEN/URBEN, art. 652 N 3.

311 DUPASQUIER, *Le financement d'une jeune société*, N 645.

312 DUPASQUIER, *Le financement d'une jeune société*, N 645 ; WENGER/SPECK, p. 185.

313 DUPASQUIER, *Le financement d'une jeune société*, N 645.

314 DUPASQUIER, *Le financement d'une jeune société*, N 647.

After signing, the funds are deposited in a Swiss bank for the exclusive use of the company (art. 633 para. 1 CO).

3.6 Selection of Key Legal Clauses

The following section aims to offer a comprehensive understanding of the significance of certain provisions, as they wield substantial influence over the financial and governance framework of the company. Through this exploration, our goal is to equip entrepreneurs with insights that will allow them to acquire a first perspective on selected mechanisms that may intervene during their fundraising process. While there is an abundance of possible clauses that can be found in investment or shareholders' agreements[315], the only ones that truly matter are those who influence economics or control[316]. As eloquently expressed by FELD/MENDELSON, "*if investors are digging their heels in on a provision that doesn't impact economics or control, they are often blowing smoke, rather than elucidating substance*"[317]. Moreover, although many of these clauses will be common across various term sheets, shareholders' agreements, or investment agreements, their specific content will differ. It is crucial to evaluate the clauses holistically, considering their interplay with one another to assess the overall quality of a deal[318].

3.6.1 Liquidation Preferences

3.6.1.1 Generalities

As highlighted earlier in this paper, an investor's fundamental objective in committing capital is to realize a substantial return on investment when they decide to withdraw[319]. This event is commonly referred to as the investor's *exit*. In the context of startups, this event holds substantial importance and is always planned in early negotiations[320]. By default, art. 661 CO states the following: "*Unless the articles of association provide otherwise, the share of the profits and the proceeds of liquidation are calculated in proportion to the amount paid up on the share capital".* As GERHARD aptly pointed

---

315 As a result of the contractual freedom in Switzerland, see *supra*: Chapter 3.1.2.

316 FELD/MENDELSON, p. 38.

317 FELD/MENDELSON, p. 38 ; also see KC, *Startup guide*, p. 63 for a graphical representation of economic and control clauses.

318 Interview with M. HAAS.

319 GERHARD, *Exit*, p. 85 and 95.

320 DUPASQUIER, *Le financement d'une jeune société*, N 1035.

out, this implies that the investor shares the decline in value of the company in which he has invested[321]. Following is an illustration of the problematic[322]:

SHAREHOLDERS	INITIAL INVESTMENT	% DETAINED
FOUNDER	CHF 20	20%
INVESTOR	CHF 80	80%

SELLING PRICE	CHF 80 (T+1)	% OBTAINED	CHF 200 (T+2)	% OBTAINED
FOUNDER	CHF 16	20%	CHF 40	20%
INVESTOR	CHF 64	80%	CHF 160	80%

As shown above, if the company is sold for more than the initial investment, both the founder and the investor will profit from their initial investment. However, as FELD/MENDELSON point out: "*The liquidation preference is especially important in cases in which a company is sold for less than the amount of capital invested*"[323]. With the primary purpose of protecting investors from losing their investment, liquidation preferences are contractual provisions that give certain investors the right to receive a predetermined amount of proceeds in the event of a liquidity event[324]. Such events are typically defined as the sale of the company or a significant portion of its assets[325]. Moreover, there are two components to liquidation preference: the preference and the participation[326]. The preference means that funds are distributed to a particular series of the company's stock before other series of stock, essentially ensuring that the investor receives a predetermined multiple of the initial investment per share before any consideration is allocated to the common shares[327].

---

321 GERHARD, *Exit*, p. 120.

322 *Inspired by the tables in*: GERHARD, *Exit,* p. 120.

323 FELD/MENDELSON, p. 45.

324 DUPASQUIER, *Le financement d'une jeune société*, N 1036 ; VON SALIS-LÜTHOLF, *Vertragsklauseln*, p. 276

325 DUPASQUIER, *Le financement d'une jeune société*, N 1036 ; FELD/MENDELSON, p. 45 ; GERHARD, *Exit*, p. 120.

326 FELD/MENDELSON, p. 45 ; STREET, *start-up.*

327 Ibid.

In the past, this preference often guaranteed a return equal to the amount invested, but in the aftermath of the internet bubble burst, investors started seeking even higher preferences, occasionally reaching up to ten times their initial investment[328].

3.6.1.2 Participating Stock

The second component of the concept of liquidation preference is the participation, which comes in three different forms: full participation, capped participation and no participation[329]. In the case of fully participating shares, the shareholder receives its predetermined liquidation preference and subsequently participates in the distribution of liquidation proceeds as if the shares were converted into common shares[330]. This participation is determined by the conversion ratio of the shares and allows the shareholder to benefit from both the preference and a share of the remaining proceeds[331].

The following illustrates the situation with a fully participating liquidation preference of x2[332]:

SHAREHOLDERS	INITIAL INVESTMENT	% OF SHARES DETAINED
FOUNDER	CHF 20	20%
INVESTOR	CHF 80	80%

SELLING PRICE	CHF 80 (T+1)	% OBTAINED	CHF 200 (T+2)	% OBTAINED
FOUNDER	CHF 0	0%	CHF 8	4%
INVESTOR	CHF 80	100%	CHF 192	96%

As demonstrated in this scenario, the founder may find himself with minimal returns in the event of an exit when liquidation preferences are applied. Therefore, careful consideration must be applied when discussing liquidation preferences.

---

328 FELD/MENDELSON, p. 45.

329 FELD/MENDELSON, p. 45 ; GERHARD, *Exit,* p. 120 ; STREET, *start-up.*

330 FELD/MENDELSON, p. 46 ; STREET, *start-up.*

331 FELD/MENDELSON, p. 46.

332 *Inspired by the tables in*: GERHARD, *Exit,* p. 120.

