A background image showing three women in business attire. One woman with curly hair is standing and looking down at a document held by another woman. A third woman is seated to the left, also looking at the document. The scene is brightly lit, suggesting an office or meeting environment.

# Founder Risk in Startup Investments

Founder-centric due diligence, tailored reps and warranties, enforceable undertakings, and calibrated founder liability  
(with clause mechanics and negotiation playbook)

# 1. Why this topic deserves its own chapter

In a conventional M&A or minority growth investment, the investor is largely underwriting the company: its assets, contracts, systems, and financial performance. Founders matter, but they are rarely the single point of failure.

In a startup investment, the investor's decision is often founder-led. The business may have limited operating history, limited assets, incomplete documentation hygiene, and high dependence on a small leadership group. The company can be, in practice, a wrapper around the founders' execution capacity and integrity.

That changes the lawyer's job. The "special issue" is not only corporate due diligence. It is a combined problem of (i) founder-centric due diligence, (ii) targeted disclosure and risk allocation through representations and warranties, (iii) forward-looking control through undertakings, and (iv) practical enforcement tools—often equity-based—when founders are the key value driver.

This chapter provides a practical framework and a clause package that associates can understand, draft, negotiate, and explain. It is written as jurisdiction-neutral. However, some tools, especially company redemption, share buybacks, and "return investment" mechanics, may be constrained by local corporate law principles (capital maintenance, solvency tests, distributable reserves, financial assistance restrictions, mandatory corporate approvals, and timing/procedure rules). The sample drafting is therefore illustrative and should be tailored to the governing law, constitutional documents, and actual cap table mechanics.

## 2. A single discipline that ties the whole workstream together: "DD → contract response"

Founder risk work becomes messy when DD is treated as a separate workstream from drafting. The simplest discipline is to treat DD as unfinished unless every material issue ends up in one of four contractual buckets:

### Closing Deliverable

If an issue can be fixed before the money goes in, it should become a closing deliverable / condition precedent.

### Representations & Warranties

If it is a "truth about the past or present," it should be allocated via representations and warranties (with proper qualifiers and limitations).

### Undertakings / Covenants

If it is a "risk about future behavior," it should be governed by undertakings / covenants (drafted to be measurable and enforceable).

### Residual Risk

If it cannot be fixed or cleanly allocated, it must be identified as residual risk and explicitly accepted, priced, or governed.

This mapping is the foundation. It prevents two common failures: a "perfect" DD report that never changes the documents, and a "template" set of documents that ignores what DD found.

### 3. Founder-centric DD: what you are actually trying to learn

Founder-centric DD is not about collecting everything. It is about finding what can destroy value quickly, especially in a business where formal records may be thin.

The practical questions are consistent across most startup deals. Does the company truly own the product and the equity structure it is presenting? Is there a founder-related risk that can cause a collapse of team, customers, IP, or regulatory viability? Can that risk be cured pre-closing, and if not, what is the fastest enforceable remedy if it materializes post-closing?

A useful output is a **Founder Risk Memo**, ideally one page, that ranks the top risks, records evidence obtained and gaps, and proposes a specific contractual response and closing deliverables for each. This memo is what the investment committee (and senior deal team) will use to decide which fights to pick in negotiation.

# 4. The ten-bucket founder DD framework (and why each bucket matters)

Founders are not "just people"; they are legal and commercial risk nodes. The ten buckets below are stable across jurisdictions, even if the legal tools differ.

1

Identity and eligibility  
KYC, sanctions screening (if required by fund policy), disqualification risks, major litigation exposure, and major reputational issues. In founder-led businesses, credibility is currency. A serious eligibility issue is not only a legal risk; it is a fundraising and customer risk.

2

Time commitment and outside obligations  
Side consulting, board seats, parallel ventures, unpaid obligations to earlier projects. The key is not morality; it is whether execution is compromised and whether conflicts will emerge.

3

Cap table integrity and founder equity title  
Early issuances are often informal. SAFEs, notes, advisor promises, and undocumented options create hidden dilution and control risks. Title defects also create transfer and enforcement issues if you later need to exercise repurchase or leaver consequences.

4

IP chain of title  
This is the most frequent existential problem. Code written by friends or contractors without assignment, repositories held under a founder's personal account, open-source usage without a policy, or missing invention assignment deeds can break financings and exits.

5

Prior employer or university claims  
Many founders built early versions of the product while employed elsewhere. Even if no one complains today, a future dispute can be fatal when the company becomes valuable.

