

The Intersection of Law and Business: Protecting Foreign Franchise Agreements in Indonesia

Arthur M. Evans*, Rebecca D. Anderson

* Universitas Pamulang Banten Indonesia

KEYWORDS: Protection of Law, Foreign Affairs, Franchising.

ABSTRACT

The concept of the franchise business has become a popular topic that has given new breakthroughs to the dynamics of the Indonesian economy, especially as a form of business development. Remember franchise is a successful business. p potential protective law for foreign franchising business in Indonesia has been governed by various regulations. However, the franchise agreement is the main legal aspect in providing legal protection for foreign franchises. This paper aims to study the Legal Protection for Foreign rapidly growing franchise in a business venture in Indonesia. Using normative studies by collecting primary data and secondary data.

INTRODUCTION

The fast and complex world economic growth has an impact on economic growth in Indonesia. Economic growth occurs in business activities based on business law aspects. The form of this aspect is profit which is the purpose and purpose of business activities obtained from the entrepreneur. A business that has the potential to be developed is a franchise business. It can be said that the franchise business is global. Franchising has grown rapidly in terms of product distribution and marketing. That's because this system has several advantages that are worth considering (Moch Najib Imanullah, 2008: 41).

This was marked by cooperation between Indonesian businessmen and foreign businessmen in the field of business which included the franchise business in the franchise agreement. Foreign entrepreneurs bring venture capital and new technology to Indonesia. Indonesia as a developing country is aware of the limitations of its ability to master technology. Ability to overcome limited capital capabilities and limited technology. Therefore, it is necessary to improve technology transfer capabilities.

One way to transfer technology is through a franchise agreement. Franchising grows and develops because of the need to develop a business without spending a lot of money. A business that uses a franchise system is a method of distributing goods and services to consumers. The owner of the method is called the franchisor, and the franchise is named for the party entitled to use the method. The franchisee is given the rights and authority to use products, trademarks, and business systems created by franchise owners (Moch. Basarah and Faiz Mufidin, 2008: 2).

The important thing from the franchise cooperation that is included in the agreement or contract must be understood by each party. In addition, stability in contract activities means that the rights and obligations between franchisees and franchise owners must be balanced and may not be unbalanced. In other words, legal equality within the framework of freedom of contract must be fulfilled. However, we often face imbalances in the practice of contracts or franchise agreements. That is not profitable for the franchisee, that is, in the case of the termination agreement, the franchisor is the party that has the authority to terminate the agreement with the franchise caused by reasons that also occur to terminate the franchise agreement. Condition where the franchisor does not want to renew the contract when the time period of the franchise agreement expires, and transferring the business to another party (Rooseno Harjowidgdo, 1993: 26).

This is because all parties have the same state and neither party has to inability to create principles that support their particular condition, and the principle of justice is the result of agreement and fair negotiation. (John Rawls, 2011: 13). In addition, John Rawl has created two principles of distributive justice, namely as follows (John Rawls, 2011: 78):

- 1) The principle of greatest equality means that everyone must have equal rights to the broadest basic freedoms. In other words, the same freedom for everyone.
- 2) Social and economic inequality must be properly controlled, and we need to pay attention to the principles: (1) different principles, and (2) the principle of equitable equality of opportunity. The second principle ensures the realization of proportionality for the exchange of rights and obligations of the parties.

In the context of a franchise agreement, the franchisor and franchisee must have the same guarantee of freedom to create the same principle of rights. In addition, the franchisor and franchisee must have a balance in fulfilling their rights and obligations. However, most franchise agreements are not balanced because of intellectual property rights. Most agreements for franchising are standard agreements made by one of the holders of intellectual property rights and the principle of freedom of contract cannot be applied in the agreement. Actually, standard contracts or standard agreements have been known since the days of Ancient Greece. Plato (423-347) once said that the practice of selling food whose prices were determined unilaterally by the seller without considering the difference in food quality.

