

## Legal Protection Due to the Non-Competition Clause in Franchise Contract

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**Abstract.** *This study aims to: 1) Knowing and analyzing the legal protection due to the non-competition clause in the franchise agreement, 2) Knowing and analyzing the non-competition clause that has fulfilled the elements of article 1320 of the Civil Code regarding the terms of the validity of the agreement, 3) Knowing the example of the deed franchise agreement. The research method used in this study is a normative juridical method with secondary data sources. The research specification used is descriptive analysis. Researchers used normative research specifications with secondary data sources. The secondary data used by the researcher was collected by conducting a literature study by reviewing, analyzing and then processing it into a descriptive narrative so that it was easy to read. The data analysis method used by the researcher consists of the stages that the secondary data obtained will be used for descriptive-qualitative analysis. Based on the research, it is concluded that the legal protection due to the non-competition clause in the franchise agreement of Serba Wenak Restaurant is explained that in Article 13 of the draft franchise contract regarding trade secrets that franchisees are required to keep the system, management and methods of restaurant management secret from the franchisor during their tenure. The term of the agreement lasts or has expired. One of the characteristics of the Versatile Restaurant franchise is that there must be a written agreement (contract), In this case, the Serba Wenak Restaurant franchise agreement is stated in the deed of agreement that has been agreed upon by the franchisor, represented by the company director, Mr. Drs. M. Adung Darmadung with the franchisee, Mrs. Leni Marleni.*

*Keywords: Agreement; Clause; Franchise; Law; Non-Competition; Protection.*

### 1. Introduction

The development of the business world today is in dire need of cooperation between business actors, it is useful for developing business potential. Cooperating in business practices really requires a legal certainty in order to

guarantee the rights and obligations of business actors. To guarantee the rights and obligations of business actors, an agreement is needed, especially a written agreement.

Efforts made to achieve the nation's economic development goals are in dire need of great effort and funds. The presence of a franchise is one of the efforts to achieve economic development. The presence of franchising takes a role that can support economic and social development. Its essence is to create jobs, improve people's welfare, and create economic stability for the nation.<sup>1</sup>

Arrangements regarding agreements, especially franchises (franchise) do not only refer to the Civil Code, but arrangements regarding franchises (franchise) have long been accommodated by regulations in Indonesia, such as the issuance of Indonesian Government Regulation No. 16 of 1997 dated June 18, 1997 concerning Franchising, and Decree of the Minister of Industry and Trade of the Republic of Indonesia No. 259/MPP/KEP/1997 concerning Provisions and Procedures for Implementing Franchise Business Registration<sup>2</sup>.

A franchise agreement (franchise) is one type of agreement where the contents of the agreement have been determined by the (franchisor), so that in practice the franchise agreement (franchise) recognizes the existence of a non-competition clause, which clause provides limitations to the (franchisee) such as the inclusion of provisions after expiration the agreement, the franchisee is limited to not doing the same type of business before.<sup>3</sup> This is done on the basis of freedom of contract, so that the franchisor has the freedom to determine the contents of the agreement, provided that the franchisee agrees with the contents of the agreement that has been made by the franchisor.

The clause is usually included and carried out by the franchisor in order to reduce competitors in the same line of business. In addition, the inclusion of a non-competition clause in order to protect the secrets owned by the franchisor's product, because the information obtained by the franchisee during the franchise agreement (franchise) is a secret owned by the franchisor so that it can attract the attention of business actors to enter into a franchise agreement (franchise). ) with it, so it must be kept confidential by including a non-competition clause.

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<sup>1</sup>Ardhianto, Rifki. & Hanim, Lathifah. (2017). "Peran Notaris Dalam Perjanjian Waralaba Antara PT Pos Indonesia (Persero) Pati Dengan Badan Usaha Perseorangan" in *Jurnal Akta Vol. 4 No. 1 March 2017*, p. 84. url <http://jurnal.unissula.ac.id/index.php/akta/article/view/1748> accessed on 18 November 2021 at 17.00 WIB

<sup>2</sup>Gunawan Widjaja. (2003). *Waralaba*. Jakarta: PT Raja Grafindo Persada. p. 1-2.

<sup>3</sup>P. Lindawati Sewu. (2004). *Franchise Pola Bisnis Spektakuler Dalam Perspektif Hukum & Ekonomi*. Jakarta: CV. Utomo. p. 12.

The implementation of the franchise agreement between the franchisor and the franchisee must be regulated in such a way that the parties can know for sure the provisions agreed in the deed.