## 4. The ten-bucket founder DD framework (continued)

1

Conflicts of interest and related-party transactions

Founder loans, founder-owned assets used by the company, family contracts. These often look small until they become governance disputes or diligence "red flags" for the next round.

2

Regulatory and data posture

In fintech, health, education, cross-border data, or other regulated domains, the founder's early operational decisions may have created structural illegality or compliance debt.

3

Employment and contractor reality

Misclassification and missing confidentiality/invention assignment agreements do not show up in the pitch deck but can undermine IP ownership and create liabilities.

4

Disputes and personal events affecting the company

Co-founder disputes, threatened claims, divorce/estate issues affecting shares, criminal investigations. This is where "founder risk" becomes immediate.

5

Exit behaviors

What happens if the founder leaves? Can they take the team, customers, or IP? Do you have enforceable mechanisms that allow the company to survive?

# 5. Reps and warranties: keep them narrow, real, and enforceable

In startup investments, founders are often the primary information source. Investors therefore want statements that they can rely on. Founders often resist broad personal warranties for understandable reasons: personal exposure feels unlimited, negotiation becomes hostile, and even honest founders cannot guarantee "perfect truth" across a fast-moving company.

## Company Representations

The company gives the main representation package supported by disclosure schedules.

- Cap table accuracy
- IP ownership
- Employment documentation
- Compliance status

## Founder Representations

Founders give a targeted founder representation package limited to matters uniquely within founders' knowledge and control.

- Personal equity arrangements
- Title to shares
- No side agreements
- Disputes awareness

A practical structure is usually to have the company give the main representation package supported by disclosure schedules, while founders give a targeted founder representation package limited to matters uniquely within founders' knowledge and control. This approach also reflects the reality that even if founders give personal warranties, recovery may be limited; therefore, the objective is often to create strong disclosure incentives and clean-up deliverables.

The core warranty areas are typically cap table, IP, employment/contractor documentation, disputes/investigations, and compliance (especially in regulated sectors). Drafting levers - knowledge qualifiers, materiality, disclosure mechanics, survival, caps and baskets - must be tuned to the stage and the actual risk profile.

# 6. Undertakings: managing future behavior is often more valuable than proving past truth

Many startup risks are not about past truth. They are about what founders will do after closing. That is why covenants and undertakings often provide more practical protection than warranties.

**Pre-closing undertakings** typically appear as conditions precedent. They include IP assignment, contractor assignment, transfer of domains and repositories, option plan adoption and cap table cleanup, and termination/novation of related-party arrangements.

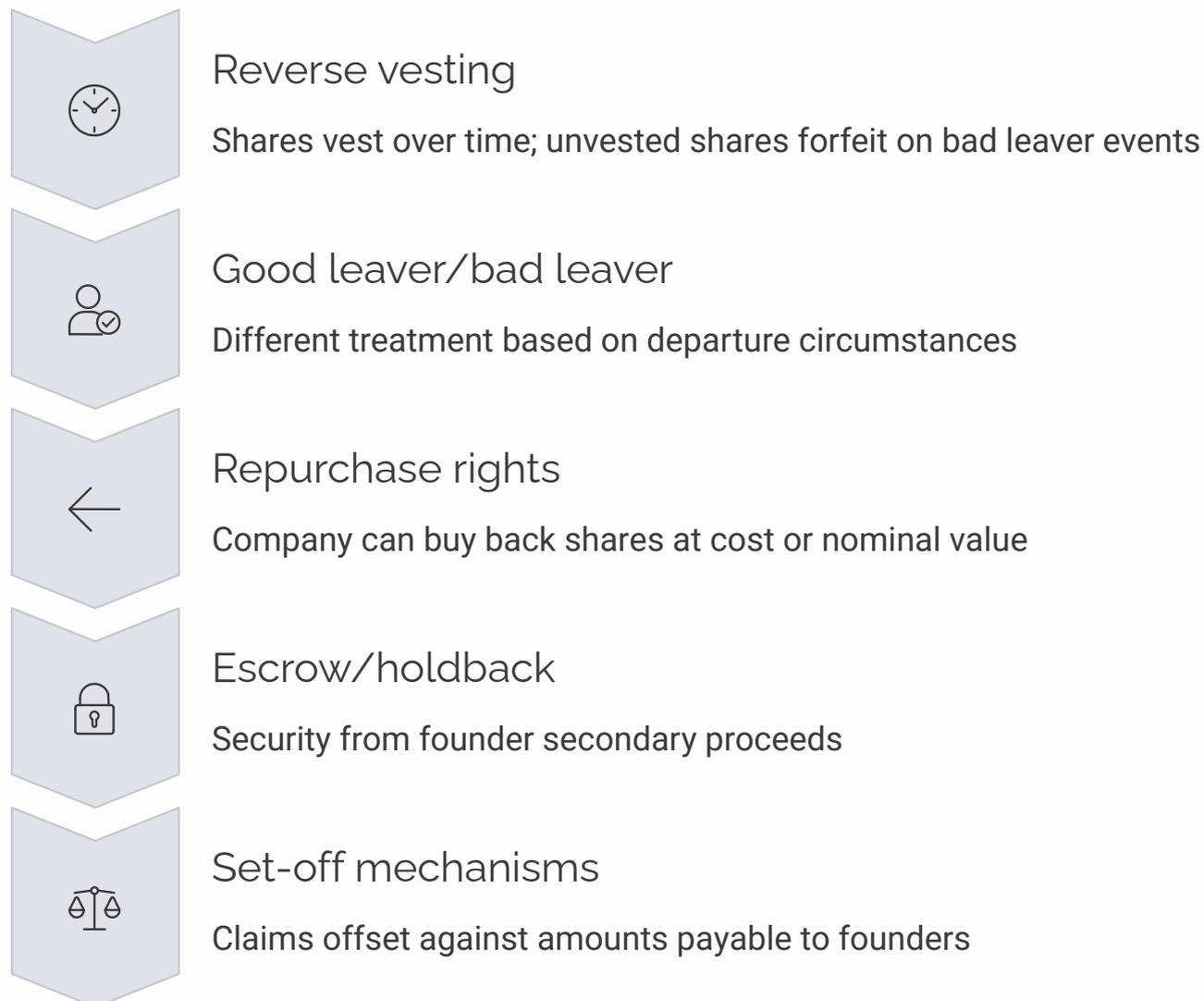
**Post-closing undertakings** should be drafted so they can be monitored. Full-time commitment, restrictions on outside activities, confidentiality, non-solicit, and cooperation obligations are usually more enforceable in practice than broad "good behavior" language.

