

## VENTURE CAPITAL FIRM'S LAW PROTECTION FOR CAPITAL GAIN GIVEN BY BUSINESS PARTNER FIRM

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### ABSTRACT

*This research studied the legal relation related to the giving of Capital Gain between Business Partner Firm and Venture Capital Firm in Business Activity, to find out the business partner firm's responsibility to the venture capital firm over the capital gain giving and to find out the solution to the capital gain giving problem occurring. To study the problem, the research method employed was normative law research method with statute and conceptual approaches. Technique of collecting law material used in this study was library study. The result of research showed that the partnership between venture capital and business partner firms was based on Article 1338 of KUHPerdata (Civil Code) so that the agreement into which both parties enter should be obeyed and the right and obligation should be performed according to the agreement. When legal issue occurs related to capital gain, according to Articles 1244 and 1266 of KUHPerdata (Civil Code), it could be concluded that when the business partner firm does not perform the agreement over capital gain giving, the venture capital firm is entitled to take repressive stance as long as it is justified and does not deviate from the clause of agreement. To prevent the business partner firm from not giving capital gain, the venture capital firm should consider the business prospect of potential business partner, as governed in OJK (Financial Service Authority)'s Regulation No. 35/POJK.05/2015 in Article 9 clause (1). In relation to capital gain, there should be regulation governing it, because when a legal issue occurs and the regulation has not been established, a larger issue will occur in the future. There should be a special regulation governing the percentage capital gain giving, in order to prevent the venture capital and the business partner firms from suffering from loss with the regulation governing it presently.*

Key words: law protection, venture capital firm, capital gain, business capital firm.

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### Introduction

Venture Capital Firm is the one operating in financing sector investing in Business Partner Firm. The finance given is business capital rather than loan and there is no collateral given by the business partner to the venture capital firms, in which the profit in the form of capital gain will be received by Venture Capital Firm only.

Recalling that Japan as a developed country in Asia region and as a state emphasizing on its state development through industrial sector all at once, it also experiences great progress in finance through venture capital system. Since 1963, many venture capital firms had been established in Tokyo, Osaka, and Nagoya (Japan). Then, *Kyoto Enterprise Development* operating in venture capital field was also established in 1992. Nomura, as the largest security firm in Japan in 1973, established venture capital firm called JAFCO.<sup>1</sup> Electronic industry in Taiwan also grows and develops through finance given by venture capital firms, beginning with *Hsinchu Science-based Industrial Park*.<sup>2</sup> South Korea also gives the venture capital firms a space to develop. On April 28, 1981 a venture capital firms named Korea Technology Development Corporation has been established.<sup>3</sup>

Considering the important role of venture capital firms in economic development in Asian region, or in other words venture capital firms will contribute importantly to Indonesian economic development, the venture capital firms are governed in Presidential Regulation Number 9 of 2009 about Financing Institution explaining that venture capital is an enterprise operating financing business in the form of investing capital into a firm receiving financing aid (grant) for certain period of time based on profit sharing. Meanwhile, in Financial Minister Regulation's Number 18/PMK.010/2012 about Venture Capital Firms and Financial Service Authority's Regulation Number 35/POJK.05/2015 about the Organization of Venture Capital Firms' Business mentions that as lately as in 10 years the venture capital firm should get out of business partner firm. The venture capital firm's exit is called divestment. Divestment is essentially the withdrawal of capital investment conducted by venture capital firm from its business partner. After the achievement of capital investment's objective and business partner reveals a good performance, venture capital firm withdraws its capital or makes divestment. Post-divestment, the venture capital firm will get capital gain obtained from the result of share selling.<sup>4</sup>

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<sup>1</sup> Khotibul Umam, *Modal Ventura (Alternatif Pembiayaan Usaha Micro, Kecil Menengah, dan Koperasi)*, BPFE, Yogyakarta, 2010, First Edition, p. 25

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid.*, p. 26

<sup>4</sup> *Ibid.*, p. 16

The regulation and implementation of capital profit gain between venture capital and business partner firms has governed the capital gain giving, particularly in Presidential Regulation Number 9 of 2009 about Financing Institution, Financial Service Authority (OJK)'s Regulation Number 35/POJK.05/2015, and Financial Minister Regulation Number 18/PMK.010/2012 about Venture Capital Firm, but the problem of percentage profit sharing and deadline of capital gain giving has not been governed in detail in the existing regulations. The existing regulations govern profit sharing and capital gain sharing only, but not percentage capital gain. This matter is governed only in the agreement between venture capital and business partner firms. Considering the elaboration above, the problem of research is formulated as follows:

1. How is the legal relation between business partner and venture capital firms in the term of capital gain giving?
2. How is the law protection for the venture capital firm in the case of business partner firm does not give capital gain?

