

# Franchise Agreement And Islamic Franchise Concept

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## **Abstract**

*Every franchise agreement has three principles, namely to be honest and clear, each article in the agreement must be fair, and the contents of the agreement can be enforced based on law, this research uses a normative juridical approach, the results of the study state that franchising is carried out based on a franchise agreement that must be registered. at the competent government agency. The franchise agreement regulates the legal relationship between the franchisor and the franchisee to carry out franchise activities. The franchise agreement or franchise is in written form. Before making an agreement, the franchisor is required to provide a written statement or prospectus regarding his business data or information correctly to the franchisee. The franchise agreement contains a clause at least the names and addresses of the parties; types of intellectual property rights; business activities; the rights and obligations of the parties; assistance, facilities, operational guidance, training and marketing provided by the franchisor to the franchisee; business area; duration of the agreement; reward payment procedure; ownership, change of ownership and rights of heirs; dispute resolution; as well as procedures for extension, termination and termination of agreements.*

**Keywords:** *Islamic Franchise; Franchise Agreement; Bussiness;*

## **1. Introduction**

In this era of globalization, the business world in Indonesia is experiencing rapid progress. Various business ventures are developing, so as to create jobs in order to create business opportunities and improve community welfare. In the face of very tight business competition, companies make various efforts or efforts to exist, namely by expanding the network, and one way to develop and expand business networks, namely with a franchise business system.

According to Suhrawardi K. Lubis, franchising is a franchise agreement (franchising) granting rights by francisors to franchisees to use business peculiarities or business identifier features in the trade/service sector in the form of product types and forms sought including corporate identity (logo, brand, and company design, users of marketing plans as well as providing extensive assistance, operating time/hours, clothing, and employee appearance so that the distinctiveness

of the business or the identifying characteristics of the franchisor's trade / service business.<sup>1</sup>

The regulation of franchise or franchise business in Indonesia is currently regulated in Government Regulation Number 42 of 2007 concerning Franchising. In Article I number 1 of Government Regulation Number 42 of 2007, it is determined that: Franchising is a special right owned by an individual or business entity against a business system with business characteristics in order to market goods and / or services that have been proven successful and can be utilized and / or used by other parties based on a franchise agreement. Business cooperation by means of franchising will involve at least 2 (two) parties, namely the party that gives the right to open a similar business unit (franchisor), to another party who receives the right (franchisee).

Franchise or franchise can be said to be part of the suitability of business partners to the rules of the game given by the entrepreneur (franchisor), both in the form of use of trademarks, service marks, copyright on logos, industrial designs, patents in the form of technology, trade secrets, procedures. and the form of marketing.<sup>2</sup>

Franchise is essentially a marketing concept in order to expand the business network quickly. Franchise is not an alternative but one that is just as powerful, as strategic as the conventional way of developing a business. Even the franchise system is considered to have many advantages, especially regarding funding, human resources and management, except for the willingness of brand owners to share with other parties.

The definition of international franchise is a franchise that comes from outside Indonesia and operates in Indonesia, while the domestic / local franchise is a franchise concept that was born in Indonesia, both operating in Indonesia and abroad.<sup>3</sup> Franchise is also known as a very effective distribution channel to bring products closer to consumers through the hands of franchisees. In Indonesia, franchising has been known since the 70s when the entry of Shakey Pisa, KFC, Swensen, and Burger King.

Basically, a franchise is an agreement regarding the method of distributing goods and services to consumers. Franchisors for a certain period of time grant licenses to franchisees to carry out business distribution of goods or services under the name of the franchisor's identity in a certain area. The business must be carried out in accordance with the procedures and procedures set by the franchisor. The franchisor provides assistance to the franchisee, then in return the franchisee pays an amount of money in the form of an initial fee and royalties.<sup>4</sup>

Para pihak (*franchisor* dan *franchisee*) yang bersepakat dalam suatu Apart from being related to juridical issues, franchise transactions also prioritize other, more important things,