📄 **Remedies must be fast.** Time is the enemy in startup crises. You therefore often tie founder undertakings to equitable relief, leaver consequences, or repurchase rights.

# 7. Founder liability: direct liability plus equity-based "liability substitutes"

Direct personal liability tools include founder warranties and specific indemnities (especially for IP chain-of-title gaps and undisclosed cap table defects). They matter, particularly where founders are the sole source of truth. But damages claims often face collectability issues.

For that reason, startup documents often rely on "**liability substitutes**" that operate through equity rather than cash damages:



This is less about punishment and more about alignment and survivability. If a founder departs badly or creates catastrophic risk, the company needs a path to stabilize leadership and cap table, and the investor needs a credible remedy.

# 8. Founder scandal, criminal trouble, and "go to jail" scenarios

This category deserves explicit drafting attention because the practical impact is immediate. A founder scandal (fraud, bribery, harassment, major compliance breach) or a criminal proceeding can trigger employee exits, customer churn, and investor withdrawal in days, not months. If a founder is detained or incarcerated, execution stops and control disputes begin.

The legal objective is not moral judgment. It is **continuity and stabilization**. The contract package should therefore define objective "Key Person Event" triggers, provide governance tools (removal from officer roles, suspension of authority, interim executive appointment), and create economic consequences (bad leaver, forfeiture/repurchase). It should also require cooperation-handover of credentials and property, and execution of any confirmatory IP documents needed to protect operations.

Drafting should avoid subjective triggers like "embarrassment." Where reputational harm is included, it should be tied to a board determination made in good faith and linked to a Material Adverse Effect standard.

## 9. Extreme remedy: buyback and "return investment" mechanics

In extreme cases - fraud, long incarceration, fundamental IP failure, or core business illegality - investors sometimes negotiate mechanisms designed to recover capital or exit quickly. These clauses are attractive commercially but legally constrained in many jurisdictions.

The main structures are company redemption or investor put rights, founder buyback obligations (often as fallback), call options focused on stabilizing control, and rarer unwind/rescission-style approaches.

### **A realistic drafting approach is to:**

1. Define Trigger Events narrowly and objectively
2. Make redemption explicitly subject to applicable law and solvency/distributable reserves constraints
3. Include fallback to founder buyback if redemption is not legally possible
4. Avoid drafting language that implies certainty of repayment when the law or company finances may not allow it

# 10. Clause mechanics: recommended provisions, drafting notes, founder objections, and counsel replies (with samples)

What follows is the clause package. For each clause, the explanation is written first, then a suggested sample clause appears immediately below. After the sample, you will see common founder-side objections and practical responses.