## Research Methods

This work emphasized on normative research, as in this legal study, the law is conceptualized as what is written in the legislation (law in books) or law is conceived as a norm constituting the standard of decent human behavior.<sup>5</sup> Meanwhile, this research employed statute and conceptual approaches. Statute approach intended by the author in this study was to study the law pertaining to the deviation of capital gain giving conducted by the business partner firm against the venture capital firm. Meanwhile, conceptual approach departs from perspectives and doctrines in legal science, in which the author will find some ideas generating definitions, concepts and principles of law relevant to the issue dealt with. The understanding on those perspectives and doctrines becomes a foundation for the author in building a legal argument in solving the issues studied.<sup>6</sup>

## Result and Discussion

### A. Legal Relation between Business Partner and Venture Capital Firms in the term of Capital Gain Giving

#### Legal Relation Between Business Partner and Venture Capital Firms

Venture capital is a financing institution that in principle emphasizes on profit sharing pattern, so that the prospect business partner largely consisting of micro-, small-, and medium-scale enterprise sector will not be burdened with the collateral that should be available in borrowing business capital, as explained in Article 22 of OJK's Regulation Number 35/POJK.05/2015 about the Organization of Venture Capital Firm Business. Traditionally, the venture capital investment pattern is like what Indonesians have done, such as "profit sharing with ratio of 50:50" in farm cultivation or pattern in cattle breeding. In this pattern, farmers or cattle raisers do not have capital to manage their business and finally will look for partner to get fund help in order to operate their business and to gain profit. When they have gotten business capital or worked land and mutual agreement, the investor will get share from the farm or cattle profit.<sup>7</sup> It is just like venture capital firm that invests its capital to its business partner, but in this case the dimension is broader and the management is more professional.

As partnership firm, the profit of which is obtained through profit sharing pattern, cooperation between venture capital firm and business partner firm in operating business, in which partnership is two or more parties' commonness or responsibility in undertaking business strategy in certain period of time and in getting mutual profit by interdependence, as included in Article 25 of Law Number 20 of 2008 about Micro-, Small- and Medium-size enterprises stating that a concept of partnership is essentially interdependency in capital, human resource and technology aspects.

The establishment of partnership between venture capital firm and business partner firm is explained in Anders Isaksson's study entitled Studies on the venture capital process stating that to understand issues associated with the venture capital process, it is important to clearly describe how the process works. Bygrave and Timmons described the process as consisting of four different phases: 1) the investment decision, 2) contracting, 3) control and value adding, and 4) exit. Other authors, such as Tyebjee and Bruno, identified five principal activities carried out by venture capitalists: 1) deal origination, 2) deal screening, 3) deal evaluation, 4) deal structuring, and 5) post-investment activities.<sup>8</sup>

The partnership between venture capital and business partner firms occurs because Business Partner Firm borrows capital to venture capital Firm in order to get capital and facilitation in running its business. This partnership established by giving capital and facilitation is governed in Article 10 of Financial Minister's Regulation Number 18/PMK.010/2012 about Venture Capital Firm stating that "Venture Capital Firm business activity as intended in Article 2 can be accompanied with providing training and facilitation to the business partner firm in administration, accounting, management and marketing areas, and in other areas supporting the business activity of venture capital firm" and in Article 2 clause (4) of Financial Service Authority's Regulation Number 35/POJK.05/2015 about the Organization of Business for Venture Capital Firm. In other words, the development of venture capital business is dependent on the good relation between venture capital and business partner firms.