3.6.1.3 Capped participating stock

Founders have the option to establish a capped participation mechanism[333], whereby the preferred share first receives its liquidation preference and then participates in the distribution of liquidation proceeds up to a specified multiple return[334]. Once the return on the investment exceeds this predetermined cap, the participation feature ceases to apply. This approach allows founders to strike a balance between rewarding investors and preserving founder's equity during a successful exit.

Furthermore, such clauses not only have a substantial impact on the economics of a deal, but also have a profound impact on the founder's mindset and motivation[335]. A misalignment between the founding team's effort and their potential rewards will cause them to lose enthusiasm for pursuing exit opportunities[336] or worse, lose the drive[337] to grow the company to its full potential[338]. Liquidation preferences should serve as a protective measure for investors, ensuring them a minimum return in case of an early sale of the company where the proceeds fall below their initial investment. It is not recommended to include liquidation preferences in seed rounds. At this early stage, the company may lack adequate liquidity. It is therefore advised to postpone such considerations until the company has matured and is better positioned for returns[339]. This approach not only protects the motivation of the founder, but also emphasizes the importance of fostering a mutually favorable environment. Ultimately, maintaining a positive and collaborative atmosphere between both parties is key to cultivating a successful exit in the future[340].

---

333 DUPASQUIER, *Le financement d'une jeune société*, N 1042 ; FELD/MENDELSON, p. 46 ; STREET, *start-up.*

334 FELD/MENDELSON, p. 46.

335 DUPASQUIER, *Le financement d'une jeune société*, N 1036 ; GERHARD, *Exit,* p. 121.

336 GERHARD, *Exit,* p. 121.

337 Even with a liquidation preference of 3x, a company devoid of value ultimately yields no return on investment.

338 MICHEL, *Liquidation Preferences*.

339 Interview with M. HAAS.

340 MICHEL, *Liquidation Preferences*.

3.6.2 Anti-dilution

3.6.2.1 Generalities

Anti-dilution provisions function as a safeguard for shareholders by protecting against dilution in subsequent financing rounds[341]. The provision is typically included to protect investors and founders who participated in previous rounds by preserving their ownership stakes in subsequent fundraising stages. Two types of dilution can occur: ordinary dilution resulting from the introduction of new shareholders, and financial dilution specific to the fundraising activities of a young company[342].

3.6.2.2 Ordinary Dilution

Ordinary dilution happens when new shares are issued without being proportionally allocated to the existing shareholders. Instead, they are over-proportionately given to a specific group of shareholders, typically to new investors in subsequent financing rounds[343]. The dilution can impact either the real value of the shares[344], the distribution of the profit or the voting rights[345]. At art. 652b para. 1 CO[346] the legislator protects existing shareholders against dilution due to the issuance of new shares by setting up a preferential subscription right, allowing them to match the equity they detained in previous rounds[347]. Art. 652b para. 2 CO gives the possibility to restrict or cancel this subscription right for good cause[348]. However, an existing shareholder can be diluted against his will when he

---

341 DUPASQUIER, *Le financement d'une jeune société*, N 852.

342 Ibid.

343 Each financing round involves a 25% dilution on average. DUPASQUIER, *Le financement d'une jeune société*, N 853 ; VON SALIS-LÜTHOLF, *Finanzierungsverträge*, p. 203.

344 Meaning the actual value of the share determined as objectively as possible, considering the chosen valuation method to accurately represent the company's true worth. See: DUPASQUIER, *Le financement d'une jeune société*, N 854 and the references cited.

345 For e.g. even if the issuance of new shares occurs above the actual share price, it still diminishes the voting influence of the existing shareholders. CR CO II-ZEN-RUFFINEN/URBEN, art. 652b N 1; DUPASQUIER, *Le financement d'une jeune société*, N 854 ; VON SALIS-LÜTHOLF, *Finanzierungsverträge*, p. 203.

346 This article states the following: *"every shareholder is entitled to the proportion of the newly issued shares that corresponds to their existing participation."*

347 DUPASQUIER, *Le financement d'une jeune société*, N 855.

348 It is however only admitted in rare cases. CR CO II-ZEN-RUFFINEN/URBEN, art. 652b N 1 *in fine* ; also see: ATF 121 III 219, grounds 2, 3 and 5 regarding motives for the cancellation of preferential subscription rights in a SA.

lacks the available funds to participate in a share capital increase[349]. This scenario could for e.g. occur if a company opts for a simultaneous reduction and increase of its share capital as a restructuring measure (Art. 653q para. 1 CO), known in french as a "*coup de l'accordéon*"[350].

In these instances, founders who often lack available equity capital may find themselves excluded from the shareholder base, even with the protection of the preferential subscription right under art. 652b para. 1 CO.

3.6.2.3 Specific Financial Dilution

Investors can face a particular form of dilution not addressed by Swiss company law[351]. This occurs when new shares are issued at a price lower than that paid by previous investors[352]. This scenario is known as a "down round". In this context, anti-dilution provisions act as a safeguard for investors who invested based on an inflated valuation of the company. Typically, it is common practice for founders in this scenario to waive their preferred subscription rights in favor of the diluted investor[353] and provide remedial measures, such as granting the diluted investor the right to purchase new shares in the upcoming funding round until the average price of their entire shares matches the price paid by the incoming investors[354]. Investors frequently include anti-dilution clauses in shareholders' agreements. Consequently, founders must proceed with caution in the valuation process, avoiding overvaluing their startup to minimize the risk of anti-dilution clauses being triggered in future rounds[355]. The two most commonly remedial measures known are referred to as the "full ratchet" and "weighted average"[356]. The following is a brief introduction to these two types of clauses. We have opted to delve into their operational aspects, refraining from delving into extensive mathematical formulations as they vary from a case-to-case basis.

