

Liability of the Parties in Franchising Due to Pandemic Covid-19

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ABSTRACT

The occurrence of Covid-19 in recent years provokes a great deal of issues all around the world including Indonesia. It influenced every aspect of life and the most prominent one falls within the economic field. Businesses were dealing with a lot of difficulties and one of them is encountered within the franchising business between the relationship of Indonesian franchisee and foreign franchisor in which a dispute arose within their franchise agreement. This is due to the fact that plenty of restrictions were imposed that cause the Franchisor incapable of importing raw materials for the Franchisee in Indonesia, hence, the Franchisee is unable to start their business here in Indonesia. The Indonesian franchisee has likewise paid a certain amount of the initial fee, thus, the Indonesian franchisee requested a full refund for the delay of the service. Normative legal research is applied in determining the liability of each party and the best possible solution in overcoming the issues within this franchising business. Furthermore, this issue shall be contemplated as hardship instead of force majeure and renegotiation shall be conducted by both parties.

ABSTRAK

Munculnya Covid-19 dalam beberapa tahun terakhir menimbulkan banyak permasalahan di seluruh dunia termasuk Indonesia. Hal ini mempengaruhi setiap aspek kehidupan dan yang paling menonjol terletak pada bidang ekonomi. Banyak kendala yang dihadapi oleh para pelaku usaha dan salah satunya ditemukan dalam hubungan bisnis waralaba antara penerima waralaba di Indonesia dengan pewartalaba asing dimana terjadi perselisihan dalam perjanjian waralaba mereka. Hal ini disebabkan oleh banyaknya pembatasan yang diberlakukan yang menyebabkan pewartalaba tidak dapat mengimpor bahan baku untuk penerima waralaba di Indonesia, sehingga mitra waralaba tidak dapat memulai usahanya di Indonesia. Penerima waralaba di Indonesia juga telah membayar sejumlah biaya awal, sehingga penerima waralaba meminta pengembalian dana penuh atas keterlambatan layanan. Penelitian hukum normatif diterapkan dalam menentukan tanggung jawab masing-masing pihak dan solusi terbaik dalam mengatasi masalah dalam bisnis waralaba ini. Selanjutnya, masalah ini merupakan *hardship* sehingga tidak dapat dinyatakan sebagai *force majeure* dan renegosiasi harus dilakukan oleh kedua belah pihak.

INTRODUCTION

Franchising businesses are growing rapidly these days as people's interests are likewise developing, particularly relating to the foodservice industry. However, subsequent to the appearance of Covid-19, entire elements within the economic sector in Indonesia were profoundly influenced and that include the foodservice industry. This is due to the fact that after the appearance of Covid-19 there are countless different regulations enforced worldwide. Identically, the Indonesian government likewise imposed plenty of regulations with the main purpose of coping with the current situation as well as averting the foreseeable issues that might occur near the future. Franchising is explicitly regulated under the Ministry of Trade of the Republic of Indonesia Regulation No. 71 of 2019 on Franchising ("Franchising Law"), is defined as the right owned by an individual/business entity towards a business system in which it is proven that their marketing goods and/or services are successful and it is credible to be utilized by other parties conforming to the franchise agreement.¹

Furthermore, there are mainly two types of parties concerned within the franchising businesses that comprise of Franchisor and Franchisee. Based on the Franchising Law, Franchisor basically is an individual or business entity that has the authority to grant the right to utilize its Franchise to the Franchisee.² Meanwhile, Franchisee is an individual or business entity that obtained the right from the Franchisor to utilize the Franchise owned by the Franchisor.³ This research is conducted pursuant to the dispute that arose between the franchise agreement of an Indonesian franchisee (PT Prima) and the Malaysian Franchisor (CVT SDN BHD), hereinafter referred to as Franchise Agreement. The Letter of Intent (LOI) was signed on October 11th, 2019 and the Master Franchise Agreement was signed on November 28th, 2019. A franchise agreement essentially is a written agreement stipulated by the Franchisor and the Franchisee.⁴

Subsequent to the signing of the Franchise Agreement, the Franchisee and the Franchisor agreed to proceed on the warehousing for stocks and they committed to open 2 units of outlets in Jakarta in line with the Franchise Agreement. Moreover, within the range of October 14th and November 14th November 2019, both parties proceeded to the training courses where the Franchisee suggested the training to be conducted in one of the malls in Jakarta and the training cost has been utilized with food stock expenses for 9 crews in favor of the 1month training period. The establishment of the booth itself costs USD 4,550 and in conformity, to the franchise agreement the Franchisee is responsible for all expenses relating to the renovation. Relating to the Franchisee's commitment, under the franchise agreement it is stated that the Franchisee committed that 50 outlets shall be open within 10 years and 2 outlets shall be open within the period of the first 6 months. Other relevant targets are stipulated within the development schedule. In the event when the Franchisee fails to fulfill the development schedule, the Franchisor is authorized to seek different franchise developers within the territory and other relevant countermeasures.

With regard to the Franchisor's FPC (Food Process Centre) memo, it is stated that they are very well prepared to export the Franchisor's goods within the period of 3 months. Thus, adhering to the franchise agreement, it has been decided that a period of 6 months without a delay or any invalid reason will be given in opening and developing the First Flag Ship outlet in Jakarta. In the case that the Franchisee fails to comply with the applicable Franchise Agreement, hence, the Franchise Agreement for JABODETABEK will be automatically terminated in a writing format and any sort of refunds such as the Franchisee's fee and security deposits will not be given subsequent to the termination of the Franchise Agreement.

¹ The Ministry of Trade of the Republic of Indonesia Regulation No. 71 of 2019 on Franchising, art 1(1).

² Ibid, art 1(3).

³ Ibid, art 1(4).

⁴ Ibid, art 1(8).

Moreover, pertaining to the export activities that must be carried out by the Franchisor, as this franchising business runs within the foodservice industry, thus, a health certificate is mandatory from both country's customs departments in order to export food like meat and poultry.⁵ The Franchisor requested the health certificate along with the customs procedure since November 18th, 2019 in light of the fact that a period of 6-8 months is required for this process including audits. Nevertheless, the appearance of Covid-19 that highly affected the world leads to the implementation of a lockdown policy by a lot of countries. One of the countries that implemented this policy is Malaysia. This policy caused every office including government offices to close down and work is done from home. Hence, this policy likewise created loads of obstacles that include the postponement and the delay towards the health certificate application.

The Franchisor then advised the Franchisee to proceed with the export accordingly with a memo that was sent to the Franchisee in early August in which the health certificate status was approved. The Franchisor was likewise informed that the export activities can be arranged within a period of 3 months. Exactly on August 28th, 2020, the Franchisor finally obtained the health certificate required to carry out the export, however, the Franchisee showed no interest to communicate with the Franchisor and this is proven by the Franchisee that left the WhatsApp group and blocked the communication on early August 2020 until early September 2020. As the abovementioned problems emerged, the Franchisor is open to a further negotiation through a video conference related to this matter supposing that the Franchisee agreed in order to solve this matter. It is the Franchisor's intention to highlight that they are unable to proceed to the refund mechanism for the initial franchise and training fee requested by the Franchisee as the master franchise agreement was signed where the unit franchise agreement was not proceeding the location accordingly.

