



UDC 332; DOI 10.18551/rjoas.2023-01.05

THE LEGAL ASPECTS OF VENTURE CAPITAL AS AN ALTERNATIVE FINANCING

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ABSTRACT

This paper aims to discuss the legal aspects of venture capital businesses in Indonesia as an alternative financing instrument in assisting the capital aspect for businesses to develop the corporation through venture capital. The results of the research in this paper are that in establishing and operating a company, it requires capital, one of which is through alternative financing, namely venture capital. The legal aspects of venture capital in legal regulations and policies are needed to support the corporation, neither the corporation founded by the State and by private parties, but the regulations and legal policies of venture capital are still unable to provide adequate legal protection. Therefore, to strengthen the legal protection of venture capital businesses, the government must be supported as a regulator and facilitators and community businesses which that venture capital can develop better so that not only large companies, but also small firms and medium can be helped by the growth of venture capital.

KEY WORDS

Venture capital, alternative financing, corporation, legal protection, business law.

The existence of laws and regulations as legal provisions that regulate the living system of all aspects of life is very important, including legal relations in the field of economic activity (Rahardjo; 1979). One of the legal provisions regulating economic activity is a provision regulating venture capital financing institutions as one of the financing institutions for small and medium firm enterprises, which are new institutions as the development of non-bank financial economic institutions. In Indonesia, this venture capital is expected to also develop (James; 1992) but initially directed at empowering small and medium firm companies often experiencing capital difficulties. In the past regulations and legal proceedings were greatly ignored, while economic considerations, particularly to obtain the greatest profit, took precedence. The October 1988 Policy Package (PAKTO 88), which liberalized the banking sector with the ease of establishing new banks resulted in banks spreading across the country. This can be used by businesses more widely to obtain business capital, but small and medium firm companies remain difficult to obtain capital from these banks, whereas to obtain capital from the bank, because it does not meet banking requirements (bankable) (Rahardjo; 1979).

The problem is that there is a distant inequality between economic actors who can get the support of the ruler while small economic actors do not get this support, it was not even able to meet economic or political requirements as a result of the emergence of several banks that can only be used by large entrepreneurs or entrepreneurs who are already established and able to meet banking requirements (bankable). Meanwhile, small entrepreneurs remain unable to take advantage of existing banking institutions. As a result of this uneven opportunity in terms of obtaining capital, there are injustices and gaps in the growth of the business world (Robyn Owen; 2022).

Based on this description, the existence and role of financing institutions in the form of venture capital in Indonesia is important to be researched, because it is institution that starting to develop, of course it has an influence on the development of the business world and its legal institutions. Unfortunately, this institution is not followed by the establishment of legal institutions that regulate the legal relationship between venture capital companies and financed companies (business partners).



METHODS OF RESEARCH

This paper is descriptive analytical the method used in this research is normative juridical by using primary sources of legal material through interviews with a number of companies that utilize venture capital while secondary legal materials with tracing techniques through library research, especially the study of legal materials in the form of regulations, agreements, literature books, results of research and reports, as well as other articles on the development of venture capital in Indonesia and abroad, so that conclusions can be drawn regarding the important matters needed for the development of venture capital in Indonesia.

RESULTS AND DISCUSSION

The existence of venture capital as a form of financing institution in Indonesia which is regulated by Presidential Decree No.61 of 1988 and Decree of the Minister of Finance No.1252/KMK.013/1988 that are expected to provide financing to small and medium firm companies in Indonesia, so that there is a balance of opportunities to obtain capital for all levels of business, and many more related regulation (Richardson; 1987). The implementation of venture capital is as a work partner and business partner for companies financed by venture capital, legal relationship is based on an agreement. Legal relationship in venture capital company with a partner company based on an agreement.

According to language terms "Venture Capital is invested or available for investment in stocks, especially funds is invested of never unseasoned enterprise, called also equity capital or risk capital" (Company; 1984). A venture capital company is a business entity that conducts financing business in the form of equity participation into a company that receives financing assistance (Investee Corporation) for a certain period of time. Based on this formula, it can be concluded that venture capital is capital/financing fund in the form of equity participation in a company with a certain period of time (Muliadi; 2013).