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1. Suhrawardi K. Lubis, *Hukum Ekonomi Islam*, Cetakan Kesatu, Sinar Grafika, Jakarta, 2001, page. 168.
  2. Gunawan Widjaya, *Seri Hukum Bisnis, Lisensi atau Waralaba*, Rajawali Press, Jakarta, 2001, page. 4.
  3. Johannes Ibrahim dan Lindawaty Sewu, *Hukum Bisnis Dalam Persepsi Manusia Modern*, Refika Aditama, Bandung, 2004, page. 124.
  4. Burhanuddin S., *Hukum Kontrak Syariah*, BPFE Yogyakarta, Yogyakarta, 2009, page. 241.

namely the assurance that both the franchisor and franchisees are parties whose cooperation can be relied on for business, managerial ability and bona fide to jointly build business cooperation. These demands are used as a measure in determining the main elements of the agreement, the terms, rights and obligations of the parties, which are ultimately set out in the clauses of a franchise agreement. Therefore, the franchise agreement must be prepared very carefully so that the business cooperation that is carried out benefits both parties equally.

Government Regulation Number 42 of 2007 stipulates that franchising is carried out based on a franchise contract that must be registered with the authorized government agency. The franchise contract will at least also regulate the permission to use trademarks and / or services, and permission to implement a business system that is protected as a trade secret, owned by the franchisor by the franchisee.

## **2. Research Method**

Based on the formulation of the problem and research objectives, the authors use a normative juridical approach, because this research is conducted by examining secondary data or library materials. The specification of this research is descriptive analysis, because it is expected to be able to provide a detailed, systematic, and comprehensive description of the object to be studied.<sup>5</sup>

## **3. Result and Discussion.**

### **1. Terms of the franchise agreement on a franchise business in Indonesia**

Basically, operating a franchise is not much different from opening a branch office. It's just that, in opening a branch office everything is funded and done by yourself, while in a franchise, business expansion is funded and carried out by another party called a franchisee at its own risk and responsibility, in the form of its own business, but according to the franchisor's directions and instructions .

Franchising or product and trade franchise (product and trade franchise) is the simplest form of franchise. In product and trademark franchises, the franchisor grants the franchisee the right to sell products developed by the franchisor which is accompanied by granting permission to use the franchisor's trademark. With the granting of permission to use the trademark, the franchisor usually gets a form of advance royalty payment, and then the franchisor gets a profit through the sale of the franchised product to the franchisee. In their simplest form, product and trademark franchises often take the form of agency, distributor, or sales license. In this form of franchise, the franchisor helps franchisees to choose the right location and provides training services for franchisees.

According to the International Franchise Association, franchise / franchise essentially

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5. Soerjono Soekanto, *Pengantar Penelitian Hukum*, UI Press, Jakarta, 1986, page.15

involves three elements, namely the brand, the business system, and costs.<sup>6</sup>

1. Brand;

In each franchise agreement, the franchisor as the owner of the franchise system grants a license to the franchisee to be able to use the trademarks or services and logos owned by the franchisor.

2. Business system;

The success of a franchise organization depends on the application of the same system or business method between the franchisor and the franchisee. The business system is in the form of guidelines covering product standardization, methods for preparing or processing products or service methods, visual standards of business facilities, advertising standards, reservation systems, accounting systems, inventory control, trade policies, and so on.

3. Fee.

In each franchise business format, the franchisor, either directly or indirectly, collects payments from the franchisee for the use of the brand and for participating in the franchise system that is being run. Fees usually consist of an upfront fee, royalty fees, service fees, licensing fees, and / or co-marketing fees. Other fees can also be in the form of fees for services provided to the franchisee, for example management fees.

In the franchise / franchise business, franchisees will get facilities when compared to opening their own business. Franchisees don't need promotion, don't need to do research to find out which products are popular with people, or create new products that people like.<sup>7</sup>

There are four main factors in the franchise business that will not be found in conducting business or business activities independently outside the franchise system, namely as follows :

1. The existence of the franchisor and franchisee in an ongoing relationship;
2. Obligation to use the franchisor's name and system and comply with its controls;
3. There are risks that can damage the franchise business that is beyond the ability and readiness of the franchisee to deal with it, for example the failure of the franchisor's business or other franchisee's actions that make the franchise's reputation / franchise become bad;
4. The franchisor's ability to continue to provide services in accordance with predetermined standards, which are considered valuable and reasonable which can make the franchise business successful.