Apart from that, the Franchisor sent out the letter of demand to prepare the warehouse for receiving goods and stocks within a period of 3 months as well as to open up the 1st outlet in Jakarta conforming to the development expansion plan schedule written under the master franchise agreement. Pursuant to the Franchisor's concern letter dated August 1st, 2020, the Franchisee is obligated to carry out the outlet opening and expansion plan. Nonetheless, the Franchisee ignored and did not even consider this concern letter. The Franchisor has provided full support towards the Franchisee by participating in the Franchise & Licensing Expo Indonesia 2019 (FLEI 2019) on September 13th – 15th, 2019 where the Franchisor rented a booth and spent a total of USD 4,455 from their own expenses.

In addition, throughout the exhibition, the Franchisor assisted the market as well as carried out the promotion to attain potential unit franchisees as planned under the expansion plan. Those efforts executed by the Franchisor were all for free and the Franchisee was not requested to spend a single penny. Rationally this could be a great basis for the Franchisor to seek compensation towards the Franchisee as the Franchisee did not carry out the outlet expansion. However, instead of directly requesting compensation and terminating the franchise agreement, the Franchisor demanded further action from the Franchisee in which a period of 6 months for preparation and 3 months for import as well as warehousing process shall be given to open their First Flag Ship outlet in Jakarta. The elaboration within this research will focus on the liability of each party as well as determining the best possible solution in settling the dispute between the Franchisor and the Franchisee. In relation to the liability of each party, for the reason that the dispute occurred due to Covid-19 and the contract was stipulated prior to the appearance of Covid-19, thus the determination of whether

⁵ Government Regulation of the Republic of Indonesia No. 28 of 2004 on Food Safety, Quality, and Nutrition, art 1(25); Ministry of Health Malaysia, 'Food Safety Information System of Malaysia' (*FoSIM*) <<http://fsis2.moh.gov.my/fosimv2/HOM/frmHOMPage.aspx>> accessed 13 September 2021.

the delay can be considered as force majeure or another obstacle will be likewise administered. Hence, resulted in two primary research questions “How is the liability of each party and what is the best possible approach to settle the dispute between the parties of the Franchise Agreement?”

METHODS

The research will be conducted through normative legal research or commonly accepted as library research along with document study in light of the fact that this research mainly focuses on the written laws and regulations as well as other legal materials that are relevant to this research. Primary, secondary, and tertiary legal materials will likewise be analyzed within this research.⁶ Studies on relevant provisions from another country like Malaysia relating to this research that include the Malaysian Franchise Act 1998 (“Malaysia Franchise Act”) will be utilized as a comparison with the applicable existing laws and regulations in Indonesia which encompass the Presidential Decree No. 12 of 2020 on the Stipulation of Non-Natural Disaster of the Corona Virus Disease 2019 (COVID-19) As a National Disaster, the Indonesian Civil Code, and The Ministry of Trade of the Republic of Indonesia Regulation No. 70 of 2019 on Franchising. Additionally, Gustav Radbruch’s theory will be imposed and it will play a major role in the determination of the solutions in settling the dispute between the parties.

RESULTS AND DISCUSSION

1. The Liability of the Franchisor and the Franchisee

The liability of the Franchisor and the Franchisee shall be elaborated further within this section as the requirements of the Franchise Agreement in accordance with the Franchising Law will be associated with the requirements of a general contract/agreement conforming to the Indonesian Civil Code (“ICC”). The principle of contract, in general, will likewise be applied within this examination as it is relevant and applicable for the Indonesian contract in general. Moreover, further examination will be related to the Malaysia Franchise Act as a comparison, however, it is solely limited to the Franchise Agreement and the obligations of the Franchisor as well as the Franchisee from Malaysia Franchise Act.

1.1. Legal Requirements of a Contract in General under Indonesian Law

In a contract, there are 4 legal requirements and it consists of the consent of the parties, legal capacity, specific subject matter, and permitted cause. The consent of the parties towards a particular contract functions as proof of the willingness of the parties in agreeing to the content of the contract set forth and cannot be identified by others.⁷ It is essential to highlight that in entering a contract, the consent given from the parties cannot be given in force.⁸ Furthermore, there is legal capacity in which those who cannot enter into an agreement are those who are under 21 years, have not been married, and for those who shall be under guardianship.⁹

The third requirement is the specific subject matter, this requirement is referring to the agreed object of the contract that must explicit, comprehensible, trade-able, and it must be easily examined despite the indefinite quantity of the objects.¹⁰ Lastly, the final requirement is permitted cause, in essence, the contract must be in conformity with the existing laws and regulations without deceptive intention. Additionally, it should not contradict the ethics along with public order. In the case that the contract is against these obligations, the contract will remain powerless and invalid.¹¹

⁶ Soejono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif* (PT Raja Grafindo Persada 2004), 14.

⁷ Salim H.S, *Pengantar Hukum Perdata Tertulis (BW)* (Sinar Grafika 2002), 33.

⁸ I Ketut Oka Setiawan, *Hukum Perikatan* (Sinar Grafika 2016), 63.

⁹ Indonesian Civil Code, art 330.

¹⁰ *Ibid*, art 1332 & 1333.

¹¹ R. Subekti, *Hukum Kontrak: Teori & Teknik Penyusunan Kontrak* (2rd edn, Sinar Grafika 2004), 19.

1.2. Principle in a Contract under Indonesian Law

The principles of Contract encompass freedom of contract, consensualism, *pacta sunt servanda*, good faith, and personality. The first principle is Freedom of contract, essentially refers to the right owned by every individual to bind themselves into an agreement, determining the form of the contract, stipulate the provisions of the contract as well as the enforcement of the contract.¹² It must be noted that the parties do not have the right to free themselves from the negligence that they conducted.¹³ The second principle is consensualism, which basically states that an agreement will automatically be established when the parties have put out their consent and this is proven as one of the requirements of a contract in which consent of the parties is mandatory within the establishment of a contract.

The third principle is *pacta sunt servanda* is one of the most crucial principles as well and it is commonly known as the principle of legal certainty. This principle substantially indicates the power of a contract that legally binds, acts as the law, and guarantees the legal certainty of the parties to the contract.¹⁴ This principle is likewise prioritizing the principle of good faith within a contract and it plays an important role in providing guidelines within a contract.¹⁵

Furthermore, there is the principle of good faith in which every contract must be initiated with good faith. This principle requires the party of the contract to take into account their interest. This principle is likewise acting as a judge to clarify the content of the contract.¹⁶ Good faith is very crucial in dealing with the parties of the contract and it is shown through honesty and decency.¹⁷

In terms of honesty, the principle of good faith illustrates the acceptance with regard to factual objectivity and the parties' obedience towards their responsibilities lay down within the contract.¹⁸ Last but not least, the principle of personality in substance attribute to the fact that an individual can solely enter into an agreement with their own consent, and the agreement is solely relevant for the parties of the contract nor jeopardizing or shall beneficial for third parties unless regulated within Article 1317 of the ICC.¹⁹

1.3. The Obligations of the Franchisor and the Franchisee according to the Franchising Law

As stipulated within the first addendum of the Franchising Law, the Franchisor has the right to collect fees or royalties from the Franchisee or continuing franchisee, and the Franchisor is obligated to assist the Franchisee by providing continuous guidance.²⁰ Whilst the Franchisee is authorized to utilize the intellectual property rights or business characteristics owned by the Franchisor and the Franchisee is obliged to maintain the confidentiality of the Franchisor's intellectual property rights or business characteristics granted by the Franchisor.²¹

¹² Indonesian Civil Code, art 1320 & 1338.

