

Legal Protection for the Parties in Franchise to Welcome ASEAN Economic Community

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Abstract

Indonesia has one of the largest population in the ASEAN region. Indonesian society is quite heterogeneous because it consists of different types of tribes, languages and customs that spread from Sabang to Merauke. Indonesia has a pretty good economic strength, it is of capital importance to prepare the people of Indonesia towards the ASEAN economic community (AEC) in 2015. AEC implies aspects of opportunities and challenges for all countries. Indonesia next challenge is to realize the economic and social life to realize the proper and legal protection for all the people of Indonesia in accordance with the lofty goal of the establishment of the Indonesian state. Distribution of goods and services by using the concept of franchise as the latest concept in business that is growing rapidly, both local and transnational. Franchises have supported the development changes people's lifestyles are increasingly selective and prioritize quality in obtaining services and technology goods and services. Legal aspects of treaty law, especially in the pattern of a franchise business is necessary in order to protect the interests of the parties. Therefore, we need the readiness of the legal aspects of franchise law in particular in order to meet AEC 2015.

Keywords : AEC, Franchise, Legal Protection

1. Introduction

Indonesia as one of the ASEAN founders, should make every effort to improve the performance of our government institutions and non government to make us ready for the era of economic integration through AEC-MEA (Masyarakat Ekonomi ASEAN , translated from ASEAN Economic Community), Indonesia can use these opportunities to expand regional market access and increase goods and services distribution. We can say that Indonesia also became the largest market in ASEAN , with a total population of more than 40% of the total 627 million population of ASEAN , with the number of people in charge of 40% of the total population of ASEAN ,¹ countries outside Indonesia would see the market from Sabang to Merauke, this is a market that potential.

Since the begining of 2016, the Indonesian Government spending on infrastructure and supportive conditions for household spending should fuel an acceleration in growth. However, the more uncertain global environment following the United Kingdom's Brexit vote could impact Indonesia's exports or investment flows. Focus Economics panelists see Indonesia's economy picked up steam in the second quarter, recording the best result since Q4 2013.²

¹ ASEAN Economic Community Chartbook 2016, The text of this publication may be freely quoted or reprinted, provided proper acknowledgement is given and a copy containing the reprinted material is sent to the Community Relations Division (CRD) of the ASEAN Secretariat, Jakarta. page 1.

General information on ASEAN appears online at the ASEAN Website: www.asean.org

² <http://www.focus-economics.com/countries/indonesia/news/gdp/gdp-growth-loses-steam-in-q1>

GDP growth rose from 4.9% in Q1 to 5.2% in Q2 over the same period last year. The result overshoot the Focus Economics Consensus Forecast for a 5.0% expansion and marked a breakthrough for President Joko Widodo, who has been trying to push the economy into a higher gear.³

Facing MEA, lots of challenges will be faced by Indonesian small-medium enterprise(SME) sector. The troubles in the development of SME in Indonesia is the absence of the process of the implementation of being conformable with government policy, in another phrase the development of SME sector in Indonesia has collided by bureaucratic system and unfavorable economic-politic domestic situation.⁴ It is very important for Indonesian to boost export growth through international business regulation, in addition, Indonesia also faces challenges, to find new markets for its products. 2016-2017 are those years which will give Indonesia the position to gain benefit at its maximum from MEA opportunity, that gives additional support for economic competitiveness increase by closing the gap in infrastructure and skill as well as regulation reform, so it will decrease costs in business. In addition, to reach and utilize closer regional economic integration, it should involve ASEAN countries in legislation cooperation to decrease obstacles in non-tariff and regulation, specifically in services.

Since Business cooperation in Indonesia is already that occurs very diverse, depending on what area of business that is being run. Diversity of business cooperation, of course spawned new problems and challenges, therefore the law must be prepared to be able to anticipate any developments that arise, the potential of human resources in terms of the potential amount of legal arrangements must be accompanied by a particularly good franchise law, in order to market the franchise Indonesia is ready to receive the onslaught of the ASEAN market. Nowadays, franchising is considered as a business strategy that is developing and can survive for long time period.