Freely and simply, franchising or franchising is defined as a privilege that exists and / or is given by the franchisor to the franchisee with a number of obligations or payments.

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6. Adrian Sutedi, *Hukum Waralaba*, Ghalia Indonesia, Bogor, 2008, page. 49.

7. Andri VB, *Jurus Sukses Franchise, 100% Pasti Untung*, Gramedia Widiasarana, Jakarta, 2013, page. 33.

In a business format, the definition of franchise is a business arrangement with a system of granting the right to use a trade name by the franchisor to an independent party or franchisee to sell products or services in accordance with the agreement.<sup>8</sup>

Franchise itself comes from Latin, namely *francorum rex* which means “free from ties”, which refers to the freedom to have business rights. Meanwhile, the definition of franchise comes from medieval French, taken from the word “franc” (free) or “francher” (free), which is generally interpreted as granting privileges. Therefore, the definition of franchise is interpreted as exemption from certain restrictions, or the possibility to carry out certain actions, which for others are prohibited. In English, franchise is translated as a privilege (special right). In the United States, franchise means concession.<sup>9</sup>

The franchise agreement regulates the legal relationship between the franchisor and the franchisee to carry out franchise activities. Basically, franchising is a form of licensing, it’s just a little different from the definition of a license in general, franchising emphasizes the obligation to use systems, methods, procedures, procedures, marketing and sales methods as well as other things determined by the franchisor exclusive, and may not be violated or ignored by the licensee. This results in that franchising tends to be exclusive. It is not possible for a person or party who receives a franchise to carry out other activities of the same type or in an environment that may create competition with the franchise business activities obtained by him from the franchisor.<sup>10</sup>

Secara umum, bisnis *franchise* atau waralaba dapat dibedakan dalam dua bentuk, yaitu : <sup>11</sup>

1. product and trade franchise;

The simplest form of franchising. In product franchising and trademarks, the franchisor gives the franchisee the right to sell products developed by the franchisor, accompanied by granting permission to use the franchisor’s trademark. For granting the license to use the trademark, usually the franchisor gets a form of royalty payment in advance, and then the franchisor gets a profit through the sale of the franchised product to the franchisee. In this very simple form, product and trademark franchises often take the form of agency, distributor, or sales license. Examples of this form include car dealerships (Auto 2000 and Toyota) and car pumping stations (Pertamina).

2. Franchise format business.

Granting all licenses by one person to another, this license gives the franchisor the

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8. *Ibid.*, page. 6.

9. *Ibid.*

10. Gunawan Widjaya, *Lisensi Atau Waralaba, Suatu Panduan Praktis*, Raja Grafindo Persada, Jakarta, 2002, page. 20.

11. Gemala Dewi et.all, *Hukum Perikatan Islam*, Kencana Prenada Media, Jakarta, 2005, page. 194 dan 195.

right to do business using the franchisor's trademark or trade name, and to use the entire package, which consists of all the elements necessary to make a previously untrained person skilled in business and to run it with constant assistance on predetermined grounds. This business format franchise consists of:

1. The overall business concept of the franchisor;
2. There is an initiation process and training on all aspects of business management in accordance with the concept of the franchisor;
3. The franchisor's ongoing assistance and guidance process.

A franchise business is characterized by its existence:<sup>12</sup>

1. Franchisors who offer business packages;
2. Franchisees that have business units (outlets) that utilize the franchisor's business packages;
3. There is cooperation between franchisors and franchisees in terms of managing business units;
4. There is a written contract governing cooperation.

The elements or aspects of the franchise according to Martin D. Fern, namely:

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1. Granting the right to do business in a certain business;
2. A license to use a business identification card, usually a trademark or service mark, which will become the identifying feature of the franchisee's business;
3. Licensed to use the franchisor's extensive marketing plans and assistance to franchisees; and
4. Payment by the franchisee to the franchisor is in the form of something of value to the franchisor apart from a bona fide wholesale price for the goods sold.

Before entering into an agreement, the franchisor is required to provide a written statement or prospectus regarding his business data or information correctly to the franchisee which at least contains:

1. The identity of the franchisor, along with a description of its business activities, including the balance sheet and income statement for the last year;
2. Intellectual property rights or inventions or business characteristics that are the object of the franchise, accompanied by supporting documents;
3. A description of the criteria or requirements that must be met by the franchisee, including investment costs;

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12. Adrian Sutedi, *op.cit.*, page. 48.