---

349 DUPASQUIER, *Le financement d'une jeune société*, N 856.

350 For more detail on the simultaneous reduction and increase in share capital see: OULEVEY/LEVRAT, p. 157 ff.

351 DUPASQUIER, *Le financement d'une jeune société*, N 858.

352 VON SALIS-LÜTHOLF, *Finanzierungsverträge*, p. 207.

353 DUPASQUIER, *Le financement d'une jeune société*, N 858.

354 DUPASQUIER, *Le financement d'une jeune société*, N 861 and the references cited.

355 VON SALIS-LÜTHOLF, *Finanzierungsverträge*, p. 209.

356 DUPASQUIER, *Le financement d'une jeune société*, N 863 ; WENGER, *Venture Capital*, p. 24.

3.6.2.4 Full-ratchet and Weighted Average Methods

A full-ratchet clause is utilized to equalize the share capital participation of a diluted investor[357]. In essence, it enables the pricing of previously issued shares to be adjusted to align with the lower price of the ongoing round[358]. For example, let's consider investor A who acquires 100 shares in Company X for a total of CHF 2'000 in financing round T, resulting in a share value of CHF 20 per share. In the subsequent financing round, T+1, investor B purchases 100 shares of Company X for CHF 1'000, with the share value dropping to CHF 10 per share. By applying a full ratchet clause, investor A would receive an additional 100 shares at no cost, aligning the total value of their shares with those issued to investor B in the second round[359]. The full-ratchet clause is therefore extremely advantageous for investors and puts the burden of overvaluation on the founders[360]. Founders must exercise extreme caution when considering the inclusion of this type of clause, as it can prove highly disadvantageous, particularly in the case of a down round.

There is another significant risk associated with full-ratchet clauses, particularly when the new financing round values the share at a significantly lower price than the previous round[361]. This situation may arise if the initial investor intentionally initiates a new financing round at a much lower price to capitalize on anti-dilution protection, acquiring additional shares at a more favorable price[362]. To mitigate this risk, a minimal financing clause can be incorporated, requiring a certain threshold for the anti-dilution clause to activate. Alternatively, a cap on the maximum shares obtainable by investors in the application of such a clause can also be implemented[363].

In practice, the use of the weighted average method is more prevalent since it offers a fairer solution, particularly for founders[364]. For example, consider a hypothetical situation where a company has previously issued shares at different prices in numerous funding rounds[365]. If, in a subsequent round,

---

357 DUPASQUIER, *Le financement d'une jeune société*, N 864 and the references cited.

358 FRICK, *Private Equity*, p. 337 ff. ; VON SALIS-LÜTHOLF, *Finanzierungsverträge*, p. 208.

359 Exemple inspired by DUPASQUIER, *Le financement d'une jeune société*, N 864

360 DUPASQUIER, *Le financement d'une jeune société*, N 865 ; VON SALIS-LÜTHOLF, *Finanzierungsverträge*, p. 209.

361 DUPASQUIER, *Le financement d'une jeune société*, N 866.

362 DUPASQUIER, *Le financement d'une jeune société*, N 866 ; GERICKE, *Vorzugsrechte*, p. 138.

363 DUPASQUIER, *Le financement d'une jeune société*, N 866 ; GERICKE, *Vorzugsrechte*, p. 138.

364 GERICKE, *Vorzugsrechte*, p. 140.

365 DUPASQUIER, *Le financement d'une jeune société*, N 867 ff.

the new shares are issued at a lower valuation, the weighted average method considers not only the most recent issuance but also the historical context of previous rounds. For example, if the new issuance happens at a lower valuation than the prior round, the weighted average method calculates the adjustment by factoring in the different prices and quantities of both old and new shares. This leads to a more evenly distributed impact across different funding rounds, easing the burden of potential dilution on current shareholders. In contrast to the full-ratchet method, which concentrates solely on the latest issuance, the weighted average method implements a more impartial strategy, further solidifying its desirability in anti-dilution practices[366].

3.6.3 Drag along

3.6.3.1 Definition

The drag along clause greatly facilitates an investor's ability to exit the company. This provision enables shareholders who wish to sell their shares to force the other shareholders to sell their shares on the same terms[367]. In practice, this provision is implemented to enable the VC to increase the liquidity of his investment and maximize the selling price of his shares[368]. The option to sell the entire share pool leads to more efficient transactions compared to selling only a percentage of the equity[369]. This grants the buyer complete control of the company and mitigates the potential risks associated with future actions[370] by minority shareholders[371]. As pointed out by GERHARD, the drag along clause can also be a source of conflicts of interests[372]. Indeed, VCs wish to secure a return on investment inside a limited timeframe[373], while founders may wish to retain control over their company for as long as possible, as they are often emotionally invested. Moreover, depending on the sale price of the shares, a situation may arise where, in accordance with the liquidation preferences, only the

---

366 For an illustration of the formulas used for the weighted average method and its variants see: DUPASQUIER, *Le financement d'une jeune société*, N 870 ; GERICKE, *Vorzugsrechte*, p. 139.

367 DUPASQUIER, *Le financement d'une jeune société*, N 938 ; FORSTMOSER/KÜCHLER, *Aktionärbindungsverträge*, p. 411 ff. ; GERHARD, *Exit*, p. 116 ; SÖDING, *Private Equity*, p. 377 ff.

368 DUPASQUIER, *Le financement d'une jeune société*, N 940 ; GERHARD, *Exit*, p. 116.

369 DUPASQUIER, *Le financement d'une jeune société*, N 940 ; GERHARD, *Exit*, p. 116.

370 GERHARD, *Exit*, p. 116.

371 Regarding this, we refer to a decision of the Swiss Federal Tribunal 4A_531/2017 of the 20th February 2018, where the court has changed its practice regarding the protection of minority shareholders inside an SA. For further details see: WILHELM/VARRIN, p. 1 ff.

372 GERHARD, *Exit*, p. 117.

373 Ibid.

investors receive proceeds, leaving founders with no returns[374]. It is therefore key for the parties to set up appropriate triggers for the clause.

