GOOD FAITH AS A KEY PRINCIPLE OF BUSINESS ETHICS TO FRANCHISE AGREEMENT AND DEVELOPMENT IN INDONESIA

Pan Lindawaty Suherman Sewu, Universitas Kristen Maranatha

ABSTRACT

Franchising is a business application in providing guarantees to other parties to use the trademarks along with the processes and sales distribution of goods/services. Interactions between the franchisor and franchisee relationships build on the basis of an agreement. The main principle of creating a franchise agreement is a base on good faith. The relationship between the parties in the franchise agreement is based on human dignity. Freedom of contract is subject to the norms and values of goodwill which embodied in business ethics especially when implemented in business activity. The principle of good faith is a universal value with global principle. The principle of good faith basically has two dimensions of honesty-rationality and decency/fairness. Regulation on the franchise especially with regards to clause contained in a franchise agreement and disclosure document (prospectus) must be be formulated based on good faith of the parties. The principle of good faith in the franchise agreement on business practices in Indonesia must develop better so the development of the franchise will be increased significantly. Application of the principle of good faith cannot be imposed entirely to the parties, because the perception and understanding of the pattern of the franchise in the businesses may vary among parties. Application of the principle of good faith in the franchise agreement and franchising practices must be supported by legal institutions that can provide guarantees and legal protection for the interests of the parties, especially the franchisee.

Keywords: Good Faith, Franchisee, Franchisor, Legal Guarantee.

INTRODUCTION

Business is one of the main activities necessary to support economic development. The current business activity is increasing, both in terms of quantity and diversity. Various forms of business cooperation grow and develop. The diversity of business cooperation can create new problems and challenges, so the law must be prepared to anticipate any emerging developments (Mulyawan, 2018; Budiharseno, 2017). One of the business strategy that is developed at this time one of them is a franchise (Khairuunnisa & Supriatna, 2018). The interaction that occurs between the franchisor and the franchisee is set forth in the franchise agreement. Neither the franchisor nor the franchisee needs a written guideline that can be shared in the franchise. The interaction between the franchisor and the franchiser is built on a contractual relationship. In relation to this it is fitting that the relationship between franchisor and franchisor is based on a relationship that upholds human dignity, based on good faith.

However, in practice in the implementation of the franchise agreement found a discrepancy with the noble value. The franchise agreement is established by the principles of the underlying

agreement, so it is necessary to further examine the principle of agreement what should be the principle held by the parties in the franchise agreement so that the parties properly implement the agreement (Prayogo, 2018; Roisah et al., 2018). This research seeks to examine the principles of good faith in franchises. The approach method used in this article is normative juridical, in this study the literature is the basic data of research classified as secondary data. Data collection technique is done by library research. Analytical technique is used with qualitative approach.

Good Faith in Franchising Agreement

The Franchise according to the European Code of Ethics for Franchising:

> *"...is a system of marketing goods and/or services, which is based upon a close and ongoing collaboration between legally and financially separate and independent undertakings, the Franchisor and its Individual Franchisees, whereby the franchisors grants its Individual Franchisees the right, and imposes the obligation, to conduct a business in accordance with the Franchisor's concept."*

The pattern of distribution of goods and services that developed well to date is a franchise pattern. Franchising is currently well developed, because:

1. Franchise offers convenience or flexibility. Modern man spends much of his money in order to buy comfort and flexibility because of the stressful life of the modern world. Therefore, leisure time is usually spent on buying convenience. Examples: massage reflexi, spa and so forth.
2. Increased demand for services. Currently developing many new services. Examples: catering services, laundry services, home cleaning services, package and food services and so on.
3. Consumers have limited time. Time is a very valuable thing, we are required to meet the needs of fast-paced. Example: fast food, between goods on line.
4. Good service and quality, is very coveted by consumers wherever they are.

Franchise business patterns are growing rapidly, such developments occur because of lifestyle changes. Modern society prioritizes quality, convenience, timeliness, and diversity of services in acquiring goods and services.

The interaction between the franchisor and the franchiser is built on a contractual relationship. The interaction between the franchisor and the franchiser should be built on a relationship that upholds human dignity and prestige. Freedom of attachment is subject to the norms/values of good faith embodied in ethics especially if in the business field is implemented in business ethics (Dillavou, 1962).

