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JURIDICAL REVIEW OF THE VALIDITY OF NON-COMPETITION CLAUSE IN FRANCHISE BUSINESS AGREEMENTS

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Abstract

Based on Law Number 13 of 2003 concerning Employment, it provides equal rights and opportunities for workers to choose, get or change jobs and earn decent income both at home and abroad. However, in the franchise contract, there are several clauses, one of which is a non-competition clause, which means that to protect the franchisor's trade secrets, the franchisee is prohibited directly or indirectly from opening another business that is the same or similar to the franchise business. During and even up to several years after the termination of the agreement. Through a franchise agreement, the franchisor grants the franchisee the right as a business partner to run a business in the same field by using a trademark or trade name and other intellectual property rights by maintaining the quality standards and reputation of the franchisor in relation to the use of the brand of the goods and/or services agreed upon. Furthermore, this raises a question about whether or not this clause can be used as a basis for companies to claim achievements. However, in reality there were some workers who did not fulfill this clause on the grounds that they needed work to fulfill their needs. So the "clause" (cause) of the agreement is what the parties want to achieve with the agreement, namely the purpose of the agreement. It must be seen about the purpose of the company that includes a non-competition clause in the work agreement. As long as the purpose is reasonable and it can be proven that the interest must be protected, and does not limit rights excessively, the conditions for this permissible cause are fulfilled.

Keywords: *Agreement; Clause; Franchise*

INTRODUCTION

The current era of globalization continues to show its existence and development in almost all corners of the world, including having dominated the economic and business sectors which has resulted in the marketing system of goods and services almost having no gaps. Today the franchise business or franchise is one way to enter the business world which is very popular in the world, because considering that franchise products and services are

the majority of products or services that are global and have high quality. Foreign franchise products that have been worldwide are McDonald's, Starbucks, Pizza Hut, and others.[1] While local franchises that have been successful include KFC, Es Teller 77, Alfamart, Johnny Andrean, and others. Along with the development of the franchise business, businesses in Indonesia are also developing. Starting in the 90s until now the franchise business in Indonesia has penetrated various business fields spread throughout Indonesia by marketing products or services to consumers.

In the franchise contract, there are several clauses, one of which is a non-competition clause, which means that to protect the franchisor's trade secrets, the franchisee is prohibited directly or indirectly from opening another business that is the same or similar to the franchise business for as long as and even up to several years after the expiration of the agreement. It is also not allowed to carry out activities that can be categorized as unfair competition as regulated in Law Number 5 of 1999 (Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat).[2] Then what if there are cases related to non-competition clause violations and what are the legal consequences? Or is there legal protection for franchisees? As in this case example:

[In November 2013 Riana signed a business agreement in the form of Dina's Fitness Center Franchise (Fitness A). Fitness A is a well-known fitness center in Semarang so it continues to try to open branches in various cities such as Solo, Yogyakarta, Salatiga, Surabaya and Malang. Therefore, Riana, who is also a hobbyist and has the ability to become a gymnastics instructor, wants to become a franchisee to open this business in Malang with a contract period of 10 years. Riana also knew that when signing the contract there was a clause or obligation for the franchisee not to work or open a business in the same field within 12 months after the termination of the employment relationship. However, Riana cannot negotiate the contents of the contract because it is the terms and conditions that have been imposed by the franchisor. Then in 2018 Riana felt that turnover continued to decline due to no system update by the franchisor to attract visitors, so that in the same year Riana decided to terminate the franchise contract with Fitness A because

[1] Naili Farida. (2003). "Upaya Mencetak Laba melalui Perjanjian Bisnis Waralaba". *Majalah Masalah-Masalah Hukum*, XXXII (4): p. 310

[2] Achmad Busro. (2013). *Kapita Selekta Hukum Perjanjian*. Yogyakarta: Pohon Cahaya, p. 100

she wanted to work elsewhere. Then in 2020 Riana worked as a Gymnastics instructor at Fitness B in Malang and received a summons and a warning that she would be sued by Fitness A for violating the agreement on the grounds that Riana had to comply with the non-competition clause until November 2023 (10 years contract). Riana feels aggrieved by this subpoena so she wants to find out if there is any legal protection for her.]