The focus of this research is legal protection for franchisors and franchisees nationwide Indonesia in order to know the maximum protection that can be provided by the statutory provisions, in addition to researchers analyzed based on the theories, principles, and opinions of law, the author also comparing the similar provisions relating to the implementation of existing franchises outside Indonesia, especially in Malaysia, Hong Kong, Australia. The selection of these countries can not be separated from the background of the development pattern of the franchise and the role of government concerned with protecting the franchise giver and receiver in each of these countries are eligible to be used as reference for the development of the pattern of franchise business in Indonesia.

2. The Method

The methodology that used in this research is descriptive, that trying to give a picture of the actual problems based on the facts that appear. Furthermore, the research methods used in accordance with the formulation of the problem which is the focus of this study.

The approach used in this study is juridical normative law research that takes literature data supported by the data fields. Normative research, which is the main research in this study, is a legal research library materials. In this study is basic data research classified as secondary data.

Normative juridical research using secondary data. In the legal research, secondary data includes primary legal materials, secondary law, and tertiary legal materials.

The analysis technique used with a qualitative approach. In this qualitative approach is not used statistical parameters. Deductive method is used for the data obtained from the literature search, whereas the inductive method is used for the data obtained from the field and complementary in this study.

³ Emirza Adi Syailendra, "Consensual Leadership in ASEAN: Will it Endure Under Jokowi?", this article accessed on February 2, 2015. http://www.fairobserver.com/region/asia_pacific/consensual-leadership-asean-will-endure-jokowi-02487/

⁴ Hayashi, Mitsuhiro, "Development of SMEs in the Indonesia Economy, *Journal of Asian Economics*", 2002, page. 9.

3. Literature Review

Legal protection is the role of the state in providing protection to its citizens. Basically, the state has a strategic role in ensuring the protection of its citizens. The development of the concept of a state of law to the concept of the welfare state is seen as the concept of the state that can provide comprehensive protection to every citizen in the legal, economic, social, cultural, political, and so forth. Paragraph 4 of the preamble of the 1945 Indonesian Constitution which states the purpose of the state in protecting the entire Indonesian nation and promote the general welfare, asserted that Indonesia uses the concept of the welfare state. Based on those implied before, the relationship between law and economics are on the state's obligation to provide legal protection in the field of economics. Implications of legal protection in the field of economics is the application of various regulatory devices which can affect economic performance, to achieve the goal of creating well-being of mankind.⁵

The National Long Term Development Plan, (abbreviated as National RPJP), is the national development planning document for a period of 20 (twenty) years. National RPJP for 2005 up to 2025 is set in the Act No. 17 of 2007. Implementation of the 2005-2025 National RPJP divided into stages of development planning in the periodization of the national medium-term development planning five (5) years. National Medium Term Development Plan, (abbreviated as National Development Plan), is a planning document for the period of 5 (five) years consisting of :

1. RPJM Nasional I Year 2005–2009,
2. RPJM Nasional II Year 2010–2014,
3. RPJM Nasional III Year 2015–2019,
4. RPJM Nasional IV year 2020–2024.

One concept of the existence of ASEAN² is the fact a common desire to live in a region that is peaceful, secure and stable, sustainable economic growth, shared prosperity, social progress, and to promote our interests, ideals, and aspirations with the people of Southeast Asia.⁶ Each member, including Indonesia should give legal protection for both the franchisor and the franchisees nationwide in ASEAN free market. Franchising Indonesia, in the sense of national franchisor Indonesia, as well as the Indonesian national franchisee should get legal protection in their running of the business using the franchise pattern with the unity of vision, identity and community (one vision, one identity, and one community) caring and sharing for the creation of shared prosperity.⁷

Economic Community (AEC) is one of the main pillars of the ASEAN Community which aims to achieve a single market and a unified production base, competitive economic region, equitable economic growth, and integrated with the global economy. ASEAN Economic Community (AEC) 2015 is a program for ASEAN countries to further improve the economy, especially trade as contained in the AEC Blueprint (blueprints) or work plan. AEC Blueprint as² guide or reference for the current embodiment of the AEC 2015⁸. AEC is formed with the aim to further strengthen ASEAN integration in the face of international constellation developments both in the field of ideology, political, economic, social, cultural, and security and defense.