Venture capital activities have five elements, namely: sources of funds, management capabilities, supervisory institutions, asset liquidity and business opportunities. A Venture capital is a high-risk activity because in venture capital financing there is no certainty that the capital invested in partner companies will receive high profits (Sunaryo; 2008). The venture capital financing model doesn't have a legal basis that can minimize risks, even if it is to bear the risk of business failure (Buchner; 2017). Even if the partner company makes a profit, it isn't necessarily these profits can be immediately converted into dividends which are directly distributed to shareholders. The law of venture capital financing is conducts by equity participation in a business partner company, not by providing credit (Dimitris Christopoulos; 2021).

Financing by venture capital companies to their business partner companies in the form of equity financing, loan financing, a combination of capital participation and loans, financing and management services (Rossi; 2015).

Financing made by venture capital to business partner companies is in accordance with the conditions of the growth stage and is classified into several levels, including early stage financing consisting of seed financing, start-up, first stage; Expansion Financing consisting of second stage, third stage, fourth stage; acquisition consisting of acquisition financing and buyout management."(NASBIC 1987) For each level of company growth, there are available other financing alternatives which different at each level. The type of business also determines the various forms of financing that will be provided. Even venture capital almost never stands alone, therefore it must always be designed to optimize the financing structure that utilizes all available sources of funds.

In order to increase economic development, venture capital can stimulate the growth and development of medium and small businesses. Based on these conditions, it is necessary to have an alternative financing in the form of equity, namely venture capital because venture capital companies can bear the risk for companies that cannot afford according to conventional banking financing measures. Financing through venture capital is able to overcome the lack of equity from entrepreneurs and reduce the burden on partner



companies (Nurcahyo; 2020). This condition is a factor that encourages the growth of venture capital and with the presence of venture capital, it is easier for small and medium firm companies that need financing.

Small and medium firm companies have opportunity to grow and develop their business activities. However, the complaint of every small and medium firm company is that there is no capital or lack of capital. Sources of capital for small and medium enterprises tend to use their own funds to run their business activities. When small and medium firm enterprises seek loans, the type of loan depends on whether the loan is for initial investment or for business expansion (Golis; 2002). For initial investment, small and medium firm companies generally take long-term loans from relatives or from friends as investors. "As for short-term loans, they usually apply for loans from financial institutions (Permana; 2018).

"Initially, capital assistance for the development of small and medium firm companies made it easy to obtain credit however, these small entrepreneurs admitted that they had difficulty in applying for loans to official financial institutions such as bank due to difficult requirements and strict selection in providing capital loans. In this case, the Government assists small and medium firm enterprises through financial institutions by establishing various financing institutions or cooperation that aim to develop small and medium firm enterprises's business activities (James; 1992). The Government issued a regulation on Financial Institutions to determine guidelines or requirements in providing loans to small and medium firm companies in a certain proportion of their portfolio and based on certain conditions that are easier; provide a framework for credit guarantee patterns to help bear risks; provide interest subsidies (Siallagan; 2020).

The Government of Indonesia's attention to national small and medium entrepreneurs has actually been carried out for a long time. In 1973 the government established the Indonesian Credit Insurance (Askrindo) and the Indonesian Business Development Materials. PT Indonesian Credit Insurance (Askrindo) is in charge of providing credit insurance facilities for small entrepreneurs so that they can get small investment credit facilities or permanent working capital loans. PT Bahana Pembinaan Usaha Indonesia (Persero) was established as a government financial institution that specializes in financing small and medium enterprises, particularly in the form of equity participation (Muliadi; 2013). The existence of venture capital companies and their activities in Indonesia is expected to play a role in developing partner companies, especially small and medium firm companies (Robyn Owen; 2022). This is the specificity of venture capital in Indonesia because there are certain parties who state that the concept of venture capital to finance small and medium firm companies that is applied in Indonesia is less appropriate when compared to the concept of venture capital in other countries, but for Indonesia of course it's also possible to apply a different concept.