METHOD

The research method used in this study is normative jurisdiction, which is to examine or analyze secondary data in the form of secondary legal materials by understanding law as a set of positive rules or norms in the statutory system that regulates the problems in this research. Especially by analyzing the Non-Competition Clause phenomenon in the Franchise Agreement. The recommendations used consist of regulatory approvals (legal approach) and sociological requests (sociological approach). The technique of tracing legal materials uses document study techniques. The legal materials that have been collected are analyzed qualitatively.

ANALYSIS AND DISCUSSION

Non-Competition Clause in the Franchise Agreement

Work is one of the human needs that has an important role in life. Article 28 D paragraph (2) of the 1945 Constitution (Undang-Undang Dasar 1945) affirms: "Everyone has the right to work and to receive fair and proper remuneration and treatment in an employment relationship." The regulation provides an understanding that work is one part of human rights guaranteed by the constitution, where every human being is given the right to work and is free to choose a job that is in accordance with his abilities. Similar arrangements are also regulated in Law Number 13 of 2003 concerning Employment (Undang-Undang Ketenagakerjaan). In principle, the Employment Law provides equal rights and opportunities for workers to choose, get or change jobs and earn a decent income both at home and abroad. This is confirmed by Article 38 paragraph (2) of Law Number 39 of 1999 concerning Human Rights (hereinafter referred to as the Human Rights Law) which states that everyone has the right to freely choose the job he likes and is also entitled to fair employment conditions.[3]

As explained earlier, the rapid economic growth in Indonesia is due to an increase in the global economic system in

[3] Rizky Amalia. (2011). "Non-Competition Clause Dalam Perjanjian Kerja". *Jurnal Yuridika*, 26(2): p. 117

the marketing system which continues to try to enter the global market. However, it is also possible for a country's income to be generated from the investment of foreign companies in Indonesia, even foreign investment is able to become the biggest factor in increasing the country's foreign exchange. One of the marketing systems that is in the spotlight and in demand by local and foreign entrepreneurs is the franchise business system. The franchise system is considered profitable because it can have its own business even though it is not fully owned. This business system runs when the Franchisor (the main Franchise business owner) relies on the ability of the business partner (franchisee) in developing and carrying out franchise business activities only through methods, processes and a code of conduct and system that has been determined by the franchisor.[4] This business system is in demand because it can help small entrepreneurs to develop their business using recipes, technology, packaging, management, services, trademarks/services of other parties by paying a certain amount of royalties based on a franchise license.

There are two parties in a franchise business relationship, namely the franchisor and the franchisee. The relationship between the two is a relationship that results in an engagement. An engagement is a legal relationship between two people or two parties, based on which one party has the right to demand something from the other party, and the other party is obliged to fulfill that claim.[5] A franchise agreement is a legal action that creates rights and obligations for each party. Through a franchise agreement, the franchisor grants the franchisee the right as a business partner to run a business in the same field by using a trademark or trade name and other intellectual property rights by maintaining the quality standards and reputation of the franchisor in connection with the use of the trademark of the goods and/or services agreed upon.[6]

The provisions in book III of the Civil Code (Buku III KUHPerdata) divide the engagement based on the source. This can be seen in Article 1233 of the Civil Code which stipulates that every engagement is born, either by agreement (agreement), or by law. The basic difference in an engagement based on an agreement with an engagement originating from the

[4] Achmad Busro, *Op Cit.,* p. 86

[5] Subekti, (2005). *Hukum Perjanjian*. Jakarta : Intermasa, p. 1

[6] Salim H.S. (2003). *Perkembangan Hukum Kontrak Innominaat di Indonesia*, Jakarta: Sinar Grafika, p. 165

law at the will of the parties to the engagement:[7]

a. The engagement that originates from the agreement, the birth of the engagement is the will of the parties
b. Engagements that originate from the law are born because of the will of the law.