Humans are essentially blessed by God's mind and conscience to distinguish good and bad, guide and direct attitudes and behavior in living life. Man with his mind and conscience, has the freedom to decide on his own behavior or actions. But in addition to freedom, man has the ability to take responsibility for all his actions. This responsibility is a means of compensating for freedom (Khairandy, 2003).

At this time, everyone is increasingly concerned about the importance of ethics. Concern for this ethic can be seen in everyday life in society. From these experiences in society, human beings will find values and norms that are not ignored in social interaction, so that certain groups of people, especially groups of professional societies form a code of ethics.

Ethics is moral. The moral word comes from the Latin mos (single form: plural form: mores), which means customs, habits, behavior, character, character, morals, way of life. So

etymologically, the word ethics (Greek) is equivalent to the meaning of the word moral (Latin), that is the custom of the good or bad of an act. Ethics has a deep and pervasive value into all aspects of human life, and controls all the most essential human life. Ethics is born from the consensus and the force of its coming into effect, in the event of a violation, the sanction is psychological morality that is excommunicated from society. Ethical principles that apply to professionals (Kanter, 2001):

1. Responsibility, everyone who has a profession is expected to always be responsible both for the implementation of the work, as well as the results of his work. To be responsible in terms of implementation and the outcome of its duties, the excellent conditions, excellent competence, and working efficiently and effectively are the things that must be met.
2. Justice, in the framework of the implementation of the profession then need to appreciate things from other parties.
3. Autonomy, this principle requires that you professionals are given the freedom to run their profession.

Good intentions are born from the relationship between human and dignified human that the relationship between one side with another free but not mutually harmful. The principles of ethics contain good intentions in the broad sense embodied in the principle of autonomy, honesty, not doing evil, justice and respect for oneself. This broad sense of goodwill when applied in contractual relations between the parties that make the agreement materialize in the principle of good faith in the agreement (good faith in the context of the law of covenant).

Based on this, it will start from the discussion on the principles of agreement in general, the principle of good faith, and its application to the parties. Article 1313 of the Civil Code (hereinafter abbreviated as the Civil Code) provides the following formula: *"A covenant is an action by which one or more persons commit themselves to one or more persons"*. From the formulation of Article 1313 of the Civil Code, it can be concluded that the agreement or agreement referred to in that article is the agreement which causes the engagement. Thus the relationship between the engagement and the treaty is that the agreement issues an engagement. Agreement is one of the sources of engagement, in addition to other sources of the law.

The law of agreement in Indonesia is built on the basic principles that animate it. Scholten illustrates that the principle refers to: *"The underlying thoughts and background of any statutory provisions and judicial decisions within a legal system. The variety of specific rules and decisions here can be seen as the embodiment of it."* (Robert, 1987).

The Agreement is formed because of the conformity of the declaration of the will as defined in Article 1320 of the first part of the Civil Code concerning one of the conditions of the validity of the agreement, namely the consent of those who commit themselves (Komalawati, 1999).

Generally an agreement begins with a statement from either party to bind itself or offer an agreement called an offer, then the other party also gives a statement of acceptance of the offer or called acceptance. In formulating the agreement there are several principles of law which are the basic principles underlying the formation of the Covenant. The principle of law is the broadest foundation for the birth of a law. This means that the rule of law can ultimately be restored to these principles.

The principle of law contains ethical demands, therefore the principle is the bridge between the rules of law with the social ideals and ethical views of the community. The formation of the rules in the field of the treaty law is inseparable from the principle of law as the

main pillar in its formation. Through the principle of law, the rules of law change in character to be part of an ethical order.

FUNDAMENTAL PRINCIPLES OF CONTRACT LAW

Budiono (2006) argues that there are at least three basic principles. Fundamental principles surrounding the contract law are:

1. The principle of Consensualism, that agreement is formed because of the encounter of the will (consensus) of the parties. Agreement in essence can be made freely unbound and achieved not formally, but only through consensus.
2. The Principle of the Strength of Binding Agreement (verbindende kracht der overeenkomst) that the parties must fulfill what they agree on in the agreement they make.
3. The principle of Freedom of Contract (contractsvrijheid) that the parties on their own free will can make the covenant and everyone is free to bind to whomever he wishes. The Parties may also be free to determine the scope of the content and terms of an agreement provided that such agreements shall not be contrary to laws, which are forcing, whether public order or morals.