3.6.3.2 Triggers

As mentioned earlier, the inclusion of triggers for drag along clauses is essential to safeguard the founder's interests. Typically, it is the VC fund that holds the authority to determine when the entire share pool will be sold[375]. In practice, several conditions are often put in place for a drag along clause to be activated[376]. First, it should be planned that the sale must happen with an independent third party[377]. This serves the purpose of preventing a sale from occurring within the same group of investors, a scenario that could trigger liquidation preferences and result in the acquisition of total control of the company at the expense of the founders. Subsequently, restrictions can be implemented to specify who has the authority to activate the drag-along provision[378]. For instance, this could be limited to shareholders holding a minimum percentage of the company's equity[379], or it may involve specific shareholders who are integral members of the founding team. Furthermore, temporal restrictions can also be included[380]. For example, the VC fund may activate the drag along clause at its sole discretion only if the company fails to go public within a stipulated period. Alternatively, the clause may become enforceable only after a specific number of years has elapsed since the initial investment. Additionally, financial targets may be set. For example, the drag along clause may be triggered if the company achieves a specified revenue target within a specified period or experiences a significant decline in valuation over a specified period[381]. It is also possible to specify a minimum price at which the shares must be sold[382].

---

374 GERHARD, *Exit*, p. 117 ; VON SALIS-LÜTHOLF, *Vertragsklauseln*, p. 284.

375 GERHARD, *Exit*, p. 117.

376 DUPASQUIER, *Le financement d'une jeune société*, N 942.

377 DUPASQUIER, *Le financement d'une jeune société*, N 943 ; FRICK, *Private Equity*, p. 394 ; GERHARD, *Exit*, p. 117.

378 GERHARD, *Exit*, p. 117.

379 VON SALIS-LÜTHOLF, *Vertragsklauseln*, p. 277 and 283.

380 DUPASQUIER, *Le financement d'une jeune société*, N 943.

381 GERHARD, *Exit*, p. 117.

382 DUPASQUIER, *Le financement d'une jeune société*, N 944.

Finally, drag along provisions must be included in a shareholders' agreement and cannot be included in the articles of association[383]. The drag along is binding only among the parties that subscribed to it in the shareholders' agreement[384]. These restrictions aim to add a layer of control, ensuring that the activation of the drag along clause does not unduly burden founders, all while balancing the interests of investors.

3.6.4 Tag along

The tag along clause is the counterpart to the drag along clause and is usually designed to safeguard the interests of minority shareholders[385]. This clause enables a shareholder to sell its shares under identical terms as another shareholder (usually the VC) selling its shares[386]. Operative under the guarantee of performance by a third party (art. 111 CO), this right is distinctive in being triggered when a third party acquires shares without being part of the initial shareholders' agreement and without really having an obligation to acquire those shares[387]. The obligated shareholder is then responsible for ensuring that the buyer extends the same purchase offer to the beneficiaries of the tag along clause[388]. Like the drag along clause, the tag along is binding only among the parties that subscribed to it in the shareholders' agreement. In the event of a violation, the infringing shareholder shall be liable to compensate the beneficiary of the tag along clause[389]. This clause is useful for founders, in the sense that it increases the liquidity of their equity in case they want to sell their shares[390]. Finally, tag along provisions, like drag along ones, must be included in a shareholders' agreement and cannot be included in the articles of association[391].

---

383 DUPASQUIER, *Le financement d'une jeune société*, N 946 ; SÖDING, *Private Equity*, p. 378.

384 See *supra:* Chapter 3.5.3 and the references cited.

385 DUPASQUIER, *Le financement d'une jeune société*, N 947 and the references cited.

386 DUPASQUIER, *Le financement d'une jeune société*, N 947 ; FORSTMOSER/KÜCHLER, *Aktionärbindungsverträge*, p. 411 ff. ; GERHARD, *Exit*, p. 118.

387 DUPASQUIER, *Le financement d'une jeune société*, N 948 ; GERHARD, *Exit*, p. 118.

388 FRICK, *Private Equity*, p. 406 ; GERHARD, *Exit*, p. 118 ; VON SALIS-LÜTOLF, *Finanzierungsverträge*, p. 272.

389 DUPASQUIER, *Le financement d'une jeune société*, N 948 ; GERHARD, *Exit*, p. 118.

390 DUPASQUIER, *Le financement d'une jeune société*, N 949 ; GERHARD, *Exit*, p. 118 and 119.

391 DUPASQUIER, *Le financement d'une jeune société*, N 950 ; FRICK, *Private Equity*, p. 406.

3.6.5 Vesting

Agreements can include vesting modalities whereby the beneficiary is permitted to exercise their option or acquire shares transferred via an ESOP (for e.g.) after a specified period[392]. The vesting period varies depending on the industry[393]. It is generally acknowledged that the vesting period should not exceed 10 years, as per the risk of excessive engagement (art. 27 CC)[394]. Vesting additionally enables the company and other shareholders to reclaim participation rights from departing individuals, whether employees or founders, who hold shares or options acquired during their tenure with the company[395]. We advise founders and investors to clarify the vesting modalities to avoid any confusion down the line. Finally, the vesting can take place on a staggered manner or in a cliff basis[396]. A staggered vesting implies a gradual acquisition of rights, such as 20% per year, culminating in the beneficiary gaining complete rights after a 5-year period. A vesting subject to a cliff necessitates the establishment of a minimum holding duration. For instance, with a total vesting period of 5 years and a cliff clause of 2 years, the vesting of shares extends over the entire 5-year period, but during the initial 2 years, the beneficiary won't amass any shares.

3.6.6 Reverse-Vesting

Another possible vesting variant is the reverse vesting. It is one of the key points of negotiation between investors and founders when drafting early contracts. This provision grants founders immediate ownership of their equity, bypassing a waiting period. However, if a founder exits the company before the end of the reverse vesting period, he is required to return the equity to the other shareholders[397]. This provision acts as a strategic lever for investors to ensure that founders are strongly committed to the long-term success of the business, reinforcing the tangible link between founder incentives and the continued prosperity of the company. In practice, this provision is often the source of multiple conflicts between founders and investors[398].

---

392 DUPASQUIER, *Le financement d'une jeune société*, N 1106.

393 For e.g., the biotech industry is known to have longer vesting periods due to the nature of the products.

394 CHENAUX, *Plans d'intéressement*, p. 449 ; DUPASQUIER, *Le financement d'une jeune société*, N 1106.

395 DUPASQUIER, *Le financement d'une jeune société*, N 1107.

396 Id., N 1108 and 1109 ; PWC, *Equity Compensation*, p. 12.

397 DUPASQUIER, *Le financement d'une jeune société*, N 626.

398 Interview with M. HAAS.

4 Negotiation Aspects

In the final section of this paper, our focus shifts to providing founders with a repertoire of negotiation concepts that they can use in their interactions with investors. The chapter concludes by drawing key takeaways through a visual representation[399] for founders to use during real life negotiations.