⁵ Johnny Ibrahim, *Pendekatan Ekonomi Terhadap Hukum*, Putra Media Nusantara dan ITS Press, Surabaya, 2009, page. 5.

⁶ Sjamsumar Dam and Riswadi, *Kerjasama ASEAN: Latar Belakang, Perkembangan dan Masa Depan*, Ghalia Indah, 1995, page 15-17.

⁷ ASEAN, *Roadmap for ASEAN Community 2009-2015*, 2011, page. 1-5. This book ISBN 978-602-8411-04-2 can be found online at the ASEAN Website: www.asean.org, accessed on September 21, 2016.

⁸ ASEAN Economic Community Blue print, Association Of Southeast Asian Nations, 2008, page 5.

It must be realized also in establishing policies to face the ASEAN Economic Community in 2015, the Indonesian government needs to consider among other things social and cultural conditions of Indonesia and the index of human resources to support national development, which also supports the delivery of the ASEAN Economic Community 2015.⁹

As one of the founding members of ASEAN Indonesian government should make efforts to improve the performance of government agencies and non government that already exist in the face of economic integration through MEA¹⁰. The Ministry of Trade has been attempting to respond to the challenges of globalization not only AEC 2015 to prepare themselves for the effort to achieve consumer protection and secure the domestic market by establishing the Directorate General of Standardization and Consumer Protection through the Minister of Trade No. 31 The year 2010 has been enhanced with the Regulation of the Minister of Trade No. 57 Year 2012 on the Organization and Administration of the Ministry of Trade with the mission of improving the competitiveness of exports, increasing supervision and consumer protection, as well as acting as manager of policy and implementation of development programs at once on trade security in the country.

The rapid development of franchising occurs at all levels of both local, national, and international levels. Franchise Directory and the Business Opportunity Ventures edition published by the Indonesian Franchise Association noted that the number of 258 business brand comes from foreign franchises, and 426 franchise brands come from local businesses.

Data type of franchise business in Indonesia illustrates that franchising is a business format that is growing and in demand by businesses. Therefore, it is necessary to study and further research in the field of franchising arrangements and legal protection both in Indonesia and other ASEAN countries in the framework of the ASEAN Economic Community.

Government Regulation No. 42 Year 2007 on Franchise¹¹ governing the definition of a franchise, namely: "Franchising is a special right that owned by individual or business entity to a business system with distinctive feature in order to market their goods and / or services that have proved successful and can be utilized and / or used by other parties under the franchise agreement".

The government agency that houses and nurturing franchises in Indonesia is the Ministry of Trade and Industry. The government through the department of trade and industry guidance, supervision, training for entrepreneurs in the franchise, especially micro, small, and medium enterprises. In Indonesia there is the Indonesian Franchise Association and the Association of Indonesian Franchise Restaurant and with a mission to develop the franchise in Singapore.

Prospectus prepared by the Franchisor must be registered in advance to the Department of Trade and Industry, which is in line with Article 10 of Government Regulation No. 42 Year 2007 on Franchise.

Applications for registration of franchise offering prospectus as referred to in Article 10 of Government Regulation No. 42 Year 2007 on Franchise submitted by attaching documents: copy of the Franchise offering prospectus; and a copy of the legality of the business.

Furthermore, the Franchisor must also register the contents of the franchise agreement being offered to the Franchisee as stipulated in Article 11 of Government Regulation No. 42 Year 2007 on Franchise. Then the government will issue a Certificate of Franchisor list and is valid for five (5) years.

