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PAPER • **OPEN ACCESS**

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To cite this article: Ery Agus Priyono *et al* 2018 *IOP Conf. Ser.: Earth Environ. Sci.* **175** 012193

IOP Conf. Series: Earth and Environmental Science **175** (2018) 012193 doi:10.1088/1755-1315/175/1/012193

The Function of Good Faith Principle in the Application of Feedom Principle in Franchise Contract

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Abstract. Good faith is one of the main values that benchmark in determining whether a franchise contract is feasible or not to be implemented. Good faith is a filter based on moral values for the existence of a contract, after the contract is declared to have been valid under the terms of the legal contract as stipulated in Article 1320 Civil Code. A franchise contract in the form of a standard contract is a contract which tends to be one-sided and tends to violate the principle of freedom of contract. Freedom of contract is a basic principle for the establishment of a contract based on the free will of the parties reflected in an agreement. The contract which in its formation is less involving the other party is often declared as take it or leave it contract. This presentation aims to examine the function of the principle of good faith in judging a franchise as standard contract and legal consequences if the principle is violated. Descriptive and normative analysis of the data obtained by using this doctrinal approach becomes an option in the discussion. In conclusion, the consequence of a violation of the principle of good faith is that the agreement is legally null or voidable or can be cancelled.

Keyword: Good faith, standard contract, doctrinaire research

1. Introduction

Definition of Franchise according to Article 1 number 1 Government Regulation number 42 of 2007 concerning Franchise is a special right owned by individual or business entity to business system with business characteristic in order to market goods and / or services that have proven successful and can be used and / or used by other parties under a franchise agreement. Franchising is currently back in finding its momentum in Indonesia. The rise of enterprising business offers a franchise pattern or claims to be a "franchise" in various media. There is currently a "Second Awakening" franchise in Indonesia, having had a difficult time because of the 1997 monetary crisis that bankrupted many master franchisees of foreign franchises in Indonesia [1].

The spirit of running a franchise business that is as passionate as a franchisor (business owner) and a franchisee (sometimes a recipient) is sometimes not accompanied by sufficient knowledge of the franchise business in general or knowledge directly related to the object of the franchise business, they are really "new" to the field which they will do. Another thing that often creates problems in the future is their lack of understanding regarding franchise agreements that tend to give "excessive profit" to the franchisor[2]. Problem is why is the franchise agreement that has fulfilled the requirements of the validity of the agreement as stipulated in Article 1320 of the Civil Code, and the Principle of Contract Freedom, unable to fulfill a sense of justice with equal balance both economically and juridically for the parties, especially for Franchisee?

2. Methodology

The research method used in the writing of this paper is a normative juridical research method that is qualitative and comparative. The normative juridical method used in this study is to analyze the data referring to the norms contained in the legislation. This normative juridical method refers also to research that leads to the philosophical basis of the contract, in particular with regard to the philosophical foundation of the existence of good faith doctrine.

3. Literature Review

3.1. Principle of Freedom of Contract

The principle of Freedom of Contract is a universal principle. Schmitthoff in Huala Adolf asserted "The autonomy of the parties will be in the law of contract, the foundation on which an autonomous law of international trade can be built. The national souverign has, ... no objection that in that area an autonomous law of international trade is developed by the parties, provided always that the law respect in every national jurisdiction the limitations imposed by public policy" [3].

Under the Principle of Freedom of Contract, one may make or make no contract. The parties who have agreed shall make the treaty free to determine what may and may not be included in an agreement. Agreements taken by the parties bind them as legislation (Article 1338 Civil Code). The application of this principle provides an important place for the enactment of the consensual principle, which indicates a balance of interests, a balance in the distribution of the burden of risk, and the balance of bargaining positions[4].

This principle also enables strong party to impose their will on the weak side, so that the ideals of freedom of contract which initially provides the balance of law, the balance of interests and also the balance in the bargaining position, becomes a means of suppression against the weak. Therefore, Article 1337 Civil Code provides restrictions on the practice of applying the principle by affirming "cause". The agreement must be lawful means it is not prohibited by the law and not contrary to good morality or public order.

