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RESEARCH ARTICLE

Legal Certainty for Unregistered Franchise Agreements in Indonesia

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ABSTRACT

Franchising is one form of business that is growing rapidly in Indonesia. Basically, franchise agreements must be registered with the government. This is regulated in Government Regulation No. 42 of 2007 concerning franchising. The purpose of this study is to analyze the legal certainty of unregistered franchise agreements in Indonesia. This research uses normative research methods. The data collection technique in this research is by literature study. The data that has been collected is then analyzed in three stages, namely data reduction, data presentation and conclusion drawing. The results showed that the legal certainty of franchise agreements that are not registered in Indonesia, the Minister of Trade, Governor, Regent/Mayor, in accordance with their respective authorities, can impose administrative sanctions. In addition to administratively, unregistered franchises are also civilly problematic. If the agreement made does not fulfill the formalities stipulated by law, then the agreement can be null and void and is obliged to return the nominal investment that has been given by the franchisee.

KEYWORDS

Legal Certainty, Franchise Agreement, Unregistered

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1. Introduction

Franchising is a business system in which the owner of a brand or business grants rights to another party (usually referred to as the franchisor) to use the trademark operating system and distribute products or services that have proven successful. The party receiving these rights (franchisee) pays fees or royalties to the brand owner for these rights (Widodo, 2017). In the franchise business model, the franchisor provides guidance and support to the franchisee to run the business according to established standards. This includes operational guidelines, training, and quality control of products or services to remain consistent with the brand. Franchising is commonly seen in various sectors, such as fast food, retail, health services, and more (Utomo & Inayah, 2017).

In Indonesia, the franchise business has rapidly grown, encompassing various types of businesses, including fast-food restaurants like Kentucky Fried Chicken, Pizza Hut, McDonald's, hotels, and car rental services. Franchising is also widely used by local businesses, such as Es Teller 77 (Marindo, 2013). In practice, franchisors (franchise providers) have an obligation to register a franchise offering prospectus before entering into a franchise agreement with a franchisee (recipient of the franchise).

The franchise offering prospectus is a written document that minimally describes the identity, legality, business history, organizational structure, financial reports, the number of outlets owned, the list of franchise recipients, the rights and responsibilities of both the franchisor and franchisee and the intellectual property rights (IPR) held by the franchisor, as regulated by Article 1, number 7, Minister of Trade Regulation Number 71 of 2019 regarding the Implementation of Franchising ("Permendag 71/2019"). However, franchisees also have an obligation to register the franchise agreement. Thus, the obligation to register franchise-related documents is not only applied to the franchisor but also to the franchisee (Oktavira, 2020).

In implementation, there are still franchises that violate the registration obligations of the franchise offering prospectus and franchise agreement. Previous research (Rahmad & Zubaedah, 2022) examined the civil law perspective of franchise agreements in Indonesia. The research results showed that franchise agreements are already regulated by Government Regulation Number 16 of 1997 concerning franchising, which has been replaced by Government Regulation Number 42 of 2007, Minister of Industry Regulation Number 256/MPP/KEP/7/1997 concerning "Procedures for the Implementation of Franchise Business Registration," and Minister of Trade Regulation Number 12/M-Dag/Per/3/2006. In implementing franchise agreements, several principles apply, including (1) the principle of freedom of contract, (2) the consensual principle, (3) the principle of good faith, (4) the binding force principle, (5) the legal equality principle, (6) the balance principle, (7) the legal certainty principle, (8) the propriety principle, and (9) the customary principle.

Another study (Idrus, 2017) examined the legal aspects of franchise agreements from the perspectives of civil law and Islamic law. The research results showed that initially, franchising was a business concept involving the granting of rights to intellectual property and operational systems by the franchisor to the franchisee, which later became a legal institution regulating the legal relationship between the franchisor and franchisee as embodied in the franchise agreement regulated by Law Number 9 of 1995 concerning Small Businesses. The focus of this research is to discuss franchise agreements in the civil law and Islamic law perspectives aimed at achieving benefits for humanity.

A similar study (Supit, 2016) examined legal protection for franchises in business agreements in Indonesia. The research results showed that the rapid growth of the franchise business the legal umbrella provided protection to the parties involved in this business. Thus, in addition to achieving legal goals, this can have a more positive impact on the country's economy. However, in reality, issues can still be found, such as unilateral termination of a franchise agreement between the franchisor and franchisee and negligence in complying with the system, leading to disputes among business practitioners in this franchise system, potentially damaging reputation, disappointing consumers, and lowering the brand equity that has been hard-built.