¹³ Sri Lestari Poernomo, 'Standar Kontrak Dalam Perspektif Hukum Perlindungan Konsumen' (2019) 1 Jurnal Penelitian Hukum De Jure 114.

¹⁴ Indonesian Civil Code, art 1338(1).

¹⁵ Ery Agus Priyono, 'Peranan Asas Itikad Baik Dalam Kontrak Baru' (2017) 1 Diponegoro Private Law Review 13.

¹⁶ Jan M. Smits, *Contract Law: A Comparative Introduction* (Edward Elgar Publishing Limited 2014) 137.

¹⁷ Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press 2015) 74.

¹⁸ *Ibid*, 78.

¹⁹ Taufiq El Rahman and others, 'Asas Kebebasan Berkontrak dan Asas Kepribadian Dalam Kontrak-Kontrak Outsourcing' (2011) 23 Mimbar Hukum 586.

²⁰ The Ministry of Trade of the Republic of Indonesia Regulation No. 71 of 2019 on Franchising.

²¹ *Ibid*.

1.4. The Obligations of the Franchisor and the Franchisee according to Malaysia Franchise Act

As a comparison to the Indonesian Franchising Law, despite the fact that the Franchise Agreement was created in Indonesia and it is conforming to Indonesian law, it is essential to take into account the Malaysia Franchise Act as well. This is due to the fact that the Franchisor within this Franchise Agreement is from Malaysia, therefore it is crucial to demonstrate that regardless the Franchise Agreement was established in conformity with Malaysian Law, the Franchisor and the Franchisee ought to have identical obligations as imposed under the Indonesian law. The Franchisor is bound to provide a written notice relating to the breach of contract done by the Franchisee and authorize the Franchisee certain period to mitigate the breach, the Franchisor ought to assist the Franchisee in operating his business, for instance, the provisions or materials supply, services, training, marketing, etc., and the Franchisor must protect consumer's interest at all times.²² Relating to the Franchisee, they are obliged to pay for any relevant fees relating to the franchise as stipulated within the Franchise Agreement. Furthermore, the Franchisee is likewise accountable for protecting consumer's interests constantly.²³

Pertaining to the aforementioned explanation, relating to the contract requirements in general, it is apparent that the Franchisor and the Franchisee have fulfilled those requirements as the agreement made between them has entered into force. However, in consideration of the principle of contract, several issues must be specified as it contradicts the principle of the contract even though the contract itself must be following the principles of the contract set forth within the ICC. With regard to the first principle which is the freedom of contract, it is proven that the parties have fulfilled this principle as they are bound with the right to enter into an agreement on their own and they have likewise determined the conditions of the franchise agreement in line with their interests. This is likewise related to the consensualism principle and *pacta sunt servanda*, they have agreed to enter into the agreement and the franchise agreement has come into force. Therefore, both parties are obliged to carry out their obligations and attain the rights that have been specified under the franchise agreement as they are bound within the franchise agreement.

Nevertheless, in accordance with the aforesaid chronology, due to the occurrence of Covid-19, there has been a delay within the issuance of health certificates from the Franchisor side as the lockdown policy was implemented and it led to the postponement in exporting the materials for the Franchisee in Indonesia. It is coherent that with regard to this circumstance, although both parties are liable for fulfilling their obligations conforming to the Franchise Agreement but the unforeseen situation that is beyond the control of both parties appeared which led to the Franchisor being unable to proceed to their obligation to provide the relevant materials for the Franchisee and the Franchisee unable to complete their commitment as regulated under the development schedule of the Franchise Agreement. Hence, both parties are not liable for each other as both parties are suffering a loss, and again it must be noted that the delay occurred was not caused by the party of the contract as it is beyond their control.

Moreover, relating to the principle of good faith, seeing from the Franchisee side that showed no interest in communicating with the Franchisor prove that the Franchisee has neglected this principle when they are supposed to be considering the interest of the Franchisor as well. What's more, is that the Franchisor has no intention to breach the Franchise Agreement by postponing the export of the material to the Franchisee. The Franchisee should have communicated these issues to the Franchisor instead of blocking the Franchisor because it will not solve the issue especially when the Franchisor has initiated to conduct further negotiation in dealing with the issue. Additionally, in relation to the personality principle, as both parties entered into this Franchise

²² Malaysian Franchise Act 1998, sec 30(1).

²³ Malaysian Franchise Act 1998, sec 30(2).

Agreement with their own will and any issues that arise will solely affect both parties. Thus, renegotiation ought to be conducted by both parties as it is one of the most sufficient approaches to resolve a dispute between a contracting party in line with the Indonesian law and this shall be elaborated further within the subsequent section relating to the dispute settlement.²⁴ By the same token, the Franchisee should have not requested the full refund directly considering the fact that the Franchisor has demonstrated their responsibilities in assisting the Franchisee within the FLEI 2019 and the Franchisor is not liable for the delay towards the issuance of health certificate as it is clearly beyond their control.

With respect to the Franchisor and franchisee obligations under the first addendum of Franchising Law, the Franchisor has demonstrated their accountability in assisting the Franchisee by way of assisting the market and promoting to obtain potential unit franchisee throughout the FLEI 2019. Aside from that, the Franchisor has likewise rented the booth and spent a total of USD 4,455 with their expenses which are beyond the responsibility of the Franchisor regulated under the Franchising Law as the Franchisor is solely mandated to provide continuous guidance towards the Franchisee.

In the same manner, within the Malaysia Franchise Act, the Franchisor is likewise obliged to assist the Franchisee in operating the business, particularly in supplying materials and services, training, marketing, business, or technical assistance. However, it is apparent that the Franchisor is not accountable for any fee relating to the Franchisee, not to mention the fact that the conduct done by the Franchisor was not stipulated as part of the obligations within the Franchise Agreement and it is purely resting on the good faith of the Franchisor which is indicating one of the principles of contract. Yet the Franchisor did not seek compensation regardless of the Franchisee's negligence in proceeding with the outlet expansion and even ignored the concern letter from the Franchisor.

Additionally, conforming to the Malaysian Franchise Act, the Franchisee is supposed to be the one that is responsible to pay for the promotion fees or any other relevant fees provided under the Franchise Agreement, yet the promotion fee during the FLEI 2019 was paid by the Franchisor as a form of support to the Franchisee. Considering the fact that the postponement occurred due to the lockdown policy that was imposed as the result of Covid-19 it is indisputable that the Franchisor is not liable for the losses suffered by the Franchisee. Mainly, because the issuance of the health certificate is beyond the control of the Franchisor and it is the key to export the materials to the Franchisee because without the health certificate the Franchisor is unable to export the materials despite the fact that the Franchisee has likewise paid the initial fee, training fee, and other relevant costs to the Franchisor.