FORMULATION OF THE PROBLEM

Based on the statement above, important issues that must be addressed are:

1. How is the existence of foreign franchises in Indonesia?
2. What is the legal protection of foreign franchises in Indonesia?

RESEARCH METHODS

This research is normative legal research. Research data which are obtained from library research by analyzing the legal issues through legislation, literature, and other references relating to the legal aspects of foreign franchises in Indonesia. The conceptual approach is used to obtain an explanation of the legal aspects of foreign franchises in Indonesia, so that the concept of foreign franchise legal protection can be obtained. There are two legal materials used in this study, namely; primary legal material and secondary material. The main legal material takes several laws that govern the franchise business. Meanwhile, secondary material obtained from literature, legal journals, the results of several studies, and legal articles related to the main problems of this study.

DISCUSSION

Existence of Foreign Franchises in Indonesia

In the Regulation of the Minister of Trade No. 12 / M-Dag / Per / 3/2006 concerning Provisions and Procedures for Issuance of Franchise Business Registration Permits, stated that "a franchise is a bond between the franchisor and franchisee, where the franchisee is given the right to run a business using intellectual property rights or inventions or characteristics of franchisor business, and franchisor give prizes to franchisees. Prizes are made based on the conditions set by the franchisor with the responsibility to provide ongoing operational consulting support. This is provided by the franchisor to the franchisee ". In other words, this regulation explains that a franchisor is a business entity or an individual entity that gives the other party the right to use intellectual property rights or discoveries or characteristics owned by the franchisor. Meanwhile, the franchisee is a business entity or individual entity that has given the right to use intellectual property rights or inventions that are owned by the franchisor.

Initially, the term franchise was not in Indonesian legal documents. This is understandable because franchising cannot be found in the business culture or tradition of the Indonesian people. However, due to the impact of globalization that conquered many fields, franchises began to move in the cultural order and legal order of Indonesian society (Tengku Keizerina Devi Azwar, 2005: 1-2). Franchising became popular in Indonesia around the 1970s when foreign franchises began arriving in Indonesia. Foreign franchises coming to Indonesia are Kentucky Fried Chicken, Swensen, Shakey Pizza, followed by Burger King and Seven Eleven. The word franchise comes from the French language which means free. Therefore, Franchising means that someone gives freedom to other people from obstructive ties and also gives them the freedom to use or make or sell something (Ridwan Khairandy, 2000: 133). In the business field, franchising means freedom gained by an entrepreneur to run a certain business in a certain place (Richard Burton Simatupang, 2003: 56). After the term franchise became familiar, franchising became a trending topic among the public, many people also had an interest in making it a business breakthrough. In Indonesia, franchise-based businesses have developed not only foreign franchises but also local franchises. The growth of franchise businesses in Indonesia is around 12% -16% per. There are 331 franchise businesses, namely 293 franchises for foreign franchises and 38 franchises for local franchises (<http://www.solopos.com/>).

Foreign franchises are more attractive because they have a clear system, brands around the world, and are more prestigious. This is a brave history of foreign franchises: at present, the franchise is dominated by fast food restaurant franchises. The trend began in 1919 when A & W Root Beer opened a fast food restaurant. In 1935, Howard Deering Johnson worked with Reginald Sprague to monopolize the modern restaurant business. Their idea is to let their partner have an independent business using the same name, food, supply, logo, even the same design as theirs, and it is used as an exchange for some payments. During its development, this business system experienced various improvements, especially in the 1950s. Then, after experiencing various improvements, it is known as a franchise as a business format or often referred to as a second generation franchise. The rapid

development of franchise systems, especially in their home countries, United State of America, has led to the franchise being favored as a business system in a variety of fields reaching 35 companies from all retail businesses in the United States.

