

APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY TO FRANCHISE AGREEMENTS

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ABSTRACT

The purpose of this study is to analyze: 1) Does the franchise agreement meet the principle of proportionality in the standard contract? 2) How can the principle of proportionality in the franchise agreement be a solution in minimizing the problems caused by the franchise agreement and legal protection for the parties?. This research is a type of normative juridical research with a legislative approach, a conceptual approach, and a case study.

The results of the study show that: 1) The proportionality of the exchange of rights and obligations can be observed from the substance of the contract clauses agreed upon by the parties. Clauses that contain the principle of proportionality in the franchise agreement are found in the sections: *Fee and royalty clause*, *Supervision clause (quality control product and management)*, *Clause on the use of materials or franchisor products (tie in clause)*, *Clause on exclusive marketing areas*, *Clause on confidentiality* 2) The principle of proportionality guarantees equality of rights and freedom in determining/regulating the proportion of rights and obligations of the parties took place fairly. In the implementation of the contract, the principle of proportionality guarantees the realization of the distribution of the exchange of rights and obligations according to the agreed proportions to the parties.

Keywords: Usability, Application, Principles, Proportionality, Agreement, Franchise

INTRODUCTION

Background

The proliferation of foreign franchises is inseparable from the instant culture, and instead of being confused about where to put the money, entrepreneurs choose those who offer speed or instant and a standard and tested system" In the franchise agreement, the Franchisor is obliged to provide guidance in the form of training, operational guidance on management, marketing, research and development to the Franchisee on an ongoing basis.¹

The franchise business is also one of the businesses that has a considerable contribution to the development of the country's economy. In essence, a franchise business is a form of business that markets goods or services that have certain characteristics in their activities. Franchise activities themselves in Indonesia are regulated in the Regulation of the Minister of Trade Number 71 of 2019 concerning the Implementation of Franchises. The franchise agreement made by the two parties who enter into an agreement in a business contract must be based on good faith and based on the principle of proportionality, in the sense that the agreement provides a sense of fairness with the aim of providing benefits for both parties in running the franchise business.

The franchise business is based on an agreement made by the parties who have an interest in the legal act. The existence of agreements or contracts is of important value to human life because it can facilitate the fulfillment of human life needs that are not fulfilled by themselves without the help of others. In meeting the needs by involving others, it must be clear and considered very necessary to have an agreement that can protect each party from getting problems in the future. In certain cases, it can cause losses and objections between one of the parties, therefore there are legal bases in making an agreement so as to guarantee the rights and obligations of the parties.

¹ Harian Surya, Potential Local Franchise But Lack of Funds, page 3, December 10, 2011.

Article 1313 of the Civil Code (hereinafter referred to as the Civil Code) states that an agreement of an act with which one or more persons bind themselves to one or more other persons. In the agreement, there must be active interaction that is reciprocal on both parties to carry out their respective rights and obligations. However, most of the franchise agreements made are standard contracts. A standard/standard agreement is an agreement where the content or provisions in the agreement have been made unilaterally in advance by one of the parties, and the other party is not involved in making the provisions so that it tends to provide a better bargaining position for the franchisor than the franchisee. In practice, in the franchise business environment, this often happens because the content of the agreement (tends to) be biased.²

One of the principles known and embraced in contract law in Indonesia is the principle of freedom of contract. There is a principle of freedom of contract that allows both parties to freely determine what is and cannot be done in determining the content of the agreement as long as it does not violate public order and decency. This means that freedom of contract is not unlimited freedom. There are a number of restrictions on freedom of contract in a number of legal systems.

The restriction of freedom of contract is carried out both through laws and regulations and court decisions. In the agreement, there must also be a balance between the obligations and rights of the parties. The principle of proportionality and the principle of good faith are needed in making an agreement so that there is no one party who is harmed in the agreement. One of the reasons why the principle of proportionality is so necessary is because the franchise agreement is one of the forms of standard agreements.³

Problem Formulation

1. Has the franchise agreement fulfilled the principle of proportionality in the standard contract?
2. How can the principle of proportionality in franchise agreements be a solution in minimizing the problems caused by franchise agreements and legal protection for the parties?