Relating to the inability of the Franchisor to export the materials for the Franchisee, it may appear like the Franchisor has failed to fulfill the agreed contract which may seem suitable to be referred to as an act of default, however, this circumstance did not emerge due to the negligence of the Franchisor. In this manner, the Franchisor is not liable to provide compensation in terms of refund to the Franchisee. Further amplification relating to this matter will be deliberated within the ensuing section. Conclusively, it is acceptable that the Franchisor refused to provide a full refund to the Franchisee as the Franchisor did not intend to harm the Franchisee and have shown the element of good faith in settling this matter by offering a renegotiation to the Franchisee in spite of being ignored by the Franchisee as the response to the renegotiation offer.

²⁴ Law No. 30 of 1999 on Arbitration and Alternative Dispute Settlement, art 1(10).

2. Dispute Settlement Between the Franchisor and the Franchisee

2.1. Franchise Agreement Pursuant to the Franchising Law

There are a few things that are required under the Franchise Agreement in accordance with the second addendum of the Franchising Law, namely:

- a. Complete name and address of the owner or the individual that is accountable for entering the franchise agreement;
- b. Types of Intellectual Property Rights of Franchisors like logos, etc.;
- c. Business activities;
- d. Rights and obligations of the Franchisor and the Franchisee;
- e. Assistance, facilities, operation guidance, training, and marketing provided by the Franchisor;
- f. Business area;
- g. Term of the franchise agreement;
- h. Payment procedure;
- i. Ownership, change of ownership, and right of heirs;
- j. Dispute resolution;
- k. Extension and termination procedure;
- l. Guarantee from the Franchisor;
- m. The number of outlets.

2.2. Franchise Agreement Pursuant to Malaysia Franchise Act

Franchise agreement stipulated under Malaysia Franchise Act is defined as an agreement established by a franchisor and a franchisee with respect to a franchise in return for any form of consideration but does not include any contract made for the purpose of direct selling.²⁵

There are several requirements for the franchise agreement that shall be included but is not limited to the fact that it must be written,²⁶ the name and description of the product and business under the franchise, the territorial rights granted to the franchise, any relevant fees imposed to the Franchisee, the obligations of the Franchisor and the Franchisee, the Franchisee's rights to utilize the intellectual property, conditions under which the Franchisee may assign the rights under the franchise, the statement on the cooling-off period, descriptions with regard to the intellectual property owned by the Franchisor that used in the franchise, relating to a master franchisee there must be franchisor's identity and rights obtained by the master franchisee, type and particulars of assistance provided by the Franchisor, duration and terms of renewal of the franchise, and the effect of the termination.²⁷

To provide a clearer understanding with regard to the requirement of the Franchise Agreement between Indonesian and Malaysian law, attached down below is the table of comparison in accordance with the Franchising Law and Malaysia Franchise Act.

No.	Franchise Agreement as Stipulated under the Franchising Law	Franchise Agreement as Stipulated under Malaysia Franchise Act
1	Shall be made in written form ²⁸	Shall be made in written form

²⁵ Malaysian Franchise Act 1998, sec 4.

²⁶ *ibid*, sec 18(1).

²⁷ *ibid*, sec 18(2).

²⁸ The Ministry of Trade of the Republic of Indonesia Regulation No. 71 of 2019 on Franchising, art 2(2)(c).

2	Complete identity of the owner (name and address of the owner or the individual that is accountable for entering the franchise agreement)	-
3	Complete data on the object of the Franchise Agreement (types of Intellectual Property Rights of Franchisors like logos, etc, and the business activities)	Complete data on the object of the Franchise Agreement (the name and description of the product, business under the franchise, and descriptions with regard to the intellectual property owned by the Franchisor that used in the franchise)
4	Rights and obligations of the Franchisor and the Franchisee	The obligations of the Franchisor and the Franchisee, the Franchisee's rights to utilize the intellectual property conditions under which the Franchisee may assign the rights under the franchise
5	Assistance, facilities, operation guidance, training, and marketing provided by the Franchisor	-
6	Business area	The territorial rights granted to the franchise
7	Term of the franchise agreement	-
8	Payment procedure	Any relevant fees imposed to the Franchisee
9	Ownership, change of ownership, and right of heirs	-
10	Dispute resolution	-
11	Extension and termination procedure	The statement on the cooling-off period
12	Guarantee from the Franchisor	-
13	The number of outlets.	-

Note: (-) means there are no identical provision.

In consonance with the above table of comparison, evidently, there are certain provisions that are not explicitly regulated under the Malaysia Franchise Act, nonetheless, please note that the clauses within the Franchise Agreement conforming to the Malaysia Franchise Act are not limited to the aforementioned requirements²⁹ and the Malaysia Franchise Act here merely act as a comparative facet as the Franchise Agreement was established conforming with the Indonesian law.

²⁹ Malaysian Franchise Act 1998, sec 18(2).

2.3. Determination of the Cause of the Delay (Covid-19 as an Act of Default, Force Majeure, Frustrating Events, or Hardship)

In determining the cause of the delay, this section essentially will ascertain whether the delay provoked by Covid-19 can be considered as an event of force majeure or other obstacles. Hence, further explanation will be provided concerning the force majeure and other relevant issues subsequently. Within the enforcement of a contract, there are certain possibilities relating to the termination or cancellation of the contract. Those terms are usually stipulated under the clauses of the contract for instance, default and force majeure. To begin with, an act of default essentially occurs in the event when one of the parties of the contract does not fulfill the obligations set forth within the contract³⁰ and the party is accountable to provide compensation to the parties who are suffering from losses and this may arise due to force majeure as well.³¹

There are certain requirements in concluding the act of default, namely, the material requirement in which one of the parties intentionally conducted the damage towards the other parties. Secondly, the formal requirement is when one of the parties administers the act of negligence within the completion of his responsibilities.³² In the event when the parties of the contract managed to fulfill but it is not in line with the contract this can likewise be contemplated as the act of default. In the case that the activities conducted by one of the relevant parties are restricted under the applicable laws and regulations, it shall be considered as the act of default as well.³³

Furthermore, in the event when force majeure occurs, the risk that arises will be endured by all parties within a contract.³⁴ Force majeure as stated under the Presidential Decree No. 12 of 2021 on the Amendment of Presidential Decree No. 16 of 2018 on Government Procurement of Goods/Services is referring to a condition that appears against the will of the contracting parties and cannot be predicted or is unforeseeable, thus the obligations set forth within the agreement cannot be achieved. Force majeure clause in essence administers validations that particular performances that were stipulated under the agreement are not accomplished due to the occurrence of an unforeseeable event and it is justified by the law that this clause shall discharge the debtor to provide compensation on the ground of an act of default.³⁵

Commonly, termination of the contract shall be executed in a case where the object in a contract is completely ruined, there is no certainty related to the existence of the object, or within the case in which the object of the contract is completely destroyed caused by a circumstance that surpasses the debtor's responsibility.³⁶ However, bear in mind that the implementation of force majeure clause shall not automatically result in the termination of the contract, it will inaugurate a passage for the contracting parties to conduct a renegotiation in determining the measure that ought to be taken, it may be in a form of termination of the contract or adjusting the content of the contract depending on the clauses of the contract.

There are two types of force majeure and they encompass absolute and relative force majeure. Take into account that these classifications are solely recognized as the notion from the legal expert for the reason that they are not classified within the Indonesian contract law. With regard to relative force majeure, the debtor's obligations are still possible to be fulfilled subsequent to the end of the

³⁰ I Ketut Oka Setiawan, *Hukum Perikatan* (Sinar Grafika 2016), 16-22.

