

A COMPARATIVE ANALYSIS OF PROFIT-SHARING SYSTEMS IN FRANCHISE AGREEMENTS UNDER THE CIVIL CODE AND ISLAMIC LAW

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Abstract

This study examines the profit-sharing system in franchise business agreements through a comparative analysis between the Indonesian Civil Code (KUH Perdata) and Islamic law. As the franchising sector expands in Indonesia, the equitable regulation of profit-sharing arrangements between franchisors and franchisees assumes greater significance. This study endeavors to examine the legal structure that governs profit-sharing systems, the application of the principle of freedom of contract, and the legal obstacles encountered in their practical application. The research utilizes a normative juridical methodology, incorporating a comparative approach through the analysis of statutory regulations, legal doctrines, and pertinent DSN-MUI fatwas related to franchising and profit-sharing agreements. The principal findings are as follows: (1) profit-sharing systems within franchise agreements, as governed by the Civil Code (KUH Perdata), are fundamentally reliant on the validity criteria for contracts, as outlined in Article 1320 in conjunction with Article 1338; while the principle of freedom of contract affords considerable autonomy, it does not adequately safeguard substantive justice; (2) Islamic law prioritizes justice, transparency, and the avoidance of uncertainty (gharar) in profit-sharing arrangements; musyarakah is considered more suitable than mudharabah for contemporary franchise models, given the franchisee's capital investment; (3) considerable legal challenges persist, including the lack of specific profit-sharing regulations within franchise law, the potential for information asymmetry, and an unresolved legal gap concerning the enforcement of DSN-MUI fatwas in the context of dispute resolution.

Keywords: Franchise Agreement; Profit Sharing; Freedom of Contract; Islamic Law; Indonesian Civil Code.

INTRODUCTION

Global economic development and the dynamics of modern trade systems have driven the transformation of business relationship patterns from conventional models toward network-based partnership models. One rapidly growing form of cooperation is the franchise. This model enables rapid business expansion through the granting of rights to use the brand, management systems, operational standards, and business support from the franchisor to the franchisee. Economically, franchising is viewed as an efficient distribution instrument because it can expand the

market with relatively controlled risks for the brand owner (Aidi, 2019). In this context, the agreement serves as the primary foundation governing the distribution of rights, obligations, risks, and benefits among the parties.

In Indonesia's civil law system, agreements are the main source of contractual obligations. The validity of an agreement is determined by Article 1320 of the Civil Code, which requires four key elements: mutual consent, legal capacity, a specific subject matter, and a lawful cause. This article reflects the principle of freedom of contract, which allows parties to decide the terms of their agreement.



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* Received: 17 January 2026, Received in revised form: 5 March 2026, Accepted: 30 March 2026

Doi: 10.3376/jch.v10i2.1298

However, as Muhammad Syaifuddin (2021) points out, the development of modern contracts shows that the idea of freedom of contract doesn't always work in situations where there is a real balance of power. The requirements for a contract's validity often focus only on formal aspects, without considering whether the contract's terms promote fairness.

The contract's content reflects substantive justice. In franchise practice, this issue becomes increasingly complex. Franchise agreements generally take the form of standard contracts unilaterally drafted by the franchisor. The franchisee is in a position to accept or reject the contract without adequate room for negotiation. This situation creates an inequality of bargaining power, which ultimately impacts the structure of profit-sharing arrangements, cost allocation, territorial restrictions, and termination clauses. Such circumstances have the potential to create an imbalance of rights and obligations, even though all formal requirements of Article 1320 of the Civil Code are met.

To assess fairness in commercial contracts, the principle of proportionality, as articulated by Agus Yudha Hernoko (2019) in his book titled "Contract Law: A Practical Guide", serves as a relevant analytical tool. This principle underscores the necessity of proportionality in the exchange of rights and obligations, mirroring the contributions, risks, and advantages experienced by each involved party. Consequently, contractual justice transcends a mere formal agreement; it necessitates an evaluation of a rational and equitable allocation of benefits and burdens. Within the franchising

framework, the principle of proportionality serves as a tool for evaluating the fairness of a profit-sharing system, determining whether it genuinely reflects equitable distribution or, conversely, consolidates the franchisor's control.