<sup>5</sup> Amirudin and Zainal Asikin, *Pengantar Metode Penelitian Hukum*, Raja Grafindo Persada, Jakarta, 2004, p.34

<sup>6</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Prenadamedia Group, Jakarta, 2014, p.136

<sup>7</sup> KPHN Hoedhiono Kadarisman, *Modal Ventura Alternatif Pembiayaan Usaha Masa Depan*, PT Indonesia Basic Economy Coporation, Jakarta, 1995, first edition, p. 125

<sup>8</sup> Anders Isaksson, *Studies on the venture capital process*, Umeå School of Business, UMEÅ UNIVERSITY, 2006, p. 43

Meanwhile, venture capital is an attempt of encouraging innovation and economic growth; venture capital is also an important means of making legal and regulatory revolution that can improve the state's economic growth. Venture capital funds are also viewed as Alternative Investment Funds (AIFs). This is remarkable, because it is widely acknowledged that this asset class does not impose systemic risk to the financial market. On the contrary, venture capital is usually viewed as the key ingredient to job creation and economic growth.<sup>9</sup> In addition to many benefits obtained from venture capital partnership agreement, financing institution and partnership also have some weaknesses, as explained by Paul Gompers and Josh Lerner "A single limited partnership agreement governs the relationship between the limited and general partners over the fund's life of a decade or more. Unlike other agreements, like employment contracts or strategic alliances, these contracts are rarely renegotiated".<sup>10</sup>

Recalling that venture capital is equity participations in nature, the venture capital firm runs this business not expecting for the profit in short term. The investor involved in venture capital will enjoy its profit only after the business partner firm it helps has yielded dividend. It is here the profit of small-scale enterprise getting this grant is located. Nevertheless, it does not mean that the firm getting venture capital grant can be relaxed. Otherwise, it instead should work hard along with the investor that supervises the management, as both parties assume the risk of loss equally when their business fails.<sup>11</sup> Similarly, in allocating fund to the business partner firm, the venture capital firm should consider the following matters. Firstly, the power of management (management team) is very decisive in organizing the activities inside and outside firm. They have ability, broad and in-depth thinking and experience with the business to be managed. Secondly, the market that has been mastered should have adequate growth prospect, can absorb product and service produced in long term. Price competition and appearance quality are absolute requirements to penetrate into the broad market.<sup>12</sup> Considering the broader marketplace of business partner firm, the venture capital firm will organize the management more easily later so that the business partner can develop better.

### **Regulation of Capital Gain Giving by Business Partner Firm to Venture Capital Firm**

The capital gain giving between Venture Capital and Business Partner Firms has been governed in Article 8 of Financial Minister's Regulation Number 18/ PMK.010/2012 about Venture Capital and Article 22 of OJK's Regulation Number 35/POJK.05/2015 about the Business Organization of Venture Capital Firm governing the determination of capital gain, stating that "The financing based on profit sharing principle as intended in Article 6 clause (1) letter a number 4 is conducted in the form of capital investment to Business Partner in certain period of time for productive business activity by sharing the profit according to the parties' agreement".

There has been a regulation governing capital gain but, it has not detailed and governed yet the percentage capital gain to be issued by business partner firm to the venture capital firm. For that reason, some problems will occur in the future. Although the OJK's Regulation Number 35/POJK.05/2015 has governed the capital gain and Article 8 of Financial Minister's Regulation Number 18/ PMK.010/2012 about Venture Capital has governed the profit sharing based on the profit yielded from the difference of total income, the percentage of capital gain has not been governed yet. The absence of regulation governing the percentage capital gain sharing actually leads the businesspersons to develop clauses of agreement arbitrarily that can harm one of parties. Otherwise, a clear regulation governing the percentage capital gain in legislation will facilitate the development of clauses in the agreement.

In addition to meeting the specified requirement and procedure in agreement, and budgeting corresponding to the law, Article 8 of Financial Minister's Regulation Number 18/PMK.010/2012 about Venture Capital has governed about budget and profit sharing of a business but has not governed yet the percentage capital gain; it only governs the percentage on mutual consensus. It will generate legal issue in the future, because despite clauses of agreement developed, the absence of regulation governing the consequence of agreement can be the problem in venture capital business.

In relation to the essence of justice in contract agreement, some scholars including John Locke, Rosseau, Immanuel Kant, and John Rowls proposed an idea about contract-based justice. Those thinkers realized that when contract and right and obligation resulting from it are not complied with, business community will not work. Therefore, without contract, people will not be available to be bond to and dependent on other party's statement. Contract provides a way of guaranteeing that each of individuals can keep his/her promise, and it allows for the transaction between them.<sup>13</sup> The presence of law certainty established in the agreement reveals the parties' responsibility in establishing partnership.