4.1 Overview of Negotiation Concepts

Negotiating is an activity that aims to get the other party to agree to resolve a conflict or allocate resources[400]. This definition encapsulates three crucial elements. Firstly, it underscores that negotiation is an ongoing process lasting over time. Secondly, negotiation is multilateral, meaning that multiple interests and actors interact with each other. Finally, the negotiation proves to be beneficial, by putting an end to a dispute situation or by providing parties with certain benefits[401]. In the realm of fundraising, agreements embody the tangible results of parties' interests and negotiations. In the following chapters, we will delve into two distinct negotiation types, introduce the negotiation method developed at the Harvard Business School, while also discussing cognitive biases affecting founders.

4.1.1 Negotiation types

Various classifications exist for negotiation types. In this paper, we chose to discuss two of them, starting with the positional negotiation, known as an intuitive and rapid approach. Then we present principled negotiation, also known as negotiation on interests.

4.1.1.1 Positional Negotiation

Positional negotiation emerges as the more intuitive type of negotiation[402]. This approach entails parties taking turns to assume and abandon positions on a specific issue[403]. Each party sticks firmly to a stance, and omits to consider a plausible situation benefiting both parties[404]. Moreover, the stronger the defense of these initial positions, the more rigid the parties become[405], and the focus

---

399 See *infra:* Chapter 5.

400 LYNEDJIAN, *Négociation*, p. 9.

401 Ibid.

402 EBNER/EFRON, p. 252.

403 FISHER ET AL., p. 48.

404 SPANGLER, *Positional Bargaining*

405 Ibid.

shifts from substantive discussion to an ego centered one[406]. By adopting such stances, the negotiators overshadow the underlying concerns and motivations that brought them to the negotiating table in the first place. Furthermore, by adopting an extreme stance, there negotiators leave little room for concessions and introduce ambiguity regarding their underlying intentions. This lack of clarity can lead to extended negotiation periods, only for both parties to realize later that an agreeable solution may have been unattainable from the start[407]. Additionally, the very nature of this type of negotiation frequently results in compromises from both sides, leaving neither party entirely satisfied with the result[408]. This not only damages the immediate results of the immediate negotiation, but also deteriorates the quality of the relationship in the following ones[409].

4.1.1.2 Principled Negotiation

Principled negotiation is an approach developed by professors URY and FISHER in their book "*Getting to Yes: Negotiating Agreement Without Giving in*"[410]. Principled negotiation enables parties to concentrate on crafting mutually beneficial solutions that will improve, or at least not damage, their relationship[411]. This contrasts with the distributive approach employed in positional negotiation. Furthermore, leading a negotiation means operating on two fronts: first by addressing the substantive aspects, and second by negotiating the process[412]. Negotiating the substance means, for example, defining the exact valuation of the company or discussing the liquidation preferences. Negotiating the process is often done unconsciously, but it involves, for example, deciding on the facilities in which the negotiations take place or the medium used[413]. The negotiation related to the process becomes more and more necessary when negotiating across different cultures[414]. By recognizing

---

406 FISHER ET AL., p. 49.

407 Id., p. 53.

408 Id., p. 52 ; SPANGLER, *Positional Bargaining.*

409 TORRES, *Négociation*, p. 16 and 17.

410 The updated french edition (2022) in epub format has been used for this paper.

411 FISHER ET AL., p. 60 and 61.

412 Id., p. 59 ; HAK/SANDERS, p. 67.

413 For e.g. Negotiating via video call operates under different parameters compared to face-to-face negotiations.

414 FISHER ET AL., p. 60.

the dual nature of the negotiation and applying the four fundamentals of principled negotiation, negotiators can formulate wise and mutually beneficial agreements[415]. These fundamentals are now presented in the following chapters.

4.1.1.2.1 Treat the people issues and the dispute separately

Treating the people issues and the dispute separately emphasizes the fact that the negotiators are, for the time being, only human[416], with their respective weaknesses and sensitivities[417]. This human aspect often blends with the objective content of the negotiated matter, as can be seen in positional negotiation[418]. The parties must therefore separate the personal aspect and focus together on resolving the concrete issue and refrain from attacking each other[419].

4.1.1.2.2 Focus on the Interests at Stake

The idea here is to focus on the interests at stake, not the positions. This forces the parties to move away from their initial positions and put their egos aside. The negotiators must understand the fundamental interests that drive their counterpart since the objective of the negotiation is to crystallize a mutually advantageous deal. This enables the parties to disassociate from any anchoring bias present and instead recognize shared interests that they can pursue collectively, thus better positioning them to continue their relationship beyond the individual negotiation[420].

4.1.1.2.3 Consider a Wide Range of Solutions

To consider a diverse range of options before making a final decision involves a shift to a negotiation focused on interests rather than positions, which enables negotiators to detach themselves from egotistical constraints. The parties realize that there are multiple feasible solutions available[421]. By presenting each option and cooperatively evaluating their benefits, mutual gains from the negotiation can be optimized.

4.1.1.2.4 Assess the Result Based on Objective Criteria

Many agreements reflect the satisfaction of one negotiator's demands or the intransigence of another. By satisfying the needs of one party to the detriment of the other, these agreements fail to

---

415 FISHER ET AL., p. 61.

416 This point is reserved due to the rapidly developing nature of artificial intelligence in recent years.

417 FELD/MENDELSON, p. 149.

418 FISHER ET AL., p. 61 and 62.

419 Id., p. 62.

420 For the whole paragraph: Id., p. 62.

421 Id., p. 62 and 63.

represent the mutually beneficial solution that has been sought[422]. Instead they result in an unstable foundation that undermines future negotiations. Principled negotiation advocates to assess the solutions on objective criteria. This approach encourages negotiators to recognize that relying solely on their will is not a convincing argument[423]. Instead, the parties should review the solution in the light of impartial benchmarks. This can for example be concretized by asking for an expert report or by basing the solution on a decision from the Swiss Federal Court. Such criteria foster fair judgments and are more effective in getting the parties to accept the outcome of the negotiation, because they are not kneeling before each other but before a fair, independent judge[424].