If you look at the case described earlier, the agreement between Riana and Dina in the Franchise business is an agreement born from the will of the parties. Therefore, the agreement made must be clear and not detrimental to one of the parties as well as the arrangement of rights and obligations imposed on both parties so that they are not biased. The rights and obligations of the franchisor and franchisee must have certain clear boundaries so that in their implementation it does not result in arbitrariness from one party.

Usually workers are asked to sign an employment agreement that has been prepared by the company. Generally, there is no negotiation by workers on the agreed clauses. This is because they do not have a relatively balanced bargaining position.[8] Sometimes workers do not know and carefully examine the clauses that will later become their achievements. This allows for losses to both parties if one day one of the parties violates the contents of the agreement. As one of the clauses in the agreement that the worker agrees not to work as an employee or agent of a company that is considered a competitor or engages in the same line of business for a certain period or period of time after the date of dismissal or termination of employment. Or other clauses such as an employee who quits or terminates his employment relationship in the middle of his work contract, so he is not allowed to open a business opportunity with the same type of business or similar to the business field of the company where he previously worked until the time specified and agreed upon according to the employment contract.

As for the purpose of the clause protection company, it is used as a company from its competitors. This is also related to trade secrets recognized by Indonesian law by Law Number 30 of 2000 concerning Trade Secrets (Rahasia Dagang-hereinafter referred to as the Trade Secrets Law). With the inclusion of a non-competition clause, it is hoped that employees will not divulge trade secrets or any information that is confidential to competing companies. Trade secrets are

[7] J. Satrio. (1999). *Hukum Perikatan, Perikatan Pada Umumnya*. Bandung : Alumni, p. 42-43
[8] Rizky Amalia, *Op Cit*., p. 118

basically information in any form that has economic value because of its confidentiality and the efforts made to maintain its confidentiality.[9]

An agreement will have legal consequences for the parties bound in it. If there is a non-competition clause in the work agreement, of course in this case the worker who has signed the work agreement is obliged to fulfill that clause. So, if the worker does not fulfill his obligations in the implementation of the clause, it is possible that the worker has violated the work agreement. Of course, if this can be categorized as a violation of the agreement, it will bring losses to the company where the worker works. Furthermore, this raises a question about whether or not this clause can be used as a basis for companies to claim achievements. However, in reality there were some workers who did not fulfill this clause on the grounds that they needed work to fulfill their needs.

The validity of the non-Competition Clause in the Franchise Agreement

The legal relationship between workers and the company is an employment relationship which is the realization of an employment agreement. Article 1 number 15 of the Employment Law states that: "Employment relationship is a relationship between an entrepreneur and a worker/laborer based on a work agreement, which has elements of work, wages, and orders". The work agreement is an agreement between both parties, but in practice the company has prepared a draft agreement containing the achievements of both parties. Workers are only given the opportunity to read and agree to all the clauses in the employment agreement without exception. For workers, the opportunity to negotiate the contents of the agreement is very small, even it can be eliminated. The company's principle in this case is "take it or leave it", if workers do not agree with the contents of the work agreement, the company will look for other workers who agree with the contents of the agreement offered by the company. If it is related to the case above, this is what causes Riana as a franchisee as if she does not have any power to negotiate the agreement she signed.