For the just capital gain sharing to be realized, particularly the venture capital firm needs a provision of legislation guaranteeing the risk over capital grant given to business partner firm when the capital invested in the business partner firm is lost, an alternative solution model should be sought in order to prevent it from affecting the operation of business between both parties, a new regulation should be developed emphasizing more on the percentage capital gain giving, and sanction should be imposed when the venture capital firm was lost because the business partner firm does not give its capital gain. But in reality, the agreement between venture capital and business partner firms related to the percentage capital gain runs inconsistent with the original agreement. In this case, legal consequence occurs because the capital gain the venture capital firm should receive is not

<sup>9</sup> Erik P.M. Vermeulen and Diogo Pereira Dias Nunes, *The Evolution and Regulation of Venture Capital Funds*, Lex Research Ltd, 2012, p. 6

<sup>10</sup> Paul Gompers dan Josh Lerner, *The Venture Capital Revolution*, The Journal of Economic Perspectives, Volume 15, Number 2, 2001, p. 154

<sup>11</sup> Budi Rachmat, *Modal Ventura "Cara Mudah Meningkatkan usaha kecil & menengah*, Ghalia Indonesia, Bogor, 2005, First Edition. pp. 148-149

<sup>12</sup> KPHN Hoedhiono Kadarisman, *Modal Ventura Alternatif Pembiayaan Usaha Masa Depan*, PT Indonesia Basic Economy Corporation, Jakarta, 1995, first edition, pp. 122-123

<sup>13</sup> Agus Yuha Hermoko, *Hukum Perjanjian Asas Proporsionalitas Dalam Kontrak Komersial*, Kencana Prenada Media, Jakarta, fourth edition, p.52

given by the business partner firm or the percentage profit given is inconsistent with the business capital provided before in the clauses of agreement.

Article 1322 of "KUHPerduta" (Civil Code) explains whether or not the business partner firm can perform its obligation in capital gain giving, unless in an agreement there is an illegal or void substance that can be proved with human error or fraud. Thus, it can be concluded that when the business partner firm has entered into an agreement with venture capital firm related to capital gain, the business partner firm should comply with their obligation, unless the agreement is illegal by means of proving the agreement illegality.

The provision of Articles 1633-1635 of KUHPerduta (Civil Code) governs about profit and loss as explained in the following: "Article 1633 of KUHPerduta(Civil Code) states that "If in an incorporation agreement the share of profit and loss for individual participants is not specified, the share of individual participants is calculated according to their own size of capital contributed to the business", Article 1635 of KUHPerduta explains that the agreement giving profit to one party only is void. However, it is allowed to make an agreement that entire loss will be assumed by one or more participants only".

Furthermore, regarding the loss due to one of parties, Article 1630 and 1632 of KUHPerduta explains that Individual parties should compensate the loss the incorporation suffers from due to their fault, while the loss may not be calculated with the profit that has been included into incorporation owing to its effort and activity".

From the provisions in those articles, the following conclusions can be drawn:

1. Each party (both venture capital and business partner firms) performing the management of incorporation obligatorily assumes the loss suffered from by the incorporation as a result of its fault.
2. In the case of a party (business partner and venture capital firms) cannot perform the agreement unilaterally or in the agreement causes one party enjoy profit while another suffer from loss. In the agreement, all of parties (business partner and venture capital firms) should gain profit equally.
3. The law will explain that every bond made by the parties in incorporation should received the condition that sometimes the incorporation's wealth increases and sometimes it decreases due to the loss. So in this case, the parties investing the capital only in the incorporation will assume the loss larger than its input share in the incorporation.

Essentially, both venture capital and business partner firm should perform their right and obligation in the agreement they have entered into, and be responsible for the profit and the loss gained.

## **B. Law Protection for the Venture Capital Firm in the case of Business Partner Firm Does Not Give the Capital Gain**

### **Anticipative Measure the Venture Capital Firm Takes in the case of Business Partner Firm Does Not Give the Capital Gain**

Venture capital firm serves as an alternative fund source for the Business Partner firm to keep managing its business and developing in both local and international markets. In addition to be an alternative financing, venture capital is also expected to help improve economic policy packages issued by government. Therefore, technological VC along with startups and some conventional VCs have participated in the establishment of a new organization named *Asosiasi Modal Ventura dan Startup Indonesia* (Indonesian Venture Capital and Startup Association, thereafter called AMVESINDO) on May 3, 2016, aiming to contribute actively to the growth of micro-, small-, and medium enterprises and to building Indonesian economy. Along with Singapore venture capital and private equity association (SVCA), AMVESINDO establishes ASEAN Venture Council that will utilize each other's power, strengthens, promote, and supports entrepreneurship ecosystem and its supporting financial ecosystem in ASEAN region.<sup>14</sup>In other words, venture capital firm investing in micro-, small-, and medium- scale enterprise sector will very helpful to the community or the employers who want to develop their business into the larger one. Recalling that Article 1 clause (2) of RI Government's Regulation Number 4 of 1995 about Income Tax over Venture Capital Firm's income from Securities Trading Transaction or Investment Transfer to its Business Partner Firm explains that business partner firm is the small- and medium-scale enterprises conducting activities in business sectors specified by financial minister.