3.1. How to Set the Franchise and Legal Protections in Singapore¹²

⁹Mahardika, Peranan Utama Kebijakan Pemerintah Terhadap Pencapaian Dan Kesiapan Indonesia Menghadapi ASEAN Economic Community (AEC) 2015

¹⁰ Dodi Mantra, Hegemoni dan diskursus Neoliberalisme: Menelusuri Langkah Indonesia menuju Masyarakat Ekonomi Asean 2015, Bekasi: Mantra Press, 2011, Page.97.

¹¹ Government Regulation Number 42 Year 2007 on Franchise (is franchise regulation in Indonesia)

¹² Chapter 32 of the Business Registration Act, Chapter 50 of The Companies Act, Chapter 163 A of The Limited Liability Partnership Act are The Regulation of Franchise at Singapore

The marketing system of goods and services through a franchise can be done between the franchisor and franchisee. Both the franchisor and the franchisee can be either individuals or enterprises. Forms of business entities that can be used to develop a form of franchising can be a business entity with sole proprietorship, general partnership, limited partnership, limited liability company / private company. If the foreign franchises seeking to develop its business through a franchise concept in Singapore, foreign companies may be either individual businesses, as well as a limited liability company.

In Singapore arrangements regarding business entities regulated in Chapter 32 of the Business Registration Act, Chapter 50 of the Companies Act, Chapter 163 A of the Limited Liability Partnership Act.

Foreign legal entity that acts as the franchisor can relate to legal entities in Singapore with a form of business entity in the form of limited partnership, limited liability company. Singapore does not restrict foreign enterprise and foreign investment.

Manpower to operate the franchise business it can be done by Singapore citizens or foreign nationals, but must apply for a work permit and is subject to the regulation of immigration laws in Singapore. If the sole owner of a foreign company then there must be local managers over the age of 21 years, and the citizens of Singapore.

Legal protection given regarding intellectual property rights and know-how is based on the

Trade Marks Act Chapter 322. Protection of trademark rights in Singapura are given for a period of 10 years and can be extended. If the foreign franchisor to operate in Singapore, the need to register the trademark in Singapore.

In Singapore there is no definition of a franchise that is regulated by law. The Franchising and Licensing Association (FLA) is a franchise association that governs the relationship between the franchisor and franchisee. Do not become a liability / obligation to become a member of the FLA, arrangements regarding the franchise in Singapore handed over to the FLA, there is no law, regulation, or policy of the government about it. There is also no regulation concerning the prospectus to be prepared by the franchisor before the franchise agreement is signed.

FLA Code regulates some issues related to:

1. The written agreements;
2. Misleading promotion;
3. The full information on investment requirements;
4. Disclosure;
5. Legal advice;
6. Contact information;
7. Limitation of other's trademarks;
8. The selection of franchisees;
9. Training;
10. The business guidance;
11. The accessibility of the franchisor;
12. Transferability of franchise;
13. The standards of conduct;
14. The notice of breach and time for remedy;
15. Termination with good cause, and dispute resolution.

3.2. Arrangements about Franchise and Legal Protections in Malaysia¹³

The marketing system of goods and services through a franchise can be done between franchisors and franchisees. Both the franchisor and the franchisee may include individuals, partnerships, branch offices of foreign companies. In Malaysia arrangements regarding business entities regulated in the Companies Act 1965 (CA), and the commission that governs the companies is the Companies Commission of Malaysia (SSM), so if the someone want to create a company in Malaysia, they need to submit their intention to SSM.

In general, foreign companies can not open a business in Malaysia unless the representative or the company branch and a representative office in Malaysia. Since December 1, 2004, all proposals from foreign companies to operate in Malaysia must be approved by the Committee on Distributive Trade under the Ministry of Domestic Trade, Co-operative and Consumerism (the Committee), so if you want to open a new branch, relocation or expansion of branches / outlets who had walked, buy or take over the operation of the outlet, and the purchase of land, a license must obtain approval.

So overall the proposals from foreign companies that will move in the distribution of both goods and services should get approval of the Committee, and is a policy in Malaysia that must include a minimum participation of Malaysian Locals minimum of 30% in the project. All instructions to develop a franchise business in Malaysia for foreigners are under CA.