4.1.1.3 Interaction with Fundraising

Founders, now cognizant of the drawbacks of positional negotiation, should strive to cultivate a cooperative environment with their investors. Principled negotiation proves valuable throughout the entire fundraising process. It is crucial to recognize that beyond the VC, there are individuals. To achieve collaboration the parties should distance themselves from initial rigid stances and work to create a favorable environment. Founders must recognize the differing interests in their investors.

When aiming for rapid growth, founders must understand that a substantial influx of cash often comes with a loss of control. Therefore, having a clear vision from the beginning is crucial. After acknowledging human factors and mutual interests, it is essential for parties to collaborate to create a variety of solutions. This collaborative approach ensures that the company's financial support and control remain aligned with the parties' overarching goals. Furthermore, crafting pertinent agreements requires strategic utilization of the contractual freedom provided by the CO. During the fundraising process, each clause should align with a specific goal and undergo open discussions with all parties involved. It is crucial to steer away from generic templates and envision a diverse palette of possible modalities to meet the unique needs of the parties involved.

Finally, the outcomes of provisions in the term sheet, shareholder's agreement and investment agreement should be rooted in objective criteria. It is however hard to establish such criteria due to the confidential nature enveloping the ecosystem. It is therefore key for founders to work with their peers, to gain as much insight as possible. This demonstrates the importance of having a knowledgeable and strong network. All actors involved in Switzerland's innovation ecosystem should continue to contribute to an open exchange of contractual knowledge to ensure the growth of the country's innovation ecosystem.

---

422 FISHER ET AL., p. 63.

423 Ibid.

424 Ibid.

4.1.2 The Harvard Method

There is a multitude of negotiation strategies that founders can apply in their negotiations. In this paper, we chose to present the five-step process to lead a negotiation[425] developed by URY in his book “Getting Past No – Negotiating in Difficult Situations”.

4.1.2.1 Don’t React, Go to The Balcony

Reaction without thought is detrimental to negotiations. As humans, we are prone to this and can fall into one of three categories of reactions: striking back, giving in or breaking off. Striking back without thought further escalates the conflict, while giving in may result in an unsatisfactory outcome, and breaking off may lead to the end of the relationship[426]. To mitigate these negatives outcomes, the negotiator must force not to react. By “going to the balcony”, the negotiator is able to view the situation from an independent eye, assess the true interests at play and break the vicious cycle of spontaneous reactions. The Negotiator must effectively shift from his “system 1” into his “system 2”[427].

4.1.2.2 Don’t Argue, Step to Their Side

Reasoning with a person who is not receptive is a common mistake. Individuals operating under “system 1” will be fully exposed to their emotions and will not be able to construct a mutually beneficial proposition. It is therefore key for the negotiator to “disarm” his interlocutor, allowing him to shift into his “system 2” and regain vision of the interests at play. Stepping to their side means listening, by giving importance to their argument and their position. It also means agreeing with the interlocutor regarding certain points that you both find valid[428]. The key thing is to shift from a confrontation logic to a cooperation logic. In other words, shift from a positional negotiation to an interest one.

4.1.2.3 Don’t Reject, Reframe

This point ties in with the precedent one. Rejection is always harsh to accept, therefore it is key for a negotiator to enter a logic of acceptance and cooperation. Instead of rejecting the proposals, the

---

425 Known as the « Harvard Method ».

426 URY, *Getting past no*, p. 42. ff.

427 DANIEL KAHNEMAN, a Nobel Prize-winning psychologist, introduced the concept of two systems of the mind in his book "Thinking, Fast and Slow". These systems represent two distinct modes that individuals use to process information and make decisions. System 1 operates automatically and quickly, with little to no effort and without conscious control. System 2, on the other hand, requires the allocation of mental resources to function and intervenes when System 1 is not sufficient to solve the task. It is also the system responsible for critical thinking and decision making that demands careful consideration. Because of the effortless nature of System 1, humans tend to rely on it frequently, opting for cognitive simplification to avoid cognitive effort.

428 URY, *Getting past no*, p. 66. ff.

negotiator must reformulate them and highlight the different interests. The interlocutor is then pushed to see the situation through an alternative lens, and can assess interests and not positions[429]. When dismissing points, the negotiator must formulate an "elegant denial"[430].

4.1.2.4 Don't Push, Build Them a Golden Bridge

Establishing the golden bridge: by reshaping the suggested solution as a collaborative effort involving all parties, the interlocutor is more likely to be receptive to the outcome than if it were imposed. The negotiator must invite his interlocutor to build alongside him, establishing common foundations and building upon them through collaborative and constructive criticism. Finally, the negotiator must offer his pair a choice, making him realize that he can either accept the favorable mutually built solution[431] or fall back on his own BATNA[432].

4.1.2.5 Don't Escalate, Use Power to Educate

In situations where the other party remains unwavering in her position, the negotiator is then tasked with deploying an educational effort, articulating the consequences of not reaching an agreement. The negotiator must convince his interlocutor to distance himself with the win-lose scenario and realize the possibility for a mutually beneficial agreement (win-win). To achieve this, the negotiator must expose his own BATNA[433], outlining its implications and emphasizing how the situation will be tangibly affected if no agreement is reached. By demonstrating that the mutually constructed golden bridge is a better alternative to the interlocutor's BATNA, he negotiator's objective is to convince the

---

429 URY, *Getting past no*, p. 95. ff.

430 By first aligning with a broader purpose, prompting the other party to recognize the underlying interests, followed by a clear dismissal of the proposal or point, and ultimately, providing the interlocutor with an alternative solution to address the issue.

