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Drag-Along and Tag-Along Rights in the Perspective of Indonesian Company Law

Rinna Justisiana* and Togi Pangaribuan
Faculty of Law University of Indonesia, Jakarta, Indonesia
*rinna.justisiana@ui.ac.id

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Abstract
As technology develops in this Industrial Revolution of 4.0, technology companies have gained the spotlight among other business sectors. Many business actors are competing to establish a company or known as a start-up in the technology sector. These start-ups are also gaining attention from investors or venture capital companies interested in investing their funds for start-up growth. The fundraising to the company may be in the form of a debt, convertible note or equity. In terms of equity fundraising, as capital contribution or shares ownership, the founders of the start-up company will jointly partner with investors as the company's shareholders. This cooperation usually regulated under shareholders' agreement which some of the substances are rights and obligations of the shareholders. In addition to the rights of shareholders as regulated in Law Number 40 of 2007 on Limited Liability Company as lastly amended by Law Number 11 of 2020 on Job Creation or known as the Indonesian Company Law, Drag-Along Rights and Tag-Along Rights are commonly found under the modern-day investment-related shareholders' agreement. However, these two rights are not explicitly governed in the Indonesian Company Law. This article will analyze relevant provisions under the Indonesian Company Law towards the Drag-Along Rights and Tag-Along Rights enforceability.

Keywords: company law; drag-along; fundraising; shareholders' agreement; tag-along

I. Introduction

Prior to the enactment of current company law in Indonesia, historically, any matters related to the company were regulated under Article 36 to Article 56 of the Indonesian Commercial Code which originated from *Wetboek van Koophandel* (WvK). In 1971, the Indonesian Government enacted Law Number 4 of 1971 on Amendment and Addition to Article 54 of the Indonesian Commercial Code which regulated the shareholders' legal voting rights according to the number of its shares ownership in the company. Further, in 1995, for the first time Indonesia had a comprehensive company law as stipulated under Law Number 1 of 1995 on Limited Liability Company (Khairandy, 2009). Law Number 1 of 1995 was valid for 12 years until 16 August 2007 when new legislation on the limited liability company issued, namely Law Number 40 of 2007 on Limited Liability Company. Under Law Number 40 of 2007 on Limited Liability Company as lastly amended by Law Number 11 of 2020 on Job Creation (hereinafter referred to as "**Indonesian Company Law**"), a limited liability company or sometimes commonly referred to as just 'company' is a capital union established based on its shareholders' agreement. Even

though the Indonesian Company Law recently also acknowledge single-shareholder corporation for micro and small businesses. Indonesian Company Law and generally the company laws in other countries regulate similar subjects, among others, incorporation procedures, shares allotment and contribution, shareholders (including majority rules and minority protection), boards and secretary (as applicable), dissolution and insolvency, winding up, etc. In many countries, company law continues to be a rapidly changing subject and there is no promise of any respite (Oliver, 1994). The company laws also have become the primary legislation for other statutory provisions, such as investment, capital market, and insolvency laws. As a country with Civil Law system, Indonesian laws are sourced from the prevailing laws and regulations. Therefore, the Indonesian Company Law has become the primary legal source in relation to company matters.

According to the definition under Article 1 paragraph (1) of the Indonesian Company Law, below are the essential elements of a limited liability company:

1. Company or locally known as "PT" in Indonesian term, is a legal entity;
2. A capital union;
3. Established based on agreement;
4. Perform business activities;
5. The capital is divided into shares.

Referring to one of the characteristics of a company, capital in a company is divided into a certain number of shares held by a person or legal entity, referred to as shareholder. The concept of legal entity status with separate assets (including capital) from the personal assets of its shareholders is a distinguished nature from other company forms, i.e. *Vennootschap onder Firma* or Firma and *Commanditaire Vennootschap* or *CV (Sardjono, et.al., 2014)*.