## The Clause Package

Each clause is presented with:

- Purpose and drafting approach
- Sample clause text
- Common founder objections
- Practical counsel replies

# Clause 1: Condition precedent – IP assignment and contractor clean-up

## Purpose and drafting approach

This is the single most important closing hygiene item in many startups. If the company does not own the IP, warranties are not enough. Make IP chain-of-title a closing deliverable. The clause should cover founder-created IP, and require the company to procure assignments from employees/contractors who contributed to material technology. Include moral rights waiver where permitted.

## Sample clause

### Condition Precedent – IP Assignment

It shall be a condition precedent to Closing that:

(a) each Founder shall execute and deliver to the Company a deed of assignment in form and substance satisfactory to the Investor, assigning to the Company all right, title and interest (including all Intellectual Property Rights) in and to any Works and Inventions created, developed, reduced to practice or conceived by such Founder (whether solely or jointly with others) that relate to, are used in, or are necessary for the Business; and

(b) the Company shall procure that each current and former employee, consultant and contractor who has contributed to any material part of the Company's products, source code, technology or know-how has executed and delivered to the Company an assignment (or confirmatory assignment) of all Intellectual Property Rights in such contribution, together with a waiver of any moral rights to the extent permitted by applicable law.

## Founder objection

"This is too heavy; we cannot chase old contractors; it will delay closing."

## Reply

This is not a drafting preference; it is an ownership requirement. If the company cannot prove ownership, future financing and exit will be at risk. If timing is truly critical, consider a partial closing with escrow/holdback and a short hard deadline, but do not waive the ownership cure entirely.

# Clause 2: Founder representation – no side equity arrangements

## Purpose and drafting approach

Startups often have informal equity promises. This representation targets the problem at the source: the founder. It should be supported by a disclosure schedule. The wording should cover written and oral arrangements.

## Sample clause

### Founder Representation – No Side Equity Arrangements

Each Founder represents and warrants to the Investor that:

(a) other than as disclosed in Schedule [●], such Founder has not entered into, and is not bound by, any agreement, understanding or commitment (whether written or oral) to issue, transfer or allocate any Shares, options or other equity interests in the Company to any person; and

(b) there are no claims, disputes or threatened claims in relation to any Shares held or purported to be held by such Founder, including any claim that any person is entitled to any beneficial interest in such Shares.

## Founder objection

"We cannot warrant what other people might claim."

## Reply

This is not asking you to warrant unknown claims generally; it is asking you to confirm that you have not made promises or arrangements and that you are not aware of claims. If needed, add a limited knowledge qualifier to part (b), but do not dilute part (a).

# Clause 3: Founder representation – title and no encumbrances

## Purpose and drafting approach

This supports enforcement of transfer restrictions, leaver repurchase, and any future share transfers. It is essential if founder shares are the security for the governance model.

## Sample clause

### Founder Representation – Title and No Encumbrances

Each Founder represents and warrants that such Founder is the sole legal and beneficial owner of the Shares registered in such Founder's name, free and clear of all Encumbrances, and has full power and authority to enter into and perform this Agreement and to transfer such Shares in accordance with the Transaction Documents.

## Founder objection

"This is standard but we have some personal pledge/loan arrangement."

## Reply

Then it must be disclosed and either released pre-closing or carved out with investor consent. Hidden encumbrances destroy enforceability.

# Clause 4: Company representation – capitalisation

## Purpose and drafting approach

This is the company-level cap table truth statement. Keep it precise and schedule-driven. It should capture convertibles, SAFEs, pre-emptive rights, anti-dilution, and any other instruments that could change ownership or economics.

## Sample clause

### Company Representation – Capitalisation

The Company represents and warrants that:

- (a) the issued share capital of the Company and the rights attaching to the Shares are as set out in Schedule [Capitalisation];
- (b) all Shares and other securities have been validly issued, fully paid (if applicable) and issued in compliance with applicable law and the Company's constitutional documents; and
- (c) except as disclosed in Schedule [Capitalisation], there are no outstanding options, warrants, convertibles, SAFEs, notes, rights of first refusal, pre-emptive rights, anti-dilution rights, or other agreements or arrangements that would require or entitle any person to subscribe for, acquire or be issued any Shares or other securities of the Company.

## Founder objection

"We cannot list everything; early notes are messy."

## Reply

That is exactly why this rep matters. If the company cannot confidently describe its capital structure, the investor cannot price dilution and control. If documents are missing, make their ratification/regularisation a closing deliverable.