Prior research has predominantly concentrated on the administrative dimensions of franchising and the safeguarding of intellectual property rights. Pailaha's (2024) research indicates that franchise agreements tend to be dominated by the franchisor through standard clauses that limit the franchisee's room for negotiation. However, there remains a research gap not yet thoroughly addressed by Pailaha: a comparative normative analysis of profit-sharing systems under both positive law (the Civil Code) and Islamic law. Previous studies have not analyzed how Islamic legal instruments such as the *musyarakah* and *mudharabah* contracts can serve as alternatives or complements to profit-sharing arrangements within the framework of Indonesian contract law. This is the distinguishing feature and the urgency of this research.

However, these studies remain partial. Most research focuses on the protection of franchisees or the analysis of standard clauses from the perspective of positive law or Islamic law separately. There has been no comprehensive study that simultaneously integrates an analysis of Article 1320 of the Civil Code, the principle of proportionality, and a comparative analysis of profit-sharing systems in franchise agreements under both positive law and Islamic law. In fact, in Indonesian society, which is predominantly Muslim, the principles of

justice, balance, and the prohibition of exploitation in Islamic law hold strong normative and sociological relevance.

From an Islamic legal perspective, business agreements are not merely viewed as formal legal relationships but also as moral bonds that must uphold the principles of justice, honesty, and balance. The profit-sharing system in Islamic law is known through the concepts of *mudharabah* and *musyarakah*, which emphasize the proportional distribution of profits and losses in accordance with each party's contributions and risks. This principle aligns with the provision in Surah An-Nisa (4): 29, which prohibits the acquisition of wealth through unlawful means and requires the consent of all parties in every transaction (Maksum, n.d.).

Based on the above discussion, this study is important for conducting a normative and comparative examination of the profit-sharing system in franchise agreements under the Civil Code and Islamic law, using the principle of proportionality as the analytical framework. This study is expected to provide a theoretical contribution to the development of contract law that is more oriented toward substantive justice, while also offering practical recommendations for drafting more balanced and proportional franchise agreements in Indonesia.

RESEARCH METHODS

This study employs a normative legal research method, utilizing a legislative approach and a comparative law approach. The normative method was chosen because this study focuses on analyzing the legal norms governing the

validity of agreements and profit-sharing systems in franchise agreements, as well as comparing them with principles in Islamic law. The research data sources consist of secondary legal materials, which include primary legal materials such as the constitution, laws, and regulations, as well as secondary legal materials in the form of journals, books, and scientific literature related to democracy and the constitution. Data were collected through a literature review. Subsequently, the data were analyzed qualitatively using a descriptive-analytical method to explain the role of the constitution in the formation and maintenance of a democratic system of government. (Arimbi et al., 2025).

RESULTS AND DISCUSSION

1. Regulation of Profit-Sharing Systems in Franchise Business Agreements According to the Civil Code and Islamic Law

The regulation of profit-sharing systems in franchise business agreements is a fundamental aspect that highlights the paradigm shift between conventional civil law and Islamic law. Within the context of Indonesian positive law, franchise agreements are regulated by Government Regulation No. 42 of 2007 and its latest update, Government Regulation No. 35 of 2024. Both regulations are based on the principles of contract law in the Civil Code (KUHPperdata), specifically Article 1320 regarding the validity requirements of a contract and Article 1338(1), which affirms the principle of freedom of contract. Based on this principle, every contract entered into validly is binding as law upon the parties. Consequently, as long as the clauses in a franchise

agreement are freely agreed upon and meet formal requirements, the agreed-upon compensation system is deemed valid, without delving deeply into the substantive fairness of profit and risk distribution (Nafri, 2025).

In conventional franchising practice, the system used is not a sharing of net profits, but rather the payment of a franchise fee or royalty fee, which is generally calculated as a percentage of gross revenue. The franchisee runs the show, taking care of the business location, staffing, and all the day-to-day expenses. In return, the franchisor gets a cut for letting the franchisee use the brand, the established business model, and for providing managerial assistance. Royalties are still due, even if the franchisee isn't turning a profit, because they're based on sales, not the bottom line. From a legal standpoint, this arrangement holds up, provided both sides agree to it, in line with the principle of consensualism. While Government Regulation No. 35 of 2024 does set rules for things like registrations, partnerships, and the use of local products, it doesn't specifically address fairness in how the compensation is split. Thus, Indonesian positive law still exhibits a neutral-individualistic character, as it emphasizes legal certainty and contractual freedom over substantive risk balance (Akbar et al., 2024).