Either acting as founder or investor, a shareholder certainly has its own interest in the company. These various interests shall be stipulated under a written agreement accommodated in the company's articles of associations or an additional separate agreement, namely shareholders' agreement. Unfortunately, the Indonesian Company Law does not provide any definition of shareholders' agreement. Nevertheless, the shareholders' agreement may be defined as

> *"cooperative type of legal relationship separated from the articles of association but one which has a strong connection to these articles (a syndetic coordination, 'a group of contracts'), entered into on the basis of the doctrine of the freedom of contract with the participation of each member or some members of a company, or in some cases, even third parties, in the framework of which the parties undertake obligations related to the foundation, operation or termination of a company, which point beyond the frameworks of the articles of association."* (Veress, 2018).

Further, according to Vorst (Budiono, 2018), there are several considerations for shareholders to regulate specific covenants and undertakings in a shareholders' agreement compared to only stipulate it under the company's articles of association:

1. The articles of associations have legal binding effect not only to the shareholders but also to the third party, meanwhile the shareholders' agreement is only binding to the involved parties.
2. The shareholders' agreement shall only be changed by the unanimous approval of all shareholders, but the articles of associations shall be amended through the resolution of a General Meeting of Shareholders ("**GMS**") according to the attendance and voting quorums.
3. The articles of associations will be applied to any new shareholders. However, the shareholders' agreement must be approved by all shareholders (existing and new) with an amendment/addendum.
4. The articles of associations have an open-characteristic to the public whilst the shareholders' agreement has a closed-characteristic and the substances are confidential for the third parties.
5. The articles of associations are a legal nature and have great juridical influence for company's internal regulations than the shareholders' agreement.
6. The statutory obligations under an article of association may be subject to legal sanctions if the obligations are not fulfilled, such as the non-fulfillment of voting rights and dividend rights. However,

the shareholders' agreement cannot apply sanctions of a legal nature.

The shareholders' agreement is deemed necessary if the company's shareholders agreed and undertaken specific matters which uncommonly stipulated under the articles of association. Therefore, the shareholders' agreement used as a way to clarify the purpose of such specific interests in order to provide a sense of propriety and appropriateness for shareholders (Budiono, 2018). However, both articles of associations and shareholders' agreement must be in-lined, even though the shareholders may regulate detailed terms and conditions under the shareholders' agreement. Therefore, in the event any discrepancy occurs regarding the same matters under the company's articles of associations and its shareholders' agreement, the articles of associations shall prevail. Notwithstanding to the foregoing, in any case both articles of associations and shareholders' agreement shall not violate any provisions of the Indonesian Company Law.

In practice, shareholders agreement used to regulate rights and obligations of the shareholders for inadequate matters provided by the laws, especially on business matters and management of the company. Usually, the company's shareholders may require shareholders' agreement to establish a joint venture company or venture capital-backed company (Chemla, *et.al.,* 2007). In this type of cooperation, most probably the shareholders are divided into majority shareholder(s) and minority shareholder(s). Therefore, it will be deemed necessary to specify certain provisions to reach a fair arrangement between both type of the shareholders.

Even though the shareholders' agreement applies to any business sectors, this article will particularly discuss on the shareholders' agreement entered in the framework of technology company start-up investment or what is usually known as fundraising. Since the beginning of 21st century, the world has entered the 4th generation of Industrial Revolution. This era known as Industrial Revolution of 4.0 which marked by the technological advances in many sectors by the emergence of artificial intelligence, big data, Internet of Things (IoT), blockchains, etc. (Fonna, 2019).

In this Industrial Revolution of 4.0 era, as technologies are rapidly developed, many business actors also compete to establish technology-based companies, known as start-ups. Start-ups in the technology sector are gaining spotlights in the industry and have the venture capital companies and group of investors' attentions. The investment may be provided in various schemes and there are several types of fundraising for start-ups, as follows (Qur'ani, 2019):

(a) Debt, with certain terms and interest;
(b) Convertible Note, a potentially converted debt into the equity of the company;
(c) Equity, a share subscription with capital contribution in the company.