Venture capital in America generally begins to finance joint venture companies at the start-up corporation stage and leaves the joint venture company when it goes public, this is where venture capital has an important role to play in increasing capital market activities (Bruton; 2005). Venture capital in America generally finances new businesses, which is actually a bit risky, but these businesses can grow and marketable capital and are considered as future businesses, so it is an opportunity for venture capital to make a profit (Wong; 1989). In the United States, venture capital generally finances companies engaged in high technology that require large funds, while the entrepreneur concerned does not have sufficient capital. Then the financing is done with venture capital, with the hope that after being established the company will develop quick yielding, so that the high-risk capital venture will return in a short time, and even benefit from the sale of its shares (capital gain) with large profits. Also, as a result, the stock price has doubled (Arundale; 2019).

Venture capital activities in Japan are aimed at financing large companies that will be established but still lack capital, with the hope that these large companies will engage in even larger business activities, so that they are also expected to develop quickly and earn fast profits as well (Guilhon; 2020).

South Korea started its venture capital business with the establishment of the first venture capital company, namely Korea Technology Advanced Corporation (K-TAC), namely



Korea Technology Advanced Corporation (K-TAC), Korea Technology Advanced Corporation (K-TAC), aims to commercialize the results of research and development of science from the Korean Institute of Science and Technology. In 1984 more than 20.5 (twenty point five) billion won, provided funds for the development of venture capital companies in South Korea, which is now South Korea is one of the Asian tiger countries in the field of economic development (Wong; 1989).

In Singapore, the success of science and technology development involving the role of venture capital, but also cannot be separated from the participation of government agencies or institutions, such as the Economic Development Board and the Singapore Science Council that responsible for promoting and administering the science park. The role of the Singaporean government for venture capital development is also evidenced through the Singapore government-owned Economic Development Commission agency, which manifests funds for venture capital through two approaches, namely direct investment for funding and venture capital projects and investment cooperation with local companies for funding and venture capital projects (Wong; 1989).

In Indonesia, the situation is very different, the socio-economic background is also different, even the philosophy of life and ideology of life are also different, so it's naturally that the movement of their business activities is also different. In fact, venture capital activities in Indonesia don't follow the concept of venture capital in Asia Pacific countries. Therefore, the main goal in Indonesia is not to finance high-tech companies, but to finance small and medium firm companies that are usually not attracted by foreign investment (Safrina; 2013).

Venture capital activities in Indonesia seem to have a special mission, which is somewhat different from the American's concept. This special mission is to finance small and medium firm companies. Hopefully that small companies that get a touch of venture capital develop well, so that this country there will be a balance of development and growth of the business world, medium and small scale businesses.

In Indonesia, the general principle is that venture capital companies want their partner companies to develop well, because the profits of venture capital companies depend on the success of the companies they finance. If the business partner company succeeds in growing, developing and making a profit, the venture capital company will also benefit, in the form of dividends and also the value of its shares will increase (capital gain). But on the other hand, if the partner company fails, the venture capital company also suffers losses, and it may even decrease the value of its shares (capital loss). Until now, when compared to the number of small companies in Indonesia with the number of small companies that have been financed by venture capital, the comparison is still far and only a small number of small companies have obtained financing from venture capital.

Based on data from the Ministry of Finance, the venture capital division Each province has established a venture capital company that was pioneered by the government there are 29 venture capital companies currently in Indonesia. Each venture capital company within a period of 3 to 5 years can finance partner companies of approximately 80 companies, so it is hoped that little by little this venture capital activity can finance the large number of small and medium firm companies as mentioned above more broadly (Yunita; 2013). In Indonesia, a venture capital company was established with a mission to help national small and medium firm entrepreneurs, without depending solely on profit targets, but also paying attention to broader aspects of national development.

