

Legal Protection in Fiqh Muamalah Perspectives and Civil Law Franchise Agreement (Studies on Franchise *Martabak* Hawaii Tulungagung)

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Abstract — The franchise essence is a business agreement involving two parties between the franchisor and the franchisee or in Islam known as syirkah. The business will result in a profit sharing between the two parties. This business practice cannot be separated from the rules issued by the religion which has been described by the mujtahid in overcoming the problems in the era of globalization. On the other side of the State of Indonesia is not an Islamic State, therefore the role of government authorities to curb the practice of this franchise is very important. To curb the rule of the State and the religious rule of the majority of Islam, therefore it needs to be examined from the standpoint of muamalah and civil. The method used in this research is research method with qualitative approach with field research type. The nature of this research is descriptive analytical. Legal protection and agreements executed by franchise parties in the *Martabak* Hawaiian franchise Tulungagung are in conformity with Fiqh Muamalah and Civil Law.

Keyword — Franchise (Franchise), legal protection, treaties, Civil Law, Fiqh Muamalah

I. INTRODUCTION

In this globalization era the all of world aspects grow rapidly. All aspects of science also shows that the science of one another also follow times as well as the science of economics. All the practitioners from each circle of science bring up their latest ideas as well as cooperation with the franchise system. Of course with the development of scholarship that contemporary can provide welfare in the field of economy for the surrounding community.

The economic aspect of economics includes the fundamentals of life, from the beginnings of needs, economic principles, economic fields that are all inseparable from daily life. In general, this

franchise business involves franchisors to legalize their patents to franchisees within a certain period according to the agreement of both parties. The granting of such rights is better known as the franchise agreement. This business is obtained through a license, granted by the franchisor by granting permission to the licensee to perform one or a series of actions against the protected product / service and to receive compensation from him called royalty.[1]

License is a part of Intellectual Property Rights protection (IPR) which has been approved by Member States world trade (World Trade Organization-WTO).

Government Regulation No.42 of 2007 concerning Franchise in article 1, paragraph 1, provides a definition that Franchise is a special right owned by a person or an individual or a business entity to business systems with special characteristics of business in order to market goods and / or services that have been proven successful and can be utilized and / or used by other parties under the Franchise Agreement. [3]

The regulation that has been made by the government is a form of protection between the two parties that make it, the legal relationship between the two parties involved in the agreement and set forth in the operation of the work then the agreement will be a law for them (the principle of *pacta sunt servanda*). [4] The emergence of a business with a franchise system that has involved two parties, with the covenant bond they have created will certainly give rise to the rights and obligations of each party that is unionized. Therefore, it is necessary to provide protection for those who associate so as not to cause harm between one party. Based on the view of Shariah Economic Law, Franchise has the same meaning as *Shirkah* or *Musarakah*, which has the meaning of: akad done by two or more people to make cooperation in running a certain business with each party contributes funds. (or charity / expertise) of

the agreement that profits and risks will be borne together in accordance with the agreement in the agreement. [5]

In addition, in its application, the franchise business is a business based on the principle of cooperation by providing benefits between the two parties. Since the mechanisms under way must be in accordance with the agreements that have been made, then all the terms and conditions are based on the agreement. So it is important to understand and understand how the mechanism made by the franchisor or franchisor. Therefore there will be no fraud or actions that will harm either party.

Basically a franchise is a term that has the same understanding with the franchise. At first the term franchise was introduced by an educational and development management institute (LPPM). While the term franchise is a combination of two words "wara" which means more / special, and with the word profit which means "fortune". Therefore, if combined franchise has the meaning of a special business that has more profit. [6] Franchising is a business system that occurs between both parties on behalf of the company as well as on behalf of individuals to undertake a partnership in a particular business field. From the cooperation relationship, one party becomes the franchisor (franchisor) who has a well-known brand and can be marketed and profitable. And one other party becomes the franchisee who will run a business using a brand owned by the franchisor.