Conversely, Islamic legal tradition interprets the franchise agreement as a muamalah contract, necessitating adherence to the tenets of fairness, openness, and equitable risk distribution. Within the framework of muamalah jurisprudence, the profit-sharing mechanism is subject to analysis via the

mudharabah and musyarakah contracts. Nevertheless, a detailed assessment reveals that contemporary franchising practices are more congruent with the musyarakah contract, given that the franchisee functions as both the business operator and a capital contributor, providing premises, investment, and labor. In a musyarakah agreement, profit distribution is determined by a pre-established ratio, whereas losses are allocated proportionally to each party's capital investment. This stipulation embodies the principle of al-ghunmu bil-ghurmi (profit commensurate with risk), which stipulates that the party entitled to profit must also accept the possibility of loss.

Fatwa No. 07/DSN-MUI/IV/2000 of the National Sharia Council of the Indonesian Ulema Council regarding Mudharabah and Fatwa No. 08/DSN-MUI/IV/2000 regarding Musyarakah state that the distribution of profits must be determined in the form of a clear ratio from the outset and must not contain elements of gharar (excessive uncertainty), gambling, or usury. In this context, a fixed revenue-based royalty system that is collected even when the franchisee incurs losses has the potential to raise issues of fairness from an Islamic legal perspective. If the franchisor continues to receive a percentage of revenue without sharing the risk of loss, this can normatively be categorized as a form of imbalance bordering on injustice. Furthermore, if the franchisee lacks certainty regarding financial burdens proportional to the actual conditions of their business, an element of gharar may arise due to the uncertainty of the benefits received compared to the risks borne.

This is where a normative clash (legal clash) occurs between positive law and Islamic law. The Civil Code assesses the validity of an agreement based on the fulfillment of formal requirements and the consent of the parties, so a revenue-based royalty system remains valid even if the franchisee incurs losses. Conversely, Islamic law does not merely regard agreement as the basis for legitimacy but also demands distributive justice and moral balance in the sharing of profits and risks. Thus, positive law is neutral regarding the structure of risk distribution, whereas Islamic law is evaluative and normative regarding the substantive justice of such contractual relationships.

According to the author's analysis, the revenue-based royalty system in conventional franchising does indeed provide income certainty for the franchisor. Still, it has the potential to create structural inequality in the partnership relationship. The franchisee bears the full business risk, while the franchisor is relatively protected from the risk of operational losses. This model does not fully reflect the concept of an equal partnership but rather a relationship that tends to be subordinate. Conversely, the *musyarakah* approach in Islamic law offers a more proportional partnership concept because both parties share profits and losses in proportion to their capital contributions. Conversely, the successful execution of this model necessitates financial transparency, a robust audit system with accountability, and a strong ethical commitment from all stakeholders.

To address these requirements, the creation of a standardized sharia franchise contract template is essential. This template should be standardized and

approved by the National Sharia Council of the Indonesian Ulema Council to guarantee the consistent application of *musyarakah* principles in practice. Furthermore, franchise agreements must incorporate financial transparency provisions and joint audit procedures to mitigate moral hazard. Strengthening dispute resolution mechanisms through Sharia arbitration, before resorting to litigation, represents a strategic measure to ensure both certainty and justice. Thus, the integration of the principle of freedom of contract in positive law and the principle of distributive justice in Islamic law has the potential to create a franchise agreement model that is not only normatively valid but also substantively fair and oriented toward risk balance and the common good.

2. The Principle of Freedom of Contract in the Civil Code and Islamic Law in the Profit-Sharing Franchise System

The principle of freedom of contract is a fundamental tenet in contract law that grants the parties the freedom to determine the form, content, and terms of the agreement they create. In the context of the profit-sharing franchise system, this principle is particularly strategic because the relationship between the franchisor and the franchisee is complex, involving intellectual property rights, management systems, and the distribution of business profits and risks. However, the application of the principle of freedom of contract has distinct characteristics and limitations when viewed from the perspective of the Civil Code as a representation of conventional law and

Islamic law as a legal system based on Sharia values (Sudaryat, 2018).

The principle of freedom of contract is normatively implied in Article 1338(1) of the Civil Code, which states that all agreements made validly are binding as law upon the parties who made them. The meaning of the word “all” indicates that the parties are permitted to enter into various forms of agreements as long as they do not conflict with mandatory legal provisions. Philosophically, this provision affirms the autonomy of individual will in determining one’s legal relationships without state intervention, provided it does not violate the law, public order, and morality (Triyana et al., n.d.). In the franchise system, this principle serves as the basis for the legitimacy of using revenue-based royalty models or other profit-sharing models.