² Sutan Remy Sjahdeini, 1993, Freedom of Contract and Balanced Protection for Parties to Bank Credit Agreements in Indonesia, Indonesia Banker Institute, Jakarta, pp. 193-239

³ Munir Fuady, 2007, Contract Law (From the Perspective of Business Law), Citra Aditya Bakti, Bandung, p. 24

THEORETICAL FRAMEWORK

1. *Grand Theory of Legal Protection*

According to Setiono, legal protection is an action or effort to protect society from arbitrary actions by rulers that are not in accordance with the rule of law, to realize order and tranquility so as to allow humans to enjoy their dignity as human beings.⁴ Legal protection is all efforts that can ensure legal certainty, so that it can provide legal protection to the parties concerned or those who take legal action.⁵

Legal protection aims to integrate and coordinate various interests in society because in a traffic of interests, the protection of certain interests can only be done by limiting various interests on the other side. Legal interests are to take care of human rights and interests, so that the law has the highest authority to determine human interests that need to be regulated and protected. Legal protection is born from a legal provision and all legal regulations provided by the community which is basically an agreement of the community to regulate the behavioral relationship between community members and between individuals and the government which is considered to represent the interests of the community.⁶

Legal protection for every citizen of Indonesia without exception, can be found in the Constitution of the Republic of Indonesia Year 1945 (UUDNRI 1945), for that every product produced by the legislature must always be able to provide guarantees of legal protection for everyone, and even must be able to capture the aspirations of law and justice that are developing in society. This can be seen from the provisions that regulate the existence of equal legal status for every citizen.⁷

2. *Middle Theory of Legal Certainty*

One of the ideals of law is legal certainty, through certainty it is hoped that it will be able to bring justice to the ideals of law. Certainty is a characteristic that cannot be

⁴ Setiono, Rule of Law (Surakarta: Universitas Sebelas March, 2004), p. 3.

⁵ Koentjaraningrat Koentjaraningrat, "Legal Anthropology," *Anthropology of Indonesia*, 2014, <https://doi.org/10.7454/ai.v0i47.3271>.

⁶ Ibid, p. 35.

⁷ Philipus M. Hadjon, People's Protection for the People in Indonesia (A Study on Its Principles, Handling by Courts in the General Judiciary and the Establishment of State Administrative Courts) (Surabaya: PT. Bina Ilmu, 1987), p. 38.

separated from the law, especially for written legal norms. Laws without the value of certainty will lose their meaning because they can no longer be used as a guideline of behavior for everyone. Certainty itself is referred to as one of the goals of the law. Community order is closely related to certainty in law, because order is the core of certainty itself. According to Sudikno Mertokusumo⁸, legal certainty is a guarantee that the law is carried out, that those who are entitled according to the law can obtain their rights and that the verdict can be implemented.

Legal certainty is the implementation of the law according to its sound, so that the community can ensure that the law is implemented. The creation of legal certainty in laws and regulations requires requirements related to the internal structure of the legal norm itself.⁹ Guarantee for citizens to have justice in matters related to the law. Make no difference in the eyes of the law so that law enforcers obey the rules that have been made.¹⁰

3. Applied Theory Hierarchy of Legal Norms or Hierarchy of Laws and Regulations

According to Hans Kelsen, the norm is tiered in layers in a hierarchical order. In other words, the legal norms that are subordinate are valid and sourced, and are based on higher norms, and higher norms are also sourced and based on higher norms and so on until they stop at a highest norm called the Basic Norm (*Grundnorm*) and still according to Hans Kelsen are included in the dynamic norm system. Therefore, the law is always formed and abolished by the institutions of its authority that have the authority to form it, based on higher norms, so that lower norms (*Inferior*) can be formed based on higher norms (*superior*), in the end the law becomes tiered and layered to form a Hierarchy.¹¹

Hans Nawiasky¹² also grouped the legal norms in a country into four large groups consisting of:

⁸ Sudikno Mertokusumo, *Getting to Know the Law of a Reporter* (Yogyakarta: Liberty Press, 2007), p. 150.

⁹ Fernando M Manulang, *Law in Certainty* (Bandung: Prakarsa Media, 2007), p. 95.

¹⁰ Moh. Mahfud MD., "Law Enforcement and Good Governance," *National Seminar "It's Time for Conscience to Speak"*, January 8, 2009, 2009.

¹¹ Aziz Syamsuddin, *Processes and Techniques of Drafting Laws*, First Printing (Jakarta: Sinar Grafika, 2011), p. 14.

¹² See Hans Protezky, *Hans Nawiasky, Allgemeine als recht systemischen Grundbegriffe* (Zurich: Benziger Perss, 1984), hlm. 31.