In terms of investment as an equity/capital contribution or shares ownership, the founders/existing shareholders of the start-up company will jointly partner with investors as the company's shareholders. By the rise of technology companies or tech-company around the globe, especially giant tech companies, such as Google, Facebook, Amazon, Alibaba, etc. Indonesia is also experiencing the hype of tech companies by Gojek, Tokopedia, Traveloka, and many other local or foreign investment company establishments. These successful tech companies are financially supported by prominent investors, for example, Alibaba Group, Astra International, Sequoia Capital, etc. (Fitriani, 2017),

In an early fundraising stage, the company will negotiate a Term Sheet with the investors as an initial document containing general terms and conditions as the basis of the main agreement between the parties. Mostly the Term Sheet subsequently will become shareholders' agreement, which some of the subjects are the rights and obligations of the shareholders. The shareholders' agreement is essential in the cooperation between founders as existing shareholders with new investors, either in form of venture capital company or other type of investors. It is not only for regulating certain management provisions, but also in the financial matters related to the shares ownership and return of investments. In this type of investment, the invested funds usually utilized for the company's operational business growth without any positive cash flows within certain years. Therefore, the shareholders' agreement must protect all shareholders' interests with the stipulation of rights, obligations, and authorization limitations or

commonly known as reserved matters both for founders or investors.

Generally, shareholders' agreement furnishes the shareholders with certain rights, particularly related to the capital increment and transfer of shares, namely as follows (Chemla, *et. al.,* 2007):

(i) pre-emptive rights,
(ii) right of first refusal,
(iii) put options rights,
(iv) call options rights,
(v) drag-along rights,
(vi) tag-along rights.

Each right provides a different mechanism of shares acquisition and transfer of shares performed by shareholders. These rights also include certain obligations to be taken. The abovementioned rights are part of the minority shareholders' protection. The commonly known pre-emptive rights and right of first refusal provide rights for the existing shareholders to be offered an equal number of shares to maintain the shares ownership and prevent shares dilution. Further, the put and call options rights grant the shareholders an option to sell and buy shares at a certain value and specified time upon the occurrence of triggering events to reduce the risk of capital loss. In addition, the drag-along and tag-along rights also have an essential role in protecting the minority shareholders by providing certain mechanisms for shareholders upon the sale of a company's shares, especially in merger and acquisition transactions.

Indonesian Company Law has stipulated certain rights of the shareholder in terms of shares acquisition and transfer of shares which will be further elaborated in this article. In this matter, many legal research has elaborated the general minority shareholders protections, including the pre-emptive rights and right of first refusal as commonly known under the Indonesian Company Law. However, mainly the discussions are limited to the foregoing rights, and some research has addressed put options and call options rights. However, it is rare to find the legal analysis of drag-along and tag-along rights, especially under the Indonesian laws' perspective. Therefore, to fill the gap, this article will particularly analyze the enforceability of drag-along and tag-along rights under the Indonesian Company Law perspective and the validity of the shareholders' agreement consisting of the said rights.

II. Methods

Legal research, or in Dutch called as *rechtsonderzoek* (Susanti, 2018), is a scientific activity performed based on specific methods, systematic, and thoughts to analyze certain legal phenomena (Soekanto, 2014). This legal research applies a normative legal method to analyze the applicable Indonesian laws and regulations related to the shareholders' rights, especially on drag-along and tag-along rights.

This research used a literature approach with secondary data types focusing on the analysis of primary, secondary, and tertiary legal materials (Soekanto, 2019). Primary legal materials of this research are (i) Indonesian Civil Code, (ii) Law Number 40 of 2007 on Limited Liability Company, and (iii) Law Number 11 of 2020 on Job Creation. In addition, the research will also review secondary legal materials of relevant legal matters, such as books and journals, especially in the company or corporate matters, both published in Indonesia and overseas. Finally, the research will examine the tertiary legal material, such as Black's Law Dictionary, to complete the secondary data collection.

Further, this research uses a qualitative method to analyze the data by exploring the essence behind reality or action or data obtained by the author as an object of analysis (Mamudji, 2005), which is applied in this research by reviewing and analyzing the legislation of Indonesian Company Law and comparing towards the research object.