In essence for the establishment of a treaty sufficient with the occurrence of conformity or the encounter of the will of the parties intending to make the agreement. Principle of Consentuality in principle there is an agreement of those who bind themselves. Understanding is agreed to be described as a statement of will that is agreed between the parties. The statement of the offering party is called the bid, while the statement of the party receiving the offer is called acceptance.

The principle of freedom of contract is a principle in general contract law which essentially permits the parties to freely pour their will, then arranged in a treaty binding the parties signing the original agreement is not contrary to the law, good morals, or public order (vide Article 1337 Civil Code). The principle of Freedom of Contract or otherwise known as the term "*freedom of contract*" or "*liberty of contract*" is one of the most important principles in the treaty law. The Origin of Freedom of Contract Contracting was born in medieval Europe in conjunction with the emergence of the classical laissez faire economic theory which was a reaction to the mercantile system.

Freedom of contract can only achieve its objectives if the parties have a bargaining position or a balanced bargaining position. If one party is weak, then a party that has a stronger bargaining position or bargaining position will be able to impose its will to press the other side for its own benefit. Therefore, the terms or conditions of such a treaty would violate the sense of justice. In practice, the parties do not always have a bargaining position or a balanced Bargaining Position, so that the state may participate or must intervene to protect the weak.

In the beginning this principle of Freedom of Contract was not absolute. The Civil Code provides restrictions on the principle of Freedom of Contract. The principle of the binding force can be found in its legal basis in the provisions of Article 1338 Paragraph (1) of the Civil Code: *"All legally-enacted agreements shall be valid as laws for those who make them."* This principle of binding force states that a treaty results in a legal obligation and the parties are bound to enter into a contractual agreement. The promise of the spoken words is binding. Agreement is made and determined by the parties, both the scope and the procedure for the execution of the agreement (Rahardjo, 1986). This will have legal consequences and apply to the parties, as well as the law for the parties (Article 1338 paragraph (1) of the Civil Code).

In addition to the 3 main principles underlying the treaty law, in the opinion of the author there is another important and fundamental principle to be considered in the effort to establish a law of agreement that is the principle of good faith. The whole basic principle underlying the treaty law will not work properly if it is not based on a principle which is the basis of the whole basic principles.

Good faith is the principle of the covenant, basically the agreement must be made in good faith (vide Article 1338 paragraph (1) Civil Code), whereas in the context of Article 1338 paragraph (3) Civil Code, good faith must be based on rationality and propriety. Arrangement of Article 1338 (3) of the Civil Code stipulates that approval should be carried out in good faith (contractus bonafidei-contract on the basis of good faith). The meaning of the agreement is carried out according to propriety and justice. Understanding good faith in the world of law has a broader meaning compared with everyday understanding. Hoge Raad in its verdict dated February 9, 1923 gave the formula that the agreement should be executed volgens de eisen van redelijkheid en bilijkheid meaning good faith must be carried out with decency and merit. Werry (1990) translates it with the term virtue and decency working power of good faith that according to van Dunne applies to the entire contract process, covering three phases of contract travel: pre contractuele phase, contractuele phase, and postcontractuele phase.

In the National Civil Law Symposium organized by the National Legal Development Board (BPHN, 1981), good faith should be interpreted as:

1. Honesty when making contracts.
2. At the stage of manufacture is emphasized, if the contract is made in the presence of officials, the parties are considered to have good intentions.
3. As a propriety in the execution phase, that is, a good appraiser to the behavior of the parties in carrying out what has been agreed upon in the contract, is solely aimed at preventing undue behavior in the execution of the contract.