1. kelompok I: *staatspundamentalnorm* (Norma Fundamental).
2. Group II: *Staatgrundgesetz* (basic rules/basic rules of the country)
3. Group III: *Formell Gesetz* (Formal law)
4. Group IV: *Verordnung* and *satzung autonomy* (implementing rules and autonomous rules).

RESEARCH METHODOLOGY

This research is included in the type of doctrinal research, where the approach method used is juridical-normative. The study method used in this study is normative legal research, which is a study conducted by examining the laws and regulations that apply or applied to a certain legal problem. Research that includes research on legal principles, research on legal systematics, research on legal synchronization, legal history research, and comparative legal research.¹³

The study carried out is a literature study (*library research*) which uses secondary data. Peripheral data through field studies, secondary data in this study are obtained through literature studies, by searching for as complete and as much information as possible with journal literature, newspapers, articles, scientific papers and laws and regulations related to online buying and selling in electronic contracts. The use of secondary or literature data is intended to; 1) Inform readers about the results of other research related to the research being conducted; 2) Connecting a research that is carried out on an ongoing basis to fill in the gaps and expand other research; and 3) Provide a framework and reference to compare a study with other findings. The data collected in this study will be analyzed descriptively with a qualitative approach, namely by providing a thorough and in-depth presentation and explanation (*holistic/verstelen*).¹⁴

RESEARCH RESULTS

Franchise Agreement Has Fulfilled the Principle of Proportionality in Standard Contracts

An agreement is a two-sided legal act (*een tweezijdige overeenkomst*) which is based on an agreement to cause legal consequences. What is meant by a two-sided legal act is none

¹³ Soerjono Soekanto and Sri Mamudji, Normative Legal Research, A Brief Review, (Jakarta: Raja Grafindo Persada, 2011), p. 65.

¹⁴ Sugiyono, "Quantitative, Qualitative and R&D Research Methods," 26th (Bandung: Cv. Alfabeta, 2018), p. 34.

other than a legal act that includes an offer from one party and acceptance from the other party. However, the classical view of the agreement is considered inappropriate because from one side there is an offer and from the other party there is an acceptance, so there are two legal acts in the form of one act each. Thus, an agreement is not a legal act, but a legal relationship between two people who agree to cause legal consequences.¹⁵

The term agreement in the Civil Code (hereinafter referred to as the Civil Code) only refers to engagements that originate from agreements (contracts) and those born from the law. The definition of an agreement can be found in Article 1313 of the Civil Code where, an agreement is an event in which one or more people promise to one or more other people. The event of the agreement will give birth to a relationship between two or more people called an engagement. So that the agreement is very influential to support in the realm of business activities.¹⁶

Even though the agreement made is in the context of the business world, to make a valid agreement, it must still adjust the legal method that has been established as stated in Article 1320 of the Civil Code. So that the conditions for the validity of the agreement have been met, then an agreement can be considered valid and legally binding for the parties who make it. Article 1320 BW is an important instrument to test the validity of the agreement drawn up by the parties. In Article 1320 BW there are four conditions that must be met for the validity of an agreement, namely:

- a. An agreement for the parties to the agreement or it can be said to be a promise;
- b. Able to form an alliance;
- c. A specific object;
- d. Halal cause or causa in this case does not contradict the Law.¹⁷

The first two conditions are called subjective conditions, because the two conditions are the subject of the agreement and the last two conditions are called objective conditions, because they relate to the object of the agreement. After the issuance of an agreement to be able to form an agreement, both parties have the freedom to contract. If the two parties have

¹⁵ Dwi Atmoko, The Application of the Principle of Proportionality in Franchise Agreements in a Business Contract Relationship, JURNAL HUKUM SASANA, Volume 8, No. 1 (2022), 156.

¹⁶ 3 Soediman Kartohadiprodjo, Introduction to the Legal System in Indonesia (Jakarta: Ghalia Indonesia, 1979).

