

LEGALITY AND JUSTICE OF THE EXISTENCE OF THE FRANCHISE AGREEMENT IN INDONESIA

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ABSTRACT

A franchise agreement, like a legal document, deserves to fulfill three elements, namely justice, benefit and legal certainty. This paper aims to reveal why the aspect of justice is not receiving the portion as the other two aspects. The approach used in this study is philosophical normative approach. The conclusion of this study is that the contents of the franchise contract document by domestic and foreign parties on the one hand, show the prominence of the aspect of legal certainty, then in the aspect of benefit, while on the other hand, the aspect of justice does not get the “portion” it should be. Justice is not achieved for the parties, especially franchise recipients, due to the unbalanced bargaining position of the franchisor when compared to the bargaining position of the franchisee. This has an impact on the contents of the contract which is fully drawn up by the franchisor, which of course tends to provide as much benefit as the franchisor.

Keywords: Business Law, Contract, Franchise, Good Faith, Legality, Indonesia.

INTRODUCTION

The definition of an agreement, as regulated in Article 1313 of the Civil Code is an act whereby one or more people bind themselves to one or more other people. This definition is so general that it cannot describe its true essence. The weakness that exists in this definition is that it is one-sided, does not mention goals, but also does not impose limits on the word “*creation*” which is of course very broad in understanding (Badrulzaman, 2001; Simamora, 2013). An agreement whether made in oral or written contract should be able to express the general will of the parties into steps or actions that are more tangible in order to realize the purpose of the agreement which was previously agreed upon (Schwartz & Scott, 2003; Corbin, 1918).

Agreements made by the parties both orally and in writing should take into account the legal principles of the agreement, the legal rules related to the agreement. Among those foundations, among others, which are very important are the principles of freedom of contract (Epstein, 1999). This basis becomes the basis of the occurrence of the consensual basis, where this consensual basis underlies the occurrence of the basis of the force of binding agreement (Richard, 2002; Goode, 1998). The application of the principles mentioned above, especially at the pre-contract stage and generally at the contract stage, cannot be carried out freely, but within the framework of good faith and propriety (Sepe, 2010; Fuady, 2014). Good faith is not only seen subjectively in the sense of not deceiving, not lying, dishonest, but also objectively

(Priyono, 2019; Priyono et al., 2020). Objective in the sense that no matter how good an agreement is made, and agreed upon, but still cannot ignore or conflict with the laws and regulations, public order, morality and propriety, and the agreed agreement (Supramono, 2009).

It is reasonable to suspect that the nature of the agreement which is in the form of standards/standards will not be able to provide an adequate sense of justice for parties in a weak position. The form and content of the agreement has been determined by a strong party before the agreement is signed by the parties. It cannot be denied that the strong parties will try to accommodate all of their interests in the agreement, even though this has the potential to cause economic losses to the other party (Elliott & Quinn, 2007; Priyono, 2014; Priyono et al., 2018). Contracted justice is a situation in which the parties obtain their rights in accordance with the agreement that has been made based on freedom of contract and good faith. Justice in this case is the embodiment of a fair process by considering the contributions of the parties, not merely the face of justice with equal sharing (Kronman, 1979; Sandel, 2010; Rawls, 1971; Ibrahim & Stone, 2015; Badriyah et al., 2021). The focus of an agreement is based on the principle of freedom of contract (Echenberg, 2011; Roisah et al., 2017). This study aims to analyze the legality and justice of the franchise agreement or contract that legally formally fulfills the legal requirements of the agreement as stipulated in Article 1320 of the Indonesia Civil Code and is also mutually agreed upon. In fact, in its implementation it has not been able to provide a sense of justice for the parties, especially the franchisee. The approach used in this study is philosophical normative approach with descriptive and qualitative analysis.

LITERATURE REVIEW

Practices in daily life show that almost all business agreements are made in writing. The tendency is that this written agreement is made by one of the parties with a strong economic position in the form of a standard form contract (Priyono, 2019; Roisah et al., 2018). The term standard form contract refers to an agreement in printed form which is used for various contracts of the same or a kind (Treitel, 1999; Cordero-Moss, 2011). The “*foreign*” franchise business agreement, which is the object of study in the research that underlies this article, is an example of a standard agreement that applies in the world of international business. The inherent nature of a standard agreement is “*given*” in the sense that the party with a higher/stronger bargaining position/economy becomes the determinant and creator/maker of the agreement (Riches & Allen, 2009). Parties with a lower/weak bargaining position/economy do not have the opportunity to contribute to the formation of the agreement. In the world of business practice, such an agreement is often referred to as a “*take it or leave it contract*” to describe the powerlessness of the weak parties in determining the contents of the agreement (Khairandy, 2003).