## 2. Research Methods

The approach method used in this study is a normative juridical method with secondary data sources. The research specification used is descriptive analysis. Researchers used normative research specifications with secondary data sources. The secondary data used by the researcher was collected by conducting a literature study by reviewing, analyzing and then processing it into a descriptive narrative so that it was easy to read. The data analysis method used by the researcher consists of the stages that the secondary data obtained will be used for descriptive-qualitative analysis.

## 3. Results and Discussion

### 3.1 Legal Protection Due to Non-Competition Clauses in Franchise Agreements

The theory of legal protection is a development of the concept of recognition and protection of human rights (HAM). The theory of legal protection developed in the 19th century with the direction and concept of recognizing and protecting human rights, namely providing limits and laying down obligations to the community and government.<sup>4</sup>

The theory of legal protection as explained by Satjipto Rahardjo was inspired by Fitzgerald's opinion regarding the purpose of law, namely to integrate and coordinate various interests in society by regulating the protection and restrictions on these various interests.<sup>5</sup>

The confidentiality agreement regulated in the *Versa Wenak Restaurant* franchise contract, the legal basis refers to article 1338 of the Civil Code which reads: "All agreements made in accordance with the law apply as law to those who make them cannot be withdrawn except by agreement of both parties, or for reasons determined by law. The agreement must be carried out in good faith."

The maintenance of secrecy is related to *the Serba Wenak Restaurant* franchise, both the relationship between workers and employers as well as for relationships in a business partnership where one or both parties are obliged to

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<sup>4</sup>Luthvi Febryka Nola. "Upaya Perlindungan Hukum Secara Terpadu Bagi Tenaga Kerja Indonesia (TKI)", in *Jurnal Negara Hukum*, Vol.7 No. 1 June 2017. p. 39-40.

<sup>5</sup>Satjipto Rahardjo. (2000). *Ilmu Hukum*. Bandung: PT. Citra Aditya Bakti. p. 53-54

keep secrets. "Confidential Information" is always related to Intellectual Property Rights in the form of patents, rights to inventions, copyrights and related rights, moral rights, service rights, trademarks, business names and domain names, rights to the design of a product (rights in get-up), goodwill (goodwill) and right to sue for false statements (passing off) or unfair competition, design rights, computer software rights, database rights, rights to use, and protect the confidentiality of, confidential information ( including knowledge and trade secrets) and all other intellectual property rights,

The protection of trade secrets in *the Serba Wenak* Restaurant franchise contains a confidential information clause to identify things that are included in the trade secrets owned by the franchise owner. In addition, the *Serba Wenak* Restaurant franchise agreement also contains a non-disclosure agreement clause which is an agreement against a party (franchisee) not to disclose trade secret information to other parties.

If the franchise agreement has ended, the franchise agreement must contain a non-compete agreement, which states that the franchisee is prohibited from building, running or imitating similar businesses, having similarities or which can create competition with the franchise business provided and owned by the franchisor. , then all investment losses of the franchisor are at the risk of the franchisee. This aims to prevent the misuse of trade secrets by former franchisees to open the same business business which can lead to unfair business competition.

*Non-compete agreement* may be agreed as long as it is used to protect the franchisor's Intellectual Property Rights as well as to maintain the identity and reputation of the franchisee. This clause in the long term is not allowed because it can hinder competition and technological development.<sup>6</sup>

Based on the results of research conducted on legal protection due to non-competition clauses in the franchise agreement of *Serba Wenak* Restaurant, it is explained that in Article 13 of the draft franchise contract regarding trade secrets that *franchisee* are required to keep the system, management and methods of restaurant management secret from the franchisor during the duration of the agreement or after it has expired. In article 1 point (1) of Act No. 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.

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<sup>6</sup>*Ibid.*

Article 14 of the draft of the Versatile Restaurant franchise agreement point 1 explains that if the franchisee is negligent and or does not carry out his obligations as stipulated in this agreement even though the franchisor has given a third warning but still commits a different or the same violation, which violation is considered serious as written in the warning/reprimand letter according to the size of the franchisor.

The trade secret rights of the Versatile Restaurant franchise are civil rights so that the owner of the trade secret is free to enter into agreements with other parties to exploit the rights held in an economically profitable business activity. The legal relationship is protected by the state so that if a third party violates the law, the third party's actions are dialectical so that the owner of the trade secret can file a claim or lawsuit.

The substance of the lawsuit that can be made is compensation or temporary suspension of all actions as mentioned above. In addition to the settlement of claims through the district court, the parties can also settle disputes between them through arbitration or alternative dispute resolution, either negotiation, conciliation, or other methods chosen by the parties, in accordance with the laws and regulations in force in Indonesia.