¹⁷ Agus Yudha Hernoko, Law of Agreements, The Principle of Proportionality in Commercial Contracts (Surabaya: Kencana Prenada Media Group, 2009)

entered into an agreement, then it can be said that there is a freedom between the parties. This freedom of will is interpreted as minimal equality. It is understandable that an economist equality between the parties rarely appears. And if equality between the parties does not exist, then there seems to be no freedom to enter into contracts either.¹⁸

Freedom of contract in Article 1338 paragraph (1) of the Civil Code says that all agreements that are legally formed will apply like the law to those who make them. Then paragraph (3) says that an agreement must be formed and carried out in good faith. This article explains that there will be freedom of contract in the agreement, the principle of *pacta sunt servanda*, the principle of legal certainty, and the principle of good faith. "This provision is said to be open because every person or party who wants to make an agreement/agreement is given the freedom to make an agreement that regulates their legal relationship about anything, in any form but does not violate the provisions of the law."¹⁹

An ideal contract process should be able to accommodate the exchange of interests of the parties in a fair and equitable manner (proportional) at each phase or stage of the contract. Therefore, it is necessary to observe that there is an important phase that must be passed by the parties in the contract process, namely negotiations. Negotiation in commercial contracts is a manifestation of the application of the principle of proportionality towards the stage of contract formation. The negotiation phase is a '*crucial point*' to formulate the exchange of rights and obligations of the parties which will later be binding and mandatory to be fulfilled.

This is certainly contrary to the characteristics of a fast-paced and instant franchise business. Imagine if a company that is domiciled in Jakarta and wants to have 1000 franchises spread throughout Indonesia, then has to negotiate with one by one prospective franchisees, must make a clause clause in the contract that is agreed upon by both parties to get a balance in a business cooperation. This will certainly waste a lot of time. Therefore, standard contracts are very appropriate to use in the franchise business when compared to negotiated agreements. Standard/standard contracts are not only used for large-scale business

¹⁸ Johannes Ibrahim and Lindawaty Sewu, *Business Law in Modern Human Perception* (Bandung: PT Refika Aditama, 2007)

¹⁹ Fajar Sugianto, , *Contract Design & Analysis* (Surabaya: R.A.De.Rozarie, 2017).

agreements, as they appear at every level of business transactions even small-scale businesses.

Protracted negotiations need to be avoided so as not to take too long and cost more. One of the parties is usually the principal party in the form of a corporation, has a legal consultant who is in charge of drafting the terms *of the* agreement. In a standardized contract, the consultant in question seeks in such a way as to secure and protect the interests of his client from possible losses arising from the agreement.

Basically, the principle of proportionality or the principle of balance is a form of emphasis on both parties to give each other; equal rights both in rights and obligations. As for the proportional division of rights and obligations, this can be seen in the substance of the agreement. The number of achievements carried out by both parties, especially the content of the agreement is quantitative or the amount received by each party is a reflection of the balance in the agreement

Creating balance and preserving the rights owned by the parties before the agreement made becomes a binding agreement for the parties, the Civil Code provides various general principles, which are guidelines or benchmarks, as well as a limit or sign in regulating and forming the agreement to be made until it eventually becomes an agreement that applies to the parties, which can be forced to implement or fulfill. One of the principles used to measure balance in contracting is the principle of proportionality.

The word 'proportionality' or proportionality means according to proportion or proportional, balanced. While 'balance' means a state of balance (balanced – equal weight, equilibrium, comparable, commensurate); In physics, it is defined as a state that occurs when all forces and tendencies that exist in each object or system are exactly neutralized or opposed by forces or tendencies of the same magnitude but have opposite directions.²⁰

From what was stated above, the principle of proportionality is the principle that underlies the exchange of rights and obligations of the parties according to their proportion or share. To find the principle of proportionality in the contract, we need to examine how much burden is borne by the parties, the greater the burden he bears the greater he gets his

²⁰ Agus Yudha Hernoko, The Law of Agreements on the Principle of Proportionality in Commercial Contracts, Kencana Prenada Media Group, Jakarta, 2011, p. 75.

share, or if the more obligations he fulfills based on the agreement, the greater the rights he receives. Thus, the principle of proportionality does not concern balance in the sense of the similarity of results obtained (in a mathematical sense) but rather emphasizes the proportion of the division of rights and obligations between the parties that takes place properly and appropriately.²¹

Basically, the principle of proportionality is the embodiment of the doctrine of "contractual justice" which corrects the dominance of the principle of freedom of contract, which in some cases actually causes injustice.²² Peter Mahmud Marzuki called the principle of proportionality with the term "equitability contract" with unsure justice and fairness. The principle of proportionality in a contract or agreement is interpreted as the principle that underlies the exchange of rights and obligations of the parties according to their proportions or shares. The proportionality of the division of rights and obligations is manifested in the entire process of contractual relationships, both in the pre-contractual phase, the formation of contracts and the implementation of contracts. The principle of proportionality does not concern the balance/equality of results, but rather emphasizes the proportion of the division of rights and obligations between the parties. The franchise *offering circular* must be prepared in accordance with local law and the franchise agreement must show a balance between rights and obligations between the franchisor and the franchisee.²³