In selecting the potential business partner firms, venture capital firm has some divisions responsible for preventing the financing from not performing the capital gain. One starting point of venture capital finance is venture capital officer or investment division. Legal officer has obligation and authority of conducting juridical analysis on any aspects related to financing/investment plan pertaining to legal subject, legal object and collateral submitted by Business Partner Firm. In venture capital, there are also appraiser and investment administrator involved in fund disbursement and divestment.<sup>15</sup>

Those divisions are intended to be responsible for their own duties to make the business run smoothly. John Rawls suggested that from theory of justice perspective, the most important basic duty is to improve the just institutions. This duty consists of 2 (two) parts: firstly, being obedient to and performing our share in the institutions; secondly, helping develop just regulation when such a regulation is inexistent.<sup>16</sup>

<sup>14</sup><http://amvesindo.org> accessed on February 25, 2018

<sup>15</sup> Tami Rusli, *Prosedur Kemitraan dan Proses Pembiayaan Perusahaan Modal Ventura Terhadap Perusahaan Pasangan Usahanya, Keadilan Progresif*, Vol 5 Number 1 March 2014, p.60

<sup>16</sup> John Rawls, *TEORI KEADILAN (Dasar-Dasar Filsafat politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara)*, Pustaka Pelajar, Yogyakarta, 2011, Second Edition, p. 432

Meanwhile, in providing fund to the business partner firm, the venture capital firm should consider the business prospect of potential business partner firm. It is governed in OJK (Financial Service Authority)'s Regulation No. 35/POJK.05/2015 in Article 9 clause (1) stating that "Business activity of Venture Capital Firm, Venture Capital Firm Sharia and/or Sharia Business Unit as intended in Article 2 clause (1) and/or Article 6 clause (1) is intended to the potential Business Partner and/or Debtor that has productive business and/or ideas of developing productive business". Thus, venture capital firm should select and consider the prospect of its business capital firms in the future, rather than gives the capital (fund) directly.

Through selecting a perfectly competent business partner and managing the capital well, and establishing a new organization concerning venture capital, AMVESINDO along with Singapore venture capital and private equity association (SVCA) establishes ASEAN Venture Council that will mitigate the potential loss experience by venture capital firms. John Rawls says that perfect competency is a perfect procedure in the term of efficiency. The condition needed is of course very specific, and their need is very rarely met in real world. Moreover, market failure and imperfectness are often worrying; the limitations such as inadequate information should be recognized and corrected.<sup>17</sup> It is here that the venture capital firm's role is needed in selecting the potential business partner firm with commitment to establish business cooperation.

In preventing the non-performance from occurring due to, among others, the business partner firm not giving capital gain to venture capital firm, Paul Gompers and Josh Lerner say that Specialized financial intermediaries, such as venture capital organizations, can alleviate these information gaps and thus allow firms to receive the financing that they cannot raise from other sources. The tools that venture capital firms have to address these information issues are to scrutinize firms intensively before providing capital and then to monitor them afterwards. The monitoring and information tools of venture capitalists include: meting out financing in discrete stages over time; syndicating investments with other venture capital firms; taking seats on a firm's board of directors; and compensation arrangements including stock options.<sup>18</sup> In other occasion, Paul Gompers and Josh Lerner suggest that The tools that venture capital firms have to address these information issues are to scrutinize firms intensively before providing capital and then to monitor them afterwards.<sup>19</sup> The venture capital firm should study first the prospect business partner, and then invest its capital and supervise the operation of its business partner firm. From Paul Gompers and Losh Lerner's explanation, it can be found that studying and selecting the potential business partner firm will determine whether or not the partnership performs well.