The novelty of this research lies in its object of study, namely the legal certainty of franchise agreements that are not registered in Indonesia. This research can help clarify the legal framework related to franchise agreements, especially in cases where these agreements are not officially registered. The theoretical implications can also contribute to the overall development of contract law, clarifying the legal limitations related to franchise agreements in Indonesia. Meanwhile, practically, the results of this research can provide valuable insights for business practitioners, especially those involved in franchise agreements. The aim of this research is to analyze the legal certainty of franchise agreements that are not registered in Indonesia."

2. Method

This research employs a normative research method. The normative research method is an approach used in legal research to analyze and interpret legal regulations, legal doctrines, and principles that are in force. This approach refers to the norms within a specific legal system to develop legal arguments (Efendi & Ibrahim, 2018). The method involves examining legislation, doctrines, and previous research results related to legal certainty for unregistered franchise agreements in Indonesia. The data collection technique used in this research is a literature review. After gathering relevant data related to the research topic, the next step is to analyze the data in a structured manner. The first stage is data reduction, where the collected data is simplified, focused, and organized for more effective processing. Subsequently, the data is presented through a data presentation process, where the reduced information is presented in a more easily understandable form. Finally, the conclusion stage is conducted to analyze the processed and presented data. The conclusions drawn result from the interpretation of the data and provide answers to the research questions or objectives set earlier.

3. Theoretical Study

3.1 Legal Certainty

Certainty is an integral characteristic of law, especially in the context of written legal norms. Law without certainty loses significance because it cannot serve as a guide for individual behavior. Certainty is considered one of the essential goals in law, and historically, discussions about legal certainty have existed since the concept of the separation of powers by Montesquieu. Orderliness in society is closely related to legal certainty because orderliness is at the core of certainty itself. Orderliness allows individuals to live with confidence, facilitating them to engage in necessary activities in social life (Darmawan et al., 2021).

Jan M. Otto explains that legal certainty is created through legal rules that can reflect the existing culture in society. His theory of legal certainty, known as realistic legal certainty, refers to the need for harmony between the state and its citizens who have an orientation and understanding of the legal system of the state. Otto's opinion emphasizes that real legal certainty may have more juridical dimensions but within the limitations of the previously described situation. He also asserts that law enforcement by law enforcement agencies is key to ensuring legal certainty, necessary to maintain order and justice in society (Sulaeman, 2015).

3.2 Franchise Agreements

A franchise agreement is a written agreement between parties, usually a standard agreement unilaterally determined by the franchisor, which tends to provide greater benefits to the franchisor than to the franchisee. This agreement allows the franchisor to grant permission to the franchisee to use the business system, operational methods, and Intellectual Property Rights owned by the franchisor. Usually, this agreement is recorded in a written contract, in line with the provisions of Article 4 of Government Regulation Number 42 of 2007, which states that franchise agreements must be made in writing in the Indonesian language. Although, in civil law, franchise agreements are considered special agreements not specifically regulated in the Civil Code (KUHPerdata) (Lolowang, 2015). Franchise agreements, generally standardized agreements unilaterally determined by the franchisor, specify the requirements to be met by the franchisee. This condition tends to give the franchisor a greater advantage than the franchisee. This situation creates an imbalance in the positions between the franchisor and the franchisee (Priyono, 2018).

4. Results and Discussion

The value of legal certainty is fundamentally aimed at providing legal protection for every citizen against arbitrary actions of authority. Consequently, the law imposes responsibility on the state to guarantee protection for its citizens (Remaja, 2014). Legal certainty helps society understand rights and obligations, preventing violations of individual rights and community interests. Additionally, legal certainty contributes to justice by preventing abuse of power and arbitrary actions. In this context, legal certainty holds a position as a value that must exist in every law created and applied. Therefore, the law can provide a sense of justice and contribute to the orderliness of societal, national, and state life.

Franchising in the business world is considered a highly beneficial system, as evidenced by various national and international companies (Atmoko, 2022). The globalization of franchising began in the 1990s due to factors such as domestic market saturation and intense domestic competition (Alon et al., 2020). The development of franchising has also entered Indonesia, where compliance with applicable regulations on franchising is essential for both franchisors and franchisees to support the dedication to continually improve the value of the franchise business system.

Franchising involves two parties, the franchisor and the franchisee, expanding business through a proven successful system. This business model is mutually beneficial, with the franchisor rapidly and efficiently growing their business and profiting from franchise fees, royalties, and other fees, while the franchisee gains a greater chance of success by leveraging a proven brand and system. A successful franchise cooperation exists when certain conditions are met (Oktavia, 2013):

1. The franchisor offers a business package.
2. The franchisee owns the business unit.
3. There is cooperation between the franchisee and the franchisor in managing the business unit.
4. There is a written contract governing the cooperation between the franchisor and the franchisee.