In fact, the enthusiasm of developing a local franchise has emerged. However, the local franchise still has several disadvantages that make the local franchise unable to compete with foreign franchises. Almost all franchises built by local entrepreneurs failed. It is indeed not easy to build a franchise business, but it looks profitable from people who buy franchises, it can be said that this business is profitable. Local franchising has several weaknesses, namely (Anke Dwi Saputro, 2016: 1-73):

Too fast in franchising

It is usually the reason why franchising fails because the franchisor is not ready to let others use his business as an independent business. Sometimes, it is influenced by the persuasion of those who want a franchise business, even though the business is not ready for franchising. On the other hand, franchise owners are too hasty in approving franchise requests. Therefore, there are many franchises that make it difficult for franchise owners to control the business, and then one by one the business is closed. Moreover, the damaged reputation caused the business to be built to die. This can be analogous to the baby who just stood up, but he was forced to run. This can be described in a franchise business that is already franchised, even though it is still premature. Franchising will also be difficult to develop optimally. This new business certainly does not have experience in the business world. Therefore, it would be better if the business to be franchised is a business that has survived for at least 5 years.

Limited capital

Sometimes, franchise businesses become a medium for franchise owners to expand their business, and expansion is done by holding franchisees. Their efforts in developing business made franchise owners negligent in choosing franchisees. As a result they failed to choose a potential franchise. So, that will trigger the problem. Franchisees often run out of funds to continue the franchise business, even though the contract is not over. This is what makes the franchise die. Running out of capital is driven by wrong financial management, or business profits are not as expected and it leads to losses.

Small Business Scale

Local franchise businesses are often just train businesses that rely on roadside for business premises. The chosen franchise business is a business that is foreign to society. Instead of basic needs, almost all Indonesian franchisors choose food or soft drinks as their business.

Seasonal Products

Most Indonesian people are the type of person who often follows new trends. This means that original ideas are hard to find in Indonesia. Therefore, Indonesian Franchising is a business that only follows the current trend. So, it will make the product difficult to survive. In addition, the product cannot be adapted to all conditions. For example, cold drinks will not get profit during the rainy season.

Price Competition

There will be price competition because all Indonesian franchises only follow the current trend. Then, it will be a weapon that can reduce income and bring the business to an unfavorable situation. In addition, price competition can occur when the franchisor knows the difficulty to comply with the price set by the franchisor. This is due to the increase in prices of raw materials. As a result, the franchisor took a shortcut by buying half of the material from another place, while half of it was bought from the franchisor. Therefore, it can affect the quality of goods, so it makes consumers disappointed and the franchisee will lose its customers. Then, it makes the franchise business go bankrupt.

Human Resources Problems

Human resources in Indonesia are often regarded as less professional human resources. There have been many incidents where the chef stole receipts from other people or chefs who randomly requested countless salaries. A franchise business is a business demanded by most business people who are busy with work in their offices. This causes business people not to have special skills and they entrust business management to the chef. Then, that belief caused the chef to fool the owner.

Unorganized System

The system owned by the local franchise is less qualified than foreign franchises. This system still cannot be considered a sophisticated system because it is still in the middle level. Then, it causes operational and financial work not to be well organized. The effect is the failure of the franchise business.

Intellectual Property Ownership Conflict

There are several problems caused by the seizure of intellectual property. Franchisors often forget to register brands, patents, trade secrets, even to register franchises, even though this is important to do in the world of franchising. Franchisees will get a good opportunity to take over the franchise business, when franchisors focus on franchising expansion which makes them forget to carry out their legal protection obligations to protect themselves. There are many cases that are similar to the case above, and ironically intellectual property is often lost from the franchisor's ownership.

Betrayed by Business Partners

Deforestation of business partners is often done using business cloning. In other words, the franchisor mimics the franchisor's business and runs its own business using the same business. In addition, the franchisor also conceals the fact that he opened another franchise to avoid paying royalty fees that must be paid to the franchisor.

Based on the factors that cause local bankruptcy business bankruptcy, we can see overall that the local franchise business is less prestigious. As a businessman, we clearly pursue profit and a well-organized system that gives us certainty to be able to compete in the world of commerce.