Moreover, freedom of contract as a principle born at the time of the spread of the *laissez faire* trend in economics pioneered by Adam Smith is to prevent excessive government intervention was a cult of individualism, in its development this principle emerged as a new paradigm in contract law on unrestricted freedom of contract (Khairandy, 2003). Current conditions, this principle also allows strong people/parties to impose their will on weak parties, so that the ideals of freedom of contract which initially provide legal balance, balance of interests and also balance in bargaining position, become a means of pressure for weak parties, by therefore Article 1337 of the Civil Code provides a limitation on the practice of implementing

this principle by emphasizing “*because*” the agreement must be lawful, meaning that it is not prohibited by law, does not conflict with good morals or public order.

In a popular agreement of food franchise in Indonesia, this agreement illustrates to us that the position of the company/franchisor, which is so dominant economically, is the determinant for his party to enact business laws that are strictly binding on anyone who wants to work with him. So, it is not an exaggeration if some experts argue that they do not agree with the use of standard agreements because they are no different from private legislators (Treitel, 1999). The application of the principle of freedom of contract in practice which was initially more consensual in the field of private law, albeit with the restrictions set forth by Article 1337 of the Civil Code on prohibited causes (prohibited by law, contrary to good morals and public order), Article 1338 paragraph 3 Civil Code (agreement must be executed in good faith) (Priyono, 2019).

In subsequent developments, government intervention has become greater due to demands for protection from the public or consumers or national business actors. So that a franchise business that is fully subject to the provisions of private agreement law, in its development cannot deviate from some rules that are public in nature, for example Government Regulation regarding Franchising No. 42 of 2007 which is effective starting July 24, 2008 the terms of the franchise company registration. From the agreement document signed by the parties, where this agreement is the standard agreement that has been prepared by a stronger party, namely the company/franchisor then it can be ensured that the contents have been designed by the party and for the benefit of the franchisor. Agreed agreements do not provide a sufficient opportunity for the weaker party to express freedoms based on the principle of freedom of contract in order to protect its interests as a party to the agreement (Mason, 2000).

Badrulzaman (1991) uses the term standard agreement, standard means measure, reference. If the legal language is standardized, it means that the legal language is determined by its size, standard, so that it has a fixed meaning, which can become a general rule (Ibrahim, 2003). Sjahdeini (1993) concluded that a standard agreement is an agreement in which almost all the clauses have been standardized by the wearer and the other party basically does not have the opportunity to negotiate or request change. The standard agreement was born from the needs of the community itself. The business world cannot take place without standard agreements. Standard agreements are required by and therefore accepted by the community (Simister & Turner, 2003). Sjahdeini (1993) further stated that the validity of the standard agreement did not need to be questioned, in line with this Slawson (1971) explained that standard contract forms probably account for more than 90 percent of all contracts now made. Most persons have difficult remembering the last time they contracted other than by standard form, because practically it has been accepted but the basic rules need to be regulated as the rules of the game so that the clauses or provisions in the standard agreement, either partially or in part entirely binding on the other party (Pohan, 1994).

The basis of freedom of contract as can be concluded from Article 1338 paragraph (1) of the Civil Code which has a close relationship with Article 1320 of the Civil Code which regulates the basis of consensualism which is one of the legal conditions of an agreement most likely violated by the standard agreement. The Pizza Hut franchise agreement is a standard agreement by stating a number of exonerative terms, therefore it is necessary to make strict rules and strictly enforce the ban on these exonerative standard terms in order to protect the growth of

competitive national business. The definition of justice in a simple sense is impartial, not arbitrary, and impartial (Santoso, 2015). Contracted Justice is a situation in which the parties obtain their rights in accordance with an agreement that has been made based on freedom of contract and good faith. Justice in this case is a manifestation of a fair process by considering the contribution of the parties, not merely justice with an equal distribution (Kronman, 1979; Sandel, 2010; Rawls, 1971; Ibrahim & Stone, 2015).

The justice expected of the parties in an agreement is the implementation of the agreement in accordance with the results of the agreement through the process of bargaining (offer and acceptance) which not only refers to subjective concensuality but also objective concensuality. Justice results from the spirit of fairness in applying the Principles of Contracting Freedom to achieve mutual accents, which will ultimately provide a counter to achievement that is perceived as fair by the parties even though they do not have to produce equal portions (Fletcher, 1996; Lemek & Ngani, 2007; Hegel & Dyde, 1896).