³¹ R. Subekti and R. Tjitrosoedibyo, *Kamus Hukum* (Pradya Paramita 1996), 110.

³² R. Subekti, *Pokok-pokok Hukum Perdata* (PT. Intermedia 1982), 127.

³³ R. Setiawan, *Pokok-pokok Hukum Perikatan* (Bina Cipta 1994), 49.

³⁴ Salim H.S, *Hukum Kontrak, Teori dan Teknik Penyusunan Kontrak* (Sinar Grafika 2008), 101.

³⁵ R. Subekti, *Hukum Perjanjian* (PT. Intermedia 2007), 55.

³⁶ Indonesian Civil Code, art 1444 & 1445.

force majeure event.³⁷ Relative force majeure is likewise referring to the performance is conducted by the party of the contract, however, there is a delay for a certain period within the completion of the obligation.³⁸ As for the absolute force majeure, the performance within a contact is completely incapable of being fulfilled.³⁹ Within the case of absolute force majeure, generally, the agreement tends to be canceled as the obstacle that appears has a permanent effect, thus performing the obligations becomes impossible.⁴⁰

Additionally, force majeure is accentuating a crucial element which is the appearance of the unforeseeable events throughout the enforcement of a contract. The event of force majeure is limited within the ICC, on the grounds that Article 1244 and 1245 of the ICC merely regulate relating to the debtor being freed from the accountability to provide compensation.⁴¹ However, commonly, the force majeure clause encompasses the occurrence of an act of God, such as, fire, earthquake, flood, rainstorm, power outages, catalyst damage, war, terrorism, embargo, or other events that are contemplated as a natural disaster and it causes the performance to be impossible to complete.⁴²

With respect to the act of default, it can be seen that based on the aforementioned chronology that the Franchisor may seem like they have failed to fulfill their obligations in terms of exporting the materials needed for the Franchisee within the period that was set forth under the franchise agreement. However, the Franchisee has no intention to cause any damage nor losses within the relationship of the franchise agreement. The implementation of the lockdown policy from the occurrence of Covid-19 lead to a delay in the process of exporting materials to the Franchisee. The effort shown by the Franchisor in fulfilling their obligations in a form of support towards the Franchisee shall not be contemplated as an act of default as the Franchisor has no authorization relating to the issuance of the health certificate and it is beyond the capacity of the Franchisor as they are bound to comply with the policy enforced by the Malaysian government. Hence, despite the fulfillment of the Franchise Agreement content was obstructed an act of default cannot be implemented within this case for the Covid-19.

Further, the Indonesian legal system acknowledges the force majeure clause under the laws and regulations relating to the contract law. Regardless of the fact that there is no explicit provision under the Indonesian contract law that requires the force majeure clause to be stipulated within an agreement, nevertheless, this clause is very crucial for the contracting parties as there is always a possibility for an unforeseen event to arise throughout the accomplishment of the contract. The force majeure clause will likewise function to strengthen the element of the contract.⁴³ Accordingly, in contemplation of alleviating the possible loss towards the parties of the Franchise Agreement, a force majeure clause shall be inserted.

³⁷ Umdah A. Rohmah, 'Konsep Force Majeure Dalam Akad Maurabahah dan Implementasinya Pada Lembaga Keuangan Syariah' (2019) 4 *Lex Renaissance* 113.

³⁸ Agus Y. Hernoko, 'Force Majeure Clause atau Hardship Clause; Problematika Dalam Perancangan Kontrak Bisnis' (2006) 11 *Perspektif* 209.

³⁹ *ibid.*

⁴⁰ Arie Exchell Prayogo Dewangker, 'Penggunaan Klausula Force Majeure Dalam Kondisi Pandemi' (2020) 8 *Jurnal Education and Development Institut Pendidikan Tapanuli Selatan* 309.

⁴¹ Daryl John Rasuh, 'Kajian Hukum Keadaan Memaksa (Force Majeure) Menurut Pasal 1244 dan Pasal 1245 Kitab Undang-Undang Hukum Perdata' (2016) 4 *Lex Privatum* 173.

⁴² Michael D. Robinson, *A Contractor's Guide to the FIDIC Conditions of Contract* (John Wiley & Sons, Ltd 2011), 93.

⁴³ Husni Thamrin, 'Landasan Yuridis Gugatan Pembatalan Perjanjian Build Operate Transfer' (2018) 2 *Jurnal Ilmu Hukum the Juris* 26.

As explained above, the core element of force majeure is the occurrence of unforeseeable circumstances. In consideration of this element, it may seem like force majeure is the suitable obstacle for Covid-19 as Covid-19 appeared abruptly and it is indisputable that Covid-19 is an unforeseeable circumstance that then leads to the implementation of the lockdown policy. Nonetheless, it is essential to take note that the force majeure clause under the Indonesian law is not limited to the act of God, for instance, fire, earthquake, flood, rainstorm, power outages, catalyst damage, war, terrorism, embargo, or other events that are contemplated as a natural disaster and it causes the performance to be impossible to complete. Taking into account this matter, pandemics such as Covid-19 may appear suitable to be contemplated as an event of relative force majeure, nonetheless, a thorough examination is essential towards the content of the force majeure clause within a contract in determining the appropriate cause for the delay. Subsequently, with regard to this provision, further elaboration shall be associated with two crucial regulations enforced by the Indonesian government relating to the Covid-19 and it is the Presidential Decree No. 12 of 2020.

The Presidential Decree No. 12 of 2020 essentially stated that Covid-19 is a non-natural disaster. Referring to the abovementioned elaboration on the definition of the force majeure, relative force majeure may seem appropriate for the Covid-19, be that as it may, it should be noted that the Franchise Agreement did not incorporate Covid-19, non-natural disaster, or in broadways the pandemic as the Franchise Agreement was constructed prior to the occurrence of Covid-19. From this point, it can be asserted that force majeure is not suitable for Covid-19.

Aside from that, as a supplementary, force majeure is solely applicable in the event when it is impossible to complete the performance, however, within this franchising case Covid-19 is only causing a delay towards the fulfillment of the Franchise Agreement and it is due to the implementation of the lockdown policy, it does not permanently or completely stop the whole performances. Instead of the Covid-19, the force majeure clause is more relevant towards the impact or the aftermath from the Covid-19 itself in terms of the influence towards the health of the society, etc.⁴⁴

It is necessary to underline that within the Presidential Decree No. 12 of 2020, the Indonesian government solely asserts that Covid-19 is a non-natural disaster. Thereupon, force majeure is not appropriate for Covid-19 as force majeure lies within the aftermath of the impact of Covid-19, in this case, the lockdown policy shall be more sufficient to be referred to as a relative force majeure. Howbeit, the lockdown policy can solely be contemplated as force majeure in the event when the content of the force majeure clause within the agreement explicitly stated about the lockdown policy or the elaboration shall be adequate to cover the lockdown policy.