Article 16 draft of the Versatile Restaurant franchise agreement regarding Dispute Settlement that if a dispute arises between the two parties as a result of this agreement will be resolved by deliberation and consensus. If the deliberation for consensus does not succeed in reaching an agreement, then both parties will settle legally and therefore both parties choose a permanent legal domicile at the Registrar's office of the West Jakarta District Court. Settlement of disputes contained in the franchise agreement (franchise) is a form of legal protection.

The theory of legal protection contains about how the parties who feel aggrieved by the breach of default on the contract agreement to take legal action in order to get justice, while the substance of the lawsuit that can be made is compensation or temporary suspension of all actions as mentioned above. In addition to the settlement of lawsuits through the district court, the parties can also settle disputes between them through arbitration or alternative dispute resolution, either negotiation, conciliation, or other methods chosen by the parties, in accordance with the applicable laws and regulations.

### 3.2 The position of the non-competition clause that has complied with the elements of Article 1320 of the Civil Code regarding the Validity of the Agreement.

The franchise of Tasty Restaurant is essentially a marketing concept in order to quickly expand the fast food restaurant business network. Franchising is not an alternative but an equally strong and conventional strategy with the aim of making business development easier, faster and wider.

Characteristics of a franchise Tasty Restaurant among them are<sup>7</sup>: There must be a written agreement (contract), in this case the Versa Wenak Restaurant franchise agreement is stated in the deed of agreement that has been agreed upon by the franchisor/franchisor represented by the company director, Mr. Drs. M. Adung Darmadung with the franchisee / franchisee, namely Mrs. Leni Marleni, here through a balanced (fair) representation of interests between the franchisor and the franchisee;

Article 4 Government Regulation no. 42 of 2007 concerning Franchising states that franchising is carried out based on a written agreement between the franchisor and the franchisee with due observance of Indonesian law. The agreement as described in Paragraph (1) is written in a foreign language, the agreement must be translated into Indonesian. Based on the applicable legal provisions as described in Article 1320 of the Civil Code, an agreement is said to be valid if it meets 4 (four) conditions, including<sup>8</sup>:

1. Agree on those who bind themselves

In this case, the parties agree to bind themselves to establish a cooperative relationship as outlined in a deed of franchise agreement, where the parties are Mr. Drs. M. Adung Darmadung represents the company as the franchisor with Mrs. Leni Marleni as the franchisee

2. Acting Skills To Make a Covenant

The skills of the parties are explained at the beginning of the draft agreement by including the identities of them; 1) Drs. M. Adung Darmadung, as Director of the *Serba Wenak* Restaurant having his/her address at St. Raja Panjang No. 221 Kebun Jeruk, West Jakarta, in this case acting for and on behalf of the *Serba Wenak* Restaurant in this agreement, hereinafter referred to as the Franchisor;

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<sup>7</sup>Richard Burton Simaputang. (2007). *Aspek Hukum Dalam Bisnis*, Jakarta: Rineka Cipta. p.58-59

<sup>8</sup> Ong Argo Victoria, Ade Riusma Ariyana, Devina Arifani. (2020). Code of Ethics and Position of Notary in Indonesia. *Sultan Agung Notary Law Review* 2 (4), 397-407, <http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/SANLaR/article/view/13536>

2) Leni Marleni, private, having her address at St. Van Java No. 32 Radio Dalam South Jakarta, in this case acting for and on behalf of personally as the recipient of the Franchise, hereinafter referred to as the Franchisee. The parties are declared competent because they are adults, namely more than 21 (twenty one) years old based on proof of identity, namely KTP/ID.

Article 16 of the draft franchise agreement regarding the closing explains that this agreement is made and signed by the parties in good physical and mental health without any coercion from any party and is made in 2 (two) copies, each of which has the same legal force. Created and signed in Jakarta on June 12, 2008. Generally, a person is said to be capable of carrying out legal actions when he is an adult, meaning that he has reached 21 years of age or is married even though he has not yet reached the age of 21.<sup>9</sup>

### 3. The existence of an object or a certain thing

The object of the agreement in this franchise contract is the Versatile Franchise Restaurant where the parties submit and agree to the things that have been regulated in the franchise agreement.

### 4. *Halal* Cause

The *Serba Wenak* Restaurant franchise agreement in this case is a business in the field of ready-to-eat food, which in our society is a positive thing, especially since the menu of the *Serba Wenak* Restaurant has received a *Halal* certificate from the MUI, so a *Halal* cause has been fulfilled in this agreement which is stated in a deed of Franchise Agreement

The owner of a trade secret when entrusting the management of his company to company organs that have certain positions or positions that are directly related to his trade secret, usually makes a special agreement, both written and unwritten, aimed at employees to maintain and not divulge their trade secrets to the public, any party without the permission of the owner of the trade secret. Legally and ethically, the employee who is given the mandate is obliged to maintain the confidential information. When an employee leaks a trade secret belonging to the company where he works, the principles of honesty in business ethics are violated automatically.