Financial institutions including venture capital in the context of running their business are prohibited from withdrawing funds directly from the public in the form of demand deposits, savings, deposits, issuance of promissory note, the funds obtained by the venture capital company are very limited, namely, among others, investment funds from equity participation or the sale of shares from the venture capital company itself and profits and funds obtained from loans (Sunaryo; 2008). Based on the concept stated by Clinton Ricardson, that venture capital can include capital by buying shares directly from the company being financed, with loan or a combination of both (Richardson; 1987). The limited sources of funds that can be obtained by venture capital companies will result in very limited funds, so that this becomes an obstacle and is also limited to financing business partner



companies, which are small and medium firm companies (Chambers; 2020). If the macro economy experiences instability, then the development of the business world, including corporate financing with a capital participation system as practiced by venture capital, will also face various obstacles, especially during high bank interest rates, so that financing with a capital investment system will inevitably experience setbacks (Siallagan; 2020). If the bank interest is high, people prefer to invest their money in the bank in the form of deposits or savings which are surely every month or even daily to get a fairly high interest. So that venture capital companies will have difficulty obtaining funds, thus the financing activities of equity participation carried out by venture capital companies will be very limited. In fact, the high interest rates on loans or loan interest greatly affect the growth and development of companies in general. The higher the credit interest, the more difficult it is for the business world to develop their company (Ramsinghani; 2021). Although bank interest is a conventional interest based on the agreement, but if left unchecked there will be unstable changes, it can even become very high, therefore according to the author there is a need for control, so that credit interest is not too high and economic stability also relatively secure. This control can be carried out by a policy decision or by laws and regulations governing the highest interest rate, which should not be exceeded.

Venture capital as a business activity, then of course the review is about company law, therefore the discussion is regarding the form of business entity. Article 3 paragraph (2) Decree of the President of the Republic of Indonesia No.61/1988 in conjunction with Article 9 paragraph (2) Decree of the Minister of Finance of the Republic of Indonesia No. 1251/KMK.013/1988 states that a venture capital company must be in the form of a Limited Liability Company or Cooperative.

The occurrence of an agreement to be poured into a financing agreement between a venture capital company and its business partner company also begins with a concept agreement from the venture capital company or investor, which is commonly referred to as a standard contract (Golis; 2002). Standard contract from a term known in Dutch "*standaard voorwaarden*" or in German "*algemeine geschäfts bedingung*". "Standard" means a directive, measure, reference, which has a fixed meaning that can be a general guideline, so that a standard agreement means an agreement whose standards or size have been determined. Traditionally an agreement is considered to occur based on the principle of freedom of contract between two parties who have a balanced position and both parties try to reach the agreement necessary for the agreement to occur through a process of bargaining negotiations between producers and consumers. The only possibility given is to choose one of the alternatives provided by the manufacturer. Conditions proffered by producers, in the form of clauses that are considered burdensome to consumers, which often appear in standard agreements called exoneration clauses (in Dutch: *exoneratie clause*) or exclusion clauses (in English: *exemption clause*). "In English legal literature, an exoneration clause is called an exclusion clause, the exoneration clause is called an exclusion clause and some even give an equivalent word (exception clause)." In United States law literature, the clause is called an exculpatory clause, a warranty disclaimer clause, and a limitation of liability clause (Guilhon; 2020).

"According to Mariam Darus Badruzaman, the definition of an exoneration/exemption clause is a clause that limits the liability of the producer or service provider or creditor (Badruzaman; 1994). Before there is an agreement between the two parties, namely between the venture capital company as a venture capitalist and the business partner company as a prospective investee corporation, there is a negotiation or negotiation to reach an agreement which is described as the terms of the agreed will (*overeenstemmende wilsverklaring*) between the parties.

CONCLUSION

The re-evaluation of venture capital in Indonesia as a capital institution for the business world in Indonesia is carried out because it can only be used by large companies, so that small and medium firm businesses do not get the opportunity to obtain capital to develop



their businesses small and medium enterprises. With the Presidential Decree Number 61/1988 and the Decree of the Minister of Finance Number 1251/KMK.013/1988, the legal basis for the existence of venture capital financing institutions is clear, but the rules for the performance of venture capital do not yet exist, so that in practice it is based on the principle of freedom of contract, which implementation is based on the agreement (agreement) submitted to the parties. Since venture capital carries a high risk, venture capital companies need to be careful to include their capital with business partners, even to reduce risk, PMV determines the terms unilaterally, so that a standard agreement occurs. Standard contract if there is no supervision (control) will cause an imbalance, so that the creditor will tend to put pressure on the debtor, while the debtor as a weak party is usually forced to accept what is required by the creditor because of his needs.