This contract, known as the franchise agreement, outlines the requirements, conditions, and commitments desired by the franchisor for its franchisees. The agreement includes provisions related to the rights and obligations of both parties, location requirements, training provisions, fees payable by the franchisee to the franchisor, the duration of the franchise agreement, and extensions, as well as other provisions governing the relationship between the franchisor and the franchisee (Putri, 2020).

The franchise agreement is also detailed in Government Regulation No. 42 of 2007, stating that the franchise agreement must at least include the names and addresses of the parties, types of intellectual property rights, business activities, rights and obligations of the parties, assistance, facilities, operational guidance, training, and marketing provided by the franchisor to the franchisee, business area, agreement duration, payment procedures, ownership, changes in ownership, and inheritance rights, dispute resolution, and procedures for extension, termination, and termination of the agreement.

Furthermore, Minister of Trade Regulation No. 71 of 2019 on the Implementation of Franchising explains various processes and obligations that must be fulfilled by both parties involved in running their franchise business. One of these obligations is for the franchisee to register the franchise agreement, as stated in Article 7, paragraph 2, which mandates that Franchisees or Continuing Franchisees must register the Franchise Agreement. Registration is done through the submission of a Franchise Registration Certificate (STPW) application in accordance with the provisions of this Ministerial Regulation. Furthermore, Article 1, paragraph 10, defines the Franchise Registration Certificate (STPW), which is proof of the registration of the Franchise Offering Prospectus for Franchisors and Continuing Franchisors, as well as proof of the registration of the Franchise Agreement for Franchisees and Continuing Franchisees, provided after meeting the registration requirements specified in this Regulation.

The mandatory requirement to have an STPW is also stipulated in Trade Minister Regulation No. 53 of 2012, Article 10. This regulation outlines the process for obtaining an STPW; for example, foreign franchisees must register the franchise agreement with the Directorate of Business Development or the Regional Trade Service Unit of the Ministry of Trade by filling out the specified form. Meanwhile, local franchisees, Continuing Franchisees from foreign franchises, and Continuing Franchisees from local

franchises must register the franchise agreement with the relevant trade service office in the province, city or regency, or the Integrated One-Stop Service Office throughout Indonesia by completing the form as outlined in this Ministerial Regulation.

The registration of franchise agreements is deemed mandatory and can last up to five years. If this obligation is not fulfilled, the Minister of Trade, Governor, Regent/Mayor, according to their respective authorities, can impose administrative sanctions, such as (Trade Minister Regulation 53 of 2012):

1. A written warning, up to three times consecutively, with a two-week interval for each warning, starting from the date of the warning letter issued by the STPW issuing official, using the specified form.
2. A fine of up to 12 100,000,000 (one hundred million rupiahs), imposed on 12 franchisor based on the applicable Government Regulation on Non-Tax State Revenue at the Ministry of Trade. The fine is deposited into the state treasury as Non-Tax State Revenue at the Directorate General of Domestic Trade, Ministry of Trade, starting from the expiration of the third warning letter.
3. Revocation of the STPW by the STPW issuing official for Franchisors and Franchisees who do not comply with the regulations after a temporary suspension of the STPW for a maximum of two in the form of a decision as stipulated in this Ministerial Regulation.

Undoubtedly, a franchise agreement that is not registered remains legally valid under civil law. However, an unregistered franchise agreement does not enjoy the benefits of registration, diminishing the legal certainty of the agreement. The legal issues that may arise in unregistered franchise agreements include difficulties in proving them in court, resulting in a lack of legal protection during conflicts. The issuance of the Franchise Registration Certificate (STPW) for franchisees is crucial for legal certainty and legal protection. The obligation to obtain an STPW for every franchisor serves as legal protection for both the franchisor and the franchisee. In case of any discrepancies, the STPW can be a guiding document for the affected party (Ningrum & Inayah, 2021).

9 The legal consequence of a franchise agreement without an STPW is that the agreement is void ab initio (Annisa & Andraini, 2023). An agreement without an STPW is considered to violate the requirements of an agreement related to a lawful cause. Without an STPW, the franchise agreement is deemed to have violated legal regulations, making it legally void. Void ab initio means the franchise agreement is considered never to have existed, and the franchisor is obliged to reimburse or return the financing amount provided by the franchisee. The franchisee does not need to cancel the agreement because the agreement is considered never to have existed, along with all the provisions agreed upon within it.

Therefore, the issuance of the Franchise Registration Certificate (STPW 13 for franchisees is crucial to provide legal certainty and legal protection. The obligation to have an STPW for every franchisor is a form of legal protection for both the franchisor and the franchisee. The Franchise Registration Certificate (STPW) serves as a document that can be used as a reference in case of violations or discrepancies with what has been agreed upon in the agreement. Additionally, when a franchise agreement is preceded by an STPW, the franchise is legally recognized and deemed to have fulfilled the required conditions.