# Clause 5: Company representation – IP ownership and non-infringement

## Purpose and drafting approach

This is typically the most negotiated rep in software-heavy startups. The "ownership" limb is often unqualified, while "non-infringement" is commonly knowledge-qualified. Include reasonable steps to protect trade secrets and confidentiality.

## Sample clause

### Company Representation – Intellectual Property

The Company represents and warrants that, except as disclosed in Schedule [IP]:

(a) the Company owns, or has valid and enforceable licences to use, all Intellectual Property Rights necessary for the conduct of the Business as currently conducted and as proposed to be conducted in accordance with the Business Plan;

(b) to the Company's Knowledge, the conduct of the Business does not infringe any third party Intellectual Property Rights; and

(c) the Company has taken reasonable steps to protect its Confidential Information and trade secrets, including by using confidentiality and invention assignment agreements with relevant employees and contractors.

## Founder objection

"We cannot warrant 'as proposed to be conducted' because the product may change."

## Reply

That phrase is there to prevent a "bait and switch" where the business plan relies on technology the company does not own or cannot lawfully use. If scope is genuinely evolving, narrow the proposed conduct to the business plan attached or approved by the board.

# Clause 6: Specific indemnity – IP chain-of-title gap (prior employer/contractors)

## Purpose and drafting approach

This clause is used when the investor accepts residual uncertainty but wants a targeted remedy for high-impact IP claims. It is often tied to founders because founders are the historical actors. "Jointly and severally" is a common investor ask; founder-side often seeks several liability.

## Sample clause

### Specific Indemnity – IP Chain of Title Gap

Each Founder (jointly and severally) shall indemnify and hold harmless the Investor and the Company from and against any Losses arising out of or in connection with any claim by any third party (including any current or former employer, university, contractor or consultant) alleging ownership of, or rights in, any material Intellectual Property Rights used in or necessary for the Business, to the extent such claim relates to any act or omission occurring prior to Closing and is not fairly disclosed in Schedule [IP/Claims].

## Founder objection

"Unlimited indemnity is not acceptable; we have no ability to pay."

## Reply

If the concern is collectability, then pair this with escrow/holdback, or restrict the indemnity to specific known risk areas, but do not remove it entirely where IP risk is existential. Alternatively, require a cure as a closing deliverable.

# Clause 7: Founder undertaking – full-time commitment and outside activities

## Purpose and drafting approach

This is not about control for its own sake; it is about protecting execution. Define the duration (time-based or ownership-based). Provide a consent process and carve out passive investments.

## Sample clause

### Founder Undertaking – Full-Time Commitment

Each Founder undertakes that, from Closing and for so long as such Founder holds at least [●]% of the Shares (or for [●] years, whichever is earlier), such Founder shall:

(a) devote substantially all of such Founder's working time and attention to the Business; and

(b) not, without the prior written consent of the Board (including the affirmative vote of the Investor Director, if appointed), engage in any other business activity that is material or that could reasonably be expected to interfere with such Founder's performance of duties to the Company.

## Founder objection

"This prevents me from doing normal professional activities and investments."

## Reply

It does not ban passive investing or minor activities. It restricts material outside activities that interfere with performance. If needed, add an explicit carve-out for passive investments below a threshold.

# Clause 8: Founder undertaking – confidentiality and IP protection

## Purpose and drafting approach

Confidentiality is often the most enforceable restrictive covenant. Tie it to inventions disclosure and execution of documents to perfect IP ownership.

## Sample clause

### Founder Undertaking – Confidentiality and IP Protection

Each Founder undertakes that such Founder shall:

- (a) keep confidential, and not disclose or use (except for the benefit of the Company) any Confidential Information; and
- (b) promptly disclose to the Company any Inventions relating to the Business conceived or developed by such Founder during the period of such Founder's engagement with the Company, and execute all documents reasonably requested by the Company to perfect the Company's ownership of such Inventions.

## Founder objection

"This is too broad; it covers general know-how."

## Reply

Define "Confidential Information" appropriately and exclude general skills and knowledge. Keep protection strong for trade secrets, code, roadmap, and customer data.

# Clause 9: Founder undertaking – non-solicitation (employees and customers)

## Purpose and drafting approach

Non-solicit is often more enforceable than non-compete. Tie the customer limb to "material dealings" and a defined lookback period.