III. RESULT AND DISCUSSION

Individually, a shareholder as owner of the company does not have significant power towards the board of directors and the board of commissioners (Rajagukguk, 2011). However, the shareholders may have significant power if united under a GMS. Indonesian Company Law does not define a shareholder. However, we may find definition of General Meeting of Shareholders (Article 1 point 4 *jo*. Article 75 paragraph (1) of Indonesian Company Law), as follows:

"General Meeting of Shareholders, hereinafter referred to as GMS, means a Company Organ with specific authorities not given to the Board of Directors or Board of Commissioners within the permissible limits stipulated in this Law and/or article of association."

Indonesian Company Law stipulates certain types of shareholders' rights which divided into individual rights and collective rights (Widjaja, 2008). One of the individual rights is related to the right to have the first offer of capital increment and prior to the shares transfer. As for collective rights of shareholders, the GMS has the authority to appoint and dismiss the members of the board of directors and the board of commissioners.

These rights of shareholders may be further regulated under an agreement, in addition to the company's articles of association. This agreement between the shareholders is commonly known as shareholders' agreement. It has the advantage of flexibility than the articles of association. The articles of association under a Notarial deed have a standard and rigid format than the shareholders' agreement. However, the company's articles and association prevail to the company stakeholders, such as shareholders, board of directors, and board of commissioners, and other third parties. In contrast, the shareholders' agreement shall be valid and binding only for the parties involved under the agreement as stipulated in Article 1340 paragraph (1) of the Indonesian Civil Code.

This section will analyze and discuss on the validity of shareholders' agreement under the Indonesian Civil Code perspective, elaborate particular shareholders' rights related to the capital increment and shares transfer, and mainly to analyze the enforceability of drag-along and tag-along rights under the perspective of Indonesian Company Law.

A. Shareholders' Agreement Validity

A shareholders' agreement may be in many forms and concepts. For example, some partnerships enter the agreement in their initial establishment process. Others are contractually bound during the changes of shareholder's process, either due to sale and purchase of shares or new shareholder participation. As any other agreement, the shareholders' agreement also subject to the Indonesian Civil Code which originated from *Burgerlijk Wetboek* (BW), particularly on the contract validity requirements under Article 1320. According to the Article of 1320, to be validly legal and binding any agreement must fulfill 4 (four) requirements, namely:

(i) consent,
(ii) capability,
(iii) particular subject matter, and
(iv) legitimate cause.

The first 2 (two) requirements are known as subjective conditions. Failure to comply with these requirements may be appealed for the annulment of agreement before the court. The last 2 (two) requirements are known as objective conditions. Failure to comply with these requirements, the agreement shall become null and void.

In addition, a valid agreement shall be applied as a prevailing law between the parties according to Article 1338 paragraph (1) of the Indonesian Civil Code or known as the *Pacta Sunt Servanda* principle. This article also provides the freedom of contract, which means that the parties may agree on any matters to the extent they shall not violate the prevailing laws and regulations in general.

A shareholders' agreement complying to the provisions of the Indonesian Civil Code and other prevailing laws and regulations in Indonesia (including the Indonesian Company Law) shall become a valid and binding contract between the parties or shareholders of the company. For instance, a foreign investment-related shareholders' agreement shall not govern any nominee arrangement provision due to the prohibition under investment laws as expressly stipulated in Article 33 paragraph (1) and (2) of Law Number 25 of 2007 on Investment as lastly amended by Law Number 11 of 2020 on Job Creation. In this matter, the said shareholders' agreement shall become null and avoid as it does not fulfill the legitimate cause requirement by violating the investment laws.

Further, the shareholders' agreement shall be made in good faith or in Dutch called as *goeder trow* as regulated under Article 1338 paragraph (2) of the Indonesian Civil Code (Fuady, 2001). The good faith principle applies in the agreement performance. In the context of shareholders' agreement, the shareholders must fulfill and perform the terms and conditions as agreed under agreement in addition to the provisions of the company's articles of association. Therefore, any violation to the agreement shall be deemed as breach of contract.