Following the agreement to enter into cooperation, the franchise agreement was formalized as a form of legal force for both parties. The franchisor then grants the franchisee the right to run a business on goods or services based on agreement in a written agreement. In addition, the agreement also contains certain benefits as a profit on the business undertaken which is then agreed upon by both parties. [7]

Government Regulation No. 42 of 2007, Article 4 states that the franchise should contain the following clause:

Identity of Parties that enter into franchise agreements, both franchisees and franchisors.

Position of the Contracting Parties which shall sign the agreement. Neither the franchisor nor the franchisee.

Explanations relating to intellectual property rights or related to the characteristic of such products.

Rights and obligations of the parties and facilities obtained.

Location Marketing, franchisor may choose to determine the exact location to market the products it runs. Because the franchisor has a rough knowledge of the marketing project, so there needs to be coordination related to the

place to be marketing the product. By choosing strategic oasis and easy to reach.

Time, in general the time period given by the franchisor to the franchisee is for 5 years. However, if at any time may make an extension of the contract with the record has met the terms and conditions set.

Settlement of disputes, the existence of established cooperation does not cover the possibility of wanprestasi or other things either from the franchisor or from the franchisee. The existence of this clause as a means to provide a choice of solutions in resolving disputes.

The reasons for the termination of the contract / agreement, not necessarily the parties may terminate the contract unilaterally, it is necessary to point out the explicitly related to the end of the contract on cooperation in the franchise agreement.

Compensation may be made by the franchisor (franchisor) or the franchisee, depending on which party violates the contents of the agreement.

Payment methods, depending on each franchisor, can be done at the beginning and ending even done with the installment system.

Related to the use of the product must be in accordance with the provisions and applicable standards, both on product management and brand usage to be performed.

Franchisor provides coaching, training and guidance to the franchisee. This form of coaching is done as a means to maintain the brand and characteristic of products owned by the franchisor. [8]

One of the businesses that use the franchise system is *Martabak* Hawaii Tulungagung. In the implementation of the franchise agreement which is then agreed by both parties both franchise recipients and franchisors. The legal consequences of such an agreement will give rise to the responsibilities that both must have. So that will create a protection during the contract is executed in the form of a franchise agreement. Therefore, in this study, the main focus in the study is the form of protection provided by the franchisor (franchisor) to the franchisee by looking from the point of view of muamalah fiqh and civil law.

II. METHOD

In this study, the research method used is qualitative approach with field research type. The nature of this research is descriptive analytical. Primary sources used in this study are journal journals, journals about franchising (franchise) as well as secondary sources used from several books that in sync with the studied discussion. While the data collection techniques used through direct observation

at the location of the study, documents and also some data that sourced from the journal. In addition, data collection is also done by visiting Franchisor and Franchisee locations in *Martabak* Hawaii Tulungagung to ask permission to conduct research on franchise business about Legal Protection against Franchisee in general. Starting from work system to special into the agreement and legal protection.

III. RESULT

The existence of a franchise business that runs in the realm of the growing economy and can be said to be a source of promising benefits. Because the uniqueness and its characteristic are able to compete in the market economy both traditional and modern. Thus, if an entrepreneur wishing to conduct business under a franchise agreement must be in accordance with the terms of the agreement. The main legal basis in this agreement comes from civil law which in fact becomes the main reference in making the agreement. In the context of this research is concrete evidence that the walabara agreement in Hawaiian *martabak* franchise is in conformity with the ground rules.

Based on the research, the following research results can be obtained:

The implementation of the agreement between the franchisor and the franchisee has been carried out in accordance with the terms of the agreement.

Protection The law provided has been run in accordance with Islamic and state religious principles in the franchise agreement.

From both points, it can be analyzed as follows:

A. The implementation of the agreement between the franchisor and the franchisee has proceeded in accordance with the terms of the agreement.