## Sample clause

### Founder Undertaking – Non-Solicitation

For a period of [12–24] months after the date such Founder ceases to be employed or engaged by the Company, such Founder shall not, directly or indirectly:

(a) solicit or entice away any employee, consultant or contractor of the Company or any Group Company; or

(b) solicit, canvass or deal with any customer or supplier of the Company with whom the Company had material dealings in the [12] months prior to cessation,

in each case, for the purpose of competing with the Business.

## Founder objection

"Two years is too long; and 'deal with' is too broad."

## Reply

Duration and scope can be tuned. Keep the principle: the founder must not pull the company apart after leaving. Narrow "deal with" to "solicit or entice" if needed, but preserve meaningful protection.

# Clause 10: Key Person / Founder Misconduct Event (including incarceration and scandal)

## Purpose and drafting approach

This clause defines objective triggers and gives the board the power to stabilize governance. Include conviction, indictment/charge (with MAE threshold), detention/incarceration duration, and a board good-faith determination for gross misconduct causing MAE.

## Sample clause

### Key Person / Founder Misconduct Event

A "Key Person Event" occurs if any Founder:

- (a) is convicted of any felony or any offence involving fraud, bribery, corruption or dishonesty;
- (b) is indicted or formally charged for any offence which, if proven, could reasonably be expected to have a Material Adverse Effect;
- (c) is detained, incarcerated or otherwise deprived of liberty for more than [30] consecutive days; or
- (d) commits (or is reasonably determined by the Board, acting in good faith, to have committed) any act of gross misconduct that has caused or could reasonably be expected to cause a Material Adverse Effect.

Upon the occurrence of a Key Person Event, the Board may (and, if requested by the Investor Director, shall) (i) remove such Founder from any officer position, (ii) suspend such Founder's management authority, and (iii) appoint an interim executive, in each case subject to applicable law.

## Founder objection

"Indictment/charge is not proof; this is unfair."

## Reply

The clause does not declare guilt; it triggers governance stabilization when operational risk becomes unacceptable. If the founder wants protection, require a board process and MAE threshold, or an independent director vote, but keep the ability to act quickly.

# Clause 11: Bad Leaver definition (including Key Person Event and criminal trouble)

## Purpose and drafting approach

Bad leaver definitions convert misconduct into equity consequences. Include material breach, Key Person Event, and fraud/wilful misconduct findings. Provide cure periods where appropriate.

## Sample clause

### Bad Leaver

A Founder shall be a "Bad Leaver" if:

- (a) such Founder's engagement is terminated for Cause;
- (b) such Founder breaches any material provision of the Transaction Documents and fails to remedy such breach (if capable of remedy) within [15] Business Days after notice;
- (c) a Key Person Event occurs in respect of such Founder; or
- (d) such Founder is found by a court of competent jurisdiction to have committed fraud or wilful misconduct in connection with the Business or the Transaction.

"Cause" includes gross misconduct, fraud, dishonesty, material breach of duty, or conviction for an offence involving fraud, bribery, corruption or dishonesty.

## Founder objection

"Bad Leaver is too punitive; define Cause narrowly."

## Reply

The purpose is not punishment; it is to protect the company and investors from catastrophic founder events. You can refine Cause and include cure periods for remediable breaches, but do not remove fraud and serious misconduct triggers.

# Clause 12: Founder reverse vesting and forfeiture (liability substitute)

## Purpose and drafting approach

Reverse vesting aligns founder retention. Upon Bad Leaver, unvested shares are forfeited or repurchased at nominal value. Draft as an automatic transfer where possible, or as an option if local law requires.

## Sample clause

### Founder Reverse Vesting

The Shares held by each Founder shall be subject to reverse vesting as follows: [●]% vested on Closing and the balance vesting in equal [monthly/quarterly] instalments over [36–48] months.

If a Founder becomes a Bad Leaver, all Unvested Shares of such Founder shall automatically be transferred (or, if required by applicable law, shall be subject to the Company's or its nominee's option to acquire) for nominal consideration of [US\$1] (or the lowest amount permitted by applicable law).

## Founder objection

"Nominal consideration is unfair and may be unenforceable."

## Reply

This is standard in many venture structures as an incentive mechanism. If enforceability is a concern, consider "lower of cost and fair market value" for vested shares, while keeping nominal for unvested shares, because unvested shares are effectively unearned.

# Clause 13: Bad Leaver repurchase option for vested shares (at lower of cost and FMV)

## Purpose and drafting approach

This is harsher than a pure forfeiture model but more defensible than extreme penalties. The "lower of cost and FMV" is a typical investor-friendly construct.