### 3.3 Sample Deed of Franchise Agreement

The Draft Multipurpose Restaurant Agreement was represented by two parties, namely, 1) Drs. M. Adung Darmadung, as Director of the *Serba Wenak* Restaurant having his/her address at St. Raja Panjang No. 221 Kebun Jeruk, West Jakarta, in this case acting for and on behalf of the *Serba Wenak* Restaurant in

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<sup>9</sup>Abdul Kadir Muhammad. (1992). *Hukum Perikatan*, Badung: PT. Aditya Bakti. p. 92.

this agreement, hereinafter referred to as the Franchisor; 2) Leni Marleni, private, having her address at St. Van Java No. 32 Radio Dalam South Jakarta, in this case acting for and on behalf of personally as the recipient of the Franchise, hereinafter referred to as the Franchisee.

The matters contained in the contract include, Article 1 regarding the terms; Article 2 concerning Franchisee Fees and Royalties; Article 3 concerning Disputes with Third Parties; Article 4 concerning Restaurant Opening Hours; Article 5 concerning Franchisor's Obligations; Article 6 concerning Franchisee Obligations; Article 7 concerning Fees; Article 8 concerning Taxes; Article 9 concerning System Changes; Article 10 concerning the Term; Article 11 concerning Power of Attorney; Article 12 concerning Reports; Article 13 concerning Trade Secrets; Article 14 concerning Cancellation; Article 15 concerning Dispute Settlement; Article 16 concerning Closing

#### **4. Conclusion**

The franchise agreement is a special agreement for the parties bound in it, because it relates to intellectual property rights. There is a need to include a minimum clause in the franchise agreement, namely in the form of a non-competition clause, this can create a balance in the position of the parties in the agreement, especially for the franchisor because it relates to the company's trade secrets while providing legal protection. Legal protection due to non-competition clauses may be included in the franchise agreement with the aim of protecting the IPR/Trade Secrets of the franchisor. This is stated in the guidelines for Article 50 letter b of Act No. 5 of 1999. In Regulation 330/2010 the prohibition not to compete can be enforced at the time of entry into force of the agreement and at the expiration of the agreement. The franchise agreement prohibits Leni Marleni (franchisee) from conducting the same business in the field of fast food restaurants as those run by *the Serba Wenak* Restaurant (franchisor) during the validity of the agreement and at least 2 (two) years after the end of the agreement. The purpose of this provision is to maintain the confidentiality of the guidelines, systems and management provided by the franchisor. The franchisee, all employees, or parties who are authorized by the franchisee are required to keep the guidelines, systems and operations confidential for the duration of the franchise agreement or after it has ended. In addition, franchisees are prohibited from directly or indirectly running, operating, establishing businesses of the same type or the same as those run by the franchisor during the validity of the agreement and within a period of 2 years from the expiration date of the agreement. The position of the Non-Competition Clause in the franchise agreement between *Serba Wenak* Restaurant and Mrs. Leni Marleni does not violate business competition. The application of the non-competition clause has also been agreed upon by the franchisee at the beginning



of the signing of the agreement, so the word Agree in this case has been fulfilled. The clauses contained in the agreement are limited by the guidelines of Article 50 letter b of Act No. 5 of 1999 but this clause does not violate the principle of business competition, because the clause was made to protect the interests of the *Serba Wenak* Restaurant and Mrs. Leni Marleni as franchisees and not to hinder competition. By not violating the business competition law in this franchise agreement related to the *Halal* requirements, it can be said that the agreement between the Versatile Restaurant and Mrs. Leni Marleni was made by complying with the legal terms of the agreement as regulated in Article 1320 of the Civil Code. So that the franchise agreement between *Serba Wenak* Restaurant and Mrs. Leni Marleni is a legal agreement according to law. The Versatile Restaurant Franchise Agreement is made in writing which is stated in a Deed between Drs. M. Adung Darmadung, as Director of the *Serba Wenak* Restaurant as the franchisor with Leni Marleni as the franchisee.

## 5. References

### Journals:

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- [2] Luthvi Febryka Nola. "Upaya Perlindungan Hukum Secara Terpadu Bagi Tenaga Kerja Indonesia (TKI)", in *Jurnal Negara Hukum, Vol.7 No. 1 June 2017*. p. 39-40.
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- [5] Widjaja, Gunawan. (2003). *Waralaba*. Jakarta: PT Raja Grafindo Persada.

### Regulation:

- [1] Civil Code (*Burgerlijk Wetboek*)
- [2] Act No. 5 of 1999 concerning Trade Secrets