This form of franchise agreement is a form of sale and purchase, meaning the franchisee gives some money to buy products and permission to market a product or brand from a franchisor. So in the mechanism to be executed by the franchisee (franchisee) must be in accordance with the stipulated. Nevertheless, the agreement can be run in accordance with the contents of the agreement that has been agreed upon both. Franchisor does not necessarily release the franchisee just like that. Because during the period of the franchisor agreement provides regular monitoring and evaluation.

It is evident that the franchisor still provides a form of concern for the progress of the business undertaken by the franchisee. Not only long-term evaluation and monitoring during the agreement. However, after the contract is signed, the franchisor provides several facilities such as providing training on how to process and make Hawaii *martabak* in accordance with the provisions and SOPs that have

been set. This form of training is done on a large scale with some business managers who will join together Hawaiian *martabak*. But another form of concern given by the franchisor is a pickup training facility. This means that the franchisee is located far away from a predetermined location for training or unable to attend at that time. So the franchisor will send the tentor who will visit the location of the franchisee.

Even after the joint training, the franchisee must implement the mechanism in accordance with applicable regulations. But nevertheless the franchisor gives freedom to the franchisee creativity *martabak*, both about the shape and toping that will be used. But the original characteristic of *martabak* itself must be kept well. Because it would include wanprestasi if it damages or alters the characteristics of the *martabak*. The purpose of the training is to improve quality in running Hawaii *martabak* business.

In addition, the franchisor also provides some primary equipment in the form of equipment in making *martabak* complete with the materials in a single cook as a supporter runs the franchise business. These materials include the initial cost of purchasing Hawaiian *martabak* brands. As for *martabak* franchisee are to buy basic ingredients from franchisor. The existence of flour in the supply directly from the franchisor is what makes characteristic *martabak* Hawaii can not be eliminated. Therefore, seen from some facilities provided from the beginning of the contract agreement until the training and business run *martabak* Hawaii tulungagung. It has been in accordance with the contents of the franchise agreement that has been agreed by both parties. Both the franchisor and the franchisee have performed their respective obligations.

B. Legal Protection Given Has Been Walked In accordance with Fiqh Muamalah and Civil Law.

The form of cooperation undertaken on the basis of business agreements has been in line with the principles of sharia. Although not clearly visible, but its sharia principles have been seen and can be verified. Sharia form is listed in the form of protection provided from the franchisor to the franchisee, it is in Islam has been mentioned that should be mutual protection among others. Especially in the bonds of cooperation are mutually interconnected.

The existence of other forms of protection, the absence of mutually won or defeated. It is not because the franchisor has greater voting rights than the franchisor. But the voting rights of the franchisor and franchisee are the same (50-50). Both of them may share comments or constructive feedback. Even the comments inside forms of criticism may be done too, as long as it relates to the business being run. In either case, both have the right to file a lawsuit if either of them has a wanprestasi. This has been

stated in the contents of the agreement which was then agreed upon by both. So that no party feels harmed, because both have a thing to act law. This is so that if in time when one of the parties did wanprestasi, then both franchisor and franchisee have equal rights to sue.

Associated with the existence of events out of control (forcemajeour) such as a fire or natural disaster. So the form of protection provided by the franchisor is to provide help to start the business from scratch. So with the incident does not mean just ending, but the form of care until things happen. To strengthen the existence of this forcemajeour, the franchisor also provides an explanation in the contents of the franchise agreement.

Although this type of franchise is a form of brand, the franchisor still provides oversight as an effort to see and review whether the running business still retains the brand or not. Form of supervision conducted periodically, seen how the progress of the business run until the loyalty in the use of the brand.

Because this form of franchise using the system of sale and purchase so that the business is run also there is no fee distribution in every periodic sales made by the franchisee, because the form of the transaction has been done from the beginning before officially opening the product. So whatever profit the franchisee does not take any profit. Only once in the initial transaction in the sale and purchase agreement. Therefore the franchisee can enjoy and run the business freely without heeding the fee to be given to the franchisee.

C. Franchise Agreement

Franchise business is a form of cooperation between both parties or more to run a business with the same brand and product. In general 3 components in the franchise are as follows:

Franchisor: is a party that has a product with a certain brand that already has provisions and SOPs that have been established (party giver) franchise.