According to Herneko, the principle of proportionality in contracts is interpreted as the principle that underlies the exchange of rights and obligations of the parties according to their portions or parts. The principle of proportionality does not concern the balance (equality) of results, but rather emphasizes the proportion of the division of rights and obligations between the parties. Basically, the principle of proportionality is the embodiment of the doctrine of "contractual justice" which corrects the dominance of the principle of freedom of contract, which in some cases actually causes injustice. The principle of proportionality is not only important to produce a fair and mutually beneficial contract (substantial justice), but the principle of proportionality is also important to emphasize the existence of fairness (justice in

²¹ Ibid, 89.

²² Dewi Astuty Mochtar, Technology Transfer License Agreement in Indonesia Technology Development, Alumni, Bandung, 2001. thing. 79

²³ Jessica Amelinda, et al, Implementation of Proportionality in the Formation of Franchise Agreement Vidio Ezy Jakarta, Diponogoro Law Review, 3 (2) 2014.

procedures), so that for its role the principle of proportionality should always be involved in every process of forming a contract.

Application of the Principle of Proportionality includes:

1. In the pre-contract stage, the principle of proportionality opens up negotiation opportunities for the parties to exchange rights and obligations fairly. Therefore it is disproportionate and must be rejected in bad faith negotiation process;
2. In the formation of contracts, the principle of proportionality ensures equality of rights and freedom in determining/regulating the proportion of rights and obligations of the parties in a fair manner.
3. In the implementation of the contract, the principle of proportionality guarantees the realization of the distribution of the exchange of rights and obligations according to the agreed proportions/imposed on the parties.
4. In the event of a failure in the performance of the contract, it must be assessed proportionally whether the failure is fundamental so that it interferes with the implementation of most contracts or just simple things/minor important errors.
5. Even in the event of a contract dispute, the principle of proportionality determines that the proportion of the burden of proof to the parties must be divided according to fair consideration.

The proportionality of the exchange of rights and obligations can be observed from the substance of the contract clauses agreed upon by the parties. Clauses that contain the principle of proportionality in franchise agreements are found in the sections: *Fee and royalty* clauses, *Quality control product and management* clauses, Clauses on the use of materials or products by franchisors (*tie in clause*), Clauses on exclusive marketing areas, Confidentiality clauses.²⁴

In the design of the standard contract on the franchise, there are certain conditions so as not to give rise to an exoneration clause that tends to harm the franchisee as a weak party. Exonerations that arise due to the intentionality of entrepreneurs are contrary to morality. The sentence that mentions "the first party is free from the responsibility arising from it" is an

²⁴ Fisiliya Aricka Yuliyarsih, Franchise in Franchise Agreements in Indonesia, JURNAL RECHTENS, Vol. 2, No. 2, December 2013

exoneration clause, which is a condition that limits or exempts the responsibility of one of the parties or individuals in carrying out the agreement. This exoneration requirement arises because one of the parties does not want to suffer too much loss for an act, so avoid losses by making an exoneration clause. The provisions of article 18 of the Consumer Protection Law, the prohibition on the use of standard agreements are associated with two things, namely the content and form of writing, in terms of content, it is prohibited to use standard agreements that contain unfair clauses, while in terms of the form of writing, the clauses must be written simply, clearly and clearly so that they can be read and understood properly. The franchise agreement has clauses that reflect the principle of proportionality, including:

1. Fee and royalty clauses

The inclusion of fee and royalty clauses, related to the franchise's obligation to fulfill the obligation to pay a certain amount of money as an inseparable part of the cooperation commitment. The obligation to pay this fee is generally carried out at the beginning of the implementation of the contractual relationship. Meanwhile, royalty payment is a form of payment for the results of the use or utilization of rights (IPR), products and management by the franchise.