With reference to the Malaysian law relating to the force majeure clause, force majeure is, in essence, referring to the appearance of a situation that is unforeseeable, beyond the control of the parties of the agreement, or could not have been foreseen by the parties of the contract when they entered into the agreement.⁴⁵ Pertaining to this definition, substantially Malaysian law has a pretty similar interpretation towards the force majeure clause with the Indonesia law in which the force majeure clause shall be implemented within the occurrence of an unforeseeable circumstance,

⁴⁴ Julia Heinich, 'the Impact of the Coronavirus Epidemic on Business Contracts: from Force Majeure to Unpredictability' (2020) Dalloz Collection 611; Klaus P. Berger and Daniel Behn, 'Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study' (2020) 6 McGill Journal of Dispute Resolution < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3575869> accessed 14 September 2021.

⁴⁵ Sarah Kambali and Marcus Leong, 'Malaysia: Force Majeure and Frustration of Contract in Sale and Purchase Agreements' (*Mondaq*, 28 January 2021) < <https://www.mondaq.com/litigation-contracts-and-force-majeure/1030760/force-majeure-and-frustration-of-contract-in-sale-and-purchase-agreements>> accessed 15 September 2021.

nevertheless, the definition likewise pointed out that force majeure clause includes the situation that could not have been foreseen by the parties of the contract as they bound themselves to the agreement. Force majeure may seem suitable to this definition as it is undeniable that the parties of the franchise agreement could have not foreseen the appearance of Covid-19.

However, contradictory to the civil law system, the common law system including Malaysia interprets the implementation of the force majeure clause depending on the wording of the provision as well as the facts from each case.⁴⁶ This clause is commonly proposed within a contract to encompass risks that are beyond the parties' rationale and it will exempt the parties of the contract from their responsibilities stipulated within the contract in an event like war, riot, or act of God like an earthquake.⁴⁷ The primary elements within the force majeure clause consist of the description of what is considered as an event of force majeure and the consequences of this clause.⁴⁸

The aforementioned explanation basically indicates that if the clause is adequate nor wide enough to cover the Covid-19, for instance, if the force majeure clause covers pandemic outbreak, government impediment, or business/travel restrictions.⁴⁹ Consequently, this clause shall be applicable for Covid-19. In line with the chronology and the Franchise Agreement, the Franchise Agreement did not clearly mention nor adequate to cover the pandemic of Covid-19 for the reason that it was likewise written prior to the appearance of Covid-19. Certainly, the terms of Covid-19 are not eligible to be envisaged as force majeure.

Supplementary to this, in relation to the principle of freedom of contract itself, it is coherent that the parties of the contract have the right to include any clauses that may be relevant or adequate to cover the Covid-19, and yet it was not imposed within the force majeure clause. Hence, the force majeure clause from a Malaysian law point of view is likewise irrelevant for Covid-19 and the force majeure clause ought to be implemented for Covid-19 solely in the event when Covid-19 is stipulated under the force majeure clause within the Franchise Agreement. Whereas, this Franchise Agreement did not include pandemics or any restriction arising from Covid-19. It solely regulates the events resulting from Acts of God or relating to nature.

Subsequently, identical to the concept of force majeure within the civil law system, despite the fact that Indonesian law does not regulate this doctrine, however, the common law system acknowledges the concept of frustrating events.⁵⁰ Frustrating events are alluding to particular changes that cause the performances of a contract impossible to be fulfilled.⁵¹ The frustrating event likewise attributes to the event in which the performances done by the parties of the contracts are contemplated to be illegal or in the event when the commercial targets of the contract have disappeared.⁵²

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ RHB Capital Bhd v Carta Bintang [2012] 10 MLJ 469.

⁴⁹ Chong Kok Seng and others, 'Covid-19: Impact on Contractual Obligations – Force Majeure and Frustration' (*Raja, Darryl & Loh*, 1 April 2020) < <https://rajadarrylloh.com/covid-19-impact-contractual-obligations-force-majeure-frustration/>> accessed 15 September 2021.

⁵⁰ Novi Epilia, 'Kontrak Internasional Dalam Mengantisipasi Krisis Ekonomi: Analisis Terhadap Penerapan Klausula Force Majeure Untuk Memperkecil Dampak Negatif Krisis Ekonomi' (Master's Thesis, Universitas Indonesia 2010).

⁵¹ Cavendish LawCards, *Contract Law* (4th edn, Cavendish Publishing Ltd 2004) 132.

⁵² Chris Turner, *Contract Law* (2nd edn, Hodder Education 2007) 186-188.

Moreover, frustrating events or the doctrine of frustration are recognized within Malaysian law. The definition itself can be found within the Contracts Act 1950. The doctrine of frustration extensively is defined as when the performance of a contract becomes impossible, by an event in which the promisor could not prevent occur, or when the act done by the parties of the contract is unlawful.⁵³ There are two main points that must be highlighted, the element of impossibility and unlawful.

The first requirement on the concept of the frustrating events may seem sufficient within this case as Covid-19 led to the implementation of the lockdown and provokes a delay towards the exporting activities. Particularly, to provide a clearer illustration, one of the relevant case that applied the doctrine of frustration asserted that this doctrine is suitable in the case where an event that frustrated the contract is the one that was not included within the provision of the contract.⁵⁴ However, bear in mind that frustrating events explicitly assert the word impossible in performing the agreed responsibilities and within this franchising case it is not impossible to complete the performances, it is just being postponed.

Relating to the second element which is unlawful, seeing from this franchising case, it is coherent that the performances done between the franchise agreement is in accordance with the applicable laws and regulations and the Covid-19 itself does not induce the performances of the Franchise Agreement to evolve into an unlawful act. Accordingly, it can be asserted that the Covid-19 will not provoke the performance to be insurmountable and a frustrating event is not appropriate within this case.

Supplementary to the frustrating events, the common law system likewise recognizes the doctrine of hardship. Notwithstanding the fact that the term of hardship may seem unusual within the Indonesian contract law, on the other hand, Indonesian legal fields are very much familiar with this term, especially within the International contract law. The doctrine of hardship is implying to the occurrence of a primary change or transformation towards the stability of the contract, cost of performance raise, and in the event when the value of the performance by one party is reduced.⁵⁵ The application of the doctrine of hardship shall conform to several requirements that comprise of the incorporation of good faith, the failure that arises due to an impediment that is beyond the control of the relevant parties within a contract, and an unforeseeable event. In addition, hardship is referring to an event where the completion of the performances within a contract becomes onerous rather than impossible.⁵⁶

In consonance with the aforesaid elaboration, there are a few things that need to be highlighted. First and foremost, Covid-19 satisfies the requirement of the doctrine of hardship in which it is unforeseeable to the contracting parties within this Franchise Agreement. Secondly, the doctrine of hardship is alluding to the occurrence of an event in which it is beyond the control of the parties of the contract and this is highly identical to the present situation in which the occurrence of Covid-19 is beyond the control of the parties of the Franchise Agreement.

On the other hand, it is undeniable that Covid-19 resulted in the postponement towards the completion of performances as the appearance of Covid-19 causes the fulfillment of the agreed obligations to become onerous instead of impossible. Inevitably, the Covid-19 is undoubtedly

⁵³ Malaysia Contract Act 1950, sec 57(2).

⁵⁴ Guan Aik Moh (KL) Sdn Bhd v Selangor Properties Bhd [2007] 4 MLJ 201.