B. Shares-Related Shareholders' Rights under the Indonesian Company Law

In Indonesia, shares are considered as movable object (see Article 60 par. 1 of Company Law *jo.* Article 511 par. 3 of Indonesian Civil Code). As an object, shares may be transferred, sold, pledged, and provide benefits to the owner (Widjaja, 2008). Under Indonesian Company Law, shares are categorized into 3 (three) types, as follows:

(i) Authorized Capital as the maximum amount of company's shares;
(ii) Issued Capital as the allocated shares;
(iii) Paid-up Capital as the subscribed and paid shares by the shareholders with similar amount to the Issued Capital.

Article 33 of the Indonesian Company Law stipulates that the minimum Issued and Paid-up Capital shall be 25% (twenty-five percent) out of the Authorized Capital. Therefore, it is possible to increase the capital during the company operation by issuing new company's shares with a particular mechanism according to its articles of association, Indonesian Company Law, and other relevant prevailing laws in the company's business sector.

In relation to the capital increment and transfer of shares, the Indonesian Company Law acknowledge certain rights of the shareholder as follows:

1. Pre-emptive Rights

The pre-emptive rights or also known as Right of First Offer is regulated under Article 43 paragraph (1) of the Indonesian Company Law as follows:

"All shares issued for capital increment ***must*** *first offer to each shareholder balanced with their share ownership for the same share classification."*

According to the provisions of Indonesian Company Law, the Pre-emptive Rights only apply for the capital increment, either issuance of the authorized capital or issued and paid-up capital. This right shall be automatically granted to the existing shareholders. They are given 14 (fourteen) days to exercise the rights prior to the share allocation offered to other third parties or investors. Further, the Pre-emptive Rights apply to private and public companies. Relevant provision for the public company as stipulated under the Financial Service Authority (FSA) Regulation Number 14 /POJK.04/2019 as the amendment of FSA Regulation Number 32/POJK.04/2015 on the Capital Increment of Public Company by Granting the Pre-emptive Rights.

The following is the sample of Pre-emptive Rights provision in the articles of association under the Capital section:

> *"3. All shares which have not been issued, shall be issued by the Company in accordance with the Company's capital requirements, with the approval of the General Meeting of Shareholders.*
>
> *If the Company increase its authorized or issued capital through the issuance of shares, the Company shall, unless otherwise agreed, offer to the Shareholders, and the Shareholders shall have the priority right to subscribe to, such additional share capital in proportion to their respective shareholding in the Company.*
>
> *The existing shareholders whose names are registered in the Company's Register of Shareholders shall have pre-emptive rights to purchase the shares to be issued in proportion to their*

shareholding within 14 (fourteen) days after the date of receipt of their offer both for the shares offered to them in proportion to their shareholdings and, for those shareholders still interested, the remaining shares, which were offered to but not subscribed to by the other shareholders.

Any portion which shall not be subscribed by any Shareholders shall be issued and paid up as approved by all the shareholders pursuant to a General Meeting of Shareholders and on terms approved at such meeting."

However, as set out in Article 43 paragraph (3) of the Indonesian Company Law, the Pre-emptive Rights may be waived in the event the following conditions of shares issuance occurs:

a. intended for the company's employees under Employee Stock Option Program (ESOP);
b. intended to the company's convertible bond or other security holders as approved by the General Meeting of Shareholders ("GMS"); or
c. for company reorganization and/or restructuring as approved by GMS.

2. Rights of First Refusal

Rights of first refusal is stipulated under Article 57 paragraph (1) point (a) of the Indonesian Company Law as follows:

"The articles of association ***may*** *stipulate requirements regarding the transfer of rights to shares, namely:*
a. must first offer to shareholders with certain classification or other shareholders;"

Referring to the provision, the Rights of First Refusal is not automatically granted to the shareholders. It must be expressly stipulated under the company's articles of association. The following is the sample of Rights of First Refusal provision in the articles of association under the Transfer of Shares section:

*"5. Subject at all times to the terms and conditions of permitted transfer of shares under the shareholders agreement between the Shareholders, the selling Shareholder (****Seller****) intending to transfer its shares to any person other than another Shareholder (the* ***Buyer****) by selling it must first deliver an irrevocable transfer notice in writing to other Shareholder(s) (****Continuing Shareholder(s)****) with respect to those shares by specifying the details of the proposed transfer (the* ***Sale Terms****), including:*

*(a) the number of shares which the Seller proposes to transfer (****the Sale Shares****);*

(b) the price offered by the Buyer for the Sale Shares (the ***Sale Price****);*

(c) the identity of the Buyer;

(d) the completion date of the proposed transfer (which shall be no earlier than (30) Business Days and no later than one hundred eighty (180) Business Days after the date of the Transfer Notice); and

*(e) other material terms and conditions of the proposed transfer (including any warranties, representations and indemnities) (****Transfer Notice****). A Transfer Notice once given, may not be varied."*

Exception for the Rights of First Refusal stipulated under Article 57 paragraph (2) of the Indonesian Company Law which stating that the requirements under Article 57 paragraph (1) shall not apply on the transfer of shares due to inheritance or as a result of merger, consolidation, or dissolution.

C. Drag-along and Tag-Along Rights Provisions

Under a modern-day shareholders' agreement, it is common to found drag-along and tag-along rights provisions in relation to the transfer of shares in the company (D'Souza, 2020). These two provisions protect the shareholders in different triggering events and are commonly used in merger and acquisition

transactions. By enforcing drag-along rights, majority shareholders with a certain number of shares may force other existing shareholders to trade its shares ownership with the same treatment. Additionally, the minority shareholders may demand the buyer/new investor to purchase its shares under tag-along rights with similar conditions offered to other shareholders. Both drag-along and tag-along rights is used as an exit clause by the majority and minority shareholders.

The drag-along rights enable the majority shareholders to sell their shares, including all of the company's shares to new investors without any concern about other existing shareholders' objections. Thus, even though it may be deemed beneficial only to the majority shareholders, basically, it will provide similar treatment to the minority shareholders' shares valuation. This protection is also available in tag-along rights, which enable the minority shareholders to obtain equal treatment of shares sale and purchase conditions offered to the majority shareholders. Therefore, both types of shareholders will obtain the same shares value offerings.

(i) Drag-along rights

Drag-along or right to withdraw commonly adheres to the majority shareholder. The majority shareholder may utilize this right if it wants to sell its shares to a third party by dragging the minority shareholders to participate in selling their shares. In this mechanism, the majority shareholder will offer the minority shareholder a similar price and conditions. Therefore, the new shareholder may be allowed to acquire entire shares. This right is deemed beneficial to the majority shareholder in order to avoid any obstacles in the shares sales and purchase towards uncooperative minority shareholders. However, it will also benefit the minority shareholders with a similar offering made to the majority shareholders.

Under a shareholders' agreement, the drag-along rights may be stipulated as below:

"17.1 In the event of an offer from a bona fide Proposed Purchaser for all the Shares, where ***[Shareholders holding at least [75] per cent. of the Shares (excluding any Treasury Shares) (on an as-converted basis) (who shall include the Series A Majority)]*** *(the "**Majority Shareholders**") agree to such offer and wish to transfer all their interest in Shares (the "**Sellers' Shares**") to the Proposed Purchaser, the Majority Shareholders shall have the right (the "**Drag-Along Right**") to compel each other Shareholder (each a "**Called Shareholder**" and together the "**Called Shareholders**") to sell and transfer all their Shares to the Proposed Purchaser or as the Proposed Purchaser shall direct (the "**Drag Purchaser**") in accordance with the provisions of this Clause* ***Error! Reference source not found.****.*

*17.2 The Majority Shareholders may exercise the Drag-Along Right by giving a written notice to that effect (a "**Drag-Along Notice**") to the Company, which the Company shall forthwith copy to the Called Shareholders, at any time before the transfer of the Sellers' Shares to the Drag Purchaser. A Drag-Along Notice shall specify that:*

*17.2.1 the Called Shareholders are required to transfer all their Shares (the "**Called Shares**") under this Clause;*