431 URY, *Getting past no*, p. 129 ff.

432 The Best Alternative to a Negotiated Agreement invites negotiators to contemplate alternative solutions if the deal isn't concluded, providing two vital benefits: the capacity to avoid entering unfavorable agreements that should be rejected and the ability to optimize the deal's outcome in the event of negotiation failure. The better the available BATNA is, the better the position of the negotiator will be. He acquires significant walk away power, which is the best asset during negotiations. Drafting the BATNA requires time and preparation, plus the BATNA often evolves based on the changing parameters of the negotiation. Therefore, the negotiator must constantly assess his solutions, to keep up with the flow of the transaction.

433 Regarding fundraising, founders can use multiple VCs to create competition among them. This gives them key leverage during the negotiation process. Timing is also a crucial consideration in relation to BATNA. The influence of another term sheet diminishes if it does not align with those of others in terms of timing. Planning the timeline for investor approaches is crucial, and ideally, founders should aim to lead several negotiations simultaneously.

other party to acknowledge the mutual benefits and incentives that come with reaching a collaborative agreement. Finally, the negotiator must keep in mind that the goal of a negotiation is to reach mutual satisfaction, not victory[434]. Sometimes this is achieved through the conclusion of an agreement, sometimes by simply walking away[435].

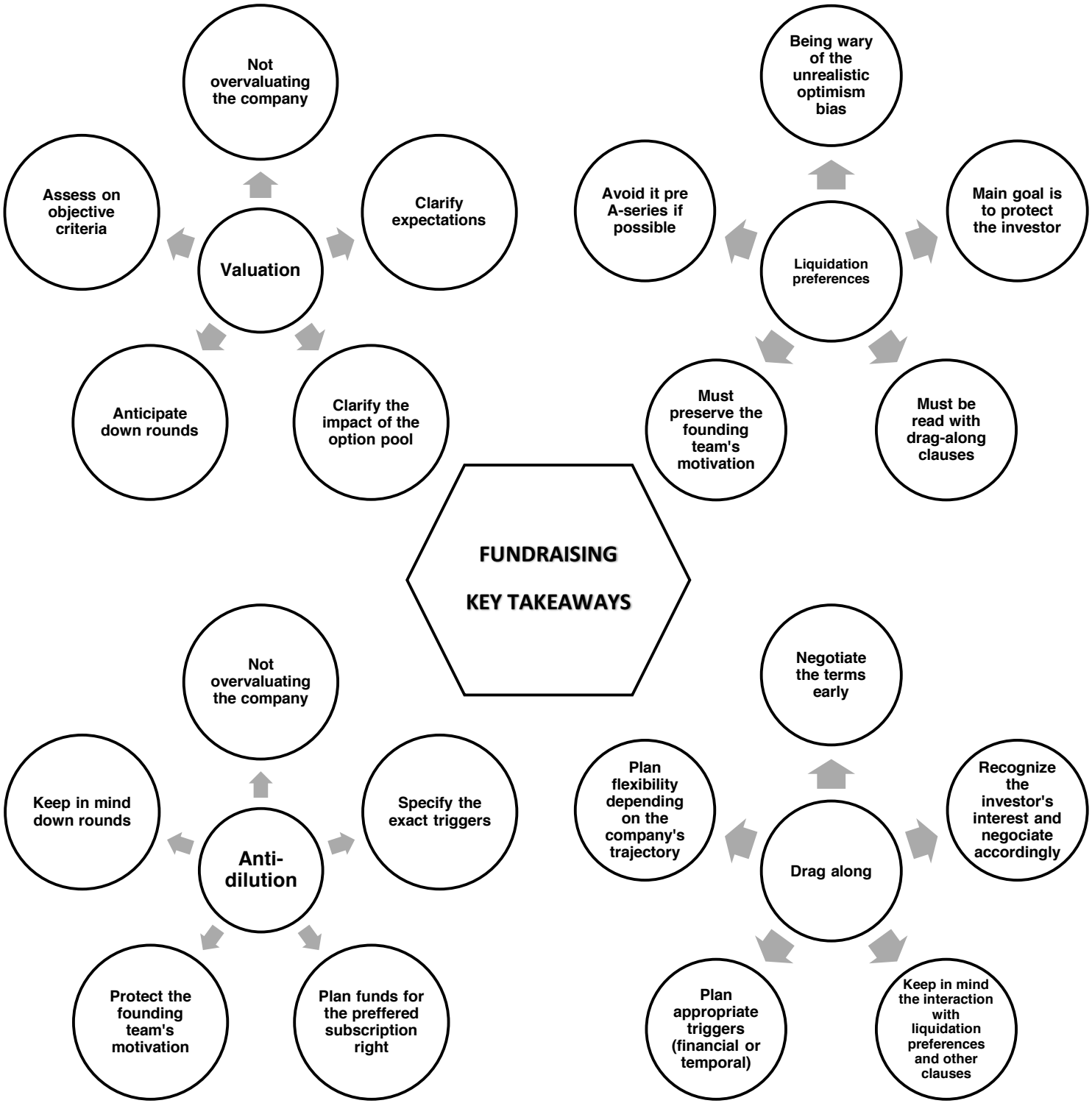
---

[434] URY, *Getting past no*, p. 187 ff.

[435] An investor becoming a shareholder, even with a small stake, can entail potential complexities for the company that are sometimes not worth the money ; Interview with M. HAAS.

5 Visual Summary of Selected Clauses

Below we provide founders with a visual representation regarding key points to keep in mind during a negotiation. It is important to note that the focus is on highlighting selected issues rather than providing an exhaustive analysis of all clauses. An exploration of every clause would be beyond the scope of this section.



6 Conclusion

The primary objective of this paper was to provide guidance to founders as they navigate the complex waters of fundraising in Switzerland. We provided insights into the various challenges they may encounter, including a myriad of legal considerations, but also broader aspects related to fundraising. We started with an examination of the key actors, the legal and general frameworks related to fundraising and finished with an overview of key negotiation principles. Our analysis yields the following key takeaways.