In making a work agreement, it is possible to add other clauses. One of them is about the non-competition clause. Only companies that have an interest add this clause to an employment agreement. Black's Law Dictionary defines non-competition clause (in the dictionary re-

[9] Rahmi Jened dalam artikel : Perlindungan "Trade Secret" (Rahasia Dagang) dalam Rangka Persetujuan TRIPs

ferred to as non-competition covenant) as a promise usually in a sale-of business, partnership or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner or employer. This understanding states that the non-competition clause is not limited to the scope of the agreement. Because based on the principle of freedom of contract which is understood in making a business agreement, the non-competition clause is usually one of the things that is highlighted and must be included in the agreement. Because basically every effort seeks to reduce competitors and raise the company's image in the community. So the non-competition clause is considered necessary and usually includes several things such as time and geography. The term of time means that within a certain duration (usually 12 months) the worker may not join all competitors of the company or the like. Meanwhile, based on geography, it means that workers cannot join any company within 50 km of the previous company.

Non-competition clauses in various countries are given limitations in their application. Some are limited by a law or by public policy. Based on the provisions of treaty law in Indonesia, an agreement is valid if it fulfills four conditions as stipulated in Article 1320 Burgerlijk Wetboek (BW/Civil Code)), namely (1) Agree that they are bound; (2) The ability to make an engagement; (3) A certain matter; (4) a lawful clause.[10] This last condition relates to the clauses contained in an agreement. Even though contract law adopts an open system, people are free to enter into agreements that are not related to existing provisions, but the conditions for the validity of the desired agreement must be fulfilled so that the agreement is flawless. Likewise, the principle of freedom of contract can still apply to the extent that the application of the principle does not conflict with the heteronomous rules of labor law.

The fourth condition of the validity of the agreement is the permissible clause (halal clause). This condition in the work agreement is intended that the work agreed upon does not conflict with public order, decency and applicable laws and regulations. This is an adoption of Article 1320 juncto 1335 and 1337 BW the meaning of causa (cause) is completely different, and less common. There the notion of causa (cause) refers to the relationship of purpose (causa finalis). So, the causa (cause) of the agreement is what the par-

[10] Achmad Busro. (2017). *Hukum Perikatan Berdasarkan Buku III KUH Perdata*. Yogyakarta : Pohon Cahaya, p. 280

ties want to achieve with the agreement, namely the purpose of the agreement. It must be seen about the purpose of the company that includes a non-competition clause in the work agreement. As long as the purpose is reasonable and it can be proven that the interest must be protected, and does not limit rights excessively, the conditions for this permissible cause are fulfilled. If what the parties want (causa) is not lawful, which is contrary to law, morality or "openbare order" in Article 1337 BW which is judged according to the circumstances at the time of closing the agreement, then the agreement that wants to achieve this is void.[11]

The non-competition clause relates to the efforts of the franchise business owner to protect trade secrets, with the assumption that workers must know the trade secrets of the place of work. In developing a business business in the form of a franchise, the owner of the company must be very careful so that his trade secrets are not leaked by his business partners, employees/employees who are working or who are no longer working at the company or its business partner companies. The owner of a trade secret must protect his trade secret from being used by other parties. According to article 1 point (1) of Law Number 30 of 2000 concerning Trade Secrets, it is stated that trade secrets are information that is not publicly known in the field of technology and business, has economic value because it is useful in business activities and is kept confidential by the owner of the trade secret. From the formulation of Article 1 point (1) of Law Number 30 of 2000 concerning Trade Secrets, it can be stated several elements of trade secrets, namely:[12]

1. There is information,
2. The information is not publicly known or private,
3. Information in the field of technology or business,
4. The information has economic value (commercial),
5. The information is protected by the owner with protective measures.