Legal protection given regarding intellectual property rights are based on the Trade Marks Act 1976 (TMA) and organized by the Malaysian Intellectual Property Office (MyIPO). Registration is the best way to obtain intellectual property protection in Malaysia, as it gives the exclusive right to use the trademark for goods and services.

The definition of a franchise in Malaysia, regulated in Section 4 of the FA (as Mended by the Franchise (Amendment) Act 2012). Franchising is a contract or agreement whether written or oral between two or more parties, of which:

1. franchisor guarantee the franchisee has the right to use the brand, trademarks, confidential information or intellectual property rights owned by the franchisor;
2. The franchisor has the right on an ongoing basis to supervise the business operations franchise to run in accordance franchise system;
3. The above entitlements are received by the franchisee, and the franchisee must pay either in the form of fees or other forms.

Special franchises in Malaysia is based on the provisions stipulated in the Franchise (Amendment) Act, 2012, and must be approved by The Franchise Development Division of the Ministry of Domestic Trace, Co-operatives and Consumerism (MDTCC).

The franchisor must provide a copy of the franchise agreement document and prospectus documents no later than 10 (ten) days before signing the agreement.

3.3. Arrangements about Franchise and Legal Protections In Thailand

Thailand is a country that adheres to all Civil law system in the field of private law subject to the regulation of the Civil and Commercial Code (CCC).

The franchise agreement in Thailand is an agreement between the parties, almost all forms of business entity can be adopted either by the franchisor and the franchisee. The source of law for all types of legal entities subject to its CCC. It is run and regulated by the Thai Ministry of Commerce. For foreign investors also apply in the Foreign Business Act. When a company goes public it is subject to a regulation under the Public Company Act.

¹³ Companies Act 1965, Trade Marks Act 1976, Franchise Amendment Act 2012 are the related regulation to protect Franchise business at Malaysia.

Businesses that are not open to foreign investment, among others in the field of newspapers, radio stations, agriculture, arts, traditional culture and others in accordance with the provisions in Thailand. However, in Thailand it is possible the foreigner has fully and has provided the majority ownership Integration approved by the Thai Ministry of Commerce (MOC).

Employment arrangements in Thailand is governed by labor law. The relationship between employer and employee in the franchise agreement should be written specifically, the relationship between the franchisor and the franchisee in the perspective of employment should be specifically described.

Legal protection given regarding intellectual property rights is based on the Thai Trademark Act. Intellectual property laws govern also sanction either civil or criminal actions if there are violations. Intellectual property used in Thailand must be registered under the laws of Thailand in order to obtain legal protection. Know how protected by the Trade Secrets Act of 2002.

Other legal protection relating to franchising, among others, the Town Planning Act, the Building Control Act, the Retail Act. the Retail Act enacted in Thailand in order to harmonize with the entry into force of the ASEAN Economic Community (AEC).

In Thailand was not found specific definition of a franchise based on the law¹⁴, but franchises in Thailand can be interpreted as a business system where one party called the franchisor and the other is called the franchisee, the franchisee to use the intellectual property rights belonging to the franchisor in running a business in a particular area, a certain time under the business systems of the franchisor and the franchisee has the obligation to pay to the franchisor

Until now, in Thailand there has been no special arrangement which requires the franchisor to make the prospectus and communicated to prospective franchisees before signing the agreement. However, there is provision of legal protection given to the parties in the agreement made by The FA, while for the contractual relationship between the parties is based on clause agreed arrangement, the formulation must be in accordance with the Contract Act, 1950. The other legal arrangements relating to the franchise if relating to competition law stipulated in the competition Act, 2010.

4. Analysis

The marketing system of goods and services through a franchise can be done between the franchisor and franchisee. Establishment of a franchise (both the giver and the receiver franchise) may be owned by the individual or business entity both unincorporated and incorporated. Form of business entity is to develop a franchise patterns may be as an individual, firm, CV, a limited liability company.