2. Klausul pengawasan (*quality control product and management*)

The inclusion of a *quality control product and management* clause is part of the franchise's commitment to maintain the image (good name) of the franchisor's product. This clause is important, considering that the maintenance of product quality and the form of the servant greatly affect the success of the business. For this reason, the form of strict supervision is an effort to maintain the continuity of the franchise itself

3. Tie-in clause *for the* use of materials or products of the franchisor

The inclusion of a clause on the use of franchisor materials or products (*tie in clause*), is part of the franchise business process to maintain product quality to meet the specified quality standards. In fact, there are often clauses related to the confidentiality of the products or services that are franchised

4. Exclusive marketing area clause

The inclusion of this exclusive marketing area clause is related to the policy to regulate franchisee distribution networks, in addition to avoiding competition among franchisees, it is also expected to guarantee the return on investment that has been invested by franchisees

5. Confidentiality Clause

The inclusion of a confidentiality clause is intended to bind the franchise so that it does not divulge the secrets that have been licensed to other parties without the written permission of the franchisor. This is very closely related to IPR, the amount of franchisor investment and other business considerations.²⁵

In an agreement, in general, the parties have a balanced achievement and are a mutual relationship. A balanced position is a form of bargaining power for the parties who enter into an agreement in a franchise which is proof of the existence of a fair agreement in an agreement. According to Paulus J. Soepratignja, the making of a standard agreement will only be carried out if there is an urgency to respond to the interests of business actors, namely:

- a. Dealing with transactional activities in high frequency.
- b. For the sake of business competition, it must provide services efficiently and effectively to consumers.
- c. For the sake of the efficiency of distributing production products, all or part of the conditions in each transaction must be prepared in writing in advance, so that consumers can immediately know it.
- d. Compensate for the high frequency of transactional activities, so that it must provide the manuscript and/or terms of the agreement, in bulk and uniformly for the same transaction, without showing the conditions and/or needs of each consumer.
- e. The requirements of the agreement in bulk and uniformly must effectively be able to guarantee the strength and legal certainty for the business actors themselves and for consumers.²⁶

²⁵ Rachdinda Pradigda Al-Qarano, The Principle of Standard Contract Proportionality in Franchise Agreements, *Glosains: Journal of Global Indonesia*, Vol. 2, No. 1, January 2021

²⁶ Dwi Atmoko, Application of the Principle of Proportionality in Franchise Agreements in a Business Contract Relationship, *JURNAL HUKUM SASANA*, Volume 8, No. 1 (2022), 155.

In franchise agreements, it is not separated from the issue of fairness. Any contract, including franchise contracts, is a forum that brings together the interests of one party with another demanding a fair exchange of interests. Distributive justice is the beginning of all kinds of justice theories. According to Thomas Aquinas, distributive justice is basically a respect for the human person (*acceptio personarum*) and his nobility (*dignitas*). In the context of distributive justice, justice and propriety (*equity*) are not achieved solely by determining the actual value, but also on the basis of similarity between one thing and another (*aequity rei adrem*).

In a technology transfer contract or franchise contract, where the clauses are more protective of the interests of the technology provider/franchisor, while on the other hand burdensome the technology recipient/franchisee, it is possible that it is a form of abuse of circumstances (Netherlands-misbruik van omstandigheden; United Kingdom-undue influence).²⁷

The balance of franchise contracts is realized in the implementation of the provisions of Article 18 of Law Number 8 of 1999 concerning Consumer Protection (hereinafter referred to as UUPK). The substance of the article regulates the inclusion of standard clauses that must be considered by producers so as not to harm consumers, even in it sanctions the cancellation of the consumer contract concerned. Therefore, if there is an unbalanced position between the parties, then this must be rejected because it will affect the substance and the purpose and purpose of the contract. The interpretation of the use of the term balance on the substance content of the rule is:

- a. First, it leads to the balance of the positions of the parties, meaning that in the contractual relationship the positions of the parties are given a balance charge.
- b. Second, the similarity of the division of rights and obligations in contractual relationships seems to be without paying attention to the process that takes place in determining the final result of the division.
- c. Third, balance seems to be the end result of a process.

²⁷ Purwahid Patrik, *The Legal Foundations of Alliances (Alliances Born from Agreements and Laws)*, Mandar Maju, Bandung, 1994, p. 61.

- d. Fourth, state intervention is a coercive and binding instrument in order to realize a balance in the positions of the parties.
- e. Fifth, basically the balance of the positions of the parties can only be achieved under the same conditions and conditions (*ceteris paribus*).²⁸

The principle of proportionality in franchise agreements can be a solution in minimizing the problems caused by franchise agreements and legal protection for the parties

Basically, the principle of proportionality in an agreement is included in all aspects starting from the pre-contract stage, formation, implementation to if there is a dispute in the implementation of the agreement. "In the process before the formation of the agreement, the principle of proportionality provides the possibility to negotiate for the parties to carry out the exchange of their rights and obligations. Therefore, it is disproportionate and must be declared rejected if the negotiation is followed by bad faith.