In addition, the legal protection of trade secrets in a franchise business can be carried out through a franchise agreement. The franchise agreement is an innominate agreement as stipulated in article 1319 of the Civil Code (KUHPerdata) and is subject to articles 1320 and 1338 of the Civil Code. Trade secrets as a very valuable

[11] Hardijan Rusli. (2004). *Hukum Ketenagakerjaan*. Jakarta : Ghalia Indonesia, p. 26

[12] Hendra Djaja. (2009). *Hukum Hak Kekayaan Intelektual (Prinsip Dasar Dan Norma Perlindungan Varietas Tanaman - Rahasia Dagang - Desain Industry – Desain Tata Letak Sirkuit Terpadu – Paten- Merek- Hak Cipta*). Jakarta : Surya Pena Gemilang, p. 58

company asset must be maintained at any time indefinitely. If the secret is revealed to other parties, both to companies that carry out similar trades, or those that are not similar, it will still bring losses to the inventor. For this reason, it is necessary to maintain its confidentiality and need to get protection.[13]

The work agreement is a coercive agreement (dwang contract) because the parties cannot determine their own desires in the agreement. Contract law which regulates general provisions, as long as it is not regulated by labor law applies in the work agreement, but if the labor law has regulated it then the provision is coercive, meaning that it cannot be ruled out.[14]

The non-competition clause applies when the employment relationship has ended. The termination of the employment relationship is due to the employee resigning of his own free will or through a termination of employment. In Article 1601 paragraph (2) of the Civil Code it is stated that: "The employer cannot obtain the right from a promise as referred to in paragraph one, if he has terminated the employment relationship in violation of the law or he intentionally or because of his mistake has given urgent reasons to the worker. to terminate the employment relationship and the worker has used that authority, or if the Court at the request or claim of the worker has declared the termination of the employment relationship based on urgent reasons, which was given to the worker because of the employer's intention or mistake."

Legal Consequences for Non-Competition Clause Violations

The employment relationship is based on a work agreement, where the end of the employment agreement, the employment relationship ends. This is different from the non-competition clause, because this clause has the power to apply after the employment relationship ends. This clause binds the worker after being dismissed or quits his job. This clause is a prohibition clause because it contains an achievement not to do something. Workers who are bound by this clause are deemed to have fulfilled their achievements if within the time and geographical area determined by the company, the workers do not carry out the prohibitions stipulated in this clause. The prohibition is in the form of not allowing a worker to accept a job and work in a company that is a competitor or is engaged in the same

[13] Lanny Kusumawaty. (2005). *Pemahaman Rahasia Dagang*. Surabaya : Srikandi, p. 15.
[14] Hardijan Rusli, *Op Cit*., p. 70

field as the company where the worker previously worked. This is prohibited because of concerns from the company about the former employee leaking all important company information, both trade secrets, and other confidential information without their knowledge.

Violations of the non-competition clause in practice often occur. Workers often override the existence of this clause because the worker thinks that accepting or choosing a job is a human right that is regulated in Constitution of 1945. If in an agreement the party with the obligation does not carry out his obligations, it will certainly cause losses to the creditor. An agreement agreement is not implemented properly by one of the parties in a franchise agreement, the party who accidentally defaults can occur because he is not able to fulfill the achievement or also because he is forced not to do the achievement.[15] Such a violation is not a problem if the old company where the worker worked did not suffer losses due to the violation of this clause by his former employee. This is different if the violation committed by the employee against this clause brings a threat and loss to the company that binds the employee to the non-competition clause. Categorization of workers has violated the non-competition clause, namely if the employee discloses company information which includes all confidential information or trade secrets without the knowledge of the company that owns the information for the benefit of the new company where he works, causing losses to the old company where he previously worked.

If this is not done by the worker, then the non-fulfillment of the achievement will not result in anything and the worker can be said to have not committed a violation. Usually the knowledge, skills, expertise or mental abilities acquired by a worker in the old company where he worked previously are not classified as confidential information and may be used or applied in the new workplace. There are things that need to be considered, namely that workers can use confidential information from the company where they work, provided that they do not violate the confidentiality agreement they have made with the company that owns the confidential information.