The scope of the principle of freedom of contract includes the freedom to enter into or refrain from agreeing, to choose contractual partners, to determine the subject matter and cause of the agreement, and to determine the form and content of the agreement itself. In the context of a profit-sharing franchise system, this principle allows the franchisor and franchisee to agree on the profit-sharing ratio, calculation method, and distribution period for business proceeds in accordance with the parties’ negotiations (Ulum, 2024). However, in practice, franchise relationships are often outlined in standard contracts unilaterally drafted by the franchisor, so that this freedom may, in substance, be illusory. This aligns with findings from previous research indicating franchisor dominance through standard clauses that limit the franchisee’s room for negotiation.

The principle of freedom of contract is also closely related to the principle of consensualism as stipulated in Article 1320(1) of the Civil Code regarding the agreement of the parties as a valid requirement for a contract. Theoretically, such an agreement must be reached without any defects of consent, such as coercion, fraud, or mistake, as stipulated in Articles 1321 through 1328 of the Civil Code (Fariana et al., 2023). However, in the reality of the franchise business, the bargaining positions of the parties are not always equal. Franchisees are often in a weaker position due to their dependence on the franchisor’s brand and business system. Consequently, even though a formal agreement exists, there may be a substantive imbalance in the distribution of risks and benefits.

Restrictions on contractual freedom in the Civil Code are regulated under Article 1337, which states that a cause is prohibited if it conflicts with the law, public morality, or public order. These restrictions are, in principle, general in nature and do not specifically address issues of economic imbalance in contracts. In the context of a profit-sharing franchise system, a clause requiring royalty payments based on turnover, even if the franchisee incurs a loss, is not automatically considered a violation of positive law as long as it is agreed upon by the parties (Mentari, 2024). This demonstrates that positive law places greater emphasis on formal legality than on an evaluation of substantive justice.

Specific restrictions in the franchise sector are governed by Government Regulation No. 35 of 2024 on Franchising, which took effect on

September 2, 2024. This regulation sets forth registration requirements, prospectus transparency, and certain obligations for franchisors. However, the regulation does not explicitly address mechanisms for fair profit-sharing or restrict revenue-based compensation systems. Consequently, the state continues to allow significant discretion for parties to determine compensation systems based on the principle of contractual freedom, reflecting the character of Indonesian positive law, which tends to be neutral and individualistic in the structure of business risk distribution.

In contrast to the approach of the Civil Code, Islamic law recognizes freedom of contract (*al-hurriyah*) but with stricter normative limitations. The Prophet's hadith states that Muslims are free to enter into agreements as long as they do not prohibit what is lawful or permit what is unlawful. This principle indicates that freedom in Islamic law is responsible and bound by Sharia values. Its normative foundation is also found in the Quranic Surah Al-Maidah (5:1), which commands the fulfillment of contracts. From this perspective, the validity of a contract depends not only on formal agreement but also on the concept of *ridha* ('*an taradhin*), which requires genuine consent free from any element of oppression or exploitation (Sumiyati, 2022).

Islamic law provides ample room for contractual innovation as long as the pillars and conditions of the contract are met. Various forms of contemporary contracts, such as *musyarakah mutanaqishah*, franchising, and hybrid contracts, can be accommodated within the framework of *muamalah fiqh* (Syariah

et al., n.d.). In the context of profit-sharing franchises, the *musyarakah* model is more relevant because both parties contribute capital and share risks. The principle of *al-ghunmu bil-ghurmi* asserts that profit must be commensurate with the risk borne.

Prohibitions against *riba*, *maisir*, *gharar*, *dzalim*, and *risywah* substantively limit contractual freedom in Islamic law. Unlike positive law, which typically focuses solely on formal legality, Islamic law evaluates the content of agreements from the perspective of distributive justice. Therefore, the "system—a fixed-rate royalty based on turnover that is paid even when the franchisee incurs losses—can be questioned normatively because it potentially contains elements of risk imbalance and approaches practices of injustice. This is where the paradigmatic difference lies between positive law, which is based on consensualism, and Islamic law, which is based on social-religious justice.