13. Juajir Sumardi, *Aspek-aspek Hukum Tentang Franchise dan Perusahaan Transnasional*, Citra Aditya Bakti, Bandung, 1995, page. 9.

4. Assistance or facilities provided by the franchisor and franchisee;
5. Rights and obligations between the franchisor and the franchisee; and
6. Other data or information that the franchisee needs to know in the framework of implementing a franchise agreement other than letters (a) to letters (e).

The definition of an agreement according to Article 1313 of the Civil Code is: "An agreement is an act whereby one or more people bind themselves to one or more other people." Two parties agree to determine the rules or rules or rights and obligations that bind them to be obeyed and carried out. The agreement is to create legal consequences, give rise to rights and obligations and if the agreement is violated there are legal consequences, the violator can be subject to legal consequences or sanctions.<sup>14</sup>

In general, the components that make up a franchise agreement are as follows : <sup>15</sup>

- a. Franchisor, is a party who has a system or certain ways of doing business. Franchisor is a business entity or individual that grants rights to other parties to utilize and / or use intellectual property rights or inventions or business characteristics that they own;
- b. Franchisee, namely the party receiving the franchise or business system from the franchisor so that it has the right to run the business in ways developed by the franchisor;
- c. Franchise, namely the systems and ways of business itself, this is knowledge or business specifications from France that are sold to the franchisee, in a franchise agreement, the franchise is positioned as the object of the agreement..

According to Government Regulation Number 42 of 2007, it is also stated that the legal subject in the franchise agreement is:

1. 1. Franchisor is an individual or business entity that gives the franchisee the right to utilize and / or use the franchise owned by the franchisee;
2. 2. Franchisee (franchisee) is an individual or business entity that is given the right by the franchisor to utilize and / or use the franchise owned by the franchisor.

Meanwhile, the object in the franchise agreement is a license. License is a license granted by the owner of a registered mark to another party through an agreement based on the granting of rights (not the transfer of rights) to use the mark, either for all or part of the types of goods / services registered within a certain period of time.<sup>16</sup>

The cooperation agreement in the franchise in the agreement regarding the franchise must have the following conditions: <sup>17</sup>

- a. The cooperation agreement should be contained in a franchise agreement that is legally validated;

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14. Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, Liberty, Yogyakarta, 1991, page. 98.

15. Burhanuddin S., *Op.Cit.*, page. 242.

16. *Ibid.*, page. 38.

17. Mariam Darus Badruzaman, *Aneka Hukum Bisnis*, Alumni, Bandung, 2005, page. 40.

- b. This cooperation agreement describes in detail all the rights, obligations and duties of the franchisor and franchisee;
- c. It is strongly recommended that each party agreeing, even for some countries, to obtain advice from a competent legal expert regarding the contents of the agreement and with sufficient time to understand it..

In each model of the franchise agreement / franchise, there are at least the following elements: <sup>18</sup>

1. There are at least two parties, namely the franchisor and the franchisee, where the franchisor is the party providing the franchise business, while the franchisee is the party receiving the franchise business;
2. There is an offer in the form of a business package from the franchisor;
3. The existence of cooperation in the form of business unit management between the franchisor and the franchisee;
4. Having a certain business unit (outlet) by the franchisee that will take advantage of the franchisor's business package;
5. There is a written contract in the form of a standard agreement between the franchisor and the franchisee.

## **2. Konsep bisnis waralaba (*franchise*) menurut syariat Islam.**

The concept of franchise includes the concept of musyarakah (syirkah) in muamalah fiqh. Musyarakah (syirkah) by definition, namely cooperation between two or more people in terms of capital, skills, or trust in a particular business with profit sharing based on a ratio agreed upon by the unionized parties. Based on the above definition, syirkah is categorized as: <sup>19</sup>

1. Cooperation in capital;
2. Cooperation in skills;
3. Cooperation in trust.

To create an Islamic franchise business system, a syariah value system is needed as a business moral filter that aims to avoid various business moral deviations. This filter is committed to staying away from the seven maghrib (western) taboos, which are as follows: <sup>20</sup>