Venture capital firm should choose the potential (prospect) business partner firm selectively. The potential business partner firm should meet the specified criteria. In addition, the venture capital firm should analyze the financing of potential business partner in all aspects including financial, business, and legal. Another measure the venture capital should take is to optimize hands-on management in the business partner company. Venture capital firm should give management aid maximally to the business partner firm, in order to minimize the business failure in the business partner firm as the legal consequence of non-performance, one of which is the capital gain not given by business partner firm.<sup>20</sup>

The obligations mentions above are inseparable from the clauses of agreement into which the venture capital and the business partner firms have entered. The agreement should be based on the existing law, so that the clauses of agreement will not be harmful to one and another, as it is developed for the parties' interest in order to perform their own right and obligation.

#### **Legal Measure the Venture Capital Firm Takes against the Business Partner Firm not giving Capital Gain**

There some factors leading to a dispute between venture capital and business partner firms. *Firstly*, the venture capital firm's incapability of recognizing its business partner will highly affect the venture capital business, because when the venture capital firm does not known well its business partner, it will only assume to try anything without taking the sale value of business partner's production output into account. Thus, the loss will occur, so that the business partner cannot give capital gain agreed before. *Secondly*, there is no legal foundation underlying their business process, so that the awareness of fulfilling right and obligation concerning the giving of capital gain agreed in the agreement cannot be realized well.

Although the giving of capital gain has been governed in Article 8 of Financial Minister's Regulation Number 18/PMK.010/2012 about Venture Capital Firm and in Financial Service Authority's Regulation Number 35/POJK.05/2015 about the Organization of Venture Capital Firm Business, the problem of percentage capital gain has not been governed specifically. It indicates the business persons' low understanding and appreciation on the law to protect their business activity.

From the explanation above, when a legal problem occurs between business partner and venture capital firms related to non-performance in the term of capital gain, it can be explained in articles 1630, 1642, 1644, 1237, 1266 and 1267 KUHPerdata (Civil Code).

*Firstly*, Article 1630 of KUHPerdata (Civil Code) states that "Individual parties should compensate the loss the incorporation suffers from due to their fault, while the loss may not be calculated with the profit that has been included into incorporation owing to its effort and activity". From this statement, it can be summarized that the burden of loss is imposed to venture capital and business partner firms committing legal deed and in the case of there is a fault in committing the legal deed. However, for

<sup>17</sup> *Ibid.*, p 349

<sup>18</sup> Paul Gompers and Josh Lerner, *The Venture Capital Revolution*, The Journal of Economic Perspectives, Volume 15, Number 2, 2001, p.155

<sup>19</sup> *Ibid.*,

<sup>20</sup> Khotibul Umam, *Modal Ventura (Alternatif Pembiayaan Usaha Micro, Kecil Menengah, dan Koperasi)*, BPFE, Yogyakarta, 2010, First Edition, p. 102

the interest of third party having legal relation to the parties, they will repay first their liability from the venture capital firm's wealth (property). For the loss of alliance's wealth as the result of repayment to the third party, the venture capital firm is entitled to demand it again from the business partner firm not giving capital gain according to the original agreement they have entered into.

*Secondly*, in principle, according to Article 1642 of KUHPerdata (Civil Code), although the venture capital firm is the management of incorporation and binds its business partner firm, other business partner firm participants are not bond to all of debts made by one of participants not giving capital gain to the venture capital firm.

*Thirdly*, from Article 1644 of KUHPerdata (Civil Code) jo Article 1642 of KUHPerdata (Civil Code), it can be found that a participant managing the incorporation can bind only other participants in the incorporation, in addition to binding the incorporation. Thus, it can be concluded that when in a legal deed or action, a participant does not get authority from other participants, according to the provision of Article 1644 of KUHPerdata (Civil Code) jo Article 1642 of KUHPerdata (Civil Code), such the legal deed or action will not bind other participants in the incorporation.<sup>21</sup>

*Fourthly*, from the explanation of Article 1237 of KUHPerdata (Civil Code), it can be found that the transfer of risk to the debtor since the agreement is entered into, both parties and when non-performance occurs, the debtor should be responsible for the non-performance. Similarly, in agreement of venture capital financing, the agreement into which venture capital and business partner firms have entered into is effective after the agreement is developed and when the business partner firm does not perform the capital gain as specified by both parties previously, the business partner firm should be responsible for reimbursing it.