## Sample clause

### Bad Leaver Repurchase Option (Vested Shares)

If a Founder becomes a Bad Leaver, the Company (or its nominee) shall have the option to purchase all or any portion of the Vested Shares held by such Founder at the lower of:

(a) the Subscription Price (or cost paid by such Founder for such Shares); and

(b) Fair Market Value,

as determined in accordance with Clause [Valuation].

## Founder objection

"This is a penalty; FMV should apply."

## Reply

The pricing reflects that misconduct or catastrophic events harm the company and investor value. If founders insist on FMV, then the investor usually needs stronger alternative remedies (escrow, indemnity, governance control) because FMV repurchase may not deter harmful conduct.

# Clause 14: Founder proceeds escrow/holdback (security for claims)

## Purpose and drafting approach

When founders take secondary liquidity, escrow/holdback is one of the most practical security devices. Tie it to founder reps and specific indemnities. Include a release mechanism for finally determined claims.

## Sample clause

### Founder Proceeds Escrow

If any Founder receives any cash proceeds from a Secondary Sale at Closing or thereafter, then [●]% of such proceeds shall be deposited into an escrow account for a period of [18–36] months as security for any claims under (i) the Founder representations and warranties and (ii) the Specific Indemnities. The Investor may instruct the escrow agent to release amounts to satisfy any unpaid, finally determined claim in accordance with the escrow agreement.

## Founder objection

"This blocks my liquidity; escrow period is too long."

## Reply

Escrow is a substitute for an unenforceable personal claim. If the founder wants shorter escrow, tighten the scope of claims or reduce the percentage, but keep a meaningful security package.

# Clause 15: Knowledge definition (make knowledge qualifiers meaningful)

Purpose and drafting approach

Knowledge qualifiers are meaningless unless "Knowledge" is defined. The definition should identify specific officers and require due enquiry.

Sample clause

Knowledge

"Knowledge" means, in respect of the Company, the actual knowledge of the Chief Executive Officer, Chief Technology Officer and Chief Financial Officer (or equivalents), after due and careful enquiry of those employees who would reasonably be expected to have knowledge of the relevant matter.

Founder objection

"Due enquiry is too burdensome."

Reply

Due enquiry is the price of a knowledge-qualified representation. Without it, "knowledge" becomes an easy escape. The enquiry should be reasonable, not forensic.

# Clause 16: Equitable relief (speed remedies for key covenants)

## Purpose and drafting approach

This clause supports injunctive relief and specific performance, especially for confidentiality, IP assignment, non-solicit, and transfer restrictions. It is critical because damages are often inadequate.

## Sample clause

### Equitable Relief

Each Party acknowledges that a breach of Clauses [Confidentiality], [IP Assignment], [Non-Solicitation] or [Share Transfer Restrictions] may cause irreparable harm for which damages may be an inadequate remedy. Accordingly, the non-breaching Party shall be entitled to seek injunctive relief, specific performance or other equitable remedies, without the necessity of proving actual damages, in addition to any other rights and remedies available at law.

## Founder objection

"This makes any dispute an injunction threat."

## Reply

It is limited to specific high-risk covenants where damages do not repair harm. The company's trade secrets and team cannot be restored by a damages award.

# Clause 17: Investor put / company redemption right (subject to applicable law)

## Purpose and drafting approach

This is the "return investment" tool, but it is heavily law-constrained in many jurisdictions. Draft it as subject to applicable law, solvency tests, and distributable reserves. Include fallback if redemption is not possible.

## Sample clause

### Investor Put / Redemption Right (Subject to Applicable Law)

If a Trigger Event occurs, the Investor may require the Company to redeem all (but not some only) of the Investor Shares at a price equal to the higher of:

(a) the Subscription Price paid by the Investor for such Shares plus an amount equal to [●]% per annum compounded annually; and

(b) Fair Market Value.

This Clause shall apply only to the extent permitted by applicable law and subject to the Company satisfying any applicable solvency test and having sufficient distributable reserves (or other legally available funds). If redemption is not legally permitted in full, the Company shall redeem the maximum portion permitted and the balance shall be addressed in accordance with Clause [Founder Buyback Fallback].

## Founder objection

"This turns equity into debt; it will scare future investors."

## Reply

It is limited to extreme Trigger Events. If optics are sensitive, you can soften economics (remove interest uplift) or narrow triggers further, but the investor needs a catastrophic-risk exit path.

# Clause 18: Founder buyback fallback (if redemption not legally possible)

## Purpose and drafting approach

Founder buyback is often the only practical fallback where corporate law prevents redemption. Include payment mechanics and instalment flexibility. Keep "joint and several" if investor insists, but consider negotiation.