⁵⁵ UNIDROIT Principles of International Commercial Contracts 2010, art 6.2.2; Rahabistara Ditiagonzaga and others, 'Pengaruh Asas Pacta Sunt Servanda Dalam Kontrak Karya Terhadap Divestasi Saham PT. Freeport Indonesia' (2019) 1 Jurnal Krisna Law 70.

⁵⁶ John Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, 2007) 500.

making the whole performance of the Franchise Agreement troublesome on the grounds that the outcome from the Covid-19 itself resulted in the implementation of the lockdown policy which then leads to the postponement of the issuance of the health certificate, and for this reason, the performances can still be carried out subsequent to the issuance of the health certificate.

Supplementary to the aforementioned reasoning, as the implementation of hardship encompasses the element of good faith, in essence, it is conforming to the Indonesian contract law or the ICC as well,⁵⁷ in which a contract shall not solely function as a binding factor for the contracting parties, it shouldn't contradict with propriety along with justice, and it has a role to avert the abuse of power between the relationship in a contract. Thence, the doctrine of hardship shall be the most sufficient barrier for Covid-19.

2.4. Solutions to Settle the Dispute

Beforehand, the previous examination has determined that the Covid-19 is solely sufficient to be contemplated as hardship, although the doctrine of hardship is not acknowledged under the Indonesian contract law. Notwithstanding the verifiable truth that the essence of the relative force majeure may seem similar to the doctrine of hardship, however, relative force majeure shall not be implemented to justify the doctrine of hardship considering that force majeure can solely be applied to the outcome of the Covid-19 that will influence the society, health, etc.

Within this Franchising case, the condition that would suffice the criteria of force majeure would be the lockdown policy and it is solely acceptable in the condition when it is covered under the force majeure clause of the Franchise Agreement. Therefrom, this section will dwell on further examination in examining the best possible solution in settling the dispute between the Franchisor and the Franchisee.

The examination within this section will be assisted by the theory of Gustav Radbruch for the reason that the consideration from a legal expert's point of view is a substantial element in determining the solution to this dispute. Gustav Radbruch is a legal philosopher from Germany that has prominent influence within the legal field.⁵⁸

Radbruch incorporates 3 main views, namely, philosophical, normative, and empirical within 1 view.⁵⁹ Radbruch affirms 3 primary ideas within the legal fields and those ideas are recognized by the legal philosophers as an objective of law and regulation. The 3 main ideas comprise of justice (*gerechtigheid*), utility (*zwechmatigheid/doelmatigheid*), and certainty (*rechmatigheid*).⁶⁰

Moreover, the 3 main ideas mentioned above function as the standards of law (*rechtsidee*) and as the legal basis in determining the essence of law that will be wasted without those 3 elements.⁶¹ Hence, those standards of law do not only function as the regulatory benchmark. These standards of law have a critical function as a guiding principle relating to the norm of criticism along with acting as a stimulating factor within the management of the law, for example, within the

⁵⁷ Indonesian Civil Code, art 1338-1339.

⁵⁸ W. Friedman, *Teori dan Filsafat Hukum-Idealisme Filosofis dan Problema Keadilan* (2nd edn, Raja Grafindo Persada 1994) 42; Husnan Wadi, 'Perselisihan Keadilan, Kemanfaatan, dan Kepastian Hukum Dalam Privatisasi Sumber Daya Air' (2014) 2 *Jurnal IUS* 226.

⁵⁹ M. Muslih, 'Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustav Radbruch' (2013) 4 *Legalitas* 143.

⁶⁰ Achmad Ali, *Menyibak Tabir Hukum* (Gunung Agung 2002) 3; Satjipto Rahardjo, *Biarkan Hukum Mengalir: Catatan Kritis Tentang Manusia dan Hukum* (Penerbit Kompas 2008), 80.

⁶¹ Soejono Koesoro Sisworo, *Mempertimbangkan Beberapa Pokok Pikiran Pelbagai Aliran Filsafat Hukum dalam Relasi dan Relevansinya Dengan Pembangunan/Pembinaan Hukum Indonesia* (Badan Penerbit Universitas Diponegoro 1995).

construction, enforcement, administration, exploration of the laws as well as the guidance in carrying out legal action.⁶²

First off, Radbruch's theory of justice is inherently the theory that upholds the law and is utilized as the parameter towards the injustice within the legal system. This theory is set as a reference line within a positive legal system on the grounds that positive law lies within justice.⁶³ Within Radbruch's theory of Justice, justice is referring to legal egalitarianism within the society.⁶⁴ Essentially, justice itself is the core element within the law and for that reason, certain provisions cannot be entitled as a law because it does not include the element of justice.⁶⁵ Justice is placed within the position in the hierarchy, the next in line is utility and legal certainty.⁶⁶ The hierarchy imposed within this standard of law functions to avert the possibility of conflicts that may appear within those legal values.⁶⁷

Following the theory of justice, there is a theory of utility within the second place on the hierarchy. The theory of utility was established by Radbruch to be enforced simultaneously along with the theory of justice. The theory of utility shall advance into one element that blends with the theory of justice and it ought to be a standard that is acknowledged as a utility with justice.⁶⁸ This theory will then have a vital role to expand humanities' value.⁶⁹ The last theory within the hierarchy of the standard of law is the theory of legal certainty. The theory of legal certainty has a normative characteristic in terms of legal provisions and judge's decisions and this theory focalizes on the juridical context.⁷⁰ In relation to the theory of justice, the theory of legal certainty has a strong bond towards the theory of justice as both theories must unite in order to complete the element of justice.

As an illustration, it can be seen that equality must be upheld regardless of any reason throughout the administration of the rules and regulations. Radbruch broke down the definition of legal certainty within 4 core points.⁷¹ First of all, is when the law is positive and this is alluding to the positive law or applicable laws and regulations.⁷² Secondly, positive law is in line with the factual circumstances.⁷³ Thirdly, to avert misinterpretation within the application of the law, a definite form of facts must be codified.⁷⁴ Finally, it is crucial to point out that it should not be too simple to adjust the law. Additionally, legal certainty is likewise linked to the compatibility of the Judge's

⁶² Arief B. Sidharta, *Refleksi Tentang Struktur Ilmu Hukum* (Mandar Maju 2000) 181.

⁶³ Yovita A. Mangesti and Bernard L. Tanya, *Moralitas Hukum* (Genta Publishing 2014) 74.

⁶⁴ Agus Setiawan, 'Penalaran Hukum Yang Mampu Mewujudkan Tujuan Hukum Secara Proporsional' (2017) 3 *Jurnal Hukum Mimbar Justitia* 2014.

⁶⁵ Bernard L. Tanya and others, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi* (Genta Publishing 2013) 117.

⁶⁶ Janedjri M. Gaffar, *Demokrasi Konstitusional: Praktik Ketatanegaraan Indonesia Setelah Perubahan UUD 1945* (Konpress 2013) 135-136.

⁶⁷ Shidarta, *Putusan Hakim: Antara Keadilan, Kepastian Hukum, dan Kemanfaatan Dalam Reformasi Peradilan dan Tanggung Jawab Negara* (Komisi Yudisial 2010) 3.

⁶⁸ Jaka Mulyata, 'Keadilan, Kepastian, dan Akibat Hukum Putusan Mahkamah Konstitusi Republik Indonesia No: 100/PUU-X/2012 tentang Judicial Review Pasal 96 UU No: 13 Tahun 2003 tentang Ketenagakerjaan' (Master's Thesis, Universitas Sebelas Maret 2015).