17.2.2 the person to whom they are to be transferred;

17.2.3 the consideration (whether in cash or otherwise) for which the Called Shares are to be transferred (calculated in accordance with this Clause);

17.2.4 the proposed date of transfer; and

*17.2.5 the form of any sale agreement or any other document of similar effect that the Called Shareholders are required to sign in connection with such sale (the "**Sale Agreement**"),*

(and, in the case of Clauses 0 to 0 above, whether actually specified or to be determined in accordance with a mechanism described in the Drag-Along Notice). No Drag-Along Notice or Sale Agreement may require a Called Shareholder to agree to any terms except those specifically provided for in this Clause."

There are many considerations for the implementation of the drag-along rights, as follows (Chakraborty, 2020):

a. **Transaction:** merger, acquisition, sale of substantial assets, and sale of substantial securities;
b. **Minimum percentage:** The right applies to the majority shareholder, usually with the minimum share ownership of 51% (fifty-five percent). However, the shareholders may determine a higher percentage depending on the shareholding structure in the company.
c. **Restrictions by the minority shareholders**: In some cases, a minority shareholder may set out restrictions or even delay the transfer of drag-along shares. Therefore, some of the drag-along clauses are made favorable to the minority shareholder.

(ii) Tag-along Rights

Unlike the drag-along rights, the tag-along rights is deemed to be beneficial to the minority shareholders. If the majority shareholder intends to sell its shares, the tag-along right will assure the interest of the minority shareholder in terms of participating in selling the shares at an equal price. The purpose of this right is to anticipate the inequality interest of minority shareholders in the sale and purchase of the company’s shares.

This tag-along right shall be applicable if any third party (investors) wishes to buy all of the company's shares. The minority shareholder is risked to force in selling the shares at a lower price than the majority shareholder. Tag-along rights provide the minority shareholders protection in the shareholders’ agreement.

The following is a sample of tag-along rights provision under a shareholders’ agreement:

“16.1 Save where the provisions of Clauses ***Error! Reference source not found.*** *and* ***Error! Reference source not found.*** *apply, and subject to Clause* ***Error! Reference source not found.****, no transfer of any of the Shares held by any* ***[Founder] [and/or] [Shareholder holding more than [5]% of the Shares (excluding Treasury Shares) (on an as-converted basis) other than the Investors (a "Significant Shareholder")]*** *may be made unless the relevant* ***[Founder] [and/or] [Significant Shareholder]*** *(and any Permitted Transferee of that* ***[Founder] [and/or] [Significant Shareholder]****) (each, a "****Selling Shareholder****") shall have observed the following procedures of this Clause* ***Error! Reference source not found. [unless the Series A Majority has determined that this Clause*** *Error! Reference source not found.* ***shall not apply to such transfer]****.*

16.2 After the Selling Shareholder has gone through the right of first refusal process set out in Clause ***Error! Reference source not found.*** *(if applicable), the Selling Shareholder shall give to each Series A Shareholder not less than* ***[20 (twenty)]*** *Business Days' notice in advance of the proposed sale (a "****Tag-Along Notice****"), which notice shall specify:*

*16.2.1 the identity of the proposed purchaser (the "****Buyer****");*
16.2.2 the price per share which the Buyer is proposing to pay;
16.2.3 the manner in which the consideration is to be paid;
16.2.4 the number of Shares which the Selling Shareholder proposes to sell; and
16.2.5 the address where the notice of the number of Shares which a Series A Shareholder wishes to sell should be sent.”

D. Indonesian Company Law Perspective: Drag-along and Tag-Along Rights

In relation to drag-along and tag-along rights, the Indonesian Company Law does not define majority and minority shareholders terminology. However, as stipulated under Black’s Law Dictionary, we may find the following definitions (Black’s Law Dictionary, 9th ed):

Majority Shareholder.

“A shareholder who owns or controls more than half the corporation’s stock.”

Minority Shareholder.

"A shareholder who owns less than half the total shares outstanding and thus cannot control the corporation's management or singlehandedly elect directors."