1. *Maisir*, namely all forms of gambling speculation (gambling) that kill the real and unproductive sectors;
2. *Immoral*, namely business practices that violate social morals and norms;
3. *Gharar*, namely all transactions that are not transparent and unclear so that they have

18. Adrian Sutedi, *op.cit.*, page. 80.

19. Mardani, *Hukum Perikatan Syariah Di Indonesia*, Cetakan Pertama, Sinar Grafika, Jakarta, 2013, page. 236.

20. Adrian Sutedi, *op.cit.*, page. 42 dan 43.

the potential to harm one of the parties;

4. *Haram*, namely the object of transactions and business projects that are prohibited by sharia;
5. *Riba*, namely all forms of currency distortion by turning currency into a commodity and imposing additional (interest) on credit or loan transactions or exchanges (barter) between similar ribawi goods;
6. *Ikhtikar*, namely hoarding and monopolizing goods and services for the purpose of playing prices;
7. *Dangerous*, namely all forms of transactions and businesses that endanger individuals and society and are against the benefit.

Franchising is one of the intellectual property rights. In sharia law, this is also confirmed in the Fatwa Decree of the Indonesian Ulema Council Number: 1 / Munas VII / MUI / 15/2005 concerning Protection of Intellectual Property Rights (HKI). In sharia, the basis for IPR Law is emphasized as follows : <sup>21</sup>

1. The Word of Allah S.W.T regarding the prohibition of eating other people's property (without rights) and the prohibition of harming other people's property and rights, among others are as follows :
  - a. *O believers, do not eat each other's wealth in an evil way, except by way of commerce that is consensual among you. And don't kill yourself. Indeed, Allah is Most Merciful to you* (QS. Al Nisa `verse 29);
  - b. *And do not harm humans for their rights and do not be rampant on the face of the earth by causing damage* (QS. Asy-Syu'ra verse 183);
  - c. *So if you do not do (leaving the remaining usury) then know that Allah and His Messenger will fight against you. And if you repent (from taking usury), then for you the principal of your property, you will not persecute and (also) be persecuted* (QS. Al Baqarah verse 279).
2. The Prophet's hadiths regarding assets are as follows :
  - a. Whoever leaves the property (wealth), then (the property) is for his heirs, and whoever leaves the family (poor), hand it over to me. (HR. Bukhari);
  - b. Surely your blood (soul) and wealth are haram (noble, protected) (HR. al-Tirmizi);
  - c. Rasulullah S.A.W delivered the Kutbah to us, saying: "Know: it is not lawful for a person not to have the least bit of his brother's property except with a willing heart." (HR. Ahmad).
3. The hadiths regarding the prohibition of doing wrong are as follows:
  - a. O my servants! Truly I have forbidden injustice against myself and I have made injustice

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21. *Ibid.*, page. 43-44.

- a thing that is forbidden between you, so do not punish each other. (HR. Muslim);
  - b. Muslim is the brother of Muslim (another), he should not abuse and insult him (HR. Bukhari).
4. The hadith of the Prophet, narrated by Ibn Majah from 'Ubadah bin Shamit, narration of Ahmad from Ibn' Abbas, and Malik from Yahya: "It is not allowed to harm (harm) oneself and also not harm (harm) others.";
5. *Qawa'id fiqh* :
- a. Hazards (losses) must be eliminated;
  - b. Avoiding mafsadat taking precedence over bringing maslahat;
  - c. Everything that is born (arises) from something that is haram is haram;
  - d. Not allowed to take legal actions on (use) the rights of others without their permission.

The decision of the Fatwa of the Indonesian Ulema Council was also strengthened by several opinions, namely as follows: <sup>22</sup>

1. Decree of *Majma' al-Fiqih al-Islami* Number 43 (5/5) Congress V of 1409 H / 1988 AD concerning *al-Huquq al-Ma'nawiyah*;

First: Trade names, addresses and brands, as well as creations (compositions) and creations are special rights owned by their owners, which in the modern age such rights have an economic value which is recognized by people as wealth. Therefore, such rights should not be violated.

Second: Owners of non-material rights, such as trade names, addresses and brands, and copyrights have the authority with a certain amount of money to avoid various uncertainties and frauds, such as the authority of a person over rights that are material in nature.