Fundraising presents a formidable but monumental challenge for founders. In addition to comprehending the nuances of their respective products and industries, founders must acquaint themselves with various concerns, such as legal, management and social aspects. Drafting this paper made us realize the interdisciplinary nature of the fundraising process, mirroring the founder's journey. Navigating the waters of fundraising necessitates founders to maintain a positive mindset and unwavering confidence in their abilities and their team. However, a recognition of their individual limitations is imperative, especially concerning intricate issues such as legal agreements, prompting the need for seeking appropriate guidance. Prior to the fundraising process, founders must articulate a clear vision for themselves and for their company. This vision, while subject to evolution, requires founders to exhibit agility and embrace change or opportunities when necessary. By having clear goals in mind, founders can target the fitting category of investors for their project.

We have seen that investors vary in motivation, size and investing power. Founders must therefore correctly identify the right funding in accordance with their initial vision. Initial investors often happen to be family or friends, but as the company grows, funding typically shifts to larger investors like business angels or venture capitalists. Understanding the different interests of these groups is key for effective negotiation. Additionally, exploring alternative financing options is essential. While we did not address them in this paper, other possibilities do exist. We are thinking of the examples of crowdfunding or the recent possibilities offered by the blockchain technology. In Switzerland, while traditional banks typically avoid investing in young companies due to the inherent risks associated with them, some nonetheless provide financing options through specialized startup financing departments. Furthermore, before engaging with large investors, founders can initiate projects by participating in competitions and awards. This not only secures initial funding but also offers significant visibility and valuable contacts.

Founders, although equipped with an in-depth knowledge of their company, face an information asymmetry with investors, who typically possess a deep understanding of investment intricacies. This imbalance must be addressed not only by founders but by the entire ecosystem. Founders have the duty to embark on an educational journey, but also share with their networks and help their likes in order to push innovation. Moreover, founders must realize that the freedom provided by Swiss

contract law presents itself as a double-edged sword, enabling tailor-made agreements but also potentially leading them to unfavorable terms due to their lack of legal expertise. This underscores the need to realize their personal limitations and seek appropriate guidance as early as possible.

Building a strong network and choosing the right investors are crucial elements in realizing founders' aspirations. Additionally, founders must distance themselves from the prevalent misconception associated with the costs of hiring a competent legal expert. It is imperative for them to recognize that the value provided by a competent advisor is essential for safeguarding their interests. Fortunately, an increasing number of law firms in Switzerland now offer customized guidance for young companies, with cost structures often tailored to the company's financial capacity. For instance, payment can be arranged after the conclusion of an investment round. Therefore, founders should proactively plan and allocate resources to secure competent legal support from the outset without hesitation.

Throughout the investment process, founders will encounter an array of documents. It is crucial for founders to be mindful of the timeline and various steps associated with these documents, ultimately leading to the funds reaching the company's account. The appointed legal advisor plays a crucial role in that regard, deploying a consequent educational effort to enlighten founders regarding the implications of each agreement entered. This advisor should possess a deep knowledge about Swiss contractual law, company law, alongside a deep comprehension of the investment and shareholders' agreements. Additionally, he must stay informed about the latest trends emerging from the USA, often regarded as the breeding ground of innovation.

Within these documents, founders encounter a variety of clauses. It is key to understand each clause's specific purpose and the interests it aims to protect. Given that negotiation demands energy and time, it is crucial to channel these efforts toward meaningful causes. When assessing negotiation outcomes, founders should view the different agreements and clauses as a unified entity and anticipate future implications. The guidance of an experienced legal professional proves invaluable in this context, as he can highlight potential risks associated with each point and help founders focus their negotiation efforts effectively. Identifying the interconnection of the different clauses is paramount. As we have seen, an overly optimistic valuation, even if accepted by early investors, may result in a burden for founders through the activation of anti-dilution clauses in a down round. Additionally, tax and labor law implications of setting up incentive plans should also be considered, although not addressed in this paper.

In the last part, we provided founders with an introduction to a few negotiation concepts. By making founders aware of different negotiation types, they should be able to avoid the pitfalls of positional negotiation, and focus on the teachings of principled negotiation, by keeping in mind the interests at stake. The introduction to KAHNEMAN's two systems of thinking allows founders to transition from an intuitive, impulsive mode of thought, to a more analytical and thoughtful process, which empowers

them to overcome potential biases that might impede. It remains imperative, however, for founders to tailor these tools to their unique personalities and styles, intuitively developing and creating their own weapons.

Our investigation has also unveiled the persistently intricate nature of fundraising mechanisms in Switzerland. Documentation is frequently inaccessible to entrepreneurs with limited legal knowledge. The complexity of the different provisions and tools contributes to the creation of the omnipresent glass ceiling. Noteworthy efforts towards simplification are nonetheless underway, exemplified by the introduction of lighter and more comprehensible documentation by SECA and the growing interest of literature on the subject. Moreover, we have observed a lack of diversity in available legal structures for innovative companies. While most lean towards the SA due to its flexibility, it doesn't fully address the inherent concerns related to a startup. The lack of adaptation from the legislator regarding undercapitalization clauses is a prime example. Creating tailored legislative provisions would offer innovative companies a greater flexibility and more room to grow.

Additionally, the legislator should go beyond private capital tax exemptions, exploring other tax advantages, like the accredited investor status present in the USA. All these considerations could greatly benefit Switzerland's startup ecosystem. Moreover, the current confidentiality surrounding investor deals poses a challenge to resource-sharing and certainly impedes the growth of innovation in the country. Despite the commonalities in clauses across agreements and models, their individual content and their interactions remain unclear for founders. This hinders transparency and collaboration within the ecosystem.

In conclusion, a pivotal insight from this paper is that the growth of a company hinges on establishing a harmonious cohabitation between founders and investors. Honesty and transparency play a crucial role in nurturing a conducive environment for expansion. Competent investors share a common goal with the founders, wanting the company to thrive. Recognizing that fostering the founder's motivation is paramount, they understand the significance of this factor in achieving success. The relationship between founders and investors, often likened to a marriage, is distinguished by the fact that the "divorce" is planned before the union begins. Striving for transparency, collaboration, and mutual understanding emerges as the optimal approach, paving the way for a harmonious and satisfactory conclusion to this partnership.