Article 1339 of the Civil Code, is a legal basis for controlling, an agreement that has provided justice for the parties, either in a balance or proportionally. “*Foreign*” Franchise Agreement which is the object of study in this paper which is in standard form, of course, is more profitable for the franchisor than what is obtained by the franchisee. Moral values are one of the basic values that control the agreement made by the parties, as confirmed in Article 1339 of the Civil Code (Dworkin, 1999; Leback, 2015; Mallor et al., 2010).

The agreement which is entitled “*Foreign*” franchise agreement consists of 26 articles, with several articles. As is usual for a franchise agreement, this agreement contains matters such as: Intellectual property Rights (IPR); IP transfer; royalty payment; tax liability; rights and obligations of the parties, transfer and/or license of intellectual property rights; governing law; dispute resolution; and termination of the franchise agreement (Ryder, 2005). Cheeseman (2000), stated in general terms in the franchise agreement containing: quality control standards; training requirements; covenant not to compete; arbitration clauses; other terms and conditions.

RESULT

Freedom of Contract as an Essential Principle

Freedom of contract is an essential principle, both for individuals in self-development in both personal and social life, so some experts assert that freedom of contract is a part of human rights that must be respected (Khairandy, 2003). Countries that have a Common Law legal system recognize the freedom of contract with the term Freedom of Contract or *laissez faire*. Jessel M. R. formulated in the case “*Printing and Numerical Registering Co. vs Samson*” men of full age and understanding shall have the utmost liberty of contracting, and that contracts which are freely and voluntarily entered into shall be held sacred and on force by the courts... you are not lightly to interfere with this freedom of contract (Rusli, 1993).

The principle of freedom of contract has become the source of the rapid development of treaty law, not only in Indonesia, but also at the regional and international levels. Such as in Japan, China and India (Fauvarque-Cosson & Mazeaud, 2009; Hooft & Vissert, 2005; Zhang, 2019; Bath, 2009). Based on the principle of freedom of contract, people may or may not make agreements. The parties who have agreed to make a free agreement determine what can and

should not be included in an agreement (Jean-Baptiste et al., 2008) In connection with the application of the consensual principle, this principle provides information that an agreement basically has existed since an agreement was reached between the parties in the agreement. The principle of consensualism contained in article 1320 of the Civil Code implies the willingness of the parties to bind themselves to one another and this willingness inspires confidence that the agreement will be fulfilled (Caterina, 2015).

Ibrahim (2003) states that the principle of consensuality is the peak of human improvement. Furthermore, the principle is expressed that people must be able to hold their words” is a demand for morality, but Article 1320 of the Civil Code becomes the legal basis for its enforcement. Not fulfilling the terms of consensualism in the agreement causes the agreement to be canceled, because it does not meet the subjective requirements (Priyono, 2019). The principle of consensualism contained in the word “*agreement made legally*”, which refers to Article 1320 of the Civil Code, especially in paragraph 1, namely that they agree to bind themselves. With the principle of consensually, it means that the agreement was born when the agreement of the parties who entered into the agreement was reached. To bind themselves to each other in an obligatory agreement, the agreement made is binding on the parties (Patrik, 1994). The principle of consensualism then affects the form of the agreement, namely by the existence of consensualism. The agreement was born or formed at the time an agreement was reached between the parties so that no other form of formality was needed. As a result, the agreement that occurs because of the agreement is a free agreement so that it can be oral or written.

CONCLUSION

The results showed that the essence of the agreement or contract, including an agreement or franchise contract, is an agreement based on voluntary will, to achieve an objective that is profitable (economic prospective) which is considered fair to the parties. A contract or agreement is not born out of an agreement alone but must also comply with the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code. On the other words, any agreement, whatever its name or form, cannot ignore the applicable legal rules where the agreement is made solely.

The agreement the parties make binds them as law (Article 1338 of the Civil Code). The application of this principle provides an important place for the application of the consensual principle, which indicates a balance of interests, discretion in risk sharing, and a balance in the bargaining position. Hence it can be seen that the freedom to reach an agreement does not occur in a balanced manner, due to the dominance of the company/franchisor candidate over the prospective franchisee. In the article that regulates rights and obligations, it appears that the franchisor's interests are more legally protected than the interests of the franchisees.

As a practical implication, the agreement made by the domestic parties and foreign franchisor in a franchise agreement has to meet the legal terms of the agreement as stipulated in Article 1320 of the Civil Code. However, because this agreement is a standard agreement (boiler plate contract, standard form contract, adhesive contract, take it or leave it contract), where the content of the agreement has been determined by a party with a strong bargaining position, the formulated contract is often one-sided, and often includes clauses of limitation or release of

responsibility from one party to the other party. The legal protection is to protect the weak parties and to strengthen law enforcement of the fairness principle in contracting.

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