3. Legal and Practical Challenges in the Application of the Profit-Sharing System in Franchise Agreements

The synthesis between contractual freedom under the Civil Code and Islamic law in profit-sharing franchises lies at the intersection of contractual justice. While the Civil Code emphasizes procedural aspects such as the formal agreement of the parties (consensualism), Islamic law complements this with substantive limitations rooted in the ethics of *muamalah*. Thus, the profit-sharing system in franchising cannot be viewed merely as an embodiment of the autonomy of will, but must reflect a fair

distribution of risk (risk-sharing) to prevent the economic exploitation of one party. The element of gharar may arise if the profit-sharing mechanism is not based on transparent and verified financial reports. In contrast, the element of dzalim may occur if a fixed franchise fee is collected when the franchisee suffers significant losses or a force majeure event without any mechanism for relief or restructuring of obligations. In this context, the freedom of contract in the Civil Code must be interpreted progressively so that it does not merely stop at formal agreements but also considers the substantive balance of rights and obligations.

According to the author's analysis, this distinction indicates that the concept of contractual freedom in the Civil Code is procedural-formal in nature. In contrast, in Islamic law, it is both procedural and moral-substantive. The Civil Code considers an agreement valid as long as it meets the requirements of Article 1320 and does not violate Article 1337. In contrast, Islamic law assesses the validity of a contract also from the aspects of fair distribution of risk and the prohibition of exploitation. Thus, the profit-sharing system in franchising should be positioned as a mechanism for equitable partnership, not merely a technical variation of the conventional royalty scheme.

The implementation of the profit-sharing system in franchise agreements faces various multidimensional challenges, both from legal and practical perspectives. These challenges arise because the profit-sharing system demands transparency, accountability,

and a high level of trust among the parties, unlike the conventional royalty fee system, which is simpler and relatively easier to predict. This complexity is further exacerbated when the profit-sharing system is applied within two distinct legal frameworks: the Indonesian Civil Code as Indonesia's positive law and Islamic law as a sharia-based legal system. Each possesses different approaches, philosophies, and dispute resolution mechanisms, making the risk of normative disharmony unavoidable.

One fundamental challenge is the absence of specific and comprehensive regulations regarding the profit-sharing system in franchise agreements within the Civil Code or franchise regulations. The Government Regulation on franchising primarily addresses administrative aspects such as registration, the obligation to provide a prospectus, and the use of domestic products, but does not specifically regulate profit-sharing mechanisms. Existing regulations essentially accommodate the conventional franchise model involving franchise fees and royalty fees, so the implementation of a profit-sharing system is entirely dependent on the principle of freedom of contract as stipulated in Article 1338 of the Civil Code (Nasution, 2019).

The absence of such specific regulations implies potential legal uncertainty, particularly regarding the scope of clauses that can be agreed upon, the allocation of loss risks, and the legal consequences in the event of breach of contract or disputes. Unlike conventional franchising, whose practices are well-established, the profit-sharing franchise model is still relatively new and lacks

standardized best practices. This situation places franchisees—who often lack legal knowledge and have weaker bargaining power—in a vulnerable position regarding one-sided clauses (Sulistyaningsih, 2017). From the author's analytical perspective, this regulatory gap indicates that Indonesian positive law remains neutral-individualistic and has not actively protected the balance of risk in franchise partnerships.

Another legal challenge relates to the proof and verification of business profits as the basis for profit sharing. The profit-sharing system requires accurate calculations of net profit, necessitating transparent mechanisms for financial recording, reporting, and auditing. However, the Civil Code does not establish accounting standards or audit obligations in franchise profit-sharing contracts. This situation creates information asymmetry between the franchisee, who manages daily operations, and the franchisor, who only receives financial reports. This information imbalance has the potential to lead to moral hazard—that is, the manipulation of reports or underreporting of profits by the franchisee to reduce the share to be distributed.

In practice, franchisors often face difficulties verifying the accuracy of financial reports if there is no agreed-upon independent audit clause from the outset. High audit costs can also become an additional burden, particularly for small and medium-sized franchises. From a legal evidentiary perspective, in the event of a dispute regarding financial statement manipulation, the burden of proof in court can pose a serious challenge for the franchisor. Conversely,

the franchisee may also be harmed if the franchisor makes baseless allegations (Mayasari, 2018). Therefore, clear and balanced standards of proof and verification mechanisms are necessary to protect both parties.