13 Conclusion

The purpose of this study was to analyze the legal certainty of unregistered franchise agreements in Indonesia. The absence of franchise agreement registration in Indonesia gives rise to significant legal implications. According to research, the Minister of Trade, Governors, Regents, or Mayors, according to their authority, can impose administrative sanctions for the non-registration of franchises. In addition to administrative consequences, the civil law aspect is also affected. The existence of an agreement without proper registration in accordance with legal requirements has the potential to lead to the legal cancellation of the agreement. In this case, if the agreement does not comply with the formalities required by the law, the agreement can be declared null and void. As a result, the franchisee may be obliged to return the investment provided to them.

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References

- [1] Alon, I., Apriliyanti, I. D., & Parodi, M. C. H. (2020). A systematic review of international franchising. *Multinational Business Review*, 29(1), 43-69.
- [2] Annisa, P. N., & Andraini, F. (2023). Perlindungan Hukum Kerugian Franchisee Akibat Perbuatan Melawan Hukum Dalam Perjanjian Waralaba Hanashobu Japanese Noodle Bar. *UNES Law Review*, 6(1), 1224-1239.
- [3] Atmoko, D. (2022). Penerapan Asas Proporsionalitas Dalam Perjanjian Waralaba (Franchise) Pada Suatu Hubungan Kontrak Bisnis. *Jurnal Hukum Sasana*, 8(1), 153-162.
- [4] Dermawan, A., Saputra, E., & Hutagalung, J. E. (2021). Peran masyarakat dalam menaati hukum dan mendukung perkembangan teknologi komputer dalam bisnis digital. *Community Development Journal: Jurnal Pengabdian Masyarakat*, 2(3), 569-573.

- [5] Efendi, J., & Ibrahim, J. (2018). Metode Penelitian Hukum: Normatif dan Empiris.
- [6] Idrus, N. S. (2017). Aspek Hukum Perjanjian Waralaba (Franchise) Dalam Perspektif Hukum Perdata
- [7] Lolowang, S. (2015). Aspek Hukum Pemberian Lisensi Hak Kekayaan Intelektual Dalam Perjanjian Waralaba. *Lex Administratum*, 3(2). dan Hukum Islam. *Jurnal Yuridis*, 4(1), 28-45.
- [8] Marimbo, R. C. (2013). Rasakan Dahsyatnya Usaha Franchise!. *Elex Media Komputindo*.
- [9] Sulaeman J, M M. E. I. (2015). Kepastian Hukum Gadai Tanah dalam Islam. *Deepublish*.
- [10] Ningrum, T. A. L., & Inayah, S. H. (2021). *Perlindungan Hukum Bagi Penerima Waralaba (Franchisee) Terhadap Pewaralaba (Franchisor) yang Tidak Memiliki Surat Tanda Pendaftaran Waralaba (STPW)* (Doctoral dissertation, Universitas Muhammadiyah Surakarta).
- [11] Oktavira, B. A. (2020). Masalah Hukum Waralaba yang Belum Terdaftar. <https://www.hukumonline.com/linik/a/masalah-hukum-waralaba-yang-belum-terdaftar-1t5e3b3a31adc96>. Diakses pada 18 Desember 2023.
- [12] Priyono, E. A. (2018). Aspek Keadilan dalam Kontrak Bisnis di Indonesia (Kajian pada Perjanjian Waralaba). *Law Reform*, 14(1), 15-28.
- [13] Putri, E. A. (2020). Perlindungan Hukum Bagi Para Pihak Dalam Perjanjian Usaha Waralaba (Franchise). *Tadulako Master Law Journal*, 4(2), 174-200.
- [14] Rahmad, A., & Zubaedah, R. (2022). Tinjauan Perspektif Hukum Perdata Terhadap Perjanjian Waralaba di Indonesia. *Jurnal Ilmu Hukum dan Humaniora*, 9(1), 20.
- [15] Remaja, N. G. (2014). Makna hukum dan kepastian hukum. *Kertha Widya*, 2(1).
- [16] Supit, I. (2016). Perlindungan Hukum Bagi Franchise (Waralaba) Dalam Perjanjian Bisnis Di Indonesia. *Lex Administratum*, 4(4).
- [17] Utomo, S. B., & Inayah, S. H. (2017). Tinjauan Yuridis Supporting Management Pada Kontrak Franchise Di Surakarta Berdasarkan Peraturan Menteri Perdagangan Republik Indonesia Nomor 53/M-DAG/PER/8/2012 Tentang Waralaba (Doctoral dissertation, Universitas Muhammadiyah Surakarta).
- [18] Widodo, S. (2017). Karakteristik Yuridis Perjanjian Waralaba. *Kosmik Hukum*, 16(1).

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