Actually the existence of foreign franchises in Indonesia does not have a negative impact on local franchises. Foreign franchises also provide several benefits for local franchises. The advantages are as follows;

- a) Foreign franchise businesses in Indonesia must provide knowledge about global business models to Indonesian entrepreneurs. This is actually a good education for our local business knowledge. Therefore, local franchises can participate in quality franchises to compete with foreign franchises.
- b) Foreign franchises, which have a well-prepared system, will provide a higher chance of success and the effect will provide a better sales turnover (especially in the economic sector) for Indonesia's economic turnover.
- c) The impact on employment will be better. The existence of a foreign franchise can reduce unemployment in Indonesia. This can also be a medium for employment and improving the welfare of Indonesian citizens.
- d) The impact on learning technical industries is better proceed to technology transfer activities. Based on foreign technology that has better quality, it must be knowledge for the people of Indonesia to develop a local franchise business.
- e) The impact on trading activities on local suppliers will be extraordinary. This will turn suppliers into global suppliers. Imagine that local suppliers who have a good track record work with international brands.
- f) The increase in foreign franchises or multinational businesses in Indonesia suggests that Indonesia is part of a developed country, and that it will lift the impression that Indonesia is the least developed country. More and more international brands entering the Indonesian market will give confidence to foreign investors to invest their assets in Indonesia. The impact is Indonesia's economic progress.

At present, the franchise business is popular in Indonesia. Franchising is a good business sector. We can find businesses around us, not only local franchises, but also foreign franchises. Franchising is a business sector where we can find the name of the borrower and recipient of royalties. Given the existence of companies in the business world, we can find difficulties in building new businesses because competition between companies cannot be avoided. Therefore, some budding entrepreneurs choose a franchise business as their business. There are many foreign franchises in Indonesia that are engaged in various fields, such as education, retail, automotive, and culinary. The existence of foreign franchises will obviously have an impact on local businesses, so, the Minister of Trade made a rule to limit the number of foreign franchises.

There are several foreign franchises that are popular in Indonesia, especially in the food and beverage sector. One of the foreign franchises engaged in food and beverages is MC Donald. There is also Burger King who has the same field as MC Donald. Other foreign franchises are Pizza Hut, Baskin Robins, Yogen Fruzz, Dunkin Donuts, Round Table Pizza, and Jollie Bee.

Franchise engaged in non-food and beverage is Gakken Educational Co. Ltd. and Schida Educational Institute Inc. The two institutions are institutions from Japan. There is also an online trading academy from California, USA. This is an online education service. For those who like to cook, there are Young International Chefs who

are also from America. There is Crestcom International, LLC from America. This is a field engaged in management and employee training services. Other foreign franchises engaged in education are Dale Carnegie & Associates, Inc. from New York, and the global enrichment center Pte Ltd which is engaged in mathematical money education services.

Foreign franchises in the retail field are DKH Retail Limited from the UK. There is also Coas Fashion Limited which is engaged in accessories. Another popular retail franchise is Karen Millen, which is engaged in fashion and accessories. Furthermore, there are Oasis Fashion Limited and Ne Look Retailers Ltd, both of which are from England. Almost foreign franchises in Indonesia succeed, it can be a lesson for us. In addition, it makes us understand that foreign franchises have a well-prepared business system that makes it successful in a foreign country.

PROTECTION OF FRANCHISE LAW IN INDONESIA

In general, a franchise can be defined as a privilege that binds and / or is given by the franchisor to the franchisee with obligations or payments. In business format, the definition of franchise is a business regulation by granting the right to use the brand system by the franchisor to an independent party or franchisor to sell products or services based on an agreement (Anonim, 2013).