Freedom is a fundamental right recognized in the 1945 Constitution[5]. The freedom granted to the parties in making the treaty is not freedom with no restrictions. Article 1320 of the Civil Code, Article 1337 Civil Code, Article 1338 Civil Code, and Article 1339 Civil Code are clear evidence of the restriction. In other words, the Principle of Contracted Freedom contains "responsibilities", moreover in the country which its ideological basis is Pancasila[6].

3.2. Standard Form Agreement

The standard form agreement, including the Franchise Agreement, is an agreement whose content has been prepared in advance by the creditor. Large-scale agreements such as, lease agreements, franchises, factoring, housing loans, vehicle loans, or consumer financing, will surely use agreements with the standard model. One of the reasons is practical necessity, but actually it is more of an effort to minimize the occurrence of losses on the manufacturer[7].

Slawson [8] in his writings "Standard Form Contract and Democratic of Law Making Power" as quoted by Pohan, writes ..."standard contract form possible account for more than 90 percent of all contract now made. Most people have difficulty remembering the last time they contracted other than by standard form."

The controversy brought by the agreement in the form of a standard agreement is related to the "violation" of a principle which highly respected in the world of contract, namely the principle of freedom of contract (partij autonomie, freedom of contract). This principle is a source of rapid development of the law of agreement, not only in Indonesia, but also at regional and international levels[9]. This principle also underlies the enactment of contracts in India[10], Japan[11], and China[12].

In practice, almost all agreements in the business world, especially large-scale and/ or recurrent and sustainable agreements are implemented in the form of standard contracts that are limited to the Principle of Freedom of Contract. The background of growing standard agreements is due to socio-economic circumstances. In the use of these standard agreements, franchisor obtains efficiency in spending, cost, energy, and time[13].

The purpose of making a standard agreement is not different from other written agreement, which provides balanced or proportional benefits for the parties. Stephen Simister and Rodney Turner stated in his paper .....

....Standard forms of contract purport to provide a representative viewpoint of the industry which they serve. Rather than favor one particular party to the contract, standard forms should place both parties on an equal standing and fair basis by providing for an equitable distribution of risk[14].

The standard agreement, recognized or not, has become a limiting space for the Principle of Freedom of Contract. The principle of Freedom of Contract which initially serves as a guideline for the parties to realize a just agreement, in its development is misused by a strong party to suppress the weak party by making a standard agreement which is "take it or leave it contract". In the name of freedom of contract, justice for the parties, especially the weak party becomes unrealized [7].

The standard agreement is basically not prohibited, for efficiency reasons, and the standard agreement is always applied in almost all existing agreements[7]. This agreement leaves no room for the weak to negotiate properly. Accept or reject (take it or leave it) is the only option for the weak party's bargaining position. Deviations that often hitch a ride on the standard agreement is the inclusion of exemption clauses, which is a section or provision which content is restriction of responsibility or even the release of responsibility of one party to the other party. This deviation is also a negative impact of the less controlled implementation of freedom of contract principle[7].

The franchise agreement is a form of agreement in the field of private law in the form of a standard agreement, the basis of which is the principle of freedom of contract. As a standard agreement, the agreement is usually prepared by one of the parties having a strong bargaining position. Others who usually have a weaker bargaining position can only give their consent in the form of accepting or rejecting, so this standard agreement is commonly called take it or leave it contract[15].

The standard nature of the franchise agreement is often unfair, this is evident from the results of the author's research on some franchise agreements both foreign and domestic. The authors' conclusions are metaphorically in the franchise agreement, the franchisor's rights (franchisor) 100, the liability of which is only one, on the contrary for the franchisee, the right is only one while the obligation 100[2].

3.3. Good Faith Principle

The principle of Good Faith is derived from Roman law, which was adopted by the civil law, and in its development is also shared by several Common Law states [2]. The development of good faith in Roman law was not related to the evolution of the contract law itself. At first Roman law only recognizes iudicia stricti iuris, a contract born from a legal act (negotium) that strictly and formally refers to ius civile. If a judge faces such a contractual case, he must decide upon it in accordance with the law. The judge is bound to what is expressly stated in the contract (express term). Next develop iudicia bonae fidei. A legal act based on iudicia bonae fidei is called negotia bonae fidei. The concept of negotia comes from ius gentium which requires the parties to make and execute the contract to be in good faith[16].