⁶⁹ *ibid.*

⁷⁰ Rommy H. Djojarahardjo, 'Mewujudkan Aspek Keadilan Dalam Putusan Hakim Di Peradilan Perdata' (2019) 5 *Jurnal Media Hukum dan Peradilan* 94.

⁷¹ Arief B. Sidharta, *Meuwissen Tentang Pengembangan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum* (PT. Refika Aditama 2008) 20.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

decision between the Judge's verdict and the relevant cases as it is not solely referring to law articles.⁷⁵

Appertaining to the theory of justice, it is likewise attributing to one of the principles of contract which is the principle of good faith. Within the relationship of a contract nor the franchise agreement, it is important to uphold the equality between the parties and therefore it has a substantial correlation with the theory of justice from Radbruch as the essence of the principle of good faith is no parties shall be harm. On the account that hardship is the most suitable condition for Covid-19 therefore renegotiation shall be conducted in settling the dispute between the Franchisor and the Franchisee. This is due to the fact that in the event when the case of hardship is brought upon the court it shall be solved by means of renegotiation.⁷⁶ The theory of justice will be proven through renegotiation as it advocates the element of good faith and it is accentuating the well-being and upholds the equality of both parties as well.

Relating to the theory of utility, the implementation of renegotiation is highly encouraged towards the parties of the franchise agreement because through renegotiation the Franchise Agreement shall not be terminated and no parties will be harm nor encountered further losses from this relationship. This approach justifies the element of justice and utility. The element of utility is likewise correlated to the sustainability of the contract and this can be reflected from the aforesaid explanation relating to the termination of the contract. Through renegotiation, termination of the contract will be unlikely to happen and thus, the sustainability of the franchise agreement will be maintained.

Just as importantly, with regard to the final theory from Radbruch, it is important to validate that the solution provided to the Franchisor and the Franchisee in settling their dispute shall provide legal certainty to both of the parties. For the reason that through renegotiation the parties will obtain the opportunities to convey their intention, therefrom the parties of the Franchise Agreement can come into an agreement in which no parties shall be harmed or suffering from further loss as the postponement has harmed both Franchisor and Franchisee because the Franchise Agreement cannot be performed accordingly.

Moreover, the continuation of the Franchise Agreement itself will be maintained. Despite the fact that renegotiation is not stipulated within the Franchising Law relating to the dispute settlement of the Franchise Agreement. However, conducting a renegotiation is conforming to the applicable law in Indonesia as one of the approaches to settle a dispute and it is explicitly set forth under the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution Article 1(10), hence, renegotiation will be in line with the concept of legal certainty on the grounds that according to Radbruch's theory, substantially, legal certainty is referring to the existing laws and regulations.

Supplementary to the renegotiation, the theory of legal certainty from Radbruch has the main purpose to provide peace and order. In the event when renegotiation relating to the dispute between the Franchisor and the Franchisee is utilized peace will be obtained between the parties of the Franchise Agreement, in light of the fact that through renegotiation the likelihood for a conflict occurs will be confined. Aside from that, through renegotiation order shall be attained as well, and hence, legal certainty will be fulfilled through renegotiating all terms and conditions stipulated under the Franchise Agreement.

⁷⁵ *ibid.*

⁷⁶ Dwi Prilmilono Adi, 'Absopsi Prinsip *Rebus Sic Stantibus* Dalam Kerangka Pembaharuan Hukum Perjanjian Nasional' (2017) 30 Jurnal Hukum JATISWARA 86.

Lastly, considering the fact that it is possible to bring this case to the court, nevertheless, the judges within the court will prioritize settling this case through mediation in a form of renegotiation. To sum up, renegotiation towards the terms and conditions of the Franchise Agreement shall be the most impeccable approach in dealing with the issue between the Franchisor and the Franchisee as the Franchise Agreement will be sustained.

CONCLUSION

In a nutshell, the issue that occurred between the Franchisor and the Franchisee is that subsequent to agreeing to the Franchise Agreement an issue arose because of the appearance of the Covid-19 which resulted in the implementation of the lockdown policy. Every office in Malaysia was closed down and all work is done from home and therefore, the health certificate required for the Franchisor to export the materials to the Franchisee cannot be issued within the period stated under the Franchise Agreement. The postponement towards the exporting activities on the materials for the Franchisee resulted in the Franchisee being unable to open the outlets. Furthermore, the Franchisee has likewise paid the initial fee to the Franchisor, and for the reason that this postponement occurred the Franchisee requested a full refund to the Franchisor despite the fact that the Franchisor initiated to conduct a renegotiation relating to the terms and conditions of the Franchise Agreement.

Supplementary to this issue, the Franchisee likewise cut off their communication with the Franchisor during a certain period of time. Subsequently, the liability of the parties within the Franchise Agreement was elaborated relating to the principle of contract as well. It is coherent the Franchisor shall not be liable for the postponement of export activities towards the material needed by the Franchisee. On the account that the Franchisor does not have any authorization with regard to the issuance of the health certificate. Basically, it is beyond the capacity of the Franchisor and it is the obligation of the Franchisor to obey the policy that was imposed by the government. Henceforth, the Franchisee has no right to request a full refund because the Franchisor has no intention to postpone the whole plan as the Franchisor likewise has contributed and fulfilled their obligations in assisting the Franchisee.

Franchising businesses are developing rapidly these days especially within the foodservice industry. Unfortunately, the occurrence of the Covid-19 has provoked a lot of changes around the world. Every sector is highly impacted especially within the health and the economic sector, not to mention any other sector that are likewise suffering because of Covid-19. Subsequent to the appearance of Covid-19 plenty of policies are enforced around the world and that includes Indonesia. Policies such as a lockdown or in Indonesia it is acknowledged as Large-scale Social Restriction (PSBB) or Community Activities Restrictions (PPKM) are implemented to reduce the number of cases. The implementation of these policies resulted in several advantages and disadvantages for society. The biggest impact is mostly felt by the business sector and within this case, it is related to the franchising business and the relationship between the Indonesian franchisee (PT Prima) and the Malaysian Franchisor (CVT SDN BHD).

Additionally, the Covid-19 should be contemplated as the doctrine of hardship, however, it is not acknowledged within the Indonesian contract law, thus, it is crucial for the Indonesian government to enhance the quality of the Indonesian contract law. Furthermore, as the Indonesian contract law only recognizes the concept of force majeure, it must be asserted that the Covid-19 cannot be contemplated as an event of force majeure as force majeure can solely be applied to the impact of the Covid-19 and in the event when the force majeure clause within the contract stated the Covid-19 itself or it is wide enough to cover Covid-19.

Meanwhile, this Franchise Agreement is established prior to the occurrence of Covid-19 and it did not cover the scope of pandemic or Covid-19 itself. Relating to the impact of Covid-19, in this case, the lockdown policy can only be considered as an event of force majeure if it is likewise covered under the force majeure clause despite its relevancy to be contemplated as an event of force majeure.

Lastly, to settle the dispute between the Franchisor and Franchisee, the most appropriate approach would be by conducting a renegotiation towards all terms and conditions within the franchise for the sake of averting losses between the parties of this Franchise Agreement.

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