Likewise with franchise agreements, legal problems will arise if the franchise agreement is doubtful in terms of fairness because the contractual relationship system formed does not work in a balanced manner. "In general, the general public who act as parties to an agreement, do not think in detail or in detail about the various provisions and requirements of a draft agreement, but only stipulate the main things that are considered important".²⁹

The formation of a franchise agreement that contains the exchange of rights and obligations of the parties in proportion can be said to be fair if observed from the substance of the agreement clauses agreed upon by the parties. So that between the franchise owner and the franchisee must have the ability in the field of law at least the basics, principles or norms, especially in the law of the agreement so that the process of exchanging interests in the agreement runs smoothly and can be said to be balanced. Because if observed, not a few parties easily fall into declaring that the agreement is one-sided or unbalanced, and even ends up being unfair just because of differences in strata or status of the parties. Such as only basing on the background of the parties and saying that the agreement was formed with different

²⁸ A. Yudha Harnoko, THE PRINCIPLE OF PROPORTIONALITY IN FRANCHISE AGREEMENTS, Journal of Business Law Vol 1 No.1 April 2015, 10.

²⁹ I.G. Rai Widjaya, Designing a Contract (Jakarta: Kesaint Blanc, 2004).

gaining positions. However, the imbalance contained in the franchise agreement must be more carefully examined so as not to immediately state that the agreement is biased.³⁰

The principle of proportionality must be understood as a form of "fair agreement", meaning that a form of agreement, especially in an agreement in a franchise, must contain values that show fairness for both parties. Agus Yudho Hernoko proposed a criterion that can be used as a guideline to find the principle of proportionality in contracts, as follows:

- a. A contract with the substance of the principle of proportionality is a contract that gives recognition of equal rights, opportunities and opportunities to contractors to determine a fair exchange for them. Equality is not in the sense of "equality of outcomes" but in the position of the parties who assume "equality of position and rights (equitability)" (the principle of equality of rights/equality of rights)
- b. Based on the equality/equality of rights, a contract with the substance of the principle of proportionality is a contract based on the freedom of contractors to determine what substance is fair and what is unfair to them (the principle of freedom)
- c. A contract with the substance of the principle of proportionality is a contract that is able to guarantee the exercise of rights and at the same time distribute obligations proportionally to the parties. It should be underlined that justice does not always mean that everyone gets the same amount, in this context it is possible that there are different end results. In this case, the principle of proportionality to the rights and obligations of the parties must refer to fair exchange.
- d. In the event of a contract dispute, the burden of proof, the light weight of the error and other related matters must be measured based on the principle of proportionality to obtain an elegant settlement and *a win-win solution*.

A commercial contract structure based on the proportional exchange of rights and obligations of the parties will result in a fair contract for both parties. As for the franchise contract agreement, it must be based on objective thinking and reasoning in the sense that the agreement does not arouse suspicion of both parties and is based on good faith in making an agreement.

³⁰ Ifada Qurrata A'yun Amalia & Endang Prasetyawati, CHARACTERISTICS OF THE PRINCIPLE OF PROPORTIONALITY IN THE FORMATION OF FRANCHISE AGREEMENT CLAUSES, Bonum Commune Business Law Journal Volume 2 Number 2 August 2019, 177

According to Agus Yudho Hernoko, the principle of proportionality means "the principle that underlies or underlies the measurement of the rights and obligations of the parties in proportion or their part in the entire contractual process". The principle of proportionality assumes that the division of rights and obligations is realized in the entire process of contractual relationships, both in the pre-contractual phase, the formation of contracts and the implementation of contracts (pre-contractual, contractual, post contractual). The principle of proportionality is very oriented to the context of the relationship and interests of the parties.