4. Findings

Some examples of negative impact of agreement made by the stronger party are as follows:

1) Pizza Hut franchise agreement between Pizza Hut (Whicita Kansas United States, Franchisor / company) with PT. Sarimelati Kencana (Indonesia, franchisee / operator) signed on May 1, 1989, is contained in the XXVI article, out of all articles in almost all articles containing obligations to the operator / franchisee that are absolutely binding. Just by reading the contents of the agreement, it appears that this agreement is one-sided, or whether it is a "reasonable price" for a well-known business in almost all parts of the world.

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2) As already known to some franchisees, especially franchises of the business format, the franchisee must submit, obey, to all terms established by the franchisor in the form of a manual procedure, which has set in detail how this franchise business should run. It is not uncommon in the franchise business that usually there is a section that regulates the release of the franchisor's responsibility for potential losses that may arise in running this franchise business. For example an agreement between Alaska Pancake House of Alaska and Syrup Company, Inc. of Michigan signed on January 2, 1998 in Recital J.

..... The franchisee acknowledges that he understands that the success of the business to be operated under his agreement ...... franchisee understands that the restaurant operated under this agreement may lose money or fail.

Provisions in the contents of agreement Article 5 letter c

..... the franchisee be responsible for all costs of operating this unit including but not limited to ...... In addition to the franchisee shall save the company his business[17].

Some of the above examples provide a glimpse into the need for a re-arrangement (reconstruction) in the practice of a franchise agreement either when establishing an agreement or in the execution of agreement.

This fact explains that in the franchise agreement, the legal protection for the franchisee is very weak. Predicating “partner” to the franchisee for the recipient is economically understandable, but legally, it is not appropriate because the franchisee is not the worker for the franchisor. Even the legal protection provided by the state through the provisions of Law no. 8 of 1999 on Consumer Protection is not enough to provide a sense of security for the recipient of the franchise.

The application of the principle of Freedom of Contract which is oriented towards the western individualism, which ignores the Principle of Justice should be reorganized and restricted so as not to be misused by any party who has a strong position in the making of the agreement. The necessity of applying the principles of other agreements as controls for the application of the Principle of Freedom of Contract, another principle of good faith and equilibrium (reasonableness), and least but not least the principles unearthed from the noble values of Pancasila, as efforts to keep upright justice for the parties to the agreement[18].

All agreements must be executed in good faith (te goeder trouw), thus the contents of Article 1338 paragraph 3 of the Civil Code. This principle affirms that the parties to enter into an agreement should be based on good faith and decency, which implies making the agreement between the parties should be based on honesty to achieve common goals. Implementation of the agreement should also refer to what should and should be followed in the community. This principle is a principle that must exist in any agreement, and cannot be eliminated even though the parties agree to (immutable) [19].

The principle of Good Faith derives from Roman law, which was adopted by the civil law, even in its development also shared by several Common Law states[19]. The development of good faith in Roman law was not related to the evolution of the contract law itself. At first Roman law only recognizes iudicia stricti iuris, a contract born from a legal act (negotium) that strictly and formally refers to ius civile. If a judge faces such a contractual case, he must decide upon it in accordance with the law. The judge is bound to what is expressly stated in the contract (express term). Next develop iudicia bonae fidei. A legal act based on iudicia bonae fidei is called negotia bonae fidei. The concept of negotia comes from ius gentium which requires the parties to make and execute the contract to be in good faith[16].

The sense of goodwill and propriety flourished in line with the development of the Roman contract law, which originally only provided room for contracts set forth in law (iudicia stricti iuris sourced from Civil Law). On the receipt of contracts based on bonae fides requires the application of Good Faith and Fit Principle in the manufacture and execution of the agreement[20].