Good intentions are an important principle in the legal system of agreements in Indonesia. Good intentions should be done from the pre-contract stage. The agreement should be examined from what is expressly agreed upon and all other supporting factors that may affect the execution of the contract. Good faith can have the following functions:

1. The interpretation of the contract is not only based on what is clearly agreed or to the will of the parties, but also must pay attention to good faith. This is because good faith is a form of contract law implementation as contained in Article 1338 paragraph (3) of the Civil Code. This principle can be used in resolving disputes arising from agreements. The implementation of the agreement must be carried out by relying on decency and social norms, as stipulated in Article 1339 of the Civil Code. As a contractual basis, the principle of propriety in the implementation phase is related to a good assessment of the behavior of the parties in carrying out what has been agreed upon in the contract, which is intended to prevent inappropriate behavior in the implementation of the contract (Simamora et al., 2015).
2. Add and subtract the contents of the treaty or even the provisions of the law, when a judge in a particular case finds the contents of the contract in contravention of justice or propriety, unable to reduce or even exclude a contractual obligation. Some legal jurisprudence and a number of judges' decisions regarding good faith in Indonesia, such as the Decision of Simalungun District Court No. 37/Pdt/Plw/2012/PN SIM, have provided a basis for legal protection given to buyers with good intentions. Hierarchically, national jurisprudence regarding good faith can be seen from several Supreme Court jurisprudence that made good faith a benchmark in its decision, namely Decision No 251k/sip/1958 dated December 26, 1958, and Decision No. 3201k/Pdt/1991 which stated that buyers with good intentions must be protected. However, in

legal cases at the local level, the judge sometimes does not fully specify aspects of good faith for the buyer or seller in his decision (Simamora et al., 2015).

Good Faith in Indonesian Civil Law

Good faith becomes the essential principle in the system of agreement law in Indonesia. Good faith must be executed since the pre-contract stage (Subekti, 1995). The agreement must be analyzed from what has been fixedly promised and all the other supporting factors which can influence the execution of the contract. Good faith can have the functions as follows:

1. The interpretation of a contract is not only based on what has been clearly promised or the parties' desire, but also on considering the good faith.
2. Adding and subtracting the content of the agreement or even the legal requirements, when a judge in a certain case finds that the contract content is against fairness and appropriateness, cannot decrease or even negate the contractual obligation.

The discussion in this paper will be described further by looking at the problems of franchising in Indonesia. In Indonesia it is estimated that there are around 300 foreign franchises and 2100 national franchise and Business Opportunities (BO). Unfortunately, from the total of 2100 there are only no more than 100 businesses that are worthy of being called a franchise. The author argues that franchising is less developed in Indonesia due to the lack of good faith of the franchisor and the franchisee. For example, the behavior of the franchisor who wants to succeed quickly causes the franchisor not to think seriously about developing a franchise business concept. Franchisors only think material benefits. In addition, business people generally do not have a vision of doing business, and are not diligent enough and resilient to overcome the problems faced (Bardwell, 2015; O'Brien, 2015). Franchisors should master all efforts, obstacles and have overcome the problems faced from A to Z, starting from determining customer segments, business marketing programs and products or services, how to sell and manage businesses, recruit HR, train them and so on. Then he also has to make a determination of location, administration or accounting system, recruitment of employees, preparation of Standard Operational Procedure, run standardization, training programs and so on. Thus various problems must be understood by every franchise to make the franchise industry healthier and well-developed in Indonesia. Furthermore, some times the behavior of the franchisee who violates the signed contract. One of the franchisee's behaviors that show bad faith is not being able to maintain the confidentiality of the franchise business concept. Secrecy in the franchise business is an important element, so confidentiality must always be maintained by the franchisee. In addition, in Indonesia, franchisees often become competitors by violating the signed franchise agreement. This should be overcome if the parties both the franchisor and the franchisee uphold the principle of good faith. This should be overcome if the parties both the franchisor and the franchisee uphold the principle of good faith. The author argues, if the franchise wants to develop well in Indonesia, the parties must uphold the principle of good faith. Upholding good faith will result in the growth of the franchise business concept in Indonesia.

CONCLUSION

The development of a well-developed franchise pattern needs to be supported by franchisors, both franchisors and franchisees. A franchise agreement may proceed both to provide both franchisor

and franchisor's protection if the exercise of the agreement is grounded in the principle of goodwill. Good faith comes from human nature itself as a noble creature (think of others) and dignified (can be accountable). If the relationship between the franchisor and the franchisee as stated in the franchise agreement is executed by upholding the principle of good faith, the agreement can be executed properly, taking into account the rights and obligations of the parties as the parties hold their word or promise, do not take advantage by misleading acts in other human beings, obeying his duties and behaving as respectable and honest people.

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