REFERENCES

1. Arundale, K. (2019). *Venture Capital Performance: A Comparative Study of Investment Practices in Europe and the USA* Taylor and Francis.
2. Badruzaman, M. D. (1994). *Aneka Hukum Bisnis*. Alumni. Bandung, Alumni.
3. Bruton, G. D., Vance H Fried, and Sophie Manigart (2005). "Institutional Influences on the Worldwide Expansion of Venture Capital." *Entrepr. Theory and Practice* 29 (6): 739.
4. Buchner, A., Abdulkadir Mohamedand Armin Schwienbacher (2017). "Diversification, Risk, and Returns in Venture Capital." *Journal of Business Venturing* 32(5): 527.
5. Chambers, D., Anson, M., Black, K., & Kazemi, H. (2020). *Alternative Investments*, Wiley.
6. Company, G. C. M. (1984). *Webster's Third New Dictionary of the England Language*. London: 2542.
7. Dimitris Christopoulos, S. K. (2021). "Syndication Networks And Company Survival: Evidence from Eur. Venture Capital Deals." *Int. Journal of Entrepr. Finance* 24(2): 109.
8. Golis, C. C. (2002). *Enterprise and Venture Capital: A Business Builders and Investors Handbook*. Australia, Allen & Unwin Pty Ltd.
9. Guilhon, B. et al (2020). *Venture Capital and the Financing of Innovation* Wiley.
10. James, K. (1992). *Aspek-aspek Finansial Usaha Kecil and Menengah: Studi di ASEAN*. Jakarta, LP3ES.
11. Muliadi, A. (2013). *Hukum Lembaga Pembiayaan*. Jakarta, Akademia Permata.
12. NASBIC, N. A. o. S. B. I. C. (1987). *Layman's Guide to The Legal Aspects of Venture Investments*. Washington, Nasbic: 62.
13. Nurcahyo, E. (2020). "Hukum Modal Ventura Di Indonesia".
14. Permana, S. (2018). *Peran Perusahaan Modal Ventura bagi UMKM di Indonesia*. Jakarta, Yayasan Pustaka Obor Indonesia.
15. Rahardjo, S. (1979). *Ilmu Hukum*. Jakarta, Balai Pustaka.
16. Ramsinghani, M. (2021). *The Business of Venture Capital* Wiley.
17. Richardson, C. (1987). *The Venture Capital: Complete Guide to Venture Capital*. NY.
18. Robyn Owen, T. B., Javed Hussain & Osman Anwar (2022). "Solving the SME finance puzzle: an examination of demand and supply failure in the UK." *International Journal of Entrepreneurial Finance* 24(3-4).
19. Rossi (2015). "The Role of Venture Capital Funds in Financing Innovation in Italy- Constrains and Challenges for Innovative Small Firms." *Internasional Journal of Globalisation and Small Business* 7(2): 162-180
20. Safrina (2013). "Peranan Modal Ventura Sebagai Alternatif Pembiayaan Usaha Kecil and Menengah." *Kanun Jurnal Ilmu Hukum* 15(59).
21. Siallagan, S., M.T, Msc (2020). "Corporate Venture Capital, for Investing on Startup in Indonesia." *International Journal of Innovation and Research in Educational Sc.*, 4(3).
22. Sunaryo (2008). *Hukum Lembaga Pembiayaan*. Jakarta, Sinar Grafika.
23. Wong, R. K. G. C. K. C. (1989). *Venture Capital in the Asia Pasific Region: with Special Reference to Singapore*. Singapore, Toppan Co (S) Ltd: 237.
24. Yunita, S. (2013). "Efektivitas Penyaluran Modal Ventura Sebagai Alternatif Modal Bagi UMKM." *Kanun Jurnal Ilmu Hukum* 15(61).