Franchisee: It is the receiving party or the party who cooperates in the system agreement with Franchisor to run a business based on predetermined provisions.

Franchise: is a system or any method used to run the business itself by providing a product that will be made as the sales object to be given to the franchisee. [9]

Article 5 relating to the operation of a franchise makes it clear that the franchise in its operation shall be in accordance with a written franchise agreement made between the franchisor and the franchisee who has the force of law and applies to the laws of Indonesia. [10] The franchise agreement must contain a clause containing the grant of the franchisee to appoint another franchisee. The provision is that the franchisee already has at least one

place of business. In addition, in the franchise agreement must also contain a clause on the standard of product quality that will be executed. Including the implementation of the business mechanism that will do. It was made in writing in the agreement. [11] So with the written evidence will bind the two who have the power of law.

A franchise agreement must contain the rights and obligations of each party involved in the agreement. The right franchisee is accepting license, while the obligation is to pay royalties to the Franchisor and maintain the quality of goods and services in the franchisee. One of the main things in presenting the rights and obligations of the parties in the franchise agreement is the payment of the license used. [12] The franchise trade which requires an agreement between the two parties shall be in accordance with the principle of freedom of contract which states that any party involved is free to determine the contents of the agreement provided that it is not contrary to law, morality and public order. [13]

D. Franchising According to Fiqh Muamalah

Franchise business franchise alongside traditional markets where traditional markets meet almost all of the needs that will become the object of trading the franchise business. The needs of consumer goods can be obtained from traditional markets, shops or other outlets. [14] It can be seen that the franchise is a business that is run based on an agreement between the two parties, while the form of cooperation that occurs is a form of development of syirkah system in Islam. So with the agreement resulted in a cooperative relationship between both parties within the stipulated timeframe. This means that if the benefits will be shared for both parties. It is an economic principle in Islam.

In addition, in the franchise will also arise an agreement which resulted in both parties are bound in a contract. Therefore both parties are obliged to fulfill certain achievements. A bond of agreement under Islamic law must be met all the principles of muamalah complete with harmonious and legal terms in the agreement. In addition there are provisions in which contains mutual fulfillment of obligations in the agreement as well as some restrictions in cooperation not to commit sin. And the ability of all parties to act in legal action. [15]

Because in the franchise applied the principle of openness and caution in running a business. So in this case has been in accordance with the terms and covenants in the study of Islam, namely in the subject of the engagement called al-aqadain, or Object Engagement (mahallul 'aqd), there is also the purpose of engagement (Maudhuul' Aqd) as well as the existence of the consent and qabul (Sighat al-'Aqd) and the last of the ban on gharar transactions

(unclear). [16] The Qur'an in the letter of Al-baqarah verse 282 has been mentioned: "O ye who believe, if ye do not keep in cash for a prescribed time, you shall write it down." It is clear that in this verse is very firm emphasize to be written over a period of time.

A franchise agreement is a formal agreement made in writing. It aims as a form of protection for both parties who will. So in accordance with the written principle or kitabah in the verses that have been described. The purpose of the contract that is established with the agreement, it can be said that the franchise agreement is a contract associated with a particular object ('ain). It is so called because in its agreement to exploit certain objects in the form of intellectual property rights owned by the franchisor to the franchisee, so that the resulting legal effect is a transferable form of alienation (al-iltizam bi al-ain), either in the form of the object itself or in the form of benefits . [17] Regardless of the terms and conditions of the agreement, the Agreement shall not occur if one party is not linked, since the contract constitutes an engagement between the two parties through the agreement they have already entered into. [18] Akad is a legal confirmation between the two parties through a consent which states the will of the (franchisor) and kabul the will of the party (franchisee)

So it can be argued that the franchise business (Franchise) in this study is not contrary to Islamic law and fiqh muamalah. This means that travel made in the form of the agreement does not deviate from Islamic law. The form of such agreement is permissible as long as the object of the treaty is not an act which is prohibited in the Islamic Shari'a. For example in the form of buying and selling illegal drinks or other prohibited actions. So if there is such case then automatically canceled according to Islamic law because it has been contradictory with Islamic shariah.