The next challenge relates to dispute resolution mechanisms. Disputes in profit-sharing franchises tend to be more complex than in conventional franchises because they involve technical issues regarding profit calculations, the interpretation of operational costs, and the allocation of loss risks. Resolution through litigation is often time-consuming, costly, and has the potential to damage the partnership relationship. Therefore, dispute resolution mechanisms should ideally be designed in a tiered manner—through negotiation, mediation, arbitration, and litigation as a last resort. However, in practice, many franchise agreements do not include comprehensive dispute resolution clauses (Suryati Dzuluqy, 2024).

From an Islamic legal perspective, legal challenges have their own distinct dimensions, particularly regarding compliance with the fatwas of the National Sharia Council of the Indonesian Ulema Council (DSN-MUI) governing *mudharabah* and *musyarakah* contracts. DSN-MUI fatwas serve as operational guidelines for sharia business operators, but they do not hold the status of generally binding legislation. This quasi-binding normative status raises issues when disputes arise in general courts, as judges do not always explicitly refer to DSN-MUI fatwas in their deliberations.

The legal ambiguity of these fatwas raises a normative question: should fatwas be positioned as a source of substantive

law in Sharia franchise disputes? What if there is a conflict between sharia-based contract clauses and the principles of the Civil Code? Although Religious Courts have jurisdiction to adjudicate Sharia economic disputes, this jurisdiction depends on the existence of a choice-of-forum clause that explicitly designates the Religious Court as the dispute resolution forum (Idrus, 2017). In the author's analysis, this uncertainty highlights the need for normative harmonization between positive law and Sharia law so that the profit-sharing system in franchising possesses both legal certainty and moral legitimacy.

Overall, these challenges demonstrate that the profit-sharing system in franchising is not merely a technical issue of profit distribution, but a structural issue concerning contractual justice, transparency, evidence, and the harmonization of legal systems. Therefore, an integrative approach is needed that does not rely solely on the principle of freedom of contract but also internalizes the principles of risk-sharing and substantive justice as emphasized in Islamic law, so that franchise partnerships truly reflect a proportional balance of rights and obligations.

CONCLUSION

First, the regulation of profit-sharing systems in franchise agreements under the Civil Code is based entirely on the principle of freedom of contract in Article 1338 of the Civil Code in conjunction with Article 1320 of the Civil Code, as there are no specific provisions regarding profit-sharing mechanisms in existing franchise regulations, including Government Regulation No. 35 of 2024.

This situation creates a legal void that places the parties in legal uncertainty. Meanwhile, Islamic law regulates the profit-sharing system through the musyarakah contract, which is considered more relevant for modern franchising, as the franchisee contributes capital in the form of business premises and operational investments, unlike mudharabah, which positions the franchisee solely as a manager.

Second, the principle of freedom of contract in both the Civil Code and Islamic law provides a foundation for the application of the profit-sharing system in franchising, albeit with different characteristics. The Civil Code is neutral and individualistic in nature and emphasizes the formal procedures of an agreement; thus, profit-sharing clauses that are substantively burdensome to the franchisee may still be considered valid as long as they meet the formal requirements. Islamic law is social-religious and "in nature, imposing strict substantive limitations through prohibitions on gharar, maysir, riba, dzalim, and risywah. The common ground between the two lies in the concept of contractual justice, which demands a proportional distribution of risk (risk-sharing), as conceptualized in Agus Yudha Hernoko's Principle of Proportionality.

Third, the application of the profit-sharing system in franchise agreements faces three major legal challenges: (a) a legal void in the regulation of franchise profit-sharing under Indonesian positive law, which causes legal uncertainty; (b) the risks of information asymmetry and moral hazard in proving actual profits as the basis for profit-sharing; and (c) the

issue of the legal force of DSN-MUI fatwas in dispute resolution. The legal solution to the third challenge is the inclusion of a choice-of-law clause designating Islamic law/KHES and a choice-of-forum clause selecting the Religious Court or BASYARNAS in sharia franchise agreements, as permitted by Law No. 3 of 2006 on Religious Courts.

ACKNOWLEDGEMENTS

The author would like to thank all parties who have provided support and contributions to the conduct of this research and the preparation of this manuscript. Special thanks are extended to the academic advisor who has provided continuous guidance, feedback, and academic supervision, enabling this research to be completed. The author also expresses appreciation to the Faculty of Law at the University of Muhammadiyah North Sumatra for providing an academic environment and scientific resources that supported the smooth progress of the research process. Additionally, the author extends his thanks to fellow academics and other parties who assisted, both directly and indirectly, in the form of scholarly discussions, advice, and moral support throughout the process of writing this manuscript.

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