*Fifthly*, from Article 1266 of KUHPerdata (Civil Code), it can be concluded that when the business partner firm is not cooperative or does not perform capital gain, the venture capital firm is entitled to cancel the agreement they have entered into. It can function as protection for the venture capital firm against the business partner firm not fulfilling their right and obligation, as long as it is not in contradiction with Law and decency.

*Sixthly*, according to Article 1266 of KUHPerdata (Civil Code), in an engagement occurring in a reciprocal agreement, when business partner firm does not perform its obligation as promised in the agreement, the venture capital firm, based on the business partner firm's non-performance, is entitled to choose *firstly* whether to compel the business partner firm to comply with the agreement when it can still be done, or *secondly* to demand for the cancelation of agreement and the compensation for the capital given, the loss, and the interest agreed from its business partner firm. John Rawls, states that fairness has two sides. On the one hand, it states how we can acquire obligation and *secondly*, how to impose the conditions for the institutions to be fair<sup>22</sup>. In other words, fault cannot cancel the agreement and perform the obligation specified in the agreement, unless it is proved according to the provision of Article 1337 of KUHP Perdata (Civil Code) stating that "a cause is prohibited, when it is specified so by law, or when it is in contradiction with decency or public orderliness. Otherwise, the agreement that has been entered into should be performed responsibly and fairly corresponding to the principle of balance (equilibrium). Schoordijk argues that the binding power of agreement should be found in the confidence generated among the opponents."<sup>23</sup>

## Conclusion

- A. The partnership between venture capital firm and business partner firm consists of four different phases: 1) deal origination, 2) deal screening, 3) deal evaluation, 4) deal structuring, and 5) post-investment activities; in other words, cooperation is needed between venture capital firm and business partner in operating business in economic development in both Indonesia and ASEAN region. The partnership itself contains commonness or responsibility in running their business strategy taken by two or more parties in certain period of time and to get mutual profit by interdependency. In partnership agreement, both venture capital and business partner firms should perform their right and obligation in the agreement they have entered into, and be responsible for the profit and loss experienced.
- B. Venture Capital Firm's responsibility in the case of Business Partner Firm does not give capital gain can be implemented in anticipative way, by means of selecting the potential business partner selectively and analyzing all finance of potential business partner, when legal problem occurs related to non-performance of capital gain, it can be explained in Articles 1630, 1642, 1644, 1237, 1266 and 1267 of Civil Code. It can also be done in repressive way, in which in an engagement occurring in a reciprocal agreement, when business partner firm does not perform its obligation as promised in the agreement, the venture capital firm, based on the business partner firm's non-performance, is entitled to choose *firstly* whether to compel the business partner firm to comply with the agreement when it can still be done, or *secondly* to demand for the cancelation of agreement and the compensation for the capital given, the loss, and the interest agreed from its business partner firm.

<sup>21</sup> Gunawan Widjaja, *Seri Aspek Hukum Dalam Bisnis Persekutuan Perdata, Persekutuan Fira Dan Persekutuan Komanditer*, Prenada Media, Jakarta, 2004, First Edition, pp.165-169

<sup>22</sup> John Rawls, *TEORI KEADILAN (Dasar-Dasar Filsafat politik Untuk Mewujudkan Kesejahteraan Sosial Dalam Negara)*, Pustaka Pelajar, Yogyakarta, 2011, Second Edition, pp.144

<sup>23</sup> Herlien Budiono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia*, PT Citra Aditya Bakti, Bandung, 2015, Second Edition, pp 393

## Recommendation

- A. The regulation and implementation of capital profit gain between venture capital and business partner firms has governed the capital gain giving, particularly in Presidential Regulation Number 9 of 2009 about Financing Institution, Financial Service Authority (OJK)'s Regulation Number 35/POJK.05/2015, and Financial Minister Regulation Number 18/PMK.010/2012 about Venture Capital Firm, but the problem of percentage profit sharing and deadline of capital gain giving has not been governed in detail in the existing regulations. The existing regulations govern profit sharing and capital gain sharing only, but not percentage capital gain. There should be a special regulation governing the percentage capital gain giving, in order to prevent the venture capital and the business partner firms from suffering from loss with the regulation governing it presently.
- B. In establishing partnership, before investing its fund, the venture capital firm should study intensively the prospect (potential) business partner firms that meet the criteria; when all specified criteria have been met, it can invest its fund but it should also monitor the operation of business. Therefore, studying and selecting the potential business partner firm will determine whether or not the partnership performs well.

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