E. Franchising in Civil Law View

A franchise business is a contractual business that has legal rules as well as rules in other areas of the law, the study of contractual law in the franchise business can not be separated from the existence of principles or principles of practice established in article 1338, paragraph 1320 paragraph 1, paragraph 1338, paragraph 3, 1315, 1340, 1317, 1318, BW. The article is a set of rules of law which became the pillar for the building of the law of covenant. [19] In a law of agreement which has rules of law has been determined by the Civil Code has the character of Accesoir. This means that the parties involved in the franchise agreement are free to determine the contents of the agreement as long as it does not cross the boundaries as it does not violate the law, there is no compulsion between the parties, and does not deviate from the norms of public order and moral norms. [20]

In the core clause of the franchise business agreement of the cooperation agreement is to talk about the legal subject that makes the cooperation agreement. Referring to article 1315 BW which in essence the chapter speaks of "one can not bind himself on his own behalf or ask in keeping to the covenant for himself." [21] Hence from that a covenant is the determination of at least two or more persons, as well as shall not enter into an agreement on behalf of any other person, in the sense of being liable and accepting the right of not participating in the formulation of the treaty.

As with the rule of law on the principle of the agreement, and the franchise business is a business that requires a work agreement there are of course the rights and obligations that must be fulfilled and executed by the franchisor and franchise, among others, as follows: Rights granted by (franchise) franchise, among others: the use of prescriptions and specific methods of implementation, branding, annotations related to the duration and when necessary contract renewal, and all activities involving operational relationships when necessary.

The obligation of (franchise) as a reciprocal of the right that must be received by (franchisor) obtained from the franchise business results in accordance with the profit sharing agreement contract during the business is still operational.

All events relating to the case of sale of rights (franchise) to other parties. If (the franchise) has no desire to continue the sale of the franchise business, then beforehand should be discussed with the franchisor)

All matters relating to the franchise business resulting in agreement between one party and another, if the termination of the cooperation agreement is to be agreed upon and approved by the parties concerned.

Referring to the principle of the consensualism agreement as referred to in article 1320, the article states that the validity of a treaty shall be the agreement of both parties involved in the agreement.

In this study, agreements that have been made and signed by the franchisor and the franchisor have been in accordance with civil law. The above provisions are applied solely to maintain the balance between the franchisor and the franchise recipient so that in the future not incurred dissatisfaction among one of the parties involved of this franchise business agreement. On the other hand the role of government authority is needed to provide rules about the franchise business let the people or the community do not abuse the rights and rights to avoid wansprestasi.

Franchise business is regulated in PP.(government regulation) no. 42 of 2007 which has the following conditions:

- 1) Has a distinctive business
- 2) Proven to give benefits

Have a standard for services and goods and / or services offered made in writing

Easy to teach and apply

There is ongoing support

Intellectual Property Rights that have been registered Intellectual Property Rights related to businesses such as trademarks, copyrights, patents, and trade secrets, have registered and certified or under enrollment at the competent authority. [23]

The franchise business has a format for assigning anata licenses to another party, the license grants the rights to the second party as the franchisor to use the franchisor's trade mark or trade name using the entire package comprising the necessary requirements such as: from (franchisor), the stage of training for (franchisee), the ongoing relief process of the (franchisor). [24]

IV. CONCLUSION

Franchise Agreement is a mechanism of work in this franchise business is done based on the rules of the existing rules in agreements made together between franchisor and franchisee. And this franchise business implements no royalty system for franchisees. Because according to the franchisor if applying royalty fee it is equal to taking advantage by way of false. The form of protection provided by the franchisor to the franchisee is to provide a form of training and supervision periodically during the term of the agreement. Also given assistance from things that are not desirable, for example a force majeure, then the franchisor will be involved in it.

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