## Sample clause

### Founder Buyback Fallback

If (i) a Trigger Event occurs and (ii) the Company is unable to redeem the Investor Shares in full pursuant to Clause [Investor Put / Redemption Right], each Founder (jointly and severally) shall, upon written request of the Investor, purchase from the Investor all remaining Investor Shares at the price that would have applied under Clause [Investor Put / Redemption Right], payable within [30–90] days.

The Investor may, at its election, require payment in up to [●] instalments over [●] months, with interest at [●]% per annum, provided that title to the Investor Shares shall transfer only upon full payment unless otherwise agreed.

## Founder objection

"I cannot guarantee repayment; this is impossible."

## Reply

Then the appropriate response is to narrow Trigger Events further, require escrow/holdback, or rely more on leaver/repurchase control mechanics. The investor's concern is catastrophic risk; the tool must be credible.

# Clause 19: Trigger Events for "return investment" (narrow and serious)

## Purpose and drafting approach

Trigger Events should be objective, rare, and linked to Material Adverse Effect. Common triggers include fraud, conviction, long incarceration, fundamental IP failure, and incurable illegality of core business.

## Sample clause

### Trigger Event

"Trigger Event" means any of the following, in each case resulting in or reasonably expected to result in a Material Adverse Effect:

- (a) fraud or wilful misconduct by any Founder in connection with the Business or the Transaction;
- (b) any Founder being convicted of an offence involving fraud, bribery, corruption or dishonesty;
- (c) any Founder being incarcerated or detained for more than [60] consecutive days;
- (d) a final, non-appealable determination that the Company does not own, and cannot obtain ownership of, material Intellectual Property Rights necessary to operate the Business; or
- (e) the Business being determined by a competent authority to be materially illegal in its core operations, and such illegality cannot be cured within [90] days.

## Founder objection

"Material Adverse Effect is vague."

## Reply

Then define MAE carefully, including specific carve-outs and thresholds.

# Clause 20: Set-off against amounts payable to founders

## Purpose and drafting approach

Set-off improves collectability and reduces enforcement friction. Draft it broadly, but ensure it is consistent with employment law and payment restrictions under local law.

## Sample clause

### Set-Off

The Company and/or the Investor may set off any amount due and payable by a Founder under the Transaction Documents against any amounts otherwise payable by the Company (or any Group Company) to such Founder, including salary, bonuses, consulting fees, dividend distributions (to the extent permitted by applicable law), or consideration payable in any secondary transaction.

## Founder objection

"Set-off against salary may violate labour laws."

## Reply

Then carve out salary or limit set-off to legally permissible amounts, but preserve set-off against secondary proceeds, dividends, consulting fees, or other payments where lawful.

# 11. How to place these clauses across the document set

To make enforcement real, placement matters. Company reps and closing conditions typically sit in the Subscription Agreement/SPA. Governance, reserved matters, leaver, vesting, transfer restrictions, and repurchase options typically sit in the Shareholders' Agreement. Founder-specific obligations often sit in a Founder Side Letter and in employment/consultancy agreements. IP assignments should be standalone deeds with clear execution formalities.

- ❏ This is not just a drafting preference: the same covenant may be harder to enforce in one document and easier in another depending on corporate procedures and remedies.

# 12. Closing perspective

The best startup investment documents do not attempt to eliminate founder risk. They make founder risk **survivable**. They do that by forcing disclosure, requiring pre-closing cures where possible, controlling future behavior through measurable undertakings, and using enforcement mechanisms that work in the real world—often equity-based rather than damages-based.

01

---

## Force disclosure

Create strong incentives for founders to reveal material risks through targeted representations and disclosure schedules

02

---

## Require pre-closing cures

Fix what can be fixed before money goes in through conditions precedent and closing deliverables

03

---

## Control future behavior

Use measurable, enforceable undertakings to govern founder conduct post-closing

04

---

## Deploy practical enforcement

Rely on equity-based mechanisms that work in the real world, not just theoretical damages claims

**The objective is not perfection.** It is to create a contractual framework that allows the company to survive founder departure, misconduct, or catastrophic events—and gives investors credible remedies when founder risk materializes.

# ABOUT US



Herman, Henry & Dominic is an experienced team of legal experts, based in Saigon and Hanoi. The firm believes in building strong relationship with clients based on trust and respect.

Herman, Henry & Dominic works under the motto: "Local Expertise & Global Standard."

Contact us at [info@ezlawfirm.org](mailto:info@ezlawfirm.org).