Queen said that the definition of franchise is; franchising is a method of developing business and marketing. This means expanding markets and distribution and services by sharing marketing and operational standards. Franchise holders who buy certain businesses benefit from customer awareness of brand names, eligible systems, and other services provided by franchise owners (J. Quenn, 1993: 4). Since the enactment of Government Regulation Number 42 of 2007 concerning Waralaba, especially in article 1 point 1 of Government Regulation Number 42 of 2007, franchising is a privilege owned by an independent party or business entity to a business system with business characterization. This is used to market goods and / services whose success has been proven. This can be used by other parties based on the franchise agreement. This definition applies to formal jurisdictions in Indonesia.

Gurnick states in Margono and Angkasa (Margono. Suyud and, Amir Angkasa, 2003), franchising is a model that is the most popular business for entrepreneurs because it has an effective method of supplying certain models to the market by buying the right to copy intellectual property. Owned by franchise owners. This can be in the form of brand names, products, and confidential information by providing support to franchisees such as providing training support, marketing strategies, ad groups, and purchasing regulations. Therefore, the existence of a franchise business has grown significantly. It has also received recognition from senior businessmen and business law experts, even though the law does not yet exist. However, since 1983, through the Supreme Court Jurisprudence Number 3051 / K / Sip / 1981 dated December 26, 1983 in the case of the initiates of the Gold Bond brand in providing brand licenses in Indonesia. Because one of the legal aspects of a franchise is the use of a license brand by the licensor to the license holder. Therefore, prior to the enactment of Supreme Court Jurisprudence, legal protection for franchising was carried out through franchise contracts made by other parties using the Third Book on Engagement and Articles listed in the KUH Perdata or Burgelijke wet Boek (BW). This regulates the agreement, as in Article 1320, Article 1338, and Article 1365 of the Civil Code.

As the franchise use is rapidly increasing as a business model, entrepreneurs will demand that the government renew the regulations used for legal protection for franchises in Indonesia:

- a. Agreement as basic law, Civil Code article 1338 (1), 1233 to 1456 Civil Code; the parties are free to do any business as long as they do not conflict with law, customs, politeness, or other matters relating to public order, the provisions of the validity of the agreement, etc.
- b. Agency law as a basic law, Trade Code (broker & commissioner), administrative provisions such as the Ministry of Industry, Trade, etc. Often determined firmly in the franchise contract that between the franchisor and the franchisee has no agency relationship.
- c. Brand Law, Patent, and Copyright as basic law; because of the involvement of the trademark and logo owned by the franchisor in the franchise business, plus if there are a number of possibilities that the franchisor has discovered. Discoveries that can claimed. Law number 20 of 2016 concerning Trademarks, Law Number 13 of 2016 concerning Patents, Law Number 28 of 2014 concerning Copyright.
- d. Foreign Investment Law as a basic law; if the franchisor opens an outlet in a particular country, not including the franchisee's country, it would be better to consult with a legal counsel about the possibilities and alternatives that the franchisor can take and the most profitable. Franchises are chosen to avoid restrictions for foreign companies when they will take action through direct investment.

- e. Government Regulation Number 42 of 2007 concerning franchising. In Government Regulations, all activities related to franchises held in Indonesia are regulated by the Government. In terms of criteria that can be categorized as a franchise, the provisions relating to the franchise agreement, the obligations of the franchisor, register the franchise offer prospectus, register the franchise agreement, training and supervision, and sanction. The franchise agreement will create rights and obligations, even though there are principles of freedom of contract. According to Government Regulation Number 42 freedom of contract, Government Regulation Number 42 of 2007 concerning franchising regulates certain obligations fulfilled by the parties. In Article 8, it is stated that the franchisor must train the franchisee, oversee operational management, marketing, research and continuous development. Including doing quality control and evaluating the business carried out by the franchisee (Moch Najib Imanullah, 2011: 12).
- f. Minister of Trade Regulation Number 12 / concerning M-DAG / Per / 3/2006 concerning Provisions and Procedures for Issuance of Franchise Business Registration Permits. In the regulation of the Minister of Trade, it is explained about the procedure for issuing franchise registration business licenses that must be owned by franchisees. In addition, it is also explained about the obligations of franchisees, and local and foreign franchisees for registration franchise agreements and franchise offer prospects for domestic trade department generals, and local franchises can register with the local trade department.