The validity of the agreement itself must be a joint statement that creates a sense of justice for all who make the agreement. In the franchise agreement, even though the Franchise feels burdened, based on article 1320 of the Civil Code, the conditions for the validity of the agreement are:

1. The agreement of those who bind themselves means that the parties who make the agreement must agree on what will be agreed in an agreement
2. Being able to make a treaty means that the person who makes an agreement must be able to make a treaty according to the law. In Article 1330 of the Civil Code, it is said that the person is an adult and is not under a guardianship.
3. Regarding a certain matter, it means what are agreed on the rights and obligations of both parties in the event of a dispute. The goods referred to in the agreement must at least be determined in type.
4. A halal cause means for the purpose of the agreement itself. Because what is not halal is contrary to the law, morality and public order.

Article 1335 of the Civil Code states that an agreement without a cause or that has been made for a false or prohibited cause, has no force. Furthermore, the principle of proportionality is the principle that underlies the exchange of rights and obligations of the parties according to their proportions or shares. So in principle, the principle of proportionality emphasizes more on the feasibility and propriety of a good contract for both parties. The role of the principle of proportionality and its relationship with business activities, the contract functions to secure transactions, Daalam understands that before an agreement occurs, there needs to be negotiation between the two parties regarding what matters are

the rights and obligations of each party, certain clauses also need to be raised or those that become dominant. Later, there needs to be a separate agreement so that it does not cause problems in the future and becomes the object of dispute between the two parties who make the agreement.

Good faith in the formation of contracts, the principle of proportionality ensures equality of rights and freedom in determining/regulating the proportion of rights and obligations of the parties in a fair manner. In the implementation of the contract, the principle of proportionality guarantees the realization of the distribution of the exchange of rights and obligations according to the agreed proportions to the parties. In the event of a failure in the performance of the contract, it must be assessed proportionally whether the failure is fundamental so that it interferes with the implementation of most contracts or is just a simple thing/small error. Therefore, testing through the principle of proportionality is very decisive for the failure of contract implementation, so that there is no abuse by one party in utilizing the clause, solely for the benefit of one party by harming the party. In the event of a contract dispute, the principle of proportionality emphasizes that the proportion of the burden of proof to the parties must be divided according to fair consideration. Contracts, which are the process of the chain of relations between the parties, must be built based on the understanding of justice in providing equal opportunities and opportunities in the exchange of rights and obligations proportionately. The function of the principle of proportionality is very important as a touchstone in the implementation of the exchange of rights and obligations of the parties to the agreement.

A contract that runs well certainly provides positive value for both parties who make the agreement. The achievement of tangible results generated in a contractual agreement based on the principle of proportionality certainly provides its own value.³¹ Similarly, the principle of proportionality, like other legal principles, is also expected to be a starting point in the formation of a contract, so that a contract is held in accordance with the values and wishes of each party.

³¹ Dwi Atmoko, Application of the Principle of Proportionality in Franchise Agreements in a Business Contract Relationship, JURNAL HUKUM SASANA, Volume 8, No. 1 (2022), 158-160

In order for protection and justice to be realized in an agreement, harmony is needed from all legal principles of the agreement, namely the principle of freedom of contract, the principle of consensualism, the principle of legal certainty (*pacta sunt servanda*), the principle of good faith (good faith), the principle of personality, the principle of trust, the principle of legal equality, the principle of balance, the principle of legal certainty, the principle of morality, the principle of propriety, and the principle of protection.³² All of these principles are interrelated with each other, cannot be separated, applied simultaneously, take place proportionally and fairly, and are used as a binding frame for the content of the agreement. Thus, it is hoped that the ideal and desired application of law can be realized.³³

CONCLUSION

The results of the study show that;

1. The proportionality of the exchange of rights and obligations can be observed from the substance of the contract clauses agreed upon by the parties. Clauses that contain the principle of proportionality in franchise agreements are found in the sections: *Fee and royalty* clauses, *Quality control product and management clauses*, Clauses on the use of materials or products by franchisors (*tie in clause*), Clauses on exclusive marketing areas, Clauses on confidentiality
2. The principle of proportionality ensures equality of rights and freedom in determining/regulating the proportion of rights and obligations of the parties in a fair manner. In the implementation of the contract, the principle of proportionality guarantees the realization of the distribution of the exchange of rights and obligations according to the agreed proportions to the parties.

³² Sinaga, Niru Anita. (2018). The Role of Legal Principles of Agreements in Realizing the Purpose of Agreements. *Legal Binamulia*, 7(2)

³³ Ratna Dewi et al, APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY TO CONTRACT REGULATIONS IN FRANCHISE AGREEMENTS (FRANCHISE, JUCN: Journal of Intelek dan Cendikiawan Nusantara, 1 (20 2024, 1216

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