Foreign franchises if seeking to develop its business in Indonesia through a franchise concept, then foreign companies may be either individual businesses, as well as a limited liability company.

A regulation on business entity in Indonesia arranged and subject to in the book a legal statute trade, and act no 40 years 2007 about limited company.

Foreign legal entity that acts as the franchisor can relate to the legal entity in Indonesia as a franchisee, other forms of agreement that can be selected include master franchise, direct franchise, joint venture agreement.

If foreign franchisors want to become the provider in Indonesia, they must enrol in the Department of Trade and Industry to get a registration certification franchisors, and are required to pay taxes in accordance with the provisions of the tax law applicable in Indonesia.

¹⁴ Foreign Business Act, Public Company Act, labor law, Thai Trademark Act, Trade Secrets Act of 2002, , the Town Planning Act, the Building Control Act, the Retail Act, the Contract Act are the arrangement how to run a franchise business at Thailand.

Every worker should be preferred to operate the franchise business should take precedence people of Indonesia, if needed foreign workers it would require special permission from the Ministry of Worker in Indonesia and must submit and obey the regulations on employment in Indonesia.

Guidance and supervision of the franchise entirely run by the FLA, and based on good faith, the process of treaty negotiations. Legal protection given to the franchisee is based on the Consumer Protection (Fair Trading) Act. Franchises are also protected by the Competition Act, which is run by the Competition Commission of Singapore (CCS).

A description of the rule of law, protection of the law that has been done in section Literature Review provide a general description of the legal regulation of the franchise in Indonesia and other ASEAN countries. Explanation above also expressed regarding legal protection for those involved in the business of franchising.

The things above are material analysis of legal arrangements and legal protection, especially in the field of franchising. Analysis will be done with peeling about what the similarities and what was the difference from these countries.

1. Equation

Similarities between Indonesia and other ASEAN countries in terms of legal regulation and legal protection for the parties involved in the business using the franchise pattern, among others:

- a. The main reference source in the legal relationship between the franchisor and franchisee is a franchise agreement;
- b. The franchise agreement between the franchisor and the franchisee set forth in a written agreement;
- c. Franchising is a method of distributing goods and services that have been recognized to have the advantage;
- d. There is intellectual property protected by intellectual property laws

2. Difference

Differences were found in both the setting and the legal protection in the method of distribution of goods and services through franchise concepts, among others:

- a. Franchise arrangements specifically set forth in a separate regulation, such as Indonesia, Malaysia.
- b. Setting franchise specifically poured in a separate regulation, such as Singapore, Thailand, Philippines.
- c. The Government through the extension of his hand like a department or commission to supervise as a form of legal protection for the parties to both the franchisor and franchisee.
- d. Supervision as a form of legal protection for both the franchisor and the franchisor conducted by the Association franchise in the country, such as Singapore and Thailand, the Philippines. The code of ethics is the main source of law in running a franchise business concept. Good faith is a source of the franchise agreement.
- e. Thailand recorded state is making efforts in order to harmonize the ASEAN Economic Community in 2015 to create designs setting legally attention to harmonization with other ASEAN countries.

The results of the research that has been done can be a reference for the development of franchising practice in Indonesia, especially Indonesia which is located in the micro and medium scale. The necessity of the implementation process of setting franchise law in line with government policy.

5. Conclusions

Regulatory reform should be in accordance with the plan long-term and medium-term development of Indonesia and there should be harmonization between issued policy with the purpose so as to

create conditions to improve the business climate, of course, an arrangement of both laws, policies or other legal products should be the stance ultimate that can answer questions or resolve problems faced as well as the protection of local industries mainly based creative industries.

The research that has been done is expected to contribute to the State of Indonesia and other ASEAN countries. Research conducted has entered the first stage in the second year. In the next phase will be presented to and analysis of legal arrangements Country Vietnam in order to complement this research. So in the end this research is expected to contribute positive input on the framework of the ASEAN Economic Community, and in turn there is the harmonization of regulations concerning franchising and legal protection in the ASEAN countries.

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