Violation of the non-competition clause is closely related to the violation of trade secrets. If a worker commits a trade secret violation (entrepreneur), among others, through the general judiciary,

[15] Ahmadi Miru. (2007). *Hukum Kontrak dan Perancangan Kontrak*. Jakarta : Raja Grafindo, p. 74

whether civil or criminal, through arbitration, or using alternative dispute resolution. Thus, for violations of this clause, legal remedies can be filed, both through civil and criminal channels. Violation of a non-competition clause occurs when the employee commits an act that can harm the company, including disclosing confidential or trade secret information to other parties without the knowledge of the information owner. The workers' obligations are related to the obligation not to divulge trade secrets regulated in the Trade Secrets Law. In addition, the unlawful acts committed by these workers also violate the rights of the company, the rights here are related to intellectual property rights.

In addition to civil aspects, Law Number 30 of 2000 concerning Trade Secrets also regulates criminal aspects related to violations of trade secret rights. This criminal aspect is indeed necessary to protect the owners and holders of trade secret rights in good faith. The criminal act of violating the right to trade secrets is regulated in Article 17 paragraph (1) of Law Number 30 of 2000 concerning Trade Secrets, among others, states:

> *"Any person who intentionally and without rights uses the trade secret of another party, or commits an act of intentionally disclosing the trade secret of another party, reneging on an agreement or reneging on a written obligation; or mastering trade secrets in a way that is contrary to the law, shall be punished with imprisonment for a maximum of two years and/or a maximum fine of Rp 300.000.000,- (three hundred million rupiah)."*

With the violation of the law, the company suffers a loss, and the loss is the result of a non-competition clause violation committed by the employee. The loss occurred due to the fault of the worker. With the existence of a causal relationship between the elements in the unlawful act, the company's lawsuit based on this unlawful act can be successful against non-competition clause violations.

Violation of the non-competition clause by an employee causing a loss to the company may take legal action. The legal remedies that can be taken by the company are through court or out of court. This is adjusted to the agreement that has

been made by both parties in terms of dispute resolution in connection with the implementation of the agreement. Legal remedies outside the court can be pursued through an alternative dispute resolution, namely by negotiating, mediating, conciliating or arbitration. Meanwhile, through the court, it can be through filing a lawsuit for default or a lawsuit for violating the law.

Regarding the objection to this non-competition clause, it can be categorized as a conflict of interest as referred to in Article 1 point 3 of Law Number 2 of 2004 concerning Settlement of Industrial Relations Disputes (Penyelesaian Perselisihan Hubungan Industrial/PPHI). This dispute must be sought first through bipartite negotiations by deliberation to reach consensus. Then if the bipartite negotiations fail, then one or both parties register the dispute to the agency responsible for the local manpower sector. The agency responsible for the local manpower sector is obliged to offer the parties to agree on choosing a settlement through conciliation or arbitration. In the event that the parties do not determine the choice of settlement through conciliation or arbitration, the settlement of this dispute is delegated to the mediator. If an agreement is not reached, one of the parties may file a lawsuit with the Industrial Relations Court.

CONCLUSION

The validity of the non-competition clause is not absolute, because if the clause is enforced without any restrictions and it limits the rights of the workers too much, then the clause cannot be enforced so that it does not have binding power to the workers. It would be unfair if in relation to this clause no protection was given to workers. So it doesn't mean that if this clause is not fulfilled by the workers, this is a violation that can be sued in court by the company. This is because there must be a balance between the interests of the workers and the company.

If the non-competition clause is deemed to severely limit the rights of the worker or in other words this clause is not within reasonable limits, the worker has the right to file an objection. Workers can file a lawsuit with the local District Court. The contents of the lawsuit, among others, contain objections to the contents of the Competition Agreement and request the Judge to cancel the contents of the Competition Agreement. This is regulated in

Article 1601 paragraph (2) of the BW which states that: "The court is allowed on the demands of the workers even though because they are asked to in their defense in a case, nullify in whole or in part such a promise on the grounds that compared to the interests of the protected employer, workers are unfairly harmed by the promise".

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