Pursuant to the foregoing definition of majority shareholder, it may be noted that as the company's controller, it can dominate the GMS resolutions including related to the company's shares transfer and acquisition. However, the minority shareholder may not have adequate power to determine the GMS resolutions. Based on this condition, in terms of the shareholders' partnership in a company, shareholders' agreement shall become an instrument to provide fair arrangements between company shareholders. The shareholders' agreement will be valid and binding if it complies with the prevailing laws and regulations and fulfills the requirements of agreement validity as stipulated under 1320 Indonesian Civil Code as previously elaborated.

Drag-along and tag-along rights are commonly found under modern-day shareholders' agreement involving venture capital and private equity company as an investor, especially in the acquisition plan. In the sale and purchase of the company's shares, the buyer/investor usually intends to hold 100% (one hundred percent) control over the company, including the majority of its shares.

Unfortunately, the Indonesian Company Law does not stipulate any drag-along and tag-along rights provisions. Article 43 paragraph 1 and Article 57 paragraph 1 of Indonesian Company Law only specify the Pre-emptive Rights and the Right of First Refusal in terms of capital increment and transfer of shares. In the case of drag-along and tag-along rights interpreted as part of Article 57 paragraph 1 of Indonesian Company Law regarding the compulsory to offer the prospective transfer of shares to other existing shareholders, it must be expressly regulated under the articles of association. However, the drag-along and tag-along rights provide shareholder rights beyond the meaning under Article 57 paragraph 1 of Indonesian Company Law, which is known as the Right of First Refusal principle.

Stipulation of the drag-along and tag-along rights shall become a contractual mechanism between the shareholders and violation to the mechanism may lead to a breach of contract. This breach of contract shall refer to the Article 1239 of the Indonesian Civil Code and the party suffering any loss from the agreement violation may conduct legal action according to the relevant dispute settlement procedures under the agreement.

Therefore, the stipulation of drag-along and tag-along rights under the shareholders' agreement is contractual and reflects the freedom of contract principle. Therefore. It is enforceable under Indonesian Laws in general and Indonesian Company Law in particular, to the extent that the provisions are not violating any laws and regulations. Furthermore, as any other clauses under the shareholders' agreement, these rights prevent any potential future disputes and ensure a fair mechanism for the shareholder to exit from the company. Moreover, each of the drag-along and tag-along rights is beneficial for majority shareholder and minority shareholder.

In addition to the foregoing, with additional protection for minority shareholders, both drag-along and tag-along rights shall be formally regulated under the Indonesian Company Law. As a result, these rights will provide equal treatment to the shareholders regarding the sale and purchase of shares with the new investor, especially under merger and acquisition transactions.

IV. Conslusion

Under Indonesian Company Law, there are many types of the shareholders rights, primarily related to the capital increment and shares transfer, among others, (i) pre-emptive rights, (ii) right of first refusal, (iii) put options rights, (iv) call options rights, (v) drag-along rights, and (vi) tag-along rights. Unfortunately, the Indonesian Company Law only acknowledges Pre-emptive Rights and Right of First Refusal, and it does not expressly stipulates the drag-along and tag-along rights. However, the shareholders may regulate these additional rights under a shareholders' agreement.

Shareholders' agreement has been a common arrangement for the shareholders to perform the Company's business operation. It regulates internal matters within the company's stakeholders according to the prevailing Indonesian Company Law and other contractual business arrangements. As any other

agreement, it must be subject to and comply with the provisions under the Indonesian Civil Code, especially Article 1320 and 1338. Further, shareholders' agreement containing the drag-along and tag-along rights shall be deemed enforceable and have the legal and binding powers as a valid agreement. As any other provisions, the drag-along and tag-along rights are intended to provide a fair mechanism for the shareholders to exit from the company.

The common use of drag-along and tag-along rights under a shareholders' agreement shall become consideration of the legislator to formulate a formal legislation of these rights especially under the prevailing Indonesian Company Law and generally in Indonesian civil law system. Therefore, it will be beneficial for protection of any shareholders' interests, especially minority shareholders protection as in accordance with the spirit of Indonesian Company Law.

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