CONCLUSION AND SUGGESTION

Conclusion

Economic development occurs in business activities that are based on business law aspects in the form of profit which is the purpose and purpose of business activities obtained from entrepreneurs. Therefore, processes that support business activities need to be considered in the agreement. This is intended to be the basis for all business activities. This was marked by cooperation in the field of business, including franchising in franchise agreements. One technology transfer is through a franchise agreement. A business with a franchise system is a method of distributing goods and services to customers. The owner of this method is called the franchisor, and the party that gets the right to use this method is a franchisee. Franchising is granted the right and authority to use products, a trademark and business system created by franchise owners. The important thing about the franchise cooperation written in the agreement must be understood by each party and there is a balance in the contract. This means that the rights and obligations between the franchisee and the franchisor must be balanced. In other words, legal equality within the framework of freedom must be fulfilled.

Suggestion

The government of course has carried out reforms in the regulations regarding franchising, but the legal aspects that have been implemented by the government are no guarantee for the franchisor and franchisee. Government supervision is required for agreements between the franchisor and the franchisee, so that the franchisee as the licensee is not harmed due to unclear agreements. Therefore, socialization is needed for people who will join the franchise business.

REFERENCE

1. Basarah, Moch., dan H.M. Faiz Mufidin. 2008. *Bisnis Franchise dan Aspek-Aspek Hukumnya*. Bandung. PT. Citra Aditya Bakti.
2. Dwi Saputro, Anke. 2016. *Penyebab Matinya Waralaba*. Jakarta. Elex.
3. Fuady, Munir. 2001. *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis)*. Bandung. PT. Citra Aditya Bakti.
4. Ibrahim, Johannes, dan Lindawaty Sewu. 2004. *Hukum Bisnis Dalam Perspektif Manusia Modern*. Jakarta. PT. Refika Aditama.
5. Keizerina Devi Azwar, Tengku. 2006. *Perlindungan Hukum Dalam Franchise*. Repository USU.
6. Khairandy, Ridwan. 2000. *Perjanjian Franchise sebagai Sarana Alih Teknologi*. Pusat Studi Hukum UII Yogyakarta bekerjasama dengan yayasan Klinik Haki Jakarta.
7. Margono. Suyud dan, Amir Angkasa. 2003. *Komersialisasi Aset Intelektual Aspek Hukum Bisnis*, Jakarta, Grasindo.
8. Moch Najib Immanullah. 2008. *Kontribusi Huku Terhadap Waralaba di Indonesia*, Yustisia Edisi 74 Mei-Agustus 2008 Tahun XIX.
9. Moch Najib Immanullah. 2011. *Urgensi Pengaturan waralaba dalam Undang-Undang*. Yustisia Edisi 83 Mei-Agustus 2011 Tahun XXI.
10. Naihasy, Syahrin, *Hukum Bisnis (Business Law)*, Mida Pustaka, Yogyakarta, 2005.

11. Queen, Douglas J., *Pedoman Membeli dan menjalankan Franchise* : Tuntutan langkah Demi Langkah Menuju Keberhasilan Suatu Franchise, PT. Elex Komputindo, Jakarta, 1993.
12. Rawls John. 1971. *A Theory Of Justice*. Harvard: Belknap Press.
13. Richard Burton Simatupang, *Aspek Hukum Dalam Bisnis*, Rineka Cipta, Jakarta, 2003.
14. Rooseno, Harjowidigdo, *Perspektif Pengaturan Franchise*, Makalah Peraturan Ilmiah Tentang Usaha Franchise dalam Menunjang Pembangunan Ekonomi, Jakarta: BPHN, 1993.
15. Sutedi, Adrian, *Hukum Waralaba*, Ghalia Indonesia, Jakarta, 2008.