The meaning of "good faith" according to Indonesian Dictionary is belief, firm belief, intent, willingness (good) [15]. Then, the good faith (te goede trouvv), according to Fockema Andreae's Law Dictionary, is "the purpose, the spirit which animates the participants in a legal act or is involved in a legal relationship"[15].

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1) Furthermore, Black's Law Dictionary provides a good faith understanding (good faith), namely:

"Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it compasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or to seek unconscionable advantage, and individual's personal good faith is the concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone, ... In common usage this term is ordinarily used to describe the state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation[21].

National Civil Law Symposium held by the National Legal Development Board (BPHN) in 1981, interpreted good faith, namely:

a) Honesty at the time of contracting;
b) At the stage of manufacture is emphasized, if the contract is made in the presence of an official, the parties are considered to have good intentions (although there are also opinions expressing their objections);
c) As a propriety in the implementation stage, that is related to a good assessment of the conduct of the parties in implementing what has been agreed in the contract, is solely aimed at preventing inappropriate behavior in the implementation of the contract.

Subekti explained that good faith under Article 1338 Paragraph (3) of the Civil Code is one of the most important stake of the contract law, which gives the judge the power to oversee the execution of a contract, so as not to violate propriety and justice. This means that the judge is authorized to deviate from the contract if the execution of a contract violates the feelings of justice (recht gevoel) between two parties. If Article 1338 Paragraph (1) of the Civil Code requires legal certainty, in the sense that the terms and norms of the concrete and individual law (sections) in the contract shall be 1338 paragraph (3) of the Civil Code in a dynamic manner encompassing the entire contract process.

The problem that arises until now has not one word to provide the right basis as a benchmark whether the agreement has been executed on the basis of good faith and decency or not. The practice is left to the judge to assess it. This is also true in Anglo Saxon countries, judges do not have agreed standards for measuring the principle. Usually the phrase ... good faith and propriety is always associated with the meaning of fairness, reasonable standard of dealing, a common ethical sense[22].

Good faith in Roman law refers to the three forms of behavior of the parties to the contract. First, the parties must hold firmly to their promises or stakes. Second, the parties should not take advantage of the misleading action against either party. Third, the parties comply with their obligations and behave as respectable and honest even though the obligations are not expressly agreed upon[15].

With regard to the validity of the principle of good faith in the pre-contracting stage, it may be explained that if the execution of a contract creates an imbalance or violates the feelings of justice, the judge may make adjustments to the rights and obligations contained in the contract. In the practice of contract law, the judge does use his authority to interfere with the contents of the contract, so it seems that good faith must exist not only at the stage of signing and the post-contracting phase (execution) of the contract, but also the preliminary (contract) design stage[15].

For example, the Supreme Court of the Republic of Indonesia (MARI), in civil case No. 341 / K / Pdt / 1985, dated March 14, 1987, Ny. Boesono and R. Boesono against Sri Setianingsih, decided that the 10% interest rate per month was too high and led to injustice. OIEH therefore, MARI lowered the interest rate from 10% to 1% per month[15].

Good faith test should be conducted for each stage of the contract, both the contract pretreatment (contract), the contract making (signing) and the post-contracting (contract) implementation phase. Subjectively the state of ignorance will result in one party in the absence of contract. Furthermore, it is important to understand that objective testing of good faith with propriety must be thorough and profound, since propriety is constantly changing in accordance with the development of the values held by citizens.

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In general, the understanding of "good faith" consists of two meanings[15]:

a) The objective meaning: that the agreement made must be done by heeding the norms of propriety and decency.
b) The subjective meaning: the notion of "good faith" which lies in one's inner attitude.

5. Conclusion

Standard-shaped contracts are basically not prohibited when considering the need for practices that require contracts to consider aspects of efficiency, both in terms of time, cost, and labor. Normative standard contracts also do not violate the provisions of Article 1320 governing the terms of the validity of the agreement. Violation of the principle of good faith due to the existence of a contract in the standard form may result in the contract null and void if it is categorized as a violation of the principle of good faith as a violation of objective conditions. Meanwhile, the violation of good faith principle if categorized as a violation of subjective requirements then the agreement is null and void.

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