Third: Copyrights, compositions, and other copyrights are protected by syara'. The owner has the right to it and should not be violated.

2. The opinions of scholars regarding IPR are as follows :
- a. The majority of scholars from the Maliki, Syafi'i, and Hambali schools of thought argue that copyrights on original and beneficial works are classified as valuable assets as objects if they can be used syara' (Islamic law);
  - b. With regard to authorship rights (*haqq al-ta'lif*), one of the copyrights, Wahbah al-Zuhaili emphasized that authorship rights are rights protected by syara' (Islamic law), so based on the *qaidah istishlah*, reprint or copy books (without valid permission) is seen as a violation or crime against the rights of the author, in the sense that the act is immorality that causes sin in the view of syara' and constitutes theft which requires compensation for the author's rights to the printed text in violation and

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22. *Ibid.*, page. 45-46.

- wrongdoing, and causes moral loss that befell him;
- c. The ulama's recognition of the right as a legacy that is inherited: "Tirkah (inheritance, inheritance) is property or right".
  3. Explanation from MIAP as represented by Ibrahim Senen in the Fatwa Commission meeting on May 26, 2005;
  4. Opinion of the Commission C Session on Fatwa at the VII Munas MUI 2005.

The fatwa of the Indonesian Ulema Council also emphasizes that in Islamic law, IPR is seen as one of the *huquq maliyyah* (property rights) that has legal protection (*mashu*) as well as *mal* (wealth). IPRs that are protected by Islamic law are IPRs that do not conflict with Islamic law. IPR can be used as the object of the contract (*al-ma'qud 'alaih*), both the *mu'awadhah* (exchange, commercial) contract, and the *tabarru'at* (non-commercial) contract, and can be *waqaf* and be inherited. Every form of violation of IPR, not only limited to using, including disclosing, making, using, selling, importing, exporting, circulating, submitting, providing, announcing, reproducing, plagiarizing, falsifying, or pirating IPR belonging to others is an injustice and the law is haram.

In a franchise, openness and prudence are required. This is in accordance with the pillars and terms of the contract according to Islamic law and the prohibition of *gharar* transactions (obscurity). Seen from the point of view of the agreement, the franchise agreement is a formal agreement, so it is required to be made in writing. This is necessary as a form of protection for both parties involved in the franchise agreement. This is in accordance with the written principles contained in QS. Al Baqarah verse 282. In addition, franchising involves the right to utilize and / or use intellectual property rights or inventions or business characteristics for a fee with conditions. This is in accordance with the principle of respect for work in accordance with the principles of Islamic civil law.

Thus, it can be argued that the franchise system (franchising) does not conflict with Islamic sharia as long as the object of the franchise agreement is not prohibited in Islamic sharia. If the franchise business that is carried out is contrary to Islamic sharia, for example the business of selling food and drinks is haram, then the franchise agreement is automatically canceled according to Islamic law.

## 5. Conclusion.

The franchise agreement contains a clause at least the names and addresses of the parties; types of intellectual property rights; business activities; the rights and obligations of the parties; assistance, facilities, operational guidance, training and marketing provided by the franchisor to the franchisee; business area; duration of the agreement; reward payment procedure; ownership, change of ownership and rights of heirs; dispute resolution; as well as procedures for extension,

termination and termination of agreements. As for the principles contained in a franchise agreement, namely the principle of consensualism, the principle of binding strength of the agreement, and the principle of freedom of contract. Every franchise agreement has three principles, namely that it must be honest and clear, each article in the agreement must be fair, and the contents of the agreement can be enforced by law. The concept of franchise according to Islamic law is included in the concept of musyarakah (syirkah) in muamalah fiqh. In the concept of franchising according to Islamic law, there is a sharia value system as a business moral filter that aims to avoid various business moral deviations, namely maisir, immoral, gharar, haram, usury, and ikhtikar. In a franchise, openness and prudence are required. This is in accordance with the pillars and terms of the contract according to Islamic law and the prohibition of gharar transactions (obscurity). The franchise agreement is a formal agreement, so it is required to be made in writing. This is necessary as a form of protection for both parties involved in the franchise agreement. This is in accordance with the written principles contained in